NATIVE AMERICAN *WINTERS* DOCTRINE AND STEVENS TREATY WATER RIGHTS: RECOGNITION, QUANTIFICATION, MANAGEMENT

RACHAEL PASCHAL OSBORN
*Executive Director, Center for Environmental Law & Policy, Washington State; Gonzaga Law School, Spokane, U.S.A.**

I THE IMPORTANCE OF WATER TO NATIVE AMERICAN TRIBES

'In the Circle of Life, Water is the Giver of Life.'[1]

In the Pacific Northwest region of the United States of America, water is a deeply respected component of the ecosystem for the Indigenous people who have occupied these lands for millennia. In this arid region, water is also an invaluable resource for the descendants of the Euro-American settlers who arrived in the 1800s and who now dominate in terms of population and resource use. Not surprisingly, substantial differences mark the values placed on water by Native American Tribes and non-Indian settlers and their descendants. These differences are well-illustrated in the context of legal claims to water rights and water resource management norms and processes.

In the western United States, water is critical to the lifeways of Native American Tribes, particularly because water in situ is a physical precept to the health and abundance of salmon fisheries.[2] Tribal reliance on salmon cannot be overstated, and is reflected in philosophical and economic relationships between the Indigenous Salish inhabitants of the Pacific Northwest and the natural ecosystems that sustain them.[3]

The natural history of salmon illuminates the significance of water and the basis for tribal claims, and judicial and political recognition of tribal rights, to water in the United States. Salmon are anadromous; they hatch and rear in fresh water streams, out-migrate to the Pacific Ocean for one to four years, and finally return to their natal streams to spawn a new generation and die. Historically, many millions of salmon, comprising hundreds of species and sub-species, returned to Pacific Northwestern rivers each year. The migration was (and is) impressive not only in terms of sheer numbers, but also the extraordinary distances – up to 900 miles in the Columbia River drainage – that certain sub-species travel to return to their streams of origin.[4]

Because of their broad geographic range, ecological perturbations affect salmon at many levels. Water is, of course, a universal need. Clean, cool, flowing waters are essential to virtually every aspect of the salmon life history. Conversely, the degradation of rivers brought about through post-contact human activities has caused major adverse impacts on salmon abundance and, consequently, on the health and well-being of salmon-dependent Tribes.

Native American Tribes claim, and have been awarded, water rights based on two legal theories, both arising out of treaties with the United States Government. First, Tribes hold rights arising from their cession of millions of acres of aboriginal territories – virtually the entire estate of the Pacific Northwestern region – and agreements to settle on homeland reservations, which serve as the loci of various, evolving economic pursuits.[5] Second, and unique to the Pacific Northwest Tribes, the tribal-U.S. treaties reserved Indigenous rights to continue to take fish at historic fishing sites, including locations outside of the tribal reserves. This fishing right includes a right to habitat sufficient to support fish. Habitat for fish is water; hence recognition of the so-called 'Stevens Treaty water rights', intimately associated with tribal treaty fishing rights for salmon and other aquatic species.[6]

The definition and quantification of water rights for specific Tribes is nearly always a product of legal proceedings, some of which have been the largest and longest-running lawsuits in the United States. The water courts that hear such cases and the claims of opponents – typically non-Indian water users – often manifest hostility to tribal claims. Yet substantial tribal water rights have been recognized in court proceedings or negotiated through litigation-driven settlements.

Once rights are awarded, water must be managed for protection and proper allocation. Historic assimilation policies of the U.S. Government, dating from the late 1800s, allotted already-diminished tribal reserves to non-Indians. The patchwork ownership of reservation lands has created modern-day jurisdictional quagmires for all types of regulatory systems, including water resources management. This article concludes with two examples of successful and creative exercise of tribal sovereign powers of self-government to bridge the gap and effectively manage tribal water resources.

* info@celp.org.

1 Chiish Tamanwit (Water Law), Chapter 60.01, Section 60.01.01 (Findings), Revised Code of the Yakama Nation (2005).

2 Joseph C. Dupris, Kathleen Hill, & William H. Rodgers, Jr., The Si'lailo Way: Indians, Salmon and Law on the Columbia River (Carolina Academic Press 2006).

3 Eugene S. Hunn, Nch'i-Wána, 'The Big River': Mid-Columbia Indians and Their Land (Univ. of Washington Press 1990).

4 James A. Lichatowich, Salmon Without Rivers (Island Press 2001).

5 *See below* Section II.1.

6 *See below* Section II.2.

II LEGAL FOUNDATIONS

II.1 *Winters* doctrine water rights

II.1.1 Concept of federal implied reserved water rights

Indigenous water rights in the United States trace back to a 1908 decision of the United States Supreme Court, *Winters v. United States*.[7] The locus of the *Winters* controversy, northeastern Montana, is a semi-arid, sparsely populated landscape dominated by vast tracts of grassland. Before Euro-American contact, the area was inhabited by multiple Indigenous Tribes and bands who relied on the buffalo as a major economic and food resource. Through a series of engagements and agreements with the United States, two such Tribes, the Assiniboine (known also as the Nakoda) and the Gros Ventre, settled on lands near the Fort Belknap Indian Agency. The 1888 Fort Belknap Treaty established a 640,000 acre reservation for the two Tribes, bounded by the Milk River on the north.[8]

The *Winters* case arose out of conflict between non-Indian settlers and the Tribes over diversions from the Milk River, a source insufficient to meet all water demands. It was impossible to pursue agricultural activities in this region of Montana without active irrigation, but the 1888 Treaty – which expressed clear intent that the Tribes would take up agricultural pursuits – made no mention of water rights nor did it even make reference to the word 'water'. In deciding the *Winters* case, the Supreme Court held that the 1888 Treaty reserved water rights to the Tribes by implication. The Court found it inconceivable that the two Tribes would have ceded millions of acres of lands to take up agriculture as the primary means of sustenance, without also intending to reserve sufficient water to survive in such an extreme arid environment. The Court therefore found it appropriate and necessary to infer a tribal water right from the language of the Fort Belknap Treaty.

Key to the *Winters* decision were three canons or rules of construction that U.S. courts utilize to interpret treaties between the U.S. and Native American Tribes. First, the Tribes owned all land and resources prior to treaty-making and were in 'command of the lands and the waters – command of all their beneficial use'.[9] The United States Government recognized tribal title and engaged in treaty making in order to obtain ownership of those lands.[10] Because the Tribes owned all resources pre-contract, any rights not explicitly granted to the United States by the treaties were presumed retained by the Tribes.

Second, treaties are construed as the Tribes would have understood them at the time of treaty making. '[T]he treaty must … be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.'[11] And third, because the treaties were written in English, a non-native language to the Tribes, ambiguities are resolved 'from the standpoint of the Indians'.[12]

The significance of the *Winters* decision is profound. Little attention was paid at the time the Court ruled and for several decades thereafter, as the United States actively sought to open tribal lands to settlement and develop water resources for the benefit of non-Indians. But, in a 1963 decision involving allocation of the Colorado River between the states of Arizona and California, the Court relied on the *Winters* precedent to find that the Colorado River Indian Tribes possessed substantial water rights for their desert reserves.[13] The Court further held that such rights were to be quantified under an objective standard, termed 'practicably irrigable acreage' or PIA, which evaluated the economic and technical feasibility of converting arid lands to irrigated agriculture. The *Arizona v. California* court also clarified that the reserved water rights held by the Tribes enjoyed a 'priority date' based on the date the tribal reserve was established, often pre-dating existing state-law based water rights. Further, these rights could not be lost for non-use.[14]

These interpretive rules created an inherent conflict between the treaty-based implied water rights held by Indian Tribes and state-based water permits held by non-Indians that are ordered according to date of first use and beneficial (actual) use standards. The inchoate, unquantified water rights of Indian Tribes, which are often senior to state-based rights, threaten non-Indian water usage that has developed over the past century. Non-Indians are therefore often motivated to oppose tribal rights in legal and political proceedings.

II.1.2 Duality: Winters *water rights and western water law*

Virtually all *Winters* doctrine cases have emerged from the western continental United States. The western U.S. region encompasses 17 states and approximately 230 federally recognized Indian Tribes.[15] In the federalist system of government, states have primacy with respect to control of water resources within their boundaries. States promulgate water codes, maintain water resource administrative agencies, and issue and regulate permits for use. The exceptions to comprehensive state control are *Winters* and Stevens Treaty water rights, creatures of federal common law. Under federal Indian jurisprudence, tribal water rights are held 'in trust' for Tribes by the U.S. Government.[16]

7 *Winters v. United States*, 207 U.S. 564 (1908).

8 JOHN SHURTS, INDIAN RESERVED WATER RIGHTS: THE *WINTERS* DOCTRINE IN ITS SOCIAL AND LEGAL CONTEXT, *1880s–1930s*, (Univ. of Okla. Press, 2000).

9 *Winters* (n 7) at 576.

10 The U.S. policy to enter into treaties with the Indigenous peoples of North America does not reflect the entire history. Violence, war, coercion, and fraud are among the problems that plagued relationships between Tribes and the U.S. The U.S. Government became 'trustee' of tribal property and interests after treaties were established, creating a 'double edged sword' of duties and power. *See* Ralph W. Johnson, *Fragile Gains: Two Centuries of Canadian and United States Policy Toward Indians*, 66 WASH L. REV. 643 (1991). Nonetheless, the United States' original recognition of tribal ownership of lands and resources, including water, has led to important legal interpretations that are critical to understanding tribal water rights today.

11 *Jones v. Meehan*, 175 U.S. 1, 11 (1899).

12 *Winters* (n 7) at 576–77.

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

14 *Id.* at 599–601.

15 U.S. Dept. of the Interior, Federally Recognized Indian Tribes, 73 Fed. Reg. No. 66 (pp. 18553–57) (April 4, 2008).

16 NELL JESSUP NEWTON, ET AL., COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, § 1905 (Lexis Law Pub. 2005). Not discussed in this article, *Winters* doctrine implied water rights also extend to all types of federal reservations (e.g., military bases, national parks). *Arizona v. California* (n 13) at 597.

In the western United States, the 100th Meridian serves as the informal boundary between the well-watered east and the arid west, where precipitation averages between 5 and 15 inches per year. Scarcity has animated epic conflicts, tribal and non-tribal, over water allocation. The western United States are dominated by mountain ranges, including the Rockies, Great Basin, Sierra Nevada and Cascades, that capture precipitation on their western slopes, store it as winter snowpack, and release it to the many rivers that flow throughout the region. A typical hydrograph for a western U.S. river depicts substantial snowmelt-driven runoff during spring months (March through June), followed by summer low flows (June through September). Irrigation is a necessity for most agricultural endeavors in this region, and summer season water demand competes with river flows needed to protect fisheries habitat, water quality, and other instream uses.

The western states allocate water to individual users pursuant to the doctrine of prior appropriation, as articulated through the principles of beneficial use and priority. A water right is created by actual and continuous use of water according to standards of reasonable efficiency. A water right that is not consistently utilized over time may be deemed forfeited or abandoned and returns to the state for reallocation. Water is allocated according to seniority, i.e., the first person to utilize water from a given source is entitled to their full measure of water as against all subsequent claimants. If the water source is insufficient to serve all claims, the most recent users will be curtailed.[17] This system is efficient, but inequitable, and has historically favored out-of-stream utilization of water resources.

Winters water rights are not governed by principles of prior appropriation. Rather, these rights contemplate that Tribes may use water over time as needed to fulfill the purposes of their tribal land reserves. Unlike prior appropriation rights, *Winters* rights are not based on actual use, but future needs. Further, *Winters* rights cannot be lost for non-use.

The chief point of intersection between *Winters* and prior appropriation water rights is the priority date. *Winters* rights date at least to the time of establishment of tribal reservations, which often predates the development of state-permitted water use in western watersheds. *Winters* rights for in situ water use, i.e., instream flows to support fisheries, date back even further, to 'time immemorial'. Indian Tribes may rely on this priority, at least in theory, to require non-tribal junior appropriators to curtail their water use in favor of tribal rights.

The treaties between Indian Tribes and the United States extinguished Indian title to vast tracts of lands that then became available for Euro-American homesteading and development. Access to and use of water was critical to successful agriculture and new settlers claimed and developed water rights at will, without regard to the proprietary rights of Tribes. In 1902, Congress established the U.S. Bureau of Reclamation, a federal agency that developed hundreds of water projects (dams, reservoirs, canals), again without regard to and often in derogation of tribal *Winters* water rights.[18] Water development was the foundation for settlement of the American West.

As a result of headlong development, many rivers and groundwater systems of the western U.S. are over-appropriated, i.e., claims to use exceed supply. The inevitable byproduct of the resulting scarcity has been conflict. As Indian Tribes have grown in population and economic might, they have sought to exercise their previously unused *Winters* rights. In basins where non-Indian water uses have fully or over-appropriated available supply, *Winters* rights represent a substantial threat to the status quo. Legal battles over the recognition, quantification, and management of *Winters* rights have dominated development of water law.

II.1.3 Adjudicating Winters *rights*

Winters rights, although recognized at law, are not self-executing. A forum is necessary where the scope of *Winters* water rights for individual Tribes may be evaluated and quantified. That forum is typically the courts, and numerous lawsuits over tribal water rights have ensued since 1963, when the *Arizona v. California* court expanded on the *Winters* doctrine, finding that water is 'essential to the life of the Indian people'.[19]

Under the U.S. federalist system of government, treaty-making and interpretation is a matter of federal law, and Indian Tribes normally bring treaty-based disputes before the federal courts.[20] However, a 1952 federal law, the McCarran Amendment,[21] was interpreted in the 1970s as waiving both U.S. and tribal sovereign immunity. Hence, states may join federal agencies and tribal governments as parties to stream adjudications, a special proceeding initiated in state courts that joins all water claimants within a watershed to determine the validity, priority, and quantity of water rights.[22] General stream adjudications are now the most common venue for quantification of all types of water rights, including *Winters* doctrine rights. In the early cases, federal court jurisdiction could be invoked to resolve *Winters* disputes, but the McCarran Amendment gave rise to a court-developed abstention doctrine for federal water right cases.[23]

General stream adjudications can involve thousands of claimants and are often filed in watersheds where water conflicts are already occurring, even without tribal exercise of the full measure of *Winters* rights. To ameliorate the placement of federal law-based water claims in state courts, such courts are admonished rigorously and properly to apply federal law to treaty-based claims to water. As explained below, this rule is not as effective as federal courts may have hoped.

17 Dan A. Tarlock, The Law of Water Rights and Resources, §§ 5:30, 5:66, 5:86 (Thomson Reuters 2010).

18 Reclamation Act of 1902, 43 U.S.C.A. 391 (2010); Donald Worster, Rivers of Empire: Water, Aridity and the Growth of the American West (Oxford Univ. Press 1992).

19 *Arizona v. California* (n 13) at 599.

20 U.S. Const. art. II, § 2, cl. 2.

21 43 U.S.C. § 666 (U.S.C.A. 2010).

22 *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983); *Colo. River Conservation Dist. v. United States*, 424 U.S. 800 (1976).

23 *Id*.

Winters water rights are based on the purposes of the reservation for which they are claimed. While Tribes frequently argue that reservations were intended as 'homelands' and thus the reservation purpose should be broadly construed, few courts have accepted such a general basis for the award of rights.[24] The point should be moot, because Tribes are empowered to transfer or change the purpose of use of their *Winters* rights.[25] However, state courts (most notably Wyoming, see Section II.1.4 below), have refused to acknowledge tribal decisions to apply diversionary rights to non-consumptive uses.

Quantification and distribution of tribal water rights are further complicated by the misguided federal policy that allowed non-Indian settlement within the boundaries of Indian reservations. Pursuant to the 1887 Dawes Act, Congress required that tribal lands be allotted to tribal members (typically 80 or 160 acres per person) and 'surplus' lands sold to non-Indians.[26] This disastrous policy was halted in 1934, but not before millions of acres of tribal lands were transferred into non-Indian ownership. The Indian Reorganization Act of 1934 reinstated the boundaries of tribal reservations, but did not restore to the Tribes the lands that had already been transferred into non-Indian ownership.[27] As a result, many tribal reservations are occupied by non-Indians, in some places creating significant conflicts over jurisdiction and control of resources. As discussed in Section II.2.3 below, non-Indian property owners on Indian reservations may claim a portion of the Tribe's *Winters* water rights.

Finally, it is noteworthy that the myriad uncertainties surrounding *Winters* rights, including water quantities, potential for adverse state court decisions, and scientific questions, have led to major programs for settlement of tribal water rights. As discussed in the next section, the state of Montana created a commission to negotiate tribal water claims that has met with substantial success. The recent Nez Perce water settlement, discussed in Section II.2.3, has brought significant resources to that Tribe's reservation. Although inherently involving compromise, settlement agreements have become a well-trodden road to resolution of *Winters* rights.

II.1.4 Winters *rights exemplified*

Hundreds of court decisions have applied the *Winters* doctrine to tribal water claims, and decades of litigation and settlements have led to mixed results. While comprehensive review is not possible here, three examples illustrate important principles and developments in *Winters* doctrine jurisprudence.

Wyoming's Big Horn adjudication

In north-central Wyoming, the 2.2 million acre Wind River Reservation, near Yellowstone National Park, is home to two Tribes, the Northern Arapahoe and Eastern Shoshone. The Wind River Reservation exemplifies the scope and consequence of 19th century federal policies of assimilation imposed upon Native Americans. The Shoshone Tribes originally occupied 45 million acres in areas now known as the states of Colorado, Utah, and Wyoming that, through a series of cessions and purchases shrank to the current 2.2 million acre land reserve at Wind River. Historic allotment policies also affected the Wind River Reservation, where only 30 percent of the population is Indian, and land ownership among the Tribes, tribal members, and non-Indians, is fragmented. Conflicts over water from the Big Horn River and its tributaries led the state of Wyoming to commence a general stream adjudication in 1977. The Wind River Tribes filed claims for groundwater, instream, and out-of-stream water rights for a variety of purposes, including fisheries and wildlife protection, aesthetics, homeland needs, and irrigation. The Wyoming Supreme Court affirmed only those rights claimed for irrigation purposes.[28]

The Wind River Tribes are determined to restore instream flows and aquatic habitat on the rivers within the reservation. Based on federal case law authorizing Tribes to use their *Winters* rights for any purpose,[29] the Tribes established a tribal water code and water management agency, and transferred a portion of their adjudicated irrigation right to non-consumptive instream flows. These flows would conflict with non-Indian out-of-stream uses, however, and the Wyoming courts, in contravention of federal precedent, ruled that the tribal transfer was void.[30] Although the Wind River Reservation *Winters* right is a substantial 500,000 acre-feet with a priority date of 1868, water management is vested in the Wyoming state engineer's office, severely limiting the ability of the Tribes to protect and use on-reservation water resources according to their own priorities.[31] In recent years the Wind River Tribes have developed sophisticated water quality monitoring, enforcement, and source water protection programs, although issues surrounding use of *Winters* water rights have not been satisfactorily resolved. A 'Tribal Futures' irrigation project was proposed several years ago, but development has not progressed.[32]

The *Big Horn* cases present a cautionary example. The PIA standard resulted in an award of substantial quantities of water to the Wind River Tribes. But conflict with non-Indian water use, even though junior in priority, has prevented full tribal utilization of the resource. Forced into court against their wishes, the

24 *San Carlos Apache Tribe v. Arizona*, 668 F.2d 1093, 1097 (9th Cir. 1982) (accepting the concept of a 'homeland' purpose of tribal reservations); *cf. In re* Gen. Adjudication of All Rights to Use Water in the Big Horn River, 835 P.2d 273, 278–79 (Wyo. 1992) and *United States and Lummi Nation v. Washington*, 375 F.Supp.2d 1050 (W.D. Wash. 2005).

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

26 General Allotment Act of 1887 (Dawes Act), 1887, 25 U.S.C. § 331 (repealed in 1934).

27 Indian Reorganization Act (Wheeler-Howard Act or Indian New Deal), 25 U.S.C. § 478 (1934).

28 *In re* the General Adjudication of All Rights to Use Water in the Big Horn River, 753 P.2d 76 (Wyo. 1989) (the court found that domestic and commercial water uses were subsumed by the irrigation right).

29 *Anderson* (n 25) at 1358.

30 *In re* the General Adjudication of All Rights to Use Water in the Big Horn River, 835 P.2d 273 (Wyo. 1992).

31 The Tribes' attempt to appeal adverse state court decisions to the U.S. Supreme Court met with no success. *Wyoming v. United States*, 492 U.S. 406, 406–07 (1989).

32 Wyoming Water Development Comm., Wind/Bighorn River Basin Plan, Section 4.2.2.1 (2003).

Wind River Tribes encountered hostility and a refusal to apply federal law in state court proceedings.[33] Most important, the inability of the Tribes to manage their own water resources according to their own priorities, values and interests, has prevented exercise of sovereign rights of self-governance.

Oregon's Klamath adjudication

In south-central Oregon state, the Klamath Tribes 'hunted, fished, and foraged in the area of the Klamath Marsh and upper Williamson River for over a thousand years'. In the 1864 Treaty between the United States and the Klamath and Modoc Tribes, the Tribes ceded 12 million acres in return for an 800,000 acre reservation.[34] The Treaty identified two purposes of the land reserve: to convert the Tribes to agricultural pursuits, and to allow continued hunting and gathering ways of life. In 1983, as a state court adjudication was getting underway, a parallel proceeding in a federal court decided initial questions of law pertaining to tribal water rights. Specifically, the court held that both agricultural and fishing-hunting purposes were valid and recognized under the *Winters* doctrine, and that the Klamath Tribes held water rights to support game and fish adequate to the needs of Indian hunters and fishers. This right was described as a non-consumptive entitlement that prevents other users from depleting stream waters below protected levels.[35] In keeping with treaty interpretation rules, the court held that the Tribes' non-consumptive water rights were not created, but instead reserved and confirmed by the Treaty. These rights were established when the Klamath Tribes first began hunting and fishing in the region, dating back 1000 years or more. The priority of the tribal rights was therefore held to date from 'time immemorial'.[36]

The state court adjudication of water rights in the Klamath basin was filed in 1976 and in 2010 is not yet near completion. The instream flow water rights of the Klamath Tribes, legally recognized in the 1983 *Adair* decision, have yet to be quantified. Meanwhile, the over-appropriated Klamath basin has been the site of tremendous conflict over water allocation between tribal and non-tribal users.[37] In 2000, water management agencies curtailed all agricultural diversions in the basin to protect endangered fisheries. The following year, water agencies limited the release of water to streams, cutting off river flows and causing a die-off of 30,000 migrating salmon at the mouth of the Klamath River. Litigation involving endangered species recovery and hydroelectric facilities licencing has dominated annual water management.[38] In 2009, a multi-party agreement was signed to demolish four Klamath River dams – the largest dam removal ever contemplated – to allow for fish passage and ecologically appropriate water flows.[39] Whether water peace in the Klamath will be achieved is not yet known.

In the realm of *Winters* jurisprudence, the Klamath adjudication is best-known for the *Adair* holding, i.e., that reservations may be established for fisheries purposes, that instream water rights may be reserved to protect those purposes, and further, that the priority date of such rights is time immemorial.[40] While the lengthy delay in implementation of the tribal right is discouraging, the resilience of the tribal right has driven Klamath water conflicts toward creative and dramatic solutions.

Montana's Reserved Water Rights Compact Commission

Montana is a large landlocked state of 145,552 square miles, bisected by the Northern Rockies mountain range. Vast prairies dominate the eastern half of the state, once home to millions of bison that supported tribal subsistence and prosperity until extirpation by Euro-Americans. Western Montana is mountainous, and known for Glacier and Yellowstone National Parks, wild mountains populated by *Ursina horribilis* (grizzly bear) and blue-ribbon trout streams. Seven Indian reservations are scattered across the state, home to 12 linguistically distinct Tribes.

As discussed above, Montana is the locus of the 1908 *Winters* decision, which emerged from water conflicts at the Fort Belknap Reservation. It took another seven decades, however, even to commence a process to evaluate the scope and extent of the *Winters* right for the Fort Belknap Tribes. In 1979, the Montana Water Use Act was amended to establish a statewide adjudication of all water rights, state, federal, and tribal.[41] Five Tribes challenged the statute, disputing that Montana courts were empowered to exercise any authority over them, based on the state constitutional proviso stating that '. . . Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States'.[42] All proceedings were stayed as federal courts grappled with the question of state court jurisdiction over treaty-based water claims in Montana and other states with similar constitutional disclaimers. In 1983, the U.S. Supreme Court held that the McCarran Amendment, the 1952 law that waived U.S. sovereign immunity for water right adjudications, did apply to *Winters* water rights in all states.[43]

The potential was high for long-haul litigation, but the Montana Water Use Act included an innovative alternative dispute resolution approach, creating the Reserved Water Rights Compact Commission.[44] The Act called for voluntary government-to-government negotiations among the state, tribal, and federal governments, to resolve *Winters* water right claims through

33 B. Martinis, *From Quantification to Qualification: A State Court's Distortion of the Law in In Re* the General Adjudication of All Rights to Use Water in the Big Horn River System, 68 WASH L. REV. 435 (1993).
34 16 Stat. 707.
35 *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983), *cert. denied*, 467 U.S. 1252 (1983).
36 *Id*.
37 *See* HOLLY DOREMUS & DAN A. TARLOCK, WATER WAR IN THE KLAMATH BASIN: MACHO LAW, COMBAT BIOLOGY, AND DIRTY POLITICS (Island Press 2008).
38 *Klamath Water Users Ass'n v. Patterson*, 15 F. Supp. 2d 990, 997 (D. Or. 1998).
39 Klamath Basin Restoration Agreement for the Sustainability of Public and Trust Resources and Affected Communities (Klamath Basin Restoration Agreement), January 8, 2010.
40 *Adair* (n 35) at 1394.
41 Montana Water Use Act, Mont. Code Ann. Title 85, Ch. 2.
42 *Arizona v. San Carlos Apache Tribe* (n 22) at 545, 556 (1983) (citing *Draper v. United States*, 164 U.S. 240 (1896)).
43 *Id*.
44 Mont. Code Ann. § 85-2-701 (1979).

settlement agreements. The Montana Compact Commission is a unique entity, and has had substantial success in achieving water right settlements with most of the Indian Tribes in Montana. Success is attributed to the political composition of the Compact Commission (empowering the Commission to make commitments that will be adopted through state legislative process), effective mechanisms for public education and input, interdisciplinary approaches to problem solving, and flexibility in settlement terms.[45]

Even so, substantial conflict has arisen with the westernmost tribal reserve in Montana, the Flathead Reservation, home to the Confederated Salish Kootenai Tribes (CSKT). CSKT's efforts to limit on-reservation state-based water allocations reveal a flaw in the Montana settlement approach: even before compact negotiations are completed, the state water resources agency may issue 'provisional' water rights to non-Indians.

A trilogy of Montana Supreme Court decisions established that the state water resources agency may not issue water permits on the Flathead Reservation, for surface or ground waters, until CSKT's *Winters* rights are adjudicated or resolved by compact.[46] These cases contrast with the more common state court disregard for tribal water rights, and also illustrate the sophisticated legal capabilities that Tribes now marshal to defend their rights. In its rulings on Flathead Reservation water management, the Montana Court recognized fundamental distinctions between *Winters* rights – inchoate rights with early priority that contemplate future development – and prior appropriation rights, based on actual use that may be interrupted when senior rights are exercised. A key problem that the Montana compacts have had to address is the historic over-allocation of water resources prior to negotiation and settlement of *Winters* rights. The compacts have made tribal rights whole through expensive exchange, purchase, and mitigation strategies.[47] Protection of as-yet unallocated water supply has been a pragmatic and critical concern for the CSKT as it approaches the compacting process.

Tripartite settlements among states, Tribes and the federal government have become an increasingly common mechanism for resolution of *Winters* water claims.[48] In the arid American West of the 21st century, where virtually every drop is spoken for, neither the scenario of *Winters* rights unfulfilled nor radical disruption of non-Indian water use is acceptable to most parties. The Montana Reserved Water Rights Compact Commission is one approach in which a state has utilized diplomatic engagement to address historic water conflicts. Outcomes obviously require compromise, but the process does serve as an exit ramp from lengthy, expensive litigation. Because the Confederated Salish Kootenai Tribes are the sole Stevens Treaty Tribe in Montana, their claims to water on and off the Flathead Reservation present the most challenging scenario to date for the Montana compacting process.

II.2 STEVENS TREATY WATER RIGHTS

II.2.1 Antecedents: U.S. v. Washington *(the 'Boldt decision')*

Indian Tribes of the Pacific Northwest possess a second type of reserved water right derived from treaties with the United States, but linked specifically with aquatic habitat protection. These rights, referred to as 'Stevens Treaty water rights', arise out of language found in 10 treaties negotiated by Isaac Stevens, governor of Washington Territory in 1853. Stevens was a controversial figure because of the military powers and political expedience he exercised in coercing Tribes to sign treaties that transferred virtually all of the lands and resources of the Pacific Northwest region to the United States.[49] Surprisingly, his legacy represents the most powerful codification of tribal rights and interests in water resources that exists in U.S. jurisprudence.

In each of the Stevens Treaty negotiations, Pacific Northwest Tribes bargained to retain rights to traditional foods and harvest practices. A key provision of the Treaty with the Confederated Tribes and Bands of the Yakama Nation exemplifies tribal reservation of the all-important fishing right:

> The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated Tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory . . .[50]

Similar language is found in nine other treaties concluded with Tribes throughout the Pacific Northwest.[51]

For many decades, the tribal fishing right was ignored or denied, and in the mid-20th century, Indian exercise of traditional fishing rights met with arrests and convictions, confiscation of equipment, and abuse of civil rights.[52] Tribes prosecuted several lawsuits to define

45 B. Cosens, *Filling the Gap in Western and Federal Water Law, in* TRIBAL WATER RIGHTS: ESSAYS IN CONTEMPORARY LAW, POLITICS, AND ECONOMICS (John E. Thorson, et al., eds., Univ. of Ariz. Press, 2006).

46 *Confederated Salish & Kootenai Tribes of the Flathead Reservation v. Stults*, 59 P.3d; 1093 (Mont. 2002); *Confederated Salish and Kootenai Tribes v. Clinch*, 992 P.2d 244, (Mont. 1999); *Matter of Beneficial Water Use Permit Nos. 66459-76L (Ciotti)*, 923 P.2d 1073 (Mont. 1996).

47 Cosens (n 45) at 164–67.

48 R. T. Anderson, *Indian Water Rights: Litigation and Settlements*, 42 TULSA L. REV. 43 (2006); see U.S. Department of the Interior, Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims, 55 Fed.Reg. 48, pp. 9223–25 (Mar. 12, 1990).

49 *See* Charles Wilkinson, *'Peoples Distinct From Others': The Making of Modern Indian Law*, 2006 UTAH L. REV. 379, 385–86 (2006).

50 Treaty with the Yakimas, 12 Stat. 951, 953, art. 3, ¶ 2, (June 9, 1855).

51 *See* Treaty with Nisqualli, Puyallup, Etc. (Treaty of Medicine Creek), U.S.–Nisqualli-Puyallup, art. III, Dec. 26, 1854, 10 Stat. 1132, 1133; Treaty with the Dwámish Indians (Treaty of Point Elliott), U.S.–Dwámish Tribe, art. V, January 22, 1855, 12 Stat. 927, 928; Treaty with the S'Klallams (Treaty of Point No Point), U.S.–S'Kilallam Tribe, art. IV, January 26, 1855, 12 Stat. 933, 934; Treaty with the Makah Tribe (Treaty of Neah Bay), U.S.–Makah Tribe, art. IV, January 31, 1855, 12 Stat. 939, 940; Treaty with the Walla-Wallas, U.S.–Walla Walla Tribe, art. I, June 9, 1855,12 Stat. 945, 946; Treaty with the Nez Perce, U.S.–Nez Perce Tribe, art. III, ¶ 2, June 11, 1855, 12 Stat. 957, 958; Treaty with the Tribes of Middle Oregon, art. I, ¶ 3, June 25, 1855, 12 Stat. 963, 964; Treaty with the Qui-Nai-Elts (Treaty of Olympia), U.S.–Qui-Nai-Fis, art. III, July 1, 1855, 12 Stat. 971, 972; Treaty with the Flatheads (Treaty of Hell Gate), U.S.–Flathead Tribe, art. III, ¶ 2, July 16, 1855, 12 Stat. 975, 976.

52 AMERICAN FRIENDS SERVICE COMMITTEE, UNCOMMON CONTROVERSY: FISHING RIGHTS OF THE MUCKLESHOOT, PUYALLUP, AND NISQUALLY INDIANS 110–12 (UNIV. OF WASH. PRESS, 1970); *see also* CHARLES W. WILKINSON, MESSAGES FROM FRANK'S LANDING: A STORY OF SALMON, TREATIES AND THE INDIAN WAY (Univ. of Wash. Press, 2000).

and defend the treaty fishing right, culminating in a landmark 1974 decision in which U.S. District Court Judge George Boldt famously interpreted the treaty provision, 'taking fish at all usual and accustomed places, in common with the citizens of the territory', to mean that the annual salmon harvest must be shared equally between Stevens Treaty Tribes and non-Indians. Judge Boldt further held that the Tribes could harvest their 50 percent portion at traditional fishing grounds outside of their land reserves, that Washington state agencies could not regulate Indian fishing, and that Tribes and states would serve as co-managers of the fisheries resource.[53] Controversy and violence ensued, as non-Indian recreational and commercial fishers, state fisheries management agencies, and even the Washington State Supreme Court resisted the federal treaty interpretation.[54]

Over time, the states and Tribes adopted a cooperative approach to fisheries management.[55] The Boldt decision, however, gave rise to a number of new legal questions, including whether the treaty right to fish encompassed a right to habitat. Habitat for fish is water and, by virtue of this need, the Stevens Treaty fishing right swam upstream and asserted itself in the domain of freshwater management.[56]

II.2.2 Birth of the habitat right

Does the Stevens Treaty fishing right include a right to water? The first time the habitat question was put to the courts, the case was rejected as not yet ripe for review.[57] Shortly thereafter a water allocation question arose out of the Yakima River basin in central Washington State where (as quoted above) the Yakama Nation reserved its aboriginal fishing rights via treaty.[58] Salmon species were once abundant in the basin, but water management was dominated by the U.S. Bureau of Reclamation's irrigation project, which routinely manipulated water flows with devastating effects on fisheries. To reach spawning grounds, salmon must migrate several hundred miles from the Pacific Ocean, up the Columbia and Yakima Rivers into upper basin tributaries. Historically, returning Yakima Basin salmon numbered 500,000–900,000 per year.[59] However, the basin fisheries were largely eliminated in the early 1900s, when the Bureau of Reclamation developed the Yakima Project, constructing dams and reservoirs without fish passage and diverting virtually the entire flow of the river into an extensive network of irrigation canals, severely depleting stream flows for half the year. Agriculture was king, with apple, cherry, and other crops producing an annual $1 billion in export products. In the 1990s, salmon numbers declined to less than 25,000 per year.

In 1982, a low-water year, a tribal biologist discovered several Chinook salmon redds (nests of salmon eggs) directly below the gates of one of the Bureau reservoirs. These redds contained significant genetic and biological value – wild spring-run Chinook were nearly extinct in the basin – but were at risk of stranding as reservoir gates were closed to collect water for the following year's irrigation demand. The Tribe sought an emergency injunction in the federal court, where it was held that the Tribe's treaty right 'to fish in common at usual and accustomed' fishing sites included a right to demand water releases from the Bureau's reservoir system to maintain salmon-protective instream flows. That these instream releases might conflict with state-based irrigation water rights was deemed legally insignificant.[60]

The Yakama Nation's Chinook-water case was the first test of the existence and scope of the habitat right associated with the 'to fish in common' treaty right. The judicial mandate to revise the Bureau's operating procedures for Yakima basin dams was a crucial first step in the development of Stevens Treaty water rights.

II.2.3 Stevens Treaty rights exemplified

The Yakama Nation and the Acquavella *adjudication*

In 1977, a severe drought year, the state of Washington filed a general stream adjudication, titled '*Acquavella*', involving 40,000 water claimants.[61] Preliminary procedural questions consumed several years,[62] and in 1985 the court took up the first substantive claims: the Yakama Nation's claims for on-reservation *Winters* water rights for agriculture and other purposes, and Stevens Treaty claims to off-reservation instream flows to protect treaty fishing rights.

The Yakima Basin is an unlikely venue for a court decision recognizing tribal treaty fishing rights. The presiding judge, himself a former irrigation district attorney, exhibited little concern for tribal claims. But he could not ignore the admonition of *Colorado River Conservation District*: state courts may exercise jurisdiction over tribal water claims, but in so doing they must apply federal law.[63] In 1993, the Washington State Supreme Court affirmed the trial court, finding that the Yakama Nation holds off-reservation instream flow water rights for 'the absolute minimum amount of water necessary to maintain anadromous fish life in the Yakima River', that the quantity of the right is to be

53 *United States v. Washington* (the Boldt decision), 384 F. Supp. 312 (W.D. Wash. 1974); see CHARLES W. WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS (W.W. Norton & Co., 2005).

54 *United States v. Wash. Commercial Fishing Passenger Vessel Ass'n*, 443 U.S. 658 (1979); *see also* WILKINSON, supra (n 52).

55 F. Woods, *Who's In Charge of Fishing?*, OREGON HISTORICAL QUARTERLY, Vol. 106, No. 3 (Fall 2005).

56 O. Yale Lewis III, *Treaty Fishing Rights: A Habitat Right as Part of the Trinity of Rights Implied by the Fishing Clause of the Stevens Treaties*, 27 AM. INDIAN L. REV. 281 (2003).

57 *United States v. Washington*, 759 F.2d 1353, 1357 (9th Cir. 1985) (*en banc*); in U.S. jurisprudence, courts may not issue advisory opinions but instead may only decide actual cases and controversies; U.S. CONST. art. III, § 2, cl. 1; *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

58 Treaty with the Yakamas, 12 Stat. 951, 953, art. 3, ¶ 2 (June 9, 1855).

59 Northwest Power & Conservation Council, Columbia River History, Yakima River (Feb. 2010), *available at* http://www.nwcouncil.org/history/Default_Thematic.asp.

60 *Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist.*, 626 F.2d 95 (9th Cir. 1980), *aff'd* 763 F.2d 1032, 1035, n. 5 (9th Cir. 1985) (appellate court noted cryptically that it was not deciding the scope of the treaty fishing right).

61 Ottem, Sidney P., 'The General Adjudication of the Yakima River: Tributaries for the Twenty-First Century and a Changing Climate,' J. ENVTL. L. & LITIG., Vol. 23, p. 275 (2008).

62 *Dep't of Ecology v. Acquavella*, 674 P.2d 160 (Wash. 1983).

63 *Colo. River Conservation Dist. v. United States* (n 22) at 817–18.

determined annually according to weather conditions, that the Bureau is to administer the right in consultation with an advisory panel of biologists, and that the tribal instream water right dates to time immemorial.[64]

The award of the 'absolute minimum amount of water' necessary to keep fish alive seems parsimonious, but implementation of the Tribe's instream water rights has met with decided success. In 1994, another low-water year, the biologist panel advised the Bureau that release of a pulse of water, termed a 'flushing flow', was needed to assist downstream migration of juvenile salmon smolts. Irrigation districts challenged the water releases, but were rebuffed when the court deferred to scientific expertise. The court further expanded on its original ruling to find that, given the endangered status of the basin's fisheries, biology-based recommendations regarding the flows needed to support salmon life stages would receive favorable consideration.[65] Thus, the 'absolute minimum' has evolved into a standard for conservation and recovery of endangered fish populations in the Yakima Basin.

Water supply conditions in the Yakima Basin are perennially difficult. Drought occurs every few years, requiring curtailment of junior irrigation rights. Instream flows are depleted in certain reaches of the River at certain times. Climate change exacerbates water scarcity. But the Yakama Nation has parlayed its treaty right into formal and informal co-management partnerships with Washington state and the U.S. Bureau of Reclamation. Through these processes, the Tribe has successfully asserted its Stevens Treaty water rights to protect fish and habitat, and institutionalized processes to perpetuate protections. Water conservation improvements, trust water rights (dedicated instream flow rights), fish passage at basin reservoirs and other activities hold promise for fisheries restoration. Progress is slow but steady, and reveals the contemporary power of the Stevens Treaty legal right, reserved in 1855, to counter the force of prior appropriation.

The Nez Perce Tribe and the Snake River Basin Adjudication

The Nez Perce Tribe (known also as Nimi'ipu) is an Inland Northwest Tribe historically dependent on the extraordinary 900-mile migration of salmon into the Clearwater River region now known as the state of Idaho. The Nez Perce ceded 14 million acres of aboriginal lands to the United States via two treaties in 1855 and 1863, and agreed to settle on the present-day reservation.[66] The Nez Perce peoples are well-known for welcoming the Lewis & Clark expedition of 1805 when the near-starved 'Corps of Discovery' stumbled out of the Bitterroot Mountains, and were revived with salmon and other traditional foods.

The Nez Perce treaties reserved rights to fish at usual and accustomed sites. As explained by the Nez Perce tribal chairman in a hearing before the U.S. Congress, 'Fish and water are materially and symbolically essential to Nez Perce people both in the present and the past; and declines in fish and water availability, primarily due to human environmental alteration and restrictions on access, have had devastating effects on our people and their culture'.[67]

Unique among the Stevens Treaties, the 1863 Nez Perce Treaty also preserved tribal access and use rights to approximately 600 'springs or fountains … and, further, to preserve a perpetual right of way to and from the same, as watering places, for the use in common of both whites and Indians'.[68] The abundant springs of Nez Perce aboriginal lands supply water for human and livestock needs, and also support traditional foods and cultural practices.

In 1987, Idaho commenced a general stream adjudication of the Snake River Basin, and approximately 87,000 claims to water were filed. The Nez Perce Tribe filed multiple claims for on-reservation *Winters* water rights, Stevens Treaty off-reservation instream flows, and use of springs and fountains. Tribal water claims drew substantial opposition from non-Indian agricultural and timber interests, and in 1999, the adjudication court ruled that there was a lack of intent by U.S. and tribal treaty negotiators to reserve instream flows because they did not contemplate future fisheries problems. The court also ruled that Nez Perce tribal rights to off-reservation instream flows were extinguished as a result of the Dawes Act allotting lands to non-Indians on the reservation.[69]

Rather than risk further losses in the state court system, the Nez Perce Tribe elected to negotiate. The resulting settlement was substantial, but involved 'significant and difficult compromises for the Tribe'.[70] Stevens Treaty instream flow rights were not recognized in the agreement. The Tribe's on-reservation *Winters* water right was quantified at 50,000 acre-feet, dating from 1855. Instream flow rights were recognized for 205 streams off the reservation, but are managed by the state and subordinated to state water permits that predate the 2004 agreement. Both on- and off-reservation instream flow rights are subordinated to future water uses. The Tribe's 'springs and fountains' rights, explicitly reserved in the Treaty, fared better with a priority date of time immemorial, and are shared equally with non-Indian users.

64 *State v. Acquavella*, Yakima County Superior Court No. 77-2-01484-5, Memorandum Opinion re: Motions for Partial Summary Judgment (Oct. 22, 1990), *aff'd*, 121 Wn.2d 257 (1993) ('*Acquavella II*'); *see also State v. Acquavella*, Yakima County Superior Court No. 77-2-01484-5, Final Order Re: Treaty Reserved Water Rights at Usual and Accustomed Fishing Places (Mar. 1, 1995).

65 *State v. Acquavella* (n 64), Memorandum Opinion re: 'Flushing Flows' (Dec. 22, 1994).

66 Treaty with the Nez Perce, 12 Stat. 957, 958, art. III, ¶ 2 (June 11, 1855); Treaty with the Nez Perce Tribe of Indians. 14 Stat. 647 (June 9, 1863).

67 Testimony of Anthony Johnson, Nez Perce Tribal Executive Committee Chairman, United States Senate Committee on Indian Affairs, Hearing on the Snake River Basin Adjudication Settlement, July 20, 2004.

68 Treaty with the Nez Perce Tribe of Indians, 14 Stat. 647, art. VIII (June 9, 1863).

69 *In re* Snake River Basin Adjudication, Consolidated Subcase No. 03-10022 at 13, No. 39576 (Idaho 5th Dist. Ct., Twin Falls County, Nov. 10, 1999) (copy on file with author).

70 *See* K.H. Gudgell, S. Moore & G. Whiting, *The Nez Perce Tribe's Perspective on the Settlement of Its Water Right Claims in the Snake River Basin Adjudication*, 42 IDAHO L. REV. 563 (2006).

The failure of the Nez Perce settlement to recognize off-reservation instream flow rights of the Tribe represents a disappointing turn in the development of Stevens Treaty water right jurisprudence. But Idaho has proven a particularly difficult venue to protect environmental values in rivers from both tribal and non-tribal perspectives.[71] The Nez Perce settlement is hard to assail given the context for its negotiation. Moreover, the settlement brought significant resources to the Tribe that were unobtainable through the general stream adjudication. Tribal benefits include the return of 11,000 acres of federal lands within the boundaries of the Nez Perce Reservation, the right to control water releases from a major reservoir on the Columbia-Snake River system to enhance salmon migration, and payment of $90 million in federal funds to restore fisheries habitat and establish on-reservation water and sewer management infrastructure.[72]

The Muckleshoot Tribe and the Cedar River Habitat Conservation Plan

The Muckleshoot Indian Reservation is located at the foot of Mount Rainier in western Washington state; the Tribe is signatory to the Treaties of Point Elliott and Medicine Creek, which established the Tribe's six square mile reservation and rights to 'fish in common' with Euro-American settlers.[73] Descendants of the Coast Salish peoples of the Northwest, the Muckleshoot are salmon and shell fishers and possess access and use rights to aboriginal fishing sites along hundreds of miles of shorelines of the Puget Sound estuary and tributary rivers.

The Cedar River, an important tributary located near the Muckleshoot Reservation, is home to several salmon and trout species, including three that are threatened with extinction and have been listed pursuant to the federal Endangered Species Act (ESA).[74] The Cedar River is also a major source of water supply for the City of Seattle, which delivers water to 1.3 million customers. As Seattle's population skyrocketed in the 1990s, the City prepared to double its water diversions from the Cedar, an action that would have caused substantial harm to the Tribe's fishery interests.

Rather than broach the risks inherent in litigating treaty water rights, the Muckleshoot Tribe leveraged the ESA as legal authority for establishing instream flows. Because Seattle's water system threatened harm to ESA-listed salmon species, the City was required to prepare a habitat conservation plan (HCP) to meet overarching habitat and species recovery goals.[75]

Even without treaty litigation, the going was difficult. In 2000, Seattle negotiated an HCP instream flow agreement, signed off by all interested parties except the Muckleshoot Tribe and one federal agency. The Tribe's first legal challenge to the HCP was dismissed on procedural grounds,[76] but a second challenge was met with proposals for a new round of negotiations. The resulting settlement, signed in 2006, limits Seattle's diversions in perpetuity. The agreement also establishes a fish-friendly instream flow regime that protects a range of flows – including both minimum flows during summer season and peak flows needed for channel maintenance functions – and creates an Instream Flow Commission comprised of agency and tribal representatives to provide oversight for Cedar River water management.[77] The Muckleshoot Tribe heralded the agreement as one that would allow the Tribe to rely on the Cedar River watershed 'to sustain its society and culture and to provide sustenance for its people'.[78] The Tribe's use of robust federal environmental laws illustrates a successful mechanism to leverage treaty-based rights.

III MANAGEMENT OF *WINTERS* WATER RIGHTS

III.1 Introduction

Water must be managed after tribal rights are established at law. Identifying which governments are empowered to manage water resources within or adjacent to tribal reserves is a key question emerging from the *Winters* doctrine. This question has engendered yet more litigation, a developing jurisprudence, and some creative and practical responses to the need for effective water management. Regulatory jurisdiction over tribal water resources raises several issues. First is the fact of substantial non-Indian ownership of fee lands within reservation boundaries. As described above, the Dawes Act of 1887 authorized the allotment of reservation lands to tribal members and subsequent sale of 'surplus lands' to non-Indians, leading to the loss of a large amount of the tribal estate. Many individual tribal members sold their allotments or lost them in tax foreclosure proceedings, allowing non-Indians to move onto the reserves. Despite repudiation of the allotment policy in 1934, the U.S. Congress did not require the removal of non-Indians from tribal lands.[79]

The resulting patchwork patterns of non-Indian fee properties on tribal reservations created lingering questions about non-Indian entitlement to *Winters* water rights, as well as the scope of tribal governmental authority to regulate water use by all reservation residents. U.S. courts have increasingly diminished the exercise of tribal governmental authority over non-Indians and, as a result, the ability of Tribes fully to control reservation water resources has resulted in a confusing set of precedents.

Rivers and aquifers are unitary in nature, and jurisdictional fragmentation undermines protection of water resources and traditional tribal uses. Lack of clear authority over non-Indian water usage has led to illegal

71 *See, e.g.*, Michael C. Blumm, *Reversing the Winters Doctrine?: Denying Reserved Water Rights for Idaho Wilderness and Its Implications*, 73 Univ. Colo. L. Rev. 173 (2002).

72 Gudgell, et al., (n 70).

73 Treaty of Medicine Creek 10 Stat. 1132 (December 26, 1854); Treaty of Point Elliott, 12 Stat. 927 (January 22, 1855).

74 Endangered Species Act, § 4, 7 U.S.C. § 136 (1973).

75 Endangered Species Act, § 10.

76 *Muckleshoot Indian Tribe v. Washington Dep't of Ecology*, 50 P.3d 668, 671 (Wash. App. Div. 1 2003).

77 *Muckleshoot Indian Tribe v. National Marine Fisheries Service*, Civ. No. 03-3775JLR, Settlement Agreement (March 2006).

78 Earthjustice, News Release, 'Muckleshoot Tribes Settles with Seattle on Cedar River Water' (March 28, 2006).

79 Indian Reorganization Act of 1934 (n 27).

self-help, over-appropriation, and widespread contamination of tribal water resources.

Prior to the decision in *Confederated Colville Tribes v. Walton*, described below, non-Indians would secure water right permits from state water agencies for diversion and use of tribal waters. In 1981, the *Walton* court ruled that states lack authority to issue such permits, but made a point of noting the unique geographic circumstances in that case. Three years later, the same court ruled that states could issue permits for use of waters by non-Indians on non-tribal lands within an Indian reservation, when those waters are 'excess' to *Winters* doctrine needs.[80] However, 'excess' waters determinations have not been made for most Indian reservations.

Despite the confusion, Tribes are proactive in their exercise of sovereign governmental powers to protect reservation waters and promote orderly development. Many tribal governments have promulgated water codes to govern on-reservation water use. One early challenge to such a code extended the *Anderson* rule to hold that the Tribe could not regulate non-Indian use of 'excess' waters – although that term was itself not defined or quantified.[81] As discussed in Section II.1.4 above, the Arapahoe and Shoshone Tribes of the Wind River Reservation were unsuccessful in using their water code to transfer irrigation rights to instream flows. The volatility of the issue has caused the U.S. Bureau of Indian Affairs, which reviews and approves adoption of tribal law and order codes for tribal governments constituted under the Indian Reorganization Act of 1934, to impose a 35-year moratorium on approval of tribal water codes.[82]

Notwithstanding the controversies over tribal regulatory authority, many Indian Tribes have moved forward to ensure protection of reservation resources. What follows are two examples of Tribes that have carved their own path to protect their *Winters* rights and ensure protection of reservation waters.

III.2 'Walton' rights on the Colville Indian Reservation

The Colville Reservation comprises 1.4 million acres in northeastern Washington state, bounded partly by the Columbia and Okanogan Rivers. In determining the scope of the Tribe's *Winters* rights, a federal court held the purposes of the reservation to include both agriculture and fishing, the latter being of 'economic and religious importance' to the Tribes.[83]

The Tribes and bands comprising the Confederated Colville Tribes (CCT) were salmon fishers, but traditional tribal fishing grounds on the Columbia River were destroyed by the Grand Coulee Dam. To mitigate for this loss, the CCT created a replacement fishery in the Omak Lake watershed, a hydrologic system completely encompassed within the Colville Reservation. The Tribe stocked Omak Lake with a trout species that thrives in saline lake waters, but requires freshwater to spawn. After the Colville Reservation was opened to allotment, non-Indians acquired ownership of lands within the Omak Lake drainage and commenced irrigation diversions from the lake's tributary stream. Conflict arose between the Tribe's need to maintain water in the creek system for trout spawning and the non-Indian irrigation diversions.

The resulting litigation established a landmark holding in the development of *Winters* jurisprudence: non-Indian successors to Indian allotments are entitled to share in the *Winters* rights held by the Tribes. This so-called 'Walton' right (named for the Omak Lake non-Indian defendant), implicates on-reservation water management on every reservation where non-Indians have acquired lands – virtually every Indian reservation in the western United States.

Several rules apply to Walton rights, including that the non-Indian right (1) is based on a pro rata share of irrigable tribal lands, (2) must be put to use within a reasonable time (typically 15 years) from the date that the land is transferred from Indian to non-Indian ownership, and (3) may be lost for non-use.[84] If the non-Indian right is lost, it reverts to the state in which the tribal reservation is located, not the Tribe.[85]

Because water in the Omak Lake watershed is inadequate to supply all needs, usage must be carefully managed. Who regulates the Walton right? The court found that Washington state water law was preempted by the federal actions creating the Colville Reservation.[86] The Omak Lake system is non-navigable and lies entirely within the reservation, factors that were important but not determinative. Instead, the court looked to historic precedent to reject the claim that state laws, particularly water laws, may apply.[87]

The court did not decide, however, whether federal or tribal authority applied to manage on-reservation water resources. The CCT therefore set about taking control of water management, signing ground-breaking cross-jurisdictional agreements with the state of Washington and federal agencies. The CCT marshaled available law and procedures to create an impressive natural resources management program, including a water code. Sources of authority supporting tribal regulation of the natural resources and the reservation environment include tribal sovereignty,[88] federal self-determination policy and law,[89] assumption of delegated powers pursuant to federal environmental statutes such as the

80 *United States v. Anderson* (n 25) at 1358.

81 *Holly v. Totus*, 655 F. Supp. 548, 556 (E.D. Wash. 1983). Undeterred, the Tribe amended the water code to remove offending language, and has effectively regulated on-reservation waters since 1992. *See* Chiish Tamanwit, Chapter 60.01, Yakama Nation Revised Code (2005) (on file with author).

82 C. Breckinridge, *Tribal Water Codes*, TRIBAL WATER RIGHTS: ESSAYS IN CONTEMPORARY LAW, POLICY, AND ECONOMICS at 199, 206 (John E. Thorson, et al., eds., Univ. of Ariz. Press, 2006); PETER SLY, RESERVED WATER RIGHTS SETTLEMENT MANUAL at 71–74 (Island Press, 1989).

83 *Confederated Colville Tribes v. Walton*, 647 F.2d 42, 48 (9th Cir. 1981).

84 *Id*. at 51.

85 *Anderson* (n 25) at 1358.

86 *Walton* (n 83) at 51–53.

87 *Id*. (citing *Fed. Power Comm'n v. Oregon*, 349 U.S. 435, 448 (1955)); *United States v. McIntire*, 101 F.2d 650, 654 (9th Cir. 1934).

88 *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980).

89 Indian Self-Determination and Education Assistance Act, tit. II and III, 25 U.S.C. 450 (1975).

Clean Water, Clean Air, and Resource Conservation and Recovery Acts,[90] cross-jurisdictional agreements, and federal common law that creates an exception to the general prohibition on tribal jurisdiction over non-Indians under circumstances involving 'the political integrity, the economic security, or the health and welfare of the Tribe'.[91]

The Colville Tribal Water Use & Permitting Code exemplifies a successful tribal program that asserts jurisdiction over all reservation waters and, through modern management techniques such as integrated resource management planning, hydrogeologic investigations, geographic information systems, vigilant regulatory control, and hands-on interpersonal skills, effectively manages the entire reservation environment.[92]

III.3 Lummi Nation groundwater management

The Lummi Indian Nation is located on the island of Cha-Cho-Sen, now known as Lummi Peninsula, which juts into Puget Sound a few miles south of the Canada-U.S. border. The Lummi Reservation was established by the Treaty of Point Elliott.[93] Historically, the Lummi people occupied the San Juan Islands and Bellingham Bay areas of Puget Sound and, like all Northwestern Tribes, depend on salmon and shellfish as major food and cultural resources.[94]

As with many tribal reservations, lands were allotted to individual Indian households, some of which found their way into non-Indian ownership. On the 6254-acre Lummi Peninsula, the Tribe and its members comprise about two-thirds of the population and own about three-quarters of the land base.[95] Population growth has increased demand for the Peninsula's sole freshwater resource, a groundwater system recharged by precipitation and hydraulically connected to the saltwater Puget Sound. Overpumping of groundwater has become a major concern, inducing saltwater intrusion and chloride contamination of wells, rendering them unsafe for human consumption. The Lummi Nation's Water Resources Program determined that the safe yield of the Lummi Aquifer was 900 acre-feet per year, and that pumping was exceeding the natural rate of recharge and putting the Peninsula aquifer at risk.

While the Lummi Nation was in a position to control its own water usage, non-Indians would not cooperate in tribal water management. In 2001, the United States joined the Lummi Nation to bring suit in the federal court to adjudicate and quantify the rights of the Nation vis-à-vis non-Indian water users and the state of Washington.[96] The litigation and settlement of the lawsuit offer two instructive developments regarding *Winters* water rights and tribal water resource management.

First, in its initial review of legal questions, the court interpreted the scope of the Nation's Lummi Peninsula water rights pursuant to the Treaty of Point Elliott. The court held that *Winters* doctrine water rights may encompass rights to groundwater, even if the groundwater is not connected to surface waters. The court further held that under the Treaty of Point Elliott, the Lummi Nation reserved rights to utilize groundwater, even though it was not using such waters in 1855 at the time the Treaty was signed.[97]

Ultimately the parties opted for settlement and the resulting agreement is notable for its comprehensive scope. Lummi Peninsula water is capped at a fixed annual rate and regulated to prevent overpumping. All wells are metered to determine pumpage rates, and monitored for water quality. A federal water master was appointed to oversee disputes among parties,[98] and non-Indian water usage is regulated by a state water master.[99] The Lummi Nation Water Code, promulgated in 2004, regulates existing and new water use by tribal members and non-Indians who are served by tribal water systems.[100]

The Lummi Nation settlement and water management program arose out of a scientifically rigorous approach to determining aquifer yield, combined with a creative cross-jurisdictional approach to water management duties. Tribal *Winters* and non-Indian Walton rights are recognized and given effect, but within the constraints of existing supply.

IV CONCLUSION

History reveals the importance of tribal water rights and the significance of contemporary efforts to define and quantify those rights. Tribal interests and values in water emerge from traditions dating back millennia; the treaties that codified tribal water rights are 150 years old. Judicial emphasis on evaluating treaties from perspectives of times past gives history more relevance in tribal water right proceedings than virtually any other area of law. History is known to the Tribes too, as oral tradition keeps alive the meaning of the treaties. Professor Charles Wilkinson writes of the elders who testified in Judge Boldt's courtroom in 1974, explaining in detail why their parents and

90 Clean Water Act, 33 U.S.C. § 104(b)(3) (2010); Clean Air Act, 42 U.S.C. § 301 (2010); Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6908(a) (2010); *see Washington v. EPA*, 752 F.2d 1465 (9th Cir. 1985).

91 *Montana v. United States*, 450 U.S. 544, 566 (1981).

92 Colville Tribal Law & Order Code, Chapter 4–10 (Water Use and Permitting) (amended June 2006), May 27, 2010, *available at* http://www.narf.org/nill/Codes/colvillecode/cctoc.htm.

93 12 Stat. 927, Art. II (1855).

94 *United States v. Washington*, 384 F. Supp. 312, 360–63 (W.D. Wash. 1974).

95 *United States v. Washington*, 375 F. Supp. 2d 1050, 1057–58 (U.S.D.C., W.D. Wash., June 23, 2005). 1990 census data indicated 1256 Indians and 661 non-Indians, with individual Indians and the Lummi Nation owning 4500 acres, and non-Indians owning 1500 acres.

96 *United States and Lummi Nation v. State of Washington*, Complaint, No. C-01-00047Z (U.S.D.C., W.D. Wash., 2001).

97 *United States and Lummi Nation v. State of Washington*, Order at 9–12, No. C-01-00047Z (U.S.D.C., W.D. Wash., Feb. 21, 2003).

98 John E. Thorson, *Proceedings Before the Water Master, Lummi Decree, U.S. District Court (W.D. Wash.)*, Lummi Water Master, May 22, 2010, *available at* http://web.me.com/johnethorson/Lummi_Water_Master/Home.html.

99 *See* Washington Department of Ecology, *U.S.-Lummi Nation v. Ecology*, U.S. District Court Case, May 22, 2010, *available at* http://www.ecy.wa.gov/programs/wr/rights/us_lummi_ecy.html.

100 Water Resources Protection Code, Title 17, Lummi Nation Code of Laws (2004), May 22, 2010, *available at* http://www.lummi-nsn.org/NR/Water/PDF/Title17Changes2010/Title%2017%20Water%20Resources%20Protection%20Code.pdf.

grandparents reserved fishing rights and access stations in the Stevens Treaty negotiations.[101]

Equally critical is the emergence of the modern tribal governmental estate. Tribes are capable not only of self-governance, but operate sophisticated natural resource management programs. Professor Bill Rodgers identifies three unique attributes that put Tribes in a position to protect and defend the waters of the American west: tribal sovereignty, the special trust relationship between the United States and Indian Tribes, and tribal proprietary interests in land, water and wildlife resources.[102] Tribal resource agencies now participate as co-managers with state and federal governments to protect and restore the waters and fisheries in which they hold an ownership interest. The successes are palpable and will continue to improve and grow.

The antipathy of state courts toward Indian water rights cannot be averted, and the historic allotment policies that allow non-Indians to own lands within tribal reservations are a significant obstacle to full use and management of tribal water rights. However, the movement toward settlement of Indian water claims is gaining ground, owing to the need by all parties for greater control over outcomes, and the broad and productive terms that may be achieved through settlement rather than litigation.

Finally, in the United States, an evolution is underway with respect to cultural and political thinking about human relationships with water.[103] This change, long in coming, is a force for justice and the recognition of tribal water claims – claims that in turn illuminate a path forward for all people and all rivers.

101 Wilkinson, Note 49.

102 Rodgers, William H., *Tribal Government Roles in Environmental Federalism*, 21 Nat. Resources and Env't 3 (Winter 2007).

103 The Catholic Bishops of the Columbia Watershed Region, *The Columbia River Watershed: Caring for Creation and the Common Good* (Washington State Catholic Conference, 2000).