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A Reserved Right Does Not Make a Wrong

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A RESERVED RIGHT DOES NOT MAKE A WRONG

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I. INTRODUCTION

As Mark Twain stated some time ago, "Whiskey is for drinking, water is for fighting over."[1] Mr. Twain's words cannot be applied anywhere more directly than to the once dry and dusty panhandle State of Oklahoma.[2] Despite recent droughts, had it not been for Senator Robert S. Kerr, Oklahoma would today be experiencing many more serious battles over water resources.[3] Southeastern Oklahoma, now lush with an abundance of lakes, has recently become the focal point of litigation over the right to transfer that water to places outside of the region.[4] In Oklahoma, the ongoing disputes over the southeastern portion of the state's water have been witnessed through the news,[5] but even those outside the state are becoming increasingly aware of the fight for water.[6]

In August of 2011, the Chickasaw and Choctaw Nations filed a lawsuit against the State of Oklahoma to protect their rights to the water in Sardis Reservoir.[7] The outcome of this current litigation between the Tribal Nations and the State of Oklahoma could potentially set new precedent in state-tribal water rights disputes in Oklahoma and around the country.[8] If the Chickasaw and Choctaw Nations successfully obtain either full or substantial rights to the waters in Sardis Reservoir, other federally-recognized tribes that have water rights not yet formally recognized may have the footing needed to seek legal protection of those rights.[9] Conversely, if the State of Oklahoma wins this case against the Chickasaw and Choctaw Nations, tribal water rights in Oklahoma could be severely impaired and the future social and economic health of all the tribes in the state could be jeopardized, beginning with the Chickasaw and Choctaw.[10]

The purpose of this article is to use previous court rulings to sketch an outline that forecasts the decision of the United States District Court for the Western District of Oklahoma ("Western District Court") in *Chickasaw Nation v. Fallin*.[11] This case

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1. Thomas L. Sansonetti & Sylvia Quast, *Not Just a Western Issue Anymore: Water Disputes in the Eastern United States*, 34 CUMB. L. REV. 185, 185 (2003) (demonstrating use of the widely quoted phrase; however, while this quote is most often attributed to Mark Twain, it has not been authenticated as such).

2. Journal Record Staff, *Special Report: H2[who?] Oklahoma Water Wars*, THE JOURNAL REC. (June 28, 2010), *available at* http://journalrecord.com/2010/06/28/oklahoma-water-wars.

3. CHARLES ROBERT GOINS & DANIEL GOBLE, HISTORICAL ATLAS OF OKLAHOMA 217 (4th ed. 2006). Robert S. Kerr was elected to the U.S. Senate in 1948 and given a post on an inconspicuous senate subcommittee in charge of approving federal water projects. *Id.* While on the subcommittee, Senator Kerr directed hundreds of millions of dollars into Oklahoma to be put towards a multitude of water projects. *Id.* Senator Kerr "seemed to be set on putting a dam on every river and creek the state had." *Id.*

4. *See* Tarrant Reg'l Water Dist. v. Herrmann, 656 F.3d 1222 (10th Cir. 2011), *cert. granted* 80 U.S.L.W. 3453 (U.S. Jan. 4, 2013) (No. 11-889); *see also* Complaint, Chickasaw Nation v. Fallin, 2011 WL 3629363 (W.D. Okla. Aug. 18, 2011) (No. CIV-11-927-C) [hereinafter Chickasaw Nation Complaint]. The plaintiffs that filed this suit, the Chickasaw and Choctaw Nations, have since filed an amended complaint that contains additional claims against the defendants. The additional claims contained in the amended complaint are not relevant to this article's discussion, therefore this article will refer to and cite the original filed complaint.

5. Journal Record Staff, *supra* note 2.

6. Felicity Barringer, *Precious Waters: Indians Join Fight for an Oklahoma Lake's Flow*, N.Y. TIMES (Apr. 12, 2011), http://query.nytimes.com/gst/fullpage.html?res=9C01E5DB1038F93A25757C0A9679D8B63&pagewanted=all.

7. *See* Chickasaw Nation Complaint, *supra* note 4.

8. Barringer, *supra* note 6.

9. *Id.*

10. Chickasaw Nation Complaint, *supra* note 4, at para. 6.

11. *Id.*

involves a dispute over the rights to the waters being stored in the Sardis Reservoir, a body of water referred to as Sardis Lake, in Southeastern Oklahoma.[12] Section II of this article presents a summary of information relating to treaties, and the interpretation thereof, between the federal government and/or the states and Tribal Nations, beginning with the Canons of Construction.[13] Section III examines three cases, all of which help to establish the legal concept of the reserved water right.[14] Section IV considers two Oklahoma cases, each of which has a significant bearing on the issue in *Chickasaw Nation v. Fallin.*[15] Section V describes the background history of the Sardis Reservoir, which holds the water in dispute, and then lays out the Tribal Nations' claims to the rights to that water.[16] Section VI is an application of the legal principles and court decisions from the preceding sections to *Chickasaw Nation v. Fallin,* and an analysis of their likely impact on the Western District Court's ruling.[17] Section VII concludes the article with a summary of the arguments in favor of the Tribes and makes the prediction that the Western District Court will find no reasonable choice but to rule in favor of the Tribal Nations and uphold their rights to the water in the Sardis Reservoir.

II. TREATIES WITH THE TRIBAL NATIONS

The standards and methods for interpreting federal Indian law vary greatly from those used to interpret other bodies of law in the United States.[18] The manner in which the judiciary has interpreted treaties between the United States and Tribal Nations in the past — especially the authority of treaties upheld by the Supreme Court — is of paramount importance to the Western District Court's ruling in *Chickasaw Nation v. Fallin.*[19]

A. *The Canons of Construction*

The Indian Canons of Construction are generally held rules for interpreting treaties, agreements, and other instruments of law as they relate to Tribal Nations.[20] There are four basic canons for interpreting treaties between the United States and Tribal Nations: (1) treaties should be construed in a light most favorable to the Tribal Nations, (2) ambiguities in the language of the treaties should be resolved in favor of the Tribal Nations, (3) treaties should be interpreted as the Tribal Nations would have understood them at the time of drafting, and (4) the Tribal Nation's sovereignty and rights to

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12. *Id.*
13. FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 119 (Nell Jessup Newton et al. eds., 2005).
14. Cappaert v. United States, 426 U.S. 128 (1976); Arizona v. California, 373 U.S. 546 (1963); Winters v. United States, 207 U.S. 564 (1908).
15. Choctaw Nation v. United States, 397 U.S. 620 (1970); Tarrant Reg'l Water Dist. v. Herrmann, 656 F.3d 1222 (10th Cir. 2011); Chickasaw Nation Complaint, *supra* note 4.
16. *See* Chickasaw Nation Complaint, *supra* note 4.
17. *See infra* notes 240–75 and accompanying text.
18. *See* COHEN, *supra* note 13, at 119.
19. *See* Chickasaw Nation Complaint, *supra* note 4.
20. COHEN, *supra* note 13, at 119–20.

property are to be preserved unless Congress clearly and unambiguously intended the contrary.[21]

B. The Power and Purpose of the Indian Treaty

Treaties with Tribal Nations rank high as authority — second only to the U.S. Constitution — and are considered "the supreme law of the land."[22] Article II of the U.S. Constitution expressly gives the President the power to negotiate treaties, which are then subject to Senate ratification.[23] The drafters included this provision to enable the President to negotiate with foreign countries; however, it has also provided the basis for federal Indian law and established federal authority over Indian affairs.[24] In nearly all instances when the President signed a treaty with an Indian Tribe, the treaty did not actually give the Tribe any property or sovereignty.[25] Instead, the treaty formed an agreement between the Indian Tribe and the federal government whereby the Tribe ceded its rights to the property to the federal government, which in return reserved those rights on the Tribe's behalf.[26]

The origination of treaties with Tribal Nations in the western portion of the United States — including what is now the State of Oklahoma — spawned from the Louisiana Purchase.[27] The Louisiana Purchase did not actually buy the United States title to the large tract of land west of the Mississippi, but rather gave the United States the right to negotiate for title with the Tribal Nations that occupied the lands.[28] Thus, after the United States completed the Louisiana Purchase, it began to enter into treaties with the Tribal Nations to relocate them and make room for the western expansion of settlers.[29]

The purpose of these treaties was to help advance the expansion and growth of the United States westward, while, in the process, giving the Tribal Nations new and permanent homelands wherein they could continue their ways of life without disturbing the progress of the United States.[30] The Chickasaw and Choctaw Nations, along with each of the other Five Civilized Tribes[31] have a unique type of treaty in comparison to

21. *Id.* at 119–20 (citations omitted).

22. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 519 (1832) ("The very term 'nation,' so generally applied to them, means 'a people distinct from others.' The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and, consequently, admits their rank among those powers who are capable of making treaties. The words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.").

23. U.S. CONST. art. II, § 2, cl. 2.

24. COHEN, *supra* note 13, at 393.

25. *Id.* at 394.

26. *Id.*

27. Taiawagi Helton, Comment, *Indian Reserved Water Rights in the Dual-System State of Oklahoma*, 33 TULSA L.J. 979, 991 (1998).

28. *Id.*

29. *Id.*

30. *Id.* at 991–92.

31. *Id.* at 991 n.136. The Five Civilized Tribes consist of the Cherokees, Chickasaws, Choctaws, Creeks, and Seminoles. The United States signed a treaty with each of the tribes that granted them title to their treaty lands in fee simple, which was far greater than the standard grant of land to the rest of the Indian Tribes. The relevant treaties include: the Treaty with the Cherokee, Dec. 29, 1935, U.S.-Cherokee Nation, 7 Stat. 478

almost all the other Tribes in the country.[32] The treaties are unique because the United States gave the Five Civilized Tribes patents to their treaty lands, which specifically conveyed the land in fee simple.[33] These favorable conveyances have given the Five Civilized Tribes much more authority over their treaty property than the more standard treaties give other Tribal Nations.[34] The fee simple title accords these tribes the most complete ownership interest in real property recognized in this country.[35] The fact that it was conveyed through a treaty with the United States — authoritatively second only to the U.S. Constitution — renders it as powerful as any other federal law.[36]

While the purpose of the treaties was to promote the westward expansion agenda, the purpose of reserving land through treaties was, ostensibly, to provide the Tribes with permanent homelands, wherein they could continue to live and prosper as a sovereign nation.[37] The treaties were meant to ensure and protect the Tribal Nations' complete and total freedom to govern themselves and their property and to have authority over their lands and everything thereon.[38] When the United States entered into the treaty agreements with the Chickasaw and Choctaw Nations, the treaties were given the power of the supreme law of the land, and the promises within them were to be upheld and protected as such.[39]

C. *The Equal Footing Doctrine*

The Northwest Territorial Ordinance of 1778 is one of the earliest known acknowledgements of the Equal Footing Doctrine.[40] This document was created as a means to establish territories in the Atlantic Northeast and declared that, "such state shall be admitted, by its delegates, into the Congress of the United States, on an equal footing with the original states, in all respects whatever."[41] Not long after the Northwest Territorial Ordinance of 1778, settlers began moving west in large numbers as the nation expanded rapidly in the late 1800s and early 1900s, to what were known as "territories."[42] As each territory became adequately populated, Congress enabled the

[hereinafter 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 [hereinafter Treaty of Dancing Rabbit Creek].

32. Helton, *supra* note 27, at 991.

33. *See, e.g.*, Treaty of Dancing Rabbit Creek, *supra* note 31.

34. Helton, *supra* note 27, at 991 n.136.

35. 28 AM. JUR. 2D *Estates* § 13 ("A 'fee-simple title' is a freehold estate of inheritance absolute and unqualified and stands at the head of estates as highest in dignity and the most ample in extent; every other kind of estate may be derived from it and may be merged into it. 'Fee simple absolute' and 'fee simple' represent the entire and absolute interest and property in the land. No one can have a greater interest. The holder of a fee simple holds property clear of any condition, limitation, or restriction. There can be only one estate in fee simple to a particular tract of land.").

36. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 519 (1832).

37. *See* Treaty of Dancing Rabbit Creek, *supra* note 31.

38. *Id.*

39. *Worcester*, 31 U.S. at 519.

40. ORDINANCE OF 1787: THE NORTHWEST TERRITORIAL GOVERNMENT, art. 5, *reprinted in* 1 UNITED STATES CODE, at XLIII-LXXIII (Office of the Law Revision Counsel of the House of Representatives ed., 2006).

41. *Id.*

42. Helton, *supra* note 27, at 991–92.

settlers to create new states to be entered into the Union on "equal footing" with the original states.[43] The Oklahoma Enabling Act produced the means for the then Oklahoma Territory to be admitted to the Union as the State of Oklahoma in the year 1907.[44] As this article demonstrates, it is not uncommon for parties to attempt to rely on the Equal Footing Doctrine when faced with Tribal claims for the protection of lands granted to them by treaty.[45] However, the cases discussed provide the Western District Court in *Chickasaw Nation v. Fallin* ample guidance to reasonably conclude that the Equal Footing Doctrine did not pass to Oklahoma the title to the Tribal Nations' water upon Oklahoma's admission to the Union.[46]

D. *A Brief Overview of the Policy History of Treaties*

The United States and Congress were very amiable towards the Tribal Nations in the early stages of forming the nation, largely due to the fact that the struggle to gain independence from Great Britain was taking precedence at the time; the last thing lawmakers needed was added hostility from the Tribal Nations.[47] Once the British withdrew from the continent, however, the United States shifted its attitude towards the Tribes and implemented a more aggressive and one-sided approach in negotiating with them — resulting most often in Tribal disadvantage.[48] In addition to the language barrier the Tribes faced when negotiating treaties with the United States, too often the negotiations were fraught with threats, bribery, and fraud.[49] This practice of aggressive and manipulative treaty negotiation took place for decades, as the United States' primary objective was the western expansion of settlers and the procurement of land and resources to further that effect.[50]

History demonstrates that the United States was often quick to breach its treaty promises with Tribal Nations in order to further western expansion policy; it could even be argued that breaching treaties was one of the most effective policies employed by the federal government in its efforts to expand westward across the continent.[51] The members of the Five Civilized Tribes,[52] which include the Tribal Nations in *Chickasaw Nation v. Fallin*, endured numerous treaties, renegotiations, and relocations before they

43. U.S. CONST. art. IV, § 3, cl. 1 (granting Congress the sole power to admit states, not the power to create states).

44. *See* Oklahoma Enabling Act, 34 Stat. 267 (1906).

45. Choctaw Nation v. United States, 397 U.S. 620, 627–28 (1970).

46. *See id.*

47. *See* Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As long as Water Flows, or Grass Grows Upon the Earth" — How Long a Time is That?* 63 CALIF. L. REV. 601, 609 (1975).

48. *Id.* at 610.

49. *Id.* at 610–11.

50. *Id.* at 611.

51. *Id.* ("[I]n one case a treaty was respected for only [twelve] days before it was violated by the government negotiator.").

52. These five tribes became known as the Five Civilized Tribes due to their remarkably rapid settlement in terms of social and political development after they were forced to endure the "Trail of Tears" in their removal to the Oklahoma Territory. *See* ANGIE DEBO, AND STILL THE WATERS RUN: THE BETRAYAL OF THE FIVE CIVILIZED TRIBES 4–5 (1973). The name was given in order to distinguish them from the more undomesticated Tribes in the region. *Id.* at 5.

were finally able to settle and remain on the lands to which they currently hold title today.[53]

Since the 1830 signing of the Treaty of Dancing Rabbit Creek, the judicial branch of the U.S. government has been the most active and consistent participant in maintaining the validity of treaties with the Tribal Nations.[54] This policy of upholding treaties between the United States and Tribal Nations is evidenced in the prudential Indian law Canons of Construction, which U.S. courts have repeatedly utilized when deciding cases involving treaty rights.[55] The courts have made it common practice to consider additional factors outside of treaties, such as the events leading up to the treaty, when determining a treaty's meaning and authority.[56] These factors include other principals of related law and the circumstances surrounding the making of the treaty.[57] As early as the 1908 decision in *Winters v. United States*, the Court has made certain to strongly consider the notions of fairness in light of the treatment of the Tribal Nations before and at the time a treaty was entered into.[58]

In the 1980s, under President Ronald Reagan, a shift in policy began to occur.[59] The Reagan administration was concerned with the frequency and amount of litigation that was taking place between Tribal Nations and states.[60] Its greatest concern, however, was the amount of time and money it was taking to resolve the disputes in court.[61] Specifically with regard to water rights cases involving Tribal Nations, the Reagan administration in 1982 expressed its policy position as anti-litigation and instead in support of negotiating settlements with Tribal Nations.[62] The policy of negotiating amicably rather than litigating adversarially with the Tribes might simply seem like an attempt to save money by avoiding costly and lengthy court proceedings to resolve disputes over water.[63] There is convincing evidence, however, demonstrating that despite avoiding litigation, since the settlement policy has been in place the amount of spending on Tribal Nation water development and related federal programs has actually increased.[64] This increase in spending on development lends credibility to the idea that

53. Choctaw Nation v. Oklahoma, 397 U.S. 620, 622–28 (1970). The Supreme Court provided an excellent and very thorough history of the succession of treaties that took place between the Five Civilized Tribes and the United States. *Id.* In the recounting of each treaty, the Court seemed to make special note of when the United States breached a particular treaty. *Id.* The Court made statements such as, "[o]nce again, the United States assured the Indians that they would not be forced to move," and "again due in large part to pressure from settlers . . . Congress acted to change the arrangement." *Id.* at 626–27.

54. KIRKE KICKINGBIRD ET AL., INDIAN TREATIES 31 (1980).

55. *Id.* at 31–32.

56. *Id.* at 31–33.

57. *Id.* at 32.

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

59. DANIEL MCCOOL, NATIVE WATERS: CONTEMPORARY INDIAN WATER SETTLEMENTS AND THE SECOND TREATY ERA 46–48 (2002).

60. *Id.* at 46–47.

61. *Id.*

62. *Id.* at 47 ("In 1982 the Reagan administration began to actively encourage tribes to negotiate.").

63. *Id.* at 46–56.

64. *Id.* at 45–56.

perhaps the federal government has become more concerned with protecting the Tribal Nations and upholding its agreements with them.[65]

Many people believe that Tribal Nation water rights, along with a multitude of other Tribal rights, are issues of justice and obligation.[66] The executive branch of the federal government, responsible for enforcing the treaty agreements made with the Tribal Nations, along with many private business interests, constituted a strong opposition to protecting Tribal rights throughout the past.[67] As this article discusses, the judicial branch, on the other hand, has seemingly been an avid proponent of upholding treaties and agreements and protecting the rights of the Tribal Nations.[68] This article examines several cases that lend credence to the proposition that the policy of the judiciary has consistently been to recognize and uphold the rights granted to Tribal Nations in their treaties with the United States.[69]

E. The Treaty of Dancing Rabbit Creek

The Tribal Nations in *Chickasaw Nation v. Fallin* assert their rights to the waters in Sardis Reservoir under the power and provisions of the Treaty of Dancing Rabbit Creek, entered into by the Tribes with the U.S. federal government in 1830.[70] The Treaty provided the agreement reached between the Choctaw Nation and the United States regarding the lands that the United States reserved and granted to the Tribal Nation for the purposes of providing the Choctaws a homeland.[71] Article Two of the Treaty gives rather precise geographical descriptions of the boundaries of the Choctaw's reserved lands and specifies that the land shall be "conveyed . . . in fee simple to them and their decedents, to insure them while they shall exist as a nation and live on it."[72]

The Treaty of Dancing Rabbit Creek also contains specific language guaranteeing the Choctaw Nation the lawful right to tribal self-governance and jurisdiction over all people and property outlined in the Treaty.[73] Article Four of the Treaty of Dancing Rabbit Creek states:

> The Government and people of the United States are hereby obliged to secure to the said Choctaw Nation of Red People the jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the government of the Choctaw Nation and their descendants; and that no part of the land granted them shall ever be embraced in any Territory or State; but the U.S. shall forever secure said Choctaw Nation from, and against, all laws except such as from time to time may

65. *Id.* at 54.

66. *Id.* at 50.

67. *See* DEBO, *supra* note 52, at 318–24.

68. *See infra* footnotes 85–166 and accompanying text.

69. *See* Cappaert v. United States, 426 U.S. 128 (1976); Arizona v. California, 373 U.S. 546 (1963); Winters v. United States, 207 U.S. 564 (1908).

70. Chickasaw Nation Complaint, *supra* note 4, at para. 1; *see also* Treaty of Dancing Rabbit Creek, *supra* note 31, at art. 2.

71. Treaty of Dancing Rabbit Creek, *supra* note 31, at art. 2.

72. *Id.*

73. *See id.* at art. 4.

be enacted in their own National Councils, not inconsistent with the Constitution, Treaties, and the Laws of the United States; and except such as may, and which have been enacted by Congress, to the extent that Congress under the Constitution are required to exercise a legislation over Indian Affairs.[74]

The Chickasaw Nation is implicated in the Treaty of Dancing Rabbit Creek under a separate treaty — the Treaty of Doaksville.[75] By signing this treaty, the Chickasaw Nation obtained what was to be termed a "Chickasaw District."[76] The "Chickasaw District" was within the boundaries and under the government of the previously established Choctaw Nation lands, and "guarantied [sic] rights of homeland ownership and occupancy."[77] Except for the right to dispose of the lands — a right held in common by both the Choctaw and the Chickasaw Nations — the Treaty of Doaksville guaranteed the Chickasaw Nation the same rights and sovereignty the Choctaw Nation had under the Treaty of Dancing Rabbit Creek.[78] It is the reason the Tribal Nations in *Chickasaw Nation v. Fallin* jointly bring this action under the Treaty of Dancing Rabbit Creek.[79]

The Treaty of Dancing Rabbit Creek was a development of the United States' particularly unique handling of matters with the Five Civilized Tribes.[80] The United States made special agreements with the Five Civilized Tribes for their several and respective relocations, beginning with the Cherokee's signing of the first removal treaty in 1817.[81] In these treaties, including the Treaty of Dancing Rabbit Creek, the United States granted federal land patents to the Tribes[82] describing the property conveyed as permanent homeland.[83] The Five Tribes Doctrine promulgates the notion that these permanent homelands carry with them all the rights to the water, not just the water necessary to fulfill the purpose of the treaty lands.[84]

III. THE ESTABLISHMENT AND EXPANSION OF THE INDIAN RESERVED WATER RIGHT

Reserved water rights are a combination of the riparian and prior appropriation systems of obtaining rights to water.[85] Like a riparian water right, a reserved water right

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74. *Id.*

75. *See* Treaty with the Choctaw and Chickasaw, Jan. 17, 1837, U.S.-Choctaw Nation-Chickasaw Nation, 11 Stat. 573 [hereinafter Treaty of Doaksville].

76. *Id.* at art. I ("It is agreed by the Choctaws that the Chickasaws shall have the privilege of forming a district within the limits of their country, to be held on the same terms that the Choctaws now hold it, except the right of disposing of it, (which is held in common with the Choctaws and Chickasaws) to be called the Chickasaw district of the Choctaw Nation . . . .").

77. Chickasaw Nation Complaint, *supra* note 4, at para. 25; *see* Treaty of Doaksville, *supra* note 75.

78. Treaty of Doaksville, *supra* note 75.

79. *See id.*; *see also* Treaty of Dancing Rabbit, *supra* note 31; Chickasaw Nation Complaint, *supra* note 4, at para. 25.

80. *But see* Helton, *supra* note 27, at 991 n.136 (including the Treaty of Dancing Rabbit Creek as one of several treaties, suggesting it is perhaps less than unique).

81. *Id.*

82. *See generally* Jennifer E. Pelphrey, Note, *Oklahoma's State/Tribal Water Compact: Three Cheers for Compromise*, 29 AM. INDIAN L. REV. 127 (2005).

83. *See* Helton, *supra* note 27, at 993.

84. *Id.* at 994–95.

85. *Id.* at 990; *see generally* DAVID H. GETCHES, WATER LAW IN A NUTSHELL (4th ed. 2009) (providing an explanation of the prior appropriation and riparian systems of water rights).

is attached to the land and originates with the ownership of the land.[86] Just like a riparian water right, a reserved water right cannot be diminished or relinquished through nonuse.[87] A reserved water right, on the other hand, is also like an appropriated water right in that a reserved water right is quantifiable and does not diminish during water shortages when other junior appropriators also need water.[88] Diversion and beneficial use are not elements needed to establish a reserved water right.[89] Rather, a reserved water right is established when the federal government reserves lands that require water in order to be made useful.[90] The cases in this section discuss and demonstrate the reserved water right as it has been applied to reserved Tribal Nation treaty lands, as well as how it has been generally expanded to carry out Congress' intent and to meet the needs of justice.[91]

A. Winters v. United States*: The Establishment of Reserved Indian Water Rights*

The *Winters* case established that Indian Tribes in fact have reserved water rights attached to their federally reserved lands.[92] The ruling in the *Winters* case, which evolved into what has long been termed the "*Winters* doctrine," holds that when the federal government reserves lands for tribal purposes, it also, by implication, reserves appurtenant waters to the extent necessary to achieve the purposes intended by the reservation.[93] The *Winters* case has a substantial effect in almost any litigation seeking to establish the water rights of Tribal Nations, as it was the first decision declaring the reserved Indian water right.[94]

In *Winters*, the United States brought a lawsuit against the defendants to enjoin them and any other party from constructing a dam or otherwise maintaining a structure or facility that would prevent waters from naturally flowing to federally-reserved Indian lands.[95] The Court recognized that the reserved lands, which were occupied by the Indians and reserved by way of a treaty with the federal government, carried with them numerous and certain rights.[96] The Court noted that the reservation was once part of a much larger tract of land that the Indians had, at one time, a right to occupy and use.[97] According to the facts of the *Winters* case, the Tribal Nations — referred to simply as "Indians" at that time — wanted to become more of a civilized people and, in

86. Helton, *supra* note 27, at 990.

87. *Id.*

88. *Id.*

89. *Id.* at 990–91.

90. *Id.* at 991.

91. *See generally* Cappaert v. United States, 426 U.S. 128 (1976); Arizona v. California, 373 U.S. 546 (1963); Winters v. United States, 207 U.S. 564 (1908).

92. *See Winters*, 207 U.S. 564.

93. *Id.*

94. *Id.*

95. *Id.* at 565. The United States prevailed at the district court level with the court granting an interlocutory order, enjoining the defendants from interfering with the water flowing onto Indian Reservation land. The Ninth Circuit Court of Appeals affirmed the district court's order in *Winters v. United States*, 148 F. 684 (9th Cir. 1906). The case cited and discussed here is the defendant, Winters, arguing the case to the Supreme Court.

96. *Winters*, 207 U.S. at 576.

97. *See id.*

furtherance of this desire, agreed to change their living conditions and reside on a much smaller tract of land.[98] The defendants contended that when the Indians agreed to reduce their area of occupation, they also relinquished their rights to their command over the lands and the waters contained thereon because they were not savvy enough to express their rights in the agreement.[99] The Court firmly struck down the defendant's contention, reasoning that the Indians, once having commanded all the beneficial use of the lands and the waters — whether for hunting, grazing, or agriculture — would not have intended to "reduce the area of their occupation and give up the waters which made it valuable or adequate."[100]

In examining the events that led up to the signing of the treaty and interpreting the language of the treaty, the Court determined that its purpose was to provide the Tribal Nations with a permanent homeland where they could prosper as a "pastoral and civilized people."[101] The Court ruled in favor of the Tribal Nations, holding that they were, in fact, entitled to the water on their federally reserved treaty land, as entitlement to a resource such as water was inferred by the agreement and served to "support the purpose of the [treaty]."[102] Thus, the Indian reserved water right was born.[103]

The *Winters* court promulgated a doctrine that has been cited to in countless tribal water rights cases and secondary sources since its decree.[104] The *Winters* doctrine sets what should be regarded as the standard for determining the minimum water rights that a Tribal Nation possesses.[105] *Winters* clearly states that Tribal Nations have a right to the amount of water necessary to fulfill the purpose of their reservation, but since the ruling in the *Winters* case, the Court has been willing to examine more closely the purposes of reservations — both Indian and non-Indian — and what degree of right to water justly fulfills those purposes.[106]

B. Arizona v. California: *Not Only Enough Water to Fulfill the Purposes of Today, but Enough to Fulfill the Purposes of Forever*

The Supreme Court expanded the *Winters* doctrine in 1963, nearly fifty years after it made its ruling in the *Winters* case.[107] The case was *Arizona v. California*, which was a legal dispute "over how much water each State [and each Tribe of Indians had] a legal right to use out of the waters of the Colorado River and its tributaries."[108] The Court's

98. *Id.* It was the Government's policy at the time to attempt to shift the Indians from a "nomadic and uncivilized people" into a more "pastoral and civilized people." *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 576–77.

103. *Id.*

104. *See Citing References*, WESTLAW, https://a.next.westlaw.com/RelatedInformation/Ib918b5279cb811d9bc61beebb95be672/CitingReferences.html?originationContext=documentTab&transitionType=CitingReferences&contextData=(sc.UserEnteredCitation)&docSource=00c718108a034ea0a1cd9c4c27269fe9 (last visited Jan. 11, 2013) (reporting that *Winters* has been cited to 1,518 times).

105. *Winters*, 207 U.S. 564.

106. Cappaert v. United States, 426 U.S. 128 (1976); Arizona v. California, 373 U.S. 546 (1963).

107. *Arizona*, 373 U.S. 546.

108. *Id.* at 551.

decision was based partly on "the meaning and the scope" of a piece of legislation Congress enacted — the Boulder Canyon Project Act of 1928.[109] This Act of Congress enabled numerous public works projects, including what would become known as the Hoover Dam, and implicated the water rights of several states and several Tribal Nations with federally established Indian reservations.[110]

The Court, when ruling on the Tribal Nations' Colorado River water rights, cited the *Winters* decision and upheld its ruling, stating that when the United States created an Indian Reservation, it "intended to deal fairly with the Indians by reserving" enough water to fulfill the purpose of their reservation.[111] The *Arizona* Court expanded the *Winters* doctrine by stating that the amount of water reserved for the Indians "was intended to satisfy the future as well as the present needs of the Indian Reservations."[112] Additionally, the Court stated that "enough water was reserved [to the Indians] to irrigate all the practicably irrigable acreage on the reservations."[113] Those needs, according to the Court, could be reasonably calculated by measuring how much water it would take to irrigate the entire reservation.[114] The *Arizona* Court reasoned: "How many Indians there will be and what their future needs will be can only be guessed. We have concluded . . . that the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage."[115]

C. Cappaert v. United States*: The Supreme Court Further Expands the* Winters *Doctrine*

The Supreme Court further expanded the *Winters* doctrine in *Cappaert v. United States* in 1976, over sixty years after the Court made its ruling in *Winters*.[116] Although the *Cappaert* case did not address tribal water rights, it dealt with applying the reserved right doctrine to groundwater as a case of first impression.[117] The United States brought suit against Cappaert because his pumping of groundwater was causing the water level of a pool, called Devil's Hole, to drop.[118] The United States claimed that President Truman protected Devil's Hole when he withdrew the land surrounding it from the public domain and made it a detached portion of the Death Valley National Monument.[119] The United States argued that the purpose of the reservation of the lands was to protect the pool of water and included an implied reservation of the water necessary to fulfill that purpose, which was the protection and preservation of the pool.[120]

109. *Id.* at 552; Boulder Canyon Project Act of 1928, 45 Stat. 1057, ch. 42, 43 U.S.C.A. § 617 (2012) [hereinafter Boulder Canyon Act].
110. *See* Boulder Canyon Act, *supra* note 109.
111. *Arizona*, 373 U.S. at 600.
112. *Id.* at 600.
113. *Id.*
114. *Id.* at 600–01.
115. *Id.* at 601.
116. *See* Cappaert v. United States, 426 U.S. 128 (1976).
117. *Id.* at 142.
118. *Id.* at 134–36.
119. *Id.* at 131; Proclamation No. 2961, 17 Fed. Reg. 691 (Jan. 17, 1952).
120. *Cappaert*, 42 U.S. at 139.

The Court analyzed President Truman's Proclamation, which contained specific language explaining the Proclamation's intention to give the pool special protection in an attempt to preserve it for future generations.[121] The Court reasoned that because the pool is a body of water, "[T]he protection contemplated [by the Proclamation] is meaningful only if the water remains."[122] Thus, the water, be it groundwater or surface water, was explicitly reserved.[123] While this case does not involve treaties with Tribal Nations, it certainly supports the assertion that the *Winters* doctrine of reserved water rights is expandable where such expansion is required to fulfill the purpose of federally reserved lands.[124]

IV. TWO OKLAHOMA CASES THAT SUPPORT THE TRIBAL NATION CLAIMS

A. Choctaw Nation v. Oklahoma *(The* Arkansas River Bank *Case)*

The district court presiding over *Chickasaw Nation v. Fallin* must decide whether the Tribal Nations have rights to the waters in Sardis Reservoir — waters that were not expressly mentioned in the Treaty of Dancing Rabbit Creek.[125] The decision in *Choctaw Nation v. Oklahoma* ("*Arkansas River Bank*") is pivotal in determining the outcome of *Chickasaw Nation v. Fallin.*[126] Whereas the cases previously discussed in this article illustrate the reserved Indian water right, *Arkansas River Bank* focuses more on the power of the treaty and the policy behind its enforcement.[127] The U.S. Supreme Court, which made the ultimate determination in *Arkansas River Bank*, ruled that the plaintiff Tribal Nations did in fact have rights to the beds and banks of the Arkansas River, despite those rights not being mentioned in the Treaty of Dancing Rabbit Creek.[128] The *Choctaw Nation* Court carefully considered the Treaty of Dancing Rabbit Creek and relied on the provisions, intended purpose, and authority of the agreement in ruling in favor of the Tribal Nations.[129] The Cherokee Nation originally commenced this action against the State of Oklahoma to recover certain royalties for minerals discovered upon and beneath the watercourse known as the Arkansas River.[130] The Choctaw and Chickasaw Nations intervened in the action, claiming "that part of the riverbed [in dispute] belong[ed] to them."[131] The U.S. District Court for the Eastern District of Oklahoma ruled in favor of the State and the Tribal Nations appealed.[132] The Tenth

121. *Id.* at 140–41.
122. *Id.* at 140.
123. *Id.*
124. *Id.*
125. Treaty of Dancing Rabbit Creek, *supra* note 31.
126. Choctaw Nation v. United States, 397 U.S. 620 (1920); *see also* Chickasaw Nation Complaint, *supra* note 4. The similarities between these two cases are remarkable, as this article demonstrates.
127. *See Choctaw Nation*, 397 U.S. 620.
128. *Id.* at 635.
129. *Id.* at 634–36.
130. *Id.* at 621. The Cherokee Nation also commenced this lawsuit against various corporations to recover royalties from mineral leases on land underlying the Arkansas River. The facts of the case do not indicate the names of these corporations, however, and they are of no significance in the discussion of this article.
131. *Id.*
132. *Id.* at 621–22.

Circuit Court of Appeals affirmed.[133]

The Tenth Circuit decided that the Tribal Nation's claims were based on "inference and implication."[134] The court recounted its understanding that treaties with Indian Tribes are to be construed liberally in favor of the Indians.[135] However, the court held more prominent the rule that the sovereign conveys nothing within a grant by implication — in other words, a sovereign nation must specify anything it wishes to convey or else there is no conveyance.[136] The court's decision reflected its reliance on this rule, for there was no express language granting the Tribes rights to any part of the beds or banks of the Arkansas River in the Treaty of Dancing Rabbit Creek.[137] Upholding the district court's judgment, the circuit court held that title to the beds and banks of the Arkansas River was not part of the Tribal Nations' treaty lands, but lawfully conveyed to the State of Oklahoma upon its admission to the Union in 1907, when the United States conveyed the title under the Equal Footing Doctrine.[138]

The U.S. Supreme Court granted certiorari to hear the Tribal Nation's case[139] and reversed the circuit court's ruling, deciding in favor of the Tribes.[140] Justice John Marshall delivered the opinion of the Court, stating the Court's conclusion that the United States intended and did in fact convey in the Treaty of Dancing Rabbit Creek title to the beds and banks of that portion of the Arkansas River that flow within the metes and bounds of the Tribal Nation's treaty lands.[141] Since the Tribal Nations identified the Treaty of Dancing Rabbit Creek as the treaty that conveyed to them the rights to the beds and banks of the Arkansas River, the Court paid special attention to the history of events that led up to the Treaty.[142] The Court recognized that the early "clash between the obligation of the United States to protect Indian property rights on the one hand and the policy of forcing their relinquishment on the other was inevitable."[143] The Court asserted that "[w]ith the passage of the Indian Removal Act of 1830, it became apparent that policy, not obligation, would prevail."[144] The impending Indian Removal Act was the threat that prompted the Tribal Nations in this case to agree to leave their homes in 1830 and sign the Treaty of Dancing Rabbit Creek, which granted them the land on which they

133. *See* Cherokee Nation or Tribe of Indians in Okla. v. Oklahoma, 402 F.2d 739 (10th Cir. 1968) *rev'd sub nom. Choctaw Nation*, 397 U.S. 620.

134. *Id.* at 748.

135. *Id.* at 747.

136. *Id.*; *accord* Caldwell v. United States, 250 U.S. 14, 20 (1919); Northern Pacific Ry. Co. v. Soderberg, 188 U.S. 526, 534 (1903).

137. *Cherokee Nation*, 402 F.2d. at 747.

138. *Id.* at 745 (stating that "Oklahoma was admitted to the Union on an equal footing as the original states" and that "the equal footing principal must be recognized and maintained").

139. Choctaw Nation v. Oklahoma, 394 U.S. 972 (1969) (petitions for writs of certiorari to the United States Court of Appeals for the Tenth Circuit).

140. *Choctaw Nation*, 397 U.S. at 635–36 ("We thus conclude that the United States intended to and did convey title to the bed of the Arkansas River . . . .").

141. *Id.*

142. *Id.* at 622 ("As background, it is necessary briefly to relate the circumstances by which petitioners received large grants of land by treaty from the United States.").

143. *Id.* at 625.

144. *Id.*

live today — the land that the Arkansas River runs through.[145]

The Court also took a hard look at the language and purpose of the agreement in accordance with the Canons of Construction.[146] The ruling of the Court reflected its interpretation of the provisions of the treaty, as well as its understanding of the treaty's purpose.[147] The Court concluded that the United States did, in fact, intend to convey to the Tribal Nations the rights to the bed and banks of the Arkansas River, and that the Treaty of Dancing Rabbit Creek effectively made that conveyance despite its lack of specific language.[148]

1. Government Policy Over Legal Obligation

The *Arkansas River Bank* Court, in its retracing of the history of treatment of Tribal Nations by the United States, made a very clear and definite assertion: the United States has a track record of promoting policy that supported its current interests rather than upholding agreements and fulfilling obligations that may not have furthered those interests.[149] The Court seemed to go out of its way to underscore the past injustices that the Tribes experienced — making specific reference to the United States' concerted effort to manipulate and abuse its relationship with the Tribes in its policy to further expand the settlement of the continent.[150]

The Court, in this case, made its first remark regarding the United States' choosing to promote policy favorable to the expansion of the settlers rather than upholding its "solemn guarantee" to the Tribal Nations, to which it reserved land for shortly after the Revolutionary War.[151] The United States made the Louisiana Purchase shortly after making these "solemn guarantees" to the Indians and immediately proposed that the Tribes pick up and relocate to lands even further west;[152] the purchase expanded the United States' territory vastly in that direction and made available larger eastern portions for the expansion of settlers.[153]

The *Arkansas River Bank* Court cited to the Indian Removal Act of 1830 as the mechanism which forced the involuntary removal of the Tribal Nations only a few years after they had been solemnly guaranteed through various treaties that they would have a

145. *Id.*
146. *Id.* at 630.
147. *Id.* at 635.
148. *Id.*
149. *Id.* at 623, 625.
150. *Id.* at 623–28.
151. *Id.* at 622–23. After the Revolutionary War, the United States made a series of treaties with the Cherokee and Choctaw Nations assigning them the right to lands for their "exclusive use and occupancy." *See id.* (citations omitted).
152. *See id.*
153. *See* Treaty with France, art. I, 8 Stat. 200 (1803).

new homeland to call their own.[154] The United States created The Indian Removal Act as a policy mechanism that had the effect of completely destroying the Tribal Nations' rights to their treaty lands.[155]

The *Arkansas River Bank* Court noted the "clash between the obligation of the United States to protect Indian property rights on the one hand and the policy of forcing their relinquishment on the other."[156] It is impossible to say with certainty, but the Court seemed conscience-stricken in recounting the effect of the United States' choice to pursue policy over obligation in its consideration and analysis of the history behind the Tribal Nations' struggle for a homeland.[157] The Court stated that the Indian Removal Act made it "clear that the United States was unable or unwilling to prevent the States and their citizens from violating Indian rights."[158] The Supreme Court's ruling reflected its consideration of the notion of fairness and the United States' obligation to uphold its agreements with the Tribal Nations, even if it had not done so in the past.[159]

2. Justice Douglas's Concurring Opinion

In the *Arkansas River Bank* case, Justice Douglas was not a part of the opinion delivered by Justice Marshall, but rather delivered a separate concurring opinion that pointed out an alternate reason for ruling in favor of the Choctaws.[160] Justice Douglas echoed the majority's factual recitation of the treaty granting the Tribal Nation over 14,000,000 acres of property.[161] In addition, he made note of the fact that the lands conveyed in fee simple to the Tribal Nations completely surround the segment of the Arkansas River in dispute in the case.[162]

Justice Douglas exclaimed that it was a "mystery" as to why, if all the land surrounding the segment of the Arkansas River was conveyed to the Tribal Nations in fee simple, the bed in that portion of the river was not also conveyed.[163] He made the keen observation that the United States, in drafting the agreement with the Tribal Nations, took special care to expressly reserve certain rights, including but not limited to the right to "establish and maintain military posts and roads together with the free use of land, timber, fuel, and materials for the construction and support of those facilities."[164] Justice Douglas reasoned that if the United States in fact intended to withhold the rights to the beds of the Arkansas River, then it would have so indicated in the agreement.[165] Justice Douglas concluded by stating, "[s]ince the United States made some reservations but made no reservations of the river bed, and if fair dealing is the standard, one would

154. *Choctaw Nation,* 397 U.S. at 623–25 (construing the Indian Removal Act of 1830, 4 Stat. 411).
155. *Id.*
156. *Id.* at 625.
157. *Id.* at 623, 625.
158. *Id.* at 625.
159. *Id.*
160. *Id.* at 636 (Douglas, J., concurring).
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.* at 637.

conclude, I think, that the river bed was the tail that went with the hide."[166]

B. Tarrant v. Herrmann*: When Congress Speaks, States Must Listen*

The Western District Court presiding over *Chickasaw v. Fallin* should consider *Tarrant Regional Water District v. Herrmann*, a very recent Tenth Circuit decision that bears significantly on the relationship between federal and state action.[167] The Tarrant Regional Water District of Texas sued Rudolph Herrmann in his official capacity as a member of the Oklahoma Water Resources Board ("OWRB").[168] On September 7, 2011, the Tenth Circuit affirmed the Western District of Oklahoma Court's decision in favor of the OWRB, thereby preventing Tarrant from transferring water into Texas from Southeastern Oklahoma.[169] The Tarrant Regional Water District, located in the northern region of Texas and bordering Oklahoma, had applied for permits that would allow it to transfer water from southeastern Oklahoma for use in Texas.[170] The OWRB could not issue the permits as it violated Oklahoma state law to do so.[171]

In 2009, Tarrant sued for declaratory judgment to quash particular Oklahoma statutes governing water appropriation and to enjoin the OWRB from enforcing them.[172] Tarrant argued that the Oklahoma statute making it illegal to transfer water outside the state was a violation of the Commerce Clause because it discriminated against non-residents.[173] The Tenth Circuit Court rejected Tarrant's arguments and ruled in favor of Herrmann and the OWRB, concluding that an interstate compact — The Red River Compact ("RRC") — gave Oklahoma the right to enact discriminatory legislation preventing the transfer of water.[174] Arkansas, Louisiana, Oklahoma, and Texas entered into the RRC, an agreement wherein each of the states to the compact came to an accord with respect to the rights to the water of the Red River, along with its tributaries.[175] The above-mentioned states entered into the RRC to provide an "equitable apportionment" of the waters of the Red River and its tributaries; Congress approved and ratified the Compact once agreed upon by the interested states.[176]

On appeal, the Tenth Circuit Court ruled that the authority of the RRC, to which both Oklahoma and Texas were parties, preempted Oklahoma's state statutes, and that

166. *Id.*
167. Tarrant Reg'l Water Dist. v. Herrmann, 656 F.3d 1222, 1250 (10th Cir. 2011), *cert. granted*, 80 U.S.L.W. 3453 (U.S. Jan. 4, 2013) (No. 11-889).
168. *Id.* at 1227.
169. *Id.* at 1250.
170. *Id.* at 1227.
171. *Id.*
172. Tarrant Reg'l Water Dist. v. Herrmann, CIV-07-0045-HE, 2009 WL 3922803 at *1 (W.D. Okla. Nov. 18, 2009), *aff'd Tarrant Reg'l Water Dist.*, 656 F.3d 1222.
173. *Id.* at *3–4.
174. *Id.* at *7.
175. Pub. L. No. 96-564, 94 Stat. 3305 at Preamble (1980) ("Red River Compact") [hereinafter Red River Compact]; BLACK'S LAW DICTIONARY 120 (9th ed. 2009) (A compact is "an agreement or covenant between two or more parties, [especially] between governments or states;" "[a] voluntary agreement between states enacted into law in the participating states upon federal congressional approval.").
176. *See* Red River Compact, *supra* note 175.

the OWRB was vindicated in exercising its right to not issue the permits.[177] The ruling affirmed the Western District Court's decision that, with respect to the water transfer at issue, the RRC trumped state law and that the provisions of the interstate water compact governed the issue in favor of Oklahoma.[178] The RRC declared that each state could control the transfer of Red River waters within its borders, and the court interpreted the language of the Compact to give each respective state the authority to enact legislation to that effect, even if the legislation would otherwise be an unlawful restriction of interstate commerce.[179] The district court granted Herrmann's motion for summary judgment — a ruling which was upheld on appeal — proclaiming that the RRC was adequate authority to preclude the Commerce Clause and Supremacy Clause claims that plaintiff asserted and to deny it access to that water as it flowed in the Red River.[180]

The RRC that controlled the transfer of water in the *Tarrant* case can be likened to the Treaty of Dancing Rabbit Creek in that both agreements were an expression of Congress' will, and they carried the full weight of Congress' authority and intent.[181] The RRC explicitly stated in its "General Provisions," under Section 2.01, that "[e]ach Signatory State may use the water allocated to it . . . in any manner deemed beneficial by that state" and that "[e]ach state may freely administer water rights and uses in accordance with the laws of that state."[182] The RCC contains language clearly stating that "[t]he State of Oklahoma shall have free and unrestricted use of the water[s]" allocated to it.[183]

There were several reasons that both the Western District Court and the Tenth Circuit Court ruled in favor of the RRC's authority over state matters.[184] First, the Western District Court recognized and upheld the RCC's validity and authority as entered into by Oklahoma, Texas, Louisiana, and Arkansas under the Compact Clause.[185] The Western District Court referred to *Texas v. Mexico* in stating, "Once Congress has approved an interstate compact, the compact becomes more than just an agreement between the involved states. It also becomes, in legal effect, a federal statute."[186] The *Tarrant* court, along with the interested parties, understood that the Dormant Commerce Clause was only applicable where Congress had remained silent on an issue relating to commerce.[187] They also appreciated that when Congress takes actions to authorize a state activity or regulation, that activity or regulation is "immune

177. *Tarrant Reg'l Water Dist.*, 656 F.3d at 1250.

178. *Id.*

179. *Id.*

180. *Tarrant Reg'l Water Dist.*, 2009 WL 3922803 at *8.

181. *See* Treaty of Dancing Rabbit Creek, *supra* note 31; *see also* Red River Compact, *supra* note 175.

182. Red River Compact, *supra* note 175, § 2.01.

183. *Id.* § 4.02(b).

184. *Tarrant Reg'l Water Dist.*, 2009 WL 3922803 at *8; *Tarrant Reg'l Water Dist.*, 656 F.3d at 1250.

185. U.S. CONST. art. I, §10, cl. 3 ("No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay."); *Tarrant Reg'l Water Dist.*, 2009 WL 3922803 at *4.

186. *Tarrant Reg'l Water Dist.*, 2009 WL 3922803 at *4 (construing Texas v. New Mexico, 482 U.S. 124, 128 (1987)).

187. *Id.*

from Commerce Clause attack even if it would otherwise be contrary to 'dormant' Commerce Clause principles."[188] The court declared that it was undisputed that Congress ratified the RRC, and that such ratification of an interstate compact transformed the agreement into a federal statute.[189]

The district court noted that the *Tarrant* case seemed one of first impression for the court, requiring it to determine whether an interstate compact such as the one at issue was sufficient to "insulate state statutes from Commerce Clause scrutiny."[190] Overall, the district court thoroughly supported its interpretation of the congressionally-vested authority in the RRC.[191] The Western District Court concluded that, without any controlling authority, the only method of deciding the dispute was to interpret Congress' intent behind the RRC, as Congress ratified and promulgated it as a federal statute.[192] In its interpretation of the RRC, the court concluded that it preempted state law, and as such, "the approval of the RRC by Congress *necessarily* constituted its consent to a legal scheme different from that which would otherwise survive Commerce Clause scrutiny."[193] The Western District Court ruled in favor of Oklahoma's right to deny Texas permits to transfer water.[194] It further ruled that the RRC, as federal law, exempts the State of Oklahoma from Commerce Clause attack for what would otherwise be considered unconstitutional state statutes.[195]

In addition, the Tenth Circuit Court applied the ruling in *Intake Water Co. v. Yellowstone River Compact Comm'n*, which held that interstate water compacts cannot be challenged under the Dormant Commerce Clause and that a "[c]ompact cannot, by definition, be a state law impermissibly interfering with commerce but is instead a federal law, immune from attack."[196] The Tenth Circuit Court based its conclusion "on the language of the Compact itself as providing congressional consent."[197] It recognized the clear intent of the RRC and its authorization of a broad scope of state authority, paying particular attention to the plain language authorization of each signatory state to regulate all transfer and appropriation of the waters within its state boundaries.[198] The Tenth Circuit Court upheld the District Court's decision to grant OWRB's motion for summary judgment on the basis that the RRC in fact insulated the State of Oklahoma from any Dormant Commerce Clause challenge insofar as the challenge applied to the surface waters subject to the agreement as ratified by Congress.[199]

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188. *Id.*
189. *Id.* (construing *Texas*, 482 U.S. at 128).
190. *Id.* ("So far as the court can determine, no case has squarely addressed the question of whether Congress' approval of compact language like that involved here is sufficient to insulate state statutes from Commerce Clause scrutiny.").
191. *Id.* at *5.
192. *Id.*
193. *Id.* at *5–6.
194. *Id.* at *6.
195. *Id.* at *8.
196. Tarrant Reg'l Water Dist. v. Herrmann, 656 F.3d 1222, 1236 (10th Cir. 2011) (quoting Intake Water Co. v. Yellowstone River Compact Comm'n, 769 F.2d 568, 570 (9th Cir. 1985)).
197. *Id.* at 1239.
198. *Id.*
199. *Id.* at 1250.

V. SARDIS RESERVOIR: FROM THE BEGINNING

In 1974, the State of Oklahoma, by and through the Oklahoma Water Conservation and Storage Commission ("OWCSC"), contracted with the Army Corps of Engineers ("The Corps") for the construction of the dam that created the water storage facility known as Sardis Reservoir.[200] Before The Corps built the dam, the smaller body of water that was there at the time was known as Clayton Lake.[201] The OWCSC was thereafter dissolved, and the OWRB took over its contractual obligations.[202]

Sardis Reservoir, referred to as Sardis Lake for recreational purposes, is located in the southeastern corner of Oklahoma, in Pushmataha County.[203] As is the case with many of Oklahoma's lakes, The Corps created Sardis Lake by constructing a large dam.[204] Sardis Lake has ninety-two miles of shoreline and a normal pool capacity of 233,053 acre-feet[205] of water.[206] While it was built for many purposes — including flood control, water supply, recreation, and fish and wildlife — providing a storage facility to retain and hold water was the primary purpose behind the lake's construction.[207]

Oklahoma failed to honor its contract with The Corps by discontinuing payment on its debt after the reservoir was constructed.[208] In 2009, The Corps obtained a favorable judgment in the United States District Court for the Northern District of Oklahoma against the State of Oklahoma.[209] The Court decree: (a) specified the amount of the State's default as $21,783,809, (b) provided $38,202,797 for future storage use debt obligations, and (c) required an ongoing operation, management, and replacement obligation of $147,200 per year.[210]

It can be speculated that the reason that Oklahoma did not honor and fulfill its contractual obligations with The Corps is because it did not have sufficient funds to do so.[211] On June 15, 2010, shortly after the district court rendered a judgment, the OWRB

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200. United States v. Oklahoma, 184 F. App'x 701 (10th Cir. 2006). This action was brought by the United States to affirm the remaining debt on the 1974 contract between the Army Corps and the state of Oklahoma for the construction of Sardis Reservoir.

201. *See* Contract Between the United States of America and the Water Conservation Storage Commission of the State of Oklahoma for Water Storage Space in Clayton Lake, Apr. 9, 1974 [hereinafter Dam Contract].

202. OKLA. STAT. tit. 82, § 1085.38 (1991) ("As of the effective date of this act, all existing obligations of the Oklahoma Water Conservation Storage Commission shall be assumed by the Oklahoma Water Resources Board.").

203. *Lakes of Oklahoma, Sardis*, OKLA. WATER RES. BD., http://www.owrb.ok.gov/news/publications/lok/lakes/Sardis.php (last visited Jan. 13, 2013).

204. *See* Dam Contract, *supra* note 201.

205. *Water Use Permitting, Fact Sheet*, OKLA. WATER RES. BD., http://www.owrb.ok.gov/about/about_pdf/Fact-Permitting.pdf (last visited Jan. 13, 2013). An acre-foot of water is a volume used in describing large sources of water. The amount of water in an acre-foot is described as water at the height of one foot covering one acre of land. There are 325,851 gallons of water in one acre-foot.

206. OKLA. WATER RES. BD., *supra* note 203.

207. *See* Dam Contract, *supra* note 201.

208. United States v. Oklahoma, No. Civ-98-00521 (N.D. Okla. Sept. 3, 2009) (setting forth the times and amounts of payments to be made under the Contract between the United States and the State of Oklahoma for the construction of Sardis Reservoir in 1974).

209. *Id.*

210. *Id.*

211. *Id.* (stating that Oklahoma was refusing to make payments on its debt to the Army Corps of Engineers).

entered into a contract ("Storage Transfer Contract") with the Oklahoma City Water Utilities Trust (OCWUT).[212] In the Storage Transfer Contract, the State of Oklahoma and the OWRB agreed to transfer all of their water storage rights in Sardis Reservoir to OCWUT in return for OCWUT's paying off the remainder of Oklahoma and OWRB's outstanding debt to the United States.[213] The Storage Transfer Contract contains language that states OCWUT is not authorized to use any of the water in the Sardis Reservoir unless it obtains a permit from the OWRB.[214] The OWRB acknowledged that OCWUT filed an application for a permit to appropriate a massive amount of water from the reservoir.[215]

The Storage Transfer Contract contains suggestive language that tends to support the assumption that the OWRB "acknowledges" OCWUT's application to appropriate 136,000 acre-feet of water as part of its consideration for OCWUT's assuming the debt for the construction of Sardis Reservoir.[216] While the language in the contract is merely suggestive of a permit to appropriate water conditioned on the agreement, an earlier draft of the agreement contains additional provisions that further support the validity of this assumption.[217]

A. Chickasaw v. Fallin*: The Fight for the Water in Sardis Reservoir*

In southeastern Oklahoma, push has finally come to shove over the long and heavily-debated Sardis Reservoir and who legally holds the rights to the waters therein.[218] The Tribal Nations, who filed the lawsuit in the Western District of Oklahoma in August of 2011, have not acted in haste; news of agonizing debate and attempted compromise dates back to early 2010.[219] The battle between the Tribes and the respondents is anything but a late-breaking news story, and with no compromise having been reached over the years of debate, the controversy is now up for the courts to decide.[220]

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212. *See* Storage Contract Transfer Agreement Between Oklahoma Water Utilities Trust and State of Oklahoma Water Resources Board, June 15, 2010.

213. *Id.*

214. *Id.*

215. *Id.* The transfer agreement contains very suggestive language that tends to support the assumption that the OWRB "acknowledges" OCWUT's application to appropriate 136,000 acre-feet of water as part of its consideration in the contract.

216. *Id.*

217. Draft Storage Contract Transfer Agreement between Oklahoma Water Utilities Trust and State of Oklahoma Water Resources Board, June 3, 2010, §§ 2.5(b)(i)–(ii). This draft of the transfer agreement contract contains sections provisioning for the approval of OCWUT's permit application to transfer water from the Sardis Reservoir. *Id.* The provisions include a $15,000,000 payment from OCWUT to the OWRB "[o]n or before the date which is thirty (30) days after OWRB approves a final order issuing a permit to OCWUT." *Id.*

218. Journal Record Staff, *supra* note 2 (displaying just the articles written in The Journal Record regarding the Sardis Reservoir water sale dispute). The Journal Record has consistently covered the story of the Sardis Reservoir dispute, and while the source may not necessarily be relied on as completely accurate or scholarly material, it does do an excellent job of tracking the progress of the dispute.

219. *Id.*

220. *See* Chickasaw Nation Complaint, *supra* note 4.

On August 8, 2011, the Chickasaw and the Choctaw Nations jointly filed a complaint in the Western District Court.[221] Both of the plaintiffs are federally recognized Tribal Nations that have lawful rights to lands in the State of Oklahoma.[222] Each of the named defendants to the lawsuit is an employee of the State in some capacity, most of whom hold or have held positions on the OWRB.[223] Additional defendants include Mary Fallin, in her official capacity as the Governor of the State of Oklahoma, Oklahoma City, as "an Oklahoma municipal corporation," and the OCWUT in its capacity as "a public trust for the benefit of the City of Oklahoma City."[224]

The Tribal Nations' complaint seeks "declaratory and injunctive relief to protect their federal rights — including their present and future use water rights, regulatory authority over water resources, and right to be immune from state law and jurisdiction."[225] The present and future water rights the Tribes are asking the court to grant declaratory and injunctive protections include, among others,[226] the Sardis Reservoir.[227]

The injunctive relief sought by the Tribal Nations would prevent the OWRB from selling its rights to the water in Sardis Reservoir, if in fact the court finds any such rights to be in existence, to the OCWUT.[228] The rights in controversy pertain to the authority to permit waters of the Kiamichi Basin to be stored in the Sardis Reservoir, as well as to control the withdrawals of water from Sardis Reservoir.[229] Further, the Tribal Nations assert that the language of the agreement entered into between the OWRB and the OCWUT manifests an intention "to issue a water-use permit that grants the [Oklahoma City Water Utility] Trust the right to annually withdraw water from the Sardis Reservoir and/or Kiamichi Basin in an amount equal to roughly ninety percent (90%) of Sardis's estimated sustainable yield."[230]

The Tribal Nations claim that they depend on the waters in Sardis Reservoir, and on the rest of their treaty lands, "to fulfill the homeland purposes for which that territory was set aside under the [Treaty of Dancing Rabbit Creek]."[231] The Tribal Nation's claim that the water is necessary and used to fulfill various purposes, including "protecting and

221. *Id.*

222. *See* Treaty of Dancing Rabbit Creek, *supra* note 31.

223. Chickasaw Nation Complaint, *supra* note 4 (listing Defendants as "(1) Mary FALLIN, in her official capacity as Governor of the State of Oklahoma; (2) Rudolf John Herrmann, (3) Tom Buchanan, (4) Linda Lambert, (5) Ford Drummond, (6) Ed Fite, (7) Marilyn Feaver, (8) Kenneth K. Knowles, (9) Richard Sevenoaks, and (10) Joe Taron, each in her or his official capacity as a member of the Oklahoma Water Resources Board; (11) J.D. Strong, Executive Director of the Oklahoma Water Resources Board in his official capacity; (12) City of Oklahoma City, an Oklahoma municipal corporation; (13) Oklahoma City Water Utility Trust, a public trust for the benefit of the City of Oklahoma City").

224. *Id.*

225. *Id.* at para. 1.

226. *Id.* at para. 2 ("These water resources include, *inter alia*, those stored in Sardis Reservoir, a federal water storage facility, and Atoka Lake, a non-federal water storage facility, as well as the free flowing waters of the Kiamichi Basin, Clear Boggy Basin, and the other river systems located within the Treat Territory.").

227. *Id.*

228. *Id.* at paras. 1–7.

229. *Id.* at paras. 3–4 (referring to the "Storage Contract Transfer Agreement Between Oklahoma City Water Utilities Trust and State of Oklahoma Water Resources Board").

230. *Id.* at para. 3.

231. *Id.* at para. 36.

enhancing the environmental quality and productivity of the Treaty Territory lands, waters, and natural and cultural resources, pursuing economic self-sufficiency, and meeting the growing needs of their communities."[232]

The Tribal Nations assert that State officials have recognized their rights to the water in Sardis Reservoir in the past.[233] Further, the State has implicitly recognized their rights in attempting to seek their participation in various negotiations regarding interstate transactions involving Kiamichi Basin waters, some of which are the same waters that are stored in Sardis Reservoir.[234] However, none of these negotiations resulted in any form of finalized agreement.[235]

The Tribal Nations contend that the State of Oklahoma and the OWRB are ignoring their rights to the water in Sardis Reservoir — rights granted to them in the Treaty of Dancing Rabbit Creek.[236] They claim that allowing the transfer of Sardis Reservoir water storage rights and the issuance of permits to withdraw and export water from the reservoir jeopardizes the future prosperity of their treaty lands and their ability to protect their federal rights from state action.[237] Their primary prayer for relief is that the court issue an injunction to stop the transfer of the storage rights and issuance of any withdrawal permits "unless and until a comprehensive adjudication of water rights" has been conducted.[238] A "comprehensive adjudication of water rights," as provided for by the McCarran Amendment, requires that anyone who claims to have a right to water from a particular source (e.g. a reservoir, stream, etc.) must become a party to the action and have that right adjudicated in a court of law.[239] The Tribal Nations assert that because the State of Oklahoma and the OWRB have refused to conduct meaningful negotiations with them to sort out fair apportionment of the rights to the water in Sardis Reservoir, they are left no choice but to file a lawsuit and force an adjudication of all rights to the water so that their rights will be quantified, declared, and protected by law.[240]

VI. ANALYSIS

The Western District Court's interpretation of the Treaty of Dancing Rabbit Creek is critical to the outcome of *Chickasaw Nation v. Fallin*.[241] The *Winters*, *Arizona*, and *Arkansas River Bank* cases all prove that even if treaties between the United States and Tribal Nations do not expressly mention certain rights, those rights are still often

232. *Id.*
233. *Id.* at para. 44.
234. *Id.*
235. *Id.*
236. *Id.* at para. 1.
237. *Id.* at para. 4.
238. *Id.* at para. 73.
239. See generally Michael D. White, *McCarran Amendment Adjudications — Problems, Solutions, Alternatives*, 22 LAND & WATER L. REV. 619 (1987) for a more detailed description of the McCarran Amendment.
240. Chickasaw Nation Complaint, *supra* note 4, at paras. 64–71.
241. *Id.*

impliedly reserved with the land to fulfill the purpose of the treaty.[242] The Treaty of Dancing Rabbit Creek does not expressly provide for the Tribal Nations' reserved rights to water; however, if the Western District Court follows the Supreme Court's example, an implied right should be found and the Tribal Nations' rights recognized.[243]

If the *Chickasaw Nation v. Fallin* court properly interprets the Treaty of Dancing Rabbit Creek, it will have a clear understanding of the intention of the treaty and the purpose of the grants therein.[244] The Western District Court's appreciation of the purpose of the land grant to the Tribal Nations will enable it to find that there was in fact an impliedly reserved water right attached to the land.[245] The *Winters* case clearly establishes the fact that the Chickasaw and Choctaw Nations have reserved rights to the waters in the Sardis Reservoir.[246] The Treaty of Dancing Rabbit Creek clearly spelled out the purpose of the land granted to the Tribal Nations.[247] The *Winters* doctrine effectively establishes that the Chickasaw and Choctaw Nations are entitled to enough water to fulfill the present and future purpose of their treaty lands and supports the contention that none of the water from their land should be transferred or sold until their rights are formally recognized and adequately quantified.[248]

The *Arizona* Court's use of the "practicably irrigable acre" was landmark in establishing a reserved right for future water use.[249] The *Arizona* case further proves that the Tribal Nations in *Chickasaw Nation v. Fallin* have at the very least rights to enough water to irrigate all the land granted to them in the Treaty of Dancing Rabbit Creek.[250] However, irrigation is not the primary purpose of the Tribes' land today and they have asserted that they have a far greater need and economic interest in being able to protect their rights to the waters impliedly reserved in the Treaty of Dancing Rabbit Creek.[251] Because reserved water rights do not diminish with nonuse and they are reserved for the current and future purposes of the Tribal Nations, the rights remain with the Tribal Nations in perpetuity and should be no less than the amount required to irrigate the original treaty lands.[252]

The *Cappaert* Court expanded the *Winters* doctrine to include groundwater and further proved that the reserved water right is not set in stone and is flexible with the needs of justice.[253] Although the *Cappaert* case did not involve Tribal Nations or their treaties, its ruling should compel the Western District Court deciding *Chickasaw Nation v. Fallin* to consider the ultimate purpose of the Treaty of Dancing Rabbit Creek.[254] The

242. *See* Choctaw Nation v. United States, 397 U.S. 620 (1970); Arizona v. California, 373 U.S. 546 (1963); Winters v. United States, 207 U.S. 564 (1908).

243. Treaty of Dancing Rabbit Creek, *supra* note 31; Chickasaw Nation Complaint, *supra* note 4.

244. *See* Treaty of Dancing Rabbit Creek, *supra* note 31; Chickasaw Nation Complaint, *supra* note 4.

245. *See* Treaty of Dancing Rabbit Creek, *supra* note 31; Chickasaw Nation Complaint, *supra* note 4.

246. *See Winters*, 207 U.S. 564.

247. *See* Treaty of Dancing Rabbit Creek, *supra* note 31.

248. *See Winters*, 207 U.S. 564.

249. Arizona v. California, 373 U.S. 546 (1963).

250. *Id.*; Chickasaw Nation Complaint, *supra* note 4.

251. Chickasaw Nation Complaint, *supra* note 4, at para. 36.

252. *See supra* notes 85–91 and accompanying text.

253. Cappaert v. United States, 426 U.S. 128, 141 (1976).

254. *Id.*

facts of the *Chickasaw v. Fallin* case can be directly imputed into the analysis the *Cappaert* Court used to arrive at its decision.[255] The purpose of the Treaty of Dancing Rabbit Creek was to provide the Tribal Nations with land that they could make into a permanent home.[256] This permanent homeland was meant to be exclusively controlled by the Tribal Nations without interference from any state or government.[257] Thus to fulfill this purpose, the water, be it in a stream, lake, or reservoir, is impliedly reserved for the Tribal Nations so that they may continue to fulfill the purposes of their federally granted treaty land, govern and protect their property, and remain permanently on the lands without being forced to relinquish essential resources that make the land a permanent place to live and conduct business.[258]

The Supreme Court's ruling in the *Arkansas River Bank* case may provide the clearest guidance for the Western District Court presiding over *Chickasaw Nation v. Fallin* because both cases involve the Treaty of Dancing Rabbit Creek.[259] *Chickasaw Nation v. Fallin* requires the Western District Court to examine the same exact treaty used by the Supreme Court to determine the outcome of the *Arkansas River Bank* case.[260] The *Arkansas River Bank* Court stated that treaties such as the Treaty of Dancing Rabbit Creek "are not to be considered as exercises in ordinary conveyancing."[261] The Court recognized that the Indians did not initiate these treaties with the U.S. government, but rather the United States imposed the treaties on the Indians with hardly a choice but to consent.[262] The fact that the Supreme Court interpreted the Treaty of Dancing Rabbit Creek in favor of the Tribal Nations is confirmation of the Western District Court's responsibility to view the Treaty in the light most favorable to the Tribal Nations in determining their rights to the water in Sardis Reservoir.[263]

The *Chickasaw Nation v. Fallin* court should be compelled to consider the past treatment of the Chickasaw and Choctaw Nations and follow in the footsteps of the *Arkansas River Bank* Court in upholding the promises made by the United States in the Treaty of Dancing Rabbit Creek.[264] The Court discussed the "clash between the obligation of the United States to protect Indian property rights on one hand and the policy of forcing their relinquishment on the other."[265] The *Chickasaw Nation v. Fallin*

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255. *Id.*

256. *See id.*; Choctaw Nation v. United States, 397 U.S. 620 (1970); Arizona v. California, 373 U.S. 546 (1963); Winters v. United States, 207 U.S. 564 (1908).

257. Treaty of Dancing Rabbit Creek, *supra* note 31.

258. *Id.*

259. *Choctaw Nation*, 397 U.S. at 630–32; Chickasaw Nation Complaint, *supra* note 4.

260. *See* Chickasaw Nation Complaint, *supra* note 4.

261. *Choctaw Nation*, 397 U.S. at 630–31.

262. *Id.*

263. *Id.* The concept of interpreting Indian treaties in a light most favorable to the Tribal Nation was expressed in *Winters* and has been the standard for interpreting such treaties since the *Winters* ruling. This article simply asserts that the Western District Court presiding over *Chickasaw v. Fallin* must not stray from the standard and should be compelled by the *Arkansas River Bank* decision to consider the waters in Sardis Reservoir in the same manner the *Arkansas River Bank* Court considered the banks of the river.

264. *Id.* at 625.

265. *Id.*

court has the opportunity here to avoid the clash between obligation and policy by upholding the Treaty of Dancing Rabbit Creek and granting the Tribal Nations' request for an injunction so their water rights can be quantified before the State of Oklahoma and the OWRB issue permits to transfer large amounts of water from off their treaty land.[266]

Justice Douglas's analogy — made in his concurring opinion in the *Arkansas River Bank* case — supports the reserved water rights established by *Winters* and its progeny, which in turn supports the Tribal Nations' claims in *Chickasaw v. Fallin.*[267] Justice Douglas's analogy also speaks to the principle of "fair dealing" and points out that unilaterally altering material terms of an agreement after it has been agreed upon is contrary to the standard of fair dealing.[268] The State of Oklahoma is attempting to do just that with respect to the Tribal Nations' water rights in attempting to sell and transfer the water without regard to the rights granted to Tribal Nations in the Treaty of Dancing Rabbit Creek.[269] The Treaty gave the Tribal Nations absolute and exclusive use of the land without ever mentioning a single provision regarding the United States' intent or desire to withhold certain waters.[270] Justice Douglas would agree that in the case of Sardis Reservoir, the waters therein are merely "the tail that went with the hide."[271]

The *Winters*, *Arizona*, and *Arkansas River Bank* decisions were largely decided based on the Court's interpretation of the purpose and the authority of the Treaty of Dancing Rabbit Creek.[272] Moreover, the district court presiding over *Chickasaw v. Fallin* should consider the decision in *Tarrant* as not merely persuasive, but controlling.[273] The *Tarrant* court held that the authority vested in the interstate water compact was controlling over the interstate dispute because it was the express will of Congress and carried with it the force of a federal mandate.[274] The *Chickasaw Nation v. Fallin* court should find the intention of the Treaty of Dancing Rabbit Creek clearly reserves the lands and waters for the Tribal Nations.[275] Congress ratified the Treaty of Dancing Rabbit Creek in 1830 and the Treaty continues to carry with it the full force of Congress' authority over state matters.[276] While the Treaty is not as old as the U.S. Constitution, it is still a direct expression of Congress' will and the "supreme law of the land," which certainly gives it authority over state action.[277]

266. *See* Cappaert v. United States, 426 U.S. 128 (1976); *Choctaw Nation*, 397 U.S. 620; Arizona v. California, 373 U.S. 546 (1963); Winters v. United States, 207 U.S. 564 (1908).

267. *Choctaw Nation*, 397 U.S. at 637 (Douglas, J., concurring); Chickasaw Nation Complaint, *supra* note 4.

268. *Choctaw Nation*, 397 U.S. at 637 (Douglas, J., concurring).

269. *See* Chickasaw Nation Complaint, *supra* note 4.

270. Treaty of Dancing Rabbit Creek, *supra* note 31.

271. *Choctaw Nation*, 397 U.S. at 637 (Douglas, J., concurring).

272. *See* Cappaert United States, 426 U.S. 128 (1976); *Choctaw Nation*, 397 U.S. 620; Arizona v. California, 373 U.S. 546 (1963); Winters v. United States, 207 U.S. 564 (1908).

273. Tarrant Reg'l Water Dist. v. Herrmann, 656 F.3d 1222 (10th Cir. 2011); Chickasaw Nation Complaint, *supra* note 4.

274. *Tarrant Reg'l Water Dist.*, 656 F.3d at 1236.

275. Treaty of Dancing Rabbit Creek, *supra* note 31.

276. *Id.*

277. *Id.*; Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 519 (1832).

VII. CONCLUSION

The *Winters*, *Arizona*, and *Cappaert* cases make obvious the Supreme Court's acknowledgment and enforcement of the reserved water right, establishing the fact that the Chickasaw and Choctaw Nations do in fact have lawful rights to the water in Sardis Reservoir.[278] The *Arkansas River Bank* case demonstrates the Supreme Court's appreciation of the hardships that Tribal Nations have been forced to endure and the devastatingly unfair policy that they have been subject to over the course of this nation's history.[279] All of the cases discussed in this article tend to prove that when Congress and the U.S. government act — by way of treaty, compact, or otherwise — no state of the union may act in contravention, and the will and intention of the United States must be upheld.

The Western District Court presiding over *Chickasaw Nation v. Fallin* has ample guidance for deciding whether the Tribal Nations have a legal right to the water in Sardis Reservoir.[280] The outcome of this case is extremely important to the Tribal Nations that commenced the lawsuit and the court's decision will have a profound effect on their — along with all other Tribal Nations' — ability to protect valuable interests and rights going into the future.[281] The cases discussed in this article are not exhaustive of the controlling and persuasive authorities that should be used by the court to make its decision; rather, the material discussed here is meant to demonstrate the overwhelming strength of authority that does exists. For the reasons presented in this article, it is firmly predicted that the Western District Court will enjoin the State of Oklahoma and the OWRB from selling or transferring rights to the water in the Sardis Reservoir — along with any other source of water on the Tribal Nations' treaty land — until the Tribal Nations have had their water rights, no matter how large or small, formally recognized, legally protected, and adequately quantified.

—Wyatt M. Cox*

278. *See* Cappaert v. United States, 426 U.S. 128 (1976); Arizona v. California, 373 U.S. 546 (1963); Winters v. United States, 207 U.S. 564 (1908).

279. Choctaw Nation v. United States, 397 U.S. 620 (1970).

280. *See* Chickasaw Nation Complaint, *supra* note 4.

281. *Id.*

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