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Protecting Traditional Water Resources: Legal Options for Preserving Tribal Non-Consumptive Water Use

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Protecting Traditional Water Resources: Legal Options for Preserving Tribal Non-Consumptive Water Use

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I. INTRODUCTION

The law governing the quantification and use of tribal water rights is complex and inconsistent, creating major challenges for tribes working to gain control over and make use of their water resources. There are even greater challenges a tribe must overcome if it wishes to safeguard non-consumptive water uses not generally protected under Western water law regimes. Non-consumptive water uses include any use that does not require removing water from the natural water body.[1] Such uses include protecting in-stream water flows for fisheries, riparian habitat, traditional plants, ceremonial uses, or recreation. There are legal tools available to tribes, however, which can accomplish non-consumptive tribal water resource management goals. This article will describe and explore the pros and cons of several to those options.[2]

This article will proceed by first describing the federal law that governs special tribal territory and resources, or Indian federally reserved rights. The article will then present the state of federal law governing tribal non-consumptive water use as it interacts with and has been applied within Western prior appropriation state water law systems. The article then describes the pros and cons to five major strategies available to tribes wishing to protect their non-consumptive water resources on or near their reservations: first, negotiating water settlement agreements to include in-stream flows or other non-consumptive use protections; second, developing tribal water codes that protect and allocate resources to non-consumptive use; third, irrigating for in-stream flows or traditional plants,

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1. *See* CHRISTINA LEB, COOPERATION IN THE LAW OF TRANSBOUNDARY WATER RESOURCES 18 n.16 (2013).

2. The substance of this article is based in large part on a policy handbook I co-authored in 2014 with Julie Nania, a former research faculty member at the Getches-Wilkinson Center. The handbook, titled *Restoring Sacred Waters: A Guide to Protecting Tribal Non-Consumptive Water Uses in the Colorado River Basin*, is designed for use by tribal officials and policymakers to consider the options for, and limits on, the development of tribal water law and policy when seeking to protect non-consumptive water uses, such as in-stream flows. The project was funded by the Wallace Foundation, and was designed to specifically address water resource challenges faced by tribes reliant on the Colorado River Basin, although it is in many ways applicable to tribal communities throughout the West. This article differs from the handbook in that it is written for a legal audience, and thus will focus more closely on the legal and policy tools available to tribes' legal council as opposed to the larger-picture considerations designed for a broader tribal audience in the handbook. *See* JULIE NANIA & JULIA GUARINO, RESTORING SACRED WATERS: A GUIDE TO PROTECTING TRIBAL NON-CONSUMPTIVE WATER USES IN THE COLORADO RIVER BASIN (2014), *available at* http://www.waterpolicy.info/docs/Restoring_Sacred_Waters_Nania_Guarino2014.pdf.

or both; fourth, leveraging federal laws that tangentially protect non-consumptive water use; and fifth, implementing tribal conservation easements.

II. INDIAN FEDERALLY RESERVED RIGHTS

Federal law defines the relationship between tribes and the federal government broadly, while each tribe's territory and specific reserved rights are generally described in treaties or treaty-like agreements signed with the federal government.[3] A robust body of federal law further delimits the power of the resulting treaty-based reserved rights to which individual tribes are entitled, including water rights. This section of the article will describe Indian federally reserved rights generally, followed by a more detailed explanation of federally reserved water rights in the subsequent section.

There are 567 federally recognized tribal governmental organizations.[4] A list of these federally recognized tribes is published in the Federal Register each year.[5] This list designates the tribal communities that are "eligible . . . for all Federal services and benefits furnished to federally recognized Indian tribes or their members."[6] Federally recognized tribes are sovereign governmental entities, with the right to self-determination—the power to make laws and be governed by them.[7]

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3. *See* Charles Wilkinson & John Volkman, *Judicial Review of Indian Treaty Abrogation: As Long as Water Flows, or Grass Grows upon the Earth--How Long a Time is That*, 63 CAL. L. REV. 601, 616-17 (1975) ("[t]he same standards of construction that are applied to treaties have been applied to executive orders, statutes, agreements and secretarial withdrawal. Thus the rule has developed that the specific method of setting land aside for tribes is not determinative; the test is whether it was intended that a reservation be established-set apart for the use of Indians-and, if such intent existed, the special rules of construction and other Indian law principles are applicable.")

4. Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 80 Fed. Reg. 1942 (Jan. 14, 2015); Final Determination for Federal Acknowledgment of the Pamunkey Indian Tribe, 80 Fed. Reg. 39,144 (July 8, 2015).

5. In accordance with Pub. L. No. 103-454, 108 Stat. 4791, 4792 (1994).

6. 25 U.S.C. § 1300m–1(c)(2012). There is an intensive process that unrecognized tribal communities must undergo in order to receive recognition. *See* 25 C.F.R. 83 (1994).

7. In a series of cases known as the "Marshall Trilogy" in the first part of the Nineteenth Century, the Supreme Court of the United States laid out the nature of tribal entities in relation to federal and state governments. In the first case, *Johnson v. M'intosh*, 21 U.S. 543 (1823), the court held that the federal government is the sole entity that can purchase tribal land and extinguish tribes' "right of occupancy." *Id.* at

There are some limits to this right, however. The most consistently present limit is Congress's plenary power over tribes,[8] which permits that Congress may at any time make laws that unilaterally alter tribal treaty rights.[9] This is countered by an accompanying "trust responsibility" by the federal government to tribes,[10] which resembles a "guardian to ward" relationship.[11] As part of the "trust responsibility," the federal government also holds tribal property "in trust" for tribal entities or individual tribal members, the collective sum of which makes up a tribe's reservation.[12] Property in trust is not taxable in most instances,[13] but tribes must seek federal approval before they can sell trust property.[14] Tribal reservations lie within state borders, and like states, are subject to federal law, but are not generally subject to state law, unless explicitly authorized by Congress.[15]

Over the course of United States history, the Supreme Court of the United States has produced a robust body of case law affirming the federal government's trust responsibility, and the power of treaty rights. The Court has developed three major legal principles[16] that govern treaty interpretation: first, Indian treaties must be interpreted in the way in which the tribe would have understood them;[17] second, ambiguous treaty terms

562. In the second case, *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831), the Court held that the Cherokee Nation was a "domestic dependent nation" and likened its relationship to the federal government to ward and guardian. The third case, *Worcester v. Georgia*, 31 U.S. 515 (1832), held that states do not have authority to enforce laws within tribal territory.

8. Warren Trading Post v. Ariz. State Tax Comm'n, 380 U.S. 685 (1965).

9. *See* Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

10. *See, e.g.*, United States v. Navajo Nation, 537 U.S. 488, 490, 515-16 (2002); Morton v. Mancari, 417 U.S. 535, 553-55 (1974); United States v. Sandoval, 231 U.S. 28, 39 (1913).

11. *Cherokee Nation*, 30 U.S. at 13.

12. Not all federally recognized tribes have reservation territory held in trust. *See* Bureau of Indian Aff., *Frequently Asked Questions*, U.S. DEP'T OF THE INTERIOR, http://www.bia.gov/FAQs/ (last visited Mar. 17, 2016).

13. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, § 8.03, 696-718 (Nell Jessup Newton ed., 2012) [hereinafter COHEN'S].

14. 25 U.S.C. § 177 (2015).

15. *See* Rice v. Olson, 324 U.S. 786, 789-90 (1945).

16. *See* Wilkinson & Volkman, *supra* note 3, at 617.

17. *See, e.g.*, Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970).

must be resolved in the tribe's favor;[18] and third, treaties must generally be construed liberally in favor of the tribe.[19]

The seminal Supreme Court case that describes the nature of Indian treaty-based reserved rights is *United States v. Winans*.[20] In 1905, the Yakama Nation found itself in dispute with private landowners holding property along the Columbia River in Washington State, where the tribe had traditionally fished for salmon.[21] The Yakama's treaty stated that the tribe retained "the right of taking fish at all usual and accustomed places."[22] The Supreme Court upheld the tribe's right to continue to fish at traditional sites despite their ownership by private citizens, acknowledging that the fish "were not much less necessary to the existence of the Indians than the atmosphere they breathed."[23] The Court further explained that "the treaty was not a grant of rights to the Indians, but a grant of right from them,-a [sic] reservation of those not granted."[24] The implication of this holding is that tribes have the right to continue to make traditional use of resources as long as neither the tribe nor Congress has expressly ceded that right. The Court clarified that this means that conflicting state-based rights cannot impede tribal use of treaty-based Indian federally reserved rights.[25]

In summary, tribal treaty-based federally reserved rights generally require explicit abrogation by the federal government or the tribe before they can be extinguished.[26] Water rights are a powerful example of treaty-based federally reserved rights, and are described in the following section.

III. *WINTERS* RIGHTS

Tribes may hold state-based water rights like any other individual or entity, but there is a unique type of water right that only federally recognized tribes may hold. These unique water rights are called Indian federally reserved water rights or *Winters* rights, based on the first

18. *See, e.g.*, McClanahan v. State Tax Comm'n of Ariz., 411 U.S. 164, 174 (1973).

19. *See, e.g.*, Choctaw Nation v. United States, 318 U.S. 423, 431-32 (1943).

20. 198 U.S. 371 (1905).

21. *Id.* at 377.

22. *Id.* at 378.

23. *Id.* at 381.

24. *Id*.

25. *Id.* at 382-83.

26. *See, e.g.*, Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 690 (1979).

Supreme Court case articulating this legal doctrine, *Winters v. United States*.[27]

Winters concerned a dispute between the Gros Ventre and the Assiniboine Tribes of the Fort Belknap Indian Reservation and a group of non-Indian homesteaders upstream on the Milk River, in Northeastern Montana.[28] The Tribes had been living in the area for hundreds of years, and were making use of water from the Milk River for irrigation and domestic purposes prior to the arrival of the homesteaders.[29] The homesteaders argued that their water rights were nonetheless superior to those of the Tribes because they had been properly established and recorded according to state law, whereas the Tribes' rights had not.[30] The Supreme Court rejected the arguments of the homesteaders, holding that along with their reservation lands, the federal government had impliedly reserved to the Indians the right to enough water to make their arid reservation habitable under the federal reserved rights doctrine.[31]

A. Quantifying Winters *Rights*

Although *Winters* held in 1908 that treaties implicitly reserved enough water to make a tribe's reservation habitable, the first Supreme Court case to consider a specific method of quantifying tribal reserved rights was *Arizona v. California*, in 1963.[32] In *Arizona*, the Court's task was to quantify the rights of Colorado River water users on the stretch of river spanning the border shared by the states of Arizona and California, including the reservations of five federally recognized Indian tribes.[33] The Special Master appointed to the case quantified the tribes' *Winters* rights

27. 207 U.S. 564 (1908).

28. *Id.* at 565.

29. *Id.* at 566-67.

30. *Id.* at 569.

31. *Id.* at 576-77("[t]he Indians had command of the lands and the waters—command of all their beneficial use, whether kept for hunting, 'and grazing roving herds of stock,' or turned to agriculture and the arts of civilization. Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate? . . . [I]t would be extreme to believe that within a year Congress destroyed the reservation and took from the Indians the consideration of their grant, leaving them a barren waste,—took [sic] from them the means of continuing their old habits, yet did not leave them the power to change to new ones.")

32. Arizona v. California, 373 U.S. 546 (1963), *judgment entered*, 376 U.S. 340 (1964), *amended*, 383 U.S. 268 (1966), *amended*, 466 U.S. 144 (1984).

33. These were the Chemehuevi Indian Tribe, Cocopah Indian Tribe, Quechan Indian Tribe, Colorado River Indian Tribes, and Fort Mojave Indian Tribe. *Arizona*, 466 U.S. at 144.

by calculating the "practically irrigable acreage" ("PIA") of each reservation.[34] The Special Master concluded that using the PIA would assure that the amount of water reserved to each tribe would "satisfy the future as well as the present needs of the Indian Reservations."[35] Arizona challenged this method of calculation, arguing that it reserved too much water for the tribes, but the Supreme Court affirmed the Special Master's use of the PIA to quantify *Winters* rights.[36] The Court concluded that "the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage."[37] Other cases, however, have departed from the PIA standard.[38]

Many tribes in the United States have not had their *Winters* rights quantified, and are not using large portions of the water they are likely entitled to under the law.[39] This deeply complicates water management in and around Indian Country, especially as water becomes ever more scarce in the West as a result of climate change and long-term drought.[40]

B. Non-Consumptive Uses and Winters *Rights*

As discussed in the preceding sub-section, strong case law provides guidance on quantifying *Winters* rights but less clarity on whether there are limits to how *Winters* rights may be used. There are two major federal appeals court cases that have considered non-consumptive use of other federally reserved water rights: *Cappaert v. United States*[41]

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34. 373 U.S. at 596.

35. *Id.* at 600.

36. *Id.* at 598-99 ("[m]ost of the land in these reservations is and always has been arid. If the water necessary to sustain life is to be had, it must come from the Colorado River or its tributaries. It can be said without overstatement that when the Indians were put on these reservations they were not considered located in the most desirable area of the Nation. It is impossible to believe that when Congress created the great Colorado River Indian Reservation and when the Executive Department of this Nation created the other reservations they were unaware that most of the lands were of the desert kind—hot, scorching sands—and that water from the river would be essential to the life of the Indian people and to the animals they hunted and the crops they raised.")

37. *Id.* at 601.

38. *See, e.g.*, United States v. Adair, 723 F.2d 1394 (9th Cir. 1983).

39. Daniel Cordalis & Amy Cordalis, *Indian Water Rights: How* Arizona v. California *Left an Unwanted Cloud Over the Colorado River Basin*, 5 ARIZ. J. OF ENVT'L L. & POL'Y 333, 335-36 (2015).

40. *See generally* Sarah Krakoff, *American Indians, Climate Change, and Ethics for a Warming World*, 85 DENVER U. L. REV. 865 (2008).

41. 426 U.S. 128 (1976).

and *United States v. New Mexico*.[42] Although other types of federally reserved rights differ from *Winters* rights, some courts have nonetheless occasionally looked to these cases to limit tribal non-consumptive water uses.[43]

In *Cappaert*, the Supreme Court held that all federal land withdrawals are accompanied by an implied reservation of "appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation."[44] The case arose because the Cappaert family was pumping ground water from a state-permitted irrigation well adjacent to the Devil's Hole National Monument, which was drawing down an underground pool that was the spawning ground for the endangered Devil's Hole pupfish.[45] The 1952 Proclamation that established the monument "discussed the pool in Devil's Hole in four of the five preambles and recited that the 'pool . . . should be given special protection.'"[46] The Court held that the monument had a reserved water right for a water level in the pool sufficient to allow the Devil's Hole pupfish to spawn.[47]

Several years after the *Cappaert* decision, the Supreme Court refused to recognize water for in-stream flow for wildlife and recreational purposes in *New Mexico*.[48] *New Mexico* concerned the federally reserved water rights of the Gila National Forest, which was established in 1899.[49] The Court, in quantifying the forest's reserved water rights, held that they were limited to the original, primary purposes of the reservation.[50] The Court concluded that although the Multiple-Use Sustained-Yield Act of 1960 declared that the purposes of all national forests include recreation and wildlife, these were merely "secondary purposes" for which the United States must seek additional water rights through the state appropriation system.[51]

In *United States v. Adair*, the Unites States Court of Appeals for the Ninth Circuit made use of *Cappaert* and *New Mexico* to inform their

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42. 438 U.S. 696 (1978).
43. *See, e.g.*, *Adair*, 723 F.2d at 1408-09.
44. 426 U.S. at 138.
45. *Id.* at 133.
46. *Id.* at 139-40 (quoting Addition of Devil's Hole, Nevada, to Death Valley National Monument – California and Nevada, Proclamation No. 2961 (Jan. 17, 1952)).
47. *Id.* at 147.
48. 438 U.S. at 697-98.
49. *Id.*
50. *Id.* at 714.
51. *Id.* at 713-17.

decision regarding the Klamath Indian Tribe's *Winters* rights.[52] Although the court acknowledged that the cases concern non-Indian federally reserved water rights and are not directly applicable to *Winters* rights cases, it nonetheless found that they serve as guidance for Indian reserved water rights and "indicate that water may be reserved under the *Winters* doctrine only for the primary purposes of a federal reservation."[53] The court went on to expansively interpret the meaning of "primary purpose" of the Klamath Reservation to include serving as an agricultural "homeland" and preserving the Tribes' traditional hunting and fishing practices.[54] The court in *Adair* thus established the only precedent for non-consumptive *Winters* rights, by holding that a tribe with federally reserved fishing rights[55] has an accompanying right to sufficient water to sustain that fishery.[56] The Ninth Circuit again affirmed that principle in *Colville Confederated Tribes v. Walton*, the certiorari petition for which was denied by the Supreme Court.[57]

The Ninth Circuit also concluded in the 1984 case *United States v. Anderson* that a tribe may make use of its irrigation rights for non-consumptive use if it so chooses.[58] Two state court adjudications[59] have, however, considered whether tribes may use their *Winters* rights for non-consumptive purposes and come to very different conclusions.[60] These cases, and the other factors that determine the extent of a tribe's jurisdictional control over its *Winters* and other water rights are considered in the following section.

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52. 723 F.2d at 1408-09.

53. *Id.*

54. *Id.* at 1410.

55. Most of the reservations in what were formerly the Northwest Territories of the United States were established in treaty negotiations during the mid-1800s with Governor Isaac Stevens. Stevens included the language that tribes retained "the right of taking fish in all the usual and accustomed places" in almost every treaty he negotiated. This language has proved powerful, interpreted by the Supreme Court to mean that tribes retained a right to fish despite conflicting state-law-based property rights. *See Fishing Vessel*, 443 U.S. at 680.

56. *Adair*, 723 F.2d at 1414.

57. Colville Confederated Tribes v. Walton, 647 F.2d 42, 49 (9th Cir. 1981), *cert. denied*, 454 U.S. 1092 (1981).

58. United States v. Anderson, 736 F.2d 1358, 1365 (9th Cir. 1984).

59. The McCarran Amendment granted state courts jurisdiction over federally reserved water rights. 43 U.S.C. § 666 (2012); *see infra* Section IV(B), for a more detailed discussion of The McCarran Amendment.

60. *In re* General Adjudication of All Rights to Use Water in the Big Horn River Sys., 835 P. 2d 273, 275 (Wyo. 1992) [hereinafter *Bighorn River Adjudication*]; *In re* General Adjudication of All Rights to Use Water in Gila River Sys. & Source, 35 P.3d 68, 315-19 (Ariz. 2002) [hereinafter *Gila River Adjudication*].

IV. TRIBAL JURISDICTION OVER ON-RESERVATION WATER RIGHTS

There are two key cases that have shaped tribes' abilities to govern within their borders, the first concerning tribal criminal jurisdiction,[61] and the second concerning tribal civil jurisdiction.[62] Tribes share criminal jurisdiction over tribal members with the federal government.[63] Prior to the Supreme Court's 1978 opinion in *Oliphant v. United States,* tribes, like states and foreign governments, could also presumably enforce criminal laws against non-Indians within reservation boundaries.[64] In *Oliphant*, the Supreme Court held that the tribe could not enforce its criminal laws against two non-Indian defendants, even though both defendants lived and had broken laws within the boundaries of the Port Madison Indian Reservation.[65] The court concluded that the federal government had exclusive jurisdiction over non-Indian crime within reservation boundaries unless and until Congress specifically chose to authorize tribal criminal jurisdiction over non-Indians.[66] Although water law is largely civil in nature, this case restricts tribal sovereignty in ways that affect tribes' abilities to govern and control resource use and conflicts within their territories by preventing tribes from imposing criminal penalties for violations of law on the reservation, including those involving water.

Before the Supreme Court articulated its doctrine on tribal civil jurisdiction, tribal courts also presumably had civil jurisdiction over non-Indians living or acting within tribal boundaries, as states and foreign governments do. However, the Supreme Court strictly limited tribal civil jurisdiction over non-Indians in the 1981 case *Montana v. United States*.[67] In *Montana*, the Court held that tribes generally do not have civil jurisdiction over non-Indians, except in two exceptional circumstances.[68] The first exception is in the case of a "consensual relationship" with the tribe,[69] and the second is when a non-Indian's conduct "threatens or has some direct effect on the political integrity, the economic security, or the

61. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).
62. Montana v. United States, 450 U.S. 544 (1981).
63. *Oliphant*, 435 U.S. at 210-11.
64. *Id*. at 211-12.
65. *Id*.
66. *Id*. For instance, the Violence Against Women Reauthorization Act of 2013 specifically grants tribes jurisdiction over non-Indians who commit domestic violence within reservation boundaries under certain circumstances. Violence Against Women Reauthorization Act, Pub. L. No. 113-4, 127 Stat. 54, 121 (2013).
67. 450 U.S. 544.
68. *Id*. at 565-66.
69. *Id*. at 565.

health or welfare of the tribe."[70] This second exception has allowed tribes to develop some creative means to conduct business and protect resources on their reservations, including water.[71]

The application of the *Montana* exceptions to water resources, however, has not been straightforward for tribes. The federal trust obligation comes with both benefits and drawbacks for tribal authority over resources. Tribes can also hold state-based water rights above and beyond their *Winters* rights, and individuals can hold state-based water rights within reservation boundaries. These considerations lead to a handful of questions about jurisdictional authority. The following subsections will ask and answer: first, what is the extent of federal authority over tribes' *Winters* rights?; second, do states have any authority over *Winters* rights?; and third, do tribes have civil jurisdiction over state-based water rights within reservation boundaries?

A. What is the Extent of Federal Authority Over Tribes' Winters *Rights?*

As with other Indian law issues, Congress has plenary power to regulate Indian water rights, and to make unilateral decisions that govern those rights.[72] This means that Congress, if it so chooses, may alter or abrogate tribal treaty rights to water resources, including tribal use and control of those rights.[73] Furthermore, a tribe may not sell, lease, or otherwise encumber tribal trust property, including *Winters* rights, without prior federal consent.[74] Therefore, tribes must seek federal approval before entering into a water rights settlement or any other lease or encumbrance of their *Winters* rights.[75] Additionally, some tribal constitutions require the Secretary of the Interior's ("Secretary") approval before a tribe can implement a water law code.[76] In 1975, then-Secretary Roger Morton

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70. *Id*. at 566.

71. *See*, e.g. Montana v. U.S. EPA, 137 F.3d 1135 (9th Cir. 1998) (holding that the Confederated Salish and Kootenai Tribes' water quality standards should be upheld because they met the criteria of the second exception articulated in *Montana v. United States*).

72. *See infra* Section II, (discussing the federal trust obligation to tribes and Congress' plenary authority over Indian affairs.)

73. *See, e.g.*, *Adair*, 723 F.2d at 1412.

74. 25 U.S.C. § 177.

75. For further information on the application of the trust doctrine to *Winters* rights, *see* Judith V. Royster, *Indian Water and the Federal Trust: Some Proposals for Federal Action*, 46 NAT. RESOURCES J. 375 (2006).

76. Many tribes established formal governance structures, including standardized constitutions, under the Indian Reorganization Act of 1934. 25 U.S.C. §§ 461–479 (2012). Many of these constitutions included the provision: "any resolution

issued a moratorium on tribal water code approvals, which remains in place today.[77]

B. Do States Have Any Authority over Winters *Rights?*

The *Winters* doctrine ties tribal water rights to tribal treaties, reservation purposes, and traditional uses, and is sometimes at odds with the state systems of "prior appropriation" generally applicable to water users in the Western United States.[78] State law does not apply, in most circumstances, to tribal land,[79] and state water law does not apply to tribal *Winters* rights.[80] However, a 1952 Congressional Amendment, often referred to as the McCarran Amendment, requires that federally based rights be included in state stream-wide adjudications.[81] The Supreme Court concluded in *Arizona v. San Carlos Apache Tribe of Arizona* that the McCarran Amendment applies to *Winters* rights in addition to other federally reserved water rights.[82] The Court reasoned that because tribal rights often come out of shared water resources, state adjudication of *Winter* rights would allow for them to be qualified and assigned a priority date within the "first in time, first in right" system.[83] The priority date of *Winters* rights is often the date of the reservation, but sometimes it is "time immemorial," both of which typically amount to first priority.[84]

Although the McCarran Amendment serves a practical purpose, there are some challenges for tribes when state courts control the

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or ordinance which, by the terms of this Constitution, is subject to review by the Secretary of the Interior, shall be presented to the Superintendent of the Reservation, who shall, within ten (10) days hereafter, approve or disapprove of the same." *See, e.g.*, BLACKFEET NATION, CONSTITUTION AND BY-LAWS FOR THE BLACKFEET TRIBE OF THE BLACKFEET INDIAN RESERVATION OF MONTANA art. VI (Dec. 13, 1934), http://blackfeetnation.com/government/constitution.

77. Memorandum from Rogers C.B. Morton, Sec'y of the Interior, to the Commn'r of Indian Aff., *Tribal Water Codes* (Jan. 15, 1975), *in* TASK FORCE FOUR: FEDERAL, STATE, AND TRIBAL JURISDICTION: REPORT ON FEDERAL, STATE, AND TRIBAL JURISDICTION: FINAL REPORT TO THE AMERICAN INDIAN POLICY REVIEW COMMISSION 163 (1976), *available at* http://archive.org/stream/reporals00unit#page/n1/mode/2up.

78. *See* DAVID H. GETCHES, WATER LAW IN A NUTSHELL 340-41 (4th ed. 2009).

79. *See* COHEN, *supra* note 13, at § 6.01[2], 492-96.

80. *See generally Winters*, 207 U.S. 564.

81. 43 U.S.C. § 666 (2012).

82. Arizona v. San Carlos Apache Tribe of Ariz., 463 U.S. 545, 549 (1983).

83. *See* COHEN, *supra* note 13, at § 19.01, 1204-06.

84. *Id.*

adjudication of *Winters* rights. Most prominent among these is a lack of clarity in the law concerning the application of state water law restrictions and principles when a state court is considering the quantification and use of *Winters* rights.[85] The basic tenets of federal Indian law, including tribal sovereignty, the rules of treaty interpretation, and the federally reserved rights doctrine would all indicate that tribes have full authority over their *Winters* rights within reservation boundaries. However, the Supreme Court of Wyoming held in a 1992 case that the Wind River Tribes were required to go through the state legal system in order to change the use of their *Winters* rights from irrigation to any other use.[86] The court relied on the primary versus secondary purpose of the reservation test in *New Mexico*,[87] and held that the primary purpose of the Wind River Reservation was exclusively agricultural.[88] The United States Supreme Court, without issuing an opinion, upheld Wyoming's decision, which has left the law in a state of some confusion.[89] There is very little in federal case law that would support Wyoming's interpretation,[90] but no subsequent United States Supreme Court case has overturned it.

Other courts have rejected Wyoming's interpretation.[91] In *United States v. City and County of Denver,* the Colorado Supreme Court explained, "[o]nce the federal right has been quantified, that amount is then outside the state appropriation system."[92] During the Gila River Adjudication, the Arizona Supreme Court specifically rejected the Wyoming Supreme Court's approach, holding that *New Mexico*'s primary purpose of the reservation test does not apply to *Winters* rights.[93] Furthermore, the Arizona Supreme Court held that the purpose of Indian reservations is to reserve a permanent homeland for tribes, which necessarily requires that tribes be able to make relevant use of their *Winters* rights.[94]

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85. *See Bighorn River Adjudication*, 835 P.2d 273; *but see* United States v. City and Cnty. of Denver, 656 P.2d 1, 34-35 (Colo. 1982); *Gila River Adjudication*, 35 P.3d at 76.

86. *Bighorn River Adjudication*, 835 P.2d at 275.

87. *New Mexico*, 438 U.S. at 713-717.

88. *Bighorn River Adjudication*, 835 P.2d at 278.

89. Wyoming v. United States, 492 U.S. 406 (1989).

90. *See* Judith V. Royster, *A Primer on Indian Water Rights: More Questions than Answers*, 30 TULSA L.J. 61, 79-81 (1994).

91. *See, e.g.*, *City and Cnty. of Denver*, 656 P.2d at 34-35; *Gila River Adjudication*, 35 P.3d at 76.

92. *City and Cnty. of Denver*, 656 P.2d at 34-35.

93. *Gila River Adjudication*, 35 P.3d at 76.

94. *Id*. at 76.

Under the reserved rights doctrine and canons of treaty interpretation, tribes retain any authority that they have not explicitly ceded and that no act of Congress has abrogated.[95] This has not, however, prevented contradictory case law from arising, and is one reason why many tribes turn to non-litigation avenues to negotiate protection and control over their *Winters* rights.[96]

C. Do Tribes Have Jurisdiction Over State-Based Water Rights Within Reservation Boundaries?

The Supreme Court has yet to address tribal authority over water resources within reservation boundaries in excess of the tribe's *Winters* rights. Lower courts remain split on the issue of whether tribes have civil jurisdiction to regulate state-based water rights within reservation boundaries under the exceptions described in *Montana v. United States*.[97] The question that emerges from *Montana* is: does tribal regulation of water use within reservation boundaries constitute an issue that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe?"[98]

Courts have not always agreed on the answer to this question in the context of water rights.[99] In *Colville Confederated Tribes v. Walton*, the Ninth Circuit held that the Confederated Tribes of the Colville Reservation retained jurisdiction over No Name Creek, which lies fully within the boundaries of the Tribes' reservation.[100] The court reasoned that water use by non-Indians within reservation boundaries threatened tribal fisheries, and thus was an important aspect of sovereignty reserved to the tribe.[101] However, the Ninth Circuit came to the opposite conclusion in *United States v. Anderson*, holding that the Spokane Tribe of Indians did not have jurisdictional authority over state-based water rights on fee land within the reservation boundaries.[102] The court reasoned that the Tribe lacked jurisdiction because no consensual agreement existed between the non-tribal water users and the Tribe, the state interest in the regulation was

95. *See supra* Section II.

96. *See generally* Celene Hawkins, *Beyond Quantification: Implementing and Sustaining Tribal Water Settlements*, 16 U. DENV. WATER L. REV. 229 (2013).

97. *Montana*, 450 U.S. at 565-66.

98. *Id*.; *see supra* Section IV.

99. *See Colville*, 647 F.2d at 52; *Anderson*, 736 F.2d at 1365-66.

100. *Colville*, 647 F.2d at 51-53.

101. *Id*. at 52.

102. *Anderson*, 736 F.2d at 1361, 1365.

great, and the Tribe's rights would not be impaired by state regulation.[103] The court further distinguished the facts of *Anderson* from *Colville Confederated Tribes*, given that the river in *Colville Confederated Tribes* flowed almost entirely outside of reservation boundaries and reasoning that state regulations in this case were sufficient to protect the Tribe's *Winters* rights.[104]

Both *Colville Confederated Tribes* and *Anderson* rely heavily on geographical facts to determine whether the tribe or the state has authority to regulate water resources within reservation boundaries.[105] Neither case suggests that states can reach into the reservation to regulate tribal use of *Winters* rights, nor do they address a scenario in which the tribe is the state-based rights holder itself.[106]

V. VARIOUS LEGAL STRATEGIES AVAILABLE TO TRIBAL GOVERNMENTS FOR NON-CONSUMPTIVE USE PROTECTIONS

Given the complicated nature of law and jurisdiction that applies to *Winters* rights, tribes must carefully consider their options for managing their resources based on which court opinions apply to their reservation.[107] Tribes throughout the West have developed creative solutions to circumnavigate barriers to non-consumptive water uses and protections.[108] This section of the article will present four major strategies for tribes wishing to protect non-consumptive water uses on or near their reservation: first, negotiating water settlement agreements to include in-stream or other non-consumptive use protections; second, developing a tribal water code that protects and allocates resources to non-consumptive use; third, irrigating for in-stream flows or traditional plants; fourth, leveraging federal laws that tangentially protect non-consumptive use; and fifth, creating tribal conservation easements.[109] This section will present the advantages and disadvantages of each of these strategies in turn.

A. Negotiating Water Settlement Agreements to Include In-Stream or Other Non-Consumptive Use Protections

103. *Id*. at 1365.

104. *Id*. at 1365-66.

105. *See Colville*, 647 F.2d at 52; *Anderson*, 736 F.2d at 1365-66.

106. *See generally Colville*, 647 F.2d 42; *Anderson*, 736 F.2d 1358.

107. For example, the Wind River Tribes in Wyoming are subject to the Wyoming Supreme Court's holding in *Bighorn River Adjudication*, and thus must go through the state change of use system in order to apply their *Winters* rights to any use other than agriculture. *Bighorn River Adjudication*, 835 P.2d at 275.

108. *Restoring Sacred Waters* provides several examples. NANIA & GUARINO, *supra* note 2.

109. *Id.* at 53-100.

Negotiating non-consumptive protections as part of water rights settlements is fairly straightforward to describe and extremely difficult to address—it often takes decades for a tribal water settlement to gain congressional approval.[110] Nonetheless, there are several advantages that settlement provides for a tribe wishing to protect its non-consumptive water uses.[111] Settlement can assist a tribe in avoiding the uncertainty of federal law concerning non-consumptive water uses. Furthermore, the tribe, the state, the federal government, and other interested parties can craft an agreement that protects the needs of all who are affected. Settlements can include, for example, clarification of the rights and roles of the various parties in spite of contradictory case law. However, most tribes give up a portion of the water to which they have a legal right during these types of negotiations, often in exchange for infrastructure funding or other financial support from the federal government.[112] This section will provide brief descriptions of two tribal water settlement examples: the Zuni Indian Tribe Water Rights Settlement Act of 2003 and the water rights compact entered into by the Confederated Salish and Kootenai Tribes of the Flathead Reservation, the State of Montana, and the United States. [113]

The Zuni people have been connected to the sacred lake at Zuni Heaven since time immemorial, and continue to undertake ceremonial pilgrimage to Zuni Heaven in Arizona from their reservation in New

110. For example, the State of Montana has negotiated reserved water rights compacts with all of the federally recognized Indian Tribes with reservations within the state's boundaries. Mont. Dep't of Natural Res. & Conservation, *Reserved Water Rights Compact Commission*, STATE OF MONT., http://dnrc.mt.gov/divisions/reserved-water-rights-compact-commission (last visited Mar. 17, 2016). These negotiations were begun in 1979 and the final negotiation, with the Confederated Salish and Kootenai Tribes, was completed as of 2015. *Id.*

111. For more information on tribal settlement negotiations, including non-consumptive use protections, *see* BONNIE G. COLBY, JOHN E. THORSON & SARAH BRITTON, NEGOTIATING TRIBAL WATER RIGHTS: FULFILLING PROMISES IN THE ARID WEST (2005).

112. *See*, e.g. John Rulpe, *The Navajo-Gallup Project: Legality of Intrastate/Interbasin Diversions Under the Colorado River Compact*, 24 J. LAND, RESOURCES, & ENVT'L L. 475 (2004).

113. *Restoring Sacred Waters* provides a detailed discussion of various provisions that a tribe might consider including in its settlement agreement in order to provide non-consumptive use protections, and describes two examples of tribal settlement negotiations that protected tribal non-consumptive water uses. NANIA & GUARINO, *supra* note 2, at 55-68.

Mexico.[114] Over time, the lake and surrounding wetlands began to dry up due to irrigation and other development upstream.[115] In response, the Zuni Tribe worked to achieve a settlement agreement that provides water for the restoration of Zuni Heaven's wetlands and protection of the Tribe's most sacred springs.[116] The agreement further provides that state law does not apply within the Zuni Heaven reservation,[117] and includes a provision that explicitly states that "water use by the Zuni Tribe or the United States on behalf of the Zuni Tribe for wildlife or in-stream flow use, or for irrigation to establish or maintain wetland on the Reservation, shall be considered to be consistent with the purposes of the Reservation."[118]

The Confederated Salish and Kootenai Tribes, who occupy the Flathead Indian Reservation in Northern Montana, are descended from three distinct bands of native peoples: the Salish-speaking peoples sometimes referred to as the Flathead, the Pend d'Oreilles, who spoke a similar language, and the Kootenai, whose territory traditionally extended north of that of the Flathead into Canada, but who historically hunted buffalo on the plains of Southern Montana along with the Salish and Pend d'Oreilles.[119] The Tribes traditionally hunted and fished in their vast territory, and the 1855 Hellgate Treaty signed by all three tribes protected their reserved right of "taking fish at all usual and accustomed places, in common with the citizens of the territory."[120] Development, dams, and non-native species along the Flathead River, which runs through the current reservation, have destroyed the salmon runs altogether, and continue to threaten the native bull trout population.[121] After more than a decade of negotiation and heated debate, the Montana Legislature finally ratified the Confederated Salish and Kootenai Tribe Water Compact

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114. *See generally Zuni Indian Tribe Water Settlement Act: Hearing on S. 2743 Before the S. Comm. on Indian Aff.*, 107th Cong. 2 (2002).

115. Id.

116. Zuni Indian Tribe Water Rights Settlement Act of 2003, Pub. L. No. 108-34, 117 Stat. 782 (June 23, 2003).

117. *Id.* § 8(b)(1)(B).

118. *Id.* § 8(b)(1)(E).

119. PETER NABOKOV & LAWRENCE LOENDORF, RESTORING A PRESENCE: AMERICAN INDIANS AND YELLOWSTONE NATIONAL PARK 105-07 (2004).

120. Treaty Between the United States and the Flathead, Kootenay, and Upper Pend d'Oreilles Indians art. III, July 16, 1855, 12 Stat. 975.

121. Rob Chaney, *Biologist: CSKT Committed to Reducing Flathead Lake Trout 75 Percent*, THE MISSOULIAN (Feb. 13, 2015), *available at* http://missoulian.com/news/local/biologist-cskt-committed-to-reducing-flathead-lake-trout-percent/article_21dd8ed0-9450-11e3-a69f-001a4bcf887a.html.

("Compact") on April 15, 2015.[122] The Compact, as passed by the Montana Legislature, provides for minimum enforceable in-stream flows to protect fish habitat in various locations, as well as target in-stream flows, which are reached only after the satisfaction of existing state-based irrigation rights.[123] The Compact additionally includes co-ownership of off-reservation in-stream flow rights shared by the Tribes and the Montana Department of Fish, Wildlife, and Parks.[124]

B. Developing a Tribal Water Code that Protects and Allocates Resources to Non-Consumptive Use

A tribe can develop a water code that protects and provides a mechanism for administering non-consumptive use on the reservation. A water code can serve as an important means of clarifying a tribe's stance on non-consumptive water uses both within tribal governments and communities, and in interactions with outside entities. There are, however, several hurdles that a tribe might face when undertaking the task of drafting, passing, and enforcing a tribal water code. As previously discussed, some tribal constitutions require approval by the Secretary to implement a water code, and there is currently a secretarial moratorium on tribal water code approvals.[125] Some tribes, however, have been able to enact a water code despite the presence of this provision in their constitution. The Salt River Pima-Maricopa Indian Community, for example, negotiated a water settlement agreement with the State of Arizona that included a tribal water code, which the Secretary subsequently approved.[126] Other tribes have amended their constitutions to remove the clause that requires Secretarial approval of a water code.[127]

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122. *See* Tristan Scott, *CSKT Water Compact Faces Long Journey from Helena to Washington*, FLATHEAD BEACON (Apr. 21, 2015), *available at* http://flatheadbeacon.com/2015/04/21/cskt-water-compact-faces-long-journey-from-helena-to-washington/ (congress must additionally approve the Compact in order for it to become binding law).

123. MONT. CODE ANN. § 85-20-1901 (2015) (signed into law Apr. 24, 2015); *see also* NANIA & GUARINO, *supra* note 2, at 65-68 (discussion of the settlement negotiation process). The Compact has yet to be ratified by Congress and the President, approved by the water court, and ratified by the tribe.

124. MONT. CODE ANN. § 85-20-1901.

125. *See supra* notes 76, 77.

126. *See* Cabell Breckinridge, *Department of the Interior's Moratorium on Approval of Tribal Water Codes*, *in* TRIBAL WATER RIGHTS: ESSAYS IN CONTEMPORARY LAW, POLICY, AND ECONOMICS 206 (John E. Thorson, Sarah Britton & Bonnie Colby eds., 2006).

127. *Id.*

Furthermore, tribal water codes are sometimes challenged in court, and a federal district court in *Holly v. Confederated Tribes & Bands of Yakama Indian Nation* held that the Yakama Nation could not enforce provisions in its water code that exerted jurisdiction over non-Indian users within reservation boundaries.[128]

Given the complicated state of the law, particularly when non-Indian water rights are implicated, many tribes rely on negotiated agreements or cooperative partnerships rather than a tribal code alone, when seeking to protect important water resources.[129]

C. Leveraging Federal Laws that Tangentially Protect Non-Consumptive Use

There are additionally two federal conservation laws that provide strong, although tangential, protections for non-consumptive water resources, although those protections also come with some drawbacks. These laws are the Clean Water Act ("CWA")[130] and the Endangered Species Act ("ESA").[131]

The CWA is designed to protect minimum water quality standards.[132] These standards are generally enforced in the form of a maximum parts per million of identified pollutants and maximum or minimum temperature standards.[133] Both of these standards are sometimes achieved by requiring polluters to dilute pollutants or regulate temperatures with increased water flows.[134] Enforcement of the CWA falls to the Environmental Protection Agency ("EPA"), but states or tribes that meet certain criteria can step into this enforcement role with EPA approval.[135] Courts have held that when tribes are approved as enforcement bodies, their authority includes the ability to implement

128. 655 F. Supp. 557 (E.D. Wash. 1986).

129. *Restoring Sacred Waters* describes many of the considerations that go into a tribe's decision to implement a water code, and details specific example provisions from the Colville Confederated Tribes' and Navajo Nation's water codes. NANIA & GUARINO, *supra* note 2, at 70-83.

130. 33 U.S.C. § 1251-1274 (2012).

131. 16 U.S.C. § 1531-1544 (2012).

132. 33 U.S.C. § 1251.

133. 33 U.S.C. § 1313 (2012).

134. *See* PUD No. 1 of Jefferson Cnty. v. Wash. Dep't of Ecology, 511 U.S. 700, 719 (1994).

135. 33 U.S.C. § 1341 (1972).

higher quality standards than those required by federal law, and they have the power to enforce those higher standards on up-stream state users.[136]

The ESA is often cited as the most powerful federal conservation law in existence.[137] The ESA is designed to protect endangered and threatened species, as well as the habitat and ecosystems on which those species depend.[138] To receive ESA protection, a species must be designated as "threatened" or "endangered."[139] Once a species is listed, individuals are prohibited from "taking"[140] or possessing members of that species.[141] Additionally, all federal agencies must ensure that federal actions will not jeopardize the listed species or adversely modify its critical habitat.[142] Occasionally, tribes have sued other parties or the federal government under the ESA to protect traditionally used native species.[143] Tribes have been successful at enforcing minimum stream flows to protect fish and other wildlife in this way.[144] Tribes, however, are also sometimes hesitant to seek a species listing, because tribal members will no longer be able to hunt or fish for that species if listing is successful.[145]

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136. *See* City of Albuquerque v. Browner, 97 F.3d 415 (10th Cir. 1996); *U.S. EPA*, 137 F. 3d 1135; Wisconsin v. EPA, 266 F.3d 741 (7th Cir. 2001).

137. *See* Anne Lindquist, *Job's Plight Revisited: The Necessity Defense and the Endangered Species Act*, 33 ENVTL. L. 449, 450 (2003).

138. 16 U.S.C. § 1531.

139. 16 U.S.C. § 1532.

140. 16 U.S.C. § 1532(19) (defining "take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.")

141. 16 U.S.C. § 1538.

142. 16 U.S.C. § 1536(a). The agency that lists the species may additionally designate "critical habitat" for that species that are essential to the survival of the species proposed for listing. Once habitat is listed as critical habitat, federal agencies cannot destroy or adversely modified that area. However, few species have had their critical habitat designated because the ESA and accompanying regulations require the agency to consider economic and other factors when determining whether to designate a species' habitat as critical. *See* 16 U.S.C. §§ 1532(5)(A), 1533(B)(2).

143. *See, e.g.*, Pyramid Lake Paiute Tribe of Indians v. U.S. EPA, No. CV-R-85-025-DWH (D. Nev. Dec. 4, 1996); Pyramid Lake Paiute Tribe of Indians v. U.S. EPA, No. CV-R-86-438-DWH (D. Nev. Dec. 4, 1996).

144. *See, e.g.*, Nez Perce Tribe v. NOAA Fisheries, No. CV-07-247-N-BLW, 2008 WL 938430 (D. Idaho Apr. 7, 2008).

145. *See* Jami K. Elison, *Tribal Sovereignty and the Endangered Species Act*, 6 WILLAMETTE J. INT'L L. & DISPUTE RESOLUTION 131, 140-41 (1998) (discussing the potentially destructive results of the ESA in Indian Country).

D. Irrigating for In-Stream Flows or Traditional Plants

Irrigating for in-stream flows or traditional plants are relatively untested strategies that might be employed as part of a host of options, or used to circumvent unfavorable case law.[146] By irrigating in the downstream area of a reservation, a tribe can also enjoy the benefit of protected streamflows along the upstream portion of the reservation water body.

The Wind River Tribes' proposed Riverton East Project would make use of this strategy by applying senior water rights to a major irrigation project on the downstream end of the reservation.[147] This irrigation project would both provide tribal income and employment, and ensure sufficient streamflow in the stretch of the Little Wind River that traverses the reservation.[148] The project remains stalled, however, in part due to concerns about downstream impacts on fisheries, as well as potentially prohibitive development costs.[149]

A tribe might also consider irrigation projects specifically for traditional plants or wetlands, in light of the fact that the application of *Winters* rights to irrigation projects are rarely challenged.[150] In this way, a tribe might be able to accomplish particular cultural and resource management goals without long negotiations or contentious litigation.

E. Tribal Conservation Easements

A final, relatively untested strategy for protecting tribal non-consumptive water resources is the use of conservation easements.[151] Conservation easements are contracts that restrict or prohibit certain land uses and are entered into between private landowners and either a private land trust or designated government agency.[152] Usually conservation

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146. NANIA & GUARINO, *supra* note 2, at 97-100.

147. *See* WYO. WATER DEV. COMM'N, FINAL REPORT: RIVERTON EAST IRRIGATION PROJECT: LEVEL II FEASIBILITY STUDY (Oct. 2002), *available at* http://library.wrds.uwyo.edu/wwdcrept/Riverton/Riverton_Valley-Rehabilitation_No_2_Level_II_Phase_II-Final_Report-2002.html.

148. *Id.*

149. *Id.*

150. NANIA & GUARINO, *supra* note 2, at 100.

151. *Id.* at 93-96.

152. The Uniform Conservation Easement Act statute defines conservation easements as:

> [a] nonpossessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic, or open-space values of real

easements are granted to a land trust or government agency in perpetuity.[153] Conservation easement restrictions can include protection of riparian areas around water bodies and restrictions on the development of water resources.[154] Because tribes are governmental bodies, they can take on the role of either the landowner or the government agency that holds and enforces the conservation easement.

The Confederated Salish and Kootenai Tribes of Montana have experimented with jointly owned and managed conservation easements, in cooperation with the Trust for Public Land, the Montana Department of Fish, Wildlife and Parks, and the Bonneville Power Administration.[155] Tribal leaders at Confederated Salish and Kootenai Tribes cite the expense and lack of full control as two downsides to conservation easements as water resource protection strategies.[156] Nevertheless, they consider conservation easements a useful tool when a landowner is not willing to outright sell an important piece of land to the Tribe.[157]

VI. CONCLUSION

Large and looming water resource challenges face communities in the American West both on and off reservations, and these challenges are likely to linger long into the future. In many parts of the West, large quantities of unused and very early priority water rights owned by the

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> property, assuring its availability for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of property.

NAT'L CONFERENCE OF COMMN'RS ON UNIFORM STATE LAWS, UNIFORM CONSERVATION EASEMENT ACT (2007), *available at* http://www.uniformlaws.org/Act.aspx?title=Conservation%20Easement%20Act.

153. *See* BETH ROSE MIDDLETON, TRUST IN THE LAND: NEW DIRECTIONS IN TRIBAL CONSERVATION 12 (2011).

154. *See* THE NATURE CONSERVANCY, CONSERVATION EASEMENTS: CONSERVING LAND, WATER AND A WAY OF LIFE (2003), *available at* http://www.nature.org/about-us/private-lands-conservation/conservation-easements/conserving-a-way-of-life.pdf.

155. *See Elk Creek Conservation Area*, SWAN ECOSYSTEM CTR., http://www.swanecosystemcenter.org/Elk_Creek_Conservation.html (last visited Jan. 18, 2016); *Success Stories*, RIVER TO LAKE INITIATIVE, http://www.flatheadrivertolake.org/index.php/success-stories/#Conrad%20Drive (last visited Jan. 18, 2016) (these include two properties on Elk Creek jointly purchased with Swan Ecosystem Center in 2001, and a third on Flathead River).

156. NANIA & GUARINO, *supra* note 2, at 95-96.

157. *Id.*

tribes under the *Winters* doctrine remain a "sleeping giant." As collective available water resources continue to become scarcer in the future, the problem of management that can maintain and sustain growth in Western communities will become more pressing and daunting. In the face of these challenges, tribes and non-tribal entities must continue to seek creative, long-term solutions to water use and protection in the West.