

THOUGHTS ON A NATION WITHIN'S DISCUSSION OF THE NAVAJO NATION'S WATER RIGHTS

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Professor Ezra Rosser's book, *A Nation Within: Navajo Land and Economic Development*,¹ paints a vivid picture of the challenges facing the Navajo Nation. The book provides a concise history of the challenges the Navajo have encountered since first European contact. Rosser clearly explains the past injustices perpetrated against the Navajo by the United States, including Kit Carson's brutal scorched earth campaign, confinement at the "concentration camp"² Bosque Redondo, and the New Deal's slaughter of Navajo sheep.³ Unlike most other books on federal Indian law and policy, *A Nation Within* discusses tribal level corruption by chronicling the Peter MacDonald episode at length.⁴ Rosser's examination of the MacDonald scandal alone makes the book a significant contribution to the Indian law canon.⁵

The book is also valuable because of Rosser's unique perspective. Rosser is a non-Indian with Ivy League degrees; however, he actually spent a portion of his childhood on the Navajo Nation.⁶ It is not unheard of for

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1. See generally EZRA ROSSER, *A NATION WITHIN: NAVAJO LAND AND ECONOMIC DEVELOPMENT* (2021).

2. *Id.* at 1, 27.

3. See *id.* at 44-47.

4. See *id.* at 91-101. Rosser notes scholars are often reluctant to discuss tribal shortcomings out of fear that Congress or the Supreme Court will weaponize a single tribal error to undermine tribal sovereignty throughout the United States. *Id.* at 11.

5. See *id.* at 91-101.

6. See Biography of Ezra Rosser, WASH. COLL. OF L., <https://www.wcl.american.edu/community/faculty/profile/rosser/bio> [https://perma.cc/BJ75-S98Z]; see also ROSSER, *supra* note 1, at xi.

Indians to write books about their tribe,⁷ but it is rare for non-Indians to write books about reservations where they grew up and still have family. This makes Rosser's perspective on Navajo Nation economic development particularly insightful. While the book covers many areas of the law, Rosser's discussion of tribal water rights is particularly noteworthy.

Rosser applies a public choice lens to the Navajo Nation's water rights. Public choice theory is based upon the notion that politicians and other civil servants are not seeking to improve society's general welfare; rather, public choice theory operates on the assumption that government employees—whether an elected official or lowly bureaucrat—are primarily motivated by their own self-interest.⁸ Hence, politicians focus on issues that will increase their likelihood of staying in office.⁹ In a democratic system, this often means putting the majority's desires over minority rights.¹⁰ Even facially-neutral laws tend to be unfavorably enforced against minorities.¹¹ Rosser's analysis of tribal water rights perfectly fits this frame.

Indian water rights took their legal shape in the 1908 Supreme Court case of *Winters v. United States*.¹² The issue was whether the agreement creating the Fort Belknap Reservation granted the tribe rights to water or the land alone.¹³ Even though the agreement did not explicitly reserve water, the Court held tribes retained water rights.¹⁴ The Court's reasoning was simple: the reservation was created to provide the Indians with a "civilized" home, and without water, the reservation would not be able to

7. See generally T. MAYHEART DARDAR, *ISTROUMA: A HOUMA MANIFESTO/MANIFESTE HOUMA* (2014); JOSEPH MEDICINE CROW, *FROM THE HEART OF THE CROW COUNTRY: THE CROW INDIANS' OWN STORIES* (Bison Books 2000) (1992).

8. See William F. Shughart II, *Public Choice*, ECONLIB, <https://www.econlib.org/library/Enc/PublicChoice.html> [https://perma.cc/YM3S-GXA4] ("But public choice, like the economic model of rational behavior on which it rests, assumes that people are guided chiefly by their own self-interests and, more important, that the motivations of people in the political process are no different from those of people in the steak, housing, or car market.").

9. See Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; Or, Why Don't Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079, 1080 (1993).

10. See Barry Friedman & Elizabeth G. Jánosky, *Policing's Information Problem*, 99 TEX. L. REV. 1, 3 (2020) ("There's also little in the way of hard analysis of distributional costs: policing regularly falls most heavily on communities of color and on the poor, imposing a tax for keeping the rest of us safe that often fails to enter our calculus at all.").

11. See Adam Creppelle, *Probable Cause to Plunder: Civil Asset Forfeiture and the Problems It Creates*, 7 WAKE FOREST J. L. & POL'Y 315, 350 (2017).

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

13. See *id.* at 575-76.

14. See *id.* at 576-77.

accomplish this objective.¹⁵ In the arid West, water rights are based upon first use. For tribes, water rights go to the date their reservation was created, and this antedates the claims of the vast majority of non-Indian water users.¹⁶

Winters grants tribes water rights to sufficiently fulfill the purpose of the reservation's creation. A separate Supreme Court case, *Arizona v. California*, determined tribes are entitled to enough water "to irrigate all the practicably irrigable acreage on the reservations."¹⁷ The exact amount of acreage that is "practicably irrigable" is ambiguous, and ambiguity can lead to litigation over the quantity of land that is practicably irrigable. Nonetheless, black letter law recognizes tribes have strong legal claims to vast amounts of water.¹⁸

Rosser eloquently explains why tribes' clear water rights do not amount to much in reality: "[f]or more than a century, Western states and the US Bureau of Reclamation have largely ignored Indian water rights, preferring to facilitate non-Indian development."¹⁹ Rosser notes major cities like Las Vegas, Phoenix, and Los Angeles depend on the Colorado River for water as well as power.²⁰ However, the Navajo Nation has priority rights to a large portion of the Colorado River's flow.²¹ In fact, the Navajo Nation has legal rights to more water than California or Arizona.²² But as is often the case in Indian law, the Navajo Nation's water rights are trumped by non-Indian desires. Rosser quotes a 1973 Nation Water Commission report admitting the federal government encouraged western development without any effort to protect Indian water rights, despite the federal government having a legal obligation to protect Indian water rights.²³ According to Rosser, this was not a matter of federal "neglect but of indifference and theft."²⁴

Although the United States has an avowed Indian policy of tribal self-determination, Rosser lucidly explains why the Navajo Nation will never

15. *Id.* at 576.

16. In fact, it is possible for tribal water rights to have a priority date of since "time immemorial." See *United States v. Adair*, 723 F.2d 1394, 1413-14 (9th Cir. 1983).

17. *Arizona v. California*, 373 U.S. 546, 600 (1963).

18. See FELIX S. COHEN, *COHEN'S HANDBOOK OF FEDERAL INDIAN LAW* 1204 (Nell J. Newton et al. eds., 2012) ("Indian tribes have well-established rights to large, but often still unquantified, amounts of water").

19. ROSSER, *supra* note 1, at 186.

20. See *id.* at 186-87.

21. See *id.* at 185.

22. *Id.* at 188.

23. *Id.*

24. *Id.*

see its full water rights recognized. Quite simply, Rosser states acknowledging tribal water rights “would be tremendously disruptive to non-Indian communities.”²⁵ The legal mechanism designed to vindicate water rights forces tribes into state courts.²⁶ Federal courts exist, in large part, to provide a neutral forum. For example, federal judges are appointed and hold their positions for life whereas state judges are usually elected.²⁷ Consequently, it is difficult to imagine an elected state court judge upsetting the water rights of millions of non-Indians in favor of Indians.²⁸ Regardless of what the law may say, real-world developments have largely doomed tribes’ ability to substantiate their rights.

As an example, Rosser summarizes the Supreme Court’s 2005 decision in *City of Sherrill v. Oneida Indian Nation*.²⁹ The case arose when Oneida refused to pay property taxes to the City of Sherrill on the theory that the property was part of the Oneida’s reservation.³⁰ The Supreme Court ruled against the tribe because it did not want to “disrupt[] the governance of central New York’s counties and towns.”³¹ The opinion relied on the repudiated Doctrine of Discovery³² and claimed Oneida lost its rights because the land had been “converted from wilderness to become part of cities like Sherrill.”³³ The Court also asserted the Oneida lost sovereignty because the land was “over 90% non-Indian, both in population and in land use.”³⁴

Rosser’s theory still holds true. In *Oklahoma v. Castro-Huerta*,³⁵ the Supreme Court affirmed non-Indian preferences override tribal legal rights. *Castro-Huerta* was a reaction to *McGirt v. Oklahoma*,³⁶ which recognized

25. *Id.*

26. 43 U.S.C. § 666; *see also* COHEN, *supra* note 18, at 1243; ROSSER, *supra* note 1, at 189.

27. *Judicial Selection: Significant Figures*, BRENNAN CTR. FOR JUST. (Oct. 11, 2022), <https://www.brennancenter.org/our-work/research-reports/judicial-selection-significant-figures> [<https://perma.cc/29MC-PK5C>] (“Most states use elections as some part of their selection process – 39 states use some form of election at some level of court.”).

28. *See* ROSSER, *supra* note 1, at 189.

29. 544 U.S. 197 (2005).

30. *Id.* at 211.

31. *Id.* at 202.

32. *Id.* at 203 n.1; *see also* Clay S. Jenkinson, What the Repudiation of the Doctrine of Discovery Means for Indian Country, Governing the Future of States and Localities (Apr. 9, 2023), <https://www.governing.com/context/what-the-repudiation-of-the-doctrine-of-discovery-means-for-indian-country> [<https://perma.cc/2X3P-VYZX>].

33. *Id.* at 215.

34. *See id.* (citing *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 604-05 (1977)).

35. 142 S. Ct. 2486 (2022).

36. 140 S. Ct. 2452 (2020).

nearly half of Oklahoma as Indian reservations.³⁷ Oklahoma fumed about the decision and spent over \$10 million on a media campaign to gut the decision.³⁸ The state filed over forty petitions seeking to have *McGirt* reversed.³⁹ The Court declined.⁴⁰ However, the Court did hear *Castro-Huerta*, which involved the seemingly simple question of whether Oklahoma could prosecute non-Indians who victimize Indians within reservations.⁴¹ The answer was clearly “no.”⁴² The Constitution, as well as over two hundred years of federal policy, expressly excluded states from prosecuting Indian country crimes involving Indians.⁴³ In fact, Oklahoma admitted it lacked jurisdiction over this class of crimes in 2020.⁴⁴ The total absence of legal authority for Oklahoma’s position prompted Justice Gorsuch to ask, “[A]re we to wilt today because of a social media campaign?”⁴⁵ Notwithstanding, a majority of the Court sided with Oklahoma,⁴⁶ leading Justice Gorsuch to describe the majority’s opinion as “embarrassing” in dissent.⁴⁷ *Castro-Huerta* is a grim reminder Indian rights are adjudicated in the “[c]ourts of the conqueror.”⁴⁸

Rosser presents an interesting solution to the Navajo Nation’s water rights—diverting water. The Navajo Nation is located upstream of the Colorado River,⁴⁹ so it could simply divert water and start irrigating its own land. This would not be stealing because the Navajo Nation has an earlier

37. *Id.* at 2482 (Roberts, C.J., dissenting) (“The rediscovered reservations encompass the entire eastern half of the State—19 million acres that are home to 1.8 million people, only 10%–15% of whom are Indians.”).

38. See Kelsey Vlamis, *Oklahoma Spent Millions on a Legal and PR Campaign to Paint Reservations as ‘Lawless Dystopias’ and Persuade the Supreme Court to Weaken Tribal Sovereignty*, *Experts Say*, YAHOO!ENTERTAINMENT (July 4, 2022), <https://www.yahoo.com/entertainment/oklahoma-spent-millions-legal-pr-134000157.html> [https://perma.cc/NXE6-8Y4Z].

39. See Derrick James, *Supreme Court Moves Review of State’s McGirt Argument*, NATIVE NEWS ONLINE (Jan. 11, 2022), <https://nativenewsonline.net/sovereignty/supreme-court-moves-review-of-state-s-mcgirt-argument> [https://perma.cc/N732-VVCK].

40. *Id.*

41. *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2491 (2022).

42. *Id.* at 2505 (Gorsuch, J., dissenting).

43. *Id.*

44. Brief for Respondent at 3, *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2462 (2020) (No. 18-9526), 2020 WL 1478582, at 7 (“The State would lack jurisdiction to prosecute any crime involving an Indian (whether defendant or victim) in eastern Oklahoma.”).

45. Transcript of Oral Argument at 61, *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486 (2022) (No. 21-429), WL 1250875, https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/21-429_3e04.pdf [https://perma.cc/X89N-V3J8].

46. *Castro-Huerta*, 142 S. Ct. at 2504-2505.

47. *Id.* at 2521 (Gorsuch, J., dissenting).

48. See *id.* at 2505 (Gorsuch, J., dissenting).

49. See ROSSER, *supra* note 1, at 192.

priority date than other users; rather, the Navajo Nation would merely be claiming what is rightfully its water. Although the Navajo Nation would be well within its legal rights, Rosser candidly says there is almost zero chance this will work.⁵⁰ Water is a scarce resource in the West; hence, each drop the Navajo Nation acquires is one less for Phoenix and other non-Indian communities. There is little chance the United States would permit tribes to prevail in water rights litigation if the tribal victory cut off water from Phoenix or Las Vegas.⁵¹

This dynamic leads to water rights settlements, which the Navajo Nation entered with Utah in 2020.⁵² Water rights settlements are generally preferred to litigation by both tribes and non-Indians. States have an incentive to reach a settlement with tribes because black letter law is clearly on the tribes' side. Alternatively, tribes have an incentive to settle because they well know paper rights do not always count for much in the "[c]ourts of the conqueror."⁵³ In addition to substantive law and political incentives, court procedure practically compels the parties to settle as water rights litigation is often a losing effort for all parties. The cases are extremely expensive, have highly unpredictable water quantification outcomes, and take decades to conclude.⁵⁴ Accordingly, water rights settlements are the most feasible solution for tribes and states. Settlements usually result in tribes ceding their claims to water in exchange for infrastructure funding that will enable tribes to better use their remaining water. States and their non-Indian water users benefit from settlements by removing the legal threat tribes pose to their water; moreover, the states benefit from the infrastructure water settlements provide to reservations without spending any state funds. Hence, non-Indians are the real winners in tribal water settlements.⁵⁵

This reality has led to severe criticism of water rights settlements, and Rosser offers the remarks of three Diné scholars on the proposed Navajo-Hopi Little Colorado River Settlement (NHLCRS).⁵⁶ He notes Andrew

50. *See id.*

51. *See id.* The Supreme Court recently heard oral arguments in *Arizona v. Navajo Nation*, a case in which the Court will attempt to resolve a long-running dispute between the Navajo Nation and the State of Arizona over the rights to water. *See Arizona v. Navajo Nation*, No. 21-1484 (U.S. argued Mar. 20, 2023).

52. Navajo Utah Water Rights Settlement Act, H.R. 644, 116th Cong. (2020).

53. *See Johnson v. M'Intosh*, 21 U.S. 543, 588 (1823); *see also Castro-Huerta*, 142 S. Ct. at 2505.

54. CHARLES V. STERN, CONG. RSCH. SERV., R44148, INDIAN WATER RIGHTS SETTLEMENTS 2 (2022).

55. *See* ROSSER, *supra* note 1, at 191-92.

56. *Id.* at 190.

Curley believes Navajo opponents challenge the legitimacy of the United States' water law.⁵⁷ Benjamin Bahe Jones shares Curley's sentiments.⁵⁸ Rosser also quotes Melanie Yazzie averring the NHLCRS "is the latest instance of Navajos' long-held dissatisfaction with the tribal government's history of collusion with non-Indian interests, and especially in areas related to economic development."⁵⁹ While acknowledging the force of these arguments, Rosser pragmatically notes tribes do not have a plausible alternative to settlements.⁶⁰

Rosser's work focuses on the Navajo Nation, but its water discussion is germane to all western tribes. Despite the trust relationship, the United States has perennially failed to protect tribal water rights. A prime example is the United States' delinquency in funding tribal water safety. For every \$100 tribes need from the Safe Drinking Water Revolving Fund, tribes get \$0.75.⁶¹ Louisiana, the state receiving the smallest amount from the Fund, receives more than triple the funding of tribes.⁶² As a result, a 2016 Democratic staff report of the House Committee on Natural Resources found "nearly half (48%) of all homes on tribal land lack access to adequate drinking water, sewage, or solid waste disposal facilities."⁶³ This means over 660,000 Indians and Alaska Natives do not have a reliable source of safe water.⁶⁴ Lack of access to safe water makes it more difficult to engage in basic sanitation; hence, federal neglect of tribal water infrastructure was a significant reason why COVID-19 ravaged Indian country.⁶⁵ Poor access to water also undermines tribal economies because few modern businesses are going to open in places without water infrastructure.⁶⁶

Although Rosser's brief section on Navajo Nation water rights is brilliant, it could have been improved by addressing climate change. Climate change is exacerbating droughts;⁶⁷ in fact, in 2021, Navajo Nation

57. *Id.*

58. *See id.* at 190-91.

59. *Id.* at 190.

60. *See id.* at 192.

61. RAÚL M. GRUJALVA & DEMOCRATIC STAFF OF H. COMM. ON NAT. RES., 114TH CONG., DEMOCRATIC STAFF OF THE HOUSE COMM. ON NAT. RES., WATER DELAYED IS WATER DENIED: HOW CONGRESS HAS BLOCKED ACCESS TO WATER FOR NATIVE FAMILIES 2-3 (2016).

62. *Id.* at 3.

63. *Id.* at 1.

64. *See id.*

65. *See* ROSSER, *supra* note 1, at 208.

66. *See* Adam Creppelle, *How Federal Indian Law Prevents Business Development in Indian Country*, 23 U. PA. J. BUS. L. 683, 728-29 (2021).

67. *See* Lauren Sommer, *The Drought in the Western U.S. Is Getting Bad. Climate Change Is Making It Worse*, NPR (June 9, 2021, 5:00 AM),

President Jonathan Nez stated, “[w]ater resources are becoming a greater concern for the southwest portion of the United States.”⁶⁸ States are currently looking for ways to reduce water use.⁶⁹ If water shortages continue, the rules governing water law will have to be amended. Water rights settlements will occur against an ever-greater water shortage. How does climate change impact the Navajo Nation’s ability to assert its water rights? Although there is no clear answer, Rosser’s discussion of how non-Indian interests undermine tribal rights likely provides the answer—tribes lose. Nevertheless, climate change deserved a mention in the section.

Rosser’s water rights section also would have benefitted from discussing water quality. After all, an unlimited quantity of water is largely useless if the water is toxic. This is particularly significant given the Navajo Nation’s history with pollution. In the section following his discussion of water rights, Rosser briefly mentions tribes can be treated as states under the Clean Water Act⁷⁰ and cites the famous case of *City of Albuquerque v. Browner*.⁷¹ Isleta Pueblo prevailed in the case even though its water quality standards impacted non-Indian users located outside of the tribe’s reservation, and the tribe’s standard for arsenic was “1,000 times more stringent than the State of New Mexico standards.”⁷² Accordingly, Rosser asserts the Navajo Nation should use this status to protect themselves from upstream polluters.⁷³

While Rosser’s suggestion is reasonable, the section would have benefitted from articulation of how the Navajo Nation should wield its tribes as state status to its advantage. The *Browner* example is helpful, but the facts of the case are easily distinguishable from a potential assertion of strict water quality standards by the Navajo Nation. The Navajo Nation is vastly different than Isleta Pueblo. The Navajo Nation has a long history of dealing with environmental contamination from oil, gas, and uranium.⁷⁴

<https://www.npr.org/2021/06/09/1003424717/the-drought-in-the-western-u-s-is-getting-bad-climate-change-is-making-it-worse> [<https://perma.cc/L9GV-5W6X>].

68. See Hank Lacey, *9th Circuit Rebukes U.S. on Native Interests in Colorado River Rights*, L. WEEK COLO. (May 14, 2021), <https://www.lawweekcolorado.com/article/9th-circuit-rebukes-u-s-on-native-interests-in-colorado-river-rights/> [<https://perma.cc/UL6D-QLHJ>].

69. See Michael Elizabeth Sakas, *Colorado River States Need to Drastically Cut Down Their Water Usage ASAP, or the Federal Government Will Step In*, CPR NEWS (June 17, 2022, 5:32 PM), <https://www.cpr.org/2022/06/17/colorado-river-states-need-to-reduce-water-use/> [<https://perma.cc/DC7M-XP98>].

70. ROSSER, *supra* note 1, at 193.

71. See generally *City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996).

72. ROSSER, *supra* note 1, at 197.

73. See *id.*

74. Cameron Oglesby, *The Navajo Nation Generates a Ton of Power – But 14,000 Homes Don’t Have Electricity*, GRIST (Mar. 5, 2021), <https://grist.org/justice/navajo-nation-electricity->

Isleta Pueblo does not. Fair or not, this will probably make a difference if the Navajo Nation seeks to enforce its water quality standards outside of its reservation. Likewise, Albuquerque has a population of roughly 900,000.⁷⁵ This is a sizeable number, but the Phoenix metro area, which would be impacted by the Navajo Nation's water rights assertion, has a population of nearly five million.⁷⁶ If the Navajo Nation were to implement stringent water quality standards, the effects could extend across the entirety of Arizona, Colorado, Utah, New Mexico, and California. Odds are the federal government will not permit the Navajo Nation to control the economies of five states. However, it would be interesting to learn how far Rosser thinks the Navajo Nation can get with water quality standards.

A Nation Within is a significant contribution to the Indian law canon. Rosser's expertise in the field and his connection to the Navajo Nation combine to make the book a must-read for anyone interested in learning about the Navajo Nation. Though the book provides a useful discussion of several areas of the law, its examination of how non-Indian interests prevent tribes from actualizing their water rights is illuminating.

power-covid/ [https://perma.cc/9UNN-Z4KV] ("And yet the reservation is an energy-exporting hotspot, having until recently been home to the Navajo Generating Station, the largest coal-fired power plant in the western U.S, as well as many coal, uranium, oil, and fracking operations").

75. See *Albuquerque, NM Metro Area*, CENSUS REP., <https://censusreporter.org/profiles/31000US10740-albuquerque-nm-metro-area/> [https://perma.cc/AY5G-D27F].

76. See *Phoenix-Mesa-Chandler, AZ Metro Area*, CENSUS REP., <https://censusreporter.org/profiles/31000US38060-phoenix-mesa-chandler-az-metro-area/> [https://perma.cc/M3WJ-CQLB].