THE MIRAGE OF INDIAN RESERVED WATER RIGHTS AND WESTERN STREAMFLOW RESTORATION IN THE MCCARRAN AMENDMENT ERA: A PROMISE UNFULFILLED

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Western state water law has been notorious for its failure to protect streamflows. One potential means of providing the missing balance in western water allocation has always been Indian water rights, which are federal rights "reserved" from state laws. These federal water rights usually have priority over state-granted rights because they typically were created in the nineteenth century, well before most western state water allocation systems were even established.

Over two decades ago, in 1983, Justice William Brennan assured Indian tribes that their reserved water rights would not be compromised by subjecting them to state court adjudications under the so-called McCarran Amendment, an appropriations rider given expansive interpretation by the Supreme Court in the 1970s and 1980s. Justice Brennan's belief that state courts—comprised largely of elected

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The first Bicentennial Conference, *From the Corps of Discovery to the Discovery Doctrine and Beyond: The Legacy of the Lewis and Clark Expedition in Indian Law* (May 2004), produced Michael C. Blumm, *Retracing the Discovery Doctrine: Aboriginal Title, Tribal Sovereignty, and Their Significance to Treaty-Making and Modern Natural Resources Policy in Indian Country*, 28 VT. L. REV. 713 (2004). The second Bicentennial Conference, *The Rule of Capture and Its Consequences* (April 2005), produced the articles in the symposium reprinted at 35 ENVTL. L. 4 (2005), including Michael C. Blumm & Lucus Ritchie, *The Pioneer Spirit and the Public Trust: The American Rule of Capture and State Ownership of Wildlife*, 35 ENVTL. L. 673 (2005).

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judges—could treat tribal claims evenhandedly, despite the high stakes and entrenched interests involved in western water rights adjudications, has never been evaluated.

This study aims to begin to fill that gap by examining the results of six western water right adjudications—five of which were in state courts—involving the Klamath, Wind, Yakima, Gila, and Snake rivers, as well as Pyramid Lake. The results suggest that Justice Brennan's optimism was quite misplaced: in none of the cases studied did a court order restoration of streamflows necessary to fulfill the purpose of the tribe's reservation. Instead, in an apparent effort to reduce the displacement of current water users, the state courts created a number of new legal principles to limit or diminish tribal water rights.

The Article concludes that, in the McCarran Amendment Era, tribes must resort to extrajudicial means of restoring streamflows necessary to fulfill the purposes of their reservations. It shows how some tribes have employed settlements—and even state law—to achieve partial streamflow restoration, which is all that now seems possible in an era in which their claims are usually judged by skeptical state court judges who face reelections in which entrenched water users exert considerable influence.

Just like the desert shows a thirsty man
A green oasis where there's only sand.
You lured me into something I should have dodged.
The love I saw in you was just a mirage.[1]

I. INTRODUCTION

Reserved water rights have always been controversial in the West. The Supreme Court created the doctrine in its famous *Winters v. United States*[2] decision of 1908, basically to interject some equity into federal-tribal relations in which Indian reservations were being "pulverized" by Dawes Act allotments.[3] The reserved rights doctrine, which awards water to federal reservations to fulfill their purposes, has the potential to destabilize western water rights built around state systems grounded on diversions and temporal priority because the priority assigned these federal rights is the date of the reservation, not the date of use.[4] And since fulfilling the purposes of federal reservations often requires maintaining streamflows for wildlife, watershed, and aesthetic purposes, application of reserved rights offered the prospect of restoring streamflows depleted by state systems which offer little effective protection for instream uses.[5]

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[1] SMOKEY ROBINSON AND THE MIRACLES, *The Love I Saw in You Was Just a Mirage*, *on* MAKE IT HAPPEN (Motown Records 1967).

[2] Winters v. United States, 207 U.S. 564, 577 (1908); *see* 4 WATERS AND WATER RIGHTS § 37.01(b)(2) (Robert E. Beck ed., 2004 repl vol., Matthew Bender & Co. 2003) (1967) (explaining *Winters* as holding that the federal government implicitly reserved water rights when it set aside the Indian reservation, and those rights survived statehood).

[3] General Allotment Act of 1887 (Dawes Act), ch. 119, 24 Stat. 388; *see* 4 WATERS AND WATER RIGHTS, *supra* note 2, § 37.02(f)(2) (explaining the overall effect of the Dawes Act and considering its effect on the allocation of water rights); Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 9 (1995). President Theodore Roosevelt described the effect of the Allotment Act as a "mighty pulverizing to break up the tribal [land] mass" in his 1901 message to Congress. THEODORE ROOSEVELT CYCLOPEDIA 250 (Albert Bushnell Hart & Herbert Ronald Ferleger eds., Meckler Corp. 1989), *available at* http://www.theodoreroosevelt.org/TR%20Web%20Book/TR_CD_to_HTML287.html.

[4] *See* 4 WATERS AND WATER RIGHTS, *supra* note 2, § 37.01(c)(1). However, over a decade ago, a study by two respected analysts concluded that while quantification of Indian reserved rights led to increased tribal water use, existing non-Indian users were generally protected and, in some cases, their rights were expanded. Reid Peyton Chambers & John E. Echohawk, *Implementing the Winters Doctrine of Indian Reserved Water Rights: Producing Indian Water and Economic Development Without Injuring Non-Indian Water Users?*, 27 GONZ. L. REV. 447, 468 (1991–1992) (citing provisions for new storage, conservation, exchanges, and marketing).

[5] *See, e.g.*, Michael C. Blumm, *Unconventional Waters: The Quiet Revolution in Federal and Tribal Minimum Streamflows*, 19 ECOLOGY L.Q. 445 (1992) (giving an overly optimistic assessment). Western states that developed minimum streamflow programs in the latter part of the 20th century have no effective streamflow protection against earlier diversionary rights, which continue to dominate western water law under prior appropriation principles as vested

Although reserved water rights are the product of federal law, due to a 1952 appropriations rider known as the McCarran Amendment,[6] federal reserved water rights are increasingly being interpreted by state courts. After the U.S. Supreme Court ruled that the McCarran Amendment waived the federal government's sovereign immunity defense and gave consent for the government to be joined in state court suits determining the water rights of all users within a river basin,[7] the Court ruled that reserved rights were subject to state adjudications.[8] The Court then twice ruled that Indian reserved rights were subject to McCarran Amendment adjudications.[9]

The policies served by the McCarran Amendment, as Justice Brennan explained in the *Arizona v. San Carlos Apache* decision, are to avoid "duplicative litigation, tension and controversy between the federal and state forums, hurried and pressured decision making, and confusion over the disposition of property rights."[10] In dissent, Justice Stevens responded that federal courts were an appropriate forum for resolving Indian reserved water rights, and their decisions could then be incorporated into state decrees.[11] Stevens observed that: "States and their citizens may well be more antagonistic toward Indian reserved rights than other federal reserved rights, both because the former are potentially greater in quantity and because they provide few direct or indirect benefits to non-Indian residents."[12] He cited a congressional promise in the federal courts' jurisdictional statute that Indian tribes could invoke a neutral federal forum,[13] and also the McCarran Amendment's silence regarding Indian tribal claims.[14]

Whether Justice Brennan's or Justice Stevens's view of the appropriateness of state court adjudications of Indian reserved water rights has proved more accurate, and whether the resolution of Indian reserved water rights claims actually produces streamflow restoration, have never been carefully studied. This Article attempts to fill that void by examining

property rights. For a survey of the obstacles states have erected against recognizing and implementing reserved rights, see Reed D. Benson, *Can't Get No Satisfaction: Securing Water for Federal and Tribal Lands in the West*, 30 ENVTL. L. REP. 11056, 11057–59 (2000).

6 43 U.S.C. § 666 (2000) (consenting to have the United States joined as a party in state water rights adjudications). The effect of the McCarran Amendment has been to leave all but a few reserved rights cases to state courts. Benson, *supra* note 5, at 11057 (citing JOSEPH L. SAX ET AL., LEGAL CONTROL OF WATER RESOURCES 833 (2d ed. 1991)).

7 *See* Dugan v. Rank, 372 U.S. 609, 618 (1963) (holding that 43 U.S.C. § 666 does not waive sovereign immunity when the state adjudication does not seek to determine the rights of all the various owners of a given stream).

8 United States v. Dist. Court *ex rel.* Eagle County, 401 U.S. 520, 523–24 (1971).

9 Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 809–11 (1976); Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 564 (1983); *see also* 4 WATERS AND WATER RIGHTS, *supra* note 2, § 37.04(a) (discussing the McCarran Amendment's effect on federal-state jurisdiction).

10 *San Carlos Apache Tribe*, 463 U.S. at 569.

11 *Id.* at 574.

12 *Id.* at 575.

13 *Id.* at 576–77 (citing 28 U.S.C. § 1362 (2000)).

14 *Id.* at 578.

the assertion of tribal reserved water rights claims in six well-known cases over the last quarter-century. These cases form the bedrock of modern tribal reserved rights law in the McCarran Amendment Era. They include McCarran Amendment adjudications in five different western states, plus one federal court proceeding, and involve celebrated rivers like the Klamath, the Big Horn, the Yakima, the Snake, and the Gila, as well as Pyramid Lake.

The Article first explains the case law these adjudications have produced. Although reserved water rights are the product of federal law, application of the McCarran Amendment has produced a fractured doctrine, as state courts make their own interpretations of federal law. This examination should help clarify the origins and nature of some these fissures. More importantly, the Article explores the result of the assertion of reserved tribal rights claims on streamflows in the West. The study reveals that reserved rights case law in the McCarran Amendment Era has not produced restored western streamflows. Instead, any streamflow improvements were more likely the product of settlements or from negotiations with state water agencies and congressional delegations after tribal reserved rights received judicial recognition.

In short, by authorizing state courts to interpret federally-reserved water rights, the McCarran Amendment has forced tribes into hostile forums in which tribes must be prepared to compromise their claims for streamflows that fully support the purposes of the reserved rights, perhaps settling for stream improvements that can partially restore river ecosystems. Although tribal reserved water rights claims may open the door to discussions about streamflow restoration, in practice the McCarran Amendment Era has reduced these claims to mere bargaining chips rather than vehicles for achieving the purpose of reservations through streamflow restoration.

This Article proceeds to examine each of the six assertions of reserved rights, including the history of litigation and its aftermath, focusing specifically on whether that aftermath has included any improvements in streamflows. Five of the cases involve McCarran Amendment adjudications in which state courts have or will determine the scope and sometimes the existence of reserved water rights: Oregon's Klamath Basin adjudication, Wyoming's Big Horn adjudication, Washington's Yakima Basin adjudication, Arizona's Gila River adjudication, and Idaho's Snake River adjudication. A sixth case study, the controversy over Truckee River flows into Pyramid Lake, did not involve a state McCarran Amendment adjudication, but the Pyramid Lake Pauite Tribe has successfully employed state law to improve streamflows in the wake of the Supreme Court's refusal to recognize the tribe's reserved water necessary to sustain its fishery. Several tribes have successfully pursued post-adjudication settlements, usually aided by congressional funding.[15]

[15] *See infra* notes 165–72, 198–208, 287–97, and accompanying text (describing settlements concerning the Yakima, Gila, and Snake River controversies).

The Article concludes that in the McCarran Amendment Era, tribal hopes for a neutral forum to adjudicate their reserved water rights claims has been largely a mirage. In this era, now dominated by state law and state courts, tribes must pursue settlements which compromise their water right claims based on fulfilling the purpose of the reservation, or they must emulate the dexterity with federal and state law that the Yakama Nation and Pyramid Lake Tribe have shown following their judicial defeats.

II. THE KLAMATH TRIBES' RESERVED RIGHTS: TIME IMMEMORIAL PRIORITY AND A THIRTY-YEAR DELAY

The Klamath River rises in upper Klamath Lake, in south-central Oregon, at the confluence of the Wood, Williamson, and Sprague rivers, and winds circuitously through the Cascade Mountains in southwest Oregon and the Klamath National Forest in northwestern California before emptying into the Pacific Ocean twenty miles south-southeast of Crescent City.[16] The Klamath Basin encompasses 15,600 acres. The basin is divided between California and Oregon, with two-thirds located in California. For several thousand years before the first white settlers ever set foot in the region, the Klamath Tribes[17] hunted, fished, and foraged for subsistence throughout the Klamath River Basin.[18] Historically, the tribes were dependent on the river and the fish it produced, harvesting thousands of pounds of fish annually.[19]

In 1864, the Klamath Tribes relinquished their aboriginal title to more than twenty-two million acres in south-central Oregon and northern California to the United States in return for a reservation of approximately 1.9 million acres in south-central Oregon, and the "exclusive right" to hunt, fish, and gather on the reservation.[20] Despite some instability in the years

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[16] Christine Swift, *Crisis in the Klamath: New Considerations for Managing Water Under the Endangered Species Act*, 22 TEMP. ENVTL. L. & TECH. J. 65, 70 (2003–2004) (describing the geography and climate of the Klamath Basin); THE NEW ENCYCLOPEDIA OF THE AMERICAN WEST 600 (Howard R. Lamar ed., 1998) [hereinafter NEW WEST ENCYCLOPEDIA].

[17] Three separate tribes—the Klamath, Modoc, and Yahooskin—collectively comprise the Klamath Indians. The Klamath Tribes, Klamath Tribes History, http://www.klamathtribes.org/history.html (last visited Nov. 12, 2006) [hereinafter History]. There is evidence that Native Americans have lived in the region for at least 7,000 years. National Park Service, National Wild and Scenic Rivers System, Klamath River, Oregon, http://www.nps.gov/rivers/wsr-klamath-oregon.html (last visited Nov. 12, 2006).

[18] *See* United States v. Adair (*Adair II*), 723 F.2d 1394, 1397 (9th Cir. 1983); The Klamath Tribes, The Long Struggle Home: The Klamath Tribes' Fight to Restore Their Land, People and Economic Self-Sufficiency, http://www.klamathtribes.org/tribal-lands-restoration.htm (last visited Nov. 12, 2006) [hereinafter The Long Struggle Home] (stating that the Klamath Tribes continue to retain property rights to hunt, fish, and gather).

[19] Ryan Sudbury, *When Good Streams Go Dry:* United States v. Adair *and the Unprincipled Elimination of a Federal Forum for Treaty Reserved Rights*, 25 PUB. LAND & RESOURCES L. REV. 147, 151 (2004).

[20] *See* Treaty with the Klamath, Oct. 14, 1864, 16 Stat. 707 (Article I reserved to the tribe "the exclusive right of taking fish in the streams and lakes [of the reservation], and of gathering edible roots, seeds, and berries within its limits."). The treaty also required the United States to make annual payments of $8,000 for the first five years, $5,000 for the next five years, and $3,000 for the next five years, along with a one-time payment of $35,000 for the "use and benefit

following the treaty concerning the boundaries of the reservation,[21] the Klamath Tribes established several successful economic enterprises, including freight and cattle companies and a successful sawmill.[22] The Klamath Tribes achieved a measure of social and economic self-sufficiency which practically no other Indian tribe could match,[23] apparently encouraging Congress to terminate the Klamath reservation in the misguided 1954 Klamath Termination Act.[24] In enacting the Klamath Termination Act, Congress sought to eliminate federal superintendence over the tribes, dispose their land, and abolish federal services available to them.[25] Under the Act, most were induced to give up their interest in tribal land for a cash

of [the Tribe]." *Id. See also* Or. Dep't of Fish & Wildlife v. Klamath Indian Tribe (*Oregon DFW*), 473 U.S. 753, 755–57 (1985). The U.S. Supreme Court's opinion in *Oregon DFW* and the Ninth Circuit's opinion in *Adair II* differed significantly as to the exact acreage ceded by the Klamath Indians under the 1864 Treaty. *See Adair II*, 723 F.2d at 1398 (noting the Klamath Tribe "relinquished its aboriginal claim to some 12 million acres of land in return for a reservation of approximately 800,000 acres"). This Article uses the U.S. Supreme Court's figures. *See also* The Long Struggle Home, *supra* note 18 (noting the Klamath Tribes once controlled 22 million acres in south-central Oregon).

21 For example, the United States forced the Modoc Tribe to occupy the same reservation as the Klamath, which led to an Indian uprising against the United States. *See* Holly Doremus & A. Dan Tarlock, *Fish, Farms and the Clash of Cultures in the Klamath Basin*, 30 ECOLOGY L.Q. 279, 296 (2003). The Klamath Tribes also disputed the United States' demarcation of the reservation boundary. *Oregon DFW*, 473 U.S. at 755–57. A boundary commission later found that the United States had erroneously excluded approximately 617,000 acres from the reservation—approximately one-third of the agreed upon reservation lands. *Id.* The United States finally agreed to compensate the tribes for the error in a 1901 agreement. *Id.* at 758–60. The U.S. Supreme Court later concluded that this agreement extinguished the tribes' hunting and fishing rights on the excluded lands. *Id.* at 755–74.

22 Sudbury, *supra* note 19, at 152–53; *see also* History, *supra* note 17.

23 Sudbury, *supra* note 19, at 153. *See also* The Klamath Tribes, Did You Know?, http://www.klamathtribes.org/dyk.html (last visited Nov. 12, 2006) ("At the time of termination in 1954, the Klamath Tribes were the second wealthiest tribe in the nation."); The Long Struggle Home, *supra* note 18 (noting that in 1953, the average income for Klamath tribal members was just 7% lower than their white counterparts, and that the Klamath were also the only tribes in the country able to pay their Bureau of Indian Affairs administrative costs).

24 Act of Aug. 13, 1954, ch. 732, 68 Stat. 718 (1954) (codified at 25 U.S.C. §§ 564–564w (2000)). Prior to 1887, the Klamath Tribes held the reservation in communal ownership. In 1887, Congress passed the Indian General Allotment Act of (Dawes Act (Indian)), ch. 119, 24 Stat. 388 (1887), under which the government granted parcels of the reservation to individual Indians in fee. Approximately 25% of reservation lands were converted to individual Indian ownership under the Dawes Act. Over time, many of the Indian grantees conveyed their allotments on to non-Indian owners. *See Adair II*, 723 F.2d at 1398.

25 *See* Klamath Termination Act, 25 U.S.C. § 564 (2000).

> The purpose of this subchapter is to provide for the termination of Federal supervision over the trust and restricted property of the Klamath Tribe of Indians consisting of the Klamath and Modoc Tribes and the Yahooskin Band of Snake Indians, and of the individual members thereof, for the disposition of federally owned property acquired or withdrawn for the administration of the affairs of said Indians, and for a termination of Federal services furnished such Indians because of their status as Indians.

Id.; *see also* Kimball v. Callahan, 590 F.2d 768, 770 (9th Cir. 1979) (describing the Act and its purposes); Sudbury, *supra* note 19, at 153–55 (providing a detailed history of the Act and its purposes).

payment.[26] For those members who opted not to accept the cash payment, the federal government placed a portion of the otherwise liquated reservation in a private trust for the remaining tribe members.[27] In 1973, the private trustee sold the land that it was holding in trust for those members and disbursed the proceeds to those Indians who had refused the initial payment.[28]

Although the Klamath Termination Act explicitly preserved the tribes' water and fishing rights,[29] the state of Oregon disputed the significance and extent of the tribes' rights, arguing that the rights could be exercised only by Indians who were members of the Klamath Tribes at the time of the Termination Act, and that tribal rights did not extend to any lands that had been disposed under the General Allotment Act of 1887.[30] In 1979, in the second *Kimball v. Callahan*,[31] the Ninth Circuit rejected Oregon's arguments, holding that the Termination Act expressly recognized and secured the tribes' hunting and fishing rights.[32] Moreover, the court held that those rights extended to the descendants of every member of the tribe.[33] The court did rule, however, that the tribes' treaty hunting and fishing rights could be regulated by the state for conservation purposes.[34]

A. The Adair *Cases: Recognition Without Water*

The federal government filed suit in 1975 in an effort determine the water rights of the U.S. Fish and Wildlife Service, which had succeeded to the tribes as owner of the Klamath Marsh—now the Klamath National Wildlife Refuge—within the Williamson River Basin.[35] The tribes intervened to protect their treaty water rights necessary to protect the hunting and

[26] *Adair II*, 723 F.2d at 1398; *see also* Klamath Termination Act, 25 U.S.C. §§ 564b–564d (2000) (describing the procedures for distributing, valuing, and purchasing individual Indians' property rights).

[27] *Adair II*, 723 F.2d at 1398; 25 U.S.C. § 564d(a)(2), (5) (2000).

[28] *Adair II*, 723 F.2d at 1398. The trustee was the U.S. Bank of Oregon. Memorandum from Carl J. (Bud) Ullman, Dir., Water Adjudication Project for the Klamath Tribes, Chiloquin, Or., to David Becker (July 13, 2006) [hereinafter "Ullman Memo"].

[29] *See* 25 U.S.C. § 564m(a)–(b) (2000) ("Nothing in this subchapter shall abrogate any water rights of the tribe and its members . . . . Nothing in this subchapter shall abrogate any fishing rights or privileges of the tribe or the members thereof enjoyed under Federal treaty.").

[30] *Kimball*, 590 F.2d 768, 771 (9th Cir. 1979). *See also supra* note 24 and accompanying text.

[31] 590 F.2d 768 (9th Cir. 1979). The initial decision in *Kimball v. Callahan*, 493 F.2d 564, 569 (9th Cir. 1974), ruled that Klamath Indians who withdrew from the tribe under the Klamath Termination Act retained for themselves and their descendants treaty rights to hunt, trap, and fish within the ancestral Klamath Indian Reservation.

[32] *Kimball*, 590 F.2d at 775–75.

[33] *Id.* at 776.

[34] *Id.* at 777–78.

[35] United States v. Adair (*Adair I*), 478 F. Supp. 336, 339 (D. Or. 1979). For a thorough examination of the *Adair* litigation see Sudbury, *supra* note 19. The Williamson River, a renowned fly-fishing stream, has a drainage area of 3,000 square miles, supplying one half of the inflow of upper Klamath Lake. *See* JOHN C. RISLEY & ANTONIUS LAENAN, U.S. GEOLOGICAL SURVEY, UPPER KLAMATH BASIN NUTRIENT-LOADING STUDY—ASSESSMENT OF HISTORIC FLOWS IN THE WILLIAMSON AND SPRAGUE RIVERS 1 (1999).

fishing rights that the *Kimball* decision ruled had survived termination.[36] The district court did not issue its first opinion in *United States v. Adair* (*Adair I*)[37] until 1979, about the same time the Ninth Circuit decided *Kimball*. *Adair I* confirmed that the 1864 Treaty guaranteed the tribes an implied right to water necessary to protect the tribes' fishing and hunting rights.[38] Perhaps more significantly for water users throughout the Klamath Basin, however, the court concluded that these impliedly reserved rights had a "time immemorial" priority date, which survived the termination of the reservation.[39]

The state and the non-Indian water users in the Klamath Basin appealed to the Ninth Circuit, arguing that the district court erred in awarding reserved water rights to the tribes.[40] The state also argued that the district court should have dismissed the case under the *Colorado River* abstention doctrine.[41] In *United States v. Adair* (*Adair II*),[42] the Ninth Circuit rejected the state's abstention arguments, concluding that the district court properly exercised federal jurisdiction.[43] The appeals court noted that the district court carefully limited its ruling to a determination of the priority of reserved water rights arising under federal law and left the actual quantification and administration of those rights to the state proceeding.[44]

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[36] *See supra* notes 31–32 and accompanying text. At the time that the federal government filed the *Adair* suit, the tribes had been terminated for a quarter-century; consequently, the government had no trust obligation to protect tribal water rights. The federal concern was simply to protect the U.S. Fish and Wildlife Service's interest in the Klamath Marsh. Ullman Memo, *supra* note 28.

[37] *Adair I*, 478 F. Supp. at 336.

[38] *Id.* at 345.

[39] *Id.* The district court also retained jurisdiction over any issues that might arise relating to the enforcement of the tribes' "time immemorial" water right. *Id.* at 350.

[40] *Adair II*, 723 F.2d 1394, 1399–1400 (9th Cir. 1983).

[41] *Id.* at 1400. The *Colorado River* abstention doctrine counsels against federal court jurisdiction over issues traditionally left to state courts when such jurisdiction would result in duplicative and piecemeal litigation. Colo. River Conservation Dist. v. United States, 424 U.S. 800, 819–20 (1976). While the *Adair II* case was pending, the U.S. Supreme Court decided Arizona v. San Carlos Apache Tribe of Arizona, 463 U.S. 545 (1983), concluding that federal courts should avoid exercising jurisdiction over disputes pending in state water rights adjudications when the exercise of federal jurisdiction would create "the possibility of duplicative litigation, tension and controversy between the federal and state forums, hurried and pressured decision making, and confusion over the disposition of property rights." 463 U.S. at 569.

At the time the federal government filed suit in *Adair I* there was no contemporaneous state proceeding concerning rights of any water users in the Klamath Basin. *Adair II*, 723 F.2d at 1404–05. Several months after the federal government filed suit in federal court, the state of Oregon initiated the Klamath Basin Adjudication by issuing notice to some 25,000 water users in the basin. *Id.* While *Adair I* was being litigated, the State filed a motion in the district court to dismiss the federal lawsuit in favor of the state proceedings under the U.S. Supreme Court's abstention doctrine announced in *Colorado River* and its progeny. *Id.* at 1399. However, the district court effectively denied the State's motion when it issued pretrial orders governing the federal lawsuit in 1977. *Id.*

[42] 723 F.2d 1394 (9th Cir. 1983).

[43] *Id.* at 1407.

[44] *Id.* at 1406. The Ninth Circuit noted that far from intruding in the role of the state court, the district court limited its ruling to questions involving application of the federal Indian law

By so doing, the district court's ruling actually furthered the policy considerations underlying the McCarran Amendment and the abstention doctrine—that is, avoiding duplicative and piecemeal adjudication of water rights and promoting judicial efficiency.[45]

On the merits of the case, the Ninth Circuit affirmed the district court's holding that at the time the Klamath Reservation was established, Congress intended to reserve water on the reservation "not only for the purpose of supporting Klamath agriculture, but also for the purpose of maintaining the Tribe's treaty right to hunt and fish on reservation lands."[46] Although the Ninth Circuit upheld the district court's "time immemorial" priority date, the court confusingly qualified the Klamath Tribes' fishing rights, stating that the treaty entitled the tribes only to "the amount of water necessary to support its hunting and fishing rights as currently exercised to maintain the livelihood of Tribe members, not as these rights once were exercised by the Tribe in 1864."[47] According to the court, the Klamath Tribes' hunting and fishing rights "secure[] so much as, but not more than, is necessary to provide the Indians with a livelihood—that is to say, a moderate living."[48] The court also noted that whatever the scope of the Indian reserved hunting and fishing right, it did not entitle the tribes to restored wilderness conditions—what the court called a "wilderness servitude."[49] It would be a mistake, however, to interpret *Adair II* as foreclosing restoration of river flows, since the court's statement was that the tribes were entitled to "the amount of water necessary to support its hunting and fishing rights as currently exercised to maintain the livelihood of Tribe members, not as these rights once were exercised by the Tribe in 1864. . . . *unless, of course, no lesser level will supply them with a moderate living*."[50]

Shortly after the federal government filed suit in *Adair I*, the state of Oregon initiated the Klamath Basin Adjudication in 1975.[51] The state took virtually no further adjudicative action for nearly fifteen years, however. Consequently, the state was compelled to reissue notices of intent to adjudicate to all water users in the basin when it finally decided to proceed with the adjudication in 1990.[52] The state's 1990 issuance of notices of intent

doctrine of reserved water rights, which allowed each forum to consider those issues most appropriate to its expertise. *Id.*

[45] *Id.* at 1406 n.11.

[46] *Id.* at 1410.

[47] *Id.* at 1414–15.

[48] *Id.* at 1415 (citing Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 686 (1979)).

[49] *Adair II*, 723 F.2d at 1414.

[50] *Id.* at 1414–15 (emphasis added). The court's language suggested that water flows necessary to restore tribal fisheries are part of the tribes' reserved rights if the restored fisheries are necessary to ensure the tribes' right to a moderate living. *See* JUDITH V. ROYSTER & MICHAEL C. BLUMM, NATIVE AMERICAN NATURAL RESOURCES LAW: CASES AND MATERIALS 409 (2002).

[51] United States v. Oregon, 44 F.3d 758, 762–65 (9th Cir. 1994). The state adjudication created a federal abstention issue. *See infra* note 57; Sudbury, *supra* note 19, at 162–63.

[52] *Oregon*, 44 F.3d at 762–65.

prompted the United States to challenge the adequacy of Oregon's adjudication of federal reserved water, fishing, and hunting rights.[53]

In *United States v. Oregon*,[54] the federal government argued that despite the McCarran Amendment's waiver of sovereign immunity, Oregon's adjudication was insufficiently comprehensive to warrant the application of the waiver because it excluded groundwater claimants and those with state-certificated rights.[55] The federal government also maintained that the McCarran Amendment waived sovereign immunity as to "suits" in "court"—not state administrative adjudications.[56] The Ninth Circuit rejected these arguments, holding that tribal reserved water rights could be quantified in state adjudication, even if that adjudication begins before an administrative agency and excludes certain classes of water rights holders.[57] Despite that decision, the state has made only glacial progress quantifying Indian reserved water rights—or any other water rights for that matter—in the Klamath Basin.

More than twenty years after the district court first recognized the existence, scope, and priority of Indian water rights in the Klamath Basin, the federal government and the Klamath Tribes returned to federal court to ask whether the tribes' reserved water rights included water to support their gathering rights, and how the "moderate living" standard announced in *Adair II* applied to the quantification of the tribes' water right.[58] In *United States v. Adair* (*Adair III*),[59] Oregon District Court Judge Owen Panner confirmed that the Klamath Tribes' reserved water rights included water necessary to support the tribes' gathering rights, as well as their hunting, fishing, and trapping rights, and that the priority date for those rights was time immemorial.[60]

The district court then proceeded to address the relationship between the "moderate living" standard and the quantification of the tribes' reserved water rights, flatly rejecting any state quantification of the tribes' reserved water rights that failed to reserve enough water to support a "productive habitat."[61] Noting that the "moderate living" standard qualifies—rather than replaces—the initial quantification of Indian reserved water rights, the court outlined a two-step approach to determining its effect on the quantity of the tribes' right.[62] First, the tribes were entitled to "'whatever water is necessary to achieve' the result of supporting productive habitat."[63] Second, the court

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53 *Id.*

54 44 F.3d 758 (9th Cir. 1994).

55 *Id.* at 767–68.

56 *Id.* at 765–67.

57 *Id.* at 770–71 (noting that the Oregon courts will eventually review the state agencies preliminary determinations).

58 United States v. Adair (*Adair III*), 187 F. Supp. 2d 1273, 1274 (D. Or. 2002), *vacated*, United States v. Braren, 338 F.3d 971 (9th Cir. 2003).

59 187 F. Supp. 2d 1273 (D. Or. 2002).

60 *Id.* at 1275.

61 *Id.* at 1275–76; *see* ROYSTER & BLUMM, *supra* note 50, at 409.

62 *Adair III*, 187 F. Supp. 2d at 1276–77; *see* ROYSTER & BLUMM, *supra* note 50, at 409.

63 *Adair III*, 187 F. Supp. 2d at 1277 (quoting *Adair I*, 478 F. Supp. 336, 346 (D. Or. 1979)).

concluded that the "moderate living" standard applied only "if tribal needs may be satisfied by a lesser amount."[64] The court noted that without water sufficient to fulfill the purposes of the reservation, state water users could effectively abrogate tribes' treaty rights to hunt, fish, gather, and trap on reservation lands—yet only an act of Congress may terminate Indian treaty rights.[65]

Finally, the court turned to the parties' dispute concerning the meaning of the Ninth Circuit's "as currently exercised" language in *Adair II*, which the state maintained restricted the scope of the tribal right to that amount of water used in 1979. Judge Panner rejected that argument, concluding that the "as currently exercised" phrase must be construed to refer "only to the moderate living standard which recognizes that changing circumstances can affect the measure of a reserved right."[66] Any other result, he concluded, would be inconsistent with the fulfillment of the purposes of the reservation.[67]

The state and several individual water users appealed to the Ninth Circuit, arguing that the district court should either have dismissed the case on ripeness grounds or abstained from exercising its jurisdiction.[68] Oregon claimed that the state agency's 1999 "Preliminary Evaluation" established no permanent standard for measuring the tribes' water rights, since the parties were free to contest those findings through administrative processes and eventually before the Oregon courts.[69] Because there was no final Klamath Basin Adjudication determining the scope and extent of the tribes' reserved rights, Oregon argued that the case was not yet ripe.[70]

The Ninth Circuit agreed with the state, holding that further factual development of the Klamath Basin Adjudication was necessary to determine what standard of quantification Oregon would actually apply to the tribes' rights.[71] Until the Oregon Water Resources Department (OWRD) embraced and applied a final standard for determining the tribes' rights, the state's "minimum amount of water necessary" standard was subject to change. Indeed, there were at least two steps—the administrative hearings and the

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64 *Adair III*, 187 F. Supp. 2d at 1277 (quoting Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 685 (1979)). Judge Panner distinguished the U.S. Supreme Court's decision in Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n (*Fishing Vessel*), 443 U.S. 658 (1979), from the facts in *Adair II*. Although the reserved right in *Fishing Vessel* could be reduced without completely frustrating the purpose of the reservation, he concluded that the Klamath Tribes' reserved water right could not be reduced without abrogating the reserved rights of the tribes. *Adair III*, 187 F. Supp. 2d at 1277.

65 *Id.* at 1275–76.

66 *Id.* at 1279.

67 *Id.*

68 United States v. Braren, 338 F.3d 971, 974 (9th Cir. 2003). Oregon argued that the district court should have abstained under the U.S. Supreme Court's *Colorado River* abstention doctrine. The Ninth Circuit did not reach the abstention issue, instead dismissing the case on ripeness grounds. *Id.* at 976.

69 *Id.* at 974–75.

70 *Id.*

71 *Id.* at 975–76.

final administrative decision—at which that standard could be altered.[72] Thus, the state's preliminary adoption of the "minimum amount of water necessary" was not a final agency action ripe for review.[73]

By dismissing the case on ripeness grounds, the Ninth Circuit avoided ruling on the merits of Judge Panner's habitat protection ruling.[74] More significantly, however, the decision effectively precluded further federal court review of any Klamath Tribes' reserved water rights claims until the state completes the Klamath Basin Adjudication.[75] This is an exceedingly complex and time-consuming process that started thirty years ago, and is unlikely to be completed any time soon.

In the *Adair* decisions, the federal courts confirmed that the Klamath Tribes have time-immemorial reserved water rights, including instream flows, to satisfy the purposes—hunting, fishing, trapping, gathering, and agriculture—for which the tribes and federal government agreed to establish the Klamath Reservation in 1864.[76] However, as a result of the *Oregon* and *United States v. Braren* decisions, the quantification of these water rights is now left to the state OWRD administrative adjudication.[77] Although the federal courts acknowledged the tribes' paramount water rights nearly a quarter-century ago, the state provides no protection for those rights until the OWRD manages to quantify them in the state adjudication.

B. The Situation Today

Following unsuccessful efforts in the late 1990s and early 2000s to resolve Klamath water rights claims through an alternative dispute resolution process,[78] OWRD broke the tribal water rights claims into eight separate cases that corresponded to the different subbasins of the Klamath River, including Klamath Lake and Klamath Marsh.[79] In late 2005 and early 2006, the tribes, the federal government, and other parties briefed the issues in these cases for the state's Office of Administrative Hearings of OWRD.[80] This agency scheduled hearings for 2007, with the goal of issuing a decree by the end of that year.[81] Although the state announced that the 1999 "preliminary evaluation" standards

[72] *Id.*

[73] *Id.*

[74] Sudbury, *supra* note 19, at 170.

[75] *Id.* at 171.

[76] *See supra* note 20 and accompanying text.

[77] *See supra* notes 51–57 (*Oregon*), 68–75 (*Braren*) and accompanying text.

[78] *See* Stephen E. Snyder, *Klamath Water Crisis*, *in* NEGOTIATING TRIBAL WATER RIGHTS 148–49 (Bonnie G. Colby et al. eds., 2005) (examining the Klamath water crisis and the reasons alternative dispute resolution efforts between stakeholders were unsuccessful).

[79] These subbasins included the Williamson, Sycam, Wood, and Sprague Rivers as well as the mainstem Klamath. Telephone Interview by David Becker with Carl J. (Bud) Ullman, Dir., Water Adjudication Project for the Klamath Tribes, Chiloquin, Or. (Mar. 14, 2006) [hereinafter Interview with Bud Ullman].

[80] *Id.*; *see, e.g.*, United States and Klamath Tribes' Joint Motion for Ruling on Legal Issues Defining the Tribal Water Rights, Barrett v. U.S. Bureau of Indian Affairs, No. 281 (Office of Admin. Hearings, Or. Water Res. Dep't July 8, 2005).

[81] Interview with Bud Ullman, *supra* note 79.

at issue in *Braren* will be given no weight in the forthcoming adjudication,[82] it is hardly clear just what standards, beyond those articulated in the *Adair* cases, ODWR will apply in quantifying the tribes' reserved instream rights.

Over a quarter-century after the court in *Adair I* recognized the Klamath Tribes' reserved instream flow rights, the Klamath tribes continue to await the outcome of the state comprehensive adjudication process in order to obtain river water to which their treaty entitles them. Although the litigation that the tribes undertook to obtain recognition of their reserved water rights was a critical first step on the road to obtaining "wet rights" to instream flows, it is quite evident that that was only the first step in a process which has yet to come to full fruition. And partly because the tribes' water rights claims have languished in the state administrative process, Klamath River salmon runs reached critically low levels, requiring the closure of the off-shore salmon harvesting along the Oregon and northern California coasts in 2006.[83] Litigation and negotiations continue over the relicensing or removal of four dams licensed to PacifiCorp, currently blocking treaty-reserved fish from passing up the Klamath River into Oregon.[84] The scope of the Klamath Tribes' reserved water rights might be resolved as part of a settlement focusing on fish survival and dam removal,[85] making the state administrative water rights adjudication moot.

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[82] *Id.* In its brief in *Braren*, the state expressly disclaimed that the preliminary evaluation standard had any legal significance, urging the federal courts not to intervene to review that standard. *See* Brief of Defendant-Intervenor-Appellant State of Oregon at 20, United States v. Braren, 338 F.3d 971 (9th Cir. 2003) (Nos. 02-35441, 02-35446).

> The preliminary evaluation does not in any way control the hearing officer's decisions or preclude the hearing officer from coming to a conclusion different from the preliminary evaluation after hearing all the arguments and evidence. The preliminary evaluation does not control the Department's final determination. And the preliminary evaluation does not control the exceptions that may be filed in the circuit court, or the circuit court's decree. It does not represent a decision by the state.

Id.

[83] *See* Peter Sleeth, *Short Season to Start June Fourth for Chinook*, THE OREGONIAN, Apr. 29, 2006, at C01 (reporting the federal government's final decision to limit commercial fishing of salmon but to maintain close to normal levels of recreational fishing); *see also* Peter Sleeth & Michael Milstein, *Feds Call for Halt this Season of Salmon Fisheries off Coast*, THE OREGONIAN, Mar. 8, 2006, at A1 (reporting that Federal fish managers had called for a moratorium on commercial and sport fishing of salmon in California and Oregon).

[84] In March 2006, the U.S. Fish & Wildlife Service and National Marine Fisheries Service recommended that the dams' owner, PacifiCorp, install fish ladders and turbine screens at four of the dams as a condition of relicensing. Jeff Barnard, *Power Firm Would Rather Truck Fish than Build Ladders*, THE COLUMBIAN (Vancouver, Wash.), Apr. 29, 2006, at C7.

[85] The Federal Power Act's provisions that require protection of the purposes of federal reservations and the installation of fishways, Federal Power Act, 16 U.S.C. §§ 803(e), 811 (2000), as well as the Clean Water Act's requirement that federal licensees comply with state water quality standards, Federal Water Pollution Control Act, 33 U.S.C § 1341(a) (2000), may encourage licensees to agree to remove dams rather than incur costly renovations. *See* Michael C. Blumm & Viki A. Nadol, *The Decline of the Hydropower Czar and the Rise of Agency Pluralism in Hydroelectric Licensing*, 26 COLUM. J. ENVTL. L 81 (2001) (discussing the decline of the FERC's authority). For an examination of the effects of the 2005 amendments to the FPA, see David H. Becker, *The Challenges of Dam Removal: The History and Lessons of the Condit Dam and Potential Threats From the 2005 Federal Power Act Amendments*, 36 ENVTL. L. 811, 854–62 (2006).

III. THE WIND/BIG HORN RIVER LITIGATION: WATER RIGHTS THAT CANNOT BE USED

The Wind/Big Horn River system originates in several creeks along the north side of the Wind River Mountains Range in west-central Wyoming. The Wind flows about 200 miles southeasterly across the Shoshone Basin and through the Wind River Indian Reservation, then northward, through a gap in the Owl Creek Mountains where, after flowing out of Boysen Reservoir, its name becomes the Big Horn River, a tributary of the Yellowstone River.[86] The 1868 Second Treaty of Fort Bridger established the Wind River Indian Reservation for the Eastern Shoshone Tribe.[87] Ten years later, the federal government moved the Northern Arapaho onto the reservation.[88] The reservation was subsequently diminished in a series of agreements the federal government negotiated with the tribes.[89] By the turn of the twentieth century, the tribes—once nomadic buffalo hunters—were failed agrarians, dependant on the federal government for food, shelter, and clothing.[90]

Meanwhile, settlers inhabited the tribes' ceded lands under public land disposal statutes. They first settled lands along the river that could be easily irrigated in the semi-arid climate. Gradually, they expanded into the upper basin, where irrigation projects (both private and government-funded) were necessary to sustain agriculture.[91] There is consequently considerable non-Indian irrigation on both ceded lands and the reservation itself.[92]

A. The Big Horn Adjudication

In January 1977, the Wyoming legislature, responding to the Supreme Court's 1976 decision subjecting tribal reserved rights to McCarran

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[86] *See* Geology.com, Wyoming Rivers Map, http://geology.com/state-map/maps/wyoming-rivers-map.gif (last visited Nov. 12, 2006); *see also* Wikipedia, Wind River (Wyoming), http://en.wikipedia.org/wiki/Wind_River_(Wyoming) (last visited Nov. 12, 2006); Wikipedia, Bighorn River, http://en.wikipedia.org/wiki/Bighorn_River (last visited Nov. 12, 2006).

[87] *See* Treaty with the Shoshonees and Bannacks, July 3, 1868, 15 Stat. 673 (setting aside 2.8 million acres for the reservation). A treaty concluded just five years earlier had set aside over 44 million acres. *See* Treaty between the United States of America and the Eastern Bands of Shoshonee Indians, July 2, 1863, 18 Stat. 685.

[88] *See In re* General Adjudication of all Rights to Use Water in the Big Horn River System (*Big Horn I*), 753 P.2d 76, 83 (Wyo. 1989).

[89] In the First McLaughlin Agreement in 1897, the tribes sold the Big Horn Hot Springs. In the Second McLaughlin Agreement of 1904–1905, the tribes ceded an additional 1.48 million acres. *Id.* at 84.

[90] *Id.* at 83–84.

[91] *See id.* at 84 (discussing the geography and history of the reservation). Today, the area produces mostly spring grains, alfalfa, other hay, and sugar beets. BRS, INC. ET AL., WIND/BIGHORN RIVER BASIN PLAN FINAL REPORT 14 tbl.2.2-4 (2003), *available at* http://waterplan.state.wy.us/plan/bighorn/finalrept/final_report.pdf.

[92] In 1934, the federal government reserved all ceded lands that had not been settled and subsequently restored some of these undisposed lands to the tribes. The government also purchased some lands from settlers and conveyed those to the tribes. Since 1953, the amount of Indian lands on-reservation has been fairly stable. *See id.* at 84.

Amendment procedures,[93] authorized system-wide state adjudications for water rights, including federal water rights.[94] Two days later, the state filed suit in Wyoming district court concerning the Big Horn River Basin, including among the defendants the federal government as trustee for the tribes.[95] In what became the first state court quantification of Indian reserved rights, the district court appointed a special master who, after four years of proceedings, issued a 1982 report recommending that the court find that the purpose of the Wind River reservation was to establish a permanent homeland for the tribes and recognize a reserved water right for the tribes to fulfill that purpose. The master quantified reserved rights for irrigation, stock watering, fisheries, wildlife, aesthetics, as well as for domestic, commercial, industrial, and municipal uses.[96]

In its 1983 decision, the district court declined to adopt the master's recommendations, refusing to recognize reserved rights for non-agricultural purposes. However, the court did approve the part of the master's report that quantified reserved irrigation rights based on the number of practicably irrigable acres within the reservation.[97] The court concluded that the purpose of the Wind River reservation, as evident from the text of the Second Treaty of Fort Bridger, was "purely agricultural."[98] The state, the tribes, and numerous other parties appealed to the Wyoming Supreme Court.

Six years after the district court decision, a fractured Wyoming Supreme Court affirmed the district court.[99] Concerning the reservation's purpose, the court acknowledged the canon of treaty construction that calls for construing treaties generously in favor of the tribes but emphasized the treaty language referring to "said agricultural reservations."[100] This phrase, along with other treaty provisions authorizing agricultural allotments, providing seeds and farm implements, and promising stipends and bonuses for farming, convinced the court that the sole purpose of the reservation was agricultural.[101] The court was not persuaded by the tribes' clear intention of continuing to hunt and fish on the reservation or by post-treaty agreements and Indian agent reports describing the continuation of such non-agrarian pursuits.[102]

In terms of instream flows, the most important tribal claims were for fisheries and for wildlife and aesthetics. The Wyoming Supreme Court

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93 *See generally* Colo. River Conservation Dist. v. United States, 424 U.S. 800, 819–20 (1976) (holding that the McCarran Amendment's "consent jurisdiction . . . bespeaks a policy that recognizes the availability of comprehensive state systems for adjudication of water rights ").

94 WYO. STAT. ANN. § 1-1054.1 (1977) (current version at WYO. STAT. ANN. § 1-37-106) (2000)).

95 *Big Horn I*, 753 P.2d at 84.

96 *Id.* at 85.

97 *Id.* at 86.

98 *Id.* at 95.

99 *Id.* at 83.

100 *Id.* at 96–97. The court stated that "we cannot remake history," quoting Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 615 (1977), and observed that "courts should not distort the words of a treaty to find rights inconsistent with its language." *Big Horn I*, 753 P.2d at 97.

101 *Id.* at 97 (citing Articles 6, 7, 8, 9, and 12 of the treaty).

102 *Id.* at 98.

recognized that other courts had recognized reserved water rights for fisheries, but the court noted that those were due to express treaty provisions or situations where tribes "were heavily, if not totally, dependent on fish for their livelihood."[103] The court faulted the special master for thinking that a reserved right for fishing could be implied where a tribe was only "partially dependent upon fishing," noting that the district court determined that the Wind River tribes had "neither a dependency upon fishing nor a traditional lifestyle involving fishing."[104] Absent an express treaty provision or an historic heavy dependence on fishing, the court would imply no reserved right for fish.[105]

As for wildlife and aesthetics, for which the master had awarded sixty percent of historic flows, the district court found insufficient evidence justifying reserved rights for these purposes.[106] The Wyoming Supreme Court affirmed the district court's conclusion that the reservation's purpose was exclusively agricultural, observing that no other purpose was mentioned in the treaty language, and determining that the tribes and the federal government failed to introduce sufficient evidence of "a tradition of wildlife and aesthetic preservation" to justify an implied reserved water right.[107]

Although the court's rulings on instream issues were adverse to the tribes, and the court also rejected the tribes' claim for reserved groundwater,[108] the decision did produce a substantial award for tribal irrigation. Using the "practicably irrigable acreage" test to measure the scope of the reserved irrigation right,[109] the court affirmed a quantification of over 500,000 acre-feet of water.[110] When the U.S. Supreme Court affirmed, dividing evenly on the issue of applying the practicably irrigable acreage test

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103 *Id.* (citing *Adair II*, 723 F.2d 1394, 1409 (9th Cir. 1983) and Colville Confederated Tribes v. Walton, 647 F.2d 42, 48 (9th Cir. 1981)).

104 *Id.*

105 *Id.*

106 *Id.* at 99.

107 *Id.*

108 *Id.* at 100. The court noted that "the logic which supports a reservation of surface water to fulfill the purpose of the reservation also supports reservation of groundwater," but could find no cases awarding reserved rights to groundwater, noting that the Supreme Court's decision in United States v. Cappaert, 426 U.S. 128, 143 (1976), concerned a surface water pool (although it resulted in an injunction against groundwater pumping). *Big Horn I*, 753 P.2d at 99. Justice Burger's opinion for the *Cappaert* Court found that the water in the national monument at issue was surface water, even though the water in the pool was some 50 feet below the opening of the cavern. *Cappaert*, 426 U.S. at 131, 142.

The Arizona Supreme Court subsequently rejected the Wyoming court's unwillingness to find reserved rights in groundwater. *In re* Gila River System and Source, 989 P.2d 739, 749–50 (Ariz. 1999*). See infra* note 191 and accompanying text; *see also* 4 WATERS AND WATER RIGHTS, *supra* note 2, § 37.02(d), at ch. 37, 44 n.284 (collecting other cases indicating that groundwater may be the subject of reserved rights).

109 *See* 4 WATERS AND WATER RIGHTS, *supra* note 2, § 37.02(e), at 37–46 (discussing cases concerning changing on-reservation water use).

110 *See* A. DAN TARLOCK ET AL., WATER RESOURCE MANAGEMENT: A CASEBOOK IN LAW AND PUBLIC POLICY 895 (5th ed. 2002) (noting that certiorari was granted solely on the state's contention the state court should have employed the practically irrigable acreage test).

after Justice O'Connor recused herself,[111] the tribes were left with a substantial amount of water for an agricultural purpose that they did not wish to pursue.[112]

In order to use part of its decreed reserved rights for instream purposes, the tribes proceeded to adopt the Wind River Interim Water Code and establish the Wind River Water Resources Control Board, which in turn issued an instream flow permit for 252 cubic feet per second (cfs) of Wind River flows for "fisheries restoration and enhancement, recreational uses, groundwater recharge, and downstream benefits to irrigators and other water users."[113] But when the tribes subsequently complained to the state engineer that upstream diverters were depleting Wind River flows below the level called for in the tribal permit, the engineer refused to take action against the diverters, claiming that the tribes' right was only to divert water, not preserve streamflows.[114]

The tribes sued, and the Wyoming district court appointed another special master, who issued another report favoring the tribes. This time the district court agreed with the master, declaring that the tribes could use their federal reserved rights as they wished, regardless of Wyoming state law, and appointing the tribal water agency as the administrator of all on-reservation water rights.[115] But a deeply divided Wyoming Supreme Court reversed.

The court produced five different opinions from its five justices.[116] A majority ruled that the tribes could not change the use of their reserved rights to future water[117] from irrigation to instream, but the reasoning was hardly clear. Two justices concluded that the change was impermissible because it was inconsistent with state law, which restricted instream flows

111 Justice O'Connor recused herself due to her family's participation in the Gila River Adjudication in Arizona. An opinion she apparently drafted for the Court would have modified the practicably irrigable acreage standard with a "sensitivity doctrine" that would help protect junior non-Indian water rights. *See* Andrew C. Mergen & Sylvia F. Liu, *A Misplaced Sensitivity: The Draft Opinions in* Wyoming v. United States, 68 U. COLO. L. REV. 683, 684–685 (1997).

112 The dissenting justices in the Wyoming Supreme Court thought that limiting the tribes' reserved rights to agriculture "assumes that the Indian peoples will not enjoy the same style of evolution as other people, nor are they to have the benefits of modern civilization." *Big Horn I*, 753 P.2d at 119 (Thomas, J., dissenting). Justice Thomas thought that the homeland purpose "assumes that the homeland will not be a static place frozen in an instant of time but . . . will evolve and will be used in different ways that the Indian society develops." *Id.*

113 *See* DAVID GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 832 (4th ed. 1998) (noting that the flows would come from the part of the tribes' reserved rights awarded for future projects; thus, it was water that could not be presently used by the tribes); TARLOCK, *supra* note 110, at 896.

114 GETCHES, *supra* note 113, at 832–33.

115 TARLOCK, *supra* note 110, at 896.

116 The five opinions made it so confusing as to what the court actually held that one justice felt compelled to supply "a guide to the court's present opinion" in order to provide some clarity. *In re* General Adjudication of All Rights to Use Water in the Big Horn River System (*Big Horn II*), 835 P.2d 273, 300–01 (Wyo. 1992) (Golden, J., dissenting).

117 "Future water" refers to that part of reserved water rights not currently in use by the tribes.

to state ownership.[118] Another thought that state law did not govern, but that the federal treaty prohibited instream use.[119] Both interpretations ignored U.S. Supreme Court precedent upholding the right to transfer irrigation water to other uses.[120] The court also overruled the district court concerning the tribal water agency administering on-reservation water rights, concluding—again on a three to two vote—that only the state engineer possessed authority to administer water rights.[121]

B. The Situation Today

The Wyoming Supreme Court decisions frustrated the Shoshone and Arapaho Tribes' efforts to secure instream flows in the Wind River. Tribal efforts to develop water for irrigation on the Wind River Reservation, and to seek alternative means of securing instream flows, have been in limbo for the past fifteen years, in part due to lack of funding for water projects on the reservation.[122] However, the tribes continue to negotiate with the state and federal governments over the use of their reserved water rights, including the possibility of exchanging a portion of their water rights for funding of on-reservation water projects.[123] Although the Wyoming Supreme Court

118 *Big Horn II*, 835 P.2d at 279–80 (majority opinion), 284 (Thomas, J., concurring). According to the leading treatise on federal Indian law, the notion that state law may limit the uses to which reserved water rights may be put "runs counter to the principle that tribal reserved rights are governed by federal law." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 1190 (Nell J. Newton et al. eds., LexisNexis Matthew Bender 2005) (1941).

119 *Big Horn II*, 835 P.2d at 286–287 (Cardine, J., concurring in part, dissenting in part). Judge Cardine also suggested that the tribes were free to change the use of their existing water to instream purposes. *Id.* at 285.

120 Arizona v. California, 439 U.S. 419, 422 (1979) (noting that water awarded under the practicably irrigable acreage (PIA) standard could be used for non-agricultural purposes, stating that while PIA "shall constitute the means of determining quantity of adjudicated water rights [it] shall not constitute a restriction of the usage of them to irrigation or other agricultural application").

121 *Big Horn II*, 835 P.2d at 283 (majority opinion) (construing the Wyoming Constitution). The commentary was quite critical. *See, e.g.*, Peggy Sue Kirk, *Cowboys, Indians and Reserved Water Rights: May A State Court Limit How Indian Tribes Use Their Water?,* 28 LAND & WATER L. REV. 467, 487 (1993) (concluding that the decision "strengthens the argument that state courts are not a fair forum for the adjudication of Indian reserved water rights."); Berrie Martinis, *From Quantification to Qualification: A State Court's Distortion of the Law in* In re General Adjudication of All Rights to use Water in the Big Horn River System, 68 WASH. L. REV. 435, 454 (1993) (concluding that the decision "is a step on the road to extinction of tribal sovereignty").

122 Telephone Interview by David Becker with Wes Martel, Former Tribal Councilman, Eastern Shoshone Tribe of the Wild River Reservation, in Ft. Washakie, Wyo. (Mar. 21, 2006) [hereinafter Interview with Wes Martel]; *see also* Ramsey Kropf, *Wind River Litigation*, *in* NEGOTIATING TRIBAL WATER RIGHTS, *supra* note 78, at 111–12 (describing ongoing litigation and settlement efforts); Daniel Kraker, *The New Water Czars*, HIGH COUNTRY NEWS, Mar. 15, 2004, at 7, 11, *available at* http://www.hcn.org/servlets/hcn.Article?article_id=14616 (noting that the Wind River Reservation Tribes won extensive water rights but had "absolutely no money to develop those resources.").

123 Interview with Wes Martel, *supra* note 122; *see also* Wyoming State Water Plan, Wind/Bighorn/Clarks Fork Rivers, http://waterplan.state.wy.us/basins/bighorn/issues.html (last visited Nov. 12, 2006) (describing ongoing discussions between the State and Tribes over the

decisions stopped the tribes from transferring their water to instream use, it is possible that the tribes may be able to persuade the state to obtain and hold instream rights in exchange for allowing more water storage on the Wind River Reservation.[124] Additional water storage is an important goal for the state, and the reservation is the only feasible location for building new storage in the Wind River Basin.[125]

In addition to their continuing efforts to secure additional instream flows and water development opportunities based on the tribes' decreed reserved water rights, the tribes have worked with the United States Environmental Protection Agency (EPA) on civil and criminal enforcement of the Clean Water Act in order to preserve the water quality in the Wind River and to improve water delivery on the reservation. In 2001, EPA ordered a cattle company to restore a section of the Wind River it had degraded by releasing some 4,000 cubic yards of streambed sediment into the river.[126] Four years later, three businesses agreed to settle EPA claims for polluting within the boundaries of the Wind River Reservation in violation of the Clean Water Act, Safe Drinking Water Act, and Oil Pollution Act by paying $1.327 million in penalties.[127] The violations included underground injection and surface discharges which contaminated tribal drinking water.[128] The penalties included some $700,000 for so-called "supplemental environmental projects" on the reservation, including the purchase and installation of piping and other equipment to upgrade water treatment facilities and provide better quality and quantity of drinking water to tribal members.[129] And, in 2006, with the tribes participating as amicus in the appeal, the Tenth Circuit upheld the conviction of an irrigation district manager for building earthen dikes in the Wind River adjacent to the reservation in violation of the Clean Water Act.[130] Although these regulatory enforcement efforts have not put water back in the river, they have helped improve the quality of the water that is there and will allow the tribes to develop projects that may reduce water waste on the reservation, potentially enhancing streamflows.[131]

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administration of reserved rights and the development of the Tribes' "futures" award).

124 *See* Kropf, *supra* note 122, at 112; Interview with Wes Martel, *supra* note 122.

125 Interview with Wes Martel, *supra* note 122.

126 Press Release, U.S. Envtl. Prot. Agency Region 8, Developers Ordered to Restore Wind River (Oct. 5, 2001), *available at* http://yosemite.epa.gov/r8/r8media.nsf (follow "2001" hyperlink under "Archives"; then follow "10/05/2001: Developers ordered to restore Wind River" hyperlink).

127 *Oil Firms Pay $1.32 Million for Fouling Wind River Reservation Water*, ENV'T NEWS SERVICE, June 8, 2005, *available at* http://www.ens-newswire.com/ens/jun2005/2005-06-08-09.asp #anchor3.

128 *See id.*

129 *See id.*

130 United States v. Hubenka, 438 F.3d 1026, 1035 (10th Cir. 2006).

131 *See* BRS ENG'G, TECHNICAL MEMORANDUM, WIND/BIGHORN BASIN PLAN: SOCIOECONOMIC FACTORS AND WATER DEMAND 20 (2003), *available at* http://waterplan.state.wy.us/plan/bighorn/techmemos/socio.pdf ("Much of the water allocated for current use is not actually used but lost on the Reservation, due to leakage resulting from the poor condition of water distribution and conveyance infrastructure in many areas.").

IV. THE YAKAMA EFFORT TO RESTORE A SALMON STREAM: "TIME-IMMEMORIAL" BUT "DIMINISHED" RESERVED RIGHTS

The headwaters of the Yakima River are in the Cascade Mountain Range in central Washington. The Yakima, which flows some 214 miles southeasterly until it joins the Columbia River near Tri-Cities, Washington, was once home to the largest salmon runs in the upper Columbia Basin,[132] but has been subject to heavy irrigation since the late nineteenth century. Largely as a result of dam building and irrigation diversions, Yakima Basin salmon declined from nearly 1,000,000 returning adults to fewer than 5,000 by the mid-1990s,[133] and its coho (*Oncorhynchus kisutch*), sockeye (*Oncorhynchus nerka*), and summer chinook (*Oncorhynchus tshawytscha*) runs went extinct.[134]

The decline of Yakima Basin salmon has been especially difficult for the Yakama Indian Nation, which has been dependent on salmon fishing for subsistence, commerce, and culture for centuries.[135] The Yakama

One potential avenue the tribes might consider, with EPA cooperation, would be to pursue "treatment as a State" (TAS) status under the Clean Water Act (CWA). 33 U.S.C. § 1377(e) (2000). If the tribes included in an EPA-approved program flow parameters as part of their water quality standards and required all non-point sources of pollution, such as irrigation diversions, to certify that they were meeting water quality standards, the tribes could perhaps produce substantial instream flow improvements through regulatory means. Under the CWA, state and tribal programs may be stricter than federal requirements. *Id.* § 1370; City of Albuquerque v. Browner, 97 F.3d 415, 423 (10th Cir. 1996) ("We conclude that the EPA's construction of the 1987 amendment to the Clean Water Act—that tribes may establish water quality standards that are more stringent than those imposed by the federal government—is permissible because it is in accord with powers inherent in Indian tribal sovereignty.").

132 *See* YAKIMA SUBBASIN FISH & WILDLIFE PLANNING BD.Y YAKIMA SUBBASIN PLAN 2004 1-34 (2004), *available at* http://www.nwcouncil.org/fw/subbasinplanning/yakima/plan/1_Overview.pdf (stating that historically 500,000–900,000 salmon returned to the Yakima Subbasin annually, while current numbers are greatly reduced, and summer chinook, sockeye, and native coho are extinct in the subbasin).

133 Nw. Power Planning Council, Notes to Committee Members (Apr. 2, 1998), *available at* http://www.nwcouncil.org/fw/artprod/apc/1998_04/notes.htm. *See generally* Northwest Power Planning Council, 1998 Council Briefing Book, *available at* http://www.nwcouncil.org/library/1998/98-10.htm (stating that salmon and steelhead populations have "been reduced to historic lows," and noting that while irrigation has substantially reduced streamflows, much of the basin's habitat remains intact, making it one of the best areas in the Columbia Basin for salmon restoration); YAKIMA SUBBASIN FISH AND WILDLIFE PLANNING BOARD, NORTHWEST POWER PLANNING COUNCIL, YAKIMA SUBBASIN PLAN (2004), *available at* http://www.nwcouncil.org/fw/subbasinplanning/yakima/plan/0_ExecSumm.pdf (describing how Yakima Basin salmon populations have been "dramatically reduced").

134 *See* Legacy of Loss: A Partial List of Extinction of Salmon and Steelhead Populations, http://www.inforain.org/mapsatwork/salmonstocks/salmonstocks_appendix2.htm (last visited Nov. 12, 2006) (coho, summer chinook); MICHAEL C. BLUMM, SACRIFICING THE SALMON: A LEGAL AND POLICY HISTORY OF THE DECLINE OF COLUMBIA BASIN SALMON 50–51 (2002) [hereinafter SACRIFICING THE SALMON] (sockeye).

135 *See* NW. POWER PLANNING COUNCIL, U.S. TRIBES AND TRIBAL ORGANIZATIONS 62 (2004), http://www.nwcouncil.org/library/2000/2000-11.pdf (last visited Nov. 12, 2006) (noting that due to the decline in salmon populations, "the Yakama Indian Nation has lost a major source of its physical, spiritual, cultural and economic wellbeing").

Reservation, established by treaty in 1855,[136] was established in part to allow the tribe to continue their historic fishing practices. The treaty expressly promised the tribe the exclusive right to take fish on-reservation and also "the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory," off of the reservation.[137] The Yakama joined in litigation filed in 1970, seeking, among other things, to have a federal court declare that the express treaty "right of taking fish" supplied protection of salmon habitat from degrading activities like irrigation diversions. The district court deferred on that issue but ruled that the treaty entitled the tribes the right to half of the salmon harvests,[138] which the Supreme Court affirmed in 1979.[139]

A. The Acquavella *Adjudication*

After the Supreme Court decision, the Yakama renewed their habitat protection claim, maintaining that the operation of a Yakima Basin dam was threatening to dewater salmon redds (nests). In the fall of 1980, the district court ordered that sufficient water be left in the Yakima River to protect the threatened redds,[140] a result the Ninth Circuit eventually affirmed in 1985.[141] Neither this case nor the Supreme Court's 1979 decision dealt directly with the tribes' reserved water rights, however, as those were already at issue in a McCarran Amendment adjudication of all rights in the Yakima Basin, known as the *Acquavella* adjudication, which the state filed in 1977.[142] In 1989, after

136 Treaty with the Yakamas, June 9, 1855, 12 Stat. 951, 952 (ratified in 1859).

137 *Id.* art. III; *see* SACRIFICING THE SALMON, *supra* note 134, at 53–67 (describing the negotiations leading to the signing of "Stevens treaties" like the Yakama Treaty).

138 United States v. Washington, 384 F. Supp. 312, 343 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975).

139 *Fishing Vessel*, 443 U.S. 658 (1979).

140 Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist., 763 F.2d 1032, 1033–34 (9th Cir. 1985) (describing the district court's order of the release of water stored behind the Cle Elum Dam in order to protect salmon redds).

141 *Id.* at 1035. The Ninth Circuit issued three different opinions in the case, becoming progressively less clear about the nature of the treaty in response to the en banc Ninth Circuit's decision in Phase II of United States v. Washington, 759 F.2d 1353, 1357 (9th Cir. 1985) (vacating a district court decision that had concluded that the treaty "right of taking fish" included the right to protect the habitat necessary to maintain fishing because granting declaratory relief without concrete facts would be judicially imprudent, possibly producing results that could be "imprecise in definition and uncertain in dimension"). *See* SACRIFICING THE SALMON, *supra* note 134, at 251–52, 255–56 (discussing the three different Ninth Circuit opinions, in which the court took an increasingly vague stance on the Tribe's fishing rights).

142 *See* Wash. Dep't of Ecology v. Yakima Reservation Irrigation Dist. (*Acquavella II*), 850 P.2d 1306, 1309 (Wash. 1993) (noting that the state began the adjudication in October 1977). The Yakama's upstream neighbor, the Confederated Tribes of the Colville Reservation, obtained judicial recognition of their instream water rights in the early 1980s. *See* Colville Confederated Tribes v. Walton (*Colville I*), 647 F.2d 42 (9th Cir. 1981) (holding that the tribe possessed reserved water sufficient to establish a tribal fishery with Lahonton cutthroat trout to replace its historic salmon fishery, lost due to construction of impassable federal dams); Colville Confederated Tribes v. Walton (*Colville II*), 752 F.2d 397 (9th Cir. 1985) (quantifying those reserved rights and indicating that reserved water for irrigation had a reservation priority date); *see also* Joint Bd. of Control of Flathead, Mission, and Jocko Irrigation Dists. v. United States,

considerable procedural wrangling,[143] the district court quantified the Yakama Nation's reserved rights for irrigation and ruled that while the tribe had reserved water for fish with a priority date of "time immemorial,"[144] the scope of the tribe's reserved right for fish had been substantially diminished and were limited to the "minimum instream flow necessary to maintain anadromous fish life in the river, according to annual prevailing conditions."[145]

The Washington Supreme Court affirmed in a puzzling 1993 decision. Employing standard rules of treaty interpretation, the court noted that ambiguities must be interpreted in the tribes' favor, and therefore ruled that neither a 1906 federal statute authorizing dams in the Yakima Basin, nor a 1914 statute expanding the tribe's irrigation water rights, nor other government actions over the years terminated the tribe's fishing rights.[146] But, in an apparent effort to avoid ordering a restoration of treaty-time streamflows, the court concluded that a series of unspecified government actions between 1905 and 1968 produced "encroachment upon and significant damage to the Indians' treaty fishing rights," and consequently "substantially diminished"—though they did not abrogate—such rights.[147] Thus, the court affirmed the trial court's ruling that the Yakama's reserved water for fishing was limited to the minimal amount necessary to maintain

832 F.2d 1127, 1131–32 (9th Cir. 1987) (distinguishing the priority dates of reserved water for fish and reserved water for irrigation). Because reserved water for fish is necessary to fulfill a use that pre-dated the Indian treaties and reservations—and which the treaties and reservations aimed to preserve—it has been referred to as a *Winans* right, after the seminal Supreme Court case of United States v. Winans, 198 U.S. 371 (1905). *See* United States v. Abousleman, 83cv01041-JEC-ACE, at 26–27 (D.N.M. Oct. 4, 2004), *available at* http://www.ose.state.nm.us/water-info/CourtOrders/JemezRiver/Jemez1.pdf; 4 WATERS AND WATER RIGHTS, *supra* note 2, § 37.02(a)–(b) (distinguishing *Winans* rights from *Winters* rights). On the *Winans* decision, see Michael C. Blumm & James Brunberg, *Not Much Less Necessary Than the Atmosphere They Breathed: Salmon, Indian Treaties, and the Supreme Court—A Centennial Remembrance of* United States v. Winans *and Its Enduring Significance*, 46 NAT. RES. J. (forthcoming 2006).

143 *See* Wash. Dep't of Ecology v. Acquavella (*Acquavella I*), 674 P.2d 160, 165 (Wash. 1983) (stating that due process rights of individual water users were not violated when process was served on individual users' water distributors in lieu of providing individual notice).

144 *Acquavella II*, 850 P.2d at 1310.

145 *Id.*

146 *Id.* at 1321–22. The Yakima Project is a series of 11 storage and diversion dams on the Yakima River and its tributaries, including two hydropower plants. *See generally* Bureau of Reclamation, U.S. Dep't of the Interior, Yakima Project: Washington, http://www.usbr.gov/dataweb/html/yakima.html (last visited Nov. 12, 2006) (describing the history, organization, and operation of the dams, power plants, and associated facilities which constitute the Yakima Project).

147 *Acquavella II*, 850 P.2d at 1323.

> We therefore cannot conclude that the inconsistent actions of Congress, the executive branch and administrative agencies, were sufficient, in and of themselves, to *extinguish* those reserved water rights necessary to fulfill treaty fishing rights. We conclude, however, that there was encroachment upon and significant damage to the Indians' treaty fishing rights during this period. Thus, although the treaty rights were not extinguished, they were diminished.

Id.

salmon, according to annual prevailing conditions.[148] This unprecedented interpretation of diminishing—or partially abrogating—treaty rights, despite a lack of clear intent to abrogate, was inconsistent with Supreme Court standards.[149]

The court drew support for its diminishment rationale from a 1968 Indian Claims Commission settlement, in which the tribe accepted $2.1 million for damage to its fishing rights occurring as a result of dam construction, unscreened irrigation diversions, and the like.[150] But while the claims commission had jurisdiction to award damages, it had no jurisdiction to take or diminish treaty rights, a fact subsequently noted by the New Mexico Court of Appeals in refusing to follow the Washington Supreme Court's reasoning.[151]

B. The Situation Today

The Washington Supreme Court decision seemed to be a crushing blow to the Yakama Nation's efforts to restore salmon runs to the Yakima Basin. But in 1995 the trial court in the McCarran adjudication interpreted the Supreme Court's recognition of a limited habitat right "to maintain fish life" in the river as requiring both tributary flows and flushing flows in the mainstem.[152] "The latter decision required the Bureau of Reclamation to release some 600 acre-feet of storage water for fish migration."[153]

In ensuing years, the Yakama Nation has successfully litigated and negotiated to obtain "wet" rights based on its reserved water rights and to keep additional water in the Yakima River and its tributaries. After the federal court's decision protecting the imperiled salmon redds from

148 *Id.* at 1310.

149 In United States v. Dion, 476 U.S. 734, 739–40 (1986), the Court required clear congressional intent to abrogate treaty rights, a result of which the Washington Supreme Court was quite aware. *See Acquavella II*, 850 P.2d at 1321 (citing *Dion*). For criticism, see Michael C. Blumm & Brett M. Swift, *The Indian Piscary Profit and Habitat Protection in the Pacific Northwest: A Property Rights Approach*, 69 U. COLO. L. REV. 407, 476 (1998) ("Under this unprecedented interpretation, inconsistent government actions may apparently substantially diminish treaty rights, despite a lack of clear congressional intent that is required for abrogation of those rights. This result . . . invites . . . courts to find such 'diminishments' of treaty rights on the basis of judicial interpretations of history.").

150 *Acquavella II*, 850 P.2d at 1323–24 (citing Yakama Tribe of Indians v. United States, 20 Indian Claims Comm'n Decisions 76, 89 (1968)).

151 State *ex rel.* Martinez v. Kerr-McGee Corp., 898 P.2d 1256, 1260 (N.M. Ct. App. 1995) ("We note that *State Department of Ecology*, 850 P.2d at 1324–25 (applying Washington state law), is contrary. However, because the opinion failed to analyze the effect of the ICC's [Indian Claims Commission] limited jurisdiction, as well as the dissimilarity in the causes of action and parties, we do not find that opinion persuasive and decline to follow it.").

152 *See* ROYSTER & BLUMM, *supra* note 50, at 414 (citing Water Order Re Treaty Reserved Rights at Usual and Accustomed Fishing Places, Wash. Dep't of Ecology v. Acquavella, No. 77-2-01484-5, (Wash. Sup. Ct. Mar. 1, 1995) and Order Re Flushing Flows, Wash. Dep't of Ecology v. Acquavella, No. 77-2-01484-5 (Wash. Sup. Ct. Apr. 13, 1995)).

153 Blumm & Swift, *supra* note 149, at 477–78.

dewatering in 1980,[154] the Bureau of Reclamation began operating the Yakima Project[155] using "flip-flop operations," which means annually reducing flows in the upper arm of the Yakima River, while increasing flows in the Naches River, an upper tributary of the Yakima, to ensure that spring chinook salmon redds remain inundated.[156] In 1994, after the Washington Supreme Court recognized the Yakama Nation's "diminished" instream flow rights,[157] Congress passed the Yakima River Basin Water Enhancement Project Act.[158] One goal of this statute was to provide increased instream flows to protect salmon and steelhead runs.[159] The legislation included specific numerical criteria for instream flows, including target flows at two dams in the Yakima Project.[160] The statute also established a Conservation Advisory Group, including representatives of the Yakama Nation and other stakeholders, to provide recommendations for a basinwide conservation program.[161]

The Yakama Nation has also been successful in directly influencing the operations of the Yakima Project to improve instream flows for fish protection. The Yakama now have a voice in setting the level of instream flows through the Yakima Project System Operations Advisory Committee, a group of fishery biologists (including biologists from the Yakama Indian Nation), which advises the Bureau of Reclamation Secretary of the Interior regarding annual biologically-based flows for salmon protection.[162] The Secretary uses these recommendations to determine the flows necessary to maintain all the life stages of the fish in the Yakima River and tributaries.[163] The Yakama Nation retains the right

154 *See* Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist., 763 F.2d 1032, 1033–34 (9th Cir. 1985) (describing the district court ordering of the release of water stored behind the Cle Elum Dam to protect salmon redds).

155 *See supra* note 146 (describing the organization and operation of the Yakima Project).

156 Telephone Interview by David Becker with Tim Weaver, Attorney for the Yakama Nation, Yakima, Wash. (Mar. 21, 2006) [hereinafter Interview with Tim Weaver]; *see also* Press Release, U.S. Dep't of the Interior, Bureau of Reclamation, Yakima Project "Flip-Flop" Operation to Begin (Aug. 30, 2005), *available at* http://www.usbr.gov/newsroom/newsrelease/detail.cfm?RecordID=7462 (describing the "flip-flop" river flow operation to encourage salmon to spawn at relatively low flows).

157 *Acquavella II*, 850 P.2d 1306, 1323 (Wash. 1993).

158 Pub. L. No. 103-434, tit. XII, 108 Stat. 4526, 4550 (1994).

159 *See id.* § 1201(1), 108 Stat. at 4550 (stating the purpose as "to protect, mitigate, and enhance fish and wildlife through . . . improved instream flows"); *id.* § 1203(d)(2), 108 Stat. at 4554 (stating "to improve streamflow and fish passage conditions").

160 *Id.* § 1205(a)(1)(B), (a)(2)(A)–(B), 108 Stat. at 4557–58.

161 *Id.* § 1203(c), 108 Stat. at 4552–53.

162 Interview with Tim Weaver, *supra* note 156; *see also* YAKIMA NATION STAFF, WATER FOR INSTREAM FLOWS, *available at* http://www.waterpolicy.wa.gov/2002/papers/flows/Vyvyan.doc (describing the role of the System Operations Advisory Committee in determining instream flow); R.C. BAIN ASSOCS. & MONTGOMERY WATER GROUP, TECHNICAL MEMORANDUM YAKIMA RIVER BASIN WATERSHED PLAN: WATER SUPPLY NEEDS FOR INSTREAM FLOWS 4–5 (Jan. 2002), *available at* http://www.co.yakima.wa.us/TriCnty/Technical%20Memorandum/T330-Instream.pdf (summarizing a report issued by the System Operations Advisory Committee to the Secretary of the Interior that outlines a program to establish biologically based flows).

163 *See* R.C. BAIN, *supra* note 162, at 4–5.

to have the state court enforce minimum flows under prior orders in the *Acquavella* adjudication, but to date it has not had to do so.[164]

The Yakama Nation has also participated in negotiations that have led to the settlement of water rights claims in the ongoing adjudication, resulting in several irrigation districts agreeing to give up part of their claims to water rights and implement water conservation projects to enhance instream flows.[165] For example, in 2003, a settlement among the Sunnyside Division, the Washington Department of Ecology, the Bureau of Reclamation, and the Yakama Nation gave Sunnyside and its members confirmed water rights of 435,422 acre-feet.[166] Sunnyside waived its claims to another 23,098 acre-feet, reducing the demand on Yakima Basin streamflows,[167] and also agreed to implement water conservation projects by 2016 that will achieve a total savings of 29,162 acre-feet of water, two-thirds of which will augment Yakima Basin flows.[168] Although all parties agreed to keep these improved instream flows to satisfy the Yakama Nation's reserved water rights and Yakima Project's purposes,[169] the settlement is silent as to the legal mechanism for doing so.[170] The federal Bureau of Reclamation holds title to the water, but only the state of Washington can hold title to instream flow rights under state law.[171] Because the Bureau does not want to relinquish title, one possibility is a long-term (e.g. ninety-nine year), nominal-fee lease from the federal government to the state that would allow the state to place the water rights into the state trust water rights program.[172]

Thus, through litigation, negotiation, and settlement, the Yakama Nation has been able to improve Yakima Basin streamflows for fish habitat protection over the last two decades. The tribe has not invariably triumphed in court,[173] but judicial recognition of the existence of its

164 Interview with Tim Weaver, *supra* note 156.

165 *See, e.g.*, Press Release, Wash. Dep't of Ecology, Agreement Settles Major Water-Right Claims (May 8, 2003), *available at* http://www.ecy.wa.gov/news/2003news/2003-083.html [hereinafter Sunnyside Agreement] (describing the settlement between Sunnyside Division, the Washington State Department of Ecology, the U.S. Department of the Interior for the Bureau of Reclamation, and the Yakama Nation).

166 *See* Notice of Sunnyside Div. Water Rights Settlement Agreement at 2–9, *In re* Matter of the Determination of the Rights to the Use of the Surface Waters of the Yakima River Drainage Basin, No. 1752 (Sup. Ct. Yakima County May 12, 2003) (on file with authors) [hereinafter Sunnyside Water Rights Settlement Agreement] (enumerating details for six of the water rights agreed upon in the settlement).

167 Sunnyside Agreement, *supra* note 165.

168 Sunnyside Water Rights Settlement Agreement, *supra* note 166, at 17–19.

169 *Id.* at 12 (listing the uses for which the remaining water may satisfy the Yakama Nation's reserved water rights and project purposes).

170 Telephone Interview by David Becker with Dan Haller, Envtl. Eng'r, Water Res. Program, Wash. State Dep't of Ecology, in Yakima, Wash. (Mar. 28, 2006).

171 *Id.*

172 *Id.*

173 However, the tribe has won every action filed in the *Acquavella* adjudication since the Washington Supreme Court's decision in 1993. E-mail from Tim Weaver, Attorney for the Yakama Nation, to Michael Blumm (Aug. 3, 2006) (on file with author). The tribe's attorney considered this track record to have deterred irrigator challenges and now "reason generally

reserved water right for fish equipped the tribe with leverage that it has been able to successfully employ in administrative and congressional fora, producing some promise of restored salmon runs in the Yakima Basin after over a century of decline.

V. THE GILA RIVER SETTLEMENTS: WATER QUALITY, A CHALLENGE TO PIA, AND SOME WET WATER

The Gila River, a tributary of the Colorado River, is one of the largest desert rivers in the world, historically flowing for some 630 miles. It rises in the mountains of western New Mexico, flows southwest through the Gila National Forest, through the San Carlos Apache Reservation in eastern Arizona, and then westward across Arizona, where it flows through the Gila River Indian Community (GRIC) southwest of Phoenix. Below Phoenix, due to agricultural and municipal diversions, the river is largely a trickle; prior to water project development it flowed intermittently into the Colorado River near Yuma, Arizona.[174] The Gila was largely excluded from the epic Supreme Court litigation over the Colorado River that pitted Arizona against California.[175]

The GRIC includes twenty-two villages within a 580-square mile reservation in central Arizona, southwest of Phoenix.[176] Congress established the reservation, shared by the Akimel O'odham (Pima) and the Pee Posh (Maricopa) people, in 1859.[177] The people of the GRIC traditionally depended on agricultural crops watered by the Gila River for their livelihood.[178]

prevails." *Id.*

174 ARIZ. DEP'T OF WATER RES., LOWER GILA RIVER WATERSHED 1 (2005), *available at* http://www.azwater.gov/dwr/Content/Find_by_Program/Rural_Programs/OutsideAMAs_PDFs_for_web/Lower_Colorado_River_Planning_Area/Lower_Gila_River_Watershed.pdf [hereinafter LOWER GILA RIVER WATERSHED]; s*ee also* NEW WEST ENCYCLOPEDIA, *supra* note 16, at 428 (describing the Gila as the "master stream" of central Arizona, historically contributing "well over" one million acre-feet of water to the Colorado River); U.S. ENVTL. PROT. AGENCY, NAT'L WATER QUALITY INVENTORY REPORT: REPORT TO CONGRESS 192 (1994), *available at* http://www.epa.gov/owow/305b/94report/gilariv.pdf [hereinafter WATER QUALITY INVENTORY REPORT] (describing the Gila river); Wikipedia, Gila River, http://en.wikipedia.org/wiki/Gila_River (last visited Nov. 12, 2006).

175 Arizona v. California, 373 U.S. 546, 594–95 (1963); *see also* 4 WATERS AND WATER RIGHTS, *supra* note 2, § 37.01(b)(3) (explaining that the suit determined water rights to the Colorado River); Chambers & Echohawk, *supra* note 4, at 453 (noting that the five tribes in the case were awarded over 900,000 acre-feet of water from the Colorado River to irrigate 135,000 acres).

176 WATER QUALITY INVENTORY REPORT, *supra* note 174, at 192.

177 *Arizona Water Settlements Act: J. Hearing on S. 437 Before the Subcomm. on Water and Power of the Comm. on Energy and Natural Resources and the Comm. on Indian Affairs*, 108th Cong. 23 (2003) (testimony of Richard Narcia, Governor, Gila River Indian Community), *available at* http://energy.senate.gov/earings/testimony.cfm?id=945&wit_id=2661.

178 *Id.*

A. The Globe Equity *Decree and Ensuing Litigation*

In 1937, the United States government completed Coolidge Dam, creating the San Carlos Reservoir[179] on the Gila River upstream from the community and downstream of the San Carlos Apache Reservation. The dam's purpose was to store flood waters, half of which were reserved for allottees on the GRIC.[180] Downstream of Coolidge Dam, the Gila flows to the Ashurst Hayden Dam, which diverts water to the GRIC and to non-Indian irrigators.[181] Below Ashurst Hayden Dam, the river is ephemeral, flowing only in response to precipitation or water releases from upstream dams.[182] While there is now no consistent streamflow on the reservation, the river was intermittent pre-development.[183]

There has been considerable conflict over Gila River flows over the past eighty years, the precipitating event being congressional authorization of the Coolidge Dam in 1924 for the primary purpose of providing water to allotted lands on the GRIC.[184] The next year, the federal government filed suit, seeking a judicial determination of the rights and priorities of both Indians and non-Indians to Gila River streamflows.[185] A decade later, the parties agreed to a consent decree, the 1935 *Globe Equity* Decree (so named because it was entered by the federal district court located in the city of Globe), which established the measure, extent, and limits of the rights of all the parties and their successors in interest to divert the waters of the Gila River. Without expressly mentioning reserved rights, the decree recognized that the Pima Indians of the GRIC had an "immemorial" priority right to

179 *See* CRAIG RUSSON, JERRY HORN & STEVE OLIVER, A CASE STUDY OF GILA RIVER INDIAN COMMUNITY (ARIZONA) AND ITS ROLE AS A PARTNER IN THE NSF-SUPPORTED UCAN RURAL SYSTEMIC INITIATIVE (RSI) 2 (2000), *available at* http://www.wmich.edu/evalctr/rsi/gila_river.pdf (tracing the history and current condition of the GRIC).

180 Act of June 7, 1924, ch. 288, 43 Stat. 475, 475 (providing for the continuing construction of the San Carlos Federal Irrigation project). *See infra* note 184 (quoting the congressional purpose of the Act).

181 E-mail from Gregg Houtz, Attorney, Ariz. Water Res. Dep't, to David Becker (July 7, 2006, 9:36:12 PST) (on file with author) [hereinafter Houtz E-mail].

182 LOWER GILA RIVER WATERSHED, *supra* note 174, at 1 (2005).

183 Houtz E-mail, *supra* note 181. In the Lower Gila River watershed, most streamflow is ephemeral: flows occur only in response to precipitation events or water releases from upstream dams. Historically, the river would flow in the spring due to winter rains and melting snow, and in summer following monsoon rains. *See* LOWER GILA RIVER WATERSHED, *supra* note 174, at 1 ("[f]low in the lower portion of the Gila River would be intermittent if it were not controlled by dams").

184 Act of June 7, 1924, ch. 288, 43 Stat. 475. The Act states that the federal government built the dam

> for the purpose, first, of providing water for the irrigation of lands allotted to Pima Indians on the Gila River Reservation, Arizona, now without an adequate supply of water and, second, for the irrigation of such other lands in public or private ownership, as in the opinion of the . . . Secretary [of the Interior], can be served . . . without diminishing the supply necessary for said Indian lands . . . .

Id.

185 United States v. Gila Valley Irrigation Dist., 961 F.2d 1432, 1433 (9th Cir. 1992) (citation omitted).

120,000 acre-feet of irrigation water, and the Apaches above the reservoir had an 1846 priority date (prior to all other diverters) to 6,000 acre-feet of irrigation water.[186]

Implementation of the *Globe Equity* Decree produced numerous legal skirmishes over the years.[187] One pathbreaking judicial result was the 1994 decision of the federal district court ruling that irrigators upstream of the San Carlos Apache Reservation had to allow the tribe's 6,000 acre-feet of irrigation water to flow undiverted, in order to ensure that the quality of the water delivered to the reservation was sufficient to grow crops, the first decision to recognize the important proposition that water quality was a component of reserved rights.[188] Encouraged by the Supreme Court's expansive view of the McCarran Amendment's waiver of federal sovereign immunity,[189] the Salt River Valley Water Users Association initiated what became the Gila River adjudication in 1974.[190] Between 1992 and 2006, the

186 United States v. Gila Valley Irrigation Dist., No. E-59-Globe, at 86 (D. Ariz. 1935); *see* United States v. Gila Valley Irrigation Dist., 454 F.2d 219, 220–21 (9th Cir. 1972) (discussing section 8(2) of the 1935 decree, which authorized junior upper valley users to divert an amount of the "natural flow" equal to the amount of stored water in the San Carlos Reservoir behind the Coolidge Dam; the latter would be used to serve the senior rights of the GRIC); *see also* Gila Valley Irrigation Dist. v. United States, 118 F.2d 507, 508–09 (9th Cir. 1941) (reprinting section 8(2)). The Ninth Circuit interpreted the decree to establish "two entirely different water rights involved in the adjudication; one, the right to the natural flow of the stream . . . and, the other, the right to use the water stored in the dam when needed." *Id.* at 510. The "natural flow" rights of the San Carlos Apache Tribe would lead to the water quality decision discussed *infra* note 187 and accompanying text.

187 *See Gila Valley Irrigation Dist.*, 118 F.2d at 509 (holding that water flowing out of the San Carlos Reservoir at the same rate as inflow was "natural flow" within the meaning of the *Globe Equity* Decree and, thus, did not count toward "stored water" available to the lower valley); *Gila Valley Irrigation Dist.*, 454 F.2d at 221 (ruling that the water commission erred in allowing increased diversions in the upper valley without considering the effects on the senior Pima Indians in the lower valley); *Gila Valley Irrigation Dist.*, 961 F.2d at 1439 (determining that although the *Globe Equity* Decree did not require specific water quantity calculation methods, it did require the state water commission to deduct water lost in transit when calculating the amount of water available to the lower valley).

188 United States v. Gila Valley Irrigation Dist., 920 F. Supp. 1444, 1456 (D. Ariz. 1996), *aff'd* 177 F.3d 425 (9th Cir. 1997) (adopting the reasoning of the district court).

189 The Court first ruled that federal reserved water rights were included within the McCarran Amendment waiver in *United States v. District Court ex rel. Eagle County*, 401 U.S. 520, 524 (1971). The Court subsequently clarified that the waiver included Indian reserved rights in *Colorado Water Conservation District v. United States*. 424 U.S. 800, 805 (1976). Then, when the San Carlos Apache Tribe claimed that it should not be subjected to the Gila River adjudication against its will because Arizona disclaimed any jurisdiction over Indian tribes in its statehood act (as did several other western states), the Court rejected that argument in favor of avoiding "duplicative and wasteful" concurrent federal and state proceedings. Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 567 (1983); *see also* 4 WATERS AND WATER RIGHTS, *supra* note 2, § 37.04(a)(1) (citing the potentially duplicative nature of concurrent federal and state proceedings as one factor used by the Supreme Court in Colorado Water Conservation District v. United States, 424 U.S. 800 (1976)).

190 The initial petition sought a determination of rights in the Salt, Verde, and San Pedro rivers, but the case was later expanded to include the Gila, Santa Cruz, and Agua Fria rivers. *See* Lindsay Murphy, *Death of a Monster: Laws May Finally Kill Gila River Adjudication*, 28 AM. INDIAN L. REV. 173, 178 (2003).

Arizona Supreme Court produced six major decisions in the Gila adjudication.[191]

The most significant of these decisions were the Arizona Supreme Court landmark rulings in 1999 and 2001, which—disagreeing with the Wyoming Supreme Court on several issues[192]—held that 1) groundwater could be the subject of a reserved rights claim,[193] 2) the purpose of establishing an Indian reservation was to create a "permanent home and abiding place,"[194] and 3) the standard measurement for reserved irrigation water—"practicably irrigable acreage" (PIA)—was not the exclusive

191 All of the cases are captioned *In re* Gen. Adjudication of All Rights to Use Water in the Gila River System & Source with the exception of the first, which is captioned *In re* the Rights to Use the Gila River. In the second, the court upheld the postal and publication notice given to the potential claimants as sufficient where some 849,000 property owners who could be located received mail notice, while publication notice was provided to property owners who could not be located. *In re* the Rights to Use the Gila River (*Gila River I*), 830 P.2d 442, 455–56 (Ariz. 1992). In *Gila River II*, the court ruled that "subflow"—which is subject to the same appropriation rules as surface water—included only water that is "immediately adjacent to" the bed of the surface stream itself, thus rejecting a more expansive approach adopted by the trial court. *In re* Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source (*Gila River II*), 857 P.2d 1236, 1245–46 (Ariz. 1993). In the third, the court held that Indian reserved rights extended to groundwater where surface flows were not adequate to fulfill the purpose of the reservation. *In re* Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source (*Gila River III*), 989 P.2d 739, 741, 747–48 (Ariz. 1999). In the fourth, the court upheld the trial court's revised (and narrower) definition of "subflow." *In re* Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source (*Gila River IV*), 9 P.3d 1069, 1076–77 (Ariz. 2000). In the fifth, the court rejected applying the "practicably irrigable acreage" standard to quantifying Indian reserved rights for agriculture, since the purpose of Indian reservations was to provide a "permanent home and abiding place," which requires water for multiple uses, and may or may not include irrigated agriculture; consequently, the court adopted a multi-factor test for quantification, including a tribe's historical use of water and its cultural importance, as well as, geography, topography, and feasible and economically sound tribal development plans requiring water. *In re* Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source (*Gila River V*), 35 P.3d 68, 74–81 (Ariz. 2001). In the sixth, the court rejected tribal claims for additional water beyond that recognized in the *Globe Equity* Decree, concluding that *res judicata* precluded the claims, even though the tribe was not a party to the decree; however, the court also ruled that the decree did not determine rights to Gila River tributaries. *In re* Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source (*Gila River VI*), 127 P.3d 882, 903 (Ariz. 2006).

192 *See supra* notes 99–110 and accompanying text (discussing the *Big Horn* decision, where the Wyoming Supreme Court ruled against the tribe on instream issues and reserved groundwater, and used the "practicably irrigable acres" test to measure the scope of a reserved irrigation right).

193 *Gila River III*, 989 P.2d at 745–46 ("We can appreciate the hesitation of the *Big Horn* court to break new ground, but we do not find its reasoning persuasive."). The court determined that "[t]he significant question for the purpose of the reserved rights doctrine is not whether the water runs above or below the ground but whether it is necessary to accomplish the purpose of the reservation." *Id.* at 747; *see* 4 WATERS AND WATER RIGHTS, *supra* note 2, § 37.02(d) (emphasizing that reserved waters should "extend to all waters reasonably necessary to fulfill the reservations purpose" and questioning the Wyoming court's exclusion of groundwater from reserved waters).

194 *Gila River V*, 35 P.3d at 76. *See generally* Barbara A. Cosens, *The Measure of Indian Water Rights: The Arizona Homeland Standard, Gila River Adjudication*, 42 NAT. RESOURCES J. 835, 845–63 (2002) (analyzing the Arizona Supreme Court's homeland standard's purpose and measure).

measure of reserved water.[195] The court concluded that basing the scope of reserved rights on potential irrigation in the twenty-first century was inequitable, anachronistic, and potentially overly generous:

> A permanent homeland requires water for multiple uses, which may or may not include agriculture. The PIA standard, however, forces 'tribes to prove economic feasibility for a kind of enterprise that, judging from the evidence of both federal and private willingness to invest money, is simply no longer economically feasible in the West.'[196]

To replace PIA, the court adopted a two-part feasibility test, which considered whether the proposed use was 1) practicably achievable and 2) economically sound, and suggested a multi-factor test to employ in quantifying reserved rights, including considering historic tribal dependence on water and its cultural significance, both of which might affect instream flows.[197]

Even prior to the Arizona Supreme Court's 2001 decision, the GRIC and other parties to the adjudication negotiated a settlement.[198] After the decision, Congress adopted that settlement in 2004, incorporating it into the Arizona Water Settlements Act.[199] That statute promised the GRIC 653,500 acre-feet of water from the Central Arizona Project and the Gila, Salt, and Verde rivers.[200] The Act also provided funding for the GRIC to build a new water delivery system, supplying total estimated economic benefits of $200–400 million.[201] The statute did not restrict the GRIC's use of the water on its reservation, and also specified that the GRIC may lease a portion of its water to off-reservation water users.[202]

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195 *Gila River V*, 35 P.3d at 78–81.

196 *Id.* at 78 (quoting Martha C. Franks, *The Uses of the Practicably Irrigable Acreage Standard in the Quantification of Reserved Water Rights*, 31 NAT. RESOURCES J. 549, 578 (1991)).

197 *Id.* at 79–81. The non-exclusive list of factors the court outlined included: 1) a tribe's historic dependence on water, 2) the cultural significance of water to the tribe, 3) the tribe's land and natural resources in relation to the most efficient use of water, 4) whether the tribe's current economic status corresponded to the proposed economic development and its attendant water use, 5) whether the tribe traditionally used water in the proposed manner, and 6) the tribe's present and projected population. *Id.* at 79–80.

198 *See Gila River Settlement and Little Colorado River Negotiations*, *in* NEGOTIATING TRIBAL WATER RIGHTS, *supra* note 78, at 134.

199 Arizona Water Settlements Act, Pub. L. No. 108-451, 118 Stat. 3478 (2004).

200 *See id.* (providing adjustments to allocation of water from the Central Arizona Project and authorizing the GRIC water rights settlement); *see also* Kraker, *supra* note 122 (noting that the GRIC settlement would win GRIC extensive water rights); Betty Beard, *Water Accords Joyous to Tribe*, THE ARIZ. REPUBLIC, Apr. 23, 2005, *available at* http://www.azcentral.com/community/ahwatukee/articles/0423ar-gilawater23Z14.html (noting that the law guarantees GRIC 653,500 acre-feet of water a year). The settlement called for 173,100 acre-feet for the Pima-Maricopa Indian Irrigation Project, to irrigate some 77,000 acres of GRIC farmland. The GRIC's 1984 Master Plan envisioned a 146,000-acre farm, which the settlement's 653,500 acre-feet would theoretically serve, although only 77,000 acres will be irrigated in the near-term. *See* Houtz E-mail, *supra* note 181.

201 *See Gila River Settlement*, *supra* note 198, at 134; Beard, *supra* note 200.

202 Telephone Interview by David Becker with Gregg Houtz, Attorney, Ariz. Dep't of Water Res., in Phoenix, Ariz. (Mar. 20, 2006) [hereinafter Interview with Gregg Houtz]; *see also Gila*

The settlement neither authorized nor prohibited the GRIC from using a portion of its irrigation water to instream flows, but presumably the community may do so under its water code or by a decision of the GRIC Council.[203] The Arizona Water Resources Department will have no involvement concerning any on-reservation change of use.[204]

B. The Situation Today

The GRIC is now developing the Pima-Maricopa Irrigation Project to irrigate some 146,000 acres of agricultural land on-reservation, a plan that envisions using some of that water to restore riparian habitat, including recreational fisheries.[205] However, because the tribes of the GRIC were traditionally agricultural, and there was no significant fishery in the lower Gila River due to its intermittent nature, the GRIC does not anticipate using its water to restore historical flows in the Gila River.[206] In addition, although Arizona is one of three states (besides Alaska and Nevada) which allow a private party to hold instream flow rights,[207] the settlement does not authorize the GRIC to obtain additional off-reservation water, or to market its settlement water off-reservation, except leasing to surrounding communities.[208]

VI. PYRAMID LAKE RESTORATION: EFFECTUATING FEDERAL RESERVED RIGHTS THROUGH STATE IMPLEMENTATION

In its natural state, Pyramid Lake was the second largest inland lake in the western United States.[209] The lake is fed by the Truckee River, which carries the outflow from Lake Tahoe.[210] Lower, shallower, warmer, and more saline than Lake Tahoe, Pyramid Lake—located around forty miles northeast of Reno, Nevada—is the largest remnant of Lake Lahontan, which covered much of northwestern Nevada at the end of the Ice Age. Although at fifteen miles long and eleven miles wide, it is now only one-tenth the size of the Great Salt Lake, Pyramid Lake has twenty-five percent more volume.

The Pyramid Lake Paiute occupied the lake area when it was first mapped by John C. Fremont in 1844. The lake and the surrounding area was set aside by the Bureau of Indian Affairs for the Northern Paiute in 1859 and

River Settlement, *supra* note 198, at 134 (describing the authorization of water leasing).

203 Interview with Gregg Houtz, *supra* note 202.

204 *Id.*

205 Susan Randall, *Gila River Tribe Plans to Restore Farms*, CASA GRANDE DISPATCH, Oct. 12, 2004, *available at* http://www.zwire.com/site/news.cfm?newsid=13123742&BRD=1817&PAG=461&dept_id=68561&rfi=8; Interview with Gregg Houtz, *supra* note 202 (reporting that only some 77,000 acres are likely to be irrigated in the near-term; *see supra* note 200).

206 Interview with Gregg Houtz, *supra* note 202.

207 DAVID M. GILLILAN & THOMAS C. BROWN, INSTREAM FLOW PROTECTION 120 (1997).

208 Interview with Gregg Houtz, *supra* note 202.

209 ROYSTER & BLUMM, *supra* note 50, at 446.

210 NEW WEST ENCYCLOPEDIA, *supra* note 16, at 931; United States v. Alpine Land & Reservoir Co., 340 F.3d 903, 910 (9th Cir. 2003) (describing Pyramid Lake).

confirmed by President Grant as one of the first executive order Indian reservations in 1874.[211] Today, the lake, which supports populations of Lahontan cutthroat trout[212] and cui-ui[213]—both of which are listed under the Endangered Species Act[214]—lies entirely within the reservation, as do the lower twenty-five miles of the Truckee River.

Pyramid Lake fish are listed under the ESA because of the effects of the Newlands Project, the nation's first reclamation project, which produced the Derby Dam in 1905[215] that in turn blocked fish passage to spawning grounds and diverted water bound for Pyramid Lake into Lahontan Reservoir on the Carson River for irrigation. Without adequate river flows from its only source, the lake became more saline (now one-sixth as saline as the ocean) and declined some seventy vertical feet.[216] As a result, the Pyramid Lake Tribe and the federal government fought a long series of legal battles attempting to restore Truckee River flows and the Pyramid Lake ecosystem.

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211 *See* United States v. Truckee-Carson Irrigation Dist., 649 F.2d 1286, 1290 (9th Cir. 1981) (describing the history of the reservation).

212 Lahontan cutthroat trout, the largest of the cutthroat species and the state fish of Nevada, were essential to the Northern Paiute's subsistence and also became an export fish of some renown (up to a million pounds annually) in the late 19th century, marketed throughout the West, especially to western mining towns. Although the species, which is endemic to the Truckee River drainage and several other nearby drainages, was not irreparably damaged by the heavy harvests, it did not fare so well at the hands of the Derby Dam, constructed in 1905, which blocked spawning migration and diverted flows from the Truckee into the Lahontan Reservoir, thereby impairing water quality in the lower river and in Pyramid Lake. By 1943, the Pyramid Lake population of Lahontan cutthroat was extinct. The lake and river have since been restocked with populations from other drainages and subsist today with hatcheries managed by the tribe because the lake is too saline and the river flows inadequate to produce sustainable spawning. *See* U.S. FISH & WILDLIFE SERV., RECOVERY PLAN FOR THE LAHONTAN CUTTHROAT TROUT 7–10 (1995).

213 Cui-ui, another staple of the Northern Pauite diet (they call themselves "Cuiyui Tichutta," or cui-ui eaters), is a large sucker fish (females reaching two feet long and six pounds) endemic to Pyramid Lake. Cui-ui are long-lived—the average life-span is 40 years—which explains how the species managed to survive with virtually no recruitment during the 1970s and 1980s due to poor water quality and quantity in the Truckee River, where they must spawn. Improved river conditions since the 1990s have led to a rebound in cui-ui populations, but they remain listed under the Endangered Species Act. *See* NatureServe Explorer, *Chasmistes cujus, Cui-ui*, http://www.natureserve.org/explorer/servlet/NatureServe?searchName=Chasmistes+cujus (last visited Nov. 12, 2006) (providing conservation status data and ecology and life history information for Cui-ui); *see also* Wikipedia, Cui-ui, http://en.wikipedia.org/wiki/Cui-ui (last visited Nov. 12, 2006).

214 Threatened Status for Three Species of Trout, 40 Fed. Reg. 29,863, 29,864 (July 16, 1975) (cutthroat); Native Fish and Wildlife Endangered Species, 32 Fed. Reg. 4001 (Mar. 11, 1967) (cui-ui).

215 Only 15 days after the enactment of the 1902 Reclamation Act, 32 Stat. 388 (1902), the brainchild of Senator Francis Newlands (D-Nev.), the Secretary of the Interior withdrew some 200,000 acres in Nevada for the Newlands Reclamation Project. Derby Dam diverted water into the Truckee Canal and transported out-of-basin to the Lahontan Reservoir on the Carson River drainage for distribution to irrigators. *See* ROYSTER & BLUMM, *supra* note 50, at 446.

216 *See* Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252, 255 (D.D.C. 1972), *rev'd*, 499 F.2d 1095 (D.C. Cir. 1974) (describing the effects of Derby Dam on Pyramid Lake); *see also* Wikipedia, Pyramid Lake, http://en.wikipedia.org/wiki/Pyramid_Lake (last visited Nov. 12, 2006).

A. Pyramid Lake Litigation: The Federal Trust and Some State Implementation

The first litigation over Truckee River flows, occasioned by the construction of Derby Dam, began in 1913, brought by the federal government to secure water rights for the Pyramid Lake Reservation. Over thirty years later, the case settled, producing what became known as the 1944 *Orr Ditch* Decree. That decree recognized 32,000 acre-feet of reserved water for tribal irrigation, with an 1859 priority, but the federal government asked for no reserved water for the Pyramid Lake Paiute Tribe's fisheries.[217]

The *Orr Ditch* Decree did not allocate rights to all the water in the Truckee River, at least not in above-average water years. So, in 1972 the Pyramid Lake Paiute Tribe—in the first water case in which a tribe sued its trustee, the federal government—sought to enjoin the government from allocating waters in excess of the *Orr Ditch* Decree to local irrigators.[218] In what retrospectively might seem to be a surprising result, the district court agreed with the tribe that the federal government had violated its trust obligation, ruling that the government had breached its fiduciary responsibility by allocating excess water on the basis of a "judgment call."[219] The court ordered the secretary "to assert his statutory and contractual authority to the fullest extent possible [to formulate a closely developed regulation that would preserve water for the tribe.]"[220]

The tribe's successful assertion of the trust doctrine concerned only excess waters not allocated by the *Orr Ditch* Decree. The next year, in 1973, the federal government sought to reopen the allocations in the *Orr Ditch* Decree, finally claiming water rights for the tribe's fishery.[221] The district court dismissed the case on res judicata grounds, but the Ninth Circuit reversed, finding a lack of adversity between the government and the Truckee-Carson Irrigation District, suggesting that the government had breached its fiduciary duty to the tribe by neglecting the tribe's fishing rights.[222] But the Supreme Court, in a five to four decision, reversed the

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[217] *See* Nevada v. United States, 463 U.S. 110, 116–19 (1983) (explaining that in 1924 a special master recommended awarding the reservation 12,412 acre-feet annually of water for the tribe to irrigate 3,130 acres of reservation lands; however, the government sought water to irrigate an additional 2,745 acres, to which the irrigators agreed in a 1935 settlement, which the district court adopted as the *Orr Ditch* Decree in 1944); *see also* ROYSTER & BLUMM, *supra* note 50, at 446–47.

[218] *Pyramid Lake Paiute Tribe*, 354 F. Supp. at 254, 257.

[219] *Id.* at 257.

[220] *Id.* at 256.

[221] *See Nevada*, 463 U.S. at 119 (quoting the government's claim of a water right for "the maintenance of the lower reaches of the Truckee River as a natural spawning ground for fish").

[222] *See Truckee-Carson Irrigation Dist.*, 649 F.2d 1286, 1308 (9th Cir. 1981) ("The government's representation of the Tribe's interests in *Orr Ditch* was analogous to that of a faithless fiduciary who was nevertheless authorized to represent its beneficiary."); *id.* at 1310 ("By representing the Tribe and the Project against the *Orr Ditch* defendants, the government compromised its duty of undivided loyalty to the Tribe."). The Ninth Circuit reversed only as to the Truckee-Carson Irrigation District, not other irrigators, since the federal government represented both the district and the tribe in the *Orr Ditch* proceedings, meaning their was no

Ninth Circuit, concluding that there was no breach because Congress had, by assuming trusteeship for the tribe while authorizing the Newlands Project which damaged the tribe, required the secretary "to carry water on at least two shoulders."[223] As a result, the Court ruled that the federal government "cannot follow the fastidious standards of a private fiduciary," and thus the secretary did not breach his duties when he failed to protect the tribal fisheries in the *Orr Ditch* Decree.[224] The Court gave no attention to the fact that the *Orr Ditch* Decree never expressed any intention to terminate the tribe's fishing culture or the fact that for centuries tribal members had been fishermen.[225] A respected Indian law scholar concluded that the best explanation for the decision was Chief Justice Rehnquist's campaign against Indian tribal autonomy.[226]

B. The Situation Today

The Supreme Court's decision in *Nevada v. United States* foreclosed the Pyramid Lake Paiute Tribe from using its reserved rights for the protection of its historical fisheries—a bitter irony, given that the water decreed to the tribe in the 1944 *Orr Ditch* Decree was based on the supposedly agricultural purpose of the Pyramid Lake Reservation, notwithstanding the fact that tribal members had for centuries been fishermen.[227] Despite this apparently crushing setback, over the past twenty years the tribe has successfully used Nevada state water law, water quality litigation, and pressure based on the ESA status of the cui-ui and Lahontan cutthroat trout to secure additional instream flows in the Truckee River and into Pyramid Lake.

The tribe has been an active participant in federal litigation and settlements aimed at keeping water in the Truckee River and Pyramid Lake to protect the cui-ui and Lahontan cutthroat trout and maintaining the river's water quality. In 1985, the federal district court in Nevada obtained jurisdiction over the 1972 District of Columbia district court decree in *Pyramid Lake Paiute Tribe v. Morton*,[228] and then ordered the Department of

adversity between them, and therefore the court felt that *res judicata* was inapplicable. *See id.* at 1309 ("[T]he rules of *res judicata* are based upon an adversary system of procedure which exists for the purpose of giving an opportunity to persons to litigate claims against each other.").

223 *Nevada*, 463 U.S. at 128.

224 *Id.*

225 *See* Brendan Smith, Lower Truckee River Restoration (Apr. 2005), http://www.redlodgeclearinghouse.org/stories/truckeeriver.html (last visited Nov. 12, 2006) [hereinafter Lower Truckee River Restoration] (providing a history of the Truckee River and competing interests' attempts to solve its environmental challenges); Telephone Interview by David Becker with John Jackson, Dir., Water Res., Pyramid Lake Paiute Tribe, in Nixon, Nev. (Mar. 16, 2006) [hereinafter Interview with John Jackson].

226 Ralph W. Johnson, *Chief Justice Rehnquist and the Indian Cases*, 16 PUB. LAND L. REV. 1, 7, 10 (1995).

227 *See* Lower Truckee River Restoration, *supra* note 225; Interview with John Jackson, *supra* note 225.

228 *See* Pyramid Lake Paiute Tribe of Indians v. Hodel, 882 F.2d 364, 367 (9th Cir. 1989) (discussing the history of the case).

the Interior to adopt operating criteria and procedures for the Truckee River to cause surplus water from the Stampede Reservoir to flow down the Truckee into Pyramid Lake.[229] The changed operations produced more litigation, and the Ninth Circuit eventually upheld the Department's authority to manage Stampede Reservoir to provide instream flows in 1989.[230]

In an effort to resolve some of the long-standing disputes over Truckee River water rights, including the tribe's claims, Congress passed the Truckee-Carson-Pyramid Lake Water Rights Settlement Act in 1990.[231] The Settlement Act required the Secretary of the Interior to negotiate an operating agreement for the Truckee River and Newlands Reclamation Project that would enhance flows in the Truckee River for the Pyramid Lake fishery to help meet the requirements of the ESA, including a recovery plan for the cui-ui.[232] The Act also established an economic development fund of $40 million for the tribe as well as a separate $25 million fund for the recovery of the lake's fisheries.[233] Six years later, in October 1996, the tribe agreed to drop the Clean Water Act lawsuits it had brought in 1988—thus conceding to changes in the operation of the Reno/Sparks wastewater treatment plant—as part of the 1996 Truckee River Water Quality Agreement.[234] In return, the two cities and the Department of the Interior agreed to spend $24 million to purchase existing water rights on the Truckee River from willing sellers and dedicate that water to instream flow approved by the state engineer.[235] By 2006, the federal government and the cities had spent about $8 million of the settlement amount acquiring approximately 4,500 acre-feet of water rights for instream flows.[236] The tribe now administers the federal part of the program, which results in the creation of instream rights under Nevada law, titled in the tribe's name.[237]

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229 *See id.* at 368, 370; *see also supra* notes 215–17 and accompanying text.

230 *Id.* at 367–70 (reversing a district court decision which ordered storage releases for irrigation based on irrigator claims that they were entitled to a "water credit").

231 Pub. L. 101-618, tit. II, 104 Stat. 3289 (1990); *see also* State of Nev., Div. of Water Res., Nevada Water Facts (1992), *available at* http://water.nv.gov/Water%20Planning/wat-fact/issues.htm [hereinafter Nevada Water Facts]; Paul Wagner & Martin E. Lebo, *Managing the Resources of Pyramid Lake, Nevada, Amidst Competing Interests*, 51 J. SOIL WATER CONSERV. 108, 113 (1996).

232 *See* Nevada Water Facts, *supra* note 231; Wagner & Lebo, *supra* note 231, at 113–14.

233 *See* Nevada Water Facts, *supra* note 231.

234 *See* Div. of Water Res., State of Nev. Dep't of Conservation & Natural Res., Truckee River Chronology Part III—Twentieth Century, http://water.nv.gov/Water%20planning/truckee/truckee3.htm (last visited Nov. 12, 2006) (noting the initiation of lawsuits in Dec. 1988 and subsequent resolution in Oct. 1996); John Jackson, *Truckee River Water Quality Agreement*, *in* TRANSBOUNDARY WATERS: CROSSING CULTURAL BOUNDARIES FOR SUSTAINABLE SOLUTIONS 48 (Utton Transboundary Res. Ctr., 2005), *available at* http://uttoncenter.unm.edu/pdfs/Crossing_Cultural_Boundaries.pdf.

235 Interview with John Jackson, *supra* note 225; *see* Jackson, *supra* note 234, at 48.

236 Jackson, *supra* note 234, at 48. Many of the rights purchased have 1902 priority dates because they are original rights associated with the Newlands Reclamation Project. *Id.*

237 *Id.* Acquisition of additional rights has slowed because of a spike in the price of water rights on the Truckee River. However, the tribe is exploring purchasing and retiring irrigation rights along the Carson River. This would effectively increase flows in the Truckee River by

The tribe has also successfully asserted its rights under Nevada water law to obtain additional instream flows. In 1998, the Nevada state engineer granted the tribe's application, under Nevada state law, for the remaining unappropriated water in the Truckee River.[238] These new tribal water rights are junior to existing rights and are subject to state law. In 1999, the Nevada legislature amended state water law to protect owners of Truckee River and other state surface water rights from forfeiture due to non-use, thus ensuring that water rights used for instream flows would not be forfeited.[239] Then, in 2001, the state engineer approved the tribe's application for a temporary transfer of nearly 25,000 acre-feet of its reserved irrigation water rights to instream use to protect fish during a drought year.[240] Although the right transferred was a reserved tribal water right, so that the tribe arguably could have sought the change of use in federal court, it decided instead to use the state transfer procedures.[241] According to the tribe's water resources director, this process of establishing tribal instream rights under state law has encouraged the tribe and upstream water users to view themselves as partners in restoring the Truckee River.[242]

Thus, through a multi-faceted approach including litigation, settlement, and use of the state water rights process, the Pyramid Lake Pauite Tribe has been able to restore some instream flows to the Truckee River despite the 1983 Supreme Court decision that denied its attempt to use the reserved rights doctrine to restore its fisheries. The ensuing use of settlement and state law to produce tribal instream flows has begun to transform the lower Truckee and may perhaps eventually do the same for Pyramid Lake itself.[243]

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reducing the amount required to be diverted out of the Truckee and into the Carson under the Interior Department's operating criteria and procedures adopted in the wake of the 1972 federal district court decision in *Pyramid Lake Paiute Tribe v. Morton*. *Id.*

238 *See* Turnipseed v. Truckee-Carson Irrigation Dist., 13 P.3d 395, 396–97 (Nev. 2000) (noting that the state engineer granted the tribe's application to appropriate previously unappropriated waters of the Truckee River on Nov. 24, 1998); *see also* NEV. DIV. OF WATER PLANNING, NEVADA STATE WATER PLAN 2-12 (1974), *available at* http://water.nv.gov/water%20planning/wat-plan/pt1-sec2.pdf ("[T]he Pyramid Lake Paiute Tribe has secured a right to the unapprorpriated water in the Truckee River in accordance with Nevada water law.").

239 *See* NEV. REV. STAT. § 533.060(2) (2005) ("Rights to the use of surface water shall not be deemed to be lost or otherwise forfeited for the failure to use the water therefrom for a beneficial purpose.").

240 *See* United States v. Truckee-Carson Irrigation Dist., 429 F.3d 902, 904–05, 907–09 (9th Cir. 2005) (upholding the district court's decision to allow the tribe to transfer the total amount of water it had a right to use for irrigation to improve instream flow minus the amount that would have been lost due to irrigation transport losses).

241 Interview with John Jackson, *supra* note 225.

242 *See* Jackson, *supra* note 234, at 48 (explaining that through the agreement, the tribe has moved from seeing Truckee irrigators and other upstream water users as opponents to seeing them as partners); *see also* Interview with John Jackson, *supra* note 225 (noting that the tribe decided to request only a temporary transfer, thus allowing the use to revert back to irrigation in future years, mindful that it might never be able to reverse a permanent transfer to instream flow because of concerns for the ESA-listed fish).

243 Interview with John Jackson, *supra* note 225.

VII. THE NEZ PERCE TRIBE AND THE SNAKE RIVER BASIN ADJUDICATION: SETTLING TO AVOID A HOSTILE STATE JUDICIARY

The Snake River—the Columbia's largest tributary—rises above Jackson Lake, Wyoming and flows westerly through central Idaho, then north along the Idaho-Oregon border, and eventually west through southeastern Washington to its confluence with the Columbia River.[244] For several thousand years, the Nez Perce lived throughout the valleys and canyons of the Snake River Basin in small, peaceful fishing villages.[245] Historically, the Nez Perce fishery encompassed at least fifty different sites in the Snake River Basin, each yielding between 300 and 700 adult salmon per day.[246]

In 1855, the Nez Perce signed the first of two treaties with the United States, relinquishing aboriginal title to some 5.5 million acres in southeastern Washington and northeastern Oregon in return for a reservation of approximately eight million acres and the exclusive right to harvest fish in streams running through the reservation.[247] Like the other Indian treaties signed with Washington Governor Isaac Stevens,[248] the Nez Perce Treaty also reserved to the tribe the "right of taking fish at all usual and accustomed places in common with citizens of the Territory."[249]

Although the 1855 Treaty required the United States to defend the Nez Perce reservation,[250] the government failed to prevent homesteaders, miners,

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244 In total, the Snake River spans 1,038 miles through Wyoming, Idaho, Oregon, and Washington. *See* Wikipedia, Snake River, http://en.wikipedia.org/wiki/Snake_River (last visited Nov. 12, 2006).

245 FRANCES HAINES, THE NEZ PERCÉS, at xv (1955). The aboriginal territory of the Nez Perce—or Nimi'ipuu—encompassed some 17 million acres in central Idaho, southeastern Washington, and northeastern Oregon. Nez Perce Tribe Web Site, Frequently Asked Questions, http://www.nezperce.org/History/FrequentlyAskedQ.htm (last visited Nov. 12, 2006). Historically, the Nez Perce consisted of several separate bands, each with its own territory, and each comprised of several fishing villages. Together, the various villages and bands comprised a politically unified composite band. Although the Nez Perce were not technically a nomadic people, they did travel seasonally throughout the Snake River Basin to hunt, fish, and gather food. *Id.*

246 JOSEPH E. TAYLOR, III, MAKING SALMON: AN ENVIRONMENTAL HISTORY OF THE NORTHWEST FISHERIES CRISIS 20 (1999). For a detailed examination of the Nez Perce litigation and the subsequent Snake River Basin Adjudication Agreement, see generally Alexander Hays V (Ti), *The Nez Perce Water Rights Settlement and the Revolution in Indian Country*, 36 ENVTL. L. 869 (2006).

247 Treaty with the Nez Perces, art. III, June 11, 1855, 12 Stat. 957 (1863); *see* ALVIN M. JOSEPHY, JR., THE NEZ PERCE INDIANS AND THE OPENING OF THE NORTHWEST 334–45 (1965) (discussing the terms of the treaty).

248 *See* Treaty with the Nez Perces, *supra* note 247, at art. III; Treaty with the Walla-Wallas art. I, June 9, 1855, 12 Stat. 945 (1863); Treaty with the Yakamas art. III, June 9, 1855, 12 Stat. 951 (1863).

249 Treaty with the Nez Perces, *supra* note 247, at art. III. The United States also agreed to pay the Nez Perce two hundred thousand dollars in a series of payments. *Id.* art. IV.

250 *See id.* art. II (establishing the Nez Perce reservation for the "exclusive use and benefit" of the Tribe and expressly prohibiting any "white man, excepting those in the employment of the Indian department [from residing upon the reservation] without permission of the tribe"); *see also* Hays, *supra* note 246, at 876–77 (discussing the terms of the 1855 treaty).

and grazers from trespassing and settling on reservation lands.[251] Instead, the United States attempted to quell growing tensions between settlers and the Nez Perce by reinitiating treaty negotiations with the tribe, persuading the Nez Perce to cede most of its remaining tribal lands.[252] Consequently, in 1863, the Nez Perce ceded approximately ninety percent of the lands the tribe reserved in the treaty just eight years earlier, retaining only a 750,000-acre reservation east of Lewiston, Idaho.[253] The tribe also expressly retained its 1855 treaty rights to both on and off-reservation fishing rights.[254] Despite the long history of judicial interpretation of such treaties on terms favorable to the Indians,[255] however, the Nez Perce have not fared well in either federal or state courts when asserting water rights necessary for the preservation and protection of the tribe's treaty right to fish.

A. The Nez Perce Tribe Meets a Hostile Judiciary

In *Nez Perce Tribes v. Idaho Power Company*,[256] for example, the federal District Court of Idaho denied the tribe compensation for the damage done to its salmon fisheries by Idaho Power Company's (IPC) construction and operation of the Hell's Canyon dams on the middle Snake River.[257] Under the Federal Power Act (FPA), each federal dam licensee is liable for all damages to the "property" of others caused by the construction, maintenance, or operation of its projects.[258] The Nez Perce alleged that IPC's

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251 *See* HAINES, *supra* note 245, at 142–44 (describing mass trespasses by settlers on Nez Perce lands).

252 *Id.* at 144–147; *see* Hays, *supra* note 246, at 877 (describing events leading to the second treaty).

253 Treaty with the Nez Perces, June 9, 1863, 14 Stat. 647 (1863). Historians and commentators claim that the United States obtained the Treaty of 1863 without the consent of several Nez Perce bands and villages, many of whom were forced to leave their ancestral homes as a result of the Treaty of 1863. *See* HAINES, *supra* note 245, at 145–47.

254 *See* Treaty with the Nez Perces, *supra* note 253, at art. VIII (providing that "all the privileges of said treaty [referring to the Treaty of 1855] which are not abrogated or specifically changed by any article herein contained, shall remain the same to all intents and purposes as formerly . . . to the Indians outside of the reservation").

255 *See Adair II*, 723 F.2d 1394, 1408 n.13 (9th Cir. 1983) ("[T]he purposes of Indian reservations are necessarily entitled to broader interpretation if the goal of Indian self-sufficiency is to be attained."); United States v. Winans, 198 U.S. 371, 380 (1905) (construing the Stevens' treaties as "unlettered people" would have understood them and as "justice and reason demand").

256 847 F. Supp. 791 (D. Idaho 1994).

257 *Id.* at 808. The Hell's Canyon Complex—three privately owned hydroelectric dams and reservoirs, all owned by Idaho Power Company—is the largest non-federal hydroelectric facility in the Pacific Northwest. U.S. Forest Serv., Hells Canyon Complex-Relicensing, http://www.fs.fed.us/r6/w-w/planning/relicensing/index.htm (last visited Nov. 12, 2006). The complex consists of Brownlee Dam and reservoir, a large storage dam; Oxbow Dam; and Hell's Canyon Dam, which is the lowest of the dams on the river and the uppermost reach of salmon migration today. Blumm & Swift, *supra* note 149, at 482 n.373.

258 16 U.S.C. §§ 792–825 (2000). Under the Federal Power Act, licensees are liable "for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license." *Id.* § 803(c).

Hell's Canyon dams, which permanently blocked salmon access to nearly eighty percent of the historical spawning grounds in the upper Snake River and decimated salmon populations in the Snake River Basin,[259] entitled the tribe to damages under the FPA as well as under federal common law.[260]

Despite judicial precedent recognizing that the Stevens treaties not only created tribal property rights,[261] but also reserved for the tribes a fair share of harvestable salmon runs[262] and water necessary to protect fishing rights,[263] the district court held that the Nez Perce had no property rights for which compensation was due because the tribe did not own an absolute right to the individual fish in any given salmon run.[264] Instead, so the court reasoned, the Nez Perce Treaty created only treaty rights—that is, the treaties merely reserved to the tribes "an opportunity to catch fish if they are present at the accustomed fishing grounds."[265] According to the court, the Nez Perce treaty rights restricted the tribe's compensation claims to those against the government—not private parties like IPC.[266] In so ruling, the district court failed to recognize that the Indian treaty fishing right is in fact a property right—a *piscary profit à prendre*[267]—which burdens non-parties to the agreement, including private parties and subsequently incorporated

259 NAT'L MARINE FISHERIES SERV., FACTORS FOR DECLINE: A SUPPLEMENT TO THE NOTICE OF DETERMINATION FOR WEST COAST STEELHEAD UNDER THE ENDANGERED SPECIES ACT 6 (1996), *available at* http://www.krisweb.com/biblio/gen_nmfs_nmfs_1996_stlhffd.pdf. In 1996, the National Marine Fisheries Service (NMFS) estimated Columbia River Basin anadromous fish stocks at 10 million below historical levels. The agency attributed approximately 80% of this decline to hydropower development on the Columbia and Snake rivers. *Id.* In the late 1800s, the number of spring/summer chinook salmon returning to the Snake River to spawn may have exceeded 1.5 million. By 1994, this figure declined by over 99%, to 1,822 fish. NAT'L MARINE FISHERIES SERV., PROPOSED RECOVERY PLAN FOR SNAKE RIVER SALMON II-9, 13 (1995). In 1990, only 78 wild Snake River chinook salmon returned to the Hell's Canyon reach of the Snake River. *Id.* In the late 1980s and early 1990s, Snake River sockeye salmon—eliminated from nearly all areas of their historical Snake River Basin habitat—returned to the Snake River in single-digit numbers annually. *Id.* at II-10, 13–14.

260 *Nez Perce Tribe*, 847 F. Supp. at 795.

261 *See* United States v. Winans, 198 U.S. 371, 381 (1905) (determining that treaty fishing rights burden private property with servitudes of access to usual and accustomed fishing sites; the U.S. Supreme Court characterized this right as a "right in the land"); Menominee Tribe of Indians v. United States, 391 U.S. 404, 413 (1968) (suggesting that, should the United States commit a taking of a treaty hunting or fishing right, a claim for compensation would arise).

262 *Fishing Vessel*, 443 U.S. 658, 686–87 (1979).

263 *Adair II*, 723 F.2d 1394, 1410 (9th Cir. 1983).

264 *Nez Perce Tribe*, 847 F. Supp. at 808. For more on Idaho District Court's ruling see SACRIFICING THE SALMON, *supra* note 134, at 267–70.

265 *Nez Perce Tribe*, 847 F. Supp. at 795. The district court's distinction between treaty rights and property rights was inconsistent with Supreme Court precedent indicating that treaties should be broadly interpreted as the "unlettered" Indian peoples would have understood them. *See, e.g.*, *Winans*, 198 U.S. at 380 (explaining that the Court "will construe a treaty with the Indians as 'that unlettered people' understood it"); *Fishing Vessel*, 443 U.S. at 676 ("[T]he treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." (quoting Jones v. Meehan, 175 U.S. 1, 11 (1899)).

266 *Nez Perce Tribe*, 847 F. Supp. at 811.

267 *See* SACRIFICING THE SALMON, *supra* note 134, at 270.

states.[268] Before the Ninth Circuit heard an appeal of this decision, IPC and the tribe settled the case.[269]

Five years after the federal district court ruled that the Nez Perce treaties implied no right to protect salmon habitat from damage caused by private parties,[270] the Nez Perce and the United States as trustee for the tribe filed water rights claims in the Snake River Basin Adjudication (SRBA), a McCarran Amendment proceeding involving all water claims in the Snake River. From the special state court established to adjudicate the SRBA, the tribe sought recognition of its claims to waters necessary to preserve the tribe's express treaty-reserved fishing rights.[271] Like the implied reserved rights recognized by the Supreme Court in *United States v. Winans*[272] and the Ninth Circuit in *Adair II*,[273] the Nez Perce argued that the treaties implied a federal right to streamflows necessary to preserve the tribe's bargained-for treaty right to fish in the Snake River Basin.[274] Without such a right, the tribe maintained, its treaty fishing rights would be virtually meaningless.

The SRBA court proceeded to ignore the precedents supporting the tribe and the federal government[275] and ruled that its reserved treaty right to

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[268] In *Winans*, for example, the Supreme Court concluded that the Indian treaty right was a right in land—a servitude—which burdened private parties operating fish wheels on the Columbia River, and attempting to exclude Indians from their historical fishing grounds. 198 U.S. at 381; *see also* Seufert Bros. v. United States, 249 U.S. 194, 198–99 (1919) (concluding that the treaties entitled Indians to cross the Columbia River to access historical fishing grounds on both sides of the river); Union Oil Co. v. Oppen, 501 F.2d 558, 568 (9th Cir. 1974) (allowing a damages action brought by commercial fishers against oil companies that caused an oil spill); Puget Sound Gillnetters Ass'n v. U.S. Dist. Court, 573 F.2d 1123, 1132–33 (9th Cir. 1978) (concluding that a citizen's right to take fish is "derivative of the state's interest," and thus individual fishers were bound by the treaties); United States v. Washington, 135 F.3d 618, 635 (9th Cir. 1998) (concluding that Indian treaty rights to shellfish burdened private property owners, and entitled the tribes to a fair share of the harvest and granted the tribes access to historical shellfish beds across private lands). As long ago as 1809, English courts recognized that the owner of a duck pond had a cause of action against someone who drove away the ducks, and in so doing "hinder[ed] another in his trade or livelihood." Keeble v. Hickeringill, (1809) 103 Eng. Rep. 1127, 1128 (K.B.).

[269] Under the settlement, IPC paid the tribe $11.5 million not to pursue an appeal. The utility also offered $5 million for the tribe's "full support" of IPC's application to relicense its Hells Canyon dams. *See* ROYSTER & BLUMM, *supra* note 50, at 550. The tribe subsequently decided against offering its "full support" of IPC's relicensing application.

[270] *See Nez Perce Tribe*, 847 F. Supp. at 808.

[271] *In re* SRBA, No. 39576, Subcase No. 03-10022 at 9 (Idaho Dist. Ct. Nov. 10, 1999); SACRIFICING THE SALMON, *supra* note 134, at 264.

[272] 198 U.S. 371 (1905); *see supra* note 142 and accompanying text.

[273] In *Adair II*, 723 F.2d 1394 (9th Cir. 1984), discussed *supra* notes 37–50 and accompanying text, the Ninth Circuit observed that the Klamath Tribe intended to preserve a traditional fishing lifestyle when it agreed to the 1864 treaty with the federal government, and that this purpose necessarily implied instream water rights. *Id.* at 1414–15. The court concluded "at the forefront of the Tribe's concerns in negotiating the treaty" was "a continuation of its traditional hunting and fishing lifestyle." *Id.* at 1409. The fishing right was virtually meaningless without water. *Id.*

[274] *In re* SRBA, No. 39576, Consolidated Subcase No. 03-10022 at 9; *see* Hays, *supra* note 246, at 881 (discussing this case).

[275] *See Winans*, 198 U.S. at 381 ("The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians

fish on ceded lands included no accompanying water right.[276] Judge Barry Wood[277] determined that the Nez Perce treaty's express reservation of the right to continue to fish off-reservation did not evince sufficient intent to reserve off-reservation water rights necessary to preserve that purpose.[278] Central to the SRBA court's decision was its conclusion that the tribe's claim to off-reservation water was inconsistent with the purpose of the Nez Perce Treaty, which the court thought "was to resolve the conflict which arose between the Indians and non-Indian settlers."[279] Although certainly the federal government sought to ease tensions between the Nez Perce and settlers by extinguishing aboriginal title and removing the tribe to a reservation out of the onrushing path of settlement,[280] the SRBA court failed to seriously consider the tribal purpose of the Nez Perce treaties: the preservation of its traditional fishing culture through express reservations of fishing rights.[281]

than the atmosphere they breathed."); *Adair II*, 723 F.2d at 1410 (concluding that without water, the Klamath Tribe's treaty right to hunt and fish on reservation lands would be virtually meaningless); *see also supra* notes 35–50, 140 and accompanying text.

276 *In re* SRBA, No. 39576, Subcase No. 03-10022 at 38.

277 After Judge Wood rendered his SRBA opinion, the Nez Perce learned the judge was in fact a Snake River Basin water right holder who had a pecuniary interest in the outcome of the case, as did his family. SACRIFICING THE SALMON, *supra* note 134, at 265. Judge Wood had groundwater claims for irrigation and domestic uses on thirteen acres; his brother and two sisters also had water rights claims subject to the SRBA. Michael C. Blumm et al., *Judicial Termination of Treaty Water Rights: The Snake River Case*, 36 IDAHO L. REV. 449, 475 (2000) [hereinafter *The Snake River Case*]. Judge Wood's sister and brother-in-law were also members of a partnership that had irrigation and domestic water rights claims in the SRBA. *Id.* Under the Idaho Rules of Civil Procedure, a judge may be disqualified for cause if the judge "is a party, or is interested in the action or proceeding," or because the judge "is related to either party by consanguinity or affinity within the third degree . . . ." IDAHO R. CIV. P. 40(d)(2)(A)(1)–(2). Despite Judge Wood's potential conflicts, he rejected a Nez Perce motion to disqualify him, ruling that any conflicts were "indirect, speculative and, at best de minimus." *The Snake River Case*, *supra*, at 476 (quoting *In re* SRBA, No. 39576, Subcase No. 03-10022). For a detailed examination of Judge Wood's role in the SRBA case see *The Snake River Case*, *supra*, at 475–77.

278 *See* ROYSTER & BLUMM, *supra* note 50, at 415.

279 *In re* SRBA, No. 39576, Subcase No. 03-10022 at 38. The SRBA court concluded that it was "inconceivable that either the United States or the Tribe intended or even contemplated that the Tribe would remain in control of the water." *Id.*

280 *Nez Perce Tribe*, 847 F. Supp. 791, 806 (D.Idaho 1994); *The Snake River Case*, *supra* note 277, at 458; Hays, *supra* note 246, at 882–83.

281 *See The Snake River Case*, *supra* note 277, at 458–60 (examining the SRBA court's one-sided interpretation of the Nez Perce treaties, and concluding that the court opinion resembled an "advocate's brief more than a dispassionate judicial opinion[]"). Despite the U.S. Supreme Court's observation that a salmon fishery is "not much less necessary to the [Tribe's] existence . . . than the atmosphere they breathed," the *SRBA* court concluded that it would be repugnant to the purpose of the treaty negotiations to find that the tribes or the United States intended to reserve off-reservation streamflows for the benefit of the fishery. *See Fishing Vessel*, 443 U.S. 658, 650 (1979) (quoting *Winans*, 198 U.S. 371, 381 (1905)); *In re* SRBA, No. 39576, Subcase No. 03-10022 at 38 (distinguishing *Fishing Vessel* because the Nez Perce treaty aimed to resolve a conflict between tribal members and non-Indians settlers who had obtained federal patents under the provisions of the Oregon Donation Act of 1850, and concluding that "[i]t is inconceivable that the United States would have intended or otherwise agreed to allow the Nez Perce to reserve instream flow off reservation water rights appurtenant to lands intended to be developed and irrigated by non-Indian settlers.") The Idaho court also described

Echoing the earlier federal district court decision,[282] the SRBA court opined that "an implied water right [wa]s not necessary" because the Nez Perce enjoyed no "absolute right to a predetermined or consistent level of fish."[283] For this proposition, the court cited the Supreme Court's decision in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*,[284] in which the Court ruled that treaty language like that in the Nez Perce treaty reserved up to one-half of salmon harvests to tribal fishers but did not establish a minimum entitlement.[285] The SRBA court managed to overlook the Supreme Court's central ruling—that the treaties established an entitlement to the amount of harvestable salmon "necessary to provide the Indians with a livelihood—that is to say, a moderate living."[286] If water is necessary to provide the tribe a moderate fishing livelihood, it is hard to understand why the tribe would not have reserved water to fulfill that purpose.

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the Nez Perce's instream claim as an attempt to remedy an "unforeseen consequence which it now believes threatens its fishing right." *Id.* at 39. The court noted that, historically many activities have threatened the fishing rights, including blocked access to fishing grounds and overharvest of fish by non-Indian fisherman, but erroneously claimed that these threats were not protected by the treaty (overlooking *Winans* and *Fishing Vessel*), and thus the treaty offered no protection against either the current scarcity of water issue or other future issues, as "only so many interpretations can be exacted from the Treaty language." *Id.*

282 *Nez Perce Tribe*, 847 F. Supp. at 819 (D. Idaho 1994); *see supra* notes 264–66 (discussing the court's reasoning and holding).

283 *In re* SRBA, No. 39576, Subcase No. 03-10022 at 33. According to the *SRBA* court, both the state's authority to regulate the treaty harvest right in the name of conservation as well as the Idaho District Court's earlier *Nez Perce Tribe* decision—holding that the tribe had no ownership rights in any individual fish—supported its conclusion that the treaty right to fish was a limited one. *Id.* at 34–37; *see The Snake River Case*, *supra* note 277, at 456 (discussing the *SRBA* Court's decision). In so doing, the SRBA court distinguished precedent recognizing implied water rights to fulfill the fishing purposes of Indian treaties on the grounds that those cases involved either on-reservation fishing rights or exclusive fishing rights—not merely rights to take fish "in common" with the citizens of the state. *In re* SRBA, No. 39576, Subcase No. 03-10022 at 34–37. Aside from its inaccurate characterization of precedent, see SACRIFICING THE SALMON, *supra* note 134, at 268–71, the SRBA court's distinction seems particularly unpersuasive in light of the U.S. Supreme Court's decision in *Winans*, in which the Court rejected the argument that the right to take fish "in common" simply put the Indians on "equal footing with the citizens of the United States," and interpreted the Yakama Tribe's treaty to imply an Indian right of access to historical fishing grounds on the Columbia River. *Winans*, 198 U.S. at 381.

The SRBA court also found significance in an 1893 agreement—later incorporated into a statute—in which the Nez Perce agreed to a "present and total surrender of all tribal interests" except as reserved by agreement. *In re SRBA*, No. 39576, Subcase No. 03-10022 at 44. The *SRBA* court made no mention of Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999), in which the U.S. Supreme Court held that the Mille Lacs' reserved off-reservation hunting and fishing rights survived a similar agreement. *See The Snake River Case*, *supra* note 277, at 455–56 (discussing the SRBA court's decision).

284 443 U.S. 658 (1979).

285 *In re* SRBA, No. 39576, Subcase No. 03-10022 at 33 (citing *Fishing Vessel*, 443 U.S. at 685–86).

286 *Fishing Vessel*, 443 U.S. at 686; *see also* SACRIFICING THE SALMON, *supra* note 134, at 275–76 (arguing the moderate living standard should guide federal and state agencies in planning and approving projects that will affect salmon habitat).

B. The Situation Today

Rather than appeal the 1999 SRBA court decision denying reserved water rights for its off-reservation fishing rights,[287] the Nez Perce and the other parties entered into prolonged mediation in an attempt to settle the case out of court. Over five years later, in March 2005, the tribe settled its claims for on- and off-reservation water rights.[288] The settlement resulted in state recognition of tribal on-reservation water rights, which could be used for instream flows, and the state agreed to acquire and administer instream flow rights on rivers near the tribe's reservation to improve salmon habitat. The terms of the settlement call for the tribe to receive 50,000 acre-feet of water for on-reservation uses consistent with the tribal water code.[289] However, the tribe waived its claims to off-reservation instream flows based on its treaty-reserved fishing rights.[290]

As part of the settlement, the state—the only entity allowed to hold instream flow rights under Idaho water law[291]—promised to establish instream flow rights at nearly 200 locations, selected by the tribe, in the Salmon and Clearwater basins and also protect 600 springs on federal lands ceded by the tribe.[292] These instream flow rights will be subordinated to water rights existing at the date of the settlement and also to future domestic, commercial, industrial and municipal water rights, but they will not be subordinated to future agricultural water use, except as to a small,

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287 The tribe was clearly influenced by the Idaho Supreme Court's surprising rejection of the federal government's reserved rights claims for wilderness areas within the state. Potlatch v. United States, 12 P.3d 1260 (Idaho 2000) (reversing an earlier decision on a 3-2 vote). *See generally* Michael C. Blumm, *Reversing the* Winters *Doctrine?: Denying Reserved Water Rights for Idaho Wilderness and Its Implications*, 73 U. COLO. L. REV. 173 (2002) (discussing the implications of the Idaho Supreme Court's decisions on the future of the federal reserved water rights doctrine, the prospects for streamflows in Idaho, and the Nez Perce tribe's water claims).

288 *See generally* Hays, *supra* note 246, at 869 (describing history of Nez Perce reserved water rights, efforts to secure acknowledgement of those rights through litigation, and the 2005 settlement agreement). For the Nez Perce Tribe's perspective on the settlement, see K. Heidi Gudgell, Steven C. Moore & Geoffrey Whiting, *The Nez Perce Tribe's Perspective on the Settlement of Its Water Rights Claims in the Snake River Basin Adjudication*, 42 IDAHO L. REV. 563 (2006).

289 Gudgell et al., *supra* note 288, at 590.

290 *See id.* at 572–73, 589–93 (discussing the tribe's water right claims and provisions of the final settlement agreement).

291 *See* IDAHO CODE ANN. § 42-1503 (2005) ("Whenever the [Idaho water resource] board desires to appropriate a minimum stream flow . . . it shall submit an application to the director [of the Idaho department of water resources]"); *id.* § 42-1504 ("Any person . . . may, in writing, request that the board consider the appropriation of a minimum streamflow of the unappropriated waters of any stream."); *see also* GILLILAN & BROWN, *supra* note 207, at 121 (stating that Idaho "[s]tate statutes allow 'the public' to petition the Board to apply for instream flow rights, but the Board has interpreted this language to mean that it may accept petitions only from state agencies.").

292 Hays, *supra* note 246, at 890. In addition, the federal government promised the tribe over 11,000 acres of on-reservation land and some $96 million in three separate funds for tribal drinking water and sewer projects, water development projects, and cultural preservation and fishery habitat restoration projects. *See* NATIVE AM. RIGHTS FUND, ANNUAL REPORT 2005 16 (2005), *available at* http://www.narf.org/pubs/ar/NARF2005.pdf [hereinafter NARF Report].

varying percentage of use based on land ownership in each subbasin.[293] The state may change the use of these instream flow rights only after consultation with the tribe.[294] Despite the consultation requirement, the state retains ultimate authority to change uses.[295] The state must also identify other flow-limited streams, take measures to augment instream flows, and undertake other habitat improvement projects,[296] although these commitments are quite vague.

The Nez Perce decision to settle its reserved water right claims has yielded a promise of enhanced instream flows outside its reservation through the instream flow rights contained in the SRBA Agreement and through the congressional funding provided in the SRBA Agreement to the tribe and state in separate accounts. The tribe is likely to prioritize use of these funds based on biological and cultural importance, and the state is likely to prioritize these funds based on ESA exposure. It remains to be seen whether the 2005 SRBA settlement will enable the tribe to successfully transform its treaty fishing and water rights into sustainable and meaningful instream flows that can help restore its damaged fishing culture.[297]

VIII. CONCLUSION

The six cases examined in this study reveal that Justice Stevens's misgivings about states' ability to provide a neutral forum for adjudicating tribal reserved water rights were well justified.[298] No tribe among the six studied here was able to improve streamflows substantially through successful litigation of its reserved water rights. In the McCarran Amendment Era—where elected state court judges have the authority to decide the scope of Indian reserved water rights—perhaps these results are not surprising.[299]

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293 Hays, *supra* note 246, at 890.

294 *Id.*

295 *Id.* at 898.

296 *See id.* at 891–93 (describing terms of settlement).

297 According to the tribe's legal representative, the Native American Rights Fund, the settlement

> represents the merging of traditional Indian water rights settlement elements with other major environmental issues confronting all of the people of Idaho. It could well be looked at by other states and tribes and federal land management agencies in the west seeking to sort out Indian water claims and other challenges presented by the federal Endangered Species Act and the Clean Water Act.

NARF Report, *supra* note 292, at 17.

298 *See* Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 575 (acknowledging that "[s]tates and their citizens may well be more antagonistic toward Indian reserved rights than other federal reserved rights, both because the former are potentially greater in quantity and because they provide few direct or indirect benefits to non-Indian residents.").

299 The litigation concerning Pyramid Lake was of course in federal, not state, court, a reminder that the McCarran Amendment does not displace federal court jurisdiction unless the state has undertaken a comprehensive basinwide adjudication meeting McCarran Amendment standards. *See, e.g.*, Thomas H. Pacheco, *How Big Is Big? The Scope of Water Rights Suits Under the McCarran Amendment*, 15 ECOLOGY L.Q. 627, 669 (1988) (stating that the McCarran

The Klamath Tribes are perhaps the best example of the mirage: over thirty years after initiating federal court litigation, the tribes—despite consistent success on the merits of their claims—have yet to see any improvements in streamflows essential to their treaty fishing rights, as the glacial movement of Oregon quantification inches forward.[300] The tribes of the Wind River Reservation, despite winning a considerable reserved right for agriculture in the Big Horn Adjudication, were frustrated in their attempt to transfer that ownership right to their preferred instream use by the Wyoming Supreme Court.[301] The Yakama Nation saw its attempt to protect its treaty fishing rights with reserved water rights largely rejected by the Washington Supreme Court, which invented out of whole cloth the concept of "diminished" reserved rights.[302]

Settlements loomed large for the Gila River Indian Community, the Pyramid Lake Paiute Tribe, and the Nez Perce Tribe. The Gila River Indian Community used state court recognition of its reserved irrigation rights to convince Congress to produce a statute that recognized the tribe's water rights and supplies the means to effectively use them.[303] Whether this will improve Gila River streamflows is uncertain, but the tribe does have the apparent authority to produce increased streamflows on-reservation.[304] The Pyramid Lake Paiute Tribe perhaps produced the blueprint for the future: despite Supreme Court denial of its attempt to use its reserved rights to restore its fishery, the tribe has over the last two decades substantially improved flows in the Truckee River, and in the process managed to effectively use state law and procedures.[305] This result is due, in large part, because Nevada law allows parties other than the state to hold instream flow rights.[306] The Nez Perce Tribe—frustrated by hostile federal and state

Amendment "enabled nonfederal water users to obtain a judicial determination of the sizeable federal water interests in the Western states. As interpreted by the courts, that consent to suit contained the important qualification that consent was given only when such suits determine all of the water rights of all of the water users in the entire stream system."). For some of the problems inherent in elected state court judges determining the scope and nature of federal rights, see Gregory J. Hobbs, Jr., *State Water Politics Versus an Independent Judiciary: The Colorado and Idaho Experiences*, 5 U. DENV. WATER L. REV. 122, 123 (2001) (explaining that two state judges lost reelections largely because of decisions they authored which held that federal water rights superseded state water rights).

300 *See supra* notes 78–85 and accompanying text (explaining that the Oregon Water Resources Department (OWRD) is still in the process of resolving Klamath water rights over a quarter century after the court in *Adair I* recognized the Klamath Tribes' reserved instream flow rights).

301 *See supra* notes 115–21 and accompanying text (discussing the Wyoming Supreme Court's decision).

302 *See supra* notes 146–51 and accompanying text (explaining the Washington Supreme Court's interpretation of diminished treaty rights).

303 *See supra* notes 198–204 and accompanying text (reviewing the Arizona Water Settlements Act).

304 *See supra* note 203 and accompanying text (explaining that the tribe may use a portion of its irrigation water for instream flows).

305 *See supra* notes 227–43 and accompanying text (discussing developments concerning Truckee River flows).

306 *See supra* note 237 and accompanying text (explaining that tribes administer the federal

court decisions to both its reserved rights claims and apparent precedent—decided to settle for substantially less water and control than it claimed, including allowing the state to determine the existence and scope of instream rights essential to the tribe's treaty fishing rights.[307]

Although the McCarran Era has made tribal reserved water rights claims largely a mirage in terms of producing improved western streamflows, tribal reserved rights are not insignificant. As the Pyramid Lake Pauite Tribe and the Yakama Nation have shown, dexterous use of judicial recognition of their reserved rights can enable tribes to bargain to transform those federal rights into state-recognized rights capable of implementation by established state water regimes.[308] This seems to be the future for tribes like those of the Klamath Reservation, which have yet to transform their federally recognized reserved water rights into state-recognized rights that the state will protect.

This reality will no doubt disappoint those who viewed resolution of reserved water rights claims as a means to revolutionize western water flows. But given the historic and recent hostility of both the federal and state judiciary to tribal water rights,[309] perhaps the best that tribes can do—given the mirage of the McCarran Amendment Era—is to attempt to transform the mirage into meaningful—albeit diminished—streamflow protection that states and state courts, equipped with the immense authority the McCarran Amendment supplies them,[310] will accept.

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part of the Truckee River and Newlands Reclamation Project, which results in instream rights under Nevada law). Only Nevada, Arizona, and Alaska among western states allows entities other than the state to hold instream rights. *See* Jack Sterne, *Instream Rights & Invisible Hands: Prospects for Private Instream Water Rights in the Northwest*, 27 ENVTL. L. 203, 206–07 n.28 (1997) (explaining that instream rights in Arizona and Nevada rest on judicial interpretation).

307 *See supra* notes 287–97 and accompanying text (discussing the Nez Perce settlement).

308 *See supra* notes 228–43 (Pyramid Lake Tribe), 152–73 (Yakama Nation) and accompanying text (discussing the tribes' recent legislative, administrative, and judicial successes).

309 *See, e.g.*, *supra* notes 68–73 and accompanying text, discussing United States v. Braren, 338 F.3d 971, 974 (9th Cir. 2003) (vacating a federal district court decision, ruling that Klamath Tribes' treaty reserved rights to hunt, fish and gather on reservation lands implied a reserved water right sufficient to support a "productive habitat," for lack of ripeness due to the pendency of state McCarran Amendment proceedings); and notes 270–85 and accompanying text, discussing *In Re* SRBA, No. 39576, Subcase No. 03-10022 (Idaho Dist. Ct. Nov. 10, 1999) (rejecting the Nez Perce claim of reserved water to support its off-reservation fishing rights).

310 The McCarran Amendment has been called "the Magna Carta of state water rights adjudication," John E. Thorson et al., *Dividing the Waters: A Century of Adjudicating Rivers and Streams*, 8 U. DENV. WATER L. REV. 355, 359 (2005) (quoting A. Dan Tarlock, *The Illusion of Finality in General Water Rights Adjudication*, 25 IDAHO L. REV. 271, 272 (1988–1989)). For an argument that the Supreme Court should reexamine its McCarran Amendment decisions and insist on an "unequivocal expression" of congressional intent in order to waive federal sovereign immunity, see Stephen M. Feldman, *The Supreme Court's New Sovereign Immunity Doctrine and the McCarran Amendment: Toward Ending State Adjudication of Indian Water Rights*, 18 HARV. ENVTL. L. REV. 433, 460 (1994).