Resolving Conflicts Between Tribal and State Regulatory Authority Over Water

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In 2017, the Agua Caliente Band of Cahuilla Indians affirmed their legal right to water in a landmark victory in the Ninth Circuit Court of Appeals. In an exercise of its sovereign authority, the Tribe then implemented a permit system to regulate use of the groundwater underlying its reservation. But local and state water agencies already have a conflicting regulatory framework in place. In the past, courts have resolved similar water management disputes by applying a complicated framework based on who is regulated and where the regulation takes place.

But this outdated approach leads to divergent outcomes and often does great harm to Tribal interests. Courts should instead recognize a presumption of exclusive Tribal regulatory authority over all on-reservation water resources. This approach safeguards Tribal health and welfare while providing sorely needed predictability to Tribal-state regulatory disputes over water. States can be confident that their interests will be adequately accounted for because Tribes have a proven track record of equitably regulating water resources, and there are plentiful opportunities for state-Tribal cooperation.

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> "Regulation of water on a reservation is critical to the life-style of its residents and the development of its resources. Especially in arid and semi-arid regions of the West, water is the lifeblood of the community. *Its regulation is an important sovereign power*."[1]

INTRODUCTION

At the corner of a busy intersection in downtown Palm Springs, California, a crystal-clear spring surges forth from deep beneath the desert. Since time immemorial, the Agua Caliente Band of Cahuilla Indians (the "Agua Caliente Tribe") have cared for the spring, relying on its life-giving waters for drinking, bathing, and farming.[2] While the spring lies on land owned by the Tribe, the

1. Colville Confederated Tribes v. Walton, 647 F.2d 42, 52 (1981) (emphasis added).

2. Mona M. de Crinis, *Eternal Spring*, ME YAH WHAE 26 (Fall–Winter 2015–2016), https://www.aguacaliente.org/documents/OurStory-6.pdf [https://perma.cc/HU8U-TC76]. The term "Indian" is a legal term of art in the field of federal Indian law. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 3.01 (2019). While many Native Americans identify themselves using different terms and primarily identify themselves as constituents of particular groups, such as the Navajo or Cheyenne, the term "Indian" is most commonly used in federal law. *Id.* at n.1. In this article, I use both "Tribe" and "Tribal Nation" interchangeably to refer to "group[s] of native people with whom the federal government has established some kind of political relationship." *Id.* at § 3.02(2). I also capitalize these terms to accord due respect for the sovereignty of Tribal Nations. *See* Angelique EagleWoman, *The Capitalization of "Tribal Nations" and the Decolonization of Citation, Nomenclature, and Terminology in the United States*, 49 MITCHELL HAMLINE L. REV. 623, 624 (2023) ("Within the U.S. legal profession and field of law, words have consequences that are often detrimental to Native peoples in Native homelands.").

United States' allotment policy, which divided up Indian lands and passed many parcels into nonmember hands, has resulted in a "checkerboard" of land ownership within the Agua Caliente Reservation.[3] Groundwater pumping on these nonmember lands by nonmember owned resorts, golf courses, and irrigation districts has severely lowered the groundwater table, thereby imperiling the existence of the Tribe's sacred spring.[4]

In 2017, the Tribe won a landmark case in the Ninth Circuit that affirmed its right to groundwater underlying the reservation.[5] After the case, the Tribe passed Tribal Ordinance 55, which established the Agua Caliente Water Authority ("ACWA").[6] Pursuant to the ordinance, the ACWA has established a water code and permit system that regulate all pumping of groundwater beneath the reservation in an effort to safeguard "the health, security, and economic well-being of the Tribe, its members, and the entire Reservation community."[7]

As an exercise of their inherent authority, Tribes across the United States are increasingly seeking to exert regulatory authority over their water, often through the establishment of Tribal water codes like the one established by the Agua Caliente Tribe.[8] This trend is likely to increase following the Secretary of the Interior's lifting of a half-century-old Department of the Interior-imposed moratorium on Tribal water codes.[9] As is the case with most Tribal-state civil regulatory authority disputes, Tribal authority to regulate the activities of Indians on Indian lands is largely unquestioned.[10] In the arid West, however, such exercises of civil regulatory authority are often met with stiff resistance from

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3. Miranda Caudell, *A People's Journey*, ME YAH WHAE 50 (Fall–Winter 2016–2017), https://flipbook.pub/me-yah-whae/2016-fall-winter/. Legally, Indian reservations are distinguishable from Tribal property. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 15.02 (2019). A reservation is "a place within which a tribe may exercise tribal powers," but land within the reservation may be owned by individuals or entities who are not members of the Tribe. *Id.* For the purposes of this article, I use the term "Tribal land" to refer to land owned by the Tribe or Tribal members, *see id.*, as well as land held in trust by the United States on behalf of the Tribe, *see id.* at § 15.03. I use "fee lands" to refer to lands within the boundaries of a reservation that are owned by nonmembers. *See id.* at § 15.04(5).

4. STETSON ENGINEERS INC., ANNUAL GROUNDWATER CONDITIONS REPORT FOR THE AGUA CALIENTE INDIAN RESERVATION: WATER YEAR 2020 16 (April 2021) ("Overall, the water level has declined by as much as 100 ft since the 1950s . . . .") [hereinafter "2020 Agua Caliente Groundwater Report"].

5. Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist., 849 F.3d 1262, 1273 (9th Cir. 2017).

6. Agua Caliente Water Authority, Agua Caliente Band of Cahuilla Indians, Ordinance No. 55 (Aug. 6, 2019), https://www.acwaterauthority.org/documents/Ordinance-55-Tribal-Water-Authority.pdf [https://perma.cc/2SSA-8Q6P].

7. Q&A, AGUA CALIENTE WATER AUTHORITY, https://www.acwaterauthority.org/ [https://perma.cc/2MSG-YKME] (scroll down to "Q&A" section).

8. *See* National Congress of American Indians, *Tribal Water Codes: Regulation of Water Quantity and Quality in Indian Country*, YOUTUBE (2014), https://www.youtube.com/watch?v=Aiiq-JyJjQM [https://perma.cc/Q3Q6-XBG3] [hereinafter "NCAI 2014 Webinar"].

9. Kelsey Turner, *Haaland Clears Way for Tribes to Regulate their Own Water*, NATIVE NEWS ONLINE (Apr. 8, 2022), https://nativenewsonline.net/sovereignty/haaland-clears-way-for-tribes-to-regulate-their-own-water [https://perma.cc/4DZ8-CKJW].

10. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 6.02 (2019) ("Tribal governing power is at its zenith with respect to authority over tribal members within Indian country.").

states, which view Tribal regulatory activities as a threat to existing uses and fragile state water systems based on the concept of prior appropriation.[11] Yet, when Tribes seek to regulate the water use of nonmembers on fee lands, courts have extended the "civil implicit divestiture doctrine" announced in *Montana v. United States* to limit inherent Tribal authority over these resources.[12] In general, however, litigation in this area is sparse, and the Supreme Court has not weighed in on the many difficult legal questions and complex interests at stake.

Part I of this paper describes the history of the Agua Caliente Tribe and its recent exertions of regulatory authority. Part II outlines the relevant law. Part III argues that the civil implicit divestiture doctrine has been applied by courts to limit Tribal authority over water resources in a way that harms Tribal communities and leads to divergent and unpredictable outcomes. Part IV argues that courts should instead adopt a presumption that Tribal regulation of water is permitted under the second exception in *Montana v. United States*, which enables Tribal regulation when there are "direct effect[s]" on the "health or welfare" of the Tribe.[13] Because Tribes have established themselves as effective water regulators, and plentiful opportunities for Tribal-state cooperation exist, a presumption of exclusive Tribal regulation of on-reservation water is not only legally sensible but should be encouraged as a practical matter.

I.
CASE STUDY: THE AGUA CALIENTE BAND OF CAHUILLA INDIANS

The history of the Agua Caliente Band of Cahuilla Indians parallels the experience of many Tribes in the United States who have persisted and thrived in the face of centuries of shifting federal policies aimed at destroying their right

11. *See, e.g.*, *In re* the General Adjudication of All Rights to Use Water in the Big Horn River System, 835 P.2d 273, 280–83 (Wyo. 1992) (authorizing state regulatory authority over Tribal water resources). Under the system of prior appropriation, the water right holder who is first to make "beneficial use" of their water has senior priority. *See* 1-11 WATERS AND WATER RIGHTS § 11.04(a) (2009). Those who put their water to beneficial use later retain junior priority. *See id.* Accordingly, during times of shortage when there is not enough water to satisfy all water rights, the senior rights holder will receive their full water allocation before junior water rights holders see a drop. *See id.* Many Tribal water rights, conversely, were impliedly "reserved" by the Tribe under the *Winters* doctrine with a priority date corresponding to the date of the establishment of the Tribe's reservation. *See* Winters v. United States, 207 U.S. 564, 576–77 (1908). Because Tribal water rights carry a priority date that is older, and accordingly more senior, than most water rights perfected under state law, many states view Tribal rights as a threat to their water rights systems. *See*, *e.g.*, *In re Big Horn River System*, 835 P.2d at 286 (Cardine, J., concurring in part) ("The reserved right looks backward for priority purposes to the establishment date of the reservation. Thus, reserved rights escape many of the limitations imposed by the prior appropriation system. Since they are in derogation of this system, by which all other appropriators must live, their scope should be carefully limited to avoid undue prejudice to those who receive their rights under state law.").

12. *See, e.g.*, Holly v. Confederated Tribes & Bands of Yakima Indian Nation, 655 F. Supp. 557, 558 (E.D. Wash. 1985), *aff'd sub nom*. Holly v. Totus, 812 F.2d 714 (9th Cir. 1987) ("To determine whether the Yakima Nation's sovereign power is sufficient to apply its Code to non-members of the Tribe using excess waters on fee lands requires analysis under *Montana v. United States* . . . .").

13. *See* Montana v. United States, 450 U.S. 544, 566 (1981).

to self-governance.[14] One of the Tribe's creation stories details the arrival of a great leader who traveled over "the mountains and saw the green spot, now known as Palm Springs."[15] Soon thereafter, his community followed him across the mountains and settled alongside the spring in the desert lowlands of what is today the Coachella Valley.[16] Archeologists similarly maintain that the first Cahuilla ancestors arrived in the desert regions of what is today Southern California around five thousand years ago.[17] For thousands of years thereafter, the Cahuilla thrived in the harsh region, where they hunted game, gathered mesquite berries and acorns, and established extensive trade networks with Tribes as far away as the Colorado River.[18]

In the nineteenth century, the Cahuilla peoples came into increasing contact with Anglo-American settlers.[19] By the second half of the century, the Tribe's ancestral homelands played host to a busy stagecoach route, which was quickly followed by the Southern Pacific Railroad in 1876.[20] In order to further incentivize settlement by nonmembers, President Ulysses S. Grant established the Agua Caliente Reservation that same year.[21] The reservation granted the Tribe only a small portion of its original territory and further divided the land in checkerboard fashion, with even-numbered sections becoming reservation land and odd-numbered sections passing to the railroad.[22] The Tribal lands were held in trust for the Agua Caliente peoples, who were charged fees to bathe in their own springs.[23]

In 1891, Congress passed the Mission Indian Relief Act, which sought to divide and distribute the remaining Indian land to individual Indians and nonmembers as private property.[24] This action was part of the government's broader allotment programs of the late nineteenth and early twentieth centuries.[25] Under allotment, the U.S. government broke Indian reservations, which were already mere fractions of Tribes' original territories, into individual "allotments" in an attempt to "assimilate" and "civilize" Native Americans by forcing them into private land ownership.[26] Because the U.S. government already split the Agua Caliente Reservation into a checkerboard at its formation, the further subdividing of the Tribe's lands through allotment resulted in a double

14. *See* Judith Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 29–43 (1995).

15. *Tahquitz 101*, ME YAH WHAE 75 (Summer 2017), /https://www.aguacaliente.org/documents/OurStory-13.pdf [https://perma.cc/W5H7-N9YA].

16. *Id.*

17. Caudell, *supra* note 3, at 51.

18. Mona De Crinis, *Cahuilla Territory*, ME YAH WHAE 62, 66–67 (Fall–Winter 2021–2022), https://aguacaliente.org/documents/Cahuilla_Territory.pdf [https://perma.cc/RN2Q-SDRV].

19. *Id.* at 66.

20. *Id.* at 67.

21. *Id.*

22. *Id.*

23. ED AINSWORTH, GOLDEN CHECKERBOARD 195 (1965).

24. De Crinis, *supra* note 18, at 67.

25. Royster, *supra* note 14, at 7–18.

26. *Id.* at 9.

checkerboarding and a complex system of land ownership across the Coachella Valley.[27]

Where the lands did remain in Agua Caliente hands after allotment, restrictive federal leasing laws generally prohibited Tribal members from leasing their lands for development or using their property for profitable enterprises, contributing to widespread poverty on the reservation.[28] It wasn't until 1959, after years of tireless advocacy and lobbying by an all-woman Agua Caliente Tribal Committee, that Congress passed The Equalization Act, which "evened out the differing financial values of land allotments regardless of their physical location" and secured favorable lease terms for Tribal lessors.[29] Following the Act, Palm Springs quickly developed into the resort destination it is today, and "many Tribal members achieved economic independence."[30] However, the complex history of land ownership continues to result in conflict and confusion regarding the division of regulatory responsibilities between the Tribe, the City of Palm Springs, and the State of California.[31] Notably, this confusion extends to groundwater use in the area.[32]

In 2013, recognizing that the aquifer underlying its reservation was in overdraft—meaning substantially more water was being pumped out of the aquifer than was returning to it—the Agua Caliente Tribe brought suit against two nearby water agencies that pump significant quantities of water from beneath the Coachella Valley.[33] As part of its claim, the Tribe sought a declaration that it had a "federally reserved right . . . to the groundwater underlying the reservation."[34] The Ninth Circuit agreed with the Tribe, holding that the *Winters* doctrine, which provides that Tribes retain senior rights to enough water to ensure their reservation can serve as "a permanent home," impliedly reserved groundwater for the Tribe.[35] Prior to the Ninth Circuit's decision, state and federal courts disagreed as to whether *Winters* extended beyond surface water to

27. De Crinis, *supra* note 18, at 67.

28. June Allan Corrigan, *The Land They Built*, ME YAH WHAE 23 (Fall–Winter 2017–2018), https://www.aguacaliente.org/documents/OurStory-15.pdf [https://perma.cc/75GB-CXD4].

29. *Id.* at 25.

30. *Id.*

31. NCAI 2014 Webinar, *supra* note 8, at 1:11:40 (noting that, on a reservation that has been "checker-boarded" by allotment, "many people don't even know they are in the boundaries of a reservation."). Today, the Tribe employs a full-time geospatial information systems expert who maintains an interactive online map to "view the location and ownership status of allotments within the Agua Caliente Indian Reservation." *Geospatial Information Systems*, AGUA CALIENTE BAND OF CAHUILLA INDIANS, https://www.aguacaliente.org/gis [https://perma.cc/24J7-EEE8].

32. *See* 2020 Agua Caliente Groundwater Report, *supra* note 4, at 13.

33. Agua Caliente Band of Cahuilla Indians' Memorandum of Points and Authorities in Support of Motion for Summary Judgment on Phase I Issues at 4, Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist., 849 F.3d 1262, 1265 (9th Cir. 2017).

34. *Agua Caliente Band of Cahuilla Indians*, 849 F.3d at 1267.

35. *Id.* at 1269.

groundwater.[36] In finding that the Agua Caliente Tribe had a reserved right to groundwater beneath its Reservation, the court recognized that Tribal groundwater use was crucial to creating a sustainable homeland in the hot, dry Coachella Valley, where surface water supplies are exceedingly limited.[37] Because the parties had agreed to trifurcate the litigation to address discrete issues separately, the court did not weigh in on how much water the Tribe was entitled to.[38]

Based on the court's ruling, the Agua Caliente Tribal Council established the ACWA, codified a Tribal water code, and implemented a permitting process "for the production of the Tribe's groundwater."[39] The Tribe's water code applies to all "individuals or entities who have wells on the Agua Caliente Reservation or who pump groundwater from under the Reservation."[40] There are currently forty-nine groundwater production wells located on the Agua Caliente Reservation.[41] Twenty-four of these wells are located on lands owned by the Tribe or held in trust for the Tribe by the federal government, whereas the remaining twenty-five are located on fee lands owned by nonmembers.[42] Thirteen of these wells have already obtained Groundwater Production Permits through the ACWA.[43]

To date, however, the ACWA has not permitted a groundwater producer operating on nonmember-owned fee land within the reservation.[44] Instead, it has only approved permits for wells located on Tribal lands.[45] Nevertheless, the Tribe's interest in permitting all groundwater withdrawals within the reservation, coupled with the apparent reluctance of nonmember groundwater producers on nonmember-owned fee land to submit to the ACWA's permitting procedures, suggest that legal challenges to the Tribe's exertion of regulatory authority may be on the horizon.[46]

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36. Catherine Schluter, *Indian Reserved Rights to Groundwater: Victory for Tribes, for Now*, 32 GEORGETOWN ENV'T L. REV. 729, 731–33 (2020) (detailing the contradictory state court decisions addressing whether *Winters* rights extend to groundwater).

37. *Agua Caliente Band of Cahuilla Indians*, 849 F.3d at 1265–66.

38. *Id.* at 1267 ("Phase III will attempt to quantify any identified groundwater rights.").

39. Agua Caliente Water Authority, Agua Caliente Band of Cahuilla Indians, Ordinance No. 55 (Aug. 6, 2019), https://www.acwaterauthority.org/documents/Ordinance-55-Tribal-Water-Authority.pdf [https://perma.cc/2SSA-8Q6P]; A Resolution of The Board of Directors of The Agua Caliente Water Authority Levying a Groundwater Production Fee Upon All Producers of The Tribe's Groundwater Within The Reservation for FY 2022, ACWA Resolution No. 21-02 (Apr. 28, 2021), https://www.acwaterauthority.org/documents/Resolution_21-02.pdf [https://perma.cc/7SBD-P8ZF].

40. Q&A, *supra* note 7.

41. 2020 Agua Caliente Groundwater Report, *supra* note 4 at 13.

42. *Id. See supra* text accompanying note 3 regarding land designations.

43. *Id.*

44. *Id.* at 14.

45. *Id.*

46. *See id.* at 33. The Q&A section of the ACWA website appears to anticipate challenges to the Tribe's assertion of regulatory authority over its groundwater. *See*, *e.g.*, Q&A, *supra* note 7 ("Question: If I apply for a permit to drill a well on the reservation does this mean my well driller and I don't have to follow California law? Answer: In accordance with settled and longstanding federal law,

II.
THE CURRENT LEGAL FRAMEWORK IN THEORY AND PRACTICE

As the Agua Caliente Tribe begins regulating the use of its groundwater, nonmember entities who will be required to obtain permits through the Tribe are likely to challenge the Tribe's regulatory authority in court.[47] This section outlines the current legal framework a court would apply to determine the outcome of such a challenge.

A. The Civil Divestiture Doctrine and Federal Indian Law Preemption

As pre-constitutional and extra-constitutional sovereigns, Tribal Nations generally retain inherent regulatory authority over their lands and resources.[48] Accordingly, states are presumptively precluded from regulating on Indian lands.[49] At the same time, the United States has often encouraged nonmembers to enter and settle Indian lands over which Tribes presumptively have regulatory authority, most notably through the allotment policy.[50] The result is a checkerboard of land ownership within many Indian reservations, where nonmembers hold title to numerous, separate islands of fee land within a reservation.[51] At the end of the twentieth century, in response to the jurisdictional challenges created by this nonmember intrusion on reservation lands, the

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the Tribe's position is that Tribal law governs the production of groundwater on the Reservation. Nevertheless, you should consult your own legal counsel on this question.").

47. The Coachella Valley Water District, one entity that pumps groundwater from below the reservation who would be affected by the Tribe's permitting requirement, has already publicly expressed that the Tribe's affirmed right to groundwater "would frustrate [the Coachella Valley Water District's] attempts to manage groundwater for the future." *Agua Caliente Lawsuit Fact Sheet*, COACHELLA VALLEY WATER DIST. (2018), https://www.cvwd.org/DocumentCenter/View/3670/Fact-Sheet-Tribal-Litigation-February-2018-PDF- [https://perma.cc/B7CM-XTPZ].

48. *See* Worcester v. Georgia, 31 U.S. 515, 519 (1832) (recognizing Tribes as "distinct, independent political communities"); *see also* Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 788 (2014) ("Indian tribes are 'domestic dependent nations' that exercise 'inherent sovereign authority.'") (quoting Cherokee Nation v. Georgia, 30 U.S. 1, 2, 34 (1831)); *see also* United States v. Lara, 541 U.S. 193, 204–05 (2004) (affirming that a Tribe exists as "distinct political society, separated from others, capable of managing its own affairs and governing itself") (quoting Cherokee Nation v. Georgia, 30 U.S. 1, 16 (1831)).

49. *See, e.g.*, Rice v. Olson, 324 U.S. 786, 789 (1945) ("The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history."); *see also* Williams v. Lee, 358 U.S. 217, 220 (1959) (concluding that "absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them").

50. *See* John P. Lavelle, *Beating a Path of Retreat from Treaty Rights and Tribal Sovereignty: The Story of Montana v. United States*, in INDIAN LAW STORIES 539 (Carole E. Goldberg, Kevin K. Washburn & Phillip P. Frickey eds., 2011) (describing the General Allotment Act as "a revolutionary federal policy geared at breaking up reservations into a multitude of separate Indian-owned parcels (or allotments) and permitting white settlers to purchase the remaining so-called 'surplus' lands").

51. *See* Robert T. Anderson, *Water Rights, Water Quality, and Regulatory Jurisdiction in Indian Country*, 34 STAN. ENV'T. L. J. 195, 200 (2015) (noting two key effects of the Dawes Act). First, Anderson explains, Indian-owned allotments were now permitted to be transferred to nonmembers. Second, surplus lands were opened to homesteading. This led to the reduction of Indian land from nearly 140 million acres to just 48 million acres. *Id.*

Supreme Court began limiting Tribal civil authority over nonmembers. Now, many questions remain regarding the extent of this judicial abrogation and to what regulatory situations it applies.

In *Montana v. United States*, the Court announced what is now known as the "civil implicit divestiture doctrine," which holds that Tribes are implicitly divested of their regulatory authority over the actions of nonmembers on fee lands in some circumstances.[52] The dispute that animated *Montana* arose from a challenge to an ordinance passed by the Crow Tribal Council withdrawing permission for nonmembers to fish and hunt on the Crow Reservation.[53] Increased hunting and fishing pressure by nonmembers, particularly duck hunting and fishing on the "blue-ribbon" waters of the Big Horn River that flows through the Crow Reservation, imperiled "one of the [Tribe's] most valued resources and hereditary rights."[54] In direct contravention of the Tribal ordinance and with aims of setting up a political fight over on-reservation regulatory authority, a nonmember angler traveled to a parcel of state-owned land within the boundaries of the reservation and cast his lure.[55]

When the resulting dispute reached the Supreme Court, the Court passed down a decision that went against all established principles of Tribal sovereignty and "depart[ed] from 150 years of Supreme Court precedent that recognized general [T]ribal authority within Indian country."[56] The Court held that the authority to regulate nonmember conduct on fee land within the reservation was a sovereign power that Tribal Nations had lost by virtue of their "dependent status" to the United States.[57] But, the Court established two exceptions allowing for Tribal regulation of nonmember activity on fee land.[58] Under *Montana*, Tribes retain their inherent regulatory authority (1) where nonmembers enter "consensual relationships with the [T]ribe or its members" (the "consensual relationships exception") and (2) where the "conduct of non-Indians . . . threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe" (the "direct effects exception").[59]

The *Montana* framework, with its general prohibition on Tribal regulatory authority over nonmember activity on fee lands and its two exceptions, has remained relatively undisturbed since the decision. Courts continue to note the "critical importance of land status" to resolving regulatory disputes in Indian

52. *See* Montana v. United States, 450 U.S. 544, 564 (1981).
53. Lavelle, *supra* note 50, at 539–40.
54. *Id.* at 540. Brief for the United States at 5, Montana v. United States, 450 U.S. 544 (1981) (No. 79–1128) (noting that the ordinance was passed to "help alleviate the game and fish shortage and to help the economic condition of the Crow people").
55. Lavelle, *supra* note 50, at 535.
56. *See* Judith V. Royster, Montana *at the Crossroads*, 38 CONN. L. REV. 631, 631 (2006).
57. *See Montana*, 450 U.S. at 565.
58. *Id.* at 565–66.
59. *Id.*

country.[60] When it comes to *Montana*'s exceptions, the Supreme Court has explained that there are no bright line rules; rather, courts must "decide cases involving tribal civil jurisdiction over nonmembers based on the unique facts of each case."[61]

The consensual relationships exception has generally been construed narrowly. For instance, in *Atkinson Trading Co. v. Shirley*, the Court denied the Navajo Nation the authority to tax guests at a nonmember-owned hotel on fee land because neither *Montana* exception applied.[62] Even though the hotel was serviced by Navajo police and medical services, the Court held that the consensual relationships giving rise to regulatory authority must stem directly from "commercial dealings, contracts, leases, or other arrangements."[63]

In recent decades, the Court has given conflicting signals about *Montana*'s direct effects exception. On one hand, the Court has made it clear that the exception must be triggered by specific nonmember conduct and does "not broadly permit the exercise of civil authority wherever it might be considered necessary to self-government."[64] For example, in *Plains Commerce Bank v. Long Family Land and Cattle Co.*, the Court suggested that Tribes might only be able to regulate nonmember conduct on fee lands where it is "necessary to avert catastrophic consequences."[65] The Court also substituted the word "menaces" for "threatens" in the *Montana* Court's original construction of the second exception.[66] This change in language suggests Tribes must overcome a high bar to exercise civil jurisdiction.[67]

On the other hand, the Court relied on the direct effects exception in *United States v. Cooley* to hold that Tribal police have the authority to temporarily detain and search nonmembers on public rights-of-way running through the reservation.[68] The Court determined that denying Tribal police this authority would "make it difficult for [T]ribes to protect themselves against ongoing

60. *See*, *e.g.*, Att'y's Process & Investigation Servs., Inc. v. Sac & Fox Tribe of Miss. In Iowa, 609 F.3d 927, 940 (8th Cir. 2010).

61. JANE M. SMITH, CONG. RSCH. SERV., R43324, TRIBAL JURISDICTION OVER NONMEMBERS: A LEGAL OVERVIEW 5 (2013).

62. 532 U.S. 645, 649 (2001).

63. *Id.* at 656.

64. *Id.* at 658 n.12.

65. 554 U.S. 316, 341 (2008).

66. *Compare id.* ("The second exception authorizes the tribe to exercise civil jurisdiction when non-Indians' 'conduct' menaces the 'political integrity, the economic security, or the health or welfare of the tribe.'") (quoting Montana v. United States, 450 U.S. 544, 566), *with Montana*, 450 U.S. at 566 ("A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct *threatens* or *has some direct effect* on the political integrity, the economic security, or the health or welfare of the tribe.") (emphasis added).

67. *See* Cullen D. Sweeney, *The Bank Began Treating Them Badly: Plains Commerce Bank, the Supreme Court, and the Future of Tribal Sovereignty*, 33 AM. INDIAN L. REV. 549, 573 (2009) (suggesting that by creating "impossible standards for the application of the second Montana exception, the Court appears to manifest a belief that tribes are not capable—or worthy—of exercising actual jurisdiction over non-Indians").

68. 141 S. Ct. 1638, 1642–45 (2021).

threats."[69] Even before *Cooley*'s reaffirmation, one scholar argued that "[o]pening up *Montana*'s exceptions to a potentially broader reading . . . seems the least complicated path toward allowing [T]ribes more scope to regulate nonmembers."[70] Notably, lower courts have found that the direct effects exception is triggered when nonmember conduct on fee land results in on-reservation environmental and water contamination.[71]

Finally, if *Montana* purports to limit Tribal regulation of nonmember conduct on fee lands, do *states* have the authority to regulate that same conduct?[72] Courts have generally answered this question by applying the preemption-infringement test first announced by the Supreme Court in *Williams v. Lee*.[73] Under the test, courts ask whether state regulatory authority has been preempted either by federal law or by "unlawfully infring[ing] on the right of reservation Indians to self-government."[74] For instance, the Supreme Court has applied the test to bar application of New Mexico's hunting regulations on the Mescalero Apache Reservation in light of the Tribe's comprehensive and federally supported fishing and hunting regulations.[75] And in *Oklahoma v. Castro Huerta*, the Court recently held that "*Bracker* does not bar the State from prosecuting crimes committed by non-Indians against Indians in Indian country" because state prosecutorial discretion does not infringe on Tribal self-government.[76] The criminal jurisdiction context thus appears to establish a presumption of state regulatory authority.[77]

The intersecting nature of the *Montana* analysis and the *Williams* preemption-infringement test has resulted in a great deal of confusion as to which test applies to civil regulatory conflicts between Tribes and states.[78] Overall, however, the "civil implicit divestiture" doctrine announced in *Montana* has

69. *Id.* at 1643.

70. Katherine Florey, *Toward Tribal Regulatory Sovereignty in the Wake of the COVID-19 Pandemic*, 63 ARIZ. L. REV. 399, 433–34 (2021) (arguing that "the health-and-welfare exception seem[s] the most logical fit for allowing a broader scope of tribal regulation").

71. *See, e.g.*, Montana v. EPA, 137 F.3d 1135, 1141 (9th Cir. 1997) (holding that upstream water pollution by nonmembers posed "serious and substantial threats to Tribal health and welfare [and] that Tribal regulation was essential").

72. *See* Williams v. Lee, 358 U.S. 217, 220 (1959).

73. *Id.*

74. Colville Confederated Tribes v. Walton, 647 F.2d 42, 51 (1981) (quoting White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980)).

75. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 336–43 (1983).

76. 142 S. Ct. 2486, 2501 (2022).

77. *See* UCLA School of Law, *Castro-Huerta v. Oklahoma and the Attack on Tribal Sovereignty: Where Do We Go From Here?*, YOUTUBE (July 6, 2022), https://www.youtube.com/watch?v=ZmU8d4l6B0M [https://perma.cc/G27M-A248].

78. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 6.03(2)(c). A finding that the Tribe lacks regulatory authority under the *Montana* test and a holding that the state is preempted from regulating may "result[] in a jurisdictional vacuum." *Id.*

proved to be incredibly corrosive to Tribal Nations' ability to regulate crucial issues within reservation boundaries.[79]

B. Civil Implicit Divestiture Doctrine Applied to Tribal Water Regulation

Courts have only rarely attempted to resolve Tribal and state conflicts over regulation of water use. As an initial matter, courts have been clear that Tribes have exclusive authority to administer their reserved water rights because reserved rights are Tribal property rights, and "[T]ribal authority to regulate Indian property rights is exclusive of the states."[80] However, very few Tribes holding reserved water rights have had these rights quantified, and these rights exist in water bodies that also contain waters allocated by state permitting procedures.[81] Therefore, almost all assertions by a Tribe of regulatory authority over waters on its reservation will implicate the Tribe's authority to regulate water not owned by the Tribe.[82] For instance, the Agua Caliente Tribe has asserted regulatory authority over the pumping of groundwater from beneath its reservation.[83] While the Ninth Circuit has affirmed that the Tribe does indeed have a property right in a yet-to-be-determined quantity of water from the aquifer underlying the Coachella Valley, the remaining water, above and beyond the Tribe's reserved rights, remains property held in trust by the State of California.[84] Necessarily then, in exerting administrative authority over the water underlying its reservation, the Tribe has sought to regulate water use by nonmembers who hold common law state rights to certain quantities of water.[85]

In contexts like this, as is the case in other civil regulatory authority disputes between Tribes and states, courts have looked to the specific property status of the land on which the water use is taking place to determine whether the state or Tribe has regulatory authority.[86] Following the *Montana* line of cases, courts have determined that Tribes can regulate nonmember water use that occurs on Tribal lands. Where water is used by nonmembers on fee land, however, the few court decisions that have addressed this specific question have

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79. *See generally* Judith Royster, *Revisiting* Montana*: Indian Treaty Rights and Tribal Authority over Nonmembers on Trust Lands*, 57 ARIZ. L. REV. 889 (2015) (discussing the impact of *Montana*).

80. Cohen's Handbook of Federal Indian Law § 19.04 (2019) ("Indian Tribes . . . have full and exclusive regulatory authority over Indian reserved rights to water . . . .").

81. Anderson, *supra* note 51, at 208–09, 213.

82. *Id.* at 217–18.

83. Agua Caliente Water Authority, Agua Caliente Band of Cahuilla Indians, Ordinance No. 55 (Aug. 6, 2019), https://www.acwaterauthority.org/documents/Ordinance-55-Tribal-Water-Authority.pdf [https://perma.cc/2SSA-8Q6P].

84. Alec D. Tyra, *When the Well Runs Dry: Groundwater Policy and Sustainability Post-Agua Caliente*, 38 UCLA J. OF ENV'T L. & POL'Y 308, 318 (2020).

85. *Id.*

86. Anderson, *supra* note 51, at 214 n.94 (listing cases determining Tribal civil regulatory authority by looking to the status of the individual being regulated and the nature of the title of the specific land at issue).

applied, at least in part, the civil divestiture doctrine announced in *Montana* to determine whether the Tribe may regulate.[87]

1. Colville Confederated Tribes v. Walton

In the first case to squarely address the question of Tribal regulatory power over water, *Colville Confederated Tribes v. Walton*, the Ninth Circuit held that it was the Tribe and not the state that had exclusive regulatory authority over water resources within the reservation.[88] James Walton, a nonmember who had acquired fee lands within the Colville Reservation, sought to irrigate his lands with water taken from No Name Creek under the authority of state water permits he had obtained.[89] The Colville Confederated Tribes brought suit to enjoin Walton from diverting water from No Name Creek, arguing that the "Tribe itself has inherent power to regulate its own waters."[90]

The Ninth Circuit centered its analysis on whether the state had any authority to regulate on-reservation waters.[91] Noting that state regulation of water use on a federal reservation is barred absent specific congressional approval, the court held that Washington's "regulation of water in the No Name System was pre-empted by the creation of the Colville Reservation."[92] The court further noted that the general presumption of deference to state water law was inappropriate on a federal reservation, "at least where such use has no impact off the reservation."[93] In line with other cases addressing preemption in the federal Indian law context, the Ninth Circuit's analysis appeared to rely on both the federal government's overarching authority as well as the Tribe's inherent sovereign authority to find state regulation preempted.[94]

In *Walton*, the Ninth Circuit also took into consideration *Montana*, which had been decided by the Supreme Court a few months earlier, noting that a Tribal Nation's authority to "regulate generally the conduct of non-members on land no longer owned by, or held in trust for the tribe was impliedly withdrawn as a necessary result of its dependent status."[95] However, the court held that Walton's conduct triggered the second *Montana* exception and authorized Tribal

87. *Id.*
88. 647 F.2d 42, 52 (9th Cir. 1981).
89. *Id.* at 45.
90. Colville Confederated Tribes v. Walton, 460 F. Supp. 1320, 1331 (E.D. Wash. 1978), *aff'd in part, rev'd in part*, 647 F.2d 42 (9th Cir. 1981). The United States, as trustee, also argued that Washington had no authority to regulate water use on the reservation by issuing state water permits. However, contrary to the Colville's inherent powers argument, the United States argued that *it* was actually the sovereign with regulatory authority, claiming "exclusive federal jurisdiction to regulate reservation waters" pursuant to 25 U.S.C.A. § 381. *Id.*
91. 647 F.2d at 51.
92. *Id.* at 52–53.
93. *Id.* at 53.
94. *See id.* at 51 ("State regulatory authority over a tribal reservation may be barred either because it is pre-empted by federal law, or because it unlawfully infringes on the right of reservation Indians to self-government.").
95. *Id.* at 52.

regulation because Walton's use of water from No Name Creek "imperiled the agricultural use of downstream [T]ribal lands and the [Tribe's] trout fishery."[96] The court supported this contention by noting the "unitary" nature of water resources and arguing that "[r]egulation of water on a reservation is critical to the lifestyle of its residents and the development of its resources."[97]

2. United States v. Anderson

Three years later, however, the Ninth Circuit reached a different result in a case arising out of the United States' action to adjudicate the rights of the Chamokane Stream System in northeastern Washington on behalf of the Spokane Tribe of Indians.[98] In *United States v. Anderson*, the court held that *Walton* was not controlling and, accordingly, the state could extend its regulatory authority to "excess waters"—that is, water in the system beyond the Tribe's fully quantified right.[99] As was the case in *Walton*, the *Anderson* court addressed both the question of whether Washington's regulatory authority had been "preempted"[100] as well as whether the Tribe had regulatory authority after *Montana*.[101]

The court specifically distinguished *Walton* on two grounds. The first concerned the state's "interest in developing a comprehensive water program."[102] The No Name Creek System at issue in *Walton*, the court noted, was entirely contained within the Colville Reservation.[103] By contrast, the Chamokane Stream System originated outside the reservation, flowed south to make the eastern boundary of the Tribe's lands, and then continued off the reservation to discharge into the Spokane River.[104] Thus, the court found that the state's obligation to "regulate and conserve water consumption for the benefit of all its citizens" granted it regulatory authority.[105] Second, the court determined that Washington's extension of jurisdiction over the reservation would "not infringe on the [T]ribal right to self-government nor impact on the Tribe's economic welfare" under *Montana*'s direct effects exception because the Tribe's

96. *Id.* (noting, generally, that "conduct that involves the tribe's water rights" meets the second *Montana* exception because "it threatens or has some direct effect on the health and welfare of the tribe").

97. *Id.*

98. United States v. Anderson, 736 F.2d 1358, 1360 (9th Cir. 1984).

99. *Id.*

100. *Id.* at 1363 ("Regulatory jurisdiction of a state over non-Indian activities on a tribal reservation 'may be barred either because it is pre-empted by federal law, or because it unlawfully infringes on the right of reservation Indians to self-government.'" (quoting Colville Confederated Tribes v. Walton, 647 F.2d 42, 51 (1981))).

101. *Id.* at 1364 ("[T]he power to regulate generally the conduct of nonmembers on land no longer owned by or held in trust for the tribe is impliedly withdrawn as a necessary result of tribal dependent status.").

102. *Id.* at 1366.

103. *Id.*

104. *Id.* at 1361.

105. *Id.* at 1366.

water rights had "been quantified and [would] be protected by the federal water master."[106] As a result, the authorization of state jurisdiction in *Anderson* appears to apply only in situations where two circumstances are met: (1) where a state seeks to regulate use of "excess waters" by nonmembers on fee land, and (2) where a Tribe's water rights have been fully quantified and are protected by a "federal water master whose responsibility is to administer the available waters in accord with the priorities of all the water rights."[107]

3. Holly v. Confederated Tribes & Bands of Yakima Indian Nation

In another case arising out of Washington, the state sought to enjoin the enforcement of the Yakima Nation Water Code, through which the Tribal Council extended regulatory authority over all water users on the reservation, including nonmember users on fee land.[108] In *Holly v. Confederated Tribes & Bands of Yakima Indian Nation*, the District Court for the Eastern District of Washington relied solely on *Montana* to hold that the Tribal water code was "invalid as to non-member use of excess waters on or passing through the [reservation]."[109] While in *Walton* and *Anderson*, the Ninth Circuit addressed *Montana* as part of its preemption-style balancing of state and Tribal interests, the *Holly* court relied on *Montana*'s civil divestiture doctrine to limit the Yakama Nation's regulatory authority without reaching the preemption analysis.[110]

In so doing, the court read the Ninth Circuit's decision in *Walton* as following a two-step process.[111] For Tribal regulation of nonmember water use on fee land to be valid, it must first fit into one of the exceptions established in *Montana*.[112] If, and only if, one of the exceptions is met, a reviewing court then analyzes whether the state may nevertheless be able to regulate because its authority to do so has not been preempted.[113] This parsing of the *Walton* decision establishes an extraordinarily high burden for finding Tribal regulation. It effectively provides challengers to Tribal regulation with two bites at the apple: first, they can argue that no *Montana* exception has been met, and then, even if a court finds an exception, they can still win by demonstrating that state authority has not been preempted.

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106. *Id.*

107. *Id.* at 1365.

108. Holly v. Confederated Tribes & Bands of Yakima Indian Nation, 655 F. Supp. 557, 558 (E.D. Wash. 1985), *aff'd sub nom.* Holly v. Totus, 812 F.2d 714 (9th Cir. 1987).

109. *Id.* at 560.

110. *Id.* at 559. "In the mid-1990s the Yakima nation renamed itself to 'YAKAMA' [to] more closely reflecting the proper pronunciation in their native tongue." Yakama Nation History, CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION, https://www.yakama.com/about [https://perma.cc/6YHT-PR3V].

111. *Holly*, 655 F. Supp. at 559 n.3.

112. *Id.* ("After concluding, under a *Montana* analysis, that the economic welfare of the Colvilles was threatened by non-Indian use of the unitary water system in *Walton* II, the panel went on to additionally hold, under a pre-emption mode, that the state could not regulate water in that system.").

113. *Id.*

4. FMC Corp. v. Shoshone-Bannock Tribes and *Ute Indian Tribe of Uintah & Ouray Reservation v. McKee*

The most recent cases addressing *Montana*'s direct effects exception in the context of natural resources suggest disagreement between the Ninth and Tenth Circuits regarding the scope of the exception. In *FMC Corp. v. Shoshone-Bannock Tribes*, the Ninth Circuit took a broad approach to the exception, holding that "[t]hreats to [T]ribal natural resources, including those that affect tribal cultural and religious interests, constitute threats to [T]ribal self-governance, health and welfare."[114] Although *FMC Corp.* did not squarely address Tribal regulatory authority over water—the court held that FMC's storing of hazardous waste on the reservation imperiled the Tribe's welfare, enabling the Tribe to enforce its Land Use Policy Ordinance against FMC—the Ninth Circuit interpreted its prior case law regarding "threats to water rights" as enabling Tribal Nations to "invoke inherent tribal authority over non-Indians."[115] The Tenth Circuit, in *Ute Indian Tribe of Uintah & Ouray Reservation v. McKee*, recently affirmed a denial of the Ute Indian Tribe's assertion of adjudicatory jurisdiction over a nonmember accused of misappropriating the Tribe's water under *Montana*'s direct effects exception.[116] Because the nonmember divertor had been using the disputed water for over a decade without the Tribe learning of it, the court reasoned that the Tribe could hardly claim that the use of its water had "jeopardize[d]" its "self-government."[117]

These most recent cases highlight the ongoing confusion that has resulted from the application of *Montana*'s civil divestiture doctrine to questions of Tribal regulatory authority over nonmember water use on fee lands. While outcomes vary widely, established case law continues to present significant challenges to Tribes seeking to exert their sovereign regulatory authority where nonmembers who have entered reservations and acquired lands use Tribal water. Fortunately, courts can rectify the jurisdictional morass they have created by following the path adopted by the Ninth Circuit in *Walton* and adopting a presumption that *Montana*'s direct effects test is met when a Tribe's water is implicated.[118]

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114. 942 F.3d 916, 935 (9th Cir. 2019), *cert denied* FMC Corp. v. Shoshone-Bannock Tribes, 141 S. Ct. 1046 (2021).

115. *Id.* (citing Montana v. EPA, 137 F.3d 1135, 1139, 1141 (9th Cir. 1998)).

116. Ute Indian Tribe of Uintah & Ouray Rsrv. v. McKee, 32 F.4th 1003, 1010 (10th Cir. 2022).

117. *Id.*

118. Colville Confederated Tribes v. Walton, 647 F.2d 42, 52 (9th Cir. 1981) ("A tribe retains the inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the health and welfare of the tribe. This includes conduct that involves the Tribe's water rights.").

III.
THE CIVIL IMPLICIT DIVESTITURE DOCTRINE IS UNWORKABLE IN THE MODERN WATER REGULATION CONTEXT

The existing legal framework for addressing Tribal regulatory authority over on-reservation water use has failed to safeguard Tribal water resources and led to divergent, unpredictable outcomes. Specifically, in instances where the courts denied Tribal regulatory authority over water on the basis that nonmember water use was not harmful to the Tribe, subsequent nonmember actions have had a "direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[119] In addition, were a court to apply the current legal framework to a challenge to the Agua Caliente Tribe's exertion of regulatory authority, the Ninth Circuit's precedent would be in conflict, rendering the litigation's outcome entirely unpredictable. These deficiencies in the existing framework indicate that a simplified approach would lead to more consistent outcomes and better protection of Tribal water resources.

A. The Montana *Framework Fails to Prevent Harm to Tribal Health and Welfare*

In the decades following the *Anderson* and *Holly* decisions, nonmember water use on fee lands has imperiled the health and welfare of the Tribes involved in the litigation. On the Yakama Nation, where the *Holly* decision denied the Nation the authority to extend its water code to nonmember users' fee lands, these nonmember users have directly impacted the Tribes' health and welfare despite the court's assurance that "a peaceful co-existence of the non-Indian water users with the Tribes" existed.[120] While the Nation has worked tirelessly and cooperatively to safeguard its water rights and ensure the health of its treaty-protected fisheries, counties with jurisdiction over nonmember water use within the reservation have put these rights at risk by failing to ensure adequate water supplies exist.[121] The Yakama Nation recently sued Okanogan County, alleging that the county has failed to require proof of adequate supplies of water before authorizing water use permits because it "fails to account for the potential cumulative impacts of water consumption by different projects throughout the

119. Montana v. United States, 450 U.S. 544, 566 (1981).

120. Holly v. Confederated Tribes & Bands of Yakima Indian Nation, 655 F. Supp. 557, 559 (E.D. Wash. 1985), *aff'd sub nom.* Holly v. Totus, 812 F.2d 714 (9th Cir. 1987).

121. *See* Dave Leder, *Yakama Nation Uses Three-Pronged Approach to Water Management*, CAPITAL PRESS (Feb. 10, 2022), https://www.capitalpress.com/specialsections/water/yakama-nation-uses-three-pronged-approach-to-water-management/article_5a733a3e-7966-11ec-9059-4f73faee4ab1.html [https://perma.cc/523U-9268]; Hal Bernton, *Yakima Farmers Say Mismanaged Water Made Crop Losses Much Worse*, SEATTLE TIMES (Sept. 8, 2015), https://www.seattletimes.com/seattle-news/environment/yakima-farmers-say-water-flow-or-lack-of-it-added-to-woes/ [https://perma.cc/6M42-VK67].

county."[122] Additionally, the federally operated Wapato Project, which delivers water to Indian and nonmember users across the reservation, has been severely mismanaged to the point that Tribal irrigators are having their water physically stolen by farmers who have "bridled" at water rationing requirements.[123]

Despite the *Anderson* court's assuredness that the oversight of a federal master in the Chamokane Creek Basin would safeguard the Spokane Tribe of Indians' quantified rights, nonmember groundwater pumping has continued to threaten the Tribe's water supply.[124] The *Anderson* court initially found that a number of domestic and stock watering wells operating in the area, which were exempt from state permitting, had a *de minimus* impact on flows in Chamokane Creek, and thus did not involve the Tribe in the adjudication.[125] In 2013, however, a United States Geological Survey ("USGS") study found that these wells did in fact reduce Chamokane Creek flows, particularly during the warm summer months when low flows imperil fish habitat.[126] Because many members of the Spokane Tribe of Indians "eat a subsistence diet of nearly two pounds of fish daily,"[127] these water quantity reductions run the risk of triggering the health and welfare exemption by imperiling the Tribe's subsistence resources.[128]

Accordingly, the failure of the *Anderson* and *Holly* courts to safeguard the health and welfare of the Tribe suggests that these decisions misinterpreted the Supreme Court in extending the doctrine of civil divestiture to crucial water resources. Recognition by courts that threats to Tribal water resources trigger

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122. Marcy Stamper, *Yakama Nation Sues County Over Approach to Proving Water Adequacy*, METHOW VALLEY NEWS (Jan. 26, 2017), https://methowvalleynews.com/2017/01/26/yakama-nation-sues-county-over-approach-to-proving-water-adequacy/ [https://perma.cc/6A9C-26XQ].

123. Hal Bernton, *Water theft is a symptom of bigger troubles in Wapato Irrigation Project*, SEATTLE TIMES (Jul. 12, 2015), https://www.seattletimes.com/seattle-news/environment/water-theft-is-symptom-of-bigger-troubles-in-wapato-irrigation-project/ [https://perma.cc/X32M-SVJL].

124. *See generally* WASH. DEP'T OF ECOLOGY, AGREEMENT ON A PROGRAM TO MITIGATE FOR CERTAIN PERMIT-EXEMPT WELL WATER USES IN CHAMOKANE CREEK UNDER *U.S. v. ANDERSON* (2019) [hereinafter CHAMOKANE CREEK AGREEMENT] (addressing the impacts of permit-exempt wells on flows in Chamokane Creek).

125. *Id.* at 1–2; Anderson, *supra* note 51, at 221–22.

126. D. MATTHEW ELY & SUE C. KAHLE, USGS, SIMULATION OF GROUNDWATER AND SURFACE-WATER RESOURCES AND EVALUATION OF WATER-MANAGEMENT ALTERNATIVES FOR THE CHAMOKANE CREEK BASIN, STEVENS COUNTY, WASHINGTON 1 (2012). *See* United States v. Anderson, No. 72-CV-3643, 2021 WL 9207155, at *2 (E.D. Wash. May 27, 2021), *appeal dismissed sub nom*. Spokane Indian Tribe v. Sulgrove, No. 21-35502, 2022 WL 3083310 (9th Cir. Aug. 3, 2022), *cert. denied*, 143 S. Ct. 1023 (2023) (modifying the previous court order to acknowledge that the creek and the groundwater system are interrelated: "The aquifer in the Upper Chamokane Creek region is connected to the aquifer in the Middle Chamokane Creek Region, and ground and surface water withdrawals in the Upper Chamokane Creek region impact Creek flow below the falls"); CHAMOKANE CREEK AGREEMENT, *supra* note 124, at 2 (2019) (recognizing that the "flow in Chamokane Creek falls below the 27 cfs Minimum Flow established by the Anderson court in 1988").

127. Becky Kramer, *Spokane Tribe Adopts Strict Water Quality Standards,* SPOKESMAN-REVIEW (Jan. 7, 2014), https://www.spokesman.com/stories/2014/jan/07/spokane-tribe-adopts-strict-water-quality/ [https://perma.cc/P74U-FNMY].

128. Montana v. United States, 450 U.S. 544, 566 (1981) ("The complaint in the District Court *did not* allege that non-Indian hunting and fishing on fee lands imperil the subsistence or welfare of the Tribe.") (emphasis added).

Montana's direct effects exception could help avoid the ongoing challenges faced by the Yakama Nation and the Spokane Tribe of Indians in the future.

B. The Montana *Framework Leads to Divergent, Unpredictable Outcomes*

If a court was asked to address a challenge to the Agua Caliente Tribe's application of its water code to groundwater production by nonmembers on nonmember fee land, it would face a tangle of conflicting, forty-year-old precedent. Specifically, under the fact-specific *Montana*-based analysis called for by *Anderson* and *Walton*, a reviewing court would likely look to (1) the nature of the waters in question, (2) the impact of nonmember uses of Tribal water and the corresponding interest of the state to "develop[] a comprehensive water program," and (3) whether or not the Tribe's rights had been quantified.[129] Because the Agua Caliente Tribe has rights to groundwater, and owing to the complex patchwork of land ownership overlying this water resource, no clear result would emerge. Whether or not the Tribe could regulate nonmember water use under *Montana*'s direct effects exception, therefore, would likely depend on which court heard the case.

First, in assessing the "geography and hydrology" of the Coachella Valley Aquifer, a court would be presented with a factual situation fairly different from those of *Walton* or *Anderson*. In *Walton*, Tribal regulatory authority was "compelled" by the fact that "the No Name hydrological system . . . [was] located *entirely* within the reservation."[130] By virtue of the fact that the Agua Caliente Reservation consists of a checkerboard of square parcels of land, the aquifer underlying it, which extends for hundreds of square miles, plainly cannot be said to exist solely beneath the reservation.[131] Because the aquifer at issue extends outside the boundaries of the reservation, *Anderson* would suggest the state should be afforded regulatory power.[132] But the relationship between the Agua Caliente Reservation and the underlying aquifer is also nothing like the situation in *Anderson*, where the fact that the creek at issue formed only the "eastern boundary" of the reservation weighed against Tribal regulatory authority.[133] Here, by contrast, the hydrological connection between the Coachella Valley Aquifer, from which the Tribe's sacred springs flow forth, and the Agua Caliente Reservation is much more substantial than the situation in *Anderson*.[134]

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129. *See* United States v. Anderson, 736 F.2d 1358, 1366 (9th Cir. 1984); Colville Confederated Tribes v. Walton, 647 F.2d 42, 51–53 (9th Cir. 1981).

130. *Anderson*, 736 F.2d at 1365–66.

131. 2020 Agua Caliente Groundwater Report, *supra* note 4, at 14 fig. 3-1.

132. *Anderson*, 736 F.2d at 1366. ("The weight of the state's interest depends, in large part, on the extent to which waterways or aquifers transcend the exterior boundaries of Indian country.").

133. *Id.* at 1361.

134. *Id.*

Second, courts have also weighed the competing interest of the Tribe to minimize the impact of the "non-Indian conduct" on the "political integrity, economic security, or health and welfare of the Tribes"[135] with the interest of the state to comprehensively regulate "water consumption for the benefit of all its citizens."[136] In the case of the Agua Caliente Tribe, it is undeniable that the Tribe has a strong interest in regulating the pumping of groundwater beneath its reservation. The "long-term decline in groundwater levels" on the reservation as a result of nonmember pumping represents a loss of Indian property.[137] Unlike the surface waterways at issue in the Ninth Circuit's previous cases, the aquifer is essentially a nonrenewable resource because aquifers can take decades and even centuries to "recharge."[138] The loss of water beneath the reservation also means that water will be more expensive to pump and will diminish in quality should the Tribe decide to drill its own wells in the future.[139] The Agua Caliente Tribe's interest in regulating its water is further strengthened by its longstanding ceremonial use of the springs, and the fact that the Tribe has developed a substantial economy around the springs.[140]

In response, the state can argue that Tribal regulation of groundwater would impinge on its "interest in developing a comprehensive water program" throughout the state and water basin.[141] This argument may be somewhat weakened by the fact that the state has been so slow to regulate groundwater withdrawals, which means the Tribe's exertion of regulatory authority can hardly be said to interfere with a well-established state management system.[142] What's more, as a further aspect of its balancing process, the district court in *Holly* noted that the fact that the state had "met its burden of demonstrating a peaceful co-existence of the non-Indian water users with the Tribes" weighed in favor of state regulation.[143] Here, that the Tribe has explicitly acted in response to the threat posed by nonmember water use and that the state of California has recognized

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135. Holly v. Confederated Tribes & Bands of Yakima Indian Nation, 655 F. Supp. 557, 559 (E.D. Wash. 1985), *aff'd sub nom.* Holly v. Totus, 812 F.2d 714 (9th Cir. 1987).

136. *Anderson*, 736 F.2d at 1366.

137. *See* 2020 Agua Caliente Groundwater Report, *supra* note 4, at 33.

138. *Id.* (noting that recharge rates have not been enough to balance withdrawals from the aquifer).

139. *Id.* ("In addition to the loss of the water as a resource, lower groundwater elevations lead to higher costs to pump water from wells and can cause decreased water quality and increased costs to re-drill wells to reach deeper into the aquifer.").

140. *See* De Crinis, *supra* note 2, at 26 ("For centuries, the Tribe and its people have been the spring's faithful guardians. They once revered it as a living entity with a source of great power and a place of healing—a connection point with a spiritual underworld populated by ancient sacred beings (nukatem)—some with malicious potential."); Wendy O'Dea, *Palm Springs Is Getting a New Spa With 12,000-year-old Hot Mineral Spring Waters — and We Got a Sneak Peek Inside*, TRAVEL + LEISURE (Mar. 20, 2023), https://www.travelandleisure.com/spa-at-sec-he-palm-springs-cultural-plaza-7369250 [https://perma.cc/A7JG-82WJ] (explaining how the Agua Caliente Tribe's new spa development "tap into this hot mineral spring").

141. *See Anderson*, 736 F.2d at 1366.

142. Tyra, *supra* note 84, at 313. *See Anderson*, 736 F.2d at 1366.

143. Holly v. Confederated Tribes & Bands of Yakima Indian Nation, 655 F. Supp. 557, 559 (E.D. Wash. 1985), *aff'd sub nom.* Holly v. Totus, 812 F.2d 714 (9th Cir. 1987).

that the basin is in a state of severe overdraft do not demonstrate peaceful coexistence.[144] Accordingly, this factor may weigh against state regulation.

Third, the *Anderson* court noted that the fact that the Spokane Tribe of Indians' water rights had been quantified weighed against the Tribe's right to regulate all on-reservation water use.[145] The court felt that because the dispute arose out of a general stream adjudication, the Tribe's water rights would be protected by the "federal water master whose responsibility is to administer the available waters in accord with the priorities of all the water rights."[146] Therefore, the fact that the Agua Caliente Tribe's water rights have not been quantified—like the majority of reserved rights held by other Tribes—weighs in favor of affording the Tribe regulatory authority.[147] But this puts the Tribe, which will pursue quantification of its right in Phase III of the ongoing litigation against the water districts in *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District*, in an awkward position.[148] If the Agua Caliente Tribe wishes to fend off challenges to its exercise of regulatory authority over the water underlying its reservation, it would be well advised to keep its reserved rights unquantified.[149] As a general rule, however, quantification of rights should be encouraged because such clarifications bring certainty to the network of water rights attached to a particular basin and greatly reduce expensive future litigation.[150]

In sum, the current legal framework, applied to the Agua Caliente situation and other similar situations that are increasingly likely to emerge, generates unpredictable outcomes. Depending on the court that hears the case, opposite outcomes will likely emerge. This, coupled with the failure of the current legal regime to safeguard Tribal water resources, calls for a new, simplified analytical approach.[151]

IV.
A NEW LEGAL FRAMEWORK: COURTS SHOULD ADOPT A PRESUMPTION THAT TRIBES MAY REGULATE ON-RESERVATION WATER RESOURCES UNDER *MONTANA*'S DIRECT EFFECTS EXCEPTION

In light of the failures of the existing legal framework, courts should adopt a presumption of exclusive Tribal regulation of on-reservation water resources,

144. *See* 2020 Agua Caliente Groundwater Report, *supra* note 4, at 33.
145. *Anderson*, 736 F.2d at 1365–66.
146. *Id.* at 1365.
147. *See* Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist., 849 F.3d 1262, 1267 (9th Cir. 2017).
148. *Id.*
149. *See Anderson*, 736 F.2d at 1366.
150. CONG. RSCH. SERV., R44148, INDIAN WATER RIGHTS SETTLEMENTS 2 (2023).
151. *See* Judith V. Royster, *Conjunctive Management of Reservation Water Resources: Legal Issues Facing Indian Tribes*, 47 IDAHO L. REV. 255, 259 (2011) ("On virtually all reservations, two governments exercise regulatory authority over some of the water allocation and use decisions. Those allocation and use decisions are based on different laws and different legal principles.").

including nonmember water use on fee land. Courts can do so by establishing a rule that exertions of such authority are permitted under *Montana*'s direct effects exception because state water law and nonmember water use have a "direct effect on the political integrity, the economic security, or the health or welfare of the [T]ribe."[152]

There is a strong legal foundation for this argument. In *Walton*, the Ninth Circuit established that nonmember conduct that "involves" Tribal water rights triggers *Montana*'s direct effects exception.[153] The Ninth Circuit grounded its holding in a crucial footnote from *Montana*.[154] The footnote states that "[as] a corollary" to the direct effects exception established by the decision, the "Court has held that Indian [T]ribes retain rights to river waters necessary to make their reservations livable."[155] As the *Walton* court correctly noted, by highlighting the importance of Tribal water rights in the context of the civil divestiture doctrine it was announcing, the *Montana* Court suggested that nonmember conduct that "threatens or has a direct effect" on these rights is presumptively an area in which the Tribe *retains* its regulatory authority.[156]

While the Supreme Court has held that Tribes must identify conduct to trigger regulatory authority under the direct effects exception,[157] the Court has yet to define what kind of nonmember entity must engage in the conduct or when that conduct must have occurred.[158] Certainly, Tribes like the Agua Caliente who can point to *specific* conduct by nonmember water agencies that threatens their welfare have a solid argument for retaining regulatory authority.[159] But Tribes without a readily identifiable threat from a nonmember water user also have a strong argument that the historical conduct of states and the federal government triggers regulatory authority over *all* on-reservation water use. Certainly, the historical application of state water law to Tribal waters has directly affected the

152. Montana v. United States, 450 U.S. 544, 567 (1981). Anderson, *supra* note 51, at 215 (noting that "tribal interests in protecting on-reservation water resources would seem to satisfy even the most stringent application of the test employed by the Supreme Court in recent years.").

153. Colville Confederated Tribes v. Walton, 647 F.2d 42, 52 (9th Cir. 1981).

154. *Montana*, 450 U.S at 567 n.15.

155. *Id.*

156. *See id*.; *Walton*, 647 F.2d at 52. Correspondences between the justices at the time of the *Montana* decision also support this inference. In a correspondence to Justice Stewart, who wrote the opinion, an unidentified Justice expressed their assumption that the *Montana* "opinion does not go beyond anything we have said in the past with respect to a [T]ribe's general civil jurisdiction." Letter from an unidentified Supreme Court Justice, to Associate Justice Potter Stewart (Feb. 11, 1981), available at https://perma.cc/8RFD-8UA8. Foreshadowing the judicial complexity that would emerge from this decision, the Justice further noted that they had "never been clear as to the extent of a [T]ribe's civil jurisdiction within a reservation with respect to use of land owned by non-Indians." *Id.*

157. Atkinson Trading Co. v. Shirley, 532 U.S. 645, 657 n.12 (2001).

158. *See* Sarah Krakoff, *Tribal Civil Jurisdiction Over Nonmembers: A Practical Guide for Judges*, 81 U. COLO. L. REV. 1187 (2010) (noting the questions left open by the Court's opinions regarding *Montana*'s direct effects exception).

159. *See infra* Part III.B.

political integrity of Tribal Nations by precluding them from regulating water resources in accordance with Tribal interests.[160]

Furthermore, the federal government's moratorium on Tribal water codes and the proliferation of state water administration have affected Tribal economic security by denying Tribal Nations the opportunity to develop a key revenue source through permitting their own water.[161] Finally, it is axiomatic that overarching state and federal conduct limiting Tribes' ability to develop and safeguard their water resources has imperiled Tribal health and welfare.[162]

The following sections expand on three important considerations that weigh in favor of adopting a presumption of Tribal regulation under the direct effects test. First, where Tribes have regulated water quantity, they have done so effectively and with little conflict with state water administration systems. Tribal water regulation has prevented "regulatory vacuums"—where states fail to exercise regulatory authority—from emerging while creating space for the development of new approaches to water management. Second, Tribal success in regulating water quality and the fact that Tribes have long had the authority to set water quality standards for nonmembers suggest that Tribes should be afforded similar authority when it comes to regulating water quantity. Third, in the years since the current legal framework was developed, Tribes and states have developed numerous avenues for Tribal-state regulatory cooperation that can ease tensions that the development of Tribal regulatory regimes may cause.

A. Tribal Success in Regulating Water Quantity

Where Tribes have exerted their regulatory authority over all on-reservation water use, they have done so successfully, with little conflict with

160. *See* Q&A, *supra* note 7 (indicating that regulation of groundwater resources is "of paramount importance to the health, security, and economic well-being of the Tribe, its members, and the entire Reservation community"); Anderson, *supra* note 51, at 204 (arguing that state water administrative systems and the doctrine of prior appropriation operates as powerful incentives "to prevent the use of senior Indian rights ignored or deliberately neglected by the United States government"); E-mail from Bruce Wakefield, Colville Tribes Water Resource Specialist, Bruce Wakefield to author (May 2, 2022) ("The Colville Tribal water code is effective because it gives a legal foundation for the Colville Tribe (a sovereign nation) to promote its interests when dealing with other entities such as county, state or federal governments.") [hereinafter "Wakefield E-mail"].

161. *See* Cabell Breckenridge, *Tribal Water Codes*, in TRIBAL WATER RIGHTS: ESSAYS IN CONTEMPORARY LAW, POLICY, AND ECONOMICS 202 (2006) (recognizing economic development as an important reason for establishing a Tribal water code).

162. *See* Navajo Nation v. U.S. Dep't of the Interior, 26 F.4th 794, 802 (9th Cir. 2022) (discussing how the federal government's failure to support Tribal development of water rights has led to a lack of running water on many reservations and, specifically, contributed to the high COVID-19 death rate of the Navajo Nation). *See also* Reid Peyton Chambers & John E. Echohawk, *Implementing the Winters Doctrine of Indian Reserved Water Rights: Producing Indian Water and Economic Development without Injuring Non-Indian Water Users*, 27 GONZ. L. REV. 447, 448 (1991) ("[O]n Indian reservations in western states the clear disparity between Indian and non-Indian actual water use which greatly favors non-Indians is surely one cause of widespread poverty.").

state rights systems.[163] Even before their regulatory authority was affirmed in the *Walton* decision, the Colville Confederated Tribes began comprehensively administering all water resources within their reservation.[164] Today, the Tribes use their water code to administer a permit system that applies to members and nonmembers alike, including on fee lands.[165] Because the Tribes have proven their administrative capabilities, and the state of Washington has recognized that it can preserve resources by leaving regulation to the Tribes, the state has never challenged Tribal exertion of authority.[166] While the No Name River System at issue in the *Walton* litigation is entirely encompassed within the reservation boundary, the Tribes now apply their water code to all on-reservation resources and transboundary streams, including the Columbia River and groundwater underlying the reservation.[167] Over 300 water permits have been issued to nonmembers on the reservation.[168] Although some nonmember water users still have state-issued water permits in addition to their Tribal permits, no significant conflicts have emerged regarding water permitting since the Colville Tribes asserted regulatory authority.[169]

Moreover, successful Tribal water management regimes may prevent regulatory "vacuums" from emerging. Following the *Anderson* litigation, where the State of Washington successfully argued that the Spokane Tribe of Indians' regulation of nonmember water use on fee land should be barred in light of the state's comprehensive water administrative system, the state has refused to regulate nonmember groundwater withdrawals.[170] In the forty years since *Anderson*, the state has "viewed domestic water and stockwater uses" as "so small that they did not need to be regulated."[171] To the contrary, these withdrawals were contributing to dangerously low flows in Chamokane Creek, something that the Tribe recognized but could do little to remedy because they

163. Anderson, *supra* note 51, at 241–42 ("Tribal members and nonmembers are using water pursuant to tribal authority without resort to litigation because there is good tribal governance."); Wakefield E-mail, *supra* note 160.

164. AMERICAN INDIAN POLICY REVIEW COMMISSION, 95TH CONG., FINAL REP. APPENDIXES AND INDEX VOLUME TWO 511 (Comm. Print 1977).

165. The Tribal water resource office has three employees that administer the permit system. When an application comes in, the office, which includes a hydrogeologist, ascertains whether there is enough water in the source to issue the permit. NCAI 2014 Webinar, *supra* note 8, at 40:10–41:30.

166. Thomas W. Clayton, *The Policy Choices Tribes Face When Deciding Whether to Enact a Water Code*, 17 AM. INDIAN L. REV. 523, 558–59 (1992).

167. *Water Map*, CONFEDERATED TRIBES OF THE COLVILLE RESERVATION–ENVIRONMENTAL TRUST PROGRAM, https://www.cct-enr.com/state-water-map [https://perma.cc/CTW5-WBD9].

168. Anderson, *supra* note 51, at 241 n. 213.

169. Wakefield E-mail, *supra* note 160.

170. Anderson, *supra* note 51, at 242.

171. *Chamokane Creek*, STATE OF WASH. DEP'T. OF ECOLOGY, https://ecology.wa.gov/Water-Shorelines/Water-supply/Water-availability/Chamokane-Creek [https://perma.cc/6H3S-UPK8].

were precluded from regulating.[172] Because the Tribe is precluded from regulating, and the state refuses to regulate, a regulatory vacuum has emerged.

While the Agua Caliente Tribe's exertion of regulatory authority over groundwater withdrawals is still in its early stages, its actions seek to avoid a similar regulatory vacuum. Despite the fact that 85 percent of Californians rely on groundwater for some portion of their water supply,[173] the state only began regulating groundwater in 2014 with the passage of the Sustainable Groundwater Management Act ("SGMA").[174] Before the passage of the SGMA, California groundwater use was regulated by a common law system of prior appropriation that led to "chronic lowering of groundwater levels."[175] However, it remains unclear whether the SGMA, still in its first decade, will succeed in establishing an effective permitting system for groundwater use in the state.[176] In the Coachella Valley, for instance, the local water districts that must comply with the SGMA remain some of the highest per capita water users in the state, and overdraft continues to be a major issue.[177] Recognizing that the implementation of SGMA may be too little, too late, the Agua Caliente Tribe took the proactive step of implementing its own groundwater permit system to deal with the problems plaguing the Coachella Aquifer.

Finally, Tribal water codes have proven to be an important locus for the development of new water management approaches.[178] The fact that Tribal Nations are "late to the regulatory party" certainly presents an obstacle as they seek to regulate waters that may already have conflicting state-based claims.[179] However, it also means that Tribes can look back on two hundred years of state water management and correct for the failures of state administrative systems that have led to rampant overuse and ecosystem destruction.[180] A number of

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172. *See* CHAMOKANE CREEK AGREEMENT, *supra* note 124, at 1–2 (2019) (acknowledging that the State of Washington's failure to regulate groundwater withdrawals has led to declining flows in Chamokane Creek).

173. Elena Shao, *California Has Begun Managing Groundwater Under a New Law. Experts Aren't Sure It's Working*, INSIDE CLIMATE NEWS (Feb. 17, 2022), https://insideclimatenews.org/news/17022022/california-groundwater-law/ [https://perma.cc/W97Y-GWKD].

174. *Id.*; Tyra, *supra* note 84, at 313 (California was the "last state in the West to pass statewide groundwater regulation.").

175. Tyra, *supra* note 84, at 316.

176. Shao, *supra* note 173.

177. Janet Wilson, *Three of California's Five Biggest Water Users Are in the Coachella Valley. Who's Consuming the Most?*, PALM SPRINGS DESERT SUN (Mar. 21, 2022), https://www.desertsun.com/story/news/environment/2022/03/21/palm-springs-coachella-valley-water-use-among-top-california/7096541001/ [https://perma.cc/XE9U-DKGC].

178. *See* Breckenridge, *supra* note 161, at 199–200.

179. Jerilyn DeCoteau, *Chapter 2 The Effects of Non-Indian Development on Indian Water Rights*, in TRIBAL WATER RIGHTS: ESSAYS IN CONTEMPORARY LAW, POLICY, AND ECONOMICS 115–17 (Bonnie G. Colby et al. eds., 2006).

180. Kait Schilling, *Addressing the Prior Appropriation Doctrine in the Shadow of Climate Change and the Paris Climate Agreement*, 8 SEATTLE J. ENV'T. L. 97, 99 (2018) (critiquing the development of the prior appropriation system followed by western states and noting that "the priority system must change to allow the growing population to have adequate and full access to this human right"); Dionne Searcey & Delger Erdenesanaa, *A Tangle of Rules to Protect America's Water Is Falling*

Tribal water codes operating today call for the concurrent management of surface and groundwater resources.[181] For example, the Navajo Nation Water Code defines "Waters of the Navajo Nation" to include "all surface and groundwaters which are contained within hydrologic systems located exclusively within the lands of the Navajo Nation."[182] This definition recognizes that surface water and groundwater are connected and that many states' approaches have led to confusion and unexpected resource depletion.[183]

Many Tribal water codes also provide that instream flows and cultural and religious uses are beneficial.[184] Such codes often prioritize instream flows and cultural uses over industrial and agricultural uses.[185] The upshot of a water system managed by such a code is that more water remains undiverted while within the reservation. This benefits ecosystems dependent on certain flow regimes and keeps water instream—or in the ground—for downstream off-reservation uses that may not have been fulfilled had on-reservation use been governed by a state's prior appropriation system.

Some Tribal water codes have rejected the prior appropriation system that governs nearly all water law in the western states. Under the system of prior appropriation, the date of initial diversion governs who will get water during times of shortage.[186] As a result, when there is not enough water to satisfy all water rights, higher priority users will receive their full allocation of water before those with subordinate water rights see a drop.[187] The system has been increasingly criticized for encouraging "inefficient off-stream consumptive uses to the detriment of aquatic ecosystem values."[188] The Navajo Nation Water Code, by contrast, provides for equal sharing of water cuts during times of shortage.[189] The Code also provides the Water Resources Committee with the

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Short, N.Y. TIMES (Nov. 2, 2023), https://www.nytimes.com/interactive/2023/11/02/climate/us-groundwater-depletion-rules.html [https://perma.cc/44RY-CHZL] ("America's stewardship of one of its most precious resources, groundwater, relies on a patchwork of state and local rules so lax and outdated that in many places oversight is all but nonexistent . . . .").

181. Breckenridge, *supra* note 161, at 208.

182. NAVAJO NATION CODE ANN., tit. 22, § 1104 (2014).

183. *See* Breckenridge, *supra* note 161, at 208.

184. COLVILLE CONFEDERATED TRIBES CODE, §4-1-6 (2011); *see also* NCAI 2014 Webinar, *supra* note 8, at 48:00 (noting that cultural and religious use is the highest value water use because "tribes hold their identity in their cultural and religious uses," and without water for such uses, "a Tribe would not maintain an identity"); *see also* NEZ PERCE TRIBAL CODE, §3-3-9 (listing instream flows as a beneficial use for Tribal water rights).

185. *See generally* Julia Guarino, *Protecting Traditional Water Resources: Legal Options for Preserving Tribal Non-Consumptive Water Use*, 37 PUB. LAND & RES. L. REV. 89 (2016) (describing the legal strategies, including the development of Tribal water codes, Tribes can employ to safeguard nonconsumptive water use).

186. 1 WATERS AND WATER RIGHTS § 11.04(a) (LexisNexis 2009); Anderson, *supra* note 51, at 202–03.

187. A. D. Tarlock, *The Future of Prior Appropriation in the New West*, 41 NAT. RES. J. 769, 770 (2001). *See, e.g.*, Coffin v. Left Hand Ditch Co., 6 Colo. 443, 447 (1882) (noting that new "appropriations of water shall be subordinate to the use thereof by prior appropriators").

188. Tarlock, *supra* note 187, at 772.

189. *See* NAVAJO NATION CODE ANN., tit. 22, § 1304 (2014).

authority to provide individual rights holders with "a fair share of water" based on "the relative priorities of the classes of uses" as opposed to the date a given right was established.[190] Because uses of water for domestic and stock purposes have a higher priority than agricultural and industrial uses, shortages on the Navajo Nation do not result in large, inefficient agricultural entities with senior rights receiving all of the water at the expense of other valuable uses, as is the case under state prior appropriation systems.[191]

These successful and innovative water management approaches, which have eliminated regulatory vacuums and generated little conflict with state systems, can thus serve as important examples of more sustainable water management policies that states can adopt.[192]

B. Tribal Success in Regulating Water Quality

In the water quality context, Tribal Nations that have been granted treatment as a state ("TAS") status under the Clean Water Act ("CWA") have successfully promulgated and enforced water quality standards that apply to nonmembers on and off the reservation.[193] Section 518(e) of the CWA enables Tribal Nations "to [be] treat[ed] as a State" for the purpose of establishing water quality standards.[194] When a Tribe is granted TAS status, it has the authority to establish water quality standards that are binding on all entities, including nonmembers, who seek to obtain a National Pollutant Discharge Elimination System ("NPDES") Permit to discharge into water bodies that are within the borders of a reservation or that flow onto a reservation.[195] Because these standards apply to water bodies that may only touch the reservation and then flow across state boundaries, Tribes have the authority to set standards that are binding on nonmembers living miles upstream of the reservation.[196] Under *City of Albuquerque v. Browner*, a Tribe's water quality standards may even be more stringent than the state standards that would otherwise apply.[197]

In adopting the provision, the EPA expressly adopted the *Montana* framework, requiring Tribes who apply for TAS status to show that the entities they seek to regulate affect "the political integrity, the economic security, or the

190. *Id.*

191. *Id.* at § 1501(d).

192. *See generally* Elizabeth Ann Kronk Warner, *Tribes as Innovative Environmental "Laboratories"*, 86 U. COLO. L. REV. 789 (2015) (highlighting Tribal Nations' unique capacities for innovating in the area of environmental regulation).

193. *See generally* James M. Grijalva, *Tribal Governmental Regulation of Non-Indian Polluters of Reservation Waters*, 71 N.D. L. REV. 433 (1995) (providing an overview of Tribal water quality governance under the CWA and describing the authority Tribal Nations afforded TAS status have over adjacent state water quality regimes).

194. 33 U.S.C. § 1377(e).

195. Montana v. EPA, 137 F.3d 1135, 1138–39 (9th Cir. 1998), *cert. denied* Montana v. EPA, 525 U.S. 921 (1998).

196. Anderson, *supra* note 51, at 228.

197. *See* 97 F.3d 415, 423 (10th Cir. 1996).

health or welfare of the tribe."[198] At the time it promulgated § 518, the EPA presumed Tribes would be able to make this showing in the context of regulating water due to the "relationship between water quality and human health and welfare."[199] When the Confederated Salish and Kootenai Tribes of the Flathead Reservation applied for TAS status, the State of Montana brought suit challenging the recognition "to the extent such status would extend to reservation lands and surface waters owned in fee by non-members of the Tribes."[200] But the Ninth Circuit upheld the Tribe's application, pointing to *Walton*'s recognition "that threats to water rights may invoke inherent tribal authority over non-Indians."[201] The court also looked to *Walton* to note that "due to the mobile nature of pollutants . . . it would in practice be very difficult to separate the effects of water quality impairment on non-Indian fee land from impairment on the tribal portions of the reservation."[202]

Few issues have arisen where Tribes have set water quality standards for upstream municipalities despite initial concerns from state water quality agencies.[203] In New Mexico, for example, the tiny Pueblo of Isleta effectively sets the water quality standards for the entire city of Albuquerque because the city discharges wastewater into the Rio Grande upstream of the Pueblo.[204] The Pueblo's standards are more stringent than the State of New Mexico's standards, partially in an effort to protect quality for ceremonial purposes that require ingesting and bathing in water.[205] When the Tenth Circuit affirmed the Pueblo's authority to promulgate binding water quality standards, the City of Albuquerque as well as a number of scholars clamored that unbearable financial burdens and regulatory headaches would abound.[206] States were concerned that they would be subject to unreasonable and, in their eyes, arbitrarily stringent water quality standards set by Tribes and the equally indiscriminate whims of shifting Tribal policies.[207]

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198. EPA Final Rule, 56 Fed. Reg. 64877 (1991) (quoting Montana v. United States, 450 U.S. 544, 566 (1981)).

199. *Montana*, 137 F.3d at 1139.

200. *Id.* at 1140.

201. *Id.*

202. *Id.*; *see also* Bugenig v. Hoopa Valley Tribe, 229 F.3d 1210, 1222 (9th Cir. 2000), *rev'd en banc,* 266 F.3d 1201 (9th Cir. 2001) (noting that "it is difficult to imagine how serious threats to water quality could not have profound implications for tribal self government"). In 2016, the EPA stopped requiring Tribes to demonstrate that they could meet the *Montana* standard and determined instead that Section 518 constituted an "express delegation of authority by Congress to Indian tribes to administer regulatory programs over their entire reservations." Revised Interpretation of Clean Water Act Tribal Provision, 94 Fed. Reg. 30183 (2016).

203. Sibyl Diver et al., *Engaging Colonial Entanglements: "Treatment as a State" Policy for Indigenous Water Co-Governance*, 19 GLOB. ENV'T POL. 33, 48 (2019).

204. Jason Lenderman, *A Tiny Tribe Wins Big on Clean Water*, HIGH COUNTRY NEWS (Feb. 2, 1998), https://www.hcn.org/issues/issue-123/a-tiny-tribe-wins-big-on-clean-water/ [https://perma.cc/4FXW-95GZ].

205. City of Albuquerque v. Browner, 97 F.3d 415, 427 (10th Cir. 1996).

206. *See, e.g.*, Janet K. Baker, *Tribal Water Quality Standards: Are There Any Limits?*, 7 DUKE ENV'T L. & POL'Y F. 367 (1997).

207. *Id.*; Montana v. EPA, 137 F.3d 1135, 1140 (9th Cir. 1998).

However, Tribes have implemented water quality standards that sufficiently meet the federal baseline established by the CWA despite initial concerns that they would be ineffective regulators.[208] And most Tribal water quality standards are no more stringent than the federal baseline, largely mooting concerns that Tribal standards would be financially burdensome for states.[209] Establishment of Tribal water quality standards has also led to fruitful co-management opportunities, which are expressly authorized by the CWA.[210]

Even where tensions between Tribes and states remain, Tribal authority to set water quality standards has enabled Tribal Nations to step in to protect resources where states have failed to do so.[211] For example, the Spokane Tribe of Indians promulgated stringent water quality standards meant to incentivize stricter monitoring at the Spokane County treatment plant in response to increasing levels of toxins in salmon on the Spokane River.[212] Following *City of Albuquerque,* New Mexico increased the stringency of its water quality standards for the Rio Grande River to match the "primary contact" standards adopted by the Isleta Pueblo.[213] The City of Albuquerque was ultimately required to update a key wastewater treatment plant to comply with Isleta Pueblo's water quality standards, but the state's actions would likely have made this step necessary regardless.[214]

As a practical matter, threats to the *quantity* of Tribal water affect the health and welfare of the Tribe as much as threats to water *quality*. Indeed, when discussing subterranean aquifers, water quality and quantity are intimately related.[215] When water quantity decreases, the concentration of harmful

208. 137 F.3d at 1141.

209. Diver et al., *supra* note 203, at 45–46.

210. Maria E. Hohn, *Determining Water Quality Standards on Tribal Reservations: A Cooperative Approach to Addressing Water Quality under the Clean Water Act*, 11 U. DENV. WATER L. REV. 293, 309 (2008).

211. Becky Kramer, *Spokane Tribe Adopts Strict Water Quality Standards*, THE SPOKESMAN-REVIEW (Jan. 7, 2014), https://www.spokesman.com/stories/2014/jan/07/spokane-tribe-adopts-strict-water-quality/ [https://perma.cc/U72L-69UP].

212. *Id.*; *see also* Spokane Tribal Water Quality Standards on the Spokane River, YOUTUBE (Sept. 14, 2020), https://www.youtube.com/watch?v=bBjSHm_F734 [https://perma.cc/W9TN-S52B] (discussing the importance of salmon to the Spokane Tribe's diet and their unique need to prevent industrial contaminants from accumulating in salmon).

213. *Compare* State of New Mexico Water Quality Standards, 20.6.4.7(P)(5), 20.6.4.105–20.6.4.107 NMAC, EPA (2020), https://www.epa.gov/sites/default/files/2014-12/documents/nmwqs.pdf [https://perma.cc/M8WA-2RC8] (defining the "primary contact" water quality standard as encompassing "religious or ceremonial purposes" that may involve "ingestion" and applying the primary contact standard to the Rio Grande River), *with* Pueblo Of Isleta Surface Water Quality Standards § IV.D-E, V, EPA (2002), https://www.epa.gov/sites/default/files/2014-12/documents/isleta-tribe.pdf [https://perma.cc/6XDX-H5H2] (applying the "primary contact ceremonial use" standard to "the segment of the Rio Grande that passes through the Pueblo Of Isleta Reservation").

214. *See Southside Wastewater Reclamation Plant*, ALBUQUERQUE BERNALILLO CNTY. WATER UTIL. AUTH., https://www.abcwua.org/education-30_swrp/ [https://perma.cc/ZH9X-MQ7Z].

215. *See generally* LaJuana Wilcher, Assistant Administrator, Office of Water, U.S. EPA, The Connection Between Water Quality and Water Quantity, Address at Natural Resource Law Center, University of Colorado School of Law (June 1991),

substances increases, and water quality degrades.[216] The decline in groundwater levels below the Agua Caliente Reservation has resulted in a concurrent increase in the concentration of arsenic and uranium.[217] Thus, while the Tribe has the authority under the current regime to prevent a nonmember entity from injecting toxins into the Coachella Aquifer off the reservation, it might be unable to limit pumping from nonmembers that increases the concentration of those same toxins. Accordingly, the same reasoning that the EPA and courts applied to find a presumption that Tribes can regulate nonmember polluters supports a similar presumption that Tribes should be empowered to regulate nonmember water use.[218]

C. Tribal-State Water Management Cooperation

Courts should adopt a presumption that regulation of water meets *Montana*'s direct effects exception because Tribes and states have myriad options to negotiate mutually beneficial joint water management regimes. For instance, Tribes and states can develop compacts and other intergovernmental arrangements stemming out of negotiated water rights settlements that can coordinate water management and reduce interference with preexisting state water rights, thus preempting future litigation.[219]

Because water transcends geographic boundaries, and states and Tribes share an interest in using and preserving water, both entities have much to gain from cooperation.[220] Intergovernmental agreements like negotiated settlements and Tribal-state compacts enable parties to "resolve disputes that would otherwise be mired in costly, protracted, and occasionally inconclusive litigation."[221] Compared to litigation, agreements offer a more flexible method for addressing the complexities imposed by nonmember ownership of Tribal land and can create regulatory regimes that are more adaptable.[222] Because Tribal Nations are often viewed by states as "the economically and politically weaker

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https://scholar.law.colorado.edu/cgi/viewcontent.cgi?article=1082&context=books_reports_studies [https://perma.cc/E3NL-8KXP] (exploring the relationship between water quality and water quantity and arguing that both metrics must be considered together).

216. *Id.* at 2–3 (discussing the San Francisco Bay-Delta estuary, where increased withdrawals have enabled saltwater intrusion that has harmed wildlife species).

217. 2020 Agua Caliente Groundwater Report, *supra* note 4, at 29–31.

218. *See* Revised Interpretation of Clean Water Act Tribal Provision, 94 Fed. Reg. 30183, 30194, 64878-79 (2016) (acknowledging "the critical importance of water quality management to self-government" and noting "that because of the mobile nature of pollutants in surface waters . . . it would be very likely that any water quality impairment on non-Indian fee land within a reservation would also impair water quality on tribal lands").

219. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 6.05 (2019) ("[T]ribal-state cooperative agreements offer both sets of governments the opportunity to coordinate the exercise of authority, share resources, reduce administrative costs, deliver services in more efficient and culturally appropriate ways, address future contingencies, and save costs of litigation.").

220. ANDREA WILKINS, FOSTERING STATE-TRIBAL COLLABORATION 71 (2016).

221. Note, *Intergovernmental Compacts in Native American Law: Models for Expanded Usage*, 112 HARV. L. REV. 922, 929 (1999).

222. *Id.* at 929–30.

sovereign," states have historically had less incentive to form working relationships with Tribes.[223] Here, states' legal right to cooperatively manage on-reservation water with Tribal Nations can serve as a bargaining chip for Tribes to bring state governments to the table and reach mutually-beneficial agreements. State recognition of Tribal Nations as legitimate negotiating partners is warranted as Tribal governments continue to establish themselves as effective regulators.[224]

Tribal-state compacts should serve as the basis for securing cooperation, given that they are the most binding method through which regulatory cooperation over water resource management can be established.[225] Like compacts between two states, Tribal-state compacts are "negotiated agreement[s] between two sovereign entities that resolve[] questions of overlapping jurisdictional responsibility."[226] The federal government has largely encouraged state and Tribal cooperation through compacts.[227] However, when they allocate jurisdictional responsibility, Tribal-state compacts require federal approval from the Secretary of the Interior under the Trade and Intercourse Act. While Tribal-state water compacts have been traditionally viewed simply as tools for clarifying water rights, recent examples highlight the mechanism's ability to establish unique, mutually beneficial intergovernmental water management structures and regulatory tools.

In 2021, Secretary of the Interior Deb Haaland formally enacted the Confederated Salish and Kootenai Tribes Water Compact ("CSKT Compact").[228] The CSKT Compact was penned by Montana's unique Compact Commission, which was established in the 1970s to resolve Tribal-state water rights disputes by bringing Tribes, the federal government, and state representatives to the negotiating table.[229] Compared with previous compacts negotiated by the Commission, the CSKT Compact sought to better align itself with Tribal values by viewing water as "something that cannot be owned and should be stewarded for . . . future generations."[230] The compact also "forged

223. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 6.05.

224. *See* discussion *supra* Section IV.A–B.

225. *See* Note, *supra* note 221, at 924.

226. *Id.*; *see also* John A. Folk-Williams, *The Use of Negotiated Agreements to Resolve Water Disputes Involving Indian Rights*, 28 NAT. RES. J. 63, 72 (1988) (noting that the aim of compacts "in the context of Indian water rights is comparable to that of an interstate compact: to resolve jurisdictional disputes about who controls the creation of rights to water use for given volumes of water from sources that cross jurisdictional boundaries").

227. *See* Note, *supra* note 221, at 924–25.

228. Eric Dietrich, *Interior Secretary Signs CSKT Water Compact*, MONT. FREE PRESS (Sept. 17, 2021), https://montanafreepress.org/2021/09/17/interior-secretary-signs-cskt-montana-water-compact/ [https://perma.cc/5KQ5-6HTB].

229. Michelle Bryan, *The Power of Reciprocity: How the Confederated Salish & Kootenai Water Compact Illuminates a Path Toward Natural Resources Reconciliation*, 25 U. DENVER WATER L. REV. 227, 233, 259 (2022).

230. *Id.* at 259.

new ground" by establishing a system for the "unitary administration of reservation waters through a single water code and governing body."[231]

According to the CSKT Compact, all new water appropriations on the Flathead Reservation will be administered and enforced by the Flathead Reservation Water Management Board.[232] The Board is comprised of an equal number of state and Tribal members and is the "exclusive regulatory body" for all existing water rights on the reservation, including formerly state-regulated rights.[233] Notably, the CSKT Compact allows the state to retain regulatory jurisdiction over existing state water rights held by nonmembers on fee lands.[234] However, the Tribes gained an important regulatory power over preexisting state rights on Tribal lands and negotiated funding for water conveyance systems, the right to appropriate water for cultural and instream uses, and the ability to lease Tribal water rights.[235]

Tribal water rights settlements can also be useful vessels for negotiating Tribal and state regulatory authority.[236] Across the West, many Tribes have reserved water rights that were established at an earlier date than almost all existing state rights in the same river basins, meaning they hold extremely valuable "senior" water rights in the context of state prior appropriation systems.[237] The vast majority of these rights, however, remain unquantified.[238]

To quantify these rights, Tribal Nations and states must adjudicate them through expensive and protracted litigation involving the federal government.[239] These "general stream adjudications" often lead to continued conflict between water rights holders as states seek to retain control over water resources that may be overappropriated, and Tribes seek to turn their newly perfected water rights into actual water delivered to their citizens.[240]

To resolve these disputes, Tribes and states are increasingly turning to negotiated settlements that, like compacts, allow for more flexible solutions to water conflicts.[241] Although they have generally focused on establishing certainty regarding water quantity, negotiated settlements provide a useful forum

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231. *Id.*

232. MONT. CODE ANN. § 85-20-1901 et seq., Art. IV.I.1 (2021).

233. *Id.* at Art. IV (I)(2)(a).

234. *Id.* at Art. IV (I)(4)(d) ("The Board shall not have jurisdiction over water right ownership updates on water rights appurtenant to fee lands, which shall remain with the DNRC . . . .").

235. Bryan, *supra* note 229, at 262.

236. Celene Hawkins, *Beyond Quantification: Implementing and Sustaining Tribal Water Settlements*, 16 U. DENV. WATER L. REV. 229, 245–46 (2013).

237. CONG. RSCH. SERV., R44148, INDIAN WATER RIGHTS SETTLEMENTS 1–2 (2023).

238. *Id.*

239. *Id.* An adjudication to quantify rights on the Big Horn River in Montana lasted over thirty years. *See* Charles Wilkinson, *Introduction to Big Horn General Stream Adjudication Symposium*, 15 WYO. L. REV. 233, 233–34 (2015).

240. *See* DANIEL MCCOOL, NATIVE WATERS: CONTEMPORARY INDIAN WATER SETTLEMENTS AND THE SECOND TREATY ERA 52 (2002).

241. CONG. RSCH. SERV., *supra* note 237, at 2 (2023).

for setting the boundaries of Tribal and state regulatory authority and, when they are reached, address water management issues.[242]

In 1985, the Shoshone-Bannock Tribes initiated legal proceedings against the State of Idaho to quantify their water rights in the Upper Snake River Basin.[243] After five years of intense negotiation, the parties signed the 1990 Fort Hall Indian Water Rights Agreement ("Fort Hall Agreement"), which recognized the Tribes' right to over 500,000 acre-feet of water and established a unique framework for joint Tribal and state management of on-reservation water resources.[244] Like the CSKT Water Compact, the Fort Hall Agreement established an intergovernmental board made up of Tribal and state representatives "to fairly resolve disputes arising under [the] Agreement without resorting to litigation."[245] The Tribes took over the administration of all "Tribal water rights," encompassing a series of preexisting diversions and federal irrigation projects, while the state of Idaho retained authority over existing state permits held by nonmembers within the reservation.[246] The agreement also included joint notice clauses whereby the Tribe would provide the state with monthly written notice whenever it permitted a new water use or initiated a transfer of use in excess of twenty-five cubic feet per second within the reservation.[247] Reciprocally, the state agreed to provide the Tribes with notice "whenever an application for a state water right permit is sought for a water use" off of the reservation in the Snake River Basin.[248] Uniquely, the agreement allowed the Tribe to "inspect water monitoring devices and diversions" regulated

242. Susan M. Williams, *Indian Winters Water Rights Administration: Averting New War*, 11 PUB. LAND L. REV. 53, 67 (1990) ("Tribal authority over reservation water use largely has been ignored in the settlements.").

243. *Tribal Water Resources*, SHOSHONE-BANNOCK TRIBES, http://www.sbtribes.com/water-resources-department [https://perma.cc/Z23D-U6H7]. The agreement was ratified by Congress in the Fort Hall Indian Water Rights Act of 1990, which entitled the Tribe to use its water for instream flows and awarded it an appropriation of federal funds to establish a "Reservation Water Management System." Public Law 101-602. E-mail from Gail Martin, Water Resources Department, Shoshone-Bannock Tribes, Gail Martin to author (May 2, 2022) (noting that the Shoshone-Bannock Tribes "approached the State legislature to enter into government-to-government negotiations, rather than settling its right to water in a judicial setting").

244. Fort Hall Indian Water Rights Settlement Agreement art. 6, July 6, 1990, https://digitalrepository.unm.edu/cgi/viewcontent.cgi?article=1018&context=nawrs [https://perma.cc/J8PU-RMDL]; *see also* Fort Hall Indian Water Rights Act of 1990, H.R. 5308, 101st Cong. 1 (Jul. 10, 1990), https://www.govinfo.gov/content/pkg/STATUTE-104/pdf/STATUTE-104-Pg3059.pdf [https://perma.cc/2N7G-QBE7] (codifying agreement).

245. Fort Hall Indian Water Rights Settlement Agreement of 1990, *supra* note 244, at art. 9. The board was developed out of a "recognition of the concerns of separate sovereigns as well as the hydrologic and economic inter-relationships of water use within the Snake River basin." *Id.* at art. 9.1.

246. Fort Hall Indian Water Rights Settlement Agreement, *supra* note 244, at art. 7, art 8.2.6 ("The state shall administer the distribution of those rights acquired under state law within the Reservation that are not a part of the Fort Hall Agency, Tribal or Fort Hall Indian Irrigation Project water rights.").

247. *Id.* at art. 8. Notices regarding smaller quantities of water are provided in an annual report. *Id.* at art. 8.5.2.

248. *Id.* at art. 8.6.

by the state on nonmember fee lands within the reservation and on the main stem of the Snake River off the reservation.[249]

Where the parties couldn't come to a final agreement regarding water allocation—as was the case for the Blackfoot River, one of the tributaries within the Snake River Basin System—the Tribes and state agreed to install and provide mutual access to water flow and quality monitoring devices and collaborate on the development of a water management plan to reduce conflict.[250] Importantly, because the Fort Hall Indian Reservation was allotted at a later date than many other reservations, and the land itself was not easily suitable to farming, 97 percent of the reservation remains under Indian ownership.[251] Therefore, the state of Idaho plays a smaller regulatory role than would be the case for the Agua Caliente Reservation, if the state of California were to seek to permit groundwater extraction on the reservation.[252]

Settlement agreements and the formation of compacts can still be monumental undertakings.[253] However, Tribes and states can seek to preempt even more daunting litigation over water management by negotiating agreements that resolve difficult issues relating to nonmember land ownership within the reservation. The Agua Caliente Tribe, thus far, has endeavored to resolve threats to its groundwater through litigation.[254] While the Tribe's lawsuit was crucial to establish its right to groundwater, an out-of-court agreement may provide a more comprehensive and potentially longer-lasting resolution to questions surrounding the regulation of the Tribe's groundwater.[255] For instance, an intragovernmental board within the Agua Caliente Water Authority could be established to administer groundwater production permits for nonmembers on fee lands. Such an arrangement is likely the only workable resolution on checkerboarded reservations sharing unitary water sources.[256] Similarly, mutual

249. *Id.* at art. 8.2.2, art. 8.4.1.

250. *Id.* at art. 8.2.2.

251. *History of Land Ownership*, FMC IDAHO, http://fmcidaho.com/tribal-jurisdiction/history-of-land-ownership [https://perma.cc/8LVT-ZZP5]. Interestingly, the phosphorus mine and plant at issue in *FMC v. Shoshone-Bannock Tribes*, discussed *supra* in Section II.B.4, make up the majority of non-Indian owned fee land within the Fort Hall Reservation. *Id.* Should they see fit, the Tribes likely have a strong legal claim for exerting regulatory authority over FMC's water use on those lands under the Ninth Circuit's holding. *See* FMC Corp. v. Shoshone-Bannock Tribes, 942 F.3d 916, 935 (9th Cir. 2019) (noting that "threats to water rights may invoke inherent tribal authority over non-Indians"), *cert denied* FMC Corp. v. Shoshone-Bannock Tribes, 141 S. Ct. 1046 (2021).

252. *See* 2020 Agua Caliente Groundwater Report, *supra* note 4, at 13–16.

253. Anderson, *supra* note 51, at 213–14.

254. *See* Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist., 849 F.3d 1262, 1267 (9th Cir. 2017).

255. California already has a comprehensive gaming compact with the Tribe, and it is reasonable that a similar process could be applied to negotiating water regulation in the region. *See* Tribal-State Compact Between the State of California and the Agua Caliente Band of Cahuilla Indians, Cal. Gov. Code §§ 12012.46, 12012.79 (2022).

256. *See* Anderson, *supra* note 51, at 237 (noting that "water use regulation and water quality regulation are complex tasks that require some governmental cooperation").

monitoring of groundwater wells would help alleviate Tribal concerns regarding overpumping and reserve a measure of authority for the state government.[257]

Where Tribal Nations exert regulatory authority over on-reservation water, state governments should be confident that there are plentiful tools available to negotiate shared regulatory frameworks and ensure Tribal regulatory regimes do not upend state permit systems. Courts should therefore encourage Tribal regulation under *Montana*'s direct effects exception.

CONCLUSION

Tribal water administration should be encouraged not only to enable the development of Tribal sovereignty and encourage the healing of the United States' fraught relationship with Tribes, but also to improve the way our society manages its water.[258] For too long, Tribal Nations have been excluded from critical decisions concerning the administration of their water. A new legal framework is necessary to accord due respect to Tribal sovereignty and adapt to the modern landscape.[259] An important first step to pursuing these goals is the recognition that nonmember conduct affecting Tribal waters presumptively enables a Tribe to regulate those resources.

257. At this point, however, there is no regulatory authority for the State of California to retain control over because the state does not currently permit groundwater extraction. Tyra, *supra* note 84, at 312–13, 319 (describing how SGMA is still in its early stages). However, as the SGMA process continues, there may be opportunities to further involve Tribal regulatory regimes. *See id.*

258. Bryan, *supra* note 229, at 233 ("The return of waters into tribal care can thus be an incredible step toward healing."); *see also* Kronk Warner, *supra* note 192, at 846 ("By virtue of their unique authority, proven record of adaptation, and strong connection to nature and the environment, tribes may in fact be in the ideal position to prove strong "laboratories" for the development of environmental law . . . .").

259. *See* Kalen Goodluck, *Tribal Nations Are Locked Inside the U.S. Water Regime*, HIGH COUNTRY NEWS (Jan. 31, 2022), https://www.hcn.org/issues/54.2/indigenous-affairs-water-tribal-nations-are-locked-inside-the-u-s-water-regime [https://perma.cc/XP5S-PDHG].