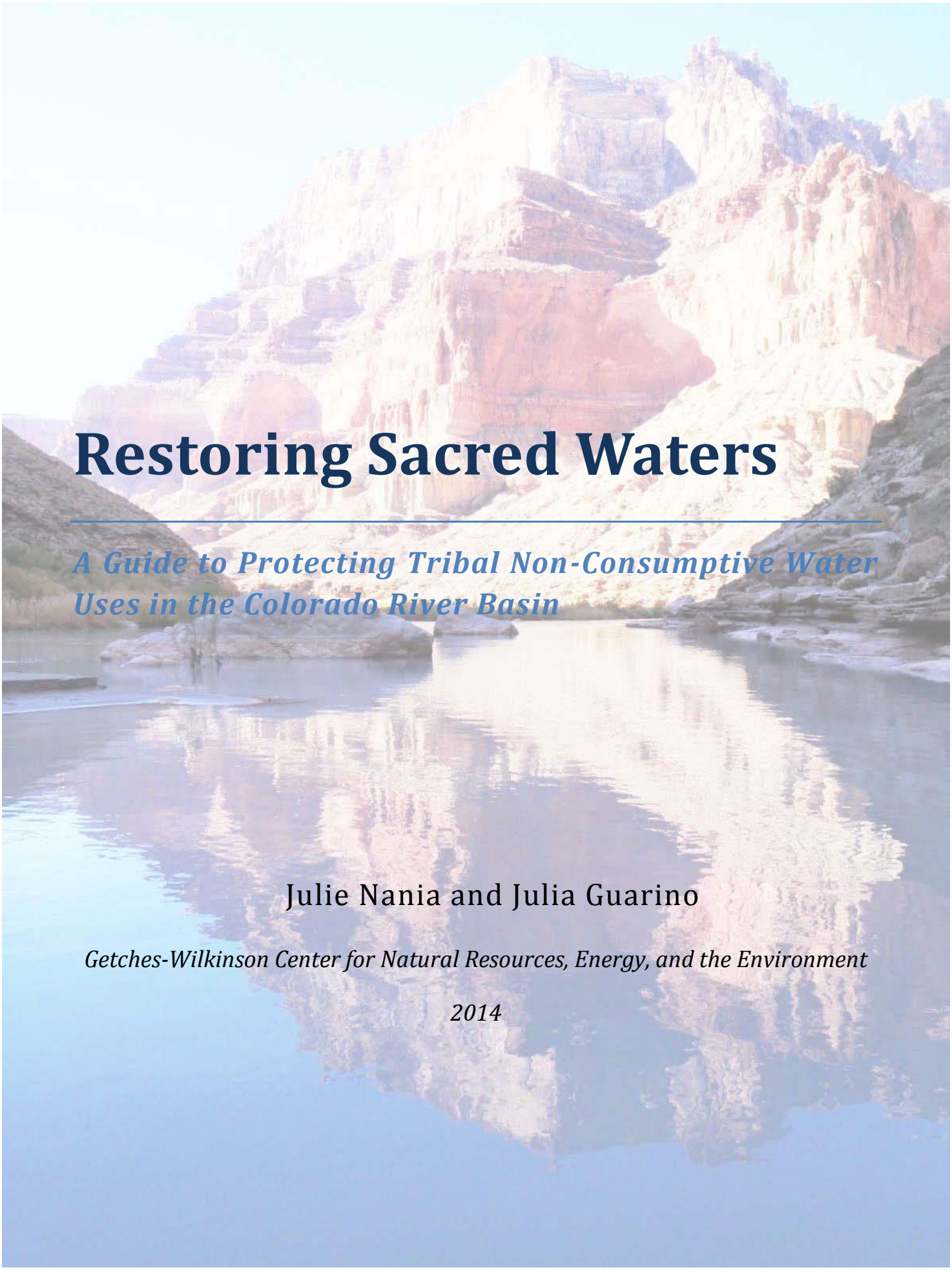
Restoring Sacred Waters

A Guide to Protecting Tribal Non-Consumptive Water Uses in the Colorado River Basin



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A Guide to Protecting Tribal Non-Consumptive Water Uses in the Colorado River Basin

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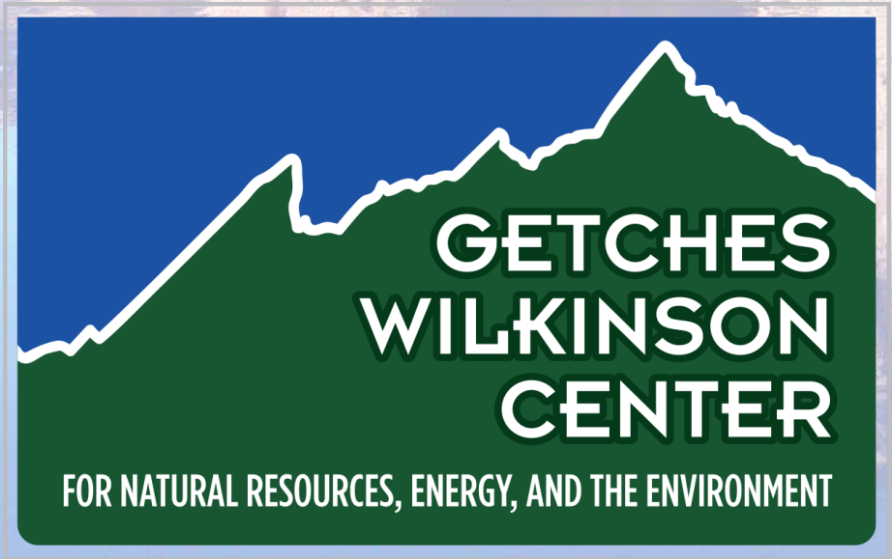

Contents

Chapter 1: Introduction

The phrase "Water is Life" is splashed across water storage tanks throughout the Navajo Nation. This saying is shared amongst many tribes and underscores the importance of water to all aspects of reservation life in the arid Colorado River Basin. Since time immemorial, Indian tribes have mapped landscapes and ceremonies in accordance with springs, seeps, and rushing rivers.[1] In arid landscapes, desert streams provide water for physical, spiritual, and cultural survival.

In *Restoring Sacred Waters* we refer to the dedication of water to any use that does not deplete a natural water body as a "non-consumptive water use."[2] Such uses include, but are not limited to, devotion of water to sustain fisheries, preserve a particular aesthetic, or protect the quality of a water source for a sacred property or ceremonial use.

Protecting water in streams, lakes, and springs may be crucial for subsistence, cultural, and economic purposes. Flourishing fisheries enable tribal members to maintain traditional ceremonial and cultural practices while harvesting fish to supplement their diets.[3] Instream flows also have a variety of indirect benefits. For example, applying Indian reserved rights to instream flows can prevent state appropriators from becoming dependent on underutilized Indian federal reserved water rights. They also can improve the tribal economy by supporting recreational, hunting, and wildlife viewing opportunities. Finally, keeping streams and rivers in their natural state can have immense intangible benefits, including the preservation of tribal customs, ceremonies, and the well-being of tribal members.

Tribal governments have been finding creative ways to include non-consumptive values and protections in their resource management regimes. Provisions for instream flows and cultural water uses are increasingly being incorporated into tribal codes, settlement

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[1] The Inter Tribal Council of Arizona explains the intangible importance of water to tribal communities:

> To every tribe, water is life. It has a sacred value; It is not simply a commodity to be measured, modeled, apportioned, bought and sold, argued about in the courts. Water is embedded in tribal culture. In many ways it is who tribal people are as human beings.

U.S. Dep't of the Interior - Bureau of Reclamation, *Attachment B - Options Submitted by the Inter Tribal Council of Arizona, The Future of the Colorado River System: A Tribal Perspective from Arizona*, 1 (May 22, 2012), http://www.usbr.gov/lc/region/programs/crbstudy/finalreport/Technical%20Report%20C%20-%20Water%20Demand%20Assessment/TR-C_Appendix9_FINAL_Dec2012.pdf.

[2] Technically, "non-consumptive" uses may lead to a certain amount of loss through evaporation or from conveyance to serve that process. The essence of these uses is that they are not *intended* to be applied for consumptive use.

[3] Many Northwest tribes also have vibrant fishing economies.

agreements, water quality standards, and resource management agreements. Despite this progress and commitment, however, tribes face substantial legal and practical barriers when implementing these protections.

Our hope is that *Restoring Sacred Waters* will provide tribal stakeholders with an effective tool to develop strategies to protect non-consumptive water uses. To that end, this guide introduces a series of approaches designed to keep Indian reserved rights in streams, wetlands and springs, provides information about potential legal hurdles, and offers practical advice from tribal officials engaged in these efforts. This guide has been written for a broad audience but emphasizes considerations that are relevant to particular communities. Potential readers may include tribal agency staff, resources managers, council members, attorneys, and any other stakeholder seeking an introduction to non-consumptive use protections for tribal waters.

Protecting Non-Consumptive Uses in the Colorado River Basin and Beyond

Many tribes in the Colorado River Basin have expressed a desire to apply a portion of their federal reserved water rights to non-consumptive uses. Some have already pushed ahead to protect such uses. For instance, in 2003, the Pueblo of Zuni Tribe obtained recognition of water rights for the Zuni Heaven Reservation to provide for "long-standing religious and sustenance activities."[4] Other tribes have settled their water rights claims and would like to apply a portion of those rights towards ceremonial, habitat, or aesthetic purposes.[5] A number of tribes are engaging in riparian restoration efforts or have incorporated instream flow provisions into tribal codes.[6] Despite these initiatives, in the past some tribes have encountered practical or legal barriers when seeking to protect non-consumptive values.

Tribes outside of the Colorado River Basin have also been protecting non-consumptive uses through a variety of means. We draw on select case studies from outside of the Colorado River Basin to illustrate a diverse range of potential solutions for application within the Basin.

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[4] The 2002 Zuni Indian Tribe Water Rights Settlement Agreement in the Little Colorado River Basin was enacted by Congress in the Zuni Indian Tribe Water Rights Settlement Act of 2003, P.L. 108-34.

[5] Water rights issues in the Colorado River Basin are often delicate matters. We would like to thank tribal officials who shared their aspirations with us during the development of this guide. To that end, many asked that specific goals remain confidential. Thus, this guide refers primarily to projects and objectives already announced publicly.

[6] Please see additional discussion in Chapter 6, below.

Contents

This guide seeks to foster a necessary understanding of the legal issues surrounding non-consumptive water uses, as well as specific strategies for achieving non-consumptive water use goals. Chapters herein include:

The following chapter contains information on beginning the process of protecting instream flows. To determine what non-consumptive protections, if any, may be suitable for the tribe, tribal resource managers will need to assess the political will of tribal council and members, assess the tribe's capacity to effectuate desired water use changes. They will also need to collect crucial data and information regarding water resources. In Chapter 2, we continue this conversation with an eye toward the type of data and expertise that should be gathered to support and inform decisions about non-consumptive use protections.

Chapter 3 contains a brief introduction to Indian federal reserved rights and the treatment of those rights by federal and state courts. This foundational information is crucial to understanding the potential barriers and legal issues that may need to be addressed when establishing non-consumptive use protections. In Chapter 3 we also discuss key legal issues.

Because of the nature of tribal water rights as federal rights arising from treaty negotiations, tribes face unique legal obstacles but may have additional opportunities to apply their water rights to non-consumptive uses. Chapters 4 and 5 focus on two of the most powerful strategies to protect non-consumptive use protections: applying Indian federal reserved rights to instream flows and negotiating protections for non-consumptive uses in settlement agreements. These chapters introduce additional legal obstacles when seeking to protect tribal non-consumptive uses and provide examples from tribes that have successfully pursued these strategies.

Chapter 6 describes one of the surest methods of protecting non-consumptive values and uses on the reservation: incorporating these protections into tribal water codes. We describe water codes generally and emphasize aspects of codes that can be drafted or amended to better support non-consumptive flow efforts. We also provide examples of language from several existing water codes and introduce basic capacity and enforcement considerations.

Chapter 7 contains a variety of piecemeal strategies that could potentially be used to secure more water for tribal streams. These tactics range from the leveraging of federal laws to the creative use of conservation easements. Specifically, we discuss how the Clean Water Act (CWA) and Endangered Species Act (ESA) may result in increased stream flows and the use of conservation easements to protect non-consumptive use values.

Chapter 8 suggests an indirect strategy for creating additional flows in tribal streams: irrigating for instream flows. We look to the Wind River Reservation for an example of a proposed irrigation project that would draw additional flows through a stream segment of interest. We also discuss the application of federal reserved rights restricted to agricultural use to irrigate traditional plants.

Finally, Chapter 9 provides a summary of key points and strategies from each preceding chapter.

Strategies

This guide examines a variety of methods that can be used to achieve the same overarching goal: ensuring adequate flows and water levels in reservation streams and lakes. Our intent is to illustrate the diverse options that exist to protect water resource values that are important to tribes. Throughout *Restoring Sacred Waters,* we address several different methods and tools that can be used to protect non-consumptive uses. Here, we provide a brief overview of those tools and strategies.

Instream flows

Instream flows are rights established to keep water in the natural stream for protection of wildlife, riparian habitat, aesthetic, or cultural and religious objectives.[7] An instream flow may be created either by establishing a flow requirement, or by appropriating a water right to remain in the natural stream.[8] In some instances, courts have found tribes retain fishery rights that necessarily included flows sufficient to sustain fisheries. Proposed and congressionally approved tribal water settlements may also include specific provisions

[7] *See generally* Tom Annear et al., Instream Flows for Riverine Resource Stewardship (Revised ed., 2004).
[8] David H. Getches, Water Law in a Nutshell 121 (1997).

establishing instream flows.[9] In Chapter 3, we address the primary legal issues associated with using Indian federal reserved rights for instream flows on the reservation. In Chapter 4, we discuss instream flow proposals.

Settlement agreements

Settlement agreements offer an opportunity to quantify and settle Indian reserved rights claims outside of the courts. They also enable parties to agree on questions about how those rights may be used and administered to meet non-consumptive use goals. By providing an opportunity to resolve a range of issues outside of the litigation context, settlement agreements have become the preferred means for resolving most Indian federal reserved rights issues. Negotiating non-consumptive uses as part of settlement agreements is discussed in Chapter 5.

Leveraging federal laws

Federal laws, particularly the ESA and CWA, may be used to protect aquatic species and stream conditions. Although the ESA is designed to protect species, ESA protections may result in additional stream flows. Provisions under the CWA permit tribes with treatment in the same manner as a state (TAS) status to set water quality standards more stringent than upstream state standards. Because water quality is often measured to meet pollution standards according to parts per million, CWA or thermal degradation standards, CWA protections may also result in additional flows to meet reservation water quality requirements. In some instances, forcing others to comply with ESA and CWA standards has provided tribes with leverage to achieve settlement agreements preserving minimum flows. We continue this discussion in Chapter 7.

Conservation easements

Conservation easements may provide an opportunity to protect certain stream qualities without involving tribes' federal reserved rights. An easement is the right to use land owned by another in a certain way. Generally, the purpose of a conservation easement is to incentivize a landowner to leave the land unused or to put restrictions on the use and management of a particular resource or property right.[10] Under some state laws, water rights may be included in the easement.[11] There is a possibility that conservation

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[9] Michael C. Blumm, Unconventional Waters: The Quiet Revolution in Federal and Tribal Minimum Streamflows, 19 Ecology L.Q. 445, 475-76 (1992).

[10] James L. Sipes, Sustainable Solutions for Water Resources: Policies, Planning, Design, and Implementation 252 (2010). Conservation easements are typically held by a land trust organization or public entity. A conservation easement provides tax benefits to the landowner in exchange for his or her agreement to forgo further development. TROUT, RALEY, MONTAÑO, WITWER & FREEMAN, P.C., Acquiring, Using, and Protecting Water in Colorado 85-86 (2004).

[11] *Id.* at 86. TROUT ET AL., *supra* note 11.

easements can be used in a manner that would result in more water in reservation rivers and streams. We discuss conservation easements in Chapter 7.

Irrigating for instream flows and traditional plants

The strategies discussed in Chapter 8 involve working within the current federal reserved rights framework which favors application of Indian federal reserved rights to agricultural applications. Applying Indian federal reserved rights to an irrigation project downstream of a targeted stream stretch could fulfill non-consumptive values but may be difficult and have negative implications downstream. Under some circumstances, tribes may be able to irrigate traditional plants found in wetlands. These strategies are discussed further in Chapter 8.

Purpose

Restoring Sacred Waters provides background information for tribal resource managers and officials when beginning the quest to restore or protect non-consumptive uses. To this end, we summarize key legal opportunities and potential obstacles, offer strategies from experienced tribal attorneys and officials, and provide relevant case studies and legislation to demonstrate how these strategies have been implemented on the ground. We include additional references for those seeking a more in-depth discussion of these issues.

The information herein is not intended to be legal or technical advice. Rather, *Restoring Sacred Waters* is an academic synthesis including information from case studies and the experiences of natural resource managers. Each tribe has unique needs and legal circumstances and should consult with its counsel when considering specific legal strategies.

Chapter 2: Gathering Information and Starting the Process

An initial scoping and community outreach process will be crucial to the ultimate success of non-consumptive use protections. Before beginning to implement non-consumptive use protections, a tribe should gather information and arrive at community consensus about the nature and scope of the desired protection. During the initial scoping stage, the tribe seeks to answer questions about its ultimate vision for reservation water resources and the community's relationship with those resources. The tribe must determine the amount of water, personnel, and financial assets it is willing to devote to the project. It is important to ascertain early on if there is a consensus in the community about overarching goals and objectives. Once these objectives are determined, the project team will want to gather the foundational information that will be instrumental during this process to make an informed decision about the best strategy to advance those goals. Below, we introduce possible information to collect here.

During this pre-implementation process, tribes should:

1) Select the project team
2) Internally identify major goals and agree on possible concessions
3) Collect legal, scientific, and technical data on water rights and resources on the reservation
4) Consider various tools to achieve non-consumptive goals
5) Identify potential funding resources

The process below further describes these steps, with the goal of facilitating a thoughtful vision of what the tribe wants to accomplish with its water rights and resources. This process is not linear, the project team may return to certain steps at various stages. For instance, the team may seek additional expertise after finding a gap in available scientific data. Here we offer one potential way to organize the process of creating a proposal. Although we emphasize instream flows, this process could be adapted to address wetlands or springs.

Step One: Selecting the Project Team

An effort to protect tribal non-consumptive uses may arise in a variety of circumstances. Perhaps the community is determined to preserve an important spring or waterfall, and the tribe's water resources department has begun to investigate how this resource can be protected. Maybe a new economic development plan suggests restoring a particular fishery

for use by tribal members as well as to generate income from permit sales to non-tribal members. On the other hand, the tribe may have been thrust into a legal or political situation where it is forced to protect existing uses in a court setting.

Who should be involved?

Once there is a strong impetus to investigate non-consumptive use protections, it can be helpful to establish an investigatory task force or project team. This project team is responsible for determining community consensus or support for the project, gathering information necessary to make an informed non-consumptive use proposal, and bringing in experts to develop additional data and offer strategic advice on how to accomplish the tribe's goals. The team will need to assess the proposed non-consumptive use protection in light of the tribe's water resources and long-term water development goals. The program team should also represent the goals and concerns of the community and tribal leadership.

The individuals selected to work on a particular project may vary according to the tribe's needs and parameters. Generally, the project team should be composed of people who bring a mix of scientific, legal, and political expertise to the table. Thus, members may include tribal personnel from water resources, natural resources, engineering, and justice departments. Because tribal resources are often limited, after initial scoping meetings the tribe may want to consider hiring outside legal and technical experts to address gaps in information or complicated legal issues.

Tribal decision-makers and community members will play an integral role in supporting the political feasibility of the project. Any approval of a final proposal will likely be subject to the tribe's political process. It is important for the project team to consult with community members for guidance when committing tribal resources or making administrative or legal agreements to achieve non-consumptive uses. Involving or at least informing the tribal council and the local community about project progress can help build political will for any final approvals.

The role of experts

Experts play a crucial role in determining the feasibility of a project. Legal experts can assist with the development of an appropriate and legally enforceable water code, determine where opportunities may exist to acquire water to be used for non-consumptive purposes, and assist with the acquisition of water rights. Experts may also be helpful in assessing the amount of available water in a stream system and understanding how junior state water rights holders may be affected, if the tribe can acquire other senior rights, and where allottees are using water on the reservation.

Water resource experts can assess potential delivery problems and solutions, help monitor water quality in vulnerable streams, and develop stream restoration plans. Water

engineers can help with the quantification of water rights and determine the potential magnitude of unsettled claims. If the tribe is seeking to secure instream flows, it will also want to consult with wildlife biologists and ecologists. Detailed information about the needs of species, habitat conditions, stream flow patterns, average flows, and ideal or minimum flows necessary for species protection will be helpful when exploring strategies for achieving instream or other non-consumptive rights. Consultation with experts about potential Endangered Species Act issues may also be necessary.

Step Two: Determining Non-consumptive Use Goals

Given that non-consumptive uses of Indian federal reserved rights provide a range of tangible and intangible benefits for Indian communities, tribes may seek to use their federal reserved water rights for a variety of non-consumptive purposes. First and foremost, the tribe should determine what specific values it seeks to protect. For example, communities may want to protect important ceremonies or cultural practices which require the maintenance of certain water bodies and conditions. Other tribes may seek to protect a species that is of particular cultural significance, or to maintain fisheries as a subsistence or commercial resource for community members. Still others may embrace the recreational attributes of water resources for member's enjoyment or as an economic development opportunity.

Potential objectives may include (but are not limited to) protecting

- cultural or religious uses of streams,
- a sacred quality of the water resource,
- wildlife, aquatic life, or sustenance uses of the riparian ecosystem,
- water quality,
- recreation, and
- aesthetics.

Determining the tribe's ultimate objective(s) is important early on in the process of securing non-consumptive uses. Below we further discuss select values that a tribe may seek to protect though water management.

Protecting traditional, sacred or cultural uses

Tribes may consider certain water features to be sacred. Maintenance of these sources in an unpolluted state is critical to continuing certain ceremonies and for the tribe's spiritual well-being. For instance, while testifying before Congress in support of a water settlement

to restore the sacred Zuni wetlands, Zuni leaders explained that the appearance of a wet oasis was crucial to the Tribe's sacred ceremonies.[12]

Protecting important wildlife or sustenance uses

The protection of fisheries is another common reason that tribes establish instream or minimum flows. Fish and other aquatic organisms generally require specific stream conditions to survive or thrive. Common conditions for aquatic organisms, with an emphasis on supporting healthy fisheries, are listed in table 2.1 and discussed further below. This subsection, in particular, incorporates information from David Gillian and Thomas Brown's book, *Instream Flow Protections*.[13] We refer readers to this source for additional information.

Table 2.1 Potential Needs of Aquatic Organisms
- Particularized spawning habitat or conditions for germination of plants
- Movement and migration passage
- Particular temperatures during certain life cycle occurrences
- Particular turbidity, dissolved oxygen conditions, nutrients, and other water quality considerations
- Food
- Cover
- Water levels

Water

To state the obvious, fish require water to live. Fish take in oxygen through their gills and cannot survive without water to breathe. When streamflows are greatly reduced, some aquatic species are able to take refuge in deep pools or shaded areas to avoid the adverse effects of water scarcity. Other species require a minimum flow of water to survive.

Food

Flowing waters provide for aquatic organisms by dislodging and transporting food sources, including algae and insects. Some organisms serving as a food source for fish may require flowing water to survive.[14]

Protection

Submerged stream features such as boulders and root systems, allow fish to expend less energy dodging predators and fighting strong currents.[15]

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[12] Zuni Indian Tribe Water Rights Settlement Agreement. Little Colorado River General Stream Adjudication. Senate Indian Affairs Committee Testimony. Malcolm B. Bowekaty, Governor. July 18, 2002.

[13] David M. Gillian and Thomas C. Brown, Instream Flow Protections: Seeking a Balance in Western Water Use (Washington, DC: Island Press, 1997.)

[14] *Id*.

Other Conditions

Instream flows help to provide for many of these conditions, but a variety of additional habitat conditions may be necessary for a species to thrive. Other factors contributing to requisite stream conditions include, but are not limited to healthy riparian vegetation, streambed features/structure, and water quality.

The Tribe may also want to consider these conditions in light of future potential climate changes. Potential climate changes in the Southwest are projected to include increased temperatures, precipitation variability, prolonged drought occurrences, and changes in the hydrologic cycles.[16] Key hydrologic changes already observed in the Southwest include declines in snowpack, more winter precipitation falling as rain rather than snow, earlier snowmelt, and below normal streamflows between 2001-2010 in both the Upper Colorado River and the Rio Grande.[17] These changing climatic conditions will have implications for the needs of maintaining stream environments.

Providing for recreation and aesthetics

Providing recreational opportunities on streams, rivers, and lakes is increasingly recognized as an important community value and a means of local economic development. Like any community, tribes may value water resources for the recreational and aesthetic qualities they contribute to reservation lands. For instance, in Yuma, Arizona the Quechan Tribe developed a beautiful picnic area alongside the Colorado River (see image below).[18] Similarly, the Cocopah Tribe is developing a recreational path along the Colorado River.[19]

[15] *Id*.

[16] Cozzetto, K., Nania, J. (2014). Chapter 5 – Climate, Hydrologic and Ecosystem Changes in the Southwest and on the Navajo Nation. *In Considerations for Climate Change and Variability Adaptation on the Navajo Nation*, edited by J. Nania and K. Cozzetto. University of Colorado, Boulder, CO.

[17] *Id.*

[18] In-person interview with RoseAna Williams, Quechan Tribe Utility Operations, Fort Yuma Indian Reservation (Nov. 11, 2012) (notes on file with author).

[19] In-person interview with Paul Soto, Cocopah Tribe Elder, Cocopah Indian Reservation (Dec. 3, 2012) (notes on file with author).

Protecting water quality

Many religious ceremonies must be performed in an environmentally "clean place" to maintain the balance of the ceremony.[20] Water quality is also important to ensure the health of aquatic ecosystems and the local environment. Greater streamflows can reduce the volume of pollutants in an ecosystem by diluting system contaminants.

Determine how far the tribe is willing to go to accomplish these protections

Each tribe will determine which properties and protections are necessary to achieve its ultimate goals. Whatever the tribe prioritizes in this step will drive the remainder of the process.

Determine the quantity

If restoring the tribal fishery is its paramount goal, the tribe may be willing to devote substantial quantities of water to this purpose. However, if the tribe has prioritized agricultural expansion or another potentially incompatible use, it may be unwilling to compromise those uses by committing water to instream flows. Thus, the tribe should carefully determine roughly how much of its water it is willing to devote to non-consumptive purposes. It may be necessary to repeat this exercise once the tribe receives initial feedback about what is hydrologically necessary to accomplish its goals. This initial scoping should help to establish basic parameters about the lengths the tribe is willing to go to protect non-consumptive water uses.

Determine permanency

Permanency is another key consideration. Tribes may devote water to non-consumptive uses through a permanent commitment of water resources, or through alternative methods that have varied degrees of permanency. For example, evoking protections under federal laws, including the Endangered Species Act (ESA) and Clean Water Act (CWA), may have long-term implications for the management of tribal streams. Similarly, easements or leases can endure for various periods. While long-term arrangements may better protect non-consumptive use, they are a serious commitment of tribal water resources. Policymakers should work with water management officials and the tribal community to consider future water development plans.

Determine comfortable concessions

The project team may want to begin to explore jurisdictional and sovereignty issues early on in its process. Throughout the following chapters, we discuss situations in which the tribe may be asked to waive its sovereign immunity. Evoking protections under federal

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[20] Robert D. Cooter & Wolfgang Fikentscher, *American Indian Law Codes: Pragmatic Law and Tribal Identity*, 56 AM. J. COMP. L. 29, 47 (2008), *available at* http://scholarship.law.berkeley.edu/facpubs/1205.

laws, including the ESA and CWA, may have long-term implications for the management of tribal water resources. When addressing off-reservation instream flows, the state may seek to work out an agreement with the tribe, whereby the state has authority to administer off-reservation use of tribal water rights. Internally determining the amount of authority that the tribe is willing to cede can facilitate smoother negotiations later on.

Consider cost

Putting non-consumptive use protections in place will likely require substantial tribal personnel hours and commitment of resources. Depending on the method of protection selected, there may be infrastructure, engineering, and long-term monitoring costs involved. The tribe may not need to arrive at an exact estimate of the resources required before beginning the process, but it may be wise to consider the magnitude of the undertaking at various points before moving forward.

Step Three: Gathering Legal and Scientific Information

Having access to certain information will be crucial to make an informed decision about appropriate water resource protections. Gathering legal and environmental information before seeking a non-consumptive water right will help the tribe anticipate potential legal issues, and gain a better understanding of how the non-consumptive use protection should be designed to protect target values. Here we present types of information commonly required when protecting a range of non-consumptive uses. We also look at examples of instream flow methodology to illustrate how data may be incorporated in the process of creating an instream flow proposal. Important information may include data on the biology, geology, and hydrology of the stream in question.

Instream flow methodologies and information

A range of different methods can be used to develop an instream flow recommendation. One such method is the hydrologic approach. We provide an overview of the data necessary to engage in this kind of analysis, and refer readers to *A Global Perspective on Environmental Flow Assessment* for more detailed information on the various methods that can be used to set an instream flow.[21]

Hydrological models focus on one of the most important factors for protecting fisheries: the amount and timing of water in the stream. The most commonly employed method of hydrologic modeling is referred to as the "Tennant" or "Montana" method.[22] The Tennant

[21] R.E. Tharme, *A Global Perspective on Environmental Flow Assessment: Emerging Trends in the Development and Application of Environmental Flow Methodologies for Rivers*, *19* RIVER RES. & APPLICATIONS 397 (2003).
[22] OKLA. WATER RES. BD., *Instream Flow Issues & Recommendations*, *in* OKLAHOMA COMPREHENSIVE WATER PLAN SUPPLEMENTAL REPORT (Feb. 2011), *available at*

method looks at the ecological needs of the river recorded over a historic period and uses a percentage of annual flow to determine the quality of fish habitat.[23] After determining average annual flows, a framework is applied to determine what amount of water is necessary to foster certain ecological conditions. According to this method, maintaining ten percent of the average annual flow is the minimum flow necessary for fish survival. Thirty percent creates fair conditions for survival, while 60 percent of the average annual flow provides excellent habitat.[24]

Tennant's method is only one potential method of determining the appropriate instream flow for a water body. Alternate methods assess the five major components of a flow regime (magnitude, duration, frequency, timing and rate of change).[25] The Hydroecological Integrity Assessment Process (HIP) identifies ecologically relevant hydrologic indices that focus on these five components. HIP is provided free of charge from the USGS.[26] For an overview of additional methods which can be used to set instream flows, we refer readers to *Instream Flow Issues & Recommendations*.[27]

Instream flows are often established to provide habitat for species. When protecting a species, a habitat-based approach to setting an instream flow, which focuses on the specific needs of the aquatic ecosystem, may be appropriate. With this approach, habitat simulation methods are used in connection with hydrologic models to provide spatial or temporal predictions of habitat suitability.[28]

The Instream Flow Incremental Methodology (IFIM) is a method that focuses on the needs of the target species and incorporates the physical habitat simulation system (PHABISM). IFIM is a particularly desirable method because of its widespread use and acceptance by a range of communities. For more information on IFIM, we refer readers to *Instream Flow Issues & Recommendations*.[29]

For any methodology, the project team may want to collect a variety of detailed research about the resource they are seeking to protect. For instance, if the tribe's primary objective is to restore a trout fishery, tribal biologists might research ideal stream requirements to create trout habitat.

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https://www.owrb.ok.gov/supply/ocwp/pdf_ocwp/WaterPlanUpdate/draftreports/OCWP_InstreamFlow_IssuesRecs.pdf.

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] More information on HIP is available at http://www.fort.usgs.gov/Resources/Research_Briefs/HIP.asp.

[27] OKLA. WATER RES. BD., *supra* note 23.

[28] *Id.*

[29] *Id.*

The reservation water budget

Mapping the reservation water budget is important to both locate water sources and identify the rights and claims of existing users. Water budgets, on a basic level, reflect the input and output of water in a defined area. Often, water budgets are assessed on the scale of river basins. A comprehensive budget will identify the tribe's water rights, existing uses, and planned future uses. It will also examine the rights and withdrawals of other users. It will be helpful to have as much information as possible reflecting the location, amount, and timing of withdrawals, and the corresponding return flows. This information can be used to determine potential sources for fulfilling non-consumptive uses, as well as the legal barriers or impediments to their uses. Water budget information should include:

- the location of water resources,
- aquifer and spring information,
- existing water uses,
- water rights and the nature and priority of those rights, and
- any existing diversions, their locations, and the status of the affected land.

Obtaining information

Tribal water engineers, resource managers, technicians, land use planners, legal counsel, and a range of other personnel may be able to contribute to the collection of background information in the initial scoping phase. The type of data collected will depend on the specific methodologies employed. Once all available data has been collected, the project team should determine whether additional data is needed. Hiring outside expertise can be expensive. Often, state or federal natural resource departments may be able to supply data, technical advice, or information regarding species and ecosystems. Technical assistance from the federal government may also be available. Table 2.2, below, provides additional resources which tribes may be able to access for technical advice.

Table 2.2 Potential Internal Sources of Information

Tribal Departments	• Tribal justice departments or attorneys can often provide crucial information about the tribe's water rights, the current administration of those rights , and potential legal issues • Tribal resource departments often have access to hydrologic information (stream data, aquifer information, diversions, etc.) and biologic data (species distribution, habitat conditions, water temperatures) • Tribal works departments may have insight into the feasibility of achieving certain engineering designs

State Departments	• Colorado Water Conservation Board - contains technical, legal and informational resources[30] • Arizona Department of Water Resources - contains technical, legal, and information resources[31] • State of Washington Department of Ecology has very helpful information on methods of developing instream flow levels[32]
Federal Agencies	• USGS National Streamflow Information Program – maintains stream gages in rivers nationally, and gathers extensive streamflow information[33] • The National Water-Quality Assessment Program – provides an overview of water quality conditions presently, over time, and in relation to human activities with implications for quality conditions[34]

The project team may find that the initial information gathered is insufficient to provide a comprehensive understanding of water resource issues on the reservation. If this is the case, the tribe may need to conduct additional studies to gather the necessary information.

Step Four: Considering Your Strategy

Once the tribe has engaged its team of experts and collected foundational information, the team can work together to determine how the tribe can best meet its non-consumptive use goals. A single goal may be achieved through a variety of different methods. For instance, while instream flows may be necessary to restore certain fisheries, strategic conservation easements may be able to protect water quality just as effectively if the primary fisheries concern relates to water quality. Throughout the remainder of this guide, we consider different tools that can be used to protect non-consumptive values. Here, we visit each briefly. The chapters that follow provide information on how these particular tools may be used to meet specific goals.

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[30] Colorado Department of Natural Resources. *Colorado Water Conservation Board*. http://cwcb.state.co.us/Pages/CWCBHome.aspx (last visited May 26, 2014).

[31] Arizona Department of Water Resources. http://www.azwater.gov/azdwr/ (last visited May 26, 2014).

[32] State of Washington Department of Ecology. *Instream Flows*. http://www.ecy.wa.gov/programs/wr/instream-flows/isfhm.html (last visited May 26, 2014).

[33] United States Geological Survey. *National Streamflow Information Program*. http://water.usgs.gov/nsip/ (last visited May 26, 2014).

[34] United States Geologic Survey. *National Water-Quality Assessment Program*. http://water.usgs.gov/nawqa. (last visited June 10, 2014).

The tribe may wish to come up with a minimum or instream flow level that is appropriate to achieve the stream qualities it is seeking to protect. Generally, instream and minimum flows are set in cubic feet per second for a stream, or established as a measurable elevation level for a lake. The tribe may choose to present a goal (for instance, protecting a cold-water fishery), then allow the team of biologists, engineers, attorneys, and tribal representatives to determine what level of stream flow and timing would provide adequate protection. Considerations for setting instream and minimum flows are discussed further in Chapter 4.

Alternatively, settlement agreements may provide additional flexibility to meet the tribe's needs. Settlements can incorporate instream or minimum flows, establish buffers to protect stream flows and groundwater resources, or include other protections for fisheries or important tribal cultural features that keep water in the streams.

Indirect tools resulting in non-consumptive use protections may include conservation easements and protections obtained through leveraging federal environmental laws. Conservation easements designed to protect ecological values often require monitoring and assessment based on scientific data. Similarly, the success of federal environmental laws is determined by quantitative analyses. The pollution protections offered by the Clean Water Act are often established by measuring the dilution of contaminates in a water body. The Endangered Species Act measures protections through biological information on species, which can include water quality and quantity. Subsequent chapters provide additional information on strategies to protect non-consumptive uses and information that may be useful to draft an appropriate proposal

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Step Five: Identifying Potential Funding Resources

Tribes, like other governments, often are limited in the resources they have available to provide the legal, technical, and financial support for these protections. Table 2.3 provides potential sources of state and federal funding and assistance.

Table 2.3 Financial and Technical Assistance for Non-Consumptive Use Protections

Funding Opportunity		Description
State Programs	Colorado Healthy Rivers Fund Grants	Assists in efforts to provide clean water, protect habitat, and improve recreation accessibility: http://cwcb.state.co.us/LoansGrants/colorado-healthy-rivers-fund-grants/Pages/main.aspx.
	Colorado Watershed Restoration Grants	Provides grants for watershed restoration projects: http://cwcb.state.co.us/LoansGrants/colorado-watershed-restoration-grants/Pages/main.aspx.
	Xcel Energy Foundation	Funds projects focusing on environmental and sustainability issues: http://www.xcelenergy.com/About_Us/Community/Corporate_Giving/Foundation_Grant_Application_Process.
	Arizona Department of Water Resources	Assists watershed groups with funding projects related to the management of water supplies in rural Arizona: http://www.azwater.gov/AzDWR/StateWidePlanning/RuralPrograms/Contact/default.htm.
	Arizona Department of Water Resources	Assists watershed groups with funding projects related to the management of water supplies in rural Arizona. http://www.azwater.gov/AzDWR/StateWidePlanning/RuralPrograms/Contact/default.htm
	Arizona Water Protection Fund	Supports water projects that conserve water resources that protect and restore rivers and streams, especially when related to fish and wildlife resources. http://www.azwpf.gov/default.htm

	Arizona Game and Fish Commission Heritage Fund	Grants money for the conservation of sensitive wildlife habitat. http://www.azgfd.gov/w_c/heritage_program.shtml
	New Mexico Finance Authority: Water Project Fund	Grants money to projects that conserve water, protect endangered species or restore and manage watersheds: http://www.nmfa.net/financing/water-programs/water-project-fund/./
	New Mexico Department of Agriculture: Soil and Water Conservation Commission Water Quality and Conservation Grant Program	Grants money to projects that focus on watershed improvement and riparian restoration. Only projects that are either sponsored or co-sponsored by one of New Mexico's 47 Soil and Water Conservation Districts (SWCDs) are eligible: http://www.nmda.nmsu.edu/swcc-water-quality-conservation-grant/./
	Rio Grande Water Fund	Grants money to conserve money for watersheds in Northern New Mexico. http://www.nature.org/ourinitiatives/regions/northamerica/unitedstates/newmexico/new-mexico-rio-grande-water-fund.xml.
	Utah George S. and Dolores Doré Eccles Foundation	Funds projects that preserve and conserve lands. http://www.gsecclesfoundation.org/preservation/index.html.
	Land and Water Conservation Fund	Gives grants for the development of public outdoor recreation areas. http://stateparks.utah.gov/resources/grants/land-and-water-conservation-fund.
	Cooperative Watershed Management Program – DOI	Supports water conservation, water quality, and ecological stream resiliency.
Federal	Reclamation Rural Water Supply Program – DOI	Support for conducting water feasibility studies.
	Indian Tribal Water Resources	Support for protecting tribal water resources.

	Development, Management, and Protection – DOI	
	Water Resources on Indian Lands – DOI	Supports tribal water management plans.
	Resource Conservation and Development – USDA	Loan assistance to community programs.
	Clean Water Act Sec. 106 Tribal Water Pollution Control Grant Program – EPA	Assists Indian tribes in carrying out effective water pollution control programs. Tribe must meet requirements for treatment as a state.
	Assessment and Watershed Protection Program Grants – EPA	Funding for implementing effective programs for watershed protection, restoration, and management.
	Targeted Watershed Grants – EPA	Support for improving water quality and protecting water.
	Tribal Wildlife Grants - U.S. Fish and Wildlife	Funding for creating programs for benefit of wildlife and their habitat.
	Cooperative Endangered Species Conservation Fund - U.S. Fish and Wildlife	Funding to protect environment of endangered species.
	USGS – HIP Software	Free access to Hydroecological Integrit Assessment Process software at: http://www.fort.usgs.gov/Resources/Research_Briefs/HIP.asp.
	Department of the Interior: Water Conservation Field Services Program	Assists in preparing and implementing water conservation programs. Only places in the Western US are eligible for this federal funding: https://www.cfda.gov/index?s=program&mode=form&tab=core&id=67e2cde635aed37a38ca8880d6dcd32b.

Chapter 3: Indian Federal Reserved Rights Law

Nearly all of the original uses of western streams were non-consumptive uses. Indian tribes relied on the harvest of salmon and other fish as part of a subsistence existence. Rivers were used to move from place to place. Ceremonies were held which involved submersion and cleansing in deep, clear waters. Despite this rich history, protections for non-consumptive uses are often presented as "new" uses of water resources.

The protection of non-consumptive uses under modern legal regimes evokes many unanswered questions. Many of these uncertainties involve aspects of federal reserved rights that have not yet been defined by Congress or the federal courts. Even where there is legal clarity in the federal reserved rights doctrine, the administration of Indian federal reserved rights within state prior appropriation systems has created additional areas of legal and political conflict. So how are these instream flow and non-consumptive uses treated in modern law? Addressing this question requires a basic understanding of both Indian federal reserved rights and western water law.

This chapter introduces the Indian federal reserved rights doctrine and examines rights recognized under that doctrine in comparison to rights acquired under the prior appropriation doctrine – the dominant doctrine in western water law – with an eye toward non-consumptive use. The purpose of the chapter is to lay the backdrop for this guide's broader recommendations for effectively pursuing and establishing tribal non-consumptive uses.

Part One: The Foundations of Indian Federal Reserved Rights

In the United States, water rights are generally administered under state water law systems. The majority of states in the West follow the prior appropriation doctrine, which recognizes individual rights to water based on the principal of "first in time, first in right." Under this doctrine, the person who first diverts water and applies it to a "beneficial use" gets her entire water allocation before any of the water rights holders junior to her get any of their water allocations.[35] Each user must continue to make "beneficial use" of her right, and is at risk of losing that right by failing to make use of it for a specified length of time. Beneficial use is generally defined by state statutes, but does not always include non-consumptive uses. Some states limit recognition of non-consumptive water uses by

[35] Each state has its own water code, which details any additional requirements for obtaining a water right.

restricting beneficial use of water to specific ecological purposes or by specifying the entities that may hold instream flows.[36]

Federally recognized Indian tribes have water rights based on federal rather than state water law.[37] The United States Supreme Court first recognized Indian federal reserved water rights in the 1908 case *Winters v. United States*.[38] In *Winters*, the Supreme Court held that when the Indian tribes and federal government create an Indian reservation, the United States impliedly reserves the water necessary to fulfill the purpose of that reservation.[39] Because of this, federally reserved Indian water rights are often referred to as *Winters* rights. These rights are defined and protected by federal common law regarding water resources, federal Indian law, and the unique relationship between the United States government and Indian tribes.[40]

United States v. Winans: The United States Supreme Court's first recognition of Indian federal reserved rights

Three years prior to the Supreme Court's holding in *Winters*, the Court laid the basis for recognition of Indian federal reserved rights to traditional natural resources in *United States v. Winans*.[41] In *Winans*, the Yakama Nation's treaty stated that the Tribe has the "right of taking fish at all usual and accustomed places" and of "erecting temporary buildings for curing them" along the Columbia River.[42] Tribal members sought to continue using these traditional sites against the objections of state fee-owners of the land.[43] The Court noted that the Tribe's "treaty was not a grant of rights to the Indians, but a grant of right from them, - a reservation of those not granted."[44] The Court made clear that these

[36] See Chapter 4 for a discussion of instream flow rights under state law in the Colorado River Basin.
[37] Tribes may hold state water rights in addition to their federal reserved rights. See Chapter 4 for additional discussion of appropriating water for instream flows under state law.
[38] 207 U.S. 564 (1908).
[39] *Id.* at 577.
[40] The federal government has a fiduciary duty to the Indian tribes, which is referred to as the federal trust relationship. In *United States v. Mitchell*, 463 U.S. 206, 225 (1983), the Supreme Court referred to "the undisputed existence of a general trust relationship between the United States and the Indian people." In *Cherokee v. Georgia*, the Supreme Court described the nature of the relationship as similar to that of a "ward to a guardian." 30 U.S. 1, 16-17(1831). The trust relationship requires that the federal government act in a tribe's best interest, and gives rise to enforceable duties remediable by actions for damages for breach of trust, particularly when the obligation arises in a federal statute.
[41] 198 U.S. 371 (1905).
[42] *Id.* at 381.
[43] *Id.*
[44] *Id.*

rights secured to the Tribe by its treaty were not "subordinate to the powers acquired by the state upon its admission into the Union."[45]

Winans articulated two important principles that have implications for tribal non-consumptive uses today. First, *Winans* stated that rights not ceded in negotiations with the federal government were reserved by the tribes. Tribes have been using western rivers for a variety of non-consumptive purposes since time immemorial. If a tribe, acting in its sovereign capacity, did not expressly cede the right to continue using tribal waters in a traditional non-consumptive manner, the tribe likely has the right to continue using water in that manner. Secondly, *Winans* established that a tribe's ability to exercise the full extent of its federal reserved right could not be impeded by conflicting state rights.[46]

Winters v. United States: The foundational case recognizing Indian federal reserved water rights

Winters v. United States was the foundational case recognizing Indian federal reserved water rights. In *Winters*, the United States Supreme Court considered a conflict over use of the waters of the Milk River in Montana between the Tribes of the Fort Belknap Reservation, represented by the federal government, and a group of non-Indian homesteaders upstream.[47] The Tribes, whose reservation was established in 1888, had been making use of the waters of the Milk River for irrigation and domestic purposes prior to the development of upstream diversions by the non-Indian homesteaders.[48] The non-Indian homesteaders alleged that their rights were superior to those of the Tribes because they had been properly established under state law.[49]

In deciding the controversy, the *Winters* Court turned to the 1888 treaty between the United States and the tribes of the Fort Belknap Reservation. The Court asked: "The 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?"[50] In light of the canon of construction the Court had established for interpreting Indian treaties, which holds that "ambiguities occurring will be resolved from the standpoint of the Indians," the Court found that the Tribes had unquestionably reserved the waters necessary to make their arid reservation inhabitable.[51] Thus, the *Winters* court followed the reasoning in *Winans* that rights not

[45] *Id.* at 382-84.
[46] *Id.* at 384.
[47] 207 U.S. at 565-73.
[48] *Id.*
[49] *Id.* at 568-70.
[50] *Id.* at 576.
[51] *Id.* at 576-77.

ceded were reserved by Indian tribes. *Winters* also established that the priority date of Indian reserved rights is the date the reservation was established.

The "Winters doctrine," recognizing the implied reservation of water rights for Indian reservations, has been elaborated upon throughout the years. Below we examine several Supreme Court cases that have contributed to the development of the doctrine.

Arizona v. California: Application of the Winters doctrine and quantification of Indian reserved water rights based on the practicably irrigable acreage standard

In the 1963 United States Supreme Court case *Arizona v. California*,[52] involving a dispute between the states of Arizona and California over the apportionment of the Colorado River, the Supreme Court addressed claims brought by the United States on behalf of five federally recognized Indian tribes.[53] The Special Master appointed to the case had earlier found in accordance with *Winters* that: "when the United States created these reservations or added to them, it reserved not only land but also the use of enough water from the Colorado to irrigate the irrigable portions of the reserved lands."[54]

The State of Arizona contested the United States' claims on behalf of tribes, arguing, among other things, that there was no evidence that the United States had intended to reserve water for the tribes, and, that even if it had, the Special Master had awarded too much water to the tribes by using a "practicably irrigable acreage" (PIA) standard.[55]

Addressing the first of these claims, the Court responded:

> We reject [this] contention[]. Most 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

[52] *State of Ariz. v. State of Cal.*, 373 U.S. 546 (1963) judgment entered sub nom. *State of Arizona v. State of California*, 376 U.S. 340 (1964) amended sub nom. *Arizona v. California*, 383 U.S. 268 (1966) and amended sub nom. *Arizona v. California*, 466 U.S. 144 (1984).

[53] The five mainstream Colorado River tribes included the Chemehuevi, Cocopah, Yuma, Colorado River, and Fort Mojave Indian tribes.

[54] 373 U.S. at 596.

[55] *Id.* at 596.

> river would be essential to the life of the Indian people and to the animals they hunted and the crops they raised.[56]

Thus, the Court re-affirmed the sentiment in *Winters* that the United States intended to make reservations habitable by reserving an amount of water necessary to fulfill the purpose of the reservation.[57]

Perhaps *Arizona*'s most significant contribution to the Indian federal reserved rights doctrine, however, was sanctioning the PIA method of quantifying waters reserved to each tribe. The Special Master had arrived at the PIA measure as a way of assuring that the tribes received the amount of water necessary "to satisfy the future as well as the present needs of the Indian Reservations."[58] The Court agreed with the Special Master, concluding: "the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage."[59]

Therefore, in *Arizona v. California*, the United States Supreme Court both re-affirmed its conclusions in *Winters* and *Winans* that tribes are entitled to federally reserved water in the quantity necessary to make their reservation habitable, and established PIA as the standard measure of those rights.

The McCarran Amendment and state general stream adjudications

After the recognition of Indian federal reserved water rights, states sought the power to join all defendants with claims to the source in question in order to settle all water rights in general stream adjudications. As sovereigns, tribes could not be forced to adjudicate their federal reserved rights without a waiver of tribal sovereign immunity. In 1952, Congress passed the McCarran Amendment for the limited purpose of permitting states to join necessary defendants to adjudicate federal reserved rights claims in state general stream adjudications.[60] In *Arizona v. San Carlos Apache Tribe of Arizona,* the United States Supreme Court held that the McCarran Amendment authorizes states to bring tribes into state court for general stream adjudications.[61] Importantly, the McCarran Amendment does not

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[56] *Id.* at 598-99.
[57] *Id.* at 599-600.
[58] *Id.* at 600.
[59] *Id.* at 601.
[60] Initially, there was some question about whether or not the McCarran amendment required that reserved rights cases be heard exclusively in state court. In *Colorado River Water Conservation District v. United States* (*CRWCD*) the Supreme Court held that efficient judicial administration requires that a federal court dismiss a suit in deference to parallel state general stream adjudication. 424 U.S. 800 (1976). State and federal courts have concurrent jurisdiction over Indian federal reserved rights adjudications, but there is a preference for hearing such cases in state forums.
[61] 463 U.S. 545 (1983).

abridge *substantive* Indian federal reserved rights; states must still apply federal law to the best of their ability to determine the scope of those rights.

Part Two: Precedent Discussing Non-Consumptive Uses of Federal Reserved Rights

The foundational Indian federal reserved rights cases discussed above are crucial to understanding the unique nature of these rights and how they fit into state prior appropriation systems. However, none of these cases directly address the use of Indian federal reserved rights for instream flows or other non-consumptive uses. The following two United States Supreme Court cases address the recognition of non-consumptive water uses when quantifying non-tribal federal reserved rights on federal lands. Although they are not directly applicable, they have in the past been used by courts as the backdrop for recognizing Indian federal reserved rights for non-consumptive uses.

Cappaert v. United States: First recognition of federal reserved rights for non-Indian reservations

In *Cappaert v. United States*,[62] the United States Supreme Court recognized that fulfilling the purpose of a federal reservation sometimes requires the recognition of a non-consumptive water use. The Cappaert family had been pumping groundwater for irrigation pursuant to a state water rights permit.[63] The pumping resulted in the drawdown of a pool in Devil's Hole National Monument in Nevada, an adjacent federal reservation, which was a spawning area for the endangered Devil's Hole pupfish.[64] Both sides stipulated that the Cappaerts' well was hydrologically connected to the water level in the Devil's Hole National Monument.[65] The 1952 Proclamation establishing 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.'"[66] The issue was whether the Cappaerts could exercise their lawfully obtained state water right to the detriment of a federal reserve.[67]

The Court in *Cappaert* rejected the state's argument that the reserved rights doctrine requires a balancing of competing interests.[68] Instead, the Court found that:

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[62] 426 U.S. 128 (1976).
[63] *Id.* at 134.
[64] *Id.* at 133.
[65] *Id.* at 135-36.
[66] *Id.* at 139-140.
[67] *Id.* at 137-38.
[68] *Id.* at 138-39.

> [W]hen the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators . . . The doctrine applies to Indian reservations and other federal enclaves, encompassing water rights in navigable and nonnavigable streams.[69]

The Court then went on to recognize that the federal monument had a federal reserved water right to maintain water in the pool at the level necessary to protect the spawning of the Devil's Hole pupfish.[70] The *Cappaert* opinion was the first recognition by a court of a federal reserved right set aside for non-consumptive use.

United States v. New Mexico: Quantifying rights based on the primary purpose of the reservation

Several years after the *Cappaert* decision, in *United States v. New Mexico*, the United States Supreme Court refused to recognize water for an instream flow for wildlife and recreational purposes when quantifying the federal reserved rights of the Gila National Forest, which was established in 1899.[71] The Court announced the principle:

> Where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water. Where water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator.[72]

The Court then went on to consider the governing statutes for the Gila National Forest, and concluded that although the Multiple-Use Sustained-Yield Act of 1960 included recreation and wildlife as purposes of all National Forests, "Congress did not intend to thereby expand the reserved rights of the United States."[73] The Court concluded that Congress intended that the new purposes be "supplemental to, but not in derogation of, the purposes for which the national forests were established" through the earlier governing statute, the

[69] *Id.* at 138 (citations omitted).
[70] *Id.* at 147.
[71] 438 U.S. 696, 697-98 (1978).
[72] *Id.* at 702.
[73] *Id.* at 713.

Organic Administration Act of 1897.[74] The Court explained that the new purposes articulated in the Multiple-Use Sustained-Yield Act, including recreation and habitat protection, were merely "secondary purposes"[75] for which the United States must seek water rights through the state appropriation system.[76]

Cappaert and New Mexico are not applicable to Indian federal reserved rights

Cappaert and *New Mexico* are often cited as precedent for Indian federal reserved rights issues, generally by those seeking to limit a tribe's use of its federal reserved rights to a "primary" purpose articulated in treaty language. Federal reserved rights as they pertain to lands reserved by the federal government are in fact very different from rights that attach to lands held in trust by the federal government for Indian tribes. Nonetheless, courts have drawn parallels between these two forms of federal reserved rights.

Two key arguments suggest that *Cappaert* and *New Mexico* should not be used to limit a tribe's ability to apply its federal reserved rights to non-consumptive purposes. First, both cases failed to acknowledge or discuss *Indian* federal reserved rights as unique from other federal reserved rights.[77] Non-Indian federal reserved rights arise from a unilateral act of Congress. In contrast, Indian federal reserved rights arise from the treaties establishing reservations that were negotiated as bilateral agreements between sovereigns.[78] Rights in these treaties must be understood according to the canons of construction governing treaty interpretation (see discussion in Part 6, below). Second, in *Cappaert* and *New Mexico*, the Supreme Court was tasked with *quantifying* the amount of water reserved, as opposed to *qualifying* how that water may be used. The result in *New Mexico* – recognizing reserved water only for the primary purpose of the reservation – did not necessarily restrict how those rights could be used.

Despite these arguments, the Ninth Circuit Court of Appeals has used the precedent in *Cappaert* and *New Mexico* to define one aspect of Indian federal reserved rights. In *United States v. Adair*, discussed in more detail below, the Ninth Circuit acknowledged that although non-Indian federal reserved water rights cases are not directly applicable to Indian reserved water rights cases, Supreme Court precedent discussing non-Indian federal reserved water rights serves as guidance for Indian reserved water rights and "indicated

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[74] *Id.* at 714.

[75] *Id.* at 714 -15.

[76] *Id.* at 717.

[77] The Court simply noted that the federal reserved rights doctrine "applies to Indian reservations and other federal enclaves." *New Mexico*, 438 U.S. at 700; *Cappaert*, 426 U.S. at 138.

[78] Some reservations were recognized in executive orders. However, the Supreme Court has noted that these reservations should be understood using the same canons of construction used to interpret treaties established via bilateral negotiations. In *Arizona*, the court explained that reserved rights were recognized for executive order reservations as well. *Arizona* 373 U.S. at 598.

that water may be reserved under the *Winters* doctrine only for the *primary purposes* of a federal reservation."[79] The court noted that: "neither *Cappaert* nor *New Mexico* requires us to choose between these activities or to identify a single essential purpose."[80] The court then defined "primary purposes" expansively, to include both serving as an agricultural "homeland" and to preserve traditional hunting and fishing practices.[81]

Part Three: Precedent Addressing Non-Consumptive Uses of *Indian* Federal Reserved Rights

The discussion below describes cases that specifically address the use of Indian federal reserved water rights for non-consumptive purposes. There are two types of cases that fall into this category. The first type of case recognizes a quantity of water necessary to support fishing rights reserved by tribes in treaty negotiations. The second type involves instances in which Indian federal reserved rights are quantified based on another purpose such as irrigation, but put to non-consumptive uses.

Instream flow rights to fulfill tribes' rights to fish

The cases discussed below recognize Indian federal reserved rights for traditional non-consumptive water uses based on the recognition of fishing rights in treaty language or traditions preserving this activity. *United States v. Adair* is the leading case that recognized reserved water rights to sustain fishing rights. The court in *Colville Confederated Tribes v. Walton* also recognized an implied water right for fisheries based on treaty language and traditional fishing practices.

United States v. Adair: Fishing rights include instream flows

In *United States v. Adair*, the Ninth Circuit Court of Appeals found that tribes with explicit fishing rights language in their treaties have a corresponding right to sufficient water to sustain tribal fisheries with a priority date of time immemorial.[82] Article I of the 1864 treaty between the federal government and the Klamath Indian Tribe reserved the Tribe's "exclusive right to hunt, fish, and gather on its reservation."[83] The court explained that: "one of the 'very purposes' of establishing the Klamath Reservation was to secure to the Tribe a continuation of its traditional hunting and fishing lifestyle."[84] The Court then

[79] 723 F.2d 1394, 1408-09 (9th Cir. 1983) (emphasis added).
[80] *Id.* at 1410.
[81] *Id.*
[82] 723 F.2d at 1415.
[83] *Id.* at 1408.
[84] *Id.* at 1409.

concluded that the Tribe's aboriginal fishing rights were necessarily accompanied by a right to sufficient water to maintain the fishery.[85]

Colville Confederated Tribes v. Walton: Traditional tribal non-consumptive water uses are valid if not ceded

In *Colville Confederated Tribes v. Walton*, the Colville Confederated Indian Tribes sued the Waltons, non-Indian farmers residing on the Colville Reservation, alleging that the Waltons' upstream irrigation practices were depleting Omak Lake and threatening the Tribes' trout fishery.[86] After finding that "[o]ne purpose of the Colville Reservation was the preservation of its fishery" the court recognized the Tribes' right to "sufficient water to permit natural spawning of the trout"[87] and found "an implied reservation of water from No Name Creek for the development and maintenance of . . . fishing grounds."[88] In arriving at this conclusion, the court noted that fishing provided a source of sustenance for the Tribal people and was "of economic and religious importance."[89] As in *Winans*, the court noted that traditional tribal non-consumptive water uses are reserved if a tribe does not explicitly cede that right by treaty.[90]

Using rights for non-consumptive purposes after they are quantified based on another purpose

What if the tribe has a treaty that does not expressly mention fishing rights? In contrast to the treaties in *Adair* and *Walton*, most treaties do not explicitly recognize a tribal right to fish. The Ninth Circuit concluded that a tribe may use irrigation water rights for instream purposes in *Anderson*.[91] However, when addressing the scope of federal reserved rights, state courts have been inconsistent. Two state court cases have addressed the use of Indian federal reserved rights for non-consumptive purposes where a right to fish is not

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[85] *Id.* at 1414. The court held that because the water right was based on an aboriginal hunting and fishing right, the Tribe's priority date for that right was time immemorial. *Id.* The court went on to discuss the unique nature of these rights, noting that: "A water right to support game and fish adequate to the needs of Indian hunters and fishers is not a right recognized as a part of the common law doctrine of prior appropriation followed in Oregon . . . Thus the right to water reserved to further the Tribe's hunting and fishing purposes is unusual in that it is basically non-consumptive." *Id.* at 1411.

[86] 647 F. 2d 42, 49 (9th Cir. 1981), cert denied, 454 U.S. 1092 (1981). Traditionally, the Colville Tribes fished for salmon and trout along the Columbia River. When dams along the Columbia River and its tributaries prevented salmon from reaching the Tribes' reservation land, they collaborated with the Department of Interior to establish the Omak Lake fishery as a replacement for loss of the traditional fisheries. When irrigation by state water rights holders threatened the water supply used to enable the spawning of trout in the Confederated Colville Tribes' Trout fishery the Tribes sued to enjoin diversions by state water users.

[87] *Id.* at 48.

[88] *Id.*

[89] *Id.*

[90] *Id.* at 46-47.

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

articulated in treaty language. These cases, *In re Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources (Big Horn I* and *III)*[92] and *In re General Adjudication of All Rights to Use of Water in the Gila River System and Source* (the Gila River Adjudication),[93] from the Wyoming and Arizona State Supreme Courts respectively, arrived at diverse conclusions about the permissible use of Indian federal reserved rights.

Wyoming's Wind River Adjudication: Wyoming subjects tribes to state change of use processes

Wyoming's Wind River adjudication involved a series of opinions discussing the quantification, use, and authority over the Wind River Tribes' federal reserved rights. The Special Master appointed in the case was of the opinion that the "Tribes are entitled to make such use of the water covered by reserved water right as they deem advisable."[94] However, the Wyoming Supreme Court came to very different conclusions about the Tribes' rights in its subsequent *Big Horn I* and *Big Horn III* opinions.

In *Big Horn I*, when the Wyoming Supreme Court was tasked with quantifying the reserved rights of the Wind River Tribes, it found that the purpose of the reservation was agricultural and refused to recognize a quantity of rights for mineral development, fisheries, wildlife, or aesthetic purposes.[95] The court explained: "Although the treaty did not force the Indians to become farmers and although it clearly contemplates that other activities would be permitted (hunting is mentioned in Article 4, lumbering and milling in Article 3, roaming in Article 9), the treaty encouraged only agriculture, and that was its primary purpose."[96] The court then affirmed the district court's quantification of the

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[92] *In re the General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76, 98-99 (Wyo. 1988) (*Big Horn I*); *In re the General Adjudication of All Rights to Use Water in the Big Horn River System*, 835 P. 2d 273, 275 (Wyo. 1992)(*Big Horn III*).

[93] *In re General Adjudication of All Rights to Use of Water in the Gila River System and Source*, 35 P.3d 68 (Ariz. 2002) (the Gila River Adjudication).

[94] Report and Recommendation of the Special Master, October 4, 1990, *In re:* General Adjudication of All Rights to Use Water In the Big Horn River System and All Other Sources, State of Wyoming, Fifth District Court of Wyoming (No. 86-00120).

[95] 753 P.2d at 98-99. The court held that:

> Article 7 of the treaty refers to "said agricultural reservations." Article 6 authorizes allotments for farming purposes; Article 8 provides seeds and implements for farmers; in Article 9 "the United States agreed to pay each Indian farming a $20 annual stipend, but only $ 10 to 'roaming' Indians"; and Article 12 establishes a $50 prize to the ten best Indian farmers. The treaty does not encourage any other occupation or pursuit. The district court correctly found that the reference in Article 4 to "permanent homeland" does nothing more than permanently set aside lands for the Indians; it does not define the purpose of the reservation. Rather, the purpose of the permanent-home reservation is found in Articles 6, 8, 9, and 12 of the treaty. *Id.* at 97.

[96] *Id.*

Tribes' federal reserved rights based on the PIA analysis.[97] The court also began to discuss the purposes for which the Tribe's water rights could be used. Justice Thomas, dissenting, balked at the majority's narrow construction of the purpose of the reservation. Justice Thomas explained: "I would hold that the implied reservation of water rights attaching to Indian reservations assumes any use that is appropriate to the Indian homeland as it progresses."[98]

While *Big Horn I* restricted the purposes recognized for quantification of the Wind River Tribes' federal reserved rights, *Big Horn III* restricted the Tribes' ability to change the use of those rights. In *Big Horn III*, the Wyoming Supreme Court found that the Wind River Tribes did not have the right to independently change a portion of their Winters rights to instream flow uses.[99] When the Tribes sought to enforce a reservation instream flow right established under tribal law, the Wyoming Supreme Court held that to do so the tribes would have had to subject their federal reserved right to the state administration system.[100] After stating that "federal law has not preempted *oversight* of federal reserved water rights,"[101] the Wyoming Supreme court proceeded to hold that the Tribes, "like any other appropriator, must comply with Wyoming water law to change the use of their reserved future project water from agriculture to any other beneficial use."[102]

There is a strong argument that the *Big Horn III* court erred when it applied state law to federal reserved rights in a manner that abridged those rights. Wyoming state water law requires that the state "shall own any instream flow water right."[103] Forcing the Tribes to abide by state water administration laws impermissibly prevents them from fully utilizing their Winters rights. Furthermore, the court subjected the tribal water right to the state non-injury rule, requiring that changes in the place, purpose, or manner of water use may

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[97] *See id*. at 112.

[98] *Id. at* 100. Thomas went on to explain that the only thing he would not permit is the marketing of water off-reservation. *Id.* Judge Hanscum, who joined in other portions of Thomas' dissent, diverged on this point, suggesting that the "sale of water off the reservation should be permitted, provided that, as a factual matter, it could be demonstrated that such marketing contributed to the progress and development of the Indian homeland." *Id.* at 135.

[99] *Big Horn III* 835 P. 2d at 282.

[100] The Wyoming Supreme Court completely reversed the holding of the District Court. The District Court held that "the Tribes may change their reserved water right to instream flow without regard to Wyoming state water law" and held that that the tribe's Water Resources Control Board, rather than the Wyoming State Engineer, should administer and enforce all water rights, both state and federal, within the boundary of the reservation.

[101] *Id. a*t 278 (emphasis added).

[102] *Id.* at 279. In doing so, the court deferred to the reasoning of the State Engineer, who had opined that the "Tribes had been awarded only the right to divert water and that any change in the use of future project water covered by their reserve water right must be made following a diversion." *Id.* at 276.

[103] Wyoming Statute § 41-3-1002 (e) (Supp.1991).

not "injure in any manner other lawful appropriators."[104] Thus, the Wyoming Supreme Court impeded the exercise of the federal reserved rights in a manner prohibited by the federal reserved rights doctrine.

Gila River Adjudication: Arizona allows tribes broad control over non-consumptive uses

In the Gila River Adjudication, *In re General Adjudication of All Rights to Use of Water in the Gila River System and Source*, the Arizona Supreme Court specifically rejected the approach taken by the Wyoming Supreme Court. First, the court concluded that there were enough significant differences between Indian and non-Indian reservations to preclude applying *New Mexico*'s primary-secondary purpose test (on which the *Big Horn* court relied) to Indian water rights cases.[105] Next, the court asserted that the purpose of a reservation was broader than solely for agriculture; instead, the primary purpose of federal Indian reservations was to serve as permanent homelands for the Indian tribes.[106] To fulfill the needs of the reservation as a permanent homeland, tribes should be able to use their water resources for a broad range of purposes, including for non-consumptive uses.

Part Four: The Importance of the Purpose of the Reservation and Permissible Use of Indian Federal Reserved Rights

As demonstrated above, the limited precedent addressing the use of Indian federal reserved rights for non-consumptive purposes leaves many issues unsettled. The courts frequently look to the purpose of the reservation to answer questions about the scope of Indian federal reserved rights. Here, we specifically examine the purpose of the reservation and its role in determining acceptable use of Indian federal reserved rights. This analysis is particularly relevant for tribes with treaties that do not explicitly reference fishing or other non-consumptive uses.

What is the purpose of the reservation?

In *Cappaert,* the Court explained: "determination of reserved water rights is not governed by state law but derives from the federal purpose of the reservation."[107] When determining the purpose of the reservation, courts look to the treaty and accompanying negotiations. Because treaty negotiations were always complicated, a single reservation may be found to have multiple purposes. Some of the common purposes identified by courts are examined here.

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[104] Wyoming Statute § 41-3-104 (1977).
[105] 35 P. 3d at 73-75.
[106] *Id.* at 76.
[107] *Cappaert*, 426 U.S. at 143.

Farming and Irrigation

Farming and irrigation are activities routinely discussed in treaty language. In *Winters*, the Court found that water was reserved so that the Tribe could become "pastoral."[108] *Arizona* recognized that tribes in the Colorado River Basin had treaties that encouraged farming, and as a result found implied rights to water sufficient to irrigate tribal lands.[109] The explicit mention of farming in the majority of treaties makes PIA a very viable and minimally controversial option for tribes seeking to quantify their federal reserved rights. Similarly, tribes can typically apply their water rights to grow crops with minimal challenges to the type of use they are engaging in. However, defining an agricultural purpose for the reservation has also been used in arguments that would seek to limit the use of Indian federal reserved rights to on-reservation irrigation. For an example of a case that uses this purpose as a limitation on use, we refer readers to the discussion of *Big Horn I & III*, above.

Fishing and Hunting Rights

Some treaties explicitly reference the continuation of hunting and fishing practices. As introduced above in the discussion of *Adair*, where treaties recognize the right to take fish, courts have recognized an accompanying quantity of reserved water rights to sustain those fisheries.[110] Although the theory is as yet untested in court, it is possible that tribes with hunting rights specifically reserved in their treaties may be able to demonstrate the need for an accompanying water right to maintain wildlife habitat.[111] When the court finds that

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[108] *Winters*, 207 U.S. at 576.

[109] *Arizona*, 373 U.S. at 599-600.

[110] *Adair,* 723 F.2d at 1415.

[111] In *Adair*, the 9th Circuit found that tribes had a treaty right to fish and an accompanying reserved water right to sustain traditional fisheries. Many tribes in the Colorado River Basin have historically hunted animals that require wetland habitats to survive. For the tribes that hunted these animals for subsistence or ceremonial uses, an argument could be made that they have a treaty right (language depending) or implied right to hunt. This right to hunt could be found to require adequate federal reserved rights to maintain wetland conditions essential for the survival of reservation wildlife.

Hunting can only continue if there is wildlife on the reservation. Just as the *Adair* court noted that "fish need water," wildlife need suitable habitat to survive. Certain wildlife species require wetland habitat, including migratory birds and mammals including mink, muskrat, and beaver. Holly L. May, Natural Resources Conservation Service. Wildlife Habitat Management Institute. Fish and Wildlife Habitat Management Leaflet. Number 21. March 2001. Accessed at http://www.wildlifehc.org/new/wp-content/uploads/2010/10/Wetland-Mammals.pdf on 5/8/2014. The Natural Resources Conservation Service (NRCS) has explained that "[w]ater is the most influential component of wetland ecosystems, controlling soil characteristics and associated plant and animal life." *Id.* Thus, although untested in the courts, a claim could be made for water rights to support wetland ecosystems indispensable necessary to support reserved hunting rights.

the continuation of fishing rights is supported in treaty language as one of the purposes of the reservation, tribes should be able to apply their federal reserved rights to instream flows.

The Homeland Standard

An expansive way to recognize the purpose of the reservation is as a permanent homeland with multiple purposes that vary over time to meet the tribe's needs. In *Big Horn I*, Justice Thomas provided a particularly eloquent articulation of this view in his dissent:

> The purpose of establishing an Indian reservation, such as the Wind River Indian Reservation, is to provide a homeland for Indian peoples. If one is to assume that, pursuant to the reserved rights doctrine relating to water, there is an implied reservation of those waters essential to accomplish the purpose of the reservation of land, then I cannot agree that the implied reservation of water with respect to the Wind River Indian Reservation should be limited, as the majority has held in approving the judgment of the district court. The fault that I find with such a limitation is that it assumes that the Indian peoples will not enjoy the same style of evolution as other people, nor are they to have the benefits of modern civilization. I would understand that the homeland concept assumes that the homeland will not be a static place frozen in an instant of time but that the homeland will evolve and will be used in different ways as the Indian society develops. For that reason, I would hold that the implied reservation of water rights attaching to an Indian reservation assumes any use that is appropriate to the Indian homeland as it progresses and develops.[112]

The "homeland standard" was adopted by the Arizona Supreme Court in the Gila River Adjudication in which the court found that "the purpose of a federal Indian reservation is to serve as a 'permanent home and abiding place' to the Native American people living there."[113] In support of this conclusion, the court quoted *Walton*: "[t]he general purpose, to

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The authors are unaware if such claims have ever been tested in the courts. As untested water, tribal attorneys would play an essential role in determining whether such a claim would have any traction on the reservation. At a minimum, establishing a strong history of harvesting traditional plants from wetlands could provide a solid foundation to support the use of Indian federal reserved rights for irrigating wetland habitats (see discussion in Chapter 8, below).

[112] *Big Horn I*, 753 P.2d at 100. Thomas went on to explain that the only thing he would not permit is the marketing of water off-reservation. *Id*. Judge Hanscum, who concurred in the majority of Thomas' dissent, diverged on this point, suggesting that the "sale of water off the reservation should be permitted, provided that, as a factual matter, it could be demonstrated that such marketing contributed to the progress and development of the Indian homeland." *Id.* at 135.

[113] *The Gila River Adjudication*, 35 P.3d at 76.

provide a home for the Indians, is a broad one and must be liberally construed."[114] The homeland standard, as the most flexible notion of the purpose of a reservation, defines the purpose of the reservation in a manner that is least likely to lead to attempts to limit the tribe's use of its rights.

As demonstrated above, treaties can be construed in a variety of ways. Courts taking a narrow approach to treaty construction emphasize the distinct and explicit purposes articulated in treaty language, whereas courts that construe treaties broadly find that reservations were intended to widely serve the past, present, and future needs of the tribe. Below, in Part Five, we address how the purpose of the reservation affects the qualification of how Indian federal reserved rights on the reservation.

Part Five: Is Applying Indian Federal Reserved Rights to Non-Consumptive Uses Permissible Under the *Winters* Doctrine?

Neither the Supreme Court nor Congress has defined the ways in which tribes may use their federal reserved rights. Decrees and settlements sometimes explicitly limit the specific uses of Indian federal reserved rights. However, outside of these congressionally approved instruments, the scope of permissible use of Indian federal reserved rights remains unclear. Planned uses of Indian federal reserved rights have occasionally been challenged in state proceedings by competing water users. At least one state supreme court has limited the manner in which a tribe may use its federal reserved right (see discussion of *Big Horn III,* above).[115] Additionally, the fear of litigation has sometimes dissuaded tribes from using their water for certain purposes. Here, we examine whether using Indian federal reserved rights for non-consumptive purposes is permissible under the federal reserved rights doctrine.

Precedent supports the use of Indian federal reserved water rights for any purpose

Courts have often discussed the recognition and use of Indian federal reserved rights as evolving along with the needs of tribes. In *Winters*, when Indian federal reserved rights were first recognized by the Court, the Court indicated those rights should be flexible enough to accommodate new and future uses. The Court in *Winters* remarked:

> It would be extreme to believe that . . . Congress destroyed the reservation and took from the Indians the consideration of their grant, leaving them a barren waste—

[114] *Id* (*citing Walton*, 647 F. 2d at 47).

[115] In Part 3, we discussed *Big Horn III*, in which the Wyoming Supreme Court sought to restrict the purposes for which the Tribes used their Indian federal reserved rights. For reasons discussed above, the Wyoming Supreme Court likely erred in its decision.

took from them the means of continuing their old habits, yet did not leave them the power to change to new ones.[116]

The *Winters* Court was clear that tribes should have access to sufficient use of reservation resources to be self-sustaining. The *Arizona* Court also discussed Indian federal reserved rights as evolving, explaining that "the water was intended to satisfy the future as well as the present needs of the Indian Reservations,"[117] in part because "[h]ow many Indians there will be and what their future needs will be can only be guessed."[118] Recognizing water rights for the reservation would allow tribes to "maintain themselves under changed circumstances."[119] Like any nation, tribal communities continually develop new customs, ways of life, and self-sustaining economies through the use of their resources.

In *Walton*, the Ninth Circuit Court of Appeals explained: "when the Tribe has a vested property right in reserved water, it may use it in any lawful manner."[120] The court emphasized that "Congress envisioned agricultural pursuits as only a first step" and that Congress's "vision of progress implies a flexibility of purpose."[121] The Ninth Circuit Court of Appeals reiterated this perspective in *Anderson*, holding that "the tribe is, of course, entitled to utilize its water for any lawful purpose."[122] Thus, Ninth Circuit Court of Appeals precedent suggests that Indian federal reserved rights should be construed broadly to permit any use.

Cases restricting use to the purpose used for quantification

As discussed in Part 3, the Wyoming Supreme Court restricted the Wind River Tribes' water use to on-reservation irrigation, which the court determined to be the sole purpose of the reservation.[123] In dicta, the United States Supreme Court has condemned the

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

[117] *Arizona v. California*, 373 U.S. 546, 600 (1963).

[118] *Id.* at 601. Special Master Rifkind's report in *Arizona v. California* stated that once quantified, Indian federal reserved rights can be used for "any purpose." *Id.* (report of Special Master Rifkind at 266).

[119] *Id.* at 576. The Court discussed specifically the importance of water for agriculture to sustaining the tribes. *See id.* at 599.

[120] *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 48 (9th Cir. 1981) (further explaining that "[a]s a result, subsequent acts making the historically intended use of the water unnecessary do not divest the Tribe of the right to the water.")

[121] *Walton*, 647 F.2d at 47 (citing 11 Cong. Rec. 905 (1881)). Additionally, the Tribe was granted a post-trial motion to seek permission to use their water for trout spawning. *Id.* at 46.

[122] *United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984).

[123] *Wyoming v. United States*, 753 P.2d 76 (Wyo. 1988), *aff'd* by an equally divided Court, 492 U.S. 406, 106 L. Ed. 2d 342 (1989). Justice Thomas's dissent discussed the establishment of a homeland standard, which would permit the tribes to use water for a variety of purposes on-reservation. The Arizona Supreme Court, later rejected the Wyoming Supreme Court's conclusions when it held in *Gila III* that reservations were established as "permanent homelands" and suggested an expansive interpretation of the ways in which tribes

conflation of quantification with qualification. In *Arizona v. California*, the Court adopted Special Master Rifkind's finding that the PIA method of quantifying Indian reserved rights "does not necessarily mean . . . that water reserved for Indian Reservations may not be used for purposes other than agriculture and related uses."[124] In the 1979 supplemental decree to *Arizona* the parties stipulated that the decree did not restrict the use of the water to agricultural irrigation.[125] Similarly, in *Walton*, the Ninth Circuit Court of Appeals explained: "the purposes for which the reservation was created governed the quantification of reserved water, but not the use of such water."[126]

Colorado River Basin tribes are likely to find themselves in a situation in which they are seeking to use rights for a non-consumptive purpose not expressly named in their treaty. Treaties do not include language asserting that the tribe can use water for instream flows. After all, legal protections for instream flows were non-existent at the time that treaties were being negotiated. However, using Indian federal reserved rights non-consumptively would nonetheless be supported if the purpose of the reservation is defined to include protecting tribe's fisheries or broadly, as a homeland for the tribe.

Part Six: Authority Over and Administration of Reservation Water Resources

There are several potential barriers for tribes seeking to assert full control over reservation water resources. First, any water resources available on a reservation above and beyond the quantity necessary to fulfill the tribe's federal reserved rights are "excess" waters available for anyone to appropriate under state law. These excess waters may be subject to state regulation (see discussion of *Anderson*, below). Second, tribes may not be fully autonomous in making decisions about their water resources due to the requirement that tribes seeks the approval of the Secretary of the Interior prior to alienating tribal trust resources. Third, Congress has the authority to act explicitly to define the scope of Indian federal reserved rights and to limit tribal authority.

The tribe may not have authority over state water rights within reservation boundaries

Federal Indian tribes have authority to administer the use of Indian federal reserved rights on the reservation. This includes the authority to determine how their reserved rights are

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could use their water rights to develop these homelands. *In re General Adjudication of All Rights to Use of Water in the Gila River System and Source*, 35 P.3d 68, 76 (Ariz. 2002).

[124] 439 U.S. at 422.

[125] *Id. See also* U.S. Dep't of the Interior, Opinions of the Solicitor of the Dep't of the Interior Relating to Indian Affairs 1930 (1979) (authorizing use of water for a housing resort).

[126] *Walton*, 647 F.2d at 48.

allocated, permitted, and protected. However, on-reservation waters in excess of Indian federal reserved right may be subject to some degree of state regulation. Two Ninth Circuit Court of Appeals cases, *Walton*[127] and *Anderson*,[128] address the state's authority to regulate water resources on the reservation. In *Walton*, the court found that the State of Washington could not regulate non-Indian water use within the reservation. In *Anderson*, the court held that the State of Washington, rather than the Spokane Tribe, had regulatory authority over state-issued non-Indian water permits on non-Indian fee land within the reservation boundaries.

Colville Confederated Tribes v. Walton: Tribes may have control over non-Indian use of water resources entirely within reservation boundaries

Part Three, above, includes a discussion of *Colville Confederated Tribes v. Walton* in which the Ninth Circuit Court of Appeals addressed the Tribes' ability to establish instream flows for fisheries preservation. The *Walton* court also addressed whether the State of Washington may regulate water use by non-Indians on fee lands within reservation boundaries. The court found that when the federal government established the Colville Indian Reservation it preempted state regulatory authority over the use of water from the No Name Creek.[129] The court arrived at this conclusion after finding that non-Indian water use was threatening the Tribes' fishery and that regulating water uses on the reservation was an important sovereign power.[130] The court emphasized that the No Name River was entirely within reservation boundaries, a factor that weighed heavily in favor of tribal administration of the river.

United States v. Anderson: The state may have authority over excess waters on fee lands within reservation boundaries

The facts giving rise to *Anderson* concerned the administration of water rights in the Chamokane Basin, which includes water bodies on the Spokane Indian Reservation.[131] Ultimately, the Court found that Washington State "has the authority to regulate the use of excess Chamokane Basin waters by non-Indians on non-tribal, i.e., fee, land" because there was no consensual agreement between the non-tribal water users and the Tribe, the state interest in the regulation was great, and the Tribe's rights would not be impaired by state regulation.[132]

The court distinguished the facts in *Anderson* from the facts in Walton, pointing out that the stream in *Walton* was entirely within reservation boundaries, while the stream in

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[127] 647 F. 2d 42, (9th Cir. 1981), cert denied, 454 U.S. 1092 (1981).
[128] 736 F. 2d 1358 (9th Cir. 1984).
[129] *Walton* , 647 F. 2d at 51.
[130] *Id.* at 52.
[131] *Anderson,* 736 F. 2d at 1361.
[132] *Id.* at 1365.

Anderson was largely outside the reservation boundaries.[133] The *Anderson* court intentionally limited the permissible exercise of state authority to "excess" waters that were not part of the Tribe's reserved rights allocation and were appropriated by non-Indians on fee lands.[134] Furthermore, regulation of state rights by the state within reservation boundaries was only permissible because adequate protections existed to protect the Tribe's reserved rights.[135]

Both *Walton* and *Anderson* relied heavily on geographical facts to determine authority to regulate water resources within reservation boundaries. Both cases addressed the ability of states to regulate non-Indian water use on the reservation. Neither case suggests that states can reach into the reservation to regulate tribal use of their Indian federal reserved rights.

Tribes must have federal approval before they can undertake certain water uses

The federal government holds reserved lands and natural resources "in trust" for the exclusive use of the tribe. The federal government is obligated to act in the best interest of the tribe when dealing on the tribe's behalf regarding that land and water, a "fiduciary duty" to the tribe referred to as the "federal trust relationship."[136] This relationship can sometimes benefit tribes. However, it also gives rise to some limitations of tribal authority over trust resources. One common limitation arising from this relationship is the requirement of federal approval before a tribe can alienate its trust resources.

Under federal law, a tribe may not sell, lease, or otherwise encumber tribal trust lands without prior federal consent.[137] Federal reserved water rights are generally considered to be included in this restriction.[138] Thus, tribes must seek the approval of Congress before entering into a water rights settlement with other stakeholders. Similarly, before entering into a conservation easement agreement or other lease or encumbrance of reserved water rights, a tribe would need federal consent.

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[133] *Id.* at 1366.

[134] "[T]he state may regulate only the use, by non-Indian fee owners, of excess water. Any permits issued by the state would be limited to excess water. If those permits represent rights that may be empty, so be it." *Id.* at 1365.

[135] "Central to our decision here is the fact that the interest of the state in exercising its jurisdiction will not infringe on the tribal right to self-government nor impact on the Tribe's economic welfare because those rights have not been quantified and will be protected by the federal water master." *Id.* at 1366.

[136] In *United States v. Navajo Nation*, the United States Supreme Court confirmed "the general trust relationship." 537 U.S. 488, 490 (2002).

[137] 25 U.S.C. § 177.

[138] For a thorough discussion of the relevant law and precedent surrounding the inclusion of federally reserved water rights in the category of protected water resources, *see* Judith V. Royster, *Indian Water and the Federal Trust: Some Proposals for Federal Action*, 46 NAT. RESOURCES J. 375 (2006).

The trust relationship has other consequences. As discussed in Chapter 6, many tribes are required by their constitutions to seek the approval of the Secretary of the Interior prior to enacting a tribal water code.[139] Some tribes have also included provisions in their water rights settlements giving the Secretary authority to administer water rights on the reservation,[140] or to develop a water management plan.[141]

Congress has authority to define Indian federal reserved rights

Under certain circumstances, Congress has the authority to unilaterally abrogate treaties with the tribes[142] when it has expressed "plain and unambiguous" intent to do so.[143] Through exercising this power Congress could exercise authority to define how tribes can use their federal reserved rights. As noted by Indian law scholars Charles Wilkinson and John Volkman, the requirement of an explicit abrogation, when paired with the federal government's fiduciary duty, creates a strict requirement consistent with "the most exacting fiduciary standards" when Congress deals with the Indians.[144]

Part Seven: Can States Impose Regulations on the Use of Indian Federal Reserved Rights?

One of the most common conflicts surrounding Indian federal reserved rights occurs when those rights are used in a manner that that is inconsistent with state water codes. However, Indian federal reserved rights are only subject to substantive federal law concerning the ways in which Indian federal reserved rights may be used. Neither Congress nor the Supreme Court has subjected federal reserved rights to state water laws. Even in state adjudications, courts must apply the federal reserved rights doctrine when adjudicating

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[139] Many tribes that developed constitutions under the Indian Reorganization Act included Secretarial approval provisions. This is particularly limiting given the Secretary's current moratorium on approving tribal water codes. See the discussion in Chapter 6.

[140] *See, e.g.*, Colorado Ute Indian Water Rights Settlement Act of 1988, Pub. L. No. 100-585, § 9, 102 Stat. 2973, 2978.

[141] *See, e.g.*, An Act relating to the settlement between the United States and the Ak-Chin Indian community of certain water right claims of such community against the United States, Pub. L. No. 95-328, 92 Stat. 409 (1978), *as amended,* Pub. L. No. 98-530, § 6, 98 Stat. 2698, 2702 (1984); San Carlos Apache Tribe Water Rights Settlement Act of 1992, Pub. L. No. 102-575, § 3710(d), 106 Stat. 4600, 4750.

[142] "The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself. Article I, s 8, cl. 3, provides Congress with the power to 'regulate Commerce . . . with the Indian Tribes,' and thus, to this extent, singles Indians out as a proper subject for separate legislation." *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974).

[143] *See County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247-48 (1985).

[144] Charles F. Wilkinson & John M. 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, 608-19 (1975).

federally reserved water rights.[145] However, state courts and resource managers have not always enforced Indian federal reserved rights according to the federal reserved rights doctrine. For instance, the facts giving rise to the *Big Horn III* opinion arose when a state official, the Wyoming State Engineer, refused to enforce an instream flow established under tribal law. In the litigation that ensued, the Wyoming Supreme Court engaged in a questionable application of federal law that did not seem to track the precedent that had developed the *Winters* doctrine.

Despite the Wyoming Supreme Court's *Big Horn III* opinion, changing the use of Indian federal reserved rights does not subject those rights to state water law. In *United States v. Anderson*, the Ninth Circuit court noted: "If the tribe chooses to use water reserved for irrigation in a non-consumptive manner, it does not thereby relinquish any of its water rights to state permittees or subject the exercise of its rights to state regulation. The state may regulate only the use, by non-Indian fee owners, of excess water."[146] The Ninth Circuit was clear in Anderson that the state has no authority over tribal water use on the reservation.

Because many of the streams in the Colorado River Basin are already over-allocated, subjecting tribal uses to prior appropriation's non-injury requirement would likely prohibit tribes from ever applying their reserved rights to any new purpose. However, as explained the Colorado Supreme Court in *United States v. City and County of Denver*, "[o]nce the federal right has been quantified, that amount is then outside the state appropriation system."[147] Thus, state law should not affect a tribe's ability to establish an in-stream flow on-reservation with federal reserved water rights.[148] This is true even if the tribe's proposed use is not a use typically supported under state laws. In *Adair* the Court noted that although "[a] water right to support game and fish adequate to the needs of Indian hunters and fisheries is not a right recognized as part of the common law doctrine of prior appropriation followed in Oregon" and "is unusual in that it is basically non-consumptive," a federal right does not need to have a "corollary in the common law of prior appropriation."[149] In this holding, the court affirmed not only that the Klamath Tribe has a right to water to support a healthy fish habitat, but also that the Tribe is not subject to state law when enforcing that right.

However, the unsettled scope of Indian federal reserved rights is often determined in state general stream adjudications. Although state courts are required to apply the federal

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[145] See *In re General Adjudication of All Rights to Use Water in Gila River System and Source*, 989 P. 2d 739, 744-45 (1999).
[146] 736 F.2d at 1365.
[147] 656 P.2d 1, 33 (Colo. 1982).
[148] See, however, the discussion of *Big Horn III*, above.
[149] 723 F.2d at 1410-1411.

reserved rights doctrine to the best of their ability in these adjudications, as demonstrated in *Big Horn III* (see Part 3, above), state courts do not always do so. Furthermore, the exact parameters of the permissible uses of Indian federal reserved rights are undefined. These unresolved issues provide state courts with an opportunity to interpret Indian water rights in a manner that protects the rights of junior state users, even if this does not represent the spirit of the Indian federal reserved rights doctrine.

To prevent any potential confusion about authority over water resources, settlements often include provisions describing the parameters of state and tribal regulatory authority over water resources. For example, the Zuni Indian Water Settlement Act of 2003 included provisions that: "[s]tate law shall not apply to water uses on the Reservation,"[150] and that "the State of Arizona may not regulate or tax such water rights or uses."[151]

Part Eight: Federal Indian Law Generally Supports Tribal Control Over Water Resources, But Tribes Should Proceed With Caution

In addition to the body of federal Indian reserved rights law discussed above, the rules of construction governing treaty interpretation likely support tribal control over the use of federal reserved rights. These canons of construction require that: 1) treaty ambiguities must be decided in favor of the tribes; 2) treaties must be interpreted as the Indians would have understood them; and, 3) treaties must be construed in favor of the tribes generally.[152] These principles have been employed by the United States Supreme Court when interpreting rights reserved by tribes in treaties.[153] As demonstrated in *Winans* and *Winters,* it is appropriate to apply these canons to interpret the scope of Indian federal reserved rights.

Tribes reserved whatever authority over their traditional lands that they did not explicitly cede in negotiations with the federal government (see discussion in Part Five, above). Unless a tribe ceded the right to use Indian federal reserved rights for non-consumptive

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[150] The Zuni Indian Tribe Water Rights Settlement Act of 2003, P.L. 108-34. Section 8 (b)(1)(B).

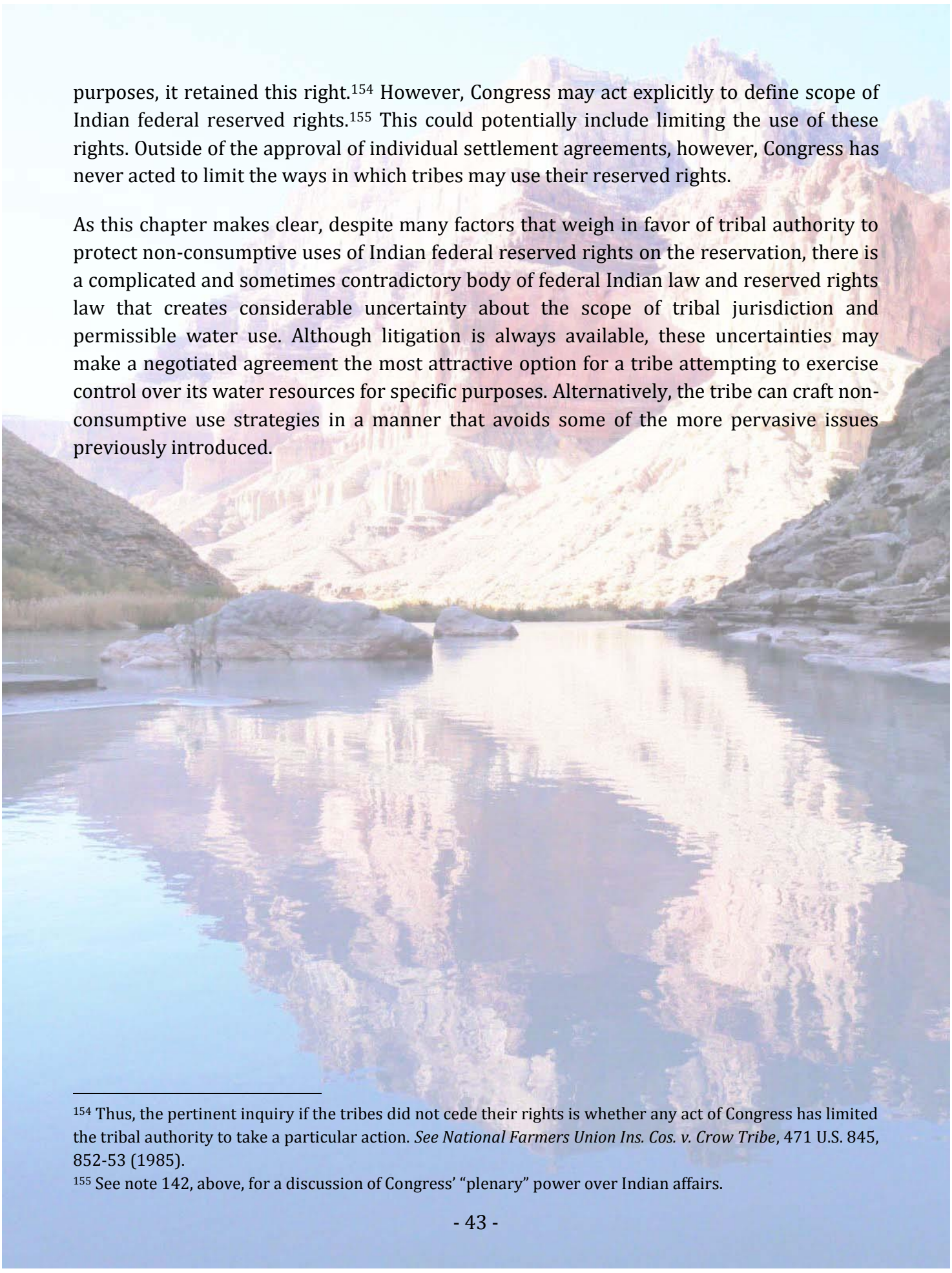
[151] *Id.* at Section 8 (b)(1) (C).

[152] *See* David M. Blurton, *Canons of Construction, Stare Decisis and Dependent Indian Communities: A Test of Judicial Integrity*, 16 ALASKA L. REV. 37-60 (1999).

[153] In *Worcester v. Georgia*, Justice John Marshall set forth the principle that, due to the inferior bargaining power of tribes during treaty negotiations, treaty ambiguities must be construed in favor of tribes. 31 U.S. 515, 582 (1832). Marshall explained: "[t]he language used in treaties with the Indians should never be construed to their prejudice . . . How the words of the treaty were understood by [the tribes] . . . should form the rule of construction." *Id.*

purposes, it retained this right.[154] However, Congress may act explicitly to define scope of Indian federal reserved rights.[155] This could potentially include limiting the use of these rights. Outside of the approval of individual settlement agreements, however, Congress has never acted to limit the ways in which tribes may use their reserved rights.

As this chapter makes clear, despite many factors that weigh in favor of tribal authority to protect non-consumptive uses of Indian federal reserved rights on the reservation, there is a complicated and sometimes contradictory body of federal Indian law and reserved rights law that creates considerable uncertainty about the scope of tribal jurisdiction and permissible water use. Although litigation is always available, these uncertainties may make a negotiated agreement the most attractive option for a tribe attempting to exercise control over its water resources for specific purposes. Alternatively, the tribe can craft non-consumptive use strategies in a manner that avoids some of the more pervasive issues previously introduced.



[154] Thus, the pertinent inquiry if the tribes did not cede their rights is whether any act of Congress has limited the tribal authority to take a particular action. *See National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 852-53 (1985).

[155] See note 142, above, for a discussion of Congress' "plenary" power over Indian affairs.

Chapter 4: Using Indian Federal Reserved Rights for Instream Flows

Free flowing streams and bubbling springs offer protection for aquatic ecosystems and may be important to tribes spiritually and culturally. Instream flows can directly protect stream ecosystems and the non-consumptive values associated with these ecosystems. However, instream flow protections are relatively new legal instruments in western water law. How tribes may utilize these protections has yet to be fully explored.

This chapter seeks to accomplish several tasks. First, we introduce instream and minimum flows and explain their legal origins. We emphasize some of the legal incompatibilities between the design of instream flow protections under state law and the nature and scope of Indian federal reserved rights. Next, we discuss the limited case law that has addressed instream flows for tribes. We highlight inconsistencies in this precedent and discuss unsettled legal issues that may have implications for tribes seeking to establish enforceable instream flow standards.[156]

Part One: Introduction to Instream Flows

When a water right is referred to as an "instream flow right," the intent of the meaning conveyed is generally to describe a legal right to water flowing in a natural stream channel. Similarly, the term "minimum flow" refers to a right of a required stream flow that is necessary to prevent harm. Although these two instruments are very similar, an instream flow is more likely to resemble an optimum stream level, whereas a minimum flow operates more like a safety net for the stream system.

The purpose of an "instream flow" is also to ensure that water remains in the natural stream to protect wildlife or riparian habitat.[157] The water designated for an instream flow may exceed the bare-bones amount of water necessary to prevent ecological or water resource harm. Once an instream or minimum flow is established, no junior water right holder can withdraw water that is necessary to maintain the instream flow. However, senior water right holders can still dry up the stream by diverting their entitlements.

Minimum flows are set to ensure a water level that protects a desired property of the water resource or ecology of a stream or lake. Minimum flows can be designed with different

[156] Once again, this guide is not intended to serve as legal advice or be a substitute for the advice of tribal legal counsel. Although we discuss legal issues and arguments, each tribe has unique circumstances that will determine the best approach towards tackling these issues.

[157] *See generally* Tom Annear et al., Instream Flows for Riverine Resource Stewardship (Revised ed., 2004).

parameters in terms of flow quantity, frequency and duration. They are often used as safety nets to protect fisheries and other aquatic ecosystem traits[158] but can also be used to protect aesthetic attributes of a stream, to manage silt and other detrital material, and to achieve water quality standards.[159] When the water in the stream system falls below established minimum flow terms, ecological harm is anticipated.

An instream flow may be accomplished by re-allocating the water from an already appropriated water right to establish a quantified flow requirement, or by appropriating a new water right that remains in the natural stream.[160] All of the states in the Colorado River Basin have some form of instream flow law that governs the appropriation of state waters for instream flows. Several Colorado River Basin tribes also have enacted tribal codes that permit Indian federal reserved rights to be used for instream flow purposes on the reservation.[161] Furthermore, a few tribes in the Colorado River Basin already have settlements that include provisions to protect minimum flows. For instance, the Fort McDowell Indian Community Water Rights Settlement Act of 2006 has a provision that includes a minimum flow provision for the Verde River.[162]

How have rights to keep water in streams been recognized in the past?

The rivers of the West, including in the Colorado River and its tributaries, were developed to meet the needs of non-native settlers. Waters were taken out of natural streams and diverted to mines, fields, and newly established towns. The western prior appropriation law doctrine evolved in a context where settler communities considered consumptive

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[158] Habitat protection plans for aquatic species often incorporate minimum flow protections. For instance, water development may be restricted under federal law if a river is designated under the Wild and Scenic Rivers Act. 16 U.S.C. §§ 1271-87. Similarly, the Endangered Species Act may require minimum flows to be maintained for the survival of a listed species. BARTON H. THOMPSON, JOHN D. LESHY, ROBERT H. ABRAMS & JOSEPH L. SAX. LEGAL CONTROL OF WATER RESOURCES : Cases and Materials 652 (Joseph L. Sax et al., eds., 2006).

[159] In western water law, a state's department of fish and wildlife or department of ecology will generally be responsible for establishing minimum flow requirements. For example, the Washington State Code requires that only the Department of Ecology may set minimum flows and includes regulations governing the establishment of such flows.

[160] DAVID H. GETCHES, WATER LAW IN A NUTSHELL 121 (1997).

[161] We refer readers to Chapter 6 for a discussion of tribal water codes and specific code provisions relating to instream flows.

[162] Fort McDowell Indian Community Water Rights Settlement Act of 2006. 109 Pub. L. No. 120 Stat. 2650. The Settlement states that the Salt River Project shall maintain a minimum flow in the Verde River below Bartlett Dam by releasing no less than "100 cubic feet per second of water (measured at the USGS gauging station immediately below Bartlett Dam) from Bartlett Dam at all times, plus the amount of water necessary to satisfy any diversion between Bartlett Dam and the confluence of the Salt and Verde Rivers," including diversions by Rio Verde, the Community, and the City of Phoenix's infiltration gallery and pumps. Id. at § 16.1. This minimum flow provision is not absolute, however. Settlement § 16.2 of the settlement states that the minimum flow may be interrupted because of drought, compliance with other user agreements, and necessary repairs for maintenance, accidents, or emergencies.

water uses to be of the highest value. In this process, the needs of fish, riparian ecologies, and the communities that relied upon and traditionally used these rivers were not included as permissible or "beneficial" uses. Thus, in the early prior appropriation doctrine there was no legal recognition of a right to keep water in the stream for non-consumptive uses.

When the modern environmental movement began to successfully advocate for in-place protections for water in streams, accommodating non-consumptive uses as beneficial uses in the prior appropriation doctrine proved to be a formidable endeavor. To make such protections politically possible, many state laws required that new instream flow appropriations could not have adverse impacts on existing rights. To further control instream flow rights, state law often restricted which entities could apply for and hold instream flows.

Even after instream flows were established as beneficial uses, there were still practical matters that limited the amount of water remaining in western streams. Because instream rights were recognized for the first time in the 1970s, newly established instream flows tended to have junior priority dates. Senior water rights remained legally superior.[163] Today, one of the most common inadequacies of instream flow rights remains the late priority date of these rights.

Part Two: State Instream Flow Laws in the Colorado River Basin

As discussed in Chapter 3, tribes are generally not subject to state water law. If a tribe is seeking to appropriate *state* water rights, they will be required to adhere to state laws governing the appropriation of water resources.[164] Otherwise, the federal reserved rights doctrine and tribal law govern the use of Indian federal reserved rights. Nonetheless, limitations and restrictions on state instream flows have had practical implications for tribal use of Indian federal reserved rights in the past. Understanding how state water law treats instream flow rights can help to better anticipate where points of contention may arise when tribes seek to apply their federal reserved rights to instream flow uses.

Each state in the Colorado River Basin has adopted some version of an instream flow law and created unique regulations that tailor instream flows to the needs and constraints of the state. These regulations commonly address several issues, including:

- For what purpose may instream flow rights be recognized (fish, wildlife, aesthetic purposes?)

[163] Historically, the priority of system administrators was to protect the priorities of senior water rights holders. On a basic level, instream flows are still regarded as unusual.

[164] See discussion on appropriating an instream flow under state law below in Part Three.

- Which entit(ies) may petition for or hold an instream flow?
- How are instream flows established?
- Are new instream flows subject to no-harm requirements?

Table 5.1 below summarizes the approach that each state in the Colorado River Basin takes towards instream flow protections.

Table 5.1. Approaches to Instream Flows in the Colorado River Basin	
Arizona	Arizona has enacted a statute permitting instream flows for the protection of recreation and wildlife.[165] In Arizona, the State may hold instream flow rights, as can federal agencies via the state water rights process. Arizona is unique in that it permits a private party to hold instream flow rights.[166] A diversion is not required to appropriate an instream flow.[167]
California	In California, individuals cannot appropriate new instream flow rights.[168] However, individuals are authorized to change the purpose of existing rights to instream flow purposes and may also initiate public trust proceedings.[169]
Colorado	Colorado's instream flow statute enabled the Colorado Water Conservation Board (CWCB) to protect natural levels in lakes and streams without showing that a diversion had been made from the natural course of the stream[170] and while maintaining senior priority dates.[171] Only the CWCB is allowed to apply for or hold an instream water right; however, the CWCB must request recommendations from the Colorado Division of Wildlife and can accept rights and leases donated from individuals for instream purposes. [172]
New Mexico	The state of New Mexico has not passed a specific law authorizing instream flows. However, in 1988, an opinion by New Mexico Attorney General Tom Udall established that New Mexico law permits instream flows to qualify as a "beneficial use" after

[165] Ariz. Rev. Stat. Ann. §37-92-102 (1990).

[166] "Any person or the state of Arizona or a political subdivision thereof" may apply to the Department of Water Resources for an instream water rights. "Any person" has been interpreted to include federal agencies. A.R.S. §45-151. A (1987).

[167] In 2005, the Arizona Court of Appeals upheld instream flow uses as a beneficial use. More explicitly, it approved non-diversionary appropriation of surface water for recreation, fish and wildlife, as a beneficial use. *Phelps Dodge Corp v. Arizona Dep't of Water Res*., 211 Ariz.146 (Ariz. Ct. App. 2005).

[168] Jesse A. Boyd. *Hip Deep: A Survey of State Instream Flow Law from the Rocky Mountains to the Pacific Ocean*. 43 NAT. RES. J. 1151, 1162-1164 (2003).

[169] *Id*.

[170] Dan Merriman & Anne M. Janicki. *Colorado's Instream Flow Program. Colorado Water Conservation Board*. Page 1. *Available at* http://cwcb.state.co.us/environment/instream-flow-program/Documents/WhyISFProgramWorksGoodForCOpdf.pdf.

[171] *Id.* at 2.

[172] The Colorado Supreme Court has upheld the appropriation of instream flow rights 12-3. *Colorado River Conserv. Dist. v. Colorado Water Conserv. Bd*.., 197 P.2d 469 (Colo. 1979).

	finding that the state constitution did not require a diversion or impoundment to appropriate water.[173]
Utah	Utah passed legislation in 1986 recognizing instream flows under certain circumstances.[174] Unappropriated water cannot be appropriated for instream purposes; if an entity is to enact an instream flow right in a certain area, it must either acquire and transfer the right to an instream flow purpose or petition the Utah's Wildlife Resources or Parks and Recreation to acquire a flow at that point.[175] Presently, Utah's Wildlife Resources or Parks and Recreation can apply to the State Engineer to change existing uses to instream flow purposes. Agencies may only purchase rights to be changed to instream uses with the approval of the state legislature.[176]

As discussed in Chapter 3, federal reserved rights are not subject to state water laws, including instream flow requirements established under state water codes. However, how states address instream flows may have practical implications for tribes. Tribal instream flow rights are necessarily administered within the state system; state water engineers administer headgates upstream of reservation stream segments and control releases of water. If tribes' application of federal reserved rights contradicts these state laws, state officials may hesitate to enforce these uses. Recall that in *Big Horn III*, the State of Wyoming required that the Wind River Tribes go through the state process for changing the use of their Indian federal reserved rights (see Chapter 3 for additional discussion).[177] Additionally, tribes seeking to establish instream flow rights from state waters would be subject to all of the rules and restrictions discussed in Table 5.1 (see Part 3 below for additional discussion).

[173] The Opinion of Attorney Tom Udall, Opinion No. 98-01 (Mar. 27, 1988); New Mexico State Constitution Article XVI, Section 2 and 3.

[174] Jesse A. Boyd, *supra* note 168.

[175] *Id*.

[176] *Id*.

[177] *In re General Adjudication of the Big Horn River System*, 835 P.2d 273, 278-79 (Wyo. 1992).

Part Three: Common Questions Regarding the Non-Consumptive Use of Indian Federal Reserved Rights

In Chapter 3, we offered an initial treatment of the legal issues surrounding the application of Indian federal reserved rights to non-consumptive uses. Here, we offer a brief summary of how several common questions regarding the use of Indian federal reserved rights may be answered.

Is using water for instream flows an acceptable use of Indian federal reserved rights?

Yes, in short. Uses of Indian federal reserved rights on reservation lands may be restricted by specific language in court decrees or settlement agreements. Outside of these explicit restrictions, tribes can likely apply their federal reserved rights to instream flow uses on the reservation. Indian federal reserved rights are recognized to fulfill the purpose of the reservation. Reservations were set aside as permanent homelands for Indian tribes (see discussion in Chapter 3). Furthermore, the canons of construction used to interpret treaties between the Indian tribes and federal government require that treaties be construed as the Indians themselves would have understood them. It is reasonable to conclude that tribes accustomed to harvesting fish and using waters for ceremonial purposes would understand that they had reserved the right to continue these uses on reservation lands. For additional discussion on this issue, we refer readers back to Chapter 3.

Are tribal instream flows valid if they usurp or cause harm to state water rights users?

Yes. If the tribe is exercising its federal reserved right in a permissible manner, the tribe is not required to balance this use against competing state users (see *Winans*, discussed in chapter 3 above). It should be reminded that the Wyoming Supreme Court diverged from this precedent in *Big Horn III*, when it required that the Wind River Tribes abide by Wyoming state law to change their water use on the reservation.[178] Please see Chapter 3 for additional discussion of this issue.

Are there other means of establishing instream flows outside of exercising the tribe's federal reserved rights?

Yes. Tribes and tribal members can apply for state water rights on the same terms as other water users in the state. If a tribe chooses to take this approach, it is important to note that state water rights must be appropriated under state law and according to state law procedures (in contrast to the application of Indian federal reserved rights for non-consumptive purposes). This holds true for non-consumptive uses and consumptive uses. If the tribe chooses to take this approach, the state laws and regulations discussed in Part 2

[178] *See In re General Adjudication of the Big Horn River System*, 835 P.2d.

of this chapter will directly control tribe's ability to appropriate water for instream flows under state law.

Part Four: Developing an Instream Flow Proposal

Tribes face regulatory circumstances unique from users establishing instream flows under state water law systems. However, tribes will use similar information for developing an instream flow recommendation. The following process, developed by Washington State Department of Ecology[179] and summarized in Table 5.2, can serve as the basis for creating a viable instream flow proposal. The process can be tailored to meet the unique needs of individual tribes and uses information gathered in the process outlined in Chapter 2.

Table 5. 2 Process for Recommending an Instream Flow[180]	
1	Identify all statutorily protected instream resources or values present in the stream (create a comprehensive water budget).
2	Gather and evaluate existing watershed-specific information on instream resources, hydrology, diversions, existing water rights, and applicable historical information which may limit instream resources.
3	Evaluate existing stream flows for the resources identified, including any additional information that is needed.
4	As needed, conduct studies to determine what stream flows are needed to protect instream resources and to evaluate past, current and the potential future hydrology in the basin.
5	Review and evaluate study results to determine the stream flows needed to protect and preserve the identified instream resources and values.
6	Evaluate current and future water uses, including both instream and out-of-stream uses.
7	Consider management alternatives to meet instream and out-of-stream needs.
8	Develop an instream flow recommendation, through the local evaluation and decision process.

[179] Lynne D. Geller. *A Guide to Instream Flow Setting in Washington*. Department of Ecology Water Resources Program. (March 2003), Pub. No. 03-11-007. *Available at* http://www.oregon.gov/owrd/docs/SB839/2003_Guide_Instream%20Flow_Setting_WA.pdf.

[180] *Id*.

9	Develop and propose a rule to establish the instream flow.

Step one in this process involves a combination of legal analysis and biological assessment of the target stream segment. The project team will want to identify all existing rights on the stream (see Chapter 2). These rights may include uses permitted under tribal law or water uses permitted under state laws. The tribe may also hold state water rights, in addition to its federal reserved rights. Any rights implicating uses of water on the stream should be included in this inventory. Legal protections for species should also be noted in this step. This information will form the basis of the "water budget" within which the tribe will be working to secure an instream flow.

In step two, the project team will gather and evaluate existing watershed-specific information on instream resources, hydrology, diversions, existing water rights, and applicable historical information which may limit instream resources. Step two should expand upon the scope of interests catalogued in step one. Here, tribal water resource managers and hydrologists will gather a range of information to draw a picture of the watershed holistically.

Desired information may include data on the biology, geology and hydrology of the stream in question. The goal of collecting this information is to determine broadly factors that may have implications for instream resources. After this basic information is collected, project participants may want to collect detailed research about the resource they are seeking to protect. For instance, if the tribe's main objective is to restore a trout fishery, tribal biologists may research ideal stream requirements to create trout habitat. This process can also be used to identify a range of methods to be used in achieving restoration objectives. For example, creating deep pools or other habitat features may be necessary to complement water supplementation. This research should emphasize any studies that may help assess streamflow requirements for the target species.

Step three begins to narrow in on the specific resources the tribe is seeking to protect. How much water will these resources need? Is there a particular time that certain flow levels are required? Are additional requirements such as water quality, clarity, or temperature, necessary to protect the values the tribe is seeking to protect? In Chapter 2, we discussed the assessment of hydrologic and ecosystem needs. Step three is our first attempt in applying such an assessment to the tribe's situation on the ground.

In step four, we track down any additional information needed to make an informed decision about setting an instream flow. There may be insufficient data or studies available to construct an informed proposal about levels necessary to protect instream values. For

instance, stream data about past and future hydrology in the basin may be not be complete. If this is the case, the project team may want to conduct additional studies. States or non-governmental agencies may be able to provide technical support during this part of the data gathering and analysis process.

Step five involves comparing initial suggestions with other studies on similar stream restoration projects. Once the needs have been determined, the project team should return to the water budget to compare the anticipated stream needs against present and future uses. Step six involves revisiting the water budget and projections about future water demands and uses to determine any potential areas of conflict. In step seven the tribe will consider management alternatives. For instance, could additional flows be provided by increased efficiency?

Once all of the relevant facts and data have been collected and analyzed and potential areas of conflict identified, the project team is ready to develop an instream flow recommendation. In step eight, the project team will develop an instream flow recommendation designed to meet the needs of the stream resource and propose a rule establishing the instream flow. The final step, step nine, will involve proposing a rule or ordinance to incorporate the standards determined in the instream flow recommendation as well as to address any legal aspects of enforcing such a provision.

Chapter 5: Negotiating for Non-Consumptive Uses in Settlement Agreements

Water rights are generally quantified through state general stream adjudications designed to systematically determine the rights of all users in a specified water basin. These cumbersome adjudications can last for decades, involve hundreds and sometimes thousands of parties, and may result in unanticipated outcomes when addressing unsettled legal questions. Tribal water rights settlements offer an alternative to adjudication. The settlement negotiation process can be used to assure that a tribe's water rights are recognized in a manner that protects its sovereign objectives.

Settlement negotiations permit tribes and other parties to negotiate mutually acceptable resolutions of water rights claims. Issues resolved in settlement negotiations vary. Generally, the tribe will receive recognition of rights to a certain quantity of water from a named source or sources of water. It may also receive federal and state funding for reservation water delivery infrastructure or general funds for tribal economic development. Settlement agreements may clarify specific legal issues related to the administration and use of quantified rights. For example, certain uses of federal reserved rights may be explicitly permitted or prohibited. Because settlements are ultimately approved and ratified by Congress, they may even include negotiated provisions that would otherwise be prohibited.

This chapter seeks to introduce the ways in which settlements can incorporate non-consumptive use protections. First, we provide a brief introduction to some of the pros and cons of negotiating a tribal water rights settlement. Then we discuss settlement terms designed to secure non-consumptive uses and provide case studies of how such provisions have been incorporated in negotiated settlements and proposed agreements in the past. We focus on aspects of settlement agreements which can best provide opportunities for non-consumptive use protections. Throughout this chapter, we refer readers to additional resources for more information.

Part One: Why Negotiate?

Unsettled legal issues surrounding the use, scope and administration of Indian federal reserved rights can be resolved in general stream adjudications, during litigation addressing specific Indian federal reserved rights issues, or in negotiated agreements ratified by Congress. So what are the benefits of negotiation? The costs of adjudication are high for all parties and include a risk of potential adverse outcomes. In settlement agreements the tribe, state and federal government may agree upon an array of water

management terms acceptable to all parties. Tribes often seek to eliminate the uncertainty associated with adjudication by determining federal reserved rights through a negotiated settlement process.[181] By creating detailed and explicit protections for non-consumptive uses, settlement agreements can be used to avoid unanticipated answers to many of the unsettled legal questions discussed in Chapter 3.

Determining the parameters of Indian federal reserved rights through negotiated settlements is also complex. Settlement negotiations can last anywhere from a few years to a few decades, involve accommodating the needs of a range of different interests and stakeholders, and are subject to the perils of the political process. Nonetheless, the incentives to settle are numerous. One of the most attractive settlement features for tribes may be that they can craft an allocation agreement which ensures that the tribe can achieve its sovereign water development goals, including – if desired – the protection of non-consumptive uses.[182]

Additional educational resources exist for tribes entering into settlement negotiations. Bonnie Colby et. al's *Negotiating Tribal Water Rights: Fulfilling Promises in the Arid West*[183] provides an informative overview for tribal stakeholders seeking to gain a better understanding of the settlement process generally. This guide emphasizes considerations and case studies specific to negotiating non-consumptive use protections.

Part Two: Preparing for Settlement Negotiations

Before negotiations begin, a detailed technical, legal, economic and political analysis of the tribe's particular circumstances and resources will provide a strong foundation for any attempt to protect non-consumptive uses. All phases of negotiation will generally involve a range of experts, including attorneys, engineers, and biologists or ecologists. Tribes should begin by compiling information from internal natural resource departments.[184] For strategies on collecting this information, we refer readers back to Chapter 2.

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[181] The Department of Interior and Department of Justice have emphasized the settlement of Indian federal reserved rights. Negotiation, rather than litigation, can save time and money and avoid the uncertainties of litigation.

[182] Local water uses may have concerns that he adjudication process will not protect their existing uses; thus, other stakeholders may also prefer the negotiation process as more inclusive of their needs.

[183] BONNIE G. COLBY, JOHN E. THORSON, AND SARAH BRITTON, NEGOTIATING TRIBAL WATER RIGHTS: FULFILLING PROMISES IN THE ARID WEST, (University of Arizona Press 2005).

[184] Please note that information shared with federal agencies may be subject to disclosure under the Freedom of Information Act. In Dept. of the Interior v. Klamath Water Users Protective Ass'n, 530 U.S. 1304 (2000).

Part Three: Settlement Terms

In water settlement agreements, the tribe, state, federal government and important local actors negotiate and agree upon an array of terms acceptable to all parties.[185] Settlement agreements generally determine the quantity of the reserved right, identify which sources will provide water to fulfill the reserved right, and acknowledge the priority date of that right. Occasionally, settlements will restrict the purpose for which the water can be used. Another result of a settlement agreement may be a compromise that establishes the boundaries of the state and tribe's respective authorities to administer federal reserved rights within or outside reservation boundaries.

Parties may agree to compromises determining unsettled legal issues or may give up certain rights or a quantity of water in exchange for other priority rights and provisions. In past settlement agreements, tribes would often agree to accept a lesser quantity of water in exchange for federal funding to develop that water on the reservation. However, in recent years, federal funding has grown tight in Congress, and it has become more difficult to obtain funding commitments for infrastructure development.[186] This may be an opportune time to pursue settlements involving non-consumptive uses, as these uses do not require the same type of funding commitments as those requiring the development of irrigation infrastructure or domestic delivery systems.[187] With any negotiated terms, buy-in from water users, water user associations, water districts and water projects may play a crucial role in the political viability of a settlement agreement.[188]

Here, we look at four primary types of provisions that may be instrumental in protecting non-consumptive uses. Types of provisions examined include: 1) jurisdiction to administer and enforce Indian federal reserved rights on the reservation; 2) permissible uses of reserved rights; 3) water supply provisions, and; 4) additional or ancillary protections directly designed to protect non-consumptive uses and values.

Jurisdiction

Tribes are sovereigns; as sovereigns, they have a strong impetus to control the use and administration of tribal water resources on reservations. Similarly, states generally have control over the administration of waters within state boundaries (federal reservations excepted). However, neither the courts nor Congress have fully clarified jurisdictional boundaries between tribal and state administration of water rights (see Chapter 3). Thus,

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[185] The federal government must simultaneously represent the tribal interest as its trustee while protecting a range of often competing federal interests.

[186] *Id.*

[187] *Id.*

[188] Email correspondence with Mike Gheleta, Attorney-Advisor at the U.S. Department of the Interior, (Jun. 9, 2014).

parties to settlements may want to predetermine how non-consumptive uses will be administered, particularly regarding off-reservation enforcement issues. Jurisdictional questions addressed in settlement agreements may include (but are not limited to):

- What entity is responsible for monitoring instream flows?
- Who has authority to call the river?[189]
- If there is a dispute over the right, where is that dispute heard?

Settlements can address each of these questions in a variety of ways. For example, regarding question three, some settlements provide a vague answer to this question, permitting disputes to be heard by courts of competent jurisdiction. Other settlements may provide comprehensive terms for joint administration of resources by state and tribal authorities and may create a neutral administrative board composed of members from different stakeholder communities to resolve these issues (i.e., the Fort Hall Agreement has a three-person intergovernmental board to address disputes).[190] Others have avoided jurisdictional questions by agreeing to deal with these issues as they arise.

Permissible use

Occasionally settlements will restrict the purposes or manner in which Indian federal reserved rights can be used. Alternatively, a settlement may explicitly condone a particular use. The Fallon Paiute Shoshone Indian Tribes Water Rights Settlement Act of 1990 permits the Fallon Paiute-Shoshone Indian Tribes to use the water for any beneficial use, including fish, wildlife or recreational purposes.[191] In contrast, the Zuni Indian Tribe Water Rights Settlement Act of 2003 places restrictions on the Tribe's water use, requiring that "the Zuni Tribe or the United States shall not sell, lease, transfer, or transport water made available for use on the Zuni Heaven Reservation to any other place."[192] At the same time, the Act explicitly permits certain non-consumptive uses, explaining that "water use by the Zuni Tribe … for wildlife or instream flow use, or for irrigation to establish or maintain wetland on the Reservation, shall be considered consistent with the purposes of the

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[190] Fort Hall Indian Water Rights Agreement of 1990. P. L. No. 101-602, 104 Stat. 3059.

[191] Fallon Paiute Shoshone Indian Tribes Water Rights Settlement Act of 1990. P. L. No. 101-618, 104 Stat. 3289.

[192] The Zuni Indian Tribe Water Rights Settlement Act of 2003, P.L. No. 108-34. § 8 (b)(2)(B) 117 Stat. 783. However, there is an exception to this provision, that "water made available to the Zuni Tribe or the United States may be severed and transferred from the Reservation to other Zuni Lands if the severance and transfer is accomplished in accordance with State law (and once transferred to any lands held in fee, such water shall be subject to State law)." *Id.*

Reservation."[193] By explicitly permitting these uses, the Tribe will avoid challenges that their water use is inconsistent with the purpose of the reservation (see Chapter 3).

Water supply

Finding water to satisfy tribal claims in settlements is often achieved by reducing the amount of "wet water"[194] that the tribe receives (often in exchange for economic development funds) or through a variety of measures to bring additional water supplies to the reservation. Here, we focus on strategies used to supply water to the in-situ location to fulfill non-consumptive objectives.

A variety of methods can be used to secure the wet-water to fulfill settlement terms. Possible methods to provide water for non-consumptive uses include conserving water by reallocating water storage[195] or altering dam operations,[196] using unallocated water from federal water projects, or applying existing Indian federal reserved rights or state water rights held by tribes to non-consumptive purposes.[197] Protecting ground-water resources through groundwater buffers can also provide protections for springs and hydrologicly connected surface waters.[198]

States will typically seek to negotiate a settlement agreement that has a low likelihood of usurping state water rights users. Thus, the state may seek to supply the water to fulfill settlement agreements from unallocated water supplies or through voluntary water transfers. Where unallocated water is available, it may be used to satisfy non-consumptive uses (see, i.e., the proposed CSKT Settlement, discussed below). However, particularly in the Colorado River Basin, streams are often over-allocated and this method is rarely an option. Although the conservation of water resources is also an option, it is difficult to implement sufficient conservation methods to meet the quantities of water necessary to

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[193] *Id*. at § 8 (b)(1)(E).

[194] In the context of Indian federal reserved right settlement negotiations, "wet water" refers to waters delivered for actual use on reservation lands.

[195] BONNIE G. COLBY, JOHN E. THORSON &SARAH BRITTON, *supra* note 185 (explaining that the Lummi Nation water rights settlement proposal includes "finding an alternative renewable supply for non-Indians pumping groundwater on the reservation so that the groundwater can be used for instream flows.")

[196] The Truckee-Carson-Pyramid Lake settlement includes delivery rules that assure releases for fishery restoration. Fallon Paiute Shoshone Indian Tribes Water Rights Settlement Act, Title II.

[197] Colby et. al., *supra* note 185.

[198] The Zion National Park Water Rights Settlement Agreement included a groundwater buffer to protect the Park's water resources. P. L. 111-11. Specifically, Art. 11§ B (3) provides that "a ground water protection zone shall be established" and limits the diversion rate from wells located within the zone as well as the overall annual amounts of diversion. Additional provisions protecting non-consumptive uses included Art. 11§ B (1), which prohibited the building of any reservoirs upstream of Zion National Park on specified rivers and tributaries, and Art. 11§ D (3) & (4), which required minimum flows below new surface diversions and reservoirs.

fulfill water settlements. We briefly discuss voluntary water transfers and water conservation below.

Voluntary water transfers

Voluntary water transfers from state water users are one of the most common methods of obtaining water to fulfill settlements, particularly where streams are already over-allocated. Voluntary water transfers generally involve purchasing rights from willing sellers. In these transactions, state water rights are acquired and retired or can be acquired and transferred.[199] The Fallon Paiute-Shoshone Indian Tribes Water Rights Settlement Act[200] and the Zuni Heaven Settlement Act provided funds for the tribes to purchase waters from willing sellers.[201]

Water conservation

Conservation is another way to secure water for instream flow purposes. However, agricultural conservation is not a commonly utilized method of obtaining water to fulfill settlement agreements. Only two Indian settlements have ever used conservation to create water to satisfy settlement provisions.[202] The 1988 San Luis Rey settlement provided several bands of northern California with water generated from the lining of the All American Canal.[203] The Truckee-Carson-Pyramid Lake Settlement also used conservation measures to increase water available for instream flow purposes.[204] The CSKT proposal, if enacted, would also rely partially on irrigation conservation methods to create additional water for the Flathead Indian Irrigation Project.[205]

Ancillary protections

A settlement can also include unique terms specifically tailored to maintaining stream qualities. It may include development bans that prevent the construction of new dams or diversions along a particular stretch of river. Another option is to include buffers around sensitive hydrologic areas, particularly when protecting specific springs or groundwater resources.[206] These, and other creative solutions, can provide a range of ancillary protections for non-consumptive use values.

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[199] See, for instance, Zuni Indian Water Settlement Act, §9(a)(6).

[200] Fallon Paiute Shoshone Indian Tribes Water Rights Settlement Act. Pub.L. 101-618, 104 Stat. 3294 (1990).

[201] Zuni Indian Water Settlement Act of 2003 Section 6., P.L. 108- 34.

[202] Colby et. al., *supra* note 185.

[203] San Luis Rey Water Rights Settlement Act of 1988, P. L. No. 100—675, 102 Stat. 4000.

[204] Fallon Paiute Shoshone Indian Tribes Water Rights Settlement Act of 1990, Title II. Truckee-Carson-Pyramid Lake Water Rights Act. Pub.L. 101-618, 104 Stat. 3294 (1990).

[205] In-person interview with Rhonda Swaney, Legal Department of the Confederated Salish and Kootenai Tribes, Pablo, Montana (Apr. 21, 2014) (notes on file with author).

[206] See FN 197.

Part Four: Examples of Settlement Provisions That Protect Non-Consumptive Uses

Until this point, we have discussed how settlement terms can be designed to protect non-consumptive uses. Here, we look at a few specific examples of settlement terms to provide context for how these provisions have been incorporated into comprehensive settlement packages in the past. Our first case study involves a finalized settlement agreement from the Colorado River Basin, the Zuni Heaven Settlement Agreement. We also examine a unique proposal from outside the Colorado River Basin, the proposed Confederated Salish and Kootenai Tribe Settlement Agreement in Montana. Although the CSKT settlement has not yet been enacted, the unique design of incorporated instream flow provisions make the proposed settlement worthy of examination.

Case study: Zuni Heaven

Since time immemorial the Zuni people have been pilgrimaging to Zuni Heaven, a place where the water would "run[ ] swift and deep" and where a sacred lake was surrounded by lush wetlands.[207] The Zuni people have maintained this pilgrimage and still travel by foot from the Zuni homeland reservation in western New Mexico to Zuni Heaven in Arizona.[208] Although the course of the trek remains the same, over the years the landscape changed dramatically, as increased diversions led to the drying up of the sacred lake and marshlands.[209]

The Zuni Heaven Water Settlement has enabled the Tribe to begin restoring Zuni Heaven. On June 23, 2003, President Bush signed the Zuni Indian Tribe Water Rights Settlement Act.[210] Jane Marx served as the Tribe's attorney through the water settlement negotiations and reports that during these negotiations "the Tribe's ultimate goal, really, the only goal, was to obtain wet water to restore the wetlands for religious purposes."[211]

The Zuni Indian Tribe Water Settlement Act recognized the religious purposes behind the reservation and contains several unique provisions and qualities designed to protect non-consumptive uses. It provided a minimum of 5,500 acre-feet annually (afa) to be applied to

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[207] Sacred springs were assigned members of clans to take care of them and to assure that they remained free of noxious weeds or aquatic plants. Zuni Indian Tribe Water Settlement Act: Hearing on S. 2743 Before the S. Comm. on Indian Affairs, 107th Cong. 2 (2002) (statement of Gov. Malcom b. Bowekaty, Governor of the Pueblo of Zuni Tribe).

[208] *Id*.

[209] Zuni Indian Tribe Water Settlement Act: Hearing on S. 2743 Before the S. Comm. on Indian Affairs, 107th Cong. 2 (2002) (statement of Edison Vincenti, Head Katchina Leader).

[210] Zuni Indian Tribe Water Rights Settlement Act of 2003; see also To Approve the Settlement of the Water Rights Claim of the Zuni Indian Tribe in Apache County, Arizona, and for Other Purposes: Hearing on H.R. 495 Before the H. Subcomm. on Water & Power of the H. Comm. On Res., 108th Cong. 87-88, 91 (2003).

[211] Phone interview with Jane Marx, Attorney for the Pueblo Zuni (Nov. 9, 2012).

restoration of the wetlands,[212] and included additional protections for critical springs along the pilgrimage route, including Hadinkya'a, one of the Tribe's most sacred springs.[213] Here, we look at those provisions as potential models for the type of settlement provisions discussed above. We will discuss provisions addressing jurisdiction and administration, permissible uses of federal reserved rights, securing water and additional protections for non-consumptive uses.

Intergovernmental agreement (jurisdiction & administration)

Jurisdiction and administration is directly addressed in an intergovernmental agreement[214] that clearly delineates tribal and state authority to manage water on the Zuni Heaven Reservation. The agreement clarifies that "state law should not apply to water uses on the Reservation."[215] However, until the Zuni Tribe adopted a water code of its own, the Secretary of Interior administers water rights on the reservation in accordance with state law.[216]

Direct approval of non-consumptive uses (permissible use)

The settlement also directly addresses permissible use. To avoid challenges to the use of water for non-consumptive purposes, the parties included a provision agreeing that "water use by the Zuni Tribe or the United States on behalf of the Zuni Tribe for wildlife or instream 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." [217]

Voluntary water transfers and a limited and direct amendment of the Arizona state water code to enable transfers (securing water)

In Chapter 3, we introduced how certain properties of federal reserved rights may conflict with state water laws. Securing water to fulfill the Zuni Heaven settlement agreement

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[212]The water was to be acquired from several different sources. Water would be transferred from Zuni lands upstream of the reservation, pumped from groundwater sources, and from the acquisition and transfer of established water rights. Zuni Indian Tribe Water Rights Settlement Act of 2003.

[213] Part of the settlement agreement involved limiting groundwater pumping in certain areas to create a buffer around culturally significant areas. *Id.* at (a)(2).

The Tribe agreed to subject its water rights to certain restrictions. The tribe agreed that it would not market water or transfer water for an off-reservation use unless transferring the water to other Zuni lands in accordance with state law. *Id.*

[214] "Intergovernmental Agreement" refers to the intergovernmental agreement between the Zuni Indian Tribe, Apache County, Arizona and the State of Arizona.

[215] *Id.* at §8 (b)(1)(B).

[216] "Until such date as the Zuni Tribe adopts a water code described in clause (i), the Secretary, in consultation with the State of Arizona, shall administer water use and water regulation on lands described in that clause in a manner that is reasonably equivalent to State law." *Id.* at §8 (b)(1)(F)(ii). Furthermore, the State "may not regulate or tax such water rights or uses." *Id.* at §8(b)(1)(C).

[217] *Id.* at §8 (b)(1)(E).

required an amendment to state water law. As a result, the settlement contains a unique provision that amended the Arizona Water Code in order to sever and transfer water rights from acquired lands with the accompanying priority date.[218] The parties eliminated potential conflicts and confusion concerning the application of state law by passing H.B. 2244 to allow water rights to be severed from the land and transferred to Indian tribes.[219]

Prohibition of development on the Zuni River (additional protections)

The agreement also contains provisions preventing future water development activities that could implicate flows in the Zuni River. The Zuni Heaven decree also holds that no new reservoirs may be constructed on the Little Colorado River between Lyman Dam and the western boundary of the Reservation without the written consent of the Tribe, except under very limited circumstances.[220]

Case Study: The proposed Confederated Salish and Kootenai Tribes Settlement

For our next example, we take a look at the proposed Confederated Salish and Kootenai Tribe (CSKT) settlement agreement negotiated between the CSKT, the federal government and the State of Montana. Although the final proposed settlement has not been approved by the Montana State legislature,[221] we nonetheless examine the proposed agreement for its innovative treatment of instream flow issues.

In 1855, the Bitterroot Salish, Pend d' Oreille and Kootenai Tribes ceded more than 20 million acres of their aboriginal homeland but retained 1.3 million acres to form the modern Flathead Reservation located west of the continental divide.[222] The Tribes' traditional homeland had spanned an area stretching from interior British Columbia down through western Idaho and Wyoming.[223] Fishing the rivers and streams that bisected this

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[218] *See id*. Arizona State law requires that "[w]hen a water right is transferred, the priority date is retained with the water only under certain circumstances, including the transfer of water to the state or its political subdivisions for recreation and wildlife purposes." Fact Sheet for H.B. 2244. *Water Rights; Zuni Settlement*. Arizona State Senate, *available at* http://www.azleg.state.az.us/legtext/46leg/2r/summary/s.2244nrt.doc.htm. (Citing A.R.S. § 45-172).

[219] Recorded as A.R.S. 45-176.

[220] In the Superior Court of the State of Arizona in and for the County of Apache. Stipulation and request for entry of decree. No. 6417. In re: The General Adjudication to Use Water in the Little Colorado River System and Source (2006). *Available at* http://www.azwater.gov/AzDWR/SurfaceWater/Adjudications/documents/StipulationandRequestforEntryofJudgmentandDecree.pdf.

[221] In 2013, and the State of Montana failed to ratify a compact through the Montana Reserved Water Rights Compact Commission that would have settled CSKT aboriginal claims and federal reserved rights claims to the Flathead Reservation.

[222] Myers Reece, *Who Owns the Water Rights?* Flathead Beacon. (June 27, 2012), 06/27/2012. Accessed at http://www.flatheadbeacon.com/articles/article/who_owns_the_water_rights/28512.

[223] *Id.* Tribal lands were reduced further by the devastating effects of federal allotment policies. During the first few years of the allotment policy, "our ownership of the land went from 100% down to about 20%."

territory was an integral part of subsistence activities and a right that was reserved by the Tribes during their treaty negotiations. Thus, Article III of the Hellgate Treaty includes explicit language protecting the Tribes' rights to "tak[e] fish at all usual and accustomed places, in common with the citizens of the territory."[224]

Despite the reduction in traditional lands, ties to natural resources remained strong. The Tribes have already lost the kokanee salmon from reservation lands and are determined to save the struggling bull trout population.[225] To protect tribal values, CSKT has worked tirelessly to restore aquatic and riparian ecosystems while buying back the reservation land base to secure tribal authority over these resources.[226] Tribal elder, Clint Folden, explains that the Great River, or the Flathead River, is "the bloodline" of the reservation.[227] The commitment to restoring aquatic ecosystems and maintaining authority over reservation resources remains crucial to the Tribes and is evidenced by the negotiation tactics they employed when seeking a water settlement agreement.

Litigation as an Impetus to Settlement

Long before CSKT entered into negotiations with Montana State to settle their *Winters* and aboriginal claims, the Tribes were a party in a series of lawsuits involving their federal reserved rights. Tribal attorney Rhonda Swaney described this history of litigation as involving a "long list" of cases, many initiated by the Tribes.[228] We briefly touch on a few of those cases here, to illustrate how litigation provided leverage in later settlement negotiations.

In the early 1980s, the CSKT first attempted to assert an instream flow right on a stream which was also used by the Flathead Indian Irrigation Project (FIIP), a reservation irrigation project relied upon primarily by non-Indian irrigators. Enforcement of the instream flow rights threatened to disrupt the water use of non-Indian junior irrigation system users.[229] Nonetheless, the Tribes held the senior priority rights to the system. Eventually, "[t]he tribes succeeded in an action to require the Bureau of Indian Affairs to

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Fragmentation of the reservation hindered the Tribes' ability to regulate reservation resources. "We have this saying- 'Get the reservation green.' Our primary goal is to own the entire reservation." Discussion with the CSKT Natural Resources Department, Polson, Montana (Mar. 22, 2014) (notes on file with author).

224 Hellgate Treaty of 1855, Art. III, 12 Stat. 975.

225 Bull trout have disappeared from certain areas. Mission Creek used to showcase the returning bulltrout; today there are no bull trout left. Accessed at http://www.cskt.org/NRD/docs/NativeNewsforWeb10-2012.pdf.

226 Protecting the river's riparian corridor has been a priority in the efforts to "turn the reservation green," that is, to acquire as much reservation lands as possible. Discussion with the CSKT Natural Resources Department (Mar. 22, 2014) (notes on file with author).

227 Discussion with the CSKT Natural Resources Department, *supra* note 222.

228 Interview with Rhonda Swaney, *supra* note 204.

229 David H. Getches, *Management and Marketing of Indian Water: From Conflict to Pragmatism*, 58 U. COLO. L. REV. 515, 531 (1988).

maintain instream flows and reservoir levels needed to protect their fisheries."[230] When the instream flow was challenged, the Ninth Circuit Court of Appeals ruled that only once the CSKT's right to instream flow for a fishery was met, could a just and fair distribution of water to the Flathead Irrigation District be permitted.[231] Thus, the instream flow right was upheld even when competing but junior state uses were implicated.

Eventually, FIIP challenged the BIA plan to protect these fisheries by ensuring minimum stream flows. Once again, the Court of Appeals ruled that the Indians' right to waters for a fishery is prior to any irrigation right, and only after fishery waters are protected could any right to a fair and equal distribution of water be asserted.[232] Furthermore, the Ninth Circuit found that the BIA was not required to apportion water between the Tribes and FIIP irrigators because the CSKT's instream flow rights were senior to any claim by FIIP.[233] Later, in *Ciotti I*[234] the Montana Supreme Court noted that the CSKT Tribes' reservation water rights were "likely pervasive."[235] These and other favorable court decisions permitted the Tribes to enter into federal reserved rights negotiations with the State of Montana with formidable leverage.

Negotiating a Settlement Agreement

When the Tribes entered into Compact negotiations with the State of Montana[236] and federal government, their primary objective was to establish a non-consumptive water use right "intended to preserve flow in streams of sufficient magnitude and seasonal variability to protect: a) the Tribe's treaty rights; b) existing stream and floodplain ecology; and c) existing stream and floodplain ecologic conditions over time."[237]

The State of Montana had three primary objectives when entering negotiations with the CSKT.[238] Jay Weiner, a Montana Deputy Attorney General, represented the Reserved Water

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[230] *Id.*

[231] *Id*.

[232] *Id.* citing . FN 78.

[233] *Joint Bd. Of Control v. United States*, 832 F.2d 1127 (9th Cir. Mont. 1987).

[234] *In re Beneficial Water Use Permit*, 278 Mont. 50 (1996) (Ciotti I).

[235] *Id.* at 59.

[236] Montana State has a unique approach to handling federal reserved right settlement negotiations. In 1973, Montana passed a comprehensive act designed to resolve all federal reserved right claims in the state with maximum efficiency. Mont. Code Ann. §§ 85-2-701, *et seq.* Jay Weiner, Deputy Attorney General for Montana State, refers to the 1979 act establishing the commission as "incredibly forward thinking." In-person interview with Jay Weiner, Helena, Montana (Aug. 13, 2013) (notes on file with author). The State had learned from negotiating a complex compact agreement with the 1950 Yellowstone River Compact. By 1979, the Montana State Legislature had established the Montana Reserved Water Rights Compact Commission (MRWRCC) to facilitate these settlements. CSKT hold the last unsettled federal reserved rights claims to be addressed by negotiations with the MRWRCC in Montana. MCA §85-2-701.

[237] On Reservation Instream Flows Status of Instream Flow Development for Inclusion in CSKT Water Rights Compact, Polson. *Available at* http://www.dnrc.mt.gov/rwrcc/Compacts/CSKT/2012/OnReservationISF.pdf.

[238] Interview with Jay Weiner, *supra* note 235.

Rights Compact Commission on behalf of the Montana Department of Justice. Weiner explains that first, the State sought to maximize the amount of water that stayed within state boundaries[239], irrespective of the ultimate user. [240] Second, it was essential that the end result of the quantification process included a final quantification of the Tribes' rights.[241] Finally, it was important politically to protect existing state users with rights junior to the Tribes' rights.[242]

Together, the parties were able to negotiate a draft settlement agreement with several key components, including:

- the Draft Compact Agreement,
- the FIIP Water Use Agreement, and
- the Unitary Administration and Management Ordinance.[243]

Here we discuss these three elements with an eye towards their implications for protecting non-consumptive use values.

The Proposed Unitary Administration and Management Ordinance (on-reservation administration of rights)

Due to the heavily allotted status of the land, a major challenge on the Flathead Reservation has been administering the rights of state and tribal water rights holders within reservation boundaries. The CSKT has a code governing water quality.[244] However, allocation of water resources on the reservation is far more complex. Administering water rights within reservation boundaries includes management and enforcement of both the rights of state water rights users and tribal water rights users.[245]

In *Confederated Salish and Kootenai Tribes v. Clinch*[246], the Montana Department of Natural Resources and Conservation (DNRC) was enjoined from processing a change of use

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[239] *Id.*

[240] *Id.*

[241] *Id.*

[242] *Id.* Weiner explains that transparency and good faith were essential elements of the negotiation process. Public meetings were held to bring in third parties and state water users into the negotiation process.

[243] The Compact Draft Unitary Administration and Management Ordinance. (November 8, 2012). *Accessed available at* http://www.cskt.org/Water.admin.ordinance.pdf.

[244] CSKT Natural Resources Department. *Surface Water Quality Standards and Antidegradation Policy*, Confederated Salish and Kootenai Tribes of the Flathead Reservation (2006), *available at* http://www.cskt.org/tr/docs/epa_wqs-antidegradationpolicy.pdf.

[245] In person interview with Jay Weiner, *Helena, Montana. August 13, 2013. Notes on file with author supra* note 235.

[246] *Confederated Salish & Kootenai Tribes v. Clinch*, 2007 MT 63 (Mont. S. Ct. 2007). The Axes wished to operate a water ski pond. Non-Indian owners of a state appropriative water right within the CSKT reservation boundaries applied to the Montana Department of Natural Resources and Conservation to change the use of the right from irrigation to recreation." District court issued permanent injunction against het

application for on-reservation non-Indian appropriators who held state appropriative rights. Despite this strong affirmation of the priority of CSKT rights, it was difficult to administer the Tribes' rights without understanding the full extent of those rights. To administer the water before a quantification of the rights was accomplished, the parties came to an interim agreement.[247] However, this interim agreement was rejected by the State of Montana and never implemented.[248] In the final settlement agreement, the Proposed Unitary Administration and Management Ordinance resulted in a single administrative body and method to oversee on-reservation water rights.[249] The ordinance would be used to administer rights on the reservation and would establish a unitary management board, composed of both FIIP and CSKT elected members.[250] Although not enacted, this type of negotiated management regime is illustrative of the type of agreement that may be negotiated by tribes and states to comprehensively manage water resources on the reservation.

Finding water for instream and minimum flows (securing water)

Water to fulfill settlement terms was derived from a variety of sources. For off-reservation rights, the State came to the negotiating table with "a strict bottom line" and refused to recognize any instream flows east of the divide or in over-appropriated basins.[251] The State investigated its water budget to find areas where there was enough existing flow that few junior users would be usurped by an increased instream flow.[252] Once these areas were selected, the State presented these areas to the Tribes for consideration.[253] Most proposed off-reservation uses were set at a rate that would be satisfied by existing hydrologic conditions but would nonetheless protect those streams from further encroachment.[254] Only a few of the proposed instream flows had potential to usurp junior users.[255] These combined strategies of using unallocated water, supplementing water resources on reservation, and retiring the dam to apply the hydropower right toward additional flows in the river would have largely satisfied the agreed upon minimum and instream flow provisions. Where proposed rights had the potential to usurp junior uses, the parties

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DNRC. The Montana Supreme Court found that the District court had erred in doing so, and remanded to the District Court to determine if the DNRC had the sovereign authority to conduct such proceedings.

[247] *In State ex. Rel. Greely v. Confederated Salish and Kootenai Tribes*, 219 Mont. 76 (1985).

[248] Email correspondence with Rhonda Swaney (May 22, 2014).

[249] Myers Reece, *supra* note 221.

[250] The Ordinance would apply instead of a state or tribal water code.

[251] Interview with Jay Weiner, *supra* note 235.

[252] *Id.*

[253] *Id.*

[254] *Id.*

[255] *Id.*

agreed not to enforce the flow for a period of ten years to permit the gradual institution of instream flows.[256]

On reservation, the parties began the process of figuring out how instream flow requirements would be implemented. The State proposed augmenting the reservation's water budget with water from off-reservation storage to obtain most of the water needed on-reservation.[257] The parties proposed taking strategic advantage of the Milltown Dam removal from the Clark Fork River after the State took ownership of the hydropower right.[258] Transferring the 1904 Milltown Dam right to co-ownership between the Tribes and Montana State Fish and Wildlife would protect flows in the Clark Fork River.[259]

Proposed Flathead Indian Irrigation Project (FIIP) Water Use Agreement

Seeking to protect state water users with junior priority dates, the State sought to negotiate a solution with the Tribes whereby these users would be able to continue their existing uses even once the Tribes' 1855 priority date was fully exercised.[260] FIIP provides delivery of water for irrigation to on-reservation farmers, the majority of who are non-Indians on fee lands.[261] The Flathead Indian Irrigation Project Water Use Agreement[262] would provide the means to protect the junior state water rights holders served by the FIIP.[263]

The parties recognized that the Tribes' off-reservation instream flow rights were likely to be recognized as dating back to time immemorial, as they were based on aboriginal use. The rights accompanying the Flathead reservation would have a priority of 1855 and would likely be equal to or senior to the rights of non-Indian water users on the

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[256] *Id.*

[257] *Id.*

[258] *Id.*

[259] The right is currently held by the Montana State Department of Justice Natural Resource Damage Program.

[260] Initially, the Tribes and State proposed "redesignation" of non-project user rights, to incorporate these rights into the irrigation project with the same early priority date as the Tribes' rights. These nonproject users would have had to submit to project administration in return for receiving the project's earlier priority date. However, adding new rights to an existing federal irrigation project proved incredibly complicated; the BIA would have to acquire new land and meet several other difficult requirements.

The parties soon decided that redesignation was too complicated. The current proposal would facilitate contracts with each individual non-project user. The terms of these deferral agreements would require that if non-project users abide by project administration and rules the Tribes would not enforce the irrigation project user's earlier priority dates against those users. These deferral agreements would be included in an appendix to the Compact. *Id*.

[261] *Id*.

[262] *Summary of the Proposed Flathead Indian Irrigation Project Water Use Agreement* (Jan. 17, 2013), *available at* http://www.cskt.org/2013-1-17Summary.of.Proposed.FIIP.Water.Use.Agreement.pdf.

[263] The Flathead Indian Irrigation Project was established in 1908 and includes 17 reservoirs and more than 1,300 miles of canals. Myers Reece, *supra* note 221.

reservation.[264] The early priority of the Tribes' rights made it likely that any tribal uses would usurp the use of state water rights holders. The CSKT negotiated with the Flathead Joint Board of Control and the United States to develop a proposed Flathead Indian Irrigation Project Water Use Agreement. This agreement would "address the exercise and administration of both the FIIP water rights and the CSKT instream flow rights for streams supplying the FIIP"[265] by quantifying:

- Minimum Enforceable Flows (MEFs),
- Farm Turnout Allowances (FTAs),
- Measured Water Use Allowances (MWUAs), and
- Target Instream Flows (TIFs).

Under the proposed agreement, CSKT agreed to modify the priority date of the instream flow rights to permit non-Indian irrigators to maintain their irrigation practices.[266] Instream flows would be fulfilled first, farm-turnout allowances second (for irrigation), and target instream flows met next.[267] A provision for potentially providing irrigators with additional irrigation from target instream flows was also provided for.[268]

The Flathead Reservation Compact

The Compact served as the cornerstone of the proposed settlement. Markedly, the Compact recognizes substantial off-reservation instream flows in the Tribes' traditional aboriginal territory. As proposed, the agreement provides instream flow rights on the main stem of the Kootenai and Swan Rivers, with a time immemorial priority date, and with the explicit purpose of maintaining fish habitat.[269] One of the most interesting features of the Compact was the proposed co-ownership of some of the off-reservation flow rights between the Tribe and Montana Fish, Wildlife and Parks.[270] Proposed terms included public recreation and reservoir contract rights on the Bitterroot; Milltown Dam water rights for the upper

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[264] *Id.*

[265] *Summary of the Proposed Flathead Indian Irrigation Project Water Use Agreement*, *supra* note 261.

[266] *Id*.

[267] *Id.*

[268] *Id.* The summary provides that "the Measured Water Use Allowance (MWUA) would allow Individual irrigators to obtain an additional increment of water over and above the FTA if it can be shown that an individual irrigator can efficiently use additional water." To be approved for MWUA the irrigator would have to go through an audit process.

[269] The State of Montana's Proposal for the Resolution of the Off-Reservation Water Rights Claims of the Confederated Salish & Kootenai Tribes, Montana RWRCC, July 20, 2011; Detailed Explanation of the State of Montana's Proposal for the Resolution of the Confederated Salish & Kootenai Tribes' Claims to Off-Reservation Tribal Water Rights, Montana RWRCC, January 30, 2012.

[270] Myers Reece, *supra* note 221.

Clark Fork; use right claims on two Kootenai River tributaries; and in-stream flow and recreation right claims for the Blackfoot and Clearwater rivers. [271]

The parties agreed to specific locations, quantities and conditions for flow provisions. Specifically, the use agreement included minimum enforceable flows and targeted instream flows.[272] Some of the Tribes' requests demonstrate important considerations that should be incorporated into a settlement agreement when designing an instream flow proposal. For instance, the Tribes sought to refine the Milltown Dam element of the proposal by requesting that:

- (a) the purpose of the water right be changed from hydropower to an instream purpose for the benefit of fisheries resources;
- (b) the 2,000 cubic feet per second (cfs) water right be protected from abandonment;
- (c) appropriation of the water right be subject to an enforcement protocol that includes a minimum daily flow hydrograph (enforceable hydrograph) and a process to initiate call; and
- (d) the ability to call be restricted to junior surface water irrigation uses and junior groundwater irrigation uses with an appropriation right greater than 100 gallons per minute.[273]

These requested revisions would explicitly address (a) acceptable uses, (b) potential conflicts with state law, (c & d) the administration of rights off-reservation, and (c & d) enforcement of those rights. These proposed revisions demonstrate an attempt to address many of the legal issues discussed in Chapter 3.

Part Three: Building Settlement Support

Achieving a final settlement agreement is a political process. Parties must agree to negotiate and work together to find mutually acceptable terms to ultimately gain the support of tribal councils, state legislatures, and Congress. Interested parties are often motivated to negotiate settlement agreements from external pressures. The threat of a general stream adjudication, an adverse finding in litigation, or even the resolution of impending endangered species act concerns may incentivize parties to negotiate.[274]

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[271] *Id.*

[272] *Id.*

[273] *Id.*

[274] Colby et al. explain that "[s]erious negotiation efforts generally have been motivated by litigation or an impending administrative decision that threatens the parties' access to water or federal resources." Colby et.

Involving many stakeholders during the negotiation process may foreshadow any potential objectives and will help to ultimately ensure that the proposed legislation has sufficient support. When deciding which parties to involve in settlement negotiations, the tribe should carefully balance inclusiveness with the need for efficiency. Nonetheless, many experienced negotiators recommend a fairly inclusive process, involving a wide range of stakeholders.[275]

Once the parties have agreed upon settlement terms, they must still seek legislative approval by Congress. The success or failure of a settlement negotiation ultimately depends on gathering sufficient political support to pass settlement legislation in Congress.[276] One strategy is to hire a lobbyist to build political will in state legislatures and in Congress. Gary Passmore, Director of the Colville Confederated Tribes' Department of Trust Resources, believes that one of the Colville Tribe's keys to success in fulfilling their water development needs has been the retention of an advocate to explain and build political will to support tribal initiatives in the Washington State legislature.[277] Thus, hiring a lobbyist is a crucial strategy for the ultimate passage of the settlement agreement.

The above examples of specific settlement provisions are intended to provide illustrations of the ways in which non-consumptive protections have been addressed in past settlement negotiations. Each tribe's situation is unique; when negotiating settlement acts the tribal negotiating team must work closely with its technical and legal advisors to tailor an agreement that will satisfy the tribe's sovereign objectives.

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al., *supra* note 185. In Chapter 7 we discuss the role that leveraging federal environmental laws can play in prompting settlement negotiations.

[275] For recommendations, see, e.g. Colby et. al., *supra* note 185, at 59.

[276] A letter from "Flathead Irrigation District farmers and ranchers" was sent to Montana Governor Steve Bullock and Attorney General Fox on January 6, 2014 in support of the Water Use Agreement and the Flathead Reservation Compact. The letter explained that the rights of the CSKT would take priority over the rights of other irrigators on the Flathead Reservation; unless the water use agreement is passed the rights of the irrigators would not be secure. The letter also sought to dispel common myths about the proposed compact. Letter from Flathead Irrigation District farmers and ranchers to Governor Steve Bullock and Attorney General Fox. (Jan. 6, 2014), *available at* http://leg.mt.gov/content/Committees/Interim/2013-2014/Water-Policy/Meetings/Jan-2014/Exhibits/January-6-2014/Exhibit22.pdf.

[277] Interview with Gary Passmore, *supra* note 304.

Chapter 6: Protecting Non-Consumptive Uses in Tribal Water Codes

Tribal codes can simultaneously protect non-consumptive uses and assert a tribe's sovereign authority to regulate use of its water resources. This chapter introduces tribal water codes generally and discusses the potential pros and cons of developing a code. We address potential legal and practical issues related to the enactment and enforcement of codes, and provide examples of tribal water code provisions that provide for and protect non-consumptive uses.[278]

The Importance of Culture

For Lois Trevino, Water Administrator for the Confederated Colville Tribes, enforcement of the Tribes' water code is an opportunity to protect and reinforce the Tribes' cultural identity. "Preserving our way of life is the most important thing we can do… this was the reason we put religious and cultural uses as our first priority in the code."

Part One: What is a Water Code?

A water code is tribally generated legislation that controls tribal administration of on-reservation water resources. Tribal codes are "systematic bod[ies] of legislation" that can include past legislation or tribal council-approved statutory law.[279] Tribal codes may incorporate customary law and laws adapted from other jurisdictions,[280] and may contain preambles that can serve as part of the substantive written law or as interpretive guidance for the written law that follows.

[278] The examples provided are a starting point; tribal resource managers, tribal council members, and attorneys can use this chapter as an introduction to providing for and protecting non-consumptive uses through tribal codes. However, we remind readers once again that the material herein is not intended to be legal advice or a substitute to advice from tribal in-house counsel.

[279] Robert D. Cooter & Wolfgang Fikentscher, *American Indian Law Codes: Pragmatic Law and Tribal Identity*, 56 AM. J. COMP. L. 29, 36 (2008), *available at* http://scholarship.law.berkeley.edu/facpubs/1205.

[280] *See id.* at 63.

Part Two: To Codify or Not?

Enacting and enforcing a tribal code can be very beneficial. At the same time, codes require substantial resources to draft, administer, and enforce. Thus, determining whether or not to enact a tribal code is a decision that must be made by individual tribes acting in their sovereign capacity.

Pros

- Tribal codes may provide a mechanism to support specific tribal water uses or objectives
- Codification of tribal law may support tribal control over water resources if tribal authority is challenged
- Enacting a code is an act demonstrating tribal sovereignty

Goals of codification may include preserving tribal culture, reinforcing tribal identity, promoting economic development, and exercising tribal sovereignty.[281] Enacting a water code can be a means of achieving a tribe's water use objectives through enforceable, tribally-generated law. Additionally, in dealings with outsiders, a tribal code can clarify the tribe's general stance on an issue and provide notice of reservation laws. Because state and federal courts rely on written law, codification can present tribal law in a manner recognizable to non-tribal administrators and courts.[282] Once a code is established, reasonable and fair tribal enforcement will broadcast the legitimacy of tribal control and self-determination of water uses.[283]

Cons

- Enforcement of a tribal code requires substantial resources
- The tribe may need to carefully assess whether it has sufficient capacity and expertise to administer the code

Though enacting a water code can have many benefits, enacting and enforcing a code requires a significant investment of time and resources. An effective code requires consensus, capacity, and capital to enforce. The development and implementation of a tribal water code demands substantial investment in terms of personnel. Outreach is required to determine community priorities and achieve political consensus. Once members have agreed that a code will help fulfill the tribe's sovereign objectives, a code that incorporates the political and legal structure of the tribe, accommodates a range of development objectives, and includes satisfactory water protections must be drafted. Once drafted,

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[281] *Id.* at 32.

[282] *Id.* at 64.

[283] Asserting jurisdiction over federal reserved rights by passing and enforcing a tribal code may help to preserve the scope of these rights. In Chapter 3 we discuss tribal authority over water resources on the reservation.

generally the tribal council must approve the code.[284] In addition, the tribe may require approval from the Secretary of Interior to enact the water code.[285] After the code has been implemented and tested for a period, the tribe may desire to revise or modify certain provisions.

Enforcing a water code also requires significant tribal resources. Codes may require the issuance of permits, the establishment of monitoring mechanisms, and the enforcement of penalties for violations. Tribal leaders may want to consider the following questions:

- Is there sufficient political will to achieve consensus and pass a code?
- Would enacting a water code better enable the tribe to achieve its water management objectives?
- Does the tribe have the capacity to manage a water code?[286]

Regardless of the benefits and drawbacks of codification, settlement agreements may require tribes to adopt a water code to carry out settlement provisions. For instance, the Zuni Indian Tribe Water Rights Settlement Act of 2003 requires that "Not later than 3 years after the deadline described in section 9 (b), the

Lionel Puhuyesva on Considering Capacity

Lionel Puhuyesva is the director of the Hopi Tribe's Water Resources Program and has led the way for the Tribe to enact a comprehensive water quality code. In the early 2000s, water quality standards on the Hopi Reservation were insufficient to achieve the water quality necessary for Hopi ceremonial and domestic water uses. "Many of the springs [on the reservation] are culturally significant," Puhuyesva explained. "People tend to want to protect certain springs and sites. Certain areas are tied to cultural traditions."

In addition to creating more stringent water quality standards, the Nation wanted the power to regulate springs on the Reservation. The Nation invested substantial time and resources to create stronger protections for environmental quality in a tribal water quality code. Puhuyesva and others considered the contamination of wells to have reached unacceptable levels: "We created an ordinance to enforce our water code. We needed to have a way to address the contamination."

Enforcement of the tribal code has been a difficult task. When interviewed in 2012, Puhuyesva noted that the Tribe was revising portions of the code "to add more teeth," including more stringent penalties for noncompliance. Puhuyesva also hoped to find additional resources to enforce the code.

[284] Each tribe has its own laws and/or procedures governing how laws are passed and enforced on the reservation.

[285] Discussed in more detail below in Part Three.

[286] The text box to the right, *Lionel Puhuyesva on Considering Capacity*, includes a first-hand account on dealing with capacity. In-person interview with Lionel Puhuyesva, Hopi Reservation (Nov. 7, 2012).

Zuni Tribe shall adopt a water code . . . reasonably equivalent to State water law."[287]

To summarize, although developing and administering a tribal water code is a serious undertaking, it is also an important step in taking control over tribal water resources and may have substantial long-term benefits.

Part Three: The Secretarial Moratorium on the Approval of Water Codes

One barrier to establishing a functional tribal water code may be the requirement of Department of Interior (DOI) approval before the code can be enacted. Tribes that have adopted an Indian Reorganization Act (IRA) constitution generally must secure approval from the Secretary of Interior to enact a tribal water code.[288] In the mid-1970s, the Secretary issued a moratorium on the approval of tribal water codes pending the adoption of rules articulating the circumstances under which such codes should be approved.[289] Although proposed rules have been developed, they have not been adopted and the moratorium endures.[290]

There are several ways for tribes with IRA constitutions to bypass the secretarial moratorium issue. One option is the negotiation of a settlement with state authorities that then must ratified by the DOI. If the tribe and state agree on a code to manage water resources, once secretarial approval is obtained, reservation water resources can be administered according to the agreed upon terms. The Salt River-Maricopa Indian Community was able to achieve control over its water resources using this method.[291] Another option is to amend the tribal constitution to remove the requirement of pre-enactment DOI water code approval. Once the tribe's constitution is amended to remove the requirement of secretarial approval, the tribal council can pass and amend the tribal water code independently. The initial process of amending the tribal constitution may

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[287] The Zuni Indian Tribe Water Rights Settlement Act of 2003, P.L. No. 108–34,. § 8 (b)(1)(F)(i), 117 Stat. 783.

[288] Many tribes adopted constitutions and governance structures under the Indian Reorganization Act. 25 U.S.C. §§ 461–479 (1934). Generally, IRA constitutions include a provision requiring that "any resolution 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."

[289] Memorandum from Rogers C.B. Morton, Secretary of the Interior, to the Commissioner of Indian Affairs, (Jan. 15, 1975).

[290] *See* David H. Getches, *Management and Marketing of Indian Water: From Conflict to Pragmatism*, 58 COLO. L. REV. 515, 527 (1988).

[291] CABELL BRECKINRIDGE, *Department of the Interior's Moratorium on Approval of Tribal Water* Codes, *in* TRIBAL WATER RIGHTS 206 (John E. Thorson, Sarah Britton, and Bonnie Colby eds., 2006).

involve seeking approval from the Secretary of Interior, but such approval is generally granted.[292]

Part Four: Enforceability

The boundary between state, federal and tribal authority over Indian federal reserved rights, and thus the extent of tribal authority to enforce tribal water codes, is not always clear. Absent a congressional grant of jurisdiction, state water laws are not enforceable on tribal land.[293] Nonetheless, tribal authority to enforce and administer codes with respect to non-Indian water users within reservation boundaries has been a point of contention in the past. Two cases have been tried which directly address the enforceability of tribal water codes.

Big Horn III: The Wind River Tribe has not been able to enforce its code in Wyoming

One of the major issues when considering the enactment of a tribal code is authority to enforce those regulations and to call the river to enforce lawful permits issued under those regulations. Here we revisit the Wyoming State Engineer's refusal to enforce instream flows established under the Wind River Tribes' water code.[294] After the quantification of the Wind River Tribes' rights in Wyoming's Big Horn River adjudication, the Tribes enacted an interim water code to better administer their reservation water rights. When the tribal water engineer issued a call to meet an instream flow established under the Tribes' water code, the Wyoming State water engineer refused to enforce the right.[295] The Tribes challenged this refusal in Wyoming State court.

In *Big Horn III*, the court explained that "a tribal water code providing for uses not included in the treaty or document creating the reservation will not be respected by the state engineer who monitors the adjudication decree . . . unless the tribe applies for a permit and the use is recognized as a beneficial use under state law."[296] Thus, if Wyoming tribes want to change their water right to a use not explicitly noted in treaty language, they must make the change under Wyoming law rather than doing so independently through their tribal code.[297] For reasons discussed in Chapter 3, the Wyoming Supreme Court likely erred in reaching these conclusions.

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[292] *Id.*

[293] 25 U.S.C. § 1322(b) (1988).

[294] See discussion above, in Chapter 3.

[295] *Id.*

[296] *In re General Adjudication of the Big Horn River System*, 835 P.2d 273, 278-79 (Wyo. 1992).

[297] *Id.*

Holly v. Confederated Tribes & Bands of Yakima Indian Nation: A tribal water code cannot be too broad or overreaching

If a code contains a declaration of authority that is too broad, the overreaching part of the code may be held to be invalid. In *Holly v. Confederated Tribes & Bands of Yakima Indian Nation*,[298] a federal district court found that the Yakama Nation's water code was overly broad and could not be enforced to its full extent.[299] The Yakama Nation had sought to assert complete territorial jurisdiction over all water users within the Yakima reservation boundaries.[300] The court, citing *Anderson* (see Chapter 3), found that the code's broad assertion could not confer authority to regulate non-Indian users of excess waters[301] within reservation boundaries[302] and announced that the Nation did not have authority over non-Indians simply because they resided within the reservation boundaries.[303]

Successful administration

Although codes are occasionally challenged, many tribes successfully administer tribal water resources in accordance with tribal water codes.[304] A few tribes have even negotiated agreements with states to exert authority over all water use on the reservation, beyond what was authorized in *Anderson*. For instance, the Confederated Colville Tribes have negotiated an agreement with state of Washington to administer all water right uses on their reservation.[305] The Confederated Colville Tribes administer the rights of tribal members as well as those of state water users on-reservation.[306] Lois Trevino, Water Administrator for the Tribes, explains that the geographic circumstances on the reservation, combined with the Tribes' close relationship with Washington State, have enabled the Tribes to take more control over reservation water resources than would otherwise be permissible under *Walton*.[307]

Particularly if the rights of non-Indians on the reservation are implicated, it may be wise for tribes to work out an agreement with the state or federal government regarding the administration of tribal non-consumptive uses. Gary Passmore, Director of the Colville

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[298] 655 F. Supp. 557 (E.D. Wash. 1986).

[299] *Id.* at 559.

[300] Specifically, the Tribe asserted the right to regulate all of the water within, underneath, or flowing through the reservation and explained that this water was reserved for tribal members. *Id.* at 551.

[301] Excess waters are waters not included as part of the Tribe's federal reserved rights.

[302] *Id.*

[303] *Id.* at 599.

[304] For instance, the Confederated Colville Tribes, discussed throughout, is a great example of a tribal government that has undertaken extensive efforts to develop a comprehensive water code.

[305] In-person interview with Gary Passmore and Lois Trevino, Colville Indian Reservation (Dec.18, 2013) (notes on file with author).

[306] *Id.*

[307] See Chapter 3 for *Walton* discussion.

Tribes' Department of Tribal Trust Resources, explains that frequent conversations with the State of Washington have improved the relationship between the State and Tribes.[308] Gary recommended regular discussions with the state to build a cooperative relationship that may result in the state being more likely to facilitate tribal management goals.[309]

Part Five: Incorporating Non-Consumptive Uses into Tribal Codes

Tribal water codes can address all aspects of water quality and water resource allocation on the reservation, or can be more narrowly tailored to address only the tribe's primary water management concerns. In Thomas Clayton's article *The Policy Choices Tribes Face When Deciding Whether to Enact a Water Code*,[310] Clayton describes several basic models that can serve as foundations for a tribal water code. While there are many factors a tribe should consider when drafting a comprehensive water code, here we focus on those of particular importance when the tribe is seeking to establish protections for non-consumptive uses on the reservation. We consider provisions addressing authority to administer those uses on-reservation, the inclusion of non-consumptive uses as permissible uses, methods or procedures for establishing non-consumptive use protections, and additional assurances that protect such uses.

Non-Consumptive Use Provisions for Tribal Water Codes	
Statement of Authority	**1) Authority to administer non-consumptive uses.** Thomas Clayton recommends including direct language that describes why the code is relevant to protecting tribal sovereignty.[311] Modeling this language to protect the "political integrity, economic security, or health and welfare of the tribe" or using other similar language can weigh in favor of tribal administration of a code if challenged in court. **Example:** In section 4-10-1(a) on Declaration of Rights and Purposes of the 2013 Draft Colville Water Code, the Tribes articulate that one of the general purposes behind the water code is to "promote the general welfare of the Colville Tribes."[312]

[308] Interview with Gary Passmore and Lois Trevino, *supra* note 304.

[309] *Id*.

[310] Thomas Clayton, *The Policy Choices Tribes Face When Deciding Whether to Enact a Water Code*, 17 AM. INDIAN L. REV. 523, 523–588 (1992).

[311] *Id.*

[312] Draft Colville Water Code §4-10-1(a) (2006).

	2) General authority over water resources. A tribe may or may not wish to include a statement declaring the assumed scope of tribal authority over reservation water resources. The benefit of such a statement is that it indicates to outsiders the tribes' intent to exercise a certain degree or scope of authority. However, the tribe may expose itself to a challenge if the statement is overly broad (see discussion of *Holly*, above). **Example:** In the Draft Colville Code, the Tribes assert authority "to the maximum extent permitted under tribal law and any federal law that may be permitted" and cite the *Walton* decision.
Permissible Uses	**1) Include non-consumptive uses as permissible uses.** Clayton explains "the greatest difference between the beneficial uses identified by states as opposed to those identified by tribes is that state uses emphasize consumptive uses and ignore conservation-type uses."[313] The tribe may want to explicitly include non-consumptive uses as permissible or beneficial. The code can directly address instream flows or indirectly address non-consumptive uses by permitting the allocation of water to maintain a stream in its "natural state" or to be used for ceremonial purposes. Alternatively, the code may simply articulate a list of permissible uses. Listing desired uses without establishing a priority of use has the benefit of creating additional flexibility in the allocation of water on the reservation. **Example:** The code could contain language permitting that: "Water may be appropriated for the following uses: Religious, ceremonial or spiritual uses; domestic uses; fish and wildlife purposes; for instream flows," etc. **2) A priority or hierarchy of uses.** If the tribe determines that it wishes to protect or prioritize certain water uses above others, it may consider incorporating a hierarchy of uses. A hierarchy of uses can be a strict prioritization, cutting off lower priority uses to preserve the top priority use or uses. Alternatively, it can be a soft prioritization, permitting the tribe's water code administrator discretion in prioritizing uses on the ground. **Example:** The Navajo Nation Water Code requires: When insufficient water supplies are present, the following priority of uses shall be considered in this order: 1. Domestic and municipal uses 2. Stock watering uses 3. Agricultural uses 4. Instream needs, for fish, wildlife, conservation and

[313] Clayton, *supra* note 309, at 566 (citing Farrow interview).

	recreational uses; 5. Economic development uses including industrial and power uses; and 6. Other uses.[314]
Method for Establishing Non-Consumptive Uses	**1) By permit application** Under some tribal codes, an individual may simply apply for an instream flow through the permitting process. **Example:** The Wind River Tribes' permit application process allows for the application of tribal waters to instream flow uses. **2) Request by a designated entity** State instream flow laws generally allow only certain entities to petition for instream flows. Only Arizona permits individuals to hold instream flow rights (see Table 5.1). Limiting the entities that can hold instream flow permits allows for greater centralized control over selecting areas where flows will be preserved. It also ensures that water is available for other development purposes in areas where those may take priority over non-consumptive uses.
Indirect Protections	**1) Similar to a public trust provision** Indirect provisions may directly address the public interest, or may contain language that preserves uses in accordance with the best interest of the tribe. **Example:** Under "Additional Policy Guidelines," the Colville code requires that Rivers and streams of the Reservation shall be retained with sufficient flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic, and other environmental values and navigational values. Withdrawals of water that would conflict therewith should be authorized only in those situations where it is clear that overriding considerations of the public interest will be served.[315] **2) Water administrator has discretion to ensure certain conditions** If a spring or stream area is used for ceremonial uses requiring a wet oasis or sufficient water quantity to submerge in, the code could include provisions protecting a certain "natural" or "flowing" condition.

[314] N.N.W.C. §1501.(D) (1984).

[315] Colville Water Code 4-10-132(a).

Direct Protections for Specific Water Sources	**1) Quantification** Where a certain level of flow or minimum flow is crucial to fulfill an important objective of the tribe, resource managers may consider specifying a particular minimum flow for a stream or isolated stretch of stream. **Example:** Lois Trevino explains that the Tribes are considering incorporating specific, quantified instream flow provisions into the Colville Water Code.

We now examine two unique tribal codes that contain differing protections for non-consumptive uses and values. Once again, we focus on provisions pertinent to protecting non-consumptive uses on the reservation.

Confederated Colville Tribes Water Code

Lois Trevino's Advice for Drafting a Tribal Water Code

- Focus on tribal priorities rather than on things to avoid
- Ask the community which uses should be priorities; listen to their response

The Colville Indian Reservation lies in northern Washington State, across the border from the Canadian headwaters of the Columbia River. The individual tribes that now compose the Colville Confederated Tribes have always been salmon people, travelling the northwest and fishing at customary locations. Preserving this tradition, the modern Colville Tribes have invested heavily in restoring fisheries and water resources to enable tribal members and the members of other tribes to continue their traditional cultural fishing practices.[316]

Gary Passmore, Director of the Tribal Environmental Trust Department, and Lois Trevino, Water Administrator, have both been integral to the process of drafting and redrafting the Colville Water Code. "Every part of the code has been drafted to reinforce the Tribes' cultural identity," Trevino explains.[317] For instance, when establishing the tribal priority of uses, Trevino sought to reinforce the Tribes' overall cultural objectives through the order of priorities. The below provisions are included in the amended draft Colville Water Code.

Authority over water resources

The Colville Water Code provides a broad declaration of authority. In section 4-10-1 "Declaration of Rights and Purpose," the Colville Water Resources Use and Permitting

[316] Interview with Lois Trevino, *supra* note 304.
[317] *Id.*

section describes the Tribes' "inherent sovereign power of self-government" and "prior, exclusive and supreme rights, in ownership of, and jurisdiction over, the waters of the Colville Reservation and lands held in trust off-Reservation for all purposes."[318] The Tribes assert their authority "to the maximum extent permitted under tribal law and any federal law that may be applicable."[319] Furthermore, waters of the Colville Indian Reservation are defined broadly[320] in the code and include enhanced flows.[321]

The Tribes also emphasize the importance of their authority to regulate water resources, explaining that the purpose of the code is to "promote the general welfare of [the Tribes]" and elaborating that water has been "of fundamental importance to the Colville Tribes since time immemorial."[322]

Inclusion of non-consumptive uses as permissible uses

The Colville Tribes have developed a hierarchy of uses to prioritize water use on the Reservation.[323] Cultural and religious uses are ranked as the number one priority, domestic uses number two, municipal uses number three, stock watering four, and fish and wildlife five.[324] Other permitted uses, in order of priority, include: agriculture, recreation, industry, power, mining and select other uses deemed beneficial by the Water Administrator.[325]

Priority one, "Cultural and Religious Uses," permits "[t]he ceremonial use of water by the Colville Tribes or its membership to express and exercise their traditional religion or cultural customs." Priority five, "Fish, wildlife, ecosystem function," permits water to be allocated "to protect, preserve or enhance habitat needed for the life cycle of fish and wildlife resident on, but not necessarily native to, the Colville Reservation.[326]

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[318] Colville Water Code 4-10-1(a).

[319] Colville Water Code 4-10-1 (b).

[320] Colville Water Code 4-10-4(a).

[321] Colville Water Code 4-10-4(c). Enhanced flows refer to waters added to supplement the amount of water in a stream. For instance, if the tribe pumps ground water and adds that water to a trout stream, this would result in an enhanced flow.

[322] Colville Water Code 4-10-1(b)

[323] "Unless otherwise provided, the following uses shall, when conflicting, be given a preference in the order in which they are listed." (Colville Water Code 4-10-130(d)).

[324] *Id.*

[325] *Id.*

[326] Provided that nothing in this section shall be construed to waive any claim that the Colville Tribes possesses an instream water right for fisheries purposes with a priority date under federal law of time immemorial as against any other party." *Id.*

Method for establishing non-consumptive uses

As part of the priority of uses, non-consumptive uses are allowed for religious, cultural, fisheries and wildlife purposes. The requirements for obtaining a permit include "provisions for insuring minimum levels for fish, wildlife, recreational and aesthetic values"[327] as well as "provisions designed to prevent or reduce obstruction of fish runs."[328]

Indirect protections

Indirect provisions have also been incorporated into the Colville Water Code to protect non-consumptive values. For instance, the Water Administrator is permitted to "ensure adequate levels in streams and lakes for wildlife conservation and other values"[329] and advises the Tribal Council on "establishing flow levels or water levels to maintain or restore a healthy riparian and aquatic environment."[330] When considering a proposed water use, the Administrator must weigh "the nature and exten[t] of degradation of other economic, cultural, historic, aesthetic, natural and environmental values."[331] Additionally, the Administrator has discretion to "shape use of available supplies to promote economic, scenic, aesthetic, historical, cultural, natural or domestic values, consistent with the priorities of [that] subsection."[332]

Under "Additional Policy Guidelines", the Colville code requires that

> Rivers and streams of the Reservation shall be retained with sufficient flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic, and other environmental values and navigational values. Withdrawals of water that would conflict therewith should be authorized only in those situations where it is clear that overriding considerations of the public interest will be served.[333]

Particularized protections for specific water resources

Although the Colville Confederate Tribes do not currently have provisions in the code to protect specific streams, Lois Trevino explains that the Tribes are contemplating inserting quantified minimum streamflows into the code.[334]

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[327] Colville Water Code 4-10-202(n).
[328] Colville Water Code 4-10-202(q).
[329] Colville Water Code 4-10-105.
[330] Colville Water Code. 4-10-105(h).
[331] Colville Water Code 4-10-130 (b)(4).
[332] Colville Water Code 4-10-131(n).
[333] Colville Water Code 4-10-132(a).
[334] Interview with Lois Trevino, *supra* note 304.

The Navajo Nation Water Code

The Navajo Nation water code also has a variety of provisions that protect non-consumptive uses. The Navajo Nation Water Code (NWC) governs water sources on the Navajo Reservation. The NWC is comprehensive and includes provisions to guide the issuance of water use permits on the Reservation. The Navajo Nation Division of Natural Resources is the primary entity charged with administering the code and is responsible for permitting water use on the Reservation in accordance with the long-term best interests of the Navajo People through the Water Code Administration.

Authority over water resources

Like the Colville Code, the Navajo Water Code defines "Waters of the Navajo Nation" broadly, to encompass all waters the Navajo Nation has reserved to it, held through prior or existing rights as well as all surface and ground water on the reservation.[335]

Inclusion of non-consumptive uses as a permissible uses

The Navajo Nation has a hierarchy of permissible uses that determines which uses receive priority in times of scarcity. The code states:

> When insufficient water supplies are present, the following priority of uses shall be considered in this order:
>
> 1) Domestic and municipal uses
> 2) Stock watering uses
> 3) Agricultural uses
> 4) Instream needs, for fish, wildlife, conservation and recreational uses;
> 5) Economic development uses including industrial and power uses; and
> 6) Other uses.[336]

Instream flows are explicitly provided for in this hierarchy; however, language in number four suggests that they must be issued for "fish, wildlife, conservation and recreational uses."

Method for establishing non-consumptive uses

The only way to obtain a right to use waters of the Navajo Nation is through processes prescribed in the Water Code,[337] which is administered by the Navajo Resource Committee. The Resource Committee can issue permits directly for instream flows, or condition permits upon adequate existing flows. Water use permits can include limitations on the

[335] N.N.W.C. §1104.
[336] N.N.W.C.§1501. (D).
[337] N.N. W.C. § 1102.

time periods during which water can be used, provisions for maintaining minimum stream flows, and provisions that enhance or maintain natural and artificial water supplies.[338]

Indirect protections

Part of the Navajo Water Code's primary purpose is to "develop and *preserve* the water resources of the Nation."[339] In administering the code, the Director of the Natural Resources Committee may deny, modify, or revoke water use permits to insure that adequate water levels remain in streams, rivers, ponds, and lakes to protect Navajo traditional religious practices, wildlife conservation and other values.[340] Before issuing a permit, the Director of the Division of Natural Resources may also consider "the nature and extent of degradation of other economic, cultural, religious, historic, aesthetic, natural or environmental values."[341]

The code also has a public interest provision stating that "[r]ivers, streams, lakes and ponds within the Navajo Nation are to be retained substantially in their natural conditions, with base flows and water levels necessary to provide for preservation of traditional and religious, recreation, wildlife, fish scenic, aesthetic, and other environmental values, to the extent possible." The code emphasizes that withdrawals of water that could conflict with those interests should only be allowed when there are overriding public interest and welfare considerations.[342]

Particularized protections for specific water resources

The Navajo Water Code does not include direct protections for specific water resources.

These selections from the Colville and Navajo water codes provide examples of how tribes may craft non-consumptive use protections for incorporation into tribal water codes. Although there are similar themes across both codes, each tribe has prioritized protections and methods of administration according to its specific needs. Many tribes have enacted water codes that can also serve as useful templates or inspiration for other tribes in the process of drafting a water code. Laws from states and municipalities may also provide useful examples. Ultimately, it is up to each tribe to craft a water code that best protect its sovereign objectives.

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[338] N.N. W.C. §1703.
[339] 22 N.N.C. §§ 1101.(emphasis added).
[340] N.N.W.C. §1404.
[341] N.N.W.C. §1501. B. 4.
[342] N.N.W.C §1503.A.

Chapter 7: Other Legal Tools

Until this point, we examined ways that tribes may directly manage their federal reserved rights for non-consumptive purposes. Here, we look at other legal tools that could be used as creative mechanisms to secure more water in important streams. We have identified three primary strategies that can result in more water in tribal streams:

1) The Clean Water Act
2) The Endangered Species Act
3) Conservation easements

Each of these tools is discussed in turn below.

Strategy One: Leveraging the Clean Water Act

The federal Clean Water Act (CWA)[343] was designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[344] Enforcement of the CWA generally does not require that a certain quantity of water be left in streams. However, the Supreme Court has held that requiring minimum instream flows is an acceptable method of maintaining water quality standards.[345] In *PUD No. 1 of Jefferson Cnty. v. Washington Dep't of Ecology*, the Court noted that distinguishing between water quality and quantity creates "an artificial distinction" and that "[i]n many cases, water quantity is closely related to water quality."[346] Additionally, CWA Section 303 regulates water quality standards and requires that water temperature standards, flow rates, seasonal variations, etc., are taken into account when establishing total maximum daily thermal loads.[347]

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[343] 33 U.S.C. §1251 et seq. (1972).

[344] 33 U.S.C. §1251.

[345] *See PUD No. 1 of Jefferson Cnty. v. Washington Dep't of Ecology*, 511 U.S. 700, 719 (1994).

[346] *Id.* at 1912-13.

[347] 33 U.S.C. § 303(d)(1)(D):

> Each State shall estimate for the waters identified in paragraph (l)(D) of this subsection the total maximum daily thermal load required to assure protection and propagation of a balanced, indigenous population of shellfish, fish and wildlife. Such estimates shall take into account the normal water temperatures, flow rates, seasonal variations, existing sources of heat input, and the dissipative capacity of the identified waters or parts thereof. Such estimates shall include a calculation of the maximum heat input that can be made into each such part and shall include a margin of safety that takes into account any lack of knowledge concerning the development of thermal water quality criteria for such protection and propagation in the identified waters or parts thereof. In this chapter we discuss specific segments of the CWA.

The CWA gives the Environmental Protection Agency (EPA) and states that meet EPA's criteria[348] the power to issue permits for the discharge of pollutants into navigable water bodies.[349] It also confers authority to set water quality standards.[350] In 1987, Congress amended the CWA to allow the EPA to treat tribes as states for the purpose of issuing permits.[351] When a tribe obtains treatment in the same manner as a state (TAS) it automatically receives National Pollutant Discharge Elimination System (NPDES) permitting certification. Certification status enables the tribe to establish permitting standards and requires the EPA to avoid granting any upstream permits that would violate these water quality standards.

Courts have upheld the EPA's authority to approve TAS applications from tribes to administer water quality standards programs for all reservation surface waters, including on the lands of non-Indians holding state water rights.[352] Once a tribe has attained TAS status, it can likely regulate quality standards for all surface waters within reservation boundaries (as opposed to just its federal reserved rights). Where reservations are checker-boarded, it is the stance of the EPA that:

> Because of the mobile nature of pollutants in surface waters and the relatively small length/size of stream segments or other water bodies on reservations, it would be practically very difficult to separate out the effects of water quality impairment within the non-Indian portions of a reservation that are very likely to affect the Tribal interest in water quality. EPA believes that a "checkerboard" system of regulation, whereby the Tribe and State split up regulation of surface water quality on the reservation, would ignore the

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For a general overview of the CWA, we refer readers to EPA*, Summary of the Clean Water Act: U.S.C. §1251 et seq.* (1972), (Jun. 10, 2014) http://www2.epa.gov/laws-regulations/summary-clean-water-act.

[348] 33 U.S.C. §1341.

[349] 33 U.S.C. §§ 1311, 1314. The CWA defines the term "navigable waters" to mean "the waters of the United States." 33 U.S.C. 1362(7). In *Rapanos v. United States*, the U.S. Supreme Court held that "the phrase 'the waters of the United States' includes only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] ... oceans, rivers, [and] lakes.' See Webster's Second 2882. The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall." 547 U.S. 715, 739 (2006).

[350] 33 U.S.C. § 1251; 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 131 (1995).

[351] 33 U.S.C. § 1377.

[352] *Montana v. United States EPA*, 137 F. 3d 1135 (9th Cir. 1998).

> difficulties of assuring compliance . . .when two different sovereign entities are regulating the same stream segments.[353]

Additionally, federal circuit courts have found that tribes with TAS may set water quality standards more stringent than those set by state entities regulating upstream water resources.[354] Thus, when a tribe sets water quality standards, the upstream state may be obligated to reduce the parts per million of pollutants in water flowing into reservation boundaries. To decrease the pollution concentration, an upstream state can reduce the amount of pollutants released into the stream or add cleaner water to the stream to dilute the concentration. Diluting the stream to meet water quality standards could, of course, produce additional flows.

In 1996, the 10th Circuit heard *City of Albuquerque v. Browner,* the first case testing a tribe's ability to set and enforce more stringent water quality standards than an upstream state.[355] Albuquerque's waste treatment facility discharged into the Rio Grande under a permit issued by the EPA.[356] The City of Albuquerque, who owned the waste treatment facility, found itself out of compliance with the downstream water quality standards set by the Isleta Pueblo Indian Tribe.[357] The EPA and the Tribe asserted that, like states, tribes had the power set more stringent water quality standards than those established by the EPA.[358] The court agreed with the Tribe and the EPA, finding that such a conclusion "is in accord with powers inherent in Indian tribal sovereignty."[359] Both the Seventh and Ninth Circuits have also found that tribes have the ability to set and enforce water quality standards more stringent than federal and state standards against upstream state users.[360]

One key consideration before evoking CWA protections is that the permit holder may meet downstream quality standards through a variety of means. After the conclusion of *Browner,* Albuquerque met the more stringent water quality standards enforced by the Isleta Pueblo Indian Reservation through upgrades to its water treatment plant facility to reduce the discharge of pollutants.[361] In contrast, Washington State has implemented water quality

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[353] Environmental Protection Agency, *Water Quality Standards Handbook - Chapter 1: General Provisions (40 CFR 131—Subpart A), available at* http://water.epa.gov/scitech/swguidance/standards/handbook/chapter01.cfm.

[354] *See City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996); *Montana,* 137 F.3d; *Wisconsin v. E.P.A.,* 266 F.3d 741 (7th Cir. 2001).

[355] *See id.*

[356] *Id.*

[357] *Id.*

[358] *Id.* at 421.

[359] *Id.* at 423.

[360] *Montana v. U.S. E.P.A.,* 137 F.3d 1135 (9th Cir. 1998); *Wisconsin v. E.P.A.,* 266 F.3d 741 (7th Cir. 2001).

[361] *See* Tania Soussan, *Water Plant Upgraded*, ALBUQUERQUE JOURNAL, Nov. 23, 1998.

standards that include minimum instream flows to meet water quality standards for certain water bodies. The Supreme Court has affirmed Washington State's power to require minimum flows as part of its water quality permitting program. [362] Tribes, too, could potentially require minimum flows as part of their water quality permitting program. The Confederated Salish and Kootenai Tribes of the Flathead Reservation have TAS status and have included instream flow uses as considerations in their water code's anti-degradation policy.[363] As these examples demonstrate, TAS can be a valuable method of protecting water quality and could be leveraged to maintain instream flows on tribal lands.

Is the CWA a good strategy for your tribe?

In order to gain (TAS) under the CWA, tribes must meet three criteria.[364] First, a tribe must be federally recognized and have a functioning government body.[365] Second, the tribe must seek to manage and protect its water resources within the reservation.[366] Finally, the Administrator must judge the tribe to be capable of carrying out the administration and enforcement of the CWA regulations.[367] Once a tribe meets these criteria and gains TAS the tribe is eligible for federal funding towards the administration of the CWA on the reservation.[368] Currently 48 tribes have gained TAS status under the CWA.[369] The small number of tribes with TAS status reflects how difficult it is for tribes to meet EPA standards.[370]

Gaining TAS status is a time and resource intensive process. When deciding whether to use the CWA as a tool for achieving or maintaining non-consumptive uses, a tribe should consider whether administering water quality standards on the reservation is an appropriate use of resources. As discussed above, the EPA's requirements for TAS have presented an obstacle for many tribes. Before obtaining TAS status the tribe must establish a tribal environmental protection agency to develop and enforce TAS standards. A tribe

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[362] *See PUD No. 1 of Jefferson Cnty. v. Washington Dep't of Ecology*, 511 U.S. 700, 719 (1994).
[363] *See* CSKT Water Quality Ordinance 89B § 1-2-206 (1993).
[364] 33 U.S.C. § 1377.
[365] 33 U.S.C. § 1377(e)(1).
[366] 33 U.S.C. § 1377(e)(2).
[367] 33 U.S.C. § 1377(e)(3).
[368] 33 U.S.C. § 1377(e).
[369] *Indian Tribal Approvals*, EPA, http://water.epa.gov/scitech/swguidance/standards/wqslibrary/approvtable.cfm (last visited Feb. 14, 2014).
[370] *See, e.g.* Keith S. Porter, *Good Alliances Make Good Neighbors: The Case for Tribal-State-Federal Watershed Partnerships*, 16 CORNELL J.L. & PUB. POL'Y 495, 538 (2007). Importantly, the tribe does not need to have quantified federal reserved rights to use this strategy.

without an administrative structure in place to adopt necessary regulations may find that other strategies for achieving non-consumptive uses are better suited to its needs.[371]

If the tribe chooses not to engage in the TAS process, there are other options to pursue. The tribe could enter into a cooperative agreement with the state. Alternatively, it could adopt the same water quality standards as the state, but then could enforce those standards on the reservation itself.

Developing water quality standards

There are a variety of resources for tribes seeking to develop their own water quality standards. The process described in Chapter 6 regarding the development of tribal codes is relevant here. The tribe will need to rely on its natural resource personnel and legal counsel to craft the code in accordance with TAS requirements. State water quality codes or the codes of other tribes may be useful examples to help facilitate this process.[372]

Strategy Two: Leveraging the Endangered Species Act

The Endangered Species Act (ESA),[373] originally enacted in 1973, is one of the most powerful federal laws protecting the natural environment.[374] The stated purpose of the ESA is to protect endangered and threatened species as well as the habitat and ecosystems on which those species depend.[375] The ESA has facilitated the protection of species important to tribes by creating additional flows in sensitive or important streams. It is important to note that the ESA was not designed to create in-situ water protections; rather, it was designed to protect species and only incidentally results in flow benefits.

To receive ESA protection, a species must be designated as "threatened" or "endangered" by the Department of Commerce's National Oceanic and Atmospheric Administration (NOAA) Fisheries or the Department of Interior's Fish and Wildlife Service (FWS).[376] The

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[371] For a discussion of developing and adopting tribal code provisions for protection of non-consumptive uses, see Chapter 6.

[372] The tribe will have to go through a series of review processes. After seeking approval of the tribal council, the tribe will have to go through the public comment process. After addressing these comments, the EPA will hopefully approve the water quality code. However, the tribe may be required to undergo multiple rounds of revisions before the standards are ultimately approved.

[373] 16 U.S.C. § 1531 et seq. (1973).

[374] *See, e.g.* Federico Cheever, *The Road to Recovery: A New Way of Thinking About the Endangered Species Act*, 23 ECOLOGY L.Q. 1, 3-4 (1996) ("the Endangered Species Act is one of the world's most powerful species preservation laws and has proved a potent tool for stopping, or at least delaying, projects that create a significant, readily identifiable threat to biological diversity").

[375] 16 U.S.C. § 1531.

[376] *See* 16 U.S.C. § 1532. An endangered species is defined as "in danger of extinction through all or a significant portion of its range." § 1532(6). A threatened species is one "which is likely to become an

Secretary of Commerce or the Secretary of Interior may designate "critical habitat" for listed species.[377] Critical habitat is geographic areas 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. Habitat features that are essential to the species may be protected (see Chapter 2 for discussion of important stream qualities). However, the ESA and accompanying regulations require the Secretary to consider economic and other factors when determining whether to designate a species' habitat as "critical habitat."[378] As a result, few species have had their critical habitat designated.[379]

After a species has been listed as endangered or threatened, individuals are prohibited from "taking"[380] or possessing members of that species.[381] Additionally, all federal agencies are also required to consult with NOAA Fisheries or FWS to ensure that federal actions will not jeopardize the continued existence of listed species or adversely modify its critical habitat.[382] "Any person", including tribes, may sue to enforce ESA provisions.[383]

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endangered species within the foreseeable future throughout all or a significant portion of its range." § 1532(20).

[377] 16 U.S.C. § 1532(5)(A). "Critical habitat" is defined in the ESA as "the specific areas within the geographical area occupied by the species, at the time it is listed . . . on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and . . . specific areas outside the geographical area occupied by the species . . . upon a determination by the Secretary that such areas are essential for the conservation of the species."

[378] "The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a) (3) of this section on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned." 16 U.S.C. § 1533(B)(2)

[379] *See, e.g.* Thomas F. Darin, *Designating Critical Habitat Under the Endangered Species Act: Habitat Protection Versus Agency Discretion*, 24 HARV. ENVTL. L. Rev. 209 (2000). Both Secretaries have adopted a joint order, acknowledging that tribes' cultural concerns should be taken into account and tribal conservation programs should be supported by both departments when designating critical habitat. Sec'y of the Interior and Sec'y of Commerce Order No. 3206 (June 5, 1997), this Secretarial Order, entitled "American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act," and its accompanying Appendix were issued this 5th day of June, 1997, in Washington, D.C., by the Secretary of the Interior and the Secretary of Commerce.

[380] "The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19).

[381] 16 U.S.C. § 1538.

[382] 16 U.S.C. § 1536(a).

[383] 16 U.S.C. § 1540(g).

Examples of tribal use of the ESA

Although the purpose of the ESA and critical habitat designation is not to increase streamflow, the ESA has served as a valuable tool for tribes to protect fisheries habitat, and, incidentally, increased flows.

The Nez Perce Tribe: Using the ESA for fisheries protection

In *Nez Perce Tribe v. NOAA Fisheries*, the Nez Perce Tribe of Idaho challenged the Bureau of Reclamation's Plan of Operations for releases from dams on a stretch of the Snake River that had previously been designated as critical habitat for the Snake River Basin steelhead.[384] The court found that the Plan of Operations and accompanying Biological Opinion by NOAA Fisheries approving the Plan under the ESA did not allow for adequate streamflows and would therefore have been "likely to result in the destruction or adverse modification of designated critical habitat for Snake River steelhead."[385] The Nez Perce Tribe, NOAA Fisheries, and other stakeholders on the river continue to wrestle in court over the biological opinion for operation of the dams.[386] In the meantime, the Nez Perce Tribe is working with state, federal, and tribal partners to restore the Snake River fall run for Chinook salmon, in large part through a hatchery operation.[387]

The Pyramid Lake Paiute Tribe: Using the ESA and CWA for instream flows

The Pyramid Lake Paiute Tribe's reservation encompasses Pyramid Lake, a desert lake that is the terminus of the Truckee River in Nevada.[388] In the early 1900s, the Truckee-Carson Irrigation Project, funded and completed by the federal Bureau of Reclamation, drastically reduced water levels in the lower reaches of the Truckee River and Pyramid Lake.[389] As a result, two native fish species, the Lahontan cutthroat trout and the cui-ui, began to decline.[390] The Lahontan cutthroat became extinct in Pyramid Lake by the 1940s.[391] The Lahontan cutthroat survived in small populations in tributaries, however, and was placed

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[384] *Nez Perce Tribe v. NOAA Fisheries,* CV-07-247-N-BLW (D. Idaho Apr. 7, 2008).

[385] *Id.*

[386] Rocky Barker, *Feds Reject Potential Way to Help Salmon*, IDAHO STATESMAN, Sept. 14, 2013.

[387] *Snake River Fall Chinook Recovery: A tribal success story* (2012), *available at* http://www.critfc.org/wp-content/uploads/2012/10/success-stories-full-set-.pdf.

[388] *About Us*, Pyramid Lake Paiute Tribe, http://plpt.nsn.us/plpt.html (last visited May 8, 2014).

[389] John Kramer, *Lake Tahoe, the Truckee River, and Pyramid Lake: The Past, Present, and Future of Interstate Water Issues*, 19 PAC. L.J. 1339, 1343 (1988).

[390] *Id.*

[391] *Id.*

on the threatened species list in 1975.[392] The cui-ui was placed on the endangered species list in 1967. [393]

The Pyramid Lake Paiute Tribe had settled its water rights in 1944 through the Orr Ditch Decree.[394] In 1973, with the cui-ui population continuing to decline, the federal government sought to re-open the Orr Ditch Decree in order to claim water for the Tribe's traditionally fishery. In *Nevada v. United States*, the Supreme Court held that the Decree was final and that the Tribe could not claim more water rights for fisheries.[395] Determined to protect the cui-ui, the Tribe turned to the ESA and the CWA, and initiated a series of lawsuits designed to protect water quality and quantity for the fish.[396] The Tribe also gained TAS under the CWA in 2007 to issue its own stringent water quality standards.[397] Through these efforts, the Lahontan cutthroat trout has been reintroduced to Pyramid Lake and the Tribe now sells recreational fishing permits for the native fish.[398]

Is the ESA a good strategy for your tribe?

The ESA is one of several federal statutes that can be used strategically by tribes to achieve instream flows. However, the ESA is designed solely to protect species, and therefore should be used cautiously by tribes if the tribe's underlying purpose is to protect water resources.[399] The most important thing for a tribe to consider when using the ESA is permanency. Once water is protected as habitat for a listed species, it may be very difficult for the tribe to use that water for other purposes.

When the tribe's primary goal is to protect a fishery or riparian habitat, the ESA can be a very powerful tool. If the species the tribe wants to protect is not yet listed, the tribe should first contemplate whether the evidence exists that the species meets the criteria for

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[392] *Id.* at 1344.

[393] *Id.* The cui-ui was listed under the Endangered Species Preservation Act of 1966, the predecessor of the ESA. Endangered Species Preservation Act P.L. 89-669 (1966).

[394] *Nevada v. United States*, 463 U.S. 110, 110 (1983).

[395] *Id.* at 111.

[396] *See Pyramid Lake Paiute Tribe of Indians v. U.S. Envtl. Prot. Agency*, No. CV-R-85-025-DWH (D. Nev. Dec. 4, 1996); *Pyramid Lake Paiute Tribe of Indians v. U.S. Envtl. Prot. Agency,* No. CV-R-86-438-DWH (D. Nev. Dec. 4, 1996).

[397] *Water Quality*, Pyramid Lake Paiute Tribe Environmental Department, http://plpt.nsn.us/environmental/water.htm (last visited May 8, 2014).

[398] *Id.*

[399] For a more thorough discussion of the CWA and its interaction with state, tribal, and federal water law, *see* David N. Cassuto and Steven Reed, *Water Law and the Endangered Species Act*, *in* WHOSE DROP IS IT ANYWAY?: EFFECTIVE MANAGEMENT OF OUR NATION'S WATER RESOURCES, (Megan Baroni, ed., 2010) *available at*: http://ssrn.com/abstract=1650241.

listing.[400] If the species is already listed, or if the tribe determines that the species does meet listing criteria, the tribe should determine whether seeking ESA protection of the species would interfere with other sovereign objectives.[401] If the tribe determines that ESA protections are appropriate for the particular circumstances of both the tribe and the species, it should then carefully consider its strategy for seeking protection. In some circumstances, the tribe may be able to develop effective partnerships with state and federal agencies to develop habitat protection plans; in other circumstances, a tribe may need to rely on ESA-based lawsuits in federal court.[402]

Tribal rights in conflict with the ESA

It is important to note that tribes have sometimes lost out when tribal water rights have conflicted with protections established under the ESA.[403] Because tribal water rights are often underdeveloped, tribal water settlements frequently require the development of infrastructure to store and deliver water to the reservation. Some large-scale tribal water projects have been scaled down due to endangered species concerns.[404] For instance, the Animas La-Plata project in southern Colorado was designed to deliver water to the Ute Mountain Ute Tribe, the Southern Ute Tribe, and the Navajo Nation in the Four Corners area. The designation of critical habitat for four native endangered fish species in streams that were slated to be impacted by project development[405] delayed completion of the

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[400] *See U.S. Fish and Wildlife Service, Public Advisory: Information to Consider When Submitting a Petition under the Endangered Species Act* (2010), *available at*: http://www.fws.gov/endangered/esa-library/pdf/petition_guidance_for_internet_final_for_posting_12-7-10.pdf. Regulations explain that:

> A species is added to the list when it is determined to be endangered or threatened because of any of the following factors:
>
> - the present or threatened destruction, modification, or curtailment of its habitat or range;
> - overutilization for commercial, recreational, scientific, or educational purposes;
> - disease or predation;
> - the inadequacy of existing regulatory mechanisms;
> - other natural or manmade factors affecting its survival.

See U.S. Fish and Wildlife Service, *Listing a Species as Threatened or Endangered* (June 2011), *available at* http://www.fws.gov/endangered/esa-library/pdf/listing.pdf.

[401] *See, e.g.*, Jami K. Elison, *Tribal Sovereignty and the Endangered Species Act*, 6 WILLAMETTE J. INT'L L. & DISP. RESOL. 131 (1998) (discussing the potentially destructive results of the ESA in Indian Country).

[402] *See* Sandi B. Zellmer, *Conserving Ecosystems Through the Secretarial Order on Tribal Rights*, 14 WTR NAT. RESOURCES & ENV'T 162 (2000) (discussing cooperative management schemes between tribes and non-tribal governments under the ESA).

[403]*See* Sandi B. Zellmer, *Indian Lands As Critical Habitat for Indian Nations and Endangered Species: Tribal Survival and Sovereignty Come First*, 43 S.D. L. Rev. 381 (1998) (discussing dangers of applying the ESA on tribal lands).

[404] *Id*, at 426-33.

[405] 50 C.F.R. § 17.11.Determination of Critical Habitat for the Colorado River Endangered Fishes: Razorback Sucker, Colorado Squawfish, Humpback Chub, and Bonytail Chub, 59 Fed. Reg. 13, 374 (1994). The species were listed as follows: Determination that the Bonytail Chub (Gila elegans) is an Endangered Species, Bonytail

project.[406] Eventually, the Ute Mountain Ute Tribe settled with the federal government for a smaller reservoir and depletion right than originally agreed upon.[407]

Strategy Three: Protecting Non-Consumptive Uses with Conservation Easements

A conservation easement is a voluntary agreement between a landowner and a private land trust or government agency that restricts, prohibits, or preserves certain development or management strategies, generally for the purpose of maintaining ecological values.[408] Generally, conservation easements are granted "in perpetuity" and take the form of an encumbrance on the deed to the land in question.[409] Conservation easements are essentially contracts that place restrictions on land uses, and therefore can be specifically designed to meet the needs of the landowner while also achieving conservation objectives, including the protection of riparian areas and water development restrictions.[410]

A tribe might consider either holding or granting a conservation easement. The entity that holds a conservation easement is legally positioned to enforce the terms of the conservation easement agreement against the landowner on whose property the easement applies.[411] The entity that grants the easement owns the land on which the easement applies, and is eligible for federal, and sometimes state, tax incentives, as long as the

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Chub 45 Fed. Reg. 227710, 27713 (1980); Endangered Species List- 1967, Colorado Squawfish 32 Fed. Reg. 4001 (1967); Endangered Species List- 1967, Humpback Chub 32 Fed. Reg. 4001 (1967); The Razorback Sucker, Xyrauchen texanus, Determined to Be an Endangered Species, Razorback Sucker 56 Fed. Reg, 54957, 54967 (1991) (to be codified at 50 C.F.R. pt. 17).

[406] *See* Adrian N. Hansen, *The Endangered Species Act and Extinction of Reserved Indian Water Rights on the San Juan River*, 37 Ariz. L. Rev. 1305 (1995).

[407] *See* United States Department of the Interior: Bureau of Reclamation, *Animas-La Plata Project/Colorado Ute Indian Water Rights Settlement Final Supplemental Environmental Impact Statement* (2000), *available at* http://www.usbr.gov/uc/envdocs/eis/animas/fseis/pdf/rod.pdf.

[408] 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 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.

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

[409] BETH ROSE MIDDLETON, TRUST IN THE LAND: NEW DIRECTIONS IN TRIBAL CONSERVATION 12 (2011) (Conservation easements that are for fixed terms are possible, but are not eligible for federal tax incentives).

[410] *See* CONSERVATION EASEMENTS: CONSERVING LAND, WATER AND A WAY OF LIFE, THE NATURE CONSERVANCY (2003).

[411] *See* JEFF JONES, ET AL., COMMON QUESTIONS ABOUT CONSERVATION EASEMENTS 4 (2009), *available at* http://www.landtrustalliance.org/conservation/documents/Bulletin%2001-09%20rd-8.pdf.

easement is held by a charitable organization or government entity,[412] which includes tribes.[413]

A tribe that develops a land trust organization could hold easements and allow the grantor to obtain tax incentives.[414] On the other hand, if a tribe is acting as a conservation easement grantor, the tribe is generally seeking to place the easement on land that the tribe owns in fee simple, which is subject to state taxation, unlike land held in trust for a tribe.[415] Land held in trust by the federal government is already tax-exempt, subject to tribal management, and requires the approval of the Secretary of Interior before any interest is transferred to a non-tribal entity or individual.[416] Conservation easements, by restricting development, often reduce the value of the land and consequently reduce the owner's tax burden.[417] Furthermore, some state programs exist that allow a conservation easement grantor to sell the tax credits it earns,[418] which might be a more attractive incentive to a tribe that already has little or no tax burden. Federal tax laws, however, do not allow for tax credit transfers.

When a conservation easement is designed specifically for non-consumptive water uses, state law can sometimes prove to be a barrier. In the West, the requirement that water be

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[412] The rules governing the eligibility of conservation easements for federal tax deductions are contained in 26 U.S.C. § 170. The Land Trust Alliance has a thorough discussion of the various other federal tax laws that apply to conservation easements on its website: *Conservation Donation Rules*, The Land Trust Alliance, http://www.landtrustalliance.org/policy/tax-matters/rules/conservation-donation-rules (last visited Mar. 4, 2014). The Land Trust Alliance also has a list of tax incentives for conservation easements available state-by-state on its website: *State and Local Tax Incentives*, The Land Trust Alliance, http://www.landtrustalliance.org/policy/tax-matters/campaigns/state-tax-incentives (last visited Mar. 4, 2014). The Internal Revenue Service has a guide to conservation easements on its website as well, although it is only current through 2012, and the laws changed regarding conservation easements at the end of 2013: *Conservation Easement Audit Techniques Guide*, Internal Revenue Service, http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Conservation-Easement-Audit-Techniques-Guide#_Toc303 (last visited Mar. 4, 2014).

[413] 26 U.S.C. § 7871 (2009) (Tribes are treated as states under the IRS code for the purposes of charitable giving).

[414] For a guide to creating a Native American land trust organization, *see* Kurt W. Russo, *The Art and Science of Creating a 501(c)(3) Native American Land Conservancy*, *in* TRUST IN THE LAND: NEW DIRECTIONS IN TRIBAL CONSERVATION 87-97 (2011).

[415] 25 U.S.C. § 177 (1834). Therefore, a conservation easement on trust land would not necessarily benefit a tribe in any material way. *See* MIDDLETON, *supra* note 409, at 25. *See also* Chapter 6 for a discussion of designing a tribal code to protect water resources.

[416] 25 U.S.C. § 177. Therefore, a conservation easement on trust land would not necessarily benefit a tribe in any material way. *See* MIDDLETON, *supra* note 409, at 25. *See also* Chapter 6 for a discussion of designing a tribal code to protect water resources.

[417] MIDDLETON, *supra* note 409, at 14.

[418] *See State and Local Tax Incentives*, The Land Trust Alliance, http://www.landtrustalliance.org/policy/tax-matters/campaigns/state-tax-incentives (last visited Mar. 4, 2014).

put to "beneficial use" can mean that water rights tied to the land and then preserved in conservation easements for ecological purposes could be labeled "abandoned."[419] A tribe considering applying water rights to a conservation easement on fee simple land should consult state water laws and apply for an instream water right, if available.[420] On the other hand, a conservation easement could protect water and riparian habitat within the borders of the conservation easement property simply by protecting the land from development.

Examples of tribal uses of conservation easements

The Confederated Salish and Kootenai Tribes of the Flathead Reservation jointly purchased the first of two conservation easement properties with the Swan Ecosystem Center in 2006.[421] The purchase was facilitated by the Trust for Public Land, with funding from Bonneville Power Administration.[422]The property lies on Elk Creek, an important spawning stream for native bull trout.[423] The Tribes, Swan Ecosystem Center, and Montana Fish, Wildlife and Parks jointly manage the land, and the Bonneville Power Administration holds the conservation easement.[424] The Tribes purchased a second conservation easement in 2011.[425] The property encompasses 146.8 acres of riparian area along the Flathead River.[426] Once again, the purchase was funded by the Bonneville Power Administration, and the Tribes worked closely with the Montana Department of Fish and Game to design an easement that would help preserve the native fishery.[427]

Are conservation easements a good strategy for your tribe?

The ways in which tribes may use conservation easements to create additional protections for non-consumptive uses remains largely an unexplored frontier. CSKT Water Quality Program Manager Paula Webster explains that conservation easements are a useful tool, but not the CSKT's preferred strategy.[428] "Conservation easements are expensive – we'd prefer to buy the land outright. That's part of our strategy with going green – buying back our lands so we can administer the resources on them."[429] Nonetheless, Paula notes that

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[419] *See, e.g.*, Jones et al., *supra* note 411 at 6 (discussing water rights issues).

[420] See discussion in Chapter 4 about state instream flow laws.

[421] *Elk Creek Conservation Area*, SWAN ECOSYSTEM CENTER, http://www.swanecosystemcenter.org/Elk_Creek_Conservation.html (last visited Feb. 18, 2014).

[422] *Id.*

[423] The Trust for Public Land, *Press Release: 1,706 Acres Protected in Swan Valley (MT)*, Sept. 26, 2006.

[424] *Id.*

[425] *Success Stories: Conrad Drive Fisheries Conservation Area*, RIVER TO LAKE INITIATIVE, http://www.flatheadrivertolake.org/index.php/success-stories/#Conrad%20Drive (last visited Feb. 18, 2014).

[426] *Id.*

[427] *Id.*

[428] In-person interview with Paula Webster, CSKT Water Quality Program Manager, Flathead Reservation (Apr. 22, 2014).

[429] *Id*.

easements can be the best option when private property owners are not willing to sell their lands outright. When the Tribes are not able to purchase the land outright, CSKT has used these easements as an alternative means of protecting important resources.[430]

As is true anytime a tribe chooses to involve outside entities in achieving tribal objectives, the tribe must carefully consider whether the outside entity is the appropriate partner. When a tribe is acting as a holder or grantor, as when engaging in a contractual relationship with other organizations, the tribe's sovereign immunity is at issue.[431] In order to develop contractual relationships with non-tribal entities, the outside entity often insists that the tribe waive its sovereign immunity for the limited purposes of the contractual relationship.[432] Although sovereign immunity waivers should not be seen as complete bars to creating productive partnerships with outside entities, such waivers should always be limited if possible.[433]

Two good resources for tribes considering implementing conservation easements or similar conservation strategies are: Elizabeth Byers and Karin Marchetti Ponte, *The Conservation Easement Handbook* (2005); and Beth Rose Middleton, *Trust in the Land: New Directions in Tribal Conservation* (2011).

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[430] *Id*.

[431] Tribes, like other governments, cannot be sued for contractual violations without their consent. "As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998).

[432] *See* MIDDLETON, *supra* note 409, at 24. *See also* the discussion in Chapter 3 about accessing tribal lands for monitoring purposes.

[433] For a thorough discussion of considerations regarding tribal sovereign immunity and waivers, *see* Patrice H. Kunesh, *Tribal Self-Determination in the Age of Scarcity*, 54 S.D. L. REV. 398 (2009).

Chapter 8: Irrigating for Instream Flows and Traditional Plants

As demonstrated throughout the previous chapters, many attempts to protect non-consumptive uses of tribal waters have been challenged in the courts. Internally, tribal decision-makers may determine that the risks associated with the strategies discussed above render them inopportune. If the tribe determines that enacting an instream flow, negotiating a settlement agreement, or leveraging federal laws is not in the tribe's best interest, it may consider another unorthodox solution: irrigating for non-consumptive purposes.

In this chapter we discuss two strategies that involve irrigating but may nonetheless achieve the tribe's non-consumptive goals. The first strategy is the most involved: developing an irrigation project downstream of a targeted stream stretch. The second strategy works within the established Indian federal reserved rights framework and relies on existing geographic features: irrigating traditional plants on the reservation. Both of these strategies, to our knowledge, are untested on the ground.

Part One: Flows Incidental to Irrigation Projects

Irrigated agriculture has a reputation of being inimical to instream flows. But the development of an irrigation project can be designed to create additional flows in an upstream stretch of river that the tribe is interested in restoring. This section provides a brief overview of how developing a tribal irrigation project could incidentally create additional flows in a targeted stream stretch.

Below we take a cursory look at initial considerations for whether an irrigation project may be feasible on the reservation. We describe the Wind River Tribes' Riverton East Proposal, which would result in flows in the Little Wind River[434] as an example of how such a project may be designed.

Developing an irrigation project for streamflows

When irrigating for instream flows, the tribe simply applies senior water rights to an irrigation use at a point downstream of the targeted stretch of river. Junior appropriators are legally required to leave enough water in the river to fulfill the exercise of downstream senior rights. Thus, even on over-allocated stream systems, the existence and application of downstream senior rights can preserve flows delivering water to the point of application.

If the tribe is considering this approach, the irrigation project should be viable on its own. Resource managers well understand the magnitude of constructing a new irrigation project

[434] Recall that the *Big Horn III* decision essentially foreclosed the option of exercising an instream flow right for the Tribes, as discussed in Chapter 3.

– it is not a challenge to be undertaken lightly. The tribe should consider several crucial questions, including:

- Is there land suitable for an irrigation project downstream of the stretch of interest?
- Is there community support to develop such a project?
- Would such a development bring additional benefits to the tribe, such as jobs or tribal revenue?
- Does the tribe have funds to independently develop the project? Are there viable potential partners?
- Does the proposal stand up under a feasibility assessment?

These questions should be considered early in the project team's discussions. An example of a feasibility assessment is discussed below, using a proposal from the Wind River Reservation in Wyoming.

How would such a proposal work?

Using an irrigation project to create additional flows in a particular stretch of stream requires particular characteristics of the tribal water right and geography of the reservation. First, the tribe needs a right to surface water that can be applied below the stream segment of interest. This right will need to be senior to, or have an earlier priority date than, competing upstream uses. The reservation geography and conditions will also need to be conducive to agricultural development. Is there suitable land for farming downstream? Can the potential farmland be feasibly developed for irrigation? Some tribes in the Colorado River Basin have reservation lands thousands of feet in elevation above their potential water source where irrigation may not be feasible (e.g., on the rim of the Grand Canyon). Others tribes have reservations where agricultural irrigation could more feasibly be developed.

The irrigation for instream flows approach has several benefits. First, because treaties and even court decrees often explicitly mention Indian agriculture or irrigation, the tribe will likely avoid legal challenges concerning the permissible *use* of Indian federal reserved rights. Thus, the tribe may be able to avoid the cost of litigation while developing a viable agricultural project. Furthermore, many tribes in the Colorado River Basin have benefited from the jobs and revenue provided by viable agricultural projects.[435] However, developing a project like this requires a substantial investment; the project should be viable on its own terms before the tribe commits substantial resources to project development.

[435] For instance, the Ak-Chin Indian Community runs one of the largest farms in the United States. The farm is presently doing "better than ever" and is now producing crops on approximately 15,000 acres. The Tribe grows alfalfa for dairies, barley, milo maize, potatoes, corn for silage, and various other crops. Farming activities have provided the Community with jobs and revenue to support community services. In-person interview with Leona Kakar, Ak-Chin Indian Reservation (Nov. 15, 2012).

The Riverton East Proposal

For some time, the Wind River Tribes in Wyoming have been considering creating additional flows in the Little Wind River through the development of a downstream agricultural project. As discussed above in Chapters 3 and 4, the Wind River Tribes were prevented from enforcing an instream flow on the Wind River Reservation in *Big Horn III*. In the aftermath of this unfavorable opinion, the Tribes remained committed to restoring the Little Wind River fisheries. During an interview in 2012 with Terry Baptiste, the Deputy Water Engineer for the Wind River Reservation, Baptiste explained that the Tribes had been developing creative proposals that could achieve their ultimate objective of restoring the Little Wind River.[436] One of these potential options, the Riverton East Irrigation Project, would involve developing an irrigation project downstream of a target segment of the Little Wind River.

The proposed Riverton East Irrigation Project would be a 3,814 acre irrigation project located on the east side of the Wind River near the confluence of the Little Wind River and the Wind River. It would be supplied by 17,544 acre feet of water annually and would have a priority date of 1868.[437] The detailed feasibility assessment on the project involved reaching out to a number of agri-businesses, and confirmed the regional need for additional agricultural production of alfalfa cubes, malt barley, sugar beets, and alfalfa hay. The feasibility study also involved a detailed soil analysis as well as environmental, cultural, and geologic evaluations that supported moving forward with the project.

Despite these promising findings, if the Wind River Tribes decide to move forward with the project, there could be considerable tradeoffs. Paradoxically, the feasibility study noted that there were "concerns [ ] related to reducing river flows and resulting impacts on the fishery, primarily sauger and burbot."[438] While the project has the potential to enhance flows upstream on the river, it could negatively affect water quality and quantity downstream of the diversions. Moving forward with the project would also involve a substantial commitment of tribal resources. The cost of project development was estimated at 10 million dollars with additional annual operating costs of $144,800 per acre.[439]

Feasibility studies, like the Riverton East Irrigation Project, are crucial for a tribe to determine the economic feasibility of projects as well as to determine potential positive and negative impacts on tribal resources.

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[436] Interview with Terry Baptiste, Deputy Water Engineer for the Wind River Reservation (Sept. 11, 2012) (notes on file with author).

[437] Riverton East Irrigation Project: Level II Feasibility Study. Wyoming Water Development Commission. Nelson Engineering. Jackson, Wyoming. November, 2001. Accessed at http://library.wrds.uwyo.edu/wwdcrept/Riverton/Riverton_East-Irrigation_Project_Level_II_Feasibility_Study-Executive_Summary-2001.pdf on 5/9/2014.

[438] *Id.*

[439] *Id.* at Executive Summary D.

Part Two: Irrigating Traditional Plants

Certain uses of Indian federal reserved rights are sometimes challenged as contrary to the purpose of the reservation, and thus unprotected by federal reserved rights law (see discussion of permissible uses in Chapter 3). However, the application of Indian federal reserved rights for agricultural purposes has rarely been challenged. Many native peoples traditionally harvested plants for subsistence, medicinal or cultural use from wetland and riparian areas. Although the desire to maintain these practices may remain strong in many native communities, these plants cannot survive without adequate water resources. Establishing irrigation practices for traditional or medicinal native plants may provide a means to maintain the conditions necessary for these plants' survival.

Irrigating wetlands may be particularly attractive for tribes that have language in their decrees or settlements that restricts their water use to on-reservation agriculture. However, this method, like every other method discussed in this guide, has its pros and cons. The geography of the reservation is an important factor in the feasibility of this strategy. A small diversion to a wetland or riparian area may be easily accomplished. If historic wetlands no longer exist, it may be more difficult to enhance native plant communities.

Chapter 9: Summary and Key Points

In each of the preceding chapters, we address a different strategy to protect non-consumptive uses of Indian federal reserved rights on the reservation.[440] These strategies approach the protection of non-consumptive uses from different angles; some involve actions that can be taken by the tribe as an independent actor, others require involvement of the courts, states or Congress. We have tried to incorporate the advice offered by tribal officials whenever possible. This chapter offers general advice applicable to all strategies addressed above and provides a brief summary of the key points garnered from prior chapters.

In *Tribal Jurisdiction Over Water Quality and Quantity*, attorneys Jane Marx, Jana Walker, and Susan Williams provide a list of "factors that weigh heavily in favor of success" when tribes are pursuing non-consumptive use protections. Efforts that can be generally helpful include[441]:

- Developing tribal water agencies, whose missions and relationships to the tribal and legislative and judicial branches is well understood, to solve high priority water quantity and quality problems;
- Assuring that the position taken by the tribal government reflects the voice of the reservation;
- Promoting consistency in leadership, staff, consultants, and attorneys;
- Using qualified outside staff, consultants and professionals where necessary, but also developing tribal expertise;
- Complying with all federal laws and procedures;
- Communicating with state and federal agencies to develop those standards; and,
- Looking beyond what is available in federal and state grants and consider the long-term commitment of tribal funds to sustain these efforts.

Keeping this broad advice in mind, below we have summarized each chapter to emphasize key points.

In Chapter One, we introduce the strategies addressed in *Restoring Sacred Waters* and provide an overview of the materials herein.

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[440] A variety of potential strategies remain unaddressed, including, but not limited to, efforts such as riparian and stream restoration efforts or the protection of certain water features as sacred sites.

[441] Jane Marx, Jana L. Walker, and Susan M. Williams, *Tribal Jurisdiction Over Water Quality and Quantity*. 43. S.D. L. Rev. 315 (1998).

Chapter One Key Points: Introduction

- Tribal communities have a unique connection to water resources.
- Many tribes traditionally used water for a range of non-consumptive purposes, including traditional, ceremonial, and fishing practices. Some tribes in the Colorado River Basin are seeking to apply their Indian federal reserve rights to non-consumptive uses.
- Tribes have encountered challenges when seeking to apply their federal reserved rights to non-consumptive uses in modern times; we can learn from their trials and experiences.
- The purpose of this guide is to provide an overview of strategies, case studies, and potential legal and political issues that may arise when pursuing non-consumptive use protections; the project team, tribal council and their legal and technical experts will decide which strategies, if any, are best for the tribe.
- This guide is not intended to provide legal advice. Project teams should consult tribal counsel for legal advice when considering the strategies herein.

In Chapter Two we discussed the importance of establishing a project team when first considering non-consumptive use protections. The project team will gauge community support and political consensus for the proposed project. Chapter Two also covers foundational matters relating to the collection of scientific data and relevant legal and policy information. We provide an overview of two methods of determining instream flow needs for the purpose of demonstrating how certain information will be utilized later in the process.

Chapter Two Key Points: Gathering Information and Starting the Process

- Hydrologic data, ecological conditions, and a comprehensive water budget help provide the project team with a more complete picture when contemplating non-consumptive use protections.
- It is important to select a well-rounded project team composed of members with scientific, legal and political expertise.
- The project team should meet with the tribal community and tribal council to identify major goals and assess community consensus.
- The project team may need to conduct additional research to address gaps in information; this may involve hiring outside consultants.
- Funding is a crucial consideration when selecting non-consumptive use strategies.

In Chapter Three we provided an overview of the legal foundations of Indian federal reserved rights and introduce issues that may implicate non-consumptive tribal water uses.

Chapter Three Key Points: Indian Federal Reserved Rights Law

- Indian federal reserved rights are based on rights reserved by tribes in treaties and are very different from state water rights; many aspects of the ways in which tribes may use these rights have not yet been defined.
- There is limited precedent addressing non-consumptive uses of federal reserved rights generally; there is even less precedent addressing the use of *Indian* federal reserved rights for non-consumptive uses.
- Treaty language and the purpose of the reservation play an important role in determining the scope of Indian federal reserved rights.
- Tribes have authority to regulate Indian federal reserved rights on the reservation, but they may or may not have authority to regulate state water rights users on fee land.
- Non-consumptive uses are likely acceptable under the Indian federal reserved rights doctrine.
- The state may not regulate Indian federal reserved rights in a manner that impedes those rights (although Wyoming Tribes may be subject to the restrictions articulated in *Big Horn III*).
- This chapter involves an academic look at legal issues surrounding Indian federal reserved rights; for legal advice tribes should consult with tribal attorneys.

In Chapter Four we took a closer look at using Indian federal reserved rights for instream flows.

Chapter Four: Using Indian Federal Reserved Rights for Instream Flows

- One of the most common protections tribes are seeking for non-consumptive issues is instream flow rights.
- Tribes are not subject to state instream flow laws unless seeking to appropriate state water rights for instream flows (with the exception of the limitations put on Wyoming tribes by the *Big Horn III* decision).
- Instream flow methodologies may require collecting a range of hydrologic, biologic, and legal data.
- Incorporating instream flow provisions into tribal codes is an essential step in enforcing on-reservation instream flows.
- It is most likely acceptable to use Indian federal reserved rights for non-consumptive purposes under the *Winters* doctrine (unless those rights have been restricted in settlement language or in a court decree).
- Tribe may fully exercise their reserved water rights even if doing so causes harm to state water users with junior priority dates.

One of the surest ways of protecting non-consumptive uses is through terms negotiated in settlement agreements. Negotiating non-consumptive use protections for settlement agreements is described in Chapter Five. Settlement agreements ratified by Congress

provide a unique opportunity to avoid legal hurdles while arriving at acceptable agreements with state and federal governments.

Chapter Five: Negotiating for Non-consumptive Uses in Settlement Agreements

- Settlement agreements offer an opportunity to define, protect and determine the administration of non-consumptive uses.
- Tribes may need to compromise to reach a settlement agreement.
- Getting Congress to approve settlement legislation may require including diverse stakeholders in negotiations and hiring a lobbyist.
- Settlements are a great way to avoid the legal uncertainties of general stream adjudications.

Passing a tribal code protecting the tribe's sovereign objectives is an exercise of tribal authority that is crucial to reinforcing its authority to manage natural resources on the reservation. In Chapter Six we discuss the pros and cons of enacting a tribal code and provide examples of the ways in which tribes have incorporated such provisions into their codes.

Chapter Six: Protecting Non-Consumptive Uses in Tribal Water Codes

- Tribes can develop tribal water codes to regulate water resources on the reservation.
- Although development and enforcement of a water code requires a substantial commitment of tribal resources, there can be major benefits to exercising this authority .
- Tribal codes can enforce instream flows on the reservation.
- One barrier to enacting a tribal water code is the secretarial moratorium on water code approvals; however, this barrier can be bypassed through an amendment to the tribal constitution (which also must be approved by the Secretary of the Interior).

Chapter Seven explains how the Clean Water Act (CWA), Endangered Species Act (ESA), and conservation easements can be effective methods of protecting non-consumptive values while avoiding federal reserved rights issues. Although these laws are not designed to provide additional flows in reservation streams, they may incidentally do so. However, evoking the protections of the CWA and ESA may inadvertently restrict other tribal development goals; thus, these methods should be used carefully.

Chapter Seven: Other Legal Tools

- Tribes may be able to evoke protections under the Clean Water Act (CWA) and Endangered Species Act (ESA) that incidentally create additional flows in reservation streams.

- Tribes with TAS status under the CWA can create standards more stringent than state standards, including thermal standards.
- The ESA is designed to protect vulnerable species and may prove restrictive for the long-term management of streams.
- Conservation easements can be used to protect riparian areas and could potentially create additional streamflows. However, tribes may prefer to purchase lands outright.

In Chapter Eight we introduced a bit of a wildcard: irrigating to preserve non-consumptive use values. Although generally untested, this strategy may be worth exploring, particularly if the tribe has encountered difficulties with other strategies discussed above.

Chapter Eight: Irrigating for Instream Flows and Traditional Plants

- Strategic development of irrigated agriculture could effectively create additional flows upstream of the irrigation project.
- Irrigation projects are expensive to develop and should be feasible standing alone.
- One potential side effect of these projects could be adverse stream implications downstream.
- Irrigating traditional plants may provide an opportunity to support wetland ecosystems while avoiding certain legal issues.

We hope that this guide has been informative and has provided you with a few ideas for protecting non-consumptive uses on the reservation. We would once again like to thank all of those who have contributed their invaluable insight into these issues and shared their experiences on the ground. The discussion above is not comprehensive; there are a range of other options outside of the scope of this guide that may nonetheless provide additional opportunities for tribes.[442] Ultimately, it will be through the exercise of self-determination and harnessing the input of the tribal council, professionals, and community members that the tribe will be able to best determine how to fulfill their non-consumptive water use goals.

[442] For instance, on-the-ground restoration activities are an obvious practical approach with numerous benefits. The purchase of additional lands with accompanying water rights, and other creative options can also result in desired outcomes. Other potential protections for tribal waters could arise if they are protected as sacred sites. Project teams will want to explore as of these options as the begin assessing possible protections.