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## First in Time: The Place of Tribes in Governing the Colorado River System

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## **FIRST IN TIME: THE PLACE OF TRIBES IN GOVERNING THE COLORADO RIVER SYSTEM\*\***

### **ABSTRACT**

Native Americans are the first inhabitants of the Colorado River Basin and have relied on its water and other resources since time immemorial. However, tribes were not involved in the shaping the Colorado River Compact and its governing institutions, and they have faced uphill battles to secure, protect, and develop their water rights—including the ability to acquire access to clean water for their members. This article begins by explaining the historic role of tribes in governing the Colorado River system. It then reviews ongoing efforts to better integrate tribal needs, interests, and priorities into management decisions, and to support opportunities for more meaningful engagement of tribes in collaborative problem-solving and decision-making. Finally, the article provides a roadmap for the future role of tribes in governing the Colorado River system. The negotiation and implementation of the post-2026 management framework presents an important inflection point in the history of the basin to enhance the capacity of tribes and to reform the architecture of governance.

### **INTRODUCTION**

The Colorado River system is facing a crisis. For more than two decades, the basin has faced the driest period on record due to drought and climate change.<sup>1</sup>

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1. Request for Input on Post-2026 Colorado River Reservoir Strategies, 87 Fed. Reg. 37884, 37885 (Jun. 24, 2022) (The Bureau of Reclamation states, “[t]he Colorado River Basin provides essential water supplies to approximately 40 million people, nearly 5.5 million acres of agricultural lands, and habitat for ecological resources across the Southwestern United States and Northwestern Mexico. The limited water supplies of the Colorado River are declining, and the Colorado River Basin is currently experiencing a prolonged period of drought and record-low runoff conditions resulting in historically low reservoir levels at Lake Powell and Lake Mead. The period from 2000 through 2022 is the driest 23-year period in more than a century and one of the driest periods in the last 1,200 years. Absent a change in hydrologic conditions, water use patterns, or both, Colorado River reservoirs will continue to decline to critically low elevations threatening essential water supplies across nine states in the United States and [Mexico] . . . it is foreseeable that without appropriate responsive actions and under a continuation of recent hydrologic trends, major Colorado River reservoirs could continue to decline to “dead pool”—elevations at which

The two largest reservoirs in the United States, Lake Mead and Lake Powell, are at record low levels.<sup>2</sup> The water supply for more than 40 million people is at risk, along with the ability to generate hydropower.<sup>3</sup> Endangered species and other environmental values are also at risk, and the future looks to be at least as dry as the past two decades.<sup>4</sup>

Despite two deadlines imposed by the U.S. Department of the Interior in 2022, the seven basin states have not yet reached consensus on a plan to cut nearly one-third of current water use.<sup>5</sup> While this effort to craft a short-term plan is a work in progress, water managers are also preparing to renegotiate water allocation agreements put in place from 2007 and 2019 and to produce a long-term water management plan by the end of 2026.

These challenges—or opportunities if you prefer—come at a notable moment in the history of the basin. The 100th anniversary of the Colorado River Compact was recognized in 2022. It is widely considered the cornerstone of the legal and institutional arrangements governing use of the Colorado River system. It is also based on overoptimistic estimates of the river's flows, which makes the fundamental question of how to better align water supply and demand that much harder.<sup>6</sup>

The confluence of these hydrologic and policy imperatives compels water managers to consider a variety of approaches to conserve and share whatever water is available in the basin. Some researchers and leaders in the basin have called for renegotiating the 1922 Compact,<sup>7</sup> while others have called for scrapping it entirely.<sup>8</sup> Other commentators have also weighed in to suggest strategies to support sustainable

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water cannot be regularly released from a reservoir—in coming years). *See also* Jonathan T. Overpeck & Bradley Udall, *Climate Change and the Aridification of North America*, 117 PROC. NAT'L ACAD. SCI. 11856, 11856 (2020); *see generally* BUREAU OF RECLAMATION, COLORADO RIVER BASIN WATER SUPPLY AND DEMAND STUDY (2012), [hereinafter *Bureau of Reclamation Colorado River Basin Study*].

2. Request for Input on Post-2026 Colorado River Reservoir Strategies, 87 Fed. Reg. at 37885.

3. *Id.*

4. *Id. See also*, John Fleck & Brad Udall, *Managing Colorado River Risk*, 372 SCI. 885, 885 (2021).

5. Christopher Flavelle, *As the Colorado River Shrinks, Washington Prepares to Spread the Pain*, N.Y. TIMES, Jan. 27, 2023, <https://www.nytimes.com/2023/01/27/climate/colorado-river-biden-cuts.html>. Six of the basin states offered a consensus-based modeling alternative as one framework for making cuts. *See* Letter from Colorado River Basin State Representatives of Arizona, Colorado, Nevada, New Mexico, Utah, and Wyoming to Assistant Sec'y Tanya Trujillo, U.S. Dep't of the Interior & Commissioner Camille Touton, U.S. Bureau Reclamation (Jan. 31, 2023), <https://perma.cc/U4CY-UKW5>; *see also* Zach Budryk, *Six Colorado River States Submit Alternative to Federal Cuts*, HILL (Jan. 30, 2023), <https://perma.cc/B3KS-A5BD>. Meanwhile, California, the largest water user in the basin, offered its own modeling alternative. *See* Letter from Chairman JB Hamby, Colo. River Bd. of Cal., to Deputy Sec'y Tommy Beaudreau, U.S. Dep't of the Interior, et al. (Jan. 31, 2023) <https://perma.cc/R76P-BX34>; *see also* Zach Budryk, *California Submits Separate Colorado River Usage Plan*, HILL, Feb. 1, 2023, <https://perma.cc/DV4H-3BC4>.

6. ERIC KUHN & JOHN FLECK, SCIENCE BE DAMMED: HOW IGNORING INCONVENIENT SCIENCE DRAINED THE COLORADO RIVER 7–14, 215–21 (2021).

7. *Id.* at 220–21; *see also* Ian James, *With Severe Drought, An Urgent Call to Rework the Colorado River's Defining Pact*, L.A. TIMES, May 19, 2022, <https://perma.cc/WSL5-AN2Z>.

8. *See, e.g.*, Daniel Craig McCool, *As Climate Change Parches Southwest, Here's a Better Way to Share Water from the Shrinking Colorado River*, CONVERSATION (Nov. 17, 2021), <https://perma.cc/U5G7-CPSV>.

water use.<sup>9</sup> As these events unfold, Native American Tribes throughout the basin continue their efforts to secure and develop water rights, and to play a meaningful role in shaping future management of the river system.<sup>10</sup> Twenty-two of the thirty federally recognized tribes in the Colorado River Basin collectively have recognized rights to use 3.2 million acre-feet of river system water annually, or approximately 22%–26% of the basin’s average annual water supply.<sup>11</sup> In addition, twelve tribes have unresolved water rights claims, which will likely increase the overall volume of tribal water rights in the basin to about 30% of average annual water supply.<sup>12</sup>

Tribal rights are generally senior to state law-based water rights.<sup>13</sup> However, many tribes have not been able to fully develop their rights due to a combination of infrastructure limitations, funding needs, and political and regulatory

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9. See, e.g., Margaret Garcia & Elizabeth Koebele, Opinion, *No More Band-Aids: How to Make the Colorado River Sustainable for the Long Term*, ARIZ. CENT., Dec. 26, 2022, <https://perma.cc/8ULU-HDX2>.

10. There is no single convention regarding the use of the terms “tribe”, “Native American”, and “Indian”. The word “Indian” is used in this article in direct quotations and in reference to federal and state law and policy consistent with usage in the field of practice known as “Indian Law.” The words “Native American” or “Native” are used here in reference to one or more individual members of Tribes. The word “tribe” is used here in reference to distinct political communities of Native Americans.

11. WATER & TRIBES INITIATIVE, POLICY BRIEF NO. 4: *THE STATUS OF TRIBAL WATER RIGHTS IN THE COLORADO RIVER BASIN I*, 1 n.2 (2021), (“Colorado River Basin tribes currently hold water rights to 3,214,088 acre-feet of Colorado River system water annually. This figure is equivalent to nearly 26% of the mean annual flows of 12.44 maf at Lees Ferry from 2000–2018, and nearly 22% of the mean annual flows of 14.76 maf at Lees Ferry from 1906–2018. Adding the outstanding or unresolved tribal claims based on current information, tribes in the Basin may have rights to a total of 3,824,888 acre-feet or more than 30% of the mean annual flows of 12.44 maf at Lees Ferry from 2000–2018, and more than 26% of the mean annual flows of 14.76 maf at Lees Ferry from 1906–2018”). See generally HOMA SALEHABADI ET AL., CTR. FOR COLO. RIVER STUD., WHITE PAPER NO. 4: *THE FUTURE HYDROLOGY OF THE COLORADO RIVER BASIN* (2020). Assuming the quantity of tribal water rights remains constant and river flows decrease, tribes’ percentage share of the available water will continue to grow.

12. WATER & TRIBES INITIATIVE, *supra* note 11, at 1, 1 n.2.

13. COLO. RIVER BASIN TEN TRIBES PARTNERSHIP, TRIBAL WATER STUDY REPORT 2-1-2 [hereinafter TRIBAL WATER STUDY] (footnotes omitted) (“Federal Indian reserved water rights generally have one of two priority dates: date of reservation or time immemorial. Where the reserved rights are necessary to fulfill purposes created by the establishing document, the priority date is the date of establishment of the reservation. If, however, water is reserved so a tribe can continue its aboriginal uses, such water may have a time immemorial priority date . . . Federal Indian reserved water rights are defined primarily by federal common law. Indian “[r]eserved water rights are ‘federal water rights’ and ‘are not dependent upon state law or state procedures.’ Although federal Indian reserved water rights are often adjudicated in state courts, state courts must apply federal law. These rights differ from state water rights in several respects. Water rights based on state law are largely fixed by the date and quantity of the landowner’s initial use or appropriation of water. Laws of the western states (and the federal Reclamation laws) also require the “beneficial use” of water (for example, for mining, irrigation, domestic, municipal, industrial, power production, stock watering, wildlife preservation, and recreation) and typically require the water to be diverted from its source. Failure to use the water for a period of time could result in loss of the right under state forfeiture or abandonment laws. Conversely, federal Indian reserved water rights are quantified based on what is needed to accomplish the reservation’s purposes, including past, present, and future uses, not on initial or current use of water. These rights may be used for any lawful purpose on the reservation. Federal Indian reserved water rights also cannot be lost because of non-use under state-law concepts such as abandonment and forfeiture.”)

constraints.<sup>14</sup> Federal funding and support for the construction of water infrastructure to serve tribal communities has long suffered from underinvestment, especially when compared to many off-reservation, non-tribal communities.<sup>15</sup> Multiple tribes in the basin lack basic access to clean water.

Given that current water use already exceeds reliable supplies, and future flows look bleak, the integration of tribes' development plans with existing and prospective non-Indian water use is a highly consequential issue for the basin's future. The ongoing efforts to reduce water use through conservation and other strategies stand in potential tension with tribes' plans to fully use their water rights to satisfy cultural, economic, environmental, and other interests.<sup>16</sup> For much of the past century, however, tribes have been largely excluded from policy dialogues, planning, and decision-making, and tribes' needs and interests have often been only marginally considered in those efforts.<sup>17</sup>

Given the significance of tribal water rights in the allocation and use of an increasingly scarce water supply—not to mention the historic inequities imposed on tribes—it is imperative that Tribes play a major role in developing and implementing the post-2026 management framework. Fortunately, the basin community seems increasingly willing to recognize this aspiration<sup>18</sup>—over the past several years, federal and state officials, along with water users and other stakeholders, have taken steps to better integrate tribes into planning and decision-making processes.<sup>19</sup> While this is a positive trend, there is still considerable work to be done to establish permanent structures for shared decision-making among the federal government, the basin states, and tribes, and to enhance tribes' capacity to participate in those efforts. Ultimately, no sustainable solution to managing water scarcity in the basin is possible without full, meaningful engagement by and with tribes.

To better understand the past, present, and potential future role of tribes in governing the Colorado River system, this article begins by surveying the legal and

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14. For a partial explanation of this issue, see HEATHER TANANA ET AL., UNIVERSAL ACCESS TO CLEAN WATER FOR TRIBES IN THE COLORADO RIVER BASIN 12–20, 44–46 (2021). See also Jessie Blaeser, et al., *Tribes in the Colorado River Basin are Fighting for their Water. States Wish They Wouldn't*, GRIST (Nov. 16, 2022), <https://perma.cc/4F6S-BMHA>.

15. See generally TANANA, ET AL., *supra* note 14 (providing an overview of current federal water infrastructure programs for tribes, including shortcomings and suggestions for improvement).

16. See TRIBAL WATER STUDY, *supra* note 13, at 5.0–5.11 (explaining how the listed tribes currently use water and how they intend to develop their reserved water rights).

17. See, e.g., Colorado River Compact, Art. VII (1922) (The sole mention of tribes in the Compact is Article VII, which consists of one sentence: “Nothing in this compact shall be construed as affecting the obligations of the United States of America to Indian tribes.”).

18. In the course of completing over one hundred interviews with tribal and other basin leaders in 2019, the Water & Tribes Initiative (WTI)—a collaborative partnership designed to facilitate connections among tribes and other leaders, build trust and understanding, and create opportunities to explore shared interests and take collaborative action—found that quantification and development of tribal water rights consistently ranked among the top issues basin stakeholders identified as needing to be addressed in developing the next management framework for the Colorado River system. WATER & TRIBES INITIATIVE, *TOWARD A SENSE OF THE BASIN: DESIGNING A COLLABORATIVE PROCESS TO DEVELOP THE NEXT SET OF GUIDELINES FOR THE COLORADO RIVER SYSTEM* 19–21, 40–41 (2020).

19. JOHN FLECK, WATER IS FOR FIGHTING OVER AND OTHER MYTHS ABOUT WATER IN THE WEST 7–11, 194–201 (2019) (explaining the “network” of stakeholders and the “collaborative culture” that has emerged in the basin over the past three decades).

sociopolitical status of tribes prior to the Colorado River Compact's drafting in 1922. It then reviews the role of tribes in river system governance over the past 100 years. The article concludes by offering a roadmap to enhance the role of tribes in formulating and implementing policies that will govern the river system moving forward.

## I. FIRST IN TIME: THE PLACE OF NATIVE AMERICANS IN THE COLORADO RIVER BASIN

### A. Indian Law and Policy: 1787–1934

The fact that there were still tribes whose rights needed to be addressed in the Compact is a testament to tribes' tenacity and resilience in the face of the United States' long-standing program to dispossess them of their lands and diminish if not wholly eliminate their status as discrete political entities.

From the earliest days of the American republic, federal and state policy focused on acquiring Indian lands, by purchase if possible but otherwise by force.<sup>20</sup> Congress and the Supreme Court occasionally recognized tribes' rights to be free from state interference in their affairs,<sup>21</sup> but this principle was far more often acknowledged in theory than realized in practice.<sup>22</sup> Moreover, the Supreme Court held in the early nineteenth century that tribes only continue to possess whatever attributes of sovereignty are not inconsistent with their status as "domestic dependent nations."<sup>23</sup> This legal fiction situates tribes as sovereign entities that are neither states

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20. C.G. CALLOWAY, *THE INDIAN WORLD OF GEORGE WASHINGTON: THE FIRST PRESIDENT, THE FIRST AMERICANS, AND THE BIRTH OF THE NATION* 321–45 (2018); *see also* Letter from George Washington to James Duane (Sep. 7, 1783), <https://perma.cc/N8Z8-TTGU> ("[P]olicy and economy [sic] point very strongly to the expediency of being upon good terms with the Indians, and the propriety of purchasing their Lands in preference to attempting to drive them by force of arms out of their Country.").

21. C.G. CALLOWAY, *supra* note 20, at 340–41 (describing the initial passage of the Indian Non-Intercourse Act (INA) in 1790 and some of the subsequent enactments. Currently codified at 25 U.S.C. § 177, the INA prohibits the "purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians" without the express consent of Congress). *See also* *Worcester v. Georgia*, 31 U.S. 515, 519 (1832) ("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.").

22. Upon hearing of Chief Justice John Marshall's opinion in *Worcester*, President Andrew Jackson is reputed to have declared: "Marshall has made his decision; now let him enforce it." Though the quotation itself is now considered likely apocryphal, the sentiment underlying it certainly reflects Jackson's attitude toward tribal sovereignty. After first championing the Indian Removal Act of 1830 (Pub.L. 21-148, 4 Stat. 111), his administration later sent federal troops to effectuate the State of Georgia's longstanding effort to eject the Muscogee (Creek) and Cherokee peoples from their ancestral lands, an endeavor that became the Trail of Tears. *See* CLAUDIO SAUNT, *UNWORTHY REPUBLIC: THE DISPOSSESSION OF NATIVE AMERICANS AND THE ROAD TO INDIAN TERRITORY* 249–54, 275–82 (2020). The Ninth Circuit Court of Appeals aptly put it in a 1956 case: "The numerous sanctimonious expressions to be found in the acts of Congress, the statements of public officials, and the opinions of courts respecting the generous and protective spirit which the United States properly feels toward its Indian wards, and the high standards for fair dealing required of the United States in controlling Indian affairs, are but demonstrations of a gross national hypocrisy." *United States v. Ahtanum Irrigation Dist.*, 236 F.2d 321, 338 (9th Cir. 1956) (citations omitted).

23. *Cherokee Nation v. Georgia*, 30 U.S. 1, 18 (1831) ("[T]he Indians are acknowledged to have an unquestionable, and . . . unquestioned right to the lands they occupy, until that right shall be extinguished

nor foreign countries in their relationship to the United States.<sup>24</sup> As such, tribes did not enjoy constitutional protections from federal power, such as those afforded to states under the 10th Amendment to the United States Constitution, nor the legal right to stand as equals with the United States. Nonetheless, for nearly the first century of its history, the United States continued prior colonizers' practices of negotiating with tribes for land cessions.<sup>25</sup> Indeed, by 1869, the U.S. government had entered into or recognized 375 treaties with tribes.<sup>26</sup> Particularly as the nineteenth century unfolded, these treaties commonly came to involve cessions of significant portions of tribes' aboriginal territory, with tribes retaining smaller territories as homelands—what we know now as “reservations”<sup>27</sup>—in exchange for promises of protection and material support from the United States.<sup>28</sup>

As non-Indians continued to move westward in the nineteenth century, however, the federal government faced increasing pressure to break up even these diminished tribal homelands. In a rider attached to the Indian Appropriations Act of 1871, Congress brought the treaty-making era to an end, declaring that no tribe thereafter was to be recognized as an “independent nation” capable of a sovereign-to-sovereign relationship with the United States.<sup>29</sup> This express repudiation of even the principles of tribal sovereignty articulated by Chief Justice Marshall in *Worcester v. Georgia*<sup>30</sup> made clear that federal power would now be exercised exclusively to supplant rather than support the role of tribes as sovereigns.<sup>31</sup> Sixteen years later, Congress enacted what has been characterized as “the most important, and to the tribes, the most disastrous piece of Indian legislation in United States history: the General Allotment Act of 1887.”<sup>32</sup> This “Dawes Act” was designed for two purposes: to open more land for settlement and to destroy tribes as distinct political communities.<sup>33</sup>

The Act authorized the president to allot portions of reservations to individual tribal members, in theory so that they would cultivate the allotments and assimilate into mainstream U.S. society as farmers.<sup>34</sup> Unsurprisingly, “there was no

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by a voluntary cession to our government; yet it may well be doubted whether those tribes which reside within the boundaries of the United States can . . . be denominated foreign nations. They may, more correctly . . . be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases.”).

24. *Montana v. United States*, 450 U.S. 544, 565 (1981).

25. See generally FELIX S. COHEN, *COHEN'S HANDBOOK OF FEDERAL INDIAN LAW* 26–75 (2005).

26. See *Early Recognized Treaties with American Indian Nation*, UNIV. NEB., <https://perma.cc/HMN3-LHYW>, (last visited Apr. 23, 2023).

27. See *United States v. Winans*, 198 U.S. 371, 381 (1905), explaining, “[T]he treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted.”

28. See generally CHARLES J. KAPPLER, *INDIAN AFFAIRS: LAWS AND TREATIES* (vols 1–5, 1904–1941).

29. COHEN, *supra* note 25, at 74, 75.

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

31. DAVID H. GETCHES ET AL., *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 187 (Thompson Reuters, 6th ed. 2011).

32. WILLIAM C. CANBY, *AMERICAN INDIAN LAW IN A NUTSHELL* 24 (West Acad. Publ'g., 7th ed. 2020).

33. GETCHES, *supra* note 31, at 141.

34. CANBY, *supra* note 32, at 25.

provision for consent of the tribes or the individual Indians.”<sup>35</sup> Nor were many of the promised farming implements or supplies delivered.<sup>36</sup> The Act also authorized the Secretary of the Interior to dispose of all “excess” lands remaining after allotments had been made to tribal members, thereby depriving tribes of governmental control over their territory, and making more land available to non-Indian settlers.<sup>37</sup> Tribes’ efforts to challenge allotment in the courts were largely unsuccessful, as the Supreme Court declared that tribes and their rights were subject to the “plenary power” of Congress irrespective of any previous treaty commitments made by the United States.<sup>38</sup>

The practical impact of the allotment era on the geographic and political integrity of tribes was catastrophic. Tribes’ cumulative landholdings declined from 138 million acres in 1887 to 48 million acres in 1934.<sup>39</sup> Of the 48 million acres that remained, some 20 million were desert or semidesert, a situation particularly acute in the Great Plains and the Southwest.<sup>40</sup> Yet despite decades of military, legal, and political assaults on their rights, their sovereignty, and their way of life, tribal cultures and traditions were not completely destroyed by the allotment policy and assimilative pressures. Tribes and Indian people continued to fight to preserve their lands, their rights, and their cultures.

## B. Legacy of Conquest

Moving from national policy and practices to the Colorado River Basin, the first thing to realize is that Native Americans have inhabited the basin since time immemorial.<sup>41</sup> Then, as now, there has been no single, monolithic population that

35. *Id.* at 25.

36. *Id.*

37. Indian General Allotment Act of 1887, 24 Stat. 388 § 1-3, repealed by section 106(a)(1) of Pub. L. No. 106-462, 114 Stat. 2007 (2000).

38. *See, e.g., Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903) (“Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.”). Viewing *Lone Wolf* in

conjunction with two significant decisions protecting tribes’ treaty rights – *United States v. Winans*, and *Winters v. United States* – it seems that the early 20<sup>th</sup> Century Supreme Court continued to adhere to the basic principles articulated in the so-called Marshall Trilogy. *United States v. Winans*, 198 U.S. 371, 381 (1905) (recognizing the continued existence of a treaty-based tribal fishing right); *Winters v. United States*, 207 U.S. 564, 577 (1908) (recognizing tribes’ reserved water rights). The Marshall Trilogy established that when there is conflict between tribes and the federal government, tribes’ rights must yield; but when there is conflict between tribes and states or tribes and individuals, tribes’ rights prevail unless Congress has specifically declared otherwise. *See generally Johnson v. M’Intosh*, 21 U.S. 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. 1, 18 (1831); *Worcester v. Georgia*, 31 U.S. 515 (1832). Again, there is significant daylight between the principles articulated by the Supreme Court and real-world practice. But, as discussed further below, the continued vitality of these principles would play a key role in the reinvigorated vitality of tribes as sovereign political communities during the latter part of the 20<sup>th</sup> Century and to the present.

39. CANBY, *supra* note 34 at 26.

40. *Id.*

41. *See* Jason Anthony Robison, *Indigenizing Grand Canyon*, 2021 UTAH L. REV. 101, 105–120 (2021) (noting specifically the primary and secondary sources included within the footnotes of that section of the article).



could be referred to as *the* “Native American community.” Rather, as our colleague says, “If you know one tribe, you know one tribe.”<sup>42</sup> Each of the thirty federally recognized tribes in the basin has a unique history, culture, economy, and government. Yet these diverse communities share two important attributes: their connection to the land and a legacy of conquest.

The Colorado River system is the very place of origin for several Native American communities.<sup>43</sup>

“It is *the* spot from which they emerged into this world, and from which they migrated for long periods to eventually arrive at their homelands. . . . Further, not only are the river system’s corridors places of emergence and migration for Native peoples, they are also places to which tribal members will return when they pass on. Thus, the prevailing sense of stewardship for the land accompanying these connections is as powerful as it is unsurprising.”<sup>44</sup>

Native Americans likewise shared a particular view of land ownership. While individual tribes identified with and occupied certain places, Native Americans did not “own” land in the sense of Euro-American colonizers.<sup>45</sup> Individual fee ownership was a wholly alien concept. Instead, Native Americans were dedicated to their communities and to a sense of cooperation for sustenance and survival.<sup>46</sup>

And that brings us to the second attribute—an experience shared by Native American communities within the Colorado River Basin, though not unique to them: a legacy of conquest.<sup>47</sup> Beginning in the first half of the 1500s and extending through the mid-1800s, Spanish and then Mexican leaders sought to upend the lifeways of Native Americans in what is now the American southwest.<sup>48</sup> The Spanish believed themselves superior to Native communities and heritage and assumed an obligation to “civilize” them.<sup>49</sup> When Mexico gained independence from Spain in 1821, Mexicans followed in their predecessors’ footsteps, self-identifying as “bearers of civilization.”<sup>50</sup> While Mexico’s civilizing program showed some continuity with Spain’s, it did grant full citizenship to Native people, incorporate Native people into

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42. This declarative statement has made its way into conversations about tribes in the Colorado River Basin thanks to our colleague Daryl Vigil, who uses the phrase to emphasize the diversity of tribal needs, interests, capacities, and priorities. The reality that there is no single tribal viewpoint or priority.

43. See generally Robison, *supra* note 41 (describing the origin stories, including places of emergence, of the Havasupai, Hualapai, Hopi, and Zuni).

44. *Id.* (describing Hopi and Zuni connections to the Colorado River system within and adjacent to the Grand Canyon); see also Jason Robison et al., *Community in the Colorado River Basin*, 57 IDAHO L. REV. 1, 12–13 (2021).

45. Robison, *supra* note 41, at 12–13.

46. *Id.* at 13–14.

47. See generally EDWARD H. SPICER, *CYCLES OF CONQUEST: THE IMPACT OF SPAIN, MEXICO, AND THE UNITED STATES ON INDIANS OF THE SOUTHWEST 1533–1960* (1962).

48. *Id.* at 281–342 (examining Spanish and Mexican “civilizing” programs).

49. *Id.* at 284–85.

50. *Id.* at 5–6.

the nation-state, and distribute individual land parcels to Native families.<sup>51</sup> The United States, by contrast, was generally uninterested in extending political rights to Native Americans after it displaced Mexican control over the region.<sup>52</sup> However, it remained committed to the practice of trying to convert Native lifeways to those of the dominant society.<sup>53</sup>

The cumulative impact of this legacy of conquest created two significant tensions that persist today. First, colonizers tended to view the basin's natural resources—including plants, animals, water, and landscapes—in utilitarian terms, valuing them predominantly as commodities to be exploited for human consumption.<sup>54</sup> Native Americans, by contrast, while certainly living off the land and its resources, generally viewed nature as sacred, endowed with intrinsic value irrespective of its instrumental value to humans.<sup>55</sup> Second, the colonizers sought to impose all-encompassing, centralized political institutions as the primary instruments of social organization, in contrast to the small, local, and autonomous arrangements developed by Native communities.<sup>56</sup>

To appreciate how this legacy of conquest shaped the everyday life of Native Americans in the Colorado River Basin, consider the Jicarilla Apache Nation's story.<sup>57</sup> The tribe's ancestors arrived from the Mackenzie Basin in what is now Canada between 1300 and 1500.<sup>58</sup> The arid southwestern environment forced the Jicarilla people into a seminomadic subsistence lifestyle that ranged across large expanses of what is now northern New Mexico, southern Colorado, and the panhandle area of Oklahoma and Texas.<sup>59</sup> Jicarilla people clustered in family groups for these travels, but still maintained strong social cohesion throughout the entire tribe.<sup>60</sup>

In 1872, the Jicarilla people sought to reserve land in northern New Mexico.<sup>61</sup> Starting in 1873, however, the federal government attempted to move the Jicarilla people to the Mescalero Apache Reservation in southern New Mexico.<sup>62</sup> Many of the Jicarilla people refused to move, and others were dissatisfied living on

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51. *Id.* at 334–35.

52. Native Americans were not formally recognized as United States citizens until the passage of the Indian Citizenship Act of 1924. *See* Pub. L. No. 68-175, 43 Stat. 253 (1924). Even then, it was nearly 40 more years before all 50 states recognized Native Americans' rights to vote in state elections. The suppression of Native Americans' efforts to exercise these legal rights remains an American political tradition. *See, e.g.*, JEAN REITH SCHROEDEL, VOTING IN INDIAN COUNTRY: THE VIEW FROM THE TRENCHES, 26 (2020); *Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989, 1017-1021, (9th Cir. 2020), *cert. granted sub nom. Bemovich v. Democratic Nat'l Comm.*, 141 S. Ct. 222 (October 2, 2020).

53. SPICER, *supra* note 47, at 345–53.

54. RICHARD WHITE, "IT'S YOUR MISFORTUNE AND NONE OF MY OWN": A NEW HISTORY OF THE AMERICAN WEST 212 (1991).

55. *Id.* at 212–13.

56. SPICER, *supra* note 47, at 6–9.

57. This narrative draws on Daryl Vigil's personal experience. *See generally* VERONICA E. VELARDE TILLER, THE JICARILLA APACHE TRIBE: A HISTORY (1983).

58. VELARDE TILLER, *supra* note 57, at 4.

59. *Id.* at 4–5.

60. *See id.* at 12–30.

61. *See id.* at 77–98.

62. *Id.* at 77–78.

that reservation.<sup>63</sup> By 1880, a second attempt was made to establish a reservation for the Jicarilla people in northern New Mexico, which again failed, this time due to intertribal conflict, the refusal of the Jicarilla and Mescalero Apaches to consolidate on the same reservation, and settlers' complaints.<sup>64</sup> In 1886, Jicarilla people still living on the Mescalero Reservation left and headed toward northern New Mexico.<sup>65</sup> This migration, combined with government attention to Jicarilla grievances, finally led to establishment of a reservation.<sup>66</sup> "The signing of the Executive Order of February 11, 1887, marked the end of an era in Jicarilla Apache history. The Indians had finally found a permanent home where the government could reasonably assure them of noninterference from whites."<sup>67</sup> At least that was the expectation.

Nearly immediately the Jicarilla people had to confront the allotment era. "For the Jicarillas, [the Dawes Act] created economic hardship and retarded social progress instead of helping to make them capable, self-sustaining American citizens."<sup>68</sup> "The standard of living and the quality of life on the Jicarilla Apache Reservation from 1887 to 1934 was intrinsically related to the economic problems fostered by the Dawes policies.<sup>69</sup> The Dawes philosophy . . . had attempted to reshape the Native Americans' way of life in the image of the American yeoman farmer, without proper planning and necessary tools."<sup>70</sup>

The land reserved for the Jicarilla people was agriculturally unproductive and lacked surface water, leading to dependence on federal rations to survive.<sup>71</sup> Because of these conditions, "[s]ome even left the reservation for fear of starvation."<sup>72</sup> The United States further hindered the Jicarilla people economically.<sup>73</sup> It was slow in building an agency, which was supposed to provide material support.<sup>74</sup> It limited the Jicarilla people's ability to earn income through employment.<sup>75</sup> Tribal efforts to improve their situation were suppressed.<sup>76</sup> The United States also egregiously mismanaged Jicarilla funds.<sup>77</sup> "Mismanagement of tribal funds was nothing new; but in the period 1908–20, when the tribe was in greatest economic need, the government chose to tie up its funds. While the funds were lying idle, the Jicarilla people were suffering unnecessarily from the ravages of poverty."<sup>78</sup>

During this time, the Jicarilla people came to the brink of extinction. Given the poor economic circumstances, poor living conditions, poor nutrition, and

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63. *Id.* at 78–83.

64. *Id.* at 83.

65. *Id.* at 94.

66. *Id.* at 97–98.

67. *Id.* at 97.

68. *Id.* at 99.

69. *Id.* at 140.

70. *Id.* at 140.

71. *Id.* at 100, 120, 133.

72. *Id.* at 108.

73. *Id.* at 140.

74. *Id.* at 105–06.

75. *Id.* at 112, 121.

76. *Id.* at 125, 127.

77. *Id.* at 115–16.

78. *Id.* at 113.

inadequate healthcare, tuberculosis, trachoma, measles, and influenza pervaded, reducing the population by over 30% between 1896 and 1920, from 853 to 588 people.<sup>79</sup> This figure remained below 600 people until 1923 (one year after the Colorado River Compact was ratified).<sup>80</sup>

The Jicarilla experience was not unique. Many other tribes in the Colorado River Basin and across the American West suffered similar travails.<sup>81</sup>

### C. Role of Tribes in Shaping the Colorado River Compact

Considering this historical context, it is not surprising that Native Americans did not have a role in shaping the Colorado River Compact.

In a series of meetings in the 1910s and 1920s leading up to creation of the Colorado River Commission, the League of the Southwest wondered about the federal government's obligation to protect the water rights of Native Americans.<sup>82</sup> Whatever authority or responsibility the federal government may have had as a legal matter, "little was said about Indians or their water rights in any discussion of the Colorado River, including the deliberations at league meetings. Indians were a forgotten people in the Colorado Basin, as well as in the country at large; and their water needs, when not ignored, were considered negligible."<sup>83</sup>

By November 1922, the Colorado River Commission had reached agreement on the major issues of water allocation and storage and was now in a position to take up "the lesser questions" that remained.<sup>84</sup> One of these regarded tribal water rights. According to Norris Hundley, Jr., "[n]o attempt was made to discover how many Indians were in the basin or what their water needs were. The commission simply assumed that the water rights of Indians were 'negligible.'"<sup>85</sup> Realizing that the federal government had some type of obligation to Native Americans, the federal representative on the Commission—Secretary of Commerce (and future President) Herbert Hoover—argued that it would be unwise to completely ignore this question.<sup>86</sup> Hoover therefore offered the so-called "wild Indian article," which was incorporated as Article VII of the Compact: "Nothing in this compact shall be

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79. *Id.* at 131.

80. *Id.*

81. See Jason Robison et al., *supra* note 44, at 28–30. Examples of similar histories can be seen with respect to tribes holding traditional connections to the Grand Canyon. See Jason Anthony Robison, *supra* note 41, at 124–27.

82. The League of the Southwest was formed in November 1917 as a regional booster organization dedicated to promoting the Southwest and supporting economic development. By the time of its fourth meeting in Denver, Colorado in August 1920, the League had become a single-issue organization dedicated to the development of the Colorado River. At that meeting, Colorado lawyer Delph Carpenter proposed that the Colorado River states create a compact or interstate treaty under Article I Section 10 of the U.S. Constitution. In 1921, Congress authorized the states to negotiate an agreement for allocation of the river water, leading to the 1922 Colorado River Compact. See NORRIS HUNDLEY, JR., *WATER AND THE WEST: THE COLORADO RIVER COMPACT AND THE POLITICS OF WATER IN THE AMERICAN WEST* 83–138 (Univ. of Cal. Press, 2nd ed. 2009).

83. *Id.* at 80.

84. *Id.* at 210.

85. *Id.* at 211.

86. *Id.* at 211–12.

construed as effecting the rights of Indian tribes.”<sup>87</sup> As explained by at least one scholar, this de minimis consideration of tribal water rights left unresolved one of the most important issues in the basin.<sup>88</sup>

The Compact’s disregard of tribal water rights is particularly ironic given that the U.S. Supreme Court had announced the Indian reserved water rights doctrine in *Winters v. United States* (1908), fewer than 15 years before the Compact’s negotiation.<sup>89</sup> The *Winters* doctrine holds that when land is designated as an Indian reservation—whether by treaty, executive order, or statute—that reservation includes a right to enough water to satisfy the reservation’s purpose(s).<sup>90</sup> The priority date for these water rights is no later than the date of the reservation’s creation, which in the western United States (including the Colorado River Basin) often occurred before significant Euro-American settlement and water development.<sup>91</sup> Tribal uses that predate the reservation’s creation are entitled to a priority date of “time immemorial.”<sup>92</sup> This means that tribes have some of the most senior water rights to the Colorado River system’s flows.<sup>93</sup>

Read in light of *Winters*, Article VII of the Compact is best understood to disclaim any intent to affect the recognition or realization of tribal water rights. Yet here is another discrepancy between principle and practice. Since the Compact’s ratification in 1922, tribes’ efforts to secure recognition, quantification, and development of reserved rights have been fraught with conflict, opposition, and delay.<sup>94</sup> The application of *Winters* to the basin was not formally applied until the U.S. Supreme Court’s *Arizona v. California* decision in 1963,<sup>95</sup> and over significant objections from the State of Arizona.<sup>96</sup> In light of this history, an arguably more

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87. Colorado River Compact, Art. VII (1921); Lloyd Burton, *The American Indian Water Rights Dilemma: Historical Perspective and Dispute-Settling Policy Recommendations*, 7 UCLA J. ENV’T LAW & POLICY 1, 16 (1987).

88. DANIEL MCCOOL, NATIVE WATERS: CONTEMPORARY INDIAN WATER SETTLEMENTS AND THE SECOND TREATY ERA 160 (The U. of Ariz. Press, 2022).

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

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

91. SANDRA B. ZELLMER & ADELL L. AMOS, WATER LAW IN A NUTSHELL 382–83 (6th ed. 2021).

92. CONG. RSCH. SERV., INDIAN WATER RIGHTS SETTLEMENT 4 n. 2 (2023).

93. There is no single source that tabulates the relative priority of tribal and non-tribal water rights in the basin. The Supreme Court’s 2006 consolidated decree in *Arizona v. California* highlights the relative seniority of the reserved rights held by the five Lower Colorado River tribes to their non-Indian neighbors with rights covered by that decree. *Arizona v. California*, 547 U.S. 150, 169, 174, 181 (2006). The Water & Tribes Initiative’s policy brief on *The Status of Tribal Water Rights in the Colorado River Basin* provides a comprehensive picture of tribal water rights in the basin but does not present them in the context of non-tribal water rights. This state of affairs in part further illustrates the basin community’s longstanding neglect of tribal water rights but is also a consequence of the size of the basin and the fact that water rights regulation is most commonly and intra- rather than inter-state matter, See generally WATER & TRIBES INITIATIVE, *supra* note 11.

94. See generally JOHN SHURTS, INDIAN RESERVED WATER RIGHTS: THE WINTERS DOCTRINE IN ITS SOCIAL AND LEGAL CONTEXT (U. of Okla. Press: Norman, 2000) (outlining the history of Indian reserved water rights).

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

96. See generally Oral Argument *Arizona v. California*, 373 U.S. 546 (1963), <https://perma.cc/GZS9-DCQH>.

realistic interpretation of Article VII is that the Compact negotiators simply wished the federal government would make the Indian “problem” go away.

There is a rather obvious irony here. A key tenet of Western water law is “first in time, first in right.”<sup>97</sup> Native Americans are indisputably the first people to inhabit the Colorado River Basin.<sup>98</sup> However, tribes were not involved in shaping the Compact (the so-called “cornerstone” of the Law of the River), and they have since faced an uphill battle to have their water rights recognized and realized, historically playing little to no role in formulating and implementing policy for the river system. In other words, first in time, first in right apparently applies to some people but not all people, at least not equally.

## II. AN EVOLVING ROLE: TRIBAL ENGAGEMENT IN COLORADO RIVER GOVERNANCE, 1922–2022

### A. Role of Tribes in Basin Governance<sup>99</sup>

On November 24, 1922, representatives of the seven Colorado River Basin states joined then-Commerce Secretary Herbert Hoover at The Bishop’s Lodge in Santa Fe, New Mexico to sign the Colorado River Compact.<sup>100</sup> This agreement was historic for several reasons. It was the first interstate water compact drafted in U.S. history.<sup>101</sup> It laid the groundwork for Hoover Dam’s construction, which changed the fate of the Southwest.<sup>102</sup> It brought a measure of stability to the basin by trying to assess and make space for the seven basin states’ current and future water needs.<sup>103</sup> It did all of this, however, by largely ignoring inconvenient science of the day, which suggested there was not enough water to satisfy the ambitions of all the farms’ and cities’ boosters and the politicians serving them.<sup>104</sup> And the Compact largely ignored tribes’ needs, interests, and water rights—a practice that persisted until at least the latter half of the twentieth century.

The continued evolution of federal Indian policy across the 20th Century helps contextualize basin tribes’ participation—or the lack thereof—in governance. Moving away from the explicitly assimilationist and expropriative policies underly the Dawes Act, Congress ended the allotment era and granted more administrative control to tribes by passing the Indian Reorganization Act of 1934.<sup>105</sup> Among other things, the Act sought to protect the remaining tribal land base and empower tribes

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97. See generally ANTHONY DAN TARLOCK ET AL., *WATER RESOURCE MANAGEMENT: A CASEBOOK IN LAW AND PUBLIC POLICY* 121–192 (7th ed. 2014).

98. See Robison et al., *supra* note 44, at 12–13. See generally PATRICIA NELSON LIMERICK, *THE LEGACY OF CONQUEST: THE UNBROKEN PAST OF THE AMERICAN WEST* 179–221 (1987).

99. See generally Jay Weiner, *Colorado Basin Tribal Water Rights*, 202 *WATER REP.* 6 (2020); *WATER & TRIBES INITIATIVE*, *supra* note 18.

100. See HUNDLEY, *supra* note 82, at 1–2.

101. See generally TARLOCK ET AL., *supra* note 97, at 806–855.

102. See generally HUNDLEY, *supra* note 82.

103. *Id.*

104. For an excellent review of this history, see generally ERIC KUHN AND JOHN FLECK, *SCIENCE BE DAMMED: HOW IGNORING INCONVENIENT SCIENCE DRAINED THE COLORADO RIVER* (2019).

105. Indian Reorganization Act of 1934, Pub. L. No. 73-383, 48 Stat. 984 (1934).

to establish legal structures for self-government.<sup>106</sup> These developments proceeded from the assumption, quite contrary to the allotment policy, that tribes would not only be in existence in perpetuity, but that they *should* be. In the 1950s and 1960s, however, the pendulum swung back again, leading to congressional efforts to “terminate” several tribes in an effort to end their existence as distinct political communities and to wholly assimilate their members into the dominant culture. Beginning in the 1970s, federal Indian policy shifted once again and reemphasized self-determination and self-governance.<sup>107</sup>

Against this backdrop, it is unsurprising that tribes’ participation in Colorado River governance was at best mixed until the 1990s. For starters, the Upper Colorado River Basin Compact of 1948 incorporated a nearly identical provision as the Colorado River Compact’s “wild Indian article”: “Nothing in this Compact shall be construed as . . . [a]ffecting the obligations of the United States of America to Indian tribes.”<sup>108</sup> Although the 1922 and 1948 compacts both acknowledge that the federal government has “obligations” to tribes in the basin, it was not until 1964 that any tribal water rights in the basin were legally quantified, with the U.S. Supreme Court’s issuance of its *Arizona v. California* decree.<sup>109</sup> That decree established the rights of five tribes with reservations along the Lower Colorado River.<sup>110</sup> However, the Court also held that any tribe’s water use within a given state must be charged against the state’s allocation under the decree, thereby creating a disincentive for states to facilitate tribal water development and use when such uses might conflict with more favored constituencies.<sup>111</sup>

The process of quantifying tribal water rights in the Colorado River Basin reached a new phase with the advent of the modern settlement era in 1978, when the Ak-Chin Indian Community Settlement Act was approved.<sup>112</sup> By the end of 2020, 13 of the 30 federally recognized tribes in the Colorado River Basin had quantified water rights.<sup>113</sup> Five other tribes have some quantified water rights as well as some outstanding claims.<sup>114</sup> Altogether, through adjudication or settlement, these 18 tribes have recognized rights to a total of “3,206,088 acre-feet per year (af/yr), equal to 26% of the Colorado River’s mean flow of 12.44 maf/yr at Lee’s Ferry from 2000–2018 and nearly 22% of the mean flow of 14.76 maf/yr at Lee’s Ferry from 1906–

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106. Indian General Allotment Act of 1887, 24 Stat. 388 § 1-3, repealed by section 106(a)(1) of Pub. L. No. 106-462, 114 Stat. 2007 (2000).

107. See Indian Self Determination and Educational Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203 (1975).

108. Upper Colorado River Basin Compact, Art. XIX(a) (1948).

109. *Arizona v. California*, 376 U.S. 340, 343–53 (1964).

110. *Id.* at 344–45.

111. *Id.* at 343.

112. See CONG. RSCH. SERV. & CHARLES V. STERN, INDIAN WATER RIGHTS SETTLEMENTS 1, 6 (2020) (providing a useful compendium on the current status of Indian reserved water rights settlements nationally). See also *Native American Water Rights Settlement Project*, UNIV. N.M.: DIGIT. REPOSITORY (last visited Apr. 23, 2023), <https://perma.cc/2RR9-EPAQ> (providing an online data base of settlements and other documents that “formalize the recognition of Native American water rights in the United States”).

113. See WATER & TRIBES INITIATIVE, *supra* note 11, at 3 (referencing current and comprehensive information on tribal water rights in the Colorado River Basin).

114. *Id.*

2018.”<sup>115</sup> The tribes mainly use this water for irrigation, municipal, and residential purposes.<sup>116</sup> Twelve tribes have wholly outstanding or unresolved claims, many of which are being pursued through ongoing settlement negotiation.<sup>117</sup>

Even with better recognition of the scope and substance of their water rights, however, basin tribes have only more recently been able to participate meaningfully in policy dialogues, planning, and decision-making. This situation is partly attributable to the fact that, for many years, there was little incentive for tribes, individually or collectively, to demand representation in basin governance.<sup>118</sup> Contending with the pendulum of federal Indian policy, tribes needed to focus on the quantification and development of their own water rights ahead of broader policy and governance issues, while simultaneously addressing myriad other challenges with limited resources.<sup>119</sup> Also, through the 1980s water supply was greater than demand, so tribes’ rights were generally not yet at meaningful risk of being crowded out by non-Indian water users.<sup>120</sup> And the seniority of tribes’ priority dates (and the language of Article VII of the 1922 Compact) may have been viewed as sufficient to defer tribes’ needs to take a more active role basin-wide.<sup>121</sup>

This situation began to change with the formation of the Ten Tribes Partnership (TTP) in 1992. TTP is a coalition of Upper and Lower Basin tribes advocating for increased influence and management of the Colorado River.<sup>122</sup> It includes ten tribes with water rights to the mainstem of the Colorado River, including the five Lower Basin tribes whose rights were decreed in *Arizona v. California* (Chemehuevi Indian Tribe, Cocopah Indian Tribe, Colorado River Indian Tribes, Fort Mojave Indian Tribe, and Quechan Indian Tribe); four tribes in the Upper Basin (Ute Indian Tribe, Southern Ute Tribe, Ute Mountain Ute Tribe, and Jicarilla Apache Nation); and the Navajo Nation, whose reservation (and water rights) spans portions of both the Upper Basin and Lower Basin.<sup>123</sup> The TTP’s purpose is to “increase the influence of tribes in Colorado River management and provide support for the protection and use of tribal water resources.”<sup>124</sup>

The TTP has played a significant role in raising awareness and understanding of tribal water rights in the basin and the need for ensuring greater tribal participation in policy dialogues about river system management. It was also the driving force behind the *Tribal Water Study*, the most comprehensive look taken

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115. *Id.*

116. See TRIBAL WATER STUDY, *supra* note 13, at 5.11-3, 5.11-4.

117. WATER & TRIBES INITIATIVE, *supra* note 11, at 7.

118. Weiner, *supra* note 99.

119. *Id.*

120. *Id.* at 5. See generally *The Hardest Working River in the West: A Story Map Exploring the Colorado River Through Data*, BABBITT CTR. FOR LAND & WATER POL’Y (Jan. 23, 2023), <https://perma.cc/8UW3-VP7V>; SALEHABADI, *supra* note 11.

121. Weiner, *supra* note 99; see Colorado River Compact, Art. VII (1922) (codified at 43 U.S.C. 6171) (1928) (referencing that “nothing in this compact shall be construed as affecting the obligations of the United States of America to Indian tribes”).

122. See *Partnership*, TEN TRIBES PARTNERSHIP, <https://perma.cc/7DUF-HQZF> (last visited Apr. 23, 2023).

123. TRIBAL WATER STUDY, *supra* note 13, at 3-1, 5.11-1.

124. TEN TRIBES PARTNERSHIP, *supra* note 122.



to date at the scope and status of tribal water rights in the basin.<sup>125</sup> The *Study* was the product of collaboration between the TTP and the Bureau of Reclamation between 2014 and 2018, which was initiated after Reclamation's 2012 *Colorado River Basin Supply and Demand Study* attempted to characterize tribes' water rights and development plans without closely coordinating with basin tribes.<sup>126</sup> The *Tribal Water Study* highlights the ten TTP tribes' current and anticipated water uses, as well as some potential effects that additional tribal development may have on the river system.<sup>127</sup>

Other notable events have reinforced this incremental progress of better addressing tribal water rights and integrating tribes into planning and decision-making processes. The 2004 Arizona Water Settlements Act made the Gila River Indian Community the single largest entitlement holder of Central Arizona Project water, and thus a critical player in Arizona and basinwide water management.<sup>128</sup> Similarly, the Colorado River Indian Tribes, who were decreed the single largest entitlement to Colorado River water in Arizona in *Arizona v. California*, seek to more fully utilize their water rights for on-reservation irrigation and off-reservation marketing and banking.<sup>129</sup> These and other examples illustrate that tribes are increasingly engaged in transactional problem-solving.<sup>130</sup>

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125. See generally BUREAU RECLAMATION, COLORADO RIVER BASIN TEN TRIBES PARTNERSHIP STUDY (2018).

126. *Id.* at 1, n. 1.

127. See generally TRIBAL WATER STUDY, *supra* note 13.

128. According to the Central Arizona Project (CAP), "There are 22 federally recognized tribes in the state of Arizona. *About/ Tribal Water Rights*, CAP, <https://perma.cc/SS8K-47JV> (last visited May 5, 2023). Of those tribes, 14 have either fully resolved, adjudicated rights, or partially resolved water rights claims; and of that group, a number of those tribes received a significant portion of their water through the CAP. Eleven Arizona tribes have outstanding water rights claims. Going forward, the 2004 Arizona Water Settlements Act set aside an additional 67,300 acre-feet of CAP water to address any remaining water rights settlement claims: 33,107 acre-feet remains for future settlements after the White Mountain Apache received 23,782 acre-feet; 6,411 acre-feet was reserved for the Navajo Nation; and 4,000 acre-feet was granted to the Hualapai Tribe in its pending settlement. In total, approximately 46% of the CAP water supply is, or will be, permanently allocated to Arizona Indian Tribes. This makes CAP the largest single supplier of Colorado River water to tribal water users in the Colorado River system." The website information highlights which Arizona tribes have fully resolved water rights, partially resolved water rights, unresolved water rights, and adjudicated rights. *Arizona v. California*, 373 U.S. 546, 83 S. Ct. 1468 (1963).

129. See *Ian James*, Colorado River Tribes Seek Approval from Congress to Put Water on the Market in Arizona, AZ CENTRAL, <https://perma.cc/WTW8-YTLE> (Jan. 4, 2021, 4:34 PM).

130. Another example of how tribes play a role in transactional problem-solving is the forbearance agreement entered into by the Quechan Indian Tribe and the Metropolitan Water District of Southern California (MWD) as part of a 2005 settlement of Quechan's claims for additional water rights above what was decreed by the United States Supreme Court in 1964. This agreement, approved by the U.S. Supreme Court in its 2006 Consolidated Decree issued in *Arizona v. California*, provides that if the Quechan Tribe chooses in a given year to "forbear" from diverting up to 13,000 acre-feet of its then-newly recognized water right in California, MWD will pay the Tribe on a per acre-foot basis at a predetermined rate for this forbearance. MWD is then entitled to divert the volume of water the Tribe forbears from diverting. *Arizona v. California*, 547 U.S. 150 (2006). This approach, while yet to be replicated elsewhere in the Basin, is worth further consideration as a model for simultaneously addressing tribes' needs to be able to fully benefit from their water rights and allowing the Basin to plan more strategically for an environment of water scarcity. For a more thorough review of recent transactions involving tribes and

The 2007 Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead (2007 Interim Guidelines),<sup>131</sup> however, reflect a significant missed opportunity to advance tribal engagement. Facing an historic drought, plummeting reservoir storage, and ongoing climate change, the federal government and the basin states embarked on a process in 2005 to develop a set of operating criteria for Lake Mead and Lake Powell to address a range of water conditions, particularly low flows.<sup>132</sup> The negotiations ultimately led to adoption of the 2007 Interim Guidelines, which govern management of the river system through 2025.<sup>133</sup> From the perspective of tribes, there was insufficient government-to-government consultation by the United States during these negotiations or regarding their ultimate outcome.<sup>134</sup> While the guidelines express a desire to increase “flexibility” in the basin, no consideration was given to whether and how tribes could provide or facilitate creative mechanisms to address the risks of water shortages.<sup>135</sup> Continued frustration with this missed opportunity is evident from comment letters sent by various tribes to Reclamation in 2020 during the agency’s formal review of the 2007 Interim Guidelines.<sup>136</sup>

Reclamation’s Pilot System Conservation Program, by contrast, specifically included tribes as part of its effort to prop up storage in Lake Powell and Lake Mead.<sup>137</sup> Created in 2014 and funded by the Central Arizona Water Conservation District, Metropolitan Water District of Southern California, Southern Nevada Water Authority, Denver Water, and Reclamation, the program sought out Lower Colorado River water users willing to forego deliveries they would otherwise rely upon in exchange for compensation.<sup>138</sup> The Colorado River Indian Tribes, Fort McDowell Yavapai Nation, Gila River Indian Community, and Tohono O’odham Nation all participated in the program, collectively conserving more than 110,000

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other water users, see generally WATER & TRIBES INITIATIVE, DEVELOPING THE NEXT FRAMEWORK TO MANAGE THE COLORADO RIVER: FLEXIBLE TOOLS TO BENEFIT TRIBES AND THE BASIN (2022).

131. See generally BUREAU RECLAMATION, RECORD OF DECISION, COLORADO RIVER INTERIM GUIDELINES FOR LOWER BASIN SHORTAGES AND COORDINATED OPERATIONS FOR LAKE POWELL AND LAKE MEAD (2007).

132. *Id.*

133. See *Colorado River 2007 Interim Guidelines And Drought Contingency Plans*, WATER EDUC. FOUND., <https://perma.cc/FQ7V-C9FY> (last visited April 20, 2023). The Bureau of Reclamation has begun a process to revise the 2007 Interim Guidelines ahead of their scheduled expiration to incorporate more shortage management tools. See Notice of Intent To Prepare a Supplemental Environmental Impact Statement for December 2007 Record of Decision Entitled Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations For Lake Powell and Lake Mead, 87 Fed. Reg. 69042, 69042-69045 (Nov. 17, 2022).

134. See Letter from Colorado River Tribes to David Bernhardt, Secretary of the Interior (June 27, 2020), <https://perma.cc/AKC3-JHHP>.

135. See generally BUREAU RECLAMATION, REVIEW OF THE COLORADO RIVER INTERIM GUIDELINES FOR LOWER BASIN SHORTAGES AND COORDINATED OPERATIONS FOR LAKE POWELL AND LAKE MEAD (2020), at 12.

136. For a review of the issues and concerns raised by tribes and others during the review, see generally *Colorado River Basin: 7.D. Review & Report Background*, BUREAU RECLAMATION, <https://perma.cc/ZR3D-AHN5> (July 13, 2022).

137. See *Lower Colorado Region: Pilot System Conservation Program (Pilot Program)*, BUREAU RECLAMATION, <https://perma.cc/WD9U-QW2X> (Aug. 31, 2021).

138. *Id.*

acre-feet.<sup>139</sup> The Upper Colorado River Commission administered a similar program in the Upper Basin, but there was only one tribal project among its forty-five participants.<sup>140</sup>

The process that led to the 2019 Drought Contingency Plans (DCPs), particularly in Arizona, also reflects incremental progress in incorporating tribes into basin planning, problem-solving, and decision-making.<sup>141</sup> The DCPs became necessary because, despite the 2007 Interim Guidelines and Minute 319<sup>142</sup> to the U.S.-Mexico Treaty, storage in Lake Mead and Lake Powell continued to drop toward levels that could trigger a shortage declaration along the Lower Colorado River, potential reductions in (or total loss of) hydropower generation at Lake Powell, and the prospect of the Upper Basin states becoming unable to meet their delivery obligations under the Compact.<sup>143</sup> With prodding from the Secretary of the Interior—who is the Lower Colorado River watermaster under the Boulder Canyon Project Act (as interpreted in *Arizona v. California*), but who lacks a similarly clear grant of such plenary authority in the Upper Basin—the basin states began discussions in 2013 on strategies to avoid these outcomes.<sup>144</sup> Their efforts ultimately culminated in the enactment and execution of the Upper Basin and Lower Basin DCPs in 2019.<sup>145</sup>

To guide its participation in the Lower Basin DCP negotiations, Arizona created a thirty-eight-member steering committee that included representatives from the Colorado River Indian Tribes, Gila River Indian Community, and Tohono O’odham Nation.<sup>146</sup> As noted earlier, each of these tribes holds quantified rights to large quantities of water, which they have developed, giving them a unique ability to contribute to mutually beneficial (i.e., transactional) solutions, as well as considerable leverage in negotiating agreements to share shortages with municipal and agricultural neighbors.<sup>147</sup> Reclamation also worked with the Inter Tribal Council of Arizona (ITCA)<sup>148</sup> to provide a clearinghouse for other interested tribes in Arizona to monitor the discussions. While certainly not perfect—multiple Arizona tribes

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139. See WATER & TRIBES INITIATIVE, *supra* note 11, at 4–5.

140. See UPPER COLO. RIVER COMM’N., COLORADO RIVER SYSTEM CONSERVATION PILOT PROGRAM IN THE UPPER COLORADO RIVER BASIN 25 (2018).

141. See *Colorado River Basin Drought Contingency Plans*, BUREAU RECLAMATION, <https://perma.cc/P34Q-R6CV> (Jan. 11, 2023).

142. See *FACT SHEET: MINUTE 319*, INT’L BOUNDARY WATER COMM’N U.S. MEX., <https://perma.cc/9TRU-LX9Z> (last visited April 21, 2023) (“Binding agreement of the International Boundary and Water Commission, United States and Mexico, to help implement the 1944 Water Treaty between the two countries.”)

143. For a compendium of resources on the issue, see *Colorado River Basin Drought Contingency Plans*, BUREAU RECLAMATION, <https://perma.cc/ZN3L-MMHV> (March 13, 2023).

144. *Arizona v. California*, 530 U.S. 392, 418, *modified*, 531 U.S. 1 (2000).

145. BUREAU RECLAMATION, *supra* note 141.

146. *Arizona Reconsultation Committee*, ARIZ. DEP’T WATER RES., <https://perma.cc/SYZ5-BWWY> (last visited Apr. 20, 2023) (showing the history, committee composition, and products associated with the Arizona Reconsultation Committee).

147. WATER & TRIBES INITIATIVE, *supra* note 11, at 2, 4–5.

148. Press Release, Inter Tribal Council of Ariz., Inter Tribal Council of Arizona and the Bureau of Reclamation Sign Historic Agreement to Ensure Tribal Participation in Colorado River Negotiations (Mar. 2, 2021) <https://perma.cc/T4QT-ZZN8> (explaining that ITCA was established in 1952 to provide a united voice for tribal governments located in the State of Arizona to address common issues of concern).

continue to feel their concerns and interests were not adequately considered during negotiations—the role tribes played in the DCP process nonetheless reflects at least some progress from where things stood when the 2007 Interim Guidelines were developed.<sup>149</sup>

More recently, several forums have emerged to support tribal engagement in water policy dialogue and decision-making. These forums are emerging at different spatial scales reflecting different political jurisdictions and include both formal (i.e., convened by federal or state governments with particular authorities and responsibilities), and more informal initiatives. The Bureau of Reclamation, for example, initiated a Tribal Information Exchange (TIE) on August 20, 2021, to regularly inform and educate tribal leaders, staff, and advisors on the hydrologic situation in the basin and federal and state responses to the ongoing crisis.<sup>150</sup> The TIE generally meets monthly, though special meetings may be convened more frequently if events dictate.<sup>151</sup> To date, the TIE has largely served as a one-way channel of communication, with the Bureau of Reclamation providing updates on hydrology and various programs to address the ongoing drought.<sup>152</sup> There is little back-and-forth dialogue.<sup>153</sup>

In the Upper Basin, the six Upper Basin Tribes came together in 2021 with the Bureau of Reclamation, the four Upper Basin States (Wyoming, Colorado, Utah, and New Mexico), and the Upper Colorado River Commission to successfully negotiate a protocol that allows and encourages the tribes to participate in developing and implementing the Drought Response Operations Plan (DROP).<sup>154</sup> The DROP is

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149. See, e.g., Letter from Robert Miguel, chairman, Ak-Chin Indian Community, to Terrence J. Fulp, Regional Director Bureau Reclamation (June 8, 2020), <https://perma.cc/KX9Y-JJFF> (expressing the Ak-Chin community's perceived inadequacy of the DPC consultations). Notwithstanding the feedback from tribes that were not part of the steering committee, the Arizona Department of Water Resources and the Central Arizona Water Conservation District reconvened the same set of participants to sit on the Arizona Reconsultation Committee, the body tasked with steering Arizona's efforts to prepare for the process of negotiating a new management framework to replace the 2007 Guidelines. See *Committee Delegates*, ARIZ. RECONSULTATION COMM., <https://perma.cc/42Y5-MH28> (last visited Apr. 20, 2023) (showing the participants of the Arizona Reconsultation Committee are the same participants from the Lower Basin Drought Contingency Plan Steering Committee). See also ARIZ. DEP'T WATER RES. *supra* note 146. See generally *Arizona Reconsultation Committee*, CENT. ARIZ. PROJECT, <https://perma.cc/N8JL-Z889> (last visited Apr. 20, 2023) (housing up to date information on the Arizona Reconsultation Committee).

150. As Reclamation put it in its initial e-mail to tribal leaders inviting participation in the TIE, “[d]ue to the critical situation in the Basin, the Department of the Interior is committed to clear coordination and communication with its partners, including tribes. To facilitate this critical communication, Interior and Bureau of Reclamation Leadership are introducing regularly scheduled technical information exchanges with tribes in the Colorado River Basin. Our goal is to provide an opportunity to share current information, listen to concerns, and respond to questions or requests.” Phone call with Ernie Rheaume, Native American Affairs Program Manager for the Upper Basin Tribes at the Bureau of Reclamation (Apr. 17, 2023) (confirming that TIE as established in August 2021 is to facilitate information about drought response operations and to offer support related to guidelines to all 30 Colorado River Basin tribes). Meetings are held monthly and more frequently when necessary. The Bureau of Reclamation is aiming to make the meetings more interactive by requesting presentations from tribes. *Id.*

151. *Id.*

152. Author observation: no public sources available at this time.

153. Author observation: no public sources available at this time.

154. In response to prolonged drought, low runoff conditions and critically low reservoir levels are threatening the of the Colorado River system, the Upper Division States and the Bureau of Reclamation,

designed in part to implement the Drought Response Operations Agreement, which is one of three elements of the Upper Basin Drought Contingency Plan.<sup>155</sup> Section 7.2 of the DROP provides that “[e]ach Upper Basin Tribe . . . may separately designate one representative to participate in and provide recommendations to any working group established by the DROA Parties to help draft, develop, implement, analyze proposals for, or monitor any Drought Response Operation.”<sup>156</sup> The DROP makes clear that participation by any tribe in any work group does not replace any other opportunities for tribes to participate in drought response planning and decision-making, including formal consultation with the federal government.<sup>157</sup> This set of provisions creates a more meaningful pathway, and a permanent structure, for tribal engagement in this context and might serve as a good example for tribal engagement elsewhere in the basin. However, it still treats tribes as a secondary sovereign and not part of the decision-making table per se, which remains exclusively reserved for the Upper Basin states.

At the state level, in 2022 the Governor of Utah appointed the first ever tribal representative on the newly created Colorado River Authority of Utah, ensuring that a tribal perspective will be heard in those discussions.<sup>158</sup> The Colorado Water Conservation Board started meeting in 2021 on a sovereign-to-sovereign basis with the two tribes in the basin located in Colorado—Ute Mountain Ute and Southern Ute.<sup>159</sup>

To complement these formal arrangements and structural changes, several informal, ad hoc forums have also emerged to better engage tribes in dialogue and deliberation. The Upper Basin Dialogue emerged in 2020 and includes representatives from the six Upper Basin Tribes and ten conservation groups.<sup>160</sup> The intent of the dialogue, co-facilitated by the Water & Tribes Initiative and the Colorado River Sustainability Campaign, is to create a forum for tribes and conservation groups in the Upper Basin to work together on issues of common concern and advance shared priorities.<sup>161</sup> Participants created a *Shared Vision for the*

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and the Upper Colorado River Commission developed the Drought Response Operations Plan (DROP) in accordance with the scope and purposes described in the DROA. *Colorado River Basin Drought Contingency Plans*, BUREAU RECLAMATION, <https://perma.cc/N8JL-Z889> (March 13, 2023). DROA is part of the 2019 Colorado River Drought Contingency Plan for the Upper Colorado River Basin which aims to minimize the risk of Lake Powell declining below critical elevations. *Id.*

155. See UPPER COLORADO RIVER COMM., AGREEMENT FOR DROUGHT RESPONSE OPERATIONS AT THE INITIAL UNITS OF THE COLO. RIVER STORAGE PROJECT ACT 1, 7 (2019).

156. 2022 DROUGHT RESPONSE OPERATIONS PLAN EXEC. SUMMARY 23 (2022).

157. *Id.*

158. Press Release, Utah Gov., Gov. Cox Appoints Paul Tsosie to Colo. River Auth. Bd. (Sept. 20, 2022) <https://perma.cc/AV9J-VBZ4>. For a brief history of the Colorado River Authority of Utah, including the appointment of the first tribal representative to the board, see *Mission & Vision*, THE COLO. RIVER AUTH. UTAH, <https://perma.cc/5ASH-HYQ4>. For more information on the Authority, including the composition of the current Board, see *Board Members*, COLO. RIVER AUTH. UTAH, <https://perma.cc/5Y7T-M8VX>.

159. *Governor Mitchell Reaffirms Commitment to Tribes for Colorado River Matters*, COLO. WATER CONSERVATION BD. (Dec. 14, 2021), <https://perma.cc/MA2D-9RFM>.

160. *Upper Colorado River Commissioners and Upper Basin Tribes Convene Historic Meeting*, UPPER COLO. RIVER COMM’N (Aug. 10, 2022), <https://perma.cc/9KH5-4ATC>.

161. See generally WATER & TRIBES INITIATIVE, *supra* note 18.

*Upper Basin of the Colorado River Basin*,<sup>162</sup> which serves as a roadmap for ongoing discussions and collaborative action on short-term efforts to stabilize the system as well as longer-term initiatives to develop the post-2026 management framework.<sup>163</sup>

More recently, the four Upper Basin states and the Upper Colorado River Commission started meeting on a regular basis with the six Upper Basin Tribes.<sup>164</sup> Referred to as the *Upper Basin Tribes-States Dialogue*, and co-facilitated by UCRC and the Water & Tribes Initiative, the intent of this effort is to exchange information and explore opportunities to work together on shared interests.<sup>165</sup> The participants recently shared a consensus framework of priorities and requests with the Bureau of Reclamation and the Department of the Interior.<sup>166</sup> They are also in the process of exploring how to better accommodate tribal needs and interests in a revived system conservation pilot program, as well as how tribes can and should benefit from unused tribal water rights in the Upper Basin: more than 50% of the recognized water rights of tribes are undeveloped and unused, thus going downstream to benefit other water users and the system as a whole.<sup>167</sup>

In addition, representatives of the seven basin states started meeting with representatives of the Basin Tribal Coalition in May 2022.<sup>168</sup> This forum emerged from a collective recognition that the basin continued to lack an ongoing mechanism to facilitate sovereign-to-sovereign dialogue among tribes and the states.<sup>169</sup> At the first meeting, the participants agreed that (1) the three sets of sovereigns in the basin—the United States, states, and tribes—have unique and complementary roles in managing the Colorado River system; (2) tribes have made significant contributions in addressing Colorado River management issues in recent years and will play a meaningful role in shaping solutions to both short-term problems facing the basin as well as developing and implementing the post-2026 management framework for the river; (3) the three sets of sovereigns need to work together to identify and address the shared issues confronting the Colorado River Basin and its resources—including the post-2026 management framework (which will be guided by the National Environmental Policy Act—NEPA) as well as any process that may run parallel to the NEPA-process to address issues, concerns, policy tools, and/or solutions that fall outside the purpose and scope of the NEPA-driven process but are critical to building broad-based agreement on the next management framework; and (4) meaningful and significant engagement and discussions among the United States,

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162. See generally FEDERALLY RECOGNIZED TRIBES & CONSERVATION GROUPS IN UPPER BASIN, SHARED VISION FOR THE UPPER BASIN OF THE COLORADO RIVER BASIN: A RESOLUTION FOR SUSTAINABILITY (2022).

163. See generally *id.* (discussing joint efforts and guiding principles for development).

164. Jerd Smith, *Tribal Breakthrough? Four States, Six Tribes Announce First Formal Talks on Colorado River Negotiating Authority*, WATER EDUCA. COLO. (Sept. 21, 2022), <https://perma.cc/LZ79-ZXVP>.

165. See FEDERALLY RECOGNIZED TRIBES & CONSERVATION GROUPS IN UPPER BASIN, *supra* note 162.

166. *Id.* Authors McKinney & Vigil co-facilitated the Upper Basin Dialogue and as such much of the information in this section is based on personal observation and notes.

167. McKinney & Vigil *supra* note 166. See generally FEDERALLY RECOGNIZED TRIBES & CONSERVATION GROUPS IN UPPER BASIN, *supra* note 162.

168. *Id.*

169. *Id.*

tribes, and states are necessary to recognize and resolve barriers to addressing recognized and unresolved tribal water rights in the basin.<sup>170</sup> The participants continue to meet at least monthly to focus on a diverse portfolio of short-term and long-term efforts to manage the Colorado River.<sup>171</sup>

From a historical perspective, these adjustments to both the official and informal architecture of Colorado River governance represent steps in the right direction. Yet they also illustrate how much work still needs to be done to arrive at a governing framework that genuinely includes tribes, as sovereigns, in actual decision-making.

## B. Evaluating the Role of Tribes: Sovereignty and Equity

After a long history of largely ignoring tribal needs, interests and rights, federal and state governments are increasingly integrating tribes into planning, problem-solving, and decision-making processes for water management in the Colorado River Basin.<sup>172</sup> While that is a positive trend, it is instructive to step back and examine how this history of tribal (dis)engagement relates to the obligations of the United States as referenced in Article VII of the Compact. To explore this topic, the discussion below reflects on two key tenets: (1) tribal sovereignty, as developed through law, policy, and practice, and (2) equity, as invoked in Article I of the Compact.<sup>173</sup> This analysis sets the stage for the article's final section addressing the future.

### 1. Sovereignty

Although it should not need stating, it continues to be essential to reiterate that basin tribes are *sovereigns*, not just stakeholders on par with nongovernmental organizations (NGOs) or water users.<sup>174</sup> While the U.S. Supreme Court has held that tribes are not the functional equivalent of states or foreign nations under the American constitutional system, basin tribes nonetheless retain the right of self-governance as distinct political communities not subject to general state jurisdiction.<sup>175</sup>

As noted earlier, the Indian Reorganization Act of 1934 brought the allotment era to a close, while the pendulum of federal Indian policy swung again during the 1950s when Congress embarked on a contrary effort to "terminate" tribes as sovereigns.<sup>176</sup> But following the civil rights era of the 1960s, and especially since passage of the Indian Self-Determination and Education Assistance Act of 1975,<sup>177</sup>

170. *Id.*

171. *Id.*

172. See discussion *supra* Section (2)(a).

173. See Jason A. Robison & Douglas S. Kenney, *Equity and the Colorado River Compact*, 42 ENV'T L.R. 1157, 1176 (2012) (framing this topic as "procedural equity" to represent the influence drawn from sovereigns and governance structures and "substantive equity" to represent the influence of equity as prescribed in the Compact).

174. See *supra* notes 21–24 and accompanying text.

175. See *Worcester v. Georgia*, 31 U.S. 515, 540 (1832).

176. See *supra* notes 102–04 and accompanying text.

177. Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (current version at 25 U.S.C. §§ 5301–5423).

the federal government has tried to bridge the gulf between the principles of tribal sovereignty that the U.S. Supreme Court has espoused and the practice of engaging with tribes as actual sovereigns—a wide gap for the better part of this country’s first 200 years of existence.<sup>178</sup>

Successive presidential administrations have aimed to reinvigorate this understanding of tribal sovereignty through policy statements and executive orders. Executive Order 13175 from 2000, for example, declares:

“In formulating or implementing policies that have tribal implications, agencies shall be guided by the following fundamental principles: (a) The United States has a unique legal relationship with Indian tribal governments. . . . Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection. The Federal Government has enacted numerous statutes and promulgated numerous regulations that establish and define a trust relationship with Indian tribes. (b) Our Nation . . . has recognized the right of Indian tribes to self-government. As domestic dependent nations, Indian tribes exercise inherent sovereign powers over their members and territory. The United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, tribal trust resources, and Indian tribal treaty and other rights. (c) The United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination.”<sup>179</sup>

While there are many examples of the federal government and other actors espousing these principles in theory—yet deviating from them in practice—the modern recognition of tribal sovereignty reached a high point in the U.S. Supreme Court’s 2020 decision in *McGirt v. Oklahoma*.<sup>180</sup> In that case, a man convicted of a heinous crime challenged the State of Oklahoma’s authority to try him on the ground that the crime scene was located within the Muscogee (Creek) Reservation.<sup>181</sup> The gist of Oklahoma’s contrary position was that even if the locus of the crime scene had once been reservation land, that reservation had long since been diminished by Oklahoma becoming a state—specifically, by implication from a series of congressional acts or the state’s long-standing treatment of the land as something other than a reservation, even if Congress had not expressly diminished the reservation.<sup>182</sup> A closely divided Supreme Court rejected these arguments.<sup>183</sup>

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178. See *infra* notes 179–87 and accompanying text.

179. Exec. Order No. 13175, 65 Fed. Reg. 67249 (Nov. 6, 2000). See also Memorandum on Tribal Consultation, 74 Fed. Reg. 57879 (Nov. 5, 2009) (President Obama reiterated many of the same principles in Memorandum for the Heads of Executive Departments and Agencies). See *infra* notes 284–289 and accompanying text.

180. *McGirt v. Oklahoma*, 140 S.Ct. 2452, 2481 (2020).

181. *Id.* at 2456.

182. *Id.* at 2465.

183. *Id.* at 2482.



From the poetry of its opening line (“on the far end of the Trail of Tears was a promise”) to the moral clarity of its concluding paragraph,<sup>184</sup> Justice Gorsuch’s majority opinion exemplified one of the rarest species in American legal and political history: a vindication of a tribe’s long-disregarded sovereignty in the face of a state’s “parade of horrors” about potentially disruptive consequences of ruling in the tribe’s favor.<sup>185</sup> It illustrates what happens when principles of federal Indian law defining the relationship between states and tribes are taken seriously—principles stretching back to those first articulated by Chief Justice Marshall in *Worcester v. Georgia* (1832).<sup>186</sup> In the wake of *McGirt*, significant portions of eastern Oklahoma have been clearly defined as Indian reservations, and the state and the tribes on those reservations are engaged in a fundamental reevaluation of their relationships to work through the consequences of the Court’s decision.<sup>187</sup>

The Colorado River Basin could benefit from a similar wholesale reevaluation of the role of tribes in governance—a point explored in the next section of this article. As Justice Gorsuch noted pointedly in *McGirt*, “Congress can welcome Native Americans to participate in a broader political community without sacrificing their tribal sovereignty.”<sup>188</sup> Of course, there is no guarantee how the basin states might operationalize this vision of what might be termed “cooperative sovereignty,” a nod toward the doctrine of “cooperative federalism.”<sup>189</sup>

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184. *Id.* at 2459, 2482 (“Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law. To hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right.”).

185. *See id.* at 2474–76.

186. *Compare McGirt v. Oklahoma*, 140 S.Ct. 2452, with *Worcester v. Georgia* 31 U.S. 515 (1832).

187. *See Oklahoma v. Castro-Huerta*, 142 S.Ct. 2486, 2492 (2022). For more information about *McGirt* and the context it arose out of, see generally Dylan R. Hedden-Nicely & Stacy L. Leeds, *A Familiar Crossroads: McGirt v. Oklahoma and the Future of Federal Indian Law Canon*, 51 N.M. L. REV. 300 (2021); MAINON A. SCHWARTZ & CONG. RSCH SERV., *THIS LAND IS WHOSE LAND? THE MCGIRT V. OKLAHOMA DECISION AND CONSIDERATIONS FOR CONGRESS 4* (2020). It is also worth noting that before the ink was even dry on the *McGirt* decision, the State of Oklahoma launched a vigorous campaign to have its core holdings reversed or greatly limited, which culminated in the Supreme Court’s 2022 decision in *Oklahoma v. Castro-Huerta*. *See* Ryan Maxey, *The Dangers of the McGirt Misinformation Campaign*, L.J. FOR SOC. JUST. AT A.S.U. (Oct. 22, 2021), <https://perma.cc/AH7D-6GD8>; *Castro-Huerta*, 142 S.Ct. 2486 (2022). Although the Court declined to reconsider the core holding from *McGirt*, the decision countenanced an unprecedented expansion of state criminal jurisdiction onto Indian reservations. *See* 142 S.Ct. 2486, 2504–05 (2022). The death of Justice Ruth Bader Ginsberg and the confirmation of Justice Amy Coney Barrett is the most obvious explanation for shift between *McGirt* and *Castro-Huerta*, as both were 5-4 decisions and the remaining eight justices adopted generally consistent views of the law between the two cases. *See* Hedden-Nicely & Leeds at 343.

188. *McGirt*, 140 S.Ct. 2452, 2467 n.6 (2020).

189. Cooperative sovereignty means that sovereignty not only refers to a right to independence, but also a responsibility to cooperate. *See generally* Franz X. Perrez, *Cooperative Sovereignty: From Independence to Interdependence in the Structure of International Environmental Law*, (Kluwer Law International, 2000). Cooperative federalism generally refers to a model of intergovernmental relations that recognizes the overlapping functions of the national and state governments. In the context of environmental law, this generally means that the federal government sets national standards while the states implement those standards within their boundaries. By contrast, dual federalism maintains that the national and state governments have distinct and separate government functions. *Cooperative Federalism*, CTR. FOR THE STUDY OF FEDERALISM (Aug. 13, 2018), <https://perma.cc/WH36-RQG6>. For a review of these concepts, see generally Hope M. Babcock, *Dual Regulation, Collaborative Management, or*

Notwithstanding recent developments to better integrate tribes into planning and policy dialogue, old habits die hard.<sup>190</sup>

The sentiments of more than 100 leaders interviewed by WTI in 2019,<sup>191</sup> however, and the developments described above, reveal that there is an emerging consensus that tribes in the basin should be more meaningfully involved in policy discussions and negotiations about the future of the river system, including the development of the governing framework that will replace the 2007 Interim Guidelines. While the WTI interviewees articulated diverse reasons for arriving at this consensus view,<sup>192</sup> nearly everyone expressed interest in the critical question of “how” to achieve this goal—and more specifically, how to move from a practice of simply seeking tribal input and advice before decisions are made to a practice of shared decision-making among the basin’s three (or four) sets of sovereigns. The final section of this article provides a possible response to that question.

## 2. Equity

Article I of the Colorado River Compact declares that one of its “major purposes” is “to provide for the equitable division and apportionment of the use of the waters of the Colorado River System.”<sup>193</sup> The U.S. Supreme Court first announced its equitable apportionment doctrine in *Kansas v. Colorado*,<sup>194</sup> 15 years before the Compact’s drafting (and one year before the *Winters* decision). While a detailed analysis of the doctrine is beyond the scope of this article,<sup>195</sup> two threshold observations are warranted.

First, the doctrine of equitable apportionment recognizes that “equality of right,” rather than “equal division of the water,” is the governing factor.<sup>196</sup>

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*Layered Federalism*, 3 HASTINGS W. NW. J. OF ENV'T L. & POL'Y 193 (1996); Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. ENV'T L.J. 179 (2005).

190. See, e.g., Jennifer Solis, *Tribes seek to secure their water rights as Colorado River dries*, NEV. CURRENT (Dec. 14, 2021 6:24 AM), <https://perma.cc/J4KH-H7D8>; Michael E. Sakas, *Historically excluded from Colorado River policy, tribes want a say in how the dwindling resource is used. Access to clean water is a start*, CPR NEWS (Dec. 7, 2021 7:42 AM), <https://perma.cc/KC2L-N9R4> (although several of the forums that have emerged are occasionally referred to as opportunities to facilitate sovereign-to-sovereign dialogue and relationships, it is still not clear what this means in practice and how sustainable this “practice” might be).

191. WATER & TRIBES INITIATIVE, *supra* note 18, at 2.

192. See *id.* at 22 n.6. Three major reasons emerged among non-tribal interviewees: (1) respect for equity, social justice, and/or tribal sovereignty in relation to the negotiation process and basin tribes’ abilities to develop and use their water rights; (2) interest in mitigating uncertainty over the impacts of tribal water development on non-tribal water users; and (3) commitment to engaging basin tribes in collaborative problem-solving aimed at meeting the needs and interests of both tribes and other water users reliant on the Colorado River. Tribes believe they need to be at the table because of their aboriginal connections to the river, their expertise and knowledge developed from this longstanding presence, and as a recognition of their sovereign status and the significance of the water rights they possess. *Id.*

193. Colorado River Compact (1922).

194. *Kansas v. Colorado*, 206 U.S. 46, 104 (1907).

195. For a comprehensive review of the equitable apportionment doctrine, see generally ANTHONY DAN TARLOCK & JASON ANTHONY ROBISON, *LAW OF WATER RIGHTS AND RESOURCES* § 10 (rev.ed. 2022). See also generally Robison & Kenney *supra* note 173.

196. *Wyoming v. Colorado*, 259 U.S. 419, 465 (1922).

In other words, states stand on an equal basis when it comes to interstate streams—the fact that a use in one state is senior to a use in another is not necessarily the last word on who has a better water right, particularly in times of shortage.<sup>197</sup>

Second, what is “equitable” is very much in the eye of the beholder. In *Kansas v. Colorado*, for example, the Supreme Court dismissed Kansas’s complaint on the ground that Colorado’s water use had not yet caused such significant adverse effects in Kansas as to render inequitable the status quo of water division between the states.<sup>198</sup> There is far more art here than science. “Equity” is commonly regarded as synonymous with fairness, which in turn “is defined by context,” including the “diversity of values affected by water allocation schemes and the variation in these values across time.”<sup>199</sup>

Reflecting on a century of experience under the Colorado River Compact, it is important to consider whether its apportionment of the basin’s water has in fact comported with its goal of “equity,” particularly when it comes to the rights of tribes. In approaching this topic, it is useful to distinguish between substantive and procedural equity.<sup>200</sup> “Substantive equity” generally refers to the definition, allocation, and relative priorities of water rights, including principles of reciprocity, fidelity, reliability, and flexibility.<sup>201</sup> “Procedural equity” refers to the governance structures for apportionment schemes, including principles of inclusivity, diligence, and transparency.<sup>202</sup> The Compact’s substantive equity is considered in several chapters in *Cornerstone at the Confluence*, a timely analysis of the Colorado River Compact at its 100th anniversary,<sup>203</sup> while the analysis below focuses on procedural equity, particularly whether and how the three principles just noted have been brought to bear on the Compact’s implementation.

The principle of inclusivity requires that “governance structures devised for apportionment schemes should be composed to provide opportunities for the full scope of parties whose interests are affected by the schemes to participate meaningfully in implementation processes.”<sup>204</sup> In the Colorado River Basin, these parties include sovereigns (federal, state, and tribal), other water users (including those with interests in consumptive and nonconsumptive uses), and members of the general public.<sup>205</sup> A truly inclusive governance structure for the basin would allow for “meaningful” participation by these diverse parties, defined from their perspectives and experiences.

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197. Indeed, one of the prime considerations in the drafting of the Colorado River Compact was to ensure that the other six basin states were not deprived of access to water for their own future development by the seniority of the voluminous water rights already developed in California.

198. *Kansas v. Colorado*, 206 U.S. at 117. The Supreme Court left open the possibility that Kansas could succeed on its complaint on a different set of facts at a later point in time. *Id.* at 117–18.

199. Robison & Kenney, *supra* note 173, at 1175.

200. The framework for the following analysis draws heavily on Robison and Kenney. *Id.* at 1173–209.

201. *See generally id.* at 1177.

202. *Id.* at 1179.

203. *See generally* JAMES ANTHONY ROBISON, *CORNERSTONE AT THE CONFLUENCE: NAVIGATING THE COLORADO RIVER COMPACT’S NEXT CENTURY* (2022).

204. Robison & Kenney, *supra* note 173, at 1180.

205. *See generally* WATER & TRIBES INITIATIVE, *supra* note 18.

Judged through this lens, the first century of governance under the Compact has largely been a failure. As discussed above, tribes had essentially no role in the Compact's formation and have largely been marginalized until quite recently.<sup>206</sup> Beyond individual transactional arrangements through which certain tribes have been able to obtain compensation for contributing water to system conservation efforts or leasing their water rights to other water users, tribes have not yet been meaningfully invited to the table where basinwide policy issues are negotiated and decided.<sup>207</sup>

The principle of diligence refers to the need for governance arrangements that “ensure that the substantive terms of apportionment schemes are implemented fully and accurately—i.e., that water users abide by the terms of their entitlements, allocation priorities are adhered to, and so forth.”<sup>208</sup> In light of this standard, overall diligence in the Lower Basin is arguably high. The Bureau of Reclamation, named the water master for the Lower Basin in the Boulder Canyon Project Act, regularly ensures that water users—including tribes—receive ordered water deliveries for the use of quantified water rights. Likewise, the Upper Basin has never failed to meet its Compact delivery obligations to the Lower Basin, thereby demonstrating a significant degree of diligence.<sup>209</sup>

Focusing more specifically on tribe's needs, interests, and rights, an alternative standard of diligence is that the Secretary of the Interior, as trustee for tribes, “must exert uncompromised efforts to secure sufficient water to the Indian, not simply seek an accommodation between the interests.”<sup>210</sup> Viewed from this perspective, current governance arrangements fall short of the principle of diligence.

For starters, several tribes continue to face obstacles to quantifying and confirming their water rights between the slow pace of adjudications and the difficulty of negotiating settlements. The basin has arrived at a place where the recognition of a tribe's rights, as a practical matter, risks water being taken away from non-Indians with junior priority dates who are able to use that water for free while the tribe's rights remain in limbo.<sup>211</sup> That latter dynamic also continues to impede tribes post-quantification, as one among *a variety of* legal, financial, and institutional barriers to developing and making full use of their water rights.<sup>212</sup> Less water for established non-tribal water users creates a disincentive for federal and states officials to provide the necessary technical and financial resources needed to develop recognized tribal water rights more fully. Tribes in the Upper Basin, for

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206. While modern developments are far from perfect, it is important to emphasize that they illustrate that neither the Compact nor the Law of the River is so static that it cannot adapt to attain greater—and more equitable—inclusivity.

207. See generally Notice of Intent to Prepare a Supplemental Environmental Impact Statement for December 2007 Record of Decision Entitled Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations For Lake Powell and Lake Mead 87 Fed. Reg. 69042 (November 17, 2022).

208. Robison & Kenney, *supra* note 173, at 1180.

209. See generally COLORADO RIVER GOVERNANCE INITIATIVE, DOES THE UPPER BASIN HAVE A DELIVERY OBLIGATION OR AN OBLIGATION NOT TO DEplete THE FLOW OF THE COLORADO RIVER AT LEE FERRY? (Natural Res. Law Ctr., Univ. Colo. Law Sch., 2012).

210. Pyramid Lake Paiute Tribe v. Morton, 360 F. Supp. 669 (D.D.C. 1973).

211. See generally, TRIBAL WATER STUDY, *supra* note 13, at Chapter 7.

212. *Id.*

example, currently use about 670,000 af/yr out of a total reserved water right of 1.8 maf/yr; in other words, the Upper Basin Tribes are using only about 40% of their recognized water rights.<sup>213</sup>

Perhaps the most egregious consequence of these impediments to developing tribal water rights is that nearly 50% of tribal homes and communities in the Colorado River Basin lack access to clean drinking water and basic sanitation<sup>214</sup> The fundamental purpose of Indian water rights, as recognized in *Winters* and its progeny, is for the maintenance of a homeland for tribes; i.e., to allow the tribe to thrive and provide for the needs of its members in perpetuity. Access to a clean, reliable supply of water is basic to human health, and clearly a necessary component to making a homeland sustainable. Unfortunately, the federal government has largely failed to fulfill its trust obligation to provide access to clean water for tribes and, in many cases over the first century of the Compact, has actively undermined tribal water rights by constructing projects and providing water principally or entirely for the benefit of non-Indians.<sup>215</sup>

When it comes to the principle of transparency, the historical role of basin tribes in Colorado River governance leaves much room for improvement. Transparency in governance refers to the essential openness of the processes by which management decisions are made and implemented.<sup>216</sup> Effectuation of this principle requires processes that invite engagement by interested individuals and organizations. Yet as explained above, tribes have historically not been invited to participate in river system governance; nor have they had meaningful opportunities to provide input and advice prior to decisions being made by state and federal officials.<sup>217</sup> Rather, tribes most often have been on the receiving end of decisions and actions imposed by the federal government and basin states. Tribes have not been afforded the opportunity to decide whether to voluntarily accept these decisions, which reflects a lack of genuine collaboration.

The procedural inequity suffered by basin tribes during most of the Compact's first century is deep, but it is not irremediable. As a threshold matter, it is important to recognize that the understanding of "obligations" owed to basin tribes is far more robust now than it was in 1922. It is also important to highlight that the Compact couches these "obligations" as belonging exclusively to the federal government, without a passing glance at tribes' relationships with basin states. With the allotment era still in full swing in 1922, this dichotomy is understandable. But tribes refused to vanish, and *Arizona v. California* set the basin on a path toward requiring a broader consideration of their water rights.<sup>218</sup> Today, basin states realize they cannot afford to ignore—and often need to collaborate very closely with—tribes to achieve goals and address critical management challenges.

The basin community's understanding of procedural "equity" has evolved in other ways as well. For example, as part of the commitments made during the

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213. See generally, TRIBAL WATER STUDY, *supra* note 13.

214. HEATHER TANANA ET AL., *supra* note 14, at v.

215. John Fleck, *Water tug of war goes on*, ALBUQUERQUE J., <https://perma.cc/SB59-B8AW> (Feb. 10, 2013 12:10 AM).

216. See generally Robison & Kenny, *supra* note 173 at 1180.

217. *Supra* Part II.A.

218. See generally Robison & Kenny, *supra* note 173 at 1201, 1202; see *supra* Part II.A.

2007 Interim Guidelines' formation, the basin states agreed to consult among themselves before embarking on litigation, a commitment that is nowhere to be found in the Compact itself, and an important trust-and-confidence building step in allowing the basin community to move forward in the face of unprecedented water scarcity.<sup>219</sup> Similarly, in the Interim Guidelines, Reclamation embraced specific obligations to consult with basin states under clearly delineated circumstances, something else not required by the Compact.<sup>220</sup>

There is no reason similar commitments could not be made to formally include basin tribes in governance. And indeed, there would be significant equity in doing so—not merely to remediate the historical marginalization tribes have suffered, but also to address the water-scarcity challenges and hydrological trends facing the basin that are threatening to create conditions where even senior tribal water rights may be subject to curtailment. It is only right, therefore, that tribes are entitled to the opportunity to be full participants at the tables where the basin states and federal government make decisions about prospective shortages. Moreover, from an evolving equity standpoint, it is both appropriate and just to view tribes as empowered to contribute directly to solutions of the basin's problems, rather than viewing them as a problem to be solved.

As noted above, some progress has occurred over the last few years to support the inclusion of tribes in planning and policy dialogues. While some of these recent developments are becoming fully integrated into the permanent architecture of Colorado River governance, others are more informal and operate alongside the formal decision-making processes. Taken as a whole, these recent developments demonstrate an openness and a willingness among the established authorities—i.e., federal and state officials—to more fully embrace tribes as sovereigns and to adjust the architecture of governing the basin to share problem-solving and decision-making among all three (or four, counting Mexico) sets of sovereigns in the basin.

### III. A ROAD MAP GOING FORWARD

The Colorado River Basin has been described as a diverse “community of communities,”<sup>221</sup> including but not limited to sovereigns, agricultural and municipal water users, recreationists and conservation groups, power providers, and the general public. Over the past two decades, this community has increasingly explored creative

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219. See BUREAU RECLAMATION, *supra* note 131, at 19878.

220. See *id.* at 19891–19892. By contrast, Congress approved and modified the Colorado River Compact in the *Boulder Canyon Project Act* (BCPA) of 1928 and left to the Secretary absolute discretion to allocate the effects of shortages. Boulder Canyon Project Act, Ch. 42, 45 Stat. 1057 (1928), codified as amended at 43 U.S.C. 617. The BCPA ratified the 1922 compact, authorized the construction of a federal facility to impound water in the Lower Basin (Boulder Dam, later renamed Hoover Dam) and related facilities to deliver water in Southern California (e.g., the All-American Canal, which delivers Colorado River water to California's Imperial Valley), and apportioned the Lower Basin's 7.5 MAF per year among the three Lower Basin states. It also directed the Secretary of the Interior to serve as the sole water master in the Lower Basin, a role in which the federal government manages the delivery of all water below Hoover Dam. *Arizona v. California* confirmed that Congressional delegation of authority. 373 U.S. 546, 565 (1963).

221. See Robison, *supra* note 41, at 5.

arrangements to address water-scarcity challenges.<sup>222</sup> Basin tribes, other sovereigns, and non-governmental stakeholders now have a unique opportunity to shape future governance, as the 2007 Interim Guidelines, Minute 323 to the U.S.-Mexico Treaty, and the DCPs all expire by the end of 2026.<sup>223</sup> While there are lessons to be learned from existing arrangements and recent practices, this is also a unique opportunity to consider a broader array of visions and options for governing the river system. The future should be fully informed, but not constrained, by the past.

The roadmap provided here revolves around three inter-connected elements: enhance tribal capacity, embrace a more integrated vision for managing the Colorado River system, and move toward permanent structures to support collaborative governance.

### A. Enhance Tribal Capacity

Irrespective of whether the basin community embraces a more integrated vision and/or a more collaborative system of governance, there is much to be done to enhance tribal capacity in the basin. The WTI, in partnership with the Colorado River Sustainability Campaign, completed a comprehensive assessment of tribal capacity in the Colorado River Basin in 2022.<sup>224</sup> Twenty-two of the thirty tribes in the basin participated in the assessment.<sup>225</sup> One of the first impressions that emerge from its findings is the tremendous variation of capacity among tribes when it comes to managing water and engaging in policy discussions about the Colorado River system. Yet even the best-resourced tribes often face capacity challenges given that they have a similar panoply of responsibilities as states and must often try to carry out those responsibilities with the resources of local governments. On any given day, a tribal leader may be dealing with issues involving health, education, and welfare; cultural events such as funerals; economic development and natural resource management; and issues related to justice and law enforcement.<sup>226</sup> The staff resources available to tribal leadership also vary greatly from tribe to tribe.<sup>227</sup>

The WTI assessment report provides detailed information on the capacity-building needs and interests of the twenty participating tribes. While each faces unique challenges, several common needs emerged: (1) securing funding for staff, water programs, and infrastructure; (2) recruiting and retaining professional water resource staff; (3) providing training and support to existing staff and leadership; and (4) inspiring and informing future leaders and tribal communities to engage with

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222. See *supra* Part II.B.1.

223. See generally Request for Input on Development of Post-2026 Colorado River Reservoir Operational Strategies for Lake Powell and Lake Mead Under Historically Low Reservoir Conditions, 87 Fed. Reg. 37884, 37886 (June 24, 2022) (explaining “Both the 2007 Interim Guidelines and the DCPs are anticipated to be in place for an interim period through 2026. Similarly, Minute 323 is anticipated to be in effect through 2026.”).

224. See generally WATER & TRIBES INITIATIVE, ENHANCING TRIBAL WATER MANAGEMENT CAPACITY IN THE COLORADO RIVER BASIN: A BASELINE ASSESSMENT (2022).

225. *Id.* at 4.

226. See generally Anna Maria Ortiz, *Tribal and Native American Issues*, U.S. GOV'T ACCOUNTABILITY OFF., <https://perma.cc/H32X-GVXQ> (last visited Apr. 1, 2023).

227. See generally WATER & TRIBES INITIATIVE, *supra* note 226 at 15–19.

water matters.<sup>228</sup> These findings are not surprising given the long history of marginalizing tribal needs, interests, and voices in the Colorado River Basin—not to mention the inequity in the amount of funding that has been invested in the Colorado River Basin to provide water to non-tribal communities (relative to tribal communities) for irrigation, municipal, and commercial uses, and basic governmental capacity building. In many ways, tribes are playing catch-up to non-tribal communities in the basin, which suggests that needs and opportunities to enhance tribal capacity will not be met by any single assessment, report, workshop, or even a one-time infusion of dollars. It is time for the federal government, both programmatically and in meaningful fulfillment of its tribal trust obligations, along with the philanthropic community and others to make an intentional, long-term commitment to address the capacity building needs, interests, and priorities as defined by each tribe.

Enhancing internal tribal capacity is essential to facilitating tribes' ability to participate meaningfully in basinwide planning, problem-solving, and decision-making, including the development and implementation of the post-2026 management framework. Tribes need greater funding for staff and consultants to access and digest information, such as the modeling and other technical work underpinning management decisions. One way to demonstrate a commitment to enhancing tribal capacity is for federal and state governments, and perhaps other stakeholders such as conservation groups and corporate and philanthropic organizations, to provide resources for tribes to hire staff or contract for outside expertise and assistance, such as hydrologists, economists, lawyers, planners, and engineers. As a simple matter of social justice, providing these financial resources to tribes is warranted given that for more than a century the United States has spent billions of dollars on projects that have diverted water away from Indian country.

In addition to securing these types of resources, tribes also need better access to policymaking and decision-making processes. While each tribe has unique needs and interests, tribal leaders have clearly identified a common interest in ensuring recognition of and respect for tribal water rights, and removing barriers that historically have hindered equitable treatment of those rights.<sup>229</sup> This common interest reflects the reality that tribes' concerns are more likely to be acknowledged and accommodated when multiple tribes speak with a unified voice.<sup>230</sup> Two long-standing intertribal organizations in the basin, the Ten Tribes Partnership and the

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228. *Id.*

229. In a joint letter from twenty tribal leaders to Secretary of the Interior Deb Haaland, tribal leaders explained that "Reclamation needs to account for Basin Tribes' current and future water use as well as Basin Tribes' use of water that is not yet quantified in developing the Next Framework. The Next Framework MUST also recognize and include support for Tribal access to clean water, Tribal water rights settlements, Tribal sovereignty, federal accountability to Tribal trust responsibilities, and providing operationally functional and flexible tools that will aid Basin Tribes in the full utilization of their water rights." Letter from twenty tribal leaders to Deb Haaland, Sec'y of the Interior (Nov. 15, 2021), <https://perma.cc/2HP6-WJSF>.

230. In fact, this sentiment was expressed in a joint letter endorsed by 14 of the 30 tribes in the basin when they came together to create the Tribal Leaders Forum, now referred to as the Basin Tribal Coalition. Tribal Leaders Forum Letter of Invitation (Jan. 13, 2021), <https://perma.cc/DJL5-NT45>.



Inter-Tribal Council of Arizona, represent various cross-sections of tribes.<sup>231</sup> A more recent effort, originally known as the Tribal Leaders Forum and now referred to as the Colorado River Basin Tribal Coalition (Coalition), provides a “whole basin” platform for all thirty basin tribes to come together under one umbrella to advance their water-related interests.<sup>232</sup> Working through the Coalition, twenty tribal leaders endorsed a joint letter in November 2021 to the Secretary of the Interior and the basin-state governors clarifying their expectations to be meaningfully involved in developing and implementing the next management framework for the river system, as well as an initial set of policy goals.<sup>233</sup> As explained earlier, the Coalition also helped catalyze and participates in the ongoing Basinwide Tribes-States Dialogue, the first ever ongoing basinwide forum for tribes and states to engage on a sovereign-to-sovereign basis.<sup>234</sup>

Time will tell how effective and sustainable these efforts are to more meaningfully engage tribes in policymaking and decision-making processes. The pace of change in the basin (driven in large part by the hydrological crisis), along with the variation in capacity among tribes<sup>235</sup> suggests that some tribes are better positioned than others to engage in ongoing policymaking and collaborative problem-solving processes. It is also important to keep in mind that the substantive needs, interests, and priorities of tribes may vary, making it difficult for tribes in the basin to speak with one voice beyond broad statements of values and principles.<sup>236</sup>

Over the longer term, basin tribes may want to consider creating a distinctly tribes-led organization or institute capable of providing a comprehensive suite of services to enhance tribal capacity. These services could include mentoring future leaders; training leaders and staff; providing technical assistance to tribes; convening tribal leaders; facilitating collaborative problem-solving among tribes and other sovereigns and stakeholders; conducting and/or aggregating research, knowledge, and information relevant to tribes’ needs and interests; and advocating for mutually agreed upon positions. Several well-established tribal organizations might provide useful insights on how to approach this long-term proposition, including the Yukon River Inter-Tribal Watershed Council,<sup>237</sup> Columbia River Inter-Tribal Fisheries Commission,<sup>238</sup> and Coast Funds.<sup>239</sup> Another model might be a congressionally chartered water resources institute for all thirty basin tribes, similar to the water resources research institutes created within each basin state under the Water

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231. See TEN TRIBES PARTNERSHIP, *supra* note 122; INTER TRIBAL COUNCIL OF ARIZONA, <https://perma.cc/6CU9-XBFP> (last visited Apr. 22, 2023).

232. Tribes, WATER & TRIBES INITIATIVE, <https://perma.cc/6PFC-TT8D> (last visited Apr. 22, 2023).

233. See Letter from twenty tribal leaders to Deb Haaland, Sec’y of the Interior, *supra* note 231.

234. See *supra* Section II.

235. *Id.*

236. For example, the values and principles presented in the joint letter by twenty tribal leaders. See Letter from Twenty Tribal Leaders to Deb Haaland, Sec’y of the Interior, *supra* note 231.

237. YUKON RIVER INTER-TRIBAL WATERSHED COUNCIL, <https://perma.cc/QB4A-7EKS> (last visited Apr. 22, 2023).

238. COLUMBIA RIVER INTER-TRIBAL FISH COMMISSION, <https://perma.cc/UUL5-24MQ> (last visited Apr. 22, 2023).

239. COAST FUNDS, <https://perma.cc/JZP3-P7GR> (last visited Apr. 22, 2023).

Resources Research Act of 1964.<sup>240</sup> These institutes, modeled on successful federal agricultural research stations created as part of the New Deal in the 1930s, pursue practical research to address the nation's growing water problems.<sup>241</sup> The federal government provides basic support for each institute along with assorted grants.<sup>242</sup>

While tribal leaders seek to advance individual and common interests and to respond to repeated calls for clarity about what they need and/or want from the post-2026 management framework, the impact of their efforts hinges not only on the human, social, and financial capital tribes can deploy and their ability to come together and build consensus, but also on the responsiveness of federal and state decision-makers. Tribes' interests and views should be considered to the same extent as those of other sovereigns, and tribes should have sufficient opportunity to influence decisions and outcomes. Tribes need some assurance from the federal government and the basin states that their engagement with tribes will be more than lip service or a box-checking exercise, but rather will lead to genuine tribal inclusion in the process of shaping and implementing the next framework for managing the Colorado River system. The recent efforts to improve tribal engagement in planning and collaborative problem-solving at different spatial scales—including but not limited to state-based initiatives, Upper Basin Tribes-States Dialogue, and Basinwide Tribes-States Dialogue—while far from perfect (especially because they do not incorporate tribes at the decision-making table per se), nevertheless reflect progress and suggest a path forward.<sup>243</sup>

## B. Embrace a More Integrated Vision

As form follows function, it is essential to start any conversation about tribal engagement in Colorado River governance by clearly identifying the objectives the governance system is designed to achieve. The Law of the River has evolved for a century and currently includes a suite of policies and programs addressing topics such as water quality, power generation, endangered species, ecological needs, and recreation, all of which have been grafted onto the historical focus on consumptive use.<sup>244</sup> “Unfortunately, some of [these adjustments] have been treated as subservient to the allocative laws and others have been applied as if they were part of an entirely disconnected body of law.”<sup>245</sup> The run-up to 2026 presents basin stakeholders with an opportunity to embrace a more comprehensive, integrated set of values associated with the river system. While some may take this as a call for wholesale reconstitution

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240. NAT'L RSCH. COUNCIL, CONFRONTING THE NATION'S WATER PROBLEMS 45 (2004).

241. *Id.* at 62.

242. *Id.* at 45.

243. *See supra* Section II.A.

244. For an overview of the place of conservation and environmental laws, policies, and programs in the Colorado River Basin, see *Law of the River*, UNITED STATES BUREAU OF RECLAMATION, <https://perma.cc/J4VF-ZKBS> (last visited April 2, 2023). For reference to specific programs see Colorado River Basin Salinity Control Act of 1974, Pub. L. No. 93-320 (1974) (*amended* 1984); Grand Canyon Protection Act, Pub. L. No. 102-575 § 1801, 106 Stat. 4669 (1992); Lower Colorado River Multi-Species Conservation Program, H.R. 5180 (2006).

245. David H. Getches, *Colorado River Governance: Sharing Federal Authority as an Incentive to Create a New Institution*, 68 U. COLO. L. REV. 573, 577 (1997).

of the Law of the River,<sup>246</sup> past myopia “need not lead inexorably to the conclusion that the law of the river must be replaced or reformed root and branch.”<sup>247</sup>

Building on this perspective, the WTI released a policy brief in 2020 titled *A Common Vision for the Colorado River System: Toward a Framework for Sustainability*.<sup>248</sup> After reviewing goals for the river system articulated by tribes and other stakeholders, the authors identified several overlapping values and themes, and then synthesized this information into a common vision for the basin.<sup>249</sup> This vision was crafted in the form of a resolution that could be adopted by political communities and other entities in and around the basin and reads as follows:

Whereas water is life; it is a precious, life-giving resource;  
 Whereas water is sacred; it is valued for spiritual, cultural, and ecological purposes as well as for sustaining human populations and economies;  
 Whereas water is foundational to the identities of tribes in the Basin and provides an intrinsic connection to their wellbeing and homelands;  
 Whereas water in the Colorado River system is essential to urban and rural communities; municipal, agricultural, industrial, recreational, and other uses; and to more than 40 million people in two countries, seven states, and [thirty] sovereign Indian nations;  
 and  
 Whereas natural and cultural resource conservation are connected.  
 Now, therefore, be it resolved that the next framework to govern the Colorado River system should:  
 Promote and support the sustainable, resilient use of the River system for people and the rest of nature;  
 Ensure the spiritual, cultural, and ecological integrity of the River system while providing water for human use and consumption;  
 Equitably allocate water by considering the contemporary diversity of needs, interests, and priorities; historical use patterns; and the realities of drought and climate change;  
 Promote and support reliable access to clean water for all residents of the Colorado River system;  
 Leave the earth and its water systems better than we found them;  
 Honor, respect, and realize the federal government’s trust responsibility toward the Basin’s tribes in a manner that acknowledges their sovereignty and human right to self-determination;  
 Engage in collaboration as the action of first resort to develop policy and solve problems; and

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246. Ian James, *supra* note 7 (interviewing Former Interior Secretary Bruce Babbitt).

247. Getches, *supra* note 247.

248. WATER & TRIBES INITIATIVE, *A COMMON VISION FOR THE COLORADO RIVER SYSTEM: TOWARD A FRAMEWORK FOR SUSTAINABILITY*, 1 (2020).

249. *Id.*

Integrate traditional indigenous knowledge with western science to better understand the River system and the consequences of alternative management scenarios.<sup>250</sup>

This vision reaches beyond a management framework focused solely on criteria for operating the river system's plumbing (like the 2007 Interim Guidelines).<sup>251</sup> Instead, it emphasizes the need to consider *holistically* consumptive uses alongside cultural and ecological uses such as instream flows, fish and wildlife needs, the sustenance of plants for traditional and subsistence purposes, and ceremonial and spiritual uses.<sup>252</sup> In the spirit that "we can have it all, but we can't have it all at once," the challenge is not only to seek consensus on a common vision for the Colorado River system, but also to agree on how best to realize that vision over time.<sup>253</sup> Although some basin leaders consulted by the WTI in 2019 see a "tension between taking a more holistic or comprehensive approach to the next set of guidelines versus a more incremental approach, most see this choice as a false dichotomy."<sup>254</sup> Our sense is that, "it is not an either/or proposition but more of a both/and proposition."<sup>255</sup> "[I]t is desirable to articulate a broad, comprehensive vision for the next 25-years (or longer) and then to move in that direction incrementally."<sup>256</sup> Adopting a sort of "pragmatic idealism,"<sup>257</sup> the key question becomes which elements of a common vision can and should be addressed in the next framework for governing the river system, and which elements might be better addressed in other forums or processes? Some parts of the common vision might be achievable more quickly, while other elements are likely to take more time.

Perhaps the most significant barrier in moving from vision to action, identified by several basin leaders interviewed by the WTI in 2019, and succinctly summarized by David Getches in 1997, is that "the awkwardness and the intractability of most of the Colorado River's problems reflect the absence of a venue to deal comprehensively with Colorado River basin issues."<sup>258</sup> The challenges posed to collective action engendered by the absence of such a framework are plainly on display now as the basin struggles to address the immediate hydrologic crisis that is threatening power production at and even water deliveries from Lake Powell and Lake Mead. To remedy this situation, Professor Getches and others have called for establishing a new entity that recognizes and integrates the interests of the basin's sovereigns, water users, and other stakeholders.<sup>259</sup>

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250. *Id.* at 5.

251. See BUREAU OF RECLAMATION, *supra* note 131.

252. WATER & TRIBES INITIATIVE, *supra* note 250, at 3.

253. *Id.* at 6.

254. WATER & TRIBES INITIATIVE, *supra* note 18, at 17.

255. *Id.*

256. *Id.*

257. *Id.*

258. Getches, *supra* note 247, at 577.

259. See, e.g., David H. Getches, *Colorado River Governance: Sharing Federal Authority as an Incentive to Create a New Institution*, 68 COLO. L. REV. 573, 573-658 (1997). The idea of a river basin commission, council, or organization for the Colorado River has a long history as expounded by several notable scholars and experienced observers. In chronological order, see the following sources: NORRIS HUNDLEY, JR., WATER AND THE WEST: THE COLORADO RIVER COMPACT AND THE POLITICS OF WATER

### C. Move Toward Collaborative Governance

Developing the next framework to govern the Colorado River system presents an opportunity not only to embrace a broader, more inclusive vision, but to reflect on the 100th anniversary of the Colorado River Compact, identify lessons learned from that century of experience, and shape a governance arrangement that is more appropriate for the 21st century. The rate and scale of change occurring in the basin—including but not limited to aridification and precipitously declining water supply, population growth, increased outdoor recreation demands, as well as efforts by tribes and conservation groups to better integrate themselves into basin management—challenge the existing governance framework, which remains largely dominated by the United States and the basin states. The time is ripe to move from ad hoc, often crisis-driven collaborative problem-solving to more intentional, institutionalized systems of collaborative decision-making. There is a qualitative

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IN THE AMERICAN WEST 181 (1975) (discussing how several negotiators of the Colorado River Compact favored creation of a permanent Colorado River Commission in 1922); Reuel L. Olson, *The Colorado River Compact 195–210* (September 1926) (Ph.D. Thesis, Harvard University) (advocating vigorously for the idea of a Colorado River Authority, though it was not included in the compact); Gilbert F. White, *A New Confluence in the Life of the River*, in *NEW COURSES FOR THE COLORADO RIVER: MAJOR ISSUES FOR THE NEXT CENTURY* 215, 223 (Gary D. Weatherford & F. L. Brown eds., 1986) (concluding that “[a] means might be found to bring together from inside and outside the basin a group representative of the diverse interests in water and related land resources to assess possible actions beyond those specified in the compact”); Charles W. Howe & W. A. Ahrens, *Water Resources of the Upper Colorado River Basin: Problems and Policy Alternatives*, in *WATER AND ARID LANDS OF THE WESTERN UNITED STATES* 169 (Mohamed T. El-Ashry & Diana C. Gibbons eds., 1988) (suggesting an interstate commission to do studies, monitor agreements, and promote dialogue); Douglas Steven Kenney, *River Basin Administration and the Colorado: Past Practices and Future Alternatives* 439–458, 467–468 (Ph.D. Dissertation, University of Arizona 1993) (proposing a Colorado River Council to be formed by compact, with participation by seven state governors and the Secretary); John G. Berggren, *Transitioning to a New Era in Western United States Water Governance: Examining Sustainable and Equitable Water Policy in the Colorado River Basin* (Ph.D. Dissertation, University of Colorado 2018) (examining policies and decision-making processes in the Columbia River Basin); John G. Berggren, et al. *A Pie No More? Building a More Equitable Colorado River Governance Structure*, in *CORNERSTONE AT THE CONFLUENCE: NAVIGATING THE COLORADO RIVER COMPACT’S NEXT CENTURY* 207, 207–223 (Jason A. Robinson, ed., 2022) (arguing for a more intentional governing structure, including a science panel, to enhance participation). It is worth noting, also, that international best practices for governing transboundary river basins suggest that an ongoing river basin commission is essential to effective and efficient water management. *See generally* MATTHEW MCKINNEY, ET AL., *A SACRED RESPONSIBILITY: GOVERNING THE USE OF WATER AND RELATED RESOURCES IN THE INTERNATIONAL COLUMBIA BASIN THROUGH THE PRISM OF TRIBES AND FIRST NATIONS* (2015) (outlining the historical context, the interests and aspirations of tribes and First Nations, the role of indigenous people in transboundary water management, and lessons for improving governance in the International Columbia Basin); Mariana Rivera-Torres & Andrea Gerlak, *Evolving Together: Transboundary Water Governance in the Colorado River Basin*, 21 *INT’L ENV’T AGREEMENTS: POL., L., & ECON.* 553, 553–574 (reviewing literature on transboundary water governance); SUSANNE SCHMEIER, *GOVERNING INTERNATIONAL WATERCOURSES: RIVER BASIN ORGANIZATIONS AND THE SUSTAINABLE GOVERNANCE OF INTERNATIONALLY SHARED RIVERS AND LAKES* (2012) (arguing that river basin organizations are the key institutions for managing internationally shared water resources); STEPHEN C. MCCAFFREY, *THE LAW OF INTERNATIONAL WATERCOURSES* (3rd ed. 2019) (examining how to apply the law on international watercourses); UNITED NATIONS ET AL., *PROGRESS ON TRANSBOUNDARY WATER COOPERATION: GLOBAL STATUS OF SDG INDICATOR 6.5.2 AND ACCELERATION NEEDS, 2021* (2021) (providing decision-makers with reliable and up-to-date evidence on where acceleration is most needed in the Sustainable Development Goal 6 global acceleration framework implemented to ensure water and sanitation for all by 2030).

difference between “collaborative problem-solving,” which typically seeks the input and advice of directly-affected stakeholders before decision-making is completed, and “collaborative decision-making,” which involves a process of sharing decision-making authority among identified entities. Rather than creating a new process every time the basin community finds itself staring down a management crisis—which is time-consuming, fraught with uncertainty, and often leads to doing things the same old way (states in the driver’s seat with the federal government riding shotgun, and everyone else crammed in the back and largely just along for the ride)—it is time to create an ongoing, collaborative framework for governing the system that is more inclusive, flexible, and adaptive. Such a system would avoid the need to stand up processes to renegotiate management agreements every several years and/or to seek congressional approval every time changes are needed. It would allow the basin community to adjust operations and management strategies more efficiently based on the changing climate and emerging needs, interests, and priorities. An adaptive system of planning and decision-making would also reflect the realization that the basin is too complex and faces too many uncertainties to have a single, sustainable permanent solution.<sup>260</sup> It would move from reactive to proactive decision-making and management, and it would more appropriately reflect and respect the full panoply of sovereigns in the basin.

Our purpose here is not to prescribe an ideal model for Colorado River governance. That effort should be done through an authentic, inclusive collaborative process that meaningfully involves all the diverse communities in the basin, including tribes.<sup>261</sup> We also realize that, barring an upheaval of catastrophic magnitude, it will be politically difficult to create an entirely new institution for governing the river system. But the Law of the River has never been a fixed, immutable edifice. So, if not now, when? And if not the current mix of tribal, state, federal, and other leaders, then who?<sup>262</sup>

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260. Compare 3 INTERNATIONAL INSTITUTE FOR APPLIED SYSTEMS ANALYSIS, ADAPTIVE ENVIRONMENTAL ASSESSMENT & MANAGEMENT 137 (C.S. Holling ed. 1978) (“[T]he inclusion of environmental considerations among the criteria for project adaptation and the integration of the assessment and planning processes . . . require[] mechanisms that allow the assessment to continue along the project evolution and mechanisms that allow the project to adapt in response to ecological considerations.”) with John Fleck & Anne Castle, *Green Light for Adaptive Policies on the Colorado River*, WATER SEMIMONTHLY, December 21, 2021, at 4, 7 (Describing uncertainties stemming from evaporation, water flow, and tribal rights).

261. See Mariana Rivera-Torres & Andrea K. Gerlak, *Evolving Together: Transboundary Water Governance in the Colorado River Basin*, 21 INT’L ENV’T AGREEMENTS: POL. L. & ECONS. 553 (2021) (“[R]esearch also uncovers an uneven institutionalization of participation and transparency in the basin. There exist concerns that some stakeholders at the subnational level . . . especially tribes . . . have been insufficiently engaged.”).

262. See generally WATER & TRIBES INITIATIVE, *supra* note 11, at 14 (“Arguments for an [overarching] commission [or council] include (1) establishing clear, consistent, transparent processes for making decisions and resolving disputes (and therefore avoiding the need to reinvent the process time and again); (2) dedicating staff whose responsibility is to consider the entire basin, rather than a portion of the basin; and (3) moving from an ad hoc system of collaboration to a more deliberate and inclusive system of planning and decision-making. Arguments against a commission or council include (1) resistance to redefining the role of states; (2) transaction costs to create such a commission; and (3) fear of the unknown.”).

Although it may be difficult to develop and implement a new governance arrangement all at once, it is possible to imagine the basin's diverse "community of communities" coming together to shape shared long-term goals for sustainability and then moving incrementally toward implementing them. This "pragmatic idealism" acknowledges that the basin's collaborative culture over the past two decades provides a solid foundation for transitioning from ad hoc problem-solving to ongoing, collaborative governance,<sup>263</sup> and that a more integrated, comprehensive approach of this sort is most likely to occur incrementally.

One step toward a new paradigm for Colorado River governance would be to create a Sovereign Governance Team (SGT) to oversee the next management framework's implementation.<sup>264</sup> While it would be preferable to have this structure in place to develop the post-2026 management framework, we recognize doing so is impractical given the limited window between now and 2026 and the acute hydrologic challenges already confronting the basin that require a more immediate response. It is more realistic, therefore, to imagine the foundation for an SGT being laid during the next management framework's development, and then actualized during its implementation.

An SGT is not an idea created out of whole cloth, and is consistent with past calls for a river basin commission or council for the Colorado River.<sup>265</sup>

The U.S. State Department under President Obama established a Sovereign Review Participation Process "for sovereign parties to collaborate and coordinate" with the federal government in conducting technical studies and developing and evaluating alternatives for the future of the Columbia River Treaty—based in part that on the rationale that "History has shown that failure to include the voices of tribal officials in formulating policy affecting their communities has all too often led to undesirable and, at times, devastating and tragic results. By contrast, meaningful dialogue between Federal officials and tribal officials has greatly improved Federal policy toward Indian tribes. Consultation is a critical ingredient of a sound and productive Federal-tribal relationship."<sup>266</sup> That treaty, in effect since 1964, is an agreement between two sovereigns—United States and Canada—to coordinate flood control and to share hydropower benefits across their shared border.<sup>267</sup> It calls for two "entities" to be designated to implement treaty arrangements—a U.S. entity and a Canadian entity.<sup>268</sup> The U.S. entity includes the Bonneville Power Administration

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263. See WATER & TRIBES INITIATIVE, *supra* note 11, at 16.

264. See WATER & TRIBES INITIATIVE, *supra* note 11, at 10–11 (discussing "Sovereign Review Team").

265. See Matt Jenkins, *In Search of Solutions: Water & Tribes Initiative Encourages Collaborative Approach to Colorado River Management*, 23 LAND LINES 75, 76 (2021). See also note 259 for a review of the history of calls for a river basin commission for the Colorado River basin.

266. The purpose, structure, and mechanics of the Sovereign Review Participation Process are explained in *Columbia River Treaty 2014–2024 Review Sovereign Review Team Sovereign Participation Process*, Approved by the SRT on July 14, 2011. This process was likely inspired and informed by President Obama's *Memorandum for the Heads of Executive Departments and Agencies, Tribal Consultation* (The White House, Office of the Press Secretary, November 5, 2009).

267. See generally UNITED STATES ARMY CORPS OF ENGINEERS, *COLUMBIA RIVER TREATY 2014/2024 REVIEW* (April 2013).

268. Treaty Relating to Cooperative Development of the Water Resources of the Columbia River Basin, Can.-U.S., Jan. 17, 1961, 15 U.S.T. 1555.

and the Army Corps of Engineers.<sup>269</sup> The treaty provided that either country could terminate most of the Treaty's provisions at any time after the treaty's first 60 years upon giving at least 10 years notice.<sup>270</sup> Created in the run-up to 2014, which was the first opportunity for either party to trigger the treaty's termination provisions, the Sovereign Review Participation Process was designed to inform and advise the U.S. entity on the treaty's past, present, and potential future.<sup>271</sup> This dynamic offers a reasonable parallel to the window now open to federal, state, and tribal sovereigns in the Colorado River Basin to reconsider the past, present, and potential future of governance arrangements for the river system ahead of 2026.

The Sovereign Review Participation Process included three layers of participation: (1) formal government-to-government consultation on a one-to-one basis between the federal government and the Columbia River Basin's four states and fifteen tribes;<sup>272</sup> (2) a Sovereign Review Team comprised of members from ten federal agencies, the four states, and the fifteen tribes (the tribes being collectively represented by five delegates); and (3) a Sovereign Technical Team composed of technical staff from all three types of sovereigns. As a genuinely collaborative effort, the process also provided multiple opportunities for diverse stakeholder participation and public participation.<sup>273</sup>

The most salient features of this experience relative to the role of tribes in governing the Colorado River system are twofold: an explicit recognition of tribes as sovereigns alongside the state and federal governments; and genuine inclusion of tribes in collaborative decision-making.<sup>274</sup> These features are particularly notable

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269. *Id.*

270. *Id.*

271. CONG. RSCH. SERV. & CHARLES V. STERN, *COLUMBIA RIVER TREATY REVIEW* 1, 2 (2023).

272. *Columbia River Treaty: Hearing to Consider the Draft Reg'l Recommendation Regarding the Columbia River Treaty Before the Comm. On Energy and Nat. Res.*, 113th Congress, 8 (2013) (Prepared statement of Brigadier General John Kem, Commander, U.S. Army Corps of Engineers, Northwestern Division, Member U.S. Entity for the Columbia River Treaty, and Stephen Oliver, Vice President, Generation Asset Management, Bonneville Power Administration, Coordinator, United States Entity for the Columbia River Treaty) ("Throughout the Columbia River Treaty 2014/2024 Review process, the U.S. Entity has consulted extensively with regional sovereigns, stakeholders, and the public."); <https://perma.cc/L3SR-UEKR>; *Id.* at 12 (Statement of Joel Moffett, Chairman, Columbia River Inter-Tribal Fish Commission) ("[T]he Columbia Basin Tribes are working with the U.S. Entity and other regional sovereigns to finalize a high level, consensus based regional policy recommendation on the future of the Columbia River Treaty."); *Id.* at 14 ("The Sovereign Participation is three-tiered: the first tier is government-to-government, where decisions are made regarding policy issues.").

273. *Columbia River Treaty: Hearing to Consider the Draft Reg'l Recommendation Regarding the Columbia River Treaty Before the Comm. On Energy and Nat. Res.*, 113th Congress, 8 (2013) (Prepared statement of Brigadier General John Kem, Commander, U.S. Army Corps of Engineers, Northwestern Division, Member U.S. Entity for the Columbia River Treaty, and Stephen Oliver, Vice President, Generation Asset Management, Bonneville Power Administration, Coordinator, United States Entity for the Columbia River Treaty) ("Throughout the Columbia River Treaty 2014/2024 Review process, the U.S. Entity has consulted extensively with regional sovereigns, stakeholders, and the public . . . the U.S. Entity has heard from and understands the perspectives of the regional stakeholders through individual meetings, workshop sessions, panel discussions and presentations, and public comment periods.").

274. *Id.* at 2 (Opening Statement of Hon. Ron Wyden, U.S. Senator from Oregon) ("Today, based upon their Treaty rights and other laws, the Columbia Basin Tribes are rightfully involved in the deliberations regarding system operations to protect salmon and other natural resources"); *see id.* at 11 (Statement of Joel Moffitt) ("Through Basin wide partnership and collaboration the tribes seek to manage



because, as in the Colorado River Basin, tribes' needs and interests were largely excluded during the Columbia River Treaty's original negotiation and implementation.<sup>275</sup>

An SGT could also build on lessons learned from international best practices for transboundary river basin commissions,<sup>276</sup> successful sovereign-to-sovereign negotiations over Indian reserved water rights settlements,<sup>277</sup> negotiations between and among federal and tribal governments on Endangered Species Act implementation,<sup>278</sup> and emerging experiments in co-management of public lands.<sup>279</sup> The design of a SGT might also benefit by considering any lessons learned from the 7/10 process initiated by the Ten Tribes Partnership and the Secretary of the

the Columbia River for today's modern values not the outdated values of the 1960s when the original Columbia River Treaty was signed.”).

275. See *id.* at 13 (“In developing this coordinated system operation under the Treaty with Canada, the U.S. did not consult with the Columbia Basin Tribes nor consider the effect of the Treaty on our cultural and natural resources.”).

276. See OECD, STAKEHOLDER ENGAGEMENT FOR INCLUSIVE WATER GOVERNANCE 172 (2015) (Table 7.1 Principles on Stakeholder Engagement in Water Governance), <https://perma.cc/6D9T-9AKG>; *The OECD Principles on Water Governance*, OECD, <https://perma.cc/5J2R-XFKM> (last visited Apr. 15, 2023, 10:00 AM).

277. See, e.g., CONG. RSCH. SERV. & CHARLES V. STERN, INDIAN WATER RIGHTS SETTLEMENT (2023); see also BONNIE G. COLBY ET AL., NEGOTIATING TRIBAL WATER RIGHTS: FULFILLING PROMISES IN THE ARID WEST 58–67 (2005).

278. On June 5, 1997, Secretary of the Interior Bruce Babbitt and Secretary of Commerce William Daley signed a joint Secretarial Order on American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act. For a review of this model, see Charles F. Wilkinson, *The Role of Bilateralism in Fulfilling the Federal-Tribal Relationship: The Tribal Rights-Endangered Species Secretarial Order*, 72 WASH. L. REV. 1063, 1063 (1997). The Order culminated 18 months of work by tribes and federal officials to establish an administrative system to resolve difficult questions involving tribal rights and the Endangered Species Act. As explained by Wilkinson, “The Order is important for the ESA’s implementation. It also carries broader significance, for it serves as one major example of how the government-to-government relationship between the United States and Indian tribes can be successfully implemented.” *Id.*

279. Since the creation of Bears Ears National Monument by President Obama in 2016, there is an increasing interest in exploring co-management arrangements for federal public land management among federal and tribal governments. Proclamation - Establishment of the Bears Ears National Monument Proclamation No. 9558, 82 Fed. Reg. 1139, 1139 (Dec. 28, 2016), <https://perma.cc/G3VV-5H2S>. For the first time in history, a president used the Antiquities Act to honor the request of tribal Nations to protect sacred sites. The original proposal was developed by the Bears Ears Inter-Tribal Coalition, made up from representatives of the Hopi Nation, Navajo Nation, Ute Mountain Ute Tribe, Ute Indian Tribe of the Uintah Ouray and Zuni Tribe. While the Coalition did not achieve everything it hoped for (it advocated for protecting 1.9 million acres and the Obama administration settled on 1.35 million acres), the proclamation created the Bears Ears Commission, which includes one elected member from each of the five tribes. Those representatives will partner with federal agencies on decisions regarding management of the national monument land. This type of co-management arrangement does not delegate authority to tribes nor is it a call for tribal unilateralism. The defining principle is “To share authority and responsibility.” It is also worth noting that the Obama Administration took this action in this case absent the consent of the State of Utah. For a comprehensive review of co-management arrangements as they apply to federal public land management, see Monte Mills & Martin Nie, *Bridges to a New Era: A Report on the Past, Present, and Potential Future of Tribal Co-Management on Federal Public Lands*, 44 PUB. LAND & RES. L. REV. 54, 54 (2021). For a recent, popular review of the theory and practice of co-management on federal public lands, see Miyo McGinn, *How Tribal Co-managing Movements are Transforming the Conservation of Public Lands*, POPULAR SCI. (Oct. 10, 2022), <https://perma.cc/9EVN-LGGR>.

Interior.<sup>280</sup> It should also build on the principles and spirit of several Biden Administration policy pronouncements: White House *Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships* (January 26, 2021);<sup>281</sup> Memorandum from the Office of the President on *Indigenous Traditional Ecological Knowledge and Federal Decision Making* (November 15, 2021);<sup>282</sup> *Joint Secretarial Order on Fulfilling the Trust Responsibility to Indian Tribes in the Stewardship of Federal Lands and Waters* (Order No. 3403, November 15, 2021);<sup>283</sup> interagency MOU on *Tribal Treaty Rights and Reserved Rights* (November 15, 2021);<sup>284</sup> and an interagency MOU *Regarding the Protection of Indigenous Sacred Sites* (November 16, 2021).<sup>285</sup>

Collectively, these policy pronouncements acknowledge tribes' interest in federal public lands and waters, including the cultural values and often-sacred nature of such resources. They also reflect an important recognition of the need not only to meaningfully consult tribes on decisions related to core tribal interests, but also to engage tribes in co-management, co-stewardship, and shared decision-making. Individually and collectively, these policy pronouncements create a useful framework for sovereign-to-sovereign relationships, as highlighted by President Biden's memorandum on *Tribal Consultation and Strengthening Nation-to-Nation Relationships*:

“American Indian and Alaska Native Tribal Nations are sovereign governments recognized under the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions. It is a priority of my Administration to make respect for Tribal sovereignty and self-governance, commitment to fulfilling Federal trust and treaty responsibilities to Tribal Nations, and regular, meaningful, and robust consultation with Tribal Nations

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280. In the early 1990s, representatives of the seven basin states and the Ten Tribes Partnership (TTP) came together to address the problems facing the Colorado River basin. The intent of the “7/10 Process,” as it is colloquially known, was for state and tribal officials to explore ways to improve water use efficiency, new river management strategies, and voluntary water transfers to extend supplies and reduce the risk of shortages. The 7/10 process was limited to the ten tribes of the TTP because these groups had established water rights to waters of the mainstem of the Colorado River. U.S. BUREAU RECLAMATION, COLORADO RIVER BASIN TEN TRIBES PARTNERSHIP TRIBAL WATER STUDY 3-1 (2018). It may be worth examining how this process could be improved.

281. See generally Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, 2021 DAILY COMP. PRES. DOC. 91 (Jan. 26, 2021).

282. See generally Memorandum for the Heads of Departments and Agencies on Indigenous Traditional Ecological Knowledge and Federal Decision Making from Eric S. Lander and Brenda Mallory (Nov. 15, 2021) <https://perma.cc/XR8L-E3AG>.

283. See generally U.S. DEP'T INTERIOR, U.S. DEP'T AGRIC., ORDER NO. 3403, JOINT SECRETARIAL ORDER ON FULFILLING THE TRUST RESPONSIBILITY TO INDIAN TRIBES IN THE STEWARDSHIP OF FEDERAL LANDS AND WATERS (2021).

284. See generally MEMORANDUM OF UNDERSTANDING REGARDING INTERAGENCY COORDINATION AND COLLABORATION FOR THE PROTECTION OF TRIBAL TREATY RIGHTS AND RESERVED RIGHTS (Nov. 15, 2021).

285. See generally MEMORANDUM OF UNDERSTANDING REGARDING INTERAGENCY COORDINATION AND COLLABORATION FOR THE PROTECTION OF INDIGENOUS SACRED SITES (Nov. 15, 2021). For a discussion of this topic, see generally Kevin Washburn, *Facilitating Tribal Co-Management of Federal Public Lands*, 2022 WIS. L. REV. 263 (2022).

cornerstones of Federal Indian policy. The United States has made solemn promises to Tribal Nations for more than two centuries.”<sup>286</sup>

The memorandum goes on to provide high-level direction to the Biden administration on how to achieve these goals.<sup>287</sup> It also affirms the Biden administration’s commitment to previous presidential directives that have guided the “Nation-to-Nation” relationship, including Executive Order 13175 of November 6, 2000, “Consultation and Coordination with Indian Tribal Governments,” and the Presidential Memorandum of November 5, 2009, “Tribal Consultation.”<sup>288</sup>

As a corollary to the Biden Administration’s policy framework, the design of an SGT could also draw on the Bureau of Reclamation’s policy guidelines to enhance tribal-federal relations, released in July 2020.<sup>289</sup> The guidelines explicitly state, that:

“Each federally recognized Indian tribe is a sovereign nation; federally recognized Indian tribes maintain a distinct legal and political relationship with the United States. This government-to-government relationship is unique for each individual tribe. It is separate and distinct from the relationship Reclamation maintains with States, counties, local municipalities, water districts, irrigation districts, or members of the general public.”<sup>290</sup>

To facilitate government-to-government relationships, the guidelines provide a framework for tribal-Reclamation “protocol agreements,” defined as “mutually agreed-upon principles and procedures for interacting and communicating . . .”<sup>291</sup> Once established, the intent of a protocol agreement is to facilitate “meaningful and proactive consultations . . . strengthening government-to-government relationships, and . . . entering into partnerships or collaborative efforts that support tribal water resources and the mission of Reclamation.”<sup>292</sup>

The Biden Administration’s policy pronouncements provide a clear and useful roadmap, but the proof is moving from policy to implementation. Likewise, none of the other examples mentioned above provide definitive guidance for how an SGT ought to be stood up. However, they do provide models for how federal, state, and tribal governments can successfully engage on a sovereign-to-sovereign basis, something the Colorado River still lacks on a basinwide scale. An SGT, as envisioned here, would recognize the principles of sovereignty and equity discussed above and build on basin tribes’ emerging capacity to engage in transactional problem-solving. It would create a more level playing field among basin sovereigns, where tribes are recognized as sovereigns alongside the basin states and the federal

286. Memorandum on Tribal Consultation, *supra* note 281.

287. *See id.*

288. *See* Exec. Order No. 13175, 65 Fed. Reg. 67249 (Nov. 6, 2000); Establishment of Bears Ears National Monument, *supra* note 285.

289. *See, e.g.*, U.S. BUREAU RECLAMATION, WORKING WITH INDIAN TRIBAL GOVERNMENTS; CONSULTATION, CULTURAL AWARENESS, AND PROTOCOL GUIDELINES (2020).

290. *Id.* at 1.

291. *Id.* at 17.

292. *Id.* at 1.

government, rather than as another “interest group” or “stakeholder” as in past processes. It would integrate tribes in a meaningful way into planning and decision-making; provide opportunities to meaningfully engage all stakeholders, experts, and the public; and could perhaps grow to include a role for Mexico as an additional sovereign in recognition of the transboundary nature of the Colorado River basin.<sup>293</sup> An SGT could thus serve as a body to facilitate adaptive management and collaborative problem-solving in the whole basin on an ongoing basis.

To ensure successful integration into the architecture of governing the basin’s water resources, federal legislation most likely would be needed to authorize an SGT. A logical vehicle would be the legislative package that inevitably will be required to implement the post-2026 management framework. Properly designed and capacitated, an SGT could then become the primary vehicle to oversee that framework’s implementation. To achieve this goal, the authorizing legislation would need to clarify several design elements.

First, it would need to identify the SGT participants. One option would be an appointment process whereby (1) the governor of each basin state names one representative (similar to what happens today); (2) the federal government selects a limited number of representatives (perhaps one each from the Upper Basin and Lower Basin, or individual representatives from key agencies such as Reclamation, the Western Area Power Administration, the U.S. Fish and Wildlife Service, and/or the National Park Service); and (3) the basin tribes collectively choose seven representatives (to match the number of state representatives) according to whatever formula the tribes deem appropriate. As noted above, in the Columbia River Basin there were a set number of seats for tribes in the Sovereign Review Participation Process—five delegates for fifteen tribes—and the tribes negotiated among themselves over their representation. Adopting a similar approach would keep the core group relatively small yet inclusive of all three (or four if Mexico is included) sets of sovereigns. The basin community should also consider the merits of including alternates for each representative.<sup>294</sup>

Second, the authorizing legislation would need to delineate the scope of the SGT’s authority. We recognize there is likely to be significant debate over whether the SGT should be an advisory council or a true decision-making body. From our

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293. To be clear, we do not view an SGT as replacing the separate bilateral United States-Mexico process under the auspices of the International Boundary and Water Commission as called for in the 1944 US-Mexico Water Treaty. *See generally* Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande Treaty Between the United States of America and Mexico, Feb. 3, 1944, 59 Stat. 1219. It would merely be supplementary to it to further enhance and facilitate sovereign-to-sovereign communication and decision-making throughout the basin. For more information on the role of the IBWC in governing the Colorado River, see INTERNATIONAL BOUNDARY & WATER COMMISSION, <https://perma.cc/8C88-AHM7> (last visited Mar. 30, 2023). For an excellent review of the literature on transboundary water governance, including an assessment of the IWBC, see generally Mariana Rivera-Torres & Andrea Gerlak, *Evolving Together: Transboundary Water Governance in the Colorado River Basin*, 21 INT’L ENV’T AGREEMENTS 553 (2021).

294. The advantage of using of alternates in multi-party negotiation, collaborative problem-solving, and consensus building is to ensure that a particular interest or view is represented in the ongoing dialogue if the designated representative is unavailable for a particular meeting or workshop. The downside is that there may not be the same level of trust among the alternate and other participants, and the alternate may not have an up-to-date understanding of the issues, options, and dynamics of the ongoing dialogue. In the final analysis, our experience is that consistency of participation is paramount to consensus-building.

perspective, the basin needs more holistic governance, and creating the SGT as a full-fledged decision-making body would enhance its legitimacy, credibility, and effectiveness—to the entire basin’s benefit. It might be more politically palatable for the legislation initially authorizing the SGT to come with a sunset date, perhaps 10 years, to allow for date-certain reassessment of the SGT’s performance. And the relationship between the SGT’s powers and duties, and the powers and duties of the Secretary of the Interior and the Upper Colorado River Commission under current law would need to be clearly and carefully addressed.

Third, the authorizing legislation would need to clarify opportunities for broad engagement by water users, stakeholders, and the general public, and to otherwise ensure that the SGT is well-resourced and staffed. Like the Sovereign Review Team in the Columbia River Basin,<sup>295</sup> the SGT could use a variety of social media, in-person, and other mechanisms to raise public awareness and understanding and to seek the input and advice from the general public on appropriate issues. It could also create working groups to include additional stakeholders and experts, delegate assignments to those working groups, and ask the groups to generate reports and recommendations. Accomplishing all these tasks and providing other backbone support will require staff and funding. Federal funding is perhaps the most obvious source, but careful consideration should be given to ensuring that any funding mechanism is reliable and durable.

When an early iteration of the idea of an SGT was presented during a basin-wide workshop convened by WTI in February 2020, it received mixed reviews.<sup>296</sup> Many participants agreed that an SGT could provide a more meaningful role for basin tribes in decision making, better integrate diverse perspectives and information into planning and problem-solving processes, and facilitate better mutual understanding among the sovereigns.<sup>297</sup> At the same time, many participants questioned how all 30 tribes in the basin could best be represented on the SGT, particularly in light of the diversity of interests and capacities among tribes.<sup>298</sup> Concern was also raised about how an SGT could be structured to ensure that its work would be seriously considered by the ultimate federal decision-makers if it is only advisory and not part of the formal decision-making process. Some participants raised a question as to whether the creation of an SGT would be subject to the Federal Advisory Committee Act,<sup>299</sup> while other participants asked operational questions about who would convene, staff, and fund an SGT as well as the challenge of how consensus might be reached among such a large and diverse group of participants.<sup>300</sup>

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295. CONG. RSCH. SERV., *supra* note 283 at 6.

296. WATER & TRIBES INITIATIVE, *supra* note 18 at 60–61.

297. *Id.*

298. *Id.* It cannot be emphasized enough that each tribe is unique, with its own goals, interests, culture, resources, and capabilities. It is no more realistic to expect a singular “tribal” position than a single “state” one.

299. Federal Advisory Committee Act of 1972, Pub. L. No. 92-463, 86 Stat. 770. This Act “formalized a process for establishing, operating, overseeing, and terminating these advisory bodies and created the Committee Management Secretariat to monitor compliance with the Act.” Federal Advisory Committee Act (FACA) Management Overview, G.S.A, <https://perma.cc/28JN-K5BJ> (last visited Mar. 30, 2023). In 1976, Executive Order 12024 delegated to the administrator of GSA all responsibilities of the president for implementing the Federal Advisory Committee Act (FACA). *Id.*

300. WATER & TRIBES INITIATIVE, *supra* note 18 at 10.

Some participants noted as problematic the fact that, by definition, a SGT would not include representatives of irrigators, conservation groups, and other water users in the basin.<sup>301</sup> And it was also noted that an SGT could supplement and complement other processes, but should not replace formal government-to-government consultation with basin tribes.<sup>302</sup>

Many of these issues and concerns focus on questions of design and implementation, which could be effectively addressed during a genuinely collaborative process to design an SGT. Inevitably, many other details would need to be addressed to create a viable and effective SGT. But that exercise alone would bring value to the basin community, making space for necessary conversations about a governance structure that is more inclusive of tribes—as well as other stakeholders—than the state-driven and tribe-excluding model created when the Colorado River Compact was drafted a century ago.

### CONCLUSION

The title of this article, “First in Time,” shines a spotlight on a basic irony built into the Law of the River. First in time, first in right is a key tenet of Western water law. Yet while Native Americans are indisputably the first inhabitants of the Colorado River Basin and have relied on its water and other resources since time immemorial, they were sidelined in the shaping of the Compact and its governing institutions, and they have faced uphill battles to secure and protect their water rights—even to simply being able to provide access to clean water for their members.

Despite this historical inequity, there is reason to hope for a better future. Federal and state sovereigns, the primary decision-makers in the basin over the last century, increasingly embrace a more collaborative, sovereign-to-sovereign approach to problem-solving, if not decision-making. At the same time, tribes are increasing their capacity to help solve the basin’s water-shortage issues and insisting on seats at decision-making tables as sovereigns. The negotiation and implementation of the next management framework presents an important inflection point for the basin at the onset of the Compact’s second century. It will take vision, passion, candor, and open, honest hard work by all sovereigns, as well as non-sovereign stakeholders, to jointly craft a future for the basin that is both equitable and sustainable. We believe the community of communities that defines the Colorado River system is up to the task.

### POSTSCRIPT

Several notable changes have emerged over the past few months since the final draft of this article was prepared. First, one of the largest snowpacks in the last 30 years during the winter of 2023 brought a temporary reprieve to the Colorado River basin.<sup>303</sup> In the upper river basin, for example, snowpack peaked at more than

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301. *Id.*

302. *Id.*

303. For more on this topic, see Ian James, *Drought ravaged Colorado River gets relief from snow. But long-term water crisis remains*, L.A. TIMES (Apr. 8, 2023, 5:00 AM), <https://perma.cc/W526-YLKG>; Scott Dance, *Lake Powell is rising more than a foot a day. But megadroughts effects will still be felt*, WASH. POST (May 11, 2023, 6:30 AM), <https://perma.cc/6KQA-HSKK>.

150% of normal. While some observers hint that this means the basin does not need to cut water use as much as expected back in June 2022, others suggest that it is not wise to kick the can down the road. The snowpack provides “breathing room” to allow water managers and stakeholders to develop agreements to “permanently reduce use by about 25% or more of Colorado River water.”<sup>304</sup>

Second, in response to the potential for ongoing low run-off conditions and unprecedented water shortages in the Colorado River Basin, the Bureau of Reclamation released a draft Supplemental Environmental Impact Statement (SEIS) on April 11, 2023, to potentially revise the 2007 Interim Guidelines for operating Glen Canyon and Hoover Dams.<sup>305</sup> The draft SEIS presented three alternatives, including a no action alternative. The two action alternatives proposed to cut water use in the Lower Basin using either the established system of priorities (i.e., first in time, first in right) or cutting all water users in the Lower Basin the same percentage. These bookend alternatives would have resulted in dire consequences for tribes and other water users in the Lower Basin, and apparently provided sufficient incentive for the Lower Basin states to negotiate a three-state agreement to conserve at least 3 maf of water through the end of 2026 to protect Lake Powell and Lake Mead.<sup>306</sup> The agreement calls for the federal government to pay about \$1.2 billion to irrigation districts, cities, and tribes in the three states if they temporarily use less water. The states have also agreed to make additional cuts beyond that amount to generate additional reductions if necessary to prevent Lake Powell and Lake Mead from declining below critical elevations. In response to this three-state proposal, Reclamation withdrew the draft SEIS in order to analyze the proposal and determine whether it should be included as part of the suite of alternatives evaluated in a final NEPA document.

Third, the architecture of the governing the basin has evolved to better integrate tribes into collaborative problem-solving and decision-making. The Colorado Water Conservation Board and the Colorado River Board of California—the primary decision-making bodies for each of those states—both appointed tribal representatives to these decision-making bodies for the first time ever in 2023.<sup>307</sup> And, one of the core prescriptions of this article is getting some traction, albeit in some very preliminary but promising ways. Several tribes, the basin states, and even

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304. See James, *supra* note 303 (quoting Bill Hasencamp, manager of Colorado River water resources for the Metropolitan Water District of Southern Colorado, in the Ian James article cited above).

305. See *Supplemental Environmental Impact Statement for Near-term Colorado River Operations*, BUREAU RECLAMATION, <https://perma.cc/VZK4-5DJ6> (May 24, 2023) (noting that the draft SEIS has been temporarily withdrawn).

306. See Press Release, Biden-Harris Administration Announces Historic Consensus System Conservation Proposal to Protect the Colorado River Basin (May 24, 2023), <https://perma.cc/DWY8-5VMX>. See also Letter from The Colorado River Basin States Representatives of Arizona, California, and Nevada to Camille Touton, Commissioner for the Bureau of Reclamation (May 22, 2023), <https://perma.cc/Y9QN-Z2VT>.

307. On the Colorado Water Conservation Board appointment, see Shannon Mullane, *Lorelei Cloud is first-ever tribal member on Colorado's top water board*, COLO. SUN, <https://perma.cc/J6SA-5KS7> (Apr. 28, 2023, 2:54 PM). On the Colorado River Board of California appointment, see *Quechan Indian Tribe President Jordan Joaquin Becomes First Tribal Representative to Sit on The Colorado River Board of California*, FORT YUMA QUECHAN INDIAN TRIBE, <https://perma.cc/33ML-X5VG> (last visited May 30, 2023).

some people in the federal government have started talking about something like the Sovereign Governance Team explained earlier to help develop the post-2026 management framework. No one has endorsed anything just yet. However, this is tremendously encouraging news, and demonstrates the realization among all three sets of sovereigns in the basin that if the basin is going to develop a management plan for a drier future, it needs a different type of process to both develop and implement that type of plan.

We therefore see encouraging signs for the future, and hope the manner in which basin leaders adapt the architecture of governing the Colorado River system in the face of uncertainty and water scarcity can provide salutary lessons to other river basins in the American West and beyond.