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Indian Reserved Water Rights in the Dual-System State of Oklahoma

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I. INTRODUCTION

The water wars that raged in the west have finally crossed Oklahoma's borders. As successor to the Indian Territory,[1] Oklahoma holds more Native

1. *See* Judith V. Royster, *A Primer on Indian Water Rights: More Questions Than Answers*, 30 TULSA L.J. 61, 62 (1994) [hereinafter *Primer*]. *See also* FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 770-75 (Rennard Strickland et al. eds., 1982) [hereinafter COHEN'S HANDBOOK] (giving a history of the Indian Territory). The "term 'Indian Territory' had been used in connection with several of the 1830's proposals to establish an organized territory governed by a tribal confederation. Although no territorial Indian government was ever established, the name 'Indian Territory' gradually came into common use as the collective term

Americans than any other state in the union,[2] thirty-six federally recognized Indian nations,[3] and all three types of Indian Country.[4] Despite these impressive statistics, the state has yet to acknowledge Indian water rights, and tribes generally have not pressed them.[5] Tribal silence ended in October 1997, when the Choctaw Nation claimed 85% of the state's water rights and approximately 90% of the state's surplus water.[6] The Nation claimed the state's water pursuant to the reserved rights doctrine.[7]

The reserved rights doctrine was established in 1908 by *Winters v. United States*.[8] According to the doctrine, when the federal government reserves land, it impliedly reserves or recognizes the right to sufficient water to fulfill the purposes of the reservation.[9] Those water rights are property rights based on federal law, which neither stem from nor depend on state substantive law.[10] Regulatory authority over tribal property in Indian country exists exclusive of the states,[11] and Indian water rights are generally paramount to rights perfected

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for the lands of the Five Civilized Tribes and others settled among them." *See id.* at 772.

2. *See* BUREAU OF THE CENSUS, STATE AND METROPOLITAN AREA DATA BOOK 1991 (4th ed. 1991).

3. *See* ARVO Q. MIKKANEN, OKLAHOMA INDIAN BAR ASSOCIATION DIRECTORY OF INDIAN NATIONS AND TRIBAL COURTS IN OKLAHOMA 1-3 (1990); *see also* JOHN W. MORRIS ET AL., HISTORICAL ATLAS OF OKLAHOMA 34 (Norman: University of Oklahoma Press, 3d ed. 1986); *see generally* RENNARD STRICKLAND, THE INDIANS IN OKLAHOMA (Norman: University of Oklahoma Press, 1980).

4. Even though the criminal code defines Indian country, the definition applies to questions of civil jurisdiction as well. *See* DeCoteau v. District County Court, 420 U.S. 425, 427 n.2 (1975); *see also* Pittsburg & Midway Coal Mining Co. v. Watchman, 52 F.3d 1531, 1540-41 (10th Cir. 1995). According to statute, Indian Country is:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities . . . and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (1994). Oklahoma holds all three kinds of Indian Country. *See* Mustang Production Co. v. Harrison, 94 F.3d 1382 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 1288 (1997) (determining trust and restricted allotments are Indian country); Housing Authority v. Harjo, 790 P.2d 1098 (Okla. 1990) (acknowledging dependent Indian communities); Oklahoma Tax Comm'n v. Sac and Fox Nation, 508 U.S. 114 (1993) (holding § 1151(a) encompasses all lands set aside for Indian tribes, not merely formal reservations).

5. In *United States v. Grand River Dam Authority*, 363 U.S. 229 (1960), the Supreme Court held that water rights to non-navigable streams in Cherokee territory did not pass to Oklahoma upon being granted statehood. *Id.* at 234-35. No tribe in Oklahoma has sued for its reserved rights and, as in most states, Oklahoma officials are reluctant to acknowledge them. *See* Robert S. Pelcyger, *Indian Water Rights: Some Emerging Frontiers*, 21 ROCKY MTN. MIN. L. INST. 743, 744-58 (1976); Joseph R. Membrino, *Indian Reserved Water Rights, Federalism and the Trust Responsibility*, 27 LAND & WATER L. REV. 1, 6-7 & n.23 (noting the state of Wyoming's denial of the existence of reserved rights in the Wind River Indian Reservation).

6. *See* Mary DeSena, *Tribes Claim Rights to Nearly All Oklahoma Water*, U.S. WATER NEWS, Oct. 1997, at 1.

7. *See id.*

8. 207 U.S. 564 (1908).

9. *See* Winters v. United States, 207 U.S. 564, 577 (1908); Arizona v. California, 373 U.S. 546, 600 (1963), *decree entered*, 376 U.S. 340 (1964); Cappaert v. United States, 426 U.S. 128, 128-29 (1976). The language of *Winters* is unclear as to whether the reservation was made by the tribes of the Fort Belknap Reservation or the United States. In either event, the sufficient water was reserved to fulfill the purposes of the reservation. *See infra* note 100.

10. *See Winters*, 207 U.S. at 577; Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976); *Cappaert*, 426 U.S. at 145; United States v. Adair, 723 F.2d 1394, 1410-11 & n.19 (9th Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984); Collville Confederated Tribes v. Walton, 752 F.2d 397, 400 (9th Cir. 1985), *cert. denied*, 475 U.S. 1010 (1986).

11. *See Primer*, *supra* note 1, at 92 (noting Congress may regulate tribal property or delegate authority for the states to do so); *see also* Brendale v. Yakima Indian Nation, 492 U.S. 408, 445 (1989) (Stevens, J.) and 460 (Blackmum, J., concurring) (determining tribes have exclusive power to zone trust lands); Montana v. United States, 450 U.S. 544, 557 (1981) (determining tribes have exclusive power to regulate hunting and

under state systems.[12] Nevertheless, the rivers and streams do not recognize political boundaries, so the state and tribal systems must mesh if either is to enjoy the benefits of the region's natural resources.

Fifty years after *Winters*, the Supreme Court confirmed the vitality of the reserved rights doctrine[13] and extended its application beyond Indian reservations in *Arizona v. California*.[14] Since that time, the doctrine has become so well established[15] that western states have become increasingly likely to acknowledge the existence of reserved water rights, repeatedly entering into Indian water rights settlements.[16] Courts spend little time discussing the basis of the doctrine;[17] litigation relates primarily to quantity and use of water rather than whether water rights exist.[18] Nevertheless, no court has ever adjudicated a tribal claim to *Winters* rights in a purely riparian jurisdiction.[19] While the Su-

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fishing on trust lands); *see generally* COHEN'S HANDBOOK, *supra* note 1, Ch. 3.

12. *See* COHEN'S HANDBOOK, *supra* note 1, at 578; William H. Veeder, *Indian Prior and Paramount Rights Versus State Rights*, 51 N.D. L. REV. 107 (1974); William H. Veeder, *Indian Prior and Paramount Rights to the Use of Water*, 16 ROCKY MT. MIN. L. INST. 631 (1971); Paul L. Bloom, *Indian "Paramount" Rights to Water Use*, 16 ROCKY MT. MIN. L. INST. 669 (1971).

13. For expanded discussions of the *Winters* doctrine, see generally Harold A. Ranquist, *The* Winters *Doctrine and How It Grew: Federal Reservation of Rights to the Use of Water*, 4 BYU L. REV. 640 (1975) [hereinafter Ranquist, *How it Grew*]; COHEN'S HANDBOOK, *supra* note 1, at 575-604; AMERICAN INDIAN RESOURCES INSTITUTE (AIRI), TRIBAL WATER MANAGEMENT HANDBOOK Ch. 4 (1988) [hereinafter AIRI]; *Primer*, *supra* note 1; 4 WATERS AND WATER RIGHTS § 37 (Robert E. Beck ed., 1991) [hereinafter 4 WATERS].

14. 373 U.S. 546 (1963).

15. *See* COHEN'S HANDBOOK, *supra* note 1, at 575.

16. *See, e.g.*, Water Right Claims—Ak-Chin Indian Community Act of 1978 (Ak-Chin Settlement Act), Pub. L. No. 95-328, 92 Stat. 409, *as amended*, Pub. L. No. 98-530, 98 Stat. 2698 (1984), *as amended*, Pub. L. No. 102-497, § 10, 106 Stat. 3258 (1992) (Ariz.); Colorado Ute Indian Water Rights Settlement Act of 1988 (Colorado Ute Settlement Act), Pub. L. No. 100-585, 102 Stat. 2973, *as amended*, Pub. L. No. 104-46, 109 Stat. 402 (1995); San Luis Rey Indian Water Rights Settlement Act (San Luis Rey Settlement Act), Pub. L. No. 100-675, title I, 102 Stat. 4000, *as amended*, Pub. L. No. 102-154, 105 Stat. 990 (1991) (Cal.); Fort Hall Indian Water Rights Settlement Act of 1990 (Fort Hall Settlement Act), Pub. L. No. 101-602, 104 Stat. 3059 (Idaho); Fallon Paiute Shoshone Indian Tribes Water Rights Settlement Act of 1990 (Fallon Settlement Act), Pub. L. No. 101-618, title I, 104 Stat. 3289 (Nev.); Northern Cheyenne Indian Reserved Water Rights Settlement Act of 1992 (Northern Cheyenne Settlement Act), Pub. L. No. 102-374, 106 Stat. 1186, *as amended*, Pub. L. No. 103-263, §§ 1-1(a), 108 Stat. 707 (1993) (Mont.); Jicarilla Apache Tribe Water Rights Settlement Act (Jicarilla Settlement Act), Pub. L. No. 102-441, 106 Stat. 2237 (N.M.); Ute Indian Water Rights Settlement Act of 1992 (Ute Settlement Act), Pub. L. No. 102-575, title V, 106 Stat. 4600, 4650 (Utah). Florida, a riparian state, settled with the Seminole Tribe of Florida. *See infra* note 19. *See also* INDIAN WATER RIGHTS: AN ANALYSIS OF CURRENT AND PENDING INDIAN WATER RIGHTS SETTLEMENTS (1996) (discussing settlements); INDIAN WATER IN THE NEW WEST (Thomas R. McGuire, et al., eds., 1993); LLOYD BURTON, AMERICAN INDIAN WATER RIGHTS AND THE LIMITS OF THE LAW (1991); JOHN A. FOLK-WILLIAMS, WHAT INDIAN WATER MEANS TO THE WEST (1982).

17. *See, e.g.*, Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 805 (1976).

18. *See* Jessica Bacal, *The Shadow of Lone Wolf: Native Americans Confront Risks of Quantification of Their Reserved Water Rights*, 12 U. BRIDGEPORT L. REV. 1, 5-6 (1991).

19. *See* PETER W. SLY, RESERVED WATER RIGHTS SETTLEMENT MANUAL 192-93 (1988); *Primer*, *supra* note 1, at 101. The Seminole Tribe of Florida addressed the issue, but settled its case through the Florida Indian (Seminole) Land Claims Settlement Act of 1987, 25 U.S.C. §§ 1772-1772g (among other things, made the Seminole Water Rights Compact federal law), *reprinted in Seminole Indian Land Claims Settlement Act of 1987: Hearing on S. 1684 Before the Senate Select Comm. on Indian Affairs*, 100th Cong., 1st Sess. 83-122 (1987). *See generally* Jim Shore & Jerry C. Strauss, *The Seminole Water Rights Compact and the Seminole Indian Land Claims Act of 1987*, 6 J. LAND USE & ENVTL. L. 1 (1990); Barbara S. Monahan, Note, *Florida's Seminole Indian Land Claims Agreement: Vehicle for an Innovative Water Rights Compact*, 15 AM. INDIAN L. REV. 341 (1991).

preme Court acknowledged Indian reserved rights in California,[20] a dual-system state,[21] it did so without reference to the state's dual system.[22] Therefore, some discussion of the state systems and the origins of the *Winters* doctrine is necessary.

This comment will first provide an introduction to state water law systems (Section II) and the reserved water rights doctrine (Section III), as well as propose two bases for Indian water rights in Oklahoma (Section IV). Because the implementation of reserved rights in a dual-system state has yet to be fully addressed,[23] this comment submits a proposal for the integration of the tribal and state water rights in Oklahoma (Section V).

II. STATE WATER LAW

Two basic water law systems developed in the United States, the riparian system and the appropriation system. Each evolved to distribute water according to the particular customs of the people and the climate in their respective regions. The riparian system[24] is used primarily in the eastern states where water is relatively abundant,[25] while the appropriation system[26] developed in the drier western states. Some states, particularly those along the 100th meridian, initially used both systems, although most of those now use the appropriation system exclusively.[27] Now only California, Nebraska, and Oklahoma continue to use both.[28]

A. *The Riparian Doctrine*

The United States adopted the riparian doctrine from Europe,[29] and the doctrine was first applied in *Tyler v. Wilkinson*.[30] Most riparian jurisdictions in the United States abandoned the archaic natural flow doctrine, which entitled a riparian owner to have the water in a water course flow in its natural channel without diminution or alteration,[31] in favor of the reasonable use theory. The reasonable use theory is more flexible than the natural flow doctrine, allowing

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20. *See* Arizona v. United States, 373 U.S. 546, 600 (1963); 4 WATERS, *supra* note 13, at § 37.02.
21. *See infra* Part II.C.
22. *See Arizona*, 373 U.S. at 600.
23. *See Primer*, *supra* note 1, at 102-03.
24. *See* 1 WATERS, *supra* note 13, at §§ 6-9 (discussing the riparian doctrine in general).
25. *See* COHEN'S HANDBOOK, *supra* note 1, at 577.
26. *See* 2 WATERS, *supra* note 13, at § 12.01 (giving an expanded history of the prior appropriation doctrine).
27. *See* 1 WATERS, *supra* note 13, at § 8.02.
28. *See id.*
29. *See* Samuel C. Wiel, *Waters: American Law and French Authority*, 33 HARV. L. REV. 133 (1919) (arguing that the riparian doctrine was founded in the Napoleonic Code). *Cf.* Arthur Maas & Hiller B. Zobel, *Anglo-American Water Law: Who Appropriated the Riparian Doctrine?*, 10 PUB. POL. 109 (1960) (suggesting that the doctrine evolved from English and American precedents).
30. 24 F. Cas. 472 (C.C.R.I. 1827).
31. *See Tyler*, 24 F. Cas. at 474. As the common law maxim *aqua currit et debet currere, ut currere solebat* (water runs, and ought to run, as it has used to run) suggests, the natural flow doctrine was inflexible, preventing nearly any non-domestic, consumptive uses. *See id.*

riparian owners to divert water from a stream, provided that the use to which the water is put is reasonable.[32]

By virtue of land ownership, the riparian owner has a right to use the water abutting that land.[33] Riparian rights are correlative; that is, each riparian owner's rights are subject to the rights of other riparians to make reasonable uses.[34] Riparian rights are not lost through lack of use.[35] Neither are they quantifiable,[36] because each riparian owner has a right to use as much water as is "reasonable."[37] Finally, during times of scarcity, the available water is distributed equitably,[38] regardless of the date of initiation of use.[39]

B. *The Appropriation Doctrine*

All of the western states recognize the prior appropriation system.[40] The system developed in mining camps, as settlers found that the riparian system did not function in the arid and mountainous regions.[41] Like mining claims, water claims were based on the notions of "use it or lose it," and "first in time, first in right."[42] The system works as follows: for an appropriation to be valid, the appropriator must divert the water from the water course[43] and apply it continuously to a beneficial use.[44] The quantity of appropriated water is the amount claimed at the date of the appropriation and employed for a beneficial

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32. *See* Cooper v. Hall, 5 Ohio 320, 324 (1832) (espousing, for the first time, the reasonable use doctrine); Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Bd., 855 P.2d 568, 574 (Okla. 1990). Factors determining reasonableness include: the purpose of the use; the extent, duration, necessity, and application of the use; the nature and size of the watercourse, and the several uses to which it is put; the extent of injury to the one proprietor and of the benefit to the other; and all other factors which may bear upon reasonableness. *See* Hoover v. Crane, 106 N.W.2d 563 (1960). *See also* RESTATEMENT (SECOND) OF TORTS § 850A (1991) (considering the protection for existing values of water uses, land, investments and enterprises, and the justice of requiring the user causing the harm to bear the loss). The tort nature of riparianism stems from nuisance.

33. *See Tyler*, 24 F. Cas. at 474. *See also* 1 WATERS, *supra* note 13, at § 7.02(a). The proper term for land abutting an ocean, sea or lake, rather than a river or stream, is littoral land. *See* Haynes v. Carbonell, 532 So. 2d 746 (Fla. Dist. Ct. App. 1988); BLACK'S LAW DICTIONARY 934 (6th ed. 1990). For clarity, the term riparian will be used throughout this article.

34. *See* 1 WATERS, *supra* note 13, at § 7.02(d).

35. *See id.* at § 7.04(d).

36. *See Franco-American*, 855 P.2d at 573.

37. *See supra* note 32.

38. *See* A. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES § 3.12[5] (1994).

39. *See* 1 WATERS, *supra* note 13, at § 7.03(d). The 98th meridian runs approximately through Oklahoma City, Oklahoma. *See* MORRIS, *supra* note 2, at 18.

40. *See* 2 WATERS, *supra* note 13, at § 12.01. *See also* AIRI, *supra* note 13, at 25-28; Ranquist, *supra* note 13, at 641-47. The doctrine was judicially accepted in *Irwin v. Phillips*, 5 Cal. 140 (1855), and applied by the United States Supreme Court in *Atchison v. Peterson*, 87 U.S. (20 Wall.) 507 (1874).

41. *See* Ranquist, *supra* note 13, at 642; *see generally* 1 WELLS A. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 159-75 (1971) (explaining the establishment of the appropriation doctrine in the west).

42. *See* Comstock v. Ramsay, 133 P. 1107, 1110 (Colo. 1913).

43. *See* Fruitland Irr. Co. v. Kruemling, 162 P. 161, 163 (Colo. 1917) (holding that the diversion, capture, or impoundment must be open and notorious, so as to provide notice to others).

44. "Proposed uses are judged to be beneficial primarily by an objective analysis of whether they promote economic, environmental, recreational, or aesthetic values rather than whether they will generate more or less value than existing uses." Gary D. Allison, *Franco-American Charolaise: The Never Ending Story*, 30 TULSA L.J. 1, 6-7 (1993).

use.[45] Unlike a riparian user, an appropriator need not use the water on land appurtenant to its source,[46] so anyone in need of water may appropriate.[47] Additionally, the appropriated water is generally transferable, but is subject to limitations on changes in use.[48] Finally, appropriators do not share during times of scarcity; water is allocated only to the most senior appropriators.[49] The first appropriator receives its full allocation, then the second receives its full allocation, and so on, until all the allocable water is gone.

Although Congress has the power to supersede state water law,[50] it adopted a policy of deferring to state water law in 1866. In that year, Congress expressly validated local customs and the water rights acquired through them.[51] The United States Supreme Court interpreted the Desert Land Act of 1877[52] to provide that state law determined the water rights of federal patentees to non-navigable streams, as well. Thus, waters on the public domain were severed from the land and opened to appropriation under state laws.

C. The Dual-System

Oklahoma's settlement history and climate are similar to those of other states along the 100th meridian and the West Coast.[53] The land in the eastern portions of those states is relatively humid and water is relatively plentiful, while the western portions are relatively arid. As a result, the riparian doctrine was used in the east, while the appropriation doctrine developed in the west, each accommodating the needs of users in their respective regions. The result was the dual rights system,[54] which attempted to combine the two irreconcilable doctrines.

Dual-system states face three major obstacles to implementing that system. First, the riparian right to initiate or maintain reasonable uses, regardless of time, cannot be upheld without denying the certainty offered by the appropriation doctrine's "first in time, first in right" and "use it or lose it" principles.[55] Second, the doctrines use discordant standards for determining the value of a

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45. *See* Denver v. Northern Colorado Water Conservancy Dist., 276 P.2d 992, 998 (Colo. 1954).

46. *See* Coffin v. Left Hand Ditch Co., 6 Colo. 443, 449 (1882).

47. *See generally* HUTCHINS, *supra* note 41, at 238-54.

48. *See* Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 805 (1976).

49. *See id.*

50. See FRANK J. TRELEASE, FEDERAL-STATE RELATIONS IN WATER LAW 147m (Nat'l Water Comm'n Legal Study No. 5, 1971); Frank J. Trelease, *Government Ownership and Trusteeship of Water*, 45 CAL. L. REV. 638 (1957). Federal authority stems from the Commerce, Property, Treaty, and Supremacy Clauses of the Constitution. *See* 4 WATERS, *supra* note 13, at 231.

51. *See* Act of July 26, 1866, ch. 262, § 9, 14 Stat. 251, 253 (codified at 30 U.S.C. § 51), *as amended* by Act of July 9, 1870, ch. 235, § 17, 16 Stat. 217, 218 (codified at 43 U.S.C. § 661); *see also* 2 WATERS, *supra* note 13, at § 11.03(a).

52. Ch. 107, 19 Stat. 377 (codified as amended at 43 U.S.C. §§ 321-23, 325, 327-29). Oklahoma is not a Desert Land Act State. *See id.* The Desert Land Act was interpreted to provide that state law determined the water rights to nonnavigable streams of federal patentees. *See* California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935).

53. *See* Allison, *supra* note 43, at 3; *see generally infra* Part II.D.

54. For criticisms of the dual rights doctrine, see 1 WELLS A. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 200-23 (1971).

55. *See* Allison, *supra* note 43, at 12.

particular use.[56] Riparian uses are judged by a relative reasonableness test, as compared to all riparian uses.[57] Appropriative uses are judged individually in terms of their economic, environmental, recreational, or aesthetic values.[58] Third, the appropriation doctrine allows anyone in need of water to appropriate, severing the water from its adjacent land, while the riparian doctrine permits only riparian landowners to divert water, generally only on riparian land.[59] As a result, a dual system "inevitably frustrates the chief advantages of one or both doctrines."[60] Consequently, only California, Nebraska, and Oklahoma still use the dual rights system.[61]

D. *Oklahoma*

The boundaries of the Indian Territory were formally established in 1824.[62] In April 22, 1889, unassigned lands in central Indian Territory were opened to white settlement.[63] Those settlers brought with them their laws and customs.[64] One year later, the Organic Act of 1890[65] extended the common law of Arkansas to the Indian Territory. That same year, the Territorial Legislature codified the common law riparian doctrine.[66]

While the riparian doctrine functioned in the humid eastern region of the territory, it failed in the arid land west of the 98th meridian.[67] To increase availability of water in the dry portion of the territory, the legislature passed a statute allowing appropriation of water for irrigation.[68] The 1897 statute protected the riparian owner from appropriation of the ordinary flow of the stream

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56. *See id.*

57. *See id.*

58. *See id.*

59. *See id.*

60. *Id.*

61. *See* 1 WATERS, *supra* note 13, at § 8.02. In the past, a number of states relied on the dual-system, including California, Kansas, Nebraska, North Dakota, Oklahoma, Oregon, South Dakota, Texas, and Washington. *See* 1 HUTCHINS, *supra* note 54, at 186-99; Anita Porte Robb, *Applying the Reserved Rights Doctrine in Riparian States*, 14 N.C. CENT. L.J. 98, 99 n.5 (1983).

62. The present boundary of the state of Arkansas was made by Act of May 26, 1824, Stat. L. III, 493, leaving the remaining area for resettlement by the Five Civilized Tribes. *See* JEFFREY BURTON, INDIAN TERRITORY AND THE UNITED STATES, 1866-1906: COURTS, GOVERNMENT, AND THE MOVEMENT FOR OKLAHOMA STATEHOOD 3 (1995). The western boundary of Arkansas was established by an act of Congress on March 2, 1819. *See id.* at 3, 255 n.2.

63. *See* Appropriations Act of Mar. 1889, ch. 412 § 13, 25 Stat. 980, 1005; *see also* COHEN'S HANDBOOK, *supra* note 1, at 773.

64. *See* McKennon v. Winn, 33 P. 582, 585 (Okla. 1893).

65. Oklahoma Territory Organic Act, § 31, 26 Stat. 81, 95 (1890).

66. *See* TERR. OKLA. STAT. § 4162 (1890); Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Bd., 855 P.2d 568, 572 (Okla. 1990).

67. *See* 1 WATERS, *supra* note 13, at § 8.02; TARLOCK, *supra* note 38, at 5. Novelist Wallace Stegner acknowledged the importance of the "dry line":

> Actually it is not the arbitrary 98th meridian that marks the West's beginning, but a perceptible line of real import that roughly coincides with it, reaching southward about a third of the way across the Dakotas, Nebraska, and Kansas, and then swerving more southwestward across Oklahoma and Texas. This isohyetal line of twenty inches, beyond which the mean annual rainfall is less than the twenty inches normally required for unirrigated crops.

WALLACE STEGNER, THE AMERICAN WEST AS LIVING SPACE 5 (1987).

68. *See* 1897 Terr. Okla. Sess. Laws, ch. 19, art. I, §§ 1-21.

without its consent, unless the appropriation was obtained by condemnation.[69] However, in 1905 the provision protecting riparians was omitted.[70] The provision was reinstated in 1909 just after statehood,[71] and eliminated once again in 1910.[72] Finally, the legislature recognized as vested all beneficial uses initiated prior to statehood in 1925.[73]

From the effective date of the 1897 Acts until 1963, Oklahoma, like other states along the 100th meridian, was a dual-system state.[74] In 1963, the legislature abandoned the dual-system in favor of a unitary appropriation system.[75] In *Franco-American Charolaise, Ltd., v. Oklahoma Water Resources Bd.* [hereinafter "*Franco-American*"],[76] the Oklahoma Supreme Court held the 1963 amendments to the state water code to be an unconstitutional taking of uninitiated riparian uses under the state constitution and expressly reinstated the dual system.[77]

The court in *Franco-American* established the following rules to reconcile the conflicting doctrines: 1) perfected appropriative rights are subject to senior appropriative rights and reasonable riparian uses;[78] 2) the rights of the riparian owner and the appropriator are to be determined by a relative reasonableness test;[79] 3) a riparian owner may apply for an appropriation permit, but doing so relinquishes riparian rights to non-domestic uses in the stream,[80] and; 4) when a riparian owner asserts a right to initiate a new reasonable use during a time of shortage, junior appropriators must release sufficient water to make the use possible.[81] Unfortunately, the *Franco-American* decision has left Oklahoma water law in disarray, leaving no clear guidance for the administration of water during scarcity. The dispute continues, creating a state constitutional crisis be-

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69. *See id.* at § 3.
70. *See* 1905 Terr. Okla. Sess. Laws, ch. 21, art. I, §§ 1-56.
71. *See* Okla. Compiled Laws § 3918 (1909).
72. *See* 1 Okla. Rev. Laws § 3636, note 1 (1910).
73. *See* 1925 Okla. Sess. Laws, ch. 76, § 1, at 125.
74. *See* Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Bd, 855 P.2d 568, 572 (Okla. 1990).
75. *See* OKLA. STAT. tit. 60, § 60 (1991); OKLA. STAT. tit. 82, § 105.1 (1991); OKLA. STAT. tit. 82, § 105.2 (1991). Existing uses were "grandfathered in," identified as "vested" and given an early priority date, but prospective rights, i.e., rights to initiate new non-domestic uses, were limited. *See* Joseph F. Rarick, *Oklahoma Water Law, Stream and Surface in the Pre-1963 Period*, 22 OKLA. L. REV. 1, 23-27 (1969) (hereinafter Rarick, *1963 Amendments*). The legislature also limited riparian domestic use "to household purposes, to the watering of domestic animals up to the land's normal grazing capacity, and to the irrigation of land not exceeding a total of three acres." *Franco-American*, 855 P.2d at 573. *See generally* Joseph F. Rarick, *Oklahoma Water Law, Stream and Surface, the Water Conservation Storage Commission and the 1965 and 1967 Amendments*, 24 OKLA. L. REV. 1 (1971); Joseph F. Rarick, *Oklahoma Water Law, Ground or Percolating in the Pre-1971 Period*, 24 OKLA. L. REV. 403 (1971).
76. 855 P.2d 568 (Okla. 1990).
77. *See id.* at 571, 576. For a critique of *Franco-American* and the chaos it wreaked on state water law, see Allison, *supra* note 43, at 1.
78. *See Franco-American*, 855 P.2d at 571. In other words, all lawful riparian uses have priority over any appropriative right. *See id.*
79. *See id.* at 578. That is, the reasonableness of each use must be balanced against the reasonableness of competing uses. *See id.*
80. *See id.* at 580. Thus, riparians may not "have their cake and eat it too," by having both riparian and appropriative rights to the same stream. *Id.*
81. *See id.* at 582.

cause neither the legislative nor executive branches of government accepted the decision.[82]

III. THE RESERVED RIGHTS DOCTRINE

A. *Evolution*

Reserved water rights, also known as *Winters* rights, are a natural product of the circumstances surrounding the development of water law in the Western States,[83] and were established in 1908 by *Winters v. United States*.[84] The Fort Belknap Reservation in Montana was created by an agreement in 1888.[85] The land was suitable primarily for grazing,[86] bounded to the north by the Milk River.[87] In 1889, the federal government began diverting water from the river for the domestic and irrigation needs of its Indian agents and officers.[88] Nine years later, the Indians began diverting water to irrigate approximately 30,000 acres of the arid land.[89] Non-Indian irrigators constructed large diversion works in 1900,[90] in accordance with state law.[91] A severe drought in 1905 created a shortage, making the river unable to meet the needs of the Indians and non-Indians.[92] As a result, the United States brought suit in its capacity as trustee for the tribes.[93]

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82. *See* Allison, *supra* note 43, at 58-59.

83. *See* Ranquist, *supra* note 13, at 641.

84. 207 U.S. 564 (1908). Pueblo water rights have a separate and distinct history. *See* CHARLES T. DUMARS et al., PUEBLO INDIAN WATER RIGHTS: STRUGGLE FOR A PRECIOUS RESOURCE (1984); Ed Newville, Comment, *Pueblo Indian Water Rights: Overview and Update on the Aamodt Litigation*, 29 NAT. RESOURCES J. 251 (1989). Tribes may also have rights to water for purposes preexisting the reservation in accordance with *United States v. Winans*, 198 U.S. 371 (1905). For instance, tribes may have rights to water sufficient to allow fishing in their usual and accustomed places, if such a right to fish was confirmed by treaty. *See* 4 WATERS, *supra* note 13, at 204-05, 220-22.

85. Throughout the nineteenth century, members of the House of Representatives were frustrated by their lack of input in the making of Indian treaties, *see* COHEN'S HANDBOOK, *supra* note 1, at 127, so the United States ceased treating with Indian tribes in 1871. *See* 25 U.S.C. § 71 (1994). The Treaty with the Blackfeet, Oct. 17, 1855, 11 Stat. 657, limited the tribes' land to what is now Montana. That territory was limited further by an 1874 statute, Act of April 15, 1874, ch. 213, 25 Stat. 113, and the reservation was finally established by agreement in 1888 by 25 Stat. 113, ch. 213. Note that the "agreement" status makes no difference to the reserved rights doctrine. *See* Arizona v. California, 373 U.S. 546 (1963).

86. *See* Winters v. United States, 207 U.S. 564, 566 (1908).

87. *See id.* at 565-66. The tribe owned the land up to the middle of the main channel of the Milk River. *See id.* at 565.

88. *See id.* at 566.

89. *See id.*

90. There is some debate as to when the non-Indian irrigators actually began diversions. The Supreme Court stated that the tribes and federal government began diversion "long prior to the acts of the defendants", *Id.* at 566, but the court of appeals found non-Indian diversions at least by 1898, *see* Winters v. United States, 143 F. 740, 741-42 (9th Cir. 1906), *aff'd*, 207 U.S. 564 (1908). The importance of the Court's decision is clear; no diversions occurred before the establishment of the reservation, and the reserved water was removed from that allocable under state law. *See Primer*, *supra* note 1, at 65 n.18.

91. *See Winters*, 207 U.S. at 568-69 (1908). The defendants appropriated in accordance with the Desert Land Act. *See Winters*, 143 F. at 742.

92. *See* 4 WATERS, *supra* note 13, at 226.

93. By 1900, the federal government's trust responsibility for Indian lands, property, and resources was well established. The trust doctrine is traceable to John Marshall in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). *See generally* COHEN'S HANDBOOK, *supra* note 1, at 16-17.

The Supreme Court held that along with the land, waters sufficient to fulfill its purposes were impliedly reserved;[94] those reservations shared the same priority date.[95] The 1888 agreement made no mention of water.[96] Nevertheless, the purpose of the reservation was to change the nomadic tribes to "pastoral and civilized people;"[97] water was absolutely essential to that purpose.[98] The Court found that the canons of construction[99] required it to resolve ambiguities or conflicts of implications in favor of the tribes. Therefore, water was reserved and vested as of the date of the reservation, regardless of the date of actual diversion. The government had the power to reserve the water,[100] regardless of the Desert Land Act or Montana's admission to the union.[101]

For fifty years, the reserved rights doctrine lay mostly dormant, but in *Arizona v. California*,[102] the Court confirmed the power of the federal government to impliedly reserve water.[103] *Arizona* extended the doctrine, stating that water could be reserved even if the reservation was established after statehood,[104] and that state ownership of riverbeds did not preclude a federal reservation of water.[105]

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94. *See Winters*, 207 U.S. at 576-77.
95. *See id.* at 577.
96. *See id.* at 576.
97. *See id.*
98. *See id.*
99. *See id.* The canons of construction developed from the trust relationship between the United States and the Indian nations. The canons first developed in cases involving treaties. Because of the federal government's role as trustee with the tribes, courts must: a) construe treaties and statutes related directly to Indians liberally in favor of tribes; b) resolve ambiguities in those statutes and treaties in favor of the tribes, and; c) construe treaties as the Indians would have understood them. *See* COHEN'S HANDBOOK, *supra* note 1, at 221-23. For an expanded discussion of the canons of construction for Indian law, see Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993).
100. The language of *Winters* is unclear as to whether the property was reserved by the tribes of the Fort Belknap Reservation or the United States. *See Primer*, *supra* note 1 at 65 & 104 n.18; 4 WATERS, *supra* note 13, at 228.

Justice McKenna noted:

> The Indians had command of the lands and the waters, — command of all their beneficial use, whether kept for hunting, 'and grazing roving herds of stock,' or turned to agriculture and the arts of civilization. Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate? . . . . If it were possible to believe affirmative answers, we might also believe that the Indians were awed by the power of the government or deceived by its negotiators. Neither view is possible.

Winters, 207 U.S. at 576. Moreover, McKenna wrote the opinion in *United States v. Winans*, 198 U.S. 371, 381 (1905), in which he wrote, "the treaty was not a grant to the Indians, but a grant of rights from them — a reservation of those not granted."

On the other hand, language in *Winters* suggests that the reservation was made by the United States. "The power of the Government to reserve the waters and exempt them from appropriation under state laws is not denied, and could not be. That the Government did reserve them we have decided . . . ." *Winters*, at 577.

The matter remains a controversy. Arguably, either circumstance may exist in a case. If a reservation is located on land occupied by a tribe prior to its establishment, the reservation may well be by the tribe. Reservations established on the public domain, to which tribes were later relocated, are likely made by the federal government. An exception to that rule may be tribes relocated to western Oklahoma, which was taken from the Indian Territory rather than the public domain. *See infra* Part IV.
101. *See Winters*, 207 U.S. at 577.
102. 373 U.S. 546 (1963).
103. *See id.* at 596.
104. *See id.* at 597-598.
105. *See id.*

B. Characteristics

The federal government may reserve all waters not already appropriated at the time of the reservation,[106] regardless of the effect on non-Indian water users.[107] Most often, there are virtually no water rights that predate such reservations,[108] therefore, little water is beyond the doctrine's reach.[109] While waters reserved generally run through or abut the reservation land,[110] water not appurtenant to the land may be reserved,[111] including groundwater.[112] The water must be of sufficient quality to fulfill the purposes of the reservation.[113]

The priority date for the reservation of water is set at the time of the reservation of land, regardless of the date of actual appropriation.[114] This rule promotes clarity in appropriation states,[115] and as will be discussed later, allows the reserved rights doctrine to mesh with riparian and dual system states as well.

> Waters are reserved to fulfill the purposes of the reservation of land.[116] [A]griculture was one of the purposes for the establishment of most, if not all, Indian reservations in the arid West; second . . . reservations were

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106. *See Primer*, *supra* note 1, at 67. "State water rights that antedate the creation of a reservation are unaffected by reserved rights." 4 WATERS, *supra* note 13, at 240-41. Tribal rights that predate the creation of the reservation have earlier priority dates, some as far back as "time immemorial." *Id.*

107. *See* PUBLIC LAND L. REV. COMM'N, ONE THIRD OF THE NATION'S LAND, 142-144 (1970). The National Water Commission suggested water marketing and compensation for non-Indians holding vested rights prior to the decision in *Arizona v. California*, would be fair and equitable, since they did not have notice. *See* NAT'L WATER COMM'N, WATER POLICIES FOR THE FUTURE: FINAL REPORT TO THE PRESIDENT AND TO THE CONGRESS OF THE UNITED STATES 483 (1973). The National Water Commission did not, however, question the government's right to reserve the water. *See generally id.*

108. In Oklahoma, for example, the land was designated as Indian Territory and the Five Tribes relocated well before the region was open to settlement. *See infra* Part IV.A.

109. *See Primer*, *supra* note 1, at 67.

110. *See, e.g.*, Winters v. United States, 207 U.S. 564, 565-66 (1908) (wherein the Milk River formed the northern boundary of the reservation).

111. *See* Arizona v. California, 373 U.S. at 546, 595-96 & n.97. (allocating water from the Colorado River to the Cocopah reservation, even though it was not adjacent land.). *See id.*

112. *See Primer*, *supra* note 1, at 68-69. *But see In re* General Adjudication of All Rights to Use Water in the Big Horn River System, 753 P.2d 76 (Wyo. 1988) (Big Horn I).

113. *See* United States v. Gila Valley Irrigation Dist., 920 F. Supp. 1444, 1448 (D. Ariz. 1996), *aff'd*, 117 F.3d 425 (1997) (deciding prior appropriator has cause of action for material degradation of water quality caused by upstream junior appropriator). *See generally* Margaret S. Treuer, *An Indian Right to Water Undiminished in Quality*, 7 HAMLINE L. REV. 347 (1984); Symposium, *Approaches to Groundwater Protection in Indian Country*, SOVEREIGNTY SYMPOSIUM VII § 7 (1994); Judith Royster and Rory SnowArrow Fausett, *Control of the Reservation Environment: Tribal Primacy, Federal Delegation, and the Limits of State Intrusion*, 64 WASH. L. REV. 581 (1989); 4 WATERS, *supra* note 13 at § 37.02(a). "Tribal water quality concerns are more commonly addressed under the federal environmental statutes." *Primer*, *supra* note 1, at 85 n.142 & 104.

114. *See* Winters v. United States, 207 U.S. 564, 577 (1908); Arizona v. California, 373 U.S. 546, 600 (1963). If the reservation continued a traditional practice on tribal land, like fishing, for example, the priority date may be "time immemorial," the earliest possible date. *See* United States v. Adair, 723 F.2d 1394, 1413-15 (1983). However, because reserved rights often predate any water right perfected under state law, the distinction may have little impact on priority. *See* New Mexico *ex rel.* Martinez v. Lewis, 861 P.2d 235 (N.M Ct. App. 1993), *cert. denied*, 858 P.2d 85 (N.M. 1993) (justifying its denial because the Mescalero Apache Tribe's reservation was established prior to white settlement, giving the tribe the senior priority date in any event, the court refused to address the claim to a priority date of time immemorial).

115. *See Primer*, *supra* note 1, at 70.

116. *See* Cappaert v. United States, 426 U.S. 128, 141 (1976); Arizona v. California, 373 U.S. 546, 599 (1963).

> intended to be a place where the Indians could 'maintain . . . their way of life which included hunting and fishing;' and third . . . all of the reservation's resources, known as well as latent, could be utilized in the effort to make the reservation a viable and permanent community. In short, Indian reservations were intended to be a permanent home where the Indians could become secure and self-sustaining.[117]

The purpose test limits both quantity and use of water.[118] The quantity is set at that amount required to meet the purposes of the land reservation,[119] and in some cases, the water may only be used for those purposes.[120] Most courts acknowledge that tribes may use water quantified by the agricultural standard of practicably irrigable acreage for any purpose,[121] but water reserved for nonconsumptive uses like fisheries protection must be used for that purpose only.[122]

C. Reserved Water and the State Systems

The reserved rights system shares specific characteristics with the riparian and prior appropriation systems. Reserved rights are, nonetheless, distinct. Like riparian rights, they arise from land ownership.[123] They are not lost through nonuse and may be asserted at any time.[124] Similar to appropriation rights, but unlike riparian rights, reserved rights are quantifiable[125] and are not subject to sharing during shortages.[126] Also like appropriation rights, reserved rights have priority dates for allocation during times of shortage.[127] However, their priority dates are established at the time of the reservation, rather than at the date of initial beneficial use.[128] Further, reserved rights are not based on diversion and

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117. Robert S. Pelcyger, *The Winters Doctrine and the Greening of Reservations*, 4 J. CONTEMP. L. 19, 25 (1977).

118. For non-Indian federal reservations, the Supreme Court has adopted the primary purposes test, which allows water to be impliedly reserved only for the primary purpose of the reservation. *See* United States v. New Mexico, 438 U.S. 696, 706-08 (1978) (concluding that recreation and aesthetics were secondary to primary purposes of timber management and conservation in national forest). Water for secondary purposes must be obtained in accordance with state law. *See id.* Nevertheless, the Court has not yet extended the primary purposes test to Indian reservations. *See Primer*, *supra* note 1, at 72.

119. *See, e.g.*, Arizona v. California, 373 U.S. at 600-01 (noting the need to quantify the Indian reserved water rights, so as to avoid uncertainty). One of the purposes of the reservation was to create an agrarian community. *See* 4 WATERS, *supra* note 13, at § 37. Accordingly an agricultural measure, the practicable irrigable acreage standard, was adopted. *See id.*

120. As in most cases, the Supreme Court in *Arizona v. California*, 439 U.S. 419, 422 (1979), *reh'g denied*, 462 U.S. 1146 (1983), declared the purpose to be no limit on use of the water.

121. *But see 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), *reh'g denied*, 492 U.S. 938 (1989) (Big Horn I); *In re* General Adjudication of All Rights to Use Water in the Big Horn River System, 835 P.2d 273 (Wyo. 1992) (Big Horn III) (deciding that the agricultural purpose prevented the tribe from putting the water to any other use.). The decisions have been widely criticized. *See, e.g.*, Peg Rogers, Note, *In re Rights to Use Water in the Big Horn River*, 30 NAT. RESOURCES J. 439 (1990); *Primer*, *supra* note 1 at 78-82.

122. *See Primer*, *supra* note 1, at 78.

123. *See* 4 WATERS, *supra* note 13, at 233.

124. *See id.* at 233-34.

125. *See Primer*, *supra* note 1, at 63.

126. *See* COHEN'S HANDBOOK, *supra* note 1, at 578.

127. *See id.*

128. *See* 4 WATERS, *supra* note 13, at 232.

beneficial use[129] as are appropriation rights. Rather reserved rights are based on the existence of reserved land in need of water.[130]

IV. THE SOURCES AND CHARACTERISTICS OF INDIAN WATER RIGHTS IN OKLAHOMA

A. *History of Oklahoma Indian Country*

The land constituting the state of Oklahoma was a part of the land ceded to the United States by the French in the Louisiana Purchase of 1803.[131] Contrary to the teachings of most history courses, the Louisiana Purchase did not give the United States legal title to the land. It instead gave the fledgling nation the right, as between old world sovereigns, to negotiate with Indian nations in that territory to obtain title.[132] Pursuant to the terms of the Louisiana Purchase, the United States entered into treaties with those tribes.[133]

The Cherokees were party to the first removal treaty in 1817,[134] although actual removal did not begin until the 1830s.[135] A series of treaties, many of which were forced on the tribes, removed the Five Civilized tribes—the Cherokees, Chickasaws, Choctaws, Creeks, and Seminoles—to the Indian Territory.[136] In exchange for the tribes' relocation, the United States promised that the lands set aside for them would "in no future time without their consent, be included within the territorial limits or jurisdiction of any State or Territory."[137] The land was intended to be a permanent homeland for the tribes.[138] After the Five Civilized Tribes arrived in their new land, they established comprehensive governments and signed treaties with one another promising peace

129. *See* COHEN'S HANDBOOK, *supra* note 1, at 578.

130. *See Primer*, *supra* note 1, at 63.

131. *See* Treaty with France, art. I, 8 Stat. 200 (1803); *see also* MORRIS, *supra* note 3, at 12.

132. *See* Treaty with France, art. VI, 8 Stat. 200, 202 (1803).

133. *See* Kirke Kickingbird, *"Way Down Yonder in the Indian Nations, Rode my Pony Cross the Reservation!" From Oklahoma Hills by Woody Guthrie*, 29 TULSA L.J. 303, 310-11 (1993). Those tribes included the Wichita, Querecho, Caddo, Quapaw, Kiowa, Comanche, and Pawnee Nations. *See id.* at 311; *See e.g.*, Treaty with the Quapaws, Aug. 24, 1818, U.S.-Quapaws, 7 Stat. 176; Treaty with the Osage, June 2, 1825, U.S.-Osage, 7 Stat. 240.

134. *See* Treaty with the Cherokee, July 8, 1817, U.S.-Cherokee, 7 Stat. 156. The first removal period was an era during which the federal policy was to relocate tribes in the southwestern United States to land in the west. *See* COHEN'S HANDBOOK, *supra* note 1 at 78. *See generally* GRANT FOREMAN, INDIAN REMOVAL (1989).

135. *See* MORRIS, *supra* note 3, at 23. The Choctaw were forcibly relocated in 1831, the Creeks in 1836, the Chickasaw in 1837, the Cherokee in 1838-1839, and the Seminole in 1842. *See id.*

136. *See* Treaty with the Choctaw and Chickasaw, Jan. 17, 1837, U.S.-Choctaw Nation-Chickasaw Nation, 11 Stat. 573; Treaty with the Cherokee, Dec. 29, 1835, U.S.-Cherokee Nation, 7 Stat. 478 (Treaty of New Echota); Treaty with the Creeks, Feb. 14, 1833, U.S.-Creek Nation, 7 Stat. 417; Treaty with the Seminole, May 9, 1832, U.S.-Seminole Indians, 7 Stat. 368; Treaty with the Choctaw, Sept. 27, 1830, U.S.-Choctaw Nation, 7 Stat. 333 (Treaty of Dancing Rabbit Creek). *See generally*, ANGIE DEBO, AND STILL THE WATERS RUN: THE BETRAYAL OF THE FIVE TRIBES (1940); ANGIE DEBO, THE ROAD TO DISAPPEARANCE: A HISTORY OF THE CREEK INDIANS (1941); ANGIE DEBO, THE RISE AND FALL OF THE CHOCTAW REPUBLIC (1934).

137. Treaty with the Cherokee, Dec. 29, 1835, U.S.-Cherokee, art. 5, 7 Stat. 478, 481.

138. *See id.*; Choctaw Nation v. Oklahoma, 397 U.S. 620, 625 (1970) (showing that the United States promised to convey the land in fee simple "to inure to them while they shall exist as a nation and live on it.").

and establishing intergovernmental relations.[139]

After the Civil War, the United States punished the Five Civilized Tribes for siding with the Confederacy.[140] In 1866, the Union forced the tribes into a new series of treaties which diminished their territory from what was all of present day Oklahoma, excepting the panhandle and Greer County, to the south-central and eastern fraction of the territory.[141] During the next twenty years another major period of Indian removal occurred, so that by 1883, the Indian Territory contained 25 reservations for 37 tribes.[142] The United States moved these tribes into the territory ceded by the Five Tribes after the Civil War.[143]

In 1889, the "unassigned lands" in central Indian Territory were opened to white settlement.[144] The following year, the Oklahoma Organic Act reduced Indian Territory to its eastern portion,[145] but "expressly preserved tribal authority and federal Indian jurisdiction in both Oklahoma and Indian Territories."[146] The status of the tribes in the Oklahoma Territory was similar to that of tribes in other organized territories.[147]

The period between 1890 and 1907 witnessed dramatic changes in the nature of tribal land holdings in the two territories. The General Allotment Act allotted the lands of most of the tribes in the Oklahoma Territory.[148] In 1893, Congress provided for allotment of the land of the Five Civilized Tribes, which had been exempted from the General Allotment Act, by creating the Dawes Commission.[149] Five years later, Congress passed the Curtis Act, which accelerated the allotment process and allowed for non-Indian ownership of some townsites.[150] The Five Tribes Act of 1906 provided for the completion of allotment, but ensured that the tribal governments "are hereby continued in full force and effect."[151] The Oklahoma Enabling Act created the constitutional

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139. *See* COHEN'S HANDBOOK, *supra* note 1, at 772 & n.19.

140. *See* JEFFREY BURTON, *supra* note 62, at 15. "While the Choctaw and Chickasaw nations were almost undivided in their support for the Confederacy, elsewhere the picture was rather different. The Creeks and Seminoles who joined the Confederate army were slightly outnumbered by their fellow tribesman on the other side." *Id.* A majority of Cherokees also sided with the Union. In fact,

> a good many citizens of [the Creek, Seminole and Cherokee Nations] had remained loyal to the Union throughout the struggle .... These considerations carried little weight in the peace negotiations .... In its treatment of the nations en bloc ... the Government showed it was much less interested in concluding a fair settlement than in exploiting the defeat of the Confederacy.

Id.

141. *See* COHEN'S HANDBOOK, *supra* note 1, at 773; MORRIS, *supra* note 3, at 19, 26, 33.

142. *See* Kickingbird, *supra* note 132, at 311-12.

143. *See* MORRIS, *supra* note 3, at 34.

144. *See* Appropriations Act of Mar. 2, 1889, ch. 412, § 13, 25 Stat. 980, 1005.

145. *See* MORRIS, *supra* note 3, at 52.

146. Oklahoma Territory Organic Act, May 2, 1890, §§ 1-28, 26 Stat. 81; *see also* COHEN'S HANDBOOK, *supra* note 1, at 773 & n.35.

147. *See* COHEN'S HANDBOOK, *supra* note 1, at 773.

148. *See* Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331-34, 339, 341-42, 348-49, 354, 381 (1994)); COHEN'S HANDBOOK, *supra* note 1, at 127-43, 774.

149. *See* 25 U.S.C. § 339 (1994); Dawes Act, ch. 209, § 16, 27 Stat. 612 (1893).

150. *See* Curtis Act of June 28, 1898, ch. 517, 30 Stat. 495, 498; Angela M. Risenhoover, *Reservation Disestablishment: The Undecided Issue in Oklahoma Tax Commission v. Sac and Fox Nation*, 29 TULSA L.J. 781-98 (1994). In accordance with the Curtis Act, the Five Tribes hold "restricted allotments" in fee; allotments may not be sold without the permission of the Secretary of the Interior. *See id.* The General Allotment Act provided for "trust allotments," held by the United States as trustee for the tribes. *See id.*

151. Act of Apr. 26, 1906, 34 Stat. 137.

mechanisms for statehood,[152] which was granted in 1907.[153] The newly-formed state was compelled to disclaim "all right and title" to Indian lands, however, and the federal government expressly retained its exclusive authority over Indian matters.[154]

B. Two Bases for Indian Water Rights in Oklahoma

Because of the unique historical circumstances surrounding the settlement history of this region, some tribes in Oklahoma may have rights to reserved water which vary from *Winters* rights. The western Oklahoma tribes typically have formal reservations,[155] to which *Winters* rights certainly attached when they were established. The Five Civilized Tribes were placed in a permanent homeland, never to be included in any state.[156] The status of their land is different; it is held in restricted fee by the tribes, rather than in trust by the federal government. As a result, the status of the Five Tribes' water may be different as well. Indian water rights in Oklahoma, therefore, have two potential foundations. The *Winters* doctrine, which developed from the historical circumstances in the arid west,[157] is the first basis for first of Indian water rights. The second basis, on the other hand, is sensitive to the distinct pattern of settlement in present day eastern Oklahoma. Although more complicated, the second basis for Indian water rights in Oklahoma may well provide the tribes with a greater quantity of water than would be reserved in accordance with their *Winters* rights.

1. Basis I: The *Winters* Doctrine

The first basis for Indian water rights in Oklahoma is relatively straightforward. All formal Indian reservations have *Winters* rights. No court has determined that lands set apart for Indians do not have *Winters* rights.[158] If the land held by or for Indian tribes in Oklahoma is equivalent to formal reservations, then that land also has reserved water rights.

In *United States v. John*,[159] the Court held that whether land is Indian Country does not turn upon whether that land is denominated "trust land" or "reservation." Instead, a court must ask whether the land has been "validly set apart for the use of the Indians as such, under the superintendence of the Government."[160] Twice in the 1990s, the Oklahoma Tax Commission [hereinafter

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152. *See* Oklahoma Enabling Act, June 16, 1906, 34 Stat. 267.

153. President Theodore Roosevelt declared Oklahoma a state by proclamation on Nov. 16, 1907. *See* 35 Stat. 2160; *see also* ROY GITTINGER, THE FORMATION OF THE STATE OF OKLAHOMA 257 (1939).

154. *See* 34 Stat. at 267-68, 270.

155. *See generally* Oklahoma Tax Comm'n v. Sac and Fox Nation, 508 U.S. 114 (1993) (suggesting that formal reservations are created by treaty, executive order, or act of Congress).

156. *See* Treaty with the Cherokee, Dec. 29, 1835, U.S.-Cherokee Nation, art.5, 7 Stat. 478.

157. *See supra* text at Part III.A.

158. *See* generally COHEN'S HANDBOOK, *supra* note 1; 4 WATERS, *supra* note 13.

159. 437 U.S. 634 (1978).

160. *See id.* at 648-49.

"Tax Commission"] incorrectly argued that tribal lands in the state which were not formal reservations were not Indian Country at all.[161] In *Oklahoma Tax Commission v. Citizens Band of Potawatomi* [hereinafter "*Potawatomi*"],[162] Chief Justice Rehnquist delivered a unanimous opinion of the United States Supreme Court, which quickly dispatched the Tax Commission's argument. Relying on *John*, the Court held that even though the land was not formally designated as a reservation, the land is trust land which was "'validly set apart' and thus qualifies as a reservation for tribal immunity purposes."[163] Two years later, in another unanimous opinion, *Oklahoma Tax Commission v. Sac and Fox Nation* [hereinafter "*Sac and Fox Nation*"],[164] the Court noted that it had never drawn a distinction between formal reservations and other lands set apart for Indian tribes; both are Indian Country.[165]

In light of *John*, *Potawatomi*, and *Sac and Fox Nation*, there is little doubt that tribal land in Oklahoma, like formal reservations, is Indian Country and has reserved water rights. When the federal government sets apart land, it impliedly reserves or recognizes the right to sufficient water to fulfill its purposes.[166] The land held by or for the tribes was validly set apart for the purpose of creating a permanent homeland for the tribes, beyond the territory of any state.[167] In accordance with the *Winters* doctrine, the tribes have sufficient water to maintain and nurture their permanent homelands from the time those lands were first validly set apart for them.

2. Basis II: The Five Tribes Water Doctrine

When the federal government reserves water under the *Winters* doctrine, only a portion of the available water is impliedly reserved. That portion is equal to the amount necessary to fulfill the purposes of the reservation of land. The remaining water goes to the state. In the case of the Five Tribes, all of the available water went with the land, directly to the tribes. The question, then, is not, How much water was reserved in the Tribe? but rather, How much water has been taken away?

a. The Eastern Tribes

When the Indian Territory was set aside for the Five Civilized Tribes, it was established for the purpose of creating a permanent Indian homeland, never to be included in any state.[168] The tribes owned the land in fee simple,[169]

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161. *See* Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505, 511 (1991).

162. *See id.*

163. *See id.* at 511.

164. 508 U.S. 114 (1993).

165. *See id.* at 125. *Accord* Alaska v. Native Village of Venetie Tribal Gov't, No. 96-1577, 1998 WL 75038 (U.S. Feb. 25, 1998).

166. *See supra* text at Part III.

167. *See supra* note 138 and accompanying text.

168. *See supra* note 137 and accompanying text.

169. *See, e.g.*, Choctaw Nation v. Oklahoma, 397 U.S. 620, 625 (1970); *see also* Michael M. Gibson,

and were to exercise authority and control over their land exclusive of any state or territory.[170] The tribes were the only possible owners of land in the region. There existed no other entity to which any property could go. Consequently, the tribes owned all of the land and the water in the Indian Territory. The water was reserved for their absolute and exclusive use.[171] Again, the question is not, How much water was reserved in the tribes? but how much water has been taken away? The shift in the nature of the question transfers the burden of establishing a right to water from the tribes to the state. The shift also creates a presumption that surplus water is the property of the tribes rather than the state.

Consequently, the Five Civilized Tribes still own much of the water currently in use by the state of Oklahoma. Indian rights to property may only be taken by an act of Congress, and that act must do so expressly.[172] Additionally, the Trade and Intercourse Act[173] precludes the transfer of Indian real property without the express consent of the Secretary of the Interior. The General Allotment Act, Dawes Act, Curtis Act, Oklahoma Organic Act, and Oklahoma Enabling Act are silent as to water rights.[174] Grants from the tribes, through the federal government, to the states are "construed in favor of the Government lest they be enlarged to include more than what was expressly included."[175] The canons of construction also require that such acts be construed liberally in favor of the tribes and as the tribes understood them.[176] Therefore, to defeat the Choctaw Nation's claim to nearly all of Oklahoma's water, the state must prove that Congress expressly intended and the tribe understood that the water was taken in addition to any land expressly taken from the tribe.[177]

Because of the general principle of Anglo law that, absent a statement to the contrary, water follows the land, and because reserved water rights, like riparian rights, run with the land, Oklahoma may argue that the state now has a

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Indian Claims in the Beds of Oklahoma Watercourses, 4 AM. INDIAN L. REV. 83 (1976).

170. *See* Treaty with the Choctaw and Chickasaw, Jan. 17, 1837, U.S.-Choctaw Nation-Chickasaw Nation, 11 Stat. 573; Treaty with the Cherokee, Dec. 29, 1835, U.S.-Cherokee Nation, 7 Stat. 478; Treaty with the Creeks, Feb. 14, 1833, U.S.-Creek Nation, 7 Stat. 417; Treaty with the Seminoles, May 9, 1832, U.S.-Seminole Indians, 7 Stat. 368; Treaty with the Choctaw, Sept. 27, 1830, U.S.-Choctaw Nation, 7 Stat. 333 (Treaty of Dancing Rabbit Creek).

171. *See* Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970). In *Choctaw Nation*, a case relating to submerged lands, the court paid particular attention to the unique history of the Five Civilized Tribes, especially the provisions of their treaties, including the Treaty with the Choctaw, Sept. 27, 1830, 7 Stat. 333-34, which noted "no part of the land granted to them shall ever be embraced in any Territory or State." *See id.* at 625. In *Montana v. United States*, 450 U.S. 544 (1981), the Court emphasized that the "special historical origins of the Choctaw and Cherokee treaties" give those tribes greater property rights than those of other tribes. *See id.* at 555 & n.5.

172. *See* United States v. Sioux Nation, 448 U.S. 371 (1980).

173. 25 U.S.C. § 177 (1994). *See infra* note 201 and accompanying text.

174. *See* 25 U.S.C. § 339 (1994); General Allotment Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331-34, 339, 341-42, 348-49, 354, 381 (1994)); Oklahoma Territory Organic Act, §§ 1-28, 26 Stat. 81 (1890); Dawes Act, ch. 209, § 16, 27 Stat. 612 (1893). *See* 25 U.S.C. § 339 (1994); Curtis Act of June 28, 1898, ch. 517, 30 Stat. 495; Oklahoma Enabling Act, 34 Stat. 267 (1906).

175. United States v. Grand River Dam Authority, 363 U.S. 229, 235 (1960).

176. *See* Frickey, *supra* note 99.

177. Inspired by a recent disestablishment case, *South Dakota v. Yankton Sioux Tribe*, 66 U.S.L.W. 4092 (Jan. 26, 1998), the state will likely argue that the tribal lands have been disestablished. If disestablishment occurred, tribal management of water resources may be in doubt. However, disestablishment is an issue for the future and is well beyond the scope of this comment.

right to water.[178] Even if that conclusion is correct, the state would be entitled only to water appurtenant to land which it holds. In such a case, the court would have to determine what fraction of the land is owned by the state and attach that same fraction of the region's water. This proposition is a mixed blessing for the tribes. While it acknowledges that the tribes do, in fact, have water rights, the quantity may be substantially smaller than needed. Moreover, because allotment era policies resulted in a checkerboard of ownership,[179] the state may win the right to administer both state and tribal water in the interest of unified administration.[180]

b. The Western Tribes

Title to the lands held for the tribes in the western portion of the state was either transferred directly from one of the Five Civilized Tribes to that tribe[181] or from one of the Five Civilized Tribes to the United States and then to the western tribe.[182] Where the transfer took place directly between the tribes, the western tribe succeeded to all of the rights of the selling tribe. As a result, the question is again How much water has been taken away? From that question, the western tribe is in the same position as its predecessor.

When title passed through the United States, however, the date of the reservation determines the extent of the water rights held by the western tribe in question. If the reservation was established before the Oklahoma Organic Act, which created the Oklahoma Territory and laid the trail for statehood, then by definition, the reservation was to create a permanent homeland for the tribe.[183] In such a case, the reservation was created at a time when Congress did not intend the territory to be encompassed by a state, so all of the available water passed to the tribe. At the time of the reservation, there was neither a territory intended to become a state nor an existing state to which to pass rights to surplus water. Again, the tribe is presumed to have retained all water, rather than the portion reserved pursuant to the *Winters* doctrine.

The creation of the Oklahoma Territory predated statehood.[184] Like the reservations of other tribes in the state, reservations established in the time period after the enactment of the Oklahoma Organic Act were intended to create a permanent homeland for the tribe.[185] Nevertheless, Congress intended the

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178. *See supra* text at Part III.C.

179. *See generally* Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1 (1995) (discussing the impact of the allotment policy on recent court opinions).

180. Oklahoma's checkerboard land distribution, the product of the disastrous allotment policy, complicates administration because non-Indian and tribal land are distributed without order. As a result, an isolated parcel of tribal land may have reserved rights while the non-Indian parcels surrounding it may not, or vice versa, making comprehensive resource management difficult. This comment does not address environmental regulation, management, or administration.

181. *See* MORRIS, *supra* note 3, at 22 (Cherokee lands were transferred to the Pawnee, Ponca, Nex Perce, and others).

182. *See, e.g.*, Treaty with the Potawatomis, Feb. 27, 1867, U.S.-Potawatomis, art. III, 15 Stat. 531, 532.

183. *See supra* note 167 and accompanying text.

184. *See supra* text at Part IV.A.

185. *See supra* note 138 and accompanying text.

post-territory reservations to be a tribal homeland within an organized territory or state.[186] Therefore, western tribes which were located to the region after the creation of the Oklahoma Territory are limited to their *Winters* rights, because any water not needed for the purpose of the reservation was not reserved by the federal government. The right to administer that water passed to Oklahoma upon the grant of statehood.

V. MESHING INDIAN RESERVED WATER RIGHTS WITH OKLAHOMA'S DUAL-SYSTEM

The basis for a particular tribal water right affects the quantity of water to which the tribe is entitled. If the *Winters* standard per Basis I is used, that quantity will be a fixed amount equal to the amount sufficient to fulfill the purposes of the reservation,[187] and the quantity will be larger if the Five Tribes water standard of Basis II is employed.[188] Regardless of the quantity of water, however, the characteristics of the Indian water right are the same.

Like all reserved rights, Indian water rights in Oklahoma are subject to rights perfected prior to the reservation.[189] No rights could have been perfected prior to the settlement by the Five Civilized Tribes,[190] therefore, the Five Civilized Tribes' rights are supreme over any other rights. Elsewhere in the Indian Territory, however, some water users may have perfected rights under territorial law. If the water right was perfected by a non-Indian prior to the establishment of the reservation, then the non-Indian's right is superior to the reserved right. Because the area was not opened to white settlement until 1889,[191] and nearly all Indian lands in Oklahoma had been set apart by 1883,[192] there is likely to be no holder of water rights superior to the tribe.

In summary, tribes in Oklahoma are entitled to a fixed amount of water, subject to rights perfected prior to the establishment of their reservations.

Although a particular water course may run through both Oklahoma and Indian Country, the tribal water entitlement is separate and distinct from the state water. In appropriation states, well-developed rules have been established to mesh the tribal and state systems. Those rules promote certainty and stability in western water law.[193] In order to mesh with state appropriation systems, reserved water rights are assigned a priority date and are quantified. No such rules have been developed for either riparian or dual system states.[194] The systems must mesh in order to determine the tribes' places in the ranking system.

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186. *See* Oklahoma Territory Organic Act, May 2, 1890, §§ 1-28, 26 Stat. 81-93.
187. *See supra* text at Part III, IV.
188. *See supra* text at Part IV.B.
189. Otherwise, a taking would result, forcing the United States to compensate the property owner.
190. *See supra* text at Part IV.B.
191. *See supra* notes 63, 144 and accompanying text.
192. *See supra* note 142 and accompanying text.
193. *See Primer, supra* note 1, at 70.
194. *See* Anita Porte Robb, *Applying the Reserved Rights Doctrine in Riparian States*, 14 N.C. CENT. L.J. 98, 100 (1983).

Although this is of primary importance during times of scarcity, the meshing of the systems is important in relation to water quality and management as well. Rules governing quantity, use, transferability, and allocation during scarcity are necessary to mesh the tribal and state systems.

Practical, political and legal concerns are best addressed by a system with the following structure. Each tribe in the state may have a fixed share of the available water to use and distribute to its citizens.[195] Oklahoma may also have a portion of the available water, and it uses a dual rights system to distribute and regulate that portion.[196] Tribes may use their water in accordance with the purpose for which the reservation was made.[197] For Oklahoma tribes, that purpose is to create a homeland.[198] Courts typically interpret that purpose broadly, allowing nearly any use.[199] The tribes may use water up to the amount to which they are entitled. State water use is limited only in that it may not interfere with tribal uses or diminish the tribes' water below the amount to which they are entitled.[200]

While the state may transfer its water to another state or to a tribe, tribes may only transfer their water rights with approval of the Secretary of the Interior, pursuant to the Indian Intercourse Act.[201] As a result, any water leases or other marketing require Secretarial approval.

According to the *Franco-American* decision, riparian rights are superior to any appropriative rights.[202] Nevertheless, the dual-system used by Oklahoma is a state doctrine, which can not interfere with prior federal reserved rights due to the Supremacy Clause.[203] Because reserved rights are federal rights, the Supremacy Clause requires that during shortages, the tribes have priority over rights perfected under state law.[204] Therefore, there is no equitable sharing. The tribes take their full entitlement and the state takes the remainder, unless the state rights are paramount to a particular tribal right. State law is unaffected by the tribe-state water system. Only the amount to which the state is entitled is

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195. *See supra* text at Part III.B.
196. *See supra* text at Part II.D.
197. *See supra* text at Section III.B.
198. *See supra* note 137 and accompanying text.
199. *See Primer*, *supra* note 1, at 72.
200. *See infra* note 204 and accompanying text; *see also* Arizona v. California, 373 U.S. 546 (1963).
201. The first Congress asserted the absolute and exclusive right of the federal government, rather than the states, to acquire and dispose of tribal lands, when it enacted the Trade and Intercourse Act, 1 Stat. 137 (1790). The current version of the Act, passed in 1834, states:

> No purchase, grant, lease, or other conveyance of lands or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such a treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to the lands within such State, which shall be extinguished by treaty.

25 U.S.C. § 177 (1994).
202. *See* Franco-American Charolaise, Inc. v. Oklahoma Water Resources Bd., 855 P.2d 568, 571 (1993).
203. *See* Winters v. United States, 207 U.S. 564, 575 (1907).
204. *See id.*

affected, so it may distribute its available water according to its own laws.

Riparian rights can only be superior to reserved rights if the riparian rights antedate the federal reservation. Riparian rights stem from land ownership, but no land ownership could have been perfected prior to the transfers to the Five Civilized Tribes, and few were perfected prior to the Oklahoma Organic Act. Therefore, no riparian rights could predate the rights of the Five Civilized Tribes and few could predate tribal claims which antedate the Organic Act. As a result, riparian rights are inferior to previously established tribal rights.

A. *Advantages*

1. For the State

For the state, the primary advantage of recognizing tribal water rights is certainty. The quantification of the reserved water rights removes the cloud on the state title to water.[205] Quantification also defuses the massive "time bomb" of tribal litigation and claims.[206] "If any lessons emerge from the water wars of the West . . . it is that ignoring Indian water rights only ensures and escalates conflict. Recognizing and accounting for Indian rights to water . . . ultimately . . . benefits both the tribes and the non-Indian users dependent upon a stable . . . supply of water."[207] The stability provided by quantification allows for a plan for non-speculative development of the state's resources. Moreover, because the Oklahoma Supreme Court left the state water system in disarray after *Franco-American*, the quantification of Indian water rights clarifies the amount the state may allocate during times of scarcity. Thus, Indian water rights mitigate some of the instability created by the state's highest court.

2. For the Tribes

Currently, tribes use water at the sufferance of the state. Quantification of the tribal water entitlement brings tribal paper rights a step closer to wet water, allowing a tribe to manage its own natural resource through a tribal water code.[208] This increased control furthers the tribes' interests in nurturing nation-

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205. *See* Jessica Bacal, *The Shadow of Lone Wolf: Native Americans Confront Risks of Quantification of Their Reserved Water Rights*, 12 U. BRIDGEPORT L. REV. 1, 6 (1991).

206. *See* 4 WATERS, *supra* note 13, at 232-33.

207. *Primer*, *supra* note 1, at 62. In Oklahoma, quantification will be particularly complicated and costly. In addition to the geological, meteorological, and hydrological obstacles to quantification, the legal status of the land will also impede the process. Oklahoma's checkerboard land distribution complicates quantification, because non-Indian and tribal land are distributed without order. As a result, an isolated parcel of tribal land may have reserved rights while the non-Indian parcels surrounding it may not, making comprehensive resource management difficult. This comment does not address the method of quantification or jurisdiction over water resources.

208. For example, in a settlement between the Sac and Fox Nation and Tenneco Oil Co., Tenneco promised to buy land for the Nation to place in trust and install three groundwater wells. *See* Notice of Lodging of Consent Decree, United States v. Tenneco Oil Co., 62 Fed. Reg. 5,654 (1997). According to Dora Young, Principal Chief of the Sac and Fox Nation, the water will allow the tribe to implement plans for economic development for the "first time in forty years." Bill Swindell, *Oil Firm, Tribe Settle Lawsuit*, TULSA WORLD, Dec. 24, 1996, at A11.

al sovereignty. The clarity provided by the quantification allows the tribes to develop the resources free of the flawed state system or state political pressures. Finally, the tribal right may allow for marketing, a genuine benefit for tribes in need of income.

Without being pressed, tribal rights to water may only diminish over time. As the state's non-Indian population increases so too may the encroachment on tribal property and the non-Indian interest in any legal dispute. The Rehnquist Court has demonstrated a willingness to participate in an ad hoc balancing of interest test.[209] Unfortunately, the only interest the Court seems to comprehend is the non-Indian interest.[210] The greater the non-Indian interest involved, the more likely the Court is to find against the tribe.[211] The longer the wait, the more likely tribes will be subjected to an illusory "balancing of interests" and a judicial taking of tribal resources.[212]

B. Disadvantages

1. For the State

The state has been using tribal water since its creation, without regard for tribal interests. The primary disadvantage for the state is that it will no longer be able to use tribal water for free.[213] Thus, the state will have less water during scarcity and less water for growth.

As tribal rights are quantified, tribes will establish tribal water codes to administer and regulate water. There will inevitably be instances in which tribal regulations will conflict with state regulation of the same water course. Mitigating such conflicts is potentially costly and time-consuming for both the state and the tribes.

The need to quantify Indian water rights may force the state into a costly general stream adjudication. General stream adjudications cost millions of dollars and take 15-20 years to complete.[214]

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209. *See* Philip P. Frickey, *Adjudication and its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754, 1775 (1997).

210. *See id.* at 1775-76.

211. *See* Frank Pommersheim, *Tribal Courts and the Federal Judiciary: Opportunities and Challenges for a Constitutional Democracy*, 58 MONT. L. REV. 313, 332 & n.65 (1997).

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

213. Because the non-Indians had access to the capital necessary to develop water resources and tribes did not, states were able to create virtual monopolies on some water sources. See David H. Getches, *Management and Marketing of Indian Water: From Conflict to Pragmatism*, 58 COLO. L. REV. 515, 516 (1988).

214. *See* David H. Getches, *Management and Marketing of Indian Water: From Conflict to Pragmation*, 58 U. COLO. L. REV. 515 (1980). Moreover, "it took Colorado fifteen years and four trips to the Supreme Court . . . ." 4 WATERS, *supra* note 13, at 260 & n.305. *See, e.g.*, *In re General Adjudication of the Big Horn Sys.*, 753 P.2d 76 (Wyo. 1988), wherein the legal fees ran into the tens of millions of dollars.

2. For the Tribes

The lack of a reliable means of quantifying Indian water rights in non-arid areas[215] makes quantification a gamble for the tribes. Tribes risk receiving an amount of water less than needed or deserved. Moreover, a fixed quantity may leave no room for growth, even though the homeland purpose of the reservation requires that the needs may grow.

Like the state, tribes face the difficulties of clashing regulatory schemes. General stream adjudications are costly for the tribes, as well. The extended time period required for such an action also delays the tribes' use of their water.

C. Overcoming the Disadvantages

Solutions to most of the disadvantages are easily found. Administrative and regulatory conflicts can be avoided by agreements between the state and the tribes. Such an agreement has already been successful between the state of Florida and the Seminole Nation.[216] A general stream adjudication can be avoided by determining the quantity of Indian water rights in federal court rather than state court. While states generally prefer their own forum for quantifying Indian water rights, they may only do so in a general stream adjudication.[217] In federal court, the parties could focus only on the Indian water rights, significantly decreasing the amount of time and cost for all involved.

The tribal concern that a fixed quantity of water does not allow for growth could be remedied if the state allowed the tribe to obtain additional water pursuant to its laws. In California, a dual-system state, the state Supreme Court held that federally-reserved lands are entitled to riparian rights under state law in *In re Water of Hallett Creek Stream System*.[218] The court's reasoning is applicable in Oklahoma, particularly because the Oklahoma Supreme Court typically relies on California and Nebraska when determining issues of first impression.[219]

At the same time, the state concern that it could have less water during times of scarcity could be remedied by a marketing agreement, wherein the tribe would market its water back to the state at an amount slightly below fair market value to offset the shortage. The marketing of water is one of the most

215. The practicably-irrigable acreage standard was established in *Arizona v. California* for arid regions, but no Court has developed a standard for quantifying consumptive reserved rights in a non-arid area.

216. *See* Florida Indian (Seminole) Land Claims Settlement Act of 1987, 25 U.S.C. §§ 1772-1772g (making the Seminole Water Rights Compact federal law) *reprinted in Seminole Indian Land Claims Settlement Act of 1987: Hearing on S. 1684 Before the Senate Select Comm. on Indian Affairs*, 100th Cong., 1st Sess. 83-122 (1987); *see generally* Shore, *supra* note 19; Monahan, *supra* note 19.

217. *See* McCarren Amendment, 43 U.S.C. § 666 (1994); *see generally, Primer, supra* note 1, at 96-101; 4 WATERS, *supra* note 13, at § 37.04.

218. *See* Water of Hallett Creek Stream System State Water Resource Board v. United States, 749 P.2d 324, 327-30 (Cal. 1988).

219. *See, e.g.*, Franco-American Charolaise, Inc. v. Oklahoma Water Resources Bd., 855 P.2d 568, 578 (1990).

important aspects of the reserved rights doctrine today. Water leasing may provide tribes with much needed capital, crucial to sustainable development and provide states and municipalities with water when their resources literally run dry. Tribes may lease water on the reservation with approval of the Secretary of the Interior, but authority for off-reservation leasing is uncertain.[220] As a result, a number of Indian water rights settlements include provisions explicitly authorizing tribes to lease their water with some restrictions.[221] Such a settlement may be the solution to Oklahoma's water law problems.

VI. CONCLUSION

According to the *Winters* doctrine, federal reservations have extensive rights to water impliedly connected to them. While the *Winters* doctrine is well-established in appropriation jurisdictions, no court has determined the applicability of the doctrine in a riparian or dual-system jurisdiction.

The state of Oklahoma has never acknowledged Indian water rights. Nevertheless, the Choctaw Nation has laid claim to nearly all of the state's water pursuant to the reserved rights doctrine. Other tribal claims are certain to follow. All parties must now consider the extent of reserved rights and the applicability of the *Winters* doctrine.

The reserved right and dual-system can mesh with little difficulty. The peculiar history of the Indian Territory and the tribes therein provides an opportunity to implement a solution sensitive to the needs of both the state and the tribes. Due to the Supremacy Clause and the tribes' establishment of nations well before the state, the tribes have senior rights to Oklahoma. To facilitate the meshing of the two systems, the tribal claims should be quantified. Tribal priority and quantification help guarantee certainty and stability in Oklahoma—characteristics lacking in the chaos after *Franco-American*.

Taiawagi Helton

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220. *See id.*

221. Those limitations include limits to specific areas, *see, e.g.*, Ak-Chin Settlement Act, § 10(b) *supra* note 16 (restricting marketing to specific water management areas); Salt River Pima-Maricopa Indian Community Water Rights Settlement Act of 1988 (Salt River Settlement Act), § 8(a)(2), Pub. L. No. 100-512, 102 Stat. 2549, *as amended*, Pub. L. No. 102-238, 105 Stat. 1908 (1991) (restricting marketing to certain Arizona municipalities); Fort McDowell Indian Community Water Rights Settlement Act of 1990 (Fort McDowell Settlement Act), § 407(a)(2), (d) & 407(f), Pub. L. No. 101-628, 104 Stat. 4469, 4480 (restricting marketing to Phoenix and three Arizona counties); Ute Settlement Act, § 503(e)(2) *supra* note 16 (marketing restricted to within Utah), specific sources, *see, e.g.*, Salt River Settlement Act, § 8(a)(2), (f) *supra* note 16; Fort Hall Settlement Act, § 6(b); Fort McDowell Settlement Act, § 407(a)(2), (d), (h) *supra* note 16; San Carlos Apache Tribe Water Rights Settlement Act of 1992 (San Carlos Settlement Act), § 3706(b)(3)-(5), Pub. L. No. 102-575, title XXXVII, 106 Stat. 4600, 4740, *as amended*, Pub. L. 103-435, § 13, 108 Stat. 4566, 4572 (1994), *as amended*, Pub. L. No. 104-91, 110 Stat. 7 (1996); time limitations, *see, e.g.*, Ak-Chin Settlement Act, § 10(b) *supra* note 16 (100 year limit); Salt River Settlement Act, § 8(a)(2) *supra* note 16 (limiting marketing to the years 2000-2098 inclusive); Fort McDowell Settlement Act, § 407(a)(2) *supra* note 16 (limiting marketing to the years 2001-2099 inclusive); Jicarilla Settlement Act, § 7(b) *supra* note 16 (99 year limit); San Carlos Settlement Act, § 3706(b)(3) *supra* note 16 (100 year limit), and; marketed water subject to state law, *see, e.g.*, Colorado Ute Settlement Act, § 5(c) *supra* note 16; Ute Settlement Act, § 503(d) *supra* note 16; Jicarilla Settlement Act, § 7(a) *supra* note 16; Fort Hall Settlement Act, § 6(b) *supra* note 16.