

I N S I D E T H E M I N D S

Best Practices for Protecting Natural Resources on Tribal Lands

*Leading Lawyers Provide Background
And Legal Framework for Protecting
Rights Over Tribal Natural Resources*



ASPATORE

©2016 Thomson Reuters/Aspatore

All rights reserved. Printed in the United States of America.

No part of this publication may be reproduced or distributed in any form or by any means, or stored in a database or retrieval system, except as permitted under Sections 107 or 108 of the U.S. Copyright Act, without prior written permission of the publisher. This book is printed on acid free paper.

Material in this book is for educational purposes only. This book is sold with the understanding that neither any of the authors nor the publisher is engaged in rendering legal, accounting, investment, or any other professional service. Neither the publisher nor the authors assume any liability for any errors or omissions or for how this book or its contents are used or interpreted or for any consequences resulting directly or indirectly from the use of this book. For legal advice or any other, please consult your personal lawyer or the appropriate professional.

The views expressed by the individuals in this book (or the individuals on the cover) do not necessarily reflect the views shared by the companies they are employed by (or the companies mentioned in this book). The employment status and affiliations of authors with the companies referenced are subject to change.

For customer service inquiries, please e-mail West.customer.service@thomson.com.

If you are interested in purchasing the book this chapter was originally included in, please visit www.legalsolutions.thomsonreuters.com

Developing a National Indian Water Rights Policy

Thomas W. Fredericks

Senior Partner

Fredericks Peebles & Morgan LLP



ASPATORE

Introduction

*We have no doubt about the power of the United States
Under [the Commerce Clause and Art. IV, § 3]
to reserve water rights for its reservations and property.¹*

In the western part of the United States, water rights are valuable. In most of the West, crops do not grow without irrigation, and much of the land cannot support significant livestock unless the landowner has water rights. The rapidly growing cities in the West need ever-increasing amounts of water. As federal courts have consistently recognized, when the United States reserved lands for a tribe's reservation, it reserved with it senior water rights for the benefit of the tribe and its citizens. However, as with nearly every other valuable right that tribes had or have, tribal water rights have been systematically expropriated by non-Indian water users to the extent that states now depend on their own use of tribal water. The water rights that tribes have been able to maintain are subject to complex and often-times illogical legal and regulatory rules.

The extent of Indian reserved water rights is an issue that has been fiercely debated since the federal government forced tribes to cede their vast aboriginal lands to be confined onto reservations in the nineteenth century. In 1908, with the United States Supreme Court's seminal decision in *Winters v. United States*,² the Court recognized that reservation tribes have a reserved right to water sufficient to fulfill the purpose of their reservations with a

¹ In the Matter of the Adjudication of Existing and Reserved Rights to the Use of Water, Both Surface and Underground, of the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation within the State of Montana in Basins 40E, 40EJ, 40O, 40Q, 40R, & 40S, No. WC-92-1, Memorandum Opinion of the Water Court of the State of Montana Upper and Lower Missouri River Divisions Special Fort Peck Compact Subbasin, 2001 WL 36525512 (Mont. Water Ct., August 10, 2001) (quoting *Montana v. U. S.*, 450 U.S. 544, 566, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981); citing *State of Ariz. v. State of Cal.*, 373 U.S. 546, 597-598, 83 S. Ct. 1468, 10 L. Ed. 2d 542 (1963), judgment entered, 376 U.S. 340, 84 S. Ct. 755, 11 L. Ed. 2d 757 (1964), amended, 383 U.S. 268, 86 S. Ct. 924, 15 L. Ed. 2d 743 (1966) and order amended, 466 U.S. 144, 104 S. Ct. 1900, 80 L. Ed. 2d 194 (1984), subsequent determination, 530 U.S. 392, 120 S. Ct. 2304, 147 L. Ed. 2d 374 (2000), supplemented, 531 U.S. 1, 121 S. Ct. 292, 148 L. Ed. 2d 1 (2000) and (*disavowed* by, *California v. U. S.*, 438 U.S. 645, 98 S. Ct. 2985, 57 L. Ed. 2d 1018 (1978)), and *U.S. v. District Court In and For Eagle County, Colo.*, 401 U.S. 520, 522-523, 91 S. Ct. 998, 28 L. Ed. 2d 278 (1971) (hereinafter *In re Fort Peck Indian Reservation*).

² *Winters v. U. S.*, 207 U.S. 564, 28 S. Ct. 207, 52 L. Ed. 340 (1908).

priority date of the establishment of their reservation or, in some cases, of time immemorial. This decision provided the legal support for Indian tribes to enforce their reservation water rights against other, non-Indian water users.

However, the “*Winters Doctrine*,” as the Court’s decision is now referred to, did not provide all the information about the legal attributes of Indian reserved water rights that are required to assign water rights between Indian tribes and non-Indian water users. Application of the *Winters* analysis to determine the purpose(s) for which a reservation was created has caused few difficulties, but determining the amount of water needed to meet the purpose(s) is legally and factually complex. As a result of the unanswered questions and the high stakes involved in water rights in the West, and because the United States did little to protect tribal water interests in the first seventy years after *Winters* was issued, the rights of many Indian tribes remain undetermined and tribes are forced to either litigate or negotiate with states and state water users to quantify their water rights.

This chapter provides an overview of Indian water rights settlements, by reviewing the historical background of the conflicts that gave rise to the judicial recognition of Indian reserved water rights and the decades-long litigation that resulted from tribes attempting to determine the extent of their water rights, finally leading to the development of a national Indian water rights policy in the late 1970s that emphasized the settlement of Indian water rights with states and the federal government that has been sustained and continues today. A review of the implementation of this national policy and recommendations for the future success of tribal development and use of Indian reserved water rights is provided.

Origin of the *Winters Doctrine* of Indian Reserved Water Rights

Since time immemorial, northeastern Montana was inhabited by a number of Indian tribes who pursued buffalo herds throughout that arid section of the country as a means of subsistence.³ As white settlement of the West began expanding into tribal hunting grounds in northeastern Montana in the mid-1800s, conflicts between Indian communities calling those lands their homelands and non-Indian farmers, ranchers, and other settlers was inevitable.

³ See JOHN SHURTS, INDIAN RESERVED WATER RIGHTS: THE *WINTERS* DOCTRINE IN ITS SOCIAL AND LEGAL CONTEXT, 1880S-1930S (2000).

In its effort to quell the rising tensions between non-Indians as well as inter-tribal skirmishes over lands and resources, and in an effort to obtain vast quantities of land from tribes, the United States engaged in treaty negotiations with numerous tribes. In *Winters*, the Supreme Court found that two treaties between the federal government and the Assiniboine and Gros Ventre tribes establishing their territory resulted in the creation of reserved water rights for their reservation. Although the Blackfoot Nation, to which the Gros Ventre Tribe was a member, was not a party to the 1851 Treaty of Fort Laramie, 11 Stat. 749,⁴ the 1851 Treaty acknowledged separate, defined tribal territories for a number of tribes, including the Blackfoot Nation. When agreeing to treaties with the tribes, the federal government's stated or claimed intent was to promote permanent settlement of tribal communities and encourage agricultural and stock-raising economies to ultimately effectuate a change in Indian life from a nomadic lifestyle to a confined pastoral existence.⁵ In 1855, the Gros Ventre Tribe, as part of the Blackfoot Nation, was party to the 1855 Treaty with the Blackfeet.⁶ The 1855 Treaty provided that each respective tribe would "remain within their own respective countries" and "exercise exclusive control," with the exception of a shared hunting ground used by all the tribes subject to the Treaty.⁷ Through the 1855 Treaty the United States again legally committed itself to creating a self-supporting, agrarian homeland for the Indians by means of the reservation system. This was evidenced by the instructions of Commissioner of Indian Affairs George Manypenny to Isaac Stevens and the other commissioners who held the 1855 treaty council with the tribes of the Upper Missouri River. Manypenny instructed the commissioners to make arrangements between the tribes and the federal government "as shall gradually reclaim the Indians from a nomadic life and tend to encourage them to settle in permanent houses, and obtain their sustenance by agricultural, and other pursuits of civilized life."⁸ The Fort Belknap Reservation was created by Congressional act in 1888,⁹ creating a permanent homeland for the Assiniboine and Gros Ventre tribes.

⁴ 11 Stat. 749.

⁵ See Historical Research Associates, Historical Analysis of Water Development on the Fort Belknap Indian Reservation, Blaine County, Montana (Draft Report) at (Jan. 17, 1989).

⁶ The Treaty with the Blackfeet, 11 Stat. 657 (1855).

⁷ *Id.* at art. 4, 6.

⁸ Manypenny to Cummings, Stevens and Palmer, May 3, 1855, at 356-359, OIA, LS, Feb. 21-June 12, 1855, M-21, Roll 51, RG75, NA.

⁹ 25 Stat. 113, 124-128.

As non-Indian settlements grew in the area, so did the need for water. Settlers in the area were taking up agricultural pursuits, diverting water from the Milk River, a large tributary near the headwaters of the Missouri River, as their primary source of water. As the Milk River became increasingly more appropriated, the water users in the Milk River basin, including the Assiniboine and Gros Ventre tribes on the Fort Belknap Reservation, began to experience water shortages. By 1905, the shortages became so pronounced that the tribes of the Fort Belknap Reservation, through the United States as trustee to the tribes, filed suit to enforce tribal rights to water against non-Indian users who were depleting Milk River water to the detriment of the tribal community.¹⁰ The suit culminated in the 1908 landmark Supreme Court decision, *Winters v. United States*.¹¹

In *Winters*, the Supreme Court of the United States ruled that the right of the tribes to use Milk River water was impliedly reserved by the government for use by reservation Indians when the United States created the Fort Belknap Reservation.¹² To reach this ruling, the Court considered the construction of the 1888 agreement, which showed the necessity of water to accomplish the purposes for which the reservation lands were set aside.¹³ Without an implied right to water, the lands are “practically valueless”¹⁴ and could not have served as a homeland for the tribes.¹⁵ The Supreme Court also reasoned that Indian tribes would have never ceded millions of acres of land to create a “pastoral and civilized” existence without intending to reserve water sufficient to meet that purpose.¹⁶

In addition to its holding that tribes had rights to water sufficient to fulfill the purpose for which the reservation was created, the Supreme Court issued an additional, important, determination that a tribe’s priority date would be no later than the date the reservation was created. State law in the western states is based upon the appropriative system of water rights:

¹⁰ COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 19.02, at 1208 (Nell Jessup ed., 2012) [hereinafter, COHEN’S HANDBOOK].

¹¹ *Winters, v. U. S.*, 207 U.S. 564, 28 S. Ct. 207, 52 L. Ed. 340 (1908).

¹² *Winters*, 207 U.S. at 575-577.

¹³ *Winters*, 207 U.S. at 575-577.

¹⁴ *Winters*, 207 U.S. at 576.

¹⁵ The Court has applied this same analysis in holding that other federal lands have reserved water rights. See, e.g., *Cappaert v. U. S.*, 426 U.S. 128, 96 S. Ct. 2062, 48 L. Ed. 2d 523 (1976) (reserved right to water for national monument).

¹⁶ *Winters*, 207 U.S. at 576.

priority of water rights for a parcel of land is determined chronologically by continuous beneficial use dating from the date of first beneficial use of water from a particular water source. Because the amount of water available is finite and because it varies over the year and from year-to-year, the tribes' early priority date ensured that they would be able to withdraw water in even the driest years. The Court noted that these rights are paramount to state-based appropriative rights perfected under state law.¹⁷ The implied right to water reserved for the Indians by the Supreme Court became commonly known as *Winters* rights.

Westward Expansion and the Over-Allocation of Western Rivers

In the first quarter of the 20th century, the population of the western United States grew at an unprecedented rate,¹⁸ fueled by public land grants and the upsurge of the West as an agrarian empire. This exodus westward continued in the 1930s as farmers from the Midwest fled the Dust Bowl for better lives promised by employment opportunities or productive irrigated land provided through the massive federal irrigation projects that were transforming the waters of the West, including the construction of the Hoover Dam on the Colorado River and the Grand Coulee Dam on the Columbia River. The increased population combined with the federal water projects during the 1920s and 1930s transformed the waters of the West into economic assets of inestimable value.

As water became an ever-increasing valuable commodity, water rights similarly became a frenzied political issue in the West.¹⁹ This led to the creation of several interstate water compacts and intrastate river adjudications, including the negotiation of the Colorado River Compact in 1922. The Colorado River has often been called the "lifeblood" of the American West.²⁰ The Colorado River stretches over 1,400 miles across the southwestern United States and its basin includes parts of seven states

¹⁷ *Winters*, 207 U.S. at 576-577.

¹⁸ The population of the West grew faster than everywhere else in the country in every decade of the twentieth century, including a 67 percent population increase in the decade 1900 to 1910. FRANK HOBBS & NICOLE STOOPS, U.S. CENSUS BUREAU, CENSR-4, DEMOGRAPHIC TRENDS IN THE 20TH CENTURY 20 (2002), <https://www.census.gov/prod/2002pubs/censr-4.pdf>.

¹⁹ See generally MARC REISNER, *CADILLAC DESERT* (rev. ed. 1993).

²⁰ BUREAU OF RECLAMATION, U.S. DEP'T. OF THE INTERIOR, *COLORADO RIVER BASIN WATER SUPPLY AND DEMAND STUDY: EXECUTIVE SUMMARY 3* (2012).

within the United States and two states in northern Mexico. The ownership of Colorado River water rights was bitterly contested even at the start of the 20th century, thus leaving the Basin states desirous to determine each state's share of the Colorado River.²¹

Although the *Winters* decision in 1908 supported the conclusion that Indian tribes had claims to potentially vast amounts of water in the Colorado River Basin, tribes' water interests were unrepresented in the Compact negotiations, despite the federal government's trust responsibility to manage and protect Indian resources for their benefit. As a result, the apportionment of water between the Upper and Lower Colorado River Basin states was made with a brief acknowledgment of the existence of Indian water rights, but in the end, "effectively ignored them."²²

The Colorado River Compact apportioned the entire annual volume of water available for consumptive use from the Colorado River Basin between the Upper and Lower Basin states, leaving the amount of an individual state's entitlement within each Basin to be determined separately, at a later date. While the Upper Basin states reached an agreement in 1948, the Lower Basin states were unable to do so, ultimately requiring the Supreme Court to decide the issue.

Arizona v. California

In 1963, the Supreme Court addressed the allocation of water rights in the Lower Basin in *Arizona v. California*.²³ Although it was not the central issue of the case, this case was a turning point for Indian water rights because, for the first time, the Court established a standard for quantifying the amount of water reserved to Indian tribes. The Court considered several alternative

²¹ CHARLES WILKINSON, *CROSSING THE NEXT MERIDIAN* 225 (1992).

²² Amy Cordalis & Daniel Cordalis, *Indian Water Rights: How Arizona v. California Left an Unwanted Cloud over the Colorado River Basin*, *Arizona J. Environmental Law & Policy*, 5:333 (2015); see Article VII of the Colorado River Compact.

²³ *State of Ariz. v. State of Cal.*, 373 U.S. 546, 83 S. Ct. 1468, 10 L. Ed. 2d 542 (1963), judgment entered, 376 U.S. 340, 84 S. Ct. 755, 11 L. Ed. 2d 757 (1964), amended, 383 U.S. 268, 86 S. Ct. 924, 15 L. Ed. 2d 743 (1966) and order amended, 466 U.S. 144, 104 S. Ct. 1900, 80 L. Ed. 2d 194 (1984), subsequent determination, 530 U.S. 392, 120 S. Ct. 2304, 147 L. Ed. 2d 374 (2000), supplemented, 531 U.S. 1, 121 S. Ct. 292, 148 L. Ed. 2d 1 (2000) and (*disavowed* by, *California v. U. S.*, 438 U.S. 645, 98 S. Ct. 2985, 57 L. Ed. 2d 1018 (1978)).

concepts for quantifying the amount of Indian water. It rejected a variable standard of quantification premised upon reasonably foreseeable needs.²⁴ The Court also rejected an equitable apportionment scheme.²⁵ The Supreme Court reasoned that equitable apportionment is a standard used to allocate water between states, but tribal water rights are founded upon federal concepts such as treaties, federal statutes, and executive orders.²⁶

The Supreme Court settled upon a standard known as practicably irrigable acreage, commonly referred to as the PIA standard. The PIA standard determines acreage as “practicably irrigable” if it is feasible to grow crops on the subject lands, using irrigation, at a reasonable cost.²⁷ The PIA standard arose out of contrasts between state-based water rights and federally-based rights enjoyed by Indian tribes. Under a state-based appropriative system, quantification of a water right is derived from historical, continuous diversion of water for a beneficial use.²⁸ This method of quantification is in contrast to the fundamental principles governing *Winters* rights, whose standard is not continuous beneficial use, but rather a quantity of water sufficient to fulfill the purpose of a reservation, regardless of prior use.

The Supreme Court reiterated its holding in *Winters*, that the United States set aside water for Indian reservations, in large measure, to force tribes to adopt an agrarian lifestyle. For this reason, the Supreme Court affirmed the use of the PIA standard that was offered in the special master’s ruling in *Arizona v. California*.²⁹ Thus, Indian lands within the exterior boundaries of reservations are analyzed by their feasibility and costs of sustained irrigation when determining a quantified appropriation of water. According to the Supreme Court in *Arizona v. California*, the application of the PIA standard can also consider the opportunity to explore future use of lands, and not just present needs, which creates a greater opportunity for Indian tribes to claim a larger share of water.³⁰ However, the Supreme Court also held or at least strongly

²⁴ *State of Ariz.*, 373 U.S. at 601.

²⁵ *State of Ariz.*, 373 U.S. at 597.

²⁶ See *State of Ariz.*, 373 U.S. at 597.

²⁷ *Arizona v. California*, 460 U.S. 605, 641 n.31, 103 S. Ct. 1382, 75 L. Ed. 2d 318, 36 Fed. R. Serv. 2d 11 (1983), decision supplemented, 466 U.S. 144, 104 S. Ct. 1900, 80 L. Ed. 2d 194 (1984).

²⁸ *Arizona*, 373 U.S. at 555.

²⁹ *Arizona*, 373 U.S. at 600-601.

³⁰ COHEN’S HANDBOOK, supra note 8 at § 19.03[5][b], 1221.

indicated that once a tribe's water allocation was quantified, it would not be subject to change based upon changed technology or circumstances.³¹

Aftermath of *Arizona v. California*

The *Winters* and *Arizona v. California* decisions set the stage for decades of complex, protracted litigation to quantify Indian water rights. As Indian tribes across the West proceeded to obtain their water rights, they did so under the canopy of influence created by these seminal rulings that have established both a right to water, as well as a way to quantify that right.

The era of state court adjudication of Indian reserved water rights began with the enactment of the McCarran Amendment³² in 1952 and its affirmation by the Supreme Court in two cases.³³ Under the McCarran Amendment, the United States waived its sovereign immunity so that it could be joined as a defendant in any suit for the adjudication of the use and/or administration of water rights.³⁴ The United States also waived its right to object to the application of state laws to the adjudication of federal reserved water rights. This meant that, for the first time, Indian reserved water rights could be adjudicated in state court proceedings, and in fact, although it provides concurrent jurisdiction, state courts were designated as the primary adjudicatory forums to resolve these issues.³⁵ Practically, this meant that tribes were now required to participate in ongoing lawsuits in state courts, despite tribal sovereign immunity, to protect any water rights the tribes might have in a state. Tribes were justifiably hesitant to have their water rights adjudicated by state officials (including judges elected by popular vote), particularly where the opposing parties in such suits included the state and non-Indian water users.³⁶ The results tribes have obtained in state court water rights adjudications have been mixed, at best.³⁷

³¹ *Arizona II*, 460 U.S. at 618-620.

³² 43 U.S.C.A. § 666.

³³ *Colorado River Water Conservation Dist. v. U. S.*, 424 U.S. 800, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976); *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 103 S. Ct. 3201, 77 L. Ed. 2d 837 (1983).

³⁴ 43 U.S.C.A. § 666(a).

³⁵ *Colorado River Water Conservation Dist. v. U. S.*, 424 U.S. 800, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976).

³⁶ E.g., *U.S. v. Kagama*, 118 U.S. 375, 384, 6 S. Ct. 1109, 30 L. Ed. 228 (1886) (Indian tribes "owe no allegiance to the states, and receive from them no protection. Because

However, the bigger problem was that even after submitting themselves to state jurisdiction to quantify their water rights in state court proceedings, tribes were still left without a way to use their water. Tribes needed a way to protect their resources by turning their paper rights into usable “wet water rights.” Where it has been used, the PIA standard has provided tribes with large “paper rights” to water. However, as the name suggests, “paper rights” can fail to achieve their purpose if tribes do not actually have a way to turn the legal right to water into actual use of the water. In the years after *Arizona v. California*, many lawsuits over Indian reserved water rights were filed, resulting in the tribes involved being awarded the legally required amounts of water under the PIA standard. However, the quantification of a tribe’s water through litigation did not provide the tribe with any financial means to capture and use that water. Practically, this limitation meant that a tribe’s reserved water rights would remain in the stream or river until a non-Indian water user diverted the water for his or her own use. Thus, without funding for Indian water projects, these litigated water rights often failed to achieve their purpose for tribes. Needless to say, states and most non-Indian water users did not complain about tribal users not taking their higher priority share of water. Unfortunately, neither did the tribes’ trustee, the United States. Additionally, while the United States has expended vast sums of money on reclamation projects throughout the West, it did not provide the same level of funding for reclamation infrastructure for tribal lands, and the United States then moved away from massive federal water projects and the damming of rivers. By the 1970s, tribal leaders strongly believed that they were looking at their last opportunity to get the federal government to make reservations lasting homelands for Indians through the development of Indian water.

To tribes, litigation of their water rights meant massive expenses in time and money, a grave uncertainty associated with adjudication in state courts, all for a result that at best would be unusable for many tribes. The system had to change; with the election of President Carter in 1977, the federal government began exploring alternatives to litigation to quantify Indian water rights.

of the local ill feeling, the people of the states where they are found are often their deadliest enemies.”)

³⁷ See, e.g., *In re General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76 (Wyo. 1988), judgment aff’d, 492 U.S. 406, 109 S. Ct. 2994, 106 L. Ed. 2d 342 (1989) and (abrogated by, *Vaughn v. State*, 962 P.2d 149 (Wyo. 1998)). The adjudication of the Big Horn River began in January 1977 and finally concluded in September 2014, reportedly costing over \$80 million to litigate.

1978 National Indian Water Policy

In 1977, the Assistant Secretary for Indian Affairs, Forrest J. Gerard, directed that the United States' Indian water policy be reviewed as part of the National Water Policy Review. As the Associate Solicitor for Indian Affairs, I led a small group of federal attorneys which included George S. Jennings, Area Rights Protection Officer, Billings, Montana, and Scott McElroy, Acting Assistant Solicitor, Indian Natural Resources, in conducting this review.

The review resulted in the National Indian Water Policy.³⁸ This comprehensive government policy was intended to serve as a serendipitous guide for the protection of Indian water rights with a strategy to ensure that present and future Indian water requirements would be met.

Although we recognized the historical concern about Indian water rights, we focused our policy review on those federal efforts that were identified as unsatisfactory at the time of our review, and placed an emphasis on identifying alternatives for addressing those concerns. A guiding principle in developing the National Indian Water Policy was the acknowledgement that the federal government (government) had particular obligations as a trustee of Indian water rights. As such, we developed standards for the Policy that ensured that the final product would be compatible with these government obligations. As part of the review process, the Joint Committee on Indian Water Rights of the National Congress of American Indians and the National Tribal Chairmen's Association submitted a statement reflecting the points that they believed must be included in the government's policy.

We also recognized that our statement on a national policy for Indian water rights would not be the "final word" on this topic, but that a final policy would emerge after additional consultation with Indian people around the country. It was our hope, however, that our initial work would serve as a map to guide the government in assisting Indian tribes and their citizens to obtain the benefits to which they are entitled.

³⁸ For the historical perspective on the national Indian water policy, this section relies on and incorporates the facts, reasoning, conclusions, and recommendations directly from the document: Forrest J. Gerard et al., National Indian Water Policy Review (January 23, 1978) (unpublished manuscript) (on file with author) [hereinafter, National Indian Water Policy Review].

The policy review was divided into four sections: (1) a statement of the ultimate objectives of the proposed policy with recommendations for the accomplishment of the goals; (2) a discussion of the legal issues involving the use of water by Indians with a history of the judicial doctrine and the controlling legal principles that grew out of the recognition by the courts of extensive Indian water rights as the foundation for the development of an Indian water policy; (3) a detailed explanation of the recommendations for achieving the desired objectives; and (4) a detailed discussion of the steps necessary to determine Indian water requirements to implement projects in the utilization of Indian water resources.

Statement of Objectives

In 1977, we identified the principles of the United States Supreme Court's decision in *Winters v. United States*,³⁹ and the *Winters* doctrine, as the appropriate nucleus for the development of a federal policy on the use of water on Indian reservations. At the same time, we recognized that in the sixty-nine years since *Winters* confirmed that tribes and their citizens had reserved water rights, the United States had made only the most modest of efforts to determine the amount of water available to tribes or to develop tribal water resources for the benefit of Indian people. Because non-Indian water users' rights were junior to tribal rights and therefore of uncertain scope and value until the senior rights were quantified, pressure from some non-Indian water users for a determination of the amounts of water to which tribes were entitled were also increasing at this time. Considering the amounts of capital investments which landowners needed to commit to develop water rights, and reviewing the Supreme Court's related discussion of the importance to users of certainty regarding water rights, we concluded that quantification of tribal water rights was necessary and would in the long term benefit all water users. We determined that a fresh look at the various methods by which the United States and tribes could secure their *Winters* water rights was required to provide an assurance that the tribes would receive the water needed to meet future uses on the reservations.

The objectives for the government's policy were to preserve, protect, and assert the senior, federally guaranteed water rights of the Indian people, to develop appropriate methods to determine the present and future water

³⁹ *Winters v. U. S.*, 207 U.S. 564, 28 S. Ct. 207, 52 L. Ed. 340 (1908).

requirements of the Indian people, and to develop and implement a program which ensures that dependable water supplies will be made available to support these requirements.

We believed that a firm commitment by the government to these objectives, implemented through the Assistant Secretary of Indian Affairs in consultation with other department officials and the Indian community, could result in a comprehensive program to achieve the desired results.

Controlling Legal Principles in 1978

Much has been written about the landmark United States Supreme Court *Winters* case,⁴⁰ and the creation of what is now known as the “*Winters* Doctrine,” and the leading case, *Arizona v. California*, endorsing a methodology for determining the quantity of water which the United States and/or tribes reserved to fulfill the purposes for which the reservation was established.⁴¹ Other cases have established the legal principles for the scope of Indian water rights: the sources of reserved waters (both navigable and non-navigable) arising on, flowing through, underlying, or bordering Indian reservations;⁴² the priority of use of the water;⁴³ the Indians’ equitable title to the right to the use of surface and groundwater related to their reservations;⁴⁴ the legal title of the water rights is held by the United States as trustee for the Indians with powers and duties strictly constrained by its fiduciary duty to protect the rights of the Indian tribes and individuals who

⁴⁰ *Winters v. U. S.*, 207 U.S. 564, 28 S. Ct. 207, 52 L. Ed. 340 (1908).

⁴¹ *State of Ariz. v. State of Cal.*, 373 U.S. 546, 83 S. Ct. 1468, 10 L. Ed. 2d 542 (1963), judgment entered, 376 U.S. 340, 84 S. Ct. 755, 11 L. Ed. 2d 757 (1964), amended, 383 U.S. 268, 86 S. Ct. 924, 15 L. Ed. 2d 743 (1966) and order amended, 466 U.S. 144, 104 S. Ct. 1900, 80 L. Ed. 2d 194 (1984), subsequent determination, 530 U.S. 392, 120 S. Ct. 2304, 147 L. Ed. 2d 374 (2000), supplemented, 531 U.S. 1, 121 S. Ct. 292, 148 L. Ed. 2d 1 (2000) and (*disavowed* by, *California v. U. S.*, 438 U.S. 645, 98 S. Ct. 2985, 57 L. Ed. 2d 1018 (1978)) (to provide an agricultural economy, the amount of water rights for the Indian reservation is the amount of water necessary to irrigate the practicably irrigable acreage of the reservation).

⁴² *Cappaert v. U. S.*, 426 U.S. 128, 96 S. Ct. 2062, 48 L. Ed. 2d 523 (1976); *Tweedy v. Texas Co.*, 286 F. Supp. 383 (D. Mont. 1968).

⁴³ *United States v. Gila Valley Irrig. Dist.*, *Globe Equity No. 59* (D. Ariz. 1935) (concluding that if Indian inhabitants had aboriginal rights to the use of water, their water rights may date from time immemorial). See 1935 decree at http://www.ose.state.nm.us/Legal/CourtOrders/Gila-VirdenValley/Gila_Valley.pdf.

⁴⁴ *In re General Adjudication of All Rights to Use Water in Gila River System and Source*, 195 Ariz. 411, 989 P.2d 739, 745 (1999).

are the beneficiaries of the trust;⁴⁵ and the conclusion that the state-based rules of prior appropriation do not apply to reserved water rights, and such rights cannot be lost by non-use.⁴⁶

Recommendations of the National Indian Water Policy Review

From the outset, the goal of our review was to establish an easier method for tribes to develop the water that they were entitled to without having to suffer decades of expensive litigation in state courts. To achieve this goal, we made seven recommendations to the government.

1. *The Development of Indian Water Resources.* In 1978, it was obvious that reservations had not been transformed into viable homelands for the Indian people. Family incomes were far below the national average and high rates of unemployment prevailed on all reservations. Although Indian lands contained the potential for development of vast resources of coal, oil, natural gas, farmland and rangelands, with some of the nation's most outstanding recreational features, commercial forests, fisheries, and wildlife stock, the availability of a dependable water supply was needed to develop these resources. Yet, despite the early promise of the *Winters* doctrine, water resources had not been made available to the Indian people.

Indian owned acreage—including tribal, allotted, and restricted—was in excess of 50 million acres. Although 123 irrigation works served this extensive land base at that time, these so-called “projects” were simple diversion works for a few parcels of land. Of the total figure, twenty to twenty-two of the irrigation works could actually be classified as projects; of these, only seven or eight were capable of serving the full project area identified at the time of project planning and construction. Further, the few projects that had been completed were already in need of extensive rehabilitation. As a result, in 1968, 370,000 acres of Indian land were irrigated; that amounts to 1 percent of all Indian

⁴⁵ *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252 (D.D.C. 1972), opinion supplemented, 360 F. Supp. 669 (D.D.C. 1973), judgment rev'd, 499 F.2d 1095 (D.C. Cir. 1974).

⁴⁶ *State ex rel. Greely v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 219 Mont. 76, 712 P.2d 754, 765 (1985).

agricultural lands. In contrast, 5.1 percent of all agricultural land in the seventeen western states was irrigated at this time.⁴⁷

Reviewing the status of the Indian water resource development efforts led inevitably to the conclusion that the need to meet present and future Indian water requirements had been sadly neglected. We concluded that a comprehensive program for the development of Indian water resources was required immediately and would require a significant commitment of resources.⁴⁸ We believed that this conclusion was supported by the overlooked fact that the construction of projects to meet the water requirements of tribes would also serve to eliminate many of the disputes over water between Indian tribes and other water users and reduce the uncertainty of tribal water rights.

2. *Amendment of the McCarran Amendment.* At the time we were developing the National Indian Water Policy, the United States Supreme Court had just issued its decision in *Colorado River Water Conservation District*⁴⁹ (frequently referred to as the “*Akin*” case), in which the Court held that Indian water rights may be adjudicated in state court proceedings under the terms of the McCarran Amendment. The decision resulted in a rush to the courthouse and long procedural battles over the choice of forum for such adjudications, which could be initiated by a state, the federal government, or a tribe.

Both the federal government and the tribes preferred to have tribal water rights declared in federal court. The *Akin* decision presented difficulties for the federal government as it sought to fulfill its obligations to protect Indian water rights. The states interpreted the Court’s decision as virtually foreclosing the federal courts as a forum for adjudicating Indian water rights—an improper position from the perspective of Indian Affairs, in part because of the preponderance of federal questions to be litigated.⁵⁰

⁴⁷JAMES P. MERCHANT & DAVID M. DORNBUSCH, THE IMPORTANCE OF WATER SUPPLY TO INDIAN ECONOMIC DEVELOPMENT (1977).

⁴⁸ National Indian Water Policy Review, *supra* note 32 at 33.

⁴⁹ *Colorado River Water Conservation Dist. v. U. S.*, 424 U.S. 800, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976).

⁵⁰ See *State ex rel. Greely v. Confederated Salish and Kootenai Tribes of Flathead*

With the Court's decision in *Akin*, some states acted to amend their state laws to conform to the McCarran Amendment, most notably Wyoming in 1977, followed by Montana in 1985.⁵¹ The states believed, and federal court decisions subsequently supported, that they could bring suit in state court at any time naming the United States as a defendant and the government would be forced to respond. When the governor of Wyoming signed the state amendment to its water laws, the State's Attorney filed suit the following Monday in state court for a general stream adjudication of all the rights to the use of water in the Big Horn River System and other sources.⁵² This resulted in immense practical difficulties for the government, as it had not prepared its annual budget for such massive litigation.

Furthermore, we were concerned about the government's and tribes' willingness to cooperate with the states for water planning and other information-sharing purposes if the states were adjudicating tribal water rights in state courts. It was felt that the sharing of information could simply aid the states in challenging tribal claims to water in state courts—a plainly undesirable result. Tribes would be unwilling to provide the states with information regarding present and future water requirements.

Although we felt that these problems were significant in themselves, the United States and the tribes' greater concern was whether the state courts possessed the expertise and impartiality required to properly adjudicate tribal water rights.⁵³ Tribes were very skeptical about that possibility, and the federal government

Reservation, 219 Mont. 76, 712 P.2d 754 (1985) (analyzing the State court's ability to apply federal, Indian reserved water rights law to state court adjudication of Indian reserved water rights, concluding that the Montana Water Use Act, Mont. Code Ann. §§ 85-2-101 et seq. is adequate to adjudicate such water rights, and reasoning that “[s]hould the Water Court abridge Indian reserved water rights by improperly applying the Act and the federal law that protects those rights, that failure can be appealed to this Court as well as to the Supreme Court of the United States for ‘a particularized and exacting scrutiny’.”)

⁵¹ See, Mont. Code Ann. § 85-2-101; Wyo. Stat. Ann. § 1-37-106.

⁵² In re the General Adjudication of all Rights to Use Water in the Big Horn River System and All Other Sources, No. 4993 (Wyo. 5th Dist. Ct. 1977).

⁵³ See *State ex rel. Greely v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 219 Mont. 76, 712 P.2d 754 (1985).

shared their skepticism.⁵⁴ In fact, the National Water Commission also endorsed the conclusion that Indian rights are appropriately adjudicated only in federal court. The Commission reasoned that exclusive federal jurisdiction was required “to avoid the suspicion of bias that might attend adjudication by elected State officials.”⁵⁵

For these reasons, we recommended as part of the National Indian Water Policy that the McCarran Amendment be amended to allow adjudication of Indian rights only in federal courts. This would eliminate lengthy disputes over choices of forum and diminish the reluctance of tribes to see their rights adjudicated, which they believed would be fairer in a federal forum, with the necessary resources committed to the preparation of the evidence in support of their rights, and it would increase cooperation between tribes and their major competitors for water, the states. We anticipated that disruption to the states’ procedures for adjudicating water rights would be diminished if the federal court decrees were then integrated into the state system.

3. *Indian and Federal Involvement in the Planning Process.* There was recognition by our Indian Water Policy team that in many western states, water was or would be the limiting factor to accelerated rates of growth. We recognized that there was a legitimate need for information regarding future Indian water requirements because many state water planning authorities recognized that they must defer to the *Winters* rights of the tribes. At the same time, state agencies realize that their authority over the manner in which reserved water rights will be utilized by the tribes is virtually non-existent, which results in state efforts to minimize the amount of water which falls under the doctrine. Deference to these *Winters* rights is difficult without a better understanding of the extent of Indian water requirements.

In 1973, the National Water Commission summarized the failure of the government to ensure that non-Indians’ use of water in the

⁵⁴ See Indian Water Rights Hearings Before the Subcomm. on Administrative Practice and Procedure of the S. Comm. on the Judiciary, 94th Cong. (1976).

⁵⁵ NAT’L WATER COMM’N, WATER POLICIES FOR THE FUTURE, 478-79 (1973).

arid West did not infringe on tribal rights and the resulting conflicts between Indian and non-Indian water users:

[I]n the water-short West billions of dollars have been invested, much of it by the Federal Government, in water resource projects benefiting non-Indians but using water in which the Indians have a priority of right if they choose to develop projects of their own in the future. In short the Nation faces a conflict between the right of Indians to develop their long-neglected water resources and the impairment of enormous capital investments already made by non-Indians in the same water supply. To resolve that conflict is not an easy task⁵⁶

Our recommendation to resolve this problem was to ensure the participation of tribes in the planning process for water resource development, which we believed would require that the Bureau of Indian Affairs have its own technical staff to provide information regarding tribal requirements and to analyze data from competing water-users.

4. *Legislation.* We considered and rejected a national legislative approach to resolving the controversies over Indian water rights. This was supported by the federal government's experience in Central Arizona, which demonstrated that extensive information must be gathered and analyzed before possible solutions could be discussed. The wide disparities in each water basin made it unlikely that any nationwide scheme could be developed which could fairly address the myriad problems distinct to each region or basin. Our recommendation was that the government avoid encouraging a political resolution of these issues unless the tribes themselves favored such a forum. We concluded that the resolution of Indian water rights and development was impossible without a clear understanding of the factual situation, including such things as possible water sources, Indian water requirements, and non-Indian water uses.

⁵⁶ NAT'L WATER COMM'N, *supra* note 51 at 476.

5. *Negotiated Agreements.* We supported the concept of negotiated agreements between tribes and competing water users as having the potential to resolve controversies without resorting to lengthy court proceedings, using tools such as tribal-state-federal compacts. We believed that this could greatly reduce the present-day conflicts over Indian water rights. We proposed that this alternative might include a moratorium on industrial or other water marketing of federally stored water until Indian rights to waters from the stream systems involved were quantified. This would have precluded the continuing investment of huge capital expenditures for improvements that could be jeopardized by prior and paramount rights to the use of the water by or on behalf of the Indian tribes. The National Water Commission had also voiced its view that projects should not be built on streams in which Indians had rights without a thorough understanding of the extent of those rights.⁵⁷

To be effective, negotiations could only take place if tribes possessed the information needed to assess their water requirements, and the relative strength of their position versus the position asserted by the states and other water users.

6. *Regulations of Water Usage on the Reservations.* The National Indian Water Policy Review team recommended that an effective scheme be developed for the regulation of water usage on reservations. Tribes retain their inherent authority to regulate water use by Indians and non-Indians on their reservations. The team believed that regulations should be enacted to provide for the delegation of secretarial authority to tribes under 25 U.S.C. § 381,⁵⁸ which authorizes the federal government to provide for a “just and equal distribution” of water “among the Indians of the Reservation.” Tribes would be encouraged to develop comprehensive tribal codes regulating the use of water on their reservations, as long as the tribal regulations satisfied the requirements of Section 381 and the protections of individual liberties guaranteed by the Indian Civil Rights Act of 1968, 25 U.S.C. § 1301, *et seq.*⁵⁹

⁵⁷ NAT'L WATER COMM'N, *supra* note 51 at 478.

⁵⁸ 25 U.S.C.A. § 381.

⁵⁹ 25 U.S.C.A. §§ 1301 *et seq.*

We concluded that regulatory schemes enacted by tribes would be advantageous because: first, only the tribes possessed the requisite authority to enact a comprehensive reservation-wide system; second, most water users did not understand the differences between state, tribal, and federal authority, and such a tribal scheme would clarify the respective lines of authority and provide a body which would be able to address problems on a routine basis. This approach would help ensure that water usage was compatible with general tribal goals for reservation development.

7. *Clarification of the Role of the Federal Government.* At the time of the national review of the Indian water policy, the Solicitor's Office and the Department of Justice (DOJ), supported by the Bureau of Indian Affairs, had recently acknowledged that the government's role in litigation requires it to act as a responsible advocate on behalf of its beneficiaries. The Indian Resources Section of the Lands Division had been established and reflected the recognition by the United States that novel approaches were needed to meet its unique obligations toward Indian tribes and their citizens. Similarly, there was an increased awareness at this time of the requirements of the trust responsibilities of the federal government in administrative matters.

Nevertheless, there remained considerable confusion among all segments of the population regarding the obligations of the federal government to protect Indian rights to the use of water and to the actual use of water by Indian tribes and their citizens. Additionally, agency efforts were not always coordinated within the government or with tribes. A comprehensive Indian water policy was required to provide a clear recognition of the role of the federal government in matters involving Indian water rights. Three standards were identified for the proper government role in dealing with questions of Indian water rights:

- a. When the United States participates as a trustee in litigation, it must represent tribal interests vigorously, presenting all reasonable arguments on behalf of its beneficiaries as would any other trustee.
- b. In administrative matters, the obligations of the Secretary of the Interior are also clear: the Secretary must recognize his

fiduciary duties that impose upon him the rigid standards of a private trustee.⁶⁰ The Secretary is also required to resolve disputes and conflicting claims within the department in a precise manner that would indicate the weight given each interest. “Possible difficulties . . . (can)not simply be blunted by a judgment call calculated to placate temporarily conflicting claims to water.”⁶¹

- c. Tribes must be consulted in both litigation and administrative matters involving Indian rights to the use of water. Affected tribes must have the opportunity to express their view before final adoption of the government’s position.

The policy review team recommended the public adoption of these standards so that all government officials and employees would be aware of their proper role and the public confusion over the proper role of the federal officials in these matters could be eliminated.

Development and Implementation of a Water Delivery Program

The team identified consultation with tribes as a critical area for the development and implementation of a water delivery program. Under the policy of self-determination, tribes were to be involved to the fullest extent possible in preparing and implementing the comprehensive development of water and related resources on their reservations, as well as participating in the overall developmental policies of the respective river basins in which their reservations lie. Additionally, the development of Indian resources would proceed according to the goals and objectives of the affected tribe.

Keeping these principles in mind, we proposed that the Department of the Interior (DOI), with the concurrence of tribes, undertake an accelerated program of research to initiate or complete studies and investigations that

⁶⁰ Relying on *Navajo Tribe of Indians v. U. S.*, 176 Ct. Cl. 502, 364 F.2d 320 (1966); *Seminole Nation v. U.S.*, 316 U.S. 286, 62 S. Ct. 1049, 86 L. Ed. 1480, 86 L. Ed. 1777 (1942); *Manchester Band of Pomo Indians, Inc. v. U.S.*, 363 F. Supp. 1238 (N.D. Cal. 1973).

⁶¹ *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252, 257 (D.D.C. 1972), opinion supplemented, 360 F. Supp. 669 (D.D.C. 1973), judgment rev’d, 499 F.2d 1095 (D.C. Cir. 1974).

are pertinent to the determination of tribal water rights and the development of Indian water and related land resources.

Determination of Indian Water Requirements

Because the Supreme Court had resolved most of the far-reaching legal issues prior to 1977, the most complex remaining issues which had to be resolved before tribal water rights could be quantified were fact-intensive questions unique to each Reservation. Our National Indian Water Policy Review recommended that land and water studies be conducted to specifically consider all information, data, and analytical requirements necessary to support water development programs on the reservations. We articulated the analytical standards to include a fundamental understanding of tribal goals and objectives; the relationships which had deterred or were expected to deter achievement of these tribal goals and objectives; and an understanding of the resource base—its adequacies and potentials for correcting imbalances and achieving and sustaining the results desired by the tribe over a period of time.⁶²

Traditionally, the Snyder Act of 1921,⁶³ which authorized regular federal funding for Indian programs, has been viewed as the appropriate authority for the Secretary of the Interior to use in expending monies to encourage economic growth and develop water supplies on the reservations. However, the Snyder Act was enacted at a time when the multitude of resources and needs of Indian tribes were not as apparent as they became in the 1970s. Consequently, there was a question of whether current legislative authority was broad enough to address the multitude of concerns identified in the National Indian Water Policy Review.

Aware of the fact that the department lacked any procedure for transforming a planning scenario into reality, we recommended that a well-defined procedure—either through regulations or legislation—be established to describe the review process and the formal implementation by the Department of the Interior and Congress of a plan for the development and

⁶² In addition to the aspects of the report discussed herein, the report contains a detailed discussion of procedures for determining present and future Indian water requirements; study criteria; framework for analysis; plan formation; planning coordination; expected costs and benefits; and recommendations for cost sharing and cost allocations.

⁶³ See 42 Stat. 208, 25 U.S.C.A. § 13.

implementation of an effective delivery system to meet the water requirements of the Indian people. We concluded that such a well-defined procedure would eliminate confusion over requirements for justifying each plan and over identification of the responsibility at each level of authority for implementing the plan.

Analysis of the Implementation of the Recommendations and the Current State of Government Policy Today

Water adjudications move slowly. Indian water rights adjudications move slower still. *Winters*, establishing that tribes had reserved water rights, was issued in 1908. *Arizona v. California*, setting out quantification criteria, was issued in 1963. The recommendations of the National Indian Water Policy Review were completed in January 1978.

These recommendations were influenced by the surprisingly large number of water adjudications and Indian water litigation taking place at that time, with the resulting view that methods other than litigation would be appropriate in certain instances to resolve controversies involving Indian rights to the use of water. The recommendations included the following, which we felt were critical if the objectives of a comprehensive Indian water policy were going to be successful:

1. The government should make a firm commitment to develop Indian water resources.
2. To minimize future conflicts, Indian tribes, with the assistance of the federal government, should participate in the water resource planning process.
3. Methods should be examined for facilitating negotiated settlements between the tribes and competing parties for the use of water.
4. The federal government should clarify its responsibilities in the area of Indian water rights.

The recommendations set forth three primary steps which had to be taken in chronological order: 1) determination of the forum in which tribal water rights would be quantified; 2) quantification of those rights; and 3) effective implementation of tribal water rights in consultation with tribes and beneficial use of those rights by tribes and Indians.

On June 6, 1978, President Jimmy Carter announced his Federal Water Policy initiative in a Message to Congress. As an important component of his new water policy, President Carter included the following specific initiative:

An instruction to Federal agencies to work promptly and expeditiously to inventory and quantify Federal reserved and Indian water rights. In several areas of the country, States have been unable to allocate water because these rights have not been determined. This quantification effort should focus first on high priority areas, should involve close consultation with the States and water users, and should emphasize negotiations rather than litigation wherever possible.⁶⁴

The first of the steps has been completed, albeit utilizing our secondary preference, negotiation, rather than our first preference of Congress mandating a federal forum. Congress simply did not have the political will to alter the McCarran Amendment, but in a somewhat unusual confluence of interests, states, tribes and the United States have all preferred water settlement negotiations to litigation. Many of those negotiations remain ongoing, and quantification of tribal water remains the *de jure* or *de facto* prerequisite step before tribes can seek effective implementation. Although we recommended that every tribe be provided with the capability to prepare an independent set of projections in relation to their own particular circumstances as it relates to determining present and future Indian water requirements, such an objective has proceeded in a slow, piecemeal fashion, in large part because Congress has been unwilling to provide sufficient funding to support a national effort of this magnitude.

Because parties uniformly chose settlement negotiations to litigation, the government, at the beginning of the administration of George Bush, Sr. in 1989, created the Secretary's Office of Indian Water Rights Settlements (given the acronym SIWRO) to provide structure and guidance as to how water settlement would be developed and implemented within the Department of the Interior and other related departments.⁶⁵ It then adopted a document

⁶⁴ "Federal Water Policy, Message to the Congress," Public Papers of the Presidents: Jimmy Carter, 1044-47 (June 6, 1978).

⁶⁵ Indian Water Rights Settlements: Tribal Consultation (Oct. 26, 2014), <https://www.doi.gov/sites/doi.gov/files/migrated/siwro/upload/Settlements-Background-Info.pdf> [hereinafter Tribal Consultation].

aptly named “The Criteria and Procedures for Participation of Federal Government in Negotiating for Settlement of Indian Water Rights Claims” (Criteria and Procedures).⁶⁶ The Criteria and Guidelines have been followed by every administration since 1990.⁶⁷

The Criteria and Procedures state four general principles for settlement negotiations: (1) The United States will be able to participate in water settlements consistent with the federal government’s responsibilities as trustee to Indians;⁶⁸ (2) Indians must receive equivalent benefits for rights which they, and the United States as trustee, may release as part of a settlement; (3) Indians have the opportunity as part of each settlement to realize value from confirmed water rights resulting from settlement; and (4) settlements will contain appropriate cost-sharing by all parties benefiting from the settlement.⁶⁹

The Criteria and Procedures also outline a four-phase settlement procedure to be used by the Water Group.⁷⁰ That process commences only if an Indian tribe and non-federal parties formally submit a request to negotiate in lieu of litigation to the DOI Secretary.⁷¹ The government, under the direction of SIWRO, creates a negotiating team, consults with the tribe, defines its negotiating position, and then begins negotiations.⁷²

Examples of Negotiation, Settlement, and Judicially Decreed Outcomes

Negotiations by the Fort Peck Tribe in Montana provide an example of the time-consuming and at times cumbersome process for negotiations and

⁶⁶ Indian Water Rights Settlements: Tribal Consultation (Oct. 26, 2014), <https://www.doi.gov/sites/doi.gov/files/migrated/siwro/upload/Settlements-Background-Info.pdf> [hereinafter Tribal Consultation].

⁶⁷ Indian Water Rights Settlements: Tribal Consultation (Oct. 26, 2014), <https://www.doi.gov/sites/doi.gov/files/migrated/siwro/upload/Settlements-Background-Info.pdf> [hereinafter Tribal Consultation].

⁶⁸ Indian Water Rights attorneys are concerned that through Secretarial Order 3335 (“Order 3335”), the Government appears to be attempting to narrow its trust responsibilities to “applicable statutes and regulations.” Many are concerned that this narrow interpretation of the trust responsibility will affect the federal government’s assistance in assisting Indian water settlements.

⁶⁹ 55 Fed. Reg. 9223.

⁷⁰ 55 Fed. Reg. at 9224.

⁷¹ 55 Fed. Reg. at 9224.

⁷² 55 Fed. Reg. 9224; *Tribal Consultation*, *supra* note 59.

settlement. While it was simultaneously involved in lengthy litigation on choice of forum,⁷³ in 1979, the State of Montana created the Montana Reserved Water Rights Compact Commission and gave that Commission the authority to negotiate on behalf of the State for agreements with the United States, and Indian tribes for the federal and Indian reserved water rights in the State of Montana.⁷⁴ After negotiating for more than four years,⁷⁵ on April 10, 1985, the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation reached an agreement under Montana law,⁷⁶ and the Fort Peck-Montana Compact was ratified by the Montana Legislature, approved by the governor of Montana, ratified by the Fort Peck Tribal Executive Board, and approved by the United States Departments of Justice and the Interior. The Water Compact was submitted on June 12, 1985, to Montana's Congressional Delegation, the Committee on Indian Affairs of the United States Senate, and the Committee on Interior and Insular Affairs of the United States House of Representatives.⁷⁷ The State then petitioned the State's Water Court to review and approve the Compact.⁷⁸

On April 6, 1994, the Montana Water Court entered its Findings of Fact, Conclusions of Law, and Order granting the State's motion.⁷⁹ It then took another seven years for the court to provide notice and an opportunity to be heard to the thousands of potentially interested parties. Finally, twenty years after intense, adversarial negotiation began, the Montana Court filed a Memorandum Opinion and Order Approving and Confirming the Fort Peck-Montana Compact, dismissing the objections, on August 10, 2001.⁸⁰

The Fort Peck Tribe's twenty-year saga of getting their water rights settlement approved in state court is merely one example of the problems associated with having courts deal with reserved water rights. In most

⁷³ For the reasons discussed above, there was also active litigation in Montana regarding forum selection. See, e.g., *Northern Cheyenne Tribe of Northern Cheyenne Indian Reservation v. Tongue River Water Users Ass'n*, 484 F. Supp. 31 (D. Mont. 1979), judgment rev'd, 668 F.2d 1080 (9th Cir. 1982), judgment rev'd, 463 U.S. 545, 103 S. Ct. 3201, 77 L. Ed. 2d 837 (1983).

⁷⁴ Mont. Code Ann. § 2-15-212.

⁷⁵ In re Fort Peck Indian Reservation, *supra* n. 1 at 39.

⁷⁶ Pursuant to Mont. Code Ann. § 85-2-702, codified at Mont. Code Ann. § 85-20-201.

⁷⁷ In re Fort Peck Indian Reservation, *supra* n. 1.

⁷⁸ In re Fort Peck Indian Reservation, *supra* n. 1 at *1.

⁷⁹ In re Fort Peck Indian Reservation, *supra* n. 1 at *1.

⁸⁰ In re Fort Peck Indian Reservation, *supra* n. 1.

courts, settlement agreements have been approved at a fairly constant rate for the past thirty-eight years. By and large, Indian reserved water rights settlements have been approved in a relatively short time except as stated in the Fort Peck example above. By contrast, adjudicating Indian reserved water rights in the courts have consistently evolved into protracted litigation at much cost and time without much benefit to the Indian tribes (see Indian reserved water right settlement discussion).

Since 1978, the Department of the Interior has worked on thirty-three Indian water rights settlements.⁸¹ Twenty-nine of these have been Congressionally approved. The remaining four have been approved by the DOI and DOJ and are awaiting Congressional approval.⁸² The DOI had thirty-nine teams working on settlements as of July 2015.⁸³ There were nineteen Negotiation Teams and twenty Implementation Teams.⁸⁴

Even though the federal government, through both Democratic and Republican administrations and Congresses, for the past forty years has consistently recognized that negotiated settlements are preferable to more costly litigation (both in terms of costs for work reaching a resolution and in costs to carry out judgments), the settlement work has been chronically underfunded,⁸⁵ and remains so at the present time.⁸⁶

⁸¹ Charles Stern, Cong. Research Serv., R44148: Indian Water Settlements 1 (2015), available at <http://nationalaglawcenter.org/wp-content/uploads/assets/crs/R44148.pdf>.

⁸² See Charles Stern, Cong. Research Serv., R44148: Indian Water Settlements 1 (2015), available at 5.

⁸³ Charles Stern, Cong. Research Serv., R44148: Indian Water Settlements 1 (2015), available at 5.

⁸⁴ Charles Stern, Cong. Research Serv., R44148: Indian Water Settlements 1 (2015), available at 5-9 (a Table of Enacted Indian Water Rights Settlements).

⁸⁵ One long-standing and still ongoing problem is that there is no long-term stable source of funding for settlement work. Instead the funding comes from annual appropriations, leading to tension between the government's obligations under approved settlements and its ongoing settlement work, and which also can detrimentally impact other programs offered by the BIA, such as the Native American Affairs water resource program. This arrangement is unfair to all parties involved. Additionally, acquiring Congressional approval for new, costly settlement agreements will be hard without a long-term, stable funding source even though these settlement agreements benefit tribes, states, the United States, and non-native parties. There is also some concern that because the origins are now forty years in the past, Congress may be losing sight of the fact that negotiations are in lieu of litigation in which the United States would have substantial financial exposure and states also would have substantial risk. E.g., Letter from Rob Bishop, Chairman of the House Natural Resources Comm. to Alletta D. Belin, Chair of the Working Grp. on

Many successful settlement agreements have been resolved through the Working Group and SIWRO since 1989. However, issues with funding, staffing, and the DOJ's interpretation of the trust responsibility as stated in Order 3335 must be addressed.

Conclusion

Over the past forty years, the policy of Indian water settlements has passed the test of time. Indian Tribal Nations have viewed water settlements as their last opportunity to turn reservations into viable homelands through agriculture and other economic development opportunities. Consequently, most settlements have had a major agricultural and irrigation development segment and have included major economic development funds to support the tribes' efforts in making their homelands viable and prosperous.

Our hope is that the settlement process will continue and that Congress and future administrations will recognize the benefits of water settlements and provide the necessary resources to settle every tribal nation's water claims in the next forty years.

Indian Water Settlements and Peter J. Kadzik, Assistant Attorney General for Legislative Affairs DOJ 1 (Feb. 26, 2015). (Chairman Bishop stated that the "Departments will be expected to affirm that a particular settlement represents a net benefit to the American taxpayer as compared to the consequences and costs of not settling litigation, and specifically support the federal financial authorization.") In response to Chairman Bishop's February 26, 2015 letter, the Working Group and DOJ noted that they always consider whether a particular settlement represents a net benefit to the taxpayers, but that "the costs and consequences of litigation to Federal and non-Federal parties are not generally susceptible to simple quantification." They also noted that the Criteria and Procedures already require that "settlement negotiations should be 'conducive to long-term harmony and cooperation among all interested parties through respect for the sovereignty of the States and tribes in their respective jurisdictions' and that settlements should 'promote economic efficiency on reservations and tribal self-sufficiency.'"

⁸⁶ Since the Claims Resolution Act of 2010, Pub. L. No. 111-291, 124 Stat. 3064, no Indian water rights settlements that require federal funding have been approved by Congress. The government also has not even provided adequate funding for negotiating teams. For example, in 2007 the Navajo Nation and Utah requested a negotiation team, but federal negotiating teams were not appointed until 2013. In response to SIWRO's 2014 consultation with tribes to evaluate SIWRO's programs, multiple tribes noted the federal negotiating teams' fact-finding during the settlement negotiation process was inadequate to prepare for settlement. According to the Congressional Research Service, "[o]ne of the primary challenges facing Indian water rights settlements is the availability of federal funds to implement ongoing and future agreements."

The Future of Indian Water Settlements

For the past forty years, Indian water settlements have been successful in securing “wet water” for present and future generations of tribal communities. Despite these successes, and contrary to *Winters* and the history of Indian reserved water rights discussed above, those who are negotiating against tribes have increasingly come to view Indian tribes as akin to any other private water user seeking an allocation of water, subject to state water law, from an interstate river or groundwater system.⁸⁷ From this, states seek to impose upon tribes numerous state water rules narrowly limiting the uses to which tribes can apply tribal water.

Any such restriction is directly contrary to Indian tribal sovereignty, since it limits both an Indian tribe’s right to water as well as how the tribe elects to use it. As is readily apparent based upon the history above, the correct, and fundamental rule, is that tribal water rights are rights reserved under and subject only to federal law. Notably, while the United States reserved enough water for tribes to develop practicably irrigable acres, it has not

⁸⁷ There are two facts which lead those negotiating against tribes to incorrectly view tribes as akin to private water users: 1) approvals of settlement agreements quantifying tribal reserved water occurs in state courts; and 2) the amount of water quantified under such agreements is in effect deducted from the water which is subject to state laws and which is available to other users within a state. The former has been discussed previously. Regarding the latter, using as an example the “law of the river” and Colorado River Compact, which applies to the mainstream of the Colorado River, the States divvied up all of the water which could be withdrawn from the river (and then some, because they overestimated the flow of the river) without even accounting for the senior reserved tribal water rights (although the Colorado River Compact includes Article VII, “Nothing in this compact shall be construed as affecting the obligations of the United States of America to Indian tribes.”). However, Article III (a) also states that the apportioned water to the Upper Basin and to the Lower Basin “shall include all water necessary for the supply of any rights which may now exist.” This would presumably apply to Indian reserved water rights with senior priority rights as established under the *Winters* doctrine. Additionally, Article VIII of the Compact also provides that “[a]ll other rights to beneficial use of waters of the Colorado River System shall be satisfied solely from the water apportioned to that Basin in which they are situated.” Simon H. Rifkind, Special Master Report 300-301 (U.S. S.Ct. 1960), in *Arizona v. California*, relied on the conclusion that “consumptive uses of mainstream water by the United States on federal establishments are chargeable to the state within which the use occurs,” and concluded that the United States’ uses in each state are limited by the apportionment to the state in which the uses occur. All current water negotiations proceed on the assumption that any quantified senior tribal water right which is quantified in an agreement with a state will then be deducted from the amount allocated to that state under the law of the river.

frozen tribal uses of water in the 1800s by prohibiting tribes from using tribal water for the highest and best use currently available. This does not mean a “blank check” for use of Indian water; rather, it means that Indian tribes with *Winters* water have the right, unless they negotiate it away, to regulate their own water allocation under negotiated federal parameters. As explained by Herbert Hoover, Secretary of Commerce at the time of the Colorado River Compact, it was presumed that the states have no power to disturb the relations between the United States to Indians, and no such result was intended.⁸⁸

It is of ever-increasing importance to tribes in negotiations to reject state attempts to limit tribal authority to determine the highest and best use of tribal water. Options for use should include water marketing (both intrabasin and interbasin), hydropower production, or an opportunity for multiple uses of the same water. While these may be the best uses of the tribe’s water rights, junior water rights holders prefer a system where the tribe is limited to irrigation and so is unable to use its full rights, and junior rights holders and states reap the benefits of return flow to the river system and other non-consumptive tribal uses of water.

With respect to water that has a negligible effect on competing water users within the state, Indian tribes should be able to use this water in any reasonable manner that benefits the tribe and not simply lose the right to use it because there is no current infrastructure to utilize it. The United States is increasingly reluctant to enter into settlements which compensate tribes for tribal senior water rights or to fund water delivery infrastructure on reservations, and tribes need to ensure that they preserve the free-market options for the use of their water, so that it is not the federal government, but the actual water user, under the highest and best use, who compensates the tribe for the use of tribal water. This should be viewed as an integral part of the negotiation process.

Indian tribes must explore new ideas and tactics for water settlement that will both recognize tribal sovereignty and, to the greatest extent possible, establish fully usable and marketable tribal water rights. While this will

⁸⁸ Amy Cordalis & Daniel Cordalis, *Indian Water Rights: How Arizona v. California Left an Unwanted Cloud over the Colorado River Basin*, *Arizona J. Environmental Law and Policy*, 5:333 at 343 (2015); see Article VII of the Colorado River Compact.

require a sea change in policy in light of the ever-increasing need for water, Indian tribes have an obligation to themselves, their children, and their children's children to ensure that notions of tribal sovereignty are recognized and that Indian tribal communities have the ability to use their water for the greatest benefit in the future. The water settlement policy continues to allow our tribal nations to make the highest and best uses for their Indian reserved water rights that they possess.

Key Takeaways

- The settlement of Indian water is centered on providing wet water on reservations so tribes can benefit from this valuable resource.
- Although the settlement policy has been in continuous use since the 1970s, the number of approved settlements is lower than it otherwise would be due to a lack of available Congressional funding. Practitioners and tribal leaders must be creative to get funding for water projects—utilize all funding sources (federal, tribal, state, and private) to build tribal water projects.
- A practitioners representing Indian tribes in water settlements or adjudications must become an expert on the facts related to the waters of the reservation, including historical uses and claims, present day uses and claims, and future uses and claims.
- Note that because Indian reserved water rights are for present and future use, any attempt to quantify a tribe's rights requires the practitioner to know the total facts of the reservation and the potential uses for the reservation in terms of domestic, municipal, commercial, industrial, and agricultural use. Practitioners should use competent experts that can fully develop a tribe's claims to water so it can withstand scrutiny.
- In any water adjudication or settlement, to ensure that the reserved water rights are utilized fully, the practitioner should require that a river management study be conducted that identifies the water in the stream as being natural flow or stored water, and the sources of any stored water, be it federal, tribal, state, or private. This provides reliability that the tribe is getting its full right of natural flow or storage water.
- Every tribe needs to develop a water code that is sufficient to manage and control the use of water within its reservation, and

tribes should employ technical experts to manage and enforce the use of tribal water.

- Note that it is of ever-increasing importance to tribes in negotiations to reject state attempts to limit tribal authority to determine the highest and best use of tribal water. Options for use should include water marketing (both intrabasin and interbasin), hydropower production, or an opportunity for multiple uses of the same water.
- Inform tribes that they need to ensure that they preserve the free-market options for the use of their water, so that it is not the federal government, but the actual water user, under the highest and best use, who compensates the tribe for the use of tribal water. This should be viewed as an integral part of the negotiation process.
- Assist Indian tribes in exploring new ideas and tactics for water settlement that will both recognize tribal sovereignty and, to the greatest extent possible, establish fully usable and marketable tribal water rights.

Thomas W. Fredericks, senior partner in Fredericks Peebles & Morgan LLP, is an enrolled member of the Mandan, Hidatsa, and Arikara Nation who grew up on the Nation's reservation on the Missouri River. He graduated from the University of Colorado Law School in 1972, and has practiced federal Indian law since then, including positions as the Executive Director at the Native American Rights Fund, as the chief legal officer for Indian Affairs, and later as the primary policy official for Indian Affairs within the Department of the Interior as a political appointee in the Carter Administration. Mr. Fredericks has, since 1981, worked in private practice primarily representing tribes and Indians. Fredericks Peebles & Morgan LLP is one of the largest Native American law firms in the country. Mr. Fredericks has substantial experience in all areas of Indian law, including representing numerous tribes in water rights litigation and negotiations, and in all other aspects of natural resources law and resource development.

APPENDIX A

WATER USE AND ADMINISTRATION CODE (DRAFT)

SECTION 1: GENERAL PROVISIONS

A. Title

This Code shall be known as the “_____ Water Use and Administration Code” (Code).

B. Findings

1. Whereas, the _____ finds that all Reservation natural resources are interconnected; and that water has cultural, spiritual and economic values that guide the appropriate use, management and protection of water and associated land use activities in the watersheds and drainage basins of the Reservation; and
2. Whereas, the _____ finds that surface and ground water are directly interconnected by the hydrologic cycle of the region and the _____ Reservation, and therefore water is a unitary resource, whether occurring as ground water, springs, mineral water, soil moisture, precipitation, percolating water, recharge, drainage waters, or surface water; and
3. Whereas, the _____ recognizes that water is vital to the health and welfare of Reservation residents and to the vitality of the Reservation economy; and
4. Whereas, resource uses may contribute to the degradation of water supply, and
5. Whereas, it is necessary to protect the environmental quality and integrity of all surface and ground water; and
6. Whereas, the _____ finds that all waters reserved for the _____, and held in trust for the benefit of the _____ and that as an essential attribute of sovereignty, the _____ has the power to determine the proper uses of the Tribal water right and the management thereof.

C. Purposes

The purposes of the _____ Water Use and Administration Code shall be:

1. To provide an orderly system for the use, management, protection, of the _____ water resources on behalf of the _____ , its tribal departments, tribal members, and allottees living within the exterior boundaries of the Reservation; and
2. To ensure that Reservation residents have sufficient water for cultural, domestic, agricultural, stock, instream, and other uses, and that the _____ has sufficient water for reservation economic development; and
3. To protect Reservation water from over-appropriation, degradation, exploitation, and any acts injurious to the quantity, quality, or integrity of the water; and
4. To encourage optimal development and multiple use of the Reservation water resources, to promote stability of investment in water use and delivery systems, and to permit all reasonable uses; and
5. To protect the health and welfare of Reservation residents, the political integrity of the _____ , and the economic security of the Reservation through effective management and protection of the Reservation's water resources; and
6. To protect traditional, religious and cultural uses of water resources and other resources dependent upon water.

D. General Powers and Authorities

This Code is enacted pursuant to the inherent sovereign powers expressly delegated to the Tribal Business Council by the Constitution and Bylaws of the _____, including the power to manage the economic affairs and enterprises of the _____, and protect and preserve the property, wildlife, and natural resources of the _____ including water on the _____ Reservation.

The Code provides for the development of a Tribal Water Management system, and as further defined by regulations of the _____ Tribal Water Commission _____ with final approval of the Tribal Business Council.

E. Construction

This Code shall not be construed in any manner which is inconsistent with the provisions of other applicable Tribal and federal law.

F. Nature of Ownership

1. The _____ is the owner of the full equitable title to all of the waters of the _____, and that title resides undiminished in the _____; to the extent provided by federal law, the United States holds the legal title to those waters solely as trustee for the _____.
2. All rights to the use of the waters of the _____ are subject to the prior and supreme rights, interests, and governmental authority of the _____, and the policy and provisions contained in this Code and any regulations promulgated by the Tribal Business Council and/or the Tribal Water Commission with respect to this Code.

G. Scope

This Code applies to all persons desiring to use or using or undertaking activities on Reservation lands affecting Reservation Water Resources.

H. Allottee Water Rights for Agricultural Purposes

Any allottee holding an allotment that was allotted for agricultural purposes, pursuant to the General Allotment Act, 25 U.S.C. §381, is entitled to request and be provided an equitable distribution of a portion of the Tribal Water right to carry out the agricultural purposes of the allotment. In administering and managing this Water Code, the Tribal Water Department and the Tribal Water Commission shall ensure that the allottees' rights are secured as provided under 25 U.S.C. §381. Section 381 does not apply to allotments established for grazing purposes on the _____ Reservation.

I. Definitions

For the purposes of this Code:

1. "Allottee" means an individual who owns a beneficial interest in a trust allotment within the exterior boundaries of the _____ Reservation, which was allotted in accordance with federal law.
2. "Beneficial Use" means any use of water for domestic, commercial, municipal, industrial, irrigation, hydropower generation, recreation,

- stockwatering, and instream flow uses as well as any other uses that provide a benefit to the user of the water.
3. “BIA” means the _____ Agency of the Bureau of Indian Affairs, Department of the Interior, the United States of America, unless otherwise indicated.
 4. “Commission” means the Water Commission of the _____ .
 5. “Diversion” means the removal of water from its natural source, natural flow, or location by means of a ditch, canal, flume, dike, pipeline, well, pump, or other artificial act and/or manmade action, including the impoundment of water in a reservoir for the purposes of rediversion.
 6. “_____ Reservation” or “Reservation lands” or “Reservation” means lands within the exterior boundaries of the _____ Reservation as established by federal law and Article _____ of the Constitution of the _____ .
 7. “Indian lands” means all lands within the exterior boundaries of the Reservation that are held in trust for the _____ , or owned by Indians and those lands, if any, outside of the exterior boundaries of the Reservation held in trust by the United States for the _____ or an enrolled member thereof.
 8. “Instream Flow” means a quantity of water in a stream required to protect or to preserve the integrity of the ecosystem.
 9. “Irrigation use” means application of water to the land surface or root zone of the soil for the purpose of producing crops, lawn or landscaping on that land.
 10. “Person” means any individual or group or combination thereof acting as a unit, however associated, or any organization of any kind, whether organized for profit or not, and regardless of the manner in which it does business, whether as a sole proprietorship, receiver, partnership, joint venture, trust, estate, firm, unincorporated association, corporation, or government, including, but not limited to, any part, subdivision, or agency of any of the foregoing; any pronoun used herein shall refer to any gender and to any number as the context requires for permits.
 11. “Place of Use” means the location where the water is used.
 12. “Point of Diversion” or “POD” means any location at which water is diverted from the water system.
 13. “Priority date” means the priority date assigned to the water rights as established by tribal, federal or state law.

14. "Purpose of Use" means the nature of use of the water right.
15. "Relinquish" means abandonment of a water claim or water right.
16. "Reservation water resources" means any and all waters underlying, flowing through or otherwise occurring or contained within the Reservation over which the _____ has jurisdiction.
17. "Source" means the named or described source of water within the water system.
18. "Transfer" means any change in a point of diversion, place of use, period of use or purpose of use for a water right.
19. "Tribal Business Council" shall mean the governing body of _____ as established and defined in Article _____ of the Constitution and Bylaws of the _____ .
20. "Tribal Court" means the _____ District Court and any courts from which appeals may be taken from a decision of the _____ District Court.
21. "Tribal lands" means those lands owned by the _____ .
22. "Tribal Water Engineer" or "Engineer" means the _____ Tribal Water Engineer.
23. "Tribal Water Department" or "Department" means the _____ agency with delegated responsibility for Tribal water rights administration on the _____ Reservation.
24. "_____ " or "Tribal" means or refers to the _____ .
25. "Water system" means all rivers, streams, lakes, springs, groundwater or other water sources within the _____ Reservation.

SECTION 2: ESTABLISHMENT OF THE TRIBAL WATER COMMISSION AND THE TRIBAL WATER DEPARTMENT

A. Tribal Water Resources Commission Established

1. The _____ Water Commission of the _____ Reservation is hereby established as the primary enforcement and management agency responsible for administering Tribal water rights on the Reservation. The Tribal Business Council shall appoint five (5) five members to the Commission from a list of nominees. Nominees shall be selected following application through public notice by the Tribal Business Council and shall be Tribal members of the _____ who are qualified, giving due weight to education, experience, and other qualities judged significant by the Tribal

Business Council. The selected Commission members shall not hold any other elected or appointed position with the _____, nor be otherwise employed by the Tribal Water Department.

The Water Commissioners shall serve three (3) year staggered terms and may be reappointed by the Tribal Business Council upon the expiration of their initial term. Commissioners shall serve the following terms: two (2) Commissioner shall be appointed and serve for three years, two (2) Commissioner shall be appointed and serve for two years; and one (1) Commissioner shall be appointed and serve for one year. It shall be the decision of the Tribal Business Committee to determine which commissioners shall serve in which term after the appointment. Thereafter, the appointments shall be advertised and appointments shall be for three-year terms. Commissioners still continue to serve until their successor is duly appointed.

- a. A Commissioner may be removed by vote of the Tribal Business Council for failure to carry out duties and responsibilities as assigned by this Code. In addition, the Commission may establish their own regulations regarding the removal of Commissioners, as is appropriate.
 - b. If a permanent vacancy occurs because of removal, resignation, or death, the Tribal Business Council shall appoint a replacement for the remainder of the term of the person being replaced.
 - c. A chairman of the Water Commission shall be designated from the appointed Commissioners by the Tribal Business Council. The Chairman shall serve in that capacity until he voluntarily relinquishes the Chairmanship, he is removed from the position, or his term expires. The Chairman shall continue to serve until his successor is duly appointed.
2. No Commissioner shall vote on a decision that could have a direct personal financial effect or other conflict of interest upon the affected Commissioner. A Commissioner shall disclose to the Commission any such financial effect or conflict of interest at the time of such vote and may participate in the discussion of the matter without voting upon it. The Commission shall adopt regulations that govern the conflicts of interest.

3. Three (3) members of the Commission shall constitute a quorum.
4. The powers, duties, and responsibilities of the Commission include:
 - a. Providing supervision over the execution and enforcement of this Code, its provisions and regulations there under;
 - b. Approving or denying water use permits in accordance with the Water Code and regulations implemented to enforce this Code;
 - c. Conducting hearings and rendering decisions regarding water permit applications and hearing disputes regarding the water management decisions and actions of the Tribal Water Engineer and/or water management staff in accordance with the procedures adopted pursuant to this Code and regulations;
 - d. Requesting production of documents or other information, and compelling attendance and testimony of witnesses before the Commission, and, if necessary, seeking judicial assistance from the Tribal Court to compel production of documents or to compel witnesses to attend the hearings;
 - e. Adopting such rules, regulations, permit forms, and other additional materials needed to carry out the Commission's duties effectively and efficiently;
 - f. Proposing amendments to this Code as necessary to interpret and execute its authority and implementing the objectives and purposes of this Code;
 - g. Advising the Tribal Business Council on all aspects of this Code and Reservation water resources including water marketing;
 - h. Organizing and operating the Office of the Water Commission in a manner intended to discharge Commission responsibilities effectively;
 - i. Coordinating with the officials from other tribal commissions, agencies, entities, and other applicable tribal, state and federal agencies to ensure comprehensive oversight of the Reservation's inter-related water quantity, water quality, land use, and fish and wildlife resources;
 - j. Advising the general membership of the _____ on all aspects of this Code, Reservation water resources, and Tribal water rights in coordination with the Tribal Water Engineer and other applicable Tribal departments;
 - k. Reviewing the proposed budget developed by the Tribal Water Engineer and making recommendations to the budget in

coordination with the Tribal Water Engineer. The Tribal Water Engineer and the Chair of the Commission shall be available to discuss such budget with the Tribal Business Council as requested. The Tribal Water Engineer shall be responsible for the day-to-day operation of the budget;

1. Imposing reasonable charges for water use by regulations promulgated by the Commission. The Commission may grant waivers of charges if the use is shown to be of benefit to the _____. The Tribal Business Council may delegate any other duties and authorities after amendment of this Code.

5. The Business Council shall fix the compensation of Commissioners. The rates of compensation so established may not be decreased during a member's term of office. Commissioners shall receive compensation only for those days they sit as members of the Commission, including meetings they are required to attend as members of the Commission.

B. Tribal Water Resources Department Established

1. There is hereby created the Tribal Water Department and the position of Tribal Water Engineer. The Tribal Water Engineer serves as chief Executive of the Commission and is responsible directly to the Commission for water administration. The Tribal Water Engineer shall be responsible for the administration of the Tribal Water Department. The Tribal Water Engineer has the authority to administer the water laws of the _____ and enforce regulations established pursuant to this Code, subject to the oversight of the Commission. The Commission may delegate any of its duties and authority to Tribal Water Engineer except the duty and authority to:
 - a. Hear disputes and conduct hearings in accordance with the procedures set forth in this Code;
 - b. Approve or deny water use permits in accordance with this Code and regulations promulgated to enforce this Code; and
 - c. Adopt regulations to implement this Code
2. For water development and all other water issues excluding office administration and personnel matters, the Tribal Water Engineer is responsible directly to the Commission.

C. Tribal Water Engineer—Minimum Qualifications and Duties

1. The Tribal Water Engineer shall be a qualified hydrologist and water resource manager with a minimum educational level of a Bachelor's degree in civil or agricultural engineering or a water-resource management field and not less than four (4) years of experience in water resource management, water rights administration, and water development and engineering.
2. The Tribal Water Engineer shall have the right to delegate responsibilities to staff provided that the ultimate responsibility shall remain with the Tribal Water Engineer.
3. The Tribal Water Engineer shall equitably guard all the interests involved in carrying out the duties and authorities of the Department. The Tribal Water Engineer shall be issued an official Tribal Water Engineer identification for enforcement purposes.
4. The Tribal Water Engineer shall have the following duties and authorities:
 - a. Enforcement Functions
 - i. To administer Tribal water rights, and ensure maximum compliance with the Code and with the conditions of all permits, determinations, orders, regulations, plans, policies, guidelines, and other actions taken by the Commission and coordinate such activities with the Bureau of Indian Affairs;
 - ii. To enter upon Reservation lands with reasonable notice to owner or occupant to investigate and inspect methods of diversion, withdrawal, irrigation, other water uses and other activities affecting water quantity; to install measuring devices on surface and ground water diversions for the purpose of enforcing and administering this Code; and to monitor water use, water quality, and the diversions in conjunction with this Code;
 - iii. In an emergency, to remove, render inoperative, shut down, close, seal, cap, modify, or otherwise control methods of diversion and withdrawal, obstructions to the flow of water, and remedy activities adversely affecting Reservation water resources, subject to expedited appeal to the Commission by the affected person, as provided in §7.B.4. of this Code;

- iv. To initiate, by citation and other means, enforcement proceedings before the Commission or, when appropriate, in Tribal Court, for violations of this Code, including injunctive relief; provided that before any enforcement actions occur, the Tribal Water Engineer shall ensure such enforcement is consistent with any applicable federal and Tribal law.
 - v. Except as otherwise provided, the Tribal Water Engineer shall ensure that water delivery systems on the Reservation shall divert only that quantity of water to which they are legally permitted.
- b. Advisory Functions
- i. To advise the Commission on all water resource related development planning issues consistent with the Tribal Water Master Plan;
 - ii. To provide the Commission and Tribal Business Council with a semiannual report on water quantity and quality and the status of water use on the Reservation,
 - iii. To provide suggestions, alternatives, and recommendations for water management;
 - iv. To declare water supply conditions and to prepare alternative water supply scenarios for different climatic trends and conditions for the Commission's use in setting priorities and preferred uses during drought;
 - v. To recommend, after coordination with other agencies or departments, designation of certain land areas, waters, and surface and ground water regions on the Reservation for dedication to certain beneficial uses or as "critical management areas" requiring specialized provisions for management;
 - vi. To recommend to the Commission proposed changes to this Code and to its regulations;
 - vii. To offer testimony on behalf of the _____ to tribal, state, or federal agencies with regard to _____ water management or interests; and
 - viii. To assist all applicants for permits in assembling and analyzing hydrologic and environmental data required to

be submitted with the application and otherwise to assist in the preparation of the application, and, if appropriate, to seek assistance from other Tribal departments.

c. Information and Research Functions

- i. To conduct hydrologic investigations to determine water supply and quality characteristics, analyze existing uses, identify water needs and development possibilities, and study means of developing, managing, conserving, and otherwise protecting Reservation water resources;
- ii. To collect, maintain, and analyze, on a continuing basis, information regarding Reservation and basin-wide water resources, including data on water, land, air quality, rangeland, and other factors actually or potentially affecting Reservation water resources or Tribal water rights;
- iii. To perform regular research regarding the overall carrying capacity of the Reservation's water system, with emphasis on discovering and reporting the levels of specific water use which impairs or injures overall water availability and use;
- iv. To identify sources of financial support for water management and development;
- v. To conduct public educational programs and develop educational material regarding Reservation water resources and Tribal water rights and administration, irrigation management, water quality, environmental issues, water conservation, and any other pertinent issues as may be determined by the Commission or Tribal Business Council;
- vi. To determine the extent of potential effects on existing water users, given hydrologic conditions, from proposed uses of Reservation water resources;
- vii. To identify promising research areas regarding Reservation water resources and to solicit research proposals by government, university, or private sources;
- viii. Coordinate joint and separate studies with Tribal departments;
- ix. One month before each irrigation season, the Tribal Water Engineer shall prepare a water supply forecast for the coming season. The Tribal Water Engineer will provide

- periodic updates on hydrologic conditions to the Commission and the Tribal Business Council; and
- x. Provide appropriate notices to the other entities as needed.

d. Administrative Functions

- i. To employ, supervise, and terminate Department and technical staff that are employed to enforce and administer this Code, provided that all hiring and firing decisions are subject to the provision contained within the _____ current Personnel Policies and Procedures Manual. This includes the right to delegate certain duties to staff members provided that the ultimate responsibility for such duties lies with the Tribal Water Engineer;
 - ii. To develop the internal tribal technical and managerial capabilities to promote the direct involvement of tribal staff that are employed to administer this Code, in the development and construction of water resource supply, distribution, and management facilities and devices;
 - iii. To develop and submit an annual budget in coordination with the Commission as set forth in Section 2.A.4.k. of this Code to submit to the Tribal Business Council; and
 - iv. To develop Department policies and procedures as is consistent with tribal policies for the orderly operation of the Department.
5. The Business Council will appropriate from available funds sufficient resources to administer the provisions of this Code.

SECTION 3: SYSTEM FOR WATER USE AND RESOURCE MANAGEMENT

A. General Policies

The following general policies shall guide the use and management of Reservation water resources:

1. Existing and established uses and relative priorities concerning the use of Reservation water resources may be protected and preserved,

subject to the _____ obligations to protect Tribal water rights and resources.

2. Surface water use may be adjusted for the varying water conditions each year, and overall water use allocation decisions will be guided by the hydrologic conditions, which require different water management strategies. Water development decisions will recognize hydrologic variability and will consider alternative sources of supply, should dry conditions prevail.
3. Ground water use will be guided by the overall condition of each aquifer system, the expected long-term yields, and the cumulative impacts of existing and proposed uses on ground and surface water supply and quality.
4. All land, water or other resource strategies, decisions, regulations shall consider the potential effect on all Reservation natural resources and will safeguard against surface and ground water degradation.
5. Decisions involving land use which significantly affect a stream bank, bed or channel, or water storage facility shall contemplate their effects upon fishery and wildlife resources.
6. Drainage strategies will be developed with due consideration for the conjunctive or integrated use of surface and ground water.

B. Beneficial Uses of Water

The uses to which water on the Reservation may beneficially be applied include, but are not limited, to:

- a. Domestic use;
- b. Commercial use;
- c. Municipal use;
- d. Agricultural use;
- e. Stockwater use;
- f. Industrial use;
- g. Instream flow use, including instream flow for fisheries, wildlife, and pollution control, aesthetic and cultural purposes;
- h. Water storage;
- i. Marketing;
- j. Ground water recharge and supply enhancement;
- k. Recreational use;
- l. Cultural use;

- m. Religious use;
- n. Power generation;
- o. Resource development; and
- p. Other beneficial uses.

There shall be no presumption of preference of use in the order in which the beneficial uses listed above.

C. Guidelines for Allocation of Tribal Water

In addition to those policies contained in Section A, the Tribal Water Engineer and the Water Commission shall take appropriate action for:

1. Water allocation. Water is to be allocated in accordance with a date of initial use pursuant to the historic practices of rotation and scheduling or upon other allocations established by the Commission.
2. Surplus. The Commission may allocate surplus water that may be used beneficially and efficiently after a recommendation of the Tribal Water Engineer, ratably among senior users first; later priorities are then allocated a proportionate share of the remainder.
3. Critical Water Areas. The Commission may designate critical water areas in cases where significant surface or ground water declines and/or water quality degradation exist, and may limit the amount of water for permitted uses in such areas pursuant to regulations designed to protect the long term quality and sustainability of the water resource.
4. Water Shortage Periods. In cases where there is a water shortage due to drought or other causes, water will be strictly allocated according to priority date, unless special agreements between the _____ and other entities provide for a temporary change of water allocation formulas. If a water shortage condition prevails such that not enough water exists to satisfy even senior users, all senior water users will have partial water uses met, but at a lesser diversion rate than that specified in the Tribal Water Permit. The diversion rate shall be set according to the specific demands in relation to overall supply. The Commission may set temporary use priorities during periods of drought after notice and hearing. The Tribal Water Engineer is to develop a drought management plan and corresponding regulations by the Commission.

SECTION 4: WATER PERMIT SYSTEM

A. Permit Required to Divert Water

1. A permit is required for all uses of water, except in cases when both the amount of water to be impounded, diverted, or withdrawn is less than 12.5 acre-feet, and the contemplated use is domestic, livestock, or fish, wildlife, and other recreational uses. Although no permit is required for these uses, the Tribal Water Engineer must be notified of the location and the acre-feet capacity for stored or utilized water once the facilities are constructed. A permit may be applied for in order to establish a priority date for these uses.
2. Except as provided in subsection A.1., no person shall divert Tribal water or undertake an activity affecting or involving such water without first obtaining a permit under this section. If such diversion or activity is required by federal law on behalf of the any federally approved irrigation project, an exemption will be granted as set forth in subsection 4 of this section. All persons shall promptly notify the Tribal Water Engineer, regardless of exemption status, in order to give notice to the _____ of all such activities on the _____ Reservation. A permit or license is required for any of the following activities:
 - a. Diversion of water from any surface or ground water source, including but not limited to any lake, pond, stream course, spring or well in excess of 12.5 acre feet, with the contemplated use being domestic, livestock, fish, wildlife, or other recreational use;
 - b. Diversion of water from any surface or ground water source, including but not limited to any lake, pond, stream course, spring or well for irrigation of more than 5 acres, or for municipal, industrial or commercial use;
 - c. Drilling of any new well or modification of any existing well, including irrigation, industrial, municipal, or commercial wells;
 - d. Altering any stream course or stream bank for any purpose, including but not limited to road construction and repair;
 - e. Developing ground water recharge projects;
 - f. Generating hydropower;
 - g. Storing or impounding water;

- h. Dedicating water to instream flow; and
 - i. Other non-exempt water uses herein not mentioned but for which a permit is determined necessary by the Tribal Water Engineer.
3. The issuance of a permit allows the activity therein described and constitutes an undertaking by the permittee to comply with the conditions therein stated and all Tribal laws and regulations of general application and applicable federal laws covering such activity.
4. Any person proposing to undertake an activity that may affect Reservation water resources may apply to the Tribal Water Engineer for an exemption. The Tribal Water Engineer may issue such an exemption if the Tribal Water Engineer finds the activity will have a minimal impact on Reservation water resources or if federal law preemptively allows the activity or diversion. The exemption shall be limited to the facts represented by the applicant. No fee shall be required for such application.
5. If, upon reviewing an action which is presumptively allowed by federal law, the Tribal Water Engineer determines such action will have more than a minimal impact on Reservation water resources or on the _____ Reservation, the Tribal Water Engineer shall notify the Tribal Council and request formal consultation with the federal government to mitigate or remove any impacts.
6. All permits issued under this Code are provisional and shall not be construed to create any entitlement in the user beyond the provisional period or to allow reliance thereon by any other person.
7. No person shall be authorized to use or otherwise take any action affecting the Reservation water resources administered under this Code unless he/she shall consent to reasonable entry upon his or her land by the Tribal Water Engineer, Tribal Water Resource employees, or Commissioners engaged in the administration of this Code. Every permit issued under this Code shall contain the condition that no use or other action affecting the waters in question may be made unless the applicant consents to such reasonable entry on his or her land.

B. The Permit System

1. The Permit System is established to regulate, inventory, and monitor the use of Reservation water resources, including Tribal

water rights. There shall be four (4) categories of permits. Any two or more categories may be combined into a single permit, as appropriate. Any permit may be made subject to such reasonable conditions and stipulations as the Commission may deem necessary in the public interest.

2. Such permitted uses shall include:

a. *Tribal Water Use Permit.* A Tribal Water Use Permit grants or confirms a right to use a share of Tribal water, and guides the present and future use and appropriation of the Tribal water set forth in the use permit. The permit applies to surface water and ground water. There shall be one Water Permit for any use of water and shall be permitted, as follows:

- (i) Members of the _____ shall have preference to the use of Tribal water, the methods and procedures for exercise of such preference to be established by the Commission by regulation.
- (ii) An existing permit for Tribal or individual lands within the Reservation may be assigned to a lessee when the land included within the permit is leased, subject to the approval of the Commission. Where there is no existing permit, the lessee may apply for a permit. A permit issued to a lessee shall be valid only as long as the lease is valid.
- (iii) A Tribal water use permit may be granted to a non-Tribal member person or non-Tribal entity to use Tribal water, upon payment to the _____ at rates to be established by the Tribal Business Council as recommended by the Commission, in addition to any applicable operations and maintenance charges.
- (iv) Permits for industrial use of groundwater from the Fox Hill aquifer shall not be granted when there are other available sources of water; and if granted, shall not exceed _____ acre feet per year.
- (v) Commission shall place such conditions on permits as are reasonably necessary to protect water quantity and quality.
- (vi) In addition to the requirements of this code and any regulations of the Commission, applicants must also comply with applicable federal law.

- b. *Transfer Permit for Changing Place of Use, Purpose of Use, Method of Application, Method of Diversion, or Point of Diversion.* A Transfer Permit grants the right to change the location or purpose of water use, method of application, method of diversion, or point of diversion. This may include the right to divert Tribal water outside the watershed of origin or to other water users in accordance with applicable federal law. The Commission shall establish specific regulations regarding such changes or transfers.
 - c. *Instream Flow Permit.* An Instream Flow Permit grants the right only to the _____ to maintain specified instream flows and/or lake levels in portions of or for entire streams or reservoirs on the Reservation.
 - d. *Storage Permit.* A Storage Permit grants the right to impound surface or ground water for a beneficial use.
 3. The Commission shall cause an inventory of all current permitted water uses and any existing diversions and uses permitted on the Reservation. An inventory list of current water users and permittees of Tribal Water Rights shall be published as public notice within one hundred twenty (120) days of adoption of this Code. This list shall be published in public places and in a newspaper of general circulation for ninety (90) days. The Commission shall promulgate regulations regarding the public notice process, objections, and hearing. The Commission may issue permits to any and all water users on the inventory list. No application for a permit shall be required for any use listed on the inventory. Once this initial inventory list is completed, water users shall update the Tribal Water Resources Department with any changes, including name and address changes.
 4. Any Tribal member who is applying for a permit for water and whose land is also part of the any federally approved irrigation project must ensure compliance with Tribal regulations, project regulations, and applicable federal law.
 5. Permits shall be granted for no more than five (5) years, but may be considered for automatic additional five years extensions as set forth by the Commission regulations.
 6. The Commission shall establish a process for changing the point of water diversion, whether surface or ground water, changing the use of

waters, or the place of use or the method of diversion or application of waters, and transferring Tribal water outside the watershed of origin.

7. No permit shall be granted unless the applicant and any licensee, lessee, assignee, or agent of applicant agrees to comply with all tribal laws and regulations and taxes applicable to the use, lease or sale of water. Failure to comply with any applicable tribal law or regulation or tax shall be grounds for immediate revocation of the permit.

C. Application Procedure for Permit

1. Applications for any permit under this Section shall be made on forms developed by the Tribal Water Engineer, including particular information of facts that in the judgment of the Tribal Water Engineer and the Commission is required for the proper processing of such applications. Information which the Water Engineer and Water Commission shall consider in processing a Water Permit may include Priority Date, Period of Use, Place of Use, Method of Diversion, Volume of Water, and Flow Rate requested.
2. Unless exempted by other provisions of this Code, the Commission shall establish, in the regulations promulgated hereunder, a schedule of applications fees for permits, which shall be paid in advance of consideration of application for any water permit governed by this Code. All fees shall be collected by the Office of the Tribal Water Engineer. The Commission may waive the fee in the case of financial hardship or for tribal members. Such fees shall be used in part to defray the cost of reviewing and processing the application and conducting a hearing when necessary.
3. The Tribal Water Engineer, or his or her designee, as consistent with the procedures in the established regulations, shall, upon request, meet with and assist any applicant in the collection of data and the preparation of the application to the extent the applicant, through lack of resources or technical knowledge, requires such assistance. The Tribal Water Engineer will notify an applicant of any errors or omissions to their application.
4. Within sixty (60) days of receipt of the application, the Tribal Water Engineer shall review each permit or license application; perform investigations and determine whether the proposed use or activity is technically feasible; prepare a report on each application; and recommend approval or denial to the Commission.

5. The Commission shall review all applications and reports and recommendations generated by the Water Engineer to determine whether the proposed use or activity adversely affects Tribal resources or other Tribal interests, and whether the proposed use or activity is consistent with the policies, purposes, and procedures described by this Code and with Tribal water laws and any other applicable Tribal or federal law. The Commission shall have the authority to grant or deny a permit within thirty (30) days of receipt of the recommendation by the Tribal Water Engineer. Every decision of the Commission must include factual findings, which justify the decision.
6. If the Commission does not approve the application or approves it with conditions which are not accepted by the applicant, the applicant shall be entitled to a hearing pursuant to Section 7.A.
7. If the Commission approves the application, the Tribal Water Engineer shall issue the appropriate permit in conformity with the Commission's decision.
8. A duly issued water permit by the Tribal Water Engineer shall constitute *prima facie* proof of the water user's right and entitlement to the use of water as defined in the water permit.

SECTION 5: VOLUNTARY RELINQUISHMENT OF CLAIMS OR RIGHTS TRANSFERS, SECURITY INTERESTS, NO LOSS BY ADVERSE POSSESSION, PRESCRIPTION, ESTOPPELS OR ACQUIESCENCE, LOSS BY NONUSE, AND REVERSION TO...

A. Voluntary Relinquishment of Clams or Rights

Any holder or claimant of any right, other than a Tribal water right, in or to the waters of the Reservation may voluntarily relinquish all or a portion of such right to the _____ by any affirmative act indicating an intent to relinquish.

B. Transfers

1. No permit granted under this Code may be transferred, exchanged, sold, or otherwise conveyed except as provided in this Code.
2. A Tribal water use permit may be transferred from one Tribal member to another Tribal member only upon the transfer of land on

the Reservation from one Tribal member to another Tribal member. An application for transfer of a water permit under this provision must be submitted to the Tribal Water Department promptly after the completing transfer of the land.

3. A Tribal water use permit held by tribal member may be transferred to the initial purchaser in fee of an allotment, provided the quantity of water transferred under the permit does not exceed the amount of water being validly used by the tribal member at the time of transfer, and does not adversely impact Tribal water rights. A water permit may be transferred from an allottee or his or her successor(s) in interest to any person for agricultural purposes with the transfer of land on the Reservation.
4. Form of Application. Applications for transfer, assignment, exchange shall be made on forms prepared and made available by the Tribal Water Engineer.

C. Security Interests

No person may create a security interest or authorize the creation of a security interest in a water permit without the express written consent of the Commission.

D. No Loss By Adverse Possession, Prescription, Estoppel, Or Acquiescence

No right to use or otherwise affect the quantity, level, flow, pressure, quality, or temperature of water may be acquired by adverse possession, prescription, estoppel, or acquiescence.

E. Loss By Non-Use

A permit shall become null and void in whole or part and the water revert to the _____ if the water user fails to use all or a portion of the water for a period of five (5) consecutive years, without sufficient cause. A tribal member may request and be granted reinstatement of all or a portion of his or her permit without reapplication, provided that the water permit of an allottee may be restored upon request by the allottee, or his or her Indian successor.

“Sufficient cause” shall include:

1. Drought or other unavailability of water;
2. Active service in the armed forces of the United States;
3. The operation of legal proceedings;
4. The application of any laws restricting water use;
5. Incarceration in a penal institution;
6. Confinement in a mental institution, whether voluntary or involuntary;
7. Incompetence by reason of age or mental incapacity;
8. Provisions for future use as provided in this Code; or
9. Other causes of nonuse beyond the control of the holder or holders or the Tribal water use permit.

The Commission shall serve notice of loss by nonuse on the permit holder. A hearing to show cause why such permit should not be revoked shall be held before the Commission not less than 30 days or more than 60 days from the date of notice. A decision of the Commission may be appealed in accordance with Section 7.

F. Reversion to the _____

If any permitted use is voluntarily relinquished or is lost by nonuse before the term of the permit expires, or is terminated for reasons of permit violation(s) or violations of this Code, the subject water use right shall revert to the _____ .

SECTION 6: ENFORCEMENT

A. Prohibited Acts

No person shall:

1. Forcibly, or through bribery, attempted bribery, threat, or other corrupt practice, obstruct or impede due administration of this Code;
2. Commit fraud, or knowingly assist another in the commission of fraud, with the intent to evade or defeat the administration of this Code or costs imposed or assessed;
3. Falsely verify by written declaration any permit, form, or other document, or intentionally withhold data required submitted by law;

4. Violate the conditions or stipulations of his or her permit, including but not limited to taking more water than is allowed by permit.
5. Willfully take, waste, alter or damage Reservation water resources or Tribal water rights;
6. Knowingly use, take action, or otherwise affect the use of Tribal waters within the Reservation without the authorization required; or
7. Willfully obstruct or interfere with Tribal employees performing their lawful duties under this Code.

B. Penalties

Any person that commits any of the above prohibited acts, or whose employees or agents in the course of their employment or agency, commit any of the above-prohibited acts, shall be subject to civil proceedings before the Commission or citation by the Tribal Water Engineer. The policy of the Commission is to assess and initiate penalties that are appropriate for the violation committed, and to ensure that penalties are sufficient to deter persons from committing violations and that compliance is achieved. On finding a violation, the Commission may impose any of the following sanctions, or any combination thereof, subject to compliance with applicable tribal and federal law:

1. Monetary damages;
2. Restitution;
3. Recommendation for cancellation of the holder's lease if the lands to which the permit applies are Tribal lands;
4. Injunctive relief;
5. Affirmative remedial action;
6. Additional conditions or limitations upon the holder's permit, including limitation of the amount of water permitted for diversion;
7. Suspension of the permit for a certain term;
8. Recommendation to the Business Council for exclusion from the territory of the Reservation, if the violator is subject to exclusion under the tribal or federal law;
9. Forfeiture of any permit;
10. Temporary or permanent disqualification from eligibility for any permit, subject to limitations set forth by applicable Tribal or federal law; and/or
11. Civil fine.

C. Appeals

Appeals from a decision of the Commission by any affected person shall be in accordance with the provisions of Section 7.C. of this Code. An affected person shall mean any person or entity that can demonstrate actual harm or potential harm because of a decision of the Commission.

D. Exhaustion of Administrative Remedy

Appeals must be made pursuant to the administrative process set forth in Section 7. The appeal procedure set forth in Section 7 shall be the sole and only appellate process by which an affected person may seek relief from a decision rendered by the Water Commission or Water Engineer. Appeals made directly to the _____ Tribal Court without exhaustion of administrative remedy are prohibited.

SECTION 7: HEARINGS AND APPEALS

A. Hearings on Permits

1. An affected person or applicant who is not satisfied with the issuance or non-issuance of a permit by the Commission shall request a hearing within twenty (20) days, and shall receive a hearing before the Commission within twenty (20) days of filing the request. The affected person or applicant shall be provided an opportunity for a full factual presentation and for public comment and testimony on the proposed use or activity.
2. Notice of such hearing will be published at the Commission's expense in a newspaper of general circulation on the Reservation at least one (1) week prior to the date of hearing. Notice shall also be posted in the Tribal and BIA offices and other such areas as may be deemed appropriate by the Commission.
3. At least 3 members of the Commission shall be present and preside over the hearing. The appellant shall have the right to present oral and written testimony under oath. The Commission shall have the authority to administer oaths to witnesses, to take evidence under oath and compel attendance of witnesses or production of documents and other evidence. The Commission shall promulgate regulations for the hearing procedure to ensure that due process requirements are met.

4. After the hearing, the Commission shall render a written decision based solely on the application and record within ten (10) days:
 - a. Approving the permit with or without conditions;
 - b. Denying the permit or license; or
 - c. Tabling action pending receipt of additional data or information.
5. The decision shall be adopted by a majority vote of the Commission, and shall be delivered to all parties by certified mail.
6. All proceedings of the hearing shall be recorded, and, if an appeal to Tribal Court is sought, the applicant or any other affected party, at their sole cost and expense, may request a transcript of the hearing.
7. An appeal of a final decision of the Commission shall be by Petition filed with the Tribal Court within thirty (30) days of receipt of the Commission's decision. The Petition shall set forth the grounds and basis of appeal and attach the decision of the Commission.
8. A decision rendered on a Petition submitted to the Tribal Court pursuant to Section 7.A. of this Code shall be final and nonappealable to any other courts.

B. Review of Tribal Water Engineer Decisions and Actions

1. Any affected person may file a written petition for a hearing before the Commission not later than thirty (30) working days after issuance of a decision by the Tribal Water Engineer.
2. Upon the proper and timely filing of a petition for a hearing, the Commission will conduct a recorded hearing to receive evidence from the appellant. The Tribal Water Engineer shall provide to the Commission, on its request, copies of all documents and other information, which formed the basis for the decision or action. The Commission may modify or reverse such action of the Tribal Water Engineer only where such decision or action is not supported by hydrologic fact, Tribal policy or law, or is clearly arbitrary and capricious. The Commission will issue a written final decision. Appeals of final decisions of the Commission shall be made only to the Tribal Court within thirty (30) days of receipt of the written final decision.
3. If no request for hearing before the Tribal Court is timely filed, the decisions or rulings of the Commission shall be binding and enforceable and not be subject to further appeal.

4. When, in the exercise of the Tribal Water Engineer's authority under Section 2.C.4.a.iii., the Tribal Water Engineer removes, renders inoperative, shuts down, closes, seals, caps or otherwise controls any method of diversion or withdrawal, any obstruction to the flow of water, or any activities adversely affecting the quality or quantity of treaty-based or Tribally-permitted water, the affected person shall have the following appeal deadlines:
 - a. A written petition must be filed with the Commission not later than seven (7) business days from the date of the Tribal Water Engineer's action;
 - b. The Commission will conduct a hearing to receive evidence from the person adversely affected by the Tribal Water Engineer's action within three (3) business days of filing such petition after having, in good faith, attempted to notify any affected permit holders; and
 - c. The Commission shall within forty-eight (48) hours issue a written decision stating the facts and grounds therefor.

D. Appeal to Tribal Court—Review of Commission Decisions

1. The Tribal Court is empowered to hear appeals from any final decisions or ruling of the Commission if filed within the time period prescribed in subsection 2.
2. Appeals of Commission decisions or rulings shall be filed with the Tribal Court no later than thirty (30) days from issuance of such decision or ruling of the Commission. Such notice of appeal shall be filed with the Tribal Court. Appellant shall send a copy of the notice of appeal to the Commission, and shall certify to the Tribal Court that the copy was sent to the commission by certified or regular mail.
3. Upon receipt by the Commission of notice that an appeal has been filed with the Tribal Court, the Secretary for the Commission shall certify and transmit to the Clerk of the Tribal Court the administrative record within fourteen (14) days, including all documents, transcripts and other information, which formed the basis for the decision or ruling being appealed.
4. Appeals to the Tribal Court shall be limited to review of the record of the Commission's administrative decisions or rulings. The standard of review shall not be a trial de novo. Based upon the record developed

during the administrative proceeding and the Commission's decision, the Tribal Court may modify, reverse, or remand a decision or ruling of the Commission only where such decision or ruling is without substantial basis in fact, is contrary to tribal policy or tribal law, or is clearly arbitrary or capricious.

SECTION 8: MISCELLANEOUS PROVISIONS

A. Sovereign Immunity

1. This Code, in no way, limits, restricts, or otherwise waives the _____ sovereign immunity from suit; and
2. Under this Code, the Tribal Business Council grants a limited waiver of sovereign immunity for its Commission and its Tribal Water Engineer for the sole purpose of providing redress and relief pursuant to Section 7 of this Code. The limited waiver of sovereign immunity for the Commission and for the Tribal Water Engineer shall only be for the sole purpose of addressing actions taken by the Commission, or by the Tribal Water Engineer, acting in their official capacities, and shall only be available for the purpose of declaring, adjudicating, and enforcing the parties' rights and duties as more fully described in this Code and any regulations promulgated hereunder; and
3. The waiver specifically does not waive the sovereign immunity of the Tribal Business Council or the _____ or any other departments; and
4. The waiver specifically does not allow any further action in any other court or jurisdiction or for any other purpose except as forth in Section 8.A.2.

B. Rules, Regulations, and Standards

1. Any rules or regulations promulgated under this Code shall be consistent with this Code and all applicable Tribal and federal law.
2. The Tribal Water Engineer shall review regulations with the Commission and submit the regulations to the Commission for review, consideration, publication, and if appropriate, approval.
3. Pursuant to Section 2.A.4.e., before the formal adoption of proposed regulations, the Commission shall publish such regulations in order to provide interested parties an opportunity to comment. The notice

will invite written comments and provide a deadline for their submission of not less than seven (7) days after publication of notice. The Commission will hold a public hearing in order to receive oral testimony to the proposed regulations. The Commission shall also establish procedures for emergency regulations.

- a. A regulation will become effective twenty-four (24) hours after the closing date for comments or on the date that is otherwise specified therein.
- b. A copy of the regulations will be filed and made available for public inspection at the Tribal Water Engineer office.

C. Records Access

1. All records maintained by the Tribal Water Engineer or the Commission are considered Tribal records as such these records may not be disclosed unless authorized by the Tribal Business Council in writing.
2. No employee may alter or destroy these records unless authorized by the Tribal Business Council in writing.
3. Nothing in this section shall prohibit other Tribal departments from sharing data or other information necessary for performing their job(s) as long as all confidential information is maintained in conformance with Tribal policies and procedures.

D. Amendment

The Tribal Business Council may amend this Code. The Commission shall notify Tribal members and other affected persons of any amendment in the manner considered appropriate by the Commission under Tribal laws.

E. Severability

In the event any provision of this Code or the application thereof to any person or circumstances is held invalid by a court of competent jurisdiction, the remainder of this Code shall not be affected thereby and, to this end, the remaining provisions of this Code shall be unaffected and survive the invalid provisions.

F. Extension of Time Limits

Except for appeals under section 7, time limits provided by provisions of this Code may be extended, for good cause shown, by the Tribal Water Engineer or the Commission before which the proceeding is pending when the ends of justice so require and when all applicable requirements have been met.

G. Effective Date

The provisions of this Code shall be in effect upon the approval and passage by the Tribal Business Council. This Code shall remain in effect until repealed or amended.

H. Repeal

Any act, ordinance, resolutions, rules or regulations, or provision of law of the _____ in conflict with the provisions of this Code are hereby repealed to the extent that they are inconsistent with, conflict with, or are contrary to, the purpose of this Code. Those acts, ordinances, resolutions, rules or regulations, or provisions of law that do not conflict shall remain in effect.

Courtesy of Thomas W. Fredericks, Fredericks Peebles & Morgan LLP



ASPATORE

Aspatore Books, a Thomson Reuters business, exclusively publishes C-Level executives and partners from the world's most respected companies and law firms. Each publication provides professionals of all levels with proven business and legal intelligence from industry insiders—direct and unfiltered insight from those who know it best. Aspatore Books is committed to publishing an innovative line of business and legal titles that lay forth principles and offer insights that can have a direct financial impact on the reader's business objectives.

Each chapter in the *Inside the Minds* series offers thought leadership and expert analysis on an industry, profession, or topic, providing a future-oriented perspective and proven strategies for success. Each author has been selected based on their experience and C-Level standing within the business and legal communities. *Inside the Minds* was conceived to give a first-hand look into the leading minds of top business executives and lawyers worldwide, presenting an unprecedented collection of views on various industries and professions.



ASPATORE