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## Reserved Indian Water Rights in Riparian Jurisdictions: Water, Water Everywhere, Perhaps Some Drops for Us

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# RESERVED INDIAN WATER RIGHTS IN RIPARIAN JURISDICTIONS: WATER, WATER EVERYWHERE, PERHAPS SOME DROPS FOR US

Hope M. Babcock†

*In this Article, the author explores the question of whether nonfederally recognized eastern Indian tribes can claim reserved tribal rights to water under the Winters doctrine. The urgency of resolving this question in the tribes' favor is underscored by the mounting problem of water scarcity in the East, where most such tribes live, and the problems these tribes have in claiming water under the prevailing systems for managing water in that part of the country, riparianism and regulated riparianism. Recognizing that, to date, these rights have been claimed almost exclusively by federally recognized western tribes who live on withdrawn federal lands in states that manage water under the prior appropriation system, the author nonetheless puts forth an array of reasons why these factors should not bar eastern tribes from claiming the same rights. After examining the major features of the three systems for allocating surface flow and the Winters doctrine, the author will show that there are no insurmountable obstacles to the assertion of Winters rights in non-prior appropriation jurisdictions. The author then turns to various normative and utilitarian reasons why eastern tribes should be able to claim these rights. The Article concludes by showing why the artifacts of federal recognition and federal reservations should not pose a barrier to eastern tribes' assertion of their Winters rights.*

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## INTRODUCTION

*There has been a lot said about the sacredness of our land which is our body; and the values of our culture which is our soul; but water is the blood of our tribes, and if its life-giving flow is stopped, or it is polluted, all else will die and the many thousands of years of our communal existence will come to an end.*<sup>1</sup>

Since the 1980s, recurrent patterns of drought and population growth have increased the demand on eastern rivers.<sup>2</sup> This, in turn,

<sup>1</sup> A Dwindling Water Supply and the Indian Struggle to Retain Aboriginal and Winters Doctrine Water Rights, AM. INDIAN J., Dec. 1978, at 35 (quoting Governor Frank Tenorio of the San Felipe Pueblo).

<sup>2</sup> See Olivia S. Choe, Note, *Appurtenancy Reconceptualized: Managing Water in an Era of Scarcity*, 113 YALE L.J. 1909, 1909 (2004) (stating that in the past few decades, "water has increasingly become scarce, due to recurring droughts and burgeoning urban and suburban populations"); see also *The Twenty-First Century Water Commission Act of 2003: Notice for Hearing on H.R. 135 Before the Subcomm. on Water Resources and Environment of the H. Comm. on Transportation and Infrastructure*, 108th Cong. (scheduled for May 7, 2003), available at <http://www.house.gov/transportation/water/05-07-03/05-07-03memo.html> (discussing

has put stress on the capacity of the traditional legal regime, the common law riparian doctrine, to allocate flow equitably and efficiently among potential users and to preserve sufficient water for ecosystem purposes.<sup>3</sup> In response to increasing consumption of surface water and the unanticipated problem of potential overconsumption, many eastern states have modified the common law riparian doctrine by incorporating features of the western appropriation doctrine, a legal regime designed for a significantly drier climate with historic water scarcity.<sup>4</sup>

Regulators have generally overlooked eastern Indian tribes<sup>5</sup> when deciding who receives access to surface water.<sup>6</sup> This remains true despite the fact that many eastern tribes occupy reservations adjacent to rivers and depend on the water in those rivers for food and income, as well as for cultural identity and ceremonial purposes.<sup>7</sup> As the demands on surface water increase in the East, these tribes, similar to tribes in the West, find themselves competing with powerful non-Indian interests for an increasingly scarce resource.<sup>8</sup> Eastern tribes are, however, at a distinct disadvantage compared with many western tribes because the legal regimes within which eastern tribes seek access to water are generally unfavorable to their claims.

One way to level the playing field for eastern tribes is to recognize that like federally recognized western tribes, tribes in the East possess a reserved water right, known as a *Winters* right, to sustain their treaty-protected aboriginal uses of the water that flows across or next to their

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H.R. 135's establishment of a commission to conduct an assessment of the United States' water resources in light of recent water scarcity in the East); SANDRA POSTEL & BRIAN RICHTER, *RIVERS FOR LIFE: MANAGING WATER FOR PEOPLE AND NATURE* 93 (2003) (stating that many eastern rivers, like those in the West, are "oversubscribed, leaving little or no flow to meet ecosystem requirements"); Richard Ausness, *Water Rights Legislation in the East: A Program for Reform*, 24 WM. & MARY L. REV. 547, 547 (1983) (attributing water shortages in the East to "expanding municipal and industrial demand" and "increasing use of supplemental irrigation").

<sup>3</sup> See Choe, *supra* note 2, at 1911–12.

<sup>4</sup> See *id.* at 1912.

<sup>5</sup> Western tribes have not been similarly ignored, because of the significant "paper rights" to water they possess by virtue of the so-called *Winters* doctrine. See Judith V. Royster, *A Primer on Indian Water Rights: More Questions than Answers*, 30 TULSA L.J. 61, 100 (1994); see also *infra* Part II (discussing *Winters*).

<sup>6</sup> See Judith V. Royster, *Winters in the East: Tribal Reserved Rights to Water in Riparian States*, 25 WM. & MARY ENVTL. L. & POL'Y REV. 169, 169 (2000).

<sup>7</sup> Furthermore, water regulation is "an important sovereign power." *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 52 (9th Cir. 1981).

<sup>8</sup> See Joseph R. Membrino, *Indian Reserved Water Rights, Federalism and the Trust Responsibility*, 27 LAND & WATER L. REV. 1, 14 (1992) ("If one may mark the turn of the 20th century by the massive expropriation of Indian lands, then the turn of the 21st century is the era when the Indian tribes risk the same fate for their water resources.").

reservations. To date, no court has recognized such a right.<sup>9</sup> This Article explores the possibility that a nonfederally recognized eastern tribe could assert a *Winters* right, and posits that the barriers to such an assertion may not be as forbidding as they initially seem.<sup>10</sup>

In order to understand the legal regime under which reserved water rights historically have arisen, as well as the systems in which, this Article suggests, reserved water rights might be asserted, Part I describes and compares three such systems for managing water flow. These systems are common law riparianism, prior appropriation, and regulated riparianism.<sup>11</sup> Part II examines the *Winters* doctrine, the source of reserved tribal water rights, and how courts have interpreted and applied the rights arising out of *Winters*. Part III puts forth several doctrinal as well as normative and utilitarian arguments for why eastern tribes could assert reserved water rights. Part IV explains why the lack of federal recognition and the absence of public lands, two presumed prerequisites for the assertion of *Winters* rights, should not be a bar to their assertion.

This Article occasionally refers to the Mattaponi Indian Tribe, whose reservation lies on the banks of the Mattaponi River in Virginia.<sup>12</sup> The Mattaponi Tribe is party to a 1677 treaty between the British Crown and Virginia's colonial government,<sup>13</sup> the Treaty at Middle Plantation, which reserves for the Tribe's exclusive use the lands on which it resides today,<sup>14</sup> including the rights to fish, hunt,

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<sup>9</sup> See, e.g., Royster, *supra* note 6, at 173 ("With one partial exception[, the Seminole Water Rights Compact], tribal water rights have been litigated only in appropriation states . . .").

<sup>10</sup> Like many who write in the field of reserved Indian water rights, I am indebted to the work of Judith V. Royster, whose piece *Winters in the East: Tribal Reserved Rights to Water in Riparian States* sets the groundwork for much of what appears here. See Royster, *supra* note 6; see also Royster, *supra* note 5, at 101–03 (introducing the idea of *Winters* rights in riparian and "dual-system" states, i.e., states with both prior appropriation and riparian water management legal regimes, such as California).

<sup>11</sup> This Article's discussion of riparianism in both its traditional and regulated forms frequently refers to Virginia's water law; this is because Virginia is the home state of the Mattaponi Indian Tribe.

<sup>12</sup> The Mattaponi Tribe is one of the few remaining descendant tribes of a paramount chiefdom controlled by Powhatan, father of Pocahontas. It is one of a group of tribes that entered into the Treaty at Middle Plantation with representatives of the British Crown in 1677, which among other things created the modern Mattaponi Indian Reservation. See HELEN C. ROUNTREE, *POCAHONTAS'S PEOPLE: THE POWHATAN INDIANS OF VIRGINIA THROUGH FOUR CENTURIES 100–03* (1990). The Tribe's perseverance is remarkable given all it has endured since its first contact with Europeans, including Bacon's Rebellion, disease, and the "black code," which denied Indians both the right to hold office in the colony as well as access to the colonial court system. See *id.* at 97–99, 127, 142.

<sup>13</sup> See Treaty at Middle Plantation with Tributary Indians After Bacon's Rebellion, arts. III–IV, 1677, reprinted in 4 *EARLY AMERICAN INDIAN DOCUMENTS: TREATIES AND LAWS, 1607–1789*, at 82–87 (Alden T. Vaughan & W. Stitt Robinson eds., 1983) [hereinafter Treaty at Middle Plantation].

<sup>14</sup> See *id.* at arts. III–IV.

and gather on ancestral lands.<sup>15</sup> Since the mid-1990s, the Tribe has fought the construction of a proposed 1,500-acre municipal reservoir that would withdraw 75 million gallons of water per day from the Mattaponi River and flood the Tribe's ancestral lands.<sup>16</sup> The Tribe argues that this withdrawal will disrupt the annual spawn of American shad on which the Tribe depends for its food, economic livelihood, and aboriginal practices. Virginia, the state in which the Tribe resides, is a regulated riparian jurisdiction, and thus retains some features of common law riparianism while also adopting some features of a prior appropriation system. The Tribe's situation, therefore, illustrates some of the points made in this Article.

## I

### THREE LEGAL DOCTRINES FOR MANAGING WATER FLOW

Three legal regimes apply to surface water allocation in the United States: riparianism, prior appropriation, and regulated riparianism. The eastern part of the country largely adheres to riparianism and regulated riparianism, while the prior appropriation doctrine dominates in the West.<sup>17</sup> Regulated riparianism arose in response to both practical and equitable concerns with common law riparianism and a growing sense that the common law doctrine was neither efficient nor promoted water conservation.<sup>18</sup> To date, nearly half of the eastern states where the common law riparian doctrine applies have adopted statutes implementing some kind of administrative permit system for the allocation of water, along with other features of the prior appropriation doctrine, in an attempt to address these problems.<sup>19</sup>

In order to understand the ease, or difficulty, of integrating a reserved tribal water right into an existing legal regime, it is necessary to know the key features of the existing system. Because prior appropria-

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<sup>15</sup> See *id.* at art. VII.

<sup>16</sup> The Tribe has challenged the issuance of permits for the project in the Virginia courts and in various federal and state agency proceedings, arguing that the permits will violate its treaty-protected right to live unmolested on its reservation and to continue its aboriginal uses of the Mattaponi River. The Institute for Public Representation at Georgetown University Law Center, of which I am a director, has represented the Mattaponi Tribe in this matter since 1996.

<sup>17</sup> The "Colorado doctrine," which governs water allocation in Alaska, Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming, does not recognize riparian rights; the "California doctrine," which holds sway in California, Kansas, Nebraska, North Dakota, Oklahoma, Oregon, South Dakota, Texas, and Washington, allows riparian rights to coexist with prior appropriative rights, even though the two doctrines are essentially incompatible. See Ausness, *supra* note 2, at 548 n.4 (observing that because of the incompatibility of riparianism and prior appropriation, most "California doctrine" states impose some "limitations on the exercise of riparian rights").

<sup>18</sup> See Choe, *supra* note 2, at 1911.

<sup>19</sup> See *id.* at 1912.

tion is the only system to recognize reserved tribal water rights, identifying the features of that system that facilitate the recognition of such rights and determining whether those features can be found in either traditional or regulated riparian systems is important. Furthermore, it is important to learn whether any aspect of traditional riparian law creates barriers to the recognition of reserved tribal water rights and whether these features are present in regulated riparian systems.

### A. Common Law Riparian Doctrine

Under the riparian doctrine, the right to use water arises from owning land bordering a river, stream, or lake.<sup>20</sup> Thus, only people who own land appurtenant to a watercourse can access and use that water, and the riparian landowners can use that water only on the parcels of land adjacent to such watercourse.<sup>21</sup> Two additional rules limit the amount of flow that a riparian can divert or consume. Under the first, the "natural flow" or "English rule," a riparian landowner has the right to the natural flow of the water passing his land "not perceptibly retarded, diminished or polluted by others."<sup>22</sup> Under the natural flow doctrine, a riparian may take all the water he or she requires "for domestic or natural uses," even if doing so drains the entire water source.<sup>23</sup> Second, under the "reasonable use" or "American rule," a riparian may use a watercourse for any beneficial purpose so long as that use does not interfere unreasonably with the legitimate water needs and uses of other riparians.<sup>24</sup> Under the natural flow rule, "all riparian owners possess correlative rights to use the water *on or in connection with the land*," and a riparian can maintain a claim that his or her rights have been violated without having to prove damages.<sup>25</sup> In

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<sup>20</sup> See Ausness, *supra* note 2, at 548.

<sup>21</sup> See *id.* In Virginia, riparian rights are severable from land and, like water rights under a prior appropriation system, can be conveyed separately, but not to another water basin. See, e.g., *Buchanan v. Norfolk S. R.R. Co.*, 142 S.E. 405, 408 (Va. 1928) (allowing the grantor to reserve a riparian right despite having conveyed fee simple title in the property to the railroad).

<sup>22</sup> Ausness, *supra* note 2, at 549.

<sup>23</sup> See *id.* at 549 n.6.

<sup>24</sup> See *id.* at 550; Carol M. Rose, *Energy and Efficiency in the Realignment of Common-Law Water Rights*, 19 J. LEGAL STUD. 261, 286–87 (1990) (noting the origin of the "reasonable use" doctrine in Joseph Story's opinion in *Tyler v. Wilkinson*, 24 F. Cas. 472 (C.C.D.R.I. 1827)).

<sup>25</sup> Laura M. Zawisa, Case Note, 64 U. DET. MERCY L. REV. 579, 580 n.12 (1987); see also RESTATEMENT (SECOND) OF TORTS § 850 note (1979) (Introductory Note on the Nature of Riparian Rights and Legal Theories for Determination of the Rights) [hereinafter RESTATEMENT] (stating that under the natural flow doctrine, "the primary or fundamental right of each riparian proprietor . . . is to have the body of water flow as it is wont to flow in nature, qualified only by the privilege of each to make limited uses of the water").

contrast, under the reasonable use rule, a riparian must show actual damages.<sup>26</sup> Most riparian states adhere to the reasonable use rule.<sup>27</sup>

Reasonableness under the American rule is a question of fact determined on a case-by-case basis.<sup>28</sup> Thus, so long as other riparians did not object and could not show injury, this rule would allow a riparian owner to use all of the water in a given watercourse.<sup>29</sup> The right to use water under this rule is not unqualified, however, as other riparians can begin reasonable uses of the stream in the future and may object to any previous uses that interfere with their new uses of the stream.<sup>30</sup>

There are numerous criticisms of the riparian doctrine in either form.<sup>31</sup> First, because riparian rights are defined in relation to other rights and must adapt to changes in those rights, water allocations under the riparian doctrine are extremely uncertain and too indeterminate to encourage economic development.<sup>32</sup> A riparian has no per-

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<sup>26</sup> See Zawisa, *supra* note 25; see also RESTATEMENT, *supra* note 25 (stating that under the reasonable use doctrine, “the primary or fundamental right of each riparian proprietor . . . is to be free from unreasonable uses that cause harm to his own reasonable use of the water”).

<sup>27</sup> See RESTATEMENT, *supra* note 25. Rose describes an almost Darwinian evolution of the earlier natural flow doctrine into the reasonable use doctrine, observing that the former “offered a workable system for allocating entitlements where the stable and relatively low demand for water resources was only sporadically threatened by extreme individual behaviors.” Rose, *supra* note 24, at 266. In contrast, the latter “was better suited to the industrial era that followed . . . [because] it permitted more intensive private utilization of flowing water, in large measure because the system of correlative reasonable rights obviated the need for agreements among all the owners along the stream.” *Id.*

<sup>28</sup> See Ausness, *supra* note 2, at 549. Ausness lists some of the factors courts examine to determine if a particular use is reasonable: climate, customs and previous uses, the watercourse’s capacity to sustain the proposed use, the amount of water taken, the social importance of the use, and the rights and reasonable needs of other riparian owners. See *id.* at 550.

<sup>29</sup> See *id.* Rose describes this possibility as characteristic of a “common pool, in which the total value to riparians was increased by allowing some modicum of damage from each riparian’s use so long as the bulk of the river flow was retained for all.” Rose, *supra* note 24, at 266.

<sup>30</sup> See Ausness, *supra* note 2, at 550 (“[A] use which is reasonable under existing circumstances may subsequently become unreasonable when others begin to use the watercourse.”). In Virginia, riparian rights are “qualified property rights incident to the ownership of the soil through or by which the waters of a stream flow,” thus giving riparian owners a little more certainty regarding their rights. *Thurston v. City of Portsmouth*, 140 S.E.2d 678, 680 (Va. 1965) (quoting *Hite v. Town of Luray*, 8 S.E.2d 369, 372 (Va. 1940)).

<sup>31</sup> See Choe, *supra* note 2, at 1911–12 (listing the following as flaws of the riparian doctrine: the doctrine fails to “protect against excessive diversions by riparians, or to ensure minimum stream flows for the public”; being “correlatively defined, and thus [capable of] shift[ing] over time as neighboring users and uses change[ ],” riparian rights are inherently uncertain, which thus “inhibit[s] investment and prevent[s] the development of markets in transferable water rights”; and, by “favoring private agrarian interests” and “lack[ing] a procedural mechanism for reallocating resources to those in need during times of scarcity,” the doctrine is inherently inequitable).

<sup>32</sup> See Ausness, *supra* note 2, at 552–53 (describing riparian rights as “vague and uncertain,” and arguing that under the reasonable use rule, “one cannot be certain who may use



manent right to a particular quantity of water, in that a subsequent water use can defeat a prior use either completely or partially.<sup>33</sup> Second, since the doctrine requires that riparian water be used on adjacent land, it cannot be transferred to a more beneficial use on nonriparian land.<sup>34</sup> This qualification results in inefficient uses of water.<sup>35</sup> Third, because the doctrine allows for the complete consumption of a watercourse, and limitations on withdrawals come solely from other users, the doctrine neither favors nor promotes conservation.<sup>36</sup> Fourth, the balancing test employed under the reasonable use rule unfairly favors large landowners and does not necessarily lead to optimal water use.<sup>37</sup> Fifth, no mechanism exists for reallocating riparian water rights from a wasteful or less socially useful purpose to a more beneficial purpose.<sup>38</sup> Finally, as there is no *ex ante* way of avoiding or resolving them, disputes between riparians often result in lawsuits, which are expensive and filled with uncertainty as their outcomes may vary from judge to judge and stream to stream.<sup>39</sup>

There are positive features of riparianism, however. Restricting the use of withdrawn water to appurtenant land limits the amount of water that can be withdrawn to the needs of a defined piece of prop-

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the available water or how much and for what purpose it may be used . . . because water use must be reasonable relative to uses of other riparian owners, and these other uses constantly change"). Ausness lists as additional deficiencies of the doctrine that it "fails to recognize the relationship between surface water and ground water," thereby making a uniform rule for the allocation of water difficult, if not impossible, to achieve, and that the riparian system lacks "an efficient mechanism for resolving disputes among competing water users." *Id.* at 553.

<sup>33</sup> A. Dan Tarlock notes that the Restatement (Second) of Torts has somewhat alleviated this problem "by introducing a modified theory of priority" under which "'protection of existing values of water uses, land, [and] investments' should be considered in determining the reasonableness of a new use." A. Dan Tarlock, *Introduction*, 24 WM. & MARY L. REV. 535, 540 (1983) (quoting RESTATEMENT (SECOND) OF TORTS § 850A (1979)).

<sup>34</sup> In Virginia, for example, even though riparian rights can be severed from the land, they can only be used on land within the watershed so that any unused water drains back into its original source. See *Town of Gordonsville v. Zinn*, 106 S.E. 508, 511-12 (Va. 1921). Thus, even an important public use may not be permissible. See, e.g., *Town of Purcellville v. Potts*, 19 S.E.2d 700, 701-03 (Va. 1942) (holding that a municipality as a riparian owner was not allowed to divert water from its riparian land, even for the purposes of constructing a public water system).

<sup>35</sup> See Choe, *supra* note 2, at 1928.

<sup>36</sup> See *id.* at 1911.

<sup>37</sup> See Joseph W. Dellapenna, *The Law of Water Allocation in the Southeastern States at the Opening of the Twenty-First Century*, 25 U. ARK. LITTLE ROCK L. REV. 9, 17 (2002); see also Choe, *supra* note 2, at 1911 ("[R]iparianism was accused of favoring private agrarian interests.").

<sup>38</sup> See Dellapenna, *supra* note 37, at 16 ("[T]here is no process for managing water in times of extreme shortage or for otherwise protecting public values.").

<sup>39</sup> See Ausness, *supra* note 2, at 553 ("Not only are lawsuits time-consuming, expensive, and uncertain in outcome, but the results even of successful litigation often are narrow and limited.").

erty<sup>40</sup> or riparian owner.<sup>41</sup> Further, the notion of appurtenancy embodies a communal principle since it involves a “web of interrelationships and monitoring that characterizes [any] common property regime.”<sup>42</sup> Carol Rose notes that “riparian law in the nineteenth century effectively turned river-bank landowners into participants in common property regimes . . . from which outsiders were excluded.”<sup>43</sup> This means that people nearest to the resource will “develop sustainable practices and . . . monitor each other’s usage” of the resource,<sup>44</sup> which scholars of communal property such as Rose and Elinor Ostrom have demonstrated to be an effective system of resource management.<sup>45</sup>

The reasonable use or American rule requires that later riparians justify their interference with existing riparian uses as more socially beneficial.<sup>46</sup> Moreover, the reasonable use rule’s requirement that a downstream riparian show actual injury in order to defeat an upstream riparian use imposes an additional limit on the amount of water that riparians can claim under the doctrine.<sup>47</sup> Finally, as a crea-

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<sup>40</sup> See Choe, *supra* note 2, at 1928 (“Appurtenancy and its sister doctrines may have tried to cap usage by drawing on the proxies of adjacency, watershed boundaries, and parcel size, just as medieval peasants relied on sheeps’ digestive systems, and Maine lobstermen relied on the size of standard fishing traps.”).

<sup>41</sup> See Choe, *supra* note 2, at 1923 (suggesting that by “limiting access to a group of users defined by their proximity to the resource,” the appurtenancy doctrine’s ownership feature “can assist in the conservation of a common-pool resource”); see also Rose, *supra* note 24, at 291–92 (explaining that eastern riparian rights did not develop out of individualistic, consumptive water uses but rather grew out of a need for power, a public or common good).

<sup>42</sup> Choe, *supra* note 2, at 1922.

<sup>43</sup> Carol M. Rose, *The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems*, 83 MINN. L. REV. 129, 179 (1998); see also David H. Getches, *Water Rights on Indian Allotments*, 26 S.D. L. REV. 405, 416 (1981) (noting that Indian reserved water rights, like their treaty-based right “to fish at certain usual and accustomed places,” are communal).

<sup>44</sup> Choe, *supra* note 2, at 1923.

<sup>45</sup> See ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* 58–102 (1990) (analyzing the organization of “common-pool resources” in Switzerland, Japan, Spain, and the Philippines and setting out seven principles that make such organizations effective); Rose, *supra* note 43, at 157 (“In [common property regimes], informal norms and user-created enforcement techniques may go some distance toward self-policing and perimeter defense.”).

<sup>46</sup> See Choe, *supra* note 2, at 1938. Choe describes how agencies in regulated riparian systems consider “the economic and social importance of the proposed water use and other existing or planned water uses sharing the water source” when making permit decisions. *Id.* (quoting THE REGULATED RIPARIAN MODEL WATER CODE § 6R-3-02 (Joseph W. Dellapenna ed., 1997)).

<sup>47</sup> See *Seeley v. Brush*, 35 Conn. 419, 423 (1868) (holding that “riparian proprietors are bound so to use their rights as not to cause any material or appreciable injury to [other riparians’] rights”).

ture of the common law, the riparian doctrine is infinitely malleable and responsive to changing circumstances and social needs.<sup>48</sup>

While riparian rights offer some promise for tribes as a source of water, the problems noted above—the impermanence of the right, the barriers to out-of-basin transfers inhibiting water marketing, and the bias toward large landowners—make it a less-than-perfect solution for tribes.<sup>49</sup> In addition, there are several problems with riparian rights specific to tribes. First, federally recognized tribes are not landowners, since the government holds their reservations in trust.<sup>50</sup> This may act as a barrier to the assertion of riparian rights, which attach to fee ownership of appurtenant land.<sup>51</sup> Further, while most tribes could show that their use of a stream is reasonable to the extent that the water is for a domestic or stock-watering use,<sup>52</sup> it is unclear whether fishing or maintaining water instream as a fish habitat in the face of a demand for water by an upstream riparian would qualify as a reasonable use. Another problem for tribes in showing injury from upstream diversion is establishing that insufficient water remains for the tribes' reasonable uses.<sup>53</sup> Thus, although tribes might secure a water supply as occupiers, and sometimes owners, of riparian lands, the limitations

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<sup>48</sup> See Rose, *supra* note 24 (describing the historical development of riparian law during the early part of Anglo-American industrialization); Tarlock, *supra* note 33, at 538 (suggesting that eastern water law's "flexibility is a strength, not a weakness," and that it is superior to western water law because it regards "nonconsumptive uses [as being] at least as important as consumptive uses"); see also Choe, *supra* note 2, at 1929–30 (noting that some states have abandoned riparian doctrine's appurtenancy requirement in allowing interbasin transfers of water to augment its efficient use and stating that "the general trend has been away from appurtenancy and toward increasing nonriparian use"). Choe also notes that courts have expanded what qualifies as a "reasonable use" of a water source's flow to allow its complete consumption as long as downstream riparian landowners either do not complain or cannot show injury. See *id.* at 1930–35.

<sup>49</sup> See *supra* text accompanying notes 31–39.

<sup>50</sup> See, e.g., Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069, 1094 (2004) (stating that the United States government holds the "great majority of Indian lands" in trust).

<sup>51</sup> See Richard W. Bartke & Susan Hedges Patton, *Water Based Recreational Developments in Michigan—Problems of Developers*, 25 WAYNE L. REV. 1005, 1009 (1979) (noting that "[r]iparian rights arise by virtue of title to the bank or shore"). But to the extent that *United States v. Winans*, 198 U.S. 371, 381 (1905), holds that rights not ceded by tribes in treaties remain with them, which would include the right to sufficient water to sustain their traditional uses, tribes may be able to overcome the problem of not possessing fee title to appurtenant land. Cf. *Buchanan v. Norfolk S. R.R. Co.*, 142 S.E. 405, 408 (Va. 1928) (holding that lessees of fishery rights had the riparian right to "limited use of the adjacent shores" because otherwise "[t]he lease would have been utterly worthless to [them]").

<sup>52</sup> See Douglas W. MacDougal, *Private Hopes and Public Values in the "Reasonable Beneficial Use" of Hawai'i's Water: Is Balance Possible?*, 18 U. HAW. L. REV. 1, 20–21 (1996) ("Domestic, municipal, agricultural and industrial uses are universally regarded as beneficial.").

<sup>53</sup> See *Town of Gordonsville v. Zinn*, 106 S.E. 508, 514 (Va. 1921) (stating that "in an action for damages or suit for injunction by a lower against an upper riparian landowner for wrongful diversion of water by the latter . . . the plaintiff . . . must show some substantial actual damage occasioned by the diminution of the quantity of the water which the plaintiff has the right to use").

and problems with the riparian doctrine make it an unappealing foundation for water rights claims.

### B. Prior Appropriation Doctrine

The prior appropriation doctrine, which dominates water law in the arid and semiarid areas of the western United States, is the antithesis of common law riparianism.<sup>54</sup> In contrast to riparians, holders of appropriative rights may transfer their rights out of basin and among various owners.<sup>55</sup> Unlike holders of riparian rights, appropriated water rights holders can lose their rights by abandoning them or allowing them to fall into disuse.<sup>56</sup> Appropriators, therefore, must “use it or lose it,” an incentive that often leads to wasting water in order to avoid losing rights. Under the “first in time, first in right” rubric, appropriative water rights are accorded on a priority basis.<sup>57</sup> In times of shortage, a junior appropriator can lose any rights to water if a senior appropriator dewateres or substantially reduces the entire watercourse.<sup>58</sup> Unlike the riparian system, the prior appropriation doctrine neither recognizes correlative rights nor perceives any need to keep water in the stream.<sup>59</sup> Although a usufruct in form, using water for a beneficial purpose creates a property right in the appropriator.<sup>60</sup>

Water rights under the prior appropriation doctrine primarily arise under state law and are subject to permit as part of comprehensive regulatory systems.<sup>61</sup> State regulators can condition, modify, or deny a permit application to protect other users or to pursue a public good such as recreation or fishery maintenance.<sup>62</sup> State administrative agencies allocate rights in an *ex ante* fashion, as opposed to judges who make *post hoc* decrees in the riparian system.<sup>63</sup> Under

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<sup>54</sup> See Choe, *supra* note 2, at 1909 n.1.

<sup>55</sup> See *Strickler v. Colo. Springs*, 26 P. 313, 317 (Colo. 1891); see also *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443, 447–49 (1882) (holding that common law riparian doctrine did not apply in Colorado and giving preemptive rights to prior appropriators, including the right to divert water from a stream to irrigate nonadjacent land).

<sup>56</sup> See Ausness, *supra* note 2, at 555.

<sup>57</sup> See *id.*

<sup>58</sup> See *id.*

<sup>59</sup> See Charles F. Wilkinson, *The Future of Western Water Law and Policy*, in *INDIAN WATER 1985: COLLECTED ESSAYS* 51, 52 (Christine L. Miklas & Steven J. Shupe eds., 1986) [hereinafter *INDIAN WATER*].

<sup>60</sup> See Katherine Lamere Mead, *Wyoming's Experience with Federal Non-Indian Reserved Rights: The Big Horn Adjudication*, 21 *LAND & WATER L. REV.* 433, 438 n.46 (1986).

<sup>61</sup> See Ausness, *supra* note 2, at 555.

<sup>62</sup> But see Tarlock, *supra* note 33, at 538 (noting that despite the fact that permit programs acknowledge nonconsumptive uses such as “aesthetic enhancement, fish and wildlife protection, pollution abatement, and recreation,” permit programs may “undervalue” such uses if no one applies for a permit for them).

<sup>63</sup> See Choe, *supra* note 2, at 1911–12.

the prior appropriation system, state law even administers federally reserved water rights.<sup>64</sup>

Western states adopted the prior appropriation system in response to the nature of the western water supply and its uses. Charles Wilkinson attributes the West's rejection of the riparian doctrine in favor of prior appropriation to the specific needs of miners in water-poor areas.<sup>65</sup> The miners required large amounts of water in order to flood mine workings, separate gold nuggets from river gravel, and blast out placer deposits in canyon walls far from the water's source.<sup>66</sup> Miners developed the basic elements of the prior appropriation doctrine identified above.<sup>67</sup> Over time, state courts<sup>68</sup> and eventually the United States Supreme Court<sup>69</sup> and Congress<sup>70</sup> recognized these elements.

Farmers, who needed above-average rainfall to irrigate their crops, soon replaced the miners.<sup>71</sup> The farmers similarly benefited from a doctrine that allowed them to transfer water and guaranteed

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<sup>64</sup> See *United States v. District Court in and for the County of Eagle (Eagle County)*, 401 U.S. 520, 524 (1971) (holding that the provision of the McCarran Amendment that provides a limited waiver of the sovereign immunity of the United States in the context of water rights adjudications, 43 U.S.C. § 666(a) (2000), subjects federal reserved water rights to adjudication in state court); see also *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 809–10 (1976) (extending the reasoning behind *Eagle County* to federally reserved water rights on behalf of tribes); Royster, *supra* note 5, at 97–98 (stating that *Colorado River* “created a new abstention doctrine” that does not divest federal courts of concurrent jurisdiction over federal reserved water rights but encourages them to refrain from exercising their jurisdiction in favor of state courts).

<sup>65</sup> See Wilkinson, *supra* note 59, at 51–52.

<sup>66</sup> See *id.* (“Water was not an amenity in Gold Rush times, it was an engine.”). But see JOHN SHURTS, *INDIAN RESERVED WATER RIGHTS: THE WINTERS DOCTRINE IN ITS SOCIAL AND LEGAL CONTEXT, 1880s–1930s*, at 40 (2000) (describing how the “first wave of miners” used a variety of “preexisting and reworked legal traditions, including practical variations of the riparian doctrine,” and stating that “a great number of western settlers, miners, politicians, writers, lawyers, and judges” from the mid- to late-nineteenth century “were comfortable working with and preferred other water allocation systems” and therefore criticized prior appropriation “as a giveaway of something valuable to the people and as tending toward unfair, private monopolization of a precious resource”); see also *id.* at 41 (“The ‘victory’ of the prior appropriation system was always a contested and contingent affair.”).

<sup>67</sup> See Rose, *supra* note 24, at 289. Rose notes that the informal system of appropriative water rights developed by miners was one of “occupancy” not just of particular locations, as it was originally in the East, but of entire watercourses. *Id.*

<sup>68</sup> See Wilkinson, *supra* note 59, at 52 (describing how water rights rules “‘firmly fixed’ by ‘a universal sense of necessity and propriety’ in the mining camps” were first upheld by the California Supreme Court in *Irwin v. Phillips*, 5 Cal. 140 (1855), and then by other Rocky Mountain state courts (quoting *Irwin v. Phillips*, 5 Cal. 140, 146 (1855))).

<sup>69</sup> See *Cal. Or. Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 163–64 (1935).

<sup>70</sup> See, e.g., 30 U.S.C. § 26 (2000) (giving miners the exclusive right of possession of the surface of their mining claims).

<sup>71</sup> See Wilkinson, *supra* note 59, at 52–53.

them a fixed quantity of water as long as they put the water to a beneficial use.<sup>72</sup>

The prior appropriation system introduced stability, clarity, and permanence into a system for allocating surface water that had been inherently unstable, opaque, and uncertain.<sup>73</sup> Under the prior appropriation doctrine, every holder of water rights knows where she stands in relation to other rights holders; rights are allocated in perpetuity and can be “diminished or terminated [only] through abandonment, forfeiture, or lack of beneficial use.”<sup>74</sup> As a result, people can invest in water development or diversion projects without fear that allocated amounts will be reduced, transferred away, or lost completely.<sup>75</sup>

Nonetheless, the system has its flaws. The prior appropriation doctrine responds slowly to changing circumstances and needs because of the resistance of vested interests.<sup>76</sup> Its “use it or lose it” dogma encourages waste and generally inefficient practices<sup>77</sup> and favors established interests.<sup>78</sup> As Rose has described it, prior appropriation is a “zero-sum game” in which one user benefits at the expense of another.<sup>79</sup>

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<sup>72</sup> See *id.* at 53. Wilkinson identifies “the provision of subsidized water for irrigators” as being one of the themes that has dominated traditional water law in the West. *Id.*

<sup>73</sup> See *id.* (identifying “state control; stable priority for historic uses; concern for private rights over public rights; [and] preference for consumptive, usually commercial, uses” as the major themes of traditional water law in the West). Ausness argues that “[a]n important objective of any system of water rights is to encourage optimal use of the resource,” which can be achieved if water rights are “both specific and secure[,] . . . specific so that the water user knows what he has, and . . . secure so that he knows where he stands in relation to other users.” Ausness, *supra* note 2, at 576. The system must be both sufficiently flexible to permit the “transfer of water from less productive to more productive uses” and fair, defined as “equal access to the resource, freedom from arbitrary treatment, and assurances that reasonable expectations will not be frustrated by a regulatory agency.” *Id.*

<sup>74</sup> Tarlock, *supra* note 33, at 536 n.3.

<sup>75</sup> See Todd S. Hageman, *Water Law: Franco-Am. Charolaise, Ltd. v. Okla. Water Resources Board: The Oklahoma Supreme Court's Resurrection of Riparian Rights Leaves Municipal Water Supplies High and Dry*, 47 OKLA. L. REV. 183, 185 (1994) (noting that “[p]rior appropriation encourages urban growth by giving local governments predictability when planning for their water supply,” which results from the fact that they can assert water rights without worrying about later appropriators interfering with or taking those rights).

<sup>76</sup> See Mark A. Weitz, *Congressman John J. Rhodes and Representation: The Case of Native American Water Rights*, W. LEGAL HIST., Winter/Spring 1999, at 79–80.

<sup>77</sup> See Jane Maslow Cohen, *Foreword: Of Waterbanks, Piggybanks, and Bankruptcy: Changing Directions in Water Law*, 83 TEX. L. REV. 1809, 1840 (2005).

<sup>78</sup> See Weitz, *supra* note 76, at 79–80. As former Navajo Tribal Chairman Peterson Zah said when commenting on his tribe's pursuit of water rights: “When I was a kid in geography class, I was taught that water always flows downhill . . . . What I've learned since is that water flows to money and power, wherever they may be.” LLOYD BURTON, *AMERICAN INDIAN WATER RIGHTS AND THE LIMITS OF LAW*, at ix (1991).

<sup>79</sup> Rose, *supra* note 24, at 291. Rose contrasts this “zero-sum game” with what happened in the East, where the primary use of water was instream power, which entails “use and relinquishment among the group of riparian owners, so that the volume of the water may be used again and again on its way downstream.” *Id.*

The federal courts have, however, intervened in response to some of the criticisms of prior appropriation noted above.<sup>80</sup> Factors that have increased public scrutiny of western water law and policy include budget constraints limiting federal irrigation subsidies, overappropriation of water as a result of continuing westward migration, groundwater mining and the realization that groundwater is not renewable, the hydrological connection between surface and groundwater requiring their “conjunctive management,” and the need to attend to pollution.<sup>81</sup> To that list one can add an array of federal statutes that have drawn attention to the problems with the prior appropriation doctrine. These statutes include the Endangered Species Act,<sup>82</sup> the Wild and Scenic Rivers Act,<sup>83</sup> the Wilderness Act,<sup>84</sup> the Federal Land Policy and Management Act,<sup>85</sup> and various forestry laws<sup>86</sup> requiring conservation of water resources to meet ecosystem and wildlife needs, unmet tribal rights to water, and an unprecedented recent cycle of drought, which has strained already overappropriated resources.<sup>87</sup> Wilkinson envisions an expanded federal presence in setting the contours of western water law, an increased emphasis on conservation to meet not only domestic and commercial uses but also recreational uses requiring sufficient water instream to meet the needs of fish, wildlife, recreation, and aesthetics.<sup>88</sup> These changes are resulting in appropriative rights being less absolute than they once were.<sup>89</sup>

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<sup>80</sup> See Heather R. Brinton, Note, *Arizona v. California: Riding the Wave of Federal Riparianism*, 13 VILL. ENVTL. L.J. 59, 60, 62 (2002) (suggesting that in *Arizona v. California* (*Arizona I*), 373 U.S. 546 (1963), the Supreme Court made “a deliberate move away from private interests and toward a [federal] riparian, public notion of water distribution,” which could potentially have deleterious effects on the West).

<sup>81</sup> See Wilkinson, *supra* note 59, at 54.

<sup>82</sup> Endangered Species Act of 1973, 16 U.S.C. §§ 1531–44 (2000 & Supp. III 2003).

<sup>83</sup> Wild and Scenic Rivers Act of 1968, 16 U.S.C. §§ 1271–87 (2000 & Supp. III 2003).

<sup>84</sup> Wilderness Act of 1964, 16 U.S.C. §§ 1131–36 (2000 & Supp. III 2003).

<sup>85</sup> Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2743 (codified as amended in scattered sections of the U.S. Code).

<sup>86</sup> U.S. Forest Service Organic Act of 1897, 16 U.S.C. § 475 (2000); Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. §§ 528–31 (2000 & Supp. III 2003); National Forest Management Act of 1976, 16 U.S.C. §§ 1600–14 (2000 & Supp. III 2003).

<sup>87</sup> For example, the Colorado River has endured five years of “the worst drought in the region’s recorded history,” prompting representatives from the seven state members of the Colorado Compact to “argu[e] about what, exactly, will happen when there’s not enough water to go around.” Matt Jenkins, *On the Colorado River, a Tug-of-War on a Tight-rope*, HIGH COUNTRY NEWS, May 16, 2005, at 5.

<sup>88</sup> See Wilkinson, *supra* note 59, at 58–61.

<sup>89</sup> See *id.* at 63. As an example of the weakening of the absolute nature of prior appropriation rights, Wilkinson cites the “public trust doctrine,” which many states have adopted. *Id.* This doctrine creates “an implied condition . . . that major environmental resources cannot be destroyed.” *Id.*

### C. Regulated Riparianism

In response to the perceived inadequacies of common law riparianism and increased water shortages in the East, about half of the eastern states have moved toward a hybrid system of water management.<sup>90</sup> Regulated riparianism combines features of both common law riparianism and the prior appropriation doctrine.<sup>91</sup>

In general, these laws require that prospective consumers of surface water apply for “a limited-duration, renewable permit from a state administrative agency.”<sup>92</sup> These permits explicitly or implicitly incorporate the western “beneficial use standard” and specify when and where a specific amount of water may be used.<sup>93</sup>

There are, however, fundamental differences between regulated riparian systems and the prior appropriation system. For example, although almost all regulated riparian systems allow nonriparians to obtain permits,<sup>94</sup> these permits, unlike their western counterparts, still attach to land and are nontransferable<sup>95</sup> unless otherwise authorized by the state legislature.<sup>96</sup> Also, unlike the prior appropriation system, under which water rights can be lost only if they are abandoned or not used,<sup>97</sup> eastern administrative agencies can use their discretion to terminate or modify permits or issue permits for a fixed period of time in

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<sup>90</sup> See Choe, *supra* note 2, at 1912.

<sup>91</sup> See Ausness, *supra* note 2, at 554 (“[V]irtually all the [water] permit systems in the East incorporate some features of the prior appropriation system.”). Rose questions whether this move toward a system of individualized property rights for common-pool resources is either a necessary evolutionary step in water management or a good thing with respect to managing and protecting a public good. See Rose, *supra* note 24, at 293–94. She notes that several western states have “pulled back” from viewing water as an individual property right and “are once again looking at water as something more akin to a . . . common resource.” *Id.* at 294.

<sup>92</sup> Choe, *supra* note 2, at 1912.

<sup>93</sup> See Ausness, *supra* note 2, at 554–55. For example, the Virginia Water Control Law requires the acquisition of water withdrawal permits and the protection of “instream beneficial uses.” Va. Code Ann. § 62.1-44.15:5(B) (LexisNexis 2001 & Supp. 2005). Virginia law defines a “beneficial use” as “[t]he preservation of instream flows for purposes of the protection of navigation, maintenance of waste assimilation capacity, the protection of fish and wildlife resources and habitat, recreation, cultural, and aesthetic values.” *Id.* at § 62.1-44.15(C). The Mattaponi Tribe challenged a permitting agency’s grant of a reservoir permit as being contrary to this statute on the ground that in granting the permit the agency ignored the tribe’s treaty-protected beneficial *cultural* uses of the Mattaponi River, which include traditional fishing and ceremonial activities. See *Mattaponi Indian Tribe v. Commonwealth*, 541 S.E.2d 920, 922–23 (Va. 2001).

<sup>94</sup> See Ausness, *supra* note 2, at 554.

<sup>95</sup> See *id.* at 555.

<sup>96</sup> See Robert Haskell Abrams, *Interbasin Transfer in a Riparian Jurisdiction*, 24 WM. & MARY L. REV. 591, 604–05 (1983) (noting that “[u]ntil an express legislative scheme governing interbasin transfers is enacted,” Virginia’s common law pertaining to riparian rights will control).

<sup>97</sup> See Ausness, *supra* note 2, at 555.



order to reallocate water for a higher or more socially beneficial use.<sup>98</sup> Finally, eastern laws generally do not recognize the priority system, a fundamental element of the western system that allows senior rights holders to defeat completely the rights of junior permittees in times of water shortage.<sup>99</sup> Senior permittees receive some protection under a regulated riparian system in that common law riparianism blocks the issuance of new permits if the permits would interfere with the water rights of existing permit holders.<sup>100</sup> In times of water shortage, however, this system does not protect senior permittees from a reduction in their rights, a protection the prior appropriation system would afford them.<sup>101</sup>

These regulated riparian legal regimes in the East also have their critics. Rose finds these regimes wanting to the extent that they have moved eastern states toward a system of individualized property rights, which she finds unsuited to a common-pool resource that is a public good.<sup>102</sup> Indeed, she notes that the eastern states, at the start of the industrial era, actively considered adopting a water rights system similar to the prior appropriation doctrine later adopted in the West, but that eastern courts decided against this, finding "riparianism more suited to their environment."<sup>103</sup>

Tarlock believes that looking at "eastern water problems through western eyes" and assuming that as scarcity and competition increase, water law "will inevitably follow the western water rights model either by adopting the doctrine of prior appropriation or by adopting the central feature of the doctrine which is a system of relatively secure private property rights" is misguided.<sup>104</sup> Water is still relatively abundant in the East such that most allocation problems there "do not center exclusively on allocating scarce supplies among competing private parties or public entities."<sup>105</sup> Tarlock argues instead that most

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<sup>98</sup> See *id.*

<sup>99</sup> See *id.*

<sup>100</sup> See *State Water Control Bd. v. Crutchfield*, 578 S.E.2d 762, 768–69 (Va. 2003) (finding that riparian landowners had established actionable injury to their existing recreational uses of a river by the water board's grant of a permit to the county to discharge wastewater fifty yards upstream from their recreational area); Ausness, *supra* note 2, at 555–56.

<sup>101</sup> See Ausness, *supra* note 2, at 555–56. In Virginia, as a continuing vestige of the riparian system, any riparian-rights holder who wishes to divert water from a watercourse must acquire the downstream riparians' rights if such a diversion will injure them. See *Town of Purcellville v. Potts*, 19 S.E.2d 700, 703 (Va. 1942). But see *Thurston v. City of Portsmouth*, 140 S.E.2d 678, 680 (Va. 1965) (stating that if riparian rights are needed to fulfill a "public purpose," then the government can take them by virtue of its eminent domain power).

<sup>102</sup> See Rose, *supra* note 24, at 266–67 ("The larger moral is that there is no universal presumption that systems of private individual rights must necessarily dominate systems of collective ownership.").

<sup>103</sup> See *id.* at 266.

<sup>104</sup> Tarlock, *supra* note 33, at 536.

<sup>105</sup> See *id.* at 537.

water use problems involve water quality and center on how land is used; they do not involve consumptive uses or private rights.<sup>106</sup>

Richard Ausness finds fault with many of the regulated riparian regimes because they do not respond to what he identifies as the “utilitarian” and “fairness” goals of effective water allocation regimes, in that many regulated riparian laws exempt large water users—domestic and industrial users, farmers, municipalities—from regulation.<sup>107</sup> According to Ausness, these laws fail to provide adequately for short-term water shortages and lack adequate mechanisms for reallocating water to more productive uses.<sup>108</sup>

Olivia Choe argues that the exemptions Ausness targets actually create an additional problem, namely the perception that these systems offer a “piecemeal” approach that is both “incoherent . . . and protective of inefficient uses.”<sup>109</sup> Moreover, in situations where agencies do require permits, the agencies “tend to favor existing or grandfathered uses.”<sup>110</sup> This prevents agencies from redistributing permits to more socially beneficial uses.<sup>111</sup> Choe further complains that since the rights bestowed by permits are “temporary and often ‘use-specific,’ voluntary transfer markets have failed to develop” and “conservation-oriented norms” have not been integrated into agency policy.<sup>112</sup>

Thus, these “permitting systems have not proved much more successful than their common law predecessor in addressing problems of conservation, efficiency, and equity.”<sup>113</sup> The questions remain, however, whether these doctrinal shortcomings indicate which legal system better suits reserved tribal rights and whether the shortcomings of the riparian doctrine or regulated riparianism suggest that those systems are incompatible with reserved water rights.

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<sup>106</sup> See *id.* at 537–38.

<sup>107</sup> See Ausness, *supra* note 2, at 576–79.

<sup>108</sup> See *id.* at 579–89. Ausness would subject voluntary water transfers to approval by state regulatory agencies to avoid “spillover effects,” such as “alterations in return flow, water pollution, waste, and diminution of supply.” *Id.* at 588 (footnotes omitted).

<sup>109</sup> Choe, *supra* note 2, at 1912 (quoting George William Sherck, *Eastern Water Law: Trends in State Legislation*, 9 VA. ENVTL. L.J. 287, 290 (1990)).

<sup>110</sup> *Id.*

<sup>111</sup> See *id.*

<sup>112</sup> *Id.* at 1912–13 (quoting Robert H. Abrams, *Water Allocation by Comprehensive Permit Systems in the East: Considering a Move Away from Orthodoxy*, 9 VA. ENVTL. L.J. 255, 281 (1990)).

<sup>113</sup> *Id.* at 1913.

## II

## RESERVED TRIBAL WATER RIGHTS

A. The Origins of Reserved Tribal Water Rights—The *Winters* Doctrine<sup>114</sup>

The origin of the reserved tribal water rights doctrine<sup>115</sup> is found in *Winters v. United States*,<sup>116</sup> a case involving a claim by several Montana tribes to water that flowed past their reservation. The Court in *Winters* ruled that when the federal government established a reservation for the tribes, it implicitly reserved water sufficient for their purposes.<sup>117</sup> Over time, the federal courts expanded the doctrine announced in *Winters* to apply to non-Indian public lands and resources.<sup>118</sup> For a long time after *Winters*, western tribes found themselves with largely “paper water,” partly because the federal government was reluctant to advocate on their behalf, and partly because the McCarran Amendment<sup>119</sup> subjected their claims to state administrative jurisdiction,<sup>120</sup> which had historically favored non-Indian

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<sup>114</sup> Shurts points out that the name “*Winters* doctrine” “immortalize[s] the misspelled name of Henry Winter,” a local rancher who had fled the United States before the appellate decisions were handed down because of revelations about his plan to kill a stock inspector and a local judge. SHURTS, *supra* note 66, at 150, 287 n.12.

<sup>115</sup> “Western water law is based on two doctrines: prior appropriation and implied reservation. [The former] is a use-based doctrine for acquiring water rights. [The latter] is a need-based doctrine employed by the federal government to reserve water rights for federal lands.” Kurt Sommer, *Ninth Circuit Rules that Disclaimer States Lack Jurisdiction over Indian Water Rights Under the McCarran Amendment*, 23 NAT. RESOURCES J. 255, 257 (1983). Tribal reserved water rights are a specialized subcategory of implied federal reserved water rights. *See id.* at 258–59.

<sup>116</sup> 207 U.S. 564 (1908). Several detailed historical analyses of the legal context of the *Winters* decision demonstrate that the decision was not an anomaly at the time it was rendered. *See generally* Norris Hundley, Jr., *The “Winters” Decision and Indian Water Rights: A Mystery Reexamined*, 13 W. HIS. Q. 17 (1982) (describing the struggle for water between Indians and non-Indians in the West that lead up to the *Winters* decision); SHURTS, *supra* note 66 (explaining that the *Winters* decision was a logical outgrowth of the political and legal developments in the West that lead up to it).

<sup>117</sup> *See Winters*, 207 U.S. at 577.

<sup>118</sup> *See Cappaert v. United States*, 426 U.S. 128, 147 (1976) (finding that a presidential proclamation establishing as a national monument a cavern that is home to a unique species of fish reserved sufficient water to protect the endangered fish); *Arizona v. California (Arizona I)*, 373 U.S. 546, 595–601 (1963) (holding that the federal government could assert reserved federal water rights on behalf of Indian reservations as well as wildlife refuges, national forests, and federal recreation areas); *Fed. Power Comm’n v. Oregon*, 349 U.S. 435 (1955) (holding that state prior appropriation law specifically excluded the public domain from acquiring reclamation water). *But see United States v. New Mexico*, 438 U.S. 696, 715–18 (1978) (limiting reserved federal water rights to only the primary purposes for which land was withdrawn).

<sup>119</sup> 43 U.S.C. § 666 (2000).

<sup>120</sup> *See id.*; *see also Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 567 (1983) (criticizing concurrent federal and state court proceedings as “duplicative and wasteful, generating ‘additional litigation through permitting inconsistent dispositions of property’” (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 819 (1976))); Ann E. Amundson, *Recent Judicial Decisions Involving Indian Water Rights*, in

claimants and was unsympathetic to claims of unique rights by Indians.<sup>121</sup> The situation is now different.<sup>122</sup> Tribes are asserting their reserved water rights, and unadjudicated *Winters* rights remain a major uncertainty in some water-based economies in the West.<sup>123</sup> This specter of unquantified water rights has spawned many critics of the

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INDIAN WATER, *supra* note 59, at 3, 5–11 (discussing the *San Carlos Apache Tribe* decision and its effect on the jurisdictional question in federal courts).

<sup>121</sup> See Reid Peyton Chambers & John E. Echohawk, *Implementing the Winters Doctrine of Indian Reserved Water Rights: Producing Indian Water and Economic Development Without Injuring Non-Indian Water Users?*, 27 GONZ. L. REV. 447, 455 (1991/92) (describing how tribes “bitterly resisted” state courts adjudicating their water rights); Charles F. Wilkinson, *Perspectives on Water and Energy in the American West and in Indian Country*, 26 S.D. L. REV. 393, 398 & n.24 (1981) (commenting on the devastating effects of the Indian fish war in the Pacific Northwest and noting that the Supreme Court made the following observation regarding state officials’ behavior in response to this conflict: “‘Except for some desegregation cases, the district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century.’” (quoting *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 696 n.36 (1979))).

<sup>122</sup> See Chambers & Echohawk, *supra* note 121, at 457–62 (stating that since *Arizona* I there has been a “significant increase in Indian irrigated agriculture and other water uses,” such as “municipal development, industrial use, [and] the protection of fish and wildlife,” largely achieved through negotiated settlements with Congress). The issue of whether tribes should negotiate their reserved rights has generated conflicting views. Compare *id.* at 462–64 (noting that the negotiation of Indian water rights results not only in a fixed quantity of water but also federal monetary contributions for both water development projects and general tribal economic improvements), and Royster, *supra* note 5, at 100 (“Settlements offer both tribes and states advantages over protracted litigation. Negotiated settlements are flexible to accommodate local needs, and they provide cheaper and faster resolution of difficult issues. Tribes receive ‘wet’ water rather than mere paper rights, and states gain the desired certainty of water rights.” (quoting Daina Upite, Note, *Resolving Indian Reserved Water Rights in the Wake of San Carlos Apache Tribe*, 15 ENVTL. L. 181, 199 (1984))), and Wilkinson, *supra* note 59, at 65–66 (arguing that all parties “have an interest in negotiated settlement, not out of weakness but out of wisdom” because of the enormous complexity of litigating water rights), and Kirk Johnson, *How Drought Just Might Bring Water to the Navajo*, N.Y. TIMES, July 23, 2004, at A16 (discussing a recent settlement between the Navajo Nation and New Mexico allocating flow levels in the San Juan River, a branch of the Colorado River), with LLOYD BURTON, AMERICAN INDIAN WATER RIGHTS AND THE LIMITS OF LAW 7 (Univ. Press Kansas 1991) (“A stark parallel may be drawn between the process which created the Indian reservations in the nineteenth century, when the tribes relinquished theoretical sovereignty over vast areas in return for federally protected control over much smaller amounts of land, and the process of current western water-rights negotiations, in which the federal executive branch, the states, and assorted business interests are urging tribes to abandon theoretical water-rights claims in return for federal delivery of much smaller amounts of water.”), and *id.* at 124 (pointing out the “lack of consistency” among various negotiated water rights settlements and a “settlement process [that] has become a legislative free-for-all,” whereby some tribes achieve better settlement terms than others), and Royster, *supra* note 5, at 78 (“In virtually all settlements, the tribes have agreed to less water than they would be entitled to under their *Winters* rights.”).

<sup>123</sup> See Wilkinson, *supra* note 121, at 396–97 (predicting “significant dislocations in local water-based economies . . . [should Indians] receive their just entitlement of water”); see also Johnson, *supra* note 122 (describing how fear of a “call” of water rights in response to a particularly severe drought combined with Indians’ superior rights led to a negotiated settlement of various claims to the San Juan River’s flow). To provide a sense of the magnitude of Indian water rights, the Western States Water Council, in a 1984 report to the Western Governors’ Association, calculated that they might equal “45 million acre-feet per

*Winters* doctrine.<sup>124</sup> Nonetheless, it is important to understand the doctrine's origins, its normative underpinnings, the extent to which it is an anomaly in a prior appropriation system, and its unfulfilled promise in that system as part of the search for the answer to the question whether an eastern tribe in a riparian jurisdiction could, and should, assert *Winters* rights.

*Winters* involved competing claims to the flow of the Milk River in Montana by the tribes of the Fort Belknap Indian Reservation and upstream ranchers.<sup>125</sup> The latter had acquired land ceded by the tribes in exchange for the government's promise to help the tribes move to a lifestyle of "sedentary pastoralism and agriculturalism."<sup>126</sup> The Fort Belknap tribes "had been nomadic hunters and gatherers with aboriginal title to large areas of land"<sup>127</sup> broken up under the General Allotment Act of 1887.<sup>128</sup> Congress established the reservation in 1888 to provide "a permanent home and abiding place" for the tribes.<sup>129</sup> During a severe drought in 1900, upstream appropriators diverted water from the Milk River to irrigate their crops, relying on state-issued water rights and thereby prompting the federal government to sue on behalf of the tribes to stop the diversions.<sup>130</sup> The gov-

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year, an amount more than three times the annual flow of the Colorado River." Wilkinson, *supra* note 59, at 55.

<sup>124</sup> See, e.g., BURTON, *supra* note 122, at 61 ("The *Winters* doctrine may sound just and honorable in the abstract, but because of earlier congressional and executive inattention, the [economic and social dislocation] costs of its implementation are now substantial."); Charles Corker, *A Real Live Problem or Two for the Waning Energies of Frank J. Trelease*, 54 DENV. L.J. 499, 499-500 (1977) (calling the implied federal reservation doctrine "a rhetorical, chimerical phantasmagoria"); Anne E. Ross, *Water Rights: Aboriginal Water Use and Water Law in the Southwestern United States: Why the Reserved Rights Doctrine Was Inappropriate*, 9 AM. INDIAN L. REV. 195, 195 (1981) ("[T]he doctrine of reserved rights . . . is attacked as unfair to the Indians because it limits the uses for which they may appropriate water and their ability to alienate their water rights, and as unfair to non-Indians because the natives are not held to rules of equitable apportionment nor to prior appropriation to assure their rights.").

<sup>125</sup> See 207 U.S. 564, 565-70 (1908); Ross, *supra* note 124, at 199.

<sup>126</sup> Ross, *supra* note 124, at 199; see also *Winters*, 207 U.S. at 576 ("It was the policy of the government, it was the desire of the Indians, to change those habits and to become a pastoral and civilized people.").

<sup>127</sup> Ross, *supra* note 124, at 199.

<sup>128</sup> See *id.*; General Allotment (Dawes) Act of 1887, ch. 119, 24 Stat. 388 amended by 25 U.S.C. § 331 (repealed 2000) (equalizing allotments in the 1887 Act so that each Indian received the same amount of land, depending on whether the land was used for grazing or farming).

<sup>129</sup> *Winters*, 207 U.S. at 565.

<sup>130</sup> See *id.* at 565-67. The government's position was very unpopular with non-Indians, and the Court's decision was instantly controversial. See SHURTS, *supra* note 66, at 7 ("Many westerners who were affected by or heard about the *Winters* decisions expressed outrage at what one labeled a 'monstrous' doctrine."). Burton notes that the government's position in *Winters* was aligned with President Roosevelt's commitment to use "every means at his command to shield federally owned resources from private local exploitation." BURTON, *supra* note 122, at 33.

ernment sued because the remaining water was insufficient to support the tribes' transformation to an agrarian economy.<sup>131</sup>

The case eventually reached the Supreme Court, which held that the federal government had, with the establishment of the Fort Belknap Reservation, created an implied reserved right to any unappropriated water necessary to fulfill the purposes of the reservation.<sup>132</sup> The Court inferred that intent based on the impossibility of fulfilling the reservation's purpose without sufficient water to convert otherwise arid, useless land into agricultural land.<sup>133</sup>

We realize that there is a conflict of implications, but that which makes for the retention of the waters is of greater force than that which makes for their cession. The Indians had command of the lands and the waters—command of all their beneficial use, whether kept for hunting, “and grazing roving herds of stock,” or turned to agriculture and the arts of civilization. Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate?<sup>134</sup>

Answering these rhetorical questions in the negative, the Court reasoned that while the Indians did not specifically receive these rights when the land was reserved for their use, the rights were implied in the tribes' favor because all ambiguities under treaties must be resolved in favor of the Indians.<sup>135</sup> Since “water was an absolute necessity” to fulfill the reservation's purposes, the Court found it was “reserved appurtenant to the land.”<sup>136</sup>

[I]t would be extreme to believe that within a year Congress destroyed the reservation and took from the Indians the consideration of their grant, leaving them a barren waste—took from them the

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<sup>131</sup> See Chambers & Echohawk, *supra* note 121, at 450. “At the time of [the *Winters*] trial, the Indians were also diverting water for irrigation, most of which they began using after the appropriative rights of non-Indians vested under state law.” *Id.*; see also *Winters*, 207 U.S. at 566 (noting that federal Indian agents on the reservation began diverting water for their domestic and irrigation needs ten years before tribal members began diverting water to irrigate 30,000 acres of arid land). Although “some debate” exists over when non-Indians started to divert water from the river, “[t]he importance of the Court's decision is clear; no diversions occurred before the establishment of the reservation, and the reserved water was removed from that allocable under state law.” Taiawagi Helton, Comment, *Indian Reserved Water Rights in the Dual-System State of Oklahoma*, 33 TULSA L.J. 979, 987 n.90 (1998).

<sup>132</sup> See *Winters*, 207 U.S. at 577.

<sup>133</sup> See *id.*

<sup>134</sup> *Id.* at 576.

<sup>135</sup> See *id.* at 576–77.

<sup>136</sup> Ross, *supra* note 124, at 199; see also Chambers & Echohawk, *supra* note 121, at 451 (“The supposition that the tribes had given up most of their land and kept their reservations without the water to develop ‘agriculture and the arts of civilization’ was simply not credible to the Court.” (quoting *Winters*, 207 U.S. at 576)).

means of continuing their old habits, yet did not leave them the power to change to new ones.<sup>137</sup>

The Court enjoined the prior appropriators, even though they were "first in time," because the priority date for the tribes was the date on which the reservation was created, May 1, 1888.<sup>138</sup> The tribes, therefore, had senior water rights, "even though no water had then been put to actual use" by them.<sup>139</sup> The Court also rejected the prior appropriators' argument, based on the Equal Footing doctrine,<sup>140</sup> that Montana's act of admission "repealed" any reservation the tribes had by virtue of their treaties with the United States, if the consequence of those treaty-based rights was to remove the water of the Milk River from potential prior appropriation by the citizens of Montana.<sup>141</sup> The Court summarily responded that the government's power "to reserve the waters and exempt them from appropriation under state laws is not denied, and could not be."<sup>142</sup>

The *Winters* Court was less clear about the scope of the reserved water right they had declared in the favor of the tribes.<sup>143</sup> Later, the Court in *Arizona v. California (Arizona I)*,<sup>144</sup> after affirming *Winters*,<sup>145</sup> created the standard for quantifying the amount of water reserved under the *Winters* doctrine when the primary purpose of the reservation was agricultural: the amount of water reserved was the amount of water necessary to irrigate irrigable lands<sup>146</sup> (the "practicably irrigable acreage" or PIA standard<sup>147</sup>). This controversial standard is still in effect today.<sup>148</sup> The *Arizona I* Court also extended *Winters*'s reach be-

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<sup>137</sup> *Winters*, 207 U.S. at 577.

<sup>138</sup> *See id.*

<sup>139</sup> Chambers & Echohawk, *supra* note 121, at 451.

<sup>140</sup> *See* Pollard v. Hagan, 44 U.S. 212, 223 (1845) (finding that a state admitted to the Union "succeeded to all the rights of sovereignty, jurisdiction, and eminent domain" that the original thirteen states possessed). On the interplay of Indian claims to submerged lands and the Equal Footing doctrine, see Frank W. DiCasteri, Comment, *Are All States Really Equal? The "Equal Footing" Doctrine and Indian Claims to Submerged Lands*, 1997 Wis. L. Rev. 179 (1997).

<sup>141</sup> *Winters*, 207 U.S. at 577-78.

<sup>142</sup> *Id.* at 577. The Court also declined to reach the federal government's riparian rights argument because its interpretation of the agreement between the tribes and the government made doing so unnecessary. *See id.* at 578.

<sup>143</sup> *See Winters*, 207 U.S. at 577 (stating that the government reserved such water rights "for a use which would be necessarily continued through years").

<sup>144</sup> 373 U.S. 546 (1963).

<sup>145</sup> *See id.* at 599-600.

<sup>146</sup> *See id.* at 601 (noting "that the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage" and not the number of Indians and their reasonably foreseeable needs).

<sup>147</sup> Chambers & Echohawk, *Indian Reserved Water Rights*, *supra* note 121, at 453 (noting that the PIA standard is "based on the assumption that the future needs of the Indians will be to irrigate all irrigable reservation lands") (emphasis added)).

<sup>148</sup> Many commentators criticize the PIA standard, questioning whether it is appropriate, let alone equitable, as it favors large land-holding reservations and restricts tribes to

yond Indian reservations, applying it to all public lands reserved after statehood, and reaffirmed that state ownership of riverbeds under the Equal Footing doctrine did not bar the federal reservation of water.<sup>149</sup>

The immediate impact of the *Winters* decision on the amount of water tribes actually received was negligible. During the fifty-year period following the decision, the United States' policy was to "encourag[e] the settlement of the West" through "large irrigation projects . . . on streams that flowed through or bordered Indian Reservations" and "the creation of family-sized farms on its arid lands."<sup>150</sup> As a result, the government ignored its duty as trustee for the tribes to prosecute water rights on their behalf.<sup>151</sup> Even today, *Winters* water rights are difficult for tribes to obtain.<sup>152</sup>

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using water only for irrigation, thus preventing them from marketing the water or using it for mineral development or tourism. See, e.g., Eric F. Spade, Comment, *Indian Reserved Water Rights Doctrine and the Groundwater Question*, 19 AM. INDIAN L. REV. 403, 420 (1994) (suggesting that the PIA standard illustrates the disconnect between the Supreme Court's application of prior policy that favored "assimilating the Indians into a pastoral people" and the "current federal policy of self-determination").

<sup>149</sup> See 373 U.S. at 597-98 (explaining that *Pollard* "involved only the shores of and lands beneath navigable waters" and therefore does not limit the United States' authority "to regulate navigable waters under the Commerce Clause and . . . government lands under Art. IV, § 3").

<sup>150</sup> NAT'L WATER COMM'N, WATER POLICIES FOR THE FUTURE 474-75 (1973); see also Getches, *supra* note 43, at 415 & n.74 (non-Indian operators farm approximately 63% of Indian farmland, generate 69% of the income from such land, and use 78% of irrigated reservation lands as a result of the allotment program).

<sup>151</sup> See NATIONAL WATER COMM'N, *supra* note 150, at 475 ("In the history of the United States Government's treatment of Indian tribes, its failure to protect Indian water rights for use on the Reservations it set aside for them is one of the sorrier chapters."); see also BURTON, *supra* note 122, at 21 (suggesting that the failure to honor tribal reserved water rights in early planning for federal reclamation projects and instream apportionment was "unfortunate," and that "all parties concerned are now paying the price for that inattention"); Membrino, *supra* note 8, at 13-14 ("[T]urmoil over the McCarran Amendment decisions . . . is about the political and economic power that the reserved rights doctrine represents for Indian tribes, and the competition for that power from the non-Indian community that has resulted from federal policies which encouraged non-Indians and Indians to rely on the same water sources.").

<sup>152</sup> See Amundson, *supra* note 120, at 16-17 (describing tribes' use of alternatives to *Winters* rights, such as treaty-based fishing rights and Endangered Species Act claims, to ensure sufficient water to support aquatic life); Peter Capossela, *Indian Reserved Water Rights in the Missouri River Basin*, 6 GREAT PLAINS NAT. RESOURCES J. 131, 144-47 (2002) (discussing criticisms that Indians have of the McCarran Amendment proceedings and the federal government's conflicting interests relating to the issue of Indian water rights); cf. Cobell v. Norton, 229 F.R.D. 5, 7 (D.D.C. 2005) ("Alas, our 'modern' Interior department has time and again demonstrated that it is a dinosaur—the morally and culturally oblivious hand-me-down of a disgracefully racist and imperialist government that should have been buried a century ago, the last pathetic outpost of the indifference and anglocentrism we thought we had left behind.").



## B. The Basic Features of Indian Reserved Water Rights

In brief, the *Winters* doctrine holds that when land is set aside for Indian tribes, whether by treaty, executive order, or statute, implicit with that reservation is the allotment of sufficient water from unappropriated sources to fulfill the purposes of the reservation.<sup>153</sup> Beginning with *Winters*, federal and state courts have almost universally agreed that the purpose of Indian reservations is to provide places where tribes can sustain themselves.<sup>154</sup> In most cases, the tribes are entitled to the amount of water necessary to irrigate irrigable lands.<sup>155</sup>

A *Winters* right arises from the creation of a reservation, or even earlier if the right is based on an aboriginal use.<sup>156</sup> The tribe cannot lose or diminish the right through nonuse or abandonment.<sup>157</sup> The federal government "holds title to the right in trust for the benefit of the Indians."<sup>158</sup> The right does not depend on state law for its existence, or on state process for its perfection, though *Winters* rights are generally adjudicated in state administrative proceedings.<sup>159</sup>

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<sup>153</sup> See *Winters*, 207 U.S. at 576–77; Royster, *supra* note 6, at 174. *Winters* rights are not restricted to water appurtenant to a reservation or that runs through it. See Helton, *supra* note 131, at 989; Charles J. Meyers, *Federal Groundwater Rights: A Note on Cappaert v. United States*, 13 LAND & WATER L. REV. 377, 388 (1978) (arguing that because "[e]quitable title to the groundwater passed to the tribe[s] in precisely the same manner as title passed to the land and its other resources" when land was set aside for the tribes, there was no need to prove federal intent to reserve groundwater for the tribes); Royster, *supra* note 5, at 68–69.

<sup>154</sup> See Royster, *supra* note 6, at 175 ("Every court that has decided the issue has agreed on one purpose for all reservations: the creation of an agrarian and settled society.").

<sup>155</sup> See *Arizona v. California (Arizona I)*, 373 U.S. 546, 601 (1963) (stating that "the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage"); see also Spade, *supra* note 148, at 441 (noting that "[q]uantification is simply a means of dragging Indian water rights into prior appropriation legal systems," and concluding that quantification and the McCarran Amendment "have diminished the [*Winters*] doctrine's importance").

<sup>156</sup> See Royster, *supra* note 5, at 70–71 (stating that "if a tribe was using water in its aboriginal territory prior to the creation of a reservation and those uses were confirmed by the treaty, agreement, or executive order creating the reservation, the water rights continue with a 'time immemorial' priority date").

<sup>157</sup> See Membrino, *supra* note 8, at 2.

<sup>158</sup> *Id.*; see also Ross, *supra* note 124, at 209 (noting that the *Winters* doctrine, under which "the federal government took title to all water rights appurtenant to Indian lands was based on a myth—that the native peoples had not established any prior legal rights to water").

<sup>159</sup> Although the federal government and the tribes have argued that federal Indian law should insulate tribes from state jurisdiction over their water rights as it has in other areas of Indian life, and that state administrative agencies were generally hostile toward the tribes' legal claims, the Supreme Court held, in *Arizona v. San Carlos Apache Tribe of Arizona*, that the McCarran Amendment allows state courts to hear Indian water rights claims. See 463 U.S. 545, 564 (1983). The Court expressed its misgivings about its decision, however, warning that "any state-court decision alleged to abridge Indian water rights protected by federal law can expect to receive . . . a particularized and exacting scrutiny commensurate with the powerful federal interest in safeguarding those rights from state encroachment." *Id.* at 571; see also *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 809–13 (1976) (concluding that the McCarran Amendment applied to tribal reserved

Judith Royster identifies four “fundamental principles” of Indian reserved water rights.<sup>160</sup> First, the establishment of Indian reservations “implicitly reserves for the use of the tribe that amount of water which is needed to fulfill the purposes for which the land was set aside.”<sup>161</sup> While courts almost unanimously agree that Indian reservations were established to create “an agrarian and settled society,” they differ as to possible other purposes of these reserved lands.<sup>162</sup> Second, the reserved right of tribes “to continue pre-existing or aboriginal practices such as fishing, hunting, gathering, and historical agriculture . . . implicitly reserves as well sufficient water to support” those activities.<sup>163</sup> Such aboriginal water uses predate the formation of reservations and are considered to have “exist[ed] as of time immemorial.”<sup>164</sup> Third, tribal reserved water rights are, “as a matter of federal Indian law, . . . paramount over subsequent state-law water rights.”<sup>165</sup> Royster finds support for this proposition in the Interstate and Indian Commerce Clauses and the Property Clause of the Constitution, which individually and collectively give the federal government plenary power over Indian water rights.<sup>166</sup> As such, Indian water rights are protected from interference by later non-Indian use, and are “reserved in perpetuity” unless Congress extinguishes them.<sup>167</sup>

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water rights and that these rights present federal questions subject to Supreme Court review); Royster, *supra* note 5, at 93 (noting how Wyoming’s Supreme Court in *In re General Adjudication of All Rights to Use Water in the Big Horn River System* (Big Horn I) “explicitly noted . . . that the [state] engineer was not empowered to regulate reserved rights under state law, but rather to enforce reserved rights as determined by federal law,” including tribal reserved water rights).

<sup>160</sup> Royster, *supra* note 6, at 173 (stating that these principles “transcend the state law water rights systems”).

<sup>161</sup> *Id.* at 174.

<sup>162</sup> *Id.* at 175–76; see also *infra* Part II.C.1.

<sup>163</sup> *Id.* at 176; see also *infra* Part IV.C.2.

<sup>164</sup> *Id.* at 176; see also *United States v. Adair*, 723 F.2d 1394, 1414 (9th Cir. 1983) (“Such water rights necessarily carry a priority date of time immemorial. . . . [T]he treaty confirmed the continued existence of these rights.”). Royster also notes that some Indian water rights law scholars disagree as to whether *Winters*, “which held that water rights implicitly accompany the reservation of land” by the federal government, or *United States v. Winans*, 198 U.S. 371 (1905), “which held that the reservation of aboriginal practices implicitly reserves as well those rights necessary to the accomplishment of the practices,” is the source of “aboriginal-practice water rights,” but “[r]egardless of the precise basis of aboriginal-practice water rights . . . a tribal reservation of the right to continue pre-existing practices implicitly reserves sufficient water to ensure that the practices in fact continue.” Royster, *supra* note 6, at 177–78.

<sup>165</sup> *Id.* at 182.

<sup>166</sup> *Id.* at 179–81; see also *Cappaert v. United States*, 426 U.S. 128, 138 (1976) (“Reservation of water rights is empowered by the Commerce Clause, which permits federal regulation of navigable streams, and the Property Clause, which permits federal regulation of federal lands.” (citations omitted)).

<sup>167</sup> Royster, *supra* note 6, at 181–82; see also *Getches*, *supra* note 43, at 419 n.86 (“[O]utright extinguishment of tribal property rights held pursuant to treaty or statute

Fourth, Indian reserved water rights survive nonuse.<sup>168</sup> Royster notes that fairness drives this principle; since most Indians had neither the resources nor the government support necessary to develop their water rights, if these rights had lapsed due to a lack of use, they “would have had little meaning” when recognized.<sup>169</sup>

The fact that tribal reserved water rights originate from the establishment of a reservation (or earlier if an aboriginal use right is claimed) significantly differentiates these rights from appropriative rights, which have as a priority date the first time the water is put to a beneficial use.<sup>170</sup> Tribal reserved water rights are therefore senior to most other rights in the West and can theoretically arise at any time to defeat (or reduce the priority status of) a vested water right under the prior appropriation system.<sup>171</sup> All of these factors make the existence of tribal water rights potentially destabilizing and a source of contention.<sup>172</sup>

### C. Some Potentially Troubling Limitations on *Winters* Rights

Although *Winters* rights offer tribes an opportunity to secure water to sustain themselves on their reserved lands, there are two unresolved issues that may lessen the value of the right: whether the reserved water can be used for nonagricultural purposes and whether the water can be transferred off-reservation. Unless these issues are resolved in the tribes' favor, *Winters* rights may be more ephemeral than actual.

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(*e.g.*, extinguishment of reserved water rights, hunting and fishing rights, *etc.*) gives rise to claims for compensation for fifth amendment takings.”).

<sup>168</sup> See Royster, *supra* note 6, at 183.

<sup>169</sup> *Id.* at 183.

<sup>170</sup> See *supra* Part I.B.

<sup>171</sup> See *Arizona v. California (Arizona I)*, 373 U.S. 546, 600 (1963) (describing tribal reserved water rights as “‘present perfected rights’ . . . entitled to priority”); see also *United States v. Ahtanum Irrigation Dist.*, 236 F.2d 321, 327 (9th Cir. 1956) (“Indians were awarded the paramount right regardless of the quantity [of water] remaining for the use of white settlers.”); *Conrad Inv. Co. v. United States*, 161 F. 829, 832–35 (9th Cir. 1908) (holding that the Blackfoot Nation’s reserved rights to the waters bordering their reservation extended to present and future water needs, even though the exercise of such rights might harm existing water users).

<sup>172</sup> Wilkinson lists several reasons why dealing with water in Indian country is extremely difficult, including the following: the need to negotiate water rights with not only federal and state governments but also with tribal governments, the “anomal[ous]” nature of Indian water rights within the prior appropriation system, the varied “land ownership pattern[s]” within a particular reservation, the unique “Indian cultural and religious attitudes toward the land and water,” and “racism.” Wilkinson, *supra* note 121, at 396–98. Each of these factors is almost nonexistent in the East.

1. *The Purposes for Which Tribes May Use Winters Rights*

A major unresolved issue in both *Winters* and *Arizona I* was whether tribes can use their reserved water solely for agricultural purposes, or whether the “practicably irrigated agriculture” standard merely quantifies the amount of water tribes can use, without restricting its use to agriculture. Though the Court in *Arizona II* clearly stated that the PIA standard was only “the means of determining quantity of adjudicated water rights but shall not constitute a restriction of the usage of them to irrigation or other agricultural application,”<sup>173</sup> subsequent decisions by lower federal and state courts have generated considerable confusion over whether a tribe may use its reserved water for nonagricultural purposes, such as stockwatering and domestic uses, or traditional purposes, such as hunting and fishing.<sup>174</sup>

For example, the Ninth Circuit in *Colville Confederated Tribes v. Walton* (*Walton I*) held that tribes may determine how to use their allotted water and that the use at issue chosen by the tribes, fishing, was “consistent with the general purpose for the creation of an Indian reservation,” which was to create “a homeland for the survival and growth of the Indians and their way of life.”<sup>175</sup> As Royster points out, restricting water use to agricultural purposes would compel tribes “to conform to late nineteenth century views of what was best for the Indians.”<sup>176</sup> In contrast, the Wyoming Supreme Court narrowly construed language in the Wind River Reservation treaty as limiting the purpose of the reservation to encouraging agricultural activities and

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<sup>173</sup> *Arizona v. California* (*Arizona II*), 439 U.S. 419, 422 (1979).

<sup>174</sup> See Royster, *supra* note 5, at 72 (arguing that lower federal and state court delineations of a reservation’s purpose “depend upon the courts’ willingness to interpret federal intentions broadly or narrowly”).

<sup>175</sup> 647 F.2d 42, 47–49 (9th Cir. 1981); see also *United States v. Anderson*, 591 F. Supp. 1, 5–6 (E.D. Wash. 1982) (affirming the magistrate judge’s grant to the tribe of a minimum stream flow to maintain a certain water temperature in order to preserve the native trout habitat historically fished by the tribe), *aff’d in part and rev’d in part on other grounds*, *United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984).

<sup>176</sup> Royster, *supra* note 5, at 79; see also *In re General Adjudication of All Rights to Use Water in the Big Horn River System* (*Big Horn III*), 835 P.2d 273, 288 (Wyo. 1992) (Brown, J., dissenting on this point) (“The effect of the majority determination is to make marginal farmers out of the Tribes forever. This defeats the purposes for which the Reservation was created.”); Getches, *supra* note 43, at 411–12 (arguing that in contrast to other federal reservations, Indian reservations have a broader purpose in that “virtually every reservation was intended to be a home where Indians could be self-governing and economically self-sustaining,” thus suggesting “an implied reservation . . . for any productive activity on an Indian reservation, including agricultural, mining, and recreational enterprises, as well as sustaining fish and wildlife and natural vegetation that support traditional pursuits”). But see Richard B. Collins, *The Future Course of the Winters Doctrine*, 56 COLO. L. REV. 481, 491–92 (1985) (finding it unlikely that courts will award Indians water based on the so-called “homeland” argument—that anything that makes a reservation more prosperous is a water use recognized under *Winters*—because some of those uses, such as mineral development or water skiing reservoirs, would have been impossible to predict, are too destabilizing of other established uses, and would require the transfer of water rights, itself an open issue).

held that tribes did not have an “‘unfettered right’ to use their PIA-based water rights for other than agricultural uses.”<sup>177</sup> Although the state’s highest court refused to recognize a fisheries purpose for the reservation because the tribes did not historically depend on fishing, it recognized that agricultural purposes encompassed stockwatering as well as municipal, domestic, and commercial uses.<sup>178</sup> Other courts have found that tribal reserved water rights can be used for fisheries purposes.<sup>179</sup>

A related question is whether reserved tribal water rights can be used to protect *water quality* on a reservation. Royster says this issue is “unresolved.”<sup>180</sup> She suggests that if a specific quality of water is required to fulfill a purpose of the reservation, then the “*Winters* doctrine would seem to dictate that the tribal water right includes a right to quality as well as quantity.”<sup>181</sup> For example, maintaining a fishery for tribal purposes requires a certain water quality to sustain the live fish. Similarly, water for irrigation, stockwatering, and domestic uses also requires a certain level of purity. At least one district court has

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<sup>177</sup> Royster, *supra* note 5, at 79 (quoting *Big Horn III*, 835 P.2d at 278). See generally *id.* at 79–81 (discussing the Wyoming Supreme Court’s ruling in greater detail); *id.* at 79 n.106 (citing various articles critical of the *Big Horn III* decision); Mead, *supra* note 60, at 453 (criticizing the *Big Horn* adjudication because “the state’s returns from its substantial outlay of money will be minimal and of little consequence to state appropriated rights”).

<sup>178</sup> See *Big Horn III*, 835 P.2d at 275. Royster notes that the *Big Horn* litigation involved an attempt by the tribes to change the use of the water they had been awarded from “the consumptive purpose of irrigation to the non-consumptive use of instream flow” for fisheries preservation and that “most courts” would find such a change permissible, although a change from a nonconsumptive use to a consumptive one is generally disallowed. Royster, *supra* note 5, at 81.

<sup>179</sup> See, e.g., *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983) (holding that the treaty creating the reservation gave the tribe the right to water to support agriculture, hunting, and fishing on the reservation with a priority date of time immemorial); see also *State ex rel. Greely v. Confederated Salish & Kootenai Tribes*, 712 P.2d 754, 764 (Mont. 1985) (citing “water reserved for hunting and fishing” as examples of aboriginal water rights that last into perpetuity); Stephen H. Suagee, *A Tribal Strategy Increases Streamflows to Restore a Facility*, NAT. RES. & ENVT., Winter 1995, at 23, 23 (describing how the Hoopa Valley Tribe used its reserved water rights, combined with the expertise of fish biologists, a hydrologist, and their attorney, to reverse federal policy favoring out-of-basin transfers of water from the Trinity River over the maintenance of the river’s salmon and steelhead populations).

<sup>180</sup> Royster, *supra* note 5, at 85. But see FELIX S. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 587 (Rennard Strickland et al. eds., 1982) [hereinafter COHEN’S HANDBOOK] (stating that “Indian reserved water rights probably are protected against impairment of water quality as well as diminutions in quantity . . . [because i]t is difficult to draw a meaningful distinction between quantity and quality of water for purposes of the *Winters* doctrine”).

<sup>181</sup> *Id.* at 85–86 (pointing out that “irrigation and fisheries protection require water of adequate quality for the intended uses”); see also *United States v. Gila Valley Irrigation Dist.*, 920 F. Supp. 1444, 1448 (D. Ariz. 1996) (awarding a tribe an injunction to protect its water rights from “material degradation”), *aff’d*, 117 F.3d 425 (9th Cir. 1997); Spade, *supra* note 148, at 441 n.297 (“Theoretically, in riparian doctrine states Indian tribes could use the *Winters* doctrine to claim a right to clean water to stop or prevent upstream pollution or groundwater contamination, or to recover damages caused by contaminated water.”).

held that a tribe “had a right to a sufficient quantity of water to keep [a stream’s] water temperature” at a level that would not “endanger the native fish population.”<sup>182</sup>

Restricting the uses to which a tribe can put its reserved water will inhibit the tribe’s economic growth and keep it mired in a past way of life the tribe might not have chosen for itself.<sup>183</sup> Since the purposes behind the establishment of eastern reservations are similar to those supporting the establishment of western reservations, if a court was inclined to interpret those purposes narrowly, it might similarly limit an eastern tribe’s water uses. Therefore, unless this issue is resolved in the tribes’ favor, tribes will not realize the full value of their *Winters* rights.

## 2. *Can Winters Rights Be Transferred?*

Another unresolved issue is whether Indian reserved rights can be transferred in order to broach the possibility of a market in tribal water rights.<sup>184</sup> Allowing tribes to transfer their rights off-reservation until they have the capacity to use them on their reservations would provide them with “a prompt economic return from their water rights.”<sup>185</sup> The revenues from water marketing would benefit tribes economically. Non-Indian users of water would also benefit, because

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<sup>182</sup> Royster, *supra* note 5, at 85, n.144 (citing *United States v. Anderson*, 6 Indian L. Rep. F-129, F-130 (E.D. Wash. 1979); *cf.* *United States v. Washington* (Phase II), 506 F. Supp. 187, 208 (W.D. Wash. 1980) (holding that the “correlative duty imposed upon the State (as well as the United States and third parties) is to refrain from degrading the fish habitat to an extent that would deprive the tribes of their moderate living needs”), *aff’d in part and rev’d in part on other grounds*, 759 F.2d 1353 (9th Cir. 1985) (remanding to the district court for further fact finding). The tribes in these cases took the position that previously recognized fishing rights entitled them to a sufficient flow of clean water to provide for an adequate fishing habitat. *See, e.g.*, *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658 (1979).

<sup>183</sup> Royster and others have suggested that tribes might assuage their concern that the *Winters* doctrine will not give them enough water to grow economically by claiming, in addition, riparian rights under state law. *See, e.g.*, Royster, *supra* note 5, at 102 (“In addition to *Winters* rights, tribes may also be able to assert state-law riparian rights to water for additional purposes not covered by their reserved rights.”).

<sup>184</sup> Some critics argue that “[t]reating water . . . solely as an economic good . . . [means] access may be determined based purely upon market forces, without regard to equity or need.” Erik B. Bluemel, Comment, *The Implications of Formulating a Human Right to Water*, 31 *ECOLOGY L.Q.* 957, 963 (2004).

<sup>185</sup> Royster, *supra* note 5, at 83 (“Once tribal water rights are quantified, tribes are often not able to put the water to immediate use. Water projects and delivery systems are seldom in place and are prohibitively expensive for most tribes to construct without federal financial assistance.”). Royster notes that those who oppose allowing tribes to transfer their water rights off-reservation are generally the same individuals who benefit from those rights. *See id.* (“Opponents of tribal water marketing generally argue that it will decrease water available to state users or make the water too expensive, but in the absence of water marketing state appropriators have free use of a valuable tribal resource.”). *But see* Chambers & Echohawk, *supra* note 121, at 466 (explaining state resistance to tribal water marketing on the grounds that “it threatens to disrupt formal or informal interstate allocations of

water could go to the most economically valuable use. Multiple barriers—legal, practical, and political—exist, however, to allowing tribes to market their water. If tribes cannot overcome these barriers, the value of a tribe's *Winters* rights is lessened.

As a starting proposition, since a water appropriation is a property right, any change in tribal ownership of water will probably require congressional approval under the Indian Nonintercourse Act.<sup>186</sup> Congress has historically approved on-reservation transfers of water rights, generally through the medium of a lease, but off-reservation transfers of these rights are more politically charged.<sup>187</sup> Even if tribes could win the political and legal right to transfer water off-reservation, few water delivery systems exist on reservations because tribes lacked, and continue to lack, the economic wherewithal to construct such systems and because the federal government spent most of its resources on water projects for the benefit of non-Indians to encourage western settlement.<sup>188</sup>

There are other barriers as well. For example, allowing the transfer of water off-reservation contradicts the underlying premise of those rights, which is to sustain Indians on their reserved land.<sup>189</sup> Additionally, the "undecreed, unquantified, and undeveloped"<sup>190</sup> nature of tribal reserved water rights renders them not easily altered into a transferable commodity. This situation is unlikely to change, given the longstanding belief of non-Indians that they possess "the eco-

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water, and because a tribe—by leasing unused water to a legally junior user—might upset the existing order of priorities under state law systems").

<sup>186</sup> 25 U.S.C. § 177 (2000) ("No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.").

<sup>187</sup> See Royster, *supra* note 5, at 82 ("While Congress has given general consent to on-reservation transfers of tribal water rights to lessees of Indian lands, there is some uncertainty concerning off-reservation transfers."); see also Capossela, *supra* note 152, at 140–41 (briefly discussing water marketing and stating that it requires the approval of the Secretary of the Interior, but that "there has been ambivalence on the issue of water marketing at the Department" because of the Secretary's conflicting duties to "both Indians and non-Indians").

<sup>188</sup> See Capossela, *supra* note 152, at 138 ("Indian water issues remained inchoate for more than half a century after [*Winters*], largely because few federally funded irrigation projects were constructed for Indians . . . [and t]he United States was far more interested in encouraging non-Indian settlement than it was in developing and protecting Indian water resources.").

<sup>189</sup> See *Winters v. United States*, 207 U.S. 564, 576–577 (1908); see also Royster, *supra* note 5, at 71 ("Under the *Winters* doctrine, water rights are reserved in order to carry out the government's purpose in creating the reservation."); Royster, *supra* note 6, at 174 ("The first fundamental principle of tribal reserved water rights is that when Indian country is established, that act implicitly reserves for the use of the tribe that amount of water which is needed to fulfill the purposes for which the land was set aside.").

<sup>190</sup> Membrino, *supra* note 8, at 25.

conomic and political power to keep tribal water rights in that condition,"<sup>191</sup> thereby enabling non-Indians to use that water freely.<sup>192</sup>

While some impediments to marketing reserved tribal water are restricted to the West and the prior appropriation system, economic and political constraints to such initiatives could occur in the East as well. For example, if the reserved right is viewed as a property right under common law or regulated riparianism,<sup>193</sup> then the Indian Nonintercourse Act may also pose a problem for eastern tribes.<sup>194</sup> A potentially greater problem exists under both riparian systems, however, in the form of the ban on transferring water out-of-basin.<sup>195</sup> Until legislatures pass laws removing this restriction, Indians, like non-Indians, will not be able to reap the full economic benefits of water marketing.

*Winters* rights, in theory, ensure sufficient water for tribes to sustain themselves on land the federal government set aside for them. Although *Winters* rights take precedent over appropriated water rights, usually because of the date upon which they arise, the limitations on the actual use of *Winters* rights lessen their value. Limitations aside, eastern tribes are unlikely to receive the water they need to sustain themselves unless they can assert *Winters* rights. The low likelihood that a tribe could successfully assert a claim of unreasonable use or actual damage against a competing common law riparian indicates the importance of *Winters* rights. In a regulated riparian jurisdiction, the tribe would also have to overcome that system's preference for grandfathered uses and exemptions. The Article next turns to whether *Winters* rights can be asserted in the East.

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<sup>191</sup> *Id.*

<sup>192</sup> *See id.* According to Membrino, since water marketing is economically sensible for both Indians and non-Indians, "[t]he objection to Indian water marketing makes sense only as a means to divest Indians of their rights . . . [and] assumes that Indian water resources are an obstacle to economic development so long as they remain in Indian ownership." *Id.* at 28.

<sup>193</sup> *See, e.g.,* COHEN'S HANDBOOK, *supra* note 180, at 576 ("Indian reserved water rights are property rights that are predicated on federal law and are not dependent on state substantive law."); Chambers & Echohawk, *supra* note 121, at 454 (describing reserved Indian rights as "vested property right[s] with proprietary components—early priority date, preservation despite non-use, and a measure as being sufficient to satisfy future beneficial needs of the Indians").

<sup>194</sup> *See* Royster, *supra* note 5, at 82 (noting that if reserved tribal water is a property right, then under the Indian Nonintercourse Act it "may not be alienated or encumbered without congressional authorization"). Royster believes that this "restriction likely extends to tribal water rights." *Id.*

<sup>195</sup> *See supra* note 34 and accompanying text.



## III

WILKINSON'S "SHADOW BODY OF LAW"<sup>196</sup> IN THE EAST

Traditionally, western federally recognized tribes have asserted reserved tribal water rights under state-administered prior appropriation systems. Although no tribe has asserted *Winters* rights in the East,<sup>197</sup> there are three compelling reasons for their recognition in that part of the country. First, the *Winters* doctrine's origins are entwined with riparian law, particularly regulated riparianism. Second, there are normative reasons, including redress for wrongs done to Indians throughout the history of the United States, distributive justice, and basic notions of fairness and environmental justice, which suggest that allocating eastern tribes reserved water rights is the just thing to do. Finally, strong utilitarian reasons also support granting eastern tribes reserved water rights, including the fact that since the tribes' dependence on water for their cultural survival requires that water be left instream for the maintenance of native fisheries, granting such rights will encourage water conservation and benefit the environment.

A. *Winters* Fits Comfortably into a Riparian Regime for Managing Water

There are several arguments for why *Winters* rights should fit within a riparian system. First, reserved tribal water rights were asserted in *Winters* as riparian rights. Therefore, the two types of rights must have initially been compatible. Second, recognizing *Winters* rights in a riparian system would be no more disruptive than in a prior appropriation system, since they contain elements of both systems. Third, given the adaptability of water management systems to changing circumstances and needs, *Winters* rights could easily be fit into either a common law riparian or regulated riparian system. Finally, the factors that led to the development of the *Winters* doctrine in the West also exist today in the East.

First, the *Winters* doctrine was originally framed in terms of riparian use rights. Although legal scholars disagree about the status of riparian law in Montana at the time *Winters* arose in the federal court system,<sup>198</sup> or decry the wrong-headedness of the government lawyer

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<sup>196</sup> Wilkinson, *supra* note 59, at 54–55 (referring to the *Winters* doctrine as “a shadow body of law”).

<sup>197</sup> See Royster, *supra* note 5, at 101 (describing the Seminole Tribe's settlement of its water claim before a Florida court could rule on the issue).

<sup>198</sup> Compare Hundley, *supra* note 116, at 24 (“While many attorneys and legal scholars argued that prior appropriation was the fundamental water law of Montana, others insisted that riparian principles applied there as well.”), and SHURTS, *supra* note 66, at 7 (noting that “the prior appropriation system itself was not nearly as dominant, or universally supported, or as productive of desired outcomes as has been supposed”), with David H. Getches, *The Unsettling of the West: How Indians Got the Best Water Rights*, 99 MICH. L. REV.

who argued the case, no one disputes that Carl Rasch, the Assistant U.S. Attorney, made riparianism the centerpiece of his legal argument.<sup>199</sup>

Rasch must have thought that since the tribes' reservation abutted the Milk River, either the federal government on behalf of the tribes or the tribes themselves could claim a riparian right to the reasonable flow of water past the reservation. By basing his claim to water on the riparian doctrine, as opposed to the prior appropriation doctrine, Rasch avoided the evidentiary weakness in his case on the issue of whether the tribes had used the water prior to the upstream appropriators.<sup>200</sup> He also might have believed that if he had prevailed, a future court would have found other tribes' need for water reasonable without having to engage in an evidentiary battle over who used the water first.

Further, if *Winters* rights work in the West, where the doctrine is virtually incompatible with the prior appropriation system,<sup>201</sup> the rights should *a fortiori* function in riparian jurisdictions, where the fit is better. The basic features of federal reserved water rights are the

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1473, 1481 (2001) (reviewing JOHN SHURTS, *INDIAN RESERVED WATER RIGHTS: THE WINTERS DOCTRINE IN ITS SOCIAL AND LEGAL CONTEXT, 1880s-1930s* (2000)) ("Not only was the sun setting on riparianism in the West as a matter of law by the early twentieth century, but politicians and development interests spoke out zealously against it while venerating prior appropriation."). Shurts and Hundley also disagree with Getches over the extent to which *Winters* conflicted with then-extant Indian law. Compare Hundley, *supra* note 116, at 40 ("The *Winters* case represented a major advance for Indians at a time when reversals for them was the usual order of the day."), and SHURTS, *supra* note 66, at 5 ("Winters and the reserved rights doctrine took shape in the shadow of, and to a great extent in opposition to, on-going developments in Indian policy and western state water law."), with Getches, *supra*, at 1474 ("Only the traditions of Indian law can explain how the Supreme Court could so threaten to disrupt the pageantry of national expansion led by yeoman farmers settling hostile lands."), and *id.* at 1493 (categorizing *Winters* as Indian law rather than water law and noting that "[i]f *Winters* 'fits' anywhere, it is within Indian law's historical tradition of sustaining tribal rights whether or not broader policy interests are served").

<sup>199</sup> See SHURTS, *supra* note 66, at 87-88 (citing as one of four propositions on which Rasch built his case in the U.S. Court of Appeals that the United States' traditional role as the riparian proprietor of the Milk River gave it an "absolute right to have the waters of the river flow down the channel of the stream to supply its requirements and necessities for domestic and agricultural purposes upon the Indian Reservation," which Rasch believed to be "the strongest point in the case"); see also Hundley, *supra* note 116, at 24 (arguing that Rasch "broaden[ed] his legal position by alluding somewhat ambiguously to 'other rights' possessed by the Indians and the federal government . . . [and] singled out riparian law as being especially applicable since the reservation abutted the Milk River"). But see Getches, *supra* note 198, at 1482 ("But Rasch must have known it was a longshot when he argued for riparian rights in the trial and appellate courts.").

<sup>200</sup> See Hundley, *supra* note 116, at 23 (noting that "Rasch lacked solid evidence for his assertions" that the tribes had appropriated water prior to upstream users).

<sup>201</sup> See SHURTS, *supra* note 66, at 6 ("The reserved rights doctrine could hardly have conflicted more with the official elements and doctrine of the prior appropriation system . . ."); see also Getches, *supra* note 198, at 1493 (noting that "[the *Winters*] decision was treated like a bombshell that did not fit in at all with the water rights trends of western water law").

polar opposite of the prior appropriation doctrine.<sup>202</sup> For example, prior appropriation requires that a fixed quantity of water be diverted from its natural source and put to some beneficial use, whereas federal reserved water rights require no diversion or prior use, are difficult to quantify because they have not yet been realized, and are unrecorded.<sup>203</sup> Therefore, appropriators on a particular stream “cannot be assured of” either a fixed priority or quantity of water “until reserved rights are adjudicated and quantified.”<sup>204</sup> Moreover, the priority date assigned to a diversion under the prior appropriation doctrine is the date on which it actually begins, whereas the priority date for a reserved right is the date of reservation of the land to which it attaches.<sup>205</sup> As a matter of federal law,<sup>206</sup> *Winters* rights are not depen-

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<sup>202</sup> See Wilkinson, *supra* note 121, at 396 (calling Indian reserved water rights “anomalies in the prior appropriation system”). But see Royster, *supra* note 6, at 173 (arguing that “tribal water rights ‘cannot be understood apart from the prior appropriation system’”) (quoting COHEN’S HANDBOOK, *supra* note 180, at 576)).

<sup>203</sup> See Mead, *supra* note 60, at 438 (“Reserved rights . . . are by their very nature unquantified and unrecorded. State water officials administering streams in prior appropriation states have no records of the existence of reserved rights, their location, their amount, or their priority.”).

<sup>204</sup> *Id.* (stating that the need to quantify reserved water rights has led to state-initiated general stream adjudications of “drainages containing federal enclaves”).

<sup>205</sup> See Royster, *supra* note 5, at 70. Because the federal government established most reservations before non-Indian appropriators attempted to establish their water rights, little water in the West is beyond the doctrine’s reach. See *id.*; see also Getches, *supra* note 43, at 410, 410 n.23 (citing *New Mexico v. Aamodt*, 537 F.2d 1102 (10th Cir. 1976), for the proposition that priority dates for tribes may even be earlier than the date on which their reservations were established). On the topic of aboriginal reserved water rights, see *State ex. rel. Greely v. Confederated Salish & Kootenai Tribes*, 712 P.2d 754, 764 (Mont. 1985) (acknowledging that pre-existing tribal water uses for hunting and fishing have aboriginal priority dates of “time immemorial” (quoting *United States v. Adair*, 723 F.2d 1394, 1414 (9th Cir. 1983))); James L. Merrill, *Aboriginal Water Rights*, 20 NAT. RESOURCES J. 45, 52 n.29 (1980); Sonya Lipsett-Rivera, *Outsiders into Insiders: The Doctrine of Prior Appropriation and Indigenous Communities in Colonial Puebla, Mexico*, 23 OKLA. CITY U. L. REV. 93, 93 (1998) (arguing that while the prior appropriation doctrine “should have privileged indigenous farmers with irrigation because they had a solid claim to ‘ancient and peaceful’ possession of water rights,” it did not); Ross, *supra* note 124, at 208 (contending that “archaeological and historical evidence” indicate that southwestern tribes’ “distinct and definite water-tenure systems . . . should have been recognized under doctrine of aboriginal title, . . . that they were full-fledged riparians and prior appropriators, builders of diversion works giving full notice that the water was being put to beneficial use” and that the *Winters* doctrine, which “put Indian water rights in the hands of the federal government, . . . substantially changed the quality of the rights the natives should have received under aboriginal title”); Royster, *supra* note 6, at 176 (“[W]hen Indian tribes reserve for themselves the right to continue pre-existing or aboriginal practices such as fishing, hunting, gathering, and historical agriculture, whether inside their Indian country or off-reservation, that act implicitly reserves as well sufficient water to support that tribally reserved activity. These rights exist as of time immemorial.”).

<sup>206</sup> See *Arizona v. San Carlos Apache Tribe of Ariz.*, 463 U.S. 545, 571 (1983) (explaining that both state and federal courts have “a solemn obligation to follow federal law” when adjudicating tribal water rights); see also *Adair*, 723 F.2d at 1411 n.19 (“The fact that water rights of the type reserved for the Klamath Tribe are not generally recognized under state

dent on state law systems, unlike appropriative water rights.<sup>207</sup> To the extent that tribal reserved water rights attach to land,<sup>208</sup> are generally not quantified or recorded unless subjected to an administrative process, and can remain in force in perpetuity,<sup>209</sup> they share some important features with common law riparian water rights.<sup>210</sup> The only major difference between traditional riparian doctrine and reserved water rights is that pro rata sharing is not required during water shortages.<sup>211</sup>

Furthermore, reserved tribal water rights should function well in the East because water management systems, especially riparianism, are inherently flexible. They reflect societal needs as such needs come into existence, and they change as those needs evolve.<sup>212</sup> For example, common law riparianism has incorporated features of the prior appropriation doctrine such as permits, an administrative bureaucracy, quantification of allotted water, and a quasi-priority system in the form of exemptions grandfathering certain existing uses.<sup>213</sup>

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prior appropriations is not controlling as federal law provides an unequivocal source of such rights.”).

<sup>207</sup> See Royster, *supra* note 6, at 192–93 (stating that “[t]ribal reserved water rights are not appropriative rights,” which are governed by state law, because they are “reserved as a matter of federal law”). Royster also points out that equating tribal reserved water rights with appropriative rights improperly reduces tribes to the status of “merely property owners within their reservations,” when they are in fact sovereign governments whose water rights are secured by treaties or equivalent federal agreements. *Id.* at 193–94.

<sup>208</sup> See *United States v. Powers*, 305 U.S. 527, 532–33 (1939) (granting tribal water rights to non-Indian successors-in-interest to an Indian allotment of land on the ground that such rights attached to the land and therefore passed to them through the conveyance); Royster, *supra* note 6, at 192 n.115 (stating that “tribal rights arise from the reservation of land or the preservation of aboriginal uses”).

<sup>209</sup> See Royster, *supra* note 5, at 63 (describing some of the attributes of Indian reserved rights and noting their “potential to disrupt state appropriation systems of water rights”); *id.* at 77 (commenting that “there is no standard for quantifying the instream flow right for fisheries”); Royster, *supra* note 6, at 181 (stating that “the rights reserved to or by tribes were reserved in perpetuity”).

<sup>210</sup> See, e.g., Brinton, *supra* note 80, at 70–71 (labeling federal reserved water rights “federal riparianism” and noting other areas of similarity between riparian and federal reserved water rights).

<sup>211</sup> See *Arizona v. California (Arizona I)*, 373 U.S. 546, 597 (rejecting the argument that the *Winters* doctrine is one of equitable apportionment); Helton, *supra* note 131, at 998 (arguing that “[b]ecause reserved rights are federal rights,” they cannot be subordinated to state common law rights due to the Supremacy Clause, and, therefore, during times of water shortage, such rights must have “priority over rights perfected under state law”).

<sup>212</sup> See Rose, *supra* note 24, at 270–74 (telling the “evolutionary” story of property rights and riparian water rights and charting the development of such rights in eastern states, finding them neither “rigid” nor “static and antidevelopmental” but rather a reflection of people’s preferences).

<sup>213</sup> See Royster, *supra* note 6, at 189–90. Royster explains that “[r]egulated riparianism . . . introduces into eastern state water law two of the central features of prior appropriation: quantification and some measure of temporal priority.” *Id.* at 189. While the latter is “not a stated feature of regulated riparianism, some degree of it is inherent in the system,” as “existing uses may be exempt from permit requirements, essentially granting those

Meanwhile, the prior appropriation doctrine is beginning to adopt features of the eastern common law riparian regime, such as allowing water to remain instream to protect the stream's ecology, being less rigid about senior water rights holders' taking their full share regardless of the impact on more junior claimants, and broadening beneficial uses<sup>214</sup> to require that the allotment be in the public interest and not ecologically damaging.<sup>215</sup> Even the administration of reserved tribal rights in the West has fundamentally changed the basic features of those rights, including their approved purposes, the quantification of reserved rights, and the assignment of a priority date.<sup>216</sup>

The changes to common law riparianism as it moves toward the prior appropriation system as well as those to reserved water rights make *Winters* rights fit more easily into a regulated riparian regime.<sup>217</sup> However, integrating tribal reserved water rights into any type of riparian legal system may prove more challenging than integrating them into pure prior appropriation systems, given the need to mesh riparianism's correlative rights principle with the "paramount and perpetual nature of tribal water rights" under the *Winters* doctrine.<sup>218</sup>

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uses a permanent priority over new uses." *Id.* at 189–90. When the water body is overdrawn, "later-proposed withdrawals may be denied or curtailed." *Id.* at 190.

<sup>214</sup> "Beneficial use" is a malleable term, generally defined as "a reasonable use consistent with the public interest in the best use of water supplies." Mead, *supra* note 60, at 438 n.47. Whether a particular use is, in fact, beneficial "depends on the facts and circumstances of each case." *Id.*

<sup>215</sup> See Wilkinson, *supra* note 59, at 64. "The fact that state-granted [appropriative] water rights, even if decreed, are not as fixed and hard as commonly believed can be critical in producing water for the tribes." *Id.* This means that water subject to a prior appropriative right which has been "diverted but wasted" can be rediverted to tribes. *Id.* Moreover, the application of good conservation practices by non-Indian users will make more water available to fulfill the needs of tribes with reserved rights and will likely be "the most common manner in which paper *Winters* rights will be reconciled with existing uses." *Id.*

<sup>216</sup> See *id.* at 184–85 (describing how assigning tribal water rights a priority date of either the date on which "the land reservation was set aside" or "time immemorial" when "water [is] reserved to preserve existing aboriginal uses and practices" and quantifying the amount of water reserved to be that which is necessary to accomplish a specific purpose either of the reservation or "to continue aboriginal uses" enables tribal water rights to fit into the prior appropriation scheme).

<sup>217</sup> See *id.* at 197 ("Certainly integrating tribal reserved rights into a regulated riparian jurisdiction poses fewer administrative headaches than doing so in a common-law riparian state."). Specifically, Royster argues that tribal reserved rights, once quantified, could be "integrated" into a regulated riparian system by setting that amount of water, along with the minimum instream flow, aside as being "beyond riparian use," which would "guarantee the paramount and perpetual nature of tribal water rights and, at the same time, minimize the burden of administering a coordinated system." *Id.*

<sup>218</sup> *Id.* (stating that "[i]ntegrating tribal reserved rights into a workable system in a common-law riparian jurisdiction will undoubtedly prove more difficult" because of the need "to coordinate a set of quantified rights for tribes with a set of correlative rights for riparian owners . . . without destroying the paramount nature of those [tribal] rights, and allowing state law to trump federal rights"). But see Gwendolyn Griffith, Note, *Indian Claims to Groundwater: Reserved Rights or Beneficial Interest?*, 33 STAN. L. REV. 103, 118 (1980)

Royster suggests “incorporat[ing] into state riparian law the doctrine that a riparian use that interferes with a paramount tribal reserved right is unreasonable per se” or “satisfy[ing] the tribal water right before any riparian rights arising subsequent to the tribal right” to the same water.<sup>219</sup> Declaring some riparian uses per se unreasonable is not a foreign concept. Virginia, for example, does this with respect to out-of-basin water transfers.<sup>220</sup> The latter would “protect[ ] the paramount nature of tribal rights,” would be “consistent with the correlative nature of common-law riparian rights” because it leaves competing riparians to allocate “the burden of any water shortage” that might arise among themselves,<sup>221</sup> and would force later users to demonstrate the unreasonableness of a tribe’s use.

Last, given the underlying rationale for tribal reserved water rights, these rights should be recognized in the East. The purpose behind reserving land on which tribes can live and maintain their traditional aboriginal practices<sup>222</sup> is the same regardless of where the land is located. This purpose carries with it the implicit right to sufficient water for such reserved lands.

*Winters* rights have more in common with riparian water management systems than with the prior appropriation system, though they arose in the latter and have been applied primarily in that system. The purposes they would serve in the East are as compelling as they are in the West. Water management systems in general, and riparian systems in particular, are sufficiently flexible to incorporate *Winters* rights. Indeed, the United States government originally used riparian principles to defend these rights. In addition to these doctrinal arguments for eastern tribes’ assertion of *Winters* rights, equitable and utilitarian reasons compel them to do so.

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(arguing that granting Indians a “preemptive right” to groundwater is “less drastic” in riparian jurisdictions than in prior appropriation jurisdictions because riparian water rights “are accompanied by a duty to allow other overlying landowners reasonable use”; therefore, “unlike the junior appropriator in prior appropriation states, the investor [in a riparian jurisdiction] does not face extinguishment of her investment by Indian preemptive rights unless the Indians’ reasonable use exhausts all the water in an aquifer”).

<sup>219</sup> Royster, *supra* note 6, at 197–98.

<sup>220</sup> See *supra* note 34.

<sup>221</sup> Royster, *supra* note 6, at 198; see also Eric H. Lord, *The Obed Wild and Scenic River of Tennessee: Asserting a Federal Reserved Water Right in a Riparian Jurisdiction*, GREAT PLAINS NAT. RESOURCE J., Spring 2003, at 1, 26, 28 (proposing both a “hybrid system” in which “reserved [water] right[s] would be on a par with those riparian users . . . with vested rights” and “quiet title action[s]” to establish a “hierarchy” of rights among users of a particular stream).

<sup>222</sup> See *In re The Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source*, 35 P.3d 68, 74 (Ariz. 2001).

B. Normative and Utilitarian Reasons Why the *Winters* Doctrine Should Apply in the East

"Western water issues cannot be dealt with now or in the years to come without squarely confronting the legal and moral force" of a history that ignored Indian water rights.<sup>223</sup> "Questions of fairness pervade the issue of Indian water rights."<sup>224</sup> On one side are the farmers and ranchers who built their homes and livelihoods in reliance on secure water rights, which the *Winters* doctrine makes highly insecure.<sup>225</sup> On the other side are Indian tribes who unwillingly provided the water that built the federal and state reclamation systems and supplied many of those farmers and ranchers with water, to the extreme detriment of the tribes.

This Part of the Article, however, uses slightly different normative arguments as a basis for recognizing the *Winters* doctrine in the East; this is because of the inapplicability of arguments based on federal water policies there. Instead, the arguments set forth below focus on historical redress for a broad array of injuries to Indians, distributive equity, and the government's fiduciary obligations to Indians.<sup>226</sup> In addition, this Part explains why granting *Winters* rights serves utilitarian purposes because it will result not only in more water for everyone, but also in water that is purer.

1. *Normative Reasons*

Liu makes the case that Indians are entitled to what she calls "historical redress" because of the "asymmetry in the development of western water resources."<sup>227</sup> She notes that federal policy favored the development of non-Indian water projects and that "the federal gov-

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<sup>223</sup> Wilkinson, *supra* note 59, at 55.

<sup>224</sup> *Id.*

<sup>225</sup> For example, the upstream area at issue in *Winters* had been settled since 1898 under the Homestead Act of 1862, ch. 75, 12 Stat. 392 (repealed 1976), and the Desert Land Act of 1877, ch. 107, 19 Stat. 377 (1877) (codified as amended at 43 U.S.C. §§ 321–39 (2000)). After having acquired title to their land from the government through these Acts, the settlers began spending a lot of money to divert water from rivers as well as build towns with schools, roads, "and other improvements usually had and enjoyed in a civilized community." *Winters v. United States*, 207 U.S. 564, 569 (1908).

<sup>226</sup> The concepts of "historical redress" and "distributive justice" come from Sylvia Liu. Sylvia F. Liu, Comment, *American Indian Reserved Water Rights: The Federal Obligation to Protect Tribal Water Resources and Tribal Autonomy*, 25 ENVTL. L. 425 (1995). Liu develops normative arguments based on Rawls's contractarian theory, general notions of tribal sovereignty, communitarian and group-based rights, and the federal government's Indian-trust obligations to support the government's taking a more assertive role in advocating a broad interpretation of the *Winters* doctrine and allowing tribes to determine how to use their water. *See id.*

<sup>227</sup> *Id.* at 434–38.

ernment did little to promote Indian water rights,”<sup>228</sup> with the result that “American Indians were by far the least active participants in the work of *Winters*” in the decades following the decision.<sup>229</sup> The “specific relative disparity” in the government’s support of “Indian tribes and non-Indian water users,” Liu posits, “compels the government to work towards providing Indian tribes with contemporary equivalent support and opportunities for water resource development,” such as the opportunity “to sell or export their water for off-reservation use.”<sup>230</sup>

To the extent that this argument rests on federal water policy, it has little applicability in the East, where such a policy does not exist. The federal government has not subsidized major eastern water supply projects since local financing for these projects is more the norm.<sup>231</sup> This does not eliminate, however, the need to redress more general wrongs done to eastern Indian tribes at the hands of white settlers. Since early contact with settlers, eastern tribes have been exposed to discrimination, disease (sometimes deliberately), genocide, slavery, removal, and wars.<sup>232</sup> Tribes ceded land in exchange for being left unmolested by non-Indians. But over time, non-Indian encroachments onto Indian lands reduced those holdings to a mere fraction of the land first the Crown, and then the United States, confirmed was theirs.<sup>233</sup>

Additionally, the *Winters* doctrine arises from, and rests on, equitable principles, as illustrated by the Court’s use of the Indian canon for construing treaties in order to find a rationale for holding in favor

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<sup>228</sup> *Id.* at 434–36. Liu notes that the “few irrigation projects” the Bureau of Indian Affairs began on reservations “remain largely unfinished due to insufficient funds,” citing as one example “an irrigation project on the Fort Belknap Reservation [begun] in 1903, [which] still had not [been] completed as of March 1995.” *Id.* at 436.

<sup>229</sup> SHURTS, *supra* note 66, at 9. Shurts takes issue with the dominant story that *Winters* “lay dormant until resurrected by the Supreme Court in the *Arizona v. California* decision in 1963, when it became a significant part of modern water disputes in the West and of the more effective assertion of Indian sovereignty,” stating that that story “obscure[s]” that “*Winters* was well known and often used by lawyers, government officials, members of Congress, and others interested in water issues involving Indians and non-Indians alike.” *Id.* at 8.

<sup>230</sup> Liu, *supra* note 226, at 438.

<sup>231</sup> For example, a consortium of cities and counties is paying for the reservoir project the Mattaponi Tribe opposes. See *Alliance to Save the Mattaponi v. Commonwealth Dep’t of Envtl. Quality ex rel. State Water Control Bd.*, 621 S.E.2d 78 (Va. 2005).

<sup>232</sup> See Hope M. Babcock, *A Civic-Republican Vision of “Domestic-Dependent Nations” in the Twenty-First Century: Tribal Sovereignty Re-envisioned, Reinvigorated, and Re-empowered*, 2005 UTAH L. REV. 443, 542.

<sup>233</sup> See ROUNTREE, *supra* note 12, at 89 (describing the English as “Protestants . . . determined to acquire the land they wanted” and the Powhatan Indians as being “soon isolated on ever-shrinking islands of tribal territory”).



of the tribes.<sup>234</sup> Justice McKenna showed his sensitivity to the circumstances that had led to the creation of the Fort Belknap Reservation, which had left the tribes with less land than they had had before. He said:

[I]t would be extreme to believe that within a year Congress destroyed the reservation and took from the Indians the consideration of their grant, leaving them a barren waste,—took from them the means of continuing their old habits, yet did not leave them the power to change to new ones.<sup>235</sup>

Relying on the moral force of these arguments, the Court refused to hear the state's equal footing argument and the government's riparian law theories.<sup>236</sup>

Unlike Liu's narrow historical redress argument, the above arguments are more consistent with traditional broad-based normative arguments that require redress for the harms done to Indians since the settling of this country.<sup>237</sup> These arguments are also premised on the importance of water to tribes for their survival and the fact that tribes entered into treaties that assured them they could continue to use and rely on this water to sustain themselves and to practice traditional culture-based activities.<sup>238</sup> Even basic normative principles arising from the notion of a bargained-for exchange between parties would impose an obligation on non-Indians to honor that exchange.<sup>239</sup>

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<sup>234</sup> See *Winters v. United States*, 207 U.S. 564, 576 (1908) (applying an interpretive rule requiring that any ambiguity in agreements and treaties "be resolved from the standpoint of the Indians"); see also Richard B. Collins, *The Future Course of the Winters Doctrine*, in INDIAN WATER, *supra* note 59, at 89, 90 (noting that *Winters* "is based on a rule of fairness followed by the Supreme Court, not, as some of its critics charge, on an ad hoc rule created for the *Winters* case," and citing the Court's "firmly established . . . rule of construing Indian laws and treaties favorably to the Indians," as well as the Court's "underlying moral principle").

<sup>235</sup> *Winters*, 207 U.S. at 577.

<sup>236</sup> See *Winters*, 207 U.S. at 578 (reasoning that "our construction of the agreement and its effect make it unnecessary" for the Court to respond to the petitioner's equal footing argument and the government's riparian argument); see also Liu, *supra* note 226, at 460 ("The nature of the *Winters* right is an historically remedial one, where courts imply from a reservation of tribal land a congressional intent to have reserved enough water to benefit the tribes and to allow them to develop fully. Given this historical context, and in light of the troubled history of federal Indian policy, an approach that defers to the needs of non-Indian water users" would merely "repeat historical inequities.").

<sup>237</sup> See, e.g., David C. Williams, *The Borders of the Equal Protection Clause: Indians as Peoples*, 38 UCLA L. REV. 759, 818 (1991) ("[B]ecause the federal government stole land and sovereignty from Indians in the past, the federal government today owes land and sovereignty to contemporary Indians.").

<sup>238</sup> See *Winters*, 207 U.S. at 576 (commenting that it is not possible that the Fort Belknap Reservation tribes would have "deliberately given up" water enabling them to subsist on their arid lands).

<sup>239</sup> See, e.g., *Wiecking v. Allied Med. Supply Corp.*, 391 S.E.2d 258, 260 (Va. 1990) (stating that the doctrine of sovereign immunity has never applied to contract actions in Virginia).

Liu further suggests that “traditional arguments of distributional justice” support her thesis that a “broad interpretation of Indian reserved [water] rights” is warranted.<sup>240</sup> She argues that it is iniquitous and unjust that non-Indians have dispossessed tribes of their natural-resource base and forced them to shoulder the burdens of scarcity disproportionate to the burdens borne by non-Indians.<sup>241</sup> Federal policies have supported and enabled this disparity, which adds to the injustice.<sup>242</sup> The same principle applies when state policies cause the inequity.

If we were to accept the State’s argument, we would be enshrining the rather perverse notion that traditional rights are not to be protected in precisely those instances when protection is essential, *i.e.*, when a dominant group has succeeded in temporarily frustrating exercise of those rights. We prefer a view more compatible with the theory of this nation’s founding: rights do not cease to exist because a government fails to secure them.<sup>243</sup>

These arguments are equally persuasive on the issue of applying *Winters* in the East.

Indians are today among the poorest people in the United States, with reservations that “continue to rank among the most economically depressed sectors of the nation.”<sup>244</sup> Reservation Indians suffer severe health and emotional problems, as well as “chronically high [rates of]

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<sup>240</sup> Liu, *supra* note 226, at 438. On the topic of environmental justice, see CLIFFORD RECHTSCHAFFEN & EILEEN GAUNA, ENVIRONMENTAL JUSTICE: LAW, POLICY & REGULATION (2002).

<sup>241</sup> See Liu, *supra* note 226, at 438–39 (noting that water scarcity on Indian reservations has further exacerbated Indians’ economic troubles).

<sup>242</sup> See Annalisa Jabaily, Note, *Water Rites: A Comparative Study of the Dispossession of American Indians and Palestinians from Natural Resources*, 16 GEO. INT’L ENVTL. L. REV. 225, 245 (2004). Jabaily comments on the “maldistributive impacts of [the] ideologies and practices” that removed both Indians and Palestinians from the landscape during settlement (and persist today) and states that such ideologies and practices have “tightly circumscribed” Indian and Palestinian access to clean water. *Id.* She finds this “especially iniquitous” as both “had lived on [the land] and regulated the natural resources before the creation of the State.” *Id.* She concludes that “because the physical land and water needs of Palestinians and American Indians exist in tense contradiction to the State ideologies that allocate the majority of clean water to ‘settlers,’ the fantasy of American Indian and Palestinian non-existence cannot forever withstand the clamor that increases with thirst.” *Id.*; see also Ross, *supra* note 124, at 209 (commenting on the “myth . . . that the native peoples had not established any prior legal rights to water”).

<sup>243</sup> *Mescalero Apache Tribe v. New Mexico*, 630 F.2d 724, 730 (10th Cir. 1980), *vacated*, 450 U.S. 1036 (1981).

<sup>244</sup> Liu, *supra* note 226, at 438; see also Chambers & Echohawk, *supra* note 121, at 448 (noting “general agreement that on Indian reservations in western states the clear disparity between Indian and non-Indian actual water use which greatly favors non-Indians is surely one cause of widespread poverty”); Jabaily, *supra* note 242, at 241 (stating that the lack of “equal access to water” on Indian reservations “has severely impacted agricultural and domestic life” and noting that “in 1980, twenty-one percent of all Indian housing units did not have running water or indoor toilets”).

unemployment” and illiteracy, and have few social services to mitigate these problems.<sup>245</sup> Liu finds, in applying distributive justice theories, that the disparities between Indian and non-Indian society are sufficiently large to justify giving Indians a more favorable status than non-Indian users of water.<sup>246</sup> Of those theories, she focuses on Rawls’s “contractarian perspective,” utilitarianism,<sup>247</sup> and Jeremy Waldron’s need-based theory.<sup>248</sup>

Rawls’s contractarian approach favors the “unequal distribution” of “social goods” in order to “advantage . . . the least favored group,”<sup>249</sup> the one with the fewest “‘things that every rational man is presumed to want,’ such as ‘rights and liberties, powers and opportunities, [and] income and wealth.’”<sup>250</sup> Indian tribes certainly qualify under this definition. This theory thus justifies granting tribes, “one of the least advantaged groups in our society, access to a primary good: sufficient water to fulfill the purposes of their reservation.”<sup>251</sup>

Waldron suggests that “the point of view of those who suffer deprivation should guide evaluations of property arrangements.”<sup>252</sup> Kaufman expands on Waldron’s theory, according to Liu, by pointing out that “an individual’s effective exercise of rights must link to a minimum standard of living, in order to guarantee the equality of what he calls ‘citizenship entitlements,’ . . . the irreducible minimum claims to state obligations that each citizen enjoys.”<sup>253</sup> Liu uses these “needs-based” theories to support granting “tribes enough water to ensure their full participation in society, which arguably entails both economic self-sufficiency and political self-determination.”<sup>254</sup>

Liu identifies, but does not rely upon, an approach to “distributive equity” that regards “American Indian water rights as *unique* property rights.”<sup>255</sup> However, this argument might be availing as well. *Winters* rights are indeed unique in that a treaty, executive agreement, or act of Congress secures them. These agreements between tribes and the federal government make tribal reserved water rights special, complete with the moral authority of contracting sovereign nations.

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<sup>245</sup> Liu, *supra* note 226, at 438. Liu uses this data as a shield against those who argue that granting tribes reserved water rights amounts to an undeserved “windfall.” *Id.* at 439.

<sup>246</sup> *See id.*

<sup>247</sup> Utilitarian arguments are developed *infra* Part III.B.2.

<sup>248</sup> *See* Liu, *supra* note 226, at 439.

<sup>249</sup> *Id.* at 440 (citing JOHN RAWLS, A THEORY OF JUSTICE 75–83 (1971)).

<sup>250</sup> *Id.* (quoting RAWLS, *supra* note 249, at 62).

<sup>251</sup> *Id.* (applying “Rawls’ own terms to interpret *Winters*”).

<sup>252</sup> Liu, *supra* note 226, at 441 (citing Jeremy Waldron, *Property, Justification and Need*, 6 CANADIAN J. L. & JURISPRUDENCE 185, 210–11 (1993)).

<sup>253</sup> *Id.* (quoting ROBERT M. KAUFMAN, RIGHTS, NEEDS, AND GROUPS: TOWARDS A RECONSTRUCTION OF PHILOSOPHIC, JURISPRUDENTIAL, AND CONSTITUTIONAL FRAMEWORKS 43, 151, 174–80 (1983)).

<sup>254</sup> *Id.*

<sup>255</sup> *Id.* at 439 (emphasis added).

*Winters* rights are also unique because they are communal rights.<sup>256</sup> The importance of water to the cultural identity and self-determination of tribes and the value of preserving tribes as unique “collective social entities”<sup>257</sup> justifies granting that water special protection.<sup>258</sup>

Liu notes that reserved tribal water rights are critical to tribal sovereignty, a concept that includes not only “political, territorial, and cultural autonomy,”<sup>259</sup> but also control over land and natural resources, such as water.<sup>260</sup> In this sense, reserved tribal water rights perform a unique cultural and political function for tribes, in addition to the more ordinary economic one that water rights provide for non-Indians. Indeed, as defined in *Winters*, reserved rights are those rights that are necessary to fulfill the purpose of the reservation.<sup>261</sup> Therefore, whether a reservation is viewed as public lands or the lands of a separate sovereign, a reservation is very different from the private lands serviced by appropriative rights.<sup>262</sup>

A final normative argument relies on the federal Indian trust relationship, which imposes a moral obligation on the federal government to protect tribes.<sup>263</sup> Originating in *Cherokee Nation v. Georgia*,<sup>264</sup> this trust obligation continues today and imposes upon the federal government unique obligations on behalf of tribes. The government’s trust responsibility towards Indian tribes involves “moral obligations of the highest responsibility and trust . . . [and] should therefore be

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<sup>256</sup> See *id.* at 442–46 (discussing various communitarian arguments justifying promotion of Indian tribes’ rights).

<sup>257</sup> *Id.* at 445; see also Babcock, *supra* note 232, at 538–39 (describing tribes as unique “homogeneous communities”).

<sup>258</sup> See Liu, *supra* note 226, at 445.

<sup>259</sup> *Id.* at 446.

<sup>260</sup> *Id.* at 448–49; see also *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 52 (9th Cir. 1981) (“Regulation of water on a reservation is critical to the lifestyle of its residents and the development of its resources. Especially in arid and semi-arid regions of the West, water is the lifeblood of the community.”).

<sup>261</sup> 207 U.S. 564, 567 (1908).

<sup>262</sup> See Mead, *supra* note 60, at 448 (noting that the “Partial Decree’s grant of the entire natural flow of [the river in Yellowstone National Park] is significant . . . [because it] illustrates that the federal government will not surrender these rights where their existence is crucial to maintaining important public lands”).

<sup>263</sup> Commentators have noted the paradox, which still exists today, of the government resting this trust responsibility in the Department of Interior, as this Department also houses the Bureau of Reclamation, the agency bearing primary responsibility for the government policy that long ignored reserved tribal water rights. See Membrino, *supra* note 8, at 20 (describing the Pyramid Lake litigation as “a paradigm of the conflict over Indian trust resources,” casting the federal trustee as “both ally and adversary of the Tribe,” and noting that “[w]hen the attempted abandonment is politically motivated, the precarious nature of the Indian trust is manifest”); see also Capossela, *supra* note 152, at 144–47 (describing “federal conflicts of interest in Indian water”).

<sup>264</sup> 30 U.S. (5 Pet.) 1, 17 (1831) (describing Indian tribes as “domestic dependent nations” and analogizing their relationship to the United States as “a ward to his guardian”).

judged by the most exacting fiduciary standards.”<sup>265</sup> The government’s responsibilities should resemble those of a private trustee.<sup>266</sup> These obligations include the duty “to litigate Indian rights.”<sup>267</sup> Recently, a U.S. district court judge found that although a state engineer’s action was not “contemptuous,” it was sufficiently “deficient” to prompt the court to remove the engineer from the matter and transfer the authority “to administer all water rights” on the reservation to the tribes.<sup>268</sup>

Liu persuasively argues that the federal-Indian trust relation requires the federal government to be an advocate for tribal interests, including achieving the “maximum quantification of Indian water rights” on the tribes’ behalf, and tribal “autonomy” in determining how tribes can use that water.<sup>269</sup> When the federal government ignores that responsibility by being either “absent or neutral” when disputes arise about reserved tribal rights, “the effect is much the same as if the government were formally an adversary to the tribal interest.”<sup>270</sup>

All of these normative arguments resonate with eastern tribes; their relevance does not stop at the 100th meridian. Non-Indians have caused suffering for eastern tribes, leaving them with little of their original homeland and in great poverty.<sup>271</sup> Eastern tribes are therefore among Rawls’s “least favored groups” and qualify for Kaufman’s “citizenship entitlements,” as do western tribes. Eastern tribes

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<sup>265</sup> *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942).

<sup>266</sup> See *Pyramid Lake Paiute Tribe v. Morton*, 354 F. Supp. 252, 256 (D.D.C. 1972) (holding that fiduciary duties required the Secretary of the Interior “to formulate a closely developed regulation that would preserve water for the Tribe . . . [and] to assert his statutory and contractual authority to the fullest extent possible to accomplish this result”), *rev’d on other grounds*, 499 F.2d 1095 (D.C. Cir. 1974). The district court in *Pyramid Lake* recognized the difficulties for the Secretary in fulfilling fiduciary obligations, but the court went on to say that these difficulties could not “simply be blunted by a ‘judgment call’ calculated to placate temporarily conflicting claims to precious water. The Secretary’s action [in this case] is therefore doubly defective and irrational because it fails to demonstrate an adequate recognition of his fiduciary duty to the Tribe.” *Id.* at 256–57.

<sup>267</sup> Capossela, *supra* note 152, at 147 (“The federal trust responsibility obligates the United States to litigate Indian rights.”).

<sup>268</sup> Membrino, *supra* note 8, at 30–31.

<sup>269</sup> Liu, *supra* note 226, at 452–58 (stating that “courts should interpret the trust relationship to require the federal government to promote Indian autonomy . . . [and] the maximum quantification of Indian water rights”). Membrino implores Congress and the Executive branch “to embrace the premise that treaties and agreements vest Indian tribes with rights in western water resources for which the government has a trust responsibility” and to recognize that “[v]igorous federal advocacy of the federal trust is essential to fair disposition of Indian claims.” Membrino, *supra* note 8, at 22–23. He reasons that federal trustee advocacy of Indian reserved rights “cannot be overstated,” because “[a] faithful trustee can prevent the Indian interest from being misunderstood or undermined,” or even “overwhelm[ed]” by the non-Indian interests. *Id.* at 17, 21–22.

<sup>270</sup> Membrino, *supra* note 8, at 23.

<sup>271</sup> See ROUNTREE, *supra* note 12, at 89 (“As each chiefdom’s lands decreased, the core Indian people became poorer.”).

could not have ceded their lands to settlers without retaining sufficient water. Water is just as essential for eastern tribes as it is for western tribes. To the extent that most eastern tribes are not federally recognized, Part IV suggests that this lack of recognition should not bar the imposition of fiduciary responsibilities on governing authorities.

2. *Utilitarian Reasons to Recognize Reserved Tribal Water Rights in the East*

Recognition of reserved tribal water rights will expand “the ‘social pie.’”<sup>272</sup> The reserved rights doctrine does not require tribes to use their water allotment and thus perhaps waste it, which means more water will be available for marketing or for instream use by other people.<sup>273</sup> Additionally, since Indians consume less water than non-Indians because traditional uses such as fishing or cultural ceremonies require that water be left in the stream, more water will remain for downstream use.<sup>274</sup> Moreover, it is extremely unlikely that tribes would, or could, develop their water rights, as they lack the resources, technical support, and land base to do so.<sup>275</sup> In fact, when tribal reserved rights have been recognized and quantified, “gallon-for-gallon reductions [in non-Indian water rights] have not occurred, largely because the increased use of water by Indian tribes resulted from new storage, improved water management, or exchanges and marketing mechanisms,” which have “increase[d],” not diminished, “the aggregate welfare.”<sup>276</sup>

Furthermore, unconsumed water serves environmental purposes, as water left in the stream supports important ecological functions such as maintaining habitats for fish and wildlife.<sup>277</sup> Recognizing reserved tribal rights to water will also ensure the level of purity necessary to maintain tribal fishing and ceremonial uses.<sup>278</sup> These environmental advantages benefit both Indians and non-Indians, thus maximizing overall social welfare.

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<sup>272</sup> Liu, *supra* note 226, at 440.

<sup>273</sup> *See id.*

<sup>274</sup> *See id.* Non-Indians consume more water partly because of widespread and inefficient irrigation practices; for instance, 85% of the water used in the West goes toward irrigation. *See id.* at 437 n.73.

<sup>275</sup> *See id.* at 436 (discussing the lack of federal financial support for tribes and the leasing of Indian lands to non-Indian farmers).

<sup>276</sup> *Id.* at 440.

<sup>277</sup> *See id.* (suggesting that tribes can use “water more efficiently, such as for maintaining instream flows for fisheries”).

<sup>278</sup> *See City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996) (upholding the Isleta Pueblo’s water standards, which were more stringent than state standards, in order to assure water purity for ceremonial purposes).

There are no geographical limits to these utilitarian arguments supporting granting western tribes *Winters* rights. However, the normative arguments are not unique to the West either. The Article now addresses the principal barriers facing eastern tribes who seek to assert *Winters* rights: the lack of public lands and federal recognition.

#### IV

#### OVERCOMING TWO BARRIERS TO ASSERTING *WINTERS* RIGHTS IN THE EAST

A major argument against eastern tribes asserting *Winters* rights is that the doctrine's invocation depends on the existence of withdrawn federal land or a federally recognized tribe.<sup>279</sup> There are three responses to this argument. The first is suggested by Royster in a footnote in her article on asserting *Winters* rights in riparian jurisdictions, namely that an analogy can be drawn between federally recognized and state-recognized tribes, and that corresponding trust responsibilities can be assigned to both governments.<sup>280</sup> While this argument provides a theoretical basis for the assertion of *Winters* rights by state-recognized tribes, the argument benefits a limited number of tribes. The theory also subjects those tribes to state law and the whimsy of state advocacy of their rights, which may be more problematic in the modern era than advocacy by the federal government.

The second response sidesteps any dependence on state law or state government by suggesting that the colonial treaties of eastern tribes entail a sufficient federal presence for the assertion of the *Winters* doctrine. While this response is slightly more inclusive than the previous one, it still benefits a limited number of tribes.

The third response disputes the argument that *Winters* rights are limited to withdrawn federal land or to federally recognized tribes, finding the limitations defective for two reasons. First, *Winters* rights attach to land regardless of its federal status, and second, tribal reserved water rights are aboriginal in nature, such that they predate the federal government's withdrawal of the land. Therefore, the status of the land and tribe are irrelevant for determining whether a tribal reserved water right exists. If this response succeeds it will benefit all tribes, not just state recognized ones or ones with colonial treaties, and will not be dependent on states or federalizing colonial treaties.

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<sup>279</sup> There are only fourteen eastern federally recognized tribes out of many hundreds of recognized tribes nationwide. 67 Fed. Reg. 46328-01 (July 12, 2002).

<sup>280</sup> See Royster, *supra* note 6, at 174 n.18.

### A. Royster's Analogy

Royster suggests that "where the state acts in the capacity of trustee for state-recognized tribes, . . . there is no reason that state-recognized tribes would not have reserved rights to water as a matter of state law."<sup>281</sup> Similar to a federal trustee, a state trustee theoretically must act in the interests of the tribe and advocate on its behalf, which includes helping the tribe secure sufficient water to maintain its traditional way of life. There are several practical problems with this analogy, however.

The Mattaponi's experience, as a state-recognized tribe,<sup>282</sup> with Virginia illustrates some of the problems with Royster's analogy. The Mattaponi's tribal identity is, as it has ever been, reliant upon the river, such that the modern Tribe considers itself culturally and economically bound to the river.<sup>283</sup> The Tribe depends on shad for its subsistence, and tribal members fish the river in the same place and manner as their ancestors and partake in religious ceremonies in the river. The Tribe makes pottery with river mud, as its ancestors did, and gathers native plants along the riverbanks for medicinal purposes and food.

Since the Mattaponi's continued existence as a tribe depends upon the water that flows by its reservation, it has fought, for over a decade, the construction of a municipal drinking water reservoir that would withdraw 75 million gallons of water per day from the river. The Tribe believes the water withdrawal will change the river's salinity and will thus disrupt the shad's annual spawn and reduce native plants. Furthermore, the reservoir will flood the Tribe's nearby ancestral homelands.

If the Mattaponi were a federally recognized tribe or occupied federal lands, it could claim a reserved water right to sustain its treaty-protected traditional uses of the river.<sup>284</sup> Although the Mattaponi are neither federally recognized nor occupy federal lands, given the Tribe's dependence on the Mattaponi River for its subsistence and cultural identity, it is highly unlikely that the Tribe intended to cede

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<sup>281</sup> *Id.*; see also 1 Va. Op. Att'y Gen. 107, 108 (1977) ("Opinions of this Office have recognized a guardian-ward relationship between the Commonwealth and the Mattaponi and Pamunkey Indians.").

<sup>282</sup> See H.R.J. Res. 25, Gen. Assem., Reg. Sess. (Va. 1994); H.R.J. Res. 54, Gen. Assem., Reg. Sess. (Va. 1983).

<sup>283</sup> For information about the Mattaponi Indian Tribe, including its fish hatchery, cultural dependence on the Mattaponi River, and its fight to preserve the integrity of that river, see Mattaponi Indian Reservation, <http://www.baylink.org/Mattaponi> (last visited May 17, 2006). The hatchery supplies jobs and income for tribal members.

<sup>284</sup> See *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 634-36 (1970) (holding that the canons of treaty construction required a finding that a tribe had title to a riverbed because a treaty establishing the reservation promised the tribe sovereignty over its federally reserved lands).



this resource when it signed the Treaty at Middle Plantation with the Virginia colonial government.<sup>285</sup> While the Treaty grants the Tribe off-reservation fishing and hunting rights,<sup>286</sup> its dependence on the Mattaponi River is not undermined, especially since the Treaty “intended [such off-reservation rights] to complement a life defined by [a] permanent home[ ].”<sup>287</sup>

Should it matter, then, that the Mattaponi neither are a federally recognized tribe nor occupy land withdrawn from the public domain on their behalf? Royster would argue no, because the Tribe is recognized by the Commonwealth and resides on land that the state holds “in trust” for the Tribe and its members.<sup>288</sup> Under her analogy, the Commonwealth is under a fiduciary duty to assert *Winters* rights, albeit a duty resting on state, not federal, law. The analogy should be persuasive. The state trustee, similar to the federal trustee, must ensure that state-recognized tribes have enough water to survive.

Making *Winters* rights dependent on state law is not a panacea for tribes, however. States have not been enthusiastic advocates for tribes,<sup>289</sup> especially when tribal needs conflict with the needs of other interested parties.<sup>290</sup> In fact, states frequently and vigorously oppose

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<sup>285</sup> See *Winters v. United States*, 207 U.S. 564, 576 (1908) (pointing out that it is unlikely that tribes intended to give up their “command of the lands and waters,—command of all their beneficial use”); see also Andrea Geiger Oakley, Note, *Not on Clams Alone: Determining Indian Title to Intertidal Lands—United States v. Aam*, 887 F.2d 190 (9th Cir. 1989), 65 WASH. L. REV. 713, 726 (1990) (noting that “[p]recedent requires that the evaluation of dependence be expanded beyond subsistence requirements and economic considerations” and commenting that the court in *Muckleshoot Indian Tribe v. Trans-Canada Enterprises*, 713 F.2d 455, 458 (9th Cir. 1983), found that “Indians depended on a disputed watercourse not only for food and materials, but in their manner of self-identification, language, and religious practices, to hold that a disputed riverbed was conveyed to the tribe”).

<sup>286</sup> See Treaty at Middle Plantation, art. VII, *supra* note 13, at 84.

<sup>287</sup> See Oakley, *supra* note 285, at 727; *id.* nn.116 & 118 (citing cases upholding tribal claims to submerged lands despite the tribes’ use of off-reservation fishing and gathering sites).

<sup>288</sup> The Commonwealth of Virginia asserts fee title to the Mattaponi’s reservation as a self-claimed postcolonial successor to the British Crown. See 1 Va. Op. Att’y Gen. 107, 108–09 (1977); see also Op. Va. Att’y Gen. 160 (1917–18) (“Mattaponi Indians of Virginia, are wards of the State, just as the Indians under the guardianship of the United States are wards of the nation.”).

<sup>289</sup> See Membrino, *supra* note 8, at 6 (noting that Wyoming responded to the Supreme Court’s warning in *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545 (1983), that “state courts adjudicating Indian water rights have a solemn obligation to follow federal law” by “assum[ing] nearly the entire litigation burden of opposing the United States and the Tribes” and “by challenging in its state court every aspect of the federal law of reserved rights”); see also Capossela, *supra* note 152, at 144 (reporting that a tribal leader called state jurisdiction over tribal water rights coupled with the federal policy of negotiated quantification of Indian water rights “annihilation”); Royster, *supra* note 5, at 99 n.227 (pointing out that “[t]ribes fear that state economic interests in the water, the vulnerability of state court judges to reelection concerns, and the actual or perceived historic bias of state courts against Indian interests will all preclude fair adjudication of Indian reserved rights”).

<sup>290</sup> See, e.g., Letter from Frank S. Ferguson, Esq., Deputy Attorney General, to John Dossett (June 3, 1997) (refusing to help the Mattaponi Tribe in its battle against the reser-

such tribal initiatives by raising sovereign immunity defenses and other state law jurisdictional challenges, as was done repeatedly in the Mattaponi proceedings.<sup>291</sup> As such, making successful assertions of the *Winters* doctrine depend on state trustees who have shown even less commitment to tribes than their federal counterparts is problematic to say the least. Additionally, Royster's suggestion contradicts historical tribal resistance to state jurisdiction.<sup>292</sup>

Furthermore, even if a state is an enthusiastic advocate for tribal interests, far too few eastern tribes will benefit since not many reside on state reservations.<sup>293</sup> Yet many eastern tribes live and depend on water adjacent to land that is neither federal nor state in character. Therefore, even if the problems with state governments and state law can be overcome, Royster's argument provides no help to these tribes.

#### B. Eastern Treaties Are Federal and the Rights Guaranteed Under Them Are Matters of Federal Law

A second response to the argument that only federally recognized tribes who inhabit ceded public lands can assert *Winters* rights is that the colonial treaties signed by eastern tribes have the force of federal law.<sup>294</sup> As federal rights, therefore, they must be enforced regardless of the tribe's status. This argument affirms that *Winters* rights arise under federal law. It rejects, however, Royster's premise that *Winters* rights can arise only in the case of nonfederally recognized tribes under state law and then only in limited circumstances where a state recognizes the tribe and acts as a trustee on its behalf. The state is irrelevant in this new response.

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voir project because doing so would favor one Commonwealth interest over another) (on file with author).

<sup>291</sup> Virginia has raised sovereign immunity eight times as a defense to permit challenges by the Mattaponi against the reservoir project.

<sup>292</sup> See *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 168 (1973) ("[T]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." (quoting *Rice v. Olson*, 324 U.S. 786, 789 (1945))); *Membrino*, *supra* note 8, at 3 (listing, among arguments opponents make against state jurisdiction over reserved tribal water rights, that "federal Indian policy traditionally operates to insulate tribes from state interference" and that "state forums are inhospitable to Indians").

<sup>293</sup> There are approximately thirty state-recognized tribes in the eastern part of the country, around nine of which have state-recognized reservations. See *State Recognized Tribes*, <http://www.accessgenealogy.com/native/staterectribes.htm> (last visited May 21, 2006). Meanwhile, there are approximately 245 nonfederally recognized tribes, over half of which also are in the eastern part of the country. See *U.S. Indian Tribes, Federally Non-recognized—Index by State*, <http://www.kstrom.net/isk/maps/tribesnonrec.html> (last visited May 21, 2006).

<sup>294</sup> On March 6, 2005, the Mattaponi Indian Tribe filed a certiorari petition with the U.S. Supreme Court asking the Court to hear the question whether a colonial treaty is enforceable as a matter of federal law under the Supremacy Clause, making many of the same arguments as are set forth in this Article. The Tribe's petition was denied. See *Mattaponi Indian Tribe v. Virginia*, No. 05-1141, 2006 WL 584102 (June 12, 2006).

The Supremacy Clause of the Constitution,<sup>295</sup> the Indian Nonintercourse Act,<sup>296</sup> and the primacy of the federal government in matters involving Indians have “federalized” colonial Indian treaties.<sup>297</sup> If colonial treaties are federal, rights reserved under those treaties are enforceable as federal law, such that states cannot defeat, reduce, modify, or deny them.<sup>298</sup>

Colonial treaties are federal law because the Constitution adopted “all Treaties made,” including those between Indian tribes and the British Crown, as “the supreme Law of the Land.”<sup>299</sup> Seeing the Constitution as “federalizing” colonial treaties would be consistent with the then-extant international law doctrine of “universal succession,” which prescribed that the United States acquired the treaty rights and obligations of Great Britain.<sup>300</sup> The Framers clearly intended the Supremacy Clause to incorporate Indian treaties made

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<sup>295</sup> U.S. CONST. art. VI, cl. 2.

<sup>296</sup> 25 U.S.C. § 177 (2000).

<sup>297</sup> Colonial Indian treaties can also be considered federal because they support federal question jurisdiction. See *Timpanogos Tribe v. Conway*, 286 F.3d 1195, 1203–04 (10th Cir. 2002) (holding that the district court had federal question jurisdiction to hear a state-recognized tribe’s land claim, even though the act creating the reservation did not include a specific cause of action); *Catawba Indian Tribe of S.C. v. South Carolina*, 865 F.2d 1444, 1455–56 (4th Cir. 1989) (holding that 1760 and 1763 treaties between the tribe and the British Crown supported federal question jurisdiction under 28 U.S.C. § 1331).

<sup>298</sup> See Indian Nonintercourse Act, 25 U.S.C. § 177 (2000); see also *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987) (“[S]tate laws may be applied to tribal Indians on their reservations if Congress has expressly so provided.”); *Oneida Indian Nation of N.Y. v. County of Oneida*, 414 U.S. 661, 670 (1974) (“The rudimentary propositions that Indian title is a matter of federal law and can be extinguished only with federal consent apply in all of the States, including the original 13 . . . [even though] the United States never held fee title to the Indian lands in the original States.”); *Getches*, *supra* note 43, at 431 (arguing that application of state regulatory law that “directly conflict[s] with the tribe’s ability to regulate Indian water rights [is] . . . barred by the preemptive force of federal protections of tribal sovereignty”); *Royster*, *supra* note 6, at 180 n.55 (citing *Puyallup Tribe, Inc. v. Wash. Game Dep’t*, 433 U.S. 165, 176–77 (1977), as an example of an exception to the usual preclusion of state law on Indian reservations for the “limited purpose of preserving the species,” arising from “the Court’s grant of authority to states to regulate Indian treaty fishing rights”).

<sup>299</sup> U.S. CONST. art. VI, cl. 2 (“[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.”); see also *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832) (“The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations . . .”).

<sup>300</sup> See *Worcester*, 31 U.S. (6 Pet.) at 544 (stating that when the United States was formed, it acquired all the claims of Great Britain, “both territorial and political”); see also *Eastern Band of Cherokee Indians v. Lynch*, 632 F.2d 373, 375 (4th Cir. 1980) (“In accord with the Treaty of Paris, signed at the end of the Revolutionary War, the United States succeeded to England’s sovereignty.”). On the topic of universal succession, see James R. Crawford, *State Succession and Relations with Federal States*, 86 AM. SOC’Y INT’L L. PROC. 1, 15–16 (1992); see also THE FEDERALIST NO. 84, at 563 (Alexander Hamilton) (Modern Library 1937) (citing Grotius’ theory that “states neither lose any of their rights, nor are discharged from any of their obligations, by a change in the form of their civil government”).

during the period of the Articles of Confederation<sup>301</sup> and were particularly worried about keeping peace with the Indian tribes when they wrote the Supremacy Clause.<sup>302</sup> Indeed, on the eve of the Revolutionary War, the Continental Congress purposefully assured tribes that their peace agreements with the British would be honored during and after the Revolution.<sup>303</sup> This concern for safety that motivated the authors of the Articles of Confederation and the Constitution, coupled with the Framers' respect for the principles of universal succession, most likely extended to colonial Indian treaties.<sup>304</sup>

Also, a cardinal principle of Indian law is that the federal government's role in dealing with Indian tribes is exclusive.<sup>305</sup> This principle stems in part from the Supreme Court's aboriginal title cases, the first of which occurred in 1823, establishing that only the federal government can extinguish Indian title to land.<sup>306</sup> Congress codified this principle in the Indian Nonintercourse Act, which prohibits the sale of Indian lands to any person or state without the approval of Congress.<sup>307</sup> When the Constitution vested the treaty-making power in the federal government, it established the federal government as the pri-

<sup>301</sup> See *Oneida Indian Nation v. New York*, 860 F.2d 1145, 1155 (2d Cir. 1988) ("[T]reaties made during the confederal period between the United States and Indian nations are entitled to the same respect as treaties made with foreign nations[,] and . . . both equally became 'the supreme Law of the Land' by virtue of Article VI of the Constitution.").

<sup>302</sup> See 5 JONATHAN ELLIOT, *DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 207 (1859) (expressing concern over states' violations of treaties, "which, if not prevented, must involve us in the calamities of foreign wars"). Furthermore, states had entered into treaties and wars with Indian tribes notwithstanding the federal government's primary authority over relations with tribes during the confederal period. See *id.* at 208; see also 2 *JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789*, at 174 (W. Ford ed., 1905) (stating that "securing and preserving the friendship of the Indian Nations, appears to be a subject of the utmost moment to these colonies" and that "it becomes us to be very active and vigilant in exerting every prudent means to strengthen and confirm the friendly disposition [of Indians] towards these colonies").

<sup>303</sup> See *A Speech to the Six Confederation Nations, Mohawks, Oneidas, Tuscaroras, Onondagas, Cayugas, Senekas, from the Twelve United Colonies, convened in Council at Philadelphia*, in 2 *JOURNALS OF THE CONTINENTAL CONGRESS*, *supra* note 302, at 178, 182 (inviting tribal leaders to "re-kindle the council fire, which your and our ancestors sat round in great friendship").

<sup>304</sup> See, e.g., *Treaty at Middle Plantation pmbl.*, *supra* note 13, at 82 ("I have caused to be drawn up these ensuing Articles and Overtures, for the firm Grounding, and sure Establishment of a good and just Peace with the said Indians." (emphasis omitted)).

<sup>305</sup> See, e.g., *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 519 (1832) (noting that "the whole power of regulating the intercourse with [Indians] was vested in the United States" when the United States was formed); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764 (1985) ("The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes.").

<sup>306</sup> See, e.g., *Johnson v. M'Intosh*, 21 U.S. 543, 586 (1823).

<sup>307</sup> See 25 U.S.C. § 177 (2000).

mary authority in regulating Indian affairs,<sup>308</sup> thereby ending the states' practice of entering treaties with Indian tribes.<sup>309</sup>

The federal government's plenary authority over Indian affairs applies to agreements between foreign discovering nations and Indian tribes. Although fee title to Indian land was first vested in the discovering European nation, and later in state sovereigns, tribal rights of occupancy became the "exclusive province of federal law" when the Constitution was signed.<sup>310</sup> This principle is applicable in the original thirteen states, even though the federal government never had fee title to Indian lands there.<sup>311</sup> While land rights passed from the Crown to the thirteen original states as individual sovereigns, those states gave up their rights over Indian lands and matters when they ratified the Constitution in 1789. Indeed, the thirteen original states ceded their right to control Indian affairs within their borders when they adopted the Articles of Confederation.<sup>312</sup> Because some states ignored the central government's primary role in Indian affairs and treaty making under the Articles, the Constitution's language centralizing authority over Indian affairs in the federal government is much stronger.<sup>313</sup> Indeed, the Supreme Court recently recognized that during the United States' early years, its legislative power to make treaties with the Indians rested partly upon "the Constitution's adoption of preconstitutional powers necessarily inherent in any Federal Government."<sup>314</sup> The federal government maintains primary authority over Indian lands and treaties today.<sup>315</sup>

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<sup>308</sup> See COHEN'S HANDBOOK, *supra* note 180, at 207 ("The Treaty Clause, granting exclusive authority to the national government to enter into treaties, has been a principal foundation for federal power over Indian affairs.").

<sup>309</sup> See U.S. CONST. art. 2, § 2, cl. 2; *see also* U.S. CONST. art. 1, § 8, cl. 3 (empowering Congress to regulate commerce with Indian tribes).

<sup>310</sup> *Oneida Indian Nation of N.Y. v. County of Oneida*, 414 U.S. 661, 667 (1974).

<sup>311</sup> *Id.*

<sup>312</sup> See ARTICLES OF CONFEDERATION art. IX, cl. 4 (U.S. 1781) ("The United States in Congress assembled shall also have the sole and exclusive right and power of regulating . . . the trade and managing all affairs with the Indians, not members of any of the states, provided that the legislative right of any state within its own limits be not infringed or violated . . .").

<sup>313</sup> See ELLIOT, *supra* note 302, at 208 (recording Madison's disapproval of states' making treaties with Indian tribes during the confederal period); *see also* Robert N. Clinton, *State Power over Indian Reservations: A Critical Comment on Burger Court Doctrine*, 26 S.D. L. REV. 434, 436 (1981) ("Madison, the prime architect of the Indian commerce clause, viewed the provision as eliminating any claim by states to authority over Indians or their lands and over the social, political and economic intercourse between non-Indian and Indian. Such power was vested exclusively in the national government.").

<sup>314</sup> *United States v. Lara*, 541 U.S. 193, 201 (2004).

<sup>315</sup> See COHEN'S HANDBOOK, *supra* note 180, at 270 ("The Supreme Court has consistently followed the principle that the Constitution delegated paramount authority over Indian affairs to the federal government.").

If federal treaties and the lands set aside for tribes under those treaties provide the basis for the assertion of federal reserved tribal waters rights in the West, eastern treaties, which are also federal, and the lands reserved under them for tribes, must support these rights as well.<sup>316</sup> To find otherwise would unfairly privilege western tribes. Such a privilege would not only defy the Privileges and Immunities Clause,<sup>317</sup> under which all citizens are entitled to the rights and privileges of other citizens regardless of which state they live in,<sup>318</sup> but also contradict basic tenets of federal Indian law, which dictate the homogenizing effect of federal law and have given paramount control over Indian affairs to Congress. Withholding *Winters* rights from eastern tribes would also create unjustifiable and normatively unacceptable distributive and other inequities between eastern and western tribes.

C. *Winters* Rights Are Not Dependent on the Federal Status of Either the Land to Which They Attach or of the Tribe that Holds Them

Although *Winters* rights are a matter of federal law, they do not depend on the existence of either federal land or a federally recognized tribe. *Winters* rights attach to reserved Indian land and are held by the tribes that occupy that land. Also, tribal reserved water rights predate the government's withdrawal of the land, so they are aboriginal in nature and therefore not dependent on the federal status of the tribe or of the land that the tribe occupies.

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<sup>316</sup> Another advantage of treating colonial treaties as federal law is that courts will apply Indian canons of construction to them. These canons direct that any ambiguity in the language of a treaty be resolved in the tribes' favor. See *Worcester v. Georgia*, 31 U.S. 515, 582 (1832) (McLean, J., concurring) ("How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction."); see also *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999); *McClanahan v. State Tax Commission of Ariz.*, 411 U.S. 164, 174 (1973); *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-32 (1943) (declaring that treaty language should not be construed to the prejudice of the Indians); *United States v. Winans*, 198 U.S. 371, 381 (1905) (holding that rights not specifically ceded by tribes, especially those necessary for tribes to exercise treaty protected rights and survive on their non-ceded land, should be considered retained by those tribes). The canons are rooted in the government's unique trust relationship with Indian tribes. See, e.g., *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) (citing *Oneida County v. Oneida Indian Nation*, 470 U.S. 221, 247 (1985). These interpretative rules should apply as well to resolve any ambiguities involving the extent to which the treaty reserved water rights for the tribe and the scope of those rights. See *State ex rel. Greeley v. Confederated Salish & Kootenai Tribes*, 712 P.2d 754, 763 (Mont. 1985) ("When adjudicating Indian reserved water rights, Montana courts must follow these principles of construction developed by the federal judiciary.").

<sup>317</sup> See U.S. CONST. art IV, § 2, cl. 1.

<sup>318</sup> While the Court in *Elk v. Wilkins*, 112 U.S. 94, 100 (1884), held that Indians "were never deemed citizens of the United States, except under explicit provisions of treaty or statute to that effect," Congress made all Indians United States citizens in 1924. 8 U.S.C. § 1401(b) (2000).

### 1. *Winters Rights Attach to Reserved Land*

As noted previously, *Winters* rights attach to the land and to the tribes that hold them and do not require assertion by the federal government. While federal law protects the rights, the rights do not adhere to the federal government, and tribes can assert them independent of the federal government.<sup>319</sup> *Winters* rights arise from the land's being set aside or reserved for tribes to enable them to survive.<sup>320</sup> Nothing in the *Winters* doctrine limits its application to federal lands, so it should apply to lands set aside by states or colonial governments for the same purpose.<sup>321</sup>

Similarly, nothing in the *Winters* doctrine restricts its application to federally recognized tribes.<sup>322</sup> Eastern reservations were established for the same reasons as western reservations, so basic notions of fairness should prevent the doctrine from being used solely to benefit western tribes.<sup>323</sup> Federal recognition is a bureaucratic artifact designed to limit the number of tribes entitled to receive federal largess like housing subsidies and health care; the definition does not constrain the existence of an Indian tribe. Many tribes refuse to seek federal recognition because of the extensive bureaucratic entanglements involved, or because they are unable to meet the criteria of having membership rolls or cannot show continuous government from the

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<sup>319</sup> See, e.g., *Arizona v. San Carlos Apache Tribe of Ariz.*, 463 U.S. 545 (1983) (water rights proceeding initiated by Indian tribes); see also Hundley, *supra* note 116, at 33–34 (arguing that the Supreme Court in *Winters* “implicitly” held that the Fort Belknap tribes and the federal government had authority to reserve water when it affirmed the Ninth Circuit holding that both parties had the right to set aside water). But see Merrill, *supra* note 205, at 57–58 (pointing out that the “debate concerning who reserved the water—the Indians or the United States” in *Winters* “is an important one” because if it was the federal government, “the argument for aboriginal water rights will at best find no help in the *Winters* doctrine.”) Merrill himself reads *Winters* as “suggest[ing] that while both the Indians and the United States reserved water from the Milk River, either standing alone had the power to do so” and that this power on the part of the Indians “to reserve necessarily implies the existence of aboriginal rights.” *Id.* at 59.

<sup>320</sup> See, e.g., Helton, *supra* note 131, at 991 (“[R]eserved rights are based on the existence of reserved land in need of water.”).

<sup>321</sup> See Royster, *supra* note 6, at 191 (noting that neither of two rationales for reserved tribal water rights—allowing “tribes to continue pre-existing or aboriginal practices, particularly those food-gathering practices essential to the tribe” and fulfilling “the purposes for which the reservation was created”—“is confined to a line west of the 100th meridian”).

<sup>322</sup> Indeed, the Court has recognized congressional preeminence even when the tribe had received state citizenship and was no longer under the federal government’s supervision. *United States v. John*, 437 U.S. 634, 652–54 (1978). The Court has also held that treaty rights survive termination of federal status. See *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412–13 (1968).

<sup>323</sup> See Royster, *supra* note 6, at 191 (comparing the Chippewa of the western Great Lakes, who “reserved to themselves the right to continue to hunt and gather the wild rice, even in their ceded territory,” to the Pacific Northwest tribes, who “reserved to themselves the right to continue to fish at their usual and accustomed places” (citations omitted)).

time of first contact with non-Indians. Other tribes do not want to subject themselves to government oversight or control.

2. *Aboriginal Use Rights Provide a Separate Basis for Winters Rights*

Aboriginal rights are “*qualitatively* different” from *Winters* rights.<sup>324</sup> Aboriginal water rights are broader than reserved tribal water rights because they can support traditional, customary activities and are not restricted by the “purposes” of the reservation.<sup>325</sup> Since aboriginal rights attach to a tribe’s ancestral lands, not the reservation, they predate *Winters* rights.<sup>326</sup> Therefore, aboriginal water rights will always be senior to other competing uses.<sup>327</sup> Aboriginal rights attaching to ancestral lands means their existence is independent of federal or state laws, including treaties, regardless of whether the federal government has subsequently reserved those lands or federally recognized the tribe.<sup>328</sup> Additionally, the *Winters* doctrine puts Indian water rights under the control of the federal government, which has done little to protect tribal reserved water rights because of the government’s dominant policy goal of developing water resources for non-Indian uses.<sup>329</sup> Since aboriginal water rights do not depend on a

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<sup>324</sup> Ross, *supra* note 124, at 200. See generally Merrill, *supra* note 205, at 46 (noting that “aboriginal rights were judicially decreed in a 1935 Arizona case and exist as pueblo water rights in California and New Mexico”).

<sup>325</sup> Royster, *supra* note 6, at 176–77.

<sup>326</sup> See *id.* at 177. Merrill suggests that “in a more subtle sense,” aboriginal rights “offer” Indians something the *Winters* doctrine does not, as they “rest on Indian history,” unlike *Winters*, which rests on “white man’s history.” Merrill, *supra* note 205, at 70. As the assertion of aboriginal water rights could theoretically “disrupt” the expectations of other holders of water rights, in part because of “[a]n immemorial priority date,” Merrill suggests this result could be avoided if the federal government “assert[ed] ownership of those rights as guardian and trustee on behalf of the Indians.” *Id.* at 67–68. He notes that “[w]hile such a result may appear anomalous to the very concept of an aboriginal right, federal guardianship over Indian property is deeply rooted in the nation’s history.” *Id.* at 68. As to whether pueblo water rights are *Winters* rights, see *id.* at 63–64 (arguing that pueblo water rights are not *Winters* rights since pueblo lands “never have been a part of the federal public domain but always have been Indian lands,” and suggesting that the Court either “extend *Winters* to the pueblos and apply the reserved rights doctrine to define their water rights” or “recognize the unique history of the pueblos and accord them a new species of water right which is truly aboriginal”).

<sup>327</sup> This difference has primary significance in a prior appropriation jurisdiction, as seniority is of limited relevance in a common law riparian system. See generally *Colorado v. New Mexico*, 459 U.S. 176, 179 n.4 (1982) (describing the rule of priority as a feature that distinguishes the prior appropriation and riparian doctrines). It may also be important in a regulated riparian system, if prior uses are grandfathered. See Choe, *supra* note 2, at 1912 (asserting that “even in those cases where permits are required [for the use of water], agencies tend to favor existing or grandfathered uses”).

<sup>328</sup> See Merrill, *supra* note 205, at 47 (stating that “Indians do not base their aboriginal claims on European grants. Indian rights stem from the tribes’ original occupation and dominion over the land and water for centuries before the Europeans arrived”).

<sup>329</sup> See *supra* Part II.A; see also Ross, *supra* note 124, at 200 (noting that “[a]t no point did the United States even make a pretense of purchasing or negotiating Indian water rights”).



federal reservation of land or on a federal trust relationship, the development of those rights does not depend on the federal government and is thus not subject to its control.<sup>330</sup>

Eastern tribes, like many western tribes, possess aboriginal rights.<sup>331</sup> These rights entitle them to hunt, fish, and gather on their ancestral lands unless these rights have been specifically abrogated by a treaty or otherwise eliminated by Congress.<sup>332</sup> When tribes ceded their land to settlers, they did not cede the aboriginal rights that attached to the land the tribes retained, including the right to sufficient water to support their activities.<sup>333</sup> Thus, treaties do not create aboriginal rights; treaties generally "confirmed the continued existence of these rights."<sup>334</sup> So long as these tribes continue to occupy their traditional homelands, which many eastern tribes such as the Mattaponi do,<sup>335</sup> aboriginal rights continue in force.<sup>336</sup>

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<sup>330</sup> State courts may, however, have jurisdiction over aboriginal water rights. See Merrill, *supra* note 205, at 65–66 (asserting that the combination of the McCarran Amendment and the Supreme Court's expansion of state court jurisdiction over *Winters* claims "suggest state courts do have jurisdiction over aboriginal rights"). Merrill also suggests that "aboriginal water rights may be a creature of state law," thus making the denial of state court jurisdiction "an absurd result." *Id.* at 66. But see Royster, *supra* note 6, at 177 n.34 (concluding that, regardless of whether tribes or the United States reserved water rights in *Winters*, such reserved rights are "questions of federal law" because they "are either federally created or federally protected and guaranteed"). Placing the prosecution of aboriginal water rights in state court raises the previously mentioned problem of the hostility of state proceedings toward tribal claims of special rights. See *supra* note 159 and accompanying text.

<sup>331</sup> See Merrill, *supra* note 205, at 52 n.29 (observing that "a literal reading of *Winters* v. United States . . . suggests that Indian reserved and aboriginal water rights often may be the same").

<sup>332</sup> See *State ex rel. Greeley v. Confederated Salish & Kootenai Tribes*, 712 P.2d 754–63 (Mont. 1985) (noting that treaties do not implicitly diminish aboriginal holdings and that uninterrupted use and occupation of land can create aboriginal title) (citing *United States v. Klamath Indians*, 304 U.S. 119, 122–23 (1938)); *United States v. Tillamooks*, 329 U.S. 40, 46 (1946) (stating that only the United States can extinguish aboriginal title); *United States v. Santa Fe Pacific R.R. Co.*, 314 U.S. 339, 353–54 (1941) (holding that an Indian reservation will be defined to protect any pre-existing possessory rights of the Indians unless a contrary intent clearly appears in the document or statute that created the reservation).

<sup>333</sup> See *United States v. Adair*, 723 F.2d 1394, 1414 (9th Cir. 1983); see also *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 198 (1999) (observing that when a treaty and the record of its negotiation were silent regarding usufructuary rights in ceded land, it was "difficult to believe" tribes would have agreed to relinquish those rights "without at least a passing word about their relinquishment"); Royster, *supra* note 6, at 176 (commenting that "tribes would not have bargained to continue pre-existing or aboriginal food practices without an understanding that the water necessary to allow those practices would be available" (citation omitted)).

<sup>334</sup> *Adair*, 723 F.2d at 1414.

<sup>335</sup> See ROUNTREE, *supra* note 12, at 163–64. The modern day Mattaponi reservation encompasses what remains of the Tribe's original treaty-protected land holdings. See *id.*

<sup>336</sup> See, e.g., *Adair*, 723 F.2d at 1413.

Finding that *Winters* affirms the existence of aboriginal-based water rights would particularly help eastern tribes<sup>337</sup> because these rights would provide tribes in the east with a separate basis for assertion of *Winters* rights.<sup>338</sup> More importantly, if *Winters* affirms the existence of aboriginal rights, then the nature of these rights eliminates the barriers and problems discussed in this Article, including the need for federal land or federal recognition. Tribes relying on their aboriginal, water-based uses should have greater flexibility using that water than they would under a strict application of the *Winters* doctrine. They should also be entitled to more water, and in riparian jurisdictions, they should benefit from being the more senior riparians, as new riparians must demonstrate that their uses will not interfere with existing uses. Basing a *Winters* claim on aboriginal use rights has not been tested in court, however, and the relationship between the *Winters* doctrine and aboriginal water rights is the subject of debate.

For these reasons, eastern tribes could claim reserved water rights, a claim which equitable and utilitarian principles encourage them to make. Therefore, despite the limitations of the *Winters* doctrine, it does offer eastern tribes the best means of claiming sufficient water to maintain their traditional ways.

#### CONCLUSION

No court has ever held that an eastern tribe cannot assert a *Winters* right to the water that flows passed its reservation, nor should a court ever do so. Although the doctrine arose in a prior appropriation jurisdiction and has been applied exclusively in western states, nothing in the original decision or the doctrine's origins indicates that it should be limited to such contexts. The doctrine's use in dual-

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<sup>337</sup> Since *Winters* rights are difficult for tribes to obtain, see *supra* note 152 and accompanying text, an alternative basis for a reserved water right is of interest to all tribes.

<sup>338</sup> See Merrill, *supra* note 205, at 59 (pointing out that those tribes whose reservations are "located in whole or in part on their ancestral lands may find support in *Winters* for their claims to aboriginal rights"). Any tribe relying on aboriginal use rights will still have to establish their existence, which may be difficult because of the indeterminacy of the historical record. See, e.g., *New Mexico Prods. Co. v. New Mexico Power Co.*, 77 P.2d 634, 639 (N.M. 1937) (finding that no pueblo existed, and consequently holding that there was no pueblo water right). However, when a treaty confirms aboriginal use rights, any ambiguity about such rights should be resolved in the tribe's favor under the Indian canons of construction. See *supra* note 316. See also *Mille Lacs*, 526 U.S. at 200 (recognizing that Chippewa tribe's treaty protected off-reservation aboriginal hunting and fishing rights); *United States v. Winans*, 198 U.S. 371, 384 (1905) (allowing a tribe to cross private property to get to its usual and accustomed fishing spots because it had retained its off-reservation fishing rights in a treaty with the federal government); *State v. Miller*, 689 P.2d 81, 84-85 (Wash. 1984) (applying Indian canons and their policy justifications in recognizing fishing and hunting rights embodied in a federal Indian treaty). The same intent should be inferred from eastern treaties, since they contain similar language. See, e.g., Treaty at Middle Plantation, arts. III, IV, VII, *supra* note 13, at 83-84.

system jurisdictions belies any such conclusion. Additionally, the inherent flexibility of common law riparianism and the evolution of regulated riparianism in the east facilitate the incorporation of *Winters* rights into those systems. In fact, *Winters* may fit better in the east than in the west, where the doctrine is an anomaly under the prior appropriation doctrine.

Although most eastern tribes are not federally recognized and do not live on withdrawn federal lands, the doctrine should still apply to the tribes because it can be used under state law. Alternatively, the *Winters* doctrine recognizes aboriginal rights, which predate the formation of the United States and do not depend on federal law, including treaties, for their existence. Even if the doctrine does depend on federal law for its existence, eastern tribes with colonial treaties can assert *Winters* rights because the treaties and the rights they guarantee are federal law under the Constitution, the Indian Nonintercourse Act, and the federal government's dominant role in matters affecting Indian tribes.

Thus, there are no insurmountable legal barriers to the assertion of *Winters* rights in the east. Indeed, there are compelling normative and practical reasons why eastern tribes should seek their use.