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Ethical Considerations: Water as a Human Right

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CONFERENCE REPORTS

TRIBAL WATER LAW: CUTTING EDGE INSIGHTS FROM PRACTITIONERS IN INDIAN COUNTRY

Las Vegas, Nevada

October 12-13, 2017

Conference Sponsor: CLE International

ETHICAL CONSIDERATIONS: WATER AS A HUMAN RIGHT

Presented by: *Heather White Man Runs Him, Esq., Native American Rights Fund.*

Dressed in the business attire of many varied cultures, a group of western tribal leaders, attorneys, and government officials came together to discuss tribal access to clean water. An examination through the lenses of legal-minded objectivity and humanitarian efforts for change revealed a clear and undeniable conclusion: tribal water law is an uphill battle. Most U.S. Representatives and practicing attorneys would be far from proclaiming that tribes have less right to water than other users and their right to water is legally established by the *Winters* doctrine. This doctrine, established in *Winters v. United States*, 207 U.S. 564 (1908), makes clear that Native American reservations are accompanied with the necessary water rights sufficient to fulfill the purpose of the reservation. Heather White Man Runs Him, an attorney for the Native American Rights Fund in Boulder, Colorado, presented her concerns over issues of legal ethics in the multi-faceted practice of tribal water rights settlement.

Federal Indian law is founded in international law. As such, the underpinnings of Heather White Man Runs Him's presentation came from modern, international human rights declarations. In 1999, the United Nations General Assembly ("UNGA") affirmed that "the rights to food and clean water are fundamental human rights" and declared their promotion a "moral imperative." In 2010, the UNGA formally recognized the fundamental right to water and that "clean drinking water and sanitation are essential to the realization of all human rights." In the same year, President Obama changed the position of the United States to support the UN Declaration on the Rights of Indigenous People ("UNDRIP").

The UNDRIP recognized that indigenous peoples and individuals have the right to: (1) the full enjoyment of all officially-recognized human rights and fundamental freedoms; (2) the enjoyment of the highest attainable standard of physical and mental health; and (3) the continued enjoyment of their strong, distinctive spiritual relationship with their traditionally used or occupied lands, territories, and waters. This last item is expanded in Article 26 of UNDRIP, which recognizes the right of indigenous peoples to own, use, and develop the

lands, territories, and resources that they have traditionally occupied or otherwise used or acquired.

As illustrated by these legal precedents, the federal government has twice recognized that indigenous people have the right to own and use water. This recognition represents both a right in and of itself and a necessary means by which indigenous people can enjoy other guaranteed human rights. Only 0.6 percent of the United States population lacks access to safe drinking water and wastewater disposal. However, in 2011, a grossly disproportionate thirteen percent of Native Americans lacked access to drinking water and wastewater disposal. Meanwhile, between 2008 and 2010, the U.S. Government spent more money on foreign water projects than it has on Native American water projects in the last twenty years.

Recent case law has cast doubt on the government's commitment to these promises as well. In *Standing Rock Sioux Tribe v. Army Corps of Engineers*, 205 F. Supp. 3d 4 (D.D.C. 2016), the plaintiff tribe asserted the right to spiritually pure water. The facts of the case recognized the historical and contemporary use of waterways, artifacts, and landmarks in spiritual practices, and how the construction of a pipeline will irrevocably damage the usability of water for spiritual purposes. However, the court held that there was no right to "spiritually pure" water. In *Hopi Tribe v. United States*, 782 F.3d 662 (Fed. Cir. 2015), the tribe claimed that past executive orders and the *Winters* Doctrine created a fiduciary duty on the part of the government to ensure the quality of tribal waters. The U.S. Court of Federal Claims dismissed the case, and the Court of Appeals affirmed. The ongoing litigation of the *Agua Caliente* case in California further justifies the doubts many people harbor regarding the government's commitment to tribal water rights. In *Agua Caliente*, the tribe is litigating for its right to groundwater, as well as surface water, under the *Winters* doctrine. Water is of paramount significance to the Agua Caliente Band of Cahuilla Indians—they live in a desert.

Heather White Man Runs Him included a discussion of the ABA Model Rules of Professional Conduct in her panel presentation. These rules make no explicit references to human rights. However, human rights issues are a driving force for many people in their decision to attend law school. Simultaneously, legal ethics do recognize inherent human dignity as a component of the attorney-client relationship. Further, while Rule 2.1 of the Model Rules of Professional Conduct only allows for moral counsel to clients, comment 2 states that "it is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice." Comment 2 goes on to explain the close relationship between moral and ethical considerations and their influence on the application of the law.

Another presenter brought pictures drawn by Native American children to show what they thought was the true source of water: trucks. A generation of children believe that pick-up trucks loaded with water jugs is the most reliable source of water—they are being taught that they cannot rely on the land. Evidence of such skewed perceptions created by a lack of clean water further emphasizes the necessity for efficient litigation and settlement of water disputes involving indigenous people.

Heather White Man Runs Him's presentation brought to mind questions of how one can ethically represent clients responsible for projects that damage

water quality or limit peoples' access to water. The ABA recognition of contemporary principles of ethical considerations has oscillated between being slow to change and progressing rapidly. In 2012, the ABA adopted UN guiding principles on human rights. Practitioners like Heather White Man Runs Him are at the forefront of questioning exactly how these ethical principles will be implemented.

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THE DAKOTA ACCESS PIPELINE: A PANEL DISCUSSION

Presented by: *Bret Birdsong, Esq., Professor of Law at the University of Las Vegas, Nevada (UNLV) William S. Boyd School of Law; Constantinos (Dean) DePountis, Esq., In-House Counsel for the Standing Rock Sioux Tribe.*

A multiplicity of scholars, academics, and attorneys convened in Las Vegas for the annual Tribal Water Law Conference to discuss the major failures and successes in the field. Bret Birdsong, Professor of Law at the University of Las Vegas, Nevada (UNLV) William S. Boyd School of Law, and Dean DePountis, in-house counsel for the Standing Rock Sioux Tribe, led a meaningful panel discussion on the Dakota Access Pipeline. Through fascinating lectures, they explored the weaknesses of the legal system in dealing with this situation and assessing the relevant environmental and cultural implications. Although the pipeline stands as a tragic defeat in the eyes of tribes all across the country, the struggle can be viewed as a learning experience in many ways.

Perhaps one of most contentious and recognized disputes in Native American history, the Dakota Access Pipeline, also known as the "black snake," has exposed the complex nature of tribal water law beyond the periphery of the public eye. While disputes over Native American land and water rights often go unnoticed, the pipeline has certainly brought attention to issues that are often hidden in plain sight: constant undermining of tribal sovereignty, lack of consultation, and a disregard to environmental and human safety on the part of both the U.S. government and private corporations.

The Dakota Access Pipeline is a \$3.8 billion project developed by Energy Transfer Partners and Dakota Access, LLC. The pipeline is approximately 1,100 miles in length, transporting crude oil from northwestern North Dakota through South Dakota, Iowa, and ending in Patoka, Illinois. The most contentious segment of the pipeline, which has become the focus of media attention, is in fact a very small portion of the entire project. This segment burrows under the Missouri River at Lake Oahe a half-mile north of the Standing Rock Sioux Reservation in North Dakota. Lake Oahe is federally-owned land managed by the United States Army Corps of Engineers (the "Corps"), but it has significant spiritual value to the Tribe's culture and history.

Dean DePountis explained that the issue with the pipeline's proximity to the reservation is twofold. First, the pipeline trespasses through culturally and