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The Big Horn Indian Water Rights Adjudication: A Battle for the Legal Imagination

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THE BIG HORN INDIAN WATER RIGHTS ADJUDICATION: A BATTLE FOR THE LEGAL IMAGINATION

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*Another way to explore the differences between narrative and conceptual thought, between the primitive and the analytic mind, might be to look at fifth-century Athens, whose intellectual history could be said to involve a movement from one to the other. Take the subject of justice, for example. The century begins with Aeschylus' play The Orestia, which tells the story of retaliatory justice in the house of Atreus—the chain of vengeance continues through generations without end—and celebrates the foundation of a public institution for trial and punishment, a way in which the community can bring the narrative of perpetual destruction to a close. The judgment of the court and jury will satisfy the same deep need to set things right that underlay the old obligation of revenge, but without giving rise to a new wrong that must itself be avenged.***

I. Wyoming v. United States as Disappointing Dramatic Narrative

Conflict between the Indians and the white settlers who have populated the American West is a recurrent theme in the history and law of that region. The enmity born of bloodshed on both sides and the wholesale displacement of traditional tribal lifestyles continues to manifest itself even today in the confrontational attitudes of the Indians and the whites toward issues vital to their coexistence. In the twentieth century, the Indians and the whites have put aside their weapons, but the struggle for dominion and sovereignty continues. These modern battles, for the most part, have unfolded in the legal arena, with the rights to large quantities of the West's scarce water and other natural resources hanging in the balance. Legal wrangling over tribal water rights, the subject of this article, is among the most prominent examples of the continuing conflict.

The legal battles of this century have an ebb and flow. Each side has won some major "victories." The two most significant Indian victories are the recognition of reserved water rights[1] and the widespread use of the practicably irrigable acreage (PIA) standard as the means by which the

To the extent that certain sources cited herein are not available at the University of Oklahoma Law Library, the editors and staff of the *Oklahoma Law Review* have relied upon the author's expertise in assuring the technical accuracy of these sources—*Ed.*

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** J. B. WHITE, THE LEGAL IMAGINATION 246-47 (abr. ed. 1985).

1. *See* Winters v. United States, 207 U.S. 564 (1908).

extent of those rights are quantified.[2] The whites can take comfort in having won the hotly contested forum shopping battle. In 1976, the United States Supreme Court ruled that the state courts, long viewed by the Indians as hostile to their claims, are the preferred forum for adjudication of Indian water rights.[3]

Now, with the state courts as the primary forum, the long-time enemies continue to press for victories. Their polar positions on the legal issues and their attitudes toward one another are sufficiently rancorous that one commentator on the controversy entitled his essay "The Water Wars."[4] Perhaps ironically, therefore, the Big Horn River System, scene of the famous last stand, became the backdrop for the newest legal battle over Indian water rights.

The Big Horn Adjudication took more than a decade to unfold, but as it neared decision, it appeared to be the possible climax of the current chapter in the long-running legal narrative. The attempts of Wyoming on behalf of its state law water rights holders to have Indian water entitlements construed narrowly failed in the Wyoming Supreme Court. In *General Adjudication of All Rights to Use Water in the Big Horn River System*,[5] the Shoshone and Arapaho Tribes of the Wind River Reservation prevailed by a 3-2 vote in having the PIA standard used as the measure of their water rights. The holding carried special import because these tribes are among the few tribes in the West having substantial, relatively senior, state law water rights sufficient to sustain large-scale irrigation-based agriculture on the reservation. Owing to their state law based water rights, the Shoshone and Arapaho are not dependent on reserved rights for all of their water needs. In this way, they appear far more vulnerable to the argument that they do not need reserved rights to sustain their existence.

Having a state supreme court support the PIA as the universal standard for quantifying Indian reserved rights, the Big Horn adjudication decision appeared to herald a great victory for the western tribes. Wyoming, making its last stand, petitioned the United States Supreme Court for further review of the PIA issue and others raised in the Big Horn Adjudication;[6] the tribes sought review of the on-reservation limitation on the use of their reserved water rights that had been imposed by the Wyoming Supreme Court.[7] When the United

2. *See* Arizona v. California, 373 U.S. 546 (1963).

3. *See* Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976).

4. *See* Reily, *The Water Wars*, NAT'L L.J. 1 (1985). *See also* J. SAX & R. ABRAMS, LEGAL CONTROL OF WATER RESOURCES 548-54 (1986).

5. 753 P.2d 76 (Wyo. 1988).

6. *See* Cross-Petition for Certiorari of the State of Wyoming at i, Wyoming v. United States, 109 S. Ct. 2994 (1989). The specific question presented on which review subsequently was granted appears below in the text of this article. For a summary of the facts, issues and background of the Big Horn Adjudication and a listing of the arguments presented to the United States Supreme Court, see Abrams, *This Century's Battle for the Big Horn: Calculating Reserved Indian Water Rights in the Arid West*, 88-89 TERM, PREVIEW OF UNITED STATES SUPREME COURT CASES 440, 440-42 (June 2, 1989).

7. *See* Cross-Petition for Certiorari of the Shoshone and Northern Arapaho Tribes at i,

States Supreme Court granted review, but limited it to only one of the several questions presented, the Big Horn Adjudication took on a new, far greater, prominence.

The question the Court had agreed to consider was the following: "In the absence of any demonstrated necessity for additional water to fulfill Reservation purposes and in the presence of substantial state water rights long in use on the Reservation, may a reserved water right be implied for all practicably irrigable lands within a Reservation?"[8] As those thoroughly familiar with Indian reserved rights recognized,[9] the grant of certiorari on that particular issue portended a move by the Supreme Court away from adherence to the PIA standard as the basis for the quantification of Indian reserved water rights. The limited grant of certiorari[10] suggested that the Court was not interested in considering all of the aspects of the Big Horn Adjudication, from which the inference could be drawn that it wanted to "correct" the Wyoming Supreme Court on this one particular issue of federal reserved water rights law.

Speculators read the Court's action against the background created by the rulings in two relatively recent cases. In *United States v. New Mexico*,[11] a case construing the reserved rights of the United States Forest Service, the rights had been limited to only that water necessary to fulfill the primary purposes of the reservation. This language offered several opportunities to cut back Indian reserved rights by invocation of strict necessity and it wholly thwarted any awards for purposes other than those that could be deemed primary. Thus, no water would be available for mineral development or other nonagricultural uses unless those uses could be said to be primary purposes. In *Washington v. Washington State Commercial Passenger Fishing Vessel Association*,[12] Indian treaty fishing rights were limited to an amount that would provide the Indians a "moderate" living and not an amount that was disproportionate to Indian needs, even when the treaty language might seem to suggest otherwise. Also fueling the anticipation of a change in doctrine was the fact that in 1988 there were even more "conservatives" on the Court than in 1978 and 1979.[13]

Wyoming v. United States, 109 S. Ct. 2994 (1989). One question presented by the tribes was: "Whether, under the Treaty, the Tribes are restricted from exporting their reserved water off the Reservation for use by themselves or by others or rather, consistently with the rights enjoyed by all other water users in Wyoming, they may export their reserved water off the Reservation?"

8. Brief for Petitioner at i, Wyoming v. United States, 109 S. Ct. 2994 (1989).

9. This article presumes the reader to have a general familiarity with both the law of prior appropriation and the federal reserved rights doctrine.

10. The remaining petitions for certiorari were stayed and not denied. This led to some counter-speculation that the Court might decide to have the case re-argued to look at additional issues if it decided to alter the PIA holding.

11. 438 U.S. 696 (1978).

12. 443 U.S. 658, *modified*, 444 U.S. 816 (1979).

13. *See* M. White, Indian Water Rights and the Wyoming Big Horn Adjudication: New Complications for Traditional Doctrines, Materials Presented to the ABA Section of Natural

If the speculation was correct, this would be a change in controlling law that would have highly significant effects throughout the American West. If the PIA were abandoned, no longer would tribes receive awards for water that, to critics of the PIA, appeared to be far in excess of present tribal water use and far in excess of tribal needs. Similarly, if the PIA were abandoned, the threat of presently unquantified Indian reserved rights being quantified in an amount that would displace large numbers of present state law appropriators was greatly reduced.

The fears of state law appropriators of wholesale displacement by newly confirmed and quantified Indian reserved rights were speculative, but only to a degree. In the wake of the famous Colorado River case, *Arizona v. California I*,[14] quantification of Indian reserved rights placed a cloud on the water rights of many state law appropriators.[15] In Wyoming, the decision of the Wyoming Supreme Court adopting a PIA-*Winters*[16] approach to quantification of the Indian water rights immediately led to the Indians being able to obtain a $5.5 million dollar payment from the State of Wyoming. In exchange for the money the tribes agreed to refrain in 1989 from insisting that water be delivered in accordance with their newly awarded legal rights.[17]

For their part, the tribal respondents of Big Horn Adjudication and the United States were seeking to use the Wyoming case as a vehicle for having

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Resources Law Workshop on Water Law: Recent Developments and New Strategies xviii (Feb. 1-3, 1989). Mr. White was to argue the case before the United States Supreme Court on April 25, 1989 and devoted his oral presentation at the ABA workshop to speculation that the grant of certiorari was an indication that the Court might be sympathetic to modification of the PIA standard to take necessity (the Indians' need for any particular quantity of water) into account.

14. 373 U.S. 546 (1963).

15. *See* Back & Taylor, *Navajo Water Rights: Pulling the Plug on the Colorado River*, 20 NAT. RESOURCES J. 71 (1980).

16. Winters v. United States, 207 U.S. 564 (1908). *Winters* is the lodestar case of Indian reserved water rights, establishing that doctrine on the basis of implication of Congressional intent to reserve the water. The Court found that Congress, when it consigned tribes to the reservation, must have intended that the Indians retain the necessary elements for survival as a pastoral people, including water with which to make the lands productive.

17. In the Big Horn setting, the tribes were irrigating substantial tracts using state-law decreed water rights bearing a 1905 priority date, a priority date shared with a large number of other state law appropriators who received water through the same federal project as did the Indians. Under the prequantification arrangement, the water was delivered on a rotating basis to the various users and any shortages were shared. After quantification, the Indians had both a larger quantitative entitlement and an 1868 priority date for their water rights.

In the dry summer of 1988 (a few months after the Wyoming Supreme Court decision awarding them PIA-quantified rights with an 1868 priority date), the Indians began to insist on receiving their entire share before any other project irrigators received water. This threatened the non-Indian water users with crop failure. For 1988 an accord was eventually reached that improved the Indians' delivery schedule for that year to the detriment of the other state law appropriators, many of whom suffered crop losses. To avoid a repetition of events in 1989, the state purchased Indian forbearance from claiming their reserved rights in that year. *See* Brief of the Petitioner at 9-10, Wyoming v. United States, 109 S. Ct. 2994 (1989).

the PIA reaffirmed.[18] However, the crux of the case apparently had more to do with money than water.[19] 1988 and 1989 events in the Big Horn Basin showed that the tribes stood to profit by the adherence to the PIA as much or more by declining to exercise the rights than by making use of the rights. Estimates of the Bureau of Indian Affairs put the value of crops grown on the lands irrigated by the tribes at $1.9 million for 1985, $2.4 million for 1986 and $2.2 million for 1987.[20] The ability of the tribes in this case and potentially in others to sell, trade or otherwise bargain away reserved rights in excess of their on-reservation needs is an important but controversial right. Cast in this light, successful defense of the PIA standard would benefit Indian tribes throughout the West. Affirmance also offered the opportunity to quell doubts about the long-term survivability of the PIA standard raised by the *New Mexico* and *Washington Fishing Vessel* decisions.

The anticipation of the opinion in *Wyoming v. United States* continued to grow after oral argument. At one point in the argument Jeffrey Minear, the Assistant Solicitor General arguing the case for the United States, was pressing the fact that *Wyoming v. United States* was practically indistinguishable from *Arizona v. California I*,[21] the landmark case concerning the apportionment of the Colorado River in which the PIA had been adopted by the Supreme Court as the method for quantification of Indian reserved rights. As if fanning the hopes of those wishing to see the PIA standard abandoned, Mr. Chief Justice Rehnquist entered into a brief colloquy with Minear:

> Mr. Minear: This Court does not lightly discard its precedents.
> Question: *Arizona I* contains virtually no reasoning.
> Mr. Minear: I think that it does contain the core kernel of reasoning that's important to the—the determination of a water rights. Namely, there is the feasible and fair method for determining the amount of water that's needed for land that's set aside —
> Question: Well, but —
> Mr. Minear: — for agricultural purposes.
> Question: — ordinarily in a court opinion that is a conclusion you reach after a discussion of possibilities. All that is a statement of a conclusion.

18. *See* Brief for United States at 16-50; Brief for Tribal Respondents at 22-28 and 43-48, Wyoming v. United States, 109 S. Ct. 2994 (1989).

19. This is not meant to be unduly critical of the Indian position. As is evident in the arguments presented later favoring an equitable division of the resource, the tribes should be encouraged to manage their decreed rights in the most economically advantageous way possible. The implicit criticism intended by the text is of the disregard for an equitable division that may be found in the litigation posture of all parties, including the tribes, in *Wyoming*.

20. *See* Brief for State of Wyoming at 10, n.7, Wyoming v. United States, 109 S. Ct. 2994 (1989). These revenues would continue even if the reserved rights were not employed by irrigating pursuant to the tribes' state law appropriative water rights.

21. 373 U.S. 543 (1963).

Mr. Minear: But the discussion took place in the Special Master's Report, which, in fact, that's appended to our brief.
Question: Yeah, but ordinarily we don't consider the report of a Special Master as someone [somehow] incorporated by reference into the Court's opinion.[22]

Then came the anticlimax, after more than a decade of litigation in the *Wyoming* case itself and after all of the excitement generated by the United States Supreme Court's expected ruling on the PIA standard: the case was affirmed by a 4-4 vote without opinion.

II. From Narrative To Conceptualization

The entire legal history[23] of the battles over Indian reserved water rights can fairly be characterized as representing a tragic narrative, akin to that of unending retribution in the house of Atreus described in the passage which opens this article. At every turn the states and the tribes seek to press for victories that tip the balance of justice beyond that which the losing party can endure. Each legal victory begets retribution in the form of a new lawsuit and legal strategy by the loser that seeks to prevail on some other issue. The tragedy persists because the adversary nature of litigation combined with the longstanding enmity of the litigants encourages extremism in selecting litigation objectives. These are parties who long have tried to annihilate their legal opponent.

Consider the positions of the parties and their proxies (amici curiae) in *Wyoming v. United States*. The state law appropriators' camp would have Indian reserved rights claims reduced to the amount of water strictly necessary to accomplish the primary purposes of the reservation as in New Mexico. At the extreme, this reduction might mean that only enough water would be allotted to ensure that the crops grown on the reservation could support the reservation population "moderately." The reserved rights advocates urged PIA-quantified reserved rights that would be freely transferrable. If granted, such rights would threaten the wholesale displacement of established non-Indian water uses in consequence of the Indians' direct or indirect use of their long-dormant rights.[24]

22. Transcript of Oral Argument at 34-35, Wyoming v. United States, 109 S. Ct. 2994 (1989).

23. The claim that all state-tribal water conflicts fit this pattern is somewhat exaggerated. There are occasional attempts at compromise and settlement on a mutually satisfactory basis that do not fit the pattern described in the text. See *infra* text accompanying notes 45-48.

24. This is more a threat than a reality. In almost all relevant settings (Indian reservations having reserved instream flow rights to support fishery are not relevant to the discussion of PIA-based quantification), the reservation is upstream of the major non-Indian water users. The Indians cannot, in any real sense, physically withhold the water from non-Indian use because they lack the means to impound, divert or consume the water before it leaves the reservation. As a result, the water will become available to non-Indian users.

A more likely scenario of free transferability of PIA-quantified reserved rights is that the Indians will become water brokers, selling those rights to off-reservation users. Willing buyers

Neither side can tolerate an unanswered total victory by the other. For the Indians, their reserved water rights must be an economic asset beyond mere sustenance if they are to be participants in modern society. For the states and their water rights holders, the potential quasi-monopoly position of the Indians leads to intolerable reliance on the tribes to permit state law water rights holders' water uses to continue. In some areas, a substantial PIA-based award could place whole regional agricultural economies founded near the turn of the century in a position where they have to bid against cities and industry in an effort to retain the water they have been using for three or more generations.

The courts are no less to blame for the extremism of the litigation objectives than the litigants. A vast recounting of instances of judicial activism is not necessary to recognize that courts could have turned reserved rights litigation aside from the primitive narrative of too-total-victories and into conceptual thought producing doctrines that would permit the "judgment of the court . . . [to] satisfy the same deep need to set things right that underlay the old obligation of revenge, but without giving rise to a new wrong that must itself be avenged."[25] Under the present legal regimes, the pendulum swings are too extreme and inequitable. At one end of the arc, the Indians feel themselves victims of a culture destroyed with even the ameliorating promises of a viable reservation on which to live and work breached by an encompassing white population. At the other end of the arc, the non-Indian settlers who have invested lifetimes in developing their lands and businesses watch their efforts set at naught by a legal formula that is not genuinely tied to either a specific promissory intent of the United States government, or to the legitimate needs of the tribe for a sufficiently generous water allocation to enable them to be productive participants in modern American society.

The most direct path for turning the reserved rights doctrine into a mechanism that will reconcile the Indian and non-Indian interests is to set that reconciliation as the doctrinal objective, rather than continuing to emphasize the search for the historically accurate, but nearly impossible to discern, implied intent that prevailed at the time of reservation.[26] Amid the chorus of conformity

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will include any present or potential water users who are not receiving all of the water they desire under the existing priority regime. If enough unsatisfied water demand is present, a bidding war for Indian water rights might ensue wherein the Indians could charge prices that would drive some water users out of the market. The prices that could be charged are not true monopoly prices, only the prices that could be commanded in a competitive market. Still, because no price is charged by a state for the right to appropriate, the charging of even a market price for the water greatly alters the status quo. Thus, the credible threat of transferable Indian reserved rights is not one of wholesale displacement of non-Indian users, rather it is a threat of redistribution of water among those users from the lowest value users of the water to higher value users who currently lack the needed seniority of right to obtain sufficient water. Even this result is inimical to the settled expectations of the current non-Indian water user class.

25. J.B. WHITE, THE LEGAL IMAGINATION 246-47 (abr. ed. 1985).

26. The doctrinal problems of this approach will be discussed more fully later in this Article. See *infra* text accompanying notes 31-35.

to the traditional polarizing approach, a single amicus brief in *Wyoming v. United States* attempted to urge a more moderate course upon the Court.[27]

A second way to escape the narrative, perhaps requiring more legal imagination, is to rechannel the inquiry from one in which the states and the tribes debate the nuances of reserved rights doctrine into a more candid debate about their sovereign interests. It should not be hard to see these Indian reserved rights cases as contests over the right to control the allocation of the water. Once this conceptual step is taken, the competing interests of the states and the tribes begin to resemble the disputes between states relating to the right to allocate interstate streams. Viewing the state-Indian disputes this way suggests that the same devices that are used to settle interstate water disputes might be applied.

The remainder of this article will canvas in summary fashion how the two avenues of escape from the present cycle of Indian reserved rights litigation might operate.

A. Rethinking the Objectives of the Reserved Rights Doctrine

As noted above, one amicus brief submitted in the Big Horn Adjudication sought to change the discourse about reserved rights in that case from a discussion about the intent of the 1868 treaty and the rote quantification standards of the PIA to a discussion of quantification based on a different, far broader, standard. That brief urged:

> Quantification of federal reserved water rights for Indian reservations should promote tribal self-determination and economic independence by awarding the amount [of] water necessary for optimal utilization of a particular tribe's resources, with sensitivity to potential impacts on existing users and regional economies. Tribal self-determination and economic independence, which are primary goals of Indian tribes and federal policy, are closely interrelated. Quantification decisions should therefore be closely linked to economic activities best suited for achieving tribal self-sufficiency, but be formulated with equity and realism.[28]

Giving more detail to that objective, the brief stated:

> The competing considerations include a reservation's specific purpose, if discernible; the reservation's population and other circumstances relating to actual needs of its residents; the particular tribe's resources and other conditions bearing upon the potential for generating jobs and income on the reservation; other sources of water for the reservation; the tribe's cultural values and traditions; efficient use of a scarce and precious resource; and impacts on existing users and regional economies dependent upon a fully appropriated stream system.[29]

27. See *infra* text accompanying notes 28-29.

28. Brief of Amicus Curiae Salt River Project Agricultural Improvement and Power District in Support of the State of Wyoming at 5-6, Wyoming v. United States, 109 S. Ct. 2994 (1989).

29. *Id.* at 7.

The essential feature of the suggested approach, the focus on providing sufficient water to allow each benefitted tribe to make optimal use of its reservation resources and providing a sound basis for tribal economic self-reliance, has little apparent similarity with reserved rights doctrine as it now exists. That appearance is deceiving in one regard; both the suggested approach of the amicus and the current reserved rights doctrine rely on a process of deduction that proceeds to reason from a purpose for the reservation to the quantity of water necessary to achieve that purpose. What is different in the approaches is: (1) the source from which the purpose itself is drawn, and (2) the degree of willingness to rely on presumptions to assist the deductive process. Of these two differences the latter is immaterial while the former presents a significant stumbling block to ready acceptance of the revised doctrine.

Taking the role of the PIA standard in water adjudications as an example, its use in computing Indian reserved water rights entitlements operates just like an evidentiary presumption in ordinary litigation. For Indian reservations found to have an agricultural purpose, the presumption simplifies and makes mechanical the calculation of an amount. Relatively easy to apply standards for practicable irrigability have been developed in order to assist the federal government in evaluating potential irrigation projects. Coupled with readily available data about the average water duty in the region, use of the land classification into PIA and non-PIA reduced the difficulty of the reserved rights quantification inquiry. If a court were willing to undertake the more elaborate inquiry into how much water is really needed to satisfy the agricultural purpose, discarding the presumption would work no change in the legal doctrine; it would simply be a change in evidentiary practice. Thus, in theory, there is no obstacle to abandoning the mechanical device and substituting a tract-by-tract analysis.[30]

Moving to the difference in approach regarding relevant intent, the change suggested by the amicus brief is not easily reconciled with the foundations of the reserved rights doctrine. As is evident, traditional reserved rights methodology focuses on the identification of the purpose of the reservation as of the date of withdrawal. In the Big Horn setting, for example, the question of purpose is one of determining the intended purpose of the reservation in 1868 when it was formed. The suggested approach substitutes a modern purpose, to "promote tribal self-determination and economic independence." These new substitutes are laudable purposes, but to whatever extent they are not the purposes that informed the reservation of the land,[31] the justification upon which reserved rights are founded is eroded.

30. The current operation of the PIA standard actually erects two presumptions. Not only does it presume that the water duty times acreage product is the right amount of water, it also presumes that the intent of agricultural reservations is to irrigate *all* such acres. Here too, it would do no violence to the reserved rights jurisprudence to try to inquire into whether the intent at the time of reservation was to provide water for all practicably irrigable land.

31. It is possible to argue that these "new" purposes are just the "old" (original) purposes restated in contemporary terms, or perhaps are a recognition that the "old" purposes were somewhat broader than they had been interpreted to be in the past. Should that be the case, the jurisprudential objection to this approach explored in the text is nullified.

Reserved rights, to make any sense at all, must arise at the time of reservation. The underlying explanation is complex, but when the federal government began to share authority with the newly-formed states of the West, one thing that was granted the states under the equal footing doctrine[32] was the right to make their own water law. Still, despite the grant to the states of that power, the question remained regarding what water rights the United States retained. In general, the answer is that the federal government retained all the waters found on the federal lands in the West, but permitted the states to allow citizens to perfect state-law property rights in those waters. Eventually, this legal relationship was crystallized when the Supreme Court held that the federal government had severed the water from the land so that patentees taking land from the United States obtained no water rights with their land.[33] In contrast, for lands retained by the federal government two rules arose: on lands still open for settlement, the water was available for appropriation under state law; on lands withdrawn from settlement and reserved to a particular purpose, the waters were exempt from the severance doctrine, lest the will of the constitutionally superior sovereign would be thwarted by denial of water rights. Thus, the reservation of lands took with it the as yet unappropriated water found on the reservation in at least the quantity necessary to fulfill the reservation's purposes.[34] With the *raison d'etre* for reserved rights being focused on the need of water to ensure fulfillment of the withdrawal purposes, the only plausibly relevant federal intent is that surrounding the act of withdrawal and reservation of the land.[35] To look elsewhere in discerning the purposes of the reserved rights upsets the established balance of federal and state interests worked out over the last century.

B. Treating Reserved Rights Cases as Inter-Sovereign Disputes

Indian reserved water rights cases, arising as part of general adjudications, do not look like binary disputes between two sovereigns. In the Big Horn adjudication, for example, more than 20,000 parties having water rights in the river system were served with notice of the proceeding and required to participate lest their water rights be lost. The common link among all but those few of the water rights claimants whose claims originate in federal law,[36] of course, is that their rights exist by virtue of the law of the state as sovereign. Thus, every general adjudication is really divisible into two distinct segments—the contest between federal law-based claimants and state law-based claimants,

32. Under the equal footing doctrine, "the new States since admitted have the same rights, sovereignty and jurisdiction . . . as the original States possess within their respective borders." Mumford v. Wardwell, 73 U.S. (6 Wall.) 423, 436 (1867).

33. *See* California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935).

34. The first example of United States Supreme Court recognition of reserved rights is Winters v. United States, 207 U.S. 564 (1908).

35. *See* Abrams, *Water in the Western Wilderness*, 1986 U. ILL. L. REV. 387, 391-95.

36. This group includes the United States itself as to its reserved rights claims for its enclaves and as trustee for Indian tribes, the tribes (who frequently appear in addition to the federal government) and transferees of Indian reserved rights.

and the intramural rights of each of those groups.[37] In fact, the purposes of the general adjudication could be served virtually as well if the difficult question of the extent of reserved rights were severed and tried separately.[38] Thereafter, the rights awarded under the aegis of the two bodies of law, federal and state, can be arranged in the proper internal relation, having due regard for the rights decreed to the other sovereign.[39]

At present, precisely that model is followed in regard to the allocation of water in interstate streams. Through one of three principal devices, the resource is allotted to the co-riparian states and then administered internally in a way that does not overreach their decreed entitlement.[40] The three principal interstate allocation devices are congressional apportionment, interstate water compact and equitable apportionment by the United States Supreme Court.[41] Abstracting the three types of allocation devices, they are: (1) external solution imposed by fiat (by an entity having the authority to do so), (2) negotiated compromise and (3) judicial allocation according to equitable principles.

Of the three devices mentioned, the first two are already available as a solution to state-Indian reserved rights controversies and will continue to be available even if the courts adopt a new approach to reserved rights litigation. Just as Congress under its power over interstate commerce has the authority to apportion an interstate river,[42] Congress can, by ordinary statute, allocate the water of a river between a state and a tribe.[43] Even if that action would vitiate claimed reserved rights by allowing the tribe less water than would a court, Congress can abrogate previously enacted treaties

37. In the Big Horn Adjudication the case was trifurcated along the lines suggested here. Of particular interest is the severance of the ranking of the state law claims amongst themselves from the awarding of federal reserved rights.

38. *See* Abrams, *Reserved Water Rights, Indian Rights and the Narrowing Scope of Federal Jurisdiction: The Colorado River Decision*, 30 STAN. L. REV. 1111, 1139-41 (1976).

39. This methodology is particularly effective where the focus of the dispute is on the relation of Indian claims to the claims of state law appropriators. This permits the Indians to promulgate water codes that govern the relations among the current beneficial holders of their reserved rights as long as those practices do not result in expanding the Indian reserved right beyond its decreed extent.

40. There are sanctions for exceeding one's allotment to the detriment of another. *See, e.g.*, Texas v. New Mexico, 482 U.S. 124 (1987) (discussing availability of either in-kind water delivery remedy or monetary remedy for failure of upstream state to make water deliveries as required by compact); Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938).

41. *See generally* J. SAX & R. ABRAMS, LEGAL CONTROL OF WATER RESOURCES 683-751 (1986).

42. *See* Arizona v. California I, 373 U.S. 546 (1963) (interpreting the Boulder Canyon Project Act of 1929 to have apportioned the Colorado River).

43. Commentators are split in their view of the efficacy of congressional intervention in this arena. *Compare* Comment, *Paleface, Redskin and the Great White Chiefs in Washington: Drawing Battle Lines Over Western Water Rights*, 17 SAN DIEGO L. REV. 449 (1980) (urging congressional action to limit Indian reserved rights claims to the present needs and uses level) *with* DuMars & Ingram, *Congressional Quantification of Indian Reserved Water Rights: A Definitive Solution or a Mirage?*, 20 NAT. RESOURCES J. 17 (1980).

unilaterally and is always free to change past statutory decisions. Conversely, even if the congressional allocation awarded more water to the tribe than would a reserved rights adjudication, injured state law water rights holders would have, at most, a claim for compensation under the fifth amendment's takings clause.[44]

The second avenue, negotiation, is also presently available as a means of resolving Indian reserved rights cases and it seems to be gaining in popularity.[45] Beyond the very difficult problem of finding a mutually agreeable figure, there are concerns that need be met, but the avenue is promising:

> To be effective, it would seem that an agreement must be reached that is satisfactory to the tribe whose rights are in issue, the United States as trustee for the tribe and the state in which the reservation is located as de facto representative of its own interest and that of private appropriators likely to be affected by the resolution of the issue. A Federal statute confirming the agreement is the surest way to make the accord legally binding on all of the parties.[46]

The commentary on negotiated settlements is favorable,[47] but the difficulty in arriving at settlements should not be underestimated.[48]

The final and most interesting way of treating reserved rights problems, like inter-sovereign disputes, is to treat their judicial resolution as appropriate for analysis under the principles used in equitable apportionment cases. In a recent opinion, the Supreme Court summarized the leading points of its equitable apportionment jurisprudence:

44. In the previously mentioned scenario in which the tribes are awarded less than might have been obtained via reserved rights quantification, the tribe and its transferees would likewise be able to submit a fifth amendment claim for compensation. Recall that even in the time before quantification, the reserved right is in existence and fully matured. See *supra* text accompanying notes 32-35. The need in virtually all congressional intervention episodes to consider what would have happened had a reserved rights quantification taken place is at least one good argument in favor of avoiding this means of claim settlement.

45. *See, e.g.*, Western States Water, July 21, 1989, at 1, col. 1 reporting that:

> The WGA [Western Governor's Association] will work with the WSWC [Western States Water Council] and Native American Rights Fund to clarify and define various types of Indian water rights, particularly as they relate to water marketing. The purpose is to explore the possibility of developing a western consensus regarding the future treatment of water transfer proposals by tribes. Consequently, another workshop will be sponsored by the Ad Hoc Group on Indian Water Rights (consisting of representatives of tribes, large business interests in the west and the WGA), to discuss the desirability of federal legislation to establish guidelines for negotiated settlements.

46. J. SAX & R. ABRAMS, LEGAL CONTROL OF WATER RESOURCES 553 (1986). The problems of dissident state law appropriators should not be substantial. Their interest is deemed adequately represented by the state as parens patriae. *See* Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251 (1972).

47. *See, e.g.*, Folk-Williams, *The Use of Negotiated Agreements to Resolve Water Disputes Involving Indian Rights*, 28 NAT. RESOURCES J. 63 (1988).

48. *See* Miller, *Taming the Rapids: Negotiation of Federal Reserved Water Rights in Montana*, 6 PUB. LAND L. REV. 167 (1985).

> It [equitable apportionment] is a flexible doctrine which calls for "the exercise of an informed judgment on a consideration of many factors" to secure a "just and equitable" allocation. We have stressed in arriving at "the delicate adjustment of interests which must be made" we must consider all relevant factors, including:
>
> > physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, [and] the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former.
>
> Our aim is always to secure a just and equitable apportionment "without quibbling over formulas."
>
> The laws of the contending states concerning intrastate water disputes are an important consideration . . . . But state law is not controlling. Rather, the just apportionment of interstate waters is a question of federal law that depends "upon a consideration of the pertinent laws of the contending States and *all other relevant facts.*"[49]

Several immediate benefits arise from this methodology. First, at a symbolic level it accords the tribes the dignity of sovereign status that they earnestly desire. Even standing alone, this is a good first step toward escaping the narrative by fashioning a resolution that will help "set things right." Second, by tracing the general contours of equitable apportionment law, this approach does not need to cast around for decades in search of precedential guidance. Third, given the inherent flexibility of the doctrines of equitable apportionment, not all cases must be resolved by rote calculations cut to fit a single pattern. Fourth, the focus of the inquiry is aimed at a sharing of the resource in a way that considers what the impacts are on both of the disputants. Finally, by assigning rights to sovereigns, postagreement redistribution of the rights is no longer a hotly debated legal issue.[50] Should the tribes wish to permit off-reservation transfers of water awarded to them, that is of no concern to the affected state unless it results in interference with the delivery obligations of the tribe at the downstream reservation boundary.

The equitable apportionment process is not without faults. Like general stream adjudications which presently are the home of reserved rights dis-

49. Colorado v. New Mexico I, 459 U.S. 176, 183-84 (1982) (citations omitted) (emphasis in original).

50. *See, e.g.*, Note, *Leasing Indian Water Off the Reservation: A Use Consistent with the Reservation Purpose*, 76 CALIF. L. REV. 179 (1988); Schapiro, *An Argument for the Marketability of Indian Reserved Water Rights: Tapping the Untapped Reservoir*, 23 IDAHO L. REV. 277 (1986-87).

putes, apportionments are major judicial undertakings. Such apportionments are a significant cost in both time and money.[51] Perhaps more significant, equitable apportionments, as they have been conducted in the past, are self-consciously nonfinal. A court will look only at present conditions in determining whether its equitable intervention is required. If conditions change that alter the equities of a particular apportionment, the Supreme Court stands ready to hear the case anew and revise the decree.[52] In the very first equitable apportionment case, a dispute between Kansas and Colorado over the growing upstream use by Colorado of the waters of the Arkansas River, the Court denied present relief to Kansas but stated:

> At the same time it is obvious that if the depletion of the waters of the river by Colorado continues to increase there will come a time when Kansas may justly say that there is no longer an equitable division of benefits and may rightfully call for relief against the action of Colorado . . . .[53]

A final concern about adopting equitable apportionment doctrine as the basis for resolving state-Indian water disputes is the extraordinary weight placed on protection of existing economies in preference to anticipated future uses by the Court's past decisions. In *Colorado v. New Mexico II*,[54] Colorado sought an apportionment of the Vermejo River which would allow it to initiate new uses, indeed, its first uses of Vermejo water. New Mexico claimed that it was already using the entire flow of the river. Colorado sought to challenge that claim by showing that whatever New Mexico's present needs for Vermejo water, those needs could be met through conservation and/or elimination of waste from present uses. Not only did the Court place the burden on Colorado to prove the inefficiency of New Mexico's existing uses by "clear and convincing evidence," the Court also imposed a heavy evidentiary burden on Colorado to demonstrate its need for the water. In justifying of this allocation of burdens the Court stated, "Society's interest in minimizing erroneous decisions in equitable apportionment cases requires that hard facts, not suppositions or opinions, be the basis for interstate diversions."[55]

51. *See, e.g.*, Meyers, *The Colorado River*, 19 STAN. L. REV. 1, 47-48 (1966). The late Dean Meyers wrote, "[A] Court division is unlikely to be completed in less than ten years. Such delays can be very costly." *Id.* at 18.

52. The cases in which statement of this principle appear are cases in which relief has been denied, *i.e.*, cases in which the Court has not found the status quo to be inequitable. There is no reason why changed conditions would not permit the Court to reopen a case in which it had granted equitable relief if the prior decree was no longer maintaining an equitable division of the resources. The Court would, presumably, be hesitant to alter an old decree because of the reliance that prior decree would have engendered.

53. Kansas v. Colorado, 206 U.S. 46, 117 (1907). Kansas did come back to the Court roughly forty years later and again was denied relief. *See* Colorado v. Kansas, 320 U.S. 383 (1943), *reh'g denied*, 321 U.S. 803 (1944).

54. 467 U.S. 310 (1984), *reh'g denied*, 468 U.S. 1224 (1984).

55. Colorado v. New Mexico II, 467 U.S. 310, 320-21 (1984).

The impact of these decisional criteria and evidentiary burdens in the Indian water rights cases will, almost invariably, work against the Indians.[56] In regard to most water-based development, be it agricultural development, minerals development, or municipal and industrial use, the tribes have lagged decades behind their white neighbors. The tribes would contend this is not coincidental, but represents one aspect, albeit more subtle than others, of the majority culture's economic repression of their aspirations. The Indian tribes themselves lacked the capital to build projects that would put water to use; the United States government has been notorious in granting large subsidies for non-Indian water projects in the West, while few tribes have been granted funds to build, or even participate, in similar projects. The private capital market has also been slow to fund Indian projects, many of which would compete for scarce water with already funded water-dependent, non-Indian projects.

The answer to the Indian concern on this point must be the explicit renunciation of a rule that grants so substantial a preference to existing economies in competition with potential future development. That answer is consistent with treating the tribes fairly with reference to the course of history and the present policy objective of providing the tribes with a means for developing the reservation on a viable economic basis. As a matter of doctrine, Indian reservations would not be held to the same high standard of proof about their entitlement to a favorable decree. Additionally, the equity claims of existing users to continue, unaffected by the apportionment, would have to be discounted as unjustified expectations to the extent that the likelihood of some award to the tribes has been patent since at least 1908.

III. Conclusion

The acrimony that surrounds Indian reserved rights litigation signals the importance of its resolution to both of the parties to the dispute. To many of the western tribes, a fair resolution is no more nor less than their central hope for enjoying a prosperous existence in the modern United States. Simultaneously, these reserved water rights are one of the sole remaining tangible compensations left to the tribes for their relinquishment of the West's vast spaces to non-Indian development. In this vein, the water rights take on an emotional significance that matches their practical importance. Water rights are the focal point for tribal welfare and the sound management and control of those rights is among the most central objects of tribal governance. To non-Indians whose water rights are at risk of being subordinated to vast PIA-based reserved rights,[57] the issue is no less vital. On

56. The most likely exceptions are where the tribes involved have a long tradition of reliance on fishery. In those cases, a decree protecting flows as a means of protecting fishery will be a protection of an existing use rather than a proposed use.

57. There is some point at which junior (to the date of reservation) non-Indian water rights holders can have little or no rational claim to the concern of the legal system for their plight. Surely after *Winters* was decided in 1908, if not before, persons obtaining water rights in

the private level, those water rights may underpin the continued enjoyment of the fruits of generations of toil at improving and developing the land. On the public level those water rights may be the basis on which whole farming communities exist.

The litigation positions of the reserved rights antagonists, wherein each side seeks a victory that the other side cannot survive, are a consequence of the current legal doctrines that courts employ in these cases. Current doctrines invite extremism. Inevitably, one party wins and the narrative is extended. Neither side should be placed in a position of suffering so great a loss, else the need for "retribution" will move the losing party to seek "vengeance" by trying to reverse the defeat in some subsequent forum. These cases deserve legal solutions that permit the dispute to be put to rest, not a continuance of doctrines that extend the narrative. The Indian reserved rights doctrine, a backward looking doctrine because of its emphasis on an ephemeral ancient intent, should be reworked. If these disputes cannot be resolved by negotiation, what should emerge is a conceptual doctrine that directly seeks a viable accommodation of present and foreseeable future interests. In these cases courts should employ their legal imagination and establish a doctrine that treats these cases as inter-sovereign resource disputes calling for resolution according to equitable principles.

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streams that flowed through Indian reservations must have anticipated that the Indians would have some legally enforceable claim to water. What will determine the sympathy with which the non-Indian claims will be met is the extent to which their claims fail only after an award to the Indians that outstrips the reasonable needs of the tribe.