Conjunctive Management of Reservation Water Resources: Legal Issues Facing Indian Tribes

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I. INTRODUCTION

The wise use of water resources is crucial to all the sovereigns of the West. Increasing demands on increasingly scarce water supplies call for cooperative approaches to the management of western water. Water is *the* critical resource, and preserving that resource will require its conjunctive management by both states and Indian tribes.

Conjunctive management is the integrated management of all water sources as a single system.[1] Historically, the primary impediment to conjunctive management of water resources has been legal regimes that fail to take account of the hydrologic connection between ground and surface waters.[2] What science has long known about the interrelationship of water sources, the law has largely ignored.

The disjunction between law and science appears to take two forms. First, some jurisdictions use different legal approaches to allocate surface water and groundwater, notwithstanding the interconnections of the water sources. If a state uses, say, prior appropriation for its surface waters and a riparian-like system for its groundwater,[3] then conjunctive

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1. WATERS AND WATER RIGHTS § 18.03 (Robert E. Beck & Amy K. Kelley eds., 3d ed. 2009); *see also* Frank J. Trelease, *Conjunctive Use of Groundwater and Surface Water*, 27 ROCKY MTN. MIN. L. INST. 1853 (1982) (discussing various aspects and meanings of conjunctive management).

2. This is hardly a new point. *See* Samuel C. Wiel, *Need of Unified Law for Surface and Underground Water*, 2 S. CAL. L. REV. 358, 369 (1929) ("It is reasonable to foresee a time [when the law will recognize] that whether more or less, there is always a connection between surface flow and groundwater; and that legal dispositions in ignorance or disregard of this connection cannot prosper.").

3. WATERS AND WATER RIGHTS, *supra* note 1, § 19.01 (noting that several states take this approach).

management becomes more difficult, though not impossible. But second, and more important, allocations of one type of water (by whatever system) fail to take account of the impacts on the other type of water resource. Each is treated as a separate, legally-unconnected resource.

That means things are complicated enough on the state side of conjunctive management. They become even more complicated when conjunctive management involves tribal water resources as well. Conjunctive management of on-reservation[4] water resources involves two governments, two regulatory systems, and at least two water allocation systems. On any given reservation, there will be tribal reserved rights to water, which may or may not extend to the groundwater, as well as the surface water sources. And on most reservations, there will also be state rights to surface water and groundwater in excess of the amounts necessary to satisfy tribal reserved rights.[5] The tribes' reserved rights to water and the states' rights to allocate excess waters arise from different legal regimes.

Indian tribal rights to water are rights impliedly reserved as a matter of federal law, with most tribal rights determined under an approach named for the 1908 case of *Winters v. United States*.[6] Under the *Winters* doctrine,[7] the reservation of land for an Indian tribe impliedly reserves sufficient water to fulfill the purposes for which the land was set aside. Most tribal reserved water rights have a priority date of the date the land reservation was established,[8] and no tribal rights may be lost for non-use. The reserved rights doctrine applies to both groundwater and surface water rights held by tribes.

This reserved rights doctrine for tribal water rights varies in important aspects from the water law regimes used by western states.[9] The prior appropriation system for surface rights, used in some form in

4. For manageability, this article will discuss conjunctive management of water resources within Indian reservations only.

5. Tribal reserved rights to water are paramount to water rights subsequently created under state law. *See, e.g.*, Winters v. United States, 207 U.S. 564, 576–77 (1908).

6. *Id.* at 564. *See generally* JOHN SHURTS, INDIAN RESERVED WATER RIGHTS: THE WINTERS DOCTRINE IN ITS SOCIAL AND LEGAL CONTEXT, 1880s-1930s (2000); Judith V. Royster, *Water, Legal Rights, and Actual Consequences: The Story of Winters v. United States*, *in* INDIAN LAW STORIES (Carole Goldberg, Kevin K. Washburn & Philip P. Frickey eds., 2011).

7. For detailed explanations of the *Winters* doctrine, *see* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW ch. 19 (Nell Jessup Newton ed., 2005 & Supp. 2009); WATERS AND WATER RIGHTS, *supra* note 1, § 37.02; Judith V. Royster, *A Primer on Indian Water Rights: More Questions Than Answers*, 30 TULSA L. J. 61 (1994).

8. Tribal water rights that exist to support aboriginal practices such as fishing or traditional agriculture, however, have a priority of time immemorial. *See, e.g.*, United States v. Adair, 723 F.2d 1394, 1414 (9th Cir. 1983).

9. It also varies in significant ways from the riparian rights systems used in eastern states. *See generally* Judith V. Royster, *Winters in the East: Tribal Reserved Rights to Water in Riparian States*, 25 WM. & MARY ENVTL. L. & POL'Y REV. 169 (2000) (discussing ways to implement *Winters* rights in eastern states).

all western states,[10] is not dependent upon land ownership. Instead, an appropriator acquires a right to the water by putting it to a beneficial use as defined by state law. Appropriators are accorded priority dates of use, and any water shortage falls first on junior appropriators.[11] By contrast, state groundwater regimes in western states are not as uniform.[12] Although most western states use a prior appropriation approach for groundwater as well as for surface water, others choose an approach of regulated reasonable use.[13] In broad outline, this approach to the allocation of groundwater requires a state permit for a limited duration, based on a determination that the use of the groundwater is reasonable.[14]

Within reservations, then, at least two, or possibly three, water rights systems are present. Tribal rights are governed by the reserved rights doctrine. State rights to excess surface waters are governed by the prior appropriation doctrine, which applies in most states to excess groundwater allocations as well. A few states determine excess groundwater allocations using more of a regulated reasonable use approach. Regardless of whether states use one system for both surface water and groundwater, or two, the state may, or may not, integrate the management of the two types of water resources.

Regulatory authority over water within reservations is, for virtually all reservations, split between tribal and state governments as well.

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10. *See* WATERS AND WATER RIGHTS, *supra* note 1, § 12.02.

11. Colo. River Water Cons. Dist. v. United States, 424 U.S. 800, 805 (1976).

12. WATERS AND WATER RIGHTS, *supra* note 1, § 19.01 ("The patterns of law regarding groundwater are more complex than for surface water, in large part because the systems of law were designed or adopted in the face of what was then pervasive ignorance regarding the nature and behavior of groundwater."). There are several groundwater regimes in use in the United States. *See id.* (citing five: reasonable use, appropriative rights, regulated riparianism, absolute dominion, and correlative rights); ROBERT GLENNON, WATER FOLLIES: GROUNDWATER PUMPING AND THE FATE OF AMERICA'S FRESH WATERS 30–31 (2002) (citing four: prior appropriation, reasonable use, absolute ownership, and correlative rights).

13. *See* WATERS AND WATER RIGHTS, *supra* note 1, § 19.01 (several states that apply appropriation principles to surface water use a regulated riparian approach for groundwater); GLENNON, *supra* note 12, at 30 (most western states use prior appropriation for groundwater; some apply principles of reasonable use). Because the WATERS AND WATER RIGHTS treatise finds that reasonable use corresponds "rather closely to traditional riparian rights," both sources seem to agree that some western states use a type of regulated reasonable use for groundwater allocation. *Id.*; WATER AND WATER RIGHTS, *supra* note 1, §19.01. Of the western appropriation states with Indian reservations, it appears that only Arizona and Nebraska use a separate "regulated riparian" approach to groundwater allocation. WATER AND WATER RIGHTS, *supra* note 1, at 23.02(c). Oklahoma, a western state with substantial Indian lands, also manages surface water and groundwater separately. The state employs both riparian rights and prior appropriation for surface water rights, *see* Franco-Am. Charolaise, Ltd. v. Okla. Water Res. Bd., 855 P.2d 568, 571–72 (Okla. 1990), and regulated reasonable use for groundwater. OKLA. STAT. ANN. tit. 82, § 1020.2 (West 2011). In addition, "Oklahoma is the only state which tried conjunctive water management strategies and ultimately rejected them." Barbara Tellman, *Why Has Integrated Management Succeeded in Some States But Not in Others?*, 106 WATER RESOURCES UPDATE 13, 16 (1996).

14. WATERS AND WATER RIGHTS, *supra* note 1, § 23.02.

States have no authority to regulate tribal reserved rights to water.[15] Moreover, states are unlikely to have regulatory powers over hydrologic resources contained entirely within reservation boundaries.[16] In the infrequent case where a hydrologic system does not extend beyond the reservation borders, the allocation of both reserved water rights and excess water should be under exclusive tribal management. In those cases, state allocations of water use within the reservation could impact tribal rights to such a degree that the tribal right to regulate nonmembers on fee lands for the health, safety, and economic welfare of the tribe should prevail.[17]

More commonly, hydrologic resources cross reservation borders. In those cases, the state makes water allocation decisions outside the reservation, and its interest in comprehensive management "weighs heavily in favor of permitting it to extend its regulatory authority to the excess waters, if any" of the reservation.[18] States thus have general regulatory authority over non-reserved water rights in transboundary waters. The state's authority within a reservation, however, is limited to the allocation and regulation of only those waters in excess of tribal rights.[19]

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15. United States v. Anderson, 736 F.2d 1358, 1365–66 (9th Cir. 1984).

16. *See, e.g.*, NAVAJO NATION CODE ANN. tit. 22, § 104 (2005) (applying to "all surface and groundwaters which are contained within hydrologic systems located exclusively within the lands of the Navajo [Nation]; and . . . all groundwaters located beneath the surface of the lands held in trust by the United States of America for the Navajo [Nation]."); Colville Confederated Tribes v. Walton, 647 F.2d 42, 52 (9th Cir. 1984) (denying state authority to issue appropriation permits to non-Indian fee owners on creek system located entirely within reservation because state allocations could impact tribal use and allocation of water).

17. *See* United States v. Montana, 450 U.S. 544, 566 (1981) (determining that tribes may regulate nonmembers on fee lands to protect against "conduct [that] threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."); *see also* Montana v. U.S. EPA, 137 F.3d 1135, 1140–41 (9th Cir. 1998) (noting that "threats to water rights may invoke inherent tribal authority over non-Indians," and upholding the Environmental Protection Agency's regulations that tribes retain inherent authority to regulate nonmembers under the Clean Water Act if the nonmember activities threaten tribal health and welfare by polluting the waters). For an overview of how the *Montana* "direct effects" test has been applied, see Sarah Krakoff, *Tribal Civil Jurisdiction Over Nonmembers: A Practical Guide for Judges*, 81 U. COLO. L. REV. 1187, 1231–33 (2010).

18. *Anderson*, 736 F.2d at 1366; *see also* Holly v. Yakima Indian Nation, 655 F. Supp. 557, 558–59 (E.D. Wash. 1985), *aff'd without opinion*, Holly v. Totus, 812 F.2d 714 (9th Cir. 1985) (holding that Yakama Nation could not extend its water code to nonmembers using excess waters of transboundary system because tribe had shown no facts demonstrating requisite effects on tribal governmental interests).

19. *See, e.g.*, *Anderson*, 736 F.2d at 1366; *see also In re* Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys., 835 P.2d 273, 282–83 (Wyo. 1992); Wyoming v. Owl Creek Irrigation Dist. Members (*In re* Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys.), 753 P.2d 76, 114–15 (Wyo. 1988), *aff'd sub nom. by an equally divided Court*, Wyoming v. United States, 492 U.S. 406 (1989) (finding that the State Engineer may monitor all water rights within reservation, but may regulate only state appropriation rights).

The result is complex. On virtually all reservations, two governments exercise regulatory authority over some of the water allocation and use decisions. Those allocation and use decisions are based on different laws and different legal principles. To complicate matters further, surface water decisions may be made on a different basis than groundwater decisions and, even if the same legal regime determines both, the decisions may not be integrated with one another.

Against that background, Indian tribes face substantial legal impediments to conjunctive management of reservation waters. In particular, three aspects of federal and state law frustrate effective tribal participation in conjunctive management. First, Indian tribes are, in many instances, barred by federal action from creating comprehensive, enforceable water codes. Without a water code, management of any kind, much less conjunctive management, becomes problematic. Second, the reserved rights doctrine does not include a clear, universal right to groundwater. Instead, the determination of whether tribes have rights to groundwater as well as surface water is left to individual court decisions and settlement acts, which results in wide variation among tribes in groundwater rights. Because conjunctive management is the integration of surface and groundwater regimes, the variability of tribal rights to groundwater hampers comprehensive approaches. And third, the lack of conjunctive management in some states can impact tribal reserved rights to water. While states have long been legally obligated to protect tribal rights to surface water in their allocation of state surface water rights, protecting tribal reserved rights to all water sources requires states to take account of tribal rights in the states' allocation of groundwater as well. In the absence of state conjunctive management, that consideration may be less likely, although alternatively, forcing states to consider the impact of state allocations of groundwater on tribal reserved rights may encourage the development of state systems to consider the impact of groundwater allocations on all use of surface waters.

II. THE ISSUE OF TRIBAL WATER CODES

Conjunctive management, in order to be effective, requires some sort of legislative and administrative process laws, regulations, permits, and the like. The government needs to determine priorities of use, a system for assigning and monitoring water use, and a method of addressing violations.[20] In short, the government needs a water code. For non-tribal governments, developing and implementing a water code is a matter of political will and legislative compromise. For many tribal governments,

20. For a thorough discussion of the issues that a tribal water code might address, see Thomas W. Clayton, *The Policy Choices Tribes Face When Deciding Whether to Enact a Water Code*, 17 AM. INDIAN L. REV. 523, 563–87 (1992).

it is a matter of seeking the federal government's approval, not only of the code provisions, but of the right to enact one at all.

More than thirty-five years ago, under pressure from western states, the Secretary of Interior announced a moratorium on the approval of tribal water codes.[21] Any law that "purports to regulate the use of water" would be disapproved, pending departmental rules for tribal water codes.[22] No federal rules were ever issued,[23] and the moratorium has never been rescinded.

The federal moratorium has no effect on those tribes that do not require secretarial approval of their laws.[24] But the moratorium obstructs, or at best hampers, water regulation by the many tribes whose Indian Reorganization Act(IRA)-era constitutions mandate secretarial approval of tribal laws.[25] There are a number of strategies these tribes can pursue, although none is entirely satisfactory.

Tribes subject to the approval requirement may request an exception from the moratorium, or simply choose to develop and implement comprehensive water codes without the required secretarial approval.[26] Tribes may engage in activities that do not require secretarial approval, such as conducting inventories of water resources and water uses, and developing internal priorities for tribal use of tribal water rights.[27] Finally, tribes involved in water settlements can include a specific right to develop a water code as part of the negotiations.[28] Of the twenty-seven water settlements enacted into federal law, a significant number of the

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21. *See* Steven J. Shupe, Water in Indian Country: From Paper Rights to a Managed Resource, 57 U. COLO. L. REV. 561, 579–81 (1986); David H. Getches, Management and Marketing of Indian Water: From Conflict to Pragmatism, 58 U. COLO. L. REV. 515, 527 (1988). The moratorium was issued in 1975.

22. *See* Shupe, *supra* note 21, at 579 n.105 (reprinting the text of the Secretary's memorandum announcing the moratorium).

23. Proposed rules were published twice, but never finalized. *See* Proposed Alteration; Extension of Comment Period, 42 Fed. Reg. 14,885 (Mar. 17, 1977); Regulation of Reserved Waters on Indian Reservations, 46 Fed. Reg. 944 (Jan. 5, 1981). The question of regulations for approval of tribal water codes has not been on the Department's agenda of rules scheduled for development since 1986. *See* Semiannual Agenda of Rules Scheduled for Review or Development, 51 Fed. Reg. 38,472, 38,517 (1986).

24. *See, e.g.*, NAVAJO NATION CODE ANN. tit. 22, § 7 (1984); Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 195, 197 (1985) (nothing requires secretarial approval of Navajo laws).

25. *See, e.g.*, Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 134–35 (1982). For a discussion of Indian Reorganization Act constitutions, *see* COHEN'S HANDBOOK, *supra* note 7, § 4.04[3][a][i].

26. Shupe, *supra* note 21, at 588 (noting that the Standing Rock Sioux Tribe enacted a water code without secretarial approval); Clayton, *supra*, note 20, at 562 n.290 (noting that the Rosebud Sioux Tribe enacted a water code in 1977 that was neither approved nor disapproved; the tribe had not attempted to enforce its code even though it amended its IRA-era constitution to remove the requirement of secretarial approval).

27. *See* Shupe, *supra* note 21, at 588.

28. *E.g.*, White Mountain Apache Tribe Water Rights Quantification Act of 2010, Pub. L. No. 111-291, § 305(e), 124 Stat. 3064 (2010).

more recent ones contain provisions for tribal water codes.[29] A few require secretarial approval;[30] most do not. Virtually all of them call for the Secretary to administer water rights until a tribal code is adopted.[31]

Each of these approaches has problems. Granting an exception to the moratorium would certainly seem to further the current federal Indian policies of self-determination and government-to-government relations,[32] but seeking one adds an unnecessary step in the process of developing a water code, and federal disapproval is still likely.[33] Proceeding without required secretarial approval is risky; in particular, any attempt to enforce an unapproved code would subject the tribe to lawsuits by regulated parties claiming the tribe is acting beyond its lawful au-

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29. Claims Resolution Act of 2010, Pub. L. No. 111-291, § 305(c) & 407(f), 124 Stat. 3064 (2010); Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, § 10805(b), 123 Stat. 991 (2009); Snake River Water Rights Act of 2004, Pub. L. No. 108-447, tit. X, § 7(b), 118 Stat. 2809 (2004); Zuni Indian Tribe Water Rights Settlement Act of 2003, Pub. L. No. 108-34, § 8(b)(1)(F)(II), 117 Stat. 782 (2003); Chippewa Cree Tribe of the Rocky Boy's Reservation Indian Reserved Water Rights Settlement and Water Supply Enhancement Act of 1999, Pub. L. No. 106-163, § 102(b)(2), 113 Stat. 1778 (1999); Indian Claims Act of 1994, Pub. L. No. 103-434, § 111(c), 108 Stat. 4526 (1994); Northern Cheyenne Indian Reserved Water Rights Settlement Act of 1992, Pub. L. No. 102-374, § 5(a), 106 Stat. 1186 (1992); Seminole Water Rights Compact, §§ II(A)(6), VII(D), *reprinted in Seminole Indian Land Claims Settlement Act: Hearings on S. 1684 Before the Senate Select Comm. on Indian Affairs,* 100th Cong., 1st Sess. 83-122 (1987), incorporated in Seminole Indian Land Claims Settlement Act of 1987, Pub. L. No. 100-228, § 7, 101 Stat. 1556 (1987). In some cases, settlement acts may not include a provision for a tribal water code because the tribe already had a water code in place. *See, e.g.*, Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, §§ 10701–10704, 123 Stat. 991 (2009) (no provision for a water code, but Navajo Water Code was adopted in 1984; *see* Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 195, 197 (1985)).

30. Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, § 10805(b)(1), 123 Stat. 991 (2009); Zuni Settlement Act, Pub. L. No. 108-34, § 8(b)(1)(F)(I), 117 Stat. 782 (2003). *See also* Consolidated Appropriations Act of 2005, Pub. L. No. 108-447, div. J, tit. X, § 7(b), 118 Stat. 2809 (2004) (secretarial approval required for water code provisions that affect allottees).

31. In addition, two of the water rights settlement acts provide for federal water plans. *See* Water Right Claims Ak-Chin Indian Community Act of 1978, Pub. L. No. 95-328, 92 Stat. 409, *as amended*, Pub. L. No. 98-530, § 6, 98 Stat. 2698 (1984) (providing for establishment of federal water management plan for reservation); Reclamation Projects Authorization and Adjustment Act of 1992, Pub. L. No. 102-575, § 3710(d), 106 Stat. 4600 (same for groundwater).

32. President Reagan introduced the "government-to-government" language in 1983, and that approach has been endorsed by every subsequent administration. *See* Statement on Indian Policy, 1 Pub. Papers 96 (Jan. 24, 1983); Press Release, Office of the Press Sec'y, Remarks by the President at the White House Tribal Nations Conference (Dec. 16, 2010), *available at* http://www.whitehouse.gov/the-press-office/2010/12/16/remarks-president-white-house-tribal-nations-conference.

33. *See* Shupe, *supra* note 21, at 587 (noting that the Flathead Reservation water code was disapproved under the moratorium). As of 1992, the only code approved after the 1975 moratorium was the Fort Peck Tribal Water Code, authorized under a 1985 water rights compact between the Fort Peck tribes and the State of Montana. *See* Clayton, *supra* note 20, at 563; PETER W. SLY, RESERVED WATER RIGHTS SETTLEMENT MANUAL 155 (1988).

thority.[34] Inventories and monitoring activities are necessary steps in the development of comprehensive water codes, but they are also half-measures, inadequate by themselves to regulate water use within reservation boundaries. And water settlement acts, although designed to meet the needs of the particular parties,[35] take years to negotiate and are generally available only to tribes whose water rights have not been adjudicated. Tribal water codes, and thus the ability of tribes to regulate waters within their jurisdictions, should not be dependent on that process.

The current state of the law on tribal water codes thus frustrates many tribes' ability to enact a valid comprehensive code. Without a valid code, the tribes' ability to manage water resources, much less to engage in conjunctive management, is also obstructed. Simply lifting the Interior Department moratorium on approval of tribal water codes would place all tribes on the same footing.[36] Tribes with IRA-era constitutions, like their counterparts without the secretarial-approval restriction, could move forward toward conjunctive management of reservation water resources.

III. THE ISSUE OF A *WINTERS* RIGHT TO GROUNDWATER

Conjunctive management, by definition, involves the integration of surface water and groundwater management. Nearly thirty years ago, the dean of western water law, Frank Trelease, proposed that the "next step beyond" integrating groundwater and surface water priority dates into a single schedule "is the recognition that a right to the water in one of the interconnected sources may give a right in the other source as well."[37] This level of conjunctive management would permit an appropriator to have "alternative points of diversion and use whichever is more convenient, cheaper, or in priority."[38]

For Indian tribes seeking this level of conjunctive management of reserved water rights, one of the major hurdles is the question of tribal rights to groundwater resources. Over the past twenty years or more, as courts have ruled on the issue, no uniform approach to tribal groundwa-

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34. *See* Clayton, *supra* note 20, at 562 n.290 (Rosebud Sioux Tribe had not, by 1992, attempted to enforce an unapproved water code enacted in 1977); *see also* Holly v. Yakima Indian Nation, 655 F. Supp. 557, 559 (E.D. Wash. 1985), *aff'd without opinion*, Holly v. Totus, 812 F.2d 714 (9th Cir. 1985) (because Yakama Nation established no facts showing nonmember use of excess waters on reservation adversely impacted tribal sovereign interests, tribe was "proceeding without authority" in applying its water code to such users and would be enjoined).

35. *See generally* Robert T. Anderson, Indian Water Rights, Practical Reasoning, and Negotiated Settlements, 98 CAL. L. REV. 1133 (2010).

36. *See* Judith V. Royster, *Indian Water and the Federal Trust: Some Proposals for Federal Action*, 46 NAT. RESOURCES J. 375, 383 (2006) (noting that lifting the moratorium is "one simple thing" that Interior could do to further its trust responsibility to tribes).

37. Trelease, *supra* note 1, at 1860–61.

38. *Id.* at 1862.

ter rights has emerged. Judicial approaches range from no right to groundwater, to a conditional right to groundwater, to fully realized rights to groundwater. This wide variance in the reserved rights doctrine, in turn, impacts tribal attempts at conjunctive management of water resources.

That significant variability in groundwater rights arises in part from state adjudication of tribal water rights. Although *Winters* rights are federal-law rights,[39] tribal claims to water may be heard in state court as part of state general stream adjudications. The McCarran Amendment of 1952 authorized joinder of the federal government in lawsuits to adjudicate water rights to a stream system;[40] the statute was subsequently interpreted to mean that the federal government could be joined to litigate tribal reserved rights to water in such suits.[41] Although Indian tribes themselves may not be joined in these state proceedings without their consent, tribes must either waive their sovereign immunity and choose to intervene, or permit the federal government to litigate on their behalf with no direct tribal input into the litigation.[42]

The McCarran Amendment did not divest federal courts of jurisdiction to hear reserved rights cases, but the Supreme Court instituted an abstention doctrine in favor of state general stream proceedings.[43] As a result, most modern litigation of *Winters* rights takes place in state courts. In theory, state courts adjudicating tribal reserved rights are bound to follow federal law,[44] but in practice different states take quite different approaches to the *Winters* doctrine. One aspect of reserved rights particularly subject to this variability is the tribal right to groundwater.

Given the historical legal disconnect between surface and groundwater, it is perhaps not surprising that extending *Winters* rights to groundwater has been controversial in some states.[45] In general, *Winters* rights to water have been litigated, in both federal and state court, for surface water sources. Several lower federal courts had suggested that groundwater might, or should, be an available source to satisfy

39. Colo. River Water Cons. Dist. v. United States, 424 U.S. 800, 813 (1976).

40. 43 U.S.C. § 666. (2011).

41. Colo. River Water Cons. Dist., 424 U.S. at 806–13.

42. *See id.*

43. *Id.* at 817–20; Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 565–69 (1983).

44. Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 571 (1983) (state courts adjudicating tribal rights to water "have a solemn obligation to follow federal law."); *see also* State *ex rel.* Greely v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 712 P.2d 754, 765–66 (Mont. 1985) ("state courts are required to follow federal law with regard to [Indian reserved] water rights.").

45. *See generally* Judith V. Royster, *Indian Tribal Rights to Groundwater*, 15 KAN. J. L. & PUB. POL'Y 489 (2006).

tribal reserved rights,[46] but the question of a *Winters* right to groundwater was not squarely addressed until 1988.

In 1988, the Wyoming Supreme Court held that the Shoshone and Arapaho Tribes of the Wind River Reservation were entitled to *Winters* rights in surface waters only, with no such rights to groundwater.[47] The court admitted the "logic" of including both sources of water, but refused to be the first court to expressly hold that a right to groundwater existed.[48] In the absence of any reserved right to the groundwater beneath the Wind River Reservation, the use and allocation of all the reservation groundwater is presumptively a matter of state law.[49]

In a similar vein, the Nevada Supreme Court recently interpreted a federal water decree as excluding groundwater rights for the Pyramid Lake Paiute Tribe.[50] Under the 1944 Orr Ditch decree, the tribe holds water rights in the Truckee River, which flows into Pyramid Lake. Its subsequent attempt to reopen the decree to assert additional rights for Pyramid Lake and the lake fishery was denied on grounds of res judicata.[51] "Therefore," the state court held, "the Tribe cannot assert a federally implied water right to the [reservation] groundwater."[52] The Nevada court's opinion, however, is based on its apparent understanding that the tribe was asserting a right to use reservation groundwater in addi-

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46. *See* United States v. Anderson, 736 F.2d 1358, 1366 (9th Cir. 1984) (states' interest in regulating excess waters "depends, in large part, on the extent to which waterways *or acquifers* [sic]" cross reservation boundaries) (emphasis added); Gila River Pima-Maricopa Indian Cmty. v. United States, 695 F.2d 559, 561 (Fed. Cir. 1982) ("Gila River water and groundwater constituted the intended sources for irrigation of the Gila River Reservation."); Tweedy v. Texas Co., 286 F. Supp. 383, 385 (D. Mont. 1968) ("the same implications which led the Supreme Court to hold that surface waters had been reserved would apply to underground waters as well."); *see also* New Mexico *ex rel.* Reynolds v. Aamodt, 618 F. Supp. 993, 1010 (D.N.M. 1985) (holding that Pueblo water rights include groundwater that is "physically interrelated to" surface water sources).

47. *In re* Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys., 753 P.2d 76, 100 (Wyo. 1988) (Big Horn I), *aff'd by an equally divided Court*, Wyoming v. United States, 492 U.S. 406 (1989). Nonetheless, the court noted that because the state of Wyoming had not appealed the decision below, the tribes could continue current withdrawals of well water to satisfy livestock and domestic needs. *Id.*

48. *Id.* at 99 ("The logic which supports a reservation of surface water to fulfill the purpose of the reservation also supports reservation of groundwater . . . nonetheless, not a single case applying the reserved water doctrine to groundwater is cited to us.").

49. *Id.* at 100 ("Because we hold that the reserved water doctrine does not extend to groundwater, we need not address the separate claim that the district court erred in determining that the State owns the groundwater.").

50. Pyramid Lake Paiute Tribe of Indians v. Ricci, 245 P.3d 1145 (Nev. 2010).

51. Nevada v. United States, 463 U.S. 110, 145 (1983).

52. *Ricci*, 245 P.3d at 1147. The tribe was using 3520 acre-feet per annum of groundwater within the reservation for irrigation, stock watering, household use, municipal use, and the tribal fish hatchery. *Id.* at 1148–49. The Dodge Flat Basin, at issue in the case, is number 82 on the State's map of Designated Water Basins of Nevada; basin number 82 includes an area surrounding the Truckee River as it turns north into Pyramid Lake, and apparently areas around the lake as well. *See* NEVADA DEP'T. OF CONSERVATION & NATURAL RES., DESIGNATED GROUNDWATER BASINS OF NEVADA (2000), *available at* http://water.nv.gov/home/designated_basinmap.pdf. Much of that land is encompassed within the Pyramid Lake Reservation. *Id.*

tion to its decreed right, and not as a part of its decreed water right. The effect, however, is the same as that of the Wyoming court: the state will allocate all the groundwater beneath reservation lands because no tribal rights in that groundwater are recognized.

With the exception of the Nevada decision interpreting a federal water decree, the Wyoming no-rights approach to groundwater has not been adopted elsewhere. Subsequent to the Wyoming decision, other state and federal courts have recognized tribal reserved rights to groundwater, although no uniform approach has emerged.

Arizona was the first to expressly reject Wyoming's cramped reading of the *Winters* doctrine,[53] ruling instead that the federal reserved rights doctrine protected both surface and groundwater.[54] Nonetheless, the Arizona Supreme Court refused to take its holding to the logical conclusion. Rather than find the same right to groundwater as to surface water sources, the court instead found a conditional right: "A reserved right to groundwater may only be found where other waters are inadequate to accomplish the purpose of a reservation."[55] The court made no attempt to define when or how surface waters would be considered "inadequate," but it did note the possibility that not all reservations would end up with groundwater rights.[56] The court's conditional-rights approach introduces unacceptable uncertainty into tribal water rights and seems to be a throwback to the long-discredited idea that surface waters and groundwater are not interrelated.[57] Any tribal water planning or management, much less conjunctive management, is essentially impossible if the tribe may potentially have rights to all, some, or none of the groundwater beneath its territory, dependent on the "adequacy" of the surface water supply.

Two courts have, however, found an unconditional right to groundwater implicit in the *Winters* doctrine of reserved rights. The Montana Supreme Court held that there was "no reason to limit" tribal rights to

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53. *In re* the General Adjudication of All Rights to Use Water in the Gila River System and Source, 989 P.2d 739, 745 (Ariz. 1999) ("We can appreciate the hesitation of the [Wyoming] court to break new ground, but we do not find its reasoning persuasive.").

54. *Id.* at 747 ("The significant question for the purpose of the reserved rights doctrine is not whether the water runs above or below the ground but whether it is necessary to accomplish the purpose of the reservation.").

55. *Id.* at 748.

56. *Id.* ("We do not, however, decide that any particular federal reservation, Indian or otherwise, has a reserved right to groundwater.").

57. The problems with the Arizona approach are considered in detail in Royster, *supra* note 45, at 493–94. Arizona is the only trans-mountain western state that uses different systems for the allocation of surface water and groundwater. *See id.* Even though the Arizona Supreme Court noted the hydrological surface water/groundwater connection, *Gila River*, 989 P.2d at 743, it also recognized that excessive groundwater use under state law had lowered some groundwater tables so far that the interconnection to surface waters was severed, and that some Indian reservations were "dewatered" by groundwater pumping allowed under state law. *Id.* at 748.

surface waters only, noting that groundwater quantification "is simply another component" of the determination of tribal water rights.[58] Similarly, a federal district court in Washington ruled that reservation groundwater, whether or not hydrologically connected to surface water, was subject to tribal reserved rights.[59] The federal decision, however, was subsequently vacated after the parties reached a settlement.

Water settlement acts, responding to the needs of the particular parties, have not been any more consistent than the court decisions.[60] Of those settlement acts that have recognized a tribal right to groundwater, several specify the quantity of groundwater[61] or place a maximum limit on groundwater pumping;[62] one settlement, by contrast, quantifies the state right and provides that the tribe allocates all other groundwater.[63] Other settlements place limitations on the groundwater right, such as restricting the purposes for which groundwater may be used,[64] or specify that groundwater withdrawals may not adversely impact surface water sources.[65] Still other settlements take an approach more con-

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58. Confederated Salish & Kootenai Tribes of the Flathead Reservation v. Stults, 59 P.3d 1093, 1099 (Mont. 2002).

59. United States v. Wash. Dep't of Ecology, 375 F. Supp. 2d 1050, 1058, 1068–70 (W.D. Wash. 2005), *order vacated by* United States *ex rel.* Lummi Indian Nation v. Wash. Dep't of Ecology, 2007 WL 4190400 (W.D. Wash. Nov. 20, 2007), *aff'd*, U.S. *ex rel.* Lummi v. Dawson, 328 Fed. App'x. 462 (2009). In the vacated order, the district court had held that "reserved *Winters* rights on the Lummi Reservation extend to groundwater." 375 F. Supp. 2d at 1058.

60. Groundwater is generally treated as more central to tribal water needs in southern states than in northern ones. *See* BONNIE G. COLBY, JOHN E. THORSON & SARAH BRITTON, NEGOTIATING TRIBAL WATER RIGHTS: FULFILLING PROMISES IN THE ARID WEST 80 (2005) (noting that northern settlements tend to treat groundwater "as a bonus, a secondary source for reservation needs," while groundwater "is usually a component" of southern settlement acts).

61. *See, e.g.*, Water Right Claims-Ak-Chin Indian Community Act of 1978, Pub. L. No. 95-328, § 2(b), 92 Stat. 409; Shivwits Band of the Paiute Indian Tribe of Utah Water Rights Settlement Act of 2000, Pub. L. No. 106-263, § 7(a)(3), 114 Stat. 737; Zuni Indian Tribe Water Rights Settlement Act of 2003, Pub. L. No. 108-34, § 8(e), 117 Stat. 782; JON C. HARE, INDIAN WATER RIGHTS: AN ANALYSIS OF CURRENT AND PENDING INDIAN WATER RIGHTS SETTLEMENTS pt. IV § 8 (1996) (discussing the Salt River Pima-Maricopa agreement, ratified by Salt River Pima-Maricopa Indian Community Water Rights Settlement Act of 1988, Pub. L. No. 100-512, 102 Stat. 2549).

62. *See, e.g.*, Southern Arizona Water Rights Settlement Act of 1982, Pub. L. No. 97 293, §§ 303(c) & 306(a), 96 Stat. 1261 (Papago Tribe, now the Tohono O'odham Nation); Southern Arizona Water Rights Settlement Act of 2004, Pub. L. No. 108-451, § 307(a)(1), 118 Stat. 3478 (Tohono O'odham Nation).

63. United States *ex rel.* Lummi Indian Nation v. Wash. Dep't of Ecology, 2007 WL 4190400, at *1 (W.D. Wash. Nov. 20, 2007), *aff'd*, U.S. *ex rel.* Lummi v. Dawson, 328 Fed. App'x. 462 (2009) (allocating a specific amount of groundwater for allocation by the state; any other groundwater withdrawal must be authorized by the Lummi Nation).

64. *See* SLY, *supra* note 33, at 29 (Colorado Ute settlement accords groundwater right for domestic and livestock purposes).

65. *See* HARE, *supra* note 61, at pt. IV § 6 (Jicarilla Apache Tribe settlement contract includes right to withdraw groundwater if usage does not deplete San Juan River system; ratified by Jicarilla Apache Tribe Water Rights Settlement Act of 1992, Pub. L. No. 102-441, 106 Stat. 2237).

sistent with Arizona's conditional right to groundwater. For example, the Fort Hall agreement restricts tribal groundwater use to supplemental water in times of need.[66]

A number of settlement acts, however, are more consistent with the approach of the Montana state and Washington federal courts. These acts, found primarily in the north,[67] provide that the tribal water rights may be satisfied from either surface water or hydrologically-connected groundwater. For example, the Northern Cheyenne settlement recognizes a tribal property right in unconnected groundwater and a tribal right to withdraw connected groundwater, with withdrawals from larger wells deducted from the tribe's total entitlement to water.[68] The Warm Springs settlement provides that the tribal water right, quantified from surface water, "may be exercised in whole or in part from ground water within the Reservation."[69] Similarly, the Snake River settlement quantifies the tribal water right from surface water, but provides that the "source" of the water right generally extends to the surface waters and the "groundwater sources hydrologically connected thereto."[70]

In the absence of a clearly- recognized tribal right to groundwater as well as surface water, Indian tribes are unable to engage in full conjunctive management. In a given situation groundwater may be more readily available, more convenient, less expensive to access, of higher quality, and so forth. Yet tribes with surface water rights only, and perhaps even those with conditional rights, may not use the groundwater beneath their own lands. Instead, the rights to use that groundwater must be granted by the state government under principles of state water law. If states allocate reservation groundwater without proper consideration of tribal rights, the potential for interference with tribal water rights is alarming.

IV. THE ISSUE OF STATES TAKING ACCOUNT OF TRIBAL

66. *See id.* at pt. IV § 4 (Fort Hall agreement recognizes tribal right to groundwater for augmentation in times of shortage; agreement ratified by Fort Hall Indian Water Rights Act of 1990, Pub. L. No. 101-602, 104 Stat. 3059).

67. *But see also* Seminole Indian Land Claims Settlement Act of 1987, Pub. L. No. 100 228, 101 Stat. 1556 (providing for a tribal preference in the use and withdrawal of groundwater resources underlying tribal lands).

68. *See* HARE, *supra* note 61, at pt. IV § 7 (analyzing Northern Cheyenne compact; compact was ratified by Northern Cheyenne Indian Reserved Water Rights Settlement Act of 1992, Pub. L. No. 102-374, 106 Stat. 1186).

69. Confederated Tribes of the Warm Springs Reservation Water Rights Settlement Agreement, art. IV, § B.3–4 (quantifying rights); art. V, § A.2 (providing for groundwater use) (Nov. 17, 1997).

70. *See In re* SRBA, Case No. 39576, Consent Decree § 3 & Attachment 4 (Idaho Dist. Ct. 5th Jud. Dist.), *available at* http://www.srba.state.id.us/nezperce.htm, *agreement ratified by* Snake River Water Rights Act of 2004, Pub. L. No. 108-447, 118 Stat. 2809.

RIGHTS IN MAKING ALLOCATION DECISIONS

As discussed above, Indian tribes have exclusive rights to the use and allocation of reserved water rights within reservation borders as a matter of federal law. States, in general, have rights to the use and allocation of on-reservation waters in excess of tribal rights. If conjunctive management is to have any meaning within Indian reservations, states must take account of tribal water rights in their management decisions for excess waters both on and near reservations. Without that consideration, state-authorized uses may severely impact tribal water rights. In extreme cases, state uses may entirely dewater an aquifer beneath reservation lands.[71]

Prior appropriation states, which include virtually all western states for surface waters and all but a handful for groundwater, assign priority dates to water rights based on when the water is put to a beneficial use.[72] One of the crucial tools in state conjunctive management of state-created water rights is the integration of these priorities between surface and groundwater into a single schedule of rights.[73] Few states, however, appear to maintain a single priority schedule.[74] Though only five of the western states treat surface water and groundwater as unrelated systems, the remaining western states take a wide variety of approaches to more integrated management.[75] About half manage their water resources separately, but review permits for one type of water withdrawal for its impact on the other type; the other half take a more unified approach to the management of ground and surface water.[76] It thus appears that despite a lack of true conjunctive management, many western states do at least take impacts on existing state uses of both types of water into account when granting water rights.

Tribal reserved rights to water are almost always prior and paramount to state rights. Priorities for tribal water rights are determined by different principles than beneficial use. Some tribal reserved rights,

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71. *In re* the General Adjudication of All Rights to Use Water in the Gila River System and Source, 989 P.2d 739, 748 (Ariz. 1999) (noting that "Some Indian reservations have been entirely 'dewatered' by off-reservation pumping.").

72. *See* Colo. River Water Cons. Dist. v. United States, 424 U.S. 800, 805 (1976).

73. Trelease, *supra* note 1, at 1860 ("[I]f we are to correlate the rights in interconnected waters, the essential starting point is to put all rights to both types of water within the same framework; the rights in one source must be relative to the rights in the other. There must be a single schedule of priorities."); Douglas L. Grant, *The Complexities of Managing Hydrologically Connected Surface Water and Groundwater Under the Appropriation Doctrine*, 22 LAND & WATER L. REV. 63, 66 (1987) (Arguing that "integration of priorities will almost inevitably be at the heart of efforts to coordinate management.").

74. One that does is Wyoming. *See* WYO. STAT. ANN. § 41-3-916 (West 2011) ("[W]here underground waters and the waters of surface streams are so interconnected as to constitute in fact one source of supply, priorities of rights to the use of all such interconnected waters shall be correlated and such single schedule of priorities shall relate to the whole common water supply.").

75. Tellman, *supra* note 13, B, at 14–16.

76. *Id.*

such as water to support aboriginal fishing practices, date from time immemorial.[77] Most water rights, however, date from the creation of the land reservation to which they are appurtenant.[78] Because most reservations were set aside in the mid- to late-nineteenth century, and because nothing is earlier than time immemorial, most tribal rights are thus prior in time to state rights to water. Tribal reserved rights are also, as federal-law rights, paramount over subsequent state-law rights.[79] As prior and paramount rights, tribal reserved water rights are due protection from state interference.

By operation of federal law, then, state water allocation decisions cannot interfere with prior tribal water rights. Whether or not a state integrates priorities between surface water users and groundwater users under state law, it is obligated to integrate its water priorities with those for tribal reserved rights.

The integration of priorities between state surface appropriation rights and tribal reserved rights has been a feature of western water law since the *Winters* case in 1908.[80] At the heart of that decision was the injunction against upstream non-Indian irrigators taking water in amounts that would interfere with the tribal reserved rights.[81] It has thus been understood for over a century, at least in theory, that junior state-law appropriators may not interfere with the senior reserved rights of the Indian tribes.

In a rare judicial recognition of the hydrologic cycle, the United States Supreme Court held in 1976 that state-permitted groundwater pumping could similarly be enjoined to protect federally-reserved water rights.[82] In *Cappaert v. United States*, the Court recognized expressly that the state user's groundwater pumping was directly lowering the water level in an adjacent national monument, a water level that was necessary to protect a unique species of fish.[83] Noting that because the reservation of water rights is based on the necessity of water to fulfill the purposes of the land reservation,[84] the Court held "that the United States can protect its water from subsequent diversion, whether the diversion is of surface or groundwater."[85]

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77. *See, e.g.*, United States v. Adair, 723 F.2d 1394, 1414 (9th Cir. 1983).

78. *See, e.g.*, Arizona v. California, 373 U.S. 546, 600 (1963).

79. *See, e.g.*, Cappaert v. United States, 426 U.S. 128, 138 (1976).

80. Winters v. United States, 207 U.S. 564 (1908).

81. *Id.* at 565.

82. *Cappaert*, 426 U.S. at 128. Even though the federally-reserved water at issue in Cappaert was an underground pool, the Court carefully avoided the issue of a reserved right to groundwater by calling the underground pool surface water. *Id.* at 142.

83. *Id.* at 128.

84. This is as true for Indian reservations as it is for other types of federally set-aside land like national monuments and national forests. *See, e.g.*, *Winters*, 207 U.S. at 576.

85. *Cappaert*, 426 U.S. at 143.

Although *Cappaert* concerned water reserved for a national monument, courts have recently expressly extended its reasoning to tribal water rights cases. In 2007, the Arizona Supreme Court rejected the Pascua Yaqui Tribe's challenges to a water settlement for the Tohono O'odham Nation, including a challenge to a groundwater protection plan that set state-administered standards for when wells could be drilled near Pascua Yaqui lands.[86] The court noted that the tribe could be granted "appropriate relief" if new wells "would harm the Tribe's federal reserved groundwater rights,"[87] thus offering the tribal water rights protection from state-authorized uses.

In 2010, the Ninth Circuit expressly held that a tribe's water rights decree protects it against diminution of water from state groundwater permits.[88] The 1944 federal Orr Ditch decree awarded the Pyramid Lake Paiute Tribe in Nevada a reserved right to water in the Truckee River.[89] In 2007, the State Engineer granted groundwater permits that the tribe contended would adversely affect its rights in the river, and the federal court took jurisdiction under its equitable power to enforce the Orr Ditch decree.[90] The State Engineer argued that the tribe had a decreed right to surface water only and that state groundwater allocations could not, therefore, violate the decree.[91] The court, however, adopted the *Cappaert* approach.[92] Acknowledging that the decree did not expressly address diminution by state groundwater allocations, the court nonetheless held that, by reserving a water right to the tribe, the decree protected that amount of water for tribal use.[93] The purpose of the decree, the court ruled, could not be defeated by allocation of either surface water or groundwater to others.[94]

As an important adjunct of federal reserved rights then, states have an obligation to take account of tribal reserved rights when assign-

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86. *In re* General Adjudication of All Rights to Use Water in the Gila River System and Source, 173 P.3d 440, 442, 444 (Ariz. 2007).

87. *Id.* at 444.

88. *Compare* United States v. Orr Water Ditch Co., 600 F.3d 1152, 1159 (9th Cir. 2010), *with* Pyramid Lake Paiute Tribe of Indians v. Ricci, 245 P.3d 1145, 1149 (Nev. 2010) (affirming issuance of state groundwater permits that tribe agreed would not interfere with tribe's decreed rights, against challenge that permits would interfere with tribe's use of groundwater). The permits in the federal case were issued in a different sub-basin than those in the state case.

89. *See* Nevada v. United States, 463 U.S. 110, 115–18 (1983) (tracing the history of the litigation). The reserved rights in the Truckee River were inadequate to protect Pyramid Lake and its fisheries, located entirely within the reservation. The Tribe was successful in its attempt to obtain excess river water for the reservation, but unsuccessful in its attempt to reopen the Orr Ditch decree to obtain a decreed water right specifically for the lake and its fisheries. Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252, 260 (D.D.C. 1973); Nevada v. United States, 463 U.S. at 145.

90. *Orr Water Ditch*, 600 F.3d at 1159–61.

91. *Id.* at 1156.

92. *Id.* at 1158.

93. *Id.* at 1158–59.

94. *Id.* at 1159.

ing water rights under state law. Recent cases extend that obligation, long recognized for surface appropriations, to groundwater as well. Protections against interference may also be built into settlement acts. For example, the compact between the Fort Peck Tribes and the State of Montana provides that neither party will authorize groundwater uses that interfere with protected groundwater uses authorized by the other.[95]

This type of conjunctive management is obviously easier if the tribal reserved right to water has been quantified, whether by adjudication or settlement. Once tribal rights are quantified, what remains is available for state allocation. In its administration of those excess waters, the state is charged with protecting tribal rights.[96]

Despite all the adjudications and settlement acts, most tribes are still operating without quantified reserved rights. But even in the absence of quantification, states need to allocate water uses with tribal interests in mind. In particular, if state allocation law requires an applicant to show that water is available for use, the applicant must make a showing that excess water, over and above tribal rights, is available. For example, the Montana Supreme Court has held repeatedly that water use applicants simply cannot make the required showing of "legally available" water within reservations unless tribal reserved rights are quantified.[97] Moreover, the Montana high court has specified, in line

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95. Fort Peck-Montana Compact, art. V § D (May 15, 1985), *available at* http://dnrc.mt.gov/rwrcc/reservations/ftpeck.asp. The Compact is not ratified by a federal settlement act.

96. *In re* Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys., 835 P.2d 273, 282 (Wyo. 1992); *see also* United States v. Anderson, 736 F.2d 1358, 1366 (9th Cir. 1984) (noting that state on-reservation permits for excess waters would not interfere with tribal sovereign interests "*because those rights have been quantified and will be protected* by the federal water master.") (emphasis added).

97. Confederated Salish & Kootenai Tribes of the Flathead Reservation v. Stults, 59 P.3d 1093, 1099 (Mont. 2002); Confederated Salish & Kootenai Tribes of the Flathead Reservation v. Clinch, 992 P.2d 244, 250 (Mont. 1999). *See also* Confederated Salish & Kootenai Tribes of the Flathead Reservation v. Simonich, 29 F.3d 1398 (9th Cir. 1994*); In re* Beneficial Water Use Permit Nos. 66459-76L, Ciotti, 923 P.2d 1073, 1079–80 (Mont. 1996). Moreover, the tribes are not required to defend their unquantified water rights by participating in state administrative hearings on proposed state permits. *Stults*, 59 P.3d at 1099–100. The court subsequently distinguished new-use permits from permits for change of use, which do not necessarily violate the state available-water standard. Confederated Salish & Kootenai Tribes v. Clinch, 158 P.3d 377, 388 (Mont. 2007). It held that the state's authority to consider on-reservation change of use applications for excess waters was not preempted, but depended upon the impacts of the proceedings on the tribe's sovereign interests. *Id.* at 386–87. The burden would be on the appropriator to prove that the proposed change would not adversely affect other water rights, including the tribe's unquantified reserved rights. *Id.* at 388.

The only excess waters presently affected by the court's rulings are on the Flathead Reservation. The state has concluded water rights compacts with the remaining tribes in Montana (Blackfeet, Crow, Fort Belknap, Fort Peck, Northern Cheyenne, and Rocky Boys), and is currently in compact negotiations with the Flathead tribes as well. Montana Re-

with conjunctive management, that its moratorium applies to applicants for both surface water and groundwater permits.[98]

The Montana approach provides a template for other states. Because tribal reserved rights are paramount under federal law, and virtually always prior to state-granted water rights to either surface waters or groundwater, states are under a duty to protect those reserved rights from interference by either state surface water use or groundwater pumping. Recognizing the hydrologic interconnection between surface and groundwater, states should take two actions. First, they should require a showing that water is available before granting any new use of surface or groundwater on or near reservations. As part of the determination of availability, the state must be satisfied that the new use will not interfere with tribal reserved rights. Second, existing uses and changes to existing uses should be monitored to guard against interference with reserved rights. Even if a state does not have an integrated set of priorities for state surface and groundwater uses, tribal reserved rights should be protected against junior uses of both sources if the junior uses adversely impact the tribal rights.

V. CONCLUSION

Conjunctive management of water resources is, in essence, the law catching up to the science. Recognizing the hydrologic connections between groundwater and surface waters, integrating the laws of the various water sources, setting a single system of priorities of use, and perhaps even recognizing a right to use whichever source is best at a given time are all steps in the process of implementing comprehensive conjunctive management.

On Indian reservations, conjunctive management issues are complicated by the fact that two governments, two regulatory schemes, and at least two water allocation systems must be coordinated. Indian tribes wishing to engage in conjunctive management face legal obstacles that states do not. Among these are constraints on the development of tribal water codes, variability of tribal rights to groundwater, and uncertainty about the extent to which state allocation decisions are made with tribal prior rights in mind. The solutions are achievable. Lift the moratorium on federal approval of tribal water codes. Recognize a universal *Winters* right to groundwater as well as surface water. Finally, take account of tribal prior rights when allocating state rights to use both surface and groundwater. Removing obstacles to the tribes' ability to engage fully in conjunctive management benefits not only the tribes, but also the shrinking water resources of the West and all those who depend upon them.

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served Water Rights Compact Comm'n, http://www.dnrc.mt.gov/rwrcc/default.asp (last visited Mar. 1, 2011).

98. *Stults*, 59 P.3d at 1099.