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A TRIBAL-STATE WATER COMPACT? EXPLORING TRIBAL AND STATE SOVEREIGN AUTHORITY, WITH CONGRESSIONAL CONSENT, TO QUANTIFY TRIBAL WATER CLAIMS

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I. INTRODUCTION AND OVERVIEW

In 1988, the late Bill Richardson quipped that "[t]here is no [more] divisive issue in the West than the dispute between Indians and non-Indians over water."[1] There is certainly a lot of history to back up that claim, but perhaps there are signs that the times are changing? Could the unprecedented inclusion of tribal nations in the negotiations concerning the future operation of the Colorado River be an indication that more equitable water allocations for tribes are on the horizon? One can hope.

In the last 40 years, Western states have recognized the benefits of good-faith negotiations with tribes to resolve tribal water claims.[2] It may be that some tribes and states reached a place and time where their interests are so aligned that they wish to exercise their respective inherent sovereign authority to resolve tribal water claims more efficiently without the shackles of a general stream adjudication. In 1987, water law scholar Dan Tarlock posited that 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."[3]

This paper explores the inherent sovereign authority of tribes and states to enter water compacts that, with the approval of Congress, have the power to definitively quantify negotiated tribal water rights. Specifically, it examines whether a congressional quantification pursuant to either a tribal water rights settlement or a theoretical tribal-state water compact could achieve finality without the heavy burden of completing a general stream adjudication.

The relationship between tribes and states concerning the rights and uses of Western water has shifted over time as each major Supreme Court ruling adjusts how or where tribal water is quantified. States went from ignoring tribal water claims in their apportionment of water through interstate compacts, to fighting tribal claims in state courts post McCarran Amendment,[4] to preferring to negotiate tribal water settlements and relying on tribal water rights to help solve major water crises.[5]

History proves that reaching a definitive resolution on tribal water rights through litigation is challenging due to the complex interplay of various government and private stakeholder interests, the lack of clear guidance on how to quantify tribal water rights,

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1. 134 Cong. Rec. H27882 (daily ed. Oct. 3, 1988) (statement of Rep. Bill Richardson).

2. DANIEL MCCOOL, NATIVE WATERS: CONTEMPORARY INDIAN WATER SETTLEMENTS AND THE SECOND TREATY ERA 8 (U. of Ariz. Press 2002) ("[W]e have, quite simply, entered the second treaty era, only this time it is water rather than land that is the object of these agreements. In Indian Country, water was to the twentieth century what land was to the nineteenth. One hopes the process will be more benign this time around. Perhaps we can learn from the mistakes of the first treaty era. In one sense that era was tragic for American Indians; it signaled the end of their traditional way of life, transferred enormous tracts of land to their enemies, and imposed a use regime that was utterly alien to them. On the other hand, it is the treaties that now stand between tribes and the omnipresent dominant society. Without these written guarantees of separateness, officially sanctioned by Anglo law, Indian tribes would have been swallowed up by the dominant society long ago. The reservations that resulted from the first treaty era are now the last vestiges of indigenous culture and political autonomy.").

3. A. Dan Tarlock, *One River, Three Sovereigns: Indian and Interstate Water Rights*, 22 LAND & WATER L. REV. 631, 653 (1987).

4. 43 U.S.C. § 666 (1952); *see infra* Sections II. B., C.

5. *See, e.g., Gila River Indian Community enters into three major agreements with Department of the Interior to address drought conditions on Colorado Rivers*, Gila River Indian News (April 21, 2023), https://www.gricnews.org/index.php/grin-articles/2023-articles/april-21-2023-articles/gila-river-indian-community-enters-into-three-major-agreements-with-department-of-the-interior-to-address-drought-conditions-on-colorado-river.

and the difficulties courts face in balancing these competing interests.[6,7] By the 1980's, Western states generally came to recognize that to protect their non-tribal constituents' significant water interests, the states needed to actively engage in negotiating water rights settlements with tribes. Since then, many tribes and states, with substantial support from the federal government, achieved settlement of tribal water claims that deliver "wet" water to tribal communities.[8] The federal government entered a total of thirty-nine tribal water settlements since 1978, and Congress has enacted legislation to approve thirty-five of these.[9] Considering that there are more than 200 tribal nations in the Western United States, many of which have water rights claims in multiple river basins, the number of settled claims are just a fraction of the total need.

The problem is that our natural environment is rapidly changing, and river flows are receding more quickly than unresolved tribal water claims can move to finality through the multi-decadal general stream adjudication process,[10] even when the parties have negotiated water right settlements.[11,12] Without a streamlined process to achieve finality for tribal water rights, all water users in river basins with undefined tribal water claims are at risk. Existing water users face the threat that when the tribes finally put their federal water rights to use; their rights may be impaired or destroyed without compensation.[13] This uncertainty deters water resources planning and development.[14]

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6. YULE KIM, CONG. RSCH. SERV., RL32198, INDIAN RESERVED WATER RIGHTS: AN OVERVIEW 1 (2008).

7. *See* United States v. Abousleman, 2023 WL 6314882, at *6 (D.N.M. Sept. 28, 2023).

8. CHARLES V. STERN, CONG. RSCH. SERV., R44148, INDIAN WATER RIGHTS SETTLEMENTS 2 (2023) ("Litigation of Indian water rights is a costly process that may take several decades to complete. Even then, Indian water rights holders may not see tangible water resources and may be awarded only 'paper water'—that is, they may be awarded a legal claim to water but lack the financial capital to develop those water resources. This situation occurs because, unlike Congress, the courts cannot provide tangible 'wet water' by authorizing new water projects and/or water-transfer infrastructure (including funding for project development) that would allow the tribes to exploit their rights.").

9. *Id.* at 6.

10. *See infra* Section II. C.

11. *See* Bolinger et. al, *2024: Climate Change in Colorado*, 3rd ed. (2024); s*ee also* Dunbar et. al., *Climate Change in New Mexico Over the Next 50 Years: Impacts on Water Resources*, N.M. Bureau of Geology and Mineral Resources, Bulletin 164 (2023).

12. *See generally* Federal Government's Role in Expediting State General Stream Adjudications, Western States Water Council, Position #458 (2020) (revised and readopted) (discussing how general stream adjudications are federal and state court actions that aim to resolve water claims in a particular river and groundwater basin, including those of the federal government and Indian tribes. Further, adjudications determine all aspects of each water right, including the priority date and create a formal inventory of water uses in a given river basin. The adjudication process provides each water right holder with the opportunity to assert their water right and to determine their right(s) relative to all the other users in the basin. Adjudications are not final and complete until the court enters a final decree into the record, which binds all the claimants to the court's determinations).

13. John E. Thorson et. al., *Dividing Western Waters: A Century Of Adjudicating Rivers And Streams*, Part II, 9 U. DENV. WATER L. REV. 299, 308 (2006) [hereinafter Thorson].

14. AMY LEWIS, NEW MEXICO INTERSTATE STREAM COMMISSION: RESILIENCE OF WATER USE SECTORS TO CLIMATE CHANGE IN NEW MEXICO, 68, 69 (2022) ("Research has shown that communities, states, and countries that have rules in place for managing shortages are better able to maintain peace among water users than those with no structure in place. Priority administration can be used to manage the distribution of water in adjudicated river basins, and shortage sharing agreements can also prepare a community to withstand the stress of a drought.").

Without defined water rights, tribal nations face the threat that existing uses of water to which the tribes are rightfully entitled will ultimately prevail over tribal water uses.[15] Tribal water settlements almost always develop in the context of a general stream adjudication—after the parties spend many years in costly court battles and finally become motivated to negotiate.[16] After the parties complete the difficult and many-years-long negotiation process and execute a settlement agreement, Congress must authorize the settlement and any federal funding.[17] Then, after congressional approval, the final determination of the tribes' water rights still does not occur until the adjudication court issues a final decree enshrining the settlement terms.[18] Virtually all tribal water right settlements require adjudication court approval and the issuance of a final decree as a condition precedent to enforcement of the settlement.[19] This requirement is to achieve finality of the water rights, to prevent the distribution of federal settlement monies prior to enforceability of the settlement, and to secure waivers of claims against the United States and other parties.[20] A problem with this approach is that it can expose enacted settlements, which have delicately balanced tribal and state water rights after years, if not decades, of extremely challenging work, to numerous court challenges. For example, in the settlement of the Pueblos of Nambe, Pojoaque, Tesuque, and San Ildefonso in the Aamodt adjudication in New Mexico, roughly 800 defendants objected to the entry of the settlement decree.[21] Courts must consider these objections even though federal, state, local, and tribal governments along with key stakeholders ratified the water right settlement, and Congress enacted legislation approving the settlement decree.

Considering the supreme authority of Congress,[22] it is not legally necessary for an adjudication court to issue a decree to achieve finality and enforceability of a tribal water rights settlement, so long as the settlement act quantifies the tribe's water rights.[23] Such

15. Thorson, *supra* note 14, at 307.

16. *Id.* at 305.

17. STERN, *supra* note 9, at 1.

18. Leslie Sanchez et al., *Beyond "Paper" Water: The Complexities of Fully Leveraging Tribal Water Rights*, FED. RSRV. BANK OF MINNEAPOLIS (May 3, 2022).

19. Except for the Ute Indian Water Rights Settlement (102 Pub. L. 575 (Oct. 30, 1992)), Indian water rights settlement Acts approve Indian water right settlement agreements but do not independently establish the quantity of a tribe's water rights and instead require a final court decree in an adjudication. *See, e.g.,* Aamodt Litigation Settlement Act, Pub. L. 111-291 (2010) ("Sec. 621. Settlement Agreement and Contract Approval. To the extent the Settlement Agreement. . .[does] not conflict with this title, the Settlement Agreement [is] authorized, ratified, and confirmed.") ("Sec. 623. Conditions Precedent and Enforcement Date . . . .The conditions precedent . . . are that . . . . (G) a partial final decree that sets forth the water rights and other rights to water to which the Pueblos are entitled under the Settlement Agreement and this subtitle and that substantially conforms to the Settlement Agreement has been approved by the United States District Court . . ., (H) a final decree that sets forth the water rights for all parties to the Aamodt Case and that substantially conforms to the Settlement Agreement has been approved by the United States District Court . . . .").

20. STERN, *supra* note 9, at 2, 5.

21. The Court allowed over two years to file objections and ultimately overruled all the objections when it approved the settlement and incorporated it into a partial final decree. New Mexico ex rel. State Eng'r v. Aamodt, 923 F.3d 798 (10th Cir. 2018).

22. U.S. CONST. art. 6, § 2, cl. 2.

23. *See, e.g.,* State ex rel. State Eng'r v. United States, 425 P.3d 723, 12 (2018) ("New Mexico's entry into the congressionally sanctioned intergovernmental agreement as part of the Settlement involved herein reinforces federal preemption of state control over the Navajo Nation's portion of the waters of the San Juan. The Settlement Agreement at issue herein expressly states,

enactment would then obviate the need to subject an enacted settlement to attacks from objectors in the adjudication process. Similarly, if a tribe and a state were to negotiate the terms of a settlement pursuant to their inherent sovereign authority, and Congress approved the resulting tribal-state water compact, it would bring finality and bind all water users.[24] This process would eliminate the need for approval from the adjudication court and the issuance of a final decree, resembling the approach taken when states negotiate and Congress authorizes an interstate water compact.[25] Under an interstate water compact, a state can only allocate the water within its boundaries that remains after it satisfies its water delivery requirements to the downstream state.[26] The Supreme Court recognizes 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.[27]

The closest example of an enacted tribal-state water compact is the compact negotiated among the Ute Indian Tribes of Uintah and Ouray (Ute Indian Tribe), the State of Utah, and the United States to resolve the Ute Indian Tribe's claims to water in the Uintah River Basin (Ute Indian Water Compact) enacted pursuant to the Ute Settlement Act.[28] The Ute Indian Water Compact explicitly provides that its purpose is to "apportion" water for the Ute Indian Tribes "from the waters apportioned to the State of Utah from the Colorado River System . . . ."[29] The Ute Settlement Act further clarifies that the "purpose" of "[t]his Act and the proposed revised Ute Indian Compact of 1990 are intended to (1) quantify the tribe's reserved water rights"[30] and the Act does not require entry of a final decree as a condition precedent to enforceability.

The State of Montana successfully entered water compacts with all the tribes within its borders. However, these compacts require court approval and entry of a final decree, a process that recently encountered difficulties. Montana's unique approach to Tribal-state water compacting highlights the complexities of integrating settled rights of enacted tribal water compacts into the state's general stream adjudication. Montana's Reserved Water Rights Compact Commission (Montana Commission) is mandated by state statute "to conclude 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."[31] Montana is the sole representative at the negotiation table for the State and non-tribal interests and engages in a robust public engagement process.[32] Until recently, the Montana Commission had a strong track record of gaining public support for tribal water compacts.[33] Following the approval of the Confed-

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'Congress approves, ratifies, and confirms the Settlement.' Such a congressionally approved settlement preempts the law of the participating states.").

24. *See infra* III. C. and D; *see* Tarlock, *supra* note 4, at 633.

25. *Id.*

26. *See* Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 96 (1938); *see also infra* III. C.

27. *See id* at 107; L. of Water Rights and Resources § 10:27.

28. *See* Ute Indian Rights Settlement Act, Pub. L. 102-575, 106 Stat. 4600 (1992).

29. Ute Indian Water Compact, art. III.

30. Ute Indian Rights Settlement Act, Pub. L. 102-575, 106 Stat. 4651, Sec. 501(b) (1992).

31. State ex rel. Greely v. Water Court of State of Mont., 214 Mont. 143, 146 (1984) *citing* MCA § 85-2-701.

32. *See* MCA § 2-15-212.

33. *See infra* V. B.

erated Salish and Kootenai Tribes (CSKT) Compact by Congress through the Montana Water Rights Protection Act in 2020,[34] approximately 1,200 defendants filed objections to the entry of the compact decree.[35] The challenges to the CSKT Compact exemplify the additional burden of finalizing a tribe's water claims through court approval, even after approval by Congress, the tribe and the state. States have the power to enforce interstate compacts on their water users, and this same authority could be used for tribal water settlements.

This paper begins with a description and comparison of tribal water rights and state-based water rights, and then looks at the general stream adjudication process before discussing the historic relationship among tribes, the United States, and states and the inherent sovereignty of tribes and states. It considers two case studies, the Ute Indian Water Compact and Montana's Reserved Water Rights Compact Commission, before addressing potential "due process" and "taking" claims that could arise with a tribal-state water compact. The paper concludes tribes and states have the inherent sovereign authority to enter water settlements or compacts that can achieve finality and bind all water users, provided Congress exercises its supreme power and grants approval.

II. TRIBAL V. STATE-BASED WATER RIGHTS

Although the federal government relinquished authority of water administration to the states around the turn of the 19th century,[36] history reveals the division of authority was anything but straight forward.[37] Although tribes have potentially large claims to water rights, quantification of such claims is fraught, because the federal reserved rights doctrine under which they were recognized is "wholly at odds with the prevailing Western doctrine of prior appropriation."[38]

A. TRIBAL WATER RIGHTS

The three types of tribal water rights are aboriginal, Pueblo, and federal reserved or Winters rights.[39] Tribes that have occupied their lands since time immemorial have aboriginal water rights that are accorded a priority date of time immemorial.[40] Pueblos in New Mexico and Texas have a type of aboriginal water rights derived from Spanish land grants and the United States Treaty of Guadalupe Hidalgo with Mexico that also has a time immemorial priority date.[41]

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34. Pub. L. 116-260, 134 Stat. 3008, Title V, Division DD (Dec. 27, 2020).

35. *See* MCA § 85-20-1901 citing United States v. Abell, No. CIV-79-33-M (filed April 5, 1979).

36. 43 U.S.C. § 614 citing Desert Land Act of 1877, 19 Stat. 377.

37. *See* Thorson, *supra* note 14, at 302.

38. MCCOOL, *supra* note 3, at 19.

39. Arguably, United States v. Winans, 198 U.S. 371, 381 (1905), which pre-dated Winters v. United States, 207 U.S. 564, 576-77 (1908), created a fourth type of federal tribal water right whereby a "Treaty between the United States and the Indians. . . is not a grant of rights to the Indians, but a grant of rights from them—a reservation of those granted." For the purposes of this paper, references to Winters rights include Winans rights.

40. United States v. Klamath & Moadoc Tribes, 304 U.S. 119, 121 (1938); United States v. Adair, 723 F.2d 1394, 1413-14 (9th Cir. 1983).

41. Richard W. Hughes, *Pueblo Indian Water Rights: Charting the Unknown*, 57 NAT. RES. J. 219, 245-46 (2017) [hereinafter Hughes] (quoting United States v. Santa Fe Pac. R.R., 314 US 339, 348 (1941); New Mexico ex rel. Reynolds v. Aamodt, 618 F. Supp. 993, 1009 (D.N.M. 1985)).

The federal reserved rights doctrine holds that when Congress reserves land for a particular federal purpose, it also reserves, by implication, enough unappropriated water as is reasonably necessary to accomplish the purpose of the reservation.[42] The right to the reserved water vests as of the date of the reservation, regardless of whether the water is actually put to beneficial use, and it is senior to the rights of those who commence the use of water after the reservation date.[43] The Supreme Court established the federal reserved rights doctrine in the 1908 *Winters* case, where it found Congress had impliedly reserved enough water to satisfy the needs of the Tribe in the treaty between the United States and the Assiniboine and the Gros Ventre Tribes of the Fort Belknap Reservation (Fort Belknap Tribe). The treaty set aside a particular tract of land from the public domain as a homeland for the Fort Belknap Tribe but did not expressly provide for the water necessary to cultivate the land. The Supreme Court found nonetheless that by creating the reservation, Congress impliedly reserved sufficient water for the present and future needs of the Fort Belknap Tribe.[44] The Supreme Court reasoned that Congress' intent that the tribal members become a pastoral and "civilized" people could not be accomplished without sufficient water to irrigate the Tribe's lands.[45] The *Winters* decision left many questions regarding federal reserved rights to be determined by other courts, most significantly a quantification standard.

In *Arizona v. California*,[46] the Supreme Court confirmed the reserved right doctrine applied to all federal reservations, and when reserving land for tribes, Congress reserved enough water "to satisfy the future as well as the present needs to Indian Reservations."[47] The Court ruled the measure of a tribe's future needs is enough water to irrigate all the "practicably irrigable acreage" ("PIA") on the reservation.[48] Courts in some states have advanced a "homeland" quantification standard as an alternative to the PIA standard.[49] For federal reserved rights, the PIA is by far the preferred method for quantifying water rights; however, courts have not yet developed a quantification standard for aboriginal rights such as for the Pueblos in New Mexico and Texas.[50]

While the case law is still evolving, Pueblo water rights appurtenant to their grant lands are different from water rights appurtenant to lands reserved to tribes by Congress. The Pueblos have occupied their grant lands since time immemorial, and the land grants they received from the Spanish Crown were in recognition of the Pueblo's aboriginal use and occupancy of their lands.[51] As the Tenth Circuit recognized in

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42. Winters v. United States, 207 U.S. 564, 576-77 (1908).

43. *See* Cappaert v. United States, 426 U.S. 128 (1976); United States v. New Mexico, 438 U.S. 696 (1978).

44. *Id.*

45. *Id.* at 576.

46. 373 U.S. 546 (1963).

47. *Id.* at 600.

48. *Id.* at 600-01; As an interesting side note, the Court adopted the PIA standard and "rejected Arizona's arguments for an equitable apportionment between a tribe and state water users, reasoning that the equitable apportionment doctrine was applicable only to allocations among states." Thorson, *supra* note 14, at 417.

49. *See* In re General Adjudication of All Rights to Use Water in the Gila River Sys., 35 P.3d 68, 78-79 (Ariz. 2001).

50. KIM, *supra* note 7, at 7.

51. Robert L. Lucero Jr., *State v. Romero: The Legacy of the Pueblo Land Grants and the Contours of the Jurisdiction in Indian Country*, 37 N.M. L. REV. 671, 674 (2007).

Aamodt, "[t]he Pueblos' land titles had long been recognized by the Spanish and Mexican governments. In 1858, these titles were confirmed by Congress."[52] Accordingly, Pueblo water rights for their grant lands have a time immemorial priority date. However, the measure of Pueblo water rights, including future needs, is uncertain as "there is still no clear court ruling on the nature or measure of water rights appurtenant to the core land holdings of the Pueblo Indians . . . ."[53] Despite this uncertainty, each of the tribal water rights settlements in New Mexico, including those approved by Congress and those still pending approval, have provided tribes with water for their present and future needs.[54]

B. STATE-BASED WATER RIGHTS - THE DOCTRINE OF PRIOR APPROPRIATION

Most states west of the Mississippi River follow the doctrine of prior appropriation whose principle is "first in time, first in right."[55] Unlike federal reserved water rights, state-based water rights are established when an appropriator applies water to "beneficial use,"[56] and such rights can be lost due to continued periods of nonuse, such as forfeiture pursuant to state statute or abandonment based on common law principles—also known as "use it, or lose it."[57] Under the prior appropriation system, when the water supply is insufficient to satisfy the needs of all water users, senior water right users' needs are to be satisfied before those of junior water right users'.[58] The chronological order of whose rights are senior or junior relative to other diverters in the basin is determined through a general stream adjudication based on the date the original appropriator of the water right first put the water to beneficial use.[59]

Tribal and federal reserved water rights differ from state-based rights in significant and conflicting ways. Federal reserved rights may be created without diversion or beneficial use and are quantified by the amount of water reasonably necessary to satisfy the purposes of the reservation.[60] The priority of the right dates from the time of the land

52. New Mexico v. Aamodt, 537 F.2d 1102, 1105 (10th Cir. 1976); Act to confirm the Land Claim of certain Pueblos and Towns in the Territory of New Mexico, Ch. 5, December 22, 1858, 11 Stat. 374.

53. Hughes, *supra* note 40, at 219.

54. *See, e.g.,* Aamodt Litigation Settlement Agreement, State of New Mexico, et al. v. Lee Aamodt, et al., No. 66cv06639, USDC, DCNM (Aug. 8, 2013) [hereinafter Aamodt Settlement]; Taos Pueblo Water Rights Agreement (2012) [hereinafter Taos Settlement].

55. *See, e.g.,* N.M. CONST., art. XVI, § 2 ("The unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state. Priority of appropriation shall give the better right."); *see also* N.M. STAT. ANN. § 72-1-1 (2023) ("All natural waters flowing in streams and watercourses, whether such be perennial, or torrential, within the limits of the state of New Mexico, belong to the public and are subject to appropriation for beneficial use.").

56. *See, e.g.,* N.M. CONST., art. XVI, § 3 ("Beneficial use shall be the basis, the measure and the limit of the right to the use of water."); *see also* N.M. STAT. ANN. § 72-1-2 (2023) ("Beneficial use shall be the basis, the measure and the limit of the right to the use of water, and all waters appropriated for irrigation purposes. . .").

57. *See,* e.g., N.M. STAT. ANN. § 72-5-28 (surface water); *see also* N.M. STAT. ANN. § 72-12-8 (groundwater); *see also* State *ex rel.* Martinez v. McDermett, 120 P.2d 745, 750 (N.M. Ct. App. 1995) (holding that to prove abandonment, a party must show that the owner relinquished the water rights with the intention to forsake such rights).

58. DAVID H. GETCHES, WATER LAW IN A NUTSHELL 78 (4th ed. 2009).

59. *Id.* at 108.

60. United States v. Jesse, 744 P.2d 491, 494 (Colo. 1987).

withdrawal and not from the date of the appropriation and use of water.[61] And the right is not lost by nonuse, i.e., forfeiture or abandonment.[62] Perhaps most significantly, "the prior appropriation doctrine was designed to meet the needs of the leading forces in the American West, primarily mining, ranching, and agricultural interests, while the main beneficiaries of the Winters doctrine have been the small number of politically weak Indian Tribes that managed to survive into the twentieth century."[63] For the first half of the 20th century, federal courts had near-exclusive power to determine tribal water rights because the United States has sovereign immunity and cannot be brought into court unless Congress has granted a waiver.[64] The modern era of Western water rights litigation began after Congress enacted the McCarran Amendment, which waived the United States' sovereign immunity in suits concerning quantification of management of water rights, and the Supreme Court held that state courts are allowed to adjudicate tribal water claims.[65] The Supreme Court held that the policy goal of underlying the McCarran Amendment of judicial economy warranted the dismissal of tribal water rights claims filed in federal courts when there are ongoing, concurrent, and comprehensive state adjudications available to address the claims.[66] The Supreme Court held that the McCarran Amendment's main purpose was to designate comprehensive state adjudications as the primary means to determine water rights claims.[67]

Ultimately, the McCarran Amendment opened the door to litigation, in both state and federal courts, concerning the existence and quantity of federal reserved water rights for national parks, national forests, national wildlife refuges, and Indian reservations.[68] This change was detrimental to tribes because it allowed state courts, which had "a long history of hostility to Indian claims, to adjudicate federal reserved water rights."[69] This has been a significant motivation for tribes to pursue negotiated settlements.[70]

C. GENERAL STREAM ADJUDICATIONS

General stream adjudications are the judicial process of confirming water right holders' title to their existing water rights.[71] Adjudication originally developed as means of correcting the deficiencies of a non-centralized system of water rights appropriation and use.[72] Many private water rights in Western states originated prior to the development of state administrative filing processes and adjudications provided the vehicle for clarifying their titles.[73] The adjudication process provides claimants with a court decree

61. *Id.*
62. *Id.*
63. MCCOOL, *supra* note 3, at 19.
64. KIM, *supra* note 7, at 3-4.
65. 43 U.S.C. § 666; Colorado River Water Conservation District v. United States, 424 U.S. 800, 809-11 (1976) (addressing federal suits brought by the United States in its role as trustee to Indian tribes); *see also* Arizona v. San Carlos Apache Tribe of Arizona, 463 U.S. 545, 566-569. (1983) (addressing federal suits brought by Indian tribes).
66. *Colorado River Water Conservation District*, 424 U.S. at 819.
67. *Id.*
68. MCCOOL, *supra* note 3, at 15.
69. *Id.*
70. KIM, *supra* note 7, at 4-5.
71. Thorson, *supra* note 14, at 304-05.
72. A. Dan Tarlock, *The Illusion of Finality in General Water Rights Adjudications*, 25 IDAHO L. REV. 271, 280 (1989) [hereinafter *Illusion of Finality*].
73. Thorson, *supra* note 14, at 303-04.

that documents the nature and extent of their water rights.[74] The compilation of water rights information resulting from completed adjudications provide state water administrators with a valuable tool for overseeing water use and undertaking long-term water planning, which is particularly critical in times of extended drought.[75] Prior to the McCarran Amendment, adjudications were generally uncomplicated proceedings that tallied up existing uses.[76] States had little reason to undertake basin-wide adjudications until they became a means to address federal reserved water rights.[77] Because federal reserved water rights "constitute a potentially enormous but unquantified charge on the water resources of the West," and exercise of such rights is not time-bound, the extent of their impact is difficult to estimate.[78] Comprehensive adjudications are one way to finally quantify tribal water rights;[79] however, as shown by the state of New Mexico's experience trying to complete adjudication of tribal rights, adjudications are glacially paced endeavors that are better resolved through negotiated settlement.

Historically, New Mexico, like other Western states, tended to ignore tribal water rights in managing water. That changed in the 1960s, with the anticipated completion of the San Juan-Chama transbasin diversion project, which authorized the diversion of up to 235,000 acre-feet per year of Upper Colorado River Basin water from tributaries of the San Juan River into the Rio Grande Basin.[80] Steve Reynolds, the storied New Mexico State Engineer, began six adjudications of tributary rights in the northern Rio Grande Basin, because he wanted to assure cities and counties contracting for San-Juan Chama Project water that water users in Northern New Mexico would not intercept their water.[81, 82] Three other suits to adjudicate the tributary rights of the more southern of the eight Pueblos were still pending as of 2017.[83]

Reynolds hoped the tributary adjudications would happen quickly and enable a mainstem adjudication; however, such expectations were "wildly unrealistic."[84] Reynolds sought to dash the possibility that the ruling in *Arizona v. California*, which granted tribes large water rights based on future uses, might be applied to the Pueblos' lands; nonetheless, determining the Pueblos' rights "turned out to be an excruciating process, Byzantine in its complexities and hugely frustrating in its glacial pace."[85] In fact,

74. *Id.* at 305.
75. *Id.*
76. *Illusion of Finality*, *supra* note 72, at 280.
77. *Id.*
78. Thorson, *supra* note 14, at 306.
79. *Id.*
80. Hughes, *supra* note 40, at 220-21.
81. New Mexico *ex rel.* State Eng'r v. Aamodt, No. 66-CV-6639 (D.N.M. filed Apr. 20, 1966) (adjudicating the Rio Pojoaque-Rio Tesuque-Rio Nambe); New Mexico *ex rel.* State Eng'r v. Abbott, No. 68-CV-7488 & 70-CV-8650 (D.N.M filed Mar. 22, 1968) (adjudicating the Rio Santa Cruz); New Mexico *ex rel.* State Eng'r v. Abeyta, No. 69-CV-7896 (D.N.M filed Feb. 4, 1969) (adjudicating the Rio Pueblo de Taos); New Mexico *ex rel.* State Eng'r v. Arellano, No. 69-CV-7939 (D.N.M filed Feb. 4, 1969) (adjudicating the Rio Hondo) (consolidated with Abeyta); New Mexico *ex rel.* State Eng'r v. Aragon, No. 69-CV-7941 (D.N.M. filed Mar. 4, 1969) (adjudicating the Rio Chama); New Mexico *ex rel.* State Eng'r v. Acequia del Alto de la Acequia del Llano Community Ditch Assoc., No. 70-CV-8650 (D.N.M filed 1970) (adjudicating the Rio Truchas) (consolidated with Abbot).
82. Hughes, *supra* note 40, at 220-21.
83. Hughes, *supra* note 40, at 230.
84. Hughes, *supra* note 40, at 221.
85. Hughes, *supra* note 40, at 222.

none of the rights of the northern Pueblos have been determined solely through litigation.[86] Rather, the rights that have been finally determined thus far have all been negotiated, and the resulting settlement agreements submitted to the relevant courts for issuance of a final decree.[87]

III. SOVEREIGNTY AUTHORITY TO COMPACT AND CONGRESSIONAL POWER

Rather than slugging it out over decades in a comprehensive general stream adjudication, tribes and states could leverage their respective inherent sovereign authority to negotiate a water compact. With Congress's consent, a tribal-state water compact would be binding upon all water users in the basin and achieve finality, like an interstate water compact. The Supreme Court has opined that when Congress consents to an interstate compact, the states are "restored to their original inherent sovereignty."[88] Given the supremacy clause of the United States Constitution, which establishes that the Constitution, federal laws made pursuant to it, and treaties made under its authority constitute the "supreme Law of the Land,"[89] congressional consent to a water compact negotiated between a tribe and a state would make that compact the supreme law of the land.[90]

The defining characteristic of sovereignty is the power to enter compacts with other governments.[91] Philosophers have long argued individuals consent, either explicitly or implicitly, to surrender some of their freedoms and submit to the authority of the government in exchange for protection of their remaining rights.[92] The United States Constitution authorizes the President, with the advice and consent of Congress, to make treaties that can override state laws and individual rights if they serve the national interest.[93] Federal, state, and local governments have the power of eminent domain to expropriate private property for public use, provided there is just compensation.[94] Similarly, tribes and states could use their inherent sovereignty to bind their members or citizens to the terms and limitations contained in a compact that quantified and protected tribal water rights and preserved existing uses. Because a tribal-state water compact requires congressional approval, in addition to layers of tribal and state approval, processes exist to address individual water right holders' concerns.

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86. The Mescalero Apache Tribe's water rights were determined through the Pecos River adjudication, New Mexico *ex rel.* Martinez v. Lewis, 861 P.2d 235, 238 (N.M. Ct. App. 1993). The Tribe claimed 17,705.4 acre-feet per year, mainly under a PIA theory, but only obtained a right for 2,322.4 acre-feet per year because the trial court found that the Tribe's proposed PIA projects were not economically feasible. *Id.* at 238, 251.

87. *See, e.g.,* Aamodt Settlement, *supra* note 54; Taos Settlement, *supra* note 54.

88. Rhode Island v. Massachusetts, 37 U.S. 657, 725 (1838).

89. U.S. CONST. art. VI, cl. 2.

90. *See* State *ex rel.* State Eng'r v. United States, 425 P.3d 723, 730 (N.M. Ct. App. 2018).

91. STEPHEN P. MULLIGAN, CONG. RSCH. SERV., LSB10807, INTERSTATE COMPACTS: AN OVERVIEW 1 (2023).

92. See e.g. Thomas Hobbes, Leviathan (1651); John Locke, Two Treaties of Government (1689).

93. U.S. CONST. art. II, §2, cl. 2.

94. See e.g. U.S. CONST. AMEND. V.; MONT. CONST. art. II, § 29.

A. TRIBAL SOVEREIGNTY AND THE FEDERAL-TRIBAL RELATIONSHIP

"Tribal rights are based in the doctrine of inherent sovereignty, affirmed in hundreds of ratified treaties and agreements, acknowledged in the commerce clause of the U.S. Constitution, and recognized in ample federal legislation and case law."[95] The Constitution grants Congress the power to regulate commerce with tribes,[96] which the Supreme Court has interpreted as the exclusive right and power to regulate affairs and trade with tribes.[97] Tribes existed before the formation of the United States and the Constitution, and for nearly two centuries, the United States Supreme Court has recognized that "tribes are unique aggregations possessing attributes of sovereignty over both their members and their territories."[98] Even though "[t]he sovereignty that the Indian tribes retain is of a unique and limited character," it "exists only at the sufferance of Congress and is subject to complete defeasance."[99]

The relationship between tribes and the federal government is composed of three doctrines: treaties, the plenary power of Congress, and the trust relationship.[100] "[T]hese doctrines, were (and are) affected by notions of colonial expansion and dominance, religious missionary zeal, federalism, commitment to the rule of law, and a concern for civil and human rights."[101] Treaties between the federal government and tribal nations are the basis for the recognition of tribal sovereignty and the foundation for the government-to-government relationship.[102] Nonetheless, Congress has often "altered, ignored, or displaced" treaties under the rationale of the plenary power doctrine, essentially limiting tribal sovereignty.[103] Yet, sometimes Congress exercises this same plenary power as preemptive power to support the inherent sovereignty of tribes.[104] Finally, the trust relationship is based on a legal obligation dictating that the federal government must protect Indian resources and assets and manage them in the Indians' best interest.[105] The trust relationship, also known as the tribal trust doctrine, emerges primarily from a trilogy of Supreme Court opinions authored by Chief Justice John Marshall.[106] Tribal water rights are vested property rights for which the United States has a trust responsibility.[107]

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95. DAVID E. WILKINS & K. TSIANINA LOMAWAIMA, UNEVEN GROUND: AMERICAN INDIAN SOVEREIGNTY AND FEDERAL LAW 8-9 (2001) [hereinafter UNEVEN GROUND].

96. U.S. CONST. art. I, § 8, cl. 3 ("Congress shall have the power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.").

97. *See* Williams v. Lee, 358 U.S. 217, 219-20 (1959).

98. United States v. Wheeler, 435 U.S. 313, 323 (1978) (quoting United States v. Mazurie, 419 U.S. 544, 557 (1975)).

99. *Wheeler*, 435 U.S. at 323.

100. Frank Pommersheim, *Tribal-State Relations: Hope for the Future*, 36 S.D. L. REV. 239, 241 (1991) [hereinafter Pommersheim].

101. *Id.* at 241-42.

102. *Id.* at 242.

103. *Id.*

104. UNEVEN GROUND, *supra* note 92, at 13.

105. *Id.*

106. Pommersheim, *supra* note 97, at 243-44.

107. STERN, *supra* note 9, at 1.

B. COMPACTING BETWEEN TRIBES AND STATES

Unlike the compacting authority between states, the authority of states and tribes to enter compacts is not well defined in law.[108,109] The legal relationship between tribes and states has been unclear since the founding of the United States and often marked by conflict.[110] Both "tribes and states stand as mutual sovereigns which share contiguous physical areas and some common citizens—tribal members who reside on the reservation are both tribal and state citizens."[111] *Worcester v. Georgia* marks the earliest attempt to address the relationship between tribes and states by proclaiming the exclusive role of the federal government with tribes and barring state authority over tribes: "The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the union."[112] Over time, the exclusive federal role has become diluted.[113]

Historically, states have been seen by tribes "as relentlessly expansionary in seeking to extend [their] authority over the reservation[s] and, in the process, to limit the tribe[s'] authority and demean [their] very existence."[114] One of the federal government's roles has been to protect tribal nations from state regulation, intrusion, and overreach. Although tribes and states share a delicate relationship from centuries of history together, they have the potential to exist in a state of mutual respect and advancement.[115] Over the years, tribes and states have entered into sovereignty accords and agreements to address various issues and have had to navigate uncertain federal law and policy concerning their authorities to enter agreements.[116]

In 1978, Congress considered legislation that would have authorized tribes and states to enter compacts. The Tribal-State Compact Act sought to address jurisdictional conflicts between tribes and states by providing Congressional consent for tribes and states "to enter into mutual agreements and compacts respecting jurisdiction and governmental operations in Indian country."[117] At the time of its introduction to the Senate, the Act recognized that "historical vacillation and inconsistency" in federal policy

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108. "The legal relationship of tribes to the states has been unclear from the very beginning of the republic. It finds, for example, no elucidation in the United States Constitution . . . [n]or can there be found a true description of the state-Tribal relationship within any state or Tribal constitution." Pommersheim, *supra* note 97, at 248-49.

109. Four areas where Congress has authorized compacts between tribes and states are: (1) Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2703 (1988), which authorizes compacts for casino gambling operations; (2) 18 U.S.C. § 1162 (1953), which grants certain states criminal jurisdiction over tribes on reservations; (3) 28 U.S.C. § 1360 (1953), which allows civil litigation that had come under Tribal or federal court jurisdiction to be handled by state courts; and (4) Indian Child Welfare Act of 1978, 25 U.S.C. § 1911 (1978), which provides broad authority for compacts respecting the care and custody of Indian children.

110. Pommersheim, *supra* note 97, at 248.

111. *Id.* at 249.

112. Worcester v. Georgia, 31 U.S. 515, 519 (1832).

113. *See generally* Williams v. Lee, 358 U.S. 217 (1959); White Mountain Apache tribe v. Bracker, 448 U.S. 136 (1980); Oklahoma v. Castro-Huerta, 142 U.S. 2486 (2022).

114. Pommersheim, *supra* note 97, at 249.

115. *Id.* at 251.

116. *See id.* at 264-67.

117. The authorization in the proposed Act was for compacts and agreements relating to (1) "the enforcement or application of civil, criminal, and regulatory laws" and (2) "allocation or

towards tribes was responsible for controversies between tribes and states.[118] The Act also acknowledged it was the responsibility of Congress to facilitate the recent "increasing expressions of interest from State and Tribal authorities to enter into compacts."[119]

Bruce Babbitt, former Arizona Governor, and United States Secretary of the Interior, strongly endorsed the proposed bill, stressing that tribes, the states, and local governmental subdivisions of the states had an opportunity to improve problem solving processes "not as adversaries, but as neighbors."[120] The bill enjoyed some support among the tribes; however, tribal opposition ultimately stopped the bill amid concerns that under such an act, "the longstanding principle of strict federal control over dealing between the states and Indians would be seriously eroded."[121]

Both tribes and states stand to benefit greatly from the certainty for river basins that is created when the nature and extent of tribal water rights are known. With defined water rights, tribal nations will no longer face the risk that their rightful water uses will succumb to non-tribal water users' reliance on shared waters.[122] Private water rights holders will no longer face the threat that when the tribes finally put their federal reserved water rights to use the private rights may be impaired or destroyed without compensation.[123] And, perhaps most importantly, tribes and states will be able to work together to plan for a warmer and drier water future.[124]

C. STATE SOVEREIGNTY

While the Compact Clause of the United States Constitution would not apply to compacts between a tribe and a state, states retain their inherent sovereign authority to enter compacts with tribes. With congressional approval, a tribal-state water compact, similar to an interstate water compact, would become federal law.[125] The Compact Clause provides that "No State shall, without the Consent of Congress . . . enter into Any Agreement or Compact with another State, or with a foreign Power."[126] States enter compacts for a variety of purposes, including the apportionment of water. Congressional consent transforms an interstate compact from an agreement among states

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determination of government responsibility . . . over specified subject matters or specified geographical areas." Tribal-State Compact Act, S. 2502, 95th Cong. 2d Sess., § 101(a) (as passed by Senate, Oct. 6, 1978).

118. Tribal State Compact Act, S. 2502, 95th Cong. 2d Sess. § 2(a) (as introduced to Senate, Feb. 6, 1978).

119. *Id.*, at § 2(d).

120. David E. Wilkins, *Reconsidering the Tribal-State Compact Process*, 22 POL'Y STUD. J. 474, 481 (1994) (quoting United States Congress, Senate Select Committee on Indian Affairs, 1979, p. 15, Statement of Bruce Babbitt, former Arizona Governor and United States Secretary of the Interior).

121. See *id.* at 482 (citing NATIONAL LAWYERS GUILD, RETHINKING INDIAN LAW, 87 (1982)).

122. Thorson, *supra* note 14, at 305-10.

123. *Id.* at 306-07.

124. "Research has shown that communities, states, and countries that have rules in place for managing shortages are better able to maintain peace among water users than those with no structure in place. Priority administration can be used to manage the distribution of water in adjudicated river basins, and shortage sharing agreements can also prepare a community to withstand the stress of a drought." AMY LEWIS, RESILIENCE OF WATER USE SECTORS TO CLIMATE CHANGE IN NEW MEXICO 68-69 (2022).

125. U.S. CONST. art. VI, cl. 2.

126. U.S. CONST. art. I, § 10, cl. 3.

into federal law.[127] "By allowing states to negotiate compacts but requiring congressional approval, the Compact Clause adapts the traditional compact-making power to the American constitutional system in which both the federal government and the states possess sovereignty authority."[128]

The doctrine of equitable apportionment governs the allocation of a shared water resource between two or more states based on the principle that states have an equal right to shared water resources.[129] There are three ways to determine a state's equitable 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 may preempt the states' quasi-sovereign interests in interstate waters by enacting a statutory apportionment, referred to as congressional apportionment.[130] States prefer to negotiate interstate compacts.[131]

Once a state enters an interstate water compact, it can only allocate the water within its boundaries that remains after it satisfies its water delivery requirements to the downstream state.[132] The Supreme Court recognizes 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.[133]

The Hinderlider Case

In *Hinderlider*, the plaintiff, a ditch company, sued the Colorado State Engineer to challenge his administration of water pursuant to the La Plata River Compact into which Colorado and New Mexico entered with the approval of Congress.[134] Pursuant to the terms of the compact, Colorado and New Mexico agreed to rotating 10-day water deliveries between the states during the hot summer months when the river ran very low.[135] The ditch company's rights, along with the relative rights of all water users in Colorado, were adjudicated in an 1898 decree.[136] The ditch company claimed that its rights under that decree entitled it to all the water in the stream except the amount required to satisfy Colorado's priority—regardless of Colorado's compact delivery obligations to the downstream state.[137] Yet, if the ditch company withdrew all its water, none would be available to New Mexico water right owners, violating the La Plata River Compact.[138]

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127. CONG. RSCH. SERV., LSB10807, INTERSTATE COMPACTS: AN OVERVIEW 1 (2023).
128. *Id.*
129. Florida v. Georgia, 592 U. S. 433, 438 (2021); Colorado v. New Mexico, 459 U. S. 176, 183 (1982); Connecticut v. Massachusetts, 282 U. S. 660, 670-71 (1931); Kansas v. Colorado, 206 U. S. 46, 98-99 (1907).
130. A. DAN TARLOCK & JASON A. ROBISON, LAW OF WATER RIGHTS AND RESOURCES § 10:1 (2023).
131. *See* Charles J. Meyers, *The Colorado River*, 19 STAN. L. REV. 1, 1 (1966); *See also* Julius M. Friedrich, *The Settlement of Disputes between States Concerning Rights to the Waters of Interstate Streams*, 32 IOWA L. REV. 244, 244 (1947).
132. Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 102 (1938).
133. *Id.* at 106.
134. *Id.* at 95.
135. *Id.* at 97.
136. *Id.* at 98.
137. *Id.*
138. *Id.*

The ditch company claimed that the State Engineer violated the ditch company's rights under the due process clauses of the Fifth and Fourteenth Amendments of the United States Constitution and Article 2, § 25 of the Constitution of Colorado.[139] The ditch company "insisted that the Compact attempted to surrender to New Mexico, and thus destroy, vested property rights of Colorado citizens."[140] The Supreme Court disagreed and ruled against the ditch company, holding that the ditch company's rights were subject to the apportionment between the states under the La Plata River Compact:

> It may be assumed that the right adjudicated by the decree of January 12, 1898 to the Ditch Company is a property right, indefeasible so far as concerns the State of Colorado, its citizens, and any other person claiming water rights there. But the Colorado decree could not confer upon the Ditch Company rights in excess of Colorado's share of the water of the stream; and its share was only an equitable portion thereof.[141]

The Supreme Court explained the origin of the states' sovereign authority to bind themselves, and their water rights holders, to an apportionment of interstate waters through the legislative means of a Compact without the need for a judicial determination.[142]

> The compact—the legislative means—adapts to our Union of sovereign States the age-old treaty making power of independent sovereign nations. Adjustment by compact without a judicial or quasi-judicial determination of existing rights had been practiced in the Colonies, was practiced by the States before the adoption of the Constitution, and had been extensively practiced in the United States for nearly half a century before this Court first applied the judicial means in settling the boundary dispute in *Rhode Island v. Massachusetts*.[143]

The Supreme Court reaffirmed that with the consent of Congress, the states were "restored to their original inherent sovereignty . . . whereby their compacts became of binding force . . . operating with the same effect as a treaty between sovereign powers."[144] The Supreme Court went on to provide that the terms of an interstate compact bind the citizens of each state:

> Whether the apportionment of the water of an interstate stream be made by compact between the upper and lower States with the consent of Congress 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.[145]

139. *Id.* at 99.
140. *Id.*
141. *Id.* at 102.
142. *Id.* at 104.
143. *Id.*
144. Rhode Island v. Massachusetts, 37 U. S. 657, 725 (1838).
145. Hinderlider, 304 U.S. at 106.

D. ACHIEVING FINALITY AND BINDING ALL WATER USERS

Federal government policy requires that tribal water rights settlements "be completed in such a way that all outstanding water claims are resolved and finality is achieved."[146] The resolution of all claims prevents future challenges to tribal water rights, secures the waivers of claims against the United States and other settlement parties, and prevents constitutional "takings" claims.[147] Although the requisite finality is almost always accomplished by entry of a final decree in a general stream adjudication,[148] it can be achieved through a congressionally approved tribal water rights settlement or a tribal-state water compact.[149]

In 1987, water law scholar Dan Tarlock suggested that under *Hinderlider*, states and tribes could agree to a compact to quantify and protect tribal water rights, similar to how states subordinate state-based right to comply with interstate compacts:

> The fairest solution seems to be to treat Indian claims as analogous to interstate waters allocated to another State by interstate compact. . . *Hinderlider* applies and State water rights are subordinated to Indian water rights just as State-created rights are subordinated to interstate compact allocations.[150]

States can only allocate the water that remains within their boundaries after satisfying their water delivery requirements to the downstream state, and the state decides how water rights will be adjusted to fulfill the compact obligation.[151] Tarlock proposed that similar to an interstate compact, the rights of individual water rights holders would not be legally impacted by the tribal apportionment in a compact between a state and a tribe because "water claimed pursuant to a state appropriation was never unappropriated water in the first place."[152]

A 1982 law review article by Clark B. Fetzer raised the question of constitutional challenges in the context of the best example of a tribal-state water compact, the 1980 Ute

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146. U.S. Dep't of the Interior Working Group In Indian Water Settlements, *Criteria and Procedures for Indian Water Rights Settlements*, 55 Fed. Reg. 48 (Mar. 12, 1990).

147. The United States Constitution protects citizens against deprivation of property "without due process of law," or a "taking" of private property "for public use, without just compensation." U.S. CONST. amends. V, XIV; *See* N.M. CONST. art. II, § 18.

148. There is some question about whether general stream adjudications do provide the desired everlasting finality. *See* A. DAN TARLOCK & JASON A. ROBISON, LAW OF WATER RIGHTS AND RESOURCES § 7:2 (2023) ("Water rights adjudication is an action to determine all respective water rights on a stream system. It is analogous to a quiet title action, but an adjudication determines the rights of water right holders among themselves not between a class of claimants and a single tract of land. The analogy between water rights adjudications and quiet title actions represents a hope rather than a reality. The correlative nature of water rights, the possibility of the constant readjustment of water rights through the application of the beneficial use requirement and the difficulty of binding all claimants, especially federal agencies and Indian tribes, makes it difficult if not impossible to give decrees the finality usually achieved in quiet title actions."); A. Dan Tarlock, *The Illusion of Finality in General Water Rights Adjudications*, 25 IDAHO L. REV. 271 at 273 (1989) ("[T]he very nature of a water right combined with the range of state and federal interests being asserted in water allocation preclude the level of certainty and finality that states are seeking.").

149. *See* supra Part III.

150. A. Dan Tarlock, *One River, Three Sovereigns: Indian and Interstate Water Rights*, 22 LAND & WATER L. REV. 631, 653 (1987).

151. *See generally id.*

152. *Id.*

Indian Water Compact, which is discussed below.[153] Fetzer anticipated individual water right owners who "are arguably not parties to the Compact and therefore not bound by its terms . . . may seek compensation for a 'taking' of their rights under the Fifth Amendment . . . ."[154] In his analysis, the author found that *Hinderlider* and its progeny supported that, when exercising its sovereign authority to apportion water through congressionally approved agreements with other sovereigns, Utah was arguably protected from "takings" claims.[155] "Although the precedential value of these cases is limited by their facts, the court's broad language suggests that the non-Indian holders of water rights may have restricted redress for damages they incur under the terms of the Ute Indian Water Compact."[156]

IV. THE UTE INDIAN WATER COMPACT

The Ute Indian Water Compact represents a unique example of a tribe and state utilizing their inherent sovereign authority to resolve tribal water claims through a congressionally approved compact, bypassing the need for court approval and a final decree in an adjudication.[157] Despite the Ute Indian Tribe's water rights not being fully quantified to this day, the *Ute Indian Rights Settlement Act* remains the clearest instance of Congress approving a water compact between a tribe and a state without necessitating a final decree in a general stream adjudication for enforceability.

A. THE UTE INDIAN TRIBE'S WATER CLAIMS

The Ute Indian Tribe is comprised of the Uintah, White River, and Uncompahgre bands, who once occupied a territory stretching from present-day Salt Lake City to Denver. The Ute Indian Tribe's ancestors utilized water to sustain their nomadic hunter-gatherer way of life, and the Ute Indian Tribe has used water for irrigation since the establishment of the reservation.[158] By executive orders, President Lincoln established the Uintah Reservation on October 3, 1861, and President Arthur established the Uncompahgre Reservation on January 5, 1882.[159] Today, the Ute Indian Tribe reservation is located within a three-county area known as the "Uintah Basin" in northeastern Utah and covers more than 4.5 million acres.[160]

In the early twentieth century, under the *General Allotment Act of 1887*,[161] the United States divided the Ute Reservation into "allotments," creating individual parcels of land that the government then gave to individual tribal members.[162] The federal government then opened any remaining reservation land for settlement by non-Indians. In 1899, Congress "directed the Secretary to secure a quantity of water necessary for

153. Clark B. Fetzer, *The Ute Indian Water Compact*, 2 J. ENERGY L. & POL'Y 181, 207 (1982).

154. *Id.* at 207.

155. *Id.* at 207-08.

156. *Id.*

157. *See id.* at 209.

158. BUREAU OF RECLAMATION, U.S. DEP'T OF THE INTERIOR, COLORADO RIVER BASIN, TEN TRIBES PARTNERSHIP TRIBAL WATER STUDY at 5.1-6. (Dec. 2018) [hereinafter Tribal Water Study].

159. Fetzer, *supra* note 149, at 182.

160. Tribal Water Study, *supra* note 154, at 5.1-1-5.1-2.

161. General Allotment Act of 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. § 331 et seq.).

162. *See* Act of March 3, 1905, ch. 1479, 33 Stat. 1048, 1069.

the present and prospective wants" of the Ute Indian Tribe "and to protect their Indian reserved water rights and interests."[163] During this time, various private irrigation companies were forming to construct canals and water storage and "to utilize the rivers of the Uinta Basin for irrigation."[164]

In 1905, the federal government "made application on behalf of the Ute Indian Tribe to the Utah State Engineer . . . to appropriate water within the Reservation for the [Uintah Indian Irrigation Project (UIIP)]," which was authorized to serve nearly 80,000 acres of allotted lands.[165] In 1916, the federal government filed in federal court to protect the Ute Indian Tribe's reserved water rights because conflicts were increasing between the Ute Indians and their neighbors over the water allocations in the Lake Fork, Yellowstone, Whiterocks, and Uinta Rivers, which provided water for the UIIP.[166] The Lake Fork River Decree provided reserved water rights for 25,071 acres and the Uinta River Decree provided reserved water rights for 34,700 acres, for a total irrigated acreage of 59,771 acres of lands.[167] The decrees also established a direct diversion limit of one cubic foot per second (cfs) per 70 acres and an annual diversion limit of three acre-feet (AF) per acre in these basins, amounting to a total reserved water right of 179,315 AF: 75,215 AF in the Lake Fork River Basin and 104,100 AF in the Uinta River Basin.[168]

Between the early 1900s and the 1950s, Reclamation planned and constructed several non-tribal water projects to utilize the water resources of the Uinta Basin.[169] In 1956, Congress authorized the initial phase of the Central Utah Project (CUP) to collect, divert and store a portion of Utah's allocation of the Colorado River into the Uinta Basin, the Bonneville Basin and the Wasatch Front.[170] The federal government divided the initial phase into four units: Jensen, Vernal, Upalco, and Bonneville, and the ultimate phase would include the Uintah and Ute Indian Units.

In 1965, the federal government requested that the Ute Indian Tribe and the Central Utah Water Conservancy District enter into an agreement (Deferral Agreement) that deferred the use of the Tribe's water on 15,242 acres of irrigable land to allow for the development of the Bonneville Unit of the CUP.[171] The Deferral Agreement recognized the Ute Indian Tribe's water rights claims for 129,331 acres, with a 549,685 acre-foot diversion right, of which 179,315 acre-feet were adjudicated in 1923.[172] The Deferral Agreement allowed the federal government to certify to Congress that it had secured an uncontested tribal reserved water right, thereby obtaining funding for the Bonneville Unit of the CUP.[173] In exchange, the federal government promised to develop the Ute Indian Tribe's reserved water rights under the CUP.[174]

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163. Tribal Water Study, *supra* note 154, at 5.1-6.
164. *Id.*
165. Tribal Water Study, *supra* note 154, at 5.1-7; *see also* Act of June 21, 1906, ch. 3504, 34 Stat. 325, 375.
166. Tribal Water Study, *supra* note 154, at 5.1-7.
167. Tribal Water Study at 5.1-8.
168. *Id.*
169. *Id.*
170. The Colorado River Storage Project Act, 70 Stat. 105 (1956); *id.*
171. Tribal Water Study at 5.1-10.
172. *Id.* at 5.1-11.
173. *Id.*
174. *Id.*

In 1968, Congress passed the Colorado River Basin Project Act,[175] authorizing the Uintah Unit as a part of the Initial Phase of the CUP, and directed that a feasibility study be conducted for the Ute Indian Unit. These units were to provide storage benefits to the Ute Indian Tribe and the UIIP.[176] However, according to the study, "due to the CUP's complex history, including escalating costs, new environmental requirements, and Congressional intervention to contain the costs of the CUP, the projects that would have benefited the Ute Indian Tribe were never constructed and benefits to the Tribe never materialized."[177]

Out of concerns that there was not sufficient water supply to satisfy both the ever expanding non-tribal uses in the area and the Ute Indian Tribes' reserved water rights, the Tribe developed claims based on the historically and practicably irrigated acres on its reservation.[178] In the late 1970s, the Ute Indian Tribe, Utah, and the federal government began negotiations concerning the full quantity of the Ute Indian Tribe's water claims. Utah's motivation to complete the Ute Indian Water Compact was its desire to develop Utah's allocation of the Colorado River through the CUP.[179] The Ute Indian Tribe 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.[180] Utah approved the first Ute Indian Water Compact in 1980, and the Ute Indian Tribe approved it in 1988.[181]

B. THE UTE INDIAN WATER SETTLEMENT ACT AND THE UTE INDIAN WATER COMPACT

The Ute Indian Water Settlement Act, enacted in 1992, approved a revised 1990 version of the Ute Indian Water Compact, subject to re-ratification by Utah and the Ute Indian Tribe. [182] In this act, Congress consented to a tribal-state water compact to "quantify" the Ute Indian Tribe's water rights: "[The] purpose [of] [t]his Act and the proposed Revised Ute Indian Compact of 1990 are intended to (1) quantify the Tribe's reserved water rights . . . ."[183] In other tribal water settlement acts, Congress acted to "approve" the settlement, rather than to "quantify" a tribe's water rights, and required entry of a final decree in a general stream adjudication as a condition to settlement enforceability.[184] The Ute Indian Water Settlement Act does not contain a requirement to obtain a final decree in an adjudication prior to enforceability.[185] However, it does not define the quantity of the Ute Indian Tribe's water rights; this is detailed in the Ute Indian Water Compact.

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175. *See* Pub. L. 90-537 (Sept. 30, 1968).
176. Tribal Water Study at 5.1-8.
177. *Id.* at 5.1-9.
178. *Id.* at 5.1-10.
179. Fetzer, *supra* note 149, at 190.
180. *Id.* at 193-94.
181. Tribal Water Study, *supra* note 154, at 5.1-10.
182. *Id.* A third version of the Ute Indian Water Compact was drafted in 2009, but no party approved it. In 2018, Utah approved the Revised 1990 Compact; however, final approval of the Revised 1990 Compact has not occurred, and negotiation among the parties continues. *See* Tribal Water Study at 5.1-11.
183. Reclamation Projects Authorization and Adjustment Act of 1992, Pub. L. No. 102-575, § 501(b), 106 Stat. 4600, 4650-51 (1992).
184. *See* Aamodt Litigation Settlement Act, *supra* note 20, at §§ 621, 623.
185. *See* Reclamation Projects Authorization and Adjustment Act of 1992 § 501.

The Ute Indian Water Compact provides that "this Compact may be included within any general stream adjudication,"[186] and provides jurisdiction to the United States District Court for the District of Utah "to adjudicate any claim made by a party to this Compact that any other party, or its officials, are acting to impair or violate any right or privilege in this Compact."[187] It is worth noting that despite the lack of an adjudication, the Ute Indian Water Compact provides that it has "the force and effect of law" upon ratification by the Ute Indian Tribe and Utah and with approval from Congress.

> 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.[188]

Unlike tribal water rights settlement agreements, the Ute Indian Water Compact contains language suggestive of an interstate water compact. All versions of the Ute Indian Water Compact provide the Ute Indian Tribe's water rights would be "apportioned . . .from the waters apportioned to the State of Utah from the Colorado River System . . . ."[189] The water rights allocated to the Tribe through the Ute Indian Water Compact would be "about eighteen and one-half percent of Utah's share."[190]

> 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. . .[191]

As described above, the term apportionment is used when considering a state's equitable share of an interstate water resource and is not generally used when referring to tribal water claims in tribal water right settlements.[192] Utah is a party to the 1922 Colorado River Compact[193] and the 1948 Upper Colorado River Basin Compact,[194] both of which state that the purpose of the interstate compact is "to provide for the equitable division and apportionment of the use of the water of the Colorado River System."[195]

V. TRIBAL-STATE WATER COMPACTING IN MONTANA

Montana's approach to tribal-state water compacting is unique because its Reserved Water Rights Compact Commission (Montana Commission) compacts with tribes for "the equitable division and apportionment of waters between the State and its people

186. UTAH CODE ANN. § 73-21-103, art. V (2018).
187. Section 73-21-103, art. IV.
188. § 73-21-103, art. V (emphasis added).
189. § 73-21-103, art. III.
190. Fetzer, *supra* note 149, at 200.
191. UTAH CODE ANN. § 73-21-103
192. *Id.*
193. 42 U.S.C.S § 171 Ch. 72 (LEXIS through Pub. L. No. 67-56).
194. 63 U.S.C.S § 31 Ch. 48 (LEXIS through Pub. L. No. 81-37).
195. *Id.*

and the several Indian tribes claiming reserved water rights within the State."[196] The Montana Commission relies on the state's inherent sovereignty to bind its citizens, like an interstate compact. However, compact approval by the Montana Water Court is required. The recently enacted CSKT Compact demonstrates the challenges associated with this approach of fitting settled rights of enacted tribal water compacts into Montana's general stream adjudication.

The legislative history of the Montana Commission provides a fascinating insight into how Montana has navigated the complex interplay of state, federal, and tribal water interests. In the late 1970s, the State of Montana developed the Montana Commission to negotiate water compacts with the twelve tribal nations that occupy seven reservations within the State.[197] Montana is the sole representative at the negotiation table for the State and non-tribal interests and engages in a robust public engagement process.[198] Although Montana engages in government-to-government negotiations and uses the "equitable apportionment" language associated with interstate compacts, Montana's tribal water compacts differ from interstate water compacts and the Ute Indian Water Compact in that they do not become enforceable until incorporated into a final court decree.

A. LEGISLATIVE HISTORY OF MONTANA'S RESERVED WATER RIGHTS COMPACT COMMISSION

Montana follows the doctrine of prior appropriation and enacted legislation to adjudicate all 219,000[199] water claims to pre-1973 water rights within the State, including all federal and tribal reserved water rights.[200] The existence of unquantified tribal rights for the seven tribal reservations was a major obstacle and complication for Montana's adjudication efforts.[201] Due to the scarcity of water in many areas, Montana was concerned that if tribes were granted enough water "'to fulfill the purposes of the reservation,' many junior appropriators would be left without water."[202] Montana established the Montana Commission as part of its state-wide general stream adjudication process and tasked it with negotiating settlements of tribal and federal reserved rights.

The legislative history of Montana Senate Bill 76 (SB76), which authorized the Montana Commission, reveals Montana was motivated by fears of unilateral federal reallocation of water. In his remarks to Montana's Natural Resources Committee, the Director of the Department of Natural Resources and Conservation (DNRC) spoke of "increasing demand for water in other parts of our nation" and "the need to record and centralize the records of existing water rights" because "what we can't prove is being put to beneficial use will be considered surplus and given to other users in other

196. § 85-2-701.

197. MONT. CODE. ANN. § 85-2-702 (2023).

198. MONT. CODE ANN. § 2-15-212 (2023).

199. Leia Larson, *As it enters its 40th year, the future of the Montana Water Court is unclear,* MONTANA FREE PRESS, (Mar. 1, 2019), https://montanafreepress.org/2019/03/01/as-it-enters-its-40th-year-the-future-of-the-montana-water-court-is-unclear/.

200. While Montana has not yet completed its state-wide adjudication process, it achieved eighteen compacts, settling reserved water rights within the state for all seven Indian Reservations, as well compacts addressing National Wildlife Refuges, National Wild and Scenic Rivers, National Parks, and Bureau of Land Management and Forest Service land. *See Water Rights in Montana,* WATER POL'Y INTERIM COMM. 7-8 (Feb. 2018)

201. PENELOPE G. WHEELER, INDIAN WATER RIGHTS IN THE WEST: A MONTANA CASE STUDY, 3 (1992).

202. *Id.*

States."[203] In 1973, the state legislature of Montana responded by enacting the Montana Water Use Act to protect its water through the adjudication of all water rights developed under state law in existence prior to July 1, 1973, and for all federal and tribal reserved water rights.[204,205]

The Water Use Act originally placed the burden of collecting and investigating claims on the DNRC, but after six years of work, it was not close to completing the adjudication of just the first basin.[206] Montana realized it needed a more efficient system to complete the adjudication of its remaining 84 basins.[207] In 1979, the State legislature enacted SB76, which amended the adjudication procedures originally established in the Water Use Act. "Rather than adjudicating existing water rights one basin at a time, the Legislature opted for a comprehensive general adjudication of the entire State."[208] Importantly, SB76 required water right claimants to file statements of claims by January 1, 1982 (this deadline was then extended to April 30, 1982), to prevent a presumption of abandonment of their rights.[209] The original version of the bill required the United States and tribes to file their claims like the non-tribal water claimants. However, representatives from Montana's tribes were not in favor of requiring tribes to file claims or risk losing the claimed rights, and thus sought to be excluded from the filing requirement.

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."[210] Jim Sanaver, Assistant to the Assistant Secretary of Indian Affairs for the Department of the Interior, stated he was asked to assist the tribes in working out a solution with the State. He introduced the Ute Indian Water Compact to the House Committee as an example of how another Western state resolved federal reserved rights claims with a tribe.[211] The state representatives expressed interest:

> [T]his is the kind of thing we should work on. The question is the process that we should use to accomplish it . . . . We want to work out something that is agreeable to both parties.[212]

Sanaver responded by referencing the proposed Tribal-State Compact Act that had been recently introduced in the United States Senate

By its February 28, 1979, meeting, the House Committee had drafted a proposed amendment to SB76 that provided "authority to enter into compacts with Indian

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203. 1973 legislative history of Senate Bill 444, Feb. 27, 1973, at 92.

204. Barbara Cosens, *The 1997 Water Rights Settlement Between the Chippewa Cree Tribe of the Rocky Boys Reservation: The Role of the Community and Trustee*, 16 UCLA J. ENVT' & POL'Y 255, 265 (1997) (at that time, the United States also "filed suits in Federal district court to quantify the reserved water rights associated with the seven Indian Reservations in the State of Montana," but the U.S. Supreme Court upheld deferral to the State adjudication process so long as the proceedings are adequate to adjudicate the reserved water rights); *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 570 (1983).

205. Cosens, *supra* note 200, at 264; MONT. CODE ANN. § 85-2-247

206. Water Policy Interim Committee, *Water Rights in Montana*, i,7 (Feb. 2018), https://leg.mt.gov/content/Publications/Environmental/2018-water-rights-handbook-final.pdf

207. *Id.*

208. *Id.* at 8.

209. Water Policy Interim Committee, *supra* note 202, at 9.

210. S.B. 76 House Select Committee on Water, (Committee Minutes).

211. *Id. See* Utah Code Ann. § 73-21-1.

212. S.B. 76 House Select Committee on Water, (statement of Rep. John Scully).

tribes and the United States in their behalf concerning Water Rights," and created the Montana Commission.[213] A Montana Representative explained that "the proposed amendment would include all Federal and interests in the petition [from the attorney general to the Montana supreme court requiring all persons file a claim] under authority granted the State by 43 U.S.C. 666," the McCarran Amendment.[214] On April 19, 1979, the Montana legislature enacted SB76 creating the Montana Commission.

B. MONTANA'S RESERVED WATER RIGHTS COMPACT COMMISSION

The Montana Commission is authorized to commence compact proceedings and to "negotiate with the Indian tribes or their authorized representatives jointly or severally to conclude compacts."[215] Montana's policy is to negotiate with tribes on a government-to-government basis.[216] The Commission acts on behalf of the State of Montana and its citizens as a whole, it does not represent the interests of individual water users.[217]

The Montana Commission is composed of two members appointed by the Speaker of the House of Representatives (one from each political party), two members appointed by the President of the Senate (one from each political party), four members designated by the Governor, and one member designated by the Attorney General.[218] Members are appointed to staggered four-year terms and may be reappointed.[219] The Montana Commission is attached to Montana's DNRC for administrative purposes only.[220] A "sufficient and appropriate staff" is assigned to serve the Montana Commission within the budget established by the Legislature; the Montana Commission directs and assigns the staff.[221]

The Montana Commission is required to submit a report to the chief water judge on the status of its negotiations every six months.[222] Once the parties have agreed to a compact, it must be ratified by the Montana legislature, the Tribal governing body, and the appropriate federal authority to become "effective and binding upon all parties."[223] Upon ratification, "the terms of a compact must be included in the preliminary decree" of the Montana Water Court.[224] The adjudication 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.[225] At that stage, individual water users can object to the compact, and may void the compact if the court sustains any objections.[226]

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213. S.B. 76 House Select Committee on Water, 46th cong. (Mont. Feb. 28, 1979) (committee minutes).
214. S.B. 76 House Select Committee on Water, (statement of Rep. John Scully).
215. MONT. CODE ANN. § 85-2-702(1) (2024).
216. Cosens, *supra* note 200, at 266.
217. *See id.* § 2-15-212.
218. MONT. CODE ANN. § 2-15-212(2).
219. § 2-15-212(5).
220. § 2-15-212(4).
221. *Id.*
222. § 85-2-705.
223. § 85-2-702(2).
224. § 85-2-702(3).
225. *See* § 85-2-702(3); Cosens, *supra* note 200, at 266.
226. Barbara A. Cosens, *The 1997 Water Rights Settlement Between the State of Montana and the Chippewa Cree tribe of the Rocky Boy's Reservation: The Role of Community and of the Trustee*, 16 UCLA J. ENV'T L. & POL'Y 255, 266 (1998).

"Therefore, it is in the best interest of all parties to fully consider individual water users' rights and interests during the negotiation process."[227]

The benefits of Montana's policy of negotiating rather than litigating water rights are multifold. It addresses:

> [C]oncern for water rights obtained and investments made since creation of a particular Federal or Indian reservation, the unique Federal attributes of reserved water rights, and the difficulty of integrating the reserved water rights with appropriations made pursuant to State law where private or State interests share a watershed with a reservation.228

Additionally, Montana's approach to negotiating water compacts "provides a forum to resolve conflicts with practical solutions" and "establishes a dialogue that may open the door to efficient resolution of disputes over water use that arise after the adjudication is complete."[229] Tribal and federal interests "receive direct benefits from turning undefined water claims into defined water rights."[230] Tribal benefits include obtaining funding to develop wet water for members or receiving payment in lieu of development.[231]

The Montana Commission had a strong track record for gaining public support for its tribal water compacts until recently. With the CSKT Compact, roughly 1,200 defendants filed objections to the entry of the compact decree[232] after Congress enacted the Montana Water Rights Protection Act in 2020, approving the compact.[233] The opponents, individual water right holders, have made extreme allegations about the CSKT Compact and expressed fears of federal control of Montana's water.[234] For example, they assert that because the Indian Claims Commission already compensated CSKT for its aboriginal lands taken, the Tribe's water claims are invalid. They have also accused the Montana Commission of conspiring with the United States and CSKT to fabricate the Tribe's federal reserved water rights.[235] Additionally, the opponents claimed that the CSKT Compact effectuates a taking of their water rights under Article 5 of the United States Constitution, and certain provisions violate their due process rights and the equal protection clauses of the Montana and United States constitutions.[236] On June 9, 2022, the Montana Water Court issued a Preliminary Decree confirming CSKT's water rights as recognized in the CSKT Compact and ordered the commencement of a special proceeding for resolution of objections to the Preliminary

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227. *Id.*
228. *Id.* at 267.
229. *Id.*
230. *Id.*
231. *Id.*
232. The Confederated Salish and Kootenai Tribes of the Flathead Reservation, CSKT Compact and Montana Water Rights Protection Act Implementation (https://acrobat.adobe.com/id/urn:aaid:sc:US:0d98c732-10dc-462e-bb84-9c3253281c0d).
233. Consolidated Appropriations Act, Pub. L. 116-260, 134 Stat. 1182 (Dec. 27, 2020).
234. Concerned Citizens of Western Montana, available at https://westernmtwaterrights.wordpress.com/.
235. Concerned Citizens of Western Montana, "Ten Things Legislators Must Read Before They Consider the CSKT Water Compact," available at https://westernmtwaterrights.wordpress.com/wp-content/uploads/2023/01/ten-things-legislators-must-read-before-they-consider-the-cskt-water-compact.pdf.
236. *Id.*

Decree.[237] As of the writing of this article, the Water Court has not yet issued a final decree approving the CSKT Compact. The anticipated hearing date to resolve objections is January 6, 2025.

The CSKT Compact situation highlights the burden of requiring a court approval process to finalize a tribal water compact that the state, the tribe, and Congress have already approved.

VI. CONCLUSION

Tribal water claims to western water resources have long cast a shadow over state water administration and planning. As western river flows are projected to shrink in the face of a warmer and drier climate, water demands continue to rise. Without a streamlined process for tribes and states to work together to resolve tribal water claims, all water users in river basins with undefined tribal water claims remain vulnerable. Tribal nations face the ongoing threat that existing uses of water will ultimately prevail over tribal water uses, and existing water users risk having their rights impaired or destroyed without compensation when tribes eventually exercise their federal water rights. [238] This uncertainty hampers effective water resources planning and development.[239]

A tribal-state water compact that joins tribal and state inherent sovereignty with the supreme authority of Congress, offers a streamlined approach to resolving tribal water rights without the protracted and contentious process of general stream adjudications. The case studies of the Ute Indian Water Compact and Montana's Reserved Water Rights Compact Commission show both the challenges and the promise of such agreements. While the inherent complexities and potential for objections remain, the benefits of efficiently achieving finality and certainty for all water users in the basin are significant. By leveraging their sovereign authority and securing congressional approval, tribes and states can collaboratively resolve tribal water claims while protecting existing uses, aiming for sustainable and just water management for future generations.

237. Case No. WC-0001-C-2021.

238. Thorson, *supra* note 14, at 470.

239. "Research has shown that communities, States, and countries that have rules in place for managing shortages are better able to maintain peace among water users than those with no structure in place. Priority administration can be used to manage the distribution of water in adjudicated river basins, and shortage sharing agreements can also prepare a community to withstand the stress of a drought." Amy Lewis for the New Mexico Interstate Stream Commission, Resilience of Water Use Sectors to Climate Change in New Mexico, 68 and 69 (March 7, 2022).