STRIKING BEFORE THE IRON IS HOT: HOW TRIBES IN THE EAST CAN ASSERT THEIR *WINTERS* RIGHTS TO PROTECT TRIBAL SOVEREIGNTY & MITIGATE CLIMATE CHANGE

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Federally recognized tribes have been denied access to their legal allotments of water for over two centuries through a combination of federal assimilation and annihilation programs, inequitable provision of irrigation systems by federal agencies, and hostile state governments. The Winters *doctrine is leaned upon heavily by tribes in the western U.S. as the mechanism to secure federal reserved water rights when treaty language is vague or absent. But* Winters *has never been tested east of the 100th meridian. I contend the doctrine applies nationwide. Accordingly, I lay out five general principles of Indian water law that appear well settled, outline a number of aspects that remain in contention, then provide multiple arguments for why* Winters *should apply throughout the country. Tribal reservations comprise over 30,000 square miles of lands and waters outside the western U.S., an area nearly the size of South Carolina. If tribes assert their* Winters *rights on these lands, an additional benefit of this exercise of tribal rights is that they may also help mitigate the effects of climate change.*

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INTRODUCTION

Federally recognized tribes have been denied access to their legal allotments of water for over two centuries through a combination of federal assimilation and annihilation programs, inequitable provision of irrigation systems by federal agencies, and hostile state governments. This changed to a limited extent when the Supreme Court recognized in *Winters v. United States* that Indian reservations include a usufructuary right to water.[1] The *Winters* doctrine has been uniformly upheld by courts in western states that follow the prior appropriation doctrine, so tribes that claim these rights can ensure that waters are conserved in perpetuity for both consumptive uses like irrigation and non-consumptive uses like fishing.[2] But no federal court has addressed a *Winters* claim in a state that

[1] REED D. BENSON ET AL., WATER RESOURCE MANAGEMENT: A CASEBOOK IN LAW AND PUBLIC POLICY 23–24 (8th ed. 2021). ("A water right holder does not own the corpus of water as a landowner owns the soil. The holder has only the right to use the water."); Winters v. United States, 207 U.S. 564, 576–77 (1908). As a note, though the terms Native American or indigenous have come to be preferred by many in place of "Indian," the latter is retained in this Article since this is the term used in the Constitution, many statutes, and in the official names of some tribes. *See, e.g.*, THE OFFICIAL PAGE OF THE MATTAPONI INDIAN TRIBE & RESERVATION, https://mattaponi.gov/ (last visited Mar. 23, 2024).

[2] *See generally* BENSON ET AL., *supra* note 1, at 31–298 (discussing *Winters*). States in the western U.S. generally follow the prior appropriation doctrine, which holds that water rights are prioritized by date. In times of shortage, the person with the oldest water rights receives all of his right, and junior users may receive no water at all. In contrast, the riparian doctrine is more common in the eastern U.S. This doctrine limits water use to those landowners who are adjacent to the water body, and generally reduces use proportionally in times of shortage. *Winters* has been upheld by Arizona v. California, 373 U.S. 546, 600 (1963) (holding all federal reservations include reserved

generally follows the riparian doctrine—the primary doctrine of water allocation in eastern states.[3] Here, I argue that the *Winters* doctrine should allow tribes in eastern states to assert their water rights in the same way the doctrine has allowed tribes to do so in western states. Additionally, because scientists and policymakers argue more land and water must be conserved as a partial solution for combating climate change, an ancillary benefit of conferring tribes their water rights could be climate change mitigation.

I begin by arguing that federal reserved water rights are legally viable in *all* states, not just those that largely follow prior appropriation. Judith V. Royster argued a quarter century ago that *Winters* applies in the East; here I update and supplement that analysis.[4] Because these rights remain viable and there are fewer conflicts in the East regarding water rights, asserting them now can conserve water for tribes. While affirming a tribe's legal right to water does not guarantee it will be conserved vis-à-vis other potential users, the nature of tribal reserved water rights allows tribes to keep the resource in the river, lake, or ground rather than using it for irrigation or other consumptive use. Any water that is conserved in this way maintains or increases tribes' sovereignty over their natural resources.

Establishing *Winters* rights is also one tool for reaching the "30 by 30" goal, an initiative to designate thirty percent of land and ocean area as protected by 2030; no other source has presented this as an option. Undoubtedly, there are numerous resources analyzing 30 by 30. However, tying the legal viability of *Winters* in the East with its potential to achieve 30 by 30 goals, and explaining how to go about establishing these rights is a topic that remains unexplored.

In Part I of this Article, I trace the development of tribal water rights, starting with the Indian law canons and their application to treaties between the U.S. and tribes, and then explain how the application of these

water rights unless specifically denied by Congress); Colville Confederated Tribes v. Walton, 647 F.2d 42, 51 (9th Cir. 1981) (holding tribal water rights extend to allotted lands previously part of a reservation); and several other cases. The fact that *Winters* has been repeatedly upheld does not, of course, mean it is safe from attack. Several groups recently filed an amicus brief urging the Supreme Court to uphold the *Winters* doctrine in Arizona v. Navajo Nation, 599 U.S. 555, 558–59 (2023). The fact that the amici felt the need to write such a brief at all indicates the concern that the doctrine could be weakened or wiped away throughout the country. *See Supreme Court: US Not Responsible for Water Rights; Navajo Nation Still Battling for Water*, NATIVE AM. RTS. FUND (June 22, 2023), https://narf.org/scotus-az-v-navajo-amicus/; United States v. Winans, 198 U.S. 371, 381 (1905) (holding tribes have the right to fish on water bodies in ceded lands).

[3] Several suits have been filed, such as Chickasaw Nation v. Fallin, CIV-11-927-C (W.D. Okla. 2011), but all have been settled prior to issuance of a court opinion.

[4] Judith V. Royster, Winters *in the East: Tribal Reserved Rights to Water in Riparian States*, 25 WM. & MARY ENV'T. L. & POL'Y REV. 169, 191–95 (2000).

canons to treaties resulted in the holdings in the *Winters* and *Winans* cases. This Part also includes several fundamental principles from those two cases that have been regularly reiterated and are still in effect today. In Part II, I pivot to analysis, laying out assertions that eastern tribes should anticipate making in a water rights claim against a state—a tribe's likely opponent—and provide legal arguments to support those assertions, which have not yet been concretely established in the case law. Part III ties together Parts I and II by presenting numerous legal reasons why the *Winters* doctrine must apply in the eastern U.S., disposing of the few arguments against its nationwide application along the way. In Part IV, I emphasize that the assertion of *Winters* rights nationwide is an opportunity to solidify tribal authority and provide some amount of legal chinking in the ever-eroding wall of tribal sovereignty. Finally, Part V is an explanation of an important secondary benefit that may arise from Indian sovereignty in this area—that is, legal protection of Indian water rights in the eastern U.S. may also conserve or restore biological diversity and ecosystem functions, which are critical for meeting the nation's 30 by 30 goal and for combating climate change.

I. ORIGINS OF TRIBAL RESERVED WATER RIGHTS

To understand why claims of tribal reserved water rights must be viable in the eastern U.S. requires a brief review of Indian law, including the canons of construction often used to interpret treaties and agreements with tribes. This leads to a description of Indian reservation origins, followed by an examination of two seminal cases, *United States v. Winans* and *Winters v. United States*, that established the fundamental principles of tribal reserved water rights.

A. Development of American Indian Law Canons

Starting in the late 1700s and continuing into the early twentieth century, mostly white miners, ranchers, farmers, and other settlers created great demand for land in and beyond the thirteen original states.[5] Through many statutes and programs, the U.S. government encouraged and subsidized this westward expansion.[6] As a result, treaties that were

[5] ROBERT T. ANDERSON ET AL., AMERICAN INDIAN LAW: CASES AND COMMENTARY 48–49, 74 (4th ed. 2020); United States v. Winans, 198 U.S. 371, 379 (1905) (whites competing with Indians for a fishery); *Winters*, 207 U.S. at 567 (whites competing with Indians for irrigation water).

[6] *Cf.* Homestead Act, 12 Stat. 392, 392 (1862) (granting 160 acres to settlers who remained living on the plot for at least five years) (repealed 1976); Desert Land Act, 19 Stat. 377, 377 (1877) (granting 640 acres at 25 cents/acre to settlers upon proof of significant irrigation) (current version at 43 U.S.C. 321); Dawes Act, 24 Stat. 388, 388–90 (1887) (allowing Indian reservations to be

mutually beneficial to the parties in the 1600s and 1700s[7] were increasingly replaced by coerced agreements that forced numerous tribes to reduce the amount of land they had historically occupied or to vacate their ancestral homelands entirely.[8] Some agreements allowed Indians to reserve a portion of their historical range as a homeland,[9] hence the term "reservation," but ceded the rest of the land to the federal government.[10] Treaties typically laid out the borders of the reservation in great detail,[11] but rarely addressed details such as whether or how much of the surface water or groundwater the tribes retained, whether the tribes retained hunting or fishing rights, or aspects of water quality, timing, or distribution.[12]

In the specific case of tribes, federal courts in the 1800s developed Indian law canons of construction rather than leaning on the Constitution for two reasons. First, treaty language between the U.S. and Indians was often vague and thus had to be interpreted by the courts when challenges arose—accordingly, there was a need for particularized Indian law canons.[13] Second, because the country was so young, the scope and limits of congressional power were still inchoate because of the general lack of adjudication.[14] That is, additional court cases were needed to help frame Congress' authority to legislate on these and other issues. The following four canons of construction of Indian law have come to be recognized as

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divided into 160-acre allotments onto which individual Indian families were forced, thereby "encouraging" them to become farmers, with remainder of the former reservation sold as "surplus") (repealed 1934); Stock-Raising Homestead Act, 39 Stat. 862, 862 (1916) (granting 640-acre plots for grazing) (repealed 1976). To be clear, the repeal of the Dawes Act in 1934 did not reverse the allotments nor bring the "surplus" lands back into the reservations.

[7] *Cf.* Treaty with the Six Nations, art. II, Oct. 22, 1784, 7 Stat. 15 (showing that the U.S. government recognized the Oneida Tribe's help in the Revolutionary War by promising that the Tribe would remain "in the possession of the lands on which they are settled."). See discussion of this treaty in County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 231 (1985).

[8] *See* Treaty with the Cherokees, art. I and II, Dec. 29, 1835, 7 Stat. 478 (evicting the Cherokee from all lands east of the Mississippi River in exchange for land in Oklahoma Territory).

[9] A common misunderstanding is that the U.S. government ceded land to Indians. The *Winans* Court, however, stated it accurately: "the treaty was not a grant of rights to the Indians, but a grant of rights from them–a reservation of those not granted." *Winans*, 198 U.S. at 381.

[10] *Cf.* Treaty with the Navajo Indians, art. IX, June 1, 1868, 15 Stat. 667 (relinquishing Navajo claims over any land outside of the stipulated boundaries of their newly created reservation.).

[11] *Cf.* Treaty with the Florida Tribes of Indians, art. II, Sept. 18, 1823, 7 Stat. 224 (establishing reservation borders using metes and bounds).

[12] The Treaty of Medicine Creek may have been the first to recognize a tribe's right to fish. Treaty with Nisquallys, etc., art. III, Dec. 26, 1854, 10 Stat. 1132.

[13] *See, e.g.*, Worcester v. Georgia, 31 U.S. 515, 551–56 (1832).

[14] ANDERSON ET AL., *supra* note 5, at 30–31. This vagueness may have been a political compromise to get the Constitution signed. The Articles of Confederation had stated that the U.S. government and states shared the ability to regulate trade with tribes and acquire their land, whereas the Constitution removed this authority from the states via the Commerce Clause.

doctrine, even though they are certainly violated on a regular basis.[15] First, treaties, agreements, statutes, and executive orders are to be liberally construed in favor of the Indians.[16] Second, all ambiguities are to be resolved in favor of the Indians.[17] Third, treaties and agreements are to be construed as the Indians would have understood them.[18] Finally, tribal property rights and sovereignty are preserved unless Congress's intent to abrogate them is clear and unambiguous.[19]

B. The Canons and Indian Water Needs Led to Winans *and* Winters

The Indian canons have been applied repeatedly to Indian water resources issues, beginning in 1905 with *Winans*,[20] and followed three years later by *Winters*.[21] Together, these two cases establish that Indians on reservations have a right to use water, and Indians on ceded lands continue to have a right to fish on those rivers and lakes.

The issue in *Winans* concerned the Yakama Nation's contested right to continue to hunt and fish on lands that were previously a part of their reservation, but that were ceded to the U.S. government in a subsequent treaty.[22] The updated treaty stated that the Indians retained an exclusive right to fish on their reservation, as well as "the right of taking fish at all usual and accustomed places, in common with citizens of the territory."[23] The Supreme Court, using the canon that treaty language must be interpreted as the Indians would have understood it, held that the Tribe retained fishing rights on ceded lands.[24] This had the effect of precluding the white settlers, who had secured fee title to the ceded land, from excluding the Yakamas from fishing on the ceded lands even though the new owners could exclude non-Indians under state law. Also, despite the settlers receiving a commercial license from the state, they could not use

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[15] *Cf.* Arizona v. Navajo Nation, 599 U.S. 555, 558–59 (2023) (following the canons by recognizing tribes' implicit rights to use waters on their reservation even when the treaty establishing the reservation does not mention those rights, but then ignoring the canons by requiring the treaty to have explicit language affirming the U.S. government's duty to provide an accounting of those rights in its role as a trustee).

[16] COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 2.02 (Nell Jessup Newton ed., 2023).

[17] *Id.* Contra proferentem, the doctrine that contracts should be construed against the drafter, is not unique to Indian law. Its use has been traced as far back as the 1600s. *See* Steven Plitt, *Historical Tour of the Contra Proferentem Doctrine*, CLAIMS J. (Apr. 28, 2014), https://amp.claimsjournal.com/magazines/idea-exchange/2014/04/28/247832.htm.

[18] COHEN'S HANDBOOK, *supra* note 16, § 2.02.

[19] *Id.*

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

[21] 207 U.S. 564 (1908).

[22] *Winans*, 198 U.S. at 377.

[23] *Id.* at 378.

[24] *Id.* at 380–81 (first quoting Choctaw Nation v. United States, 119 U.S. 1 (1886), then citing Jones v. Meehan, 175 U.S. 1 (1899)).

a mechanical "fish wheel" that would remove nearly all the fish from that stretch of the river since, as reiterated by later courts,[25] that would frustrate the intent of the treaty by creating an empty promise: that the Yakama had a right to fish, but not to share in the catch.[26] Thus, *Winans* established tribes' right to hunt and fish on ceded lands and waters unless the right had been unambiguously abrogated by Congress or the President.[27]

The *Winters* case had a similar backdrop to *Winans*. Three Tribes occupied a large area in Montana territory, but Congress diminished the reservation in 1888 to allow for non-Indian settlement.[28] And settlers did come, beginning to divert water in 1900 and secure water rights under state law.[29] When drought came, the settlers left insufficient water in the stream for the Tribes.[30] The Supreme Court referred to the Indian canons in reasoning that even though the treaty was silent regarding water rights, it would be nonsensical to think that the Indians would have ceded the waters that made the reservation habitable and held that the federal government had the power "to reserve the waters and exempt them from appropriation under the state laws."[31] As will be discussed later, besides the exemption from state law and the establishment of federal reserved rights, *Winters* is also instructive of the viability of the doctrine in the eastern U.S., since the Court ignored arguments the government made on behalf of the Tribes regarding rights under the prior appropriation and riparian doctrines,[32] and instead grounded its decision in the government's constitutional power to enter into treaties with Indians.[33]

C. Winans *and* Winters *Established Five Tribal Water Rights Principles*

Many issues regarding tribal water rights remain unsettled, but the *Winans* and *Winters* courts established several principles that have been upheld by subsequent Supreme Court cases. In this section, I discuss

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[25] *See, e.g.*, United States v. Washington, 853 F.3d 946, 964–66 (9th Cir. 2017) (emphasizing the treaty's promise of sufficient fish to sustain the Tribes in holding that Washington's use of barrier culverts to block salmon passage violated its treaty obligations).

[26] *Cf.* Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 683 (1979) ("[T]he treaty secured the Tribe's right to a substantial portion of the run, and not merely a right to compete with nontreaty fishermen on an individual basis.").

[27] *Winans*, 198 U.S. at 381.

[28] Winters v. United States, 207 U.S. 564, 567–68 (1908).

[29] *Id.* at 567–69.

[30] *Id.* at 576.

[31] *Id.* at 577.

[32] BENSON ET AL., *supra* note 1, at 799.

[33] *Winters*, 207 U.S. at 576, 578.

those bedrock principles, leaving more thinly adjudicated issues for Part II. Principles 2 through 5 were first proposed by Professor Royster.[34]

1. Protection of Water Rights Has a Constitutional Basis

Indian water rights have their legal foundation in three areas of the Constitution. First, Congress has the authority to establish such rights under the Treaty Clause, as explained in *Winters*.[35] Reservations, and their subsequent water rights, have been created throughout the U.S. as a result of treaties entered into by tribes and the federal government, a sovereign-to-sovereign relationship.[36] Second, the *Cappaert v. United States* Court noted that Congress has the authority to establish these rights under the Commerce and Property Clauses.[37] The Commerce Clause applies because the federal government may regulate navigable streams used in interstate commerce, while the Property Clause gives the government the ability to regulate federal lands, including tribal reservations held by the government in trust for tribes.[38]

2. Water Is Reserved for Purposes of the Reservation

The *Winters* Court was clear in establishing that water rights were reserved to serve the purposes of the reservation.[39] Given the U.S. government's focus during the "reservation era"[40] on converting tribes to agrarian societies,[41] farming has rarely if ever been contested as a specific use, though states and other contestants have often argued, unsuccessfully, that a tribe had no water right whatsoever.[42] After *Winters*, subsequent courts have varied widely in their interpretation of what those purposes of the reservation—for which water rights are

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[34] Royster, *supra* note 4, at 176–201.

[35] U.S. CONST. art. II, § 2, cl. 2.

[36] *See generally* Worcester v. Georgia, 31 U.S. 515, 539 (1832).

[37] Cappaert v. United States, 426 U.S. 128, 138 (1976).

[38] *Id.*

[39] Winters v. United States, 207 U.S. 564, 576–78; Royster, *supra* note 4, at 184.

[40] *See* ANDERSON ET AL., *supra* note 5, at 48–49, 78–103.

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

[42] *See id.* (making the argument that the plaintiffs' rights were senior to tribal rights because the Tribe had not yet put the water to beneficial use as required by the prior appropriation doctrine); Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist., 849 F.3d 1262 (9th Cir. 2017); *In re* Gen. Adjudication of All Rts. to Use Water in the Big Horn River Sys., 753 P.2d 76 (Wyo. 1988), *aff'd by an equally divided court sub nom.* Wyoming v. United States, 492 U.S. 406 (1989) (noting that the State argued that federal government did not intend to set aside a water right when it created the reservation); *In re* CSRBA Case No. 49576 Subcase No. 91-7755, 448 P.3d 322 (Idaho 2019) (arguing water rights did not exist because Congress did not ratify the treaty); Arizona v. California, 373 U.S. 546, 596 (1963) (arguing that the U.S. government did not have the right to reserve navigable waters after Arizona became a state, that navigable waters cannot be reserved by Executive Order, and that the U.S. government did not intend to reserve waters for the reservations).

reserved—should include. Some have allowed for fisheries, fish hatcheries, and mining, whereas others have refuted all uses except for agriculture.[43] Courts have uniformly upheld, however, that the reservation must be provided water appurtenant to the purpose of the reservation.[44]

3. Water Is Reserved for Aboriginal Practices

Reserved water rights also exist to allow tribes to continue aboriginal practices like hunting, fishing, food gathering, and religious ceremonies.[45] This point was established in *Winans*,[46] and *United States v. Adair*, leaning on the Indian canons, added "nor is it possible that the Tribe would have understood such a reservation of land to include a relinquishment of its right to use the water as it had always used it on the land it had reserved as a permanent home."[47] A number of cases across the country have upheld various aspects of aboriginal rights, both on- and off-reservation within Indian country.[48]

4. Tribal Water Rights Are Often the Most Senior

It is well settled that reserved water rights are created, and the priority date is established, on the date the reservation was created[49] unless Congress specifically states otherwise.[50] Because many Indian

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[43] *Cf. Big Horn*, 753 P.2d at 135; *Wyoming*, 492 U.S. at 407. In *Wyoming*, the special master found that the Tribes had rights for agriculture, fisheries, municipal, domestic, commercial, and wildlife and aesthetic uses. The district and supreme courts of Wyoming nonetheless denied a right existed for fisheries, wildlife and aesthetic uses, holding that agriculture was the only purpose for the reservation.

[44] *Cf.* Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir. 1981) (holding that maintaining a fishery was an appropriate use of a water right); United States v. Anderson, 591 F. Supp. 1, 5 (E.D. Wash. 1982) (holding that water for a fish hatchery was an appropriate use of a water right); Cappaert v. United States, 426 U.S. 128, 138 (1976) ("This court has long held that when the Federal Government withdraw its land from the public domain and reserved 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.").

[45] United States v. Winans, 198 U.S. 371 (1905) (hunting and fishing); United States v. Adair, 723 F.2d 1394 (9th Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984) (hunting and fishing); *cf.* United States v. Abouselman, 976 F.3d 1146 (10th Cir. 2020) (creating aboriginal water rights for several Pueblos in New Mexico in place of *Winters* rights, which do not apply to Pueblo lands because they were not set aside as reservations by the U.S. government). In some cases, usufructuary rights to hunt, fish, and gather wild rice have been recognized without establishing a water right. *See* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999).

[46] 198 U.S. at 378–79.

[47] *Adair*, 723 F.2d at 1414.

[48] For a discussion of the statutorily and judicially-established definition of Indian Country, see ANDERSON ET AL., *supra* note 5, at 273–304. *See also* McGirt v. Oklahoma, 140 S. Ct. 2452 (2020).

[49] BENSON ET AL., *supra* note 1, at 803; *Cappaert*, 426 U.S. at 138.

[50] There are no known instances where Congress has created an Indian reservation but specifically excluded federal reserved water rights. In at least one case, however, a national wildlife

reservations were created in the 1800s prior to opening lands to non-Indian settlers, tribes often count among the most senior water rights holders.[51] If, in addition, the tribe also followed aboriginal practices like hunting and fishing, the priority date for those aboriginal uses is "time immemorial" because the treaty establishing the reservation simply "confirmed the continued existence of these rights."[52] These time immemorial aboriginal use rights can exist off-reservation on lands ceded to the government,[53] as well as on the reservation.[54]

5. Non-use Does Not Extinguish Tribal Reserved Water Rights

State water laws often provide for abandonment or forfeiture of water rights for non-use,[55] but that principle does not apply to tribal water rights for at least three reasons. First, tribal reserved water rights are a product of federal property law, which preempts application of state law.[56] The exception to preemption is where Congress has empowered states to determine water rights in basin-wide adjudications under the McCarran Amendment, but this authority is limited to description and quantification of the right, not extinguishment thereof.[57] The federal government, on behalf of tribes, retains the authority to challenge in federal court any state adjudication of a reserved water right.[58] Alienation of tribal property is also precluded by the Nonintercourse Act of 1793,[59] except where Congress has provided otherwise. Similarly, adverse possession of water, despite being allowed in some states,[60] is also nonviable as a theory to

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refuge (another type of federal reservation to which the *Winters* doctrine applies) was created through the purchase of private lands and their appurtenant water rights rather than by asserting a *Winters* right, most likely because all the water in the watershed was already appropriated by other users. *See* U.S. FISH & WILDLIFE SERV., ALAMOSA – MONTE VISTA NATIONAL WILDLIFE REFUGE COMPLEX DRAFT COMPREHENSIVE CONSERVATION PLAN AND ENVIRONMENTAL ASSESSMENT (1992).

51 Royster, *supra* note 4, at 170.

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

53 United States v. Winans, 198 U.S. 371, 379 (1905).

54 *Id.*; United States v. Abouselman, 976 F.3d 1146, 1160 (10th Cir. 2020).

55 *See* N.M. STAT. § 72-5-28 (failure to use water; forfeiture); N.M. STAT. § 72-12-8 (water right forfeiture); N.M. ADMIN. CODE 19.26.2.20 (forfeiture and abandonment of a water right). The first two are New Mexico statutes, and the third is the New Mexico administrative code.

56 Cappaert v. United States, 426 U.S. 128, 145 (1976).

57 43 U.S.C. § 666 (1988).

58 *Cf.* United States v. New Mexico, 438 U.S. 696, 702 (1978) (arising from a U.S. government appeal of the results of a basin-wide stream adjudication conducted by the State of New Mexico through the state court system, which was then appealed to the U.S. Supreme Court).

59 25 U.S.C. § 177.

60 Because water rights are often treated as one of the sticks in the bundle of property rights, adverse possession of water is sometimes allowed under state common law, including in Colorado (Archuleta v. Gomez, 200 P.3d 333 (Colo. 2009)) and in Virginia (Scott v. Burwell's Bay Imp. Ass'n, 708 S.E.2d 858 (Va. 2011)). Other states, including New Mexico, have held that when water

cleave water from tribes since federal property, including property held in trust for tribes, cannot be adversely possessed.[61]

Second, the Supreme Court implied in *Winters* that reserved rights survived non-use, saying "[t]hat the government did reserve [water rights] we have decided, and for a use which would be necessarily continued through the years."[62] Several other cases have upheld the notion that a tribe's rights are not extinguished for lack of use.[63] For example, in a 1963 case, the Supreme Court held that Congress had reserved water for five Tribes in the Colorado River Basin even though little or no irrigation infrastructure had been developed since signing of the original treaty almost a century earlier.[64] Similarly, in *Colville Confederated Tribes v. Walton*, the Ninth Circuit noted that water must be reserved for the Indian reservation because at the time the treaties were signed, the Tribes "were not in a position, either economically or in terms of their development of farming skills, to compete with non-Indians for water rights."[65]

Third, non-use does not extinguish reserved water rights because, as noted by the *Walton* court, as per the Indian canons, "termination or diminution of Indian rights requires express legislation or a clear inference of congressional intent."[66] And Congress knows how to extinguish tribal rights, including in the eastern U.S.—non-use alone does not suffice as termination of the right.[67]

II. TRIBAL RESERVED WATER RIGHTS INCLUDE ASPECTS THAT ARE IN CONTENTION OR HAVE NOT BEEN LITIGATED

Above I described the foundational elements of tribal reserved water rights that the Supreme Court has repeatedly upheld or that appear relatively well settled. But many legal components of federal reserved water rights remain unclear.[68] In this Part, I analyze elements of tribal

rights are abandoned, ownership of the right reverts to the public, and public water rights cannot be adversely possessed. *See* Turner v. Bassett, 81 P.3d 564, 570–71 (N.M. App. 2003).

61 48 U.S.C. § 1489 (1994).

62 207 U.S. 564, 577 (1908).

63 Royster, *supra* note 4, at 182.

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

65 647 F.2d 42, 46 (9th Cir. 1981).

66 *Id.* at 50.

67 *See* County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 253 (1985) (noting that Congress could be expected to extinguish title of the Oneida Nation in New York as it had done in two other states, citing the Rhode Island Indian Claims Settlement Act, 25 U.S.C. § 1701 *et seq*. and Maine Indian Claims Settlement Act, 25 U.S.C. § 1721 *et seq.*).

68 *See* Skokomish Indian Tribe v. United States, 401 F.3d 979, 989 (9th Cir. 2005) (en banc) (acknowledging that in many ways, the *Winters* doctrine has remained undetailed).

reserved water rights that have been in greater contention among courts, and I further provide normative conclusions about each of these contested water rights issues. I also lay out issues that have been addressed by few courts, if any, but are relevant to reserved rights throughout the country, including in the eastern U.S. For each issue, I provide arguments and commentary to support the viability of tribal water rights, explaining as appropriate why I believe the cases were wrongly decided. Tribes asserting reserved water rights must be prepared to argue any of these points in asserting their water rights.

A. Tribal Reserved Water Rights Are Not Limited to a Single "Primary" Purpose

The Supreme Court has not fully articulated the limits of *Winters* rights for federal reservations. Several courts, including the Supreme Court, have articulated limits in discrete contexts, holding, for example, that federal reserved water rights in a national forest are limited to the single primary purpose of that property.[69] However, the issue of whether the primary purpose limitation applies to all reservations has never reached the Supreme Court. Such a limitation would be inappropriate.

The primary purpose rule was announced in *United States v. New Mexico*, where the Supreme Court held that a national forest's federal reserved water right did not extend to "aesthetic, environmental, recreational, or wildlife-preservation purposes," but instead was limited to the primary purpose of the forest: "[t]o conserve the water flows, and to furnish a continuous supply of timber for the people."[70]

Three years later, in a case involving Indian lands, the Ninth Circuit in *Walton* dutifully referenced *New Mexico*, but then appeared to distinguish it, saying "[t]he specific purposes of an Indian reservation, however, were often unarticulated. The general purpose, to provide a home for the Indians, is a broad one and must be liberally construed."[71] The court went on to recognize rights for both irrigation and a fishery that would provide a "homeland for the survival and growth of the Indians and their way of life."[72] Commentators have noted that water rights uses for Indian reservations should be interpreted broadly if self-sufficiency is truly the goal,[73] and the Ninth Circuit has repeatedly affirmed tribal reserved rights

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[69] *See, e.g.*, United States v. New Mexico, 438 U.S. 696, 702, 707 (1978).

[70] *Id.* (citing 30 CONG. REC. 967 (1897)).

[71] Colville Confederated Tribes v. Walton, 647 F.2d 42, 47 (9th Cir. 1981).

[72] *Id.* at 49.

[73] WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 536 (7th ed. 2020) (citing United States v. Finch, 548 F.2d 822, 827–32 (9th Cir. 1976)).

of water for fishing.[74] Other courts within the Ninth Circuit have held similarly, finding that appropriate purposes apart from agriculture included instream flows for fisheries,[75] instream flows for fish hatcheries,[76] and other industries.[77] Importantly, the Ninth Circuit has repeatedly allowed tribes to use their quantified agricultural water rights for other lawful purposes.[78]

On the other hand, some federal courts have denied reservation uses, assuming that *New Mexico* required a single primary purpose of the tribal reservation.[79] States and their courts—often considered the "deadliest enemies" of tribes' rights[80]—have also denied non-agricultural uses, with courts disregarding Indian canons by holding that treaty language supports only agriculture as the basis for quantifying the water right.[81]

A leading but incorrectly decided case regarding multiple purposes is *Skokomish Indian Tribe v. United States*.[82] There, the Ninth Circuit correctly read the *Cappaert* Court's decision—involving reserved water rights for tribal reservations, national parks, and national wildlife refuges—to mean that reserved rights include "only that amount of water necessary to fulfill the purpose of the reservation, no more."[83] It is reasonable and proper to place recognizable limits on all water users in a

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[74] United States v. Adair, 723 F.2d 1394, 1410 (9th Cir. 1983); *Walton*, 647 F.2d at 48. *But see* Skokomish Indian Tribe v. United States, 401 F.3d 979, 989 (9th Cir. 2005) (en banc).

[75] United States v. Anderson, 591 F. Supp. 1, 5 (E.D. Wash. 1982).

[76] *Id.*

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

[78] *Id.* at 48–49 (noting that quantified water rights set aside for agriculture could be used for other purposes); United States v. Anderson, 736 F.2d 1358, 1365 (9th Cir. 1984) (establishing that the Tribe may use its water for "any lawful purpose," including use of irrigation water to support a non-consumptive use like a fishery); United States v. Truckee-Carson Irrigation Dist., 429 F.3d 902 (9th Cir. 2005) (arising from the Tribe switching its application of water rights from agricultural irrigation to instream flow to maintain lake levels for a fishery).

[79] *Skokomish*, 401 F.3d at 989.

[80] United States v. Kagama, 118 U.S. 375, 384 (1886) ("[Tribes] owe no allegiance to the states, and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies."); McGirt v. Oklahoma, 140 S. Ct. 2452, 2462 (2020) ("Under our Constitution, States have no authority to reduce federal reservations lying within their borders. Just imagine if they did . . . It would leave tribal rights in the hands of the very neighbors who might be least inclined to respect them."); *see also* David Getches, *The Future of Winters, in* THE FUTURE OF INDIAN AND FEDERAL RESERVED WATER RIGHTS: THE *WINTERS* CENTENNIAL 307, 328 (Barbara Cosens and Judith V. Royster eds., 2012) ("The Supreme Court said long ago that the state is the deadliest enemy of the tribes."); CANBY JR., *supra* note 73, at 545 ("[Tribes] believe that the state forum is likely to be unsympathetic to Indian rights, and that the applicability of federal law does not provide great protection against bias.")).

[81] *In re* Gen. Adjudication of All Rts. to Use Water in the Big Horn River Sys., 753 P.2d 76, 97 (Wyo. 1988), *aff'd by an equally divided court sub nom.* Wyoming v. United States, 492 U.S. 406 (1989).

[82] 401 F.3d at 989.

[83] *Id.* (citing United States v. New Mexico, 438 U.S. 696, 700 (1978) (quoting Cappaert v. United States, 426 U.S. 128, 141 (1976))).

basin, including federal government reservations, so that users may rely on their rights.[84] But then the court lost its footing, inappropriately interpreting *New Mexico* to mean that the primary use rule applied to tribal reservations.[85] *New Mexico* announced the primary use rule in the context of a reserved water right in a national forest; it did not extend it to tribal reservations.[86]

The *New Mexico* Court made no mention of tribal reservations, nor should it have. A reservation for a tribal homeland is not the same as a reservation to produce timber. Tribal reservations are established under the Treaty Clause through negotiation. National forests are created under the Property Clause[87] and several statutes.[88] Tribal reservations are held in trust for benefit of the tribes by the Department of the Interior. Forest lands are managed for multiple uses by the U.S. Forest Service and can be acquired, divested, and traded. People are not trees, and the *Skokomish* court erred in its holding by blindly applying *New Mexico's* rule—regarding rights in a national forest—to the context of tribal reservations.

The *Skokomish* court also ignored the Indian canons by suggesting that treaty language would need to explicitly provide for on-reservation fishing rights to justify a fishery-based water right, rather than liberally construing the treaty and resolving ambiguities in favor of the Tribe.[89] The Ninth Circuit repeated its *Skokomish* approach in *Agua Caliente v. Coachella Valley District*, in which it again generally applied *New Mexico's* primary purpose rule to Indian reservations while simultaneously confusing the issue by affirming that a broad homeland standard existed.[90] Fortunately, recent state court cases have recognized this error and held that *New Mexico's* primary purpose rule should not be applied to Indian reservations.[91]

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

[85] *Skokomish*, 401 F.3d at 989 (citing United States v. New Mexico, 438 U.S. 696, 702 (1978)).

[86] *See generally* United States v. New Mexico, 438 U.S. 696 (1978).

[87] United States v. Gardner, 107 F.3d 1314, 1318 (9th Cir. 1997), *cert. denied*, 522 U.S. 907 (1997).

[88] Lincoln Bramwell & James G. Lewis, *The Law that Nationalized the U.S. Forest Service*, FOREST HIST. TODAY, Spring/Fall 2011 8, 8–9 (identifying the 1891 Forest Reserve Act, the 1897 Organic Act, and the 1911 Weeks Act).

[89] *See Skokomish*, 401 F.3d at 989. ("The Treaty merely provides that the Tribe shall have '[t]he right of taking fish . . . in common with all citizens of the United States.' Treaty, art. 4. This language distinguishes our case from United States v. Adair, 723 F.2d 1394 (9th Cir. 1983), where we based our finding of implied water rights in part on treaty language 'expressly provid[ing] that the [plaintiff Indian Tribe] will have exclusive on-reservation fishing and gathering rights.'").

[90] *See* Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist., 849 F.3d 1262, 1270 (9th Cir. 2017).

[91] *See In re* CSRBA Case No. 49576 Subcase No. 91-7755, 448 P.3d 322, 346 (Idaho 2019) ("Given the substantive differences between Indian and non-Indian reservations, the broad interpretation of Indian reservation rights by the United States Supreme Court, the persuasive

B. A Tribe Whose Water Right Is Limited to Agricultural Use Must Not Be Constrained by an Economic Standard

When courts choose to construe treaties as limiting reserved water rights to those needed to convert Indians to an agrarian lifestyle, meaning provision of water only for irrigation, it is also incumbent upon the court to cast away any preconceived notions regarding economic reasonableness. To limit the tribe to water only for agriculture but then reduce this amount because of an arbitrary economic metric could place the tribe in an untenable situation: having a water right limited to growing crops, but not having sufficient water to do so.

The Supreme Court, in *Arizona v. California*, established the practical irrigable acreage ("PIA") standard for tribes whose reservation was to be agrarian in nature.[92] PIA is appropriate because it requires that the area be capable of growing crops and that an engineering feasibility study show that the land is actually irrigable. From there, however, state courts added limitations that effectively reduced what would have been awarded under the PIA standard. For example, the *Big Horn* court followed the PIA standard in announcing a preliminary water right, but added a second step to the analysis—after calculating the PIA, it added a requirement that the cost of irrigation be "reasonable."[93] The court in *State ex rel. Martinez v. Lewis* later used this rule to disallow part of the Mescalero Apache Tribe's recognized PIA due to costs.[94]

Tacking an economic analysis onto a PIA award is arbitrary for at least three reasons. First, confining a tribe to a reservation and expecting tribal members to adopt agriculture makes the government liable for also reserving sufficient water for the purposes of that reservation. Related irrigation costs are a fiscal issue that must be dealt with by Congress and the tribe, not a legal matter to be addressed by the courts. Second, a standard requiring that the cost of irrigation be "reasonable" can, de facto, only be applied at a certain point in time. But revenues and costs vary greatly, and what might not be economically viable today (or perhaps

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reasoning given by the Montana and Arizona courts, the logic supporting the homeland purpose theory, as well as our own precedent, we hold the district court erred in utilizing the primary-secondary purpose analysis set out in *New Mexico*. Therefore, purposes behind the creation of an Indian reservation should be more broadly construed and not limited solely to what may be considered a 'primary' purpose."); *In re* Gen. Adjudication of All Rts. to Use Water in Gila River Sys. & Source, 35 P.3d 68, 77 (Ariz. 2001); State *ex rel.* Greely v. Confederated Salish & Kootenai Tribes of Flathead Reservation, 712 P.2d 754, 767 (Mont. 1985)).

92 373 U.S. 546, 600 (1963).

93 *In re* Gen. Adjudication of All Rts. to Use Water in the Big Horn River Sys., 753 P.2d 76, 101 (Wyo. 1988), *aff'd by an equally divided court sub nom.* Wyoming v. United States, 492 U.S. 406 (1989).

94 861 P.2d 235, 247 (N.M. App. 1993).

even legal—e.g. marijuana) might be viable under different economic circumstances. Third, this approach limits a tribe's ability to apply its reserved right to a different use in the future that could enhance the livability of the reservation.[95]

C. Tribal Water Rights Must, Where Necessary, Include Aspects of Quantity, Quality, Timing, and Distribution

The principle that reserved water rights are not limited to quantity alone—but also include aspects of quality, timing, and distribution—is less supported as black letter law, but it underlies many aspects of what might include the several purposes of a tribal reservation. Since *Winters*, courts have affirmed that water rights for a reservation must be quantified, often for irrigation of crops[96] and for fisheries.[97] Indeed, in the arid West, the scarcity of water is the main driver behind the prior appropriation doctrine.[98] But having enough water for a given purpose is only one side of the quantity coin. In the eastern U.S. especially, there also exists the possibility of having too much water at times due to the actions of upstream users. And having the correct quantity of water can be immaterial if relevant aspects of quality, timing, and distribution are not met. Thus, the right to water must encompass these factors of quality, timing, and distribution, in addition to sheer quantity of water.

Regarding the minimum side of the quantity coin, in the 1978 case *United States v. New Mexico*, the Supreme Court held that the federal government did not reserve an unlimited amount of water when it created a national forest.[99] Instead, the Court limited the federal reserve water right to the minimum amount necessary to achieve the purpose of the reservation.[100] This is conceptually straightforward in regards to irrigation needs; plainly put, crops require water.[101] Further, courts have recognized that minimums also apply to stream flow rates and lake levels for maintenance or restoration of natural fisheries and fish hatcheries.[102] Again, this is conceptually straightforward: fish need water. However,

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[95] *See infra* Part II. E.

[96] *See* Arizona v. California, 373 U.S. 546, 600 (1963); Colville Confederated Tribes v. Walton, 647 F.2d 42, 50 (9th Cir. 1981).

[97] United States v. Winans, 198 U.S. 371, 378 (1905); *Walton*, 647 F.2d at 48.

[98] *See* SEA GRANT L. CTR., OVERVIEW OF PRIOR APPROPRIATION WATER RIGHTS, https://nsglc.olemiss.edu/projects/waterresources/files/overview-of-prior-appropriation-water-rights.pdf (last visited Jan. 8, 2024).

[99] 438 U.S. 696, 718 (1978).

[100] *Id.*

[101] Though the concept that crops need sufficient water is conceptually simple, it still requires significant analysis of technical factors including soils, climate, crops, and other variables.

[102] United States v. Anderson, 591 F. Supp. 1, 5–6 (E.D. Wash. 1982).

these minimums are not to be construed as being numbers so small such that a species can be listed as threatened or endangered as long as it does not go extinct—the minimums are not just to ensure some bare minimum level of fish survival.[103] While such minima might comply with the Endangered Species Act, which protects only species listed as endangered or threatened,[104] that would be insufficient for tribes. Rather, flow rates must be such that all the target species' needs are met to sustain healthy populations allowing for a normal tribal harvest.[105] In rivers that are regulated by dams, this reserved right could include the need to allow for an annual spring minimum flood pulse, since some fish species are triggered to reproduce only when overbank flooding occurs, creating shallow riparian wetlands and backwaters with very low water flow velocity.[106] Similarly, wild grains depended upon by some tribes require soils to be flooded to germinate.[107]

A reserved right must also include a maximum quantity where appropriate. Suppose a tribe's reservation is located downstream of a dam, and the tribe depends on wild rice harvest as part of its livelihood. Dams often smooth out river flows, releasing more water during drier portions of the year and holding back waters during higher flows when overbank flooding would otherwise occur. Wild rice, after germination in flooded soils, requires a drying period, and water that remains too deep can damage the crop.[108] Thus, in such a situation, a maximum flow rate or lake level might be required of the dam operator. Flooding caused by illegal actions of the State of Florida and upstream third parties were successfully resolved after the Seminole Tribe asserted its *Winters* rights, resulting in a compact with the State and the federal government.[109]

Maximum and minimum flow rates and lake levels also require a timing component: water must be delivered at the right time of the year and may require seasonal variation depending on the purpose of the

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[103] In the parlance of the Endangered Species Act, a minimum flow rate might be required to avoid a jeopardy determination, which means that the action jeopardizes the continued existence of the species. *See* Endangered Species Act of 1973 § 7, 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.02.

[104] *See id.* § 7, 16 U.S.C. § 1531 *et seq*.

[105] *Cf.* Baley v. United States, 942 F.3d 1312, 1328–29 (2019), *cert. denied*, 141 S. Ct. 133 (2020).

[106] Lorenzo Vilizzi, *Abundance Trends in Floodplain Fish Larvae: The Role of Annual Flow Characteristics in the Absence of Overbank Flooding*, 181 FUNDAMENTAL & APPLIED LIMNOLOGY 215, 215–27 (2012).

[107] E.A. OELKE ET AL., ALTERNATIVE FIELD CROPS MANUAL: WILD RICE 4 (1992). Tribes known to have used wild rice since time immemorial include the Ojibwe, Menominee, and Cree.

[108] *Id.*

[109] Jim Shore & Jerry C. Straus, *The Seminole Water Rights Compact and the Seminole Indian Land Claims Settlement Act of 1987*, 6 J. LAND USE & ENV'T L. 1, 3, 5, 18 (1990). The Tribe asserted *Winters* for the entire scope of its water rights, not just to resolve flooding issues.

flow.[110] Said another way, tribes may need to assert an acceptable range of flow rates or lake levels on a monthly or even weekly basis to ensure the right amount of water is available at the right time throughout the year. Timing is more circumspect in court decisions awarding tribal reserved water rights, though providing tribes their volume of surface water during the winter rather than during the growing season would frustrate congressional intent in establishing the reservation for agricultural purposes unless sufficient storage was also available.[111] The storage of winter flows specifically to supply tribal irrigation needs is still rare, though storage infrastructure is becoming more common in Indian water rights settlements throughout the West.[112] For example, in New Mexico, the U.S. Army Corps of Engineers regularly stores winter flows of the Chama River in El Vado or Abiquiu Reservoir in part for the purpose of supplying downstream Pueblos with their irrigation water at the appropriate time.[113]

While water quantity and timing are mostly creatures of common law arising from *Winans*, *Winters*, and their progeny, tribes have a clear statutory path to protecting water quality for federal jurisdictional waters via the federal Clean Water Act ("CWA").[114] Tribes can apply to the Environmental Protection Agency ("EPA") for authorization to be treated in a similar manner as a state and, once approved, may establish their own water quality standards similar to those developed by states under the

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[110] *See generally* TEX. A&M UNIV. CORPUS CHRISTI HARTE RSCH. INSTS. FOR GULF OF MEXICO STUDS., FRESHWATER INFLOWS, https://www.freshwaterinflow.org/ (last visited Jan. 8, 2024).

[111] BENSON ET AL., *supra* note 1, at 845; LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1176 (3rd ed. 2000) ("The question in each instance is whether Congress, in exercising a constitutionally enumerated power, intended to preempt state water law. Courts will find such an intent if conformity to state water law would frustrate 'the accomplishment and execution of the full purposes and objectives of Congress.'") (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

[112] *Cf.* Water Infrastructure Improvements for the Nation Act, Pub. L. No. 114–332, § 3608, 30 Stat. 1628, 1796–1801 (2016) (establishing that the Choctaw and Chickasaw Nations form part of the board that manages withdrawals from Sardis Lake in Oklahoma); *id.* § 3709, 30 Stat. 1628, 1824–26 (allocating water annually from storage at Lake Elwell to the Blackfeet Indians)).

[113] Water was previously held in El Vado Reservoir, but needed repairs forced a switch to Abiquiu Reservoir in 2022–23. *See Pueblo Water Rights*, WATER ADVOCATES FOR NEW MEXICO & MIDDLE RIO GRANDE, https://mrgwateradvocates.org/pueblo-water-rights (last visited Jan. 8, 2024); U.S. ARMY CORPS OF ENGINEERS ALBUQUERQUE DISTRICT, FINAL ENVIRONMENTAL ASSESSMENT AND FINDING OF NO SIGNIFICANT IMPACT FOR A TEMPORARY DEVIATION IN THE OPERATION OF ABIQUIU DAM, RIO ARRIBA COUNTY, NEW MEXICO (2022), https://www.spa.usace.army.mil/Portals/16/docs/environmental/fonsi/2022/FEA_FONSI_Abiquiu_Deviation.pdf?ver=LnoVgGOIeZJ7R3uW43BaQw%3D%3D. The irony is that the water rights of the six Middle Rio Grande Pueblos (Cochiti, Santo Domingo, San Felipe, Santa Ana, Sandia and Isleta) have not yet been quantified, much less settled.

[114] Clean Water Act, 33 U.S.C. § 1251 *et seq.*

CWA's cooperative federalism framework.[115] As of February 2024, fifteen tribes in nine states following hybrid or riparian law have been found eligible by EPA to administer their own water quality standards program.[116] These standards, which might be stricter than those of the state, were tested in *City of Albuquerque v. Browner*, resulting in the City being required to improve its wastewater treatment plant to reach the water quality standards the Isleta Pueblo had established for its downstream reservation.[117]

CWA jurisdiction is limited to "Waters of the United States," ("WOTUS") a term whose precise definition has been in flux for over twenty years,[118] but was recently narrowed significantly by the Supreme Court's decision in *Sackett v. EPA*.[119] Outside WOTUS areas, including those regions no longer protected by the CWA due to *Sackett*, tribes must continue to assert complete and appropriate description of their reserved rights in court to prevent acute and chronic water quality degradation. Asserting rights only to the quantity of water is insufficient. For example, the district court in *United States v. Anderson* recognized that tribal treaty-based fishing rights and access to fishing areas are meaningless if the water quality is impaired to the extent that the cold-water fishery cannot be maintained.[120] In that case, the court required both a minimum flow rate and maximum water temperature as part of the Tribe's reserved water right, and gave a special master purview to adjust the flow rate to ensure the maximum water temperature was not exceeded.[121] Thus, the

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115 *EPA Actions on Tribal Water Quality Standards and Contacts*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/wqs-tech/epa-actions-tribal-water-quality-standards-and-contacts (last visited Jan. 7, 2024).

116 *Id.* The fifteen tribes are Bad River Band of Lake Superior Chippewa (WI), Eastern Band of Cherokee Indians (NC), Fond du Lac Band of Minnesota Chippewa (MN), Grand Portage Band of Minnesota Chippewa (MN), Keweenaw Bay Indian Community (MI), Lac du Flambeau Band of Lake Superior Chippewa (WI), Leech Lake Band of Ojibwe (MN), Miccosukee Tribe (FL), Pawnee Nation (OK), Sac and Fox Tribe of the Mississippi in Iowa (IA), Saint Regis Mohawk Tribe (NY), Seminole Tribe (FL), Seneca Nation of Indians (NY), Sokaogan Chippewa Community (WI), Winnebago Tribe of Nebraska (NE).

117 City of Albuquerque v. Browner, 97 F.3d 415, 429 (10th Cir. 1996).

118 CWA jurisdiction first reached the Supreme Court in Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 159 (2001).

119 143 S. Ct. 1322 (2023); *see also* Sara Bergthold, *New Mexico Wild Statement on* Sackett v. EPA *Decision Narrowing Waters of the United States Definition*, NEW MEXICO WILD, https://www.nmwild.org/2023/05/25/new-mexico-wild-statement-on-sackett-v-epa-decision-narrowing-of-waters-of-the-united-states-definition/ (May 25, 2023) (estimating that over ninety percent of the wetlands in New Mexico lost federal protection with the *Sackett* decision).

120 591 F. Supp. 1, 4 (E.D. Wash. 1982).

121 *Id.* at 5. Flow rates vary inversely with water temperature, since deeper water is warmed more slowly by the sun.

court made temperature, an aspect of water quality, an explicit component of the Spokane Tribe's reserved water right.[122]

Distribution, or getting the water to the right location, is the fourth aspect that may require description under a reserved water right. Distribution has its most likely application where a tribe's water was moved away from the reservation by, for example, a federal ditching project that drained wetlands that were needed by the tribe to continue aboriginal practices like fishing or gathering of wild rice, or simply to maintain ecological integrity.[123] This would imply a duty on the part of the federal government to restore hydrological aspects important to achieving the purposes of the reservation. Distribution does not imply a duty on the part of the government to provide irrigation infrastructure if such a responsibility is not found in the treaty or other relevant documents creating the reservation.[124]

In summary, tribes nationwide have, and should continue to, assert all four aspects of a water right—quantity, quality, timing, and distribution—when it is germane to achieving the goals of the reservation.

D. Tribal Reserved Water Rights Can Include Both Surface Water and Groundwater

The *Winters* Court did not distinguish between surface water and groundwater in its holding.[125] This is likely because groundwater and its connection to surface water was poorly understood at the time of the case, and nearly all water use, apart from domestic wells, involved diversions from streams.[126] Beginning in the 1950s, however, commercial irrigators began to rely increasingly on wells, a trend that has only increased as surface water becomes less available due to multiple factors.[127] Groundwater pumping can cause aquifer levels to decrease, resulting in

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122 *Id.*

123 *See* Shore & Straus, *supra* note 109, at 18.

124 Arizona v. Navajo Nation, 143 S. Ct. 1804, 1814 (2023).

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

126 *Cf.* Sipriano v. Great Spring Waters of Am., Inc., 1 S.W.3d 75, 76 (Tex. 1999) (observing that the Supreme Court of Texas had once "noted that the movement of groundwater is 'so secret, occult, and concealed that an attempt to administer any set of legal rules in respect to [it] would be involved in hopeless uncertainty . . .'" (quoting Hous. & Tex. Cent. Ry. Co. v. East, 81 S.W. 279, 281 (Tex. 1904))).

127 Surface water has become less available, at least in some areas, due to full or over-appropriation of surface waters, over-pumping of groundwater resulting in reduced surface flows, and climate change. *See Groundwater Decline and Depletion*, U.S. GEOLOGICAL SURV. (June 6, 2018), https://www.usgs.gov/special-topics/water-science-school/science/groundwater-decline-and-depletion.

more infiltration of surface water and, thus, decreased surface flows.[128] As such, tribes asserting their *Winters* rights today may necessarily need to rely on groundwater. This fact was not recognized by the *Big Horn* court, which found no precedent to allow the Shoshone and Bannock Tribes to use groundwater as part of their reserved water right.[129] More recently, however, the Ninth Circuit made explicit that groundwater can be a part of a tribe's water right: a federal reservation's "survival is conditioned on access to water—and a reservation without an adequate source of surface water must be able to access groundwater."[130] The Supreme Court denied certiorari in the case,[131] and at least one state court has added to the authority on this point.[132]

E. Tribes May Change the Use of Their Water

Once a right is confirmed by a court, a tribe must have the latitude to change the use of the water if it so chooses. As discussed by the Ninth Circuit in *Walton*:

> When the Tribe has a vested property right in reserved water, it may use it in any lawful manner. As a result, subsequent acts making the historically intended use of the water unnecessary do not divest the Tribe of the right to the water . . . .
>
> [P]ermitting the Indians to determine how to use reserved water is consistent with the general purpose for the creation of an Indian reservation providing a homeland for the survival and growth of the Indians and their way of life.[133]

Such a right is not controversial. Most if not all states allow water rights holders to change the use, point of diversion, and other aspects of the right if it does not negatively impact other users.[134]

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128 *Id.*

129 *In re* Gen. Adjudication of All Rts. to Use Water in the Big Horn River Sys., 753 P.2d 76, 99–100 (Wyo. 1988), *aff'd by an equally divided court sub nom.* Wyoming v. United States, 492 U.S. 406 (1989).

130 Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist., 849 F.3d 1262, 1271 (9th Cir. 2017), *cert. denied*, 583 U.S. 996 (2017).

131 *Id.*

132 *In re* CSRBA Case No. 49576 Subcase No. 91-7755, 448 P.3d 322, 349-51 (Idaho 2019).

133 647 F.2d 42, 48 (9th Cir. 1981).

134 LEON F. SZEPTYCKI ET AL., WATER IN THE WEST, ENVIRONMENTAL WATER RIGHTS TRANSFERS: A REVIEW OF STATE LAWS 5 (2015).

F. Tribal Sovereignty Requires Reserved Water Rights to Follow Federal Rather Than State Law

The Constitution recognizes that tribes are to be treated as sovereigns, not as states, corporations, or other entities.[135] While the precise definition of a sovereign has varied through the years, it is well established that tribes do not follow state laws as applied to property rights.[136] Thus, tribes' reserved water rights are claimed and perfected under federal law, not state law. The role of the state is to integrate these rights into the statewide system for water administration, but the right remains a federal right held in trust for the tribe, not a right granted by state law.

Because reserved rights follow federal law,[137] some aspects of prior appropriation may need to be adopted by riparian states as applied to tribal rights. For example, some riparian states now observe some type of seniority when issuing permits for water use.[138] When that is the case, the tribal right could theoretically receive a priority date equivalent to the date the reservation was established, and other users become more junior as applicable. In riparian states that have no priority system, however, the burden will be on the state to develop a system that does not impinge on the tribal right. For example, on a stream where riparian shortage sharing is practiced, the tribal right could be quantified, and its right would be removed "from the top," with other users then practicing shortage sharing on the remainder.

Federally recognized tribes may, of course, acquire water rights under state law independent of their federal rights, and in such cases, the state rights do not limit or alter their federal reserved water rights.[139] Requiring a tribe to apply for a water right under state law for primary purposes of the reservation or for aboriginal rights would, however, require that *Winters* be overturned, could upset dozens of cases based on *Winters* where tribal rights have subsequently been quantified and settled, and, most importantly, would further erode tribal sovereignty. It might also be

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135 *See* U.S. CONST. art. I, § 8, cl. 3; *see also* Worcester v. Georgia, 31 U.S. 515, 560–61 (1832).

136 *Worcester*, 31 U.S. at 560–61. *But see* Oklahoma v. Castro-Huerta, 142 S. Ct. 2486 (2022), which is the most recent example of the erosion of tribal sovereignty vis-à-vis state power since *Worcester*.

137 Winters v. United States, 207 U.S. 564, 577 (1908).

138 M. D. SMOLEN, AARON MITTELSTET & BEKKI HARJO, WHOSE WATER IS IT ANYWAY?, OKLA. STATE UNIV. 2, 6 (2012), https://extension.okstate.edu/fact-sheets/print-publications/e/whose-water-is-it-anyway-e-1030.pdf.

139 CYNTHIA BROUGHER, CONG. RSCH. SERV., RL32198, INDIAN RESERVED WATER RIGHTS UNDER THE WINTERS DOCTRINE: AN OVERVIEW 1–2 (2011) (citing Winters v. United States, 207 U.S. 564 (1908)).

unconstitutional.[140] Notably, states regularly attempt to assert their authority over tribes in this respect, with little to no success.[141]

Tribes that have not been recognized by the federal government by treaty, statute, regulatory process, or executive order do not receive federal support or legal assertion or protection of their property rights.[142] In this case, states may recognize tribes, create reservations, and affirm tribal reserved water rights under state law.[143]

G. Solutions in Equity Must Be Applied in the "Unique" Context of the Government's Responsibility to Indians

Several courts, including the Supreme Court, have recognized that Congress has a "unique obligation" to Indians that has often been ignored over the last two centuries.[144] Non-Indian water rights holders have enjoyed the overwhelming majority of government program benefits encouraging mostly-white settlement of the West, an effort that simultaneously pushed tribal nations onto smaller reservations. The non-Indian users have had greater access to federally-funded irrigation projects, and have come to rely on these rights, despite warnings from courts not to do so.[145] However, both *Winters* and *Winans* were decided over a century ago, and states and private rights holders have disregarded the holdings of these cases at their own peril. Thus, any court that wishes to apply a "sensitivity analysis," such as that initially proposed by Justice O'Connor in a draft opinion in *Big Horn*—suggesting that any water rights awarded to Indians must be "sensitive" to existing rights that have already developed and upon which water rights owners were reliant—would do well to explain why the justice system should not first be sensitive to the rights of tribal nations that were generally passed over by

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140 *See generally* Worcester v. Georgia, 31 U.S. 515 (1832).

141 *See, e.g.*, *In re* CSRBA Case No. 49576 Subcase No. 91-7755, 448 P.3d 322, 355 (Idaho 2019).

142 25 U.S.C. § 5304(e); *see* ANDERSON ET AL., *supra* note 5, at 251–55 (discussing the events surrounding and reasons why some groups may not be recognized as tribes).

143 *See* Mattaponi Indian Tribe v. Commonwealth, 72 Va. Cir. 444 (Va. Cir. Ct. 2007). The court in *Mattaponi* recognized that the *Winters* doctrine was just as applicable to state-recognized tribes as it was to federally recognized tribes ("[T]here is no reason why state recognized Indian tribes would not have similarly bargained to reserve water for their own sustenance."). *Id.* at 459. The court held that the Tribe must show a need for reserved water rights, and granted it leave to amend its pleading. *Id.* at 463.

144 *Cf.* Morton v. Mancari, 417 U.S. 535, 554–55 (1974) ("On numerous occasions the Court specifically has upheld legislation that singles out Indians for particular and special treatment . . . . As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed.").

145 Colville Confederated Tribes v. Walton, 647 F.2d 42, 48 (9th Cir. 1981) ("Until [the extent of Indian water rights] is determined, state-created water rights cannot be relied upon by property owners.").

federal irrigation projects until tribes began asserting their water rights in the 1970s.[146] Such a court should also be able to explain why it is irrelevant that tribes were unable to sue for adjudication of their water rights between 1863 and 1946, instead having to wait for the federal government to sue on their behalf.[147]

Furthermore, an O'Connor-like sensitivity analysis is already practiced in an underhanded way by courts that choose to ignore Indian canons, narrowly construe *Winters* rights to allow water only for irrigation, and seek to limit Indian reservations to a single primary use. The sensitivity analysis simply brings into the light the dilution of *Winters* claims "to accommodate the necessities of non-Indian water use."[148]

For the same reasons, an argument of laches rings false as applicable to reserved water rights. While courts have applied laches in novel cases such as when a Tribe refused to pay property taxes on lands it repurchased within its historical reservation boundaries,[149] this argument cannot apply to *Winters* rights since water users have been on notice of that precedent for over a century, and have known even longer of the canon that only Congress can extinguish tribal rights like water.

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146 Second Draft Opinion of the Court in Wyoming v. United States, at *17–18 (No. 88-309) (O'Connor, J.) (unpublished document, on file in Library of Congress, Manuscript Division, Papers of Justice Thurgood Marshall, Box 478) [hereinafter O'Connor Draft Opinion], *reprinted in* Andrew C. Mergen & Sylvia F. Liu, *A Misplaced Sensitivity: The Draft Opinions in* Wyoming v. United States, 68 U. COLO. L. REV. 683, 725–40 (1997). Justice O'Connor argued that any water rights awarded to Indians must be "sensitive" to existing rights that have already been developed and upon which water rights owners were reliant. *Id.* Subsequent to this draft, Justice O'Connor recused herself due to the fact that her family farm in California owned water rights that would be impacted by the Supreme Court's decision. *See* BENSON ET AL., *supra* note 1, at 856–57. This left the court deadlocked 4-4, so the lower court's decision stood. *Id.*

147 ANDERSON ET AL., *supra* note 5, at 210–12. In 1863, Congress retaliated against all Indians by passing three acts that closed the courthouse doors to tribes for the adjudication of their treaties. Whether these acts were passed in an attempt to quell the U.S.-Sioux War that had escalated the year before is unknown, but the effect was clear: between passage of these bills and the 1946 Indian Claims Commission Act ("ICCA"), tribes' only access to courts was for the federal government to take on the case, or for Congress to pass legislation allowing for the tribe to bring a specific cause of action. *See Historical Overview*, PROQUEST INDIAN CLAIMS INSIGHT, https://pq-static-content.proquest.com/collateral/media2/documents/indianclaimsinsight.pdf (last visited Mar. 8, 2024) (discussing congressional efforts to limit Native Americans' ability to bring claims in court); *see also Atlas of the Sioux Wars*, COMBINED ARMS RSCH. LIB. (May 11, 2004), https://cgsc.leavenworth.army.mil/carl/resources/csi/sioux/sioux.asp [https://web.archive.org/web/20041025152218/https://cgsc.leavenworth.army.mil/carl/resources/csi/sioux/sioux.asp] (describing the Sioux Wars).

148 Shore & Straus, *supra* note 109, at 18.

149 *See* City of Sherrill v. Oneida Indian Nation of New York, 544 U.S. 197 (2005), regarding laches and a dissent that implies the U.S. Supreme Court is getting into the business of judicial plenary power rather than leaving it to Congress to extinguish tribal rights.

The Restatement (Second) of Torts and the riparian doctrine hold that longstanding users retain their priority, but riparian users must share with other users.[150] But this is a weak argument as applied to tribes due to the massive volume of applicable case law. The overarching question I address in this Article is whether the principles of *Winters*, a federal case, apply nationwide. Only if *Winters* does not apply should a court potentially consider the principles in the Restatement, and thereby consider tribes as one of many users whose needs must be balanced against all others.[151]

H. Reserved Water Rights Are Unrelated to the Reservation Population at Any Point in Time

Courts have, on occasion, made decisions regarding tribal matters based on the number of tribal members living on the reservation at the time of a court's decision or at some point in the past. The Supreme Court has stated clearly, however, that this is not appropriate with respect to reserved water rights. In *Arizona v. California*, the Supreme Court made awards based on PIA and ignored the fact that only one family lived on the Fort Mojave Reservation around the time of the suit.[152] Subsequent decisions in the case made only minor adjustments to the original awards.[153] Tribes must not be punished with a smaller water right due to a small population that has resulted from the federal government's own

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[150] RESTATEMENT (SECOND) OF TORTS § 850A (h), cmt. k (AM. L. INST. 1979).

[151] The Supreme Court has already rejected the theory of equitable apportionment for water conflicts between tribes and states. The Court typically applies equitable apportionment when deciding conflicts between state sovereigns regarding water rights when there is no compact in place. *Cf.* Wyoming v. Colorado, 259 U.S. 419 (1922); New Jersey v. New York, 283 U.S. 336 (1931); Nebraska v. Wyoming, 325 U.S. 589 (1945) (all addressing equitable apportionment of surface water). Both Mississippi v. Tennessee, 595 U.S. 15 (2021) and Florida v. Georgia, 141 S. Ct. 1175 (2021), provide recent examples in the East, the former for groundwater, the latter for surface water. Equitable apportionment, however, is not appropriate when the dispute arises between a state and a tribe, since tribes are sovereign nations that have the constitutional right to enter into treaties or agreements with the federal government. *See* U.S. CONST. art. II, § 2, cl. 2. *But see* 25 U.S.C. § 71 (containing an added provision at the end of the 1871 Indian Appropriations Act ending the ability of the U.S. government to enter into treaties with Indian tribes but later questioned by Justice Clarence Thomas in United States v. Lara, 541 U.S. 193, 217–18 (2004) for its constitutionality).

"Treaty replacement agreements" with tribes continue to present day via legislation. Arizona used an equitable apportionment argument in Arizona v. California, 376 U.S. 340 (1964) regarding water rights for five Indian reservations along the Colorado River, but the Supreme Court rejected the argument both because of the special relationship between the federal government and tribes, and because Indian claims are governed by treaties, statutes, and executive orders, which displaces solutions based in equity.

[152] BENSON ET AL., *supra* note 1, at 808, 851.

[153] *Id.* at 808 (first citing Arizona v. California, 460 U.S. 605 (1983), then citing Arizona v. California, 530 U.S. 392 (2000)).

policies limiting economic development on reservations. Indeed, populations on some reservations have rebounded since the advent of Indian gaming and concomitant economic opportunities for tribal members.[154]

III. TRIBAL RESERVED WATER RIGHTS ARE LEGALLY VIABLE THROUGHOUT THE UNITED STATES

To this point, I have established the foundational principles of tribal reserved water rights and have described several aspects of those rights that courts disagreed on or rarely addressed, if at all. In Part III, I now lay out arguments supporting the proposition that *Winters* and *Winans* rights apply nationwide.

Commentators, states, and at least one court have expressed doubt that the *Winters* doctrine applies in the eastern U.S.[155] However, Professor Royster pushed back on this notion a quarter-century ago, and here, I further support her argument.[156] In addition to common law supporting the nationwide applicability of *Winters* rights, there are several arguments that the *Winters* doctrine applies nationwide. These arguments stand regardless of whether a state follows prior appropriation, a hybrid approach, or a form of riparianism. The most important arguments for nationwide application of *Winters* and *Winans* are that: (1) federal reserved water rights are creatures of federal law, not state law, so state water law doctrines, past and present, are irrelevant; (2) it is not difficult for a tribe to meet a "necessity" requirement that might be imposed by a court; (3) prior appropriation and riparian doctrines contain so much variability and overlap that they cannot be used to dictate the application of *Winters*; (4) the equal footing doctrine plays no role in determining tribal reserved water rights; and (5) equity requires that federally recognized tribes not be treated differently based on their location in the country. Each of these arguments is addressed below.

A. Validity of Federal Reserved Water Rights Does Not Hinge on State Law

Tribal federal water rights are construed to follow canons of construction for Indian law, which includes the canon that water rights

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154 *See, e.g.*, William N. Evans & Julie H. Topoleski, *The Social and Economic Impact of Native American Casinos* 2 (Nat'l Bureau of Econ. Rsch., Working Paper No. 9198, 2002).

155 *See* Shore & Straus, *supra* note 109, at 1–2, 9; *see also* Mattaponi Indian Tribe v. Commonwealth, 72 Va. Cir. 444 (Va. Cir. Ct. 2007).

156 Royster, *supra* note 4, at 169–172, 200–201.

persist unless Congress acts explicitly to extinguish those rights.[157] Where the federal rights conflict with state law, a preemption analysis is used:

> The question in each instance is whether Congress, in exercising a constitutionally enumerated power, intended to preempt state water law. Courts will find such an intent if conformity to state water law would frustrate "the accomplishment and execution of the full purposes and objectives of Congress."[158]

Further, the *United States v. New Mexico* Court stated that "the 'reserved rights doctrine' is . . . an exception to Congress' explicit deference to state water law in other areas."[159] Tribal rights cannot interfere with state-based water rights that existed prior to the creation of the reservation,[160] but this is an application of federal law rather than state law. Aboriginal rights existing since time immemorial would trump all other rights.[161] To reiterate, these are federal rights that follow federal law. However, there is nothing to preclude tribes and the federal government from seeking additional water rights under state law and following state procedures.

B. Courts and Congress Have Upheld Tribal Federal Reserved Water Rights Without Regard for the Water Rights Doctrine Followed by the State

State water law can be divided into three general approaches—prior appropriation, riparianism, and hybrid doctrines[162]—but federal courts have uniformly quantified and upheld federal reserved water rights regardless of state water law doctrine, and Congress has also affirmed these rights in legislation. In California, a state that follows prior appropriation for surface water and correlative rights for groundwater,[163] the Ninth Circuit held that a Tribe had a federal reserved water right for groundwater.[164] In Oklahoma, another hybrid state,[165] the Choctaw and

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157 COHEN'S HANDBOOK, *supra* note 16, § 2.02.

158 BENSON ET AL., *supra* note 1, at 845 (citing TRIBE, *supra* note 111, at 1176).

159 438 U.S. 696, 715 (1978).

160 Winters v. United States, 207 U.S. 564, 577 (1908) (holding that the federal government reserves water not already appropriated).

161 *See generally* New Mexico *ex rel.* Reynolds v. Aamodt, 618 F. Supp. 993 (1985).

162 *Water Law: An Overview*, NAT'L AGRIC. L. CTR., https://nationalaglawcenter.org/overview/water-law/ (last visited Mar. 2, 2024).

163 BENSON ET AL., *supra* note 1, at 340 (describing how correlative rights doctrine "is based on the theory of proportionate sharing of withdrawals among landowners overlying a common basin. Under the doctrine, overlying owners have no proprietary interest in the water under their soil." (citing Higday v. Nickolaus, 469 S.W.2d 859 (Mo. Cit. App. 1971))).

164 Agua Caliente v. Coachella Valley Water Dist., 849 F.3d 1262, 1263 (9th Cir. 2017).

165 Oklahoma follows prior appropriation for surface rights created after 1963, a mix of prior appropriation and riparian for surface rights created 1963 and earlier, and correlative rights for groundwater with the amount generally limited by the amount of surface land owned. *See generally*

Chickasaw Tribes negotiated a congressionally-approved settlement quantifying water rights on trust lands for the Tribes and on allotment lands for tribal landowners.[166] Finally, in Florida, a state that has a fully articulated state water code that completely displaces riparian common law, the Seminole Tribe entered into a congressionally-approved compact with the State giving the Tribe a percentage of the total flow of several water sources.[167] Obviously, settlement agreements and legislation do not create judicial precedent, but they do point to the broader principle that tribal water rights are not limited by or subject to state law, except when agreed upon by Congress, tribes, and the state.

Because state water law does not shape *Winters* rights, the argument that a tribe's reserved rights in the East are limited to reservation lands bordering a body of water fails. Such a holding would subjugate congressional intent in establishing a homeland to state law applying the riparian doctrine. In contrast, in *United States v. Rio Grande Dam & Irrigation Co.*, the Supreme Court held that:

> [I]n the absence of specific authority from Congress, a State cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the government property.[168]

Only one state court, and no federal courts, have questioned the applicability of *Winters* on the basis that the state followed the riparian doctrine.[169] The Supreme Court too has maintained that federal water rights are independent of state law.[170] The *Cappaert* Court stated: "Federal water rights are not dependent upon state laws or state procedures and they need not be adjudicated only in state courts; federal courts have jurisdiction under 28 U.S.C. § 1345 to adjudicate the water rights claims of the United States."[171]

One might point to a case involving the Penobscot Tribe in Maine as an example where federal reserved water rights were denied in a riparian state, but this would be erroneous. In *Penobscot Nation v. Frey*, after the Tribe and Maine reached an agreement on reservation boundaries that was subsequently approved by Congress, the Tribe sued the State when

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WATER LAW AND MANAGEMENT IN OKLAHOMA, OKLA. WATER RES. BD., https://www.owrb.ok.gov/supply/ocwp/pdf_ocwp/WaterPlanUpdate/joint_committee/WATER%20LAW_MANAGEMENT%20IN%20OKLAHOMA.pdf (last visited Feb. 17, 2024).

166 33 U.S.C. § 3608 (2016).

167 25 U.S.C. § 2 (1987).

168 174 U.S. 690, 703 (1899).

169 Mattaponi Indian Tribe v. Commonwealth, 72 Va. Cir. 444, 463 (Va. Cir. Ct. 2007).

170 Cappaert v. United States, 426 U.S. 128, 145 (1976).

171 *Id.*

the State asserted the reservation included only islands in the Penobscot River, and not the river itself.[172] This, however, was an argument about ownership of the beds and banks of the river, not about a *Winters* or *Winans* usufructuary right. In *Frey*, the reservation was based on an agreement with the State that displaced previous federal treaties.[173] *Winters* rights, in contrast, apply only to reservations and agreements approved by Congress.[174] Further, the *Frey* court held that the agreement stated unambiguously that the reservation included the land mass of the islands, not the surrounding waters of the river, and that the canon requiring statutes to be construed liberally in favor of Indians in cases of ambiguity[175] did not apply since the term "island" was not ambiguous.[176] The agreement also specifically addressed water rights owed to the Tribe.[177] Finally, *Winters* was not mentioned at all in the case, although *Winans* was mentioned in the context of clarifying the rights of tribal members to hunt and fish off-reservation.

C. An Argument Based on which Water Rights Doctrine a State Follows Is Irrelevant Since Most, If Not All, States Originally Followed the Riparian Doctrine

An argument that a *Winters* right only applies in prior appropriation states is specious for at least three reasons. First, *Winters* is antithetical to a strict prior appropriation doctrine.[178] Second, the artificial descriptors of the prior appropriation, hybrid, and riparian doctrines belie the variability of state water law. Finally, many states that follow prior appropriation today followed some variation of the riparian doctrine in their earliest days.

The first reason that *Winters* cannot be limited to prior appropriation states is that the holding of the case itself is antithetical to the predictability of the prior appropriation doctrine. As discussed earlier, many *Winters* rights, if asserted by tribes, could cut to the front of the appropriation line, thereby making potentially many or all other users junior to a potentially large right. This type of disruption was precisely the reason for Justice O'Connor's proposed "sensitivity doctrine" in *Big*

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172 Penobscot Nation v. Frey, 3 F.4th 484, 489 (2021).

173 *Id.* at 498.

174 Winters v. United States, 207 U.S. 564, 577 (1908).

175 County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation, 502 U.S. 251, 269 (1992).

176 *Frey*, 3 F.4th at 493.

177 *Id.*

178 United States v. Anderson, 591 F.Supp. 1, 5 (E.D. Wash. 1982).

Horn I.[179] The *Winters* Court also held that, contrary to prior appropriation doctrine, federal reserved water rights are not lost due to lack of use.[180]

Second, the monikers "prior appropriation," "hybrid," and "riparianism" are artificial and oversimplified. For example, New Mexico formally claims to follow the prior appropriation doctrine but comes closer to riparianism in several respects. There, a priority call is seen as a tool of last resort rather than a normal management practice;[181] further, several jurisdictions in the state follow shortage sharing rather than strict prior appropriation in times of drought.[182] Conversely, several states that are classified as riparian adhere to systems whose goal is to ensure minimum instream flow by limiting use through permits.[183] Thus, a newly-arrived riparian landowner in a fully-allocated system in a riparian state may be denied a permit, just as states following prior appropriation may deny a permit for the same reason.[184]

Third, most western territories that eventually became states initially followed the riparian doctrine.[185] *Winters*, decided in 1908, was based on a dispute in Montana. Prior to statehood, the Montana territorial legislature adopted English common law until and unless that was displaced by further legislation.[186] In 1865, the legislature passed a bill indicating the riparian doctrine would be followed, with the caveat that persons could divert water for irrigation.[187] Several subsequent cases indicated that the State was mostly following riparian law, including *Thorp v. Freed* in 1872, where Justice Wade, concurring with the

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179 *In re* Gen. Adjudication of All Rts. to Use Water in the Big Horn River Sys., 753 P.2d 76 (Wyo. 1988), *aff'd by an equally divided court sub nom.* Wyoming v. United States, 492 U.S. 406 (1989); O'Connor Draft Opinion, *supra* note 146, at *17–18. *See also* BENSON ET AL., *supra* note 1, at 856–57.

180 207 U.S. 564, 577 (1908).

181 Ed Merta, *Water Matters!: Priority Administration*, UTTON TRANSBOUNDARY RES. CTR. 10-5 (2015), https://uttoncenter.unm.edu/resources/research-resources/priority-administration.pdf.

182 *Id.* at 5-4.

183 *See United States State Laws Relating to Protection of Instream Flows for Environmental Purposes: Summary of Specific US State Statutes*, TEX. A&M UNIV. CORPUS CHRISTI HARTE RSCH. INSTS. FOR GULF OF MEXICO STUDS., FRESHWATER INFLOWS, https://www.freshwaterinflow.org/summary-specific-us-state-statutes/ (last visited Mar. 2, 2024) (listing several such state statutes).

184 *Cf.* N.M STAT. ANN. §72-5-7 (West 1978) ("If, in the opinion of the state engineer, there is no unappropriated water available, he shall reject such application.").

185 *See* Joseph Dellapenna, *Dual Systems*, WATER AND WATER RIGHTS, THIRD EDITION § 8.02 (Amy Kelley, ed. 2022). Montana and Nevada began as riparian states but then judicially rejected the doctrine. Utah practiced riparian-like shortage sharing. California, Oregon, and Washington all began as riparian states but legislatively limited that approach and eventually adopted prior appropriation.

186 Thorp v. Freed, 1 Mont. 651, 653 (1872).

187 *Id.* at 656, 668.

majority in the holding but not the reasoning, stated that the legislature intended to embrace riparian rights and "to utterly abolish and annihilate the doctrine of prior appropriation."[188]

In *Winters*, the federal government made arguments under the riparian doctrine, but the Supreme Court based its holding on the federal government's ability to enter into treaties with tribes and did not address the doctrinal bifurcation.[189]

Ironically, the Montana Supreme Court in 1921 held that its own discussions in a line of cases back to 1870 were all dicta with regard to riparian rights and, notwithstanding the territorial government's law regarding adherence to English common law, held that prior appropriation had always been the law of the State.[190] This choice by the state court to imply that the court's own words did not mean what they said would have been more defensible had the court been attempting to interpret treaty text from over 300 years earlier.[191] Nonetheless, the decision had the effect of simplifying Montana's state water law going forward, as well as clarifying to other parties the likelihood of success in a suit arguing riparian rights.

In short, an argument by a state or other opponent that tribal reserved water rights can only be applied in states following prior appropriation fails for the reasons highlighted above.

D. Winters *May Be a Doctrine of "Necessity," But This Is a Low Bar*

Tribal reserve water rights have historically been asserted in a defensive posture to protect water that is otherwise likely to be acquired or had already been taken by other appropriators in arid climates with limited precipitation.[192] Jacqueline Goodrum has thus argued that:

> it is critical for a party asserting *Winters* rights not only [(1)] to show the lack or shortage of sufficient quantity or quality of water, but also [(2)] to explain why state water law is inadequate. If a *Winters* claim in either region satisfies these two factors, then it satisfies the element of necessity.[193]

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188 *Id.*; Dellapenna, *supra* note 185, § 8.02(b).

189 207 U.S. 564, 577 (1908).

190 Dellapenna, *supra* note 185, § 8.02(b); Mettler v. Ames Realty Co., 201 P. 702 (Mont. 1921).

191 Mattaponi Indian Tribe v. Commonwealth, 72 Va. Cir. 444, 448 (Va. Cir. Ct. 2007) (noting that the treaty "written over three centuries ago, contains language that is, in some respects, archaic and perhaps attributes meaning to words that are defined differently in today's understanding of the English language.").

192 *See generally* Jacqueline Goodrum, *Taking on Water:* Winters, *Necessity and the Riparian East*, WM. & MARY ENV'T. L. & POL'Y REV. 807, 809 (2019).

193 *Id.*

This may be accurate in the case of a state-recognized tribe asserting a state water right in a state following the riparian doctrine.[194] However, this places too high a bar on a federally recognized tribe asserting a federal reserved water right for its reservation.

That Congress or the President created an Indian reservation where Indians were intended to live means, *de facto*, that there is a need for water for both domestic use and food.[195] This fact alone establishes the *Winters* right—there is no additional requirement to demonstrate a water shortage to justify the claim. Granted, "need" can be interpreted as the purpose of the reservation, which must be asserted, whereas a property owner is not required to demonstrate a need to own land. But the details of the water right, including quantity, quality, timing, and distribution, are separate questions that subsequently spring from the existence of the right. Several courts have thus found a tribe's water right, and then remanded the case to a lower court or special master to fill in the details.

Second, there is no requirement for a federally recognized tribe to explain to a state court why state water law is inadequate for serving the needs of the tribe. As explained by the *Cappaert* Court and mentioned here several times, federal courts have full authority to adjudicate federal reserved water rights claims.[196] Nonetheless, a declaratory judgment requires a "case or controversy,"[197] and Goodrum's "necessity" theory can fill that gap. Indeed, one state court denied a State's motion for summary judgment against a state-recognized Tribe asserting a reserved water right in Virginia, but gave the Tribe leave to amend its request to demonstrate explicitly its need for the water.[198] Given increasing water stress in the eastern states, both prongs of the necessity test—a showing of shortage and an explanation of the inadequacy of state water law—are likely to be met by future petitioners.

E. Distinctions Between Prior Appropriation and Riparian Doctrines in State Water Law Are Not Clear-Cut

The prior appropriation and riparian doctrines provide a useful shorthand for practitioners, but the reality is that both the law and practice vary widely in states that purportedly follow one doctrine or the other. States that had established a prior appropriation framework have moved away from the core principles of beneficial use and priority, instead

194 *See Mattaponi Indian Tribe*, 72 Va. Cir. at 459–62.
195 Winters v. United States, 207 U.S. 564, 577 (1908).
196 Cappaert v. United States, 426 U.S. 128, 145 (1976).
197 28 U.S.C.A. § 2201(a) (West 2020).
198 *Mattaponi Indian Tribe*, 72 Va. Cir. at 463.

bending the law to protect existing users.[199] For example, New Mexico, a state that proclaims prior appropriation to be the law in its constitution,[200] statutes,[201] regulations,[202] and case law before statehood,[203] regularly practices shortage sharing in its acequias,[204] and the state's courts have never enforced a priority call for water,[205] instead referring to priority calls as simply one tool that could be used to ensure senior users receive their water.[206] The New Mexico Office of the State Engineer refers to priority calls as a "worst case scenario."[207]

Further, several states follow a hybrid approach between prior appropriation and riparian doctrines.[208] *Winters* has been applied more than once in hybrid states.[209] Finally, several if not most states following the riparian doctrine have developed permitting systems that incorporate prior existing uses in determining whether to grant the permit.[210]

F. The Equal Footing Doctrine Has No Impact on Tribal Reserved Water Rights

"Equal footing" is a doctrine established in *Pollard v. Hagan* that each state, when it entered the Union, did so on equal footing with other states.[211] This meant that beds and banks of navigable waters were transferred from the U.S. government to states upon the granting of statehood.[212] At least one commentator has asserted that tribal water rights

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199 Reed D. Benson, *Alive But Irrelevant: The Prior Appropriation Doctrine in Today's Western Water Law*, 83 COLO. L. REV. 675, 678 (2012).

200 N.M. CONST. art. XVI, § 3 ("Beneficial use shall be the basis, the measure and the limit of the right to the use of water.").

201 N.M. STAT. ANN. § 72-1-1 (2003) (including statutory portions from the Water Code of 1907).

202 N.M. STAT. ANN. § 19.26.2 (2005).

203 Trambley v. Luterman, 6 N.M. 15 (N.M.Terr. 1891).

204 Henry Gass, *Rural New Mexicans Meet Drought with Culture of Water Sharing*, CHRISTIAN SCI. MONITOR (Sept. 27, 2021), https://www.csmonitor.com/Environment/2021/0927/Rural-New-Mexicans-meet-drought-with-culture-of-water-sharing.

205 Merta, *supra* note 181, at 10-4–10-5 (2014).

206 State *ex rel.* Office of State Eng'r v. Lewis, 141 N.M. 1, 12 (N.M.App. 2006).

207 *Frequently Asked Questions*, OFF. OF THE STATE ENG'R (NEW MEXICO), https://www.ose.state.nm.us/ProgramSupport/FAQ.php (last visited Aug. 28, 2023).

208 Dellapenna, *supra* note 185, § 8.02(c) (noting that "mixed climate states eventually adopted a dual system combining appropriative and riparian rights").

209 The *Agua Caliente* case was set in California, a hybrid state, and was the first to apply the *Winters* doctrine to groundwater. *See* Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist., 849 F.3d 1262, 1270 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 469 (2017); *see also* Catherine Schluter, *Indian Reserved Rights to Groundwater: Victory for Tribes, for Now*, 32 GEO. ENV'T. L. REV. 729, 731 (2020).

210 *Cf.* VA. CODE ANN. § 62.1-44.15:5.02 (2007) (requiring water withdrawal permits issued after July 1, 2007, in Potomac River watershed to have offstream storage to augment low flows).

211 44 U.S. 212, 216 (1845).

212 *Id.* at 212.

are thereby affected by this doctrine.[213] Courts and other commentators, however, have rejected this notion since water rights are usufructuary in nature and therefore are independent of ownership of beds and banks of rivers.[214] Tribal water rights do not depend on the historical ownership of the land (i.e. whether a state was one of the original thirteen colonies)[215] and therefore can be asserted in any state.

G. Equity Requires All Federally Recognized Tribes Be Treated Equally

Under an equity argument, a water right should not be part of a reservation for some tribes and not for others based solely on an arbitrary geographic or hydrographic boundary, nor how a state chose to establish its water apportionment system. It is well settled that equitable principles give way to statutes and treaties, but there is no evidence that Congress or the Executive have ever acted to deny federal reserved water rights to eastern tribes. The *Cappaert* Court stated, "since the implied-reservation-of-water-rights doctrine[216] is based on the necessity of water for the purpose of the federal reservation, we hold that the United States can protect its water from subsequent diversion, whether the diversion is of surface or groundwater."[217] While *Cappaert's* focus was on surface water and groundwater, the first clause of the sentence is on-point: that the *Winters* doctrine is based on the necessity of supplying water to achieve the purpose(s) of the Indian reservation. And this is the case regardless of where in the country the reservation is located.

IV. ASSERTING *WINTERS* RIGHTS TO PROTECT TRIBAL SOVEREIGNTY

Thus far I have argued that tribes may assert their *Winters* rights across the country, not just in states following the prior appropriation doctrine. An important reason for doing so—apart from the obvious need for tribes to have water on their reservations to live and thrive—is to provide some amount of legal chinking in the ever-eroding wall of tribal sovereignty. After early wins in *Cherokee Nation v. Georgia*[218] and *Worcester v.*

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213 Joseph Dellapenna, *Regulated Riparianism*, 1 WATERS AND WATER RIGHTS § 9.06(b)(2) (Robert E. Beck ed. 1991).

214 Hope Babcock, *Reserved Indian Water Rights in Riparian Jurisdictions: Water, Water Everywhere, Perhaps Some Drops for Us*, 91 CORNELL L. REV. 1203, 1224–25 (2006).

215 *Compare* Dellapenna, *supra* note 213, *with* Joseph Dellapenna, *Regulated Riparianism*, *in* 2 WATERS AND WATER RIGHTS § 8.02(b) (Amy Kelley ed., 3d ed. 2022).

216 This is another name for the *Winters* doctrine.

217 426 U.S. 128, 143 (1976).

218 30 U.S. 1, 2 (1831).

Georgia,[219] tribes have struggled to maintain their legal standing as "domestic sovereign nations," with the ability to create and enforce their own laws within their borders. The most recent example was in *Oklahoma v. Castro-Huerta* where, without explicitly overruling *Worcester*, the Supreme Court effectively held it to be dead law by granting states concurrent jurisdiction with federal government to try criminal cases in Indian Country where a non-Indian commits a crime against an Indian.[220]

The upshot is simple: tribes must continue to seek out areas of the law where they can effectively solidify sovereign authority. Asserting federal water rights in the eastern U.S. as a means to affirm *Winters* nationwide is one potential, legally feasible means for doing so.

V. ASSERTING TRIBAL RESERVED WATER RIGHTS TODAY IS ONE TOOL TO COMBAT CLIMATE CHANGE

In Part V, I explain why, in addition to providing for tribal needs and validating tribal sovereignty, asserting these rights could conserve lands and waters, thereby helping to mitigate the worst effects of climate change. Specifically, I outline the large-scale predicted effects of climate change on the eastern U.S., discuss the 30 by 30 concept, and explain why asserting *Winters* rights now rather than in the future is better for tribes and the climate. An analysis of specific, finer-scale climate impacts and the extent to which asserting tribal *Winters* rights might mitigate this is beyond the scope of this paper, as is any attempt to quantify tribes' contribution to achieving the 30 by 30 goal by protection of these resources.

A. Water Conflicts Will Continue to Grow in the Eastern U.S.

Water conflicts have increased as the U.S. population has grown and the economy has diversified.[221] Human population growth creates increased demand for water directly for domestic use and indirectly for needs like crop irrigation and energy supply.[222] The U.S. population grew seventeen percent between 2000 and 2020, and the United Nations estimates that the country's population will grow to 434 million by 2100,

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[219] 31 U.S. 515, 520 (1832) (holding that Georgia state law did not apply on the Cherokee reservation because it was "a distinct community, occupying its own territory").

[220] 597 U.S. 629, 656 (2022).

[221] *See* BENSON ET AL., *supra* note 1, at 1–30; *see also* Jeremy Jungreis, *"Permit" Me Another Drink: A Proposal for Safeguarding the Water Rights of Federal Lands in the Regulated Riparian East*, 29 HARV. ENV'T. L. REV. 369, 370–71 (2005).

[222] BENSON ET AL., *supra* note 1, at 15–17.

an increase of thirty-one percent from 2020. Thus, it is likely that water scarcity will continue to be an issue in the future.

While water quantity in the form of scarcity often receives the most attention,[223] all four factors—quantity, quality, timing, and distribution—are or will be impacted with increasing human population growth in the eastern U.S. For example, reservoirs constructed for energy production, recreation, and other uses alter the hydroperiod, have negative impacts on riparian ecosystems, and cause changes to temperature regimes and other water quality parameters.[224] Increased impervious surfaces associated with highways, parking lots, and buildings cause precipitation to run off faster, thereby reducing ground water recharge, increasing peak flows of tributaries, and causing streambank erosion that increases stream sediment and lowers water quality.[225] Finally, habitat loss often results in the loss of wetlands that capture flood flows, recharge aquifers, filter drinking water, and provide shelter for thousands of native species.[226] The long-standing conflict in the Apalachicola-Chattahoochee-Flint Basin of Alabama, Florida and Georgia embodies most, if not all, of these issues.[227]

B. Climate Change and Population Growth Will Exacerbate Water Conflicts

Water conflicts are also likely to further escalate in the U.S.—including in the eastern U.S.—due to climate change. Along with human population growth, climate change will drive changes to water quantity, quality, timing, and distribution. In fact, EPA predicts that climate change will result in higher temperatures that, even in the humid Southeast, will lead to a decline in water availability for agriculture, energy production, and use in homes and buildings.[228] The greatest and most certain declines are expected in Arkansas, Louisiana, Mississippi, Alabama, Tennessee, and Kentucky.[229] Other areas will experience heavier precipitation events that can negatively affect water quality by increasing sediment- and

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[223] *Cf.* Florida v. Georgia, 141 S. Ct. 1175 (2021); Mississippi v. Tennessee, 142 S. Ct. 31 (2021).

[224] *See generally* Michael Collier et al., *Dams and Rivers: A Primer on the Downstream Effects of Dams*, U.S. GEOLOGICAL SURV., CIRCULAR 1126 (2000), https://pubs.usgs.gov/circ/1996/1126/report.pdf.

[225] U.S. DEP'T TRANSP., THE STORMWATER PRACTITIONERS GUIDE 17 (2018).

[226] U.S. ENV'T PROT. AGENCY, PUB. NO. EPA 843-F-01-002C, FUNCTIONS AND VALUES OF WETLANDS (2001).

[227] *See Tri-State Water Wars Overview*, ATLANTA REG'L COMM'N, https://atlantaregional.org/natural-resources/water/tri-state-water-wars-overview/ (last visited Feb. 17, 2024).

[228] *Climate Impacts in the Southeast*, U.S. ENV'T PROT. AGENCY, https://19january2017snapshot.epa.gov/climate-impacts/climate-impacts-southeast_.html (last updated Jan. 19, 2017).

[229] *Id.*

nutrient-laden runoff.[230] Timing of runoff will also be affected in areas that experience an earlier snowmelt due to warmer temperatures, and lower peak spring flows due to less snowpack. All these changes can in turn affect the distribution of water, such as flows into Lake Okeechobee in Florida.[231] What, then, can be done to avoid and minimize these negative effects?

C. Conserving Water Following 30 by 30 Can Mitigate Climate Change and Reduce Its Effects

Scientists have long understood that conservation of lands and waters helps maintain biological diversity,[232] ecosystem functions and services,[233] and reduces greenhouse gas emissions.[234] More recently, E.O. Wilson quantified this need, stating that half of the Earth needs to be set aside in order to slow the rate of loss of biological diversity.[235] Other scientists and policymakers have created a near-term goal, denoted "30 by 30," to conserve thirty percent of lands and waters by 2030.[236] Conservation at this scale is not about seeing bunnies in one's backyard. It is about resilience of ecosystems that support tribes and provide broader public benefits.

The increase in tribal sovereignty upon the assertion of *Winters* rights comes with the ancillary benefit of climate change mitigation; the intersection between *Winters* rights and climate change mitigation is important for several reasons. Foremost, roughly 30,000 square miles of lands and waters in the forty-eight contiguous states are reserved by federally recognized tribes outside of pure prior appropriation states.[237]

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230 *Id.*

231 *CERP Project Planning*, S. FLA. WATER MGMT. DIST., https://www.sfwmd.gov/our-work/cerp-project-planning (last visited Aug. 28, 2023).

232 *See generally* ROBERT H. MACARTHUR & E.O. WILSON, THE THEORY OF ISLAND BIOGEOGRAPHY (1967).

233 Matt Swain, *Ecosystem Services and Land Conservation*, PECONIC LAND TR. (June 15, 2017), https://peconiclandtrust.org/blog/ecosystem-services-and-land-conservation.

234 *See* William Moomaw et al., *Wetlands in a Changing Climate: Science, Policy and Management*, 38 WETLANDS 183–205 (2018).

235 *See generally* E.O. WILSON, HALF EARTH: OUR PLANET'S FIGHT FOR LIFE (2016).

236 Jonathan Baillie & Ya-Ping Zhang, *Space for Nature*, SCIENCE, Sept. 14, 2018, at 1051.

237 *See List of Indian Reservations in the United States*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_Indian_reservations_in_the_United_States (last visited Feb. 17, 2024); for comparison, the state of South Carolina measures just over 32,000 square miles in size. *See Size of US States by Area*, NATIONS ONLINE, https://www.nationsonline.org/oneworld/US-states-by-area.htm (last visited Feb. 17, 2024). For purposes of this Article, I consider prior appropriation states to be the eleven contiguous states lying entirely west of 100 degrees longitude; i.e. Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming. It can be argued that California should not be part of this list since it is a "hybrid" state that follows correlative rights for ground water. Alternatively, it can be argued that all hybrid

Establishing *Winters* rights associated with these lands can help the midwestern and eastern U.S. manage the regional and local predicted impacts of climate change. As previously discussed, water availability, i.e. quantity, will decline due to drought and higher temperatures.[238] Water quality, timing, and distribution will also be adversely affected, as discussed earlier in this Article—water quality will be negatively affected due to higher peak river flows that will scour and carry more sediment than historical norms;[239] water timing will change as earlier snowmelt drives earlier runoff;[240] and water distribution can change as water flows and levels depart from the historic regimes developed over millennia, flooding some wetlands more frequently while leaving others drier.[241] Each of these factors will place stress on natural ecosystems and human economies that have evolved to adapt to a certain range of weather conditions and hydroperiods.[242]

Climate change may also be mitigated when tribes assert their water rights, especially those that are non-consumptive. Doing so could help conserve relatively healthy ecosystems and drive changes in existing management regimes, such as those on dammed rivers.[243] But as these climate change effects become more apparent, preserving the legal rights to waters becomes simultaneously more salient, difficult, and politically charged.[244] Failure to assert legal protections for non-consumptive uses in

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states—California plus the Great Plains states from Texas to North Dakota—should be included as prior appropriation states since they follow that doctrine to some extent for either ground or surface water. Finally, it can be argued that Florida does not fit in any category since it has entirely displaced riparian common law with a statutory structure.

238 *Droughts and Climate Change*, U.S. GEOLOGICAL SURV., https://www.usgs.gov/science/science-explorer/climate/droughts-and-climate-change (last visited Feb. 17, 2024).

239 *Climate Adaptation and Erosion & Sedimentation*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/arc-x/climate-adaptation-and-erosion-sedimentation (last updated June 14, 2023).

240 *Climate Impacts in the Northeast*, U.S. ENV'T PROT. AGENCY, https://19january2017snapshot.epa.gov/climate-impacts/climate-impacts-northeast_.html (last updated Jan. 19, 2017).

241 *Climate Impacts on Ecosystems*, U.S. ENV'T PROT. AGENCY, https://19january2017snapshot.epa.gov/climate-impacts/climate-impacts-ecosystems_.html (last updated Jan. 19, 2017).

242 *Id.*

243 *See* Curtis Knight, *The Moment We've Been Fighting For: Klamath Dams Are Coming Down*, CAL. TROUT, https://caltrout.org/50th/klamath-dam-removal (last visited Feb. 17, 2024) (discussing the twenty-year effort by several tribes and other organizations to remove dams on the Klamath River to restore salmon runs).

244 *Cf.* Aquifer Sci., LLC v. Verhines, 527 P.3d 667, 679 (N.M. Ct. App. 2022) (upholding a lower court's decision denying a developer's request to appropriate ground water for a housing development). The lower court held the appropriation was "contrary to conservation" because, even though sufficient water was available at the time, the developer's model did not take into account future effects of climate change. The appeals court agreed that sufficient evidence was available to support the climate change argument, but stopped at the contrary to conservation finding to encourage the Office of the State Engineer to begin incorporating climate change rather than having the court judicially mandate it. *Id.*

the western U.S. has led to their erosion through development of other vested and competing consumptive users who are reliant on the status quo.[245] There is still time for tribes to assert and preserve their rights in the East with less contention, but the clock is running.

Additionally, such climate change mitigation is in line with the mandate of Executive Order 14008.[246] The Executive Order, in part, establishes the goal of conserving thirty percent of U.S. lands and waters by 2030, known in shorthand as "30 by 30."[247] The purpose of 30 by 30 is to maintain and restore biological diversity, habitat, and ecosystem services. These ecosystem services can help to mitigate and adapt to climate change. Tribal assertion of water rights, I argue, may serve the goals of 30 by 30.

D. Prompt Assertion of Tribal Winters *Rights in the East Will Yield Multiple Benefits*

Assertion of tribal water rights in the eastern U.S. in the near future will help achieve important goals: tribal sovereignty over critical natural resources and the affirmation of tribal rights irrespective of location.[248] In addition and less discussed, however, the assertion of tribal reserved water rights in the eastern U.S. is one tool to help conserve or restore water quantity, quality, timing, and distribution, thereby helping retain or restore ecosystem services and biological diversity while reducing greenhouse gas emissions. Quantity can be managed in droughts by requiring minimum instream flows and lake levels for fisheries. In wet and dry periods, all four factors can be managed by requiring dam operators to mimic the historic hydroperiod, removing dams entirely,[249] or better yet, by avoiding construction of dams in the first place.[250] But

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[245] *See generally* Sharon Wirth, *Jump in Before It's Too Late: Protecting and Increasing Streamflows in New Mexico*, 55 NAT. RES. J. 269 (2015) (documenting multiple unsuccessful attempts to establish instream flows through legislation and administrative actions).

[246] Exec. Order No. 14,008, 86 Fed. Reg. 7619 (Jan. 27, 2021).

[247] *See id.* § 216; *see also Why We're Committing to 30x30*, THE NATURE CONSERVANCY, https://www.nature.org/en-us/what-we-do/our-priorities/protect-water-and-land/land-and-water-stories/committing-to-30x30/ (last visited Feb. 16, 2024).

[248] *See supra* Part IV.

[249] Knight, *supra* note 243.

[250] Mattaponi Indian Tribe v. Commonwealth, 72 Va. Cir. 444, 447 (Va. Cir. Ct. 2007). After the court gave leave to the Tribe to amend its complaint to show how a dam proposed by the defendants would affect the Tribe's need for water to maintain its shad fishery, the defendants withdrew their dam construction proposal. *See Virginia's King William Reservoir Project, USA*, GLOB. PROJECT ENV'T JUST. (Nov. 7, 2022), https://ejatlas.org/conflict/the-mattaponi-tribe-against-virginias-king-william-reservoir-project; *Newport News Scraps the King William Reservoir*, S. ENV'T L. CTR. (Sept. 23, 2009), https://www.southernenvironment.org/news/newport-news-scraps-the-king-william-reservoir/.

these legal assertions ought to be made now rather than later to minimize conflict and avoid missed opportunities for tribes. As far back as the 1990s, instream flows for Texas, a hybrid state, as well as for western prior appropriation states, were described as an idea that came too late because most water was already appropriated for other uses, and forced reallocation through suits, cancellations, or condemnations would be "fraught with political repercussions."[251]

Like any other water user, tribes will have the right to consumptively use their water, so reserving a right does not automatically equate to a gain toward the 30 by 30 goal.[252] Tribes may choose to use their water for agriculture, power generation, or other consumptive uses. Still, asserting rights today might reduce negative repercussions and could be faster and more effective than in the future for at least three reasons. First, negotiations with states proceed faster when there is less water demand—and hence fewer vested interests—allowing the claim to remain in federal court. For example, a suit pitting the Choctaw and Chickasaw Tribes against the State of Oklahoma advanced from initial complaint to settlement and approval by Congress in only six years.[253] In contrast, New Mexico initiated a basin-wide adjudication in 1966,[254] but settlement and passage of federal legislation was not completed until 2010,[255] a span of over forty-five years. Second, the McCarran Amendment waives the federal government's sovereign immunity when the state has initiated a basin-wide adjudication, as in *New Mexico ex rel. v. Aamodt*.[256] Because the federal government serves as trustee for Indian tribes, tribes are thus relegated to the slow, state court grind of identification and adjudication of their rights along with all others claiming water rights in the basin. Finally, the federal government always plays conflicting roles in tribal water issues. On one hand, it serves as trustee and fiduciary for the tribes, and thus should always be acting to achieve maximum benefit for the tribe. At the same time, it has a duty to the American taxpayer to minimize legal and settlement implementation costs. Further, as the

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[251] Ronald A. Kaiser & Shane Binion, *Untying the Gordian Knot: Negotiated Strategies for Protecting Instream Flows in Texas*, 38 NAT. RES. J. 157, 159 (1998).

[252] Irrigation is a consumptive use since water placed on fields evaporates, and plants give off water vapor through their transpiration process.

[253] *See* Chickasaw Nation v. Fallin, No. 11-CV-00927 (W.D. Okla. 2011). *See also* Water Infrastructure Improvements for the Nation Act, 33 U.S.C. § 3608 (2016).

[254] New Mexico *ex rel.* State Eng'r v. Aamodt, No. 66-CV-6639 (D.N.M., filed Apr. 20, 1966). *See also* New Mexico *ex rel.* State Eng'r. v. Aamodt, No. 66-CV-6639, at *1 (D.N.M. Feb. 3, 2003) (noting that "[t]he case was filed on April 20, 1966 by the State of New Mexico" and was initially not assigned a docket number).

[255] Claims Resolution Act of 2010, 42 U.S.C. §§ 501–513.

[256] *See supra* note 254. For more information on the McCarran Amendment, see Act of July 10, 1952, Pub. L. No. 495, § 208, 66 Stat. 549, 560 (codified at 43 U.S.C. § 666 (2012)).

Supreme Court recently held in *Arizona v. Navajo Nation*, the federal government does not have to take "affirmative steps" to secure water for a tribe if the treaty does not require it.[257] Thus, tribes that can act before a state needs to conduct a basin-wide adjudication, and that are willing to negotiate and reach settlement with the state and the federal government may be able to resolve their claims faster, at a lesser cost to all parties, and without the unpredictability of the court system. This, in turn, will more quickly guarantee the tribes' rights to their water for all time, while simultaneously locking in the benefits of reduced greenhouse gases.

CONCLUSION

The *Winters* doctrine applies to tribes throughout the U.S. and not just to tribes whose lands happen to be located within states that follow a particular water rights doctrine. Because these rights apply nationwide, eastern tribes that assert and protect their water rights today will be in the best position to protect their sovereign interests. Eastern tribes that assert their *Winters* rights today will be in a better position to settle the rights sooner due to the relative lack of legal actions to protect tribal water rights in the East vis-à-vis the West. Actions taken before resources become scarce and contentious, as they are today on the Colorado River and throughout the West, are likely to resolve more quickly.

In conjunction, that exercise of tribal autonomy may also result in the minimization of future greenhouse gas emissions, because protection of these rights will, in many cases, naturally lead to the conservation or restoration of habitats that store carbon. In turn, this may potentially help achieve the goal of conserving at least thirty percent of U.S. lands and waters by 2030. To be clear, not all water rights asserted by tribes will contribute to a lessening of greenhouse gas emissions, nor should this be an expectation. Water used for crop irrigation is, by far, the biggest consumptive use in the western U.S., and any tribe that grows crops will have the right to use this water consumptively. In the eastern U.S., the largest consumptive use of water is power plants, and tribes that have protected their rights may choose to lease their water to this or any other industry. However, many tribal water rights may still be exercised in ways that maintain instream flow, minimum lake levels, improved water

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[257] 143 S. Ct. 1804, 1810–13 (2023). The Court affirmed some rights such as minerals, timber, and use of water although they were not explicitly mentioned in the treaty, recognizing that these rights were "implicit[]." *Id.* The Court thus applied the Indian canons to recognize the rights, but then rejected their use for the Navajo's claim that the U.S. had a duty as trustee to provide an accounting of how much water the Navajo Nation was due, saying that the treaty "contains no language imposing a duty" on the U.S. to perform such a task. *Id.*

quality parameters, restored hydrologic regimes, and better management of water distribution. Such uses will have the ultimate effect of conserving water, and so acting now will ensure that these rights are protected at their fullest extent for tribes.

The Supreme Court has held that tribes only get one bite of the apple in establishing their *Winters* rights, denying a Tribe's 1973 claim to establish reserved water rights to maintain a fishery after the government had asserted only an irrigation need on behalf of the Tribe in a 1944 settlement.[258] This has caused consternation among those working on Indian water rights that some key element of the right might be forgotten when rights are being asserted.[259] However, the alternative is to allow a continuing erosion of rights and damages, along with a diminished ability to combat climate change. Assertion of *Winters* rights now will best secure protection of tribal water rights well into the future, and consequentially, better protection of the environment.

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[258] Nevada v. United States, 463 U.S. 110, 145 (1983) (holding that the subsequent case constituted the same cause of action as the original *Winters* claim); *id.* at 145 (Brennan, J., concurring) (adding that the Tribe still had a cause of action against the government for breach of duty in not asserting rights for the fishery); *see* Michael Bogert et al., *The Future of* Winters, *in* THE FUTURE OF INDIAN AND FEDERAL RESERVED WATER RIGHTS: THE *WINTERS* CENTENNIAL 307, 328 (Barbara Cosens & Judith V. Royster eds., 2012) (remarks of Jeanne S. Whiteing).

[259] Bogert et al., *supra* note 258, at 328 (remarks of Jeanne S. Whiteing).