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CENTERING MNI WACONI IN WATER LAW:

THE NATURE OF THE PONCA TRIBE OF OKLAHOMA'S WATER RIGHTS AND POTENTIAL METHODS TO ASCERTAIN THEM

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Abstract

Water is not a natural resource. Water is a source of life that every being on this planet has an inalienable right to. For that reason, we say "Mni Waconi" which means "Water is Life." The law of the United States, however, ignores this fact and attempts to create a means of dominion over a source of life that is sacred and gifted with the intention that it be shared and protected. Therefore, this note attempts to aid the Ponca Tribe of Oklahoma in the war against environmental genocide by discerning the nature of their reserved water rights and methods to ascertain them. To ensure that the Ponca Tribe of Oklahoma has access to clean water for the next seven generations and beyond, this note refutes aspects of the Winters doctrine and argues that a breach of trust claim against the federal government is the best course of action.

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"We must push the boundaries of 'sovereignty' as it is defined by the federal government. That is also the essence of cultural sovereignty."
Rebecca Tsosie

INTRODUCTION

> They are old people, but they learned to live in a new world. They were a people of rivers who could function well on the high plains. They were a people of the north who were removed at a late time to the south. They were a horticultural people who could also hunt buffalo. They were a people of peace who could fight as well as anyone in defense of their lands and their tribe. They were, and are, the Poncas—a people who survived.[1]

It would be inappropriate to initiate this conversation without first honoring the esteemed reputation, strength, and resilience of a people who continue to stand strong and refuse defeat. Yet, it is due time that the Ponca Tribe of Oklahoma (Ponca hereinafter) are no longer a people who

[1] *See* JOSEPH H. CASH & GERALD W. WOLFF. THE PONCA PEOPLE 1 (John I. Griffin et al., 1975).

merely survive but are released from the chains of oppression so they may rise as a sovereign nation towards health, safety, and economic prosperity. A key to one of the many colonial shackles that hinder the Ponca entails characterizing and ascertaining their water rights. Water is not a resource, but a source of life. It is owned by no one nation but required by all, a human right necessary to the vitality and progress of all peoples. Despite this fact, the United States has, per its customary practices concerning other sources of life, forged avenues to limit the water rights of tribal nations for its use and benefit. Now, in the face of an ever-warming climate, mass extinction of all life, and a desertifying planet, water has become increasingly precious and needed.

According to American Federal Indian Law, water rights are impliedly reserved at the creation of a reservation to fulfill the purpose for which it was created.[2] With ever-worsening water shortages on the horizon, the question of how much water a tribe is entitled to looms over America like a dense fog. Despite the race by both states and tribes to determine tribal water rights, this paper acts as a warning and encourages the Ponca to avoid adjudication or settling their water rights. Rather, this paper will ultimately encourage Ponca to file a breach of trust claim against the federal government for impinging upon and failing to protect and assert their water rights. The remedies for said breach include flipping our current understanding of Winters v. United States, 207 U.S. 564 (1908) (Winters hereinafter) and its famous *Winters* doctrine to recognize, what should be, the positively elastic character of the Ponca's water rights. As a by-product of their claim, the Ponca should demand monetary damages and further equitable reparations including the remediation, and subsequent protection, of any polluted waters and lands on their reservation.

The following sections explore the historical development of the Ponca Reservation and American water law to show why current approaches to tribal water rights are inappropriate and oppressive. That perspective will form the foundation of my assertion that a breach of trust claim is not only appropriate but necessary to protect the future of the Ponca and other tribes alike.

PART I: HISTORICAL BACKGROUND

Like other Siouan tribes, there are multiple theories about the origin of the Ponca people; however, historians are certain that, in 1673, the Ponca were living along the Niobrara River in Nebraska.[3] After the tribes were forcibly removed to Indian Country, the Ponca split up into two distinct bands known today as the Northern and Southern Ponca.[4] This note will focus on the Southern Ponca who are located in White Eagle, Oklahoma, at the confluence of the Salt Fork and Arkansas River. The sections to follow will explain how they ended up there.

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[2] *See generally* Winters v. United States, 207 U.S. 564 (1908).

[3] CASH, *supra* note 1, at 2 (describing the origin of the Ponca as "shrouded in the mists of time"); *See also* James H. Howard & Peter Le Claire. *The Ponca Tribe* 2 (1995) (providing a map of the territory used by the Ponca tribe prior to their reservation).

[4] CASH, *supra* note 1, at 5. The Northern Ponca are known as "Osni-Ponka" which means "Cold Ponca," in reference to the cold climate of Nebraska. On the other hand, the Southern Ponca are called "Maste-Ponka," or "Warm Ponca," as Oklahoma is hot and humid.

A. The Trail of Broken Treaties

As the Revolutionary War progressed, the United States began to enter into treaties with the tribal nations of North America.[5] After the war, the Constitution of the United States' Commerce Clause, Treaty Clause, and Supremacy Clause gave the federal government sole authority over Indian affairs.[6] After alliances between the British and Western tribal nations weakened the United States military during the War of 1812, the government increased its execution of treaties with Natives.[7] To terminate all tribal bonds with the British, and to protect America's fur trade, the United States entered into more treaties of peace and friendship and mutual national recognition with Native Nations.[8] As a result, the Ponca, "[d]ecimated by smallpox, and terrorized by Lakota war parties," signed their first treaty with the United States in 1817.[9]

To continue to create "conditions conducive to the peaceful development of fur trade among all tribes," treaty commissioners set out to execute further treaties with twelve different tribes, including the Ponca, in the summer of 1825.[10] The Ponca Treaty of 1825 represents a federal attempt to develop a guardian-ward status between the two nations by outlining the supremacy of the federal government and placing the Ponca under its protection.[11] The treaty also further regulated the Ponca's ability to trade while prohibiting them from furnishing firearms to hostile parties.[12]

As time went on, the Ponca's treaties proved to be meaningless as the United States consistently refused to uphold its promises to protect and provide for the tribe. The federal government's refusal to uphold its treaties has been a common narrative, especially as Federal

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[5] CAROLE E GOLDBERG, REBECCA TSOSIE, ROBERT N. CLINTON & ANGELA R. RILEY, AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM 4-5 (6th ed. 2015). On September 17, 1778, the United States executed the Treaty of Fort Pitt with the Delaware Nation. Rather than making claims to Lenape lands, the Treaty of Fort Pitt allowed the U.S. military to travel through their territory, buy supplies, and make a military alliance against the British. This treaty of friendship, and others alike, became the baseline for the inherent sovereignty of Native Nations.

[6] JUDITH V. ROYSTER ET AL., NATIVE AMERICAN NATURAL RESOURCES 72 (4th ed. 2018). ("Congress is empowered to regulate commerce. . . with Indian tribes, Art. I § 8, cl. 3; the President is empowered to make treaties, with the consent of Senate, Art. III § s, cl. 2; and the Supremacy Clause guarantees that treaties, as well as the constitution and federal statutes, are the supreme law of the land").

[7] JOE STARITA. "I AM A MAN;" CHIEF STANDING BEAR'S JOURNEY FOR JUSTICE 17 (1st ed. 2008).

[8] CASH, *supra* note 1, at 143; *See also* STARITA, *supra* note 7, at 17.

[9] *See* STARITA, *supra* note 7, at 17; *See also* KAPPLER, CHARLES J. INDIAN AFFAIRS: LAWS AND TREATIES, Vol. 2 140 (1904) (providing a copy of the Treaty with the Ponca, 1817).

[10] *See* Joseph Jablow & The United States Indian Claims Commission. *Ethnohistory of the Ponca. Commission Findings [on the Ponca Indians]172* (1974); *See also* KAPPLER, *supra* note 9, at 225-26 (providing a copy of the Treaty with the Ponca, 1825).

[11] *See* Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831) (Holding that tribes were not foreign states, rather they are domestic dependent nations whose relationship to the United States "resembles that of a ward to his guardian").

[12] *See* Jablow, *supra* note 10, at 172; *See also* STARITA, *supra* note 7, at 17-18 (explaining that the Treaty of 1825 also promised the Ponca "such benefits and act of kindness as may be convenient, and seem[ed] just and proper to the President of the United States").

Indian policy entered into the Removal Era of 1820 to 1887.[13] With a rise in Lakota raids, starvation caused by the disappearance of the buffalo,[14] and a dramatic increase in white settlers encroaching on Ponca Territory, the Ponca Chiefs were forced to sign yet another treaty in 1858.[15] As custom to the Removal Era, this treaty ceded "all Ponca lands" to the United States except for a "small, isolated, hardscrabble tract a good deal west of their traditional homeland."[16] The government described the boundaries of the Ponca's new reservation in great detail: "[b]eginning at a point on the Niobrara River running due N. so as to intersect the Ponca river 25 miles from its mouth; thence due S. to the Niobrara river; thence down said river to the place of beginning."[17] In consideration for their land, and in hopes of colonizing and domesticating them,[18] the government promised annuities for the first 30 years and $20,000 the first year to build homes, buy farming tools, and fence the land.[19] The government also pledged a mill for their grain, another to saw timber, an interpreter, a teacher to operate a school for ten years, and further protection from the "chronic Lakota Raids."[20]

Unsurprisingly, the United States failed to uphold the Ponca Treaty of 1858. Not only did the promised annuities take eighteen months to arrive,[21] but a letter between government officials in 1859 describes that other plains Indians took notice of the Ponca's cessation of lands and attacked a Ponca war party for selling their land and making a treaty with the whites.[22] To make matters worse, none of the farming tools arrived, the Ponca had no hay for their horses and were without timber, and their crops continuously failed.[23] The Ponca had given up their homelands for empty promises and it became clear that the government had no intention of supporting or protecting them, as evidenced by the following account:

> On December 3, 1863 government troops encountered a small Ponca camp not far from their reservation. The hungry group of Five Ponca women, five children, four men, and a young boy were returning home with a load of corn from their Omaha friends when some of

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[13] *See* Royster, *supra* note 6, at 73 (explaining that during the Removal era, white settlers expanded to the trans-Mississippi West which encouraged the government to create reservations "carved out of vast tracts of aboriginal lands." These reservations would be held in trust for the tribes, and the remainder of the original territory would be ceded to the government); *See also,* Alleen Brown, *half of oklahoma is "indian country." what if all native treaties were upheld?*, THE INTERCEPT, July 17, 2020 ("'The rule of thumb is every treaty's been broken,' said Matthew Fletcher, director of the Indigenous Law and Policy Center at Michigan State University.").

[14] *See generally* ANDREW C. ISENBERG, THE DESTRUCTION OF THE BISON (1st ed. 2000).

[15] *See* STARITA, *supra* note 12, at 28; See also KAPPLER, *supra* note 9, at 772 (providing a copy of the Treaty with the Ponca, 1858).

[16] STARITA, *supra* note 7, at 28-29.

[17] *See* Howard & Le Claire, *supra* note 3, at 31.

[18] *See* ROYSTER, *supra* note 6, at 73-74 (Explaining that "federal policy makers viewed reservations as living laboratories where Indians, under the leadership of the federal Indian agent, would learn the virtues of Christianity and agriculture").

[19] *See* STARITA, *supra* note 7, at 29.

[20] *Id.*

[21] *Id.*

[22] Howard & Le Claire*, supra* note 3, at 31.

[23] *See* STARITA, *supra* note 7, at 29 (explaining that "[w]hile white settlers now farmed their fertile valley, the Ponca could coax little from the rocky, barren soil of their new lands. [...] For heating fuel, they were forced to wait for the Niobrara to freeze over to cut trees on the river islands and haul logs back to camp").

> the Seventh Iowa Calvary arrived. At the time, while the Civil War occupied regular troops, groups of volunteer soldiers were paid to keep the frontier peace. The Seventh Calvary was such a group.
>
> That night, fifteen mounted Iowa soldiers rode into the camp, demanding to sleep with several of the women. Alarmed, the Ponca fled through the back of their tipis, escaping into the nearby woods, the soldiers destroyed the tipis, and threw away their corn. At dawn the next morning, the soldiers rode up while the same Ponca ate breakfast along the Niobrara. As one woman fled carrying her child, a trooper shot her in the side, the bullet lodging in the child's thigh while she struggled to cross the river to the other side of the iced-over river, she was shot again. Not far away, two soldiers found a group of women and children hiding in the bush. They dismounted, walked up to the women, and shot three of them in the face. They turned their revolvers on a twelve-year-old girl, riddling her breasts at point-blank range.
>
> When word reached their village, the outraged Ponca and their agent demanded an investigation into the murders of the three women and [the] child and compensation for their families. The governor of Dakota Territory said the Ponca should not have left their territory without a pass. No arrests were made, no charges were filed, [and] in the official reports, it was described as an unfortunate occurrence. At the time, Indians had no standing in federal courts and no legal protection under state or territorial laws. *Still, the Ponca continued to honor the Treaty of 1858.*[24]

B. Removal

Circumstances worsened when, in 1868, the government executed the Fort Laramie treaty which granted 96,000 acres of the Ponca Reservation to the Great Sioux Reservation.[25] Their newly acquired lands became the perfect excuse for more Teton Sioux raids and, notwithstanding the trail of Ponca treaties promising federal protection, the government did nothing to protect them despite countless calls for support.[26] To make matters worse, for the next eight years "the government supplied the Teton warriors with heavy caliber rifles of the latest make, ostensibly for bison hunting."[27] When the conflicts between the Sioux and the Ponca got bad enough to draw

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[24] *See* STARITA, *supra* note 7, at 30-31 (cleaned up) (emphasis added).

[25] *See* BLUE CLARK, INDIAN TRIBES OF OKLAHOMA: A GUIDE 283 (2nd ed. 2020).

[26] *See* Howard & Le Claire, *supra* note 3, at 32.

[27] *Id*. at 33; *see also id.* at 21 ("When the Great Sioux Treaty of 1868 was made at Fort Laramie by some blunder that no one has ever been able to explain, the whole Ponca Reservation which has been guaranteed to the tribe over and over again in repeated treaties with the National Government was given to their deadly enemies the Brule and Oglala Sioux. Soon their enemies understood that the Ponca Territory had been given to them by this treaty, their raids became

attention from Washington in 1876, Congress appropriated $25,000 for the removal of the Ponca to Indian Country for "a home therein," if they consented to go.[28]

In response, Chief White Eagle, Chief Standing Bear, and eight other Ponca Chiefs were selected to go to Indian Country with Inspector Edward C. Kemble to see their newly proposed homelands.[29] In February of 1877, the Chiefs rode wagons to the new territory and, after conferring with the Kaw, who they had once lived with generations before "on the other side of the Mississippi," and the Pawnee, whose people were poor, sick, and wiped out by malaria, and seeing the broken stony land, the chiefs refused to be moved there.[30] After Inspector Kemble refused to take the chiefs to Washington to speak with the president, he also refused to give the chiefs any of the money that was appropriated for the journey and their return.[31]

Without train passes, money for food, or even a map, the eight chiefs, except for the two eldest, set out for home in the middle of the night and in the dead of winter.[32] As they journeyed home, the Inspector did everything in his power to stop them from returning, including telling train cars not to let them ride and ordering them to be arrested and held prisoner at Fort Leavenworth.[33]

The punishment for refusing to move to Indian country wasn't limited to the chiefs. Back on their reservation, the local Indian officer had begun to withhold rations from the Ponca.[34] On April 2, 1877, having walked five hundred miles over forty days, the Chiefs made it home "near[ing] starvation, discolored from frostbite, [and] many of them sick."[35] To their surprise, Inspector Kemble was already there awaiting them,[36] and "four days [later], thirty mounted calvaries made their way into the villages, and not long after, another thirty arrived, the first time U.S. soldiers had ever been summoned to enforce peace on Ponca lands."[37] But it wasn't peace that they enforced. With bayonets at their backs, the Ponca were forcibly removed from their treaty lands and herded to Indian country.[38]

The Ponca Trail of Tears was two long months of suffering.[39] Due to being forced over numerous flooded rivers and even combatting tornados, it is documented that someone died of disease or exposure every few days.[40] They eventually crossed into Indian country "[d]iscouraged,

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more fierce and frequent. The seven years that followed this treaty were years when the Poncas were obliged to work their gardens and cornfields as did the Pilgrims in New England or the early settlers of Kentucky with hoe in one hand and rifles in the other.").

[28] *Id*. at 33; *See* SETH KING HUMPRHEY, THE INDIAN DISPOSSESSED: THE REMOVAL OF THE PONCA 157 (1906).

[29] STARITA, *supra* note 7, at 42.

[30] *Id.* at 43-44.

[31] *Id.* at 45.

[32] *See* STARITA, *supra* note 7, at 45 ("Ahead lay hundreds of miles of open prairie, frozen rivers and creekbeds, snow and harsh winds. Lands they did not know, inhabited by strangers whose language they did not speak. They found the rail road depot and started walking. . .").

[33] *See* STARITA, *supra* note 7, at 29 ("The inspector telegraphed his superiors: If their insubordinate chiefs are permitted to return to their people, there will be an end to all discipline among them, or to any control of the tribe by their agent") (internal quotation mark omitted).

[34] *See* Clark, *supra* note 25, at 283.

[35] *See* STARITA, *supra* note 7, at 46.

[36] *Id*. at 48.

[37] *Id*. at 55.

[38] *See* CLARK, *supra* note 25, at 283.

[39] *See* Howard & Le Claire, *supra* note 3, at 35.

[40] *Id*. 34-35.

homesick, and hopeless, [and] found themselves on the land of strangers, in the middle of a hot summer, with no crops nor prospects for any."[41]

Like the eight chiefs that originally visited the area, the Ponca were heartsick to see the lands they would now have to call home. They eventually "select[ed] an area on the west bank of the Arkansas River, covering both sides of Salt fork in present-day north-Oklahoma."[42] Although that land belonged to the Cherokee Nation, the United States had the legal right to place other tribes on the land pursuant to the Cherokee Treaty of 1866.[43] Upon settling there, the Ponca quickly demanded the establishment of their reservation boundaries and reimbursement for the 96,000 acres that they "relinquished" in Nebraska.[44]

In response to their requests, the Commissioner of Indian Affairs developed a Senate Select Committee investigation into the removal and relocation of the Ponca.[45] Due to the historically peaceful nature of the tribe, most of the committee wanted the Ponca to be returned to their Nebraska reservation while the rest argued for reparations and a direct purchase of the Cherokee land that they settled upon.[46] Some Ponca delegates even traveled to D.C. requesting that they remain on the 101,894 acres and an appropriation of nearly $200,000 to purchase the land in fee-simple and needed supplies.[47]

Based on the recommendation by the Select Committee, the President Commission, and President Hayes, Congress passed the Act of March 3, 1881, which asserted:

> For the purpose of enabling the Secretary of the Interior to indemnify the Ponca tribe of Indians for losses sustained by them in consequence of their removal to the Indian Territory, to secure to them lands in severalty on either the old or new reservation, in accordance with their wishes, and to settle all matters of difference with these Indians, one hundred and sixty-five thousand dollars to be immediately available and to be expended under the direction of the Secretary of the Interior as follows: For the purchase of one hundred and one thousand eight hundred and ninety-four acres of land in the Indian Territory, where most of these Indians are now located, fifty thousand dollars.[48]

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[41] *Id*. at 35 at 35. Despite the government's promise of land set aside for them, food, and shelter, It is here that we see the Ponca people, more so than ever, completely and utterly dependent on the United States to sustain their lives. It is here that the Guardian-Ward relationship and the Trust duty of the federal government evolved to its fullest form, just as the government intended.

[42] *Id*.

[43] *See* KAPPLER, *supra* note 9, at 942; *See also* Ponca Tribe of Indians of Oklahoma v. United States, 183 Ct. Cl. 673, 682 (1968).

[44] *Ponca Tribe of Indians of Oklahoma*, 183 Ct. Cl. at 683 (1968).

[45] *Id.*

[46] *Id.* at 684.

[47] *Id.*

[48] *See Ponca Tribe of Indians of Oklahoma*, 183 Ct. Cl. at 686-87 (1968).

After a lawsuit for the fair valuation of lands ceded to the Government in *United States v. Cherokee Nation,*[49] the Cherokee transferred the deed to its land to the Ponca on June 14, 1883. The landmark decision in *Standing Bear v. Crook*, which recognized Indians as a *person* within the meaning of the law of the United States, played a role in helping the Ponca acquire their lands in fee.[50] Shortly after his case, Chief Standing Bear went back to Nebraska and the Ponca split into the North and Southern Ponca Bands.[51] 158 of the Ponca who stayed in Oklahoma died in the first year.[52]

C. Ponca Allotments and Implications

The history of Indian removal to Indian country, the surrounding territory's settlement, and its transition to statehood have a diverse impact on the water rights of tribes throughout Oklahoma. Tribes on formal reservations in Western Oklahoma have reserved water rights known as *Winters* rights, whereas Eastern Oklahoma was designated as a permanent home for the Five Civilized Tribes who hold their land in fee.[53] Therefore, there are two bases for water rights in Oklahoma: (1) the *Winters* doctrine[54] and (2) titles to land in fee that are "sensitive to the distinct pattern of settlement in present-day eastern Oklahoma." [55] The second basis is more complicated but stands to provide tribes with a greater quantity of water than would be reserved in accordance with their *Winters* rights. The question this note will address is: which is the basis of Ponca's water rights?

Before it became the state of Oklahoma, the region had been designated as "Indian Territory" and was apportioned between the Five Civilized Tribes upon their removal to the area in the 1830s.[56] As a quid pro quo for their land, the United States promised that their new territories would never be included in any state or subject to the jurisdiction of any state or territory.[57] This promise shows the intention that the land be their permanent home, bolstered by the fact that the land be held by the tribes in fee simple rather than in trust by the federal government.[58] With title over the land in fee simple, the Five Civilized Tribes also held title to all waters in their territory

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[49] 474 F.2d 628, 629 (Fed. Cir. 1973).

[50] 25 F. Cas. 695, 5 Dill. 453 (D. Neb. 1879).

[51] PAUL R. MCKENZIE-JONES, CLYDE WARRIOR: TRADITION, COMMUNITY, AND RED POWER 5 (2015).

[52] *Id*. at 21.

[53] Taiawagi Helton, *Indian Reserved Water Rights in the Dual-System of Oklahoma*, 33 TULSA L. REV. 979, 992 (1998) (referring to the Cherokee, Choctaw, Chickasaw, Creek, and Seminole Nations).

[54] *See generally, Winters,* 207 U.S. 564 (1908) (creating the *Winters* doctrine in holding that water rights are impliedly reserved at the creation of a reservation to fulfill the purpose for which it was created).

[55] *Id*. at 994.

[56] Helton, *supra* note 53, at 992.

[57] *Id*. at 993 (citing Stat. 573; Treaty with the Cherokee, Dec. 29, 1835, U.S.-Cherokee Nation, 7 Stat. 478 (Treaty of New Echota); Treaty with the Creeks, Feb. 14, 1833, U.S.-Creek Nation, 7 Stat. 417; Treaty with the Seminole, May 9, 1832, U.S.-Seminole Indians, 7 Stat. 368; Treaty with the Choctaw, Sept. 27, 1830, U.S.-Choctaw Nation, 7 Stat. 333 (Treaty of Dancing Rabbit Creek)).

[58] *Id*. (*citing* Choctaw Nation v. Oklahoma, 397 U.S. 620, 625 (1970) (showing that the United States promised to convey the land in fee simple "to insure to them while they shall exist as a nation and live on it."); *See also* United States v. Cherokee Nation, 474 F.2d 628, 630 (Fed. Cir. 1973) (explaining that "[t]he Cherokees received fee simple title to their new lands under a United States patent issued in 1838; the lands consisted of an [E]astern segment (known as the Cherokee homeland), and to the west thereof the tract known as the Cherokee Outlet").

reserved for their *absolute and exclusive use*.[59] Because of their fee simple title over the land, rather than being limited to *Winters's* water rights, the Five Civilized Tribes held title to all waters tied to their lands. Therefore, the quantity of their water right was essentially *unlimited*.[60]

The United States later punished the Five civilized tribes for siding with the confederacy during the Civil War through a series of new treaties.[61] Those new agreements diminished their territory and eventually allowed the government to place twenty-five reservations for thirty-seven tribes in the ceded territory.[62] The Cherokee benefitted in comparison to the other tribes. They entered into a treaty with the United States declaring their alliance with the confederacy void and were able to reconfirm title to their lands.[63] The Cherokee did, however, agree to allow the United States to place other tribes on their lands in exchange for compensation for the tracts used.[64] One of those tribes placed on Cherokee land was the Ponca.[65]

As mentioned, in 1881, Congress appropriated $165,000 to the Ponca to buy the Cherokee's deed to 101,894 acres of their lands outright.[66] Therefore, like the Pawnee, the Nez Perce, and others,[67] the title to the Ponca Reservation, currently known as White Eagle, Oklahoma, was transferred directly from the Cherokee to the Ponca Tribe of Oklahoma.[68]
This is a key point in relation to the Ponca's water rights because "[w]here the transfer took place directly between the tribes, the Western tribe succeeded to all of the rights of the selling tribe."[69] Therefore, the Ponca received title to all waters in their territory reserved for their *absolute* and *exclusive* use, which is reconfirmed by the fact that the Ponca Reservation was established far before the Oklahoma Organic Act of 1890.[70] In her 1998 article, *Indian Reserved Water Rights in the Dual-System State of Oklahoma*, Taiawagi Helton explained that,

> If the reservation was established before the Oklahoma Organic Act, which created the Oklahoma Territory and laid the trail for statehood, then by definition, the reservation was to create a permanent homeland for the tribe. In such a case, the reservation was created at a time when Congress did not intend the territory to be encompassed by a state, so all of the available water passed to the tribe. At the time of the reservation, there was neither a territory

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[59] Helton, *supra* note 53, at 993.
[60] *Id.* at 995 ("The tribes were the only possible owners of land in the region. There existed no other entity to which any property could go. Consequently, the tribes owned all of the land and the water in the Indian Territory").
[61] *Id*. at 993.
[62] *Id*.
[63] United States v. Cherokee Nation, 474 F.2d 628, 630 (Fed. Cir. 1973).
[64] *Id*. (explaining the terms of Article XVI of the Treaty of July 19, 1866).
[65] *See id*. at 631; *see also* Helton, *supra* note 53, at 996 (1998).
[66] McKenzie-Jones, *supra* note 51, at 5.
[67] Helton, *supra* note 53, at 996.
[68] *Id*.
[69] *Id.*
[70] Helton, *supra* note 53, at 996.

> intended to become a state nor an existing state to which to pass rights to surplus water. Again, the tribe is presumed to have retained all water, rather than the portion reserved pursuant to the *Winters* doctrine.[71]

If we can accept Helton's position, then whether the *Winters* doctrine limits tribal water rights in Oklahoma depends on whether the reservation was created before statehood. Reservations created after statehood are limited to *Winters* rights because "any water not needed for the purpose of the reservation was not reserved by the federal government."[72] The state would then be in charge of administering the water that passed to them after statehood.[73] Therefore, in quantifying the *Winters'* rights of the Five Civilized Tribes and, in effect, the Ponca, the question is not "[h]ow much water was reserved in the tribe? but rather, [h]ow much water has been taken away?"[74]

The allotment of the Ponca Reservation had an adverse effect on the tribe's water rights. Allotments began in 1887 under the General Allotment Act (also known as the Dawes Act) which enabled the government to "survey communal tribal land and divide [it] into private allotments for individual Indians."[75] In 1892, the government sought to organize the allotments of lands in Indian country.[76] Amongst the other tribes in the region, the Ponca showed the most opposition to allotments.[77] Chief White Eagle's son, Horse Chief, argued to the commissioner that Ponca land shouldn't be subject to allotments because "unlike many tribes in the region, the Poncas actually owned their land and it was 'theirs to do with as they wished.'"[78] The Commissioner then falsely declared that "despite the legal sale of the land the government had 'retained title' and could do as it wished with the [Ponca] land, and that the commission would remain in the area until the Poncas agreed to sell it."[79] Without consent, Congress authorized an allotment policy for Ponca children born after 1894 and *authorized* the tribe to divide up their territory without federal interference.[80]

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[71] *See id.*; *see also* Helton, *supra* note 53, at 989 ("Tribal rights that predate the creation of the reservation have earlier priority dates, some as far back as time immemorial.") (internal citations omitted).

[72] Helton, *supra* note 53, at 997.

[73] *Id.* (explaining that any water needs beyond that to fulfill the reservation purpose would require state discretion).

[74] *Id.* at 994.

[75] *See* McKenzie-Jones, *supra* note 51, at 6; *See also* STARITA, *supra* note 7, at 227 (explaining that "[e]ach Indian family head [would] receive 160 acres—land the family would privately own and the government would hold in trust for twenty-five years. During this time, the policymakers believed, individual Native families would learn the true value of private ownership, how to nurture and take care of their own land, how to make a profit from it. In effect, it would force them to become self-sufficient farmers and ranchers, motivated by principles of competitive, free market economy. Ultimately, a taste for money and possessions would take hold, allowing many to achieve the same status as the white farmers and ranchers who increasingly had begun to crowd their lands. Meanwhile, any surplus land—reservation land left over after all the individual plots had been awarded—could be sold over to the whites. The sale proceeds would go into a government account with the interest used to finance a general education fund for the Indians").

[76] McKenzie-Jones, *supra* note 51, at 6.

[77] *Id.*

[78] McKenzie-Jones, *supra* note 51, at 6-7. (Horse Chief "declared that the tribe would not sell its land to the government even if offered seven dollars an acre.").

[79] *Id.* at 7. ("At the final meeting with the commissioners and the Poncas on June 6, 1893, … Standing Buffalo insisted that while ways might be 'superior,' the Poncas could not adopt them. He also suspected, quite correctly, that if the Poncas did take allotments and lease out their lands, their white tenants would cheat them.").

[80] *Id.* at 8.

The government was then able to fulfill its original goal of obtaining and distributing Ponca lands by making a system, through the Dead Indian Act of 1902, where the heirs of a deceased allottee could sell their land without the approval of the Secretary of the Interior.[81] In the midst of hot summers, failed crops, and poverty, the Dead Indian Act – a mere Hobson's choice – forced the Ponca people to sell their allotments.[82] In 1906, Congress then doubled down by passing the Burke Act to enable the Secretary of Interior to "arbitrarily circumvent the land sale restriction of the General Allotment Act."[83]

A year later, Congress passed the Non-competent Indian Act enabling the Secretary to "retain[] millions of acres of allotments in federal trust status due to the respective allottees' inability to speak, read, or write English."[84] Those acts worked together to allow for 26,120 acres of Ponca land to be sold.[85] The remaining 75,249 acres were divided amongst 628 tribal members, except for 524 acres set aside for the tribal cemetery, agency buildings, and a boarding school.[86]

The Supreme Court held that allotments carried reserved water rights in *United States v. Powers* and later held that the quantity of their right was limited to the allotment's practical irrigable acreage (PIA hereinafter);[87] however, a tribe maintains the power to govern the use of the water right.[88] Consequently, the forced allotment of the Ponca reservation stripped the tribe of their land and reduced their water rights. Therefore, any approach to recognizing their water rights must rectify this gross injustice.

PART II: APPROACHES TO TRIBAL WATER RIGHTS

The history of the Ponca and the acquisition of their reservation is at the center of this note and the nature of the Ponca Tribe's water rights.

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[81] *Id*.

[82] *Id*.; Interview with Mekasi Horinek, *infra* note 247 ("You had poor farmers, who couldn't get a loan on their land like the white farmers, that were forced to sell their allotments in order to survive.").

[83] McKenzie-Jones, *supra* note 51, at 8.

[84] *Id*.

[85] *Id*.

[86] McKenzie-Jones, *supra* note 51, at 9.

[87] *See* 305 U.S. 527, 533 (1939); *see also* Margaret Schaff & Cheryl Lohman, *Indian Allottee Water Rights: A Case Study of Allotments on the Former Malheur Indian Reservation*, COLO. NAT. RESOURCES, ENERGY & ENVTL. L. REV. Vol 31:1, 147, 153 (2020) ("The [*United States v. Powers*] Court reasoned that since agriculture was the purpose of allotments, and water is necessary for agriculture, reserved water rights are consistent with allotment policy. In later years, lower federal courts interpreted this law to give allotments a 'just share' of the tribe's agricultural water rights based on the total irrigable acres included in the allotment as a percentage of the [R]eservation. Allottees succeed to the tribal priority of the date the reservation was created.") (*Citing* Scholder v. United States, 428 F.2d 1123, 1126 (9th Cir. 1970); *see* Gila River Pima-Maricopa Indian Cmty. v. United States, 29 I. Cl. Comm. 144, 150 (1972); Colville Confederated Tribes v. Walton, 752 F.2d 397, 401 (9th Cir. 1985);
Hackford v. Babbitt, 14 F.3d 1457, 1469 (10th Cir. 1994)).

[88] Schaff & Lohman, *supra* note 87, at 153 (citing Montana v. United States, 450 U.S. 544, 565 (1981) (stating that a tribe's right to regulate allotted water rights includes the right to regulate non-Indian leased trust land)).

In the United States, water law governs one's right to use freshwater by connecting both property and tort law.[89] Due to the vital role that water plays in sustaining all life, water law is continuously evolving to not only meet growing demands,[90] but to also appease white America as they race for dominion over resources.[91] These goals are reflected in the federal government's decision to defer to state water law despite the ability to pre-empt them.[92] The sections to follow will analyze the evolution of water law by first explaining the riparian and appropriation systems that dictate one's usufructuary right to water depending on the customs and climate of their respective region.[93] A firm understanding of both systems is important as this paper focuses on Oklahoma which, like California and Nebraska, uses both systems.[94] I will then transition to the birth of the *Winters* doctrine and its relationship with the riparian and appropriation systems.

A. The Riparian System

A hydrological divide separates America along the 100th meridian into two precipitation regimes.[95] The riparian system, adopted from England and first applied in *Tyler v. Wilkinson*,[96] predominantly governs surface water rights of states on the Eastern half of the 100th meridian, where water is more abundant.[97] Under this system, water rights stem from land ownership rather than from diversion and beneficial use used in prior appropriation states.[98] Most American riparian jurisdictions have, however, abandoned the "archaic" natural flow doctrine which entitles riparian owners to all water flowing "in its natural channel without diminution or alteration."[99]

Instead, riparian rights typically include two rights: first, riparian owners of land abutting a water source have "the right to the continued existence of the waterbody in largely the same quantity and quality . . . ."[100] Second, riparian owners have the right to make reasonable use of their water source which enables such owners to divert water from a common source insofar as

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[89] ROBIN KUNDIS CRAIG, ET AL., WATER LAW (CONCEPTS AND INSIGHTS) 1 (2017).

[90] *Id.*

[91] DANIEL MCCOOL, COMMAND OF THE WATERS: IRON TRIANGLES, FEDERAL WATER DEVELOPMENT, AND INDIAN WATER 119 (1987) (Explaining that the BIA was not concerned with expanding Indian water claims and "[t]hus bowed to the political necessity of following state water law. According one BIA official, state law was followed 'to avoid criticism by white land owners"); *see also* McCool at 118 (The federal district court for Nevada declared that it was 'not moved to give a [*Winters* rights] decree destroying the rights of the white pioneers").

[92] Helton, *supra* note 53, at 984 ("Although Congress has the power to supersede state water law, it adopted a policy of deferring to state water law in 1866. In that year, Congress expressly validated local customs and the water rights acquired through them The United States Supreme Court interpreted the Desert Land Act of 1877 to provide that state law determined the water rights of federal patentees to non-navigable streams, as well. Thus, waters on the public domain were severed from the land and opened to the appropriation under state laws" (internal citations omitted)).

[93] *Id.* at 982.

[94] *Id.*

[95] CRAIG, *supra* note 89, at 1 (Describing them as "[t]he humid East, where rainfall historically has been sufficient to support agriculture without irrigation; and the arid West, in most portions of which irrigation has been an absolute necessity for farming.").

[96] Tyler v. Wilkinson, 24 F. Cas. 472, 4 Mason 397 (1827).

[97] CRAIG, *supra* note 89, at 15.

[98] ROYSTER, et al., *supra* note 6, at 480.

[99] Helton, *supra* note 53, at 982.

[100] CRAIG, *supra* note 89, at 15.

that water is put to a reasonable use.[101] Therefore, riparian owners have the ability to use water from abutting lands and, because riparian rights are correlative, each owner's rights are subject to the rights of other owners to advance its reasonable use.[102] In simpler terms, riparian rights designate any waterbody "as a common resource for the riparians who own property bordering it."[103] The issue with riparian rights is that they are always uncertain.[104] Moreover, in times of water shortage, available water is distributed evenly amongst owners regardless of their "date of initiation of use."[105]

B. The Appropriation System

As opposed to the English inherited system, the appropriation system used on the Western half of the 100th meridian stems from Western mining camps where riparian rights did not function in arid and mountainous regions.[106] The appropriation system was based on the notion that there was not enough water for everyone,[107] thus water claims were based on narratives of "first in time, first in right" and "use it or lose it."[108] Therefore, prior appropriation is based on putting the water to a continuous beneficial use rather than land ownership.[109] The quantity of one's appropriated water is the amount claimed at the initial date of appropriation and employed for beneficial use.[110] Those users then have "senior rights" and "are entitled to their full water rights before 'junior' right-holders receive any water at all."[111]

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[101] *Id*. *See also* Helton, *supra* note 53, at 982-83; ROYSTER, *supra* note 6, at 480 (highlighting that in some jurisdictions, reasonable use can include the continuation of a flow of the stream.).
[102] Helton, *supra* note 53, at 982.
[103] CRAIG, *supra* note 89, at 15.
[104] *Id*. (". . . existing uses may, under common law, still have to yield to the rights of other riparians who want to make new uses of the waterway.").
[105] Helton, *supra* note 53, at 983.
[106] *Id*.; *See also* CRAIG, *supra* note 89, at 39 ("As the United States expanded westward and as new territories and later states were admitted into the Union in the 19th and early 20th centuries, settlers faced very different hydrological, meteorological, and geographic conditions, as well as patterns of land ownership and management than those that dominated in the East, where the U. S versions of the riparian rights doctrine evolved).
[107] ROYSTER, *supra* note 6, at 479.
[108] Helton, *supra* note 53, at 984 (citing Comstock v Ramsay, 133 P. 1107, 1110 (Colo. 1913). *See also* CRAIG, *supra* note 108, at 46 (explaining that the use it or lose it aspect of prior appropriation is "designed to make sure that water rights are actually put to beneficial use rather than being held for speculation or in other ways that improperly prevent other people from using the water.").
[109] Helton, *supra* note 53, at 983. *See also* ROYSTER, *supra* note 6, at 479-80 ("historically, beneficial use is one which removes water from the stream and applies it elsewhere. For example, taking water out of the stream by way of a canal or ditch and using it to irrigate lands is a traditionally beneficial use. Consequently, the water is often used at a location remote from the source of the water"); CRAIG, *supra* note 89, at 42 (". . . riparian land ownership is not necessary to confer, and in fact does not confer, the right to use water.").
[110] Helton, *supra* note 53, at 982-986.
[111] CRAIG, *supra* note 89, at 43.

The key difference between appropriation and riparian rights are, first, that appropriators do not share when water is scarce, second, appropriators do not have to use the water on the land appurtenant to the water source, and third, the appropriated water can be transferred.[112]

C. Dual Systems

Due to the different climatic regions of Oklahoma, the state operates under both a riparian and prior appropriation systems.[113] Due to the clashes between the doctrines in real-life application, only Oklahoma, California, and Nebraska use this dual system.[114] Taiawagi Helton describes these clashes in his article asserting,

> Dual-system states face three major obstacles to implementing that system. First, the riparian right to initiate or maintain reasonable uses, regardless of time, cannot be upheld without denying the certainty offered by the appropriation doctrine's 'first in time, first in right' and 'use it or lose it' principles. Second, the doctrines use discordant standards for determining the value of a particular use. Riparian uses are judged by a relative reasonableness test, as compared to all riparian uses. Appropriative uses are judged individually in terms of their economic, environmental, recreational, or aesthetic values. Third, the appropriation doctrine allows anyone in need of water to appropriate, severing the water from its adjacent land, while the riparian doctrine permits only riparian landowners to divert water, generally only on riparian land. As a result, a dual system 'inevitably frustrates the chief advantages of one or both doctrines.'[115]

D. The Birth of the *Winters* Doctrine

In the face of a strong lobby against Federal and Indian reserved water rights and towards Western development, the BIA sought to build water infrastructure on reservations to solidify tribal water rights.[116] The BIA initiated several projects, but they eventually all failed because the BIA didn't hire professional irrigation engineers.[117] With the U.S. Reclamation Act on the horizon, which would appropriate federal funds for irrigation projects across the West to enhance

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[112] *Id.* at 42-43.

[113] Helton, *supra* note 53, at 984 (1998) ("Oklahoma's settlement history and climate are similar to those of other states along the 100th meridian and the West Coast. The land in the eastern portions of those states is relatively humid and water is relatively plentiful, while the western portions are relatively arid. As a result, the riparian doctrine was used in the [E]ast, while the appropriation doctrine developed in the [W]est, each accommodating the needs of users in their respective regions. The result was the dual rights system, which attempted to combine the two irreconcilable doctrines." (internal citations omitted)).

[114] *Id.*

[115] Helton, *supra* note 53, at 984-985 (internal citations omitted).

[116] MCCOOL, *supra* note 91, at 112.

[117] An old BIA saying: ("We began our first irrigation project in 1867 and we've never finished one yet.").

settlement,[118] and a lack of irrigation infrastructure due to the failures of the BIA, tribes were at risk of losing their unappropriated waters.[119] The *Winters* decision of 1908 gave the BIA one final crutch by reserving Indian water rights until the BIA could complete its projects.[120]

Winters v. United States concerned dams and reservoirs that prevented water from flowing to the Fort Belknap Reservation.[121] The Court reasoned that the federal government, in creating the reservation to assimilate the tribe into pastoral and civilized people, implicitly reserved water rights to enable the tribe to survive on the said reservation.[122] It is here that the "*Winters* doctrine" was birthed, establishing that water is impliedly reserved to carry out the purpose of the reservation for which it was set aside.[123] Those rights come to fruition on the date that the Indian country[124] comes into being.[125] The *Winters* doctrine reflects the canons of construction that favor the tribe in interpreting statutes or federal policies.[126] These canons enable tribal water rights to survive non-use as tribes lacked the resources to put their waters to use.[127] They also call for sufficient water to be reserved to fulfill the purpose of the reservation and require those waters to be undisturbed.[128] Rights to those waters exist until Congress, under its plenary power, terminates the reservation.[129]

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[118] Theodore Roosevelt Center at Dickinson State University, *The Arid West - The Newlands Reclamation Act of 1902*, Last visited (Mar 18, 2023), https://www.theodorerooseveltcenter.org/Blog/Item/The%20Arid%20West%20The%20Newlands%20Reclamation%20Act%20of%201902 [https://perma.cc/22X5-N35H] ("The Newlands Reclamation Act, also called the U.S. Reclamation Act, authorized the federal government to commission water diversion, retention and transmission projects in arid lands, particularly in the far [W]est. Roosevelt believed that the land should be usable and settled by farming families and that the water in western rivers, if not being used to help people, was wasted.").

[119] MCCOOL, *supra* note 91, at 112 (Chief Engineer Neweel of the Reclamation service warned in 1903 that there was a 'great danger' that the Indians would lose their water because it was not being put to beneficial use and would inevitably be appropriated by others (Reclamation Service Annual Report 1903-1904:268)").

[120] *Id.*

[121] ROYSTER, *supra* note 6, at 474.

[122] *See generally* Winters v. United States, 207 U.S. 564 (1908).

[123] *Id*.

[124] Judyth V. Royster, *Winters in the East: Tribal Reserved Rights to Water in Riparian States*, 25 WM. 7 MARY ENVI. L. REV. 169, 174 n.18 (2000) ("Indian country is defined both by common law and by statute. The statutory definition is found at 18 U.S.C. § 1151: (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation, (b) all dependent Indian communities ... and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.").

[125] *Winters*, 207 U.S. at 577.

[126] Royster, *supra* note 124, at 175 ("The canons provide that treaties and agreements should be liberally construed in favor of the tribes, that ambiguities should be resolved in favor of the tribes, and that the documents should be interpreted as the Indians would have understood them") (citing Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 196, 200 (1999)).

[127] Royster, *supra* note 124, at 183.

[128] *Id*. at 176, 179 ("tribal reserved rights to water are, as a matter of federal law, protected against interference by subsequent non-Indian uses of water.").

[129] *Id*. at 182.

Despite the landmark decision in *Winters*, Indian water rights remained in jeopardy[130] and the BIA was left without judicial guidance on how to apply the doctrine to protect them.[131] One of the first conceptualizations of *Winters* was offered by John McCourt, a U.S. attorney, who, in litigating the water rights of the Umatilla Reservation, "noted that beneficial use is not necessary to protect the right, the uses to which the water can be put are not limited to irrigation, the right is *open-ended* and it *cannot be controlled by state law*.[132] McCourt's broad interpretation of the doctrine worked to immunize tribal water rights from being hindered and restricted by state laws and, in effect, non-Indians. McCourts's broad interpretation worked to maximize and protect Indian water rights, likely the reasons it was not adopted by the BIA.

Instead, the BIA advanced "an ad hoc approach without real policy direction" until 1913 when the Commissioner of Indian Affairs, plagiarizing the language in the Chief Engineers' Annual Report, announced a favorable, yet arbitrary and narrow, interpretation of *Winters*.[133] Namely, *Winters*' reserved water rights would belong to the government rather than the Indians and, second, only existed insofar as the Indian land was unallotted.[134] Therefore, "the BIA viewed the doctrine as a temporary *government strategy* that was to be applied only for the purpose of farming for a temporary period."[135]

In other words, rather than expanding *Winters*, the BIA molded the doctrine to aid allotment policies intended to assimilate Indians and put their lands back into the public domain. There was no federal pushback on the BIA at the time because the prevailing feeling about *Winters* was that it "lacked political legitimacy" and Indian water rights were not in danger.[136] Thus as long as the BIA seemed like it was doing its job, the agency could limit Indian water rights as its contribution to the settlement and development of the arid west. The BIA heightened its efficiency in limiting tribal water rights by combining the *Winters* doctrine with prior appropriation laws.[137]

E. The Development of *Winters* and its Current Applications

Lacking guidance on how to apply *Winters* and given the "hostile political environment" of the time, the BIA, out of desperation, coupled the court mandate with the prior appropriation doctrine.[138] Combining the two doctrines "bowed to the political necessity of following state water law" and enabled the BIA to *protect* Indian water rights through beneficial use policy rather than

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[130] MCCOOL, *supra* note 91, at 113 ("BIA [water] projects all over the West were being threatened with water rights litigation and outright confiscation by whites").
[131] *Id.* at 113-14.
[132] *Id.* at 114 (emphasis added).
[133] *Id.* at 115 (The Indian commissioner announced that *Winters* was not applicable when "the land in question had not been allotted, and the case did not involve the rights of any individual Indian but settled rights of the United States on behalf of unallotted lands.").
[134] *Id.*
[135] MCCOOL, *supra* note 91, at 115 ("An internal BIA memorandum, circulated in late 1913, explained that reserved rights would automatically be dissolved when the individual Indian became the owner of an allotment") (emphasis added).
[136] *Id.* at 116 ("Basically the [BIA] did not trust [the *Winters* doctrine]; the doctrine was much too vague, it contradicted prevailing policies, and it was based on case law rather than statutory law and hence difficult to implement").
[137] *Id.* at 118.
[138] MCCOOL, *supra* note 91, at 117.

expanding the *Winters* doctrine.[139] Doing so also created multiple problems that continue to affect Indian Country today.

First, combining *Winters* and the appropriation system created confusion amongst Western settlers and caused them to race to appropriate waters because they believed that they were not subject to future Indian water claims.[140] Second, the BIA's version of the *Winters* doctrine led to increased leasing of Indian lands.[141] Although the BIA hoped to use the doctrine to aid Indian assimilation, Natives were slow to transition into farmers, so the BIA initiated a policy to lease Indian lands to non-Indians for their development.[142] However, the BIA's plan backfired. Not only did the Non-Indian lessees exhaust the soil, but, because the best lands were leased at extremely low rates, disparities in agricultural profits between Natives and non-Indian lessees further hindered the ability of Natives to transition into farmers.[143] The third–and most crucial– effect of this policy was the loss of Indian lands.[144] By 1929, 68 percent of Indian lands were either leased or sold to non-Indians.[145] Therefore, any completed BIA irrigation projects mostly benefited whites who, by 1974, were farming 71 percent of all irrigated Indian lands.[146]

The legality of using Indian water rights would not come into question until *Arizona v. California*, which held that, in regards to tribal water rights, the priority date is based on the date that the reservation came into being regardless of the date of actual appropriation.[147] Under the appropriation system, the tribes reserved water rights began to be quantified based on the reserved right as at issue and the purpose of the reservation in which it was set aside.[148] For example, if the reservation was set aside to assimilate the Indians into agricultural pastoralists, then the water needed to fulfill that purpose would be based on an agricultural measure.[149] Therefore, the tribe would be entitled to the amount of water needed to irrigate "all of the practicably irrigable acreage [] of the reservation."[150] If the treaty reserved water to continue cultural practices, then their water entitlement would be based on the amount needed to sustain said practices.[151] For example, if the

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[139] *Id*. at 118 (According to one BIA official, state law was followed "to avoid criticism by white landowners).

[140] *Id*. at 119 (Explaining that *Winters* alone did not provide settlers with notice that they should not develop waters that would be needed by Indians in the future).

[141] *Id.* at 119-120.

[142] *Id*. at 120 (Explaining that in 1910, "the BIA Engineer suggested that a 'plan of colonization' be formulated to encourage non-Indians to lease Indian Lands." This so-called "wise" plan was put into action eight years later and the BIA foresaw that the land would go back into the hands of the Natives once the lease term expired).

[143] *Id*.

[144] *Id*.

[145] MCCOOL, *supra* note 91, at 120-21.

[146] *Id*. (Displaying a chart, marked as Table 9, comparing the irrigated acreage on Indian Acreage farmed by non-Indians and Indians).

[147] Royster, *supra* note 124, at 184; MCCOOL, *supra* note 91, at 129 (1987); Helton, *supra* note 53, at 989; Arizona v. California, 547 U.S. 150 (1963).

[148] Royster, *supra* note 124, at 185.

[149] *Id.*

[150] *Id.* at 185 (Determining that the PIA of a reservation "involves soil science, engineering, and economics.").

[151] *Id*.

cultural practice was fishing then the tribe is entitled to enough water to maintain "conditions that support the practice."[152] On the other hand, if the cultural practice was agriculture, the tribe would be entitled to the amount historically used for agriculture.[153] The water rights reserved for the "aboriginal uses and practices" are currently preserved from time immemorial.[154]

Winters rights are applied in a similar fashion in a riparian system. Joseph Dellapenna argues that Native water rights in a riparian system should provide the same water rights that are provided to the state, but doing so would have many negative impacts.[155] For example, having the same riparian rights as the states would make tribal rights dependent on annual rainfall thus causing an imbalance in water rights between Eastern and Western tribes, and limiting tribal water rights to those of mere property owners.[156] Riparian rights are also based on the purpose for which the reservation was made.[157] The practicably irrigable acreage then measures the quantification of that right to allow the land to be put to productive agricultural use.[158] It should be noted that the said quantification must be based on current needs as the Supreme Court has not allowed quantification to be based on foreseeable needs.[159]

PART III: COMMON METHODS USED TO QUANTIFY TRIBAL WATER RIGHTS, WHAT TO KEEP, AND WHAT TO LEAVE BEHIND

Tribes, including the Ponca, should be apprehensive to use current mechanisms when ascertaining their water rights. Although the water law tool kit available to tribes has its benefits, the tools themselves seem inadequate to enable tribes to reach the full extent of their water rights as intended by their treaties. Therefore, we must determine what aspects of Indian water law are worth keeping and what should be left behind.

One of the benefits offered to tribes by Indian water law was poetically characterized by Professor Charles Wilkinson who described the *Winters* doctrine as "a shadow body of law" "looming large over existing uses in many water basins of the [W]est . . . ."[160] Wilkinson's description of *Winters* acknowledges the consequential truth that, despite the early confusions created by the BIA, Western settlers, and, in effect, current transferees, have infringed on tribal water rights and will eventually be liable or, at the very least, have their water rights displaced. These ramifications are confirmed by the string of case law. *Winters* informs us that water rights

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[152] *Id*.
[153] *Id*.
[154] *Id.* at 184; *See also* United States v. Adair, 723 F.2d 1394, 1414 (9th Cir. 1983); State ex rel. Greely v. Confederated Salish & Kootenai Tribes, 712 P.2d 754, 764 (Mont. 1985).
[155] Royster, *supra* note 124, at 192 (citing JOSEPH W. DELLAPENNA, REGULATED RIPARIANISM, IN 1 WATERS AND WATER RIGHTS § 9.06(b)(2) (Robert E. Beck ed., 1991)).
[156] *Id.* at 193.
[157] *Id*. at 196
[158] *Id*.
[159] *Id.* at 196 ("The Supreme Court has rejected a more indeterminate standard of "reasonably foreseeable needs," holding that "the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage").
[160] Michael Bogert, STATEMENT OF MICHAEL BOGERT CHAIRMAN OF THE WORKING GROUP ON INDIAN WATER SETTLEMENTS UNITED STATES DEPARTMENT OF THE INTERIOR BEFORE THE HOUSE COMMITTEE ON NATURAL RESOURCES ON INDIAN WATER RIGHTS SETTLEMENTS (APRIL 16, 2008), https://www.congress.gov/event/110th-congress/house-event/LC7410/text?s=1&r=21 [https://perma.cc/864N-WN85].

are implicitly reserved for reservations, thus creating the most senior priority date[161] during a time when "there were few formal legal filings for water rights for existing or future tribal use."[162] However, because tribes lacked the means to appropriate their waters, "most available surface water was fully appropriated for off-reservation use."[163] As sort of a remedial measure, *Arizona v. California* later enabled tribes to both quantify and act on their water rights even if it displaced existing water use.[164] Yet, because *Arizona v. California* is based on the BIA's arbitrary and narrow interpretation of *Winters*, it seems that tribes should be able to displace existing water uses beyond that which is needed for their PIA. Assuming that is true, the logical result is that tribes are entitled to more water than a mere portion reserved to fulfill the purpose of their reservations.

With rapid population increases, climate change, water shortages, and an uncertain future of climate refugees knocking on U.S. borders, water is becoming one of the most precious sources of life in America. To rid of the shadow referenced by Professor Wilkinson, and in light of *Arizona v. California*, states have shown an increased desire to quantify tribal water rights to "provide certainty for holders of State-based water rights, clarify [s]tate authority to manage water resources within their borders, and plan for the future."[165] They feel that doing so will ensure that non-Indians water rights are secure and compatible with those of tribal nations.[166] Many tribes have also shown a strong desire to confirm and protect their water interests against outside users and use their rights as a means to increase economic development.[167] Pursuant to these goals at both state and tribal levels, litigation and water settlements have and will continue to become more common. Despite the sense of urgency and immediate benefits offered by securing tribal water rights, the sections to follow will urge tribal nations and, ultimately, the Ponca, to proceed with caution.

A. Litigating Tribal Water Rights

As mentioned, Indian water rights are becoming increasingly valuable, especially in the West where water shortages are frequent and ever-worsening. There are two main reasons for this: for one, tribes are not held to the use it or lose it appropriation standard, and, second, pursuant to *Winters,* the priority date of Indian water rights are based on the creation date of their reservations.[168] These two reasons lead us to an exigent fact: most Western tribes still have senior water rights regardless of whether they put their rights to use.[169] Tribal nations did not originally

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[161] Arizona v. California, 547 U.S. 150 (1963) (reaffirming the *Winters* doctrine in holding that the date of priority for reserved claims is the date in which the reservation was established).
[162] Leslie Sanchez, et al., *Beyond "paper" water: The complexities of fully leveraging tribal water rights* (2022), https://www.minneapolisfed.org/article/2022/beyond-paper-water-the-complexities-of-fully-leveraging-tribal-water-rights [https://perma.cc/2R82-DEEX].
[163] *Id.*
[164] *Id.*
[165] Bogert, *supra* note 160.
[166] *Id*.
[167] *Id*.
[168] *Id.*
[169] *Id*.

have the means to create water infrastructure, due to the negligence of the federal government and the BIA,[170] which has led to non-Indian industries and settlers using what is, for lack of better words, Indian water.[171]

It would therefore seem like a no-brainer for tribes to adjudicate their water rights and get what's owed to them, but it's not that simple. Since the *Winters* decision 115 years ago, only 46 tribes, out of America's 226 reservations, have successfully adjudicated their water rights.[172] There are many reasons for this small number. First, despite being a federally reserved right, the tribe, or the Federal government on its behalf, must file a legal claim to the tribal water rights in the appropriate *state* court.[173] Second, the process typically takes twenty-two years on average between litigation and negotiation.[174] Third, the long process requires legal fees and costly technical assessments.[175] Most importantly, adjudication only results in a "paper water right" which means that a "judicial decree does not get 'wet water,'. . . nor does it provide new infrastructure or do anything to necessarily encourage improved water management in the future."[176] Due to the time, cost, and uncertainty that comes with adjudication, there are 145 remaining *Winters*-eligible reservations that have not initiated their claims, and many other tribes seeking settlements instead.[177]

B. Tribal Water Settlements

Although tribes stand to receive a greater quantity of water through litigation, "parties can request that the Secretary of Interior's Indian Water Rights Office assign a settlement-negotiation team" to settle their water rights.[178] As of December 2021, there have been 34 tribal water settlements in the United States, one of which involves the Chickasaw and Choctaw tribes of Oklahoma.[179] On the surface, tribal water settlements seem to offer a lot of benefits to both tribes and non-Indian parties. However, it is worth considering whether, even in the face of so many benefits, it would be premature and ultimately damaging for tribes to settle their water rights claims. To answer that question, one must first consider the benefits of water settlements.

To start, settlements can be a helpful option when adjudication processes become too costly.[180] Rather than a zero-sum litigation game, the settlement processes are *said* to provide a holistic and collaborative approach to quantifying tribal water rights to an amount that meets their

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[170] MCKENZIE-JONES, *supra* note 51, at 8.
[171] Bogert, *supra* note 160.
[172] Sanchez, et al., *supra* note 162 (Reclaiming 10.7 million acre-feet of water).
[173] *Id*. ("The *Winters* process officially begins when a tribe, or the federal government on a tribe's behalf, files legal claims to water rights in a state court").
[174] *Id*.
[175] *Id*.
[176] Bogert, *supra* note 160.
[177] Sanchez, et al., *supra* note 162.
[178] *Id*.
[179] *See* Secretary of Interior Water Rights Office, *Enacted Indian Water Rights Settlements* (2023), https://www.doi.gov/siwro/enacted-indian-water-rights-settlements [https://perma.cc/6NFW-NHDL]. It seems that Oklahoma is already pursuing settlements with tribes and is likely to desire to do the same with the Ponca if the opportunity were to arise.
[180] Sanchez, et al., *supra* note 161.

needs.[181] To mitigate future disputes, parties can negotiate distribution terms and ways to allocate water in times of shortage.[182] Once the settlements are enacted by Congress, federal funds are allocated for their implementation.[183] Tribes are able to use settlement funding to support both agricultural and nonagricultural economic development.[184] For example, the Ak-Chin Indian Community in Arizona is able to generate $19.5 million annually through growing traditional crops and pistachio and pecan orchards.[185] Additionally, the Navajo Nation's 2010 settlement enabled them to build infrastructure to supply surface water acquired through the settlement.[186] Some of the most appealing aspects of water settlements is that settlements enable tribes to receive wet water rather than the paper right received from a court victory,[187] they provide explicit quantification of tribal water rights that cannot be minimized by future courts,[188] and, because of said quantification, depending on the provisions of their settlement, tribes may be able to lease their water rights which has its own set of benefits for both Native Nations and Non-Indians.[189]

As for the benefits offered to tribes, the bestowed authority to lease their water rights enables their mere *Winters* rights to metamorphose into a monetized asset. In a conversation with Professor Alexander Pearl, an Enrolled Citizen of the Chickasaw Nation and Professor of Law at the University of Oklahoma College of Law, he explained that unquantified *Winters* rights are essentially non-commodifiable commodities.[190] In other words, the law views unquantified tribal water rights as trust assets, similar to right of ways of through Indian Country or oil on tribal trust land, thus requiring federal assent before a tribe can lease, sell, or convey them.[191] Without the ability to lease their water rights, tribes hold trust assets with no way of monetizing them.[192] Consequently, "Non-Indian communities and state-based or state-adjacent institutions and entities end up using tribal waters without paying the Tribe for their use."[193] Therefore, "the only way for a tribe to recover that right to monetize is through a water settlement act specifically providing for that ability."[194] As mentioned, Tribal water leases also benefit Non-Indians. Namely, leases to nearby municipalities and land owners enable existing water uses beyond reservation boundaries

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181 *Id*. (emphasis added)
182 *Id*.
183 *Id*.
184 *Id*.
185 *Id*.
186 *Id*.
187 MCCOOL, *supra* note 91, at xvi.
188 *Id.* at xv.
189 *Id.*
190 Interview with Alexander Pearl, Professor of Law at University of Oklahoma College of Law (June 20, 2023).
191 *Id*.
192 *Id.*
193 *Id*.
194 *Id.*

to be maintained and can even be used to sustain adequate stream flow to support hydropower and endangered species habitats.[195]

Despite their many benefits, tribal water settlements are not without downfalls. For one, although tribes can receive funding for water infrastructure, that funding can take decades to reach the tribes.[196] Tribes are then left in no better spot than before knowing they have rights to water without a means of accessing them. Furthermore, although it seems spectacular that tribal water rights, once quantified under the settlement, cannot be diminished by future courts, the settlement also acts as a cap; therefore, "once an amount of water is established, the tribe cannot claim more."[197] In fact, most settlements include language that forces tribes to give up their reserved water rights under *Winters* and their ability to claim and protect them in the future.[198] Settlements coerce tribes to "subordinate" the use of their water rights so they do not infringe on existing water users.[199] The practicability and beneficial use of settlements are also questionable. Despite the Navajo Nations' settlement in 2010, they were still unable to distribute water throughout their reservation which had disastrous effects on the Nation during covid in 2020.[200]

To make matters worse, settlements also provide a means for the surrounding state to increase their administrative control over Indian waters.[201] For example, the revised Ute compact gives the Utah state engineer the power to supervise the measurement, apportionment, and distribution of all surface waters held in trust for the Ute Indian Tribe and others.[202] The federal government also maintains power over Indian waters as federal approval and oversight are needed for any tribal water lease or sale made to non-Indian users.[203] Such restrictions are a means of forcing tribes to only sell and lease water to local parties rather than entering national or even international markets.[204] Additionally, most settlements demand that tribes adhere to state law upon leasing or selling their water.[205] These examples of state and federal oversight and required approvals further delay tribes from acting and benefiting from their water rights and undermine their sovereign authority to do so unilaterally and in accordance with their own law.[206] Therefore,

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[195] Sanchez, et al., supra note 162.
[196] *Id*.
[197] MCCOOL, *supra* note 91, at xvi.
[198] *Id.* (Explaining "[t]he language in the Salt River Pima-Maricopa settlement is representative: 'The [Indian] Community is authorized . . . to execute a waiver and release of all present and future claims of water rights or injuries to water rights (including water rights in ground water, surface water, and effluent), from time immemorial to the effective date of this Act, and any and all future claims of water rights (including water rights in ground water, surface water, and effluent").
[199] Bogert, *supra* note 160.
[200] *See generally* Purvis Lively, C., *COVID-19 in the Navajo Nation Without Access to Running Water: The lasting effects of Settler Colonialism*. VOICES IN BIOETHICS, 7, (2021), Available at https://doi.org/10.7916/vib.v7i.7889.
[201] MCCOOL, *supra* note 91, at xvi.
[202] *Id*. at xvii.
[203] Sanchez, et al., *supra* note 162; McCool, *supra* note 91, at xvi.
[204] MCCOOL, *supra* note 191, at xvii.
[205] *Id*. ("For example, the 1992 Jicarilla Apache settlement requires all off-reservation water contracts to be 'subject to and not inconsistent with the same requirements and conditions of [s]tate law, and any applicable Federal law, interstate compact, and internal law as apply to the exercise of water rights held by non-Federal, non-Indian entities. . . .'").
[206] Sanchez, et al., *supra* note 162 ("The San Carlos Apache Tribe's recent 100-year water lease to the City of Gilbert in Arizona took eight years to negotiate and was initially opposed by the Bureau of Reclamation.").

"Indian water settlements are sovereignty settlements," as tribes who decided to settle, settle for less and, ultimately, settle for a lack of control over their own sources of life.[207]

PART IV: APPROACHES TO THE PONCA'S WATER RIGHTS

The steps taken towards ascertaining the water rights of the Ponca Tribe "may determine whether they can continue to exist as [a] separate political and cultural entit[y];"[208] therefore, it is imperative that the Ponca not only receive the full extent of their water right, as originally intended, but retain the utmost sovereign power to protect it. The common approach to that goal would be to first have Ponca's water rights quantified. Doing so would not only provide them the ability to monetize their water rights but also maximize the Ponca's ability to protect their waters from diversion, obstruction, or pollution by local, state, or federal actors and limit any excuse for the federal government to not invest in water infrastructure for the tribe. This position is reaffirmed by the BIA which argued that

> 'the value of . . . investment[s] [in Indian irrigation projects] depends almost wholly on the legal rights to use of water on the land, and even though title to some of it may rest on the laws of appropriation and beneficial use, the only 'good' title to water for irrigation under such laws is a decree of a court.'[209]

However, after digesting the tumultuous history of the Ponca Reservation, water law, and the development of the *Winters* doctrine, it would be a mistake to quantify Ponca's water rights under the current mechanisms used to do so.[210] Therefore, a means by which the Ponca can have the full extent of their water right recognized under a broad reading of *Winters* must be identified. The seemingly best means of doing so boils down to a lawsuit led by or against the federal government. The following sections will ultimately show why a breach of trust claim against the Federal government may be the best direction for ascertaining the Ponca's water rights.

A. The Implications of the Government Seeking a Water Right Decree on Behalf of the Ponca

The federal government, acting as a trustee, should be willing to seek a judicial decree of the Ponca's water right on their behalf. It was the BIA who confused settlers as to whether their

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[207] MCCOOL, *supra* note 91, at xvi; *See* Williams v. Lee, 358 U.S. 217, 223 (1959) (holding that tribes have the right to make their own laws and be governed by them).
[208] MCCOOL, *supra* note 91, at xvii.
[209] *Id*. at 117 (quoting a BIA memorandum entitled *Superintendent to Pass on Water Rights* (June 20, 1913) (cleaned up).
[210] *See* Carla J. Bennett, *Quantification of Indian Water Rights: Foresight or Folly?,* 8 UCLA J. ENVI. L. & P.. 267, 280 (1989). ("Indians who seek quantification in effect put a limit on their claim to water, a claim which was intended to be essentially unlimited).

water rights would be subject to future Indian interests. Therefore, any financial burden or social or legal backlash arising from ascertaining and enforcing Ponca's water rights should be shouldered by the government. More importantly, the tribe should be given ample authority in dictating how the government adjudicates their water rights to protect the future of their nation.

In deciding how to guide the government's approach to their water rights, the Ponca should keep three key points in mind as to why the current interpretation of the *Winters* doctrine, besides its acknowledgment of reserved water rights and their priority date, and certain methods used to quantity Indian water rights should be abandoned. First, although the doctrine has benefited many tribes in the short term, it is the product of the assimilation era of Indian policy and, therefore, a tool for the assimilation, oppression, and destruction of Indigenous peoples that continues to hinder tribal nations today.[211]

Second, the current application of *Winters* stems from the arbitrary and narrow interpretations of the doctrine used to promote the settlement of the West rather than the welfare of Natives.[212] As explained, the BIA, without judicial guidance, rejected John McCourt's broad and practical conceptualization of *Winters*.[213] Rather than limiting a tribe's water right to its PIA, a broad interpretation of *Winters* adheres to the canons of construction. Namely, a broad interpretation infers that the *Winters* doctrine "anticipated the problem of changing [r]eservation needs by establishing an open-ended standard" especially when the reservation's purpose was not expressed.[214] Yet, rather than interpreting *Winters* in favor of the tribe, the BIA applied the doctrine arbitrarily until adhering to the direction of a Chief Engineer who undoubtedly desired to sustain resources for non-Indian Western settlers.[215] Consequently, the government put a limit on tribal claims to water, "a claim which was intended to be *essentially unlimited*."[216] These facts should be used to urge the court to confront and question the *Winters* doctrine and whether it is morally right and legally sound to continue in its historically and fundamentally biased application.[217]

The third key fact that Ponca must keep in mind is that the current methods used to quantify Indian water rights are inappropriate. As mentioned, the portion of water reserved under *Winters* is the amount necessary to fulfill the purpose for which a reservation was established.[218] Whereas the purpose of the Ponca Reservation is not expressed, there is plenty of historical evidence that shows it was supposed to be their permanent home. As mentioned, President Grant originally appropriated money to remove the Ponca to Indian Country for a "home therein."[219] Additionally, Congress appropriated funds to the Ponca people to indemnify them for losses sustained from

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[211] *See* ROYSTER, supra note 6, at 174-75; *See generally* Winters, 207 U.S. 564 (1908) (acknowledging that Indian water rights were implicitly reserved because reservations were made to assimilate natives into pastoral and civilized people. It is reasonable to assume that their decision to recognize reserved rights was made, even if only in part, to advance the assimilation of Indians).
[212] MCCOOL, *supra* note 91, at 115.
[213] *Id.*
[214] Bennet, *supra* note 210, at 273-74 ("Moreover, most treaties fail to enunciate specific purposes for the Reservation in the way that congressional acts creating other sorts of government reservations usually do.").
[215] MCCOOL, *supra* note 91, at 115 (explaining that their Chief Engineer felt that tribal water rights should be limited to the purpose of their reservation.).
[216] Bennet, *supra* note 210, at 280 (emphasis added).
[217] *Id*. at 74.
[218] *See generally Winters*, 207 U.S. 564 (1908).
[219] Humphrey, *supra* note 28, at 155.

being forcefully removed from Nebraska.[220] That money was supposed to be, and was, used by the tribe to buy their reservation lands in fee "at a time when Congress did not intend the territory to be encompassed by a state. . . ."[221] After giving so much money to the tribe[222] and having not intended for Oklahoma to come into statehood, the Ponca Reservation was obviously supposed to be their permanent home. Pursuant to that purpose, it would be utterly *oppressive* to calculate the Ponca's water rights based on their reservations' PIA. Just as water rights are impliedly reserved, a permanent home for a sovereign nation that the government wanted to assimilate demands an unlimited propensity for economic self-sufficiency.[223] Only then would the sovereign have the ability to assimilate, support itself, and advance as a "civilized" nation alongside its neighboring countrymen for generations to come. Therefore, it could not have been intended that the Ponca could be farmers forever, especially when the United States was at the cusp of the Industrial Revolution.[224] Hence, the Ponca's water rights should not be based on their PIA but should be elastic enough to fulfill any agricultural, recreational, cultural, power-generating, or industrial endeavor the tribe may decide to embark on.[225] This is not a nuance nor counter to Indian water law precedent. In fact, *Colville* enables the court to "use virtually any measure, including agricultural, municipal, industrial, or mining requirements, to determine a tribe's water entitlement."[226] The gap we reach here is that the court in *Colville* increased the quantity of the tribe's water right because their fishing grounds had been destroyed and they needed enough water to establish and maintain a fishery.[227] However, the court argued that the solution to open-ended water rights is "found in quantifying reserved water rights, not in limiting their use."[228] Yet, quantifying a tribe's water right does limit their use.[229] Additionally, rather than merely

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[220] *See Ponca Tribe of Indians of Oklahoma*, 183 Ct. Cl. at 686-87 (1968).
[221] Helton, *supra* note 53, at 996.
[222] *See Official Data,* https://www.officialdata.org/us/inflation/1881?amount=160000 [https://perma.cc/V8FK-P4UH] (last visited Mar. 3, 2023) ("$160,000 in 1881 is equivalent in purchasing power to about $4,734,682.35 today. . . .").
[223] Bennet, *supra* note 210, at 274 ("No analytically sound reason exists for interpreting Reservation purposes narrowly rather than broadly. The broad view, which many commentators support, holds that Reservations were intended to establish a permanent and economically self-sufficient home for the Indians."); *See also* Colville Confederated Tribes v. Walton, 647 F.2d 42, 47 (9th Cir. 1981), *cert. denied*, 454 U.S. 1092 (1981) ("The general purpose, to provide a home for the Indians, is a broad one and must be liberally construed. We are mindful that the reservation was created for the Indians, not for the benefit of the government.").
[224] *See* Charles Hirschman & Elizabeth Mogford, Immigration and the American Industrial Revolution From 1880 to 1920 (2009). America had already begun its transition from a rural agrarian society into an industrial economy. If they truly wanted to assimilate tribes into "mainstream society" it could not have been expected that they would be farmers for the rest of eternity.
[225] Bennet, *supra* note 210, at 275; Royster, *supra* note 124, at 192 (The Supreme Court has yet to allow tribal water rights to be quantified based on foreseeable needs, but, if the right was supposed to be essentially unlimited, tribes should not be limited to their current needs. This is why the upwards elasticity of tribal water rights is essential.).
[226] Bennet, *supra* note 210, at 274.
[227] *Colville Confederated Tribes,* 647 F.2d at 48.
[228] *Id.*
[229] Bennet, *supra* note 210, at 280 (explaining that the tribal claim to water was intended to be essentially unlimited).

acknowledging that a "change of use is permissible",[230] the *Colville* court should have taken the next step of characterizing the tribal water right as *positively elastic* to allow their right to grow with the needs of the nation. Doing so would potentially quell the concerns of open-ended tribal water rights that the *Colville* court attempted to solve.[231]

With all that said, it is unlikely that the federal government is going to allow the Ponca to control its approach to their water rights[232] and will most likely attempt to persuade the tribe to enter into a water settlement. Yet, the Ponca should be apprehensive to settle their water rights because it seems that they would be settling for less than they are entitled to. Additionally, settling is the antithesis to the intention of *Winters* as it would potentially revoke Ponca claims to reserved rights in the future, enable administrative control over Ponca water, and strip the Ponca's ability to unilaterally sell and lease their water.[233]

Settling may provide the Ponca with funding for water infrastructure, but it is not guaranteed. For one, it can take a long time for those federal funds to reach the tribe. Secondly, like the Navajo Nation who settled and still couldn't provide adequate water throughout its reservation, a water settlement is not going to magically make the Ponca water potable.

> [I]n White Eagle, the headquarters of the Ponca Tribe, several miles downstream, where the Arkansas River and Salt Fork of the Arkansas River meet, the pollution has been especially damaging. Children once swam in the waters while people fished from its banks. In recent years fish have washed up dead along the shoreline, killed by a still-unidentified pollutant. Water from private wells in the community are no longer fit for drinking, gardens are contaminated with pollution and inhalers are as common as cell phones."[234]

Any settlement money that the Ponca Tribe receives is not going to be enough to adequately clean up the damage that local polluters have caused. Likewise, it should not be the job of the Ponca to make sure that Ponca City and White Eagle, Oklahoma, are safe and inhabitable for American citizens. Rather, the Ponca tribe is entitled to federal relief and/or damages from local polluters to clean up what is nearly a superfund site so that they may act on their water rights.

En masse, it does not seem effective to request the Government to seek a water rights decree on the Ponca's behalf. For one, it is unlikely that the government is going to adhere to how the Ponca want their water rights adjudicated. Second, the government is likely to push the tribe to enter a water settlement which is not in the tribe's best interest. For these reasons, a method that forces the United States to adhere to its trust obligation in accordance with the desires of the tribe

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[230] *Colville Confederated Tribes,* 647 F.2d at 48.

[231] *Id*. *See also* Interview with Alexander Pearl, *supra* note 190 (Professor Pearl does, however, warn against offering a new mechanism to quantify tribal water rights. As seen with Gila River V, he worries that a new method of quantification will result in lower quantities of water for tribes rather than more.).

[232] Transcript of Oral Argument *Navajo Nation v. USDOI* (19-17088). Retrieved at https://www.youtube.com/watch?v=ANdf3jgPJw4 [https://perma.cc/CW9D-JET2] (John Smeltzer, on behalf of the Department of Interior, explains that a tribe cannot control how the government adjudicates their water rights).

[233] Sanchez, et al., *supra* note 162.

[234] Phil McKenna, *'We're Being Wrapped in Poison: A Century of Oil and Gas Development Has Devastated the Ponca City Region of Northern Oklahoma,* Inside Climate News (Dec. 26. 2021).

is needed. It seems that the most effective way to do that is for the Ponca to file a breach of trust claim against the government.

B. The Implications of a Breach of Trust Claim

Thus far, this paper has argued that the Ponca must demand what is rightfully theirs, in its entirety, as originally promised by the federal government. To do so, it has been argued that the Ponca should move beyond current methods of quantifying and ascertaining their water rights through adjudication or settlement. If having the government adjudicate their water right isn't going to work, then a breach of trust claim with carefully tailored remedies becomes appropriate and should be filed against the Department of Interior (DOI), the Secretary of Interior, and the BIA for their failure to assert and protect the Ponca's reserved water rights.

The strength of their claim will likely depend on their ability to center their argument in their treaties while also demanding a broad reading of the *Winters* doctrine. As noted by Daniel McCool, in *Command of the Waters; Iron Triangles, Federal Water Development, and Indian Water*,

> [t]he failure of past Indian water policy can only be corrected if policy is driven by a commitment to treaty obligations. Pork-barreling, log-rolling, and deal-making may help, but the bottom line is that *we must conceive of this as a moral issue*. If the Winters Doctrine is not placed, in Chief Justice Rehnquist's words, 'on a plateau all by itself,' it loses its moral— and practical—impact. It appears that justice still does not come cheap.[235]

According to McCool, treaties are the only rational place to discern tribal water rights; therefore, an emphasis must be placed on the Act of March 3, 1881,[236] which enabled the Ponca to buy their new reservation lands in fee. By focusing on this Act, we are able to consciously recognize that the Ponca Reservation was established before Oklahoma statehood and their status of ownership includes the right to all waters in the boundaries of their territory rather than a mere portion under *Winters*.[237] This position is logical as the Five Civilized Tribes were the first to perfect their water rights in Oklahoma.[238] Ever since the non-Indian settlement of Oklahoma did not occur until 1889, the Ponca's water rights are only subjected to those perfected by the Five Civilized Tribes.[239] Therefore, the Ponca entitlement to water is distinct and superior to that of the state despite the many rivers that run through both Ponca and state borders.[240] That being so, the state of Oklahoma's water use should have been "limited . . . [to] not interfere with tribal uses or diminish

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[235] MCCOOL, *supra* note 91, at xxv (emphasis added).
[236] *See Ponca Tribe of Indians of Oklahoma*, 183 Ct. Cl. at 686-87 (1968).
[237] Helton, *supra* note 53, at 996.
[238] *Id*. at 997.
[239] *Id*.
[240] *Id.*

the tribes' water below the amount to which they are entitled."[241] This rule derives from the Supremacy Clause that prevents states from interfering with federally reserved rights.[242] Therefore, "there is no equitable sharing" of water between the Ponca and the State because "reserved rights are federal rights, [and] the Supremacy Clause requires that during shortages, the tribes have priority over rights perfected under state law."[243] In times of shortages, "[t]he tribes take their full entitlement and the state takes the remainder, unless the state rights are paramount to a particular tribal right" which is not the case here.[244] The Ponca's rights to its portions of the Salt Fork and Arkansas Rivers should have been protected by the federal government who, instead, obstructed the Arkansas River and caused Ponca waters to be unfit for consumption.[245] The sections to follow will reiterate why a breach of trust claim is appropriate.

1. The Kaw Dam

Pursuant to the federal government's self-declared guardianship over tribal nations, it is reasonable to assume that a higher duty of care is owed when sustaining tribal access to adequate waters.[246] Like other tribes, the Ponca were forcibly removed to their reservation with almost nothing and dependent on the Federal government for their survival. Rather than ensuring that the river flows through the Ponca Reservation were adequate to sustain their Nation, Congress authorized the United States Army Corps of Engineers, through the Flood Control Act of 1962, to build a dam on the Arkansas River just upstream from the Ponca Reservation.[247] The dam was named "Kaw Dam" after the Kaw Nation whose community was flooded upon its construction.[248] Kaw Dam forced 824 Kaw Indians into homelessness and submerged their burial grounds, tribal headquarters, and last lands holdings to the bottom of what is now "Kaw Lake," the seventh largest lake in Oklahoma.[249] The Ponca were also affected by the reckless and wanton construction of Kaw Dam. In fact, the section of the Arkansas River that once gushed through the Ponca Reservation, demanding a ferry to cross, has, comparatively, become a trickling stream that can be walked across.[250]

Without an adequate supply of water to fulfill their needs, nor the infrastructure needed to distribute water across its reservation, the Ponca have been paying the state for distributions of the water that they have superior and reserved rights to.[251] Therefore, rather than providing federal assistance to enable the Ponca to access their water rights, the federal government has created a scheme where the tribe and its members are forced to pay for water controlled and distributed by

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[241] *Id*. at 998.

[242] *See generally* Worcester v. Georgia, 31 U.S. 515 (1832).

[243] Helton, *supra* note 53, at 999.

[244] *Id. at* 998.

[245] Telephone Interview with Mekasi Horinek, Member of the Ponca Nation (September 23, 2022).

[246] *See* Cherokee Nation v. Georgia, 30 U.S. at 17 (1831).

[247] U.S Army Corps of Engineers Tulsa District Website, https://www.swt.usace.army.mil/Locations/Tulsa-District-Lakes/Oklahoma/Kaw-Lake/Pertinent-Data/ [https://perma.cc/5J6C-U8MH] (last visited Apr. 4, 2023).

[248] Telephone Interview with Mekasi Horinek, *supra* note 245.

[249] *Id*. ("They flooded the [Kaw Nation] when they put that dam up, flooded their burials grounds. Bodies would float up to the surface."); See Jim Henderson, Broken Promises and Legal Loopholes Leave Kaw Indian Tribe Homeless, The Oklahoman (Nov. 7, 1983) (describing the damage caused by the Kaw Dam).

[250] Telephone Interview with Mekasi Horinek, *supra* note 245.

[251] *Id*.

the federal government and the state of Oklahoma.[252] On top of the monies they receive from the tribe and others alike, the US Army Corps of Engineers and the Oklahoma Municipal Power Authority benefit from the Kaw Dam's profits as one largest hydroelectric power plants in the country and the second largest in North America.[253] It may be unreasonable to request that the Kaw Dam be deconstructed given the services it provides to the region; however, it is clear that the Ponca, and other similarly situated tribes, should not be paying to access waters that they have superior rights to. Therefore, *it is reasonable* that the tribe and its members be repaid monies spent to receive water from Kaw Lake. Furthermore, all future water bills should be shouldered by the Federal Government which should also figure out what portion of the Kaw Dam's profits are owed to the tribe for its obstruction of the Ponca's water rights. Additionally, measures should be taken to enable the Ponca to access and distribute waters that are available on their reservation. Rather than just providing infrastructure, the Federal Government must address the water pollution on the Ponca Reservation so that infrastructure be used.[254] The government not only has a trust duty to do so but a moral obligation as they are fundamentally liable for the pollution of the water on the Ponca Reservation.

2. Federal Allotment Policies the Resulted in Pollution

To refresh the reader's memory, the historical background section of this paper was precluded with a discussion on the allotment of the Ponca Reservation. That section briefly described the strong Ponca opposition to federal allotment policies because, unlike other reservations, they owned their land for a fee. The government erroneously argued that they retained the title over the Ponca Reservation despite the legal land sale between the Cherokee and the Ponca.[255] Without consent, the government subsequently constructed schemes to allot the Ponca Reservation and issued further policies to coerce a starving people to sell their lands while also enabling the Secretary of Interior to retain allotments until the Ponca could show that they were "competent."[256] The federal conspiracy to put Ponca lands into the public sphere was ultimately a success as it allowed for 26,120 acres of the Ponca Reservation to be sold.[257] Federal allotments not only caused a loss of land, but it is the reason why the rivers that flow through the Ponca Reservation are unfit for human consumption and exposure.[258]

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[252] OKLAHOMA MUNICIPAL POWER AUTHORITY, OMPA'S KAW HYDROELECTRIC PLANT AT KAW RESERVOIR NEAR PONCA CITY, OKLAHOMA 1, https://www.ompa.com/wp-content/uploads/2010/04/2013kawhydrobrochure2.pdf [https://perma.cc/ZPN4-A58K] (last visited July 29, 2023).

[253] *About Kaw Lake*, https://www.fishing.org/lakes/oklahoma/kaw-city/kaw-lake [https://perma.cc/W7KX-KY47] (last visited Mar. 16, 2023).

[254] McKenna, *supra* note 234 (explaining that whereas the Ponca has recently built a new water supply system, many members fear how contaminated the water is and continue to rely on bottled water).

[255] MCKENZIE-JONES, *supra* note 51, at 7.

[256] *Id*. at 5.

[257] *Id*.

[258] Telephone Interview with Mekasi Horinek, *supra* note 245.

When asked about the relationship between the forced allotment of the White Eagle reservation and its current state of pollution, Mekasi Horinek, a leader in the tribe, spoke about the development of the oil refinery within the reservation.[259] Mr. Horinek explained that George Miller, a southern cattleman who attached himself to the tribe right before they entered Indian Country, quickly took the opportunity to become the main buyer of Ponca allotments.[260] His sons, known as the Miller brothers, continued their fathers legacy until they were indicted on 49 criminal counts due to defrauding the Ponca and illegally acquiring tens of thousands of acres of Ponca lands, and their mineral rights, valued at more than $380,000 at the time.[261] Regardless, given their success in acquiring Ponca lands and their mineral rights, the Miller brothers eventually teamed up with Earnest W. Marland, a Pennsylvania oilman (who later became governor of Oklahoma),[262] to negotiate a 120-acre lease with Ponca native, Willie Cries for War.[263] Given the leases inclusion of mineral rights, Marland began drilling on the leased territory until finally striking oil which provided the first real "evidence of oil in the mid-continental region, sparking the equivalent of a gold rush for oil."[264] E.W. Marland would eventually control 10 percent of the world oil reserves, accumulate a 100-million-dollar fortune, and merge his oil company with Continental Oil to make Conoco.[265] Conoco later merged with Phillips Petroleum Company "in 2002 to become ConocoPhillips, creating the world's sixth-largest publicly traded oil company and third-largest in the U.S."[266] Rather than being one of the wealthiest tribes in the country for their role in creating the refinery, the Ponca merely live downstream from the waste that the refinery produces.[267]

It is known across the Ponca tribe that the refinery has been dumping chemicals into the Arkansas River.[268] The dumping began when E.W. Marland first opened the refinery in 1918.[269]

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[259] *Id.*
[260] *Id.*
[261] *See* McKenna, *supra* note 234; See also Bureau of Labor Statistics Inflation calculator, https://www.bls.gov/data/inflation_calculator.htm (last visited Mar 18. 2023) ($380,000 in 1920 has the same buying power as $5,967,393.78 in 2023; Interview Mekasi Horinek, supra note 244 ("The Miller Brothers we bad guys. They bought allotments from poor farmers that didn't have a choice but to sell and built the 101 Ranch and that Wild West show. They would steal cattle that the Federal Government would issue us. The cattle were marked with IO for 'Indian owned'. The 101 Ranch would intercept them and brand a 1 into them to match their cattle at 10. That's how they built their cattle empire").
[262] See generally, Oklahoma Hall of Fame, *Marland, Ernest W. | 1931,* https://www.oklahomahof.com/hof/inductees/marland-ernest-w-1931 [https://perma.cc/EM9C-9M2A] (last visited Mar 18, 2023).
[263] McKenna, *supra* note 234.
[264] *See* ConocoPhillips, *About us*, https://www.conocophillips.com/about-us/our-history/1909-1875/ [https://perma.cc/66TR-C4LL] (last visited Mar 18, 2023). *See also* Oklahoma Historical Society, MILLER BROTHERS 101 RANCH. https://www.okhistory.org/publications/enc/entry.php?entry=MI029 [https://perma.cc/KJY6-Y6UU] (last visited Mar 18, 2023) ("The successful oil venture increased the Millers' profits.").
[265] *See* Oklahoma Historical Society, *supra* note 263; *see also* ConocoPhillips, *supra* note 263 ("The company owned nearly 3,000 wells and thousands of retail outlets in 30 states and was headquartered in Ponca City, OK").
[266] *See* ConocoPhillips, *About us*, https://www.conocophillips.com/about-us/our-history/2009-1990/#:~:text=August%202002%20%2D%20Conoco%20and%20Phillips,ConocoPhillips%2C%20is%20headquartered%20in%20Houston [https://perma.cc/J5N8-6NE6] (last visited Mar 18, 2023).
[267] McKenna, *supra* note 234.
[268] Telephone Interview with Mekasi Horinek, *supra* note 245.
[269] McKenna, *supra* note 234.

Since then, the groundwater had become so polluted that it led to "one of the largest environmental settlements in U.S. history, with [Cononco] buying and razing an entire neighborhood in the early 1990s."[270] The contamination was never completely remediated, for ConocoPhillips continued to buy and level dozens of homes in the area for unstated reasons.[271] The pollution is so bad that the Ponca have been told not to swim nor eat from the Arkansas River.[272] To make a bad situation worse, Mekasi Horinek explained that there are pipes in the Arkansas River that feed fracking wells and release toxic chemicals back into the river which caused five fish kills in a two-year span.[273] He even described a "Stink Creek" which flows out of the ConocoPhillips refinery straight into the Saltfork River which flows through the heart of the Ponca Reservation until feeding into the Arkansas River.[274] All of this pollution has caused Kay County, where the Ponca Reservation is situated, to have one of the highest cancer rates in the state.[275] Mekasi Horinek explained that "each family who used well water has already died from cancer. As a matter of fact, there is not one family in the tribe that hasn't been affected by cancer."[276]

The history of how the Ponca's lands and rivers came to be so poisoned through the forced allotment of their reservation obliges us to confront an undeniable fact: the United States has both a trust duty and moral obligation to remediate the pollution that has consumed the Ponca Reservation. One must keep in mind that the Ponca are not the only ones living in the area. Federal assistance in cleaning up local rivers and groundwater would allow the tribe to access their reserved water rights while protecting the health and welfare of American citizens.

C. The Likely Result of the Breach of Trust Claim

Due to the unstable political environment and the Supreme Court's recent deviations from legal precedent, it is hard to say how the Ponca's breach of trust claim would fair. However, we are given a minimal degree of insight from *Navajo Nation v. Department of Interior* where the Navajo Nation sought to enforce the government's trust duty to assess and address their water needs. The following sections will analyze the Navajo case and its implications for the Ponca.

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[270] *Id*. ("In 1989, residents from the neighborhood sued Conoco, the owner of the refinery at the time, after black slime began oozing into their basements. The residents claimed unusually high rates of cancer, respiratory problems, birth defects, skin rashes and other illnesses they believed were linked to an underground spill from a tank or pipes at the refinery. They pointed to Conoco's own water samples that showed elevated levels of benzene in the groundwater.").

[271] McKenna, *supra* note 234.

[272] Telephone Interview with Mekasi Horinek, *supra* note 245.

[273] *Id*.

[274] *Id*.

[275] *Id*.

[276] *Id*.

D. *Navajo Nation v. Department of Interior* and its Implications

Rather than litigating for a quantification of their water rights, the Navajo Nation filed a breach of trust claim in *Navajo Nation v. Department of Interior* (*NN v. DOI* hereinafter)[277] seeking an injunction,

> [r]equiring the Federal Appellees . . . (1) to determine the extent to which the Navajo Nation requires water . . . (2) to develop a plan to secure the water needed; (3) to exercise their authorities, including those for the management of the Colorado River, in a manner that does not interfere with the plan to secure the water needed . . . and (4) to require the Federal Appellees to analyze their actions . . . and adopt appropriate mitigation measures to offset any adverse effects from those actions.[278]

On appeal, as relevant to this paper, the Ninth Circuit Court held that the Navajo Nation "anchor[ed] its breach of trust claim"[279] by identifying regulations and treaty provisions that established a federal fiduciary obligation to ensure "that the Nation's reservation has the water it needs to exist as a viable homeland for the Navajo people."[280] The court pointed to *Winters*, explaining that the treaties, statutes, and executive orders that created the Navajo reservation entailed water rights to make the Nation's permanent home viable.[281] The court also highlighted its decision in *United States v. Adair* which, in their eyes, "stands for the broader proposition that [the court] may read water rights into a treaty where those rights are necessary to fulfill the treaty's primary purpose."[282] The court subsequently argued that the federal government, despite arguing otherwise, acknowledged its trust responsibilities through an environmental impact statement which stated that the Navajo Nation's unquantified water rights were an Indian Trust asset that the DOI held in trust and had a duty to protect.[283]

The Ninth Circuit closed its opinion by noting that the fault for the delay in quantifying the Navajo Nations' water rights, if any, lay with the federal government.[284] They explained that the Supreme Court never intended to enable the federal government to "hamstring" the *Winters* doctrine "by preventing tribes from seeking vindication of their water rights by the federal government when the government has failed to discharge its duties as a trustee."[285] The Ninth Circuit believed that such a reading would nullify the government's promise to "charge[] itself

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[277] *See generally* Navajo Nation v. Department of Interior, 34 F. Supp.3d 1019 (D.Ariz. 2014).
[278] *Navajo Nation*, No. 19-17088 F.4th at 15 (9th Cir. 2022) https://cdn.ca9.uscourts.gov/datastore/opinions/2021/04/28/19-17088.pdf [https://perma.cc/X3SJ-HJL9].
[279] *Navajo Nation*, No. 19-17088 F.4th at 31.
[280] *Id*. at 34.
[281] *Id*. at 27 (The court points to its reasoning in *Colville Confederated Tribes v. Walton* where is noted that ''[t]he specific purposes of an Indian reservation … were often unarticulated,'' [and] ''[t]he general purpose, to provide a home for the Indians, is a broad one and must be liberally construed[.] It is clear that the Reservation cannot exist as a viable home- land for the Nation without an adequate water supply)".
[282] *Id.* at 30.
[283] *Id*.
[284] *Id*. at 32.
[285] *Id* at 33.

with moral obligations of the highest responsibility and trust"[286] . . . "by ensuring that tribes of this country can make their reservation lands livable."[287] For these reasons, the court reversed and remanded the case holding that the Navajo Nation's complaint stated a proper breach of trust claim based on its treaties and federally reserved right.[288] On appeal, the Supreme Court granted certiorari.

On June 22, 2023, Justice Kavanaugh, delivering the opinion of the Supreme Court, reversed the Ninth Circuit Court holding that whereas the Navajo treaty of 1868 "reserved necessary water to accomplish the purpose of the Navajo Reservation [it] did not require the United States to take affirmative steps to secure water for the Tribe."[289] In mischaracterizing the relief sought by the Navajo Nation, Justice Kavanaugh mainly argues that, without either explicit treaty language or other acts by congress "establish[ing] a conventional trust relationship with respect to water," " [the Supreme] Court will not 'apply common-law trust principles' to infer duties not found in the text of a treaty, statute, or regulation."[290]

In his dissenting opinion, Justice Gorsuch explains the Courts misapprehension of the Navajo Nation's complaint was motivated by the desire to prevent courts from "requiring the United States[,] [pursuant to their trust duty,] to build pipelines, pumps, wells, or other water infrastructure" and eventually to "farm land, mine minerals, harvest timber, build roads, or construct bridges on the reservation."[291] Therefore, "the Court reject[ed] a request the Navajo Nation never made[,]" for they merely wanted the United States to "identify the water rights it holds for them" and if "misappropriated," "to formulate a plan to stop doing so."[292]

In accordance with the legal principles of contract and Federal Indian Law, Justice Gorsuch argues that the government owes a trust duty to the Navajo Nations in respect to their water rights.[293] Gorsuch explains that, despite a treaty's silence, water rights are impliedly reserved under the *Winters* doctrine and when those rights are held in trust by the government, "the United States must manage those rights as a fiduciary."[294] Consequently, "[i]t follows, then, that a Tribe may bring an action in equity against the United States for failing to provide an accurate accounting of the water rights it holds on a Tribe's behalf."[295] Justice Gorsuch continues to argue that the Court analyzed the Navajo Nation's complaint under the wrong framework, but his eloquent reasoning displayed thus far is sufficient in itself to provide a sense of optimism toward a similar claim brought by the Ponca.

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[286] *Navajo Nation*, No. 19-17088 F.4th at 33 (quoting Seminole Nation v. United States, 316 U.S. 286, 297 (1942)).
[287] *Id.*
[288] *Id*. at 34-35.
[289] *Arizona v. Navajo Nation*, 599 U.S. 2 (Opinion of the Court) (2023) (*citing* United States v. Jicarilla Apache Nation, 564 U. S. 162, 176 (2011)).
[290] Arizona v. Navajo Nation, 599 U.S. 13 (Opinion of the Court) (2023).
[291] Arizona v. Navajo Nation, 599 U.S. 1 (Gorsuch, J. dissenting) (2023).
[292] *Id.*
[293] *Id*. at 12-20.
[294] *Id*. at 16 (internal quotation marks omitted) (quoting Arizona v. California, 460 U.S. 605, 626-627).
[295] *Id*. (internal quotation marks omitted) (quoting United States v. Tohono O'odham Nation, 563 U.S. 307, 318).

The facts underlying the potential breach of trust claim by the Ponca are similar yet distinguishable enough from *NN v. DOI* to catalyze a successful result. First, like the Navajo Nation, which does not have the necessary infrastructure to access their water rights, the Ponca cannot access their waters because of how polluted they are. Second, the Ponca's right to the waters flowing through its reservation have also never been authenticated.[296] Third, just as the Navajo Nation was never consulted nor included in the various Colorado River compacts, the Ponca were never considered during the planning of the Kaw Dam.[297] Despite these few similarities, the Ponca would still have a slam dunk case due to the distinguishing factors within their claim that would forbid a court from applying *NN v. DOI.*

First and foremost, the Ponca Tribe of Oklahoma is not the Navajo Nation. In other words, the Ponca are a distinct people with a distinct set of treaties with the U.S. government and hold fee-simple title to their reservation. Second, the breach of trust claim that this note advances is based in particularized harms resulting from the conduct of the federal government rather than the *Winters* doctrine. Those harms are exactly what the government and the Supreme Court argued that Navajo Nation was missing in their case. For example, in his appellate oral argument, John Smeltzer, U.S. Government lawyer, relied heavily on his position that the Navajo failed to

> allege any fact showing [...] anything the government ha[d] done [to] put their water right in legal jeopardy or has prevented the Nation, as a sovereign, from using the right that the United States, through executive order[s] or treat[ies], has made available to the Nation.[298]

Justice Kavanaugh made a similar assertion in the introductory paragraphs of his *Arizona v. Navajo Nation* opinion emphasizing that "[t]he Navajos' claim is not that the United States has interfered with their water access."[299] In his Dissent, Justice Gorsuch also noted

> The United States, we know, must act in a 'legally adequate' way when it comes to the Navajo's water it holds in trust. It follows, *as the United States concedes*, that the federal government could not 'legally' damn off the water flowing to their Reservation, as doing so would 'interfere with the Tribe's exercise of their' water rights.[300]

We have made it clear that the government's construction of the Kaw Dam and its forced allotment of the Ponca Reservation have prevented the Ponca from using their water rights; therefore, the Ponca have a cognizable breach of trust claim outside of *Winters.* Third, John Smeltzer also argued that "it would be great if the Navajo and the government had the ability to adjudicate their water

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[296] Arizona v. Navajo Nation, 599 U.S. 8 (Gorsuch, J. dissenting) (2023); Telephone Interview with Mekasi Horinek, *supra* note 244.

[297] Telephone Interview with Mekasi Horinek, *supra* note 245; Arizona v. Navajo Nation, 599 U.S. 8 (Gorsuch, J. dissenting) (2023) ("Further, where the federal government has "full responsibility" to manage a resource or "elaborate control" over that resource, the requisite "fiduciary relationship necessarily arises.").

[298] Transcript of Oral Argument *Navajo Nation v. USDOI* (19-17088). Retrieved at https://www.youtube.com/watch?v=ANdf3jgPJw4 [https://perma.cc/X8CP-UNAW].

[299] Arizona v. Navajo Nation, 599 U.S. 2 (Opinion of the Court) (2023).

[300] Arizona v. Navajo Nation, 599 U.S. 19 (Gorsuch, J. dissenting) (2023) (citing Arizona v. California, 460 U. S. 605, 627 (1983); Tr. of Oral Arg. 13.).

rights for the entirety of the Navajo reservation at one time" rather than have multiple states involved.[301] Here, the Ponca's water rights only concern the Salt Fork and Arkansas River for the entirety of its reservation which is confined to the state boundaries of Oklahoma. For these reasons, a court should acknowledge that the decision against the Navajo Nation in *NN v. DOI* does not preclude a breach of trust claim brought by the Ponca.

If a court recognizes that the government breached its trust obligation to assert and protect the Ponca's water rights, then any remedy issued should not only attempt to make the Ponca whole but should strengthen their ability to progress and govern themselves as a sovereign nation. Although it will ultimately be up to the Ponca, given the strength of their claim, they should consider seeking both equitable relief and monetary damages.[302]

As argued throughout this paper, the tribe should not request for their water right to be quantified. Instead, they should demand a hard look at the *Winters* doctrine and judicial decree that (1) their *Winters* rights exist and remain outside of state appropriation systems,[303] (2) the *Winters* right is positively elastic and will grow with the needs of the Ponca, (3) no outside entities can impinge on the Ponca water rights by diversion, pollution, and so forth, and (4) the Ponca have the sovereign right and jurisdiction to protect their waters in accordance with their law and customs.[304] Most importantly, the decree should hold that it is within the scope of the federal government's trust duty to ensure that the provisions of the decree are met while also ensuring that Ponca forever has access to clean water to fulfill its needs as determined by the tribe.

Furthermore, the tribe should seek monetary damages from the government and the state of Oklahoma. Those damages should include that which is owed for the government's blatant breach of trust. Arising from that breach, damages should also be given to the Ponca families affected by cancer for emotional tolls and all financial losses. Beyond that, a portion of all money made from the water sales and hydroelectricity produced by the Kaw Dam should be given to the tribe.[305] The Ponca should also be reimbursed for all monies paid to receive water, a bill that should have been footed by the government in the first place. Beyond monetary damages, the tribe should also request injunctive relief. For one, the court should require the federal government to remediate all rivers, groundwater, and lands that have become unfit for exposure. Additionally, the court

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[301] Transcript of Oral Argument *Navajo Nation v. USDOI* (19-17088). Retrieved at https://www.youtube.com/watch?v=ANdf3jgPJw4 [https://perma.cc/X8CP-UNAW].

[302] Arizona v. Navajo Nation, 599 U.S. 19, 23 (Gorsuch, J. dissenting) (2023) (explaining that tribes are able to seek damages under the Tucker Act and declaratory, injunctive, or mandamus relief in a separate action in federal district court).

[303] Bennett, *supra* note 210, at 270 (explaining that a tribe does not need to actually divert the water to establish their water rights).

[304] *See* The Ponca Tribe of Oklahoma Res. No: 51-07062022 (2022) (The Ponca are one of few tribes with a rights of nature ordinance. Res. No: 51-07062022 recognizes that the Ni'sk (Arkansas River), Ni'zi'de (Salt Fork River), and Ponca water bodies are living entities that possess fundamental rights and the Ponca Tribe's authority to protect them. It is imperative that the federal government recognize and respect the Ponca's sovereign authority to enforce their resolution.) Retrieved at https://www.movementrights.org/wp/wp-content/uploads/2022/10/Resolution-Rights-of-the-River.pdf.

[305] The money should not only be given to the Ponca, but it should also be given to the Osage and Kaw nations who had their water rights impinged upon by the construction of the Kaw Dam.

should require that any and all fracking that may impinge on Ponca's underground waters and the overall health of the tribe cease immediately. Further, federal money should be appropriated to remediate any and all abandoned gas wells in the area.

CONCLUSIONS

The approach taken towards the Ponca's water rights will determine their ability to continue to exist as a sovereign nation. Given their historical reputation as "a people who survived," it goes without saying that the Ponca will continue to persist no matter what.[306] However, it is due time to ensure that the Ponca not only survive but thrive as a sovereign nation for the next seven generations and beyond. The path to manifesting that goal starts by ensuring that the Ponca's water rights are, to the utmost extent, elastic enough to grow with the needs of the tribe and protected enough to prevent all pollution and intrusion from outside entities. To make sure that this goal becomes reality, this paper has argued that Ponca should push the court, and ultimately society, to take a hard look at *Winters*, as we are with *Johnson* v. *M'Intosh*'s Doctrine of Discovery,[307] and question whether it is legally sound and morally right to continue to perpetuate its narrow and limiting interpretation. Flipping the way that we interpret *Winters* is not an unrealistic request nor is it unlikely.[308] The only difference here is that rather than overturning Indian law precedent to enable and further colonial desires, the Ponca would be asking for promises to be kept, the law upheld, and for an oppressive wrong to be rectified. To do so, a breach of trust claim against the federal government for its failure to protect and assert the Ponca's water rights may be appropriate. As a remedy, it was suggested that the Ponca demand monetary damages and equitable relief.

[306] CASH, *supra* note 1, at 1.
[307] 21 U.S. 543 (1823).
[308] The Supreme Court was more than willing to use Oklahoma v. Castro-Huerta, 597 U.S 1 (2022). 1-70 to flip 200 years of Indian law precedent and overturn foundational cases like Georgia v. Worster, 31 U.S. 515 (1832) without warning.