

THE FIVE CIVILIZED TRIBES' TREATY RIGHTS TO WATER QUALITY AND MECHANISMS OF ENFORCEMENT

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INTRODUCTION

This Article focuses on the treaty rights to water quality of the Cherokee, Choctaw, Chickasaw, Muscogee (Creek) and Seminole tribes (collectively referred to as the “Five Civilized Tribes”).¹ Although each tribe is an independent, sovereign nation, the tribes share a collective history as the largest and most dominant tribes in what is now the southeastern United States, and were all forcibly removed from their respective ancestral homelands to lands in the Indian Territory (now Oklahoma) in the 1830s.² The legal mechanism for accomplishing this forced relocation was “removal treaties” between the United States and each of the five tribal governments, which the United States pursued under the Indian Removal Act of 1830. Although these treaties had tragic consequences, the treaties also contained provisions favorable to the tribes. In exchange for these tribes vacating their ancestral homelands, the United States made promises and vested legal rights in the tribes pertaining to their new homelands in the Indian Territory.

These treaty provisions are key to solving a modern-day problem for the tribes: water pollution. Because clean water is important for consumptive uses, drinking and cultural lifeways, water pollution threatens these tribal communities in many

¹ See *Indian Country, U.S.A., Inc. v. Oklahoma Tax Comm’n*, 829 F.2d 967, 970 n.2 (10th Cir. 1987) (“The Cherokees, Chickasaws, Choctaws, Creeks, and Seminoles historically have been referred to as the ‘Five Civilized Tribes.’ Although most of what is today Oklahoma was once the ‘Indian Territory,’ after the creation of Oklahoma Territory in 1890, the phrase referred to the eastern portion of present-day Oklahoma encompassing the lands of the Five Civilized Tribes, plus lands of other tribes situated in the extreme northeastern corner of the state.”).

² The term “Five Civilized Tribes” does not connote a formal confederation or affiliation of the tribes. Grant Foreman explained the moniker this way: From their [the Cherokee, Creek, Chickasaw, Choctaw and Seminole] geographical and historical association with the white man in the South they acquired a measure of his culture as well as of his vices. Through the influence of their leading men they had copied some of the customs and institutions of the whites and four of the tribes crudely modeled their governments on those of the states. Because of their progress and achievements they came to be known as the Five Civilized Tribes. GRANT FOREMAN, *THE FIVE CIVILIZED TRIBES* vii (1934).

respects. This Article examines those treaty provisions and concludes that the tribes' property rights in the Indian Territory include rights to water quality and explores how those rights can be enforced.

I. THE IMPORTANCE OF ENFORCEABLE WATER QUALITY RIGHTS FOR THE FIVE CIVILIZED TRIBES

The question of whether each of the Five Civilized Tribes possesses an enforceable treaty right to water quality is particularly relevant at this time. Persistent pollution of the waters within the tribes' respective boundaries has sparked conflict in recent years, resulting in cases that demonstrate the dilemma faced by tribes in abating such pollution within their boundaries.³ For example, pollution from poultry producers has been especially problematic in the Illinois River.⁴ The one million-acre Illinois River watershed spans the Arkansas-Oklahoma border and includes land within the Cherokee Nation's boundaries.⁵ According to the former Oklahoma Attorney General Drew Edmondson, the Illinois River contains phosphorous levels "equivalent to the waste that would be generated by 10.7 million people, a population greater than the states of Arkansas, Kansas, and Oklahoma combined."⁶ It is currently on EPA's 303(d) list of impaired waters for phosphorus loads.⁷ While modeling for Total Maximum Daily Loads (TMDLs) has been in process for more than five years, limits have not yet been finalized.⁸

Oklahoma has attempted to abate the pollution through litigation under federal environmental statutes. In 2005, the state of Oklahoma sued Tyson Foods under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), alleging that Tyson's practice of using chicken waste as fertilizer for crops resulted in excessive nutrient loading in the

³ See, e.g., *Oklahoma ex rel. Edmondson v. Tyson Foods, Inc.*, 619 F.3d 1223 (10th Cir. 2010).

⁴ See generally *Tyson Foods*, 619 F.3d. 1223.

⁵ See Cody McBride, *Oklahoma v. Tyson: Playing Chicken with Environmental Cleanup*, 38 *ECOLOGY L.Q.* 603, 603 (2011).

⁶ *Id.*

⁷ See *Illinois River Watershed*, ENVTL. PROT. AGENCY, <http://www3.epa.gov/region6/water/npdes/illinoisriverwatershed/> (last updated Feb. 23, 2016).

⁸ See *id.*

Illinois River.⁹ The Illinois River flows out of Arkansas and through Cherokee Nation's boundaries. Although Cherokee Nation attempted to join the lawsuit, its motion was filed late and the case was dismissed by the Tenth Circuit due to Oklahoma's failure to join Cherokee Nation as an indispensable party.¹⁰ Therefore, a legal theory that would allow Cherokee Nation, or one of the other Five Civilized Tribes, to proceed independently to protect water quality is particularly desirable at this time.

Although there is a well-developed body of common law addressing tribal water rights, it has thus far primarily addressed rights to water quantity.¹¹ Few cases have presented issues of tribal rights to water quality.¹² Moreover, there is good reason to believe that the Five Civilized Tribes have more robust water rights than other tribes. A legal theory advanced by Indian law scholars, tribal attorneys, and Bureau of Indian Affairs officials, posits that the Five Civilized Tribes do not merely have a right to an allocation and use of specific amounts of water, but that they have paramount rights and exclusive regulatory jurisdiction over all water within their respective territorial areas, which are now located in eastern Oklahoma.¹³

If this theory is sound, then it would stand to reason that the Five Civilized Tribes have the ability to regulate, enjoin, or obtain damages for pollution of these waters. This Article builds on the analysis of L. Susan Work, David Mullon, and others to examine the specific issue of rights to water quality.¹⁴ It is necessary to

⁹ See *Tyson Foods*, 619 F.3d at 1223.

¹⁰ See *id.*

¹¹ See generally *United States v. Winans*, 198 U.S. 371 (1905); *Winters v. United States*, 207 U.S. 564 (1908); *Arizona v. California*, 373 U.S. 546, 600 (1963).

¹² See, e.g., *Hopi Tribe v. United States*, 782 F.3d 662, 669 (Fed. Cir. 2015); *United States v. Gila Valley Irrigation Dist.*, 920 F.Supp. 1444, 1454–55 (D. Ariz. 1996); see also JUDITH ROYSTER ET AL., *NATIVE AMERICAN NATURAL RESOURCES LAW* 420 (2013) (concluding that there is there is “virtually no reserved water rights case law . . . on the right to water quality.”).

¹³ See, e.g., David A. Mullon, *Tribal Water Rights in Eastern Oklahoma: Do the Indians Own It All?*, SOV. SYMP. XI MANUAL 78, 97 (1998); Formal Protest of Application for Water Use, February 8, 1978 (statement of Thomas Ellison, Muskogee Area Director, BIA, to Oklahoma Water Resources Board).

¹⁴ See Mullon, *supra* note 13; L. Susan Work, *Tribal Water Rights in Eastern Oklahoma — the Inapplicability of General Principals Concerning State Water Interests*, SOV. SYMP. XXII MANUAL II-14 (2009); L. Susan Work, Excerpt: Legal Analysis Regarding Allottee and Successor Owner Water Rights (unpublished memorandum) (on file with author).

analyze the following:

1. The nature and extent of the property rights vested in the Five Civilized Tribes by their respective removal treaties, especially regarding water resources and potential rights for water quality;
2. Whether these treaty rights were subsequently abrogated by the United States; and
3. What specific mechanism could be used to enforce these treaty rights, i.e. inherent sovereign authority of the tribes, delegated authority from the federal government, common law tort claims, or statutory causes of action.

Accordingly, this analysis will begin with the necessary historical background, then proceed with a discussion of the tribes' unique water rights, and conclude by examining mechanisms for enforcement of water quality standards.

II. HISTORICAL BACKGROUND OF THE FIVE CIVILIZED TRIBES

While a comprehensive history of treaties and relationships with colonial governments is far beyond the scope of this writing, some background is essential for understanding the Five Civilized Tribes' water rights. The Cherokee, Seminole, Creek, Chickasaw and Choctaw people resided in what is now the southeastern United States (roughly, present-day Tennessee, Mississippi, Alabama, Georgia, Florida, North Carolina and South Carolina) since time immemorial. Their first contact with Europeans was in the 16th Century when Hernando DeSoto arrived in the region.¹⁵ By the mid-1700s, each of these tribes had entered into treaties with various European governments, including Great Britain, France and Spain, and allied with those nations (sometimes on different sides) in several military conflicts in the 17th and 18th centuries,¹⁶ including the American Revolution.¹⁷

Immediately after the American Revolution, but prior to

¹⁵ See Emmet Starr, *HISTORY OF THE CHEROKEE INDIANS AND THEIR LEGENDS AND FOLK LORE* 24 (1921).

¹⁶ See, e.g., Treaty of Whitehall (1730); see also Jana Everett, *Cherokee*, *THE DIGITAL ENCYCLOPEDIA OF GEORGE WASHINGTON*, <http://www.mountvernon.org/digital-encyclopedia/article/chokeee/> (last visited Aug. 6, 2017).

¹⁷ See Greg O'Brien, *Chickasaws: The Unconquerable People*, *MISSISSIPPI HISTORY NOW* (2003), <http://www.mshistorynow.mdah.ms.gov/articles/8/chickasaws-the-unconquerable-people>.

ratification of the U.S. Constitution, the Five Civilized Tribes began entering into treaties with the United States.¹⁸ In 1785, Cherokee Nation entered into the Treaty of Hopewell with the United States, which recognized peace between the two governments, established the Cherokee Nation's boundaries, and acknowledged the tribe's protection by the United States.¹⁹ The Choctaws, Chickasaws, Creeks, and Seminoles entered into almost identical treaties.²⁰ Over the next few years, the tribes sometimes made additional treaties whereby the United States purchased land from the tribes encroached upon by settlers in their westward migration.²¹ The tribes continued to live by their own laws and customs on the lands they retained, and the United States "solemnly" guaranteed the tribes' land rights and recognized tribal governmental authority over their respective territories.²²

Nevertheless, conflicts between these tribes and the states regarding governing authority in Indian Country were commonplace.²³ Even as the United States was making these guarantees, President Thomas Jefferson was crafting plans to relocate Indians of the Southeast to lands west of the Mississippi River, which were newly acquired by the Louisiana Purchase.²⁴ As early as 1817, the Five Civilized Tribes began entering into treaties that traded lands in the Southeast for larger land tracts in Arkansas Territory.²⁵ However, the push westward by settlers outpaced treaty making, and soon additional treaties traded much of the Arkansas lands for lands farther west in the Indian Territory, in what is now Oklahoma.²⁶

At the same time, back in the Southeast, tensions caused by

¹⁸ See *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 622 (1970).

¹⁹ See *id.*

²⁰ See *id.*

²¹ See *id.* at 623.

²² See *id.*

²³ See *id.*; see also COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.03[4][a] (MB) (2015) [hereinafter COHEN'S] (discussing conflicts between Cherokee Nation and the State of Georgia).

²⁴ See *Choctaw Nation*, 397 U.S. at 623; ROBERT J. MILLER, *NATIVE AMERICA, DISCOVERED AND CONQUERED: THOMAS JEFFERSON, LEWIS AND CLARK, AND MANIFEST DESTINY* 90 (2006); Alysa Landry, *Thomas Jefferson: Architect of Indian Removal Policy*, INDIAN COUNTRY TODAY (Jan. 19, 2016), <https://indiancountrymedianetwork.com/history/events/thomas-jefferson-architect-of-indian-removal-policy/>.

²⁵ See *id.* at 623–34.

²⁶ See *id.* at 624–26.

non-Indian encroachment on tribal lands began boiling over.²⁷ Various attempts by Georgia to exercise its dominion over the Cherokee Nation gave rise to two U.S. Supreme Court cases, which formed the foundational principals of federal Indian law.²⁸ Mississippi took similar measures, attempting to terminate tribal authority and confiscate tribal lands.²⁹ As the Supreme Court later observed, “[a] clash between the obligation of the United States to protect Indian property rights on the one hand and the policy of forcing their relinquishment on the other was inevitable.”³⁰ Thus, Congress passed the Indian Removal Act of 1830, which authorized President Jackson to negotiate complete relocation of tribes west of the Mississippi, brought enormous pressure upon the Five Civilized Tribes, and made removal inevitable.³¹

The United States attempted to persuade the Five Civilized Tribes to enter into removal treaties with the promise that relocation to a homeland secured by the federal government in a place without a state or territorial government would relieve the pressures of non-Indian intrusion upon their tribal territory, which had been occurring with the encouragement of the Southeastern state governments. In making his case for removal in a meeting with the Choctaws and Chickasaws, President Jackson said:

Brothers, listen: the only plan by which this can be done, and tranquility for your people obtained, is, that you pass across the Mississippi to a country in all respects equal, if not superior, to the one you have. Your great father will give it to you forever, that it may belong to you and your children while you shall exist as a nation, free from all interruption.

. . .

Peace invites you there; annoyance will be left behind; within your limits, no State or territorial authority will be permitted; intruders, traders, and above all, ardent spirits, so destructive to health and morals, will be kept from among you, only as the laws and ordinances of your nation may sanction their

²⁷ See *id.* at 624–25.

²⁸ These two cases are *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831) and *Worcester v. Georgia*, 31 U.S. 515 (1832).

²⁹ See *Choctaw Nation*, 397 U.S. at 625.

³⁰ *Id.*

³¹ See FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* 214 (1984) (describing negotiation of removal treaties by the Five Civilized Tribes as occurring “under various levels of duress”).

admission.³²

The promise of territory where the tribes could govern themselves free of state governmental interference was precisely what some in the tribes sought. The Choctaws entered into the first removal treaty, the Treaty of Dancing Rabbit, in 1830, which ceded lands in the Southeast for lands west of the Mississippi River, in the Indian Territory.³³ By 1835, the Cherokees, Creeks, Seminoles and Chickasaws had entered into treaties with almost identical terms, save descriptions of the specific lands ceded and granted.³⁴ However, for each of these tribes, there was controversy over the validity of these treaties. For example, upon the signing of the Treaty of New Echota, Cherokee leaders immediately said that the Cherokee signatories had no authority to bind the tribe.³⁵ Similarly, the Seminole leaders who signed that tribe's removal treaty immediately said they had done so under duress, an account corroborated by a United States Army officer.³⁶

As a result, segments of each of the Five Civilized Tribes refused to abide by the removal treaties. Consequently, some tribal citizens voluntarily relocated to their respective tribe's new homelands, while others remained in their ancestral lands.³⁷ Most of these remaining tribal citizens experienced forced removal by the United States Army, the most well-known being the forced removal of some sixteen thousand Cherokees known as the "Trail of Tears."³⁸ Seminoles resisting removal fought the Second Seminole War, lasting from 1835 to 1842.³⁹

That background is instructive when examining the language and intent of the removal treaties. Each treaty has several facets in common that bear on examination of water rights that will be discussed in more detail below. For the moment, it should be kept in mind that each treaty granted the tribes fee patents from the

³² S. DOC. NO. 512, at 240–242 (1st Sess. 1830).

³³ See Prucha, *supra* note 31, at 216.

³⁴ See *id.* at 214–42.

³⁵ See *id.* at 237.

³⁶ GRANT FOREMAN, *INDIAN REMOVAL* 321 (2d ed. 1986).

³⁷ See *id.* at 218–19, 225–26, 222–23, 229–33.

³⁸ See *id.* at 44–55, 126–28, 205–15, 225–26, 251–63, 290–93, 294–312, 315–23, 364–70, 379–86.

³⁹ See Canter Brown, *The Florida Crisis of 1826–1827 and the Second Seminole War*, 73 *FLORIDA HIST. Q.*, 419, 419 (1995).

United States to lands in the Indian Territory.⁴⁰ Second, each treaty explicitly stated that the intent of the parties was to create a homeland for the tribes and that their land would not be encompassed within a future state⁴¹—an essential provision given the state-tribal conflicts giving rise to removal in the first place.

Despite the creation of these permanent homelands, promises of protection, and guarantees that no state would be created in the Indian Territory, federal policies toward Indian tribes shifted drastically after the Civil War. By 1907, once again under the pressure of non-Indian encroachment on tribal lands, the Indian Territory was incorporated into the state of Oklahoma, and the process of dividing and allotting tribal lands to individuals was well underway.⁴² Yet, as discussed below, the Five Civilized Tribes retained significant water rights pursuant to their removal treaties.

III. THE FIVE CIVILIZED TRIBES' WATER RIGHTS

There is a triangulated tension between federal, state and tribal sovereign authority that frequently comes to the fore in Indian law cases, especially in cases involving water and natural resources.⁴³ The outcomes of these cases usually depend on how courts delineate which of those sovereigns have ownership and, more importantly, governing authority over land, water, and resources. Among Indian tribes, the Five Civilized Tribes have unique water rights. To understand their specific position, a discussion of general principles of state and tribal water rights is necessary. Against that background, the distinct scope of the Five

⁴⁰ See Treaty with the Choctaw, Choctaw-U.S., Sept. 27, 1830, 7 Stat. 333; Treaty with the Creeks, Creek-U.S., art. 14, Mar. 24, 1832, 7 Stat. 366; Treaty with the Chickasaw, Chickasaw-U.S., art. 13, May 24, 1834, 7 Stat. 450; Treaty with the Cherokee, Cherokee-U.S., Dec. 29, 1835, 7 Stat. 478. See *infra* Section III. C.

⁴¹ See Treaty With the Choctaw, *supra* note 40, at art. 4; Treaty With the Creeks, *supra* note 40, at art. 14; Treaty With the Chickasaw, *supra* note 40, at art. 2; Treaty With the Cherokee, *supra* note 40, at art. 5.

⁴² See discussion of allotment in Part III. C, *infra*; see also Choctaw Nation v. Oklahoma, 397 U.S. 620, 626–28 (1970); Harjo v. Kleppe, 420 F. Supp. 1110, 1121 (D.D.C. 1976); Philip H. Tinker, *Is Oklahoma Still Indian Country? "Justifiable Expectations" and Reservation Disestablishment in Murphy v. Simons and Osage Nation v. Irby*, 9 DARTMOUTH L.J. 120, 132 (2011).

⁴³ See, e.g., Montana v. United States, 450 U.S. 544 (1981); United States v. Winans, 198 U.S. 371, 379 (1905); Winters v. United States, 207 U.S. 564 (1908); United States v. Adair, 723 F.2d 1394, 1414 (9th Cir. 1983).

Civilized Tribes' rights become apparent.

Two aspects of water rights are at play in this discussion. First, the water rights of states are important because the state typically competes with an Indian tribe for ownership and regulatory jurisdiction. This is true in Oklahoma, where the Bureau of Indian Affairs has long held that the Oklahoma Water Resources Board incorrectly asserts regulatory jurisdiction over tribal water. Second, of course, is the tribes' own treaty rights. The extent of the Five Civilized Tribes' water rights is vividly illustrated by comparison to general, foundational principals of Indian reserved water rights, known as the Winters Doctrine.⁴⁴ The discussion below begins with state water rights, then turns to the Winters Doctrine, and concludes with an explanation of the Five Civilized Tribes' unique water rights.

A. *State Water Rights*

At the outset, it is important to understand the twin doctrines that arise in the context of governmental control of surface waters: the Equal Footing Doctrine and the Public Trust Doctrine. As explained in more detail below, these doctrines operate differently when applied to the Five Civilized Tribes and are the underlying reason why the Five Civilized Tribes' water rights are much more expansive than those of other tribes.

An underlying doctrinal thread of state, federal, and tribal water rights cases is the Equal Footing Doctrine. Although the Equal Footing Doctrine is a lens through which federalism tensions between states and the federal government are viewed, it often arises in Indian water rights cases because courts frequently delineate territorial and governmental power through that doctrine and the Tenth Amendment.⁴⁵ The Equal Footing Doctrine as applied to water rights was first addressed by the Supreme Court in 1845. That case, *Pollard's Lessee v. Hagan*,⁴⁶ concerned the

⁴⁴ See Robert T. Anderson, *Indian Water Rights and the Federal Trust Responsibility*, 46 NAT. RES. J. 399, 409 (2006).

⁴⁵ See Richard Monette, *One Hundred Years After Winters: The Immovable Object of Tribes' Water Rights Meets the Irresistible Force of States' Reserved Water Rights Under the Equal Footing Doctrine*, in THE FUTURE OF INDIAN AND FEDERAL RESERVED WATER RIGHTS: THE WINTERS CENTENNIAL (2012) 86–89; see, e.g., *Winans*, 198 U.S. at 382–83; *Winters*, 207 U.S. at 577–78; *United States v. Holt State Bank*, 270 U.S. 49, 57–58 (1926).

⁴⁶ See generally *Pollard's Lessee v. Hagan*, 44 U.S. 212 (1845).

newly-admitted State of Alabama's rights over the shores of navigable waters and the soils under them.⁴⁷ The portion of Alabama at issue in the case had been ceded to the United States by Georgia with the explicit intent of the parties to form a new state.⁴⁸ The deed stipulated that these lands would be held in trust by the United States until certain conditions were met and a state was formed and admitted into the Union—the Public Trust Doctrine.⁴⁹ The Court first looked to the rights, sovereignty, and jurisdiction that the original states had over such lands, concluding that Alabama had dominion over the lands at issue because those states never ceded rights to shores and submerged lands of navigable waters, and the Constitution required the admission of new states on an equal footing with the original states.⁵⁰ Hence, after *Pollard*, there is a presumption that submerged lands and soils of navigable waters are held in trust by the United States for future states, and are passed to those states upon admission to the Union.⁵¹

In subsequent decades, exceptions to these general rules were developed by the Court. In *Shively v. Bowlby*,⁵² the United States had acquired the territory out of which it would eventually carve the State of Oregon. Although no sovereign had issued land patents prior to acquisition by the United States, the federal government itself had issued land patents, which included submerged lands. The conflict arose when two successors in interest—one succeeding to a federal patent and the other succeeding to a state deed—wanted to wharf out over the same submerged lands. The Court explained that although the United States generally held title to submerged lands under navigable waters in trust for future states, which would take title upon admission to the Union, exceptions existed where an international duty or public exigency dictated otherwise, and a pre-statehood grant by the United States presented such an exigency.⁵³ Accordingly, the Equal Footing Doctrine does not require that

⁴⁷ *See id.*

⁴⁸ *See id.* at 221.

⁴⁹ *See id.* at 224.

⁵⁰ *See id.* at 228.

⁵¹ *See Montana*, 450 U.S. at 551 (1981); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 283 (1997).

⁵² *See Shively v. Bowlby*, 152 U.S. 1, 9 (1894).

⁵³ *See id.* at 29–30, 47–48, 58.

ownership patterns be the same in various states, but that each state has an equal right to govern the lands.⁵⁴

Consequently, when submerged lands pass to the state upon statehood, the ownership of the surface water also passes to the state, in trust for the public's use and subject to state regulation.⁵⁵ This ownership and governance is so closely identified with sovereign authority that "disposal[] [of submerged lands and water] by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain."⁵⁶

B. *Tribal Water Rights*

While the general rule is that the federal government holds public domain lands in trust for future states, the federal government may reserve land from the public domain, which, in turn does not pass to a state upon statehood.⁵⁷ Indian reservation lands and the water necessary to support them are one such example.⁵⁸

Indian water rights cases primarily address water allocations under prior appropriation systems that are predominant in Western states. The prior appropriation system was developed in the West due to the arid climate and water scarcity.⁵⁹ Prior appropriation is a "first in time, first in right" system for determining water rights. By claiming and diverting surface water, the user establishes a right to that quantity of water put to beneficial use.⁶⁰ In times of water shortage, users are entitled to water in order of seniority—

⁵⁴ See Monette, *supra* note 45, at 102.

⁵⁵ See *Coeur d'Alene Tribe of Idaho*, 521 U.S. at 283.

⁵⁶ *Id.* at 283–84; *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 647–48 (1970) (White, J. dissenting) (quoting *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926)).

⁵⁷ See *Cappaert v. United States*, 426 U.S. 128, 138 (1976); *Montana v. United States*, 450 U.S. 544, 551 (1981) ("As a general principle, the Federal Government holds such lands in trust for future States, to be granted to such States when they enter the Union and assume sovereignty on an 'equal footing' with the established States.").

⁵⁸ See *Winters v. United States*, 207 U.S. 564, 577 (1908).

⁵⁹ See AMERICAN INDIAN LAW DESKBOOK 188 (2d ed. 1998) [hereinafter AMERICAN INDIAN LAW DESKBOOK].

⁶⁰ See *id.*

the first appropriators having priority of over later “junior” users.⁶¹ However, a senior user’s entitlement to water quantity is limited to the quantity utilized when the senior right was established and any increased quantity appropriated is subject to a later priority date.⁶² It is within this context that most Indian water law was developed by the courts, which culminated in the guiding principle: the Winters Doctrine.

While *Pollard’s Lessee* and *Shively* provide important underpinnings for understanding the extent of state water rights, two other cases set the stage for the Court’s first articulation of Indian water rights. The seeds of the Winters Doctrine were first sown in *United States v. Rio Grande Dam & Irrigation Co.*,⁶³ in which the Court held that a state could change from a riparian to appropriative water system, so long as it did not destroy the United States’ right, as owner of land bordering a stream, to continued water flows necessary for the beneficial use of government property.⁶⁴

Six years later, in *United States v. Winans*,⁶⁵ the Court examined whether citizens of the Yakama Nation retained a right, guaranteed in the 1855 Treaty of Point Elliot, to the “taking fish at all usual and accustomed fish grounds . . . in common with the citizens of the territory,” even though they had ceded territorial lands appurtenant to the Columbia River, which was in turn conveyed by patent to non-Indian settlers.⁶⁶ Crucially important to the interpretation of Indian rights, including treaty and water rights, was the Court’s conclusion that the treaty language was “not a grant of rights to the Indians but a grant of rights from them—a reservation of those not granted.”⁶⁷ Thus, the reservation of these fishing rights imposed a continuing servitude upon the United States and its grantees for Yakama Indians to cross certain lands in order to fish and, in some instances, erect temporary structures on lands for the curing of fish.⁶⁸

⁶¹ *See id.*

⁶² *See id.*

⁶³ *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690 (1899).

⁶⁴ *See id.* at 702–03; *see also* AMERICAN INDIAN LAW DESKBOOK, *supra* note 59, at 188–189.

⁶⁵ *United States v. Winans*, 198 U.S. 371 (1905).

⁶⁶ *Id.* at 379.

⁶⁷ *Id.* at 381–82.

⁶⁸ *See id.*

It was these two cases that the Court relied upon two years later when called upon to address whether the Fort Belknap Reservation in Montana had a right to water from the Milk River for irrigation purposes. In *Winters v. United States*,⁶⁹ the United States, on behalf of the Gros Ventre and Assiniboine tribes, sued to enjoin upstream water users from constructing dams and otherwise depriving the Fort Belknap Reservation of sufficient flows from the Milk River.⁷⁰

The Court's opinion centered on the history of land conveyance as well as the intent of the United States in creating the Fort Belknap Reservation. The tribes had ceded large land tracts in Montana Territory to the United States through an agreement ratified by Congress on May 1, 1888.⁷¹ This ratification also created the Fort Belknap Indian Reservation.⁷² These ceded lands were held in the public domain, subject to disposal by the United States, and were intended primarily for non-Indian settlement.⁷³ Relying on *Rio Grande* and *Winans*, the Court began its analysis with the premise that the United States could reserve federal water rights from the public domain, and those water rights would not pass to a state—in this case Montana—upon statehood.⁷⁴ Moreover, those federal water rights were protected from appropriation by other users.⁷⁵ The Court then looked to the intent of the United States and tribes to create a homeland that would shift the tribes from a nomadic to an agrarian lifestyle, and concluded that without sufficient water to support such agrarian activities, the Fort Belknap Indian Reservation would be useless for its intended purpose.⁷⁶ The Court concluded that reservation of lands from the public domain for Indian homelands impliedly reserved water rights as of the date the reservation was created, in the quantity necessary to utilize the reservation for its intended agrarian purposes.⁷⁷ Thus, the water right for Fort Belknap had an 1888 priority date, which was several years senior to the defendant

⁶⁹ 207 U.S. 564 (1908).

⁷⁰ *See id.* at 567.

⁷¹ *See id.* at 568.

⁷² *See id.* at 577.

⁷³ *See id.* at 568.

⁷⁴ *See id.* at 577.

⁷⁵ *See id.*

⁷⁶ *See id.* at 576–77.

⁷⁷ *See id.*

water users' rights.⁷⁸ This implied reservation of water rights from the public domain became known as the Winters Doctrine.

A number of rules can be gleaned from *Winters* and subsequent cases defining the contours of the Indian Reserved Water Rights doctrine.⁷⁹ First, Indian reserved water rights are creatures of federal law that preempt state water law, although they require an appropriation date to fit within the state allocation system. Second, Indian reserved water rights arise from a tribe's original occupancy of the land or are established by federal actions setting aside tribal territory.⁸⁰ Third, the priority date under rules for prior appropriation doctrine for tribal water rights is "time immemorial," when the right springs from original occupancy,⁸¹ or the date of creation of the reservation where the right is rooted in the federal government's act of setting aside tribal territory. Finally, Indian water rights (as with federal water rights) are not forfeited by non-use, and disruption of junior appropriators is of no moment in determining whether the Indian water right exists.⁸²

Upon close study of *Winans* and *Winters*, one can see that the concept of "reserved" rights has two dimensions. First, when tribes made treaties with the United States, any property rights not explicitly ceded by the tribe to the United States are regarded as reserved to the tribe. Simply stated, "rights not given up [are] reserved."⁸³ The second dimension of "reserved" rights relates to property rights reserved by the United States upon creation of a state. Much like lands in the federal public domain and military

⁷⁸ See *id.* at 577.

⁷⁹ A number of commentators refer to the same set of principles defining the Indian Reserved Water Rights Doctrine. Among them are: COHEN'S, *supra* note 23, at § 4.07; AMERICAN INDIAN LAW DESKBOOK, *supra* note 59, at 191.

⁸⁰ See Robert T. Anderson, *Water Rights, Water Quality, and Regulatory Jurisdiction in Indian Country*, 34 STAN. ENVTL. L.J. 195, 205 (2015).

⁸¹ *United States v. Adair*, 723 F.2d 1394, 1414 (9th Cir. 1983) ("Thus, we are compelled to conclude that where, as here, a tribe shows its aboriginal use of water to support a hunting and fishing lifestyle, and then enters into a treaty with the United States that reserves this aboriginal water use, the water right thereby established retains a priority date of first or immemorial use."); see also JUDITH ROYSTER ET AL., NATIVE AMERICAN NATURAL RESOURCES LAW 386 (2013) (discussing *Adair's* finding of time immemorial priority date).

⁸² COHEN'S, *supra* note 59, at § 4.07.

⁸³ See Brief for the Assiniboine and Sioux Tribes of the Fort Peck Reservation, et al. as Amici Curiae, *United States v. Dion*, No. 85-246, 1986 WL 727907, at *6 (1986) (citing *Winters v. United States*, 207 U.S. 564, 576-77 (1908)); *United States v. Winans*, 198 U.S. 371, 381 (1905).

reservations, the United States' transfer of title to a state of lands comprising that particular state does not include Indian reservation lands.⁸⁴ The interplay of these notions of reserved rights is particularly important because almost all western lands of the continent were acquired by the United States in contemplation of creating states, and indeed, treaty making in the latter part of the 19th century was primarily motivated by creation of these states. Millions of acres of land were ceded by tribes, or forcibly taken by the United States, most of which passed to states upon their creation. Most Western tribes now reside on lands reserved from the public domain lands destined to pass to particular states upon admission into the Union.⁸⁵ One exception was the Indian Territory possessed by the Five Civilized Tribes and those exceptional circumstances are at the heart of their unique water rights.⁸⁶

C. *Distinguishing Features of the Five Civilized Tribes' Water Rights*

The more expansive water rights of the Five Civilized Tribes are rooted in how the tribes came into possession of their lands within the Indian Territory. The Five Civilized Tribes' aboriginal lands were in what is now the Southeastern United States. In the early 1830s, each of these tribes entered into treaties with the

⁸⁴ See, e.g., Utah Enabling Act, ch.138, 28 Stat. 107 § 3 (1894) ("That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof; and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States"); Arizona Enabling Act, ch. 310, 36 Stat. 557 § 20 (1910) ("That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States[.]"); New Mexico Enabling Act, ch. 310, 36 Stat. 557 § 2(b) (1910) (same language as Arizona Enabling Act). The enabling act creating the states of North Dakota, South Dakota, Montana, and Washington uses the same language as the Utah Enabling Act. ch. 180, 25 Stat. 677 (1889).

⁸⁵ See Mullon, *supra* note 13, at 85.

⁸⁶ See *id.*

United States that ceded those lands in exchange for, *inter alia*, lands west of the Mississippi River, in the Indian Territory. Importantly, the United States granted the Five Civilized Tribes fee patents to their new lands in the Indian Territory.⁸⁷

The Treaty of Dancing Rabbit,⁸⁸ made with the Choctaw Nation, provides:

The United States under a grant specially to be made by the President of the U.S. shall cause to be conveyed to the Choctaw Nation a tract of country west of the Mississippi River, in fee simple to them and their descendants, to inure to them while they shall exist as a nation and live on it⁸⁹

Similarly, the Treaty with the Creeks provides in Article 14:

And the United States will also defend [the Creeks] from the unjust hostilities of other Indians, and will also as soon as the boundaries of the Creek country West of the Mississippi are ascertained, cause a patent or grant to be executed to the Creek Tribe⁹⁰

The Treaty of New Echota,⁹¹ made with the Cherokee Nation, first acknowledges fee patents already conveyed to the tribe in the Indian Territory for previous settlements via a previous treaty, recognizes that the previous amount of fee land was insufficient to support the rest of the Cherokees moving west and settling upon it, and agrees to convey an additional tract of land “to the said Indians, and their descendants by patent, in fee simple”⁹²

The procurement of lands in the Indian Territory operated slightly differently for the Chickasaw and Seminole, who were not promised fee patents in the language of their removal treaties, but were more generally promised that the United States would advance money for the purchase of new homelands.⁹³ Nevertheless, their homelands in the Indian Territory were eventually granted in fee—the Chickasaws obtained a portion of the Choctaw lands in fee, and the Seminoles obtained a portion of

⁸⁷ See Work, *supra* note 14, at II-23 to -24 (2009); *United States v. Reese*, 27 F. Cas. 742, 745 (C.C.W.D. Ark. 1879) (Parker, J.) (holding Cherokee lands obtained by tribe under Treaty of New Echota were held in fee).

⁸⁸ See generally Treaty with the Choctaw, *supra* note 40.

⁸⁹ *Id.* at art. II.

⁹⁰ See Treaty with the Creeks, *supra* note 40, at art. 14.

⁹¹ See generally Treaty with the Cherokee, *supra* note 40.

⁹² *Id.* at art. 2.

⁹³ See Treaty with the Chickasaw, *supra* note 40, at art. 13.

the Creek lands.⁹⁴

The fee patents conveyed to the Five Civilized Tribes contrast with the type of title held by almost all other tribes. In its first case addressing Indian ownership of lands, *Johnson v. McIntosh*,⁹⁵ the Supreme Court held that, pursuant to the Doctrine of Discovery, the United States held ultimate title to Indian lands, Indian tribes had only a right to “occupy” land, and “title of occupancy” could be extinguished only through purchase or conquest by the United States.⁹⁶ However, fee title carries with it a much broader, more durable bundle of rights than either aboriginal title or lands held in trust by the United States for the benefit of tribes.⁹⁷

In addition to the fact that the Five Civilized Tribes held fee patents to their new lands, the intent of the land grants was very explicit. “[B]oth the Five Civilized Tribes and the United States intended that no organized territorial government or state would ever include the new domains of the Five Civilized Tribes.”⁹⁸

⁹⁴ See *id.* at art. IV; Foreman, *supra* note 36, at 203 (detailing the purchase of Choctaw lands in the West by the Chickasaw); Treaty With the Seminole, Seminole-U.S., Mar. 28, 1833, at 424, 7 Stat. 423, 424 (“[T]heir nation shall commence the removal to their new *home* as soon as the Government will make arrangements for their emigration, satisfactory to the Seminole nation.”) (emphasis added); REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS OF 1890, DEPT. OF INTERIOR, at xxxiv–xxxv (explaining fee land holdings by the Five Civilized Tribes, describing Chickasaw lands as embraced by the fee patents issued to the Choctaw Nation and describing Seminole lands as being held under treaty of purchase from the Creek Nation).

⁹⁵ See generally *Johnson v. McIntosh*, 21 U.S. 543 (1823).

⁹⁶ See Angela Riley & Kristen A. Carpenter, *Owning Red: A Theory of Indian Cultural Appropriation*, 94 TEXAS L. REV. 859 (2016) (citing Joseph William Singer, *Original Acquisition of Property: From Conquest and Dispossession to Democracy and Equal Opportunity*, 86 IND. L.J. 763, 767 (2011)); Joseph William Singer, *Erasing Indian Country: The Story of Tee-Hit-Ton Indians v. United States* in INDIAN LAW STORIES 244–45 (Carole E. Goldberg et al. eds., 2011).

⁹⁷ See *Indian Country, U.S.A., Inc. v. Oklahoma Tax Comm’n*, 829 F.2d 967, 975–76 (10th Cir. 1987) (“Indeed, it would be anomalous to adopt the State’s position suggesting that the treaties conferring upon the Creek Nation a title *stronger* than the right of occupancy have left the tribal land base with *less* protection, simply because fee title is not formally held by the United States in trust for the Tribe.”) (emphasis in original).

⁹⁸ *Id.* See also *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 638 (1970) (“Our agents said the following to the Cherokee Council on July 31, 1837: ‘Here you are subjected to laws, in the making of which you have no voice; laws which are unsuited to your customs, and abhorrent to your ideas of liberty. There, Cherokees, you will make laws for yourselves, and establish such government as in your own estimation may be best suited to your condition. There, Cherokees,

Thus, the 1835 Treaty with the Cherokee provides:

The United States hereby covenant and agree that the lands ceded to the Cherokee Nation in the forgoing article shall, in no future time without their consent, be included within the territorial limits of any State or Territory [sic].⁹⁹

Likewise, the 1830 Treaty with the Choctaw provides:

The Government and People of the United States are hereby obliged to secure to the said Choctaw Nation of Red People the jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have the right to pass laws for the government of the Choctaw Nation of Red People and their descendants; and that no part of the land granted them shall ever be embraced by any Territory or State[.]¹⁰⁰

The 1834 Treaty with the Chickasaw provides:

The Chickasaw are about to abandon their homes, which they have long cherished and loved; and though heretofore unsuccessful, they still hope to find a country, adequate to the want and support of their people, somewhere west of the Mississippi and within the territorial limits of the United States; should they do so, the Government of the United States hereby consent to protect and defend them against the inroads of any other tribe of Indians, and from the whites; and agree to keep them without the limits of any State or Territory.¹⁰¹

The 1832 Treaty with the Creeks provided:

The Creek country west of the Mississippi shall be solemnly guaranteed to the Creek Indians, nor shall any State or Territory ever have a right to pass laws for the government of such Indians¹⁰²

Finally, the status of these lands was quite different immediately prior to Oklahoma's statehood as compared to other states. Fee title to these tribal homelands passed to the tribes and was not vested in the United States immediately prior to Oklahoma

in your new country, you will be far beyond the limits or jurisdiction of any State or Territory. The country will be yours; yours exclusively. No other people can make claim to it, and you will be protected by the vigilant power of the United States against the intrusion of the white man.' S.Doc. No. 120, 25th Cong., 2d Sess., 988").

⁹⁹ Treaty with the Cherokee, *supra* note 40, at art. 5.

¹⁰⁰ Treaty with the Choctaw, *supra* note 40, at art. 4.

¹⁰¹ Treaty with the Chickasaw, *supra* note 40, at art. 2.

¹⁰² Treaty with the Creeks, *supra* note 40, at art. 14.

statehood. Thus, the equal footing and public trust doctrines from *Pollard's Lessee* and *Shively* operated differently—or, perhaps more accurately, not at all—with regard to lands retained by the Five Civilized Tribes. This led the Supreme Court to conclude—at least in one specific instance (regarding the Arkansas Riverbed, discussed further below)—that the United States reserved no property interest for itself that could be passed to Oklahoma upon statehood.¹⁰³

Thus, unlike the federal reservation in *Winters*, the fee lands of the Five Civilized Tribes were “never encompassed within, nor carved from, an organized territory of the United States.”¹⁰⁴ The chain of title to the lands that today lie within the boundaries of Oklahoma—especially eastern Oklahoma—is unique. The federal government did not obtain the lands now within the borders of Oklahoma in contemplation of forming a state.¹⁰⁵ It was always intended to be a homeland for relocated tribes. Accordingly, title passed from the United States to the Five Civilized Tribes, and most of the lands in the western portion of the Indian Territory were ceded to the United States in post-Civil War treaties between the tribes and the United States.¹⁰⁶ Those western lands, including lands set aside for other tribes, were the subject of the 1890 Oklahoma Organic Act, which authorized the formation of Oklahoma Territory by non-Indians.¹⁰⁷ Importantly, the Organic Act continued the eastern portion’s designation as the Indian Territory, the Five Civilized Tribes continued to retain fee title to those lands, and no territorial government was authorized there.¹⁰⁸ Hence, each of the Five Civilized Tribes continued to govern their respective domains within the Indian Territory.¹⁰⁹

Additionally, because these lands were held in fee, as opposed to the trust lands held by other tribes, the Five Civilized Tribes were not subject to the General Allotment Act, which forced the transfer of title of most tribal lands held in trust by the United States, to pass to individual Indian owners, with the “surplus”

103 See *Choctaw Nation*, 397 U.S. at 634–635.

104 Work, *supra* note 14, at II-24.

105 See *id.*

106 See *id.*

107 See *id.*

108 See *id.* at II-24 to -25.

109 See *id.* at II-25.

lands becoming part of the United States' public domain.¹¹⁰ Instead, Congress enacted the Act of March 3, 1893, establishing the Dawes Commission to negotiate allotment with the Five Civilized Tribes.¹¹¹ When the tribes refused to cooperate, Congress passed the Curtis Act, which threatened termination of the tribal judicial authority and allotment if the Five Civilized Tribes did not acquiesce.¹¹² Eventually, each of the Five Civilized Tribes approved allotment agreements, but nothing in those allotment agreements relinquished tribal water rights to a future state.¹¹³ Further, under the Curtis Act, no part of the fee title held by the tribes passed to the United States, but instead passed directly to the Indian allottee.¹¹⁴ Thus, when the eastern portion of the Indian Territory eventually became part of the state of Oklahoma, the United States held no water rights it could convey to the new state.¹¹⁵ Additionally, the title passing to the Indian allottee did not expressly convey water rights, and such an express conveyance is required to alienate Indian property rights.¹¹⁶ Accordingly, since the time the Five Civilized Tribes obtained fee title to the lands in the eastern portions of the Indian Territory until the present day, they have always retained water rights that are not subject to ownership or control of any other government.

This view of the Five Civilized Tribes' water rights finds support in Supreme Court case law. In a 1959 case involving Oklahoma's authority to construct a hydroelectric facility on the Grand River, the Supreme Court held that particular federal statutes did not grant Oklahoma title to water and appurtenant lands held by the Five Civilized Tribes.¹¹⁷ The 1970 Supreme Court opinion in *Choctaw Nation v. Oklahoma*¹¹⁸ followed much the same logic, holding that the early 19th century treaties as well as fee patents issued by the United States vested title to the Arkansas riverbed located in eastern Oklahoma to the Choctaw

¹¹⁰ See Judith K. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L. J. 1, 9, 13 (1995).

¹¹¹ See Work, *supra* note 14, at II-25.

¹¹² See *id.*

¹¹³ See *id.*

¹¹⁴ See *id.* at II-25 to -26.

¹¹⁵ See *id.* at II-26.

¹¹⁶ See *United States v. Winans*, 198 U.S. 371 (1905).

¹¹⁷ See *United States v. Grand River Dam Auth.*, 363 U.S. 229, 235 (1959).

¹¹⁸ *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970).

Nation and Cherokee Nation and did not pass to Oklahoma upon statehood.¹¹⁹ These cases, while not comprehensively articulating the scope of the tribes' water rights, certainly set forth a legal framework that would support the conclusion that the tribes retain extensive water rights in eastern Oklahoma.

Further, the Five Civilized Tribes have more than a property right, but also a sovereign right of governance. A key holding from *Shively* was that, regardless of ownership, submerged lands in navigable waters are subject to *governance* by the state.¹²⁰ Even where the federal government grants title, or confirms a pre-statehood grant of title that the state must uphold, the new state assumes governance of the property upon its admission.¹²¹ However, there is an exception to the state governance rule where Indian treaty rights are exercised within the tribe's reservation territory.¹²²

There is also a drastic difference between the facts involved with Equal Footing Doctrine jurisprudence to date and the Five Civilized Tribes' history. All of those cases dealt with sovereigns patenting lands to private owners pre-statehood and to states. By contrast, the Five Civilized Tribes' treaties grant both ownership and *territory*, which is not subject to the governmental control of a future state government. For example, the Treaty of New Echota provides:

The United States hereby covenant and agree that the lands ceded to the Cherokee Nation in the forgoing article shall, in no future time without their consent, be included within the territorial limits of any State or Territory [sic].¹²³

This pairing of a grant of title and preservation of tribal governance was the crux of the Court's distinction in the *Choctaw* case. There, the Court said that the presumption against the United States conveying submerged lands was overcome by the fact that the tribes were "granted almost complete sovereignty over their new lands."¹²⁴ The Court returned to this distinction a decade later in *Montana v. United States*, when the Crow Tribe relied on the *Choctaw* case for its assertion of regulatory authority over the Big

119 *See id.* at 633.

120 *See Monette, supra* note 45, at 102.

121 *See id.* at 103.

122 *See id.* at 121.

123 Treaty with the Cherokee, *supra* note 40, at 442.

124 *Choctaw Nation*, 397 U.S. at 637-40.

Horn River. There, in declining to uphold the Crow's regulatory authority, the Court pointed to the Five Civilized Tribes' unusually strong treaty provisions for ownership and governance.¹²⁵

Therefore, under existing Equal Footing jurisprudence, it is clear that the Five Civilized Tribes have a property right in submerged lands within their territorial areas, which, in turn, gives rise to a right to regulate the waters themselves. Nevertheless, the scope of tribal governance is not unlimited and is discussed in greater detail with reference to enforcement in Section IV below.

D. *Does This Bundle of Rights Include a Right to Water Quality?*

While legal authority points to extensive water rights by the Five Civilized Tribes, there are no reported decisions on whether their bundle of rights includes an enforceable right to water quality. For that matter, there is “virtually no reserved water rights case law . . . on the right to water quality.”¹²⁶ However, there are several arguments supporting the conclusion that a right to water quality was created or implied which comport with water law, the Reserved Water Rights Doctrine, and property law. The Five Civilized Tribes' water rights are novel and do not fit neatly into traditional riparian, appropriative, or reserved water rights systems. Therefore, the exploration of rights to water quality outlined below is done so for analogous purposes and to demonstrate that the tribes' right to water quality is consistent with the rights of water users in other systems.

1. *Water Quality Rights Under a Reserved Water Rights Approach*

In discussing the parameters of reserved water rights and how that body of law bears on the Five Civilized Tribes' rights to water quality, it is important to reiterate that, unlike reserved lands, the lands of the Five Civilized Tribes were never in the public domain and *Winters-Winans* types of analysis are of limited utility. Nevertheless, these cases help to define the minimum scope of rights a tribe may hold and support the notion that tribes generally possess a collective right to water that is protected under and respected by both federal and state law. Indeed, some

¹²⁵ See *Montana v. United States*, 450 U.S. 544, 555 n.5 (1981).

¹²⁶ JUDITH ROYSTER ET AL., *NATIVE AMERICAN NATURAL RESOURCES LAW* 420 (2013).

commentators have concluded that *Winters* rights are narrower than other rights that may be held by tribes, especially under an aboriginal title, as opposed to a federal Property Power theory.¹²⁷ The rights of the Five Civilized Tribes as owners in fee are likely much greater than other tribes whose lands are held in trust by the United States. Thus, if a right to water quality may be found under the *Winters* Doctrine, it should also exist for the Five Civilized Tribes, whose fee title provides a stronger property interest. Although none of the *Winters* or *Winans* progeny have addressed implied rights to water quality, the principals on which those cases rely support the conclusion that such rights may exist.¹²⁸

At the heart of *Winters* and other reserved water rights cases is the concept of the “purpose” of a specific tract of federal reserved lands and the necessity of water to fulfill the purpose for an entire tribe. In *Winters*, the purpose was a homeland set aside for the tribe, and due to the arid location, a certain quantity of water would be required in order for the Fort Belknap Indian Reservation to be livable—hence the implied reservation of a quantity of water.¹²⁹ This fulfillment of purpose is central to other foundational reserved water rights cases as well. For example, in *Colville Confederated Tribes v. Walton*, the Ninth Circuit held that not only was an agrarian life a component of the “homeland” purpose, but that fishing was also an important economic and religious facet of Colville life and, therefore, a sufficient amount of water necessary to support and maintain the traditional tribal Omak Lake trout fishery was also implied with the reservation.¹³⁰

Fulfillment of purpose does not just apply to Indian reservations, but to all federal reservations. In *Cappaert v. United States*,¹³¹ a different type of reservation was at issue: Devil’s Hole National Monument, which contains an underground pool with a single, very rare fish species. A neighboring rancher was pumping ground water, which depleted water levels in the underground pool

¹²⁷ See A. DAN TARLOCK, *LAW OF WATER RIGHTS AND RESOURCES* § 9:40 (2016).

¹²⁸ See Mark E. Chandler, *A Link Between Water Quality and Water Rights: Native American Control Over Water Quality*, 30 *TULSA L. REV.* 105, 106–07 (1994).

¹²⁹ See *id.*

¹³⁰ See *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 48 (9th Cir. 1981).

¹³¹ See generally *Cappaert v. United States*, 426 U.S. 128, 132 (1976).

in Devil's Hole and, in turn, imperiled the fish that needed a certain quantity of water to survive.¹³² The Court held that where the United States withdraws land from the public domain and reserves it for a federal purpose, the government also reserves sufficient appurtenant water to fulfill that purpose.¹³³ This is called the federal reserved water rights doctrine. Because the purpose of Devil's Hole National Monument was preserving the scientific value of the underground fish species, the United States had impliedly reserved water for that purpose.¹³⁴ Since the plaintiff had not appropriated any water prior to the federal government's reservation, the United States' reserved water right was superior. Notably, up to that point the Court had not applied the reserved water rights doctrine to ground water.¹³⁵ Nevertheless, the Court held that the doctrine of reserved water rights applied equally to ground water where it is necessary to fulfill the reservation's purpose.¹³⁶

This concept of implying rights that are necessary to fulfilling a federal purpose applies with equal force to water quality. Impairment of water quality threatens a reservation's purpose just as much as depriving it of sufficient water quantity. Moreover, water is of little use if its quality is impaired. In order for a homeland to be livable, not only is a sufficient amount of water necessary, so is water of acceptable quality for its consumptive use. Thus, while reserved water rights cases to date have focused on water allocations, their focus on fulfillment of the federal purpose for reserving land appears to apply to water quality as well.

At least one court agrees. In *Hopi Tribe v. United States*, the Federal Circuit mentioned in dicta that "in some circumstances" the *Winters* Doctrine may also give the United States the power to enjoin activity that reduces the quality of water feeding a reservation.¹³⁷ However, the court never reached the merits of the argument due to its conclusion that it lacked jurisdiction over the

¹³² See *id.* at 133–34.

¹³³ See *id.* at 139–41.

¹³⁴ See generally *Cappaert*, 426 U.S. 128.

¹³⁵ See *id.* at 142.

¹³⁶ See *id.*

¹³⁷ See *Hopi Tribe v. United States*, 782 F.3d 662, 669 (Fed. Cir. 2015) (citing *United States v. Gila Valley Irrigation Dist.*, 920 F. Supp. 1444, 1454–55 (D. Ariz. 1996)).

case. Nevertheless, the opinion provides another indication that courts view the *Winters* doctrine as protecting a broader set of Indian water rights than just an allocation of quantity.

Plainly, the purpose of granting fee patents to the Five Civilized Tribes in the Indian Territory was to provide a permanent homeland. The preamble to the Treaty of New Echota states that the treaty was made “with a view to reuniting [the Cherokee] people in one body and securing a permanent home”¹³⁸ Likewise, the Treaty of Dancing Rabbit, entered into with the Choctaws, repeatedly refers to the tribe’s new “home.”¹³⁹ The Treaty of Pontotoc’s preamble similarly stated that rather than be subjected to the “great evil” of being subject to the laws of the state, the Chickasaw’s sought “a home in the west, where they may live and be governed by their own laws.”¹⁴⁰

Accordingly, although a federal court has never directly confronted the question of whether federal reserved water rights imply an enforceable right to water quality, there are strong indications that they do. Because courts recognize that the setting aside of lands imply the reservation of water rights to support the designated land use, there is every reason to conclude this includes rights to water quality for the very same reasons that courts have uniformly concluded that reservations include rights to water quantity.

2. *Rights to Water Quality Under General Water Law Principles*

Under the prior appropriation doctrine, some courts have held that a water right holder is entitled to water free from contamination by a superior appropriator.¹⁴¹ As one court pointed out, “[t]he courts of the western states generally agree that a prior appropriator of water is entitled to protection, including injunctive relief, against material degradation of the quality of the water by junior appropriators upstream.”¹⁴² This suggests that holding a water right is not just an entitlement to an allocation of a specific quantity of water, but also of water that is of acceptable quality.

A number of courts have held that, under appropriative water

¹³⁸ Treaty with the Cherokee, *supra* note 40, at ¶ 2.

¹³⁹ Treaty with the Choctaw, *supra* note 41, at arts. III, XVI, IXX.

¹⁴⁰ Treaty with the Chickasaw, *supra* note 40.

¹⁴¹ See *United States v. Gila Valley Irrigation Dist.*, 920 F. Supp. 1444, 1455 (D. Ariz. 1996), *aff’d*, 117 F.3d 425 (9th Cir. 1997).

¹⁴² *Id.* at 1448.

systems, junior users have a right to receive water in a “natural state of purity.”¹⁴³ Most courts have followed a “reasonable use” approach, which bars unreasonable impairment of water quality by senior users,¹⁴⁴ and senior users are likewise protected against impairment of water quality.¹⁴⁵

Under riparian water systems, pollution is a disfavored use.¹⁴⁶ There is no right to pollute, and concomitantly, downstream owners have a right to be free of pollution.¹⁴⁷ Pollution impedes natural flow and is a consumptive use because, by definition, it loads a waterway with contamination greater than the river’s ability to clean itself.¹⁴⁸ Because it claims sizable flows, pollution leaves “little room for others at the common table.”¹⁴⁹ Accordingly, polluting uses are often relegated to a subordinate status.¹⁵⁰

3. *To What Level of Water Quality are the Tribes Entitled?*

What specific level of water quality would be required is unclear. *Cappaert* suggests that it may be a minimum water quality standard.¹⁵¹ There, the Court concluded that the quantity of water reserved for Devil’s Hole was “only that amount [] necessary to fulfill the purpose of the reservation, no more.”¹⁵² Under the framework of property law, most cases follow a “sufficient quality” or reasonableness standard for the given use in a specific case. Thus, the protection is not against any water quality impairment, but only the unreasonable diminution of quality of water given its use.¹⁵³ Accordingly, what level of water quality

¹⁴³ TARLOCK, *supra* note 127, at § 5:96.

¹⁴⁴ *See id.*; Ryan Jarvis, *Prior Appropriation and Water Quality: The Water Court’s Authority to Protect an Appropriator’s Right to Clean Water*, 16 U. DENV. WATER L. REV. 295, 303 (2013) (“Colorado case law is replete with cases in which the water court protected an appropriator’s right to continued receipt of water of sufficient quality to permit continued normal use of the water.”).

¹⁴⁵ *See* WATERS AND WATER RIGHTS § 17.02 (MB) (2015).

¹⁴⁶ *See* 1 Env’t. L. (West) § 2:19.

¹⁴⁷ *See id.*

¹⁴⁸ *See id.*

¹⁴⁹ *Id.*

¹⁵⁰ *See id.*

¹⁵¹ *See Cappaert v. United States*, 426 U.S. 128, 141 (1976) (“The implied-reservation-of-water-rights doctrine, however, reserves only that amount of water necessary to fulfill the purpose of the reservation, no more.”).

¹⁵² *Id.*

¹⁵³ *See Stokes v. Morgan*, 680 P.2d 335, 338 (N.M. 1984); *Coteau Properties*

will be required is likely to be narrowly construed and case-specific.¹⁵⁴

For the Five Civilized Tribes, water has a variety of important uses that suggest they are entitled to a high level of water quality. In addition to consumptive uses, in-stream flow of high quality water supports traditional gathering and subsistence fishing, which the tribe carefully preserved in their treaties.¹⁵⁵ Moreover, many water bodies in eastern Oklahoma have cultural and ceremonial significance in tribal life and are used for spiritual purification.¹⁵⁶ These types of subsistence, cultural and ceremonial uses directly relate to tribal existence and designation of the area for tribal homelands and, therefore, likely entitle the tribes to a high level of water quality.

E. *Were the Treaty Rights Abrogated?*

Even if it is established that the Five Civilized Tribes' treaties established a right to water quality, in order for those rights to continue to the present day, one must rule out the possibility that the treaty rights were congressionally abrogated after Oklahoma statehood.

Generally, the Supreme Court has been "extremely reluctant to find congressional abrogation of [Indian] treaty rights."¹⁵⁷ At the same time, although Indian treaties were understood by Indians—and probably federal negotiators—to be agreements in perpetuity, the Supreme Court has held that Congress may abrogate Indian treaties expressly through statutes.¹⁵⁸ In 1942, Nathan Margold, Solicitor for the Department of Interior, stated the established legal rule for implicit Indian treaty abrogation:

Co. v. Oster, 606 N.W.2d 876, 879 (N.D. 2000) (holding that prior appropriator not entitled to be protected against any impairment in water quality because the standard is "must not result in quality or quantity diminution of water utilized.") (emphasis omitted).

¹⁵⁴ See Jarvis, *supra* note 144, at 304–05.

¹⁵⁵ See Ralph Keen II, *Tribal Hunting and Fishing Regulatory Authority Within Oklahoma*, 86 OKLA. BAR J. 24 (Sept. 12, 2015), <http://www.okbar.org/members/BarJournal/archive2015/SeptArchive15/OBJ8624Keen.aspx>.

¹⁵⁶ See Cara Cowan Watts, *Critical Review of U.S. Environmental Protection Agency Numerical Nutrient Criteria with Respect to Culturally Significant Waters as a Designated Use 2* (Dec., 2015) (unpublished Ph.D. dissertation, Oklahoma State University) (on file with Oklahoma State University).

¹⁵⁷ *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 690 (1979).

¹⁵⁸ See *id.*

While it is established that Congress has the right to violate treaty obligations, the converse of this rule is that an intent to do so will be found only where the language of the legislation leaves no room for any other possible construction. “A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed.”¹⁵⁹

There are three possible sources of abrogation: subsequent treaties, federal legislation explicitly abrogating treaty rights, and, possibly, federal laws of general applicability.¹⁶⁰ Each of these are examined in turn.

Following the removal treaties, the next set of significant treaty-making between the Five Civilized Tribes and the United States came after the Civil War. While some tribes made land cessions to the United States in these treaties,¹⁶¹ none of these treaties addressed water rights, let alone contained any explicit relinquishment of water rights in the lands retained by the tribes. Soon after these treaties were signed, the United States discontinued treaty-making with Indian tribes, opting to advance a new policy of assimilation through federal legislation.¹⁶²

As discussed in Part III.C above, Congress passed the Curtis Act in 1898 in an effort to force the Five Civilized Tribes into allotment.¹⁶³ The Curtis Act did not address tribal water rights, and most of the act’s provisions were avoided when the Five Civilized Tribes eventually entered into allotment agreements.¹⁶⁴ Thus, the act contains no explicit abrogation of tribal water rights.

Likewise, the Oklahoma Enabling Act does not contain an

¹⁵⁹ OPINIONS OF THE SOLICITOR OF THE DEPARTMENT OF THE INTERIOR RELATING TO INDIAN AFFAIRS 1090 (1942) (quoting *Cook v. United States*, 288 U.S. 102, 120 (1933)).

¹⁶⁰ See *Lone Wolf v. Hitchcock*, 187 U.S. 553, 553 (1903); *United States v. Dion*, 476 U.S. 734, 738–39 (1986); *Donovan v. Coeur d’Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985) (holding that a law of general applicability will not apply to an Indian tribe if it would abrogate rights guaranteed by Indian treaties); MATTHEW L.M. FLETCHER, *FEDERAL INDIAN LAW* 229 (2016) (“The Supreme Court has not definitively addressed whether federal statutes of general applicability apply to Indian nations.”).

¹⁶¹ See, e.g., Treaty with the Cherokee, *supra* note 40, at art. 17.

¹⁶² See COHEN’S, *supra* note 23, at § 1.04.

¹⁶³ See Work, *supra* note 14, at II-25 (citing Act of June 28, 1898, ch. 517, 30 Stat. 495 and *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1441 (D.C. Cir. 1988)).

¹⁶⁴ See *id.*

explicit statement abrogating tribal water rights. To the contrary, “Congress was ‘careful to preserve the authority of the government of the United States over the Indians, their lands and property, which it had prior to the passage of the act,’ by including a prohibition against construction of the Constitution ‘to limit or impair the rights of person or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished).”¹⁶⁵ Moreover, the State’s enabling act also says that the United States retains exclusive authority over Indian matters.¹⁶⁶ Accordingly, the 1907 Oklahoma Constitution disclaimed any state interest in tribal property.¹⁶⁷

It should also be noted that two other laws were passed during the allotment era that reference water rights of the Five Civilized Tribes, but neither had much, if any, ultimate effect on the Five Civilized Tribes’ water rights, much less effected an abrogation of rights to water quality.¹⁶⁸ A 1902 act allowed condemnation of lands owned by individual Indians and tribes for railway construction in the Indian Territory, including for impoundment of surface waters and the building of dams across waterways.¹⁶⁹ However, the act required full compensation for land taken and any other damages.¹⁷⁰

Additionally, the Five Tribes Act of 1906 “authorized light and power companies to construct, own, and operate reservoirs and dams across non-navigable streams in Indian Territory, for the purpose of obtaining a sufficient supply of water to generate and distribute electric[ity], light, and heat.”¹⁷¹ The Supreme Court had occasion to examine this provision in the *Grand River Dam Authority* case.¹⁷² While it did not address whether the United States or the tribes owned the water rights prior to Oklahoma statehood, it nevertheless concluded that the Act did not pass any ownership to Oklahoma but was, instead, merely a regulatory

¹⁶⁵ *Id.* at II-28 (quoting *Tiger v. Western Inv. Co.*, 221 U.S. 286, 309 (1911)).

¹⁶⁶ *See* Act of June 16, 1906, Pub. L. No. 59-234, 34 Stat. 267, 267–68.

¹⁶⁷ *See* Okla. Const. art. 1, § 3; *see also id.* at 270.

¹⁶⁸ *See* Work, *supra* note 14, at II-26.

¹⁶⁹ *See id.* at II-26 (citing Act of February 28, 1902, 32 Stat. 43 (1902 Railway Act)).

¹⁷⁰ *See id.*

¹⁷¹ *See id.* at II-26 to -27 (citing Act of April 26, 1906, ch. 1876, 34 Stat. 137).

¹⁷² *See id.* at II-27 (citing *United States v. Grand River Dam Auth.*, 363 U.S. at 229, 234 (1959)).

measure.¹⁷³ Thus, the Five Tribes Act does not contain the type of explicit divestiture of tribal water rights necessary for abrogation of the Five Civilized Tribes' treaty rights and no other acts specific to the Five Civilized Tribes mention waterways.¹⁷⁴

No other federal statutes, besides the ones discussed above, address the Five Civilized Tribes' water rights. Moreover, no court has ever found that any general federal statute, such as environmental laws like the Clean Water Act, divest a tribe of its water rights. However, it should be noted that whether those laws displace common law remedies becomes important when examining enforcement mechanisms for treaty rights and will be examined in Part IV below.

IV. ENFORCEMENT OF THE FIVE CIVILIZED TRIBES' TREATY RIGHTS

Separate from the question of whether particular water rights were vested in the Five Civilized Tribes, there is the question of how they are enforced. There are three possible ways in which the Five Civilized Tribes could enforce their rights to water quality. First, they may assert their governmental authority to regulate polluters deriving from their inherent sovereign authority, treaties, and the authority delegated to them by the federal government.¹⁷⁵ Second, they may protect their interests by pursuing remedies under statutory and common law for damages or pollution abatement. Each of these mechanisms has advantages and unique challenges, which are discussed below.

A. *Utilizing the Tribes' Inherent Authority to Enforce Water Quality Standards*

Because Indian tribes are governments, they have a power that run-of-the-mill property owners do not: regulatory authority.¹⁷⁶ Tribes possess sovereign governmental authority over both their members and their territory.¹⁷⁷ Indeed, the Supreme

¹⁷³ See *id.*

¹⁷⁴ See *id.*

¹⁷⁵ See *Montana v. United States*, 450 U.S. 544, 563–66 (1981); *United States v. Mazurie*, 419 U.S. 544, 557 (1975) (citing *United States v. Kagama*, 118 U.S. 375, 381–382 (1886); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 173 (1973)).

¹⁷⁶ See *Mazurie*, 419 U.S. at 557 (citing *United States v. Kagama*, 118 U.S. 375, 381–382 (1886)); *McClanahan*, 411 U.S. at 173 (1973).

¹⁷⁷ See *Mazurie*, 419 U.S. at 557.

Court has recognized that “[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty.”¹⁷⁸

The path-marking case delineating the scope of tribal regulatory authority is *Montana v. United States*, which set forth a framework centering on two considerations: who is being regulated and where they are being regulated.¹⁷⁹ As will be seen, the general rule itself is fairly straightforward, but it has a number of exceptions (and exceptions to the exceptions), that can make the determination of regulatory jurisdiction a maze of factors that must be considered when ascertaining the extent of a tribe’s civil regulatory authority.

In *Montana*, the Crow Tribe passed laws regulating hunting and fishing within its reservation boundaries and attempted to enforce them against both Indians and non-Indians.¹⁸⁰ Additionally, besides applying on tribal lands, the regulations purported to apply in two disputed areas, the Big Horn River, which ran through the reservation, and on fee lands within the reservation owned by non-Indians.¹⁸¹ In sorting out whether the tribe’s hunting and fishing laws could extend to these people and places, the Court recognized that tribes retain broad authority to regulate both Indians and non-Indians on lands owned by or held in trust for the Tribe.¹⁸² However, absent a different congressional direction, the Court reiterated its rule that Indian tribes lack civil authority over nonmembers on non-Indian land within a reservation.¹⁸³ However, that general rule of no tribal authority over non-Indians on non-Indian land within the reservation has two exceptions: a tribe may regulate non-members (1) when they have entered into consensual relationships with the tribe or its members, or (2) where the activity regulated by the tribe directly affects the tribe’s political integrity, economic security, health, or welfare.¹⁸⁴

Applying *Montana*’s framework to the Five Civilized Tribes’

¹⁷⁸ *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987).

¹⁷⁹ *Montana*, 450 U.S. at 557.

¹⁸⁰ *See id.* at 544.

¹⁸¹ *See id.*

¹⁸² *See id.* at 557; *see also* *Strate v. A-1 Contractors*, 520 U.S. 438, 446 (1997) (discussing the *Montana* rule).

¹⁸³ *See* *Montana*, 450 U.S. at 548; *Strate*, 520 U.S. at 446.

¹⁸⁴ *Id.*

ability to regulate water quality first requires a determination as to the status of the land. As discussed above, it is clear that the Five Civilized Tribes retain property rights in the submerged lands of the waterways within their boundaries. Indeed, in determining the Crow Tribe's rights in the Big Horn River, the *Montana* Court referred to the Five Civilized Tribes' extensive rights in submerged lands established through their treaties in order to demonstrate that the Crow Tribe did not have similar property rights and, therefore, could not regulate fishing on the Big Horn.¹⁸⁵ As the *Montana* Court noted: “[n]either the special historical origins of the Choctaw and Cherokee treaties nor the crucial provisions granting Indian lands in fee simple and promising freedom from state jurisdiction in those treaties have any counterparts in the terms and circumstances of the Crow treaties of 1851 and 1868.”¹⁸⁶ Accordingly, the Five Civilized Tribes likely have broad regulatory authority to regulate point sources discharging directly into a waterway and runoff from appurtenant tribal lands.¹⁸⁷

However, the question becomes more challenging when polluting sources are more geographically removed from the waterway and are generated by non-Indians. These sources would likely fall into two groups: (1) sources within historic reservation boundaries, and (2) sources outside historic reservation boundaries. This distinction is necessary because tribes may exercise their inherent sovereign authority only within Indian Country.¹⁸⁸ Moreover, by statute and case law, Indian Country includes all land within the boundaries of an Indian Reservation, regardless of who holds title.¹⁸⁹

¹⁸⁵ See *Montana*, 450 U.S. at 555 n.5.

¹⁸⁶ *Id.*

¹⁸⁷ See *Indian Country, U.S.A., Inc. v. Oklahoma Tax Comm'n*, 829 F.2d 976, 976 (10th Cir. 1987) (holding that Muskogee (Creek) land held pursuant to the tribe's removal treaty is Indian Country).

¹⁸⁸ Although there are a number of different types of Indian lands, such as reservation, restricted fee, and trust lands, the Supreme Court does not distinguish between these various types of Indian lands but merely looks to whether the land is “Indian Country.” See *Oklahoma Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 121–23 (1993) (citing *Oklahoma Tax Comm'n v. Citizen Band Potawatomi*, 498 U.S. 505, 511 (1991)).

¹⁸⁹ See Phillip Tinker, *Is Oklahoma Still Indian Country?: “Justifiable Expectations” and Indian Reservation Disestablishment in Murphy v. Simons and Osage Nation v. Irby*, 9 DARTMOUTH L.J. 120, 125–26 (citing 18 U.S.C. § 1151); See also *Indian Country, U.S.A.*, 829 F.2d at 973.

This determination of reservation boundaries and what constitutes Indian Country is particularly vexing for the Five Civilized Tribes. As discussed above, each tribe was granted territory within the Indian Territory, which, for the purposes of determining jurisdiction, were “reservations” at the time they were granted by the United States.¹⁹⁰ Additionally, there is no question that where the tribes still retain ownership of those unallotted, fee patented lands, they are considered Indian Country.¹⁹¹ However, there remains a substantial question as to whether these reservations were diminished or disestablished by allotment and Oklahoma statehood.¹⁹² While litigation by the Oklahoma State Tax Commission has established that there is Indian Country in Oklahoma in the form of restricted fee lands and trust lands, that litigation has not resolved the larger question of whether the Five Civilized Tribes’ reservation boundaries as established in their removal treaties remain today.¹⁹³ Today, these territorial areas established in the Five Civilized Tribes’ removal treaties, and slightly diminished by post-Civil War treaties, are commonly referred to as “Tribal Jurisdictional Service Areas” (TJSA).¹⁹⁴ Yet that term is not well-defined by statute or regulation, and whether these TJSAs are “reservations” for the purposes of tribal regulatory jurisdiction remains an open question.

There is good reason to conclude that the Five Civilized Tribes’ reservations were never disestablished and that they retain regulatory jurisdiction within their respective TJSAs. Once a reservation is established, it may be disestablished only by an act of Congress.¹⁹⁵ There is a hierarchy of three factors that courts must examine in order to determine if Congress disestablished a reservation: (1) statutory language, (2) surrounding circumstances,

¹⁹⁰ See *Indian Country, U.S.A.*, 829 F.2d at 974 (“Historically, it is clear that Creek Nation lands were Indian country, subject only to tribal and federal jurisdiction.”).

¹⁹¹ See *id.*

¹⁹² See JUDITH ROYSTER ET AL., *NATIVE AMERICAN NATURAL RESOURCES LAW* 92–93 (3rd ed. 2013).

¹⁹³ See *Tinker*, supra note 189, at 137.

¹⁹⁴ See, e.g., *Cherokee Nation of Oklahoma v. United States*, 190 F. Supp. 2d 1248, 1253 (E.D. Okla. 2001) (“The Cherokee Nation is a federally recognized tribe with an enrollment in excess of 200,000 members. Approximately 91,000 members live within the Cherokee Tribal Jurisdictional Service Area which is a 7,000 square mile region in the northeast corner of Oklahoma.”).

¹⁹⁵ See *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 359 (1961) (quoting *United States v. Celestine*, 215 U.S. 278, 285 (1909)).

and (3) subsequent treatment of the land.¹⁹⁶ In utilizing these factors, the statutory language is the most determinative, while subsequent treatment of the land is the least probative factor.¹⁹⁷

Importantly, statutory language that merely opens a reservation to non-Indian settlement and purchase of reservation land is not sufficient by itself to disestablish a reservation.¹⁹⁸ The Supreme Court also very recently reiterated that when looking at the statutory language, it is crucial to look at how the tribe was compensated for surplus, unallotted lands that were sold by the United States.¹⁹⁹ Statutory language that conveys unallotted lands to the United States for a fixed sum is most likely to effect reservation disestablishment.²⁰⁰ Conversely, statutory language that authorizes the United States to essentially act as a sales agent for the tribe, selling the land for a non-fixed sum, conveying title and depositing proceeds in the federal treasury to the credit of the tribe, does not disestablish a reservation.²⁰¹

Although each of the Five Civilized Tribes went through an allotment process pursuant to the Curtis Act, that alone is not enough to disestablish their reservations.²⁰² Additionally, the Curtis Act does not establish fixed-sum payment to the any of the Five Civilized Tribes for surplus, unallotted land. Instead, it authorizes the Secretary of the Interior to sell those lands and deposit the proceeds in the United States treasury to the credit of the tribes.²⁰³

While full treatment of the remaining factors requires an in-depth analysis beyond the scope of this Article, a few considerations are offered that indicate that they have not been met, and therefore, disestablishment of the Five Civilized Tribes'

¹⁹⁶ See *Nebraska v. Parker*, 136 S. Ct. 1072, 1078–79 (2016); *Solem v. Bartlett*, 465 U.S. 463, 470 (1984); *Murphy v. Royal*, 866 F.3d 1164, 1187 (10th Cir. 2017); See also Angela M. Risenhoover, *Reservation Disestablishment: The Undecided Issue in Oklahoma Tax Commission v. Sac and Fox Nation*, 29 TULSA L. REV. 781, 790 (1994) (discussing the Solem factors).

¹⁹⁷ See *Parker*, 136 S. Ct. at 1079.

¹⁹⁸ See *id.*; *DeCoteau v. District County Court*, 420 U.S. 425 (1975); see also COHEN'S, *supra* note 23, at § 3.04[3] (“The Supreme Court has repeatedly stated that the act of opening a reservation alone does not diminish or terminate the Indian Country status of the reservation.”).

¹⁹⁹ See *Parker*, 136 S. Ct. at 1079.

²⁰⁰ See *id.*

²⁰¹ See *id.* at 1077, 1080.

²⁰² See generally *DeCoteau v. Dist. County Court*, 420 U.S. 425 (1975).

²⁰³ Curtis Act, Section 16.

reservations likely did not occur. The second factor, surrounding circumstances, focuses on legislative history. “The clearest case [of disestablishment] is when the legislative history states the effect of a specific act on a reservation’s boundaries.”²⁰⁴ However, such a clear case is extremely rare, and a mere congressional expression of hostility toward continued reservation status does not indicate an intention to terminate the reservation.²⁰⁵ There is no express language in the Curtis Act terminating the Five Civilized Tribes’ reservations. Moreover, the more general policy of allotment was not to terminate all reservations, but “was to continue the reservation system and the trust status of Indian lands, but to allot tracts to individual Indians for agriculture and grazing.”²⁰⁶ It is also notable that the Oklahoma Enabling Act required the new state to disclaim “all right and title” to Indian lands and stated that the United States retained exclusive authority over Indian matters,²⁰⁷ which is directly at odds with the notion that Congress disestablished the Five Civilized Tribes’ reservations.

Finally, the subsequent treatment of the area is the least probative factor. If evidence on this factor is ambiguous, the factor cannot be used to overcome the other factors, particularly where the statutory language does not express intent to disestablish a reservation.²⁰⁸ Given that the Five Civilized Tribes provide extensive governmental services, including police, fire, and emergency medical services, within their reservation areas, there is certainly, at a minimum, ambiguity concerning the subsequent treatment of these areas.

The conclusion that the Five Civilized Tribes’ reservations were not disestablished is supported by recent case law. In *Murphy v. Royal*,²⁰⁹ the Tenth Circuit was for the first time squarely presented with the question of whether one of the Five Civilized Tribes’ reservations was disestablished, and held that it was not.²¹⁰

²⁰⁴ Angela M. Risenhoover, *Reservation Disestablishment: The Undecided Issue in Oklahoma Tax Commission v. Sac and Fox Nation*, 29 TULSA L.J. 781, 792 (1994).

²⁰⁵ *See id.*

²⁰⁶ *Id.* at 796–97 (quoting *Mattz*, 412 U.S. at 496).

²⁰⁷ *See* 34 Stat. at 267–68, 270.

²⁰⁸ *See Parker*, 136 S. Ct. at 1082.

²⁰⁹ *See generally* *Murphy v. Royal*, 866 F.3d 1164 (10th Cir. 2017).

²¹⁰ *See id.* at 1172.

The issue came before the court on a habeas corpus petition filed by an Indian convicted of murder in Oklahoma state court.²¹¹ He claimed that because the alleged crime occurred within the Muskogee (Creek) Nation's reservation boundaries, and because he is Indian, the state court had no jurisdiction.²¹² Utilizing the three-factor reservation disestablishment analysis, the court examined eight statutes that Oklahoma asserted cumulatively disestablished the reservation, including the tribe's allotment agreements, the Curtis Act, and Oklahoma Enabling Act.²¹³ The Court not only concluded that the statutes did not disestablish the reservation, but that they showed that "Congress recognized the existence of the Creek Nation's borders."²¹⁴ Likewise, the court held that the historical evidence did not indicate a Congressional intent to disestablish the Muskogee (Creek) reservation, nor a contemporaneous understanding by Congress that it disestablished the reservation.²¹⁵ On the third factor, the Tenth Circuit found that evidence regarding the subsequent demographics and treatment of the area was insufficient to overcome its conclusion in the first two steps of its analysis that the reservation was not disestablished.²¹⁶

Under the *Montana* test, there is little question that the Five Civilized Tribes could assert inherent sovereign authority to regulate activities impacting water quality on Indian lands within their TJSAs. However, the more challenging question is the extent to which they could assert that authority over non-Indians on non-Indian lands within their TJSAs. For that, they would have to rely on one of the *Montana* exceptions: consensual relations or conduct that threatens tribal health and welfare.²¹⁷ Here, the health and welfare exception would likely provide the best legal avenue to establish tribal regulatory authority. Indeed, a few courts have easily reached the conclusion that water quality directly bears on the health and welfare of tribal citizens.²¹⁸ Thus, the tribes' inherent authority would likely extend to regulation of activities occurring within the boundaries of their TJSAs contributing to

²¹¹ See *id.* at 1172–73.

²¹² See *id.* at 1173.

²¹³ See *id.* at 1204–19.

²¹⁴ *Id.* at 1218.

²¹⁵ See *id.* at 1226.

²¹⁶ See *id.* at 1226–33.

²¹⁷ See *Montana v. United States*, 450 U.S. 544, 566 (1981).

²¹⁸ See, e.g., *Montana v. EPA*, 137 F.3d 1135, 1140–41 (9th Cir. 1998).

impairment of their water resources, regardless of whether the conduct occurs on Indian land or non-Indian lands, and regardless of whether the regulated party is Indian or non-Indian.

However, it is highly unlikely that a court would uphold off-reservation regulation of non-Indian activities affecting water quality. Generally speaking, a tribe's inherent authority does not extend beyond reservation boundaries, unless it involves internal concerns of tribal members or the non-Indian parties have consented to jurisdiction.²¹⁹ Although courts have found tribal jurisdiction may extend off-reservation where off-reservation treaty rights are concerned, that typically involves the imposition of regulation on tribal members rather than non-members.²²⁰ This lack of tribal authority over non-Indian, off-reservation conduct has significant practical implications in the context of protecting water quality because pollutants may be deposited in a waterway far upstream from the Five Civilized Tribes' jurisdictional areas and the tribes will not have the sword of its governmental authority to protect its resources. In that instance, the tribes will have to rely on other enforcement mechanisms under statute and common law, which are discussed below.

Although Indian water rights have never been viewed as subject to equitable divestiture, some federal courts have begun applying equitable principles to tribal assertions of inherent sovereign authority to regulate non-Indians where, although within the reservation boundaries, the area has heavy non-Indian settlement.²²¹ Although decried by many scholars as contrary to foundational principals of federal Indian law,²²² the application of equities must be considered because the Five Civilized Tribes have never asserted regulatory authority over water quality. Nevertheless, there are significant ways in which the Five

²¹⁹ See COHEN'S, *supra* note 23, at §§ 6.01[5] and 7.02[1][d].

²²⁰ See *id.*

²²¹ See *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 217–19 (2005); see also *Parker*, 136 S. Ct. at 1082 (“We express no view about whether equitable considerations of laches and acquiescence may curtail the Tribe’s power to tax the retailers of Pender in light of the Tribe’s century-long absence from the disputed lands.”) (citing *City of Sherrill*, 544 U.S. at 217–21).

²²² See Patrick W. Wandres, *Indian Land Claims: Sherrill and the Impending Legacy of the Doctrine of Laches*, 31 AM. INDIAN L. REV. 131, 139 (2007) (“Thus, the Court took a broad step towards extinguishing tribal sovereignty through its decision in *Sherrill*, imposing a power which is explicitly reserved to Congress.”).

Civilized Tribes' rights are historically and legally distinguishable and likely not subject to equitable defenses.

The notion that equitable principles could bar otherwise lawful assertion of inherent tribal authority in Indian country was first announced in *City of Sherrill v. Oneida Indian Nation*.²²³ That case involved a tax dispute that arose when, in 1997 and 1998, the Oneida Nation purchased lands in fee located within their aboriginal land boundaries in New York. The tribe asserted that by purchasing these lands, their aboriginal title and fee title merged and the lands were, therefore, Indian lands not subject to taxation by the local city government. The Supreme Court held that “‘standards of federal Indian law and federal equity practice’ preclude the Tribe from rekindling embers of sovereignty that long ago grew cold.”²²⁴ It reached this conclusion by applying the equitable doctrines of laches, acquiescence, and impossibility, which it said precluded the tribe from asserting sovereignty over the lands for three reasons: (1) the non-Indian character of the area and its residents, (2) the consistent exercise of regulatory authority by New York and its counties for 200 years, and (3) the tribe’s long delay in seeking relief. The Court pointed out that if the tribe were to have sovereign authority over the subject land, it would result in a “checker-boarding” of regulatory authority: some parcels within the City of Sherrill would be subject to tribal regulatory authority, while others would be subject to state and local authority. The Court went on to conclude that checker-boarding would upset non-Indian property owners’ long reliance on comprehensive regulatory schemes, such as zoning. Therefore, according to the Court, the tribe’s assertion of sovereignty over the lands would disrupt the “justifiable expectations” of non-Indian landowners.

The *City of Sherrill* court explicitly stated that these equitable bars applied where the tribe was seeking an equitable remedy and that “application of a nonstatutory time limitation in an action for damages would be novel.”²²⁵ Yet some courts have concluded that the case has much broader application. For example, in *Cayuga Indian Nation v. Pataki*,²²⁶ the Second Circuit reversed a district

²²³ 544 U.S. 197 (2005).

²²⁴ *Id.* at 214.

²²⁵ *Id.* at 221 n.14 (citing *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 244 n.16 (1985)).

²²⁶ *See generally* *Cayuga Indian Nation of New York v. Pataki*, 413 F.3d 266

court award of nearly \$248 million for the 204-year illegal occupation of the Cayuga's land.²²⁷ In doing so, the Second Circuit cited *City of Sherrill* as standing for the broader proposition that “‘disruptive,’ forward-looking claims, a category exemplified by possessory land claims, are subject to equitable defenses, including laches.”²²⁸ The court went on to reason that the tribe's damages claim was precluded because it was premised on a possessory claim, which the *City of Sherrill* rule extinguished.²²⁹ Accordingly, the Second Circuit has been more willing to apply equitable principles to both equitable and damages remedies. The Second Circuit applied the *Cayuga* approach to three subsequent land claims cases by other tribes.²³⁰ Despite this “novel” approach, the Supreme Court has not granted certiorari in any case raising this issue.²³¹ Thus, whether the remedies sought by tribes are in equity or for money damages, it seems that courts are reluctant to recognize some assertions of tribal property rights where there may be “disruptiveness . . . inherent in the claim itself False”²³²

Additionally, by raising the specter of disruptiveness, non-tribal interests have attempted to expand the scope of *City of Sherrill* beyond tribal land claims as well. *City of Sherrill* is often cited anytime a party wants to challenge a tribe's assertion of sovereign authority, even if it does not involve a possessory land claim. Most recently, in *Nebraska v. Parker*, the state of Nebraska asserted that the Village of Pender, Nebraska, should not be considered within the Omaha Indian Reservation boundaries because it has a “non-Indian character” and claimed that a judicial finding that Pender was within the reservation boundaries would upset the settled expectations of non-Indians, whom began settling

(2d Cir. 2005).

²²⁷ See *id.* at 268.

²²⁸ *Id.* at 277.

²²⁹ See *id.* at 277–78.

²³⁰ See *Oneida Indian Nation of New York v. Cty. of Oneida*, 617 F.3d 114 (2d Cir. 2010), *cert. denied*, 132 S. Ct. 452 (2011); *Onondaga Nation v. New York*, 500 F. App'x. 87, 89 (2d Cir. 2012), *cert. denied*, 134 S. Ct. 419 (2013); *Stockbridge-Munsee Cmty. v. New York*, 756 F.3d 163, 165 (2d Cir. 2014), *cert. denied*, 135 S. Ct. 1492, 1493 (2015); *Shinnecock Indian Nation v. New York*, 628 F. App'x. 54 (2d Cir. 2015), *cert. denied*, No. 15-1215, 2016 WL 1242905 (U.S. June 27, 2016).

²³¹ See *id.*

²³² *Shinnecock Indian Nation*, 628 F. App'x at 55 (citing *Cayuga*, 413 F.3d at 275).

in the area after 1882.²³³

On first blush, *City of Sherrill* and its progeny would appear to have some application to the assertion of the Five Civilized Tribes' inherent authority to regulate water quality. An argument could be made that some iteration of each of the three factors relied on by the *City of Sherrill* court are present with the Five Civilized Tribes' assertion of rights to water quality. Yet, the Five Civilized Tribes' situation has several distinguishing features that make a *City of Sherrill* type of argument an ineffective counter.

The *City of Sherrill* court pointed to the consistent exercise of regulatory authority by New York and its counties for two hundred years. Both the facts in *City of Sherrill* and the Five Civilized Tribes' assertion of rights to water quality present situations where a tribe and state/local government are attempting to occupy the same regulatory field. Just as the Oneida's assertion of sovereign authority would have supplanted state and regulatory authority in *City of Sherrill*, the Five Civilized Tribes' assertion of authority would displace Oklahoma's assertion of authority to regulate waterways within their tribal jurisdictional areas. Yet, the Five Civilized Tribes' situation is quite distinguishable. First, Oklahoma has only been a state since 1907, so as a threshold matter any assertion of state authority would be considerably shorter than in *City of Sherrill*.²³⁴ Moreover, with reference to water rights, the tribes have asserted their rights in numerous cases and the United States has pointed out to the state of Oklahoma that the Five Civilized Tribes have exclusive authority to regulate water within their tribal jurisdictional areas.²³⁵

Additionally, Oklahoma would undoubtedly claim that assertion of tribal authority would upset settled expectations of non-Indians who believed they were subject to state, not tribal,

²³³ See Brief of Petitioner, *Nebraska v. Parker*, 2016 WL 183791 at 2, 3, 7 (2016); see also *Nebraska v. Parker*, 136 S. Ct. 1072, 1082 (2016).

²³⁴ Compare *City of Sherrill*, 544 U.S. at 216 ("For the past two centuries, New York and its county and municipal units have continuously governed the territory. The Oneidas did not seek to regain possession of their aboriginal lands by court decree until the 1970's.") with Presidential Proclamation 780 (Nov. 16, 1907), <https://research.archives.gov/id/299964> (proclaiming Oklahoma statehood).

²³⁵ See David A. Mullon, *Tribal Water Rights in Eastern Oklahoma: "Do the Indians Own It All?"* SOV. SYMP. XI MANUAL (1998) at 94, (citing Formal Protest of Application for Water Use, February 8, 1978 (statement of Thomas Ellison, Muskogee Area Director, BIA, to Oklahoma Water Resources Board)).

regulatory authority over water quality. However, unlike in *City of Sherrill* where the Oneida had no governmental presence for more than two hundred years, each of the Five Civilized Tribes exercise tribal governmental authority in numerous ways including taxation, law enforcement, fire and emergency medical services, elementary and secondary education, as well as a variety of civil regulations.²³⁶ The tribes have not acquiesced to the dominion and control of another sovereign (the state of Oklahoma), but have continuously exercised governmental authority in the geographic area since at least the 1830s²³⁷ and have done so pursuant to treaties with the United States. Far from “rekindling embers of sovereignty that long ago grew cold,”²³⁸ the tribes would be exercising authority consistent with that which it has exercised for more than 175 years, considerably longer than both the tribe in the *City of Sherrill* case as well as the state of Oklahoma in this instance.

Similarly, the Five Civilized Tribes would not be vulnerable to a claim that there was a long delay in seeking relief. First, there are a number of water rights claims made by the tribes over the years, some of which have made it to the Supreme Court. Moreover, the need to regulate water quality is of a more recent vintage, arising primarily from the more recent proliferation of concentrated poultry operations outside the TJSAs.²³⁹ As discussed

²³⁶ Information of the extensive governmental services provided by each tribe can be found at: *Cherokee Nation Services*, CHEROKEE NATION, <http://www.cherokee.org/Services> (last visited Oct. 26, 2017); *The Muscogee (Creek) Nation Services*, THE MUSKOGEE (CREEK) NATION, <http://www.muscogeenation-nsn.gov/services/> (last visited Oct. 26, 2017); *Chickasaw Nation Services*, THE CHICKASAW NATION, <https://www.chickasaw.net/Services.aspx> (last visited Oct. 26, 2017); *Seminole Nation Services*, THE GREAT SEMINOLE NATION OF OKLAHOMA, <http://sno-nsn.gov/services> (last visited Oct. 26, 2017); *Tribal Services*, THE CHOCTAW NATION, <https://www.choctawnation.com/tribal-services> (last visited Oct. 26, 2017).

²³⁷ Arguably, at least some of the tribes have exercised authority in portions of the tribal jurisdictional areas since before the removal treaties because groups of tribal citizens voluntarily immigrated there prior to removal and established governments, which later merged with the tribal governments that moved into the territory pursuant to the removal treaties. See, e.g., GRANT FOREMAN, THE FIVE CIVILIZED TRIBES, 299–300, 302–03 (describing Act of Union between Eastern and Western Cherokees and subsequent constitution adopted by the unified government).

²³⁸ *City of Sherrill*, 544 U.S. at 214.

²³⁹ See *Oklahoma ex rel. Edmondson v. Tyson Foods*, 619 F.3d 1223, 1225, 1227 (10th Cir. 2010).

in Part II above, at least one of the tribes has sought judicial relief.

An additional distinguishing feature is that in *City of Sherrill*, the Oneida Nation acquired lands within their aboriginal territory on the open market and claimed governmental jurisdiction over those lands based on the theory that their newly acquired fee title merged with their aboriginal title. Unlike the Oneidas in *City of Sherrill*, who purportedly “revived” sovereignty over specific lands with the purchase of property on the open market, the Five Civilized Tribes secured their property rights to submerged lands under treaty, it was conveyed by the United States by fee patent, and they have retained continuous ownership of waterways and submerged lands since the 1830s.

Finally, *City of Sherrill* court’s application of the Doctrine of Impossibility would not be problematic for the Five Civilized Tribes. The court based its conclusion on the idea that “[a] checkerboard of alternating state and tribal jurisdiction in New York State—created unilaterally at [Oneida Indian Nation’s] behest—would seriously burde[n] the administration of state and local governments and would adversely affect landowners neighboring the tribal patches.”²⁴⁰ However, with thirty-eight federally recognized tribes in the state, the checker-boarding of state and tribal jurisdiction is already pervasive in Oklahoma.²⁴¹ This heavy presence of tribes in Oklahoma and their assertion of governmental authority likewise augurs against *City of Sherrill*’s “non-Indian character” factor.

City of Sherrill’s use of equitable principles also starkly contrasts with the Court’s decisions in Indian water rights cases. As discussed above in Part III.B, one of the fundamental principles of Indian water rights is that they are not lost by non-use. Since the Five Civilized Tribes’ right to water quality is a treaty right just like the right to water allocation, then non-regulation should pose no greater bar than non-use.

City of Sherrill is also distinguishable on the facts. While the potential for lower courts to apply *City of Sherrill*’s equitable doctrines in ways that the Court never intended is troublesome for any tribe asserting property rights and regulatory authority, there

²⁴⁰ *City of Sherrill*, 544 U.S. at 219–20 (internal quotations and citations omitted).

²⁴¹ See *Map of Tribal Jurisdictions in Oklahoma*, OKLAHOMA DEP’T OF TRANSP., http://www.okladot.state.ok.us/Maps/tribal/map_tribal_jurisdictions.pdf (last visited Aug. 6, 2017).

are distinguishing characteristics to the Five Civilized Tribes' assertion of regulatory authority over water quality that make a *City of Sherrill-Cayuga* argument much less forceful. The factors leading to the Court's conclusion that the Indian land claims would be disruptive in *City of Sherrill* are not as present here. Most fundamentally, the Five Civilized Tribes have retained their property interests in rivers and streams continuously, unlike the tribes in the *City of Sherrill* line of cases, whose possessory land claims were interrupted, which, in the courts estimation, interjected uncertainty.

The fact that the Five Civilized Tribes' water quality rights are a treaty resource make this a much different situation. Particularly where treaty reserved natural resources and rights are concerned, the Court has recognized that state, tribal and federal interests can co-exist without legal conflict.²⁴² "Although States have important interests in regulating wildlife and natural resources within their borders, this authority is shared with the Federal Government when the Federal Government exercises one of its enumerated Constitutional powers, such as treaty making."²⁴³ Thus, where a state challenges a right specifically reserved by a treaty with the United States, it is effectively challenging an exercise of federal authority, which is difficult given that making treaties with Indian tribes is an exclusive congressional power pursuant to the Constitution.

B. *Regulatory Authority Under The Tribes' Treaty Powers*

While the *Montana* framework and possible equitable limitations to tribal regulatory authority apply when a tribe relies on its inherent sovereign authority, reliance on treaty-based authority and federal delegations of authority does not necessarily face the same limitations. As the Court has explained:

As the Court made plain in *Montana*, [T]he general rule and exceptions announced [in *Montana*] govern only in the absence of a delegation of tribal authority by treaty or statute. In *Montana* itself, the Court examined the treaties and legislation relied upon by the Tribe and explained why those measures did not aid the Tribe's case. Only after and in light of that examination did the Court address the Tribe's assertion of

²⁴² See *Minn. v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999).

²⁴³ *Id.* at 204.

“inherent sovereignty,” and formulate, in response to that assertion, Montana’s general rule and exceptions to it.²⁴⁴

On the one hand, as discussed in Part II.C above, the Five Civilized Tribes’ treaties’ grants of territory, coupled with a promise of exclusive governance, grants substantial regulatory authority over waters within their respective jurisdictions.²⁴⁵ However, it is less clear that treaty-based regulatory authority (as opposed to the tribes’ inherent authority) extends to regulation of activities of non-Indians on non-Indian fee land within their reservation boundaries.

In *Montana*, the Court concluded that the Crow Nation’s treaties conferred tribal power to exclude non-Indians from their reservation lands, and thereby, arguably, granted authority to regulate the hunting and fishing of non-Indians entering their lands.²⁴⁶ However, the Court went on to discuss the subsequent allotment of the tribe’s reservation, concluding that “treaty provisions securing tribal authority over reservation lands ‘must be read in light of the subsequent alienation of those lands.’”²⁴⁷ In the Court’s estimation, governing authority under the Crow Nation’s treaties was limited to “lands owned by Indians, held in trust by the United States for Indians, or reserved for use by Indians.”²⁴⁸

As discussed above in Part III.C, the Five Civilized Tribes were also subject to allotment of their lands. In view of the *Montana* court’s ruling regarding the impact of allotment on a tribe’s treaty-based regulatory authority, the Five Civilized Tribes’ regulatory authority over activities impacting water quality by non-Indians on non-Indian fee land appears to be severely curtailed. At the same time, as discussed in the previous section, the tribes’ inherent authority likely provides sufficient power for tribal regulation over these activities, even by non-Indians on non-Indian fee land.

²⁴⁴ *Strate v. A-1 Contractors*, 520 U.S. 438, 449–50 (1997) (citations omitted).

²⁴⁵ See discussion *infra* in Section II.C, and *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 638 (1970); *Indian Country, U.S.A., Inc. v. Oklahoma Tax Comm’n*, 829 F.2d 967, 975–76 (10th Cir. 1987).

²⁴⁶ See *Montana v. United States*, 450 U.S. 544, 558–59 (1981).

²⁴⁷ COHEN’S, *supra* note 23, at § 7.02[1][a] (quoting *Montana*, 450 U.S. at 561).

²⁴⁸ *Montana*, 450 U.S. at 561–62.

C. Tribal Regulation Pursuant to Delegated Federal Authority

In addition to inherent and treaty-based sources of regulatory authority, federal statutes may delegate tribal regulatory authority. Both the Clean Water Act and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) contain provisions delegating federal authority that are especially salient here.

The Clean Water Act delegates federal regulatory authority to tribes under certain circumstances. It provides for treatment of tribes as states (TAS), thus allowing them to regulate polluters, even where common law would not allow tribes to regulate non-members.²⁴⁹ Therefore, for most tribes, TAS certification provides the broadest, most far-reaching source of regulatory authority over water quality. However, there are two significant limitations, one applying to tribes generally and the other applying to Oklahoma tribes, which pose significant obstacles for the Five Civilized Tribes.

Under the Clean Water Act, the Environmental Protection Agency (EPA) may delegate authority to states and tribes for promulgation of water quality standards within their boundaries and, upon EPA's approval of those standards, issue and enforce discharge permits.²⁵⁰ Because state regulatory authority cannot extend into Indian lands, EPA is the water quality regulator in Indian Country, unless it certifies a tribe for TAS.²⁵¹ Moreover, although tribal jurisdiction generally does not reach off-reservation, non-Indian conduct, when a tribe obtains TAS it may set water quality standards enforceable against non-Indians outside its reservation boundaries, which are enforced by EPA, not the tribe itself.²⁵²

While the TAS provision purports to delegate substantial authority to tribes, EPA's interpretation imposes significant limitations. Section 518 of the Clean Water Act reads:

The Administrator is authorized to treat an Indian tribe as a State for purposes of subchapter II of this chapter and sections 1254, 1256, 1313, 1315, 1318, 1319, 1324, 1329, 1341, 1342, 1344, and 1346 of this title to the degree necessary to carry out

²⁴⁹ See Anderson, *supra* note 80, at 226.

²⁵⁰ See *id.* at 228.

²⁵¹ See *id.*

²⁵² See *id.*

the objectives of this section, but only if—

- (1) the Indian tribe has a governing body carrying out substantial governmental duties and powers;
- (2) the functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation; and
- (3) the Indian tribe is reasonably expected to be capable, in the Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this chapter and of all applicable regulations.²⁵³

EPA's implementing regulations interpret this as a limited, rather than direct, delegation of authority to tribes. The issue that arises here is that tribes given TAS authority would be in the position of regulating off-reservation activities of non-members. Accordingly, the EPA regulations require, *inter alia*, that a tribe satisfy the "direct effects" test under *United States v. Montana*, "which has been said to apply only when the non-member activity 'imperil[s] the subsistence of the tribal community.'"²⁵⁴ Despite this limitation, fifty tribes now have shown that impairment of water quality has direct effects on tribal member health and welfare and have obtained TAS status.²⁵⁵

EPA has explained its evaluation of tribal authority in this way:

A tribal submission meeting the requirements of § 131.8 of this regulation will need to make a relatively simple showing of facts that there are waters within the reservation used by the Tribe or tribal members, (and thus that the Tribe or tribal members could be subject to exposure to pollutants present in, or introduced into, those waters) and that the waters and critical habitat are subject to protection under the Clean Water Act. The Tribe must also explicitly assert that impairment of such waters by the activities of non-Indians, would have a serious and substantial effect on the health and welfare of the Tribe. Once the Tribe meets this initial burden, EPA will, in light of the

²⁵³ 33 U.S.C. § 1377(e) (2014).

²⁵⁴ Anderson, *supra* note 80, at 231.

²⁵⁵ See EPA Approvals of Tribal Water Quality Standards, ENVTL. PROT. AGENCY, <http://www2.epa.gov/wqs-tech/epa-approvals-tribal-water-quality-standards> (last updated Apr. 26, 2017).

facts presented by the tribe and the generalized statutory and factual findings regarding the importance of reservation water quality discussed above, presume that there has been an adequate showing of tribal jurisdiction of fee lands, unless an appropriate governmental entity (e.g., an adjacent Tribe or State) demonstrates a lack of jurisdiction on the part of the Tribe.²⁵⁶

So far, EPA's granting of TAS status has been challenged only twice, and in both instances the courts have favored tribes and the EPA.²⁵⁷ Of particular note is the Ninth Circuit's in-depth analysis in *Montana v. EPA*, where it distinguished the regulation of water quality from many other assertions of tribal regulatory jurisdiction rejected by the courts, finding that impairment of water quality poses an inherent threat to the health and welfare of tribal citizens.²⁵⁸ Thus, it is likely that the Five Civilized Tribes could satisfy the direct effects test that EPA requires for TAS, which would enable them to promulgate water quality standards that are enforceable against both tribal citizens and non-citizens, both on and off tribal lands.

However, for the Five Civilized Tribes, an additional Oklahoma-specific limitation exists to regulating water quality under the Clean Water Act. When the Pawnee Nation of Oklahoma obtained TAS approval in 2004, the state of Oklahoma sued EPA over the decision and Oklahoma Senator James Inhofe requested an investigation into the handling of TAS applications in Oklahoma.²⁵⁹ Then, apparently at the behest of the Oklahoma Independent Petroleum Association, Senator Inhofe inserted a rider into a transportation bill that severely restricted the regulatory jurisdiction of tribes over water pursuant to the Clean Water Act in two significant ways.²⁶⁰ First, the rider mandated that if Oklahoma ever gains approval to run state environmental programs, then the

²⁵⁶ Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,878–79 (Dec. 12, 1991) (to be codified at 40 C.F.R. § 131).

²⁵⁷ See *City of Albuquerque v. Browner*, 97 F.3d 415, 423 (10th Cir. 1996); *Montana v. EPA*, 137 F.3d 1135, 1141 (9th Cir. 1998); see also Anderson, *supra* note 80, at 231–32.

²⁵⁸ See *Montana v. EPA*, 137 F.3d 1135, 1141 (9th Cir. 1998).

²⁵⁹ See Marren Sanders, *Clean Water in Indian Country: The Risks (and Rewards) of Being Treated in the Same Manner as a State*, 36 WM. MITCHELL L. REV. 534, 552 (2010).

²⁶⁰ See *id.* at 552–53.

EPA, upon the state's request, must approve administration of the state program in Indian country "without any further demonstration of [state] authority."²⁶¹ Second, the rider allows EPA to treat an Oklahoma tribe as a state only where, in addition to meeting federal TAS requirements, the tribe and state enter into a cooperative agreement.²⁶² Thus, TAS is at the sufferance of the state, which must agree to "treatment of the Indian tribe as a State and to jointly plan and administer program requirements" in order for an Oklahoma tribe to be treated as a state under the Clean Water Act.²⁶³ Unfortunately, none of the Five Civilized Tribes obtained TAS status prior to Senator Inhofe's "midnight rider." Thus, without a Congressional repeal of this provision, the Five Civilized Tribes cannot obtain TAS status and cannot utilize this delegated federal authority.

In addition to the Clean Water Act, CERCLA delegates federal authority to tribes. CERCLA imposes liability for clean-up costs of contaminated sites on a wide range of potentially responsible parties (PRPs).²⁶⁴ Any government or private party who incurs clean-up costs may sue to recover their costs from a PRP.²⁶⁵ Additionally, a PRP may be liable for damages for the injury or loss of natural resources.²⁶⁶ CERCLA authorizes tribal officials, acting as public trustees, to sue PRPs to recover damages for harm to natural resources caused by releases of hazardous substances.²⁶⁷

Thus, while CERCLA does not confer on the Five Civilized Tribes direct regulatory authority, they could utilize the statute to recover clean-up costs or pursue damages for diminished water quality.²⁶⁸ While providing potentially potent tools for the tribes to recover money damages, the statute does not provide direct regulatory authority over polluters aimed at preventing polluting activities in the first instance.

In addition, utilization of CERCLA by the tribes raises procedural and jurisdictional issues in the courts. In *Oklahoma v.*

²⁶¹ *Id.* at 553.

²⁶² *See id.*

²⁶³ *Id.*

²⁶⁴ *See* 42 U.S.C. § 9607 (2002).

²⁶⁵ *See* 42 U.S.C. § 9607(a)(4)(A) (2002).

²⁶⁶ *See* 42 U.S.C. § 9607(f) (2002).

²⁶⁷ *See* 42 U.S.C. § 9607(f)(1) (2002).

²⁶⁸ *See id.*

Tyson Foods, a CERCLA suit brought by Oklahoma for damages to waterways resulting from Tyson's poultry operations, the Tenth Circuit concluded federal courts were without jurisdiction because, importantly, "[t]he State brought suit as owner of the streams and rivers of the [Illinois River Watershed], as holder of all natural resources within the State's boundaries 'in trust on behalf of and for the benefit of the public,' . . . and as trustee under [CERCLA] for natural resources within Oklahoma."²⁶⁹ Pointing to Cherokee Nation's historical claims of ownership of resources within the Illinois River Watershed and the inability to join the tribe due to its sovereign immunity, Tyson moved to dismiss the suit for failure to join Cherokee Nation as an indispensable party.²⁷⁰ Tyson also asserted that the state lacked standing because it did not have ownership or trusteeship over the Illinois River.²⁷¹ The Tenth Circuit agreed with Tyson's first argument that Cherokee Nation was an indispensable party and affirmed the District Court's dismissal of the suit and the denial of Cherokee Nation's untimely motion to intervene.²⁷²

The *Tyson* case poses two related problems for the Five Civilized Tribes. First, if a particular waterway flows through multiple jurisdictions controlled by the state or other tribes, then a single tribe cannot bring a CERCLA suit alone. Similarly, like the *Tyson* case, where the state and a tribe are both claiming ownership of a waterway flowing through a tribe's jurisdictional area, then both are required parties to the lawsuit. Consequently, utilization of CERCLA for the tribes requires unlikely litigation collaboration among multiple sovereigns, involving "coordination of political priorities, waiving of sovereign immunity, and gathering of financial resources."²⁷³

D. Remedies Under Federal Common Law

Utilizing the common law to enforce the tribes' rights to water quality also presents significant, but not insurmountable, challenges. As discussed above in Part III.D.1, federal courts have

²⁶⁹ Oklahoma *ex rel.* Edmondson v. Tyson Foods, 619 F.3d 1223, 1226 (10th Cir. 2010).

²⁷⁰ See *id.* at 1228.

²⁷¹ See *id.*

²⁷² See *id.* at 1239.

²⁷³ McBride, *supra* note 5, at 608 (citing *Tyson Foods*, 619 F.3d at 1241 (Tacha, J., dissenting)).

suggested that the Indian Reserved Water Rights Doctrine includes rights to water quality, which the United States as trustee may sue to enforce.²⁷⁴ Tribes themselves may sue to enforce their reserved water rights.²⁷⁵ Accordingly, under the approach taken by the federal courts that have spoken on the issue, it stands to reason that tribes can sue to enjoin a range of activities infringing on their water rights, including impairment of water quality.

At the same time, utilizing federal common law to enforce tribal rights to water quality would likely be challenged based on the Displacement Doctrine. The Supreme Court has held that the Clean Water Act displaces federal common law tort claims for impairment of water quality.²⁷⁶ Specifically, in *Milwaukee v. Illinois*,²⁷⁷ the Court held that the Clean Water Act's comprehensive scheme for ensuring and enforcing water quality displaces federal common law suits for abatement of a nuisance caused by interstate water pollution.²⁷⁸

However, applying the Displacement Doctrine in the Indian law context appears to diverge from the rule that abrogation of Indian treaty rights must be done through express congressional language. Indeed, although the Supreme Court has said congressional abrogation must be clearly expressed, it also held in *Federal Power Comm'n v. Tuscarora Indian Nation* that “a general federal statute in terms applying to all persons includes Indians and their property interests” unless Congress expressly excludes them.²⁷⁹

It may be possible to square these seemingly doctrinally divergent views of the Court. One possible distinction is that *Tuscarora* did not involve a treaty. At least one federal circuit

²⁷⁴ See *Hopi Tribe v. United States*, 782 F.3d 662, 669 (Fed. Cir. 2015) (citing *United States v. Gila Valley Irrigation Dist.*, 920 F. Supp. 1444, 1454–55 (D. Ariz. 1996)).

²⁷⁵ See 28 U.S.C. § 1362; see also *Standing Rock Sioux Indian Tribe v. Dorgan*, 505 F.2d 1135, 1140 (8th Cir. 1974) (“One of the purposes of [28 U.S.C. § 1362] was to permit the Tribes to initiate litigation involving issues which could have been instituted by the United States as trustee.”).

²⁷⁶ See *Milwaukee v. Illinois*, 451 U.S. 304 (1981); see also *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2537 (2011); *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 856 (9th Cir. 2012); 1 *Envtl. L. (West)* § 2:14.

²⁷⁷ *Milwaukee v. Illinois*, 451 U.S. 304 (1981).

²⁷⁸ See *id.* at 317–19; see also *Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 22 (1981) (holding the Clean Water Act preempts federal common law damages claims stemming from water pollution).

²⁷⁹ *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99 at 116.

follows the rule that where a federal statute of general applicability is silent on the issue of whether it applies to Indian tribes, it will not apply to tribes if applying the law would abrogate rights guaranteed by Indian treaties.²⁸⁰ Such a conflict between statutory application and Indian treaty rights requires express language by Congress applying the statute to the tribe.²⁸¹

Moreover, strong language limiting federal jurisdiction in the Five Civilized Tribes' removal treaties would also auger against displacement. For example, the Chickasaw Nation's removal treaty "secures the Nation from 'all laws . . . except such as may, and which have been enacted by Congress, to the extent that Congress under the Constitution are required to exercise a legislation over Indian Affairs.'"²⁸² Recently, the National Labor Relations Board (NLRB) concluded that this particularly strong treaty language meant that the Chickasaws acquiesced to federal jurisdiction only in matters involving the regulation of Indian affairs, thus precluding NLRB jurisdiction over labor issues.²⁸³ This conclusion contrasts with the NLRB's finding of jurisdiction over other tribes that did not have similar treaty language limiting federal jurisdiction.²⁸⁴

Accordingly, it is far from clear that federal environmental laws such as the Clean Water Act have displaced the common law and provide an exclusive remedy with regard to the Five Civilized Tribes. Not only have courts disfavored applying the *Tuscarora* rule where treaty rights are concerned, but the Five Civilized Tribes have only consented to federal jurisdiction where Congress is regulating Indian affairs, and federal environmental laws are not laws regulating Indian affairs. Therefore, the tribes may have a stronger argument allowing them to pursue remedies under federal common law.

CONCLUSION

When the Five Civilized Tribes entered into treaties with the

²⁸⁰ See *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985).

²⁸¹ See *id.*

²⁸² Chickasaw Nation, 362 N.L.R.B. No. 109 (June 4, 2015).

²⁸³ See *id.*

²⁸⁴ See *NLRB v. Little River Band of Ottawa Indians Tribal Gov't*, 788 F.3d 537, 551 (6th Cir. 2015) (upholding the NLRB's application of the National Labor Relations Act to an Indian tribe where no treaty right was at issue).

United States, ceding vast territories in the Southeast for new lands in the Indian Territory, they were vested with both strong property rights in their new lands,²⁸⁵ as well as nearly exclusive governmental authority within their new territories.²⁸⁶ This included not only submerged lands under navigable waters²⁸⁷ but also the governmental authority to regulate them.²⁸⁸ The tribes retain both ownership and governmental authority over waterways within their boundaries to the present day because: (1) the Indian Territory was never intended to be a state, (2) there is the unmistakably clear language vesting the tribes' land rights and governmental authority in their treaties, and (3) there is an absence of abrogating language in the Oklahoma Enabling Act or any other statute.²⁸⁹ The tribes retain inherent authority to regulate activities impacting water quality by Indians within their TJSAs, regardless of whether the polluting activities occur on Indian land or non-Indian fee land.²⁹⁰ Additionally, because regulation of water quality implicates the tribes' health and welfare, this authority likely extends to non-Indians on non-Indian lands within their respective TJSAs.²⁹¹

Yet, the complex rules governing tribal civil jurisdiction pose barriers to the tribes' ability to enforce these robust rights through regulation outside their jurisdictional boundaries.²⁹² Due to court-imposed jurisdictional limitations on tribal regulation of non-Indians outside Indian Country, the Five Civilized Tribes probably lack authority to regulate off-reservation polluting activities by non-Indians.²⁹³ This is especially troublesome because much of the pollutants currently contaminating tribal waters appear to originate

²⁸⁵ See, e.g., Treaty with the Choctaw, *supra* note 40, at art. II; Treaty With The Creeks, *supra* note 40, at art. 14; Treaty With the Cherokee, *supra* note 40, at art. 2.

²⁸⁶ Treaty with the Cherokees, *supra* note 40, at art. 5; Treaty with the Chickasaws, *supra* note 40, at art. 2; Treaty with the Creeks, *supra* note 40, at art. 14; Treaty with the Choctaws, *supra* note 40, at art. 4; see also *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 638, n.3 (1970) (quoting S.DOC. NO. 25-120, (1837)).

²⁸⁷ See *United States v. Grand River Dam Auth.*, 363 U.S. 229, 235 (1959); *Choctaw Nation*, 397 U.S. at 663.

²⁸⁸ See discussion in Part IV, *supra*.

²⁸⁹ See *id.*

²⁹⁰ See discussion in Part IV.A., *supra*.

²⁹¹ See *id.*

²⁹² See COHEN'S, *supra* note 23, at §§ 6.01[5] and 7.02[1][d].

²⁹³ See *id.*

from off-reservation sources.²⁹⁴ And while such authority could be vested by treaty, it does not appear that the tribes' treaties do so in this instance.²⁹⁵

Congress recognized this type of regulatory void and filled it with the TAS provision in the Clean Water Act, which delegates substantial federal authority to tribes.²⁹⁶ However, for the Five Civilized Tribes this mechanism is precluded by Senator Inhofe's "midnight rider," which severely curtails Oklahoma tribes' ability to gain TAS certification by requiring Oklahoma tribes to enter a cooperative agreement with the state in order to obtain certification.²⁹⁷ Not only does this hinder the Five Civilized Tribes' prospects of asserting regulatory authority, but an additional provision in Inhofe's midnight rider, which could hand over Clean Water Act regulatory authority within Indian Country located in Oklahoma to the state, has the prospect of subverting both federal and tribal protections of these treaty resources.²⁹⁸

An additional mechanism to protect water quality that could be pursued under federal delegated authority is a lawsuit for damages or injunctive relief under CERCLA. However, as the *Tyson* case demonstrates, both the tribal and state governments are required parties to such a suit, and, therefore, substantial coordination and cooperation is required to successfully utilize that statute.²⁹⁹ Accordingly, CERCLA is an ineffective mechanism for the tribes to independently enforce their treaty rights.

The dilemma of how to independently enforce treaty rights to water quality against non-Indian, off-reservation polluters is most effectively addressed by common law remedies for damages and abatement of pollution.³⁰⁰ The existence of the Clean Water Act and its displacement of federal common law presents no barrier

²⁹⁴ See, e.g., *Oklahoma ex rel. Edmondson v. Tyson Foods*, 619 F.3d 1223 (10th Cir. 2010).

²⁹⁵ See Treaty with the Cherokees, *supra* note 40 (recognizing tribe's governing authority within their territory, but silent their extra-territorial governmental authority); Treaty with the Chickasaws, *supra* note 40 (same); Treaty with the Creeks, *supra* note 286 (same); Treaty with the Choctaws, *supra* note 40 (same).

²⁹⁶ See Anderson, *supra* note 80, at 226.

²⁹⁷ See Sanders, *supra* note 259, at 552–53.

²⁹⁸ See *id.*

²⁹⁹ See generally *Tyson Foods*, 619 F.3d 1223; see also McBride, *supra* note 6, at 608–09.

³⁰⁰ See discussion in Part IV.D, *supra*.

here.³⁰¹ While the *Tuscarora* rule at times subjects tribes to generally applicable federal statutes such as the Clean Water Act, there is an exception where treaty rights are concerned.³⁰² Moreover, although utilization of the displacement doctrine by federal courts has generally meant that federal environmental statutes provide an exclusive remedy for environmental harm in federal court, the fact that the tribes possess not just a property right, but a treaty right, likely means that the doctrine does not apply, leaving them free to pursue common law remedies.³⁰³ Therefore, the Five Civilized Tribes could utilize common law causes of action, such as public or private nuisance, to enjoin the polluters, regardless of their tribal citizenship or the status and location of their lands.³⁰⁴

Utilizing common law remedies where conduct impairing water quality occurs off-reservation is inefficient. The most sensible solution is to repeal Senator Inhofe's "midnight rider," and simply allow the Five Civilized Tribes to apply for TAS status without Oklahoma's imprimatur. This would provide a familiar regulatory framework, which has been successfully implemented by scores of other tribes,³⁰⁵ and would protect tribal water quality rights. This straightforward solution would go a long way toward protecting the tribes' vital resources.

301 *See id.*

302 *See id.*

303 *See id.*

304 *See id.*

305 *See EPA Approvals of Tribal Water Quality Standards*, ENVTL. PROT. AGENCY, <https://www.epa.gov/wqs-tech/epa-approvals-tribal-water-quality-standards> (last updated Apr. 26, 2017).