STOLEN STREAMS: TRIBAL WATER RIGHTS AND JUDICIAL TAKINGS

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Tribal water rights are fundamental to tribal existence and self-determination. Yet, despite treaty protection and federal recognition of these rights for over a century, tribal communities still struggle to realize their water rights. Forced to litigate in state courts under the McCarran Amendment, tribes frequently see those rights systematically undermined by inconsistent—and often hostile—state court rulings. This article proposes a potential remedy to these challenges by exploring the application of the judicial takings doctrine to state court tribal water rights decrees. Specifically, this article argues that state courts carry out a compensable judicial taking under the Fifth Amendment, as contemplated by the Supreme Court plurality in Stop the Beach, *when issuing a water rights decree that diminishes treaty-protected tribal water rights. Analyzing the Wyoming Supreme Court's* Big Horn I *decision as a case study, this article demonstrates how the Wyoming State Court contravened established treaty law and reduced tribal water rights, effectuating a judicial taking. While judicial takings remains a doctrinally unsettled area, this article makes a novel contribution by identifying tribal water right diminishment as a compelling fact pattern to advance the theory. Judicial takings doctrine offers a partial but meaningful tool to compensate tribes and acknowledge the diminishment of our water rights in a legal landscape That frequently denies full redress.*

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"Water is necessary for all life, and when our ancestors negotiated agreements with the United States to secure our lands and our protection, water was understood and still is understood to be inseparable from the land and from our peoples."

Fawn Sharp (Quinault Indian Nation)

President, National Congress of American Indians (2019 – 2023)

Introduction

There are 374 ratified treaties[1] between the U.S. federal government and "Indian"[2] tribes,[3] many of which guarantee tribal water rights.[4] But, despite these established rights, tribes struggle to enforce them, resulting in poor water access across tribal communities. In fact, it is estimated that nearly 48% of households on Indian reservations currently lack access to clean water. [5] In contrast, less than 1% of non-Native U.S. households lack access to clean water.[6] Without household plumbing or other water sources, these Native families must resort to hauling water from several miles away simply to have water for drinking,

1. This number does not account for the many federal-tribal treaties fraudulently left unratified by Congress. For a discussion of some of the unratified federal-tribal treaties, *see* U.S. Gov. Treaties and Reps., 1851-1852 - Eighteen Unratified Treaties between California Indians and the United States 5, https://perma.cc/622Y-NL6P. For a brief overview of ratified treaties, *see Nation to Nation: Treaties Between the United States and American Indian Nations*, Smithsonian Nat'l Museum Am. Indian, https://perma.cc/R8M7-LHHC. For the most comprehensive collection of digitized federal-tribal treaties, *see Tribal Treaties Database*, Okla. State Univ. Libr., https://perma.cc/3CJH-VWEG.
2. There is no uniform consensus on the appropriate terminology for people indigenous to North America. In this article I generally use the term "Indian" to refer to groups indigenous to the North American continent. This term is also the predominant term used in legal settings in the United States. *See, e.g.,* Title 25 of the United States Code (25 U.S.C.) titled "Indians." Others are welcome to use other terms: for example, "Native American," "Indigenous people," or "First Nations." As Indian people, we generally understand ourselves in terms of our specific tribal affiliation. To refer collectively to all tribes in modern day America, I choose to refer to us collectively as Indians. Like other racial or ethnic slang, "Indian" is a term originally assigned to us by white colonists. It has, however, been partially reclaimed by Indian people as our own.
3. There are currently 574 federally recognized tribes in America. *See Federally Recognized Indian Tribes and Resources for Native Americans*, USA.gov, https://perma.cc/VZ9T-3KRC. However, this number does not account for federally unrecognized tribes. For a discussion of the tribal federal recognition process, *see generally* Mark D. Myers, *Federal Recognition of Indian Tribes in the United States*, 12 Stan. L. & Pol'y Rev. 271 (2001); Matthew L.M. Fletcher, *Politics, Indian Law, and the Constitution*, 108 Cal. L. Rev. 495, 505 (2020); Lorinda Riley, *When A Tribal Entity Becomes A Nation: The Role of Politics in the Shifting Federal Recognition Regulations*, 39 Am. Indian L. Rev. 451, 451 (2015).
4. *See generally* Winters v. United States, 207 U.S. 564 (1908) [hereinafter *Winters*] (holding that tribal water rights are reserved implicitly in the creation of a tribal reservation); Cynthia Brougher, Cong. Rsch. Serv., RL32198, Indian Reserved Water Rights Under the Winters Doctrine: An Overview (2011), https://perma.cc/W2XJ-3A9E.
5. Democratic Staff of the House Comm. on Nat. Res., Water Delayed is Water Denied: How Congress Has Blocked Access to Water for Native Families 1 (2016), https://perma.cc/C2V6-ZJTT [hereinafter Democratic Staff Report]; *see also* Heather Tanana et al., *Universal Access to Clean Water for Tribes in the Colorado River Basin*, Water & Tribes Initiative (2021), https://perma.cc/49LA-PVP4.
6. Democratic Staff Report, *supra* note 5, at 1.

cooking, cleaning, and bathing.[7] Such scarce water supply means having to choose between "us[ing] water in a health emergency, … us[ing] water to make their dinner or … [using water] to take a shower."[8]

This article argues that a novel approach to tribal water rights litigation may help compensate tribes for lost water rights. For over 100 years, since the Assiniboine and Gros Ventre tribes affirmed their Milk River water rights in 1908,[9] tribes have waded through the U.S. legal system in attempts to correct this water inequity.[10] Unfortunately, tribal water rights adjudication is almost always long and costly,[11] draining the resources of tribes who do pursue litigation and preventing other tribes from even trying. Further, even when tribes *win* in water rights litigation, the declared *paper rights* don't always provide the resources required for tribes to access their *wet water,* or usable real-life water.[12]

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7. *See, e.g.*, Tyrone Beason, *This Epic Slice of Arizona Feeds Their Souls but Lacks a Basic Necessity: Water*, L.A. Times, 2–3 (Apr. 7, 2024), https://perma.cc/43EA-FD82; Rachel Scott, Briana Stewart & Kimberly Ruiz, *Navajo Families' Miles-long Journey for Water Highlights Access Disparities*, ABC News (Apr. 21, 2023), https://perma.cc/BAA3-MTRC.
8. Rachel Frazin, *Navajo Nation Struggles With Water Access. The Supreme Court Just Dealt It a Blow on Water Rights*, The Hill (June 25, 2024), https://perma.cc/6S27-D58Y (quoting Kabir Thatte, Director of Policy and Coalitions at DigDeep).
9. *Winters*, 207 U.S. at 565.
10. Some tribes have reached settlement agreements which has allowed these tribes to build water access infrastructure. *See* Bureau of Indian Affs., *Indian Water Rights Settlements—Current Indian Water Rights Settlements*, U.S. Dep't of Interior (May 2023), https://perma.cc/CYM5-43F9. For example, in 2010, Congress passed the Claims Resolution Act of 2010, which allocated over $1 billion in federal funding to settle tribal water rights with four primary tribes: the White Mountain Apache Tribe, the Crow Tribe, the Taos Pueblo, and Aamodt Tribe. *See* Charles V. Stern, Mariel J. Murray, U.S. Cong. Rsch. Serv., Indian Water Rights Settlements 15 (Dec. 3, 2024), https://perma.cc/2STZ-TVS9; Pub. L. No. 111-291, 124 Stat. 3064 (2010). For a discussion of the arguably successful congressional-tribal water rights settlement for the Nez Perce Tribe under Snake River Water Rights Act of 2004, Pub. L. No. 108-447 at § 2(2), 118 Stat. 3432, *see* Robert T. Anderson, *Indian Water Rights: Litigation and Settlements*, 42 Tulsa L. Rev. 23, 33 (2006).
11. "The [tribal water rights] adjudication process spans 22 years on average" between litigation and negotiation. Leslie Sanchez et al., *Beyond "Paper" Water: The Complexities of Fully Leveraging Tribal Water Rights*, Fed. Rsrv. Bank of Minneapolis (May 3, 2022), https://perma.cc/M8MK-W8UJ. *See generally* Leslie Sanchez et al., *The Economics of Indigenous Water Claim Settlements in the American West*, 15 Env't Rsch. Letters, Sept. 2020 [hereinafter Sanchez, Economics of Indigenous Water Claim Settlements].
12. Paper rights provide clear legal title to a water right, but without funding for water infrastructure (e.g., money to dig the hole, build the pipes, maintain the treatment plant), there is no way for tribes to access real life "wet water." For a more comprehensive overview of the struggles between paper rights and wet water, *see* Susan D. Brienza, *Wet Water vs. Paper Rights: Indian and Non-Indian Negotiated Settlements and Their Effects,* 11 Stan. Env't L.J. 151, 160 (1992) ("From the Native American point of view, the legal result of Winters v. U.S. and Arizona v. California is that the tribes possess strong paper rights, yet the practical result is that with the concomitant and continued over-use of the actual water by non-Indians, the tribes have very little wet water."); Andrew C. Mergen & Sylvia F. Liu, *A Misplaced Sensitivity: The Draft Opinions in Wyoming v. United States*, 68 U. Colo. L. Rev. 683, 760

This ongoing struggle to effectuate tribal water rights is not new. Other tribal and Indian law scholars have made significant strides to understand and address these issues, from advocating for non-judicial remedies like congressional settlements and state-tribal compacts[13] to exploring international human rights methodologies or the federal trust relationship.[14]

Building on these prior claims, this article specifically argues that judicial takings doctrine may offer tribes a path to partial justice for water rights nullified in adjudication. In *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, a Supreme Court plurality suggested that state court decisions—judicial decisions—can constitute a taking under the Fifth Amendment if they abrogate a previously established property interest.[15] However, lower courts and scholars still struggle to agree on a consistent example of a judicial takings case. This article aims to advance both judicial takings theory and tribal water rights remedies by linking the two doctrines. I argue that, under the Fifth Amendment and *Stop the Beach*, state court alteration of tribal water rights constitutes a compensable judicial taking.[16]

This article acknowledges and does not dispute the growing consensus that, for many tribes, negotiated settlements are a better option than litigation.[17]

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n.249 (1997) ("Despite having theoretical rights to reserved water, Indian tribes have faced enormous hurdles in actually gaining access to the water (or 'wet' water).").

13. *See infra* note 17 and accompanying text.

14. *See, e.g.*, Adam Crepelle, *The Reservation Water Crisis: American Indians and Third World Water Conditions*, 32 Tul. Env't L.J. 157, 183–87 (2019) ("The courts of the conqueror have not been kind to American Indians nor are the other two branches of government likely to be receptive to American Indian water needs. Therefore, tribes should consider turning to international law to gain access to water because water has been considered a human right under international law since 1977 . . . . Congress or the Supreme Court can solve the water crisis in Indian country by affirming the tribal trust relationship."); Robert T. Anderson, *Indigenous Rights to Water & Environmental Protection*, 53 Harv. C.R.-C.L. L. Rev. 337, 375 (2018) ("Some hope [for defending tribal water rights] is provided by an outgrowth of international law's doctrine of discovery known as the federal trust responsibility.").

15. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot., 560 U.S. 702, 713–715 (2010) [hereinafter *Stop the Beach*].

16. This article focuses only on the Takings Clause. It does not consider the parallel Due Process remedy. For an analysis of the difference between Fifth Amendment Takings Clause and Due Process Clause claims, *see* Eduardo M. Peñalver & Lior Jacob Strahilevitz, *Judicial Takings or Due Process?*, 97 Cornell L. Rev. 305, 312 (2012).

17. *See, e.g.*, Robert T. Anderson, *Indian Water Rights, Practical Reasoning, and Negotiated Settlements*, 98 Cal. L. Rev. 1133, 1136, 1156 (2010) ("While litigation of Indian water rights persists, there has been a strong trend favoring congressionally approved Indian water settlements. . . . When parties leave it to the courts to decide these critical issues, they take a tremendous risk, which sometimes results in even more ambiguity, as with the Arizona Supreme Court's 2001 ruling in *Gila River*."); Tara Righetti et al., *Unbecoming Adversaries: Natural Resources Federalism in Wyoming*, 21 Wyo. L. Rev. 289, 334 (2021) ("Tribal water rights settlements have prevailed over litigation as the preferred method for resolving Indian reserved rights claims."); Tom Kinney, *Chasing the Wind: Wyoming Supreme Court Decision in Big Horn III Denies Beneficial Use for Instream Flow Protection, but Empowers State to*

Litigation presents many challenges, one of which is the growing hostility of the judiciary towards tribal rights. Even most recently, in 2023, the Supreme Court narrowed the tribal water rights doctrine. In Arizona v. Navajo Nation,[18] only the second "substantive decision[] on the nature and scope of Indian reserved water rights" after *Winters*,[19] the Court held that the U.S. government, despite its fiduciary responsibility to tribal rights,[20] has no duty to ensure the functionality of tribal water rights. This 5-4 decision, [21] holding that tribal water rights are "reserved" but not "secured,"[22] makes it significantly more difficult for tribes to effectuate their paper water rights, adding just one more obstacle to the already challenging task of tribal socioeconomic development.[23] Against this backdrop, it is evident that direct negotiation and settlement is more likely to help tribes than a protracted and unpredictable litigation process. However, in our current legal system, litigation is the origin point for almost all water rights disputes, even those that eventually reach settlement. Although litigation may not be the best route to protect tribal water rights, it is frequently a necessary one. For tribes that have already been or may soon be included in state-court water adjudications, a viable judicial takings claim would be a valuable litigation strategy, either to incentivize settlement or provide compensation for inappropriately adjudicated rights.

Administer Federal Indian Reserved Water Right Awarded to the Wind River Tribes, 33 Nat. Res. J. 841 (1993); Gina McGovern, *Settlement or Adjudication: Resolving Indian Reserved Rights*, 36 Ariz. L. Rev. 195 (1994).

18. Arizona v. Navajo Nation, 599 U.S. 555, 558 (2023) [hereinafter *Navajo Nation*].
19. Anderson, *supra* note 17, at 1136 (stating that *Winters*, 207 U.S. 564, and *Arizona v. California*, 373 U.S. 546 (1963), were the only two substantive Supreme Court tribal water right decisions in over a century).
20. The relationship between Indian tribes and the federal government is considered that of a trustee to a trust beneficiary, which arises out of the government's general "duty of protection" or trust responsibility towards Indian tribes. *See, e.g.,* Matthew L.M. Fletcher, *The Dark Matter of Federal Indian Law: The Duty of Protection*, 75 Me. L. Rev. 305 (2023); Daniel I.S.J. Rey-Bear & Matthew L.M. Fletcher, *"We Need Protection from Our Protectors": The Nature, Issues, and Future of the Federal Trust Responsibility to Indians*, 6 Mich. J. Env't & Admin. L. 397, 398 (2017).
21. *Navajo Nation*, 599 U.S. at 558.
22. *See* Mainon A. Schwartz, Kristen Hite, Cong. Rsch. Serv., LSB11001, *"Reserved" but Not "Secured": Supreme Court Sinks Navajo Nation's Attempt to Compel Federal Action on Tribal Water Rights* (2023), https://perma.cc/5KCH-FR22.
23. Research suggests that reservations with adjudicated water rights perform stronger economically than non-adjudicated reservations. Adjudication of 25 specific tribal water rights claims is estimated to reserve between 1.2 to 1.6 million acre-feet of water for tribes. Sanchez, *Economics of Indigenous Water Claim Settlements*, *supra* note 11, at 1, 2, 9–10; *see also* Suhina Deol & Bonnie Colby, *Tribal Economies: Water Settlements, Agriculture, and Gaming in the Western U.S.*, 163 J. of Contemp. Water Rsch. & Educ. 45 (2018); U.S. Gov't. Accountability Off., GAO-22-105215, Tribal Economic Development: Action Is Needed to Better Understand the Extent of Federal Support (2022), https://perma.cc/E9GY-4S4Q.

Although monetary compensation cannot substitute for fully affirmed tribal water rights, it at least furnishes an additional tool for tribes[24] adjudicating their water rights in state court.[25] As Justice Gorsuch acknowledged in his Arizona v. Navajo Nation dissent:

> "Where do [tribes] go from here [for water rights]? To date, [tribal] efforts to find out what water rights the United States holds for them have produced an experience familiar to any American who has spent time at the Department of Motor Vehicles. [Tribes] have waited patiently for someone, anyone, to help them, only to be told (repeatedly) that they have been standing in the wrong line and must try another. . . . [T]he government's constant refrain is that [tribes] can have all [the water rights] they ask for; they just need to go somewhere else and do something else first. [Tribes] have tried it all. They have written federal officials. They have moved this Court to clarify the United States' responsibilities when representing them. They have sought to intervene directly in water-related litigation. And when all of those efforts were rebuffed, they brought a claim seeking to compel the United States to make good on its treaty obligations by providing an accounting of what water rights it holds on their behalf. At each turn, they have received the same answer: 'Try again.'"[26]

This article offers tribes another tool to use in the continued effort to defend their water rights.

Diminishment of tribal water rights is likely one of the strongest claims for a judicial taking, given the seniority of tribal rights,[27] but it is also possible that non-tribal water rights could merit a judicial takings claim. Due to the extensive over-appropriation of almost all Western water sources,[28] water adjudications have become critical and hyper sensitive for all water users, not just tribes. With severe water scarcity, there are significantly more established

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24. This article focuses specifically on the water rights issues facing treaty tribes in the Western United States. However, there are many other tribes facing many other water rights issues—for example, coastal tribes facing rising sea levels or non-treaty tribes unable to depend on treaty-based water rights—not discussed in this article.

25. The interaction of interstate water rights and tribal water rights is not yet well understood and, regardless, is beyond the scope of this article. For one of the Supreme Court's most recent forays into interstate water rights, see Fla. v. Ga., 592 U.S. 433, 435 (2021) (holding that Florida had not proved Georgia was interfering with Florida's water rights).

26. *Navajo Nation*, 599 U.S. at 598–99 (Gorsuch, J., dissenting) (Justice Gorsuch ends the paragraph by noting that "[w]hen this routine [of giving tribes the runaround regarding water rights] first began in earnest, Elvis was still making his rounds on The Ed Sullivan Show.").

27. For a discussion of the seniority of tribal water rights, *see infra* Parts I.A, B.

28. *See* 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, 103 (2018) ("Currently, much of the West operates in a state of over-appropriation, as even areas with significant rainfall each year are experiencing a lack of availability for new rights applicants.") (citing John E. Thorson, Ramsey L. Kropf, Dar Crammond & Andrea Gerlak, *Dividing Western Waters: A Century of Adjudicating Rivers and Streams*, 8 U. Denv. Water L. Rev. 355, 360 (2005); Burke W. Griggs, *Beyond Drought: Water Rights in the Age of Permanent Depletion*, 62 Kan. L. Rev. 1263, 1297 (2014)).

water rights than there is water to satisfy those rights. Adjudicating thousands of rights to this scarce resource requires the courts to determine which water rights must be diminished so that the court's decree is practically workable given the lessened water quantities. Thus, it is theoretically conceivable that any judicial determination of water rights may effectively "take" some party's established property interest. Viewing water adjudications from this lens, it may be possible for several state water users to bring a judicial takings claim. However, almost all Western water rights are subject to hierarchy-based curtailment under prior appropriation "first in time, first in right" principles, meaning that the curtailment of junior water rights to facilitate senior water rights is not a per se taking under prior appropriation systems.[29] Accordingly, there are frequently either common law or contract provisions absolving the government of water curtailment liability due to scarcity. But, because tribes are frequently the most senior water right holders in the hierarchy,[30] curtailing a tribal water right to provide other water users with access to water likely *is* a taking under the doctrine of prior appropriation.[31] Accordingly, I confine my focus to tribal water rights only.

In Part I, I outline the history and doctrine of tribal water rights. In Part II, I introduce judicial takings theory and jurisprudence. In Part III, I combine the doctrines of tribal water rights and judicial takings and explain how state court diminishment of tribal water rights may constitute a judicial taking. In Part IV, I briefly highlight several benefits and limitations of a judicial takings claim in the context of tribal water rights.

I. Tribal Water Rights: History and Jurisprudence

A. Treaties, Winters, and the Indian Canons: The Origin of Tribal Water Rights

Tribal water inequities originated with European colonialism and escalated until the issue reached the Supreme Court in the 1908 case of *Winters v. United States*. Before Columbus and his contemporaries, there were millions of

29. *See supra* note 25.

30. *See id.*

31. For an introduction to the intersection of Fifth Amendment takings claims and prior appropriation curtailments in periods of water shortages, *see generally* Jacqueline Carlton, *Drought by Fifth Amendment: Debunking Water Rights As "Real" Property*, 31 BYU J. Pub. L. 409, 411 (2017) ("Action by states to curtail the usage of water raises the question of whether restrictions will be considered a taking that compels 'just compensation.'"); Jamison E. Colburn, *Don't Go in the Water: On Pathological Jurisdiction Splitting*, 39 Stan. Env't L.J. 3, 39–49 (2019) (reviewing the U.S. Court of Federal Claims' back and forth over whether a taking had occurred due to non-delivery of water during a shortage); *Klamath Irrigation Dist. v. United States*, 67 Fed. Cl. 504, 536–39 *modified sub nom. Klamath Irrigation Dist. v. United States*, 68 Fed. Cl. 119 (2005); *Baley v. United States*, 134 Fed. Cl. 619, 680 (2017), *aff'd*, 942 F.3d 1312 (Fed. Cir. 2019).

Indigenous peoples living in the present-day Americas.[32] Pre-European contact, these Indigenous nations controlled much of the continent, including the water, even as late as the 1800s.[33] Throughout the late 1700s and 1800s, however, the U.S. Government—attempting to combat the growing "Indian problem"[34] and access more land for white settlement—established a system of forced Indian removal and relocation.[35] Under this policy, the U.S. signed treaties with Indian tribes. Through these treaties, the U.S. recognized tribes as sovereign nations[36] under the protection of the U.S. government so long as the tribes gave up substantial resources and relocated to small islands of undesirable land, now known as Indian reservations.[37] Despite the frequently fraudulent and unethical federal behavior throughout this treaty-making process,[38] tribal treaties created the

32. It is impossible to know the exact population of Native America pre-European contact. However, scholarly estimates generally range from between 1 million to 18 million. For an in-depth exploration of Indigenous population estimates, *see generally* William M. Denevan, The Native Population of the Americas in 1492 (2d ed. 1992).

33. *See generally* Kathleen DuVal, The Native Ground: Indians and Colonists in the Heart of the Continent (Daniel K. Richter & Kathleen M. Brown eds., 2011); Daniel K. Richter, Facing East from Indian Country: A Native History of Early America (2001).

34. For a better understanding of early scholars' views of Indian existence as "a problem," *see generally* Nelson A. Miles, *The Indian Problem*, 128 N. Am. Rev. 304 (1898), https://perma.cc/MH3W-FFJJ; Lyman Abbott, *Our Indian Problem*, 167 N. Am. Rev. 719 (1898), https://perma.cc/J8DH-PLQ8.

35. *See* Indian Removal Act of 1830, Pub. L. No. 21-148, 4 Stat. 411; Indian Appropriations Act of 1851, Pub. L. No. 31-14, Ch. 14, 9 Stat. 574 (1851), https://perma.cc/ZFK6.

36. *See* Cherokee Nation v. Georgia, 30 U.S. 1, 2 (1831) ("'That from time immemorial the Cherokee nation have composed a sovereign and independent state, and in this character have been repeatedly recognized, and still stand recognized by the United States, in the various treaties subsisting between their nation and the United States.'").

37. *See* Vine Deloria, Jr. et al., Black Elk Speaks: The Complete Edition 6 (2014) ("But the Wasichus came, and they have made little islands for us and other little islands for the fourleggeds, and always these islands are becoming smaller, for around them surges the gnawing flood of the Wasichu . . . .").

38. The federal government often negotiated treaties with Indian tribes in flagrant bad faith. This included negotiating exclusively in languages not spoken by the tribe, retroactively changing treaty provisions after signing without tribal consent, coercing or bribing tribes to sign treaties, signing treaties with artificially appointed "chiefs," and more. The federal government's explicit purpose was almost always simply to obtain Indian land and resources as quickly as possible. *See* Washington State Dep't of Licensing v. Cougar Den, Inc., 586 U.S. 347, 360 (2019) ("The parties negotiated the treaty in Chinook jargon, a trading language of about 300 words that no Tribe used as a primary language. The parties memorialized the treaty in English, a language that the Yakamas could neither read nor write.") (internal citations omitted); Lauren Goschke, *Tribes, Treaties, and the Trust Responsibility: A Call for Co-Management of Huckleberries in the Northwest*, 27 Colo. Nat. Res., Energy & Env't L. Rev. 315, 326 (2016) (Issac Stevens, a principle treaty negotiator in the Pacific Northwest, "was hired to extinguish all Indian title in Northwest as quickly as possible to open up land for white settlers seeking to homestead on that land."); *Indigenous Interpretations: Invoking the Third Indian Canon to Combat Climate Change*, 135 Harv. L. Rev. 1568 (2022) ("'As long

legal basis for tribal sovereignty, "the most basic principle of [modern] Indian law."[39] Under this doctrine of tribal sovereignty, tribal treaties generally "insulate[]" tribes "'from state and local control,'" while also providing the tribe with guaranteed land and resources.[40] Accordingly, tribal treaties are considered "'quasi-constitutional,'"[41] binding law.[42] However, given the context surrounding the creation of these tribal treaties,[43] "Indian treaties . . . rarely, if ever, deal explicitly with water rights," making interpretation of these treaties one of "[t]he most significant problem[s]" for Indian water rights litigation.[44] For the first few centuries of Indian treaty rights, there was no legal doctrine governing tribal

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as the rivers run, as long as the tide flows, and as long as the sun shines, you will have land, fish and game for your frying pans, and timber for your lodges,' Washington Territorial Governor Isaac Stevens reassured the signatories of the 1855 Treaty of Point Elliott. The Duwamish, Suquamish, Snoqualmie, Snohomish, Lummi, Nooksack, Skagit, Swinomish, and other allied tribes' delegates took him at his word when formulating the agreement. Yet today, in what is now Washington State, climate change threatens to dry rivers, raise tides, burn timber, and deprive Indigenous communities of ancestral lands and subsistence sources.") (citations omitted); Choctaw Nation v. Oklahoma, 397 U.S. 620, 630–31 (1970) ("About all that can be said about the treaties from the standpoint of a skilled draftsman is that they were not skillfully drafted. . . . [The] treaties were imposed upon [the Indians] and they had no choice but to consent."); Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows or Grass Grows Upon the Earth"—How Long a Time is That?*, 63 Cal. L. Rev. 601, 610 (1975) (explaining that "[t]he results of treaty negotiations were almost always unsatisfactory to the Indians," frequently because the government negotiated unfairly, randomly selecting friendly Indian "chiefs" to negotiate on behalf of the tribe without tribal authorization, using "coercion, bribery, and outright fraud" in negotiations, and writing treaties only in English, a language which tribes frequently did not speak, read, or write.). For a comprehensive overview of Indian treaty negotiations, *see generally* Francis Paul Prucha, American Indian Treaties: The History Of A Political Anomaly (1994); Vine Deloria Jr. et al., Documents of American Indian Diplomacy: Treaties, Agreements, and Conventions, 1775-1979 (1999).

39. Felix S. Cohen, Handbook Of Federal Indian Law 230 (Rennard Strickland et al. eds., 1982); *see also* United States v. Wheeler, 435 U.S. 313, 322 (1978) ("The powers of Indian tribes are, in general, '*inherent powers of a limited sovereignty which has never been extinguished*.'") (emphasis in original) (internal citation omitted).
40. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 332 (1983) (quoting Mescalero Apache Tribe v. Jones, 411 U.S. 145, 152 (1973)).
41. *Indian Canon Originalism*, 126 Harv. L. Rev. 1100, 1100 (2013) (quoting Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 Harv. L. Rev. 381, 408 (1993)).
42. While extant ratified treaties are binding law, the Supreme Court has held that Congress has unilateral plenary power to abrogate or modify Indian treaties. *See, e.g.*, *United States v. Lara*, 541 U.S. 193, 200 (2004) ("First, the Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as 'plenary and exclusive.'") (citations omitted).
43. *See supra* note 38 and accompanying text.
44. Anderson, *supra* note 17, at 1135.

water rights. This changed, however, with the 1908 case of *Winters v. United States*.[45]

In *Winters v. United States*, the Supreme Court directly addressed the tribal water rights issue and held that establishment of an Indian reservation impliedly reserves federal water rights for a tribe.[46] Per *Winters* and its progeny, then-unappropriated water "appurtenant" to the reservation is reserved in an amount "necessary to accomplish the purpose of the reservation."[47] This holding descends from the more general principle that Indian treaty rights are "not a grant of rights *to* the Indians, but a grant of right *from* [the Indians]" to the U.S. Government.[48] For this reason, tribes retain any rights not explicitly granted to the United States. The *Winters* Court recognized that the reservation land would be "useless" without water rights.[49] Thus, the Court reasoned, if the U.S. Government "intended to deal fairly with the Indians" at all, the treaty-granted reservations required implicit water rights.[50] The *Winters* analysis supplies an early judicial application of the Indian canons, the default "interpretation principles" of Indian treaties.[51] The Indian canons broadly require that Indian treaties be: (i) construed to the benefit of the tribe, (ii) interpreted as the Indians themselves understood the treaty at signing, and (iii) read in light of historical context.[52] These canons of interpretation were "designed to rectify the inequality" inherent in "[t]he unequal bargaining position[s]" held between the U.S. and the Indian tribes, as well as to enforce the "trust relationship" between the U.S. and the tribes.[53] In sum, *Winters* both established the legal framework for tribal water rights and applied the Indian canons of construction to adjudicate tribal water rights.

45. *Winters*, 207 U.S. 564 (1908).
46. *Id*. at 575–76.
47. Cappaert v. United States, 426 U.S. 128, 138 (1976).
48. United States v. Winans, 198 U.S. 371, 381 (1905) (emphasis added).
49. Arizona v. California, 373 U.S. 546, 600 (1963).
50. *Id*.
51. *Navajo Nation*, 599 U.S. at 587.
52. *See generally* Felix S. Cohen, Handbook Of Federal Indian Law 119–28 (Nell Jessup Newton et al. eds., 2005); Wilkinson & Volkman, *supra* note 38; Richard B. Collins, *Never Construed to Their Prejudice: In Honor of David Getches*, 84 U. Colo. L. Rev. 1, 5 (2013); Menominee Tribe of Indians v. United States, 391 U.S. 404, 412 (1968).
53. Wilkinson & Volkman, *supra* note 38, at 617 ("Although many treaty rights are clearly expressed in Indian treaties, others are not. The courts have been liberal in recognizing the existence of Indian treaty rights in those instances when they are not clearly stated in the treaty. . . . Thus the construction of Indian treaties is akin to the construction of adhesion contracts, in that Indian treaties, like adhesion contracts, are liberally construed in favor of the weaker party. . . . The goal is to achieve the reasonable expectations of the weaker party.").

B. Western Water Systems: Prior Appropriation and Winters

In the American West, the establishment of *Winters* rights disturbed the normal cadence of state water right management and set the stage for a century of some of the most elaborate and lengthy litigation in US history.[54] States in the American West generally rely on a "prior appropriation" method of water right governance.[55] During early colonial invasion of the American West, the prior appropriation system was effective at allocating the West's scarce water resources because prior appropriation rewarded productive, early water use.[56] Prior appropriation systems are based on a "first in time, first in right" principle.[57] Because water rights in the U.S. are generally considered state property rights, this means that each state establishes its own hierarchy of historical seniority to determine which water users get water when. Under prior appropriation, the first water appropriators receive priority claim to the water, so long as they satisfy the beneficial use requirement.[58]

However, the creation of *Winters* rights created a dilemma for state water rights users because tribal *Winters* rights don't play by normal prior appropriation rules, making them ultimately stronger than normal state-based water rights.[59]

54. For a comprehensive overview and history of Western water adjudications, including general stream adjudications and the McCarran amendment, *see generally* John E. Thorson et al., *Dividing Western Waters: A Century of Adjudicating Rivers and Streams*, 8 U. Denv. Water L. Rev. 355, 440 (2005) [hereinafter Thorson (2005)]; John E. Thorson et al., *Dividing Western Waters: A Century of Adjudicating Rivers and Streams, Part II*, 9 U. Denv. Water L. Rev. 299, 305 (2006) [hereinafter Thorson (2006)]. For an introduction specifically to Indian reserved water rights disputes, *see, e.g.*, Dylan R. Hedden-Nicely, *The Legislative History of the McCarran Amendment: An Effort to Determine Whether Congress Intended for State Court Jurisdiction to Extend to Indian Reserved Water Rights*, 46 Env't L. 845 (2016); Anderson, *supra* note 10; Judith V. Royster, *A Primer on Indian Water Rights: More Questions Than Answers*, 30 Tulsa L. Rev. 61, 63 (1994).

55. Prior appropriation has been the dominant system in the West for centuries. However, prior appropriation systems reward over use of water resources. With the increasing climate crises, many are calling for a change to the systems of prior appropriation. *See generally* A. Dan Tarlock, *The Future of Prior Appropriation in the New West*, 41 Nat. Res. J. 769 (2001); *see also* Kait Schilling, *supra* note 28, at 98; Reed D. Benson, *Alive but Irrelevant: The Prior Appropriation Doctrine in Today's Western Water Law*, 83 U. Colo. L. Rev. 675, 676 (2012); Lawrence J. MacDonnell, *Prior Appropriation: A Reassessment*, 18 U. Denv. Water L. Rev. 228, 229 (2015).

56. *See, e.g.,* Norman K. Johnson, *A Survey of the Evolution of Western Water Law in Response to Changing Economic and Public Interest Demands*, 29 Nat. Res. J. 347, 348–53 (1989).

57. Lawrence Berger, *An Analysis of the Doctrine That "First in Time Is First in Right"*, 64 Neb. L. Rev. 349, 350 (1985), https://perma.cc/46QE-2D8V ("The notion that first in time is first in right is an ancient one.").

58. *Cappaert*, 426 U.S. at 140 n.5 ("Under the doctrine of prior appropriation, the first to divert and use water beneficially establishes a right to its continued use as long as the water is beneficially diverted.").

59. *See* Charles Wilkinson, *Introduction to Big Horn General Stream Adjudication Symposium*, 15 Wyo. L. Rev. 233, 234 (2015) (Tribal water rights "are independent of state water law. They

First, tribal water rights are frequently the most senior water rights in any given state because tribal *Winters* rights are said to "vest[] on the date of the reservation." [60] Following prior appropriation rules, this means that tribal water rights, established by treaty roughly between 1722 and 1868,[61] are generally "superior to the rights of [later] appropriators."[62] Additionally, unlike regular state-based water rights, tribal water rights are "not lost through non-use," so tribes do not have to use their water rights to keep their water rights.[63] Lastly, tribal *Winters* rights are *federal* water rights, meaning they are exempt from typical state jurisdiction.[64] Collectively, these differences make tribal water rights superior to normal state-based rights and exacerbate the existing tension between states and tribes.

C. The McCarran Amendment: The Problem of State Court Jurisdiction over Tribal Water Rights

In 1952, Congress attempted to fix what they saw as a flaw in the Western water governance system: the bifurcation of state and federal rights. This fix—known as the McCarran Amendment, 43 U.S.C. § 666, or simply

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fly in the face of the *first-in-time, first-in-right* and *use-it-or-lose-it* prior appropriation doctrine adopted in every western state. Traditionally, state water agencies have been beholden to non-Indian rights holders and viewed the tribes as interlopers who often have markedly different perceptions about water.") (emphasis in original) (citations omitted).

60. *Cappaert*, 426 U.S. at 138. While *Winters* rights associated with the creation of the reservation are said to vest with the creation of the reservation, other tribal water rights, aboriginal use water rights, are sometimes held to vest even earlier at "time immemorial." *See* United States v. Adair, 723 F.2d 1394, 1399 (9th Cir. 1983).

61. The U.S. Government reports the official treaty-making period between tribes and the federal government as between 1778 and 1871. *See Does the United States still make treaties with Indian tribes?*, Indian Aff., U.S. Dep't of the Interior (Nov. 15, 2019), https://perma.cc/VEV5-V98F. However, one of the first tribal treaties was The Great Treaty of 1722 between the Cayuga, Mohawk, Oneidea, Onondaga, Seneka, Mahican, and the U.S. Government. *See* The Great Treaty of 1722 or The Treaty of Albany, signed August 27, 1722, https://perma.cc/7LLR-8JAJ. One of the last federal-tribal treaties was the Treaty with the New York Indians of 1868 between the Onondaga, Cayuga, St. Regis Indians, Tuscarora, Seneca, and the U.S. Government. *See* Treaty with the New York Indians of 1868, December 4, 1868, https://perma.cc/A3S7-AJJ5.

62. *Cappaert*, 426 U.S. at 138.

63. Unlike state water rights, tribal water rights do not have to be put to beneficial use to "vest" or to remain established, so defining established tribal treaty-based water rights hinges on the original reservation-creating treaty documents, rather than proving continuous beneficial use. *See* Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist., 849 F.3d 1262, 1270 (9th Cir. 2017) (citing Colville Confederated Tribes v. Walton, 647 F.2d 42, 51 (9th Cir. 1981)) (to determine the water rights of tribal reservations "we consider the document and circumstances surrounding [the reservation's] creation, and the history of the Indians for whom it was created.") (citations omitted).

64. Hedden-Nicely, *supra* note 54, at 850 ("A typical water user in the United States acquires his or her water rights pursuant to state rather than federal law.").

McCarran—was sponsored by two U.S. senators frustrated by the federal government's disregard for, and abuse of, state water law.[65] The McCarran Amendment purported to solve the problem by waiving the federal government's sovereign immunity in certain state court water adjudications, thereby allowing states to comprehensively adjudicate water rights, both state and federal, within state boundaries.[66] However, the unanticipated impact of this "fix" was to inappropriately subject tribal water rights to state court jurisdiction, despite the notorious hostility of state courts towards tribal rights.[67] For tribal water rights, the McCarran Amendment "is an experiment that has failed."[68]

The McCarran Amendment reads in part:

> "Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of . . . water rights by appropriation under State law . . . and the United States is a necessary party to such suit."[69]

McCarran has been read to create a broad waiver of federal sovereign immunity so long as it is a "comprehensive" adjudication of a water system.[70]

Following the passage of McCarran, there were several questions about which federal water rights McCarran applied to; for example, for two decades after being passed, the McCarran Amendment was treated as not applying to tribal water rights. However, in 1971, almost twenty years after the passage of McCarran, the Supreme Court issued the first of several judicial expansions of state court jurisdiction under McCarran. In *U.S v. District Court In and For Eagle County, Colorado,* the Supreme Court held that McCarran applied not only to "water rights which the United States acquired pursuant to state law," which were the original concern of McCarran Amendment sponsors,[71] but also to certain reserved federal water rights not obtained under state law.[72] In *Eagle*

65. *Id.* at 864 ("Three separate water controversies . . . seem to have precipitated the development of the McCarran Amendment. . . . [I]n all three cases, the United States had acquired state law water rights through either purchase or by appropriation under state law, and then proceeded to use its sovereign immunity to preclude any state court adjudication or administration of those rights. This irresponsible and unfair practice acted to paralyze the state courts' ability to control state law water rights in those basins, which created significant political backlash against the United States and likely resulted in Congress taking action and passing the McCarran Amendment.").

66. 43 U.S.C. § 666.

67. *See* discussion *supra* pp. 18.

68. Lawrence J. MacDonnell, *General Stream Adjudications, the McCarran Amendment, and Reserved Water Rights*, 15 Wyo. L. Rev. 313, 342 (2015).

69. 43 U.S.C. § 666.

70. *See* Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 819 (1976) [hereinafter *Colorado River*].

71. *See supra* note 65 and accompanying text.

72. United States v. Dist. Ct. In & For Eagle Cnty., 401 U.S. 520, 523 (1971) [hereinafter *Eagle County*] ("[T]he first clause of § 666(a)(1), read literally, would seem to cover this case for 'rights to the use of water of a river system' is broad enough to embrace 'reserved' waters.").

County, the Court only addressed non-Indian federally reserved water rights, for example water rights reserved for national parks.[73]

But, five years later, in *Colorado River Water Conservation District v. United States*, the Supreme Court, in what some consider legislation by judicial fiat,[74] extended McCarran to federally reserved water rights for Indian tribes.[75] Although McCarran makes no mention of tribes, tribal sovereignty, or Indians at all, the Supreme Court interpreted McCarran to abrogate not just federal sovereign immunity, but also tribal sovereign immunity.[76] The Court stated that upholding tribal sovereignty for tribal water rights would frustrate McCarran's "clear federal policy" of avoiding "piecemeal" water rights adjudication.[77] However, the underlying purpose of McCarran was to prevent the U.S. government from buying state-law water rights and then avoiding adjudication by asserting sovereign immunity.[78] In fact, Professor Hedden-Nicely has suggested that Congress may not have intended the McCarran Amendment to touch tribal sovereign immunity at all.[79] Later, in additional expansions of McCarran jurisdiction, the Supreme Court also found that state adjudications of Indian water rights often supersede concurrent federal proceedings[80] and that res judicata can bar relitigating a state court water rights determination,[81] frequently making state courts the only available option for tribes.

Given tribes' fraught history with state governments and state courts, McCarran-based state jurisdiction poses a threat to tribal water rights. State courts have historically been "biased,"[82] "inhospitable,"[83] and outright "hostile"[84]

73. *Id.* at 523–24 (holding that non-Indian federally reserved water rights for national forests are within the scope of McCarran).
74. *See* Mary Wallace, *The Supreme Court and Indian Water Rights, in* American Indian Policy In The Twentieth Century 197, 210 (Vine Deloria, Jr. ed., 1985) (calling the Court's holding in *Colorado River* a "clear example of judicial legislation.").
75. *Colorado River*, 424 U.S. at 809 ("We conclude that the state court had jurisdiction over Indian water rights under the [McCarran] Amendment.").
76. *Id.*; *see also* 43 U.S.C. § 666.
77. *Colorado River*, 424 U.S. at 819; *see also Eagle County*, 401 U.S. at 526.
78. Hedden-Nicely, *supra* note 54, at 864.
79. *Id.* at 887–90.
80. Arizona v. San Carlos Apache Tribe of Ariz., 463 U.S. 545, 569–70 (1983) ("The McCarran Amendment, as interpreted in *Colorado River*, allows and encourages state courts to undertake the task of quantifying Indian water rights in the course of comprehensive water adjudications.") [hereinafter *San Carlos Apache*].
81. *See* Nevada v. United States, 463 U.S. 110, 143 (1983).
82. *See* Peter Nicolas, *American-Style Justice in No Man's Land*, 36 Ga. L. Rev. 895, 961 (2002) (arguing that state jurisdiction over Indian country in the criminal context "serves at best to replace the 'no forum' problem with a 'biased forum' problem.").
83. *San Carlos Apache*, 463 U.S. at 566–67 (acknowledging a "good deal of force" behind the idea that "[s]tate courts may be inhospitable to Indian rights.").
84. John Eduard Barry, *Oneida Indian Nation v. County of Oneida: Tribal Rights of Action and the Indian Trade and Intercourse Act*, 84 Colum. L. Rev. 1852, 1858–59 (1984) ("State courts, however, were generally hostile to tribal plaintiffs.").

toward Indians.[85] The Supreme Court even once famously said that states "are often [tribes'] deadliest enemies."[86] Leaving the protection of tribal water rights in the hands of state courts raises concern for many tribes, especially where tribes are supposed to be "immun[e] from state and local control."[87] Although some scholars suggest that state-tribal relations are improving,[88] continued state court corrosion of tribal water rights[89] suggests this is not enough to fully protect tribal resources.

After decades of jurisprudential tinkering, the McCarran Amendment now swallows any water right in its path, providing state courts with omnipotent oversight of water rights. In its modern form, the McCarran Amendment, as judicially interpreted, dictates that all water rights on a water system within a state's jurisdiction, including federal and tribal rights, be adjudicated in state court so long as the adjudication comprehensively covers that water system. This enormous scope has given rise to large-scale state water adjudications known as "general stream adjudications" or "GSAs," which are colossal single cases undertaking to adjudicate and decree all water claims on a given water system.[90] For example, the Gila River and Little Colorado River water rights adjudications are considered GSAs.[91] The "enormous scale" of these adjudications includes thousands of water right claims that sometimes "involve[s] entire states" in a single adjudication.[92] Importantly, although state courts hold jurisdiction in these GSAs, tribal water rights are still federal rights, meaning that state courts must

85. *See also* United States v. Kagama, 118 U.S. 375, 384 (1886) (stating that, because of states' "ill feeling" toward Indians, states are "often [Indians'] deadliest enemies."); Thomas Biolsi, Deadliest Enemies: Law and the Making of Race Relations On and Off Rosebud Reservation (2001); Bryan H. Wildenthal, *Fighting the Lone Wolf Mentality: Twenty-First Century Reflections on the Paradoxical State of American Indian Law*, 38 Tulsa L. Rev. 113, 145 (2002).

86. *Kagama*, 118 U.S. at 384.

87. *San Carlos Apache*, 463 U.S. at 570–71 (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973)) ("Nothing we say today should be understood to represent even the slightest retreat from the general proposition we expressed so recently in *New Mexico v. Mescalero Apache Tribe* []: 'Because of their sovereign status, [Indian] tribes and their reservation lands are insulated in some respects by an 'historic immunity from state and local control'. . . . But water rights adjudication is a virtually unique type of proceeding, and the McCarran Amendment is a virtually unique federal statute, and we cannot in this context be guided by general propositions.") (citations omitted).

88. *See* Matthew L.M. Fletcher, *Retiring the "Deadliest Enemies" Model of Tribal-State Relations*, 43 Tulsa L. Rev. 73, 74 (2007).

89. *See infra* Part I.D.

90. For an introduction to past and present GSAs up until 2015, *see* John E. Thorson, *Reflections on Western General Stream Adjudications Upon the Signing of Wyoming's Big Horn River Adjudication Final Decree*, 15 Wyo. L. Rev. 383, 401 (2015).

91. *Adjudications,* Arizona Dep't of Water Res., https://perma.cc/3DW6-BYHE.

92. Thorson (2006), *supra* note 54, at 303–05.

apply federal law to tribal water right determinations.[93] However, asking fifty different states to accurately apply and interpret federal Indian law, including tribal treaty rights, to over 500 different tribal nations leaves an ocean of tribal water rights doctrine for state courts to chart at their own leisure, and almost every state has landed in a different destination.

D. The Problem of State Court Inconsistency in Tribal Water Rights Doctrine

For what purposes do Indians get water rights? How are Indians allowed to use their water rights? What types of water do Indians have rights to? Under McCarran-enabled state jurisdiction,[94] these are the questions swirling around state court tribal water rights cases. Although the *Winters* doctrine "purpose[]" test[95] affirms the existence of tribal water rights, it does little to clarify how tribal water rights should be measured or determined. As a result, federal tribal water rights jurisprudence, now constructed by state courts, much resembles the work of Jackson Pollock: a splattering of haphazard doctrinal lines motivated more by individual state politics than the actual contours of federal law.[96] This gray area of tribal water right quantification doctrine has led to overwhelming and problematic inconsistency in state tribal water rights jurisprudence. Below I offer a few brief examples of the scope of state court inconsistency in tribal water rights doctrine.

One question creating a schism in tribal water right doctrine across states is whether tribal water rights extend to groundwater, rather than just surface water. Three state courts and one circuit court have all answered this question differently despite having factually and textually similar cases.[97] The Arizona Supreme Court held that tribal *Winters* rights *do* include access to groundwater but only when surface water was insufficient.[98] The Wyoming Supreme Court held that groundwater was *not* included in *Winters* rights,[99] and the Montana

93. *See* Joint Bd. of Control of Flathead v. United States, 832 F.2d 1127, 1131 (9th Cir. 1987) (quoting *San Carlos Apache Tribe*, 463 U.S. at 571) ("Once a court takes jurisdiction to resolve a water rights dispute, it has 'a solemn obligation to follow federal law' that governs Indian water rights.").

94. *See supra* Part I.C.

95. *See* United States v. Adair, 723 F.2d 1394, 1409 (9th Cir. 1983) (quoting United States v. New Mexico, 438 U.S. 696, 701 (1978)) (citations omitted).

96. *See* discussion *supra* pp. 16–17.

97. *See* Catherine Schluter, *Indian Reserved Rights to Groundwater: Victory for Tribes, for Now*, 32 Geo. Env't L. Rev. 729, 731 (2020).

98. *In re* Gen. Adjudication of All Rts. to Use Water in Gila River Sys. & Source, 989 P.2d 739, 748 (1999).

99. *In re* Gen. Adjudication of All Rts. to Use Water in the Big Horn River Sys., 753 P.2d 76, 100 (Wyo. 1988), *aff'd sub nom.* Wyoming v. United States, 492 U.S. 406 (1989), *abrogated by* Vaughn v. State, 962 P.2d 149 (Wyo. 1998) ("[W]e hold that the reserved water doctrine does not extend to groundwater.") [hereinafter *Big Horn I*].

Supreme Court held that *Winters* rights *could* include groundwater.[100] The Ninth Circuit, which binds Montana and Arizona but not Wyoming, later held that *Winters* rights *can* extend to groundwater.[101]

Another question plaguing lower courts is whether the *New Mexico* "primary-secondary purpose test"[102] applies in the determination of federal Indian *Winters* water rights.[103] The *New Mexico* primary-secondary purpose test was originally established only for non-Indian federal water rights like national parks; it holds that water is reserved only for the primary purpose of the federal reservation but not for any "secondary" purposes.[104] The Arizona Supreme Court rejected the primary-secondary test for federal Indian water rights, holding that federal Indian and federal non-Indian water rights were distinct and do not receive the same legal analysis.[105] Similarly, the Montana Supreme Court[106] and the Idaho Supreme Court[107] also rejected the primary-secondary test for Indian water rights. Conversely, the Wyoming Supreme Court[108] and the Ninth Circuit[109] have applied the primary-secondary test to Indian *Winters* rights. Other

100. The Confederated Salish & Kootenai Tribes of the Flathead Rsrv. v. Stults, 59 P.3d 1093, 1099 (Mont. 2002) ("We see no reason to limit the scope of our prior holdings by excluding groundwater from the Tribes' federally reserved water rights in this case.").

101. *See Agua Caliente*, 849 F.3d at 1272 ("[T]he *Winters* doctrine does not distinguish between surface water and groundwater. Rather, its limits derive only from the government's intent in withdrawing land for a public purpose and the location of the water in relation to the reservation created.") (citations omitted).

102. *See* United States v. New Mexico, 438 U.S. 696, 702 (1978) [hereinafter *New Mexico*].

103. *See generally* Nadège Montagnon, *The Recent Idaho Supreme Court Ruling on the Reserved Rights of the Coeur d'Alene Reservation: Analysis of the Consistency of the State Court Case with Federal Law on Reserved Water Rights*, 57 Idaho L. Rev. 175 (2022).

104. For example, the Supreme Court has held that "reserv[ing] water for recreation" is only a secondary purpose of water rights reserved for national forests, whereas a primary purpose of these national forest water rights is "to preserve the timber." *New Mexico*, 438 U.S. at 702, 711, 718.

105. *In re* Gen. Adjudication of All Rts. to Use Water in Gila River Sys. & Source, 35 P.3d 68, 77 (Ariz. 2001) [hereinafter *Gila V*].

106. *State ex rel.* Greely v. Confederated Salish & Kootenai Tribes, 712 P.2d 754, 767 (Mont. 1985) ("Unlike Indian reserved rights, which include water for future needs and changes in use, federal reserved rights are quantified on the basis of the original, primary purposes of the reservation. Water for secondary purposes is not factored into the quantification.").

107. *In re* CSRBA Case No. 49576 Subcase No. 91-7755, 448 P.3d 322, 344 (Idaho 2019) ("The reasons given by the Montana and Arizona courts are persuasive as to why the purposes of Indian reservations should not be construed similarly to non-Indian federal reservations. Even more to the point, the primary-secondary distinction runs counter to the concept that the purpose of many Indian reservations was to establish a 'home and abiding place' for the tribes. . . . We are unpersuaded *New Mexico* and its primary-secondary analysis should apply to Indian Reservations.") (citations omitted) [hereinafter *CSRBA*].

108. *In re* Gen. Adjudication of All Rts. to Use Water in the Big Horn River Sys., 835 P.2d 273, 278–79 (Wyo. 1992) [hereinafter *Big Horn III*].

109. *See Agua Caliente*, 849 F.3d at 1269 n.6 ("We have previously noted that *New Mexico* is 'not directly applicable to *Winters* doctrine rights on Indian reservations.' However, it clearly 'establish[es] several useful guidelines.' Thus, we consider its application here." (quoting

looming issues of potential state court disagreement include whether tribes can lease or market their water rights,[110] whether tribes or states can regulate or manage tribal waters,[111] and what quantification standard should apply.[112]

This growing state court inconsistency on questions of tribal water rights creates significant legal disparities for tribes, disparities based solely upon which state the tribe was relocated into by the U.S. government. One of "the West's wisest voices on water,"[113] Professor Lawrence MacDonnell explained:

> Whether consciously or not, [state courts] may well tend to apply federal law in a way that produces results protective of state interests and constrictive of federal interests. It is difficult, in reading many of these state court decisions [on tribal water rights], not to be aware of the explicit or implicit hostility toward reserved rights they often display. Put simply, the diversity of courts considering these matters has generated a diversity of results. And the promise of oversight by the U.S. Supreme Court to sort out these issues has proven illusory. It is time to remove this authority from state general adjudication courts.[114]

Professor MacDonnell further urges that tribal water rights be removed from state court jurisdiction:

> [W]e now have substantial experience with state court determination of federal and Indian reserved rights. . . . [It has been] a decidedly mixed experience with sometimes directly conflicting results that are not being addressed through U.S. Supreme Court review, and with prominent examples of exactly the kinds of concerns expressed [by Supreme Court Justices] about expecting state courts to evenhandedly decide matters that are perceived as favoring federal or tribal interests at the expense of local concerns. For all these reasons it is time to return determination of federal and Indian reserved water rights to federal courts.[115]

United States v. Adair, 723 F.2d 1394, 1408 (9th Cir. 1983))) (citations omitted); *see also CSRBA*, 448 P.3d at 344 ("Notably, the Ninth Circuit appears to have endorsed a homeland purpose theory but still used the *New Mexico* primary-secondary distinction when analyzing reservation purposes. . . . [This is a] somewhat contradictory Ninth Circuit precedent.") (citations omitted).

110. *See* Chris Seldin, *Interstate Marketing of Indian Water Rights: The Impact of the Commerce Clause*, 87 Cal. L. Rev. 1545, 1546 (1999); *see also* Samuel Joyce, *Tribal Water Sovereignty: Authorizing Indian Water Marketing in the Colorado Basin*, 35 Stan. L. & Pol'y Rev. 161, 165 (2024).

111. *See* David H. Getches, *Management and Marketing of Indian Water: From Conflict to Pragmatism*, 58 U. Colo. L. Rev. 515, 527 (1988).

112. *Compare Gila V*, 35 P.3d at 72 (using the homeland standard), *with Big Horn I*, 753 P.2d at 96 (using a version of the Practically Irrigable Acreage (PIA) standard, holding that "it was the intent at the time to create a reservation with a sole agricultural purpose.").

113. Wilkinson, *supra* note 59, at 236 (2015) ("Two of the West's wisest voices on water are Lawrence MacDonnell, longtime Executive Director of the Natural Resources Law Center at the University of Colorado and law faculty member at the Wyoming and Colorado law schools; and John Thorson, who has contributed to western water law and policy for more than thirty years, including work as special master in both the Arizona General Stream adjudication and the ongoing Lummi Decree in Washington State.").

114. MacDonnell, *supra* note 68, at 342–43.

115. *Id*. at 344–45.

The ideal solution, as Professor MacDonnell illustrates, would be for Congress to step in and amend the McCarran Amendment or for the Supreme Court to resolve jurisprudential divergence. In the interim, however, there may be another partial solution. Providing tribes the tools to bring a judicial takings claim could help mitigate the effects of tribal water right diminishment at the hands of state courts.

II. Judicial Takings: A Potential Fifth Amendment Cause of Action

As tribal water rights doctrine developed, a separate property law doctrine was emerging in parallel: judicial takings doctrine. Flowing from traditional takings doctrine, the theory of judicial takings suggests that judicial action, particularly state judicial action, can constitute a taking under the Fifth Amendment. The Fifth Amendment Takings Clause, applied to the states via the Fourteenth Amendment,[116] provides that "private property" shall not "be taken for public use, without just compensation."[117] Accordingly, a successful Fifth Amendment takings claim requires a cognizable property right or interest which has been "taken" by the government for public use without just compensation.[118] Thus, if a plaintiff owns "'a stick in the bundle of property rights'" the government cannot take that "'stick'" without just compensation.[119] This clause, as oft reported, "was designed to bar Government from forcing some people alone to bear public burdens which . . . should be borne by the public as a whole."[120] This article ultimately argues that tribal water rights are a stick that state courts have taken without just compensation.

Over time, takings doctrine, a primarily judge-defined doctrine, has expanded to encompass increasingly more types of government action. While the doctrine of physical takings is considered "as old as the Republic," other types of takings—including regulatory and exactions—are a "more recent vintage" crafted by the Court.[121] Currently, there are three well-established categories of

116. *See, e.g.*, Chicago, B. & Q.R. Co. v. City of Chicago, 166 U.S. 226, 238 (1897); Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 163–64 (1980).

117. U.S. Const. amend. V.

118. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 322 (2002) ("When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner . . . ." (citing United States v. Pewee Coal Co., 341 U.S. 114, 115 (1951))).

119. Karuk Tribe of Cal. v. Ammon, 209 F.3d 1366, 1374 (Fed. Cir. 2000) (quoting M & J Coal Co. v. United States, 47 F.3d 1148, 1154 (Fed. Cir. 1995)).

120. Armstrong v. United States, 364 U.S. 40, 49 (1960).

121. *Tahoe-Sierra*, 535 U.S. at 322 (quoting Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) [hereinafter *Penn Central*]).

political branch takings: physical takings, regulatory takings (total or partial),[122] and exactions.[123] And, although takings doctrine has historically applied primarily to legislative and executive action, expansion to the third branch of government, the judicial branch, has not been far behind.

The possibility of a judicial takings doctrine "has been floating around the courts since the early 1900s"[124] and occasionally received direct consideration by lower courts or dissenting justices[125] and interested scholars.[126] For example, in his commonly cited *Hughes v. State of Washington* concurrence, Justice Stewart suggested that certain judicial changes in "state property law" might "constitute a compensable taking" under the Fifth Amendment.[127] Similarly, in the *Stevens v. City of Cannon Beach* certiorari hearing, Justice Scalia, joined by Justice O'Connor, dissented from Court's denial of certiorari on the judicial takings issue, stating that "a State [may not] transform private property into public property without compensation" via "judicial decree."[128] Several other scholars have further chronicled the trajectory, merits, and complexities of judicial takings[129] so I do not reiterate that history here. Instead, I endeavor to apply the

122. *See, e.g.*, Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); *Penn Central*, 438 U.S. at 107; Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

123. *See, e.g.*, Dolan v. City of Tigard, 512 U.S. 374 (1994); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987).

124. *Judicial Takings, Judicial Federalism, and Jurisprudence: An Erie Problem*, 134 Harv. L. Rev. 808, 810–11 (2020) (citing Tidal Oil Co. v. Flanagan, 263 U.S. 444 (1924); Muhlker v. New York & H.R. Co., 197 U.S. 544 (1905)).

125. For an introduction to cases discussing judicial takings doctrine, *see, e.g.*, Hughes v. State of Wash., 389 U.S. 290, 295–96 (1967) (Stewart, J., concurring); Stevens v. City of Cannon Beach, 510 U.S. 1207, 1211–13 (1994) (Scalia, J., dissenting from denial of certiorari); Great Northern Ry. Co. v. Sunburst Oil & Refin. Co., 287 U.S. 358, 364–65 (1932); Brinkerhoff-Faris Tr. & Sav. Co. v. Hill, 281 U.S. 673, 681 n.8 (1930); Chi., B. & Q.R. Co. v. City of Chicago, 166 U.S. 226, 263 (1897) (Brewer, J., dissenting); Boise Cascade Corp. v. United States, 296 F.3d 1339, 1357 (Fed. Cir. 2002); Petro-Hunt, L.L.C. v. United States, 862 F.3d 1370, 1385–86 (Fed. Cir. 2017).

126. *See infra* note 129.

127. *Hughes*, 389 U.S. at 295–96.

128. *Stevens*, 510 U.S. at 1334.

129. Judicial takings doctrine has received significant scholarly attention. For an introduction to scholarly thought on judicial takings, *see, e.g.*, Maureen E. Brady, *Defining "Navigability": Balancing State-Court Flexibility and Private Rights in Waterways*, 36 Cardozo L. Rev. 1415, 1440–43 (2015); Peñalver, *supra* note 16; Barton H. Thompson, Jr., *Judicial Takings*, 76 Va. L. Rev. 1449, 1463–72 (1990); Roderick E. Walston, *The Constitution and Property: Due Process, Regulatory Takings, and Judicial Takings*, 2001 Utah L. Rev. 379, 425–33 (2001); W. David Sarratt, Note, *Judicial Takings and the Course Pursued*, 90 Va. L. Rev. 1487, 1502–10 (2004); Trevor Burrus, *Black Robes and Grabby Hands: Judicial Takings and the Due Process Clause*, 21 Widener L.J. 719 (2012); J. Peter Byrne, *Stop the* Stop the Beach *Plurality!*, 38 Ecology L.Q. 619, 630–31 (2011); Timothy M. Mulvaney, *The New Judicial Takings Construct*, 120 Yale L.J. Online 247 (2011); Roderick E. Walston, *The Constitution and Property: Due Process, Regulatory Takings, and Judicial Takings*, 2001 Utah L. Rev. 379; Ian Fein, Note, *Why Judicial Takings Are Unripe*, 38 Ecology L.Q. 749 (2011); Michael R. Salvas, Note

most recent developments in judicial takings jurisprudence within the context of tribal water rights.

In the 2010 case *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, the Supreme Court recognized a judicial takings claim for the first time.[130] In *Stop the Beach*, a Supreme Court plurality provided that any branch of government can perpetrate a taking, stating, "[i]f a legislature *or a court* declares that what was once an established right of private property no longer exists, it has taken that property."[131] *Stop the Beach* was the first time the Court recognized a takings claim predicated on judicial, rather than executive or legislative action. However, due to its lack of majority opinion, or plurality status, *Stop the Beach* left more questions than answers. With Justice Stevens recused, only three justices—Chief Justice Roberts, Justice Thomas, and Justice Alito—signed on to the portion of Justice Scalia's opinion which endorsed judicial takings theory.[132] Justice Kennedy, joined by Justice Sotomayor, concurred in the judgment that *Stop the Beach* itself was not a judicial taking but took issue with the possibility of judicial takings as a Fifth Amendment cause of action.[133] Justice Breyer, joined by Justice Ginsburg, also concurred in the judgment but stated that the question of judicial takings need not be reached in *Stop the Beach*.[134] Neither concurring opinion affirmatively held that judicial action can constitute a violation of the Takings Clause. Thus, under the *Marks* rule,[135] *Stop the Beach* amounts to a Supreme Court shoulder-shrug on whether judicial decisions can constitute a Fifth Amendment takings claim.

Since *Stop the Beach*, lower courts and legal scholars alike have struggled to clearly define what constitutes a judicial taking, but this article intends to offer a potential answer to that question. Although some courts recognize the viability of a potential judicial takings doctrine,[136] in most judicial takings cases lower courts have avoided the issue altogether, finding that, whatever a judicial taking may look like, the case presented is not one. The key issue impeding judicial takings doctrine seems to be pinpointing an appropriate fact pattern. Thus far,

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and Comment, *A Structural Approach to Judicial Takings*, 16 Lewis & Clark L. Rev. 1381 (2012); David Wagner, Note, *A Proposed Approach to Judicial Takings*, 73 Ohio St. L.J. 177 (2012); D. Benjamin Barros, *The Complexities of Judicial Takings*, 45 U. Rich. L. Rev. 903 (2011); Josh Patashnik, *Bringing A Judicial Takings Claim*, 64 Stan. L. Rev. 255, 256 (2012).

130. 560 U.S. 702 (2010).

131. *Id*.

132. Part II and III of the *Stop the Beach* opinion address the theory that "the existence of a taking does not depend upon the branch of government that effects it." *Id.* at 725.

133. *Id*. at 733–34 (Kennedy, J., concurring in part and concurring in the judgment).

134. *Id*. at 743 (Breyer, J., concurring in part and concurring in the judgment).

135. Under Marks v. United States, 430 U.S. 188, 192 (1977), in a plurality opinion with no clear majority, the narrowest holding is said to control. For an application of *Marks* to the *Stop the Beach* plurality, *see Judicial Takings, Judicial Federalism, and Jurisprudence: An Erie Problem*, 134 Harv. L. Rev. 808, 813–14 (2020).

136. *See* Smith v. United States, 709 F.3d 1114, 1116–17 (Fed. Cir. 2013) ("[I]t was recognized prior to Stop the Beach that judicial action could constitute a taking of property.").

the best fitting candidates have been state court decisions converting private waterfront property into public waterfront property,[137] but reviewing courts have struggled to move judicial takings beyond this narrow fact pattern, making it difficult for a judicial takings doctrine to develop. In declining to find a judicial taking, the 7th Circuit explained:

> Since *Stop the Beach* was decided, no federal court of appeals has recognized this judicial-takings theory. What has occurred instead is avoidance: every circuit to consider the issue has expressly declined to decide whether judicial takings are cognizable. Instead, each court has assumed without deciding that *if* such a cause of action were to exist, the relevant test would be the one Justice Scalia suggested in his *Stop the Beach* plurality opinion: did some arm of the state declare that "what was once an established right of private property no longer exists"? In each of the cases that have reached our sister circuits, the courts have held that the challenged state-court decision had not erased an *established* property right. Thus, even if there were a theoretical claim for a "judicial" taking, the plaintiffs failed.[138]

Thus, the doctrine of judicial takings is left in legal purgatory. This article endeavors to nudge judicial takings doctrine forward by identifying a prime candidate for such a claim: tribal water rights diminished by state court adjudication.

III. State Court Diminishment of Tribal Water Rights: A Candidate for Judicial Takings Redress

Thus far, tribal water rights and judicial takings doctrine have been on parallel tracks developing separately from each other; this article argues that these two doctrines can be joined to create a new claim. Despite the general buzz around judicial takings since *Stop the Beach*,[139] scholars and courts haven't solved the lingering question: What could legitimately constitute a judicial taking?[140] Here I offer a new answer to this question. I argue that tribal water

137. *See, e.g.,* Hughes v. State of Wash., 389 U.S. 290, 291 (1967); Stevens v. City of Cannon Beach, 510 U.S. 1207 (1994); *Stop the Beach*, 560 U.S. 702 (2010).

138. *See* Pavlock v. Holcomb, 35 F.4th 581, 588 (7th Cir.), *cert. denied*, 143 S. Ct. 374 (2022) (quoting *Stop the Beach.,* 560 U.S. at 715); *see also* Shinnecock Indian Nation v. United States, 112 Fed. Cl. 369, 383 (2013), *aff'd in part, vacated in part, remanded*, 782 F.3d 1345 (Fed. Cir. 2015) (dismissing a judicial takings claim on procedural grounds and noting that "plaintiff cites no case in which a property owner prevailed on a judicial takings . . . ."); Wells Fargo Bank, N.A. v. Mahogany Meadows Ave. Tr., 979 F.3d 1209, 1215 (9th Cir. 2020) (declining to find a judicial taking); PPW Royalty Tr. by & through Petrie v. Barton, 841 F.3d 746, 756 (8th Cir. 2016), *as amended* (Oct. 28, 2016) (stating "a claim of judicial taking would have failed" because there was no judicially taken property right); *In re* Lazy Days' RV Ctr. Inc., 724 F.3d 418, 425 (3d Cir. 2013) (same).

139. *See infra* note 129 and accompanying text.

140. Some scholars have begun attempting to solve this question. *See* Brady, *supra* note 129, at 1456; Peñalver, *supra* note 16, at 364–67.

rights, diminished under state court adjudication, are a candidate for a compensable judicial takings claim. In state court water adjudications, especially in GSAs, tribal water rights are being interpreted and determined not by legislative or executive action, but by state judicial action. Thus, a *judicial* takings claim, rather than a legislative or executive takings claim, is the only viable takings claim.

To illuminate the broad contours of the judicial takings of tribal water rights argument, consider the following hypothetical. Tribe A is involved in a water rights adjudication in State B. Tribe A has a federal treaty that provides for tribal hunting and fishing rights. However, State Court B finds that the *Winters* "purpose" of the reservation is an "agricultural" purpose and subsequently rules that the tribe receives no water rights for water use related to hunting and fishing. In this hypothetical, Tribe A could of course appeal State B's determination of water rights as an incorrect statement of law. However, if that appeal isn't successful, a judicial takings claim could serve as an additional, later tool for Tribe A to seek justice for their taken water rights—especially if direct appeal fails because there is, for whatever reason, insufficient water to affirm all of Tribe A's water rights. Whether or not a judicial takings claim would require truly different criteria than a substantive appeal is still an open question, but, at minimum, a judicial takings claim could theoretically allow a lower court ruling to stand, while also compensating the party—creating a way for tribes to find redress for diminished water rights. These types of judicial takings claims would also slowly help dismantle the maze of state court tribal water rights decisions by reinforcing the idea that state courts cannot simply deny or diminish tribal water rights without justice. Tribes have historically brought successful executive and legislative takings claims;[141] it is imaginable that tribes could also bring a judicial takings claim. As then-Professor and now-Dean Stacy L. Leeds pointed out, over the course of history, federal and state actions have repeatedly "divested American Indians of vast land holdings" frequently "without consent, and at times, without compensation."[142] Or, as Professor Ezra Rosser recently put it: "The taking of Indigenous land in furtherance of other societal goals is so ubiquitous and so fundamental to the American project that sometimes acts of dispossession are not even recognized as such."[143] It is time that state-court diminishment of tribal water rights is recognized as a taking, allowing tribes to

141. *See, e.g.*, United States v. Shoshone Tribe of Indians of the Wind River Rsrv. in Wyo., 304 U.S. 111 (1938) (granting compensation to the tribe for the taking of reservation natural resources); United States v. Sioux Nation of Indians, 448 U.S. 371 (1980) (holding that since "Congress had not made a good-faith effort to give the Sioux the full value of the Black Hills," the tribe was entitled to compensation for a taking).

142. Stacy L. Leeds, *By Eminent Domain or Some Other Name: A Tribal Perspective on Taking Land*, 41 Tulsa L. Rev. 51, 52–53 (2005).

143. Ezra Rosser, *Progress and the Taking of Indigenous Land*, 85 Ohio St. L.J. 623 (2025).

be compensated for the dispossession of tribal water rights at the hands of state courts.

This Part will proceed in two Subsections. In Subsection A, I outline the requirements for a successful judicial takings claim and explain how state court diminishment of a tribal water right could satisfy these requirements. In Subsection B, I provide a judicial takings case study. I use an existing tribal water rights adjudication case and analyze it under a judicial takings approach.

A. Finding a Judicial Taking: State Court Decrees that Diminish Established Tribal Water Rights

Under *Stop the Beach*, a court has executed a judicial taking when the court "declares that what was once an established right of private property no longer exists."[144] Although some have critiqued the administrability of this "establishedness" judicial taking test,[145] this is the test most closely and most recently articulated by the Supreme Court. Accordingly, I will apply the Supreme Court's *Stop the Beach* judicial takings test to the case of state court tribal water right determinations.[146]

First, I outline how some types of tribal water use rights, for example water for ceremonial or fishing uses, can be *sufficiently established* to substantiate a Fifth Amendment claim. The first requirement of a successful judicial takings claim is demonstrating an "established" property interest.[147] Unfortunately for our purposes, there is no universal test for the "establishedness" of a property right under a takings claim. Instead, courts generally apply background principles of law and "existing . . . understandings" to determine what qualifies as an established property interest.[148] Although there has been much discussion on

144. *Stop the Beach*, 560 U.S. at 715.

145. *See* Brady, *supra* note 129, at 1445–48.

146. This article assumes that the "public use" element of a taking is satisfied when a state court diminishes a tribe's water rights in a GSA. *See Stop the Beach*, 560 U.S. at 713 ("States effect a taking if they recharacterize as public property what was previously private property."). There are several theories for why this type of judicial action may, or may not, satisfy the public use requirement, but those are outside the scope of this article. For one analysis on when judicial takings claims may satisfy the public use requirement, *see* D. Benjamin Barros, *The Complexities of Judicial Takings*, 45 U. Rich. L. Rev. 903, 930 (2011) (suggesting that most takings for public use follow a "private-to-public" path of transfer).

147. *See Stop the Beach*, 560 U.S. at 715; *see also Penn Central*, 438 U.S. at 125 (To be a Fifth Amendment taking, government action must "interfere with interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute 'property' for Fifth Amendment purposes.").

148. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1030 (1992) (stating courts "traditional[ly] resort to 'existing rules or understandings that stem from an independent source such as state law' to define the range of interests that qualify for protection as 'property' under the Fifth and Fourteenth Amendments." (quoting Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972))).

whether water rights qualify "takings property,"[149] "[a]s a general matter, courts have long recognized water rights as a form of property protected by the Fifth Amendment."[150] The Supreme Court has explicitly held that water rights are property interests that can be "taken" under the Fifth Amendment.[151] Thus, the *existence* of tribal water rights as an established tribal property interest is relatively undisputed.[152] However, it is uncertain whether a certain *scope* of tribal water rights—for example certain water use rights—can be considered sufficiently established to support a Fifth Amendment property interest in a specific type of water use. Here, I argue that it can.

If a specific water use is established by a tribe's treaty, then that water use should be considered an established property interest within a tribe's *Winters* rights. *Winters* water rights are reserved, or established, to the extent "necessary to fulfill the [purpose of the reservation]."[153] Thus, if under the treaty, the purpose of a reservation includes a specific use for water, that use must be considered an established property right. To further elucidate this point, consider our previous hypothetical example: If a treaty guarantees Tribe A the right to fish, as many treaties do, there must be an associated water right for that right to

149. *See* Shelley Ross Saxer, *The Fluid Nature of Property Rights in Water*, 21 Duke Env't L. & Pol'y F. 49, 49 (2010) (suggesting there are "no consistent answers."); Sandra B. Zellmer & Jessica Harder, *Unbundling Property in Water*, 59 Ala. L. Rev. 679, 681 (2008) (same).

150. Hansen v. United States, 65 Fed. Cl. 76, 123 (Fed. Cl. 2005) (quoting United States v. Alexander, 148 U.S. 186, 191–92 (1893)); *see also* Int'l Paper Co. v. United States, 282 U.S. 399, 407 (1931) ("There is no room for quibbling distinctions between the taking of [water] power and the taking of water rights. The petitioner's right was to the use of the water; and when all the water that it used was withdrawn [by the government] . . . it is hard to see what more the Government could do to take the use."); Washoe County v. United States, 319 F.3d 1320, 1326 (Fed. Cir. 2003) ("In the context of water rights, courts have recognized a physical taking where the government has physically diverted water for its own consumptive use or decreased the amount of water accessible by the owner of the water rights."); Luis Inaraja Vera, *Takings Property and Appropriative Water Rights*, 44 Cardozo L. Rev. 271, 303 (2022) ("[I]t is reasonable to conclude that common law appropriative rights meet all the necessary requirements to be considered constitutional property for takings purposes.").

151. *See* Dugan v. Rank, 372 U.S. 609, 623–25 (1963) (stating that a physical taking of water rights has occurred "if any part of respondents' claimed water rights were invaded . . . A seizure of water rights need not necessarily be a physical invasion of land. It may occur upstream, as here. Interference with or partial taking of water rights in the manner it was accomplished here might be analogized to interference or partial taking of air space over land . . . .").

152. *Winters* guarantees the existence of water rights for treaty tribes, even if the treaty is silent on the issue of water rights. *See Winters*, 207 U.S. at 576–77 ("The lands were arid, and, without irrigation were practically valueless. And yet, it is contended [by Petitioners that] the means of irrigation were deliberately given up by the Indians. . . . [I]t cannot be supposed that the Indians were alert to exclude by formal words every inference which might militate against or defeat the declared purpose [of the treaty]."); *see also Big Horn I*, 753 P.2d at 91 ("The treaty establishing the Wind River Indian Reservation . . . is silent on the subject of water for the reservation."); *Navajo Nation*, 599 U.S. at 559 (citing Treaty Between the United States of America and the Navajo Tribe of Indians, Sept. 9, 1849, 9 Stat. 974 (ratified Sept. 24, 1850)) (suggesting that the Navajo treaty does not directly address water rights.).

153. *Caeppart*, 426 U.S. at 141.

fish to be meaningful—e.g., the treaty necessitates an instream minimum flow right to ensure adequate water for fish to survive.[154] Thus, that fishing-related water right is a specific water use property right sufficiently established to be compensable under the Fifth Amendment if taken.[155] The United States Court of Federal Claims, which has jurisdiction over all takings claims against the United States over $10,000,[156] held that, "[i]n the context of water rights, a mere restriction on use—the hallmark of a regulatory action—completely eviscerates the right itself since plaintiffs' sole entitlement is to the use of the water," thereby "effect[ing] a physical taking."[157] The court further held that although the government was "certainly free" to regulate the water rights, "it must simply pay for the water it takes [in the process]."[158] This analysis is helpful for understanding the argument for judicial takings of tribal water rights. State courts are certainly free to adjudicate water rights in an attempt to correct the extensive over appropriation of state water sources—effectively regulating the water rights. However, state courts cannot *decrease* or *amend* established water rights without providing just compensation for the lost property interests it takes in doing so.

The second requirement for a successful judicial takings claim is demonstrating that the court contravened established law—in other words, the court "took" the property interest from the owner. In *Stop the Beach*, the court found that, notwithstanding broad judicial takings theory, no taking had occurred because the Florida Supreme Court had simply enforced *existing* law, rather than *changed* the law.[159] In other words, the Florida Supreme Court had "merely activate[d] existing limitations already embedded within [the owner's] title," and so had not carried out a taking.[160] Conversely, when a court changes the law, it "alter[s] existing property entitlements," "tak[ing] property from an owner for public use."[161] Although there is robust scholarly debate over courts can be

154. *See* United States v. Adair, 723 F.2d 1394, 1408 (9th Cir. 1983) (quoting *New Mexico*, 438 U.S. at 700) (citations omitted).

155. *See id.* at 1414 (holding the Klamath Tribe's treaty right to hunt and fish "confirm[s] to the Tribe the amount of water necessary to support its hunting and fishing rights as currently exercised.").

156. *See* Jan's Helicopter Serv., Inc. v. F.A.A., 525 F.3d 1299, 1310 (Fed. Cir. 2008) ("Because appellants are asserting claims against the government based on a money-mandating provision of the Constitution and seeking money damages in excess of $10,000, the Court of Federal Claims has exclusive jurisdiction over those claims.").

157. Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313, 319 (2001) ("[T]he right of property in water is usufructuary, and consists not so much of the fluid itself as the advantage of its use." (quoting Eddy v. Simpson, 3 Cal. 249, 252–253 (1853)).

158. *Id.* at 324.

159. *Stop the Beach*, 560 U.S. at 715 ("If a legislature *or a court* declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation. '[A] State, by *ipse dixit,* may not transform private property into public property without compensation.'") (emphasis in original) (citation omitted).

160. Peñalver, *supra* note 16, at 312.

161. *Id.*

said to *change* the law, pragmatic scholars have suggested courts can and do.[162] Under this framework then, to prove a water right taking by judicial decree, a party likely must prove that the court mitigated or changed an established property right by changing the law in a way that "takes" the property right from the owner. Here I argue that established tribal water rights are "taken" when a state court holds that a tribe does not have a right to water that the tribe previously had a right to under federal treaty law. To return to the previous hypothetical: if State Court B were to deny Tribe A a fishing "use type" water right, the court would arguably have "taken" a sufficiently established water right, thus satisfying the requirements for a Fifth Amendment judicial takings claim.

B. Case Study: Wyoming State Court Disallowance of Water Rights for Tribal Fishing as a Judicial Taking

To demonstrate what a real case for a judicial takings claim might look like, I analyze the previous case of *Big Horn I* as a judicial taking of tribal water rights—specifically, as a judicial taking of a discrete water use right for fishing.[163] Wyoming's Big Horn General Stream Adjudication[164] covered 20,500 square miles, or about 21% of Wyoming, took over thirty years to litigate, included six Wyoming Supreme Court decisions, and involved around 20,000 water right claimants on the Big Horn River System.[165] In *Big Horn I*, the Wyoming Supreme Court held that the 1868 Treaty of Fort Bridger[166] ("the Treaty") established the Shoshone and Arapahoe[167] Wind River Reservation for a "sole

162. *See* Kermit Roosevelt III, *A Little Theory Is A Dangerous Thing: The Myth of Adjudicative Retroactivity*, 31 Conn. L. Rev. 1075, 1076 (1999) (explaining that "the positive source of the common law is just the judicial decisions in which it is embodied. With no positive source independent of judicial decisions, the law must change as the decisions change.").

163. *See Big Horn I*, 753 P.2d at 91. The Big Horn River GSA consists of several cases. For our purposes, I will only focus on *Big Horn I*. *See* Jason A. Robison, *Wyoming's Big Horn General Stream Adjudication*, 15 Wyo. L. Rev. 243, 278 (2015) ("Over the course of a roughly fourteen-year period extending from February 1988 to June 2002, the Wyoming Supreme Court issued five opinions and one substantive order, and the U.S. Supreme Court released one per curiam decision, to address the diverse legal issues presented in the *Big Horn* adjudication regarding the existence, nature, and scope of the reserved right held by the Eastern Shoshone and Northern Arapaho tribes, as well as derivative water rights held by Indian and non-Indian parties.").

164. For a thorough case study on the entire Big Horn GSA, *see* Jason A. Robison, *Wyoming's Big Horn General Stream Adjudication*, 15 Wyo. L. Rev. 243, 309 (2015).

165. *See* Wilkinson, *supra* note 59, at 234.

166. Treaty with the Eastern Band Shoshoni and Bannock, July 3, 1868, 15 Stat., 673, https://perma.cc/FG6J-UQZN [hereinafter Fort Bridger Treaty].

167. The Treaty was executed between the Eastern Band Shoshone and Bannock Indians and the United States. The Eastern Shoshones were original treaty signatories. However, the Northern Arapaho tribe was later forcibly relocated to the Wind River Reservation by the federal government. *See* Shoshone Tribe of Indians v. United States, 299 U.S. 476, 487–88, 494 (1937); *see also* Righetti, *supra* note 17, at 292, 340. Dividing resources between the Shoshone

agricultural purpose."[168] Under this finding, the Court held that the tribes should only receive water rights connected to agricultural uses, which it found to include consumptive rights for municipal, domestic, commercial, and livestock uses.[169] The *Big Horn I* court held that the tribes were not entitled to water rights for fishing, mineral, industrial,[170] wildlife, or aesthetic purposes[171] because they were not subsumed within the agricultural purpose of the reservation. This ruling is an example of a judicial taking because the court contravenes clearly established law—namely, the treaty—in holding that the tribe should receive only water rights connected to a solely agricultural purpose.[172] Diminishing Shoshone tribal water rights to only those subsumed under a narrow agriculture-only purpose is a judicial taking of the tribe's non-agricultural water rights.

Although the Wyoming Supreme Court later awarded tribes around 500,000-acre-feet[173] of water rights, an appropriately significant award given the tribes' reservation and treaty rights,[174] the *Big Horn I* decision itself is a controversial, if not anti-canonical, case in tribal water law. The *Big Horn I* decision has received significant criticism specifically for its holding that the Wind River Reservation was established for a sole agricultural purpose despite the Treaty

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and Arapahoe tribes has at times been a controversial matter. *See* United States v. Shoshone Tribe of Indians, 304 U.S. 111, 112 (1938) (reviewing the Shoshone tribe's suit against the U.S. Government to recover the area of reservation occupied by the Arapahoe tribe following the Arapahoe's forced relocation to Wind River). Because the Shoshone tribe was the original signatory to the Treaty, I refer mainly to the Shoshone tribe in this article. However, this does not imply that the Arapahoe tribe does not have valid water claims to the Wind River Reservation.

168. *Big Horn I,* 753 P.2d at 96.

169. *Id*. at 99 ("The logic which supports a reservation of surface water to fulfill the purpose of the reservation also supports reservation of groundwater.").

170. *Id*. at 98 ("The evidence is not sufficient to imply a fishery flow right absent a treaty provision. . . . Neither the Tribes nor the United States has cited this court to any provision of the treaty or other evidence indicating that the parties contemplated in 1868 that a purpose of the reservation would be for the Indians to develop the minerals.").

171. *Id*. at 99.

172. *Id*. at 96.

173. An acre-foot is a common measurement tool for quantifying water rights. One acre-foot of water equates to 325,851 gallons or 1,233 cubic meters of water. *See Water Science Glossary of Terms*, U.S. Geological Surv., https://perma.cc/A6S4-BVV5.

174. *See* Robison, *supra* note 163, at 282–83 (The court "concluded as follows: (1) 107,976 acres of practicably irrigable acreage existed on the reservation (54,216 acres of historic lands, 53,760 acres of future lands), and (2) a 499,862 acre-feet reserved right (290,490 acre-feet for historic lands, 209,372 acre-feet for future lands) was appropriate based upon this PIA."); *see also* Wilkinson, *supra* note 59, at 235 ("To the court's lasting credit, the decision awarded the tribes a reserved water right of some 500,000 acre feet—by far the largest water right in the basin, and so substantial that the tribes elected not to petition to the United States Supreme Court for certiorari, although the tribes did counterclaim on several issues in response to the state's certiorari petition.").

expressly providing numerous other rights to the Shoshone tribe.[175] These express rights include the right to hunt,[176] the right to industrial development,[177] the right to self-governance,[178] the right to education,[179] provision of healthcare,[180] and the right to develop agriculturally.[181] The Treaty also explicitly states that the Shoshones "will make said reservations their permanent home."[182] Professor and former Solicitor of the Department of the Interior Robert Anderson even called the Wyoming Supreme Court's *Big Horn I* decision "plainly incorrect," particularly for the court's disregard for the "Indian law canons of construction" and excessively "narrow" holding on the "purposes of a reservation."[183] Additionally, *Big Horn I* was decided by a 3-2 split on the Wyoming Supreme Court.[184] The *Big Horn I* majority overturned the decision of Special Master Roncalio,[185] who had originally found that the purpose of the Wind River Reservation was to create a permanent homeland for the tribes.[186] The dissenting justices agreed with the

175. For a critique of the "sole agricultural purpose" holding and the corresponding "Practicably Irrigable Acreage" (PIA) quantification method, *see Gila V*, 35 P.3d at 76 (holding that focusing solely on agriculture is too restrictive and unnecessarily disadvantageous to tribes); Dana Smith, *Doctrinal Anachronism?: Revisiting the Practicably Irrigable Acreage Standard in Light of International Law for the Rights of Indigenous Peoples*, 22 Ariz. J. Int'l & Comp. L. 691, 727 (2005) ("Because the *Big Horn III* decision [relying on *Big Horn I*] requires tribes to comply with state law to change the way they use their water, the decision 'runs counter to current Federal policies favoring Indian self-determination.'"); McGovern, *supra* note 17, at 211–13 ("[S]tate courts such as Wyoming are free to establish case law contrary to such policies due to the absence of clear federal authority mandating otherwise. . . . [T]he recent *Big Horn III* decision [relying on *Big Horn I*] requiring tribes to comply with state law to change the use of their decreed reserved right is a development that runs counter to current Federal policy favoring Indian self-determination.").

176. Fort Bridger Treaty, *supra* note 166, at Article 4.

177. *See id*. at Article 3 (providing the Shoshones with mills), Article 8 (providing the Shoshones with an additional blacksmith), Article 10 ("The United States hereby agrees to furnish annually to the Indians the physician, teachers, carpenter, miller, engineer, farmer, and blacksmith, as herein contemplated . . . .").

178. *Id*. at Article 1, Article 3, Article 13.

179. *Id*. at Article 7.

180. *Id*. at Article 3 (providing the Shoshones with "a residence for the physician.").

181. *Id*. at Article 6, Article 8.

182. *Id.* at Article 4.

183. Anderson, *supra* note 17, at 1153; *see also* Sammy Matsaw et al., *Cultural Linguistics and Treaty Language: A Modernized Approach to Interpreting Treaty Language to Capture the Tribe's Understanding*, 50 Env't L. 415, 425 (2020) (writing that in *Big Horn I* "Justice White not only ignored the [Indian canon] rule that ambiguities are to be resolved in favor of tribal rights but found that those rights could be *implicitly* abrogated in favor of the rights of newly created states.").

184. *Big Horn I*, 753 P.2d at 119.

185. Robison, *supra* note 163, at 275–76 (explaining that the "[F]irst special master in the *Big Horn* adjudication [was] former Wyoming Congressman Teno Roncalio. Judge Joffe would appoint Special Master Roncalio to this position on May 4, 1979. . . .).

186. Teno Roncalio, Special Master, Report Concerning Reserved Water Right Claims by and on Behalf of the Tribes of the Wind River Indian Reservation 7, 94 (December 15, 1982),

Special Master's decision. The dissenting justices wrote, respectively, that "[t]he purpose of establishing an Indian reservation, such as the Wind River Indian Reservation, is to provide a homeland for Indian peoples,"[187] and that the tribes should receive water rights for "any use that is appropriate to the Indian homeland as it progresses and develops."[188] The Supreme Court eventually granted certiorari to the *Big Horn I* controversy[189] in the case of *Wyoming v. United States*.[190] However, the Supreme Court, with Justice O'Connor recused, [191] split 4-4 on the matter and was only able to issue a single line, non-precedential[192] per curiam opinion affirming the Wyoming Supreme Court's *Big Horn I* opinion by default.[193]

Against this backdrop, I argue that the Wyoming Supreme Court's decision in *Big Horn I* was a judicial taking of at least one tribal water right, namely, the instream, non-consumptive water right for maintaining a fishing habitat. The *Big Horn I* decision is a judicial taking because the Wyoming Supreme Court *alters* the tribe's *established* right to water for fishing purposes.[194] The Wyoming Supreme Court held that the tribes were not entitled to water rights for fishing because the treaty was silent on such a right.[195] This holding is substantively wrong based on pre-existing treaty law. However, because the Supreme Court

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https://perma.cc/42T6-E3RJ (stating that the purpose of the reservation was "to provide the Indians with a homeland where they could establish a permanent place to live and to develop their civilization just as any other nation throughout history has been able to develop its civilization.").

187. *Big Horn I,* 753 P.2d at 119 (Thomas, J., dissenting).

188. *Id*. at 175 (Hanscum, J., dissenting).

189. In granting certiorari, 753 P.2d 76 (Wyo. 1988), *cert. granted in part*, No. 88-309, 488 U.S. 1040 (1989), the Supreme Court only reviewed a single question from the appeal petition: "In the absence of any demonstrated necessity for additional water to fulfill reservation purposes and in the presence of substantial state water rights long in use on the Reservation, may a reserved water right be implied for all practicably irrigable lands within a Reservation set aside for a specific tribe?", Brief for Petitioner, *Wyoming v. United States*, 492 U.S. 406 (1989) (No. 88-309), 1988 WL 1094117, at *i.

190. Wyoming v. United States, 492 U.S. 406 (1989) (per curiam), *aff'd by an equally divided court*, *In re* Gen. Adjudication of All Rts. to Use Water in the Big Horn River Sys., 753 P.2d 76, 119 (Wyo. 1988).

191. Justice O'Connor's recusal has been extensively covered by other commentators. The intrigue of her recusal lies primarily in the fact that it was later discovered that Justice O'Connor had written and circulated a draft opinion prior to recusal. *See* Andrew C. Mergen & Sylvia F. Liu, *A Misplaced Sensitivity: The Draft Opinions in Wyoming v. United States*, 68 U. Colo. L. Rev. 683, 725 (1997); *see also* Walter Rusinek, *A Preview of Coming Attractions? Wyoming v. United States and the Reserved Rights Doctrine*, 17 Ecology L.Q. 355, 356 (1990).

192. *See* Neil v. Biggers, 409 U.S. 188, 192 (1972) ("Nor is an affirmance by an equally divided Court entitled to precedential weight.").

193. *Wyoming*, 492 U.S. at 406.

194. This article argues only that the rejection of water rights for fishing purposes is a taking. This article does not adequately engage with the possibility that the Wyoming Supreme Court's agricultural purpose holding is a taking; that is outside the scope of this particular article.

195. *Big Horn I,* 753 P.2d at 98–99 ("The evidence is not sufficient to imply a fishery flow right absent a treaty provision. . . . Neither the Tribes nor the United States has cited this court to

has allowed it to stand, the *Big Horn I* opinion must be viewed as diminishing an *established* property right to water by *changing* existing treaty law, thereby constituting a judicial taking. Big Horn Special Master Roncalio himself suggested that "creative solutions to common problems" must be found.[196] A judicial takings approach offers one such creative solution to the problem of diminished tribal water rights.

First, the tribes have an established property right to water for fishing under their Treaty. The following analysis engages in treaty construction, applying the Indian canons of construction,[197] to demonstrate this point. Recently, in 2023, the Ninth Circuit found that Shoshone tribes possess on- and off-reservation fishing rights under the 1868 Treaty of Fort Bridger because Shoshone "'Chief Washakie represented the interests of all Shoshone Indians' . . . at the Treaty signing."[198] Accordingly, although the Treaty does not explicitly address water rights,[199] as many Indian treaties do not, Shoshone tribes must possess an aboriginal water use right for fishing purposes. This analysis is based on the principle that tribes "retain[] all rights not expressly ceded to the Government in the treaty."[200] Though a treaty does not expressly mention a fishing or water right, tribes retain these rights, particularly in the context of water use, as "aboriginal

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any provision of the treaty or other evidence indicating that the parties contemplated in 1868 that a purpose of the reservation would be for the Indians to develop the minerals.").

196. *See* Teno Roncalio, *The Big Horns of a Dilemma, in* Indian Water In The New West 209, 214 (Thomas R. McGuire et al. eds., 1993); *see also* Robison, *supra* note 163, at 312 ("In the words of Special Master Roncalio a decade after he resigned his post: 'Creative solutions to common problems will be found. The potential is limitless, needing only—as has always been the case in the West—the people to match the challenges: 'a society to match the scenery,' as Wallace Stegner expressed it.'").

197. *See* discussion *supra* pp. 10–10; notes 52, 53.

198. *See* Nw. Band of the Shoshone Nation v. Wooten, 83 F.4th 1205, 1208 (9th Cir. 2023) ("In 1985, the Northwestern Band asked the Bureau of Indian Affairs within the U.S. Department of the Interior (DOI) to confirm that the Band maintained hunting and fishing rights under the 1868 Treaty. In a memorandum dated March 20, 1985, Lawrence E. Cox, Acting Regional Solicitor, Pacific Northwest Region, concluded that 'the Northwestern Band does possess treaty protected hunting and fishing rights which may be exercised on the unoccupied lands within the area acquired by the United States pursuant to the 1868 Treaty of Fort Bridger.' In reaching that conclusion, the DOI adopted the findings of the Indian Claims Commission, including the finding 'that Chief Washakie represented the interests of all Shoshone Indians, including the absent Northwestern Band led by Pocatello,' at the Treaty signing. Because the Northwestern Band was represented by Chief Washakie at the Treaty signing, the DOI concluded that 'the Northwestern Band's rights derive directly from the treaty as a signatory.'").

199. *See, e.g.*, *Big Horn I,* 753 P.2d at 91 ("The treaty establishing the Wind River Indian Reservation . . . is silent on the subject of water for the reservation."); *Navajo Nation*, 599 U.S. at 559 (citing Treaty Between the United States of America and the Navajo Tribe of Indians, Sept. 9, 1849, 9 Stat. 974 (ratified Sept. 24, 1850) (suggesting that the Navajo treaty does not directly address water rights.).

200. United States v. Adair, 723 F.2d 1394, 1413 (9th Cir. 1983)

uses"[201] stemming from "aboriginal title"[202] to the land that pre-dates the creation of reservations. In the case of the Coeur d'Alene Tribe, for example, none of the tribes' formative documents[203]—the Agreements[204] of 1873,[205] 1887,[206] and 1889;[207] the Executive Order of 1873;[208] the Congressional Act of 1891 ratifying previous documents[209]—specifically provide a right to fish. Despite the lack of express textual right, the Idaho Supreme Court held, based on the Supreme Court's earlier findings,[210] that the Coeur d'Alene Tribe had a reserved implied

201. *See CSRBA*, 448 P.3d at 349–50 ("Given the analysis thus far and the language of the Reservation's formative documents, the following uses or included purposes will be recognized as involving water rights: consumptive uses for both domestic (including groundwater) and agriculture; and nonconsumptive uses for hunting (wildlife habitat), fishing (fish habitat), plant gathering (including seeps and springs), and cultural activities—so long as they can be established as aboriginal uses (i.e., uses of water predating the creation of the Reservation).").

202. *See Adair* at 1413 ("This uninterrupted use and occupation of land and water created in the Tribe aboriginal or 'Indian title' to all of its vast holdings. Aboriginal title is 'considered as sacred as the fee simple of the whites.' The Supreme Court has specifically held that the Tribe had aboriginal title to timber on the Klamath Reservation. The Tribe's title also included aboriginal hunting and fishing rights, and by the same reasoning, an aboriginal right to the water used by the Tribe as it flowed through its homeland.") (citations omitted).

203. *CSRBA,* 448 P.3d at 336 ("[E]stablishing when and how the Reservation was created is integral to determining both the potential purposes . . . Therefore, the 1873 documents (both the executive order and the agreement) and surrounding documents and circumstances (i.e., the Tribe's 1872 Petition) will be used to determine the purposes of the Reservation.").

204. In 1871, Congress ended official treaty-making with Indian tribes by adding a rider to an appropriations bill. *See* Indian Appropriations Act of 1871, Pub. L. No. 41-120. However, Congress has continued "treaty-making" in the form of ratified binding "agreements" with Indian tribes. "The effect of treaties is the same as tribal agreements ratified by Congress. In the later agreements, the Tribe's members signed and consented to relinquishing all right, title, and claim to land outside the Reservation to the United States, thus demonstrating the grant of rights *from* the Tribe. . . . Moreover, the United States Supreme Court has treated agreements and treaties with Indians similarly for purposes of their interpretation . . . ." *CSRBA*, 448 P.3d at 340 (emphasis in original).

205. *See* Agreement with the Coeur d'Alene, July 28, 1873, https://perma.cc/AQ2A-BX4B; *see also* Act of March 3, 1891, 26 Stat. 989, 1027 (reciting and ratifying 1873 agreement).

206. Agreement with the Coeur d'Alene, Mar. 26, 1887, https://perma.cc/9UMU-HAPC. *See also* Act of March 3, 1891, 26 Stat. 989, 1027 (reciting and ratifying 1887 agreement).

207. Agreement with the Coeur d'Alene, Sept. 9, 1889, https://perma.cc/R9EK-6KTR. *See also* Act of March 3, 1891, 26 Stat. 989, 1029–30 (reciting and ratifying 1889 agreement).

208. Exec. Order of Nov. 8, 1873, reprinted in Charles J. Kappler, Indian Affairs: Laws and Treaties (2d ed. 1904), https://perma.cc/7DSV-3ZLS.

209. *See* United States v. Idaho, 210 F.3d 1067, 1071 (9th Cir. 2000), *aff'd sub nom.*, 533 U.S. 262 (2001) ("The 1889 agreement, like the 1873 and 1887 agreements, required ratification, and, as a condition, the Tribe insisted that the 1887 agreement be ratified. . . . Congress formally ratified both the 1887 and 1889 agreements, but not until 1891, Act of March 3, 1891, 26 Stat. 989, nine months after Idaho's admission to the Union. Idaho Admission Bill, Act of July 3, 1890, 26 Stat. 215.") (citations omitted); *see also* Act of March 3, 1891, 26 Stat. 989, 1029–30 (reciting and ratifying 1873, 1887, and 1889 agreements).

210. In Idaho v. United States, 533 U.S. 262 (2001), the Supreme Court recognized the importance of fishing to the Coeur d'Alene Tribe. *See* 533 U.S. at 265.

water right under *Winters* for fishing purposes based on the tribe's historical "aboriginal use" of water for fishing.[211]

Similar to the Coeur d'Alene Tribe, the Eastern Shoshone held an aboriginal water use right for fishing purposes. Fishing was an important part of Shoshone life at the time of the treaty. As detailed by the Ninth Circuit, "[t]he Shoshone relied on hunting, *fishing*, and gathering practices for their support and livelihood."[212] The Wyoming Supreme Court suggested that the Shoshone people were only "partially" reliant on fishing, not "totally" reliant like other tribes, and thus should not receive a water right for fishing.[213] However, this inter-tribal quantitative comparison of fishing dependency is entirely irrelevant to the question of Shoshone-specific water rights. But even if the comparison were relevant, fishing held economic importance to Shoshone people, similar to the tribes the Wyoming Supreme Court cites as deserving of fishing water rights.[214] Wind River Shoshone tradition and custom held that the Bighorn River was created so that the Shoshone could hunt and fish on the River; the Creator is said to have provided "piles of fish" for the Shoshone to eat from the seed waters of the Bighorn River.[215] This oral tradition demonstrates the centrality of both hunting and fishing to the Shoshone way of life and is reflected in Shoshone interactions with the United States.[216] For example, during the signing of the Treaty of Fort Bridger, U.S. officials acknowledged to Shoshone Chief Washakie that the Shoshone's nomadic lifestyle consisted mostly of "hunting and fishing."[217] Despite rejecting water rights for fishing, the Wyoming Supreme Court even acknowledged that fishing was a routine part of Shoshone tribal life.[218] Based on the importance of fishing to the Shoshones, it is likely that the tribes would have understood the Treaty to protect the tribe's use of water for fishing purposes. Thus, under the Indian canons of construction, the Treaty protected the water right for fishing. Indeed, as Justice Burdick said in the Coeur d'Alene matter, "[a]fter all, one can't fish if there are no fish," and there can be no fish without water.[219] Under this analysis, the Shoshone Tribe had an established aboriginal property right to water use for fishing purposes under their Treaty with the United States.

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211. *See CSRBA*, 448 P.3d at 349–50.
212. *Wooten*, 83 F.4th at 1206 (emphasis added).
213. *Big Horn I*, 753 P.2d at 98.
214. *See Walton*, 647 F.2d at 48; *Big Horn I*, 753 P.2d at 98.
215. *See* Adam R. Hodge, *Origins*, *in* Ecology and Ethnogenesis: an Environmental History of the Wind River Shoshones, 1000–1868 17 (2019).
216. *See generally id*.
217. *See id*. at 247 (citing Grace Raymond Hebard Papers: Report on the Proceedings of the 1868 Fort Bridger Treaty Meeting).
218. *See Big Horn I*, 753 P.2d at 98 (acknowledging that "the Indians fully intended to continue to hunt and fish" following the treaty and that the Shoshone were "at least partially dependent upon fishing.").
219. *CSRBA*, 448 P.3d at 363.

Second, for a judicial taking claim, the court must "take" the established property right by altering existing law to diminish or prevent beneficial ownership of that right.[220] Here the taking is relatively simple. Before the *Big Horn I* decision, the Shoshone tribe held an aboriginal water use right for fishing purposes under their treaty rights.[221] After the *Big Horn I* decision, the Shoshone tribe no longer owned this right.[222] The Wyoming Supreme Court took the tribe's right to water for fishing purposes by denying the tribe that water right, in effect changing federal treaty law.

More specifically, the Wyoming Supreme Court altered existing law by engaging in novel, unsupported forms of treaty interpretation to distort and amend the rights granted by the Treaty. The Wyoming Supreme Court refused to interpret the Treaty as the signing Shoshones would have understood it[223] and ignored clear treaty language on non-agricultural homeland purposes of the reservation.[224] The court does go through the motions of reciting the Indian canons and rules of interpretation but makes no attempt to faithfully apply these rules.[225] The Wyoming Supreme Court's reasoning that the tribes did not "introduce sufficient evidence" of fishing water rights[226] perverts the usual treaty analysis by suggesting that affirmative evidence is required, rather than assuming the existence of Indian treaty rights *ab initio*, even if a treaty is silent on such rights.[227] In this way, the Wyoming Supreme Court altered existing federal treaty law governing the Shoshone tribe and thereby took the Shoshone's fishing water right.

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220. *See* discussion *supra* pp. 26–27.

221. *See* discussion *supra* pp. 31–34.

222. *See Big Horn I,* 753 P.2d at 96–98.

223. The Treaty describes the reservation almost exclusively in relation to the waters that the reservation will include or adjoin, stating "[t]he United States further agrees that the following [land] . . . : Commencing at the mouth of Owl Creek and running due south to the crest of the divide between the Sweet-water and Papo Agie Rivers; . . . thence in a straight line to head-waters of Owl Creek and along middle of channel of Owl Creek to place of beginning, shall be and the same is set apart for the absolute and undisturbed use and occupation of the Shoshonee Indians . . . ." Based on this language and their Native ideology toward land, the Shoshone Indians likely viewed all Shoshone reservation water use as inherent and undisputable. *See* The 1868 Treaty of Fort Bridger, Article 2, executed July 3, 1868, 15 Stat., 673.

224. The Treaty expressly states the reservation is to be a "permanent home" for the tribe. 1868 Treaty of Fort Bridger, Article IV, 15 Stat., 673, Executed July 3, 1868, https://perma.cc/3AAU-7P98.

225. *Big Horn I*, 753 P.2d at 97–98.

226. *Id*. at 99 ("The district court did not err in holding that the Tribes and the United States did not introduce sufficient evidence of a tradition of wildlife and aesthetic preservation which would justify finding this to be a purpose for which the reservation was created and for which water was impliedly reserved.").

227. *See supra* Parts I.A, B.; *see also* United States v. Dion, 476 U.S. 734, 738 (1986) ("As a general rule, Indians enjoy exclusive treaty rights to hunt and fish on lands reserved to them, unless such rights were clearly relinquished by treaty or have been modified by Congress. These rights need not be expressly mentioned in the treaty.") (citations omitted).

State court alteration of federal treaty law should arguably be impossible. However, under McCarran and the total lack of federal oversight of water adjudications, it is now not only possible but actually happening in tribal water decrees. This loophole allows state courts such as Wyoming's to lawfully abrogate existing tribal water rights by identifying an artificially narrow "purpose" for the reservation. And, right now, there is very little a tribe can do to prevent this. The opportunity to bring a judicial takings claim could offer tribes a small level of redress for otherwise lost water rights.

IV. Benefits and Limitations of Judicial Takings as a Remedy for Diminished Tribal Water Rights

There are several benefits and drawbacks to using the concept of judicial takings as redress for tribes receiving diminished water rights from state court adjudication. This section details a few of these considerations.

A. Litigation Outcomes for Tribal Water Rights: Legal Title, Monetary Compensation, or Nothing

One lingering question is whether monetary compensation is an appropriate alternative to a legal right to water. The answer to this question is likely no. But this article does not suggest that tribes should pursue compensation over affirmed legal rights. Instead, I suggest that compensation is a better alternative to receiving nothing. For tribes whose water rights have been diminished by state court decrees, compensation from a judicial takings claim could provide tribes a small benefit where they would otherwise likely get nothing at all.

In the face of mounting water scarcity and expansive over-appropriation,[228] practically oriented state supreme courts faced with the decision of whose water rights to diminish are becoming less and less likely to affirm the entirety of a tribe's deserved water rights. Given the current over-demand for and under-supply of water, the Supreme Court is similarly unlikely to grant certiorari on, much less reverse, a state Supreme Court decision which under quantifies tribal water rights. Doing so could create a deluge of appeals and instability that the Court is not prepared to handle. Given the significant over-appropriation of water, both state courts and the Supreme Court likely consider it currently impossible to adjudicate water rights without diminishing some. Although it may be administratively impractical not to diminish some established rights, state courts should not be allowed to take these property rights without providing just compensation.

A judicial takings claim provides a solution to this problem. A judicial takings claim does not ask the court to substantively reverse the lower court and

228. *See* discussion *supra* p. 7.

reinstate tribal water rights. A judicial takings claim instead asks the court to simply *compensate* the tribes for water rights lost by judicial decree. This allows the reviewing court to affirm the lower court's ultimate holding—permitting pragmatic state water management decisions to stand—and provides the tribes a small method for recourse. When possible, successful litigation or congressional settlements are both likely still a superior option for tribes. But, when these options are unavailable, a judicial takings claim could offer an additional method for water rights recourse by providing tribes with funds to operationalize their remaining affirmed water rights.

B. Judicial Takings Claim as Leverage for Tribes

Another lingering question is whether judicial takings is a truly viable claim. Because this question remains largely unanswered in court, a judicial takings claim likely offers tribes more bark than bite as a point of leverage to use in government-to-government water rights bargaining in litigation and settlement negotiations. Since the McCarran Amendment, states have wielded enormous power over tribal water rights with little oversight from or consequences in federal court. The Supreme Court, thus far, hasn't shown much motivation to overturn state court rulings on tribal water rights quantifications, even those that appear patently wrong,[229] likely due to the impossibility of confirming all existing water rights given the extensive over-appropriation of waterways.[230] A viable judicial takings claim would enable tribes to seek federal review of state court water right decrees without the federal court worrying that its decision will disturb state water governance structures. The looming possibility of this novel type of federal review could incentivize state governments to negotiate more earnestly with tribes and adjudicate tribal water rights more fairly, resulting in better tribal water rights outcomes overall.

As Charles Wilkinson and John Thorson pointed out in their contributions to the Big Horn GSA Symposium:

> On the issue of resolving federal reserved water rights, "the news here is quite favorable." But [the] point is not that state judges have correctly upheld tribal and federal claims; rather, most tribes leveraged the court cases into achieving results outside of the adjudications. Using the "pressure of litigation," tribes, federal officials, and water uses under state law have moved beyond the lawsuits and forged settlements that have been, or will be, ratified by Congress. . . . [I]n part because the adjudications have proved to be such difficult forums, cooperation and settlement has become the broadest and deepest movement in Indian water law. For the Wind River tribes who have not reached settlements, the results have been especially unfortunate.[231]

229. *See* discussion of *Big Horn I* case *supra* Part III.B.

230. *See* discussion *supra* p. 7.

231. Wilkinson, *supra* note 59, at 237–38 (2015) (quoting Thorson, *supra* note 90, at 409).

With state courts frequently poised to strip tribes of their water, tribes must continue to pursue innovative ways to defend their rights. Although congressional settlement of tribal water rights can be a successful non-litigious avenue for many tribes to protect their water rights, settlement also requires Congress to pass legislation allocating significant federal funding, an option which may not be available in our increasingly fraught political climate.[232] Using a judicial takings claim to leverage other parties into beneficial negotiations is an innovative approach that can augment tribes' existing toolbox of approaches to defend tribal water rights.

C. Procedural Difficulties with Judicial Takings

Several questions remain regarding the jurisdictional and justiciability of a judicial takings claim. For example, is the crux of a judicial takings claim essentially the same as a substantive appeal for reversal but with a different desired remedy? If the answer to this question is yes, then a judicial takings claim is a relatively unattractive solution because it would require the same inquiry as pure reversal without providing legal title. However, if the answer to this question is no—a judicial takings claim presents a lower threshold than a substantive reversal—a judicial takings claim becomes more attractive. It is thus far unclear whether the doctrinal criteria for a successful judicial takings claim are identical or lesser than the criteria required for a substantive reversal. However, it is feasible that the thresholds are distinct, making judicial takings a more useful remedy.

Lower courts have also struggled to determine what creates a justiciable judicial takings claim that exists independently from a substantive appeal for reversal. In *Boise Cascade Corporation v. United States*, the U.S. Court of Appeals for the Federal Circuit suggested that an appellate court may hear and rule on a judicial takings claim without reviewing or disturbing the lower court's substantive holding.[233] However, in *Petro-Hunt, L.L.C. v. United States*, the

232. *See* Anderson, *supra* note 10, at 33 (explaining that it "is not really known [how Congress decides how much money to allocate in congressional water rights settlements], but many suspect that it is more a matter of whether the Administration has the political will to advance a settlement with a large federal contribution than some sort of a principled economic calculation. And of course, the Administration's political will is dependent on factors such as the influence and power of the affected state's congressional delegation and whether other sectors of the water use community are in strong support of the settlement and stand to obtain significant benefits from the settlement.").

233. *See* Boise Cascade Corp. v. United States, 296 F.3d 1339, 1344 (Fed. Cir. 2002) [hereinafter *Boise*] (explaining that "resolution of this case did not require the Court of Federal Claims to review the merits of the district court's order enjoining Boise from logging without a permit" because "Boise has accepted the validity of the injunction, and only filed suit in the Court of Federal Claims to determine whether . . . the injunction worked a taking of its property. . . . Whether or not the government action took Boise's property was not before the district court, nor could it have been."). This reasoning draws on the Supreme Court's ruling in

same court clarified that if a judicial takings claim "require[s] the [appellate court] to review the propriety of a district court's actions," the claim may not be within the court's jurisdiction.[234] This suggests that there may be a fine line between which types of judicial takings claims mandate a challenge to the lower court's decision, particularly the lower court's holding on the existence of established property rights, and which judicial takings claims do not challenge the lower court's holding. The *Petro Hunt* court drew this line and distinguished *Petro Hunt* from *Boise* by determining that the *Boise* plaintiffs had "accepted the validity of the district court's [earlier ruling]" and only "filed suit in the Court of Federal Claims to determine whether the injunction effected a taking," while the *Petro-Hunt* plaintiff was still challenging the lower court's ruling.[235] The *Petro-Hunt* court, quoting its earlier *Shinnecock* ruling, determined that "the Court of Federal Claims 'cannot entertain a taking[s] claim that requires the court to scrutinize the actions of another tribunal.'"[236] The area between these two cases—one a justiciable judicial takings claim and the other not—however, is excessively gray. This line-drawing exercise has also proven difficult in other contexts including administrative forfeiture,[237] permitting decisions,[238] and bankruptcy rulings,[239] which closely reflect the justiciability concerns within judicial takings theory.

United States v. Riverside Bayview Homes, Inc. that the "proper course" for a takings claim following litigation "is not to resist the . . . enforcement [of the suit] . . . but to initiate a suit for compensation in the Claims Court." 474 U.S. 121, 129 n.6 (1985).

234. Petro-Hunt, L.L.C. v. United States, 862 F.3d 1370, 1386 (Fed. Cir. 2017) [hereinafter *Petro-Hunt*].

235. *Id.* at 1385–86 ("We disagree with Petro-Hunt that its case is comparable to *Boise*, where this court held that the Court of Federal Claims had jurisdiction to review the merits of plaintiff's Tucker Act claim after a district court had enjoined plaintiffs from logging on property. There, plaintiffs had accepted the validity of the district court's injunction and filed suit in the Court of Federal Claims to determine whether the injunction effected a taking of its property. While Petro-Hunt contends that it has accepted the result of the Quiet Title Action and therefore the Court of Federal Claims need not review the merits of the Fifth Circuit's decision, its briefings at the Court of Federal Claims and to this court show that Petro-Hunt is actually challenging the result.") (internal citations omitted).

236. *Id.* (citing *Shinnecock Indian Nation*, 782 F.3d at 1353).

237. *Id.* (citing Vereda, Ltda. v. United States, 271 F.3d 1367, 1375 (Fed. Cir. 2001)) (explaining that *Vereda* held that "the Court of Federal Claims lacked jurisdiction over plaintiff's takings claim because review would require a determination of the correctness of an administrative forfeiture, which has the same force and effect as a district court judgment.").

238. *See Boise*, 296 F.3d at 1349 (citing Wyatt v. United States, 271 F.3d 1090 (Fed. Cir. 2001); Tabb Lakes, Ltd. v. United States, 10 F.3d 796 (Fed. Cir. 1993)) (explaining that, in *Wyatt* and *Tabb Lakes*, the court determined it had jurisdiction to review a takings claim predicated on administrative denial of a plaintiff's permit).

239. *See Petro-Hunt*, 862 F.3d at 1386 (citing Allustiarte v. United States, 256 F.3d 1349, 1352 (Fed. Cir. 2001) (explaining that *Allustiarte* held that the "Court of Federal Claims lacked jurisdiction over a takings claim requiring determination of whether a bankruptcy judgment was correctly decided.").

Despite these debates over the justiciability of judicial takings claims, the Supreme Court has historically embraced relief for constitutional violations like a Fifth Amendment taking, even where the relief is somewhat nontraditional.[240] Thus, it is possible that the Supreme Court could endorse judicial takings in the context of stolen tribal water rights where other remedies are unlikely to succeed.

D. Other Difficulties with Judicial Takings for Tribal Water Rights

There are a host of other questions that still surround the idea of a judicial takings claim. One big question is whether a Due Process solution would solve the same problem as a judicial takings claim and be more viable under current jurisprudence. Along a similar vein, some may ask whether a generalized breach of trust claim might be a more viable solution. While I do not address these questions directly, other scholars have suggested that the Due Process Clause, the Takings Clause, and breach of trust remedies offer different benefits and may provide distinct solutions in similar situations.[241] In an ideal world, each of these three remedies could offer a unique tool with which tribes could defend their treaty rights.

Another frequent question is whether Indian tribes have standing to bring a judicial takings claim against the United States under the Fifth Amendment. Historically, the United States has made it difficult for Indians and tribes to bring suit against the federal government.[242] Until 1946, Indian plaintiffs were excluded from the jurisdiction of the Federal Court of Claims and the Tucker Act,[243] which effectively prevented tribes from bringing takings claims unless

240. *See* Ward v. Bd. of Cnty. Comm'rs of Love Cnty., Okl., 253 U.S. 17, 22–24 (1920) (suggesting the Supreme Court can review state court decisions related to federal law); Brown v. Plata, 563 U.S. 493, 501 (2011) (suggesting that redress was necessary for "serious constitutional violations"); Henry Paul Monaghan, *Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases*, 103 Colum. L. Rev. 1919, 1919 (2003) (suggesting that "the Supreme Court has ancillary jurisdiction to review state-court determinations of state law in cases where the Constitution or federal law imposes a duty of fidelity to prior state law (t1) and the claim is that the state court materially and impermissibly departed from that law at a later point in time (t2).").

241. *See supra* note 129 and accompanying text.

242. *See* Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 276 (1955) (holding that Indians cannot bring a takings claim or receive compensation for aboriginal land takings unless Congress had specifically recognized their claims to the land).

243. 28 U.S.C. §§ 1346(a), 1491. The Tucker Act waives the federal government's sovereign immunity and allows parties to bring suit for money damages against the government so long as there is an applicable "money-mandating" provision. *See, e.g.*, Renée Burbank, *Illegal Exactions*, 87 Tenn. L. Rev. 315, 346 (2020) ("The courts have consistently held that the Tucker Act only permits claims for money based on 'money-mandating' constitutional, statutory, or regulatory provisions, and that the Due Process Clause is not such a provision.") (citations omitted).

Congress authorized jurisdiction by special statute.[244] However, in 1946 Congress enacted the Indian Tucker Act,[245] which allowed Indian plaintiffs to bring suit in federal court against the federal government in the same way that other plaintiffs could.[246] Because the Fifth Amendment is a money-mandating constitutional provision, tribes should have no difficulty bringing a judicial takings claim under the Indian Tucker Act. This is one area where a Fifth Amendment claim may be superior to a general breach of trust claim because the Fifth Amendment is undeniably money-mandating, while breach of trust has been held not to be in certain circumstances.[247] Further, the Supreme Court has recently held that "[a] property owner may bring a takings claim . . . upon the taking of his property without just compensation by a local government."[248] Thus, although the proposed judicial taking claim would be against a state, the

244. The original enactment creating the Court of Claims was amended early on to exclude Indian tribes. *See* Act of Mar. 3, 1863, Ch. 92, § 9, 12 Stat. 765, 767 (1863) (excluding claims "dependent on any treaty stipulation entered into with foreign nations or with the Indian tribes"); *see also* Nell Jessup Newton, *Indian Claims in the Courts of the Conqueror*, 41 Am. U. L. Rev. 753, 770–71 (1992) ("Indian tribes were also disabled from suing the Government without first obtaining a private bill from Congress permitting suit. . . . The primary purpose for the creation of the Court of Claims in 1855 was to open the doors to citizens' suits. The hope of ready access to a court of law in which to air their grievances was dashed in 1863, however, when Congress amended the law to except claims 'dependent on treaty stipulations entered into with foreign nations or with the Indian tribes.' Remarkably, neither the bench nor the bar attempted to read this provision narrowly to permit claims by tribes not based on treaties to proceed in the Court of Claims. Instead, all assumed that the clause excepted any claim brought by an Indian tribe against the Government. This state of affairs continued for eighty-three years during which Indian tribes had to secure special jurisdictional statutes, granting the Court of Claims jurisdiction and waiving sovereign immunity for specific claims. The tribes had varying degrees of success on the merits because the special acts were construed so narrowly.") (citations omitted).

245. 28 U.S.C. § 1505.

246. Gregory C. Sisk, *Yesterday and Today: Of Indians, Breach of Trust, Money, and Sovereign Immunity*, 39 Tulsa L. Rev. 313, 316 (2003) ("Tribal claimants through the Indian Tucker Act thus have access to the Court of Federal Claims in the same manner and under the same general terms as individual claimants have through what might be called the 'regular' Tucker Act. Thus, the Tucker Act and its statutory cousin, the Indian Tucker Act, are congruous, differing only in the identity of the eligible claimant. . . . While individual Native American and tribal claimants may pursue constitutional and statutory claims in the same manner as ordinary claimants for money against the federal government, the historical guardian-ward relationship between the federal government and indigenous peoples may also give rise to a special cause of action, which, as we shall see, is presumptively redressable in money damages.").

247. *See* United States v. Mitchell, 463 U.S. 206, 224 (1983) (*Mitchell II*) (holding that a "bare" or "limited" trust claim is not a money-mandating statute whereas a "full responsibility" trust can be money-mandating); *see also* United States v. Navajo Nation, 537 U.S. 488, 503 (2003) ("*Mitchell I* and *Mitchell II* are the pathmarking precedents on the question whether a statute or regulation (or combination thereof) 'can fairly be interpreted as mandating compensation by the Federal Government.'") (citations omitted).

248. Knick v. Township of Scott, 588 U.S. 180, 206 (2019).

tribe could still bring that action in federal court under the Indian Tucker Act based on their constitutional Fifth Amendment rights.

Simply put, there are many lingering questions to answer regarding the viability of a judicial takings claim. This article only begins to cover the benefits, limitations, and considerations of operationalizing judicial takings.

Conclusion

Following the Supreme Court's latest assault on tribal water rights,[249] John Echohawk, Executive Director and Co-Founder of the Native American Rights Fund, said that "[d]espite today's ruling, Tribal Nations will continue to assert their water rights."[250] In the face of mounting obstacles, especially from state courts' intent on decreasing tribal reach, tribes must keep finding new and innovative ways to defend their rights. The doctrine of judicial takings is one such way. For tribes adjudicating their water rights, the opportunity to bring a judicial takings claim against state courts who inappropriately decrease or change tribal water rights would return to tribes a level of power that the McCarran Amendment stole. Although not a perfect solution, a judicial takings approach could provide tribes with critical funding to help operationalize affirmed water rights. The possibility of a judicial takings claim for diminished tribal water rights represents the possibility of at least some recognition for the systemic dispossession of tribal water rights. Such a possibility, will, I hope, encourage tribes to persist and "Try again."[251]

249. *Navajo Nation*, 599 U.S. at 558.

250. *Supreme Court: US Not Responsible for Water Rights; Navajo Nation Still Battling for Water*, N. Am. Rts. Fund (June 22, 2023), https://perma.cc/D478-8LQ9.

251. *Navajo Nation*, 599 U.S. at 598–99 (Gorsuch, J., dissenting); *see supra* note 26 and accompanying text.