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Tribal Justice and Property Rights: The Evolution of Winters v. United States

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ABSTRACT

Winters v. United States *held that Indian tribes could claim a hybrid riparian and appropriative right to irrigate their reservations so that a nomadic people could be transformed into civilized pastoralists. The right has a priority date, either the date of the creation of the reservation or time immemorial, and can be asserted by a tribe at any time. Although* Winters *created a hard property right, for years the case remained a jurisprudential puzzle and a legal backwater. It provided little wet water for most tribes because many U.S. Department of Justice claims were modest and subordinated to state rights, and Indian irrigation projects were underfunded compared to reclamation projects for non-Indian irrigators. The western states vigorously tried to limit* Winters, *but in the 1970s it became a source of tribal power when recast as a reparations doctrine. The generous potential scope of the right, which was defined as the practicable irrigable acreage of a reservation, ultimately triggered a series of congressional Indian water rights settlements as tribes saw that they could obtain more benefits through this avenue compared with protracted quantification litigation. These individual acts allowed many tribes to obtain wet water, federal funds, additional money from the sale or lease of their* Winters *entitlements, and management authority over the reservation's watershed. On a more abstract level,* Winters *proves that hard property rights can sometimes afford more justice for indigenous peoples victimized by conquest, compared to softer, anthropologically sensitive rights which characterize Australian Aboriginal rights jurisprudence.*

I. INTRODUCTION: *WINTERS*, A SUCCESSFUL CASE OF THE CREATION OF A PROPERTY RIGHT TO REDRESS THE INJUSTICE OF CONQUEST

Western water law's primary function has always been to encourage the intensive, rapid use of water to sustain human development in an otherwise arid and semi-arid region. Long before global climate change once again reminded westerners of the inhospitality of much of

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the region to human settlement,[1] westerners realized that they would have to use their highly variable water budgets "to the last drop"[2] in order to survive. After some hesitation, the arid western states rejected the common law doctrine of riparian rights and replaced it with the doctrine of prior appropriation,[3] which sustained settlement.[4] Initially designed as a doctrine to firm up small-scale irrigation and mining rights, prior appropriation easily transformed into a regime that supports large dams, reservoirs, and canals in the modern urban West.

Lubricated by generous federal subsidies, prior appropriation encouraged intensive irrigated agriculture and the growth of urban oases by creating relatively secure property rights that induced the necessary water infrastructure investment.[5] The political and social consequences of this system were not, however, neutral. Prior appropriation almost exclusively benefitted "white" agricultural irrigators, urban settlers, and

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1. *E.g.*, COMMITTEE ON THE SCIENTIFIC BASES OF COLORADO RIVER BASIN WATER MANAGEMENT, NATIONAL RESEARCH COUNCIL, COLORADO RIVER BASIN WATER MANAGEMENT: EVALUATING AND ADJUSTING TO HYDROCLIMATIC VARIABILITY (2007). (Evaluation of the potential impacts of reduced flows on the existing uses of the Colorado River and the necessary hard adjustments facing the Basin states.) Even in areas with a benign climate such as southern California, nature played a trick. "Basically the region is a paradox: a desert that faces an ocean. . . . Without the ocean breezes, the sunlight would be intolerable; without the sunlight and imported water, virtually nothing would grow in the region." CARRY MCWILLIAMS, SOUTHERN CALIFORNIA COUNTRY: AN ISLAND ON THE LAND 6–7 (1946).

2. "Good to the last drop" has been the slogan of Maxwell House Coffee since 1917. Ironically, legend has it that the great conservationist Teddy Roosevelt coined the phrase after he drained a cup of the founder's coffee at the Tennessee State Fair in 1907.

3. Prior appropriation's triumph was not inevitable. Many western states initially adopted the common law of riparian rights on the legally indisputable theory that all land and water titles were derived from federal ownership of the public domain. The states' general reception of the common law also kept the issue open for a long time. For example, Montana did not completely repudiate the common law until 1921, Mettler v. Ames Realty Co., 201 P. 702 (Mont. 1921), although the assumption at the time of *Winters* was that the state was an exclusive prior appropriation one. 3 WELLS A. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 325 (1977). There were competing use traditions. When Brigham Young ruled Utah, the local officials of the Mormon Church distributed water based on the needs of the colonists sent out from Salt Lake City to settle the Kingdom of Deseret, and this practice lasted until the end of the 1870s.

4. Coffin v. Left Hand Ditch Co., 6 Colo. 443, 446 (1882) ("Deny the doctrine of priority . . . and a great part of . . . all this property [developed in reliance on the doctrine] is at once destroyed.")

5. DONALD J. PISANI, WATER, LAND, AND LAW IN THE WEST: THE LIMITS OF PUBLIC POLICY, 1850–1920 (1996), argues that the standard story of prior appropriation, a necessary adjustment to aridity, does not capture the fact that it was law designed to encourage investment in intensive resource exploitation. However, as the quotation from the foundation case of *Coffin v. Left Hand Ditch Co.* indicates, the function was embedded in the doctrine from the beginning. 6 Colo. at 446.

the mining industry. It did not benefit fish, which can serve as proxies for both the health of aquatic ecosystems and the health of Indian tribes.

In the twentieth century, the social costs of prior appropriation began to manifest themselves. These include the exclusion of environmental values from water use and the terrible inequities and injustices of our general treatment of Indian tribes. Early in the twentieth century, the nation started the painful process of including tribal interests in water development and in the second half of it began to address the protection of environmental values. In the United States, tribal interests now include the right to a share of the available water flowing through or under the reservation[6] for the same utilitarian purposes available to non-Indians, and increasingly also include water to support the "symbolic, religious, and lifestyle" values of the tribe.[7]

The two distinguished political scientists honored by this symposium have been leaders in the recognition of this second set of values for a variety of human and nonhuman communities throughout the West. Their influential scholarship has helped extend the Old Testament idea of justice for the weak beyond the civil rights paradigm—equal treatment for individual minority victims of exclusion from the benefits afforded the majority society—to a broader sensitivity for the cultural and ecological needs of poor groups, human and nonhuman, who are at the margins of society and tied to a specific landscape.[8] The theme of this article is how this vision of social justice, or equity as Professor Fairfax and Professor Ingram prefer, was introduced into an alien legal regime, prior appropriation. This paper does not enter into the Rawlsian debate about the general nature of justice.[9] Rather, it merges equity's concern for individuals who were ill-served by the common law with the broader human rights idea that nations owe a duty to provide appropriate social justice for the weak and poor—a powerful idea which increasingly in-

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6. The right to share surface waters is clear, but some states cling to the artificial distinction between ground and surface water and contest tribes rights to a share of overlying aquifers. The Wyoming Supreme Court refused to extend *Winters* to groundwater. In re General Adjudication of All Rights to Use Water in the Big Horn River System, 753 P.2d 76 (Wyo. 1988), *aff'd sub. nom.* Wyoming v. United States, 492 U.S. 406 (1989), but Arizona, Montana, and Washington state apply the case to both surface and groundwater. *See, e.g.*, United States v. Washington, 375 F. Supp. 2d 1050, 1058 (W.D. Wash. 2005).

7. Helen Ingram, John M. Whiteley & Richard Perry, *The Importance of Equity and the Limits of Efficiency in Water Resources*, *in* WATER, PLACE, AND EQUITY 10 (John M. Whiteley, Helen Ingram & Richard Warren Perry eds., 2008).

8. For a modern articulation of outrage as the basis for identifying injustice, see ROBERT C. SOLOMON, A PASSION FOR JUSTICE (Rowan & Littlefield 1995) (1990).

9. JOHN RAWLS, A THEORY OF JUSTICE (1971).

forms human rights and international environmental law.[10] However, the argument deviates from the general human rights model because it scales justice to the specific needs of the groups' ancestral home instead of seeking universal imperatives.

Equity and justice are freighted words with multiple and contested meanings, especially when applied to indigenous peoples. To lawyers, equity refers to the more flexible, expectation-driven, and fairness-based doctrines developed by the chancery courts in their battle with the common law courts.[11] Over time this experimentation hardened into a set of technical rules,[12] and the two systems eventually merged. But the split between equity and law has left a legacy of judicial concern for those victimized by the exercise of private or state power. This legacy partially informs modern human rights law, which includes a special sensitivity for relatively powerless indigenous groups.[13]

The definition of justice is even more complex because it includes both substantive and procedural elements. The conventional dialogue starts with the Aristotelian distinction between corrective and distributive justice. The former restores a wrongfully taken entitlement and the latter bestows a new one. In general, the restoration of the status quo is the province of courts, while distributive justice is primarily a legislative function. However, cases such as *Winters* collapse the categories as they arguably both recognized status entitlements and created new ones.

Indigenous groups are a classic case of place-based victims. In the United States, they were long considered culturally inferior peoples who stood in the way of progress. However, against great odds remnant communities survived and found a tenuous place in the alien society that grew up around them. What would appropriate justice for these groups look like? Justice for Indians does not fit the civil rights model that extends established constitutional and other rights from the majority society to the minority.[14] Instead of total assimilation, many Indian tribes opted for hybrid assimilation, which included the retention of a land-based culture in contrast to the dominant society. Thus, in addition to basic individual rights for their members, Indian tribes need place-based

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10. *See* Amy Sinden, *Climate Change and Human Rights*, 27 J. LAND, RESOURCES & ENVTL. L. 255, 258 (2007).

11. The core notion of legal equity as an ad hoc exception to general rules derives from ARISTOTLE, NICOMACHEAN ETHICS, Book V, 100.

12. 5 SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 338 (1924).

13. *See, e.g.,* Sinden, *supra* note 10, (arguing that the failure to address the adverse impacts of climate change is a human rights, broadly defined, violation because "the core function of human rights is to counteract gross imbalances of power in society. . . .").

14. This model was the dream of enlightened assimilationists at the time of *Winters*. *See infra* note 41.

property rights rather than abstract civil rights. Tribes need the power to manage their land base to sustain their culture.[15] In recent years, litigation has not been a promising strategy. The Supreme Court is somewhat receptive to the recognition of constitutional rights for victim individuals, but it has rejected a spiritual land nexus as a basis for any First Amendment jurisprudence tailored to Indian tribes.[16]

Winters v. United States[17] is an example of the recognition of a place-based, "hard" property right.[18] Against formidable odds and decades after the decision, it empowered many tribes to chart their own destiny in the American West.[19] *Winters* is an amazing story because the case began as an incompletely and contradictorily reasoned, paternalistic, white-centered decision which created a new property right designed to civilize the tribes, rather than to empower them against the morally superior, progressive, non-Indian society. Ironically, it is the Court's incomplete and contradictory reasoning that allowed *Winters* to evolve in the face of strenuous efforts by non-Indian water users to limit its scope and render it ineffective. Tribes used the threat of enforcement of their

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15. *Cf.* AMARTYA SEN, THE IDEA OF JUSTICE (2009) (Justice "is ultimately connected with the way people's lives go, and not merely with the nature of the institutions surrounding them.")

16. Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) (rejecting claim that timber harvesting in a national forest sacred to several tribes violated the First Amendment). The Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb–2000bb-4, may change the result, but *Navajo Nation v. United States Forest Serv.*, 535 F.3d 1058 (9th Cir. en banc 2008), continues the rejection of a spiritual land nexus as a First Amendment protected right. *But cf.* Bear Lodge Multiple Use Ass'n v. Babbitt, 2 F. Supp. 2d 1448 (D. Wyo. 1998), *aff'd on standing*, Bear Lodge Multiple Use Ass'n v. Babbitt, 175 F.3d 814 (10th Cir. 1999), *cert. denied*, 529 U.S. 1037 (2000) (holding that voluntary climbing ban on Devils Tower during culturally significant month does not violate establishment clause). Tribes are having some success working with federal land management agencies to co-manage lands of special cultural significance to a tribe. *See* Martin Nie, *The Use of Co-Management and Protected Land-Use Designations to Protect Tribal Cultural Resources and Reserved Treaty Rights on Federal Lands*, 48 NAT. RESOURCES J. 585 (2008). *Cf.* Michigan v. EPA, 581 F.3d 524 (7th Cir. 2009) (holding that Michigan lacks standing to challenge non-degradation Clean Air Act reclassification of Indian reservation from Class II to Class I to protect it from air pollution which might render impure plants and animals used in religious ceremonies and for medical purposes.)

17. 207 U.S. 564 (1908).

18. A hard property right is a full right as defined by Wesley Newcomb Hohfeld in his jurisprudence of a closed set of universal legal relationships. A right, as opposed to a privilege, triggers a correlative duty of noninterference on the whole world, or in this case all other users on a stream. Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913) and 26 YALE L.J. 710 (1916).

19. *Winters* may also have relevance for tribes in the East. *See* Hope M. Babcock, *Reserved Indian Water Rights in Riparian Jurisdictions: Water, Water Everywhere, Perhaps Some Drops for Us*, 91 CORNELL L. REV. 1203 (2006).

Winters rights to broker deals with the western water establishment. Tribes eventually claimed large amounts of water and expanded their right to include non-agricultural use.[20] The case remains more relevant today than when it was decided. For example, in 2008 the Utton Transboundary Resources Center at the University of New Mexico organized a conference to celebrate the case's 100th anniversary and to explore its relevance for the future. The high number of attendees—more than 200—itself shows *Winters*' continued relevance.

This article claims that the creation of "hard" or full property rights can sometimes do more to redress a historical injustice than the creation of constitutional rights.[21] Property rights are a necessary component of equity and justice for indigenous peoples because the essential difference between indigenous and non-indigenous peoples is that the former remain land-based.[22] Thus, the recognition of property rights in natural resources such as surface and ground waters can play a crucial role in tribal survival and cultural evolution, including promoting economic development on the reservation.

The article first traces the early history of *Winters* as an anthropological and jurisprudential puzzle. Second, it explains how the states demonized it as an aberration in western water law and tried to eviscerate the decision. Third, the article examines how the tribes overcame efforts to marginalize the case and instead turned it into a source of tribal empowerment. In this discussion, the article compares *Winters* with the Australian High Court's more enlightened, anthropologically-centered post-1992 Aboriginal rights jurisprudence, which has only afforded some

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20. I have long thought that the most important aspect of *Winters* is that the threat of its enforcement, as opposed to its actual inconsistent enforcement, created enough fear in the western water establishment to convince them that it would be better to cut deals with the Indians to give them a firm share of the region's water. The "new" western historian Patricia Limerick has come to a similar conclusion. She argues that instead of perpetrating assimilation through Christianity, *Winters* "reverses that concept. People who think that they are pursuing a long term strategy to get Reclamation to help them develop their rights on the river . . . supported a cause which turns out a hundred years later to be about justice, [although] [t]hose people did not have justice to Indian people in mind. . . . The Supreme Court decision did not have Indian people's interests in their minds. . . ." But, in the end the tribes benefitted "from actions undertaken for the wrong reasons." Patricia Limerick, Presentation at the Utton Transboundary Resources Center: *Winters* Centennial Conference (June 9–12, 2008).

21. Property rights, of course, can both be a source of oppression and marginalization or a source of empowerment for groups once at the margins of society. The distinguished German land use planning scholar, Benjamin Davy, has explored the ambiguous nature of property and marginal groups in Benjamin Davy, *Centenary Paper, The Poor and the Land: Poverty, Property, Planning*, 80 TOWN PLANNING REV. 227 (2009).

22. AUGIE FLERAS & JEAN LEONARD ELLIOTT, THE NATIONS WITHIN: ABORIGINAL-STATE RELATIONS IN CANADA, THE UNITED STATES, AND NEW ZEALAND 2 (1992).

groups "soft" or usufructuary rights. The comparison illustrates that the "hard" property rights recognized in *Winters* have proven more effective than Australia's post-colonial, anthropological approach.[23] The article ends with examples of the use of the negotiating power that tribes have used to obtain wet water, federal dollars, and management participation for a variety of tribal purposes, despite the fact that Indians have never gained significant general political power and remain largely dependent on government grace to survive.

II. THE PUZZLE OF *WINTERS*: SUPER-RIPARIANISM IN THE AGE OF PRIOR APPROPRIATION

Winters v. United States[24] remains a jurisprudential puzzle. Its rationale remains as unclear as it was in 1909. The case was decided at the height of the widespread assumption that white western civilization was the culmination of Darwinian evolution, and we still lack a sufficient explanation why the U.S. Supreme Court gave Indian tribes a super-riparian (or as grammar check would have it, a "very riparian") right superior to most state appropriative rights. At the time, the prevailing belief was that prior appropriation was the only system of water allocation suitable for the intermountain West; it was a natural adaptation to a new environment. In recent decades, scholars have asked whether the decision represents a radical departure from the law and prevailing views of Indians at the time or merely a modest extension of the sharing principles inherent in western water law, but opinion is divided on the answers to these questions. What we do know is that this right provides tribal seats at the bargaining table.

Winters was the product of the late nineteenth-century faith in the power of irrigation to better society. To help transform a proud nomadic plains tribe, between 1903 and 1905 the federal government built a small diversion on the Milk River on the Fort Belknap Indian Reservation in north-central Montana.[25] In 1905 the tribe irrigated about 2,500 acres, pri-

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23. Historical anthropological evidence is used in the United States to vindicate tribal claims, *e.g.*, United States v. Adair, 723 F.2d 1394 (9th Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984). *See* Nicholas Buchanan, *Making History: The Expert Production of Culture and Environment in American Indian Water Claims*, Paper Presented at ABF/UI Legal History Seminar (Mar. 2, 2009) (copy on file with author). However, this approach is not as embedded in American Indian jurisprudence as it is in Australia.

24. 207 U.S. 564 (1908).

25. JOHN SHURTS, INDIAN RESERVED WATER RIGHTS: THE WINTERS DOCTRINE IN ITS SOCIAL AND LEGAL CONTEXT, 1880S–1930S, Chapter 1 (2000) [hereinafter INDIAN RESERVED WATER RIGHTS]. The Fort Belknap Reservation consists of two Plains tribes, the Gros Ventre and Assiniboine; today, they form a single tribe, the Fort Belknap Indian Community. This article does not deal with the tangled history of the reservation and refers to the two tribes

marily growing hay to support its livestock operation. In a severe drought year, the reach of the Milk River through the reservation dried up when upstream irrigators diverted the entire flow. Both the white irrigators and the reservation groups initially claimed state appropriative rights, but the white irrigators' rights were senior by a few days. What to do? A courageous U.S. Attorney sought and received permission from Washington to claim superior rights for the Indians, and astonishingly he succeeded.

Winters held that the reservation had an implied water right with a priority as of the date of the 1888 Fort Belknap Agreement, the treaty that modified the reservation. Thus, by looking backwards, the Indian reserved rights, or *Winters* rights as they came to be called, are superior to all pre-reservation state appropriative rights.[26] The hard question is why the Court reached this result. The Plains Indians, unlike tribes in Arizona and New Mexico, had no pre-conquest history of irrigation or even permanent crop agriculture. Justice McKenna offered two inconsistent rationales for the result. First, a reserved right arises when a tribe includes a prior entitlement in the treaty creating or modifying the reservation. In this case, the tribe already had the right and simply incorporated it into the treaty. Second, the right can arise from the federal government's constitutional power to dispose of property, which includes water, on federal land. On this theory the gracious Great White Father gives reserved rights to Indians as compensation for lost lands. Both rationales have advantages for tribes. The first theory supports time-immemorial aboriginal rights. The second supports reserved rights arising from all treaties and post-1867 executive order reservations (created after Congress ended the practice of negotiating treaties with the tribes).[27] Instead of endorsing either the corrective or distributive justice explanation, courts have simply adopted both rationales depending on the type of claim. Tribes may claim federal reserved rights that date *either* from the date of the creation of the reservation or, in the case of

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as a single tribe since the water right runs to the 1888 reservation, which consists of a single recognized tribe, rather than to the two historic groups which make up the reservation.

26. The leading historian of the case contests this reading and argues that both the U.S. Attorney, the trial judge, and the Ninth Circuit read the 1888 Fort Belknap Agreement "to include an explicit reservation of water." John Shurts, Presentation at the Utton Transboundary Resources Center: *Winters* Centennial Conference (June 9–12, 2008) [in Centennial proceedings] [hereinafter *Winters* Centennial].

27. The time immemorial rationale can be characterized as corrective justice while the federal grant theory sounds more like distributive justice.

hunting and fishing rights recognized in a treaty, from time immemorial.[28]

The radical departure theory is based on the historical context of the litigation. The controversy arose during the last stages of western settlement—after Indians had been confined to reservations in order to open the public domain to white settlement. The enlightened thinking of the day was that Indian society was inferior to white civilization, and that to survive, if at all, Indians must be transformed into pastoral, assimilated, civilized individual citizens stripped of any tribal identity. Reservations were pessimistically viewed as temporary holding zones pending extinction, or more optimistically, as way stations for the most adaptive Indians to complete their assimilation[29] into white, agricultural, Christian society.[30] Complete assimilation was seen as the only alternative to extinction; otherwise Indians could not compete with the superior white, agricultural society rapidly surrounding them. As Douglas Brinkley has written, the pre-presidential western historian Theodore Roosevelt "treated Native tribes, Spanish settlers, and even French Canadians as riffraff who needed to be cleared away like so many weeds."[31]

In contrast to the radical departure theory, the leading *Winters* historian, John Shurts, understands the decision as a modest extension of the sharing principles submerged in prior appropriation.[32] He notes that many adjacent farmers supported the outcome because they hoped that a decision unfavorable to upstream water rights would induce the federal government to ultimately build a reclamation project to serve *all* users in the Milk River Valley and thus protect them against upstream diversions.[33] However, in support of the radical departure theory, the histo-

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28. *E.g.*, United States v. Adair, 723 F.2d 1394 (9th Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984).

29. The literature on Indians and Indian policy is vast. Among the best treatments are BRIAN W. DIPPIE, THE VANISHING AMERICAN: WHITE ATTITUDES AND U.S. INDIAN POLICY (1982); FRANCIS PAUL PRUCHA, THE GREAT FATHER (1984); and AUGIE FLERAS & JEAN LEONARD ELLIOTT, *supra* note 22.

30. R. DOUGLAS HURT, INDIAN AGRICULTURE IN AMERICA: PREHISTORY TO THE PRESENT 96–100 (1987), traces the idea of civilizing the Indians through agriculture from the late eighteenth century to its first legislative manifestation in 1819. *See also* DAVID RICH LEWIS, NEITHER WOLF NOR DOG: AMERICAN INDIANS, ENVIRONMENT, AND AGRARIAN CHANGE (1994).

31. DOUGLAS BRINKLEY, THE WILDERNESS WARRIOR: THEODORE ROOSEVELT AND THE CRUSADE FOR AMERICA 243 (2009).

32. *See* David B. Schorr, *Appropriation as Agrarianism: Distributive Justice in the Creation of Property Rights*, 32 ECOLOGY L.Q. 3 (2005).

33. INDIAN RESERVED WATER RIGHTS, *supra* note 25, and *Winters* Centennial, *supra* note 26, argue that the case was not as surprising as previous scholars claimed because the issue of riparian rights in Montana was still open and downstream irrigators supported the fed-

rian Fred Hoxie argues that although *Winters* was a product of the assimilation era, the Court actually got the policy wrong;[34] the true policy of assimilation would have demanded fidelity to state law. I am inclined to agree, because immediately after the decision, the great treatise writer Samuel Wiel recognized the radical nature of the decision, even though the Court concealed the true scope of its ruling beneath evasive and cagey rhetorical questions, such as "[d]id they reduce the area of their occupation and give up the waters which made it valuable or adequate?"[35] In the last edition of his seminal treatise, Wiel wrote that "the general tendency of the Federal courts in dealing with waters on or use by military or Indian reservations is . . . to tacitly assume that the creation of the reservation impliedly repealed"[36] the bulk of state claims to exclusive control over western waters contained in the Act of 1866.[37]

We will never know what motivated the Court, but in retrospect the most interesting aspect of Justice McKenna's opinion is its irony. He turned the paternalistic theory of assimilation on its head.[38] The Fort Bel-

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eral government's claims because they saw their enemies as upstream users not the tribe. If upstream users were forced to share the water with all downstream users, it would be easier to convince the then-new U.S. Reclamation Service (1902; it became the U.S. Bureau of Reclamation in 1923) to propose a project in the area.

34. FREDERICK E. HOXIE, A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880–1920, at 172 (1984).

35. *See* Judith V. Royster, *A Primer on Indian Water Rights: More Questions Than Answers*, 30 TULSA L.J. 61 (1994), for a careful reading of the case that emphasizes the Court's liberal use of canons of construction to justify the decision.

36. SAMUEL C. WIEL, WATER RIGHTS IN THE WESTERN STATES 239 (3d ed. 1911).

37. The Act of 1866, 14 Stat. 251, 245, codified as amended, 43 U.S.C. § 661, provides "whenever, by priority of possession, rights for the use of water for mining, agricultural, manufacturing or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, law, and the decisions of courts, the possessors and their owners of such vested rights shall be maintained and protected. . . ." The Act grew out of a Republican effort to nationalize the gold mines, which were simply trespasses on the public domain, to finance the Civil War. Instead, westerners in Congress confirmed all prior trespasses. Weil read the Act only to confirm water put to beneficial use before 1866, but western states viewed the Act as a perpetual relinquishment of any federal interest in western waters and a grant of exclusive control to the states. *See* Reed D. Benson, *Deflating the Deference Myth: National Interests vs. State Authority Under Federal Laws Affecting Water Use*, 2006 UTAH L. REV. 241 (2006). In 1935, the Supreme Court rejected this reading and held that the Act and two other subsequent acts recognizing vested appropriations severed all waters from the public domain. California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935). *Winters* was not mentioned, but in 1963, the Supreme Court validated Wiel's theory by "reviving" *Winters* and extending reserved rights to public land withdrawals as well as Indian reservations. Arizona v. California, 373 U.S. 546 (1963).

38. John Shurts makes a similar point: "The one part that I cannot quite clear in my mind on the purposes of the reservations and the way in which the *Winters* litigation affirms them as agriculture, came along with the Allotment Act of 1887, at the very historical

knap Agreement was negotiated to implement the Dawes Act, which allowed reservations to be broken up and allotted to individual Indians, paving the way for white settlement. But instead of holding that Indians had to sink or swim as individual right holders under state water law, the Supreme Court recognized a new federal group right for the Indian tribes of the American West superior to almost all state water rights and thus helped preserve tribal identity against later twentieth-century efforts to extinguish tribes.[39] Justice McKenna did not clearly adopt the U.S. Attorney's bold, non-paternalistic theory that the Indians expected to receive what they already had at the time of the reservation's creation or that they had state riparian rights.[40] But the opinion did adopt the U.S. Attorney's basic position by rhetorically concluding that the Indians would not have given up a portion of their land without some access to the unused water, although the Court's rhetoric was couched in paternalistic, assimilationist justification terms: it was the policy of the government to transform "a nomadic and uncivilized people" into a "pastoral and civilized" one![41]

The opinion reflects the contemporary conflicting and evolving attitudes that enlightened elites under the seductive power of biological and sociological Darwinism held about Indians. Theodore Roosevelt's evolved thinking at the height of the conservation era represents the tension among elites about the correct attitude toward the surviving Indians and can serve as a possible explanation of the opinion. He maintained that despite the triumph of the settlement of the far West, as a matter of grace from the civilized conqueror, Indians should be allowed to transcend their inferior tribal status and be "brought into the constitutional

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moment when plains farming was a calamity in which white farmers were in desperate situations. . . . Just as Americas [sic] are undergoing urbanization and industrialization in a big way, just as economic activity is moving dramatically away from farming, that's the moment when Indian people are told that progress consists of becoming farmers." *Winters* Centennial, *supra* note 26.

39. During the Eisenhower administration (1952–60), the government tried to force complete assimilation through termination of the tribes, but the policy failed and helped spawn the push for tribal self-determination which remains the basis of modern Indian policy. MICHAEL P. MALONE & RICHARD W. ETULAIN, THE AMERICAN WEST: A TWENTIETH-CENTURY HISTORY 136–39 (1989).

40. Norris Hundley, *The* Winters *Decision and Indian Water Rights: A Mystery Reexamined*, 13 W. HIST. Q. 17 (1982), and INDIAN RESERVED WATER RIGHTS, *supra* note 25, at Chapter 2, both note that the U.S. Attorney also argued that the tribe had riparian rights but that the U.S. Department of Justice did not endorse this theory. It was arguing in *Kansas v. Colorado*, 206 U.S. 46 (1907), that riparian rights had been abolished in the western United States and that the federal government had sanctioned a uniform rule of prior appropriation.

41. *Winters*, 207 U.S. 564, 567 (1908).

democracy with the same God-given rights as everybody else."[42] But there was also a growing, however incomplete, nostalgic recognition among the same elites, including Roosevelt, of the value of simpler, traditional cultures as an antidote to the increasingly impersonal modern world.[43]

Whatever the explanation, *Winters* created a hybrid riparian right with a super priority date. Although reservations were created to move Indians out of the way of white settlement, the reservation creation date gives the tribes a superior priority to almost all subsequent state-created appropriative rights.[44] In addition to this super-priority, reserved rights have an element of riparianism. Appropriative rights exist only as long as water is continuously applied to beneficial use, because western water is too valuable to be hoarded for speculative purposes or wasted. In contrast, both riparian rights and reserved (or "*Winters*") rights can be claimed at any time—although the question of whether tribes are subject to the use it or lose it rule once they start using water is unresolved.

III. THE STATES PUSH BACK

Powerful military and legal weapons do not always benefit their holders when the costs of use outweigh the benefits and powerful forces mobilize to prevent their use. *Winters* exposed tribes to fierce blow back from the western states in both of these ways. First, for most of the twentieth century, *Winters* left tribes at the mercy of the Justice Department and thus vulnerable to white resistance in and outside the government.[45] To its credit, *Winters* was applied by the Justice Department more or less consistently after it was decided,[46] but it became a real source of tribal power only after it survived intense efforts by the states and white irrigators to render it useless to most tribes. Second, the states initially rejected the legitimacy of *Winters* and sought to narrow it to the maximum extent possible. They ultimately propounded a cruel vision of tribes as quaint

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42. BRINKLEY, THE WILDERNESS WARRIOR, *supra* note 31, at 255. *See also id.* at 275.

43. Professor Brinkley observes that, by the end of his administration, President Theodore Roosevelt, the real father of the Buffalo Commons, "[s]ometimes acted as if America had been better off before Wounded Knee, when the Indians still rode freely in the Great Plains." *Id.* at 641.

44. *See supra* note 40. The pressure that states placed on the federal government to subordinate *Winters* rights to irrigation, urban water supply and power generation is described in PHILIP L. FRADKIN, A RIVER NO MORE: THE COLORADO RIVER AND THE WEST 154–77 (1981).

45. Indian tribes were unable to hire their own water lawyers until the 1970s.

46. INDIAN RESERVED WATER RIGHTS, *supra* note 25, at 223–50 describes the complex and subtle role that *Winters* played in litigation and settlements on the Uintah Reservation in northeastern Utah.

people locked into a pastoral mode that they could never fully enjoy. Indians who refused to assimilate were to be permanently confined to reservations with small irrigation projects. The emphasis is on the word "small," as the states invested great energy in persuading Congress not to fund the necessary irrigation projects.[47]

To enshrine this mandatory pastoral vision in law, supporters of state water primacy characterized *Winters* rights as "outlaw" rights because they were inconsistent with the perfect prior appropriation system. One of the chief proponents of the Reclamation Act of 1902, Representative Mondell of Wyoming, called the doctrine "monstrous" and "contrary to the natural law of things,"[48] perhaps echoing the language of the case establishing the Rule Against Perpetuities.[49] Mondell's view long-dominated *Winters* discourse and contributed to the case's long period of semi "sleep-mode." As late as 1977, the leading water law academic, the late Dean Frank J. Trelease, described *Winters* as "a special quirk of Indian water law."[50]

The states cast reserved rights as vast, dark, rapidly forming clouds looming on the horizon of the western sky. When they burst, they would wash away a great many western water titles. Some tribes, such as the Navajos, did claim inchoate rights to large quantities of water which someday might displace valuable uses, but until the 1970s *Winters* did little for most tribes. During the golden era of reclamation projects (1902–1963), the states and the federal government made sure that Indian

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47. DANIEL MCCOOL, COMMAND OF THE WATERS: IRON TRIANGLES, FEDERAL WATER DEVELOPMENT AND INDIAN WATER (U. of Ariz. Press 1994) (1987).

48. INDIAN RESERVED WATER RIGHTS, *supra* note 25, at 158.

49. Duke of Norfolk's Case, (1682) 22 Eng. Rep. 931 (Ch.). "[B]ut such Remainders . . . do fight against God. For they pretend such a Stability in human Affairs as the Nature of them admits not of, and they are against Reason and the Policy of the Law, and therefore not to be endured." *Id.* at 949.

50. Frank J. Trelease, *Federal Reserved Water Rights Since PLLRC*, 54 DENVER L.J. 473, 475 (1977). Dean Trelease was expressing his surprise that *Winters* applied the public lands. The full sentence reads: "At no time prior to 1955 [the date of *Federal Power Commission v. Oregon*, 349 U.S. 435 (1955), which first suggested that the federal government had non-Indian reserved rights] did I ever hear a suggestion that the reserved rights doctrine was anything but a special quirk of Indian water law." The Western states continue to view the reserved rights doctrine as a narrow one. In the course of rejecting the argument that federal reserved rights attach to New Mexico school trust lands, which were originally part of the public domain, the court could not help observing that "[o]verall, the doctrine of federal reserved water rights represents a limited exception to the general rule that individual states govern water rights within their respective borders." State *ex rel.* State Engineer v. Comm'r of Public Lands, 200 P.3d 86, 93 (N.M. App. 2008), *cert. denied*, 202 P.3d 124 (2009).

irrigation projects were funded at a very low rate.[51] Congress approved some small project appropriations, but they were subject to the condition that water rights be acquired under state law. Not surprisingly, the weak Indian Office[52] deferred to the increasingly powerful Reclamation Service's policy of filing for state appropriations. Thus, for many tribes, *Winters* rights remained on paper rather than wet. Where Indians could put water to use, the states interpreted the nineteenth-century assimilation vision as creating frontier-era museums on the reservations. Under this theory, *Winters* rights were limited to irrigation on the reservation.[53] The right could not be used for non-agricultural purposes or transferred off the reservation.[54]

States sought additional help from the Supreme Court which responded with a new subjective Indian law jurisprudence that evidenced a consistent hostility to the tribes.[55] The Court rendered a series of decisions which severely disadvantaged the tribes' water claims and use and management options. It first held that federal non-Indian reserved rights were subject to the McCarran Amendment's[56] waiver of sovereign immunity.[57] Next, the Court held that the Amendment included *Winters* rights.[58] Tribes were thus forced into often hostile state McCarran Amendment adjudications. State courts had to apply federal substantive law, but they could apply state procedural law and thus effectively preempt federal court interpretation of *Winters*. This jurisprudence allowed some state courts to interpret treaties unfavorably to the tribes, and the

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51. *See* LLOYD BURTON, AMERICAN INDIAN WATER RIGHTS AND THE LIMITS OF THE LAW (1992); *see also* ROBERT A. SAUDER, THE YUMA RECLAMATION PROJECT: IRRIGATION, INDIAN ALLOTMENT, AND SETTLEMENT ALONG THE LOWER COLORADO RIVER (2009).

52. INDIAN RESERVED WATER RIGHTS, *supra* note 25, at 181–222.

53. *In re* General Adjudication of All Rights to Use Water in the Big Horn River, 753 P.2d 76 (Wyo. 1988).

54. Federal law requires congressional consent to any sale or lease of Indian property, 25 U.S.C. § 177 (2006), but the states opposed even the *idea* of off-reservation use.

55. David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573 (1996).

56. McCarran Amendment, 43 U.S.C. § 666, provides that consent is given to join the United States as a defendant in any suit for the adjudication of rights to the use of water of a river system or other source, or for the administration of such rights.

57. United States v. District Court in and for Eagle County, 401 U.S. 520 (1971).

58. Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976). The Amendment extends state court jurisdiction even in states whose constitutions disclaim all right and title to Indian lands. Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983). In *United States v. New Mexico*, 438 U.S. 696 (1978), the Court held that non-Indian reserved rights must be necessary to maintain the primary rather than secondary purposes of a public land reservation. The opinion did not address whether the primary-secondary distinction applied to Indian reserved rights, but many speculated that it might narrow the scope of non-irrigation claims.

Supreme Court's general hostility to tribal rights[59] discouraged tribes from seeking Supreme Court review. In the Wind River adjudication,[60] the Rehnquist Court tried to lock the states' vision on *Winters* into law. Justice O'Connor's draft majority opinion substituted a federal "sensitivity" standard for practicable irrigated acreage, discussed below, but her unexplained withdrawal from the case prevented her draft opinion from becoming a five-four majority.[61] However, *Winters* was able to withstand the Court's efforts to weaken it because by the 1980s it had become both a property and a human right with substantial majority support.[62]

IV. WHY *WINTERS* ENDURED, AND A COMPARISON WITH AUSTRALIAN ABORIGINAL RIGHTS

Winters[63] survived the push back for three basic reasons, each of which was necessary for its success. First, *Winters* gave tribes a property rather than a human right. States could chip away at the right by confining it, but they could not ignore it or eliminate it. At some level, they had a duty to honor it. Second, even in its narrowest formulation, which viewed reservations as agricultural museums, the right was a generous one. It ultimately gave tribes sufficient power to compel the states, representing cities and white irrigators, to negotiate favorable settlements with the tribes. Third, *Winters* was expanded in 1973 from a "quirk" to a justice issue, from a human right to a reparation, and for the first time, states and the federal government were shamed for their failure to use it to benefit the tribes.[64] For the Fort Belknap Reservation, there is a fourth reason. In the 1980s, Montana began to shore up its Missouri River claims against downstream neighbors by entering into generous reserved rights compacts with tribes,[65] although the reservation is still try-

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59. *E.g.*, Nevada v. United States, 463 U.S. 110 (1983).

60. *In re* General Adjudication of All Rights to Use Water in the Big Horn River, 753 P.2d 76 (Wyo. 1988), *cert. granted* Wyoming v. United States, 488 U.S. 1040 (1989).

61. Andrew C. Mergen & Sylvia F. Liu, *A Misplaced Sensitivity: The Draft Opinions in Wyoming v. United States*, 68 U. COLO. L. REV. 683, 685 (1997).

62. During the "As If Equity Mattered" in Natural Resources symposium, at the University of California, Berkeley, on October 2, 2009, Professor Joseph Sax pointed out that by the time *Winters* was revived in the 1960s, there was widespread recognition of the need to remedy the injustices of conquest and of the damage done to tribes in the name of enlightened, even equitable, paternalism.

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

64. I am indebted to the nation's leading Indian water rights lawyer, Robert Pelcyger, for reminding me of this transformation.

65. Water Rights Compact Entered Into by the State of Montana, the Fort Belknap Indian Community of the Fort Belknap Reservation, and the United States of America, MONT. CODE ANN. § 85-20-1001 (2010), entitles the reservation to 645 cubic feet per second of the Milk River.

ing to obtain funding to expand the original project and to construct an ethanol plant.[66]

A. Hard Property

The principle merits of property rights are their absolute nature, although property's absoluteness has been much criticized and modestly limited to incorporate the interests of competing claimants and the regulatory state. Many water law scholars emphasize the incomplete and limited nature of water compared to land rights. However, the important point for this article is that absoluteness worked to benefit tribes. Courts have limited discretionary power to refuse protection to the right holder's entitlement. *Winters* accomplished this by giving the tribes a water right superior to that enjoyed by state water rights holders, which in turn gave them a seat at the legislative table.[67] A comparison of the history of *Winters* with the Australian High Court's anthropological Aboriginal rights jurisprudence illustrates the benefits of a "hard" property right tailored to a cultural context. The ethnographer-historian Nicholas Buchanan offered the following observation based on his study of the litigation over the Klamath Tribe's need for water to support traditional hunting and fishing rights:[68]

> During my field work, I came to realize how important a common denominator private property is in rural areas. Everyone has a deeply ingrained understanding of property and ownership and what these mean. Water rights, on the other hand, look a whole lot more complicated and are less well understood, and seem more fungible because of that. After all, everyone's water is all mixed up most of the time while in stream. But labeling water as property gives it a cultural valence that is harder to argue with, both colloquially and legally. It incorporates water rights into very strong shared understanding of how the world is divided up.

66. Fort Belknap Seeks Water System, Money, Land in Water Rights Settlement, HAVRE DAILY NEWS, May 22, 2007, http://www.havredailynews.com/articles/2007/05/22/local_headlines/state.txt (last visited Sept. 28, 2010).

67. E-mail from Nicholas Buchanan, Doctoral Fellow, MIT, to A. Dan Tarlock, Distinguished Professor of Law, Chicago–Kent College of Law (Aug. 24, 2009) (on file with author).

68. Buchanan, *supra* note 23.

1. The Divergent Treatment of Native Populations in Australia and the United States

Australia and the United States have much in common. They are both former British penal colonies that have evolved into wealthy federal states.[69] Each had to settle a large land mass that differed, in whole or in part, significantly in climate and topography from Great Britain and northern and central Europe. Both countries define themselves by British political and cultural values even as they have evolved or are evolving into multiethnic societies. Further, each country has had to confront the survival of a pre-settlement aboriginal population that has never been fully culturally, socially, economically, or legally integrated into the dominant culture, especially in Australia. But the history of the two countries diverges in their treatment of aboriginal populations. U.S. Indians have always enjoyed the protection, albeit incomplete, of the law, while in Australia the use of law to benefit Aborigines dates only from the 1970s. As compared to Indians in the United States, Aborigines played a comparatively marginal role in Australia's post-1798 history.[70]

The American story of the treatment of native populations is much more complex than Australia's because the European settlers appreciated the North American Indians comparatively more than they did Australia's Aborigines. Indians are central, if tragic players, in the American story. Britain and the United States had to confront the reality of Indians' existence in relatively settled and sophisticated societies and therefore had to develop policies to mediate between the Indians and the settlers who invaded their homelands. The French settlements in Quebec gave Indian "nations" strategic importance in Great Britain and France's rivalry for the North American empire.[71] This legacy is reflected in the fundamental principle of U.S. Indian law that tribes are quasi-sovereign entities.[72] Indian tribes gained a significant measure of constitutional protection as "domestic dependent nations" because they resembled the western idea of a nation-state.[73]

Indian resource claims for land, water, and minerals have therefore been defined in common law or western terms. Indians were given land titles[74] and then water rights so that they could evolve into civilized,

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69. ROBERT HUGHES, THE FATAL SHORE 41–42 (1987).

70. 5 GEOFFREY BOLTON, THE OXFORD HISTORY OF AUSTRALIA: THE MIDDLE WAY 1942–1995, at 235–36 (1996).

71. FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 18 (1984).

72. Cherokee Nation v. Georgia, 30 U.S. 1 (1831).

73. *Id.*

74. For the most recent history of the creation of reservations, see STUART BANNER, HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER (2005).

Christian pastoralists. Tribes enjoy a high degree of formal sovereignty because of the reservation policy we have followed since the 1830s. Cruel as it has been, the practice of confining tribes to specific land areas has given Indians a land base that is the foundation for recognition of their sovereignty. This sovereignty is subject to the plenary control of the federal government,[75] but tribes do have considerable autonomy, if incomplete and contested, against the states under federal environmental protection statutes. For example, recent cases have upheld the power of tribes under the Clean Water Act to adopt high water quality standards which upstream, off reservation dischargers must maintain, to support religious and cultural practices.[76]

The British settlement of Australia was completely different—the Crown carefully planned it, and the British came with a complete legal theory of right to occupy the continent. From its 1788 settlement as a convict colony all the way to the 1900s, Australia was declared *terra nullius*.[77] Aboriginal groups had no protected status in colonial or Commonwealth Australian law analogous to the status of American Indian tribes. Aborigines were treated as inferior people; the British could find no Rousseauian noble savages, as they did in North America, or any evidence of civilization in the nomadic culture of the Aborigines, and thus did not consider themselves under any duty to protect traditional relationships to land and water. As late as 1979, the High Court ruled that Australia was devoid of "civilized" peoples or settlements prior to 1788.[78] Therefore, prior to the High Court's decision in *Mabo v. Queensland*, all land titles in Australia were radical, meaning they derived solely from the Crown. This attitude continues to surface. The intensely anti-Aboriginal Prime Minister of Australia, John Howard (1996–2007), consistently rejected any treaty with Aborigines because they were not a sovereign nation.[79]

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75. *E.g.*, Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955).

76. *E.g.*, City of Albuquerque v. Browner, 97 F.3d 415 (10th Cir. 1996), *cert. denied*, 522 U.S. 965 (1997), Montana v. EPA, 137 F.3d 1135 (9th Cir. 1998). *Cf.* Michigan v. EPA , 581 F.3d 524 (7th Cir. 2009) (Michigan lacks standing to challenge non-degradation Clean Air Act reclassification of Indian reservation from Class II to Class I to protect it from air pollution which might render impure plants and animals used in religious ceremonies and for medical purposes.)

77. Mabo v. Queensland II (1992) 175 C.L.R. 1.

78. Coe v. Commonwealth (1979) 24 A.L.R. 118.

79. *See* ANDREW MARKUS, RACE: JOHN HOWARD AND THE REMAKING OF AUSTRALIA (2001).

2. Australia Admits the Error of the First Fleet and Creates Soft Aboriginal Property Rights

In the twentieth century, Australian Aboriginal culture underwent a positive reevaluation supported, in part, by environmental scholarship that cast a harsh light on much of the efforts to settle the Australian interior as a new Britain.[80] One of the leading Australian proponents of this view has written about the British methods that, "[a]lthough they appear foolish in hindsight, they were in reality only terribly maladapted."[81] Aborigines are better land managers than the most enlightened European conservation thinking; Aboriginal beliefs "embody hundreds of generations of accumulated wisdom regarding the environment and how best to utilize it without destroying it."[82]

The development of a post-colonial Aboriginal policy has been a central political issue in Australia from the 1970s to 2008, when Prime Minister Kevin Rudd of the newly elected Labor government issued a formal apology. The reconciliation process began with the Whitlam Labor government, elected in 1972. It drew on decades of anthropological research and the rising social conscience in the country to enact federal laws which recognized Aboriginal civil and property rights.[83] This period coincided with the approaching bicentennial of the arrival of the First Fleet in Sydney Harbor. The lead up to the celebration provoked intense interest in the development of a national identity that emphasized the influence of the Australian landscape and the colonial experience to differentiate Australia from "mother" Great Britain. Legally, this recognition culminated in the Australian High Court's 1992 decision in *Mabo v. Queensland*.[84]

3. Mabo*: Recognition but Cultural-Based Usufructuary Rights Only*

To use the law to redress the injustices of the past, the High Court of Australia viewed its Aboriginal peoples through the lens of anthropology, which stressed their distinct culture, rather than through Enlightenment and religious conceptions of individual rights. The High Court explicitly based its jurisprudence on the post-colonial view that colonial

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80. *E.g.*, WILLIAM J. LINES, TAMING THE GREAT SOUTH LAND: A HISTORY OF THE CONQUEST OF NATURE IN AUSTRALIA (1991).

81. TIMOTHY FRIDTJOF FLANNERY, THE FUTURE EATERS: AN ECOLOGICAL HISTORY OF THE AUSTRALASIAN LANDS AND PEOPLE 355 (1994). For another example of where western colonial law squeezed out sustainable customary practices, see Hans-Werner Wabnitz, *Return to the Sources: Revival of Traditional Nomads' Rights to Common Property Resources in the Code Pastoral of the Islamic Republic of Mauritania*, 49 NAT. RESOURCES J. 191 (2009).

82. FLANNERY, THE FUTURE EATERS, *supra* note 81, at 284.

83. BOLTON, *supra* note 70, at 191.

84. (1992) 175 C.L.R. 1.

oppressors have a duty to preserve a remnant culture's identity by recognizing the right of Aboriginal peoples to use lands with which they have long-maintained a spiritual and use connection. In the extraordinary *Mabo* decision, the High Court reversed 200 years of legal history and held that Aborigines *might* possess land claims unextinguished by British, colonial, federal, or state governments. *Mabo* is Australia's *Brown v. Board of Education* because, in it, the High Court used law to make the country confront a history of injustice to a minority, but its message was ultimately less powerful than *Brown*'s on the United States.[85]

Mabo was an ideal case to recognize Aboriginal rights because it involved a small island in the Murray Islands, an archipelago in the Torres Strait, located off of the northern coast of Queensland. The traditional Aboriginal culture was still relatively intact and the Meriam peoples had limited contact with white Australians.[86] The precise issue was whether the state of Queensland could legislatively extinguish native title. Drawing on the post-World War II jurisprudence of the International Court of Justice, the High Court concluded that the *terra nullius* rationale for the settlement of Australia only established Great Britain's (and its successor, the Commonwealth of Australia's) claim to the continent as against other nations. After *Mabo*, High Court decisions initially expanded Aboriginal land claims, but a more conservative High Court subsequently put them at risk of legislative curtailment and narrowed them substantially.

Both U.S. tribes and Australian Aboriginals are subject to the plenary power of their respective nations, but the lack of a trust tradition in Australia, in contrast to the U.S. federal government's trust duty to the tribes, makes the latter more vulnerable to legislative action. The source of federal power over Aboriginal peoples is Section 51(xxvi) of the 1902 Commonwealth Constitution, which gives the Parliament the power to make any necessary laws for "[t]he people of any race. . . ."[87] Initially, the High Court held that the grant of a state pastoral lease does not per se extinguish Aboriginal claims.[88] But acts of Parliament stand on a dif-

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85. *E.g.*, MABO: A JUDICIAL REVOLUTION: THE ABORIGINAL LAND RIGHTS DECISION AND ITS IMPACT ON AUSTRALIAN LAW (M.A. Stephenson & Suri Ratnapala eds., 1993).

86. However, in a 1999 decision, *Yanner v. Eaton* (1999) 201 C.L.R. 351, the High Court accepted without discussion the claim of a member of the Gunnamulla clan of northern Queensland that he was exercising a customary right when he killed a protected estuarine crocodile using a wook, a traditional harpoon, from a motor-power dinghy.

87. 1 CONSTITUTIONS OF THE WORLD, Australia (Gisbert H. Flanz ed., 1998).

88. Wik Peoples v. Queensland (1996) 187 C.L.R. 1. The High Court held that that if the pastoralist or mineral lessee can prove that the prior non-Aboriginal uses are inconsistent with the usufructuary rights claimed by a group of Aborigines, the prior use will prevail. In practice, this limitation is not as restrictive as it might appear. However, given the

ferent footing. A 1996 case suggested, but did not squarely hold, that the Commonwealth Parliament has unlimited power to abolish Aboriginal title. An Aboriginal in South Australia claimed that Hindmarsh Island, an area slated for development, was a significant Aboriginal area and that the development was inconsistent with the federal Aboriginal and Torres Strait Islander Heritage Protection Act of 1984. In response, the Commonwealth Parliament passed an act to permit the development. A majority of the High Court reasoned that since the constitutional race power, the basis of authority over Aboriginals, was a plenary grant of authority to Parliament, it conferred unlimited discretion on Parliament to decide the nature of Aboriginal rights.[89] Only one judge dissented and advanced the argument that the Commonwealth Constitution does not permit the use of the race power to discriminate against the enjoyment of Aboriginal rights. Thus, the post-*Mabo* question has generally been the extent to which Parliament can limit usufructuary rights, although there are counter examples. New South Wales legislated the right to hunt and gather non-threatened species for ceremonial and subsistence purposes in national parks,[90] which do not hold the "sacred" status that they do in the United States.

Mabo rights are vulnerable to judicial limitation to a greater extent compared with *Winters* rights.[91] After *Mabo*, one might have predicted that Australia's culturally sensitive jurisprudence would result in greater protection compared to the U.S. Supreme Court's "subjective" Indian law jurisprudence. As previously discussed, the Supreme Court has refused to recognize the legitimacy of cultural preservation and attachment to a historic land base. The High Court's approach to Aboriginal claims, in contrast, places much more reliance on the testimony of anthropologists and Aborigines themselves compared to U.S. Indian jurisprudence. Australian Aboriginal rights may be initially claimed, provided that the group, clan, or individual can meet the *Mabo* and relevant statutory connection standard. Because Aboriginals never organ-

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vastness of many Crown leases and the limited uses claimed by the Aborigines, accommodation is often possible. *See also* Minister Administering Crown Lands Act v. New South Wales Aboriginal Land Council (1993) 31 N.S.W.L.R. 106.

89. Kartinyeri v. Commonwealth (1998) 195 C.L.R. 337. Australian High Court jurisprudence has been influenced by the U.S. Supreme Court's willingness to imply rights to protect minorities. However, the High Court's jurisprudence still reflects the more positive constitutional tradition of Great Britain. *Kartinyeri*'s refusal to find that the power to legislate with respect to race contains an implied limitation is consistent with *Western Australia v. Commonwealth* (1995) 183 C.L.R. 373, which construed the power as a political one.

90. National Parks and Wildlife Amendment (Aboriginal Ownership) Act, 1996, Part 4A (Austrl.).

91. *See infra* notes 93–101.

ized themselves as large units as Indians did in the United States, smaller units, even down to the individual, may claim title claims. In contrast, in the United States only enrolled members of tribes recognized by Congress and the Bureau of Indian Affairs can exercise most Indian rights.[92]

Australian Aborigines can claim rights for a variety of spiritual and subsistence uses based on traditional use of the land, but because custom is the foundation of *Mabo* rights, they must empirically prove the physical enjoyment of these rights on specific land.[93] Ironically, this approach has contributed to the characterization of Aboriginal rights as *lesser* usufructuary rights compared to the superior water right recognized in *Winters*. For example, a lower federal court, in *Western Australia v. Ward*,[94] used the familiar analogy of property as a bundle of sticks to conclude that the common law does not protect a spiritual connection to land and thus Aboriginal title "is a fragile divisible interest which can be extinguished piece by piece."[95] Aboriginal peoples, therefore, enjoy a much weaker legal position compared to Indian tribes in the United States.

Winters rights have evolved to meet the modern needs of tribes to a greater extent than Australian Aboriginal rights. Although there has been some evolution in Australian law,[96] in general Aboriginals are limited to a narrow range of customary uses. A group claiming a *Mabo* right must first prove that it is an identifiable Aboriginal clan or group which follows traditional cultural practices. The group members must also prove that "their traditional connexion with the land has been substantially maintained."[97] The definition of Aboriginal title as a traditional communal connection to the land, which is incorporated into Section 223(1) of the federal Native Title Act of 1993, illustrates the limitation

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92. Indians are U.S. citizens and subject to the same rights and duties as all citizens. Enrolled tribal members may be entitled to additional special rights such as the right to hunt and fish in ways not permitted to non-Indians, United States v. Washington, 520 F.2d 676 (9th Cir. 1975), although the geographical and legal boundaries of these rights are contested by state governments and non-Indians.

93. *E.g.*, Members of the Yorta Yorta Community v. Victoria (2002) 214 C.L.R. 422. The prior use or occupation of the land, however, must be more than nominal. Daruk Local Aboriginal Land Council v. Minister Administering Crown Lands Act (1993) 30 N.S.W.L.R. 140.

94. (2000) 170 A.L.R. 159.

95. Case Note, Western Australia v. Ward*: One Step Forward and Two Steps Back: Native Title and the Bundle of Rights Analysis*, 24 MELB. U. L. REV. 462, 463 (2000).

96. Yanner v. Eaton (1999) 201 C.L.R. 351 (accepting without discussion the claim of a member of the Gunnamulla clan of northern Queensland that he was exercising a customary right when he killed a protected estuarine crocodile using a wook, a traditional harpoon, from a motor-power dinghy).

97. Mabo v. Queensland II (1992), 175 C.L.R. at 51.

process at work. The connection may be spiritual and shared,[98] but once a clan or group abandons traditional laws and practices, as many Aborigines were forced to do to survive white contact, the land connection cannot be revived.[99] History and culture may also be bases to deny claims. Precedents from Canada and New Zealand have refused to recognize fishing rights that are not grounded in pre-contact culture.[100] This said, Australian jurisprudence may be returning to the *Mabo* tradition at least for shared use of the country's vast coastal waters. A 2008 High Court decision holds that the Yolngu people of the Northern Territory have the exclusive right to fish in the inter-tidal zone and waterways adjoining their traditional lands.[101]

B. A Generous and Open Right

The uncertainty inherent in the *Winters* scope and in the Practicable Irrigated Acreage (PIA) standard eventually became the tribes' nuclear option. *Winters* itself did not specify the standard that courts should use to quantify reserved rights. It simply adopted the assumption of the assimilation era that Indians were to be turned into a civilized, pastoral people and enjoined the state water right holders from interfering with their existing use.[102] For the next 50 years, the issue remained unsettled, although the few cases to consider the issue began to define the right in terms of the reservation's irrigation potential, and this ultimately emerged as the standard. This gradual (and still partial) evolution of the scope of *Winters* is an example of using open-ended property to incorporate an equity or justice component.[103]

Epic litigation between Arizona and California resulted in a resolution of the issue very beneficial for many tribes but, ironically, not for the reasons anticipated by the courts and states. Arizona sued California

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98. Australian commentators place great weight on Justice William O. Douglas' opinion in *United States, As Guardian of the Hualpai Indians of* Ariz. v. Santa Fe Pacific R.R. Co., 314 U.S. 339 (1941), which holds that the United States may sue to protect aboriginal claims based on time-immemorial usage.

99. *Mabo* 175 C.L.R. at 51.

100. R. v. Van Der Peet [1996] 2 S.C.R.; Ngai Tahu Maori Trust Board v. Director-General of Conservation [1995] 3 N.Z.L.R. 553. *But see* Yanner v. Eaton (1999) 201 C.L.R. 351, in which the High Court accepted without discussion the claim of a member of the Gunnamulla clan of northern Queensland that he was exercising a customary right when he killed a protected estuarine crocodile using a wook, a traditional harpoon, from a motor-power dinghy.

101. Gumana v. Northern Territory of Australia [2007] F.C.A.F.C. 23.

102. After the case, a 10,425-acre irrigation project was constructed on the reservation, but the tribe is still trying to expand the project. *See supra* note 66.

103. This analysis is derived from Carol Rose's seminal article, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988).

because Congress refused to fund the Central Arizona Project, which would bring Arizona's Compact share of the Colorado River to Phoenix and Tucson, until the two states settled disputes over their respective entitlements. The federal government intervened to assert the rights of several tribes along the river as well as wildlife refuges. To quantify the tribes' *Winters* rights, the Special Master considered three standards: an opened degree, existing uses, or the total irrigable capacity of the reservation. He chose the third and formulated the standard as the "practicable irrigated acreage." The Supreme Court agreed that "water was intended to be reserved to satisfy the future, as well as the present, needs of the Indian Reservations" and rejected Arizona's much narrower proposed "reasonably foreseeable needs" standard.[104] PIA gave the Colorado River tribes 900,000 acre-feet per year,[105] and the Court later awarded them 10,000 more when reservation boundaries were finally settled.[106] PIA was a tribal nuclear option because it permitted tribes to generate very high claims. The small Fort Mojave Reservation received 130,000 acre-feet, "although the largest amount of land irrigated before the decision had been twenty-three acres and only one family lived there."[107]

Arizona v. California applied the PIA standard to give the five Lower Colorado River tribes as much as 1,000,000 acre-feet out of the 7.5 million total allocated to the entire Lower Basin under the Colorado River Compact.[108] Upstream, Navajo Nation irrigation claims were estimated at almost 800,000 acre-feet.[109] States tried to limit these claims by arguing that the standard included a stringent cost-benefit test. PIA became a more serious threat as the Reclamation Era wound down and the federal spigot turned off, in part due to numerous studies showing that Bureau of Reclamation cost-benefit studies inflated benefits and deflated costs. Thus, the states' insistence on pure cost-benefit analysis for PIA claims, after enjoying decades of favorable, flawed analyses, was disingenuous, as was the argument that nineteenth-century farming practices should set the measure of practicability. The Special Master in *Arizona v. California* eventually held that economic feasibility was a relevant fac-

104. Arizona v. California, 373 U.S. 546, 600 (1963), decree entered, 376 U.S. 340 (1964).

105. Arizona v. California, 376 U.S. 340, 344–45 (1964).

106. Arizona v. California, 460 U.S. 605 (1983) (the Special Master recommended that the tribes be awarded 317,000 acre-feet per year). The Fort Yuma Reservation eventually was awarded 75,000 more acre-feet. 530 U.S. 392 (2000).

107. A. DAN TARLOCK ET AL., WATER RESOURCE MANAGEMENT: A CASEBOOK IN LAW AND PUBLIC POLICY 868 (6th ed. 2009).

108. FRADKIN, *supra* note 44, at 144.

109. *Id*. at 167.

tor[110] but rejected the full cost-benefit standard.[111] Courts never refined PIA further, and thus the rejection of cost-benefit analysis and the museum theory of reservations allowed credible Indian claims on the Colorado alone to jump as high as 15,000,000 acre-feet, more than the entire estimated yearly flow of the River.[112]

The states never accepted PIA, even though non-Indian irrigators farmed 78 percent of all reservation lands[113] and the merits of PIA were intensely debated and contested.[114] Western states and non-Indian water users claimed that it was far too generous to the tribes.[115] From the opposite direction, the tribes and their supporters also objected to PIA on two primary grounds. First, PIA subjected tribes to a higher project approval compared to non-Indian reclamation projects.[116] Second, except in a few cases—such as the Klamath—which claimed water for pre-settlement fishing and hunting,[117] PIA locked tribes into an unrealistic agricultural future. But the rejection of PIA would have been a disaster for the tribes. The quantities of water which tribes could claim would most likely have been substantially less; the focus would be on existing, not future uses. The Supreme Court was poised to reject the *Arizona v. California* formulation in the Wind River Adjudication appeal. Justice O'Connor had written an opinion that replaced PIA with the more subjective test of whether there was a reasonable likelihood that an Indian irrigation project would be built, but her unexplained recusal prevented this opinion from becoming law.

In retrospect, PIA had served its function by the 1990s. Courts were experimenting with other standards, some favorable to tribes and

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110. The Wyoming Supreme Court ran with this limitation in *Big Horn I*, *aff'd sub. nom. Wyoming v. United States,* 492 U.S. 406 (1989) after the State, tribes, and the United States stipulated that PIA meant "those acres susceptible to irrigation at reasonable costs."

111. Arizona v. California, 460 U.S. 605 (1983). *See* H.S. Burness et al., *The* "*New*" Arizona v. California*: Practicable Irrigable Acreage and Economic Feasibility*, 22 NAT. RESOURCES J. 517 (1982) and Martha C. Franks, *The Uses of the Practicably Irrigated Acreage Standard in the Quantification of Reserved Water Rights*, 31 NAT. RESOURCES J. 549 (1991).

112. WESTERN STATES WATER COUNCIL, INDIAN WATER RIGHTS IN THE WEST 26 (1984).

113. A. DAN TARLOCK ET AL., WATER RESOURCES MANAGEMENT, *supra* note 107, at 872.

114. *See* Barbara Cosens, *The Legacy of* Winters v. United States *and the* Winters *Doctrine, One Hundred Years Later*, Address to the American Bar Association, Section on Environment, Energy, and Resources, 16th Section Fall Meeting (Sept. 17, 2008).

115. Elizabeth Weldon, *Practically Irrigable Acreage Standard: A Poor Partner for the West's Water Future*, 25 WM & MARY ENVTL. L. & POL'Y REV. 203 (2000).

116. Walter Rusinek, *A Preview of Coming Attractions?* Wyoming v. United States *and the Reserved Rights Doctrine*, 17 ECOLOGY L.Q. 355, 372 (1990).

117. United States v. Adair, 723 F.2d 1394 (9th Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984).

some not, and the action was moving from the courts to Congress.[118] *Winters* had become a sufficient threat to scare the West and survive hostile decisions in ajudications in Idaho and Wyoming,[119] and it now required a solution. *Winters* had given tribes the political leverage to move from quantification through litigation to federal tribal water settlements. This leverage freed many tribes from the restrictions that the states tried to impose to protect their water rights holders. Justice O'Connor's home state of Arizona rejected the museum implications of PIA and instead adopted a cultural standard, the maintenance of a tribal homeland, as the measure of the right.[120]

C. *Winters* as Justice and Political Power

Winters transcended its potentially narrow legal scope to become a source of tribal empowerment that resulted in a series of federal Indian water rights settlement acts. There were two crucial steps in this evolution. First, in the 1970s, tribes gained the freedom and foundation resources to hire their own lawyers. Second, the 1973 Report of the National Water Commission fundamentally transformed Indian water rights discourse. The Report fell victim to the chaos surrounding the Watergate scandal, but it remains the most definite assessment of state and federal water policy, especially for the tribes. The chapter on Indian water rights had a complete discussion of *Winters* rights. Ironically, most of the discussion focused on ways to remove the cloud of western water titles by integrating *Winters* rights into state water rights through judicial quantification and satisfying these rights in a way that would not disrupt existing state-created water rights. To remove the cloud on western water titles, the Report recommended federal payments to displaced state water right users. But these recommendations were overshadowed by the preliminary discussion, which began with a paragraph that fundamentally partially recast *Winters* as a reparations doctrine:

> Following *Winters*, more than 50 years elapsed before the Supreme Court again discussed significant aspects of Indian water rights. During most of this 50-year period, the United

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118. The Arizona Supreme Court substituted a multifactor test to determine the minimum amount of water necessary to accomplish the present and future homeland purposes of a reservation in contrast to exclusive reliance on PIA as a proxy for this objective. *In re* the General Adjudication of All Rights to Use Water in the Gila River System and Source, 201 Ariz. 307, 35 P.3d 68 (2001).

119. Cosens, *The Legacy of* Winters v. United States *and the* Winters *Doctrine, One Hundred Years Later*, *supra* note 114.

120. *In re* General Adjudication of All Rights to Use Water in the Gila River System and Source, 35 P.3d 68.

> States was pursuing a policy of encouraging the settlement of the West and the creation of family-sized farms on its arid lands. In retrospect, it can be seen that this policy was pursued with little or no regard for Indian water rights and the *Winters* doctrine. With the encouragement, or at least the cooperation, of the Secretary of the Interior–the very office entrusted with protection of all Indian rights–many large irrigation projects were constructed on streams that flowed through or bordered Indian Reservations. With few exceptions the projects were planned and built by the Federal Government without any attempt to define, let alone protect, prior rights that Indian tribes might have had in the waters used for the projects. Before *Arizona v. California*, referred to hereinafter, actions involving Indian water rights generally concerned then existing uses by Indians and did not involve the full extent of rights under the *Winters* doctrine. In the history of the United States Government's treatment of Indian tribes, its failure to protect Indian water rights for use on the Reservations it set aside for them is one of the sorrier chapters.[121]

This narrative helped to create a new concept of reparations. Reparations usually refer to the "restitution of stolen property" and remedies for damage to a person or group's health and dignity.[122] Reparations for property once enjoyed and expropriated had little relevance for almost all tribes since few of them, except in the Southwest, had historically practiced irrigation or made intensive consumptive uses of water. The tradition of reparations, of course, has more relevance for water to sustain traditional fishing practices. However, the compensation offered by *Winters* for consumptive uses was broader. *Winters* rights in effect compensate tribes for self-development opportunities they lost through the federal government's nineteenth-century reservation confinement and allotment policies.

V. AN EPILOGUE AND CONCLUSION: INDIAN WATER RIGHTS SETTLEMENTS

Starting in the late 1980s, tribes were able to negotiate water rights settlements which basically traded non-Indian access to *Winters* water and the removal of *Winters* title clouds for wet reservation water, green money, and a broad range of water uses better suited to the culture and actual needs of individual reservations. The settlements allowed tribes to

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121. NATIONAL WATER COMMISSION, WATER POLICIES FOR THE FUTURE 474–75 (1973).

122. CHRISTIAN PROSS, PAYING FOR THE PAST: THE STRUGGLE OVER REPARATIONS FOR SURVIVING VICTIMS OF THE NAZI TERROR 19 (Johns Hopkins Univ. Press trans., 1998).

break free of the straightjacket that the PIA standard posed for many of them, as comparatively few tribes want to practice irrigated agriculture exclusively to sustain themselves. For example, for tribes in the wet Pacific Northwest, the best use of water is for ecosystem restoration, especially the conservation of traditional fisheries. Other tribes saw water as a commodity that they could "trade" for cash to support economic development on the reservation, although the western states had long objected to off-reservation transfers in order to limit the scope of the right. However, for tribes next to urban centers such as the Gila and Tohono O'odham in the Phoenix and Tucson areas, Indian and non-Indian interest began to align.

The Ak-Chin Community south of Phoenix irrigated 10,000 acres on its reservation, but massive groundwater mining from adjacent areas threatened its groundwater supply. In a series of settlement acts beginning in 1978, the Ak-Chin received between 72,000 and 85,000 acre-feet of water per year, most guaranteed by a 50,000 acre-foot Central Arizona Project allocation. In 1992, the Community secured the necessary legislation to lease 10,000 acre-feet of water, generated by the use of drip irrigation and computer monitoring, to a Del Webb development.[123] A similar settlement was negotiated for the Tohono O'odham south of Tucson. In return for reduced groundwater pumping, the tribe has a firm entitlement: federal responsibility for damages in the event of non-delivery and the right to market their groundwater entitlement water in the Tucson Active Management Area.[124]

Settlements have expanded beyond the wet water and marketing-cash models to tribal participation in river restoration experiments. The Nez Perce settlement is the prime example of this use of *Winters*.[125] Members of this southern Idaho panhandle reservation define themselves in relation to family, community, and "earth and water, fish, game, and roots."[126] Swept into the McCarran Act Snake River adjudication, the tribe initially fell victim to Idaho's well-documented hostility to Indian and non-Indian reserved rights.[127] Its instream flow claims were denied on the anti-historical ground that a tribe with a culture of fish and water,

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123. BONNIE G. COLBY, JOHN E. THORSON & SARAH BRITTON, NEGOTIATING TRIBAL WATER RIGHTS: FULFILLING PROMISES IN THE ARID WEST 112–15 (2005).

124. *Id.* at 152–53.

125. Ann R. Klee & Duane Mecham, *The Nez Perce Indian Water Right Settlement—Federal Perspective*, 42 IDAHO L. REV. 595, 599 (2006) (*Winters* as basis for all tribal claims recognized in the settlement.)

126. Alan G. Marshall, *Fish, Water, and Nez Perce Life*, 42 IDAHO L. REV. 763, 765 (2006).

127. *E.g.*, Potlatch Corp. v. United States, 12 P.3d 1260 (Idaho 2000). *See* Barbara Cosens, *Truth or Consequences: Settling Water Disputes in the Face of Uncertainty*, 42 IDAHO L. REV. 717, 729–34 (2006).

inter alia, did not intend to reserve the necessary water to support this culture when their reservation was set aside in 1855![128] However, despite this setback, *Winters* remained a sufficient threat to give the tribe a seat at the bargaining table, and the tribe eventually bypassed the limitations of the general adjudication process with federal help and concessions to Idaho. Under the Nez Perce Water Right Settlement,[129] the tribe received 50,000 acre-feet with an 1855 priority for irrigation, hatchery maintenance, and "cultural uses;" money to acquire land and water to improve fish habitat and construct new water services; and sewage systems and state law instream flow rights. More generally, the tribe plays a central role in the ongoing efforts to conserve salmon runs in the Snake River Basin in part because of the right to control the release of 200,000 acre-feet from Dworshak Reservoir.[130] This positive evolution of a property right, and the legislation that it induced, illustrate equity and justice in action in ways that could never have been envisioned by those who argued and decided *Winters*.

128. Cosens, *Truth or Consequences*, *supra* note 127, at 730.

129. Snake River Water Rights Act of 2004, Pub. L. No. 108–447, Division J, Title X, 118 Stat. 2809, 3431. *See* Klee & Mecham, *The Nez Perce Indian Water Right Settlement—Federal Perspective*, *supra* note 125, at 611–32.

130. K. Heidi Gudgell, Steven C. Moore & Geoffrey Whiting, *The Nez Perce Tribe's Perspective on the Settlement of Its Water Right Claims in the Snake River Basin Adjudication*, 42 IDAHO L. REV. 563, 590–91 (2006).