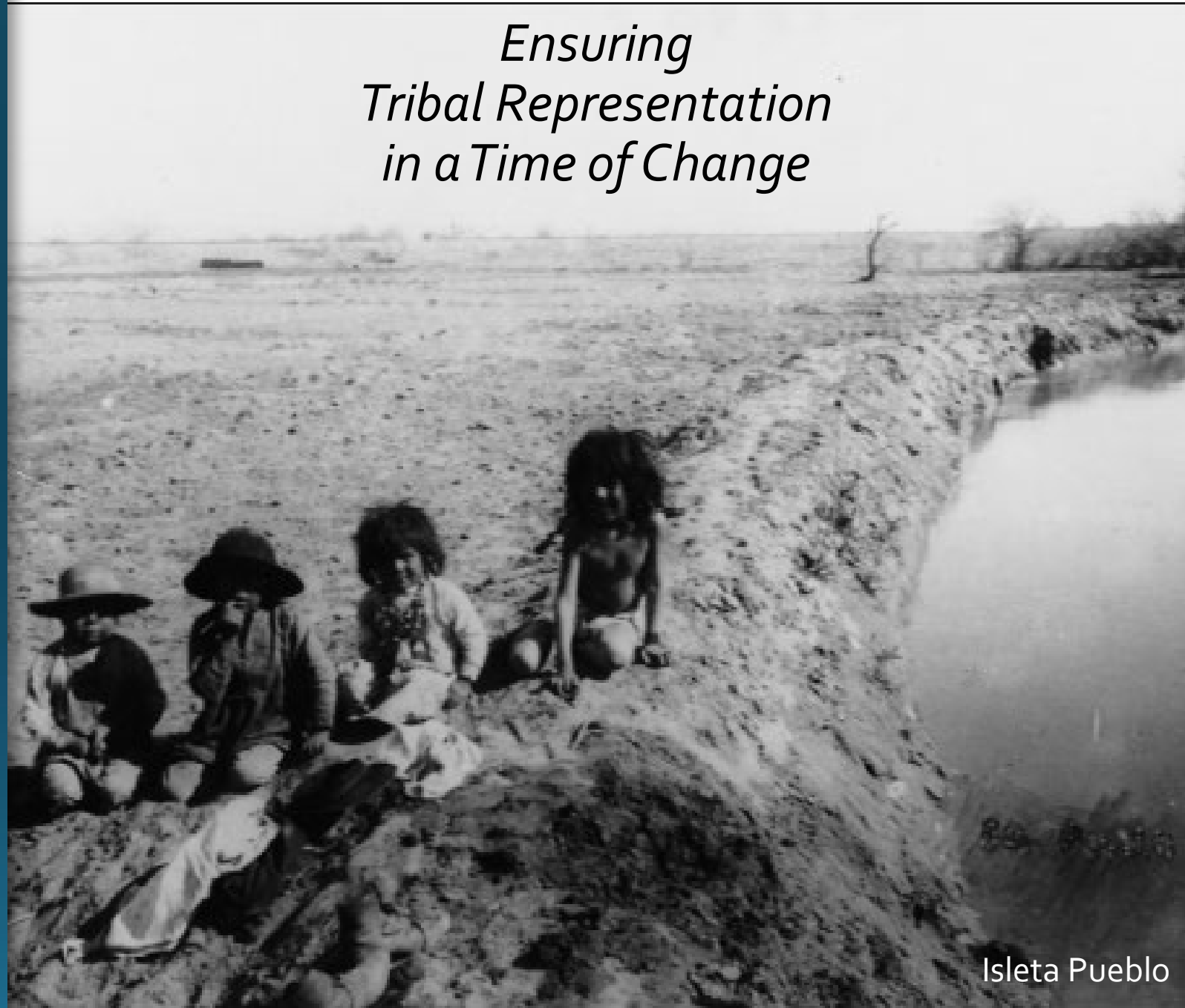


A Tribal-State Water Compact: An Alternative to Adjudication?

Josh Mann
Tribal Water Law CLE 2023

Ensuring Tribal Representation in a Time of Change

- Our environment is changing rapidly.
- Rivers are drying more quickly than Tribal water claims can move through the multi-decadal general stream adjudication process.
- The adjudication process has historically been the only means for determining Tribal water rights.
- This presentation explores a provocative alternative.
- A Tribal-State Water Compact would be legislative means for determining Tribal water rights, achieving finality and binding all water users.



Isleta Pueblo



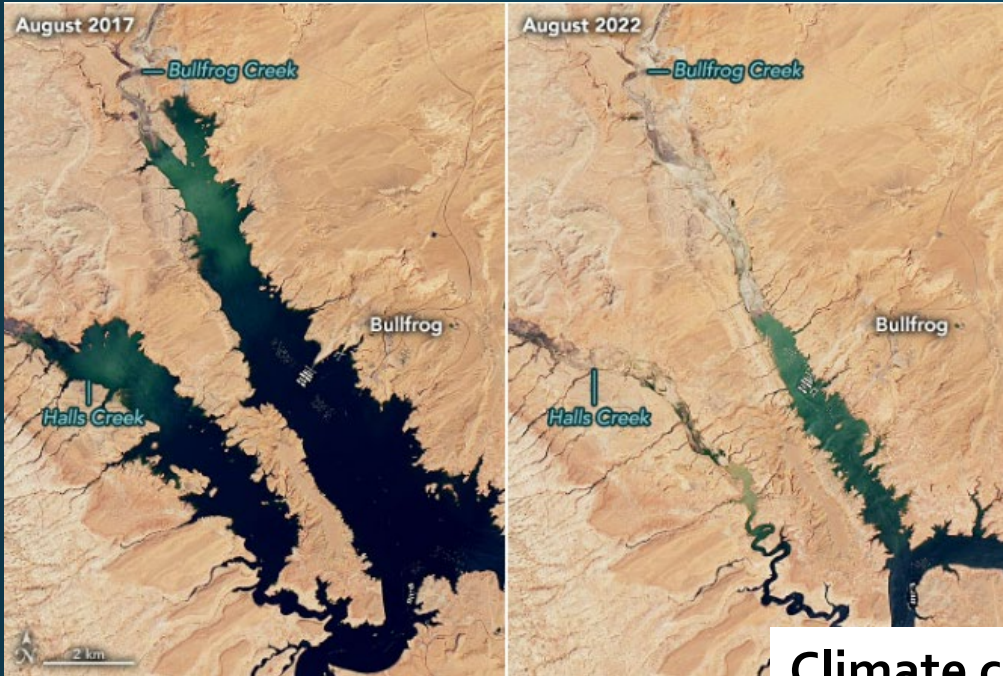
Presentation Overview

- Our Changing Climate in NM
- Tribal Water Claims in NM
- Finality and Binding Water Users
- Interstate Compacting Authority
- *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*
- Tribal-State Water Compacting Authority
- Montana's Reserved Water Rights Compact Commission
- The Ute Compact (Uintah and Ouray Tribe)
- A Tribal-State Water Compact?
- Parting Thoughts



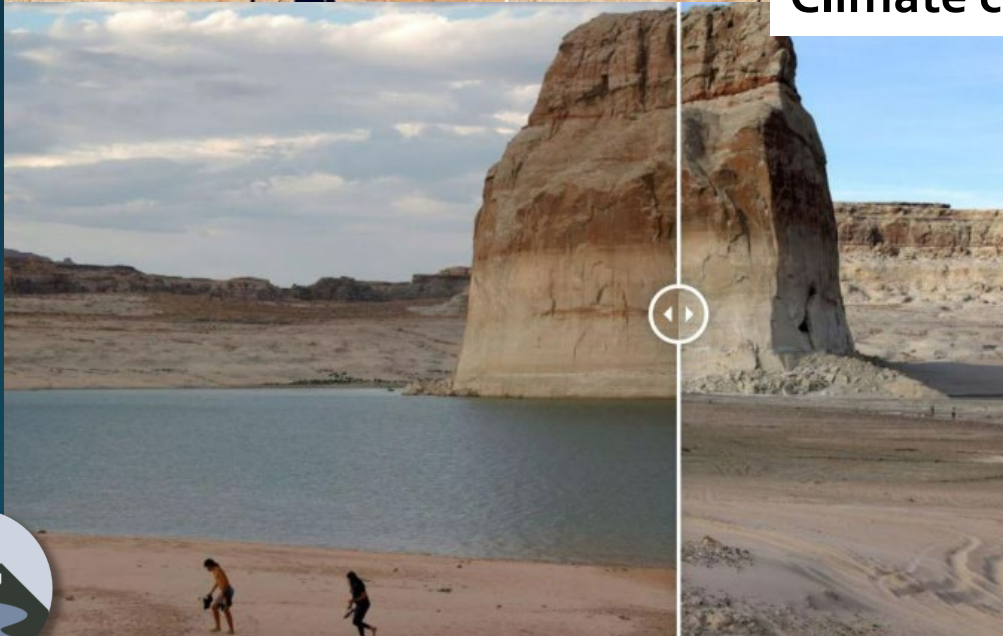
The Rio Grande running through Isleta Pueblo - 1930's era





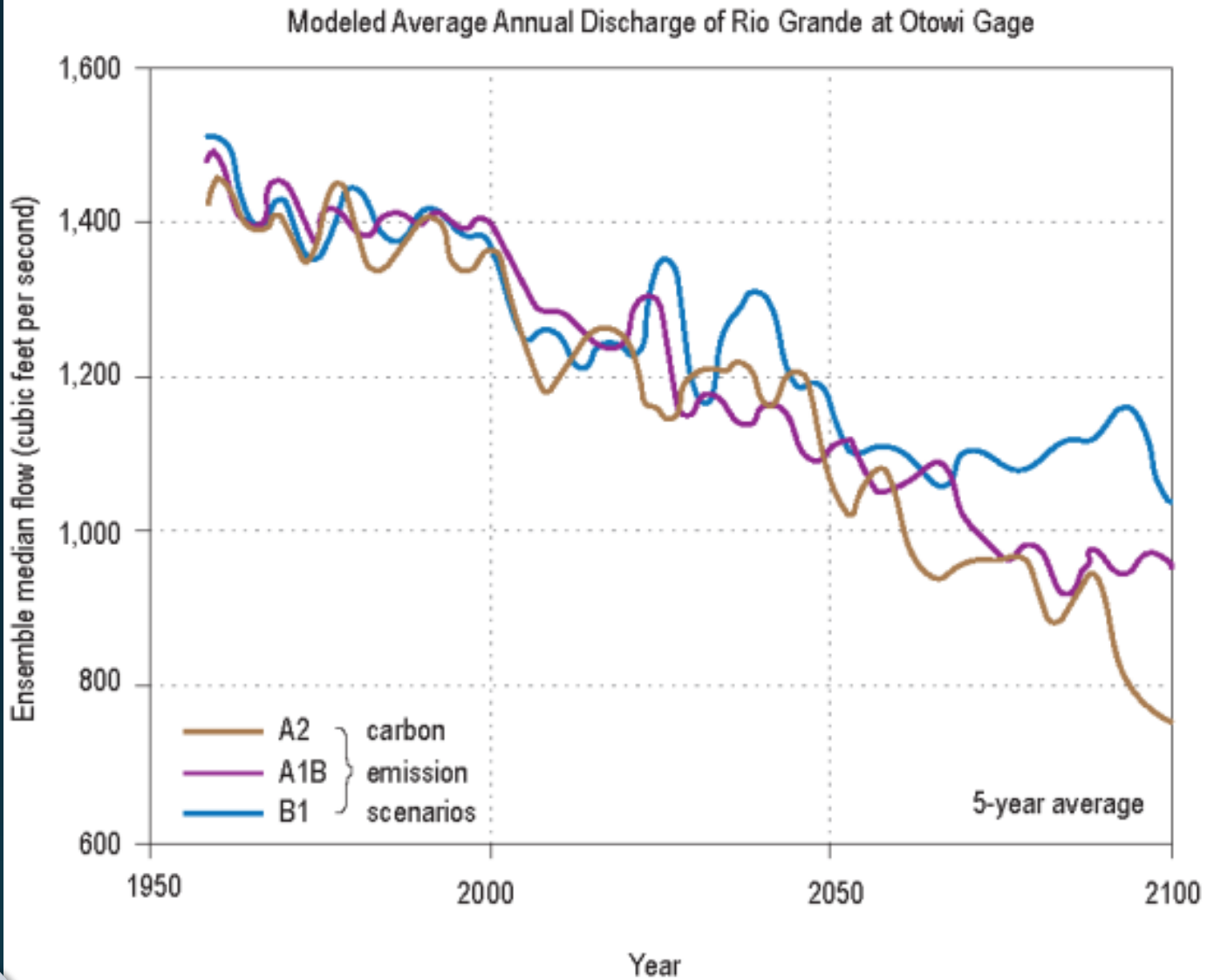
Lake Powell, AZ

Climate change is happening now.



Heron Lake, NM

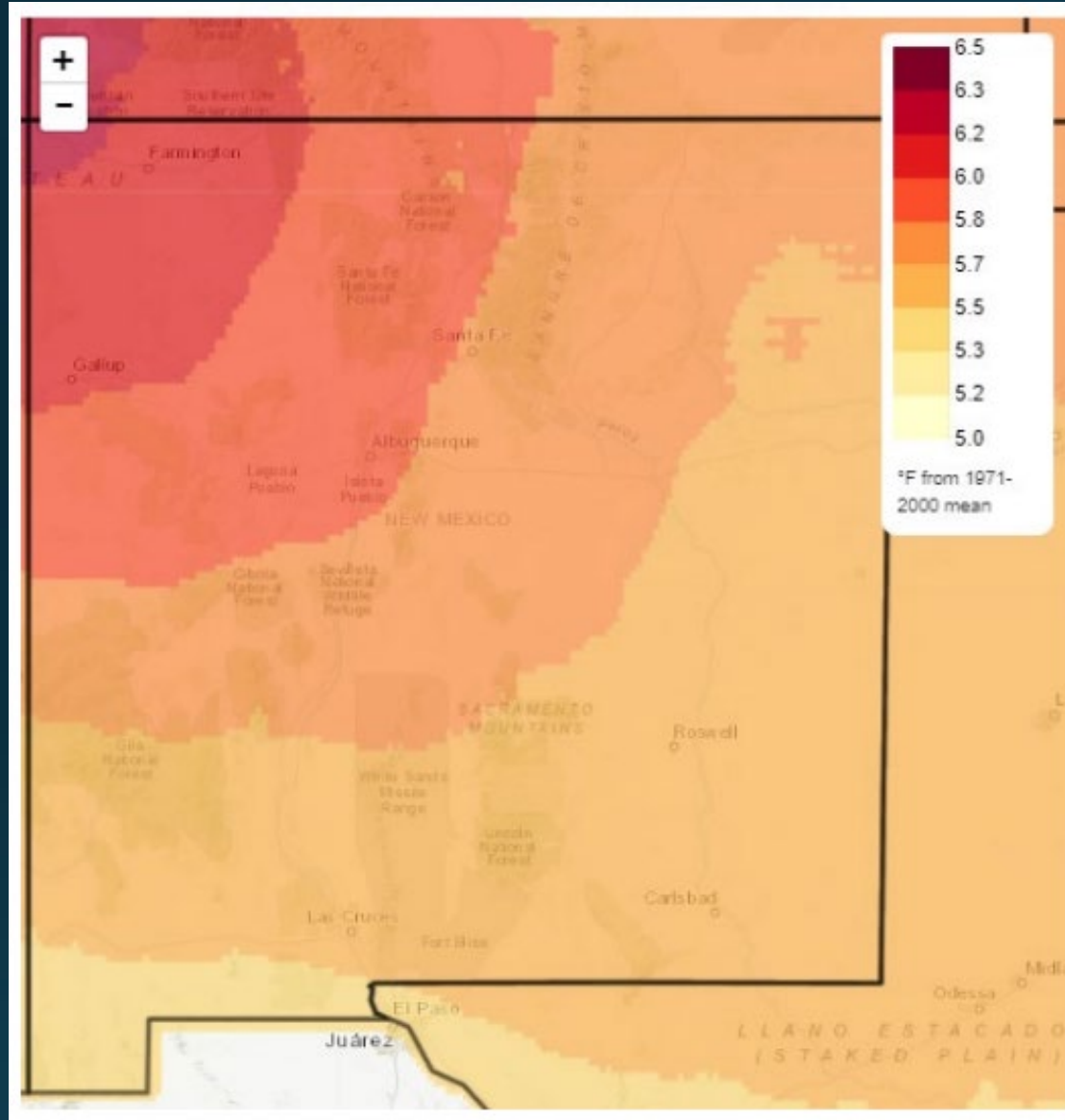




A Changing Climate

- Surface water supplies are projected to decrease.
- In 50 years flows in the Rio Grande are projected to be 25% less than today.





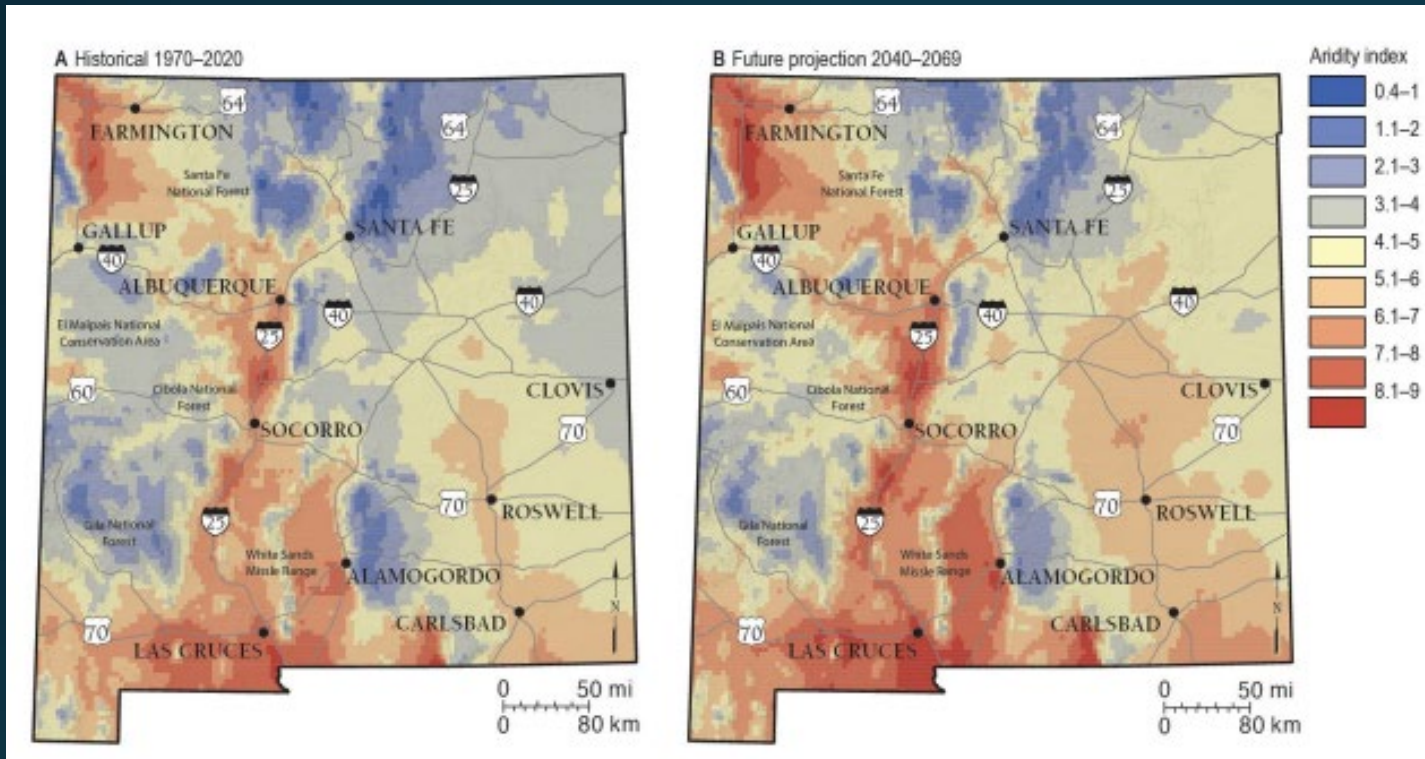
A Changing Climate

Temperature in the middle Rio Grande valley, NM is projected to increase by almost 6 degrees in 50 years.



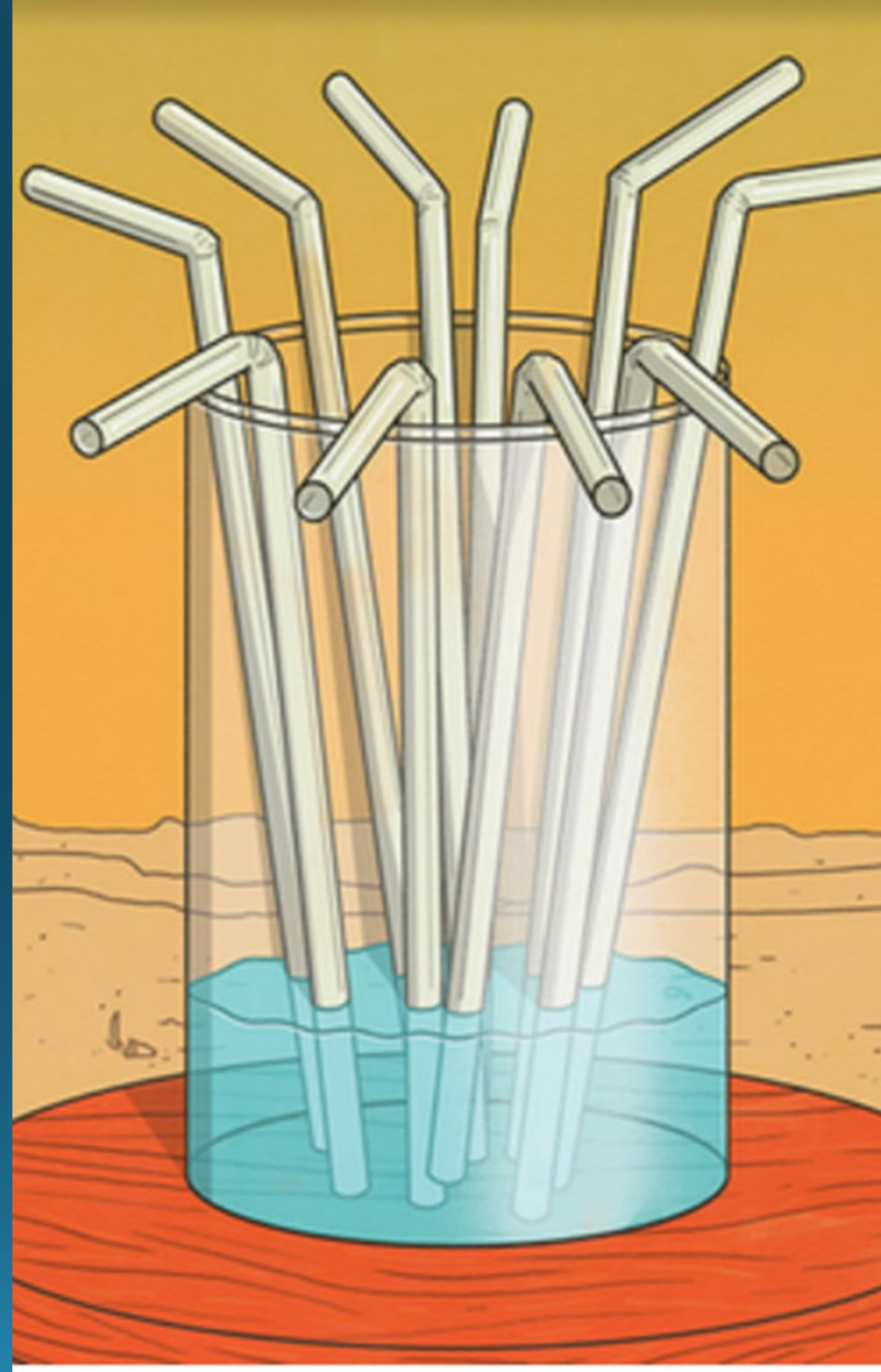
A Changing Climate

- The SW is becoming more arid, which is causing more frequent droughts, severe soil moisture deficits and the expansion of dry lands.



A Changing Climate

- In years to come, we can expect:
 - Shorter winters,
 - Earlier spring runoff,
 - Lower than average stream flow,
 - Increased aridity, &
 - More intense droughts.
- What will shrinking water supplies mean for the many Tribes whose water claims that are yet to be defined?
- Will it be harder or easier for Tribes to get their water recognized as river flows falls by a projected 25% in 50 years and our region becomes more arid?



New Mexico's Numbers:

- **23** is the number of Tribes, Pueblos and Nations in NM.
- **43** is the total combined number of water claims that the Nations, Pueblos and Tribes in NM have in the various river basins.
- **9** is the number of settled or adjudicated claims.
- **21** are pending at stages ranging from beginning assessment to fully executed settlement agreements awaiting congressional approval.
- **13** have not begun to be addressed.
- **12** is the total number of Pueblos/Tribes/Nations that have claims in unadjudicated river basins.

Pueblos and Tribes with water claims in basins without adjudications

Stream System	Pueblo, Nation, Tribe	Adjudicator	Status
Middle Rio Grande	Cochiti Pueblo	None	Assessment Phase
Middle Rio Grande	Isleta Pueblo	None	Assessment Phase
Middle Rio Grande	San Felipe Pueblo	None	Assessment Phase
Middle Rio Grande	Sandia Pueblo	None	Assessment Phase
Middle Rio Grande	Santa Ana Pueblo	None	Assessment Phase
Middle Rio Grande	Santo Domingo Pueblo (Kewa)	None	Assessment Phase
Galisteo River	Santo Domingo Pueblo (Kewa)	None	TBD
Mimbres River	Fort Sill Apache Tribe	None	TBD
Rio Embudo	Picuris Pueblo	None	TBD
Rio Puerco	Isleta Pueblo	None	TBD
Rio Puerco	Navajo Nation	None	TBD
Rio Salado	Navajo Nation (Alamo Band)	None	TBD
Santa Clara Creek	Santa Clara Pueblo	None	TBD
Upper Rio Grande	Ohkay Owingeh	None	TBD
Upper Rio Grande	San Ildefonso Pueblo	None	TBD
Upper Rio Grande	Santa Clara Pueblo	None	TBD



Adjudication: Finality & Binding Water Users

- Most western states follow the **doctrine of prior appropriation** for the regulation of water rights.
 - In times of shortage, the most senior users (those that started using water the earliest in time) get their water needs met prior to the more junior users.
- A general stream adjudication (adjudication) is the court process used to determine the priority of water rights.
 - All water right holders are legally joined in the court proceeding, evidence is presented to a judge and parties can challenge each other's claims.
- The adjudication is complete when all water users' rights are finally determined and included in a court decree.
- Water users are bound by the terms of the decree.
- Having a **final** determination that is not subject to challenge is important for Tribes, the US, the State and other parties.

1st in time = 1st in right



ZUNI RIVER AND GARDENS, LOOKING WEST

COURTESY OF: ZUNI ASHIWI AWAN MUSEUM & HERITAGE CENTER





1. Is there pending general stream adjudication or other litigation?

On-going litigation does not have to be a prerequisite to the settlement of Indian water rights claims. However, the finality of settlement demanded by the Department as the trustee of Indian resources can best be achieved by the entry of a final decree in general stream adjudication. A pending adjudication also provides a level of risk and uncertainty to the parties that can create an impetus to discuss settlement. There are, however, situations in which finality may be achieved in other ways. For example, if supplemental water is supplied to a tribe through a contractual arrangement, it may not be necessary to bind each and every local water user by a court decree. Separate litigation and subsequent court-ordered mediation efforts may also provide another means to settlement.

means to settlement.

2. Is there an identified mechanism to bind necessary parties to the settlement, such as a court decree in general stream adjudication?

Closely related to the issue of finality is whether the parties have identified and are willing to commit to a binding settlement mechanism. The most obvious settlement mechanism is the entry of a final decree in general stream adjudication. If this mechanism is not contemplated, what alternative is proposed?

3. The scope of the detriment being suffered by the Tribe and immediacy of harm to trust resources.

In the absence of fully adjudicated rights, tribal water rights and trust resources dependent upon those water rights often suffer because of the over-appropriation of water by other water users.

Finality for
the U.S.

Factors to Consider in
Appointing New Teams

1/20/2010






United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

Memorandum

FEB -3 2010

To: All Team Members

From: Pamela Williams, Director, Office of Indian Water Rights 

2. Is there an identified mechanism to bind necessary parties to the settlement, such as a court decree in general stream adjudication?

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3. The scope of the detriment being suffered by the Tribe and immediacy of harm to trust resources.

In the absence of fully adjudicated rights, tribal water rights and trust resources dependent upon those water rights often suffer because of the over-appropriation of water by other water users.

A settlement may offer the most effective and swift method of fulfilling the Department's trust responsibility to protect and preserve tribal property rights and the associated natural resources. The scope of detriment and necessity for immediate action should be carefully considered.

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Finality for
the U.S.

Factors to Consider in
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1/20/2010





United States Department of the Interior

OFFICE OF THE SECRETARY

Washington, DC 20240

JAN 11 2022

The Honorable Stuart Paisano
Chairman, Coalition of Six Middle Rio Grande Basin Pueblos
Pueblo of Sandia
481 Sandia Loop
Bernalillo, New Mexico 87004

The team will evaluate the factors addressed in the Coalition Pueblos' request and assess the opportunities that may be available to define and secure the Coalition Pueblos' water rights, including an appropriate binding mechanism that would resolve their water rights and bring certainty to other Rio Grande communities. I will be working with the Secretary's Indian Water

Working Group agreed to appoint a Federal assessment team.

The team will evaluate the factors addressed in the Coalition Pueblos' request and assess the opportunities that may be available to define and secure the Coalition Pueblos' water rights, including an appropriate binding mechanism that would resolve their water rights and bring certainty to other Rio Grande communities. I will be working with the Secretary's Indian Water Rights Office (SIWRO) to initiate next steps, including the identification of team members.

The Department, through SIWRO and the Federal assessment team, looks forward to working with the Coalition Pueblos, the State of New Mexico, and other stakeholders in assessing the possibility of a negotiated settlement that would resolve the Coalition Pueblos' water rights. If you have any questions, please do not hesitate to contact Ms. Pamela Williams, SIWRO Director, at (202) 262-0291 or pamela_williams@ios.doi.gov.

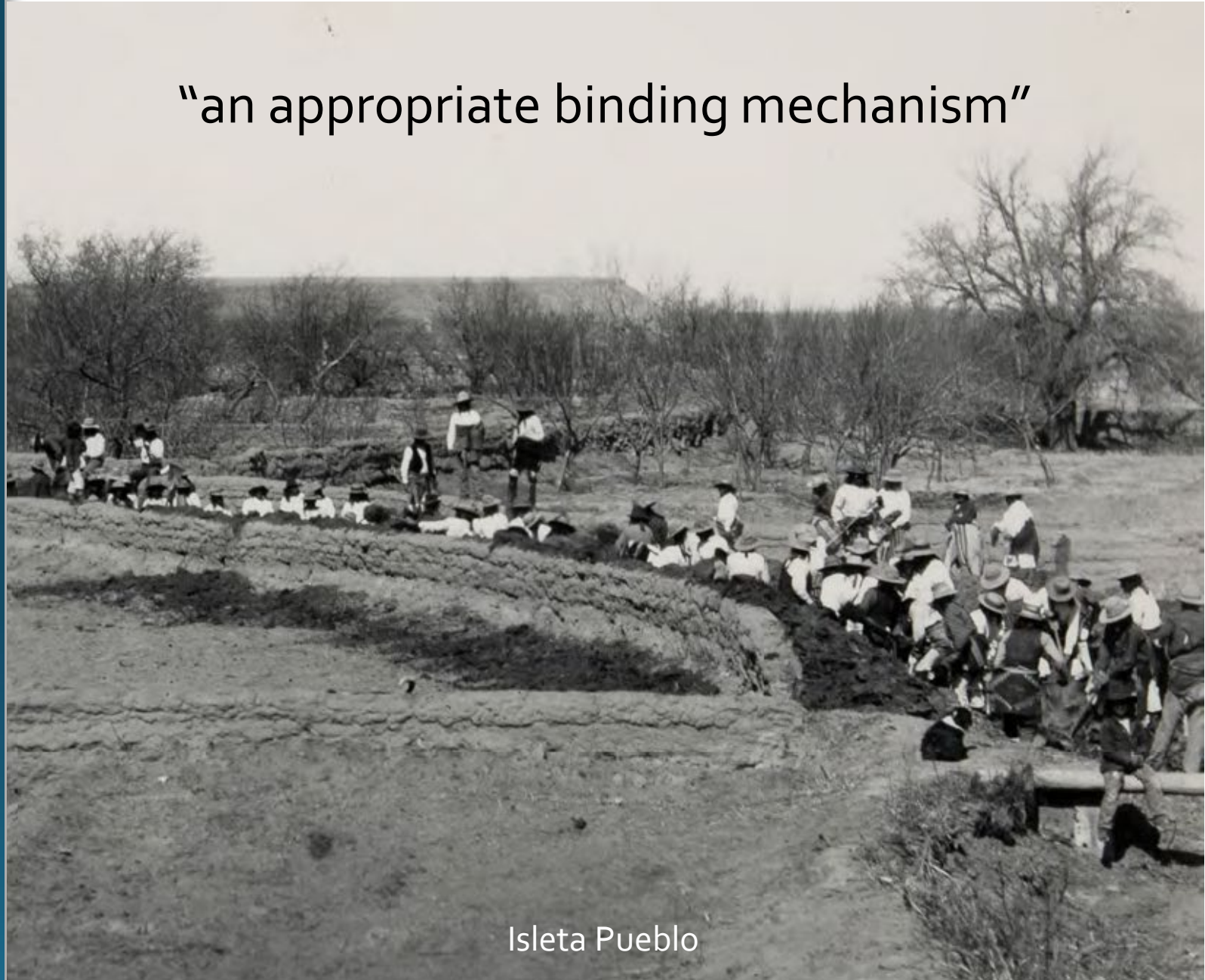
Sincerely,

Elizabeth Klein
Chair, Working Group on Indian Water Rights
Settlements



“an appropriate binding mechanism”

- Could a Tribe and a State, with the support of the U.S., enter a Tribal-State Compact akin to an interstate compact?
- If Congress approved such a Tribal-State Compact would that achieve finality and bind all water users?
- Are there any examples or models to consider?
- With a grant from the Thornburg Foundation and the support of the Utton Transboundary Resources Center, I researched these questions.



Isleta Pueblo

Ditch Cleaning Group - photo by Charles Lummis, 1891 - (P8591) Southwest Museum, Autry National Center, Los Angeles



“an appropriate binding mechanism”

“The fairest solution [for fulfilling Tribal water claims] seems to be to treat Indian claims as analogous to interstate waters allocated to another state by interstate compact.”

Dan Tarlock, One River, Three Sovereigns: Indian and Interstate Water Rights, 22 Land & Water L. Rev. 631, 653 (1987).



ZUNI WAFFLE GARDEN

© Governors Photo



Interstate State Compacting Authority

- States have a right to an equitable share of water from interstate streams.
- There are 3 ways to determine a state's share:
 1. States may bring an original action in the U.S. Supreme Court for an equitable apportionment;
 2. States may negotiate a compact among themselves that becomes binding once Congress and the respective state legislatures approve it; or
 3. Congress itself may preempt the states' quasi-sovereign interests in interstate waters by enacting a statutory apportionment.
- Negotiation of an interstate compact is the preferred method.



Interstate State Compacting Authority

- Compacts are both contracts among the signatory states and, once ratified by Congress, become federal law.
- The Compact Clause in the Constitution allows states to retain what the Supreme Court has describes as the sovereign right to make agreements and compacts.
 - Provided that Congress consents...
- The Supreme Court has held that states have the sovereign power to bind their citizens and subordinate state-based, privately held, water rights to an interstate compact approved by Congress.
 - *See Hinderlider.*
- States can only allocate the water within their boundaries that remains after they have satisfied their water delivery requirements to the downstream state.



Hinderlider v. La Plata River & Cherry Creek Ditch Co.

- The Ditch Co. sued the CO State Engineer challenging his administration of water pursuant to the La Plata River Compact, entered between CO & NM and approved by Congress.
- Per the Compact, CO and NM agreed to rotating 10-day water deliveries between the states during the hot summer months when the river ran very low.
- The Ditch Co.'s rights along with the relative rights of all water users in CO were adjudicated in an 1898 decree.
- The Ditch Co. claimed that its rights under that decree entitled it to all the water it needed - regardless of CO's compact delivery obligations to NM.
- The Ditch Co. "insisted that the Compact attempted to surrender to New Mexico, and thus destroy, vested property rights of Colorado citizens."



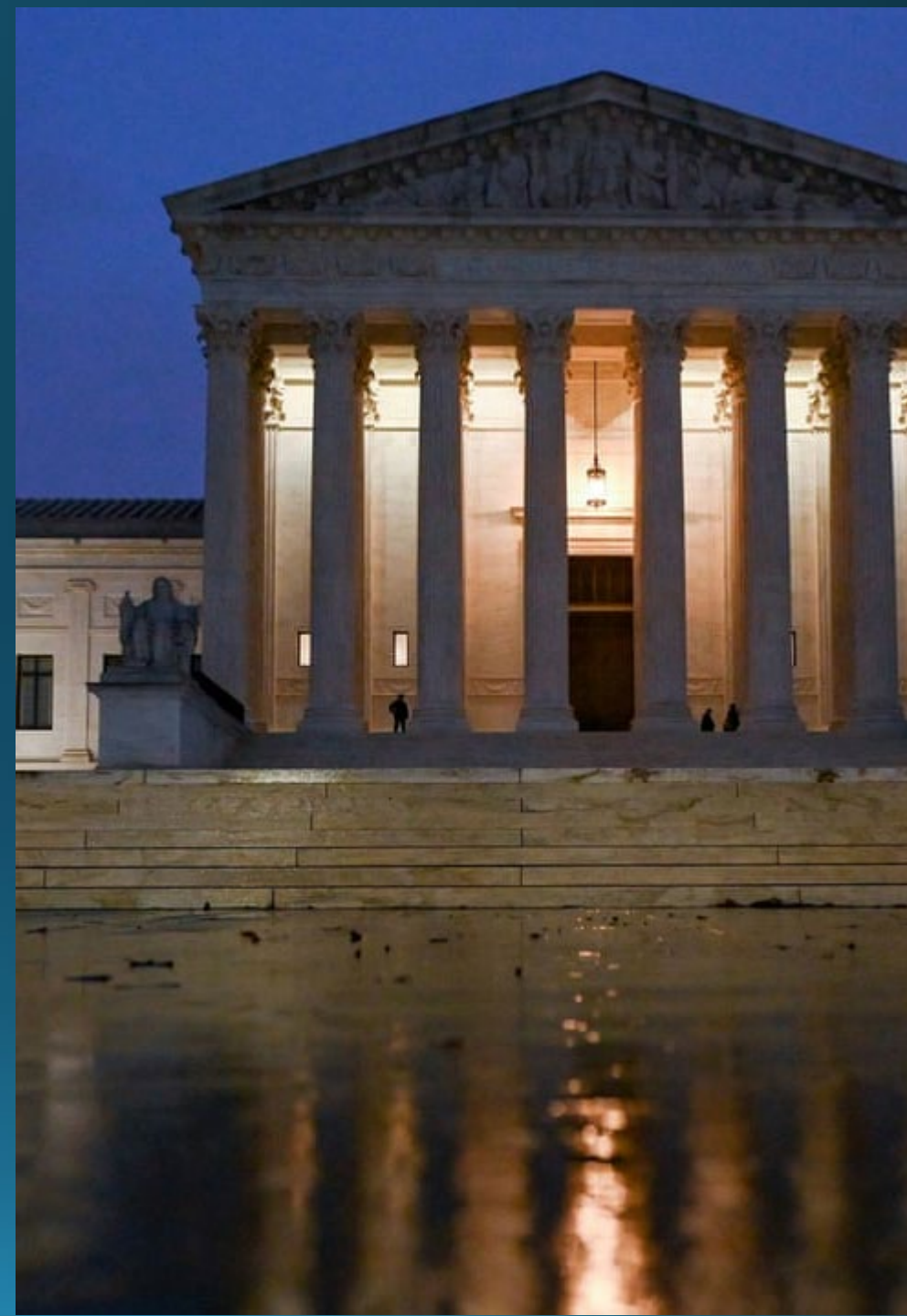
Hinderlider v. La Plata River & Cherry Creek Ditch Co.

- SCOTUS ruled against the Ditch Co. holding that the Compact was a limit on its rights:
 - “the Colorado decree could not confer upon the Ditch Company rights in excess of Colorado's share of the water of the stream...”
- SCOTUS affirmed that compacts are a legislative means of resolving boundary disputes without the need for judicial intervention.
 - Harkening back to “the age-old treaty-making power of independent sovereign nations.”
- SCOTUS shot down the Ditch Co.’s claims of violation of its due process rights under the 5th and 14th Amendments of the US Constitution.



Hinderlider v. La Plata River & Cherry Creek Ditch Co.

- “Whether the apportionment of the water of an interstate stream be made by compact...or by a decree of this Court, the apportionment is binding upon the citizens of each State and all water claimants, even where the State had granted the water rights before it entered into the compact.”
- SCOTUS reasoned that once Congress consents to a compact, it restores the states’ “original inherent sovereignty.”
 - As part of their sovereign authority, the states can bind the rights of their citizens to an interstate compact.
- Although SCOTUS’ reasoning was based on the facts of the case and that the river must be equitably apportioned between the two states, the underlying principles of sovereign authority and treaty-making power would apply to a Tribal-State Water Compact.



Compacting Authority between Tribes & States

- Unlike the compacting authority between states, the authority of Tribes and States to enter compacts is not well defined in law.
 - The Indian Gaming Regulatory Act is an example of Tribal State compacting.
- **The Tribal State Compact Act of 1978** (reintroduced in 1979 and 1981)
 - Congress considered establishing a formal procedure whereby tribes and states could negotiate and ratify compacts.
 - Bruce Babbitt, strongly endorsed the proposed bill, stressing that that Tribes and States had an opportunity to improve problem solving processes "not as adversaries, but as neighbors."
 - Concerns remained that such an act would seriously erode the longstanding principle of strict federal control over dealing between Tribes and States.



MT Governor Steve Bullock signing the Confederated Salish and Kootenai Tribe Water Compact With Tribal Chairman Vernon Finley in 2015.



Compacting Authority between Tribes & States

- Tribes are sovereign nations:
 - “[T]ribes are unique aggregations possessing attributes of sovereignty over both their members and their territories,” *U.S. v. Wheeler*, 435 U.S. 313, 323 (1978).
 - However, they are no longer “possessed of the full attributes of sovereignty,” *U.S. v. Kagama*, 118 U.S. 375, 381 (1886), having relinquished some part of it by “[t]heir incorporation within the territory of the United States and their acceptance of its protection.” *Wheeler*.
- State sovereignty:
 - “[P]owers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” 10th Amendment.
 - State sovereign authority to make treaties is restored with congressional approval. See *Hinderlider*.



MT Governor Steve Bullock signing the Confederated Salish and Kootenai Tribe Water Compact with Tribal Chairman Vernon Finley in 2015.



Compacting Authority between Tribes & States

- Congress has plenary and exclusive powers to legislate with respect to Indian tribes pursuant to the Indian Commerce and Treaty Clauses of the U.S. Constitution.
 - *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 172 n.7 (1973).
- Notwithstanding federalism concerns, a congressionally approved Tribal-State Compact would have the force of federal law and could achieve finality for Tribal water rights and bind all water users.



MT Governor Steve Bullock signing the Confederated Salish and Kootenai Tribe Water Compact with Tribal Chairman Vernon Finley in 2015.



MT's Reserved Water Rights Compact Commission

- The Commission negotiates settlement of Tribal and Federal reserved rights.
- MT has achieved 18 compacts:
 - Settling reserved water rights within the state for all 7 Indian Reservations;
 - Addressing National Wildlife Refuges, National Wild and Scenic Rivers, National Parks, and Bureau of Land Management and Forest Service land.

Montana Water Right Compacts



Montana Water Right Compacts



MT's Reserved Water Rights Compact Commission

- No other state has created a similar commission for resolving Tribal or Federal reserved rights.
- MT's Reserved Water Rights Compacts are not like interstate compacts, and they require entry of a decree in an adjudication.
- Nonetheless, MT's Commission provides ideas for how a state could engage in the process of negotiating a Tribal-State Water Compact.



MT Compact Commission: Statutory Framework

- Mission: Negotiate water rights “compacts for the equitable division and apportionment of waters between the state and its people and the several Indian tribes claiming reserved water rights within the state.”
- Authorization: Commence compact proceedings and to “negotiate with the Indian tribes or their authorized representatives jointly or severally to conclude compacts....”
- Acts on behalf of the state and its citizens as a whole and does not represent the interests of individual water users.

A story map



Montana Water Right Compacts (Scroll down for a bird's

Indian Country Water Compacts



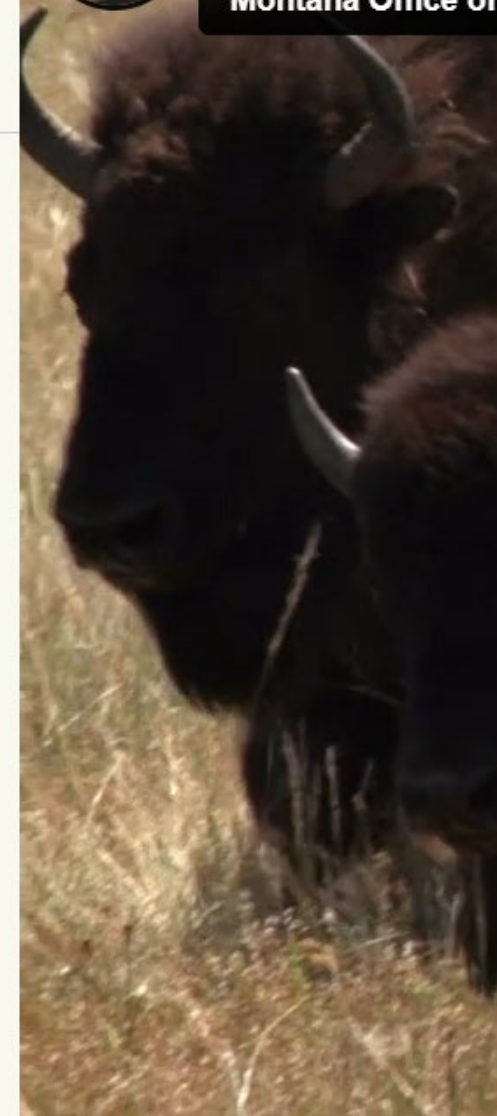
Office of Tourism

The Montana Legislature has approved water right Compacts for all seven Indian Reservations in the state:



Introducing

Montana Office of



MT Compact Commission: Statutory Framework

- Composed of:
 - 2 members appointed by the Speaker of the House of Representatives (one from each political party),
 - 2 members appointed by the President of the Senate (one from each political party),
 - 4 members designated by the Governor, and
 - 1 member designated by the Attorney General.
- Members are appointed to staggered four-year terms and may be reappointed.

A story map



Montana Water Right Compacts (Scroll down for a bird's

Indian Country Water Compacts



Office of Tourism

The Montana Legislature has approved water right Compacts for all seven Indian Reservations in the state:



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MT Compact Commission: Statutory Framework

- Reports to the chief water judge on the status of its negotiations every six months.
- Once the parties have agreed to a compact, it must be ratified by the MT legislature, the Tribal governing body and the appropriate federal authority.
- Upon ratification, the terms of the compact must be included in the preliminary decree of the MT Water Court.
- The Water Court will then consider the rights of individual water users and integrate the compact with other water rights in the basin to achieve a final decree.
- At that stage, individual water users can object to the compact, and may void the compact if the court sustains any objections.

A story map



Montana Water Right Compacts (Scroll down for a bird's

Indian Country Water Compacts



Office of Tourism

The Montana Legislature has approved water right Compacts for all seven Indian Reservations in the state:



Introducing

Montana Office of



MT Compact Commission: Public Engagement

- A key to the MT Compact Commission's success has been its ability to gain public support.
- Having state legislators on the MT Commission helps the process.
- The MT Compact Commission creates opportunities for public participation in the compact negotiation process and has created meaningful opportunities for public engagement.
 - Including "ranch by ranch" meetings with individual water users and irrigation districts.
- In some instances, the MT Commission served in the role as facilitator between water users and Tribes – developing solutions and applying for state grants to fund them.



MT Compact Commission's Origin Story

- MT's desire to quantify all the water rights within its boundaries was spurred by a growing concern that Congress would allocate MT's unused water to other states.
- In 1973, the state legislature enacted the MT Water Use Act to protect its water through the adjudication of all water rights developed under state law, and for all federal and Indian reserved water rights.
- In 1979, the legislature added the MT Reserved Water Rights Compact Commission after a series of hearings.

Chapter 690 1979

Bill H _____ S 76

Original bill & hist. C

H. Committee on Agriculture, Livestock & Irrigation S. Committee on Agriculture

Select Committee	Hearing Date(s)	C	Hearing Date(s)
<u>Water</u>	<u>Jan 19</u>	<u>_____</u>	<u>Jan 19</u>
	<u>Mar 12</u>	<u>_____</u>	<u>Jan 26</u>
	<u>Jan 31</u>	<u>_____</u>	<u>_____</u>
	<u>Mar 29</u>	<u>_____</u>	<u>_____</u>
	<u>Feb 02</u>	<u>_____</u>	<u>_____</u>
	<u>Mar 30</u>	<u>_____</u>	<u>_____</u>
	<u>Feb 09</u>	<u>_____</u>	<u>_____</u>
	<u>Apr 02</u>	<u>_____</u>	<u>_____</u>
	<u>Feb 28</u>	<u>_____</u>	<u>_____</u>
	<u>Apr 03</u>	<u>_____</u>	<u>_____</u>
	<u>Apr 09</u>	<u>_____</u>	<u>_____</u>
	<u>Apr 05</u>	<u>_____</u>	<u>Jan 29</u>
	<u>Date Out</u>	<u>_____</u>	<u>_____</u>

Did this bill originate in an interim committee? Yes No

Committee _____ Report _____

There are no minutes for House Agriculture Com
the bill was re-referred to Select Committee
Water.



MT Compact Commission's Origin Story

- The draft legislation required all water right claimants, including the U.S. and Tribes, to file statements of claims by June 30, 1983, to prevent a presumption of abandonment of their rights.
- MT's Tribes were not in favor of requiring Tribes to file claims or risk losing the claimed rights and sought to be excluded from the filing requirement.
 - "Indians will lose all rights to their water because they might not be using or exercising water...in the same way that the rest of Montana is exercising water. This is punishment of Indians for not using...water as fast as whites...The definition "beneficial use" of water does not recognize cultural, religious and spiritual water uses...In addition, Indians have received very little financial assistance in developing their own water resources." Ft Belknap Indian Community.

CHAPTER. NO. 697

SENATE BILL NO. 76

INTRODUCED BY BOYLAN, TURNAGE, GALT,
GRAHAM, KOLSTAD, CONOVER, MANLEY, SEVERSON,
THIESSEN, DOVER, NELSON, E. SMITH, S. BROWN

BY REQUEST OF THE SUBCOMMITTEE ON WATER RIGHTS

IN THE SENATE

January 8, 1979	Introduced and referred to Committee on Agriculture, Livestock, and Irrigation.
January 9, 1979	Fiscal note requested.
January 17, 1979	Fiscal note returned.
January 30, 1979	Committee recommend bill do pass as amended. Report
February 1, 1979	Printed and placed on members' desks.
February 2, 1979	Second reading, do pass.
February 3, 1979	Considered correctly engrossed.
February 5, 1979	Third reading, passed. Transmitted to second house.

IN THE HOUSE

February 6, 1979	Introduced and referred to Committee on Agriculture, Livestock, and Irrigation.
February 7, 1979	Rereferred to Select Committee on Water.
April 6, 1979	Committee recommend bill be concurred in as amended. Report adopted.



MT Compact Commission's Origin Story

- The idea of a compact commission first emerged on February 2, 1979, during a House Committee meeting "to work with the Indian tribes on the water reservations."
- Jim Sanaver, Asst. to the Asst. Secretary of Indian Affairs, stated that he had been asked to assist the Tribes in working out a solution with MT.
- Sanaver presented the MT House Committee with a compact negotiated between the State of Utah and the Ute Indian Tribe of the Uintah and Ouray Reservation.
- Sanaver said "We hope to work something similar out with the State of Montana."

February 2, 1979

The meeting was called to order by Chairman Day at 12:35 p.m. with all members present except Representative Robbins. The purpose of meeting today is to work with the Indian tribes on the water reservations.

REPRESENTATIVE SCULLY explained that this meeting would give the Indians an opportunity to explain their problems with their inclusion in Senate Bill No. 76, and we will work together as a whole to try and work out a satisfactory agreement with them.

JIM SANAYER, Department of Interior, Washington D.C., stated that he had been asked to assist the Indian tribes with working out a solution to their problems. He presented the committee with a copy of a compact that the Indians were working out with the State of Utah on the water reservations in their state. This compact is now ready to be enacted. We hope to work something similar out with the State of Montana. (compact attached)

REPRESENTATIVE SCULLY stated that this is the kind of thing that we should work on. The question is the process that we should use to accomplish it. Should we draw up a compact or just what. We want to work out something that is agreeable to both parties.

REPRESENTATIVE KEMMIS asked if there are any existing compacts with other states? The reply was they had similar agreements but not as many compacts, as with Utah.

JIM SANAYER continued by stating that one of the most promising solutions is the proposed Tribal-State Compact Act introduced in the Senate of the United States last year, and is expected to be reintroduced in this session. This proposed act does not alter current jurisdiction of federal, state, or tribal governments in Indian country, but does authorize tribes and states to enter into compacts or agreements which will provide for the application of civil, criminal and regulatory jurisdiction of either entity over Indians or non-Indians as the parties may see fit to agree. It is in this context that a Montana tribe or tribes hope to work toward mutually acceptable agreements with the State of Montana in the area of water rights. He then showed the committee a copy of the Tribal State Compact Act of 1978, hearing before the U.S. Senate Select Committee on Indian Affairs.

Since the mechanism for accomplishing an agreement or compact with the State of Montana requires Congressional, State, and Tribal action, we propose that the State of Montana exempt the water rights of Indian tribes from the proposed legislation dealing with water rights in the State for at least three years. During that time it is proposed that the State Legislature set up a mechanism for discussion and proposed resolution of water rights and jurisdictional problems with those tribes in Montana who desire to enter into such discussions.

BILL MORIGEMU, Flathead Councilman, explained that they have 125 tribes



MT Compact Commission's Origin Story

- Sanaver asserted that the mechanism for accomplishing an agreement or compact with MT requires Congressional, State, and Tribal action.
- He proposed that MT exempt the water rights of Tribes from the proposed legislation for at least 3 years. During that time, he proposed that the Legislature set up "a mechanism for discussion and proposed solution of water rights and jurisdictional problems with the tribes in Montana who desire to enter into discussions."
 - Sanaver referenced the proposed Tribal-State Compact Act that had been recently introduced in the U.S. Senate.
- By its February 28, 1979, meeting, the House Committee had drafted a proposed amendment that provided "authority to enter into compacts with Indian tribes and the United States in their behalf concerning Water Rights," and created the Montana Commission.

February 2, 1979

The meeting was called to order by Chairman Day at 12:35 p.m. with all members present except Representative Robbins. The purpose of meeting today is to work with the Indian tribes on the water reservations.

REPRESENTATIVE SCULLY explained that this meeting would give the Indians an opportunity to explain their problems with their inclusion in Senate Bill No. 76, and we will work together as a whole to try and work out a satisfactory agreement with them.

JIM SANAYER, Department of Interior, Washington D.C., stated that he had been asked to assist the Indian tribes with working out a solution to their problems. He presented the committee with a copy of a compact that the Indians were working out with the State of Utah on the water reservations in their state. This compact is now ready to be enacted. We hope to work something similar out with the State of Montana. (compact attached)

REPRESENTATIVE SCULLY stated that this is the kind of thing that we should work on. The question is the process that we should use to accomplish it. Should we draw up a compact or just what. We want to work out something that is agreeable to both parties.

REPRESENTATIVE KEMMIS asked if there are any existing compacts with other states? The reply was they had similar agreements but not as many compacts, as with Utah.

JIM SANAYER continued by stating that one of the most promising solutions is the proposed Tribal-State Compact Act introduced in the Senate in the United States last year, and is expected to be reintroduced in this session. This proposed act does not alter current jurisdiction of federal, state, or tribal governments in Indian country, but does authorize tribes and states to enter into compacts or agreements which will provide for the application of civil, criminal and regulatory jurisdiction of either entity over Indians or non-Indians as the parties may see fit to agree. It is in this context that a Montana tribe or tribes hope to work toward mutually acceptable agreements with the State of Montana in the area of water rights. He then showed the committee a copy of the Tribal State Compact Act of 1978, hearing before the U.S. Senate Select Committee on Indian Affairs.

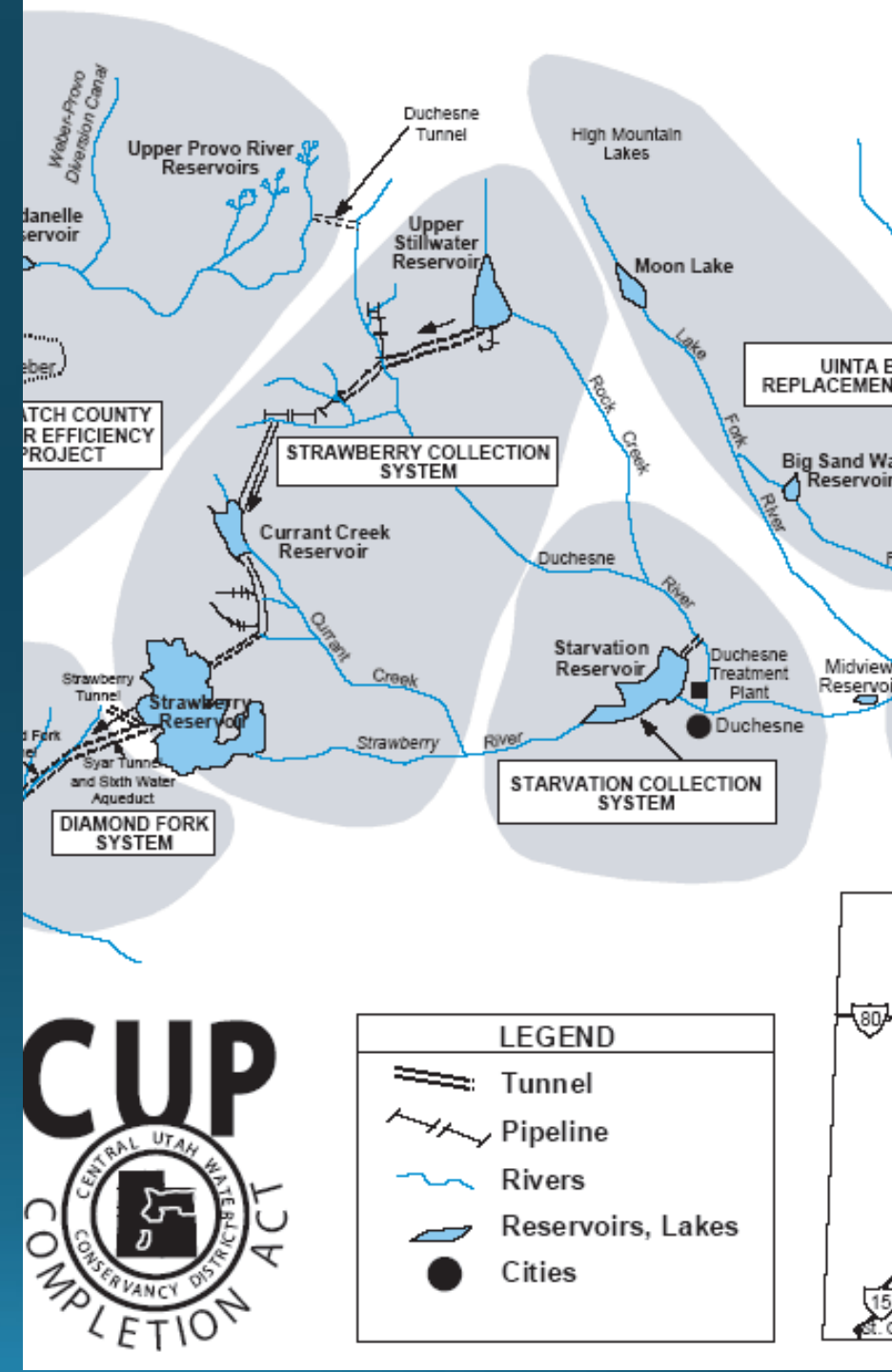
Since the mechanism for accomplishing an agreement or compact with the State of Montana requires Congressional, State, and Tribal action we propose that the State of Montana exempt the water rights of Indian tribes from the proposed legislation dealing with water rights in the State for at least three years. During that time it is proposed that the State Legislature set up a mechanism for discussion and proposed solution of water rights and jurisdictional problems with those tribes in Montana who desire to enter into such discussions.

BILL MORIGEMU, Flathead Councilman, explained that they have 125 t



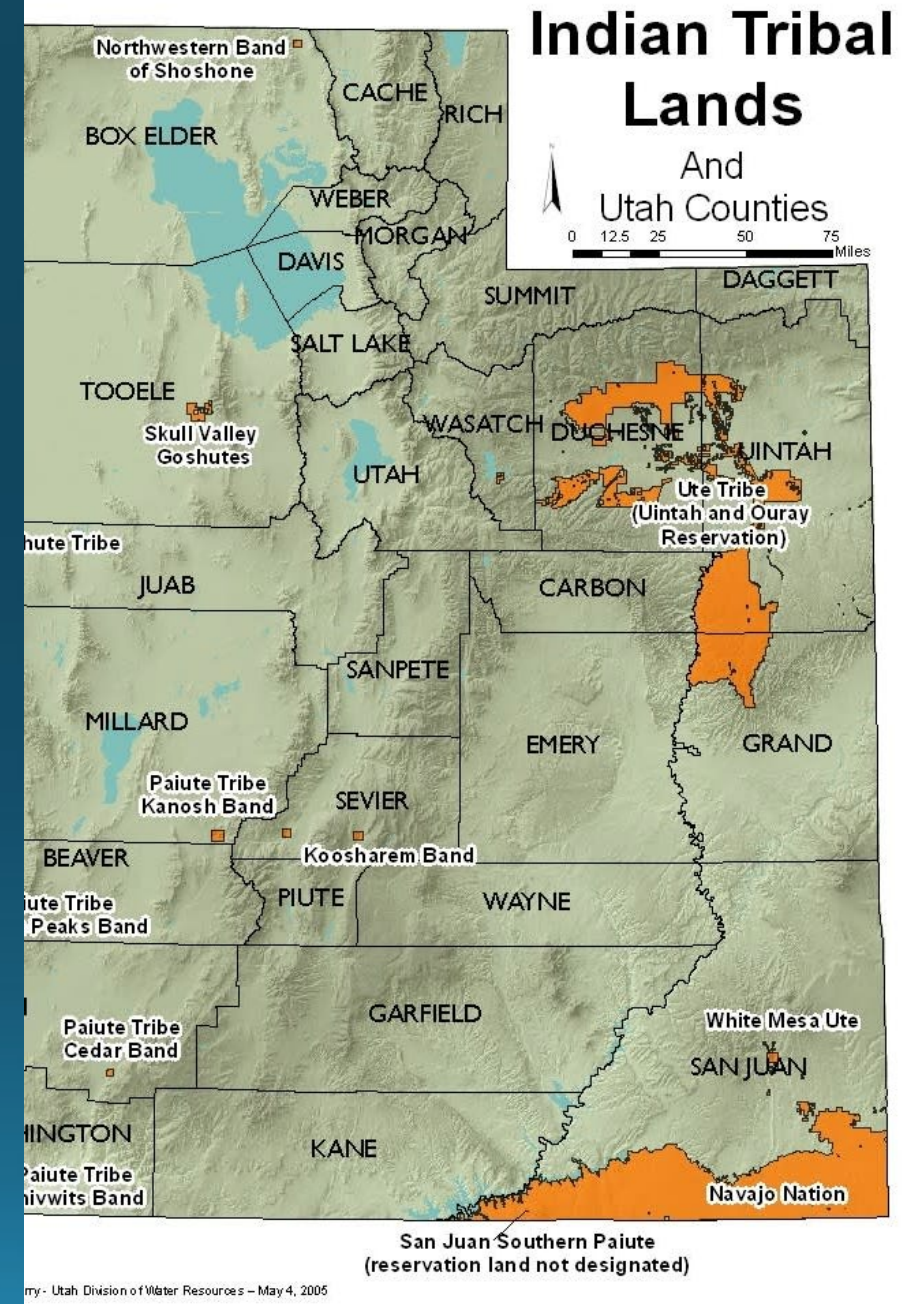
Ute Indian Water Compact

- The Ute Compact has attributes of an interstate compact and it does not require an adjudication.
- The Ute Compact aimed to settle the claims of the Ute Indian Tribe of the Uintah and Ouray Reservation
- In the late 1970s, UT, the Ute Tribe, and the US began water settlement negotiations.
- Utah's motivation to complete the Ute Compact was its desire to develop its allocation of the Colorado River through the Central Utah Project (CUP).
- The Ute Tribe had conditioned its support of the CUP upon the negotiation of an agreement to quantify and confirm the Tribe's water rights without resort to litigation.



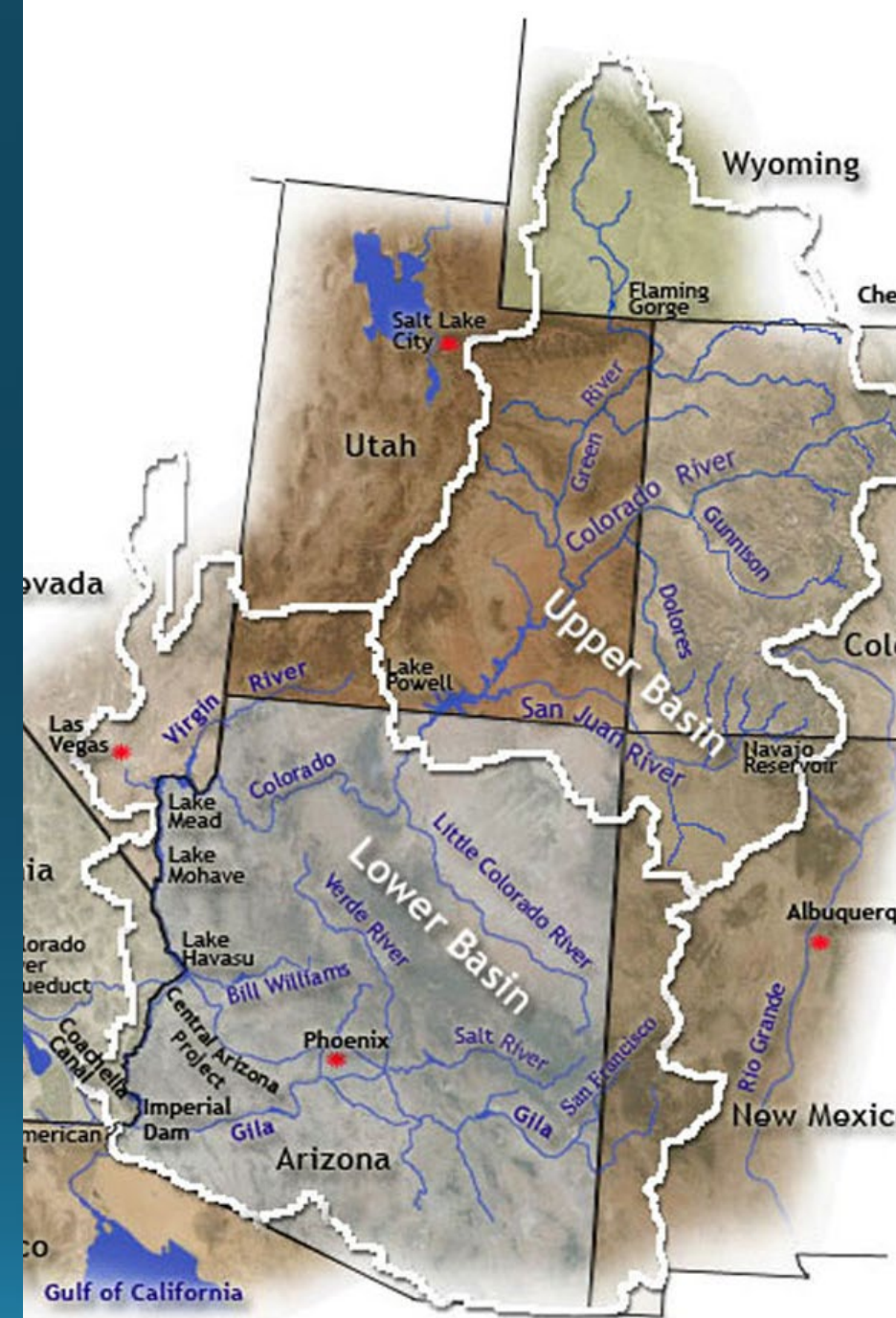
Ute Indian Water Compact

- Several versions of the Ute Compact exist:
 - The first Compact was approved by UT in 1980 and by the Ute Tribe in 1988.
 - In 1992, Congress approved a revised 1990 version the Ute Compact subject to re-ratification by Utah and the Ute Tribe.
 - In 2018, UT approved the Revised 1990 Compact; however, final approval of the Revised 1990 Compact has not occurred, and negotiation among the parties continues.
 - A 2009 version of the Compact was also proposed.



Ute Indian Water Compact

- All versions of the Ute Compact provides that the Tribe's water rights would be a sub-apportionment of UT's apportionment of the CO River.
 - The water rights allocated to the Tribe would be about 18 ½ percent of UT's share.
- "There is hereby reserved, quantified, apportioned, confirmed, and recognized from the waters apportioned to the State from the Colorado River System to: (i) the United States in perpetuity, in trust, as Winters Doctrine water rights for the Tribe and Allottees; and, (ii) those others possessing water rights derived by or through the Tribe, the Depletion of water in the amount of 248,943 Acre-Feet per annum..." *Art. III.*



Ute Indian Water Compact

- The Ute Compact does not require the entry of a court decree as a condition of its enforceability.
- “Each party acknowledges that in order for this Compact to constitute a final and permanent settlement of tribal reserved water rights, this Compact must be approved or ratified by the United States Congress, the Legislature of the State of Utah, and the Ute Indian Tribe through referendum of the Tribe's membership.” *Art. V.*
- “The parties hereto agree that the terms of this Compact have the force and effect of law...” *Art. V.*
- “This Compact may be included within any general stream adjudication.” *Art. V.*

its officers or employees to a claim for monetary damages in its efforts to so protect tribal water rights.

ARTICLE V

Ratification and Amendment

Each party acknowledges that in order for this Compact to constitute a final and permanent settlement of tribal reserved water rights, this Compact must be approved or ratified by the United States Congress, the Legislature of the State of Utah, and the Ute Indian Tribe through referendum of the Tribe's membership. The parties shall use their best efforts to have the approvals or ratifications undertaken as expeditiously as possible. The parties hereto agree that the terms of this Compact have the force and effect of law and agree to adopt all statutes, regulations and ordinances that are, or may be, necessary to harmonize existing statutes, regulations and ordinances with this Compact, and agree that this Compact may be included within any general stream adjudication. The Secretary of the Interior is authorized to take all actions necessary to implement this Compact.

This Compact is the result of a voluntary compromise agreement between the Ute Indian Tribe, the State of Utah and the United States of America. Accordingly, no provision of this Compact or its adoption as part of any pending general stream adjudication shall be construed as altering or affecting the determination of any issues relating to the claimed reserved water rights which may belong to other Indian tribes.



Tribal-State Water Compact?

“The fairest solution [for fulfilling Tribal water claims] seems to be to treat Indian claims as analogous to interstate waters allocated to another state by interstate compact.

First, Indian rights are assigned to the share, choate or inchoate, of the state in which the reservation exists.

Second, *Hinderlider* applies and state water rights are subordinated to Indian water rights just as state-created rights are subordinated to interstate compact allocations.”

A. Dan Tarlock, [One River, Three Sovereigns: Indian and Interstate Water Rights](#), 22 Land & Water L. Rev. 631, 653 (1987).

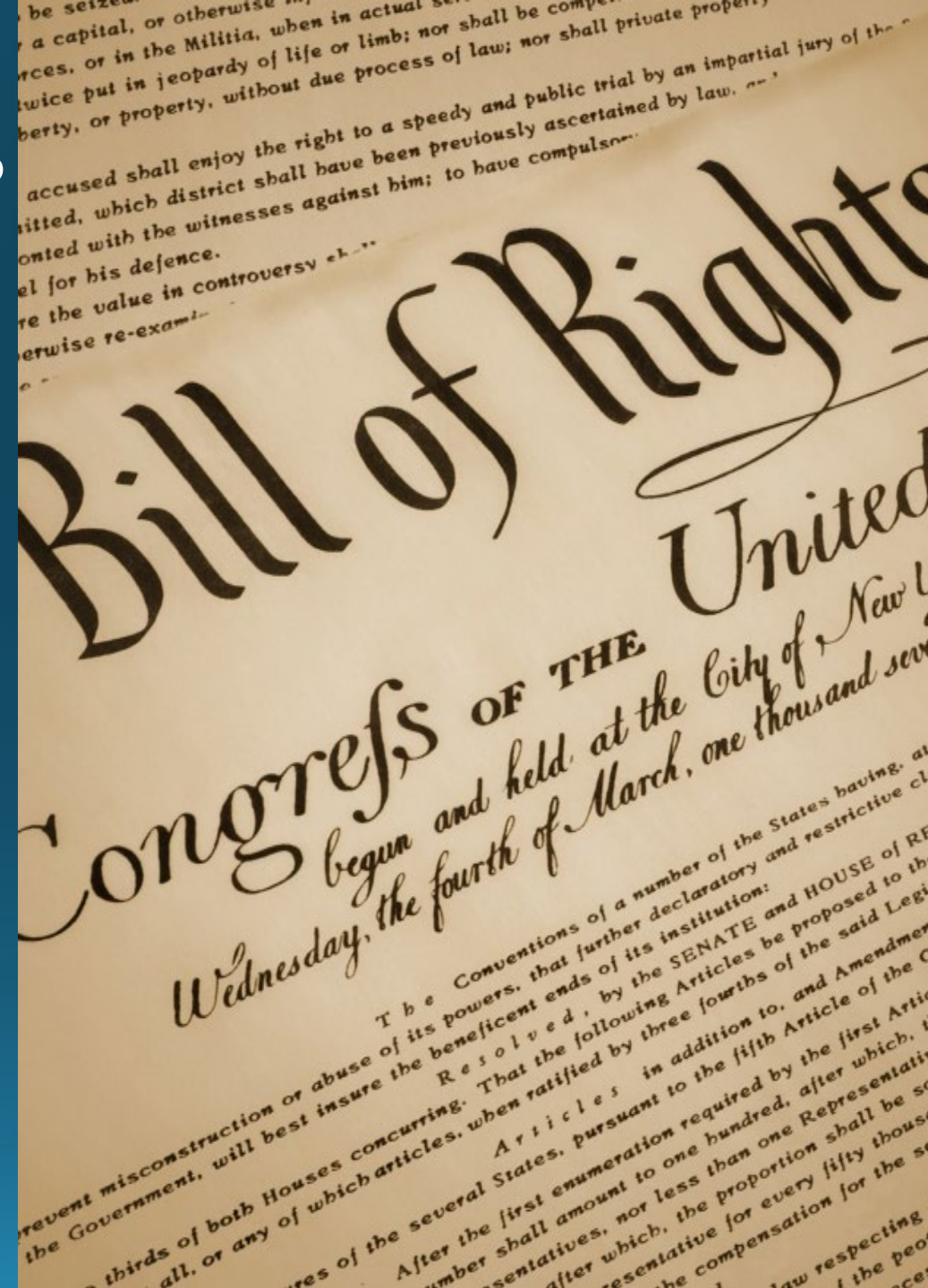


A. Dan Tarlock
Distinguished Professor and Scholar
of Water Law



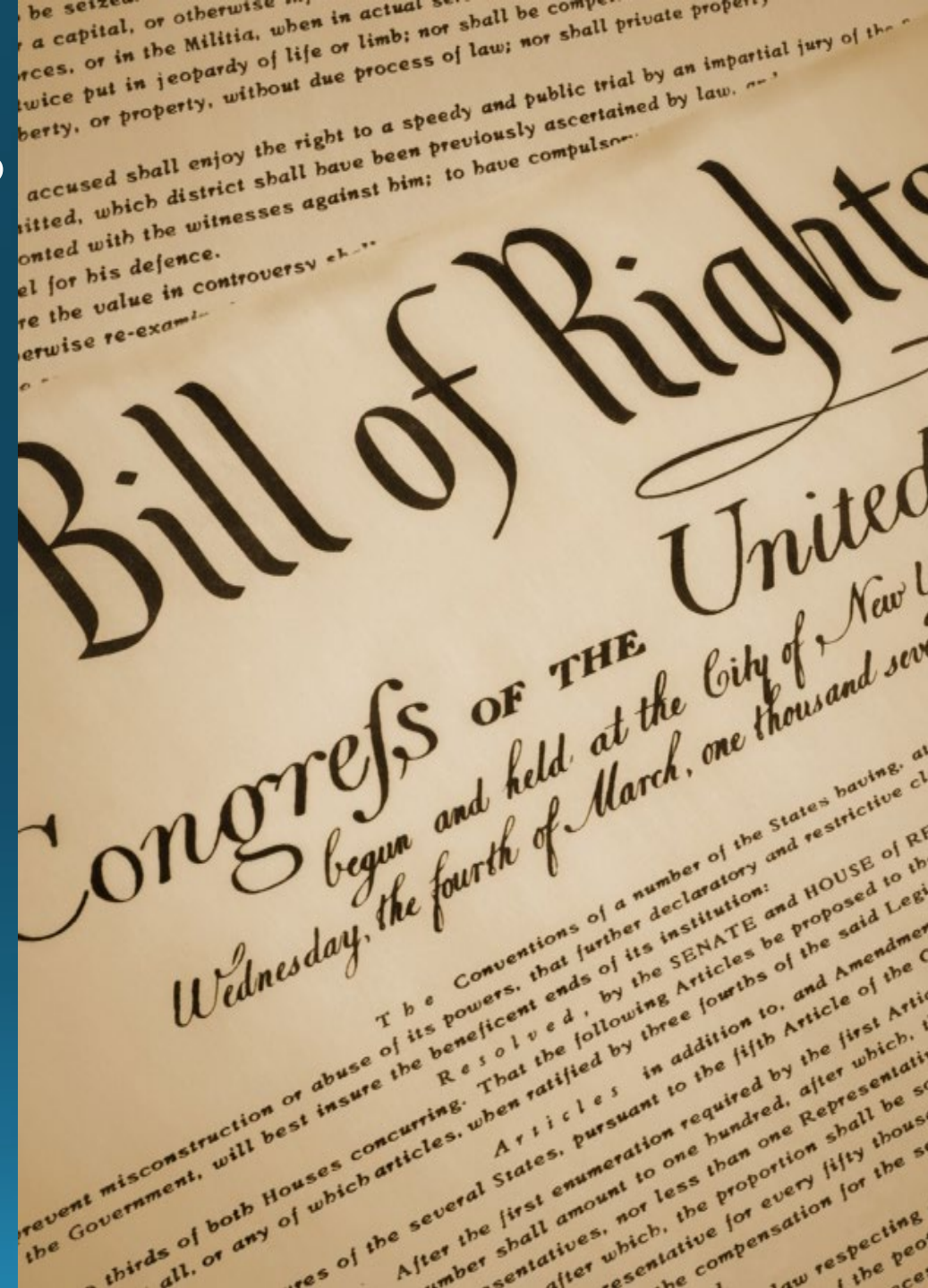
Tribal-State Water Compact?

- The United States Constitution protects citizens against deprivation of property “without due process of law,” or a private property “taken for public use, without just compensation.”
 - 5th and 14th Amendments.
- Individual water right owners who are not parties to a Tribal-State Water Compact and do not have the opportunity to challenge the terms in an adjudication may seek compensation for a “taking” of their rights without due process.



Tribal-State Water Compact?

- Takings claims are likely to fail because:
 - The Supreme Court has struck down claims that water right owners are unlawfully deprived of water by operation of a congressionally approved interstate compact. *See Hinderlider.*
 - Tribes generally have the most senior rights.
- A successful takings claim would provide compensation, but not a change to the final determination of a Tribe's water rights.
- Public engagement and support is critical, nonetheless.



Parting Thoughts...



A:shiwi A:wan Museum and Heritage Center
ZUNI RIVER, GARDENS & VILLAGE

COURTESY OF: ZUNI ASHIWI AWAN MUSEUM & HERITAGE CENTER

- Time is not on the side of Tribes that have yet to define their water rights.
- Adjudications cannot keep pace with our rapidly drying rivers.
- Tribes with claims in river basins that are not being adjudicated should not be penalized.
- A court decree in an adjudication is not the only way to legally define Tribal water rights.
- It is time for an alternative that recognizes Tribal sovereignty and state sovereignty.



Parting Thoughts...



A:shiwi A:wan Museum and Heritage Center
ZUNI RIVER, GARDENS & VILLAGE

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- A Tribal-State Water Compact is an alternative to a court decree because of the Tribes and States inherent sovereignty authority to enter compacts so long as Congress approves.
- A congressionally approved Tribal-State Water Compact would have the force of federal law, achieve finality and bind users.
- The State can provide non-tribal water right holders with opportunities for meaningful engagement in the process.
- A Tribal-State Water Compact could only succeed with the political support of all parties and potentially impacted neighboring states.



Questions?

