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Unsettling Indian Water Settlements: The Little Colorado River, the San Juan River, and Colonial Enclosures

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Abstract: In the United States, indigenous nations are settling water claims for access to the continent's surface waters. This legal-political process transforms the nature of indigenous water use to conform with logics of quantification that are foundational to western water laws. This article critiques Indian water settlements by highlighting the inherent limitations and marginalisation of indigenous water rights in two recent examples of water settlements, the Little Colorado River Water Settlement in 2012 and the San Juan River Water Settlement in 2005. This article argues that Indian water settlements are forms of colonial enclosures, built on a lineages of law that replicates and perpetuates settler-colonial dispossession. These settlements enclose upon unquantified Indigenous rights in the interest of colonial-capitalist expansion in the western states.

Keywords: Indigenous, water, settler-colonialism, enclosure, colonial-capitalism

Introduction

On 14 February 2012, then Arizona Senator Jon Kyl[1] introduced Senate Bill 2109, "The Navajo-Hopi Little Colorado River Settlement", onto the floor of the US Senate. The bill was a proposed water settlement between the Navajo Nation, the Hopi Tribe, and the United States for access to the Little Colorado River in northeast Arizona. The Little Colorado River is a tributary of the much larger and coveted Colorado River, the region's most important source of water. Kyl introduced the legislation on the 100th anniversary of Arizona's statehood and asked his colleagues to pass the settlement as a "birthday gift" for the state. Although the proposed bill and settlement eventually died in Congress, it was one act in a series of legal-political manoeuvres, spanning more than 100 years, designed to limit and exclude Indigenous peoples from their inherent rights to govern their waters. Kyl's Congressional act would have effectively stipulated to exiting upstream water appropriations that white settlers took from Native lands more than a century ago. In the 1880s, Mormon colonisers built communities near the river's source in the White Mountains and flooded their fields with waters diverted from the Little Colorado River (Abruzzi 1993). They did this prior to what we know as "western water law", a quantification and commodification of surface waters, came into full effect. Senate Bill 2109 was the last of Jon Kyl's many efforts to limit, minimise,

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and undermine Indian reserved water rights in the interest of expanding the water resources of settler communities while a US Senator. The water settlement was not only an act of colonisation, but an act of enclosure.

Enclosures are not only legal-political depravations of rights to resources; they also fundamentally change a people's relationship with their environment and ecology. US settler law has long acknowledged Indigenous water rights, but to this day, they remain largely unquantified. When Kyl stood before the Senate to support the Little Colorado River Settlement Act, he notoriously highlighted the fact that many Navajo families still had to haul water and lacked indoor plumbing in their homes to justify the legislation. Kyl claimed that the intent of a settlement was to improve the overall welfare of the Navajo and Hopi people. However, Kyl's longer record of challenging Indian water claims and vetoing federal funding for tribal water projects contradicted the veracity of his professed sentiment. Kyl's attempt to quantify and minimise Navajo water rights was consistent with a larger settler-colonial interest of limiting indigenous rights to resources.

This article argues that Indian water settlements are ultimately a form of colonial enclosures on inherent Indigenous jurisdiction over water resources. Lineages of law, such as the Colorado Compact of 1922, shape, frame, and produce Indigenous environments. Consistent with these laws, the Little Colorado River Settlement Act of 2012 worked to limit and transform how the Navajo Nation could use water. Although tribal officials and lawyers characterise water settlements as overall benefiting tribes, in fact water settlements are profoundly distorting. Water settlements constrain how tribes can interact with regional water systems. They incentivise wasteful industrial agricultural uses. Often they prevent tribes from municipal and industrial use (as I will demonstrate in the case of the San Juan River Settlement). Water settlements deny aboriginal rights to water while postulating a new set of rights based on a federal "purpose" of a reservation defined in the tradition of white supremacy. In short, Indian water settlements are part of one of the last great enclosures on the continent, an enclosure of Indigenous water resources.

Water Governance and Colonial Enclosure

Western water law, as a form of water governance, is an example of how US colonial policies and institutions are racialised against Indigenous peoples and their inherent claims to the continents resources. As in all forms of colonialisation, Indian water settlements fundamentally transform the nature of Indigenous water practices. The finality and imposition of state calculations in relation to other user's "superior" claims to water rights "limits" and "minimalises" the kinds of assertions to water that tribes can make (see section on San Juan River Settlement). This ideological apparatus of Indian water rights and, in a larger sense, federal-Indian law is an aggregate of practices within US governing institutions that racialises Indigenous jurisdiction to a subordinate status against the rights of settler communities.

Water governance is a source of colonial control. Cities like Phoenix and Albuquerque require extensive water supplies for growth. Land in "the west" is

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only as good as the water that can reach it. Development in these politically powerful places requires the minimisation of Indian water claims. They require that future settlements conform to existing water uses and diversion framed through the Colorado Compact of 1922. Water governance in western states and provinces follows the logic of land acquisition, alienating and quantifying natural systems into "scientific" forms of management (Bakker 2018; Diver 2016; Wilson 2014). Laws, institutions, and infrastructures, such as the Rivers and Harbors Appropriation Act of 1899, the state constitutions of New Mexico and Arizona of 1912, the Colorado Compact of 1922, the Army Corps of Engineers, the Bureau of Reclamation (BOR), the Roosevelt Dam, the Hoover Dam, the Glen Canyon Dam, etc. appropriate surface waters for settler communities at the expense of Indigenous rights and access to these same waters. As tools of development, water infrastructure projects often strengthen state power over the population (Akhter 2015; Meehan 2014). For Indigenous peoples, dams and other water projects only exacerbate colonial inequalities. Scholars in settler-colonial studies refer to these institutions as structures of "domination" designed to "eliminate" the Native from the land (Veracini 2015; Wolfe 2006). In the case of water settlements, these acts establish a "permanence" of the colonists' perceived rights to and uses of these waters (Veracini 2011). Indigenous critics also point out that law works in the interest of colonial theft (Wilkins and Lomawaima 2001).

Critical legal geographers demonstrate that the law is not a neutral party, it produces the physical landscape (Jepson 2012). No genre of modern state activities is more consequential to the environment as the production and practice of the law, which produces what Osage anthropologist Jean Dennison describes as "colonial entanglements" (Dennison 2012). Mushkegowuk geographer Michelle Daigle (2018) shows that in Canada perceptions of water crisis, combined with a promise of water infrastructure development, erodes Mushkegowok sovereignty over land and water resources. Canadian law, like laws in the US, is built on racist assumptions of *terra nullius* that grant colonising communities ultimate control over resources while ignoring tribal rights and jurisdictions. She deploys Kwagiulth geographer Sarah Hunt's concept of "colonialscapes" to describe how uneven political differences between the coloniser and colonised are naturalised over time (Hunt 2014). This is also the work of water settlements in the US context.

This brings us to Marx's insight about the enclosure of the English commons, which he claimed was accomplished as a political act, through "bloody legislation", or the production and enforcement of laws that were necessary to create the conditions from which early capitalist practices could emerge alongside the social-political inequalities they generate. Notions of primitive accumulation are historical critiques about how colonialism and capitalism work in tandem to choke Indigenous peoples of their lands, lives, and resources in the interest of settler-colonial state-formation and capitalist expansion (Coulthard 2014). Pasternak, for example, argues that for First Nations communities, such as Algonquians in Quebec, colonisation was accomplished through a "slow violence" of jurisdictional expansion of Canadian authority over Indigenous peoples and their lands (Nixon 2011; Pasternak 2017).

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The dispossession of Native water resources through laws was an extension of the logic of settler-colonial governance and enclosure. The "limitation" (Yazzie 2013), minimisation, and "exclusion" (Jones 2011) of Indigenous water claims in the US southwest are part of the maintenance and reproduction of the conditions of capitalism in the United States that forever limits and eliminates Indigenous relationships with water in service of the development and expansion of non-Native settler-colonial communities. For the last three decades, the United States and state governments have proposed water settlements with tribes to legally resolve the "reserved" Indigenous rights to waters that state governments have already claimed for themselves. Settlements guarantee "wet" water, but forever stipulate to unsustainable colonial diversions and appropriations that predate the expansion of colonial governance in the region. Indian water settlements in particular legalise extralegal facts on the ground in exchange for relatively small, but desperately needed water projects within reservation communities. In other words, Mormon settlers diverted water before water laws existed in the region and state lawmakers constructed regimes of water governance, including laws of prior appropriation, around these preexisting colonial appropriations. Following the US territorialising of land that erected mechanisms of governance which also disposed Indigenous peoples of aboriginal jurisdiction (Pasternak 2017), "western water law", as a machinery of dispossession, now targets the last great commons of North America, inherent Indigenous relationships with water.

Enclosures are not new in "Indian Country" (Chang 2011). Colonisation was the violent acquisition of Indigenous lands, converted into Lokean notions of property at the expense of Indigenous understandings of their resources and territory (Nadasdy 2017). The examples of land and resource theft on Indigenous lifeways are part of this process. Although recent scholarship on "new enclosures" focus on the privatisation of state lands for corporations under regimes of neoliberal resource management (Chung 2017; White et al. 2012), for Indigenous peoples "enclosures" never ended and are built upon colonial, not neoliberal arrangements. Cherokee geographer Clint Carroll (2014) highlights for example how tribes assert counter territoriality in the establishment and maintenance of tribal parks that protect Indigenous land-use practices. Others find that territoriality with and not against the settler-colonial states advances "anti-politics", or a denial of settler-colonial inequality (Ferguson 1990; Youdelis 2016). In Native North America, original accumulation and the dispossession of Native lands and resources was a critical part of the development of worldwide capitalism (Coulthard 2007, 2014).

Globally, dams, more than any other technology, have done the dirty business of enclosing upon peasant and indigenous communities (Kaika 2006). In the United States, following 19th century wars of ethnic cleansing and genocide, 20th century damming of western surface waters decimated much of what was left of Indigenous lands. The damming of the Missouri River notoriously flooded traditional tribal lands of the Sioux, Mandan, Hidatsa, and Arikara peoples, displacing many families and forcing them to find wage-labour work for survival. We witnessed reverberations of this struggle recently at Standing Rock in 2016 when colonial developers put at risk Native lives and regional drinking water for

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corporate profit (Estes 2016). In the Navajo Nation, the construction of the Hoover Dam in the 1930s led federal soil scientists to institute a violent and punitive campaign of killing Navajo sheep in an effort to prevent land erosion, while simultaneously ignoring the impact of cattle belonging to white ranchers (Weisiger 2011). Historians like Richard White (1983) have argued that "livestock reduction" was directly tied to the construction of the Hoover Dam and consequently made the Navajo people "dependent" on wages and resource development for livelihood.

Settler-colonial studies reminds us that limiting the temporal understanding of colonialism makes it difficult to understand the colonial present. As Patrick Wolfe (2006) famously wrote, settler-colonialism is a "structure", not an event, designed to "eliminate" Native peoples from the land. Although it is a structure, colonialism still requires events to reproduce its structures. Alyosha Goldstein asks us to view colonialism as an "assemblage" of power, logics, and violence that are inherent in the US settler-colonial state. He writes:

> The United States nevertheless remains reliant on the ever-expanding dispossession and disavowal of Indigenous peoples, global circuits of expropriated labor, economies of racialisation, and its expanding network of military bases—that is, on people and places remade as things in service of the accumulation of wealth and the exercise of geopolitical power. (2014:1–2)

Water settlements are an example of how US colonialism evolves from elimination, displacement, and exclusion, to politics of recognition that both limits tribal claims to water and transforms how water is fundamentally understood. They are colonial events that replicate structures of settler-colonialism that works toward the enclosure and elimination of aboriginal water jurisdictions.

Law is not only a practice, but a language given political force by its value for both state and society (Delaney 2001). As such, legal discourse reproduces human–nature binaries in contexts of racial inequality (Jepson 2012) and through the use or implied use of violence (Blomley 2003). The "genealogy" of Indian water rights was reproduced and evolved through historic "events", as Philip Abrams (1982) understood them as representations of structures and agency, which are today legally binding water settlements that concretise the effects of violence, dispossession, and displacement within backroom deals between tribal officials, lawyers, and state representatives. To resolve the spectre of Indigenous water claims upsetting decades of settler-colonial diversions and appropriations, which would jeopardise the continuation and expansion of capitalist practices in the region, state actors pressure tribes to "settle" their water for highly coveted surface waters. When agreeing to one regime of laws, Indigenous peoples in effect permanently forfeit original jurisdiction over surface waters (cf. Pasternak 2017). This erasure of Indigenous governance over the continent's water systems is fundamentally a colonial act. It reproduces structures of domination and unilateral extensions of jurisdictions within the idiom of legal discourse. Water settlements are a modern manifestation of colonisation that assumes the displacement of Indigenous governance and focuses on the minimisation and exclusion of Indigenous water claims. As Diné scholar Benjamin Jones writes:

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> Native Americans have been and continue to be shaped by the dominant ideological discourses that legitimate practices of exclusion within the complex interstices of ideology, federal-tribal trust relationship and definitions of tribal sovereignty that are inscribed within western water laws, policy and development. (2011:284)

Water settlements between states and tribes are a final realisation of enclosures that began at the advent of colonialisation.

Indian Water Settlements

In the western states, water was turned into a commodity in ways that are similar to how land was made accessible to settler-colonists and denied to Native peoples. According to US law, no one can "own" water in the United States. In fact navigable water sources are considered "waters of the United States", or under complete control of federal authorities, even when water flows through Indian lands (Wilkinson 1984). This is US imperialism. In the western states, a system called "prior appropriation" created regimes of governance that allowed for transferable possessory rights of water. These systems, recognised in nearly all western states made water akin to property rights. Today, access to water in these territories still relies on the principle, "first in use, first in right", giving priority rights to the first user to put in use a claim of water. It also prioritised a user's ability to *use* the water in ways that non-Natives understand as "productive", especially in the form of large-scale agriculture.

The laws governing water in western states were constructed at a particular time in US history when Congress encouraged the settlement of "the Great Plains" and "the Southwest". The Homestead Act, Land Grant Act, Mining and Surface Act, and the General Allotment Act were parts of this cultural milieu that facilitated land grabbing, exploitation of natural resources, and westward expansion (Dunbar-Ortiz 2014). Western water law was a product of this idea and ideology of manifest destiny (Burton 1991; Jones 2011). Originally, settlers doubted whether tribes had any rights to water at all. The origin of tribal water rights in US law was the Supreme Court decision *Winters v. United States* in 1908 (hereafter *Winters*) when White settlers tried to prevent waters from the Milk River in Montana from reaching the Fort Belknap Indian Reservation downstream (McCool 2006; Shurts 2000). In this decision, the Supreme Court did not recognise aboriginal rights as much as the court reserved water rights for federal lands in western states. What is more, in its limited recognition of tribal water rights, the Supreme Court extended a logic of water commodification in the colonial interest of settling western territories. Ruling in favour of tribes, in this particular instance, preserved the federal government's priority claims over reservations that it considers federal lands (Shurts 2000).

This consequential ruling was a denial of aboriginal jurisdiction and an application of colonial water governance. We know tribes maintain historic and ongoing relationships with water, land, and other natural elements that is a part of their social and political institutions prior to colonisation (Deloria Jr. 1979; Wilkins 2011; Yazzie 2018). For the Navajo people, water use was part of a bundle of

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"fundamental" laws that speak not only of rights, but also responsibilities to natural systems (Austin 2009). *Winters* was a reproduction of racist assumptions about Indigenous peoples and their capacity to self-govern that is the basis for the Marshall decisions in the 1830s, decisions that circumscribed inherent Indigenous sovereignty to the rights of "domestic dependent" "wards" of the US (Wilkins and Lomawaima 2001). *Winters* did not recognise aboriginal rights to water beyond the establishment and purpose of a reservation. This legal-political assertion, however, does not exist without resistance. Colonialism was never complete (Goldstein 2014) and everyday tribal actors continue to refuse and resist its perpetuation (Simpson 2014). Many Navajo people still do not agree with or recognise the presumptive right of Arizona to divide the region's waters in denial of aboriginal rights (Curley forthcoming).

Yet, as Dennison (2012, 2017) writes, the more tribal institutions and institutional actors participate in systems of colonial governance as pragmatic forms of resistance, the more they become entangled and ensnared within them. Tribal water "rights", or what the Supreme Court called "reserved rights", work within the legal structure of water governance in the west. Access to water requires forms of legal recognition that are bound to rights established in *Winters*. It was for this reason that tribes and their attorneys petitioned courts for the next 70 years to expand these rights, even though they work within colonial laws and institutions. When conservative justices took control of the Supreme Court in the 1980s, it started to rollback tribal rights and authorities under federal law (McCool 2006). In 1976, the Supreme Court ruled that tribal water claims had to be either adjudicated or settled within state courts, making it even more dangerous for tribes to litigate their water claims (Deloria 1985). This is part of the reason why tribes are pressured to settle their water claims.

These settlements still require Congressional approval, however, even when all parties agree to the terms. Congress accepted the first water settlement between tribes and states in 1978 between the Ak-Chin tribe and the State of Arizona (Thorson et al. 2006). Today there are more than a dozen settlements under active negotiation, including four pertaining to the Navajo Nation (e.g. San Juan River, Lower Colorado River, Little Colorado River, and Upper Colorado River). The movement for tribes to settle rather than to litigate their water claims began in Arizona and eventually became the national approach for resolving Indian water rights (Thorson et al. 2006:45). Dan McCool (2006:62) has argued that water settlements are somewhat deceitful, especially during the 1980s and 1990s when the federal government reduced its overall spending on tribes. The monetary compensation tribes received on infrastructure projects through settlements was taken from other parts of federal funding for tribes.

By 1991, more than a decade since water settlements took force, legal scholar Lloyd Burton noted that these agreements resembled 19th century treaty negotiations that were in their own way "settlements" to end military violence against tribal people in exchange for fractions of their former lands and resources. He wrote:

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> Only if the Indians are barred from claiming more water in the future can non-Indians proceed with some confidence to develop what little water there is in the west that remains unappropriated or to sell existing rights whose seniority and quantity have been called into question by tribal reserved-rights litigation. (Burton 1991:80)

In critiquing a proposed 2012 water settlement between the State of Arizona and the Navajo Nation over claims to the Little Colorado River, Diné scholar Melanie Yazzie (2013) suggested that settlements are legally constructed to minimise Indian water claims far below what is possible when applying reserved water standards that are part of *Winters* water rights. She wrote: "the Settlement has chopped up the [Navajo] Nation's water into quantifiable fractions not unlike those employed to determine tribal citizenship according to blood quantum policies" (Yazzie 2013:31).

Water settlements limit the rights to access of waters that were once a sort of commons among and between Indigenous nations. Indigenous nations knew how to divert, dam, and utilise the region's waters that fed sustainable fields of corn, squash, melons, and other Indigenous plants. Often tribes combined knowledge of springs, surface waters, and rain (Eldridge 2014). Eurocentric water "laws" recognise rights for appropriation and not sustainable use (Groenfeldt and Schmidt 2013). For predictability within the logic of US capitalism, water quantification was necessary (Burton 1991). Following Goldstein's (2014) use of genealogy and assemblage, water settlements perpetuate the colonial logics of Indigenous expulsion, denial, and white supremacy that are foundational edicts of the United States. Although language and demeanour of water settlement discourse is different from the violence of bullets and bayonets, the effects are the same—to enclose upon Indigenous lands and resources for the benefit of settler communities.

Dividing Up the River

Access to waters in the Colorado Basin are both historic and ongoing. Tribes have relied on these waters for centuries and continue to draw upon them for everyday use. However, when representatives from the western states (e.g. California, Arizona, Nevada, Utah, Wyoming, Colorado, and New Mexico) constructed a "compact" in 1922 that allocated the waters of the Colorado River, these delegates purposefully excluded tribes from this agreement. They felt tribal reserved water rights were "inconsequential" to the greater project of colonising the river (McCool 2006:160; Weatherford and Brown 1986). The compact overestimated an annual river flow of 15 million acre-feet-a-year. Today hydrologists recognise this was an overestimation (Colby et al. 2005). Additionally, the impacts of climate change further erode the region's water resources (Jones 2011:259). In 1922, the seven states with claims to the Colorado River split the river into two halves at a point called "Lee's Ferry", just south of what is Page, Arizona today. This division is along the northwest edge of the Navajo Nation (Price and Weatherford 1976).

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Navajo scholar, Benjamin Jones writes:

> ... evading Indian water rights may have implications as preemption or exclusionary tactics. These types of discursive strategies force the Navajos to not only grapple to determine the amount of their share of water in the present but to negotiate what has already been predetermined amounts and allocated between the states. Essentially, it forces [tribes] to consider litigation as the only way to gain access to the river. For Navajos this means a choice of either negotiating their water rights in New Mexico and Arizona or risk potential adverse judicial precedent through costly adjudication in the courts. (2011:8–9)

The states divided the entirety of the river without concern for tribal uses or rights. The development of the west over the last half-century has dramatically increased the geopolitical importance rivers and sources of water. Cities like Los Angeles, San Diego, Phoenix, Tucson, Salt Lake City, Reno, Las Vegas, and Denver are located, as Dan McCool put it, "far beyond the natural supply of water in the area" (2006:162). Not only are these cities built hundreds of miles from reliable water sources, but they also require spectacular environmental engineering in order to sustain and grow (Needham 2014; Ross 2011). Today these cities are especially reliant on waters from the Colorado River. This has put pressures on settler communities to *minimise* (Yazzie 2013), *exclude* (Jones 2011), or otherwise ignore Indigenous water claims in the region (Back and Taylor 1980) while creating political realities in new and expanding appropriations of water that make it difficult for tribes to overcome.[2]

The modernisation of the west required extensive damming of the region's water systems for the expansion of energy production (Needham 2014; Reisner 1993). The Hoover Dam is perhaps the most notorious example of environmental engineering on the Colorado River. Within Arizona, the US Bureau of Reclamation also built the Glen Canyon Dam as part of the Colorado River Storage Project. It was another federal project designed to ensure that upper basin states could divert millions of acre-feet of water from the Colorado River for ranching, farming, and municipal uses. The dam was built on the border of the Navajo Nation and Arizona and created a new city, Page, that has since quantified its claims to the Colorado River while the Navajo Nation still has no determined legal claim to the river (McCool 2006). Dams were built in tandem with quantification of western water "rights" and the extension of a logic of quantification onto tribal rights and jurisdiction completes the enclosure.

At the same time, developers in the Salt River Valley in Central Arizona understood that unless they diverted more water for Phoenix, the future growth of the city would run into naturl limitations. Development required water. Water required infrastructure and environmental transformations. By the mid-1960s, the State of Arizona successfully challenged some of California's claims to the Colorado River, but this legal victory did not guarantee future water for Arizona. Making the water "wet", needed more than a legal victory, it required government spending. To channel Colorado River waters 336 miles upward from its natural flow on the border of Arizona and California toward the Salt River Valley, where Phoenix was built, needed money and energy. The federal government spent

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billions on what is now the Central Arizona Project (CAP). Caro (2012) reports that the Johnson administration agreed to this project in exchange for Arizona votes on civil rights legislations. CAP also required Navajo coal and a forfeiture of rights to the waters of the upper Colorado River in order to assure Colorado politicians downstream use would not increase beyond the terms of the Colorado Compact (Back and Taylor 1980; Greider 1969).

The states excluded tribes from the Colorado Compact and other Congressional acts pertaining to the Colorado River, they created a status for Indigenous people that is both less than the authority of the state governments and not a part of the state's inherent water interest. When state actors discursively discuss tribal water needs, such as former Senator Kyl's request for a "birthday gift" for the State of Arizona in 2012, they are implying the needs of the state's non-reservation communities. Although Arizona claims territories that are tribal reservation lands, when settling water claims Arizona's Congressional representatives undermine the rights of tribes, whose territory is supposedly a part of the state. This colonial difference helps state governments colonise Native lands and resources while denying them representation. State representatives excluded tribes when they originally divided the waters of the Colorado River in 1922, even though the *Winters* decision in 1908 affirmed that Indigenous peoples maintain "reserved" water rights tied to the "purpose" of a reservation. Modern capitalism needs clear delineation of territories and commodities, even fictitious ones (Polanyi 2001). Without the settlement of tribal water rights, it remains hard for state planners to project how much water will be available in the coming years to continue growing cities that are far from the region's limited and unpredictable water sources.

This was the implication of the proposed settlement between the Navajo Nation and the State of Arizona over access to the Little Colorado River. It is why Kyl characterised the settlement as a birthday gift for the state. Settling tribal water claims resolves the uncomfortable ambiguity of developers and state planners over future water resources for the state and the non-Native communities within it—particularly for large cities like Phoenix with water needs that are only increasing. Outside of settlements, there remains the possibility that unquantified tribal rights to the region's waters—rights that precede colonial laws—will disrupt growth and development in the region (e.g. DuMars and Ingram 1980). Like the famous enclosure of the commons, the conquering and dividing of the west's water resources makes capitalism and development possible in the region. For Indigenous people, the enclosure of water resources comes in the form of water settlements that minimise tribal water claims and sanctions existing, extralegal appropriations. Capitalism built on unequal and racialised access to waters is part of the larger story of racial capitalism in the United States (Robinson 1983). Without the denial of Indigenous water rights, capitalism in the region would not exist in its expansive and what many consider unsustainable form (Ross 2011).

The signing of the Colorado Compact was an enclosure on Indigenous water resources and is still the agreement that governs the Colorado River and its tributaries, including the San Juan River. Today, all Indian water settlements must conform to this agreement. When Colorado Basin states met in Santa Fe in 1922 and divided the Colorado River, they denied tribal water rights, governance, and

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juridictions. Even though the language of the agreement explicitly states that it does not affect federal obligations toward tribes, the act of exclusion in this case was a mechanism of enclosure. Tribes were prevented from staking a claim to the waters of the Colorado River and exercising tribal notions of natural law that governed the water prior to European colonisation. The seven basin states divided the entirety of the river to themselves and forced tribes to comport with the agreement. Today, tribes have little with which to negotiate. Tribes can only secure water rights if they abandon difficult legal challenges that already replicate the logics of western water law. In the following example of the San Juan River Settlement of 2005, we see enclosing mechanisms at work.

Enclosure in Detail: The San Juan River Settlement of 2005

The San Juan River is a tributary of the Colorado River and is considered "Upper Basin Water" for the portion of the river that flows through the Navajo reservation. It is also under the jurisdiction of the State of New Mexico. The Navajo Nation originally filed legal claims for waters from the San Juan River in 1975.[3] Other claimants filed motions, discoveries, and counter motions in an effort to maximise their claims to the river. Because of what is called, "McCarran Amendment" in 1952, all water rights litigation involving the federal government must be decided in state courts and not within federal courts, where tribes would prefer to litigate (Burton 1991). Within New Mexico state courts, the Navajo Nation had to present historic evidence of "productive" use of the water, although the tribe had lived in that region since before the United States existed. It speaks to the settler-colonial project of assimilation as a form of erasure meant to guarantee the permanence of the settler on the land and with access to waters (Veracini 2011). *Winters* does not acknowledge the Navajo Nation's much longer, lived history on the land. It is colonial law. Indian water rights are instead bound to the date when reservations were created (ibid.). The San Juan River crosses through parts of the reservation that the federal government established in 1868 and some of the Navajo Nation's claims to the river receive this priority date. Unlike the Little Colorado River, which is mostly dry by the time it reaches the Navajo Nation, the San Juan River runs full most of the year.

The legal-political distribution of water resources imposed upon the Navajo Nation is something Yazzie (2013) characterises as "unlimited limitations". These are tricks used in water settlements to minimise and exclude tribal communities with how much water they can use and limit for what purposes. Kyl used a combination of his power and legal acumen to bully tribes into accepting water deals that ultimately served as colonial enclosures. For tribal lawmakers, parts of the deal were alluring. In a December 2004 internal memo the tribe's lead water rights attorney wrote: "The proposed settlement resolves litigation of the Navajo Nation's water rights claims and guarantees the Navajo People a permanent right to more than half of the water in the basin". Combined with statements warning elected officials about the risk of litigating water claims, it is easy to understand how tribal lawmakers feel persuaded into accepting water settlements. Included

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in the settlement were descriptions of domination, limitation, and exclusion that transform how tribes can relate with their water. For example, the settlement denied, "future municipal & industrial (M&I) use", the driver of capital expansion on the region. "With respect to M&I uses", the tribe "identified a claim for 82,396 [acre-feet-a-year] of diversion with a depletion of 28,220 [acre-feet-a-year], so the settlement appears to represent a significant compromise of the Navajo Nation's M&I claim; however, no court has ever awarded a tribe a substantial M&I water right in addition to water for irrigation". In other words, the settlement allowed the tribe to divert water for commercial agriculture, but not for the expansion of communities or the establishment of new industries (other than coalmines and power plants).

Perhaps the cruellest abuse of power was when Kyl stripped 6411 acre-feet-a-year of potable drinking water designated to the Navajo communities of Window Rock, St. Michaels, and Ft. Defiance that the State of New Mexico agreed to provide in a 2005 water settlement over the San Juan River. Kyl personally dislodged this provision in order to force the Navajo Nation to settle its water claims with the State of Arizona. Kyl made it impossible for Navajo communities in Arizona to receive drinking water through a federally funded pipeline that was already slated to be built through the New Mexico portion of the reservation and connect the bordertown of Gallup, New Mexico with waters from the San Juan River. What the Navajo Nation accomplished through the settlement was called, "an inter-basin transfer of water" that moved waters north of the artificial divide at Lee's Ferry to communities south of it. The basin boundary was a political, not geophysical one, and it was imposed on tribes. For the Navajo Nation, these artificial boundaries not of their making made it legally and politically difficult for tribal communities near a federally funded water project to gain access to it, while bordertowns were quickly incorporated.

The final settlement not only resolved Navajo claims to the San Juan River, but sanctioned non-Native appropriation in the nearby colonial community of Farmington. The San Juan River Settlement awarded the tribe tens of thousands of acre-feet-of-water a year from the San Juan River, but ultimately under the jurisdiction and supervision of the Secretary of Interior and the New Mexico State Engineer to ensure Navajo water uses do not disrupt the river's permanent flow. Perhaps the greatest benefit of the settlement was the federal funding for irrigation and water supply projects the settlement provided. Yet the vast majority of this funding went toward the "Navajo-Gallup Water Supply Project" that served mainly non-Native communities. Despite lending the Navajo name to the water project, the tribe's largest communities have not benefited from it at all. Once the Navajo Nation resolved its claims for the San Juan River with the State of New Mexico, Arizona denied the distribution of water tribes had negotiated until after tribes "resolve" or cease to resist Arizona's colonial claims to the waters of the Colorado River. To this day Navajo communities in Window Rock still rely on a hodgepodge of wells and other less reliable water sources for daily needs even though they are within twenty miles of a major water infrastructure.

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Another facet of colonial enclosures with respect to water rights is not only the amount of rights tribes receive to develop their resources, but also under what conditions tribes can put this water to use. The United States, its institutions, and the state governments favour agricultural purposes. The Navajo Nation had a strong claim to the waters of the San Juan River because of the tribe's historic, "productive" use of it and the Congressional legislation that established the Navajo Indian Irrigation Project in 1962, a large Navajo-owned agribusiness that uses vast quantities of water for commercial monoculture agriculture. When the Navajo Nation and the State of New Mexico agreed to a settlement of their rights to the San Juan River, it was the Navajo Agricultural Products Industry (NAPI), Navajo-owned industrial agriculture, which was able to claim the most water during the settlement process. NAPI is a relatively new user of San Juan River waters with a priority date of 1955. But the doctrine of prior appropriation emphasises productive use in the form of water-intensive agriculture. In the original *Winters* decision, the US Supreme Court reserved Indian water rights to fulfil "the purpose of the reservation".

Barbara Cosens (2002) points out, this "purpose" was left undefined and lacked a clear method of quantification until 1963 when the US Supreme Court introduced the concept of "practicable irrigable acreage" (PIA). PIA has become a limited opportunity for tribes to aggrandise their water claims by participating in industry or commercial agriculture. However, the colonial instinct of state courts is to deny tribal rights and jurisdictions rather than expand new frontiers of capitalism. In the earlier cited 2004 memo, the tribe's water rights attorney wrote that the settlement:

> ... does not include any water for PIA, which is a substantial compromise of the Navajo Nation's claim. However ... the trend in Indian water rights litigation is to reject water rights based on PIA. Indeed, no New Mexico court has awarded an Indian tribe a single acre-foot of water for PIA.[4]

By 2004, New Mexico's main motivation for settling water claims with the Navajo Nation was to get Congressional funding for a "water supply" pipeline from the San Juan River near Farmington, New Mexico to Gallup, New Mexico that was over 100 miles south. This project was estimated to cost $1 billion and, like the Central Arizona Project 40 years prior, it required Congressional funding.[5] In the settlement, the Navajo Nation promised not to litigate its claims to the San Juan River in exchange for a total of 500,000 acre-feet diversion of the river for NAPI, although this included severe "compromises" that limited and directed how the Navajo Nation could use this water.

The Navajo Nation also negotiated "an inter basin transfer of water". The Upper Colorado Basin states agreed that the aforementioned Navajo communities of Window Rock, Ft. Defiance, and St. Michaels could use up to 6411 acre-feet-a-year of Upper Basin Water so long as Arizona agreed to take this out of its Upper Colorado River apportionment (approximately 50,000 acre-feet-a-year). Senator Kyl removed this provision from the Congressional legislation. Even though New Mexico agreed to it, he said that the Navajo communities of Window Rock, Ft. Defiance, and St. Michaels could not receive potable drinking water until the

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Navajo Nation settled *all* of its unresolved water claims with the State of Arizona. He took advantage of the Navajo Nation's lack of political power in the process, that requires Arizona representatives and Congressional approval, and convinced Congress to pass legislation that effectively denied Navajo communities in Arizona—communities he is nominally supposed to represent—desperately needed water access through the Navajo-Gallup Water Supply Line. Seven years later, he stood before Congress pretending to champion Navajo interest through the Little Colorado River Settlement Act, cynically deploying Native poverty and underdevelopment that he had a role in creating (Summit 2012).[6]

With the passage of the "Arizona Water Settlement Act of 2004", Congress granted 200,000 out of Arizona's apportioned 2.8 million acre-feet of Lower Colorado Basin water to resolve Indian water claims, perhaps permanently limiting tribal water rights to a total of 200,000 acre-fee-a-year for all 22 Indian Nations within the state. Presumably, the State of Arizona would get the remaining 2.6 million acre-feet of Colorado River water, with much of it going toward future development that was denied to the Navajo Nation under terms of the San Juan River Settlement. Importantly, the settlement placed colonial conditions on the Navajo Nation for access and use of 6411 from the San Juan River for the Navajo communities of Window Rock, St. Michaels, and Ft. Defiance. The law read: "…the Secretary shall retain 6,411 acre-feet of water for use for a future water rights settlement agreement approved by an Act of Congress that settles the Navajo Nation's claims to water in Arizona".[7]

In the State of New Mexico's "executive summary" of the San Juan River Settlement from April 2005, the state's attorneys reiterated this point in footnote 3 of the document:

> In addition, the Project would divert annually from the San Juan river 6,410 (*sic*) acre-feet for use by the Navajo Nation in Arizona … The diversion of water by the Project for Navajo Nation uses in Arizona would not be included in the Settlement Contract and would not occur until an accounting of the use of the water within the apportionments of Colorado river Basin water made to the State of Arizona through compact, statue or court decree has been resolved and Congress has approved a water delivery contract between the Navajo Nation and the United States for such diversion.[8]

When considering the Arizona Water Settlement Act and the limitations, exclusions, and minimisations it placed on the Navajo Nation and all Arizona tribes, we start to grasp the larger meaning of Indian water settlements for settler-colonial governments. Indian water settlements serve as forms of legal-political enclosure that transforms Indigenous access and uses of the region's surface waters into practices inherently different from previous kinds of jurisdictions and that are fundamentally more limiting. In Indian water settlements, Arizona's Congressional representatives and senators have taken an adversarial role against Navajo water claims, even for communities they are supposed to represent.

In 2010, Kyl rejected a water settlement between the Navajo Nation and Hopi Tribe for the Little Colorado River and Colorado River that was more favourable to tribes. Kyl said he rejected the settlement because it promised too much

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infrastructure for water development that he said was too expensive and served too few people. This settlement would have made it possible for Navajo people in eastern Arizona to access the 6411 acre-feet of water that was promised to them for settling water claims to the San Juan River in 2005. However, for the second time in five years, Senator Jon Kyl denied nearly 7000 Navajo residences in the Window Rock area access to water from the Navajo-Gallup Water Supply line when he rejected the water settlement that both the Navajo Nation and Hopi Tribe passed in their respective governments.

Kyl could do this because colonial jurisdictions grant state governments with powers over tribes (see Corntassel and Witmer 2008). Tribes are denied direct representation in Congress. This inequality perpetuates structural racism that works to dispossess tribes of their historic rights to access regional water sources. Such an inequality allows the State of Arizona to limit, minimise, in a word, enclose upon inherent Indigenous water rights and jurisdictions through the use of Indian water settlements that we see are contrary to the law (i.e. PIA), highly unequal, and operate at the caprice of powerful and rich white men. We see that in the Arizona Water Settlements Act of 2004, Indigenous water claims were limited to no more than 200,000 acre-feet a year for all 22 tribes within the state. It limits future possibilities of growth for tribes while allowing settler communities such as Phoenix or Tucson to expand indefinitely. Indian water settlements become legal-political realities that shape (and limit) what tribes can do with their water. Water settlements between states and tribes are a final realisation of enclosures begun at the advent of colonialisation.

Conclusion

United States water laws are built on "the presumed superiority of white racial identities, however problematically defined, in support of the cultural, political, and economic domination of non-white groups" (Bonds and Inwood 2016:719–720). They are built on a lineage of racism that "have worked simultaneously to other and abject entire peoples so they can be enslaved, excluded, removed, and killed in the name of progress and capitalism" (Byrd 2011:xxiii). In a larger sense, the limitation and minimisation of Indigenous water claims are part of the maintenance and reproduction of racial capitalism in the United States that enclose upon Indigenous water access and use. Evidence from the Gold King Mine Spill in 2014 reminds us that legacies of extractive industries also dispossess future Indigenous generations of lands and waters as much as any other form of colonial appropriation (Montoya 2016; Voyles 2015).

Indian water settlements are forms of colonial enclosures, built on a lineage of law that replicates and perpetuates edicts of dispossession and colonialism that are foundational to the United States. They enclose upon unquantified Indigenous rights to use and access the continent's water resources. We see that the legal-political rationale of "reserved" rights for tribes, which undergird today's water settlements, work in tandem with logics of settler-colonialism that deny tribal jurisdiction over their lands and waters. Within this article, I have argued that Indian water settlements are ultimately a form of colonial enclosure. I suggested

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that lineages of law, building on *Winters*, actively shape, frame, and produce Indigenous environments with respect to use and access to the region's surface waters. Not only do water rights limit tribal access to waters, but also unresolved claims provoke lawmakers to act punitively against tribes. Although tribal officials and lawyers characterise water settlements as ultimately benefiting Indigenous communities, in fact they are profoundly transformative. They are part of one of the last great enclosures on the continent, the enclosure of Indigenous water resources. However, colonialism is not complete and indigenous peoples resist enclosure. Diné scholar Melanie Yazzie (2018) writes that Indigenous peoples are working toward a decolonisation of water that moves beyond simple narratives of healing and inclusion, but maintain political agendas. We see that everyday tribal people are looking toward Indigenous resurgence, or a revitalisation of Indigenous ontologies, governance, and political systems with respect to use and access of land and resources (Simpson 2016). Today Diné people are diverting rain runoffs like those that their ancestors had built for generations to flood fields and support self-sustaining life. Organisations such as *Toh Nizhoni Ani*, Black Mesa Water Coalition, and the Little Colorado River Watershed Chapters Association work to reclaim aboriginal practices around water, regardless of rights. In other words, they fundamentally challenge the premise of water law. As Diné community member and activist Janene Yazzie says, current injustices:

> … This is most important for the millennial generation, who have been taking active roles to build real alternatives to this paradigm, rejecting status quo politics and profit-driven business practices to advance inclusive movements for reform based on the understanding that we are all connected, and we all have a stake and a responsibility to take climate change seriously. (Lister and Curley 2017:7)

Or as Yazzie puts it elsewhere, "the rainbow is our sovereignty" (Powell 2015). This is not to put our faith in false hopes or deny the reality of colonial structures that surround, subsume, and ultimately change us, but it is to articulate pathways toward resistance, resurgence, and liberation that might eventually transform Indigenous and settler-colonial relationships with the land and the environment. With Indian water settlements, the law produces environments that are discriminatory toward tribes. However, we have a choice to accept or deny these laws based on principles of justice.

Endnotes

[1] Jon Kyl retired from the Senate in 2012. He served as "Senior Council" for a prestigious DC-based law firm, Covington & Burling LLP, that works on government regulation of business. In 2014 the Morris Institute at Arizona State University announced the launch of the Kyl Center for Water Policy, named after Jon Kyl for his "leadership" as a water rights attorney and "as a statesman" (see https://morrisoninstitute.asu.edu/news/kyl-center-water-policy-launched [last accessed 16 September 2016]). In the fall of 2018, Arizona Governor Doug Ducey appointed Kyl to the US Senate to finish the term of Senator John McCain who died on 25 August 2018.

[2] Beyond the Colorado Compact of 1922, Back and Taylor (1980) also identify the "Boulder Canyon Act" of 1928, the "Upper Colorado River Basin Compact" of 1948, the "Colorado River Storage Protection Act" of 1956, and the "Colorado River Basin Project Act" of

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1968 as dividing and regulating the use of the Colorado River without making any specific quantification of Native water rights.
[3] From a 26 December 2010 Navajo Nation Press Release from the Office of the President and Vice President (NNOPVP) commemorating federal funding for a water pipeline project.
[4] "Briefing on proposed San Juan River Basin in New Mexico Navajo Nation Water Right Settlement", dated December 2004.
[5] From a 26 December 2010 Navajo Nation Press Release from the Office of the President and Vice President (NNOPVP) commemorating federal funding for a water pipeline project.
[6] See https://www.c-span.org/video/?304414-2/senate-session-part-2 (last accessed 22 February 2019).
[7] See https://www.govtrack.us/congress/bills/108/s437/text/is (last accessed 22 February 2019).
[8] See http://www.ose.state.nm.us/Legal/settlements/NNWRS/NavajoSettlement/NavajoExecutiveSummary.pdf (last accessed 16 September 2016).

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