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# Tribal Water Rights Settlements and Instream Flow Protection

By Dylan DesRosier

Thesis  
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## Abstract

Native American Tribes have been fighting for access, legal recognition, and the control over their water rights for more than a century. Today less than ten percent of the 566 federally recognized Tribes have had their rights legally defined and secured under the law. One particularly complicated and compelling aspect of tribal reserved water rights involves the protection of water instream. Since the McCarran Amendment and state court quantification of *Winters* reserved rights, Tribes have sought to quantify and protect reserved water rights through negotiated settlement agreements. Although the settlements seek to bring certainty, resolution, and final integration of reserved water rights into contemporary western water law, the results for instream flow protection are far from clear.

This thesis examined the legal provisions that quantify, describe, and limit tribal reserved water rights within the 30 federally recognized tribal reserved water rights settlements to assess the extent of tribal authority to protect instream flows. Five broad themes and issues emerged from an analysis of the settlements: (1), most of the settlements have not asserted aboriginal instream flow rights nor defined instream flows, (2) there are significant restrictions imposed on Tribal authority to change *Winters* reserved rights water rights to non-consumptive uses, (3) there are direct and indirect limitations on tribal authority to enforce instream flow protections in many of the settlements, (4) opportunities to market or lease water for non-consumptive uses off-reservation are severely constrained and largely undeveloped, and (5) the majority of the settlements do not fully clarify jurisdictional responsibilities needed to protect instream flows.

The extractive and utilitarian legacy of the prior appropriation system has resulted in the de facto prioritization of consumptive uses in western state water law. This context has carried over to influence tribal reserved water rights settlements and will frustrate the extent many tribes will be able to protect non-consumptive uses of water. Settlements that broadly define the tribe's use of their quantified water right, reserve explicit authority to protect instream flows, address groundwater regulation, and clarify jurisdictional responsibilities between the tribe and the state stand to avoid future ambiguity and conflict over instream flow protection. Future settlements should not only recognize tribal authority to utilize reserved rights for protecting instream flows of water, but also more broadly reflect the governmental role that tribal nations are due as sovereign water managers.

## I. INTRODUCTION

In the 1908 Supreme Court case, *Winters v. United States*, the Supreme Court first resolved a dispute between tribes and non-Indian water users. The dispute was in Montana between Winters, an off-reservation non-Indian irrigator upstream on the Milk River, and Tribal irrigators on the Fort Belknap Indian Reservation in a season of drought. The dominant federal policy towards western water was conflicted during this time period. With a full-scale endorsement of non-Indian western expansion, settlement that required water use, and infrastructure through the reclamation era, the Federal government necessitated water consumption and allocation, but failed to account for the water rights of Indian tribes. By giving full deference to the states to allocate water, the Federal government indirectly allowed Winters to develop a prior water right on the Milk River, thereby ignoring the problematic implications for the Ft. Belknap Reservation's needs.

However, the Supreme Court ultimately decided that the establishment of the Fort Belknap Reservation carried with it a senior reservation of water not subject to state law. The case therefore set the fundamental precedent that Native American Tribes have reserved water rights, of a fundamentally different nature than state water rights, necessary to meet the purposes of each federal Indian reservation. Thus, the Court firmly cemented tribal water rights into the legal landscape of the Western U.S. Despite the case's profound ruling, its narrow scope left a legacy of uncertainty and conflict between state water law and tribal reserved water rights. Today, less than ten percent of the 566 federally recognized Tribes have had their rights legally defined or could argue that their rights are secured under the law. Native American Tribes have been fighting for access, legal recognition, and the control over their water rights for literally a century.

Each Tribe's water rights have a unique and storied history. Federal Supreme Court cases, State water law cases, federal legislation, state legislation, and Tribal sovereignty have all influenced the way individual Tribal water rights have been interpreted and continue to influence

contemporary recognition. This context has created a complex process for understanding these rights and how they are applied in the contemporary context of western water law and politics. When one focuses on the instream flow components of tribal water rights, the complexity and controversy increases.

There is a substantial amount of literature focused on the legal and political history of Tribal Water Rights.<sup>1</sup> More recently, analysis has shifted to focus on the realm of Tribal Water settlements.<sup>2</sup> In this context there are several comprehensive assessments of Tribal water settlements.<sup>3</sup> However, none of these assessments are focused on instream flow protection.

Although there is an important assessment of Tribal efforts to restore stream flows through litigation<sup>4</sup> and a comprehensive guide on how Tribes can protect non-consumptive water uses,<sup>5</sup> there remains a gap in the literature surrounding an in-depth assessment of instream flow protection and tribal water rights settlements.

Numerous policy questions surround tribal water rights settlements and instream flow protection as they move through the contemporary process for recognition. The context for administration and management of tribal instream flow rights is complex. In most cases, there are not only multiple legal regimes at play, but also different levels of government involved. For example, on most reservations there are Tribal reserved rights to water and state rights to water. The extent of tribal authority beyond surface water, beyond the reservations boundaries, and/or

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<sup>1</sup> Getches *et al*, *Cases and Materials on Federal Indian Law*. West Publishing Co. 6<sup>th</sup> Ed. (2011).

<sup>2</sup> See *e.g.*, Elizabeth Checchio, *Indian Water Rights: Negotiating the Future*. Water Resources Research Center, University of Arizona (1993). Bonnie G. Colby, *et al.*, *Negotiating Tribal Water Rights: Fulfilling Promises in the Arid West*. Tucson: University of Arizona Press, (2005). Daniel McCool, *Native Waters: Contemporary Indian Water Settlements and the Second Treaty Era*, Tucson: University of Arizona Press, (2002). John E. Thorson, *et al.*, *Tribal Water Rights: Essays in Contemporary Law, Policy, and Economics* Electronic Green Journal, 1(24). (2006).

<sup>3</sup> See *e.g.*, Barbara Cosens, *Indian Water Rights Settlement Conference Keynote Address*. 9 U. Denv. Water L. Rev. (2005). See *e.g.*, Barbara Cosens and Judith V. Royster. *The Future of Indian and Federal Reserved Water Rights: The Winters Centennial* (2012). Celene Hawkins, *Beyond Quantification: Implementing and Sustaining Tribal Water Settlements*. 16 U. Denv. Water L. Rev. 229. (2013).

<sup>4</sup> Blumm *et al*, *The Mirage of Indian Reserved Water Rights and Western Streamflow Restoration in the McCarran Amendment Era: A Promise Unfulfilled* (2006).

<sup>5</sup> Julie Nania and Julia Guarino. *Restoring Sacred Waters; A Guide to Protecting Tribal Non-Consumptive Water Uses in the Colorado River Basin*. (2014).

whether it extends beyond the tribe's reserved water rights are all somewhat legally unclear.<sup>6</sup>

When you factor in non-consumptive uses, groundwater regulation, future uses, off reservation authority, marketing, and other unique components of the negotiated settlements, the jurisdictional situation becomes even more intricate.

There are numerous reasons why tribes have asserted authority to protect instream flows.<sup>7</sup> Protecting instream flows may be crucial for subsistence, cultural, economic, and ecosystem service purposes.<sup>8</sup> A tribes ability to protect instream flows might be important for ceremonial and religious purposes, preserving fish and wildlife habitat, promoting recreation, protecting stream ecology and water quality, and facilitating groundwater recharge, among others.<sup>9</sup> Furthermore, in a future of changing water availability and supply it will be even more important for tribes to have the flexibility in their water management to protect instream flows in times of drought.

The instream flow protections expressed in some tribal water rights settlements represent a collision between the consumptive use roots of the prior appropriation system and the contemporary integration of tribal reserved water rights. At the foundation of this collision are three fundamental tensions. The first is a tension between water conservation and water consumption. The second is a deep and storied tension between State authority and Tribal sovereignty. The contemporary conflicts over western water management stem from a long and rich historical context. Although much has changed in western water law, the consumptive use tenants of prior appropriation still rule western watersheds. Another fundamental tension exists

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<sup>6</sup> Judith V. Royster. *Conjunctive Management of Reservation Water Resources: Legal Issues Facing Indian Tribes*. 47 Idaho L. Rev. 255. Page 1 (2011).

<sup>7</sup> For instance Nania and Guarino begin their discussion with the reflection that for many tribes water is sacred and is important to "all aspects of reservation life in the arid Colorado River Basin." *Supra note 5*, at 0. This assertion is also reflected in the recitals of many of the settlements. For example, the Confederated Tribes of Warm Spring Settlement states, "WHEREAS, the Tribes have a long-standing history of protection of Instream Flows on the Reservation to sustain, preserve, and enhance fisheries and have as their most important objective the maintenance of healthy, viable fish stocks, both resident and anadromous, in the Deschutes Basin." *See* Appendix A.

<sup>8</sup> There are a plethora of important ecosystem services that are served by keeping water instream. For instance, protecting water instream dilutes pollutants and maintains riparian areas and wetlands, which both act as flood control.  
<sup>9</sup> *See* Hawkins discussion, *supra* note 3, at 14, Nania and Guarino discussion *id.* and Zellmer discussion at 2. Sandra Zellmer. *Legal Tools for Instream Flow Protection*. Instream Flow Council, Integrated Approaches to Riverine Resource Stewardship: Case Studies, Science, Law, People, and Policy. 285-327. (2008), at 287.

between the future use component of Tribal reserved water rights and the focus on present uses of water under the prior appropriation system. Tribal reserved rights are not restricted by beneficial use or forfeiture and abandonment, and therefore, represent drastic differences in comparison to the emphasis on present use, consumption, and use it or lose it elements of western state systems of allocation.

The stakes are also incredibly high. As Daniel McCool astutely describes, Tribal water rights settlements symbolize a second treaty era.<sup>10</sup> The long-term significance of the settlements is blatantly evident, as the settlements represent permanent quantification of each Tribe's rights to water. Another factor, intensifying the implications for future water management in the West is the oncoming uncertainty of climate change and the foreboding potential of less water.<sup>11</sup>

Scarcity is the primary driver of water conflict in the West. To sort out the competition over water allocation, the question usually boils down to who has the authority to regulate water use. Through over a century's worth of federal and state case law, there remain substantive questions surrounding tribal authority to use and manage water. Despite the lofty objectives and compromises involved in the tribal water rights settlements that have been Federally legislated, there also remains uncertainty in how future disputes will play out between non-native consumptive use rights in western water law and tribes exerting instream flow protections. Even though the settlements have sought to bring certainty, resolution, and final integration of reserved water rights into contemporary western water law, the results for instream flow protection are far from clear.

#### A. Research Question and Organization

One principle question is asked in this thesis: to what extent have instream flows been addressed in the thirty tribal water rights settlements that have been thus far federally legislated?

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<sup>10</sup> McCool, *supra* note 2.

<sup>11</sup> See Tuholske's description, "If the Prior appropriation doctrine is ill-suited for today's world, its problems will only intensify as climate change will result in even less water to appropriate" Jack R. Tuholske. *Hot Water, Dry Streams; A Tale of Two Trout*. 34 Vt. L. Rev. 927 (2010), at 8.

Once this question is answered, I analyze how specific provisions found in these settlements may impact successful implementation of instream flow protection.

The work proceeds in the following fashion. First, this thesis describes the study's methods and research steps. Second, it provides background discussion on the prior appropriation system and introduces the nature of instream flow protection. Next, it provides a concise overview of federal Indian water law and the judicial decisions that have shaped the coming of the settlement era and its early integration with state adjudications/implementation. The central findings section then categorizes the instream flow provisions expressed in the 30 tribal water rights settlements. Next is a description of the context for implementation through settlement definitions, authority, marketing, and express instream flow provisions highlighted in the central findings section and the Settlements Table (Appendix A). Finally, the thesis concludes with overarching recommendations and final insights.

## II. METHODS

The geographic area of focus for this study broadly encompasses the western United States. This reflects the State and Tribal water law context existing within the Prior Appropriation system of water allocation.<sup>12</sup> This focus is directly relevant to the research question as the arid West faces more extensive and complicated conflicts over water allocation, and follows a very different legal system than the "Riparian Doctrine" which generally governs the central and eastern U.S. Thus, instream flow means an entirely different thing in eastern systems of water law. In addition, the distribution of Tribes is heavily reflected in the western United States. Furthermore, twenty-nine of the thirty federally legislated Tribal water settlements reflect Tribal homelands and sovereignty in the West. With that said, those twenty-nine settlements are dispersed broadly across the western states.

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<sup>12</sup> Specifically the focus is on states west of the 100<sup>th</sup> meridian, as this is generally the dividing line between Riparian states and the Prior Appropriation states.



The first step involved a systematic examination of the thirty federally recognized tribal water settlements of which twenty-eight have been enacted through Congressional legislation up to 2014.<sup>13</sup> Through this process, I focused primarily on the reservations of authority needed to protect instream flows and the specific language used. I analyzed the settlement provisions for any explicit, indirect, or implicit reservation of instream flow authority, any definitions relevant to instream flows, instream flow leasing/marketing possibilities, and limitations. For each settlement, the examination and survey involved reading the actual terms of each settlement document, (ranging between 50 to 100 to 1,500 pages) and any pertinent legal documents such as those outlining the negotiated terms between the States, Tribes, and the Federal government. To complete such a large undertaking, the settlement sections focused on claim waivers, funding, and/or other information not relevant to the research were not reviewed. The tribal water rights settlements were accessed through the University of New Mexico online repository under the Native American Water Rights Settlement Project (NAWRSP).<sup>14</sup> In all but five cases (Ak-Chin, Fallon Paiute, Pyramid Lake Paiute, Ute, and the San Luis Rey), the actual terms of the settlement agreements were accessed and reviewed. The terms of these five settlements are not included in the NAWRSP database. In the cases where the settlement agreement terms or language was incomplete or inaccessible, I instead reviewed the terms of the congressional enabling act.

This population is not exhaustive of all tribal water rights settlements, however, as many are still in various stages of recognition.<sup>15</sup> In Montana, the basic process of recognition requires that any reserved water rights compact, i.e. settlement, be first negotiated between the parties involved. Thus, the Tribe, State, and the United States (usually the Bureau of Indian Affairs advocating on the Tribes behalf) are all involved. Next the negotiation culminates in a binding

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<sup>13</sup> Two of the settlements did not require congressional approval, the Fort Peck Settlement and the Confederated Tribes of Warm Springs Settlement, *see* Jeanne Whiteing's description, *supra* note 3, at 137.

<sup>14</sup> University of New Mexico, Native American Water Settlement Project online repository. Accessed at <http://repository.unm.edu/handle/1928/21727>. (2014).

<sup>15</sup> See Nyberg's discussion that "As of 2009, there were at least 18 pending water rights settlements in the works, involving approximately 25 tribes or pueblos." Justin Nyberg. *The Promise of Indian Water Leasing: An Examination of One Tribe's Success at Brokering its Surplus Water Rights*. 55 Nat. Resources J. 181. Fall (2014).

contract between the parties, i.e. settlement agreement or compact. Prior to the agreement becoming binding, however, the various parties' democratic processes must ratify it. For example in Montana the water compact first must be ratified by the state legislature. Next, Congress must ratify the settlement. Finally, each tribe must ratify the settlement.

In some cases, negotiated settlements have emerged out of legal battles between states and tribes. For example, the Nez Perce Tribe and the State of Idaho came to a settlement agreement on appeal after the Tribe's rights were initially adjudicated in state court. When this occurs, the settlement may still need to be ratified by the Federal legislature. Hence, Congress ratified the Nez Perce settlement in 2004.

The settlements that have been federally recognized represent settlements that have gone through a formal approval process and have been legally accepted by each party involved. This research did not look into any proposed or currently negotiated settlements that are not yet ratified by the U.S. Congress other than the Confederated Salish and Kootenai Water Compact. Those settlements yet to be ratified, are highly subject to change through various stages in the process, are therefore difficult to characterize.

It is also important to note that each tribe's legal context is unique and situated in a distinct state system of water law. Therefore it is highly unlikely that any one case will be representative or generalizable to other cases. Nonetheless, several lessons were learned from studying the legal provisions and implementation process of these settlements.

### **III. BACKGROUND**

#### **A. State Prior Appropriation and Instream Flow Law**

Western water law began in an extractive and utilitarian based setting. The western legal system evolved from early mining customs to state-based statutes largely incorporating the

common law doctrine of prior appropriation.<sup>16</sup> Water use and allocation is governed under state law, not federal. Although each state has their own iteration, most of the western states follow the general aspects of prior appropriation.<sup>17</sup> Prior appropriation is a hierarchical legal system that determines who has the right to use water and how much. Thus, it primarily regulates water quantity. In this system water rights are based on seniority, i.e. *first in time first in right*. The users first to divert water, were the senior rights holders, and are therefore entitled to get their share before any other users.

Beyond seniority, western water rights are defined by a state-sanctioned “beneficial” purpose. Historically, this meant the water right was principally measured by and limited to the amount of water diverted. The underlying values behind the system were myopically utilitarian, and sought to protect seniority, certainty of use, and guarded against speculation.<sup>18</sup> The prior appropriation system simply reflected the dominant economic uses of water at the time.<sup>19</sup> Thus, only certain types of uses, e.g. mining, irrigation, domestic uses, were legally recognized and protected. The system even further compelled users against water conservation by historically considering leaving water instream as waste. If a water rights holder did not fully divert their water right and put it to “use,” it could be subject to forfeiture and abandonment, i.e. *use it or lose it*. Water that was not diverted for a beneficial use was therefore not protected under the law.

With diversion and extractive uses being inherent in most western states legal definitions of a water right, any interest in leaving water in lakes, rivers, and the ground was not legally protected. Leaving water instream was for the most part not a use, and in many cases, even unlawful. Coupled with the threat of forfeiture, this has had significant environmental

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<sup>16</sup> A. Dan Tarlock, James N. Corbridge Jr., David H. Getches, Reed D. Benson. *Water Resource Management; A Casebook in Law and Public Policy*. Foundation Press 6<sup>th</sup> Ed. (2009), at 860.

<sup>17</sup> Tuholske *supra* note 8, at 6.

<sup>18</sup> Sandra Zellmer. *Legal Tools for Instream Flow Protection*. Instream Flow Council, Integrated Approaches to Riverine Resource Stewardship: Case Studies, Science, Law, People, and Policy. 285-327. (2008), at 287.

<sup>19</sup> A. Dan Tarlock, James N. Corbridge, David H. Getches, Reed, D. Benson, Sarah F. Bates. *Water Resource Management; A Casebook in Law and Public Policy*. Foundation Press, 7<sup>th</sup> Ed. (2014), at 134.

implications over time.<sup>20</sup> One legal scholar, Jack Tuholske, asserts that prior appropriation can be a very “inefficient, wasteful water management regime.”<sup>21</sup> For example, many surface waters have become allocated to the point of overappropriation, i.e. more legal rights to extract water than actual water supply.<sup>22</sup> Therefore, resulting in the most junior water rights holders without water and more importantly, leaving some rivers and streams completely dry.<sup>23</sup> Tuholske dryly likens prior appropriation to a “race to the bottom of the creek.”<sup>24</sup>

Prior appropriation has not only discounted water conservation, but has also resulted in harsh consequences on many riparian and hydrologic ecosystems.<sup>25</sup> For example, Ferguson *et al*, describe that there are “over 4000 miles of chronically and periodically dewatered streams in the state of Montana.”<sup>26</sup> Further, the evidence and impacts of overappropriated rivers can also be seen in the listing of endangered native species of fish all across the west.<sup>27</sup> Over time, the prior appropriation system facilitated senior private rights and expectations to rule across western watersheds.

In attempt to address the issues of over allocated streams, many western states initiated general stream adjudications bringing in all water rights claims in to court to clarify all of the different rights to water on a stream segment.<sup>28</sup> In general stream adjudications all of the competing water rights claims are joined as parties and brought into state court to quantify and prove the respective seniority of each water right claim.<sup>29</sup> For example, Montana’s water rights

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<sup>20</sup> Zellmer, *supra* note 18, at 287.

<sup>21</sup> Tuholske, *supra* note 11, at 3.

<sup>22</sup> Zellmer, *supra* note 18, at 288.

<sup>23</sup> Tuholske, *supra* note 11, at 4.

<sup>24</sup> *Id.* at 2.

<sup>25</sup> Zellmer, *supra* note 18, at 288

<sup>26</sup> John J. Ferguson, Barbara Chillcott Hall, Brianna Randall. *Keeping Fish Wet in Montana: Private Water Leasing: Working with the Prior Appropriation System to Restore Streamflows*. 27 Pub. Land & Resources L. Rev. 1 (2006), at 4.

<sup>27</sup> Legal scholar Lawrence MacDonnell starkly explains, “Human alteration of these freshwater-based systems has resulted in a rate of species extinction five times greater than for land based species.” *Environmental Flows in the Rocky Mountain West: A Progress Report*. (2009), at 2.

<sup>28</sup> Tarlock, *supra* note 16, at 168.

<sup>29</sup> *Id.*

adjudication is an action to determine all of the pre-1973 Water Use Act “use” rights, “filed” rights, and the permitted water rights on a stream system.

The legal structure of western water law has shifted over time in attempt to accommodate changing societal values in water conservation and interests in restoring stream flows.<sup>30</sup> Many western states began to expand the parameters of prior appropriation when adopting state statutory permitting schemes. While these changes were occurring, several states relaxed the consequences of forfeiture and abandonment, thereby lessening the “*lose it or use it*” disincentives for water conservation.<sup>31</sup> Additionally, several states took significant steps to accommodate values for instream flows by recognizing them as a beneficial use and creating programs and mechanisms for their protection and restoration.<sup>32</sup> For example, Oregon and Washington were some of the earliest to enact instream flow legislation, which created administrative schemes of setting “minimum perennial stream flows” and “minimum stream flow levels” for protecting fish.<sup>33</sup>

On a basic level, protecting instream flows denotes the legal protection of water in a designated water body (stream, river, lake, etc.) from being diverted or consumed by other water users or appropriators. The protection can be specific to any given purpose or source of water. Today, the ways that water can be legally protected varies considerably across the western states. The methods to protect instream flows values have taken a wide array of forms as some approaches are focused on protecting water instream, while others are focused on restoring water to already dewatered streams. These methods range from recognizing instream flow

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<sup>30</sup> *Id.* at 134 (Note 3).

<sup>31</sup> For example, Schempp describes the expansion of a few western states statutory exceptions from forfeiture. Schempp, Adam. *Western Water in the 21st Century; Policies and Programs that Stretch Supplies in a Prior Appropriation World.* (2009), at 10.

<sup>32</sup> Zellmer, *supra* note 18, at 285.

<sup>33</sup> Cynthia F. Covell, *A Survey of State Instream Flow Programs in the Western United States.* 1U. Denv. Water L. Rev. 177. (1998), at 3 & 4.

appropriations as a beneficial use, permitting the change of consumptive use rights to non-consumptive use rights, administrative protections, to various other transfer and leasing options.<sup>34</sup>

In Sandra Zellmer's article, *Legal Tools for Instream Flow Protection*, she concludes that currently most western states have taken the first step and "adopted some type of legislation to sidestep the common law requirement that actual physical diversion be made, and also to allow at least limited protection of instream flows through the state water rights system."<sup>35</sup> Simply recognizing instream flows as a beneficial use is not enough to protect water instream though, as protection necessitates enforcement. Because of the nature of prior appropriation, protecting instream flows implies that other consumptive uses will be limited in the amount of water they can divert from the designated stream reach (i.e. the area of the river protected). Thus, instream flow protections have had to overcome significant political opposition and deeply entrenched consumptive user expectations. While states have developed a variety of ways to protect instream flows, the political opposition and dominant nature of prior appropriation has largely complicated and restricted the ways it is actually done.

Zellmer categorizes the range of state instream flow restrictions into the allowable sources for instream flow appropriations, the allowable appropriators that can protect instream flows, and the allowable purposes by which instream flows can be protected.<sup>36</sup> "Sources of water" indicates restrictions on the type of water available, e.g. unappropriated water, storage water, groundwater, etc. For example, some western states limit instream flow appropriations to only unappropriated water.<sup>37</sup> Although, this isn't the norm, these types of constraints greatly frustrate the point of protecting instream flows, as those watercourses' that are fully or over allocated represent the largest issue for dewatering in times of drought.

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<sup>34</sup> Zellmer, *supra* note 18, at 290.

<sup>35</sup> *Id.* at 289.

<sup>36</sup> *Id.* at 290.

<sup>37</sup> For instance Zellmer describes that Idaho specifically requires that unappropriated surplus water must be available. *Id.*

The second categorization used by Zellmer focuses on who is legally allowed to protect instream flows. For example, in several cases the state limits instream flow rights to be only held by a state agency.<sup>38</sup> Other states authorize any entity to hold an instream flow appropriation.<sup>39</sup>

Another difference between state instream protection efforts is in the allowable purpose behind the protection. In many cases, instream flows can only be protected for certain purposes. Zellmer concludes that the most commonly cited purpose for protecting instream flows is for fish, but most states also recognize recreation.<sup>40</sup> While some tools are singularly focused and restricted in their allowable purpose, many cite a broad range of values from fish and wildlife to water quality and in some cases even aesthetics.

This background demonstrates that there are numerous ways in which the states have restricted the application of instream flow laws. Along with the limitations on the allowable sources, purposes, and who can own or hold an instream flow right; many state programs have additional layers of conditions imposed on protecting instream flows.

The tools for instream flow protection employed in Montana exemplify a few different approaches to protecting water instream and some of the limitations involved. In 1969, the legislature first enabled the Department of Fish and Game to obtain new (junior) appropriative rights for instream flows for fish and wildlife.<sup>41</sup> Next, the state passed the Montana Water Use Act (MWUA) in 1973, thereby redefining beneficial use to include non-consumptive water uses for fish and wildlife, and recreation.<sup>42</sup>

The MWUA also authorized state and federal administrative reservations of instream flows. Although administrative reservations were placed on hundreds of streams in the state, most

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<sup>38</sup> See e.g., “Wyoming law plainly states that ‘no person other than the state of Wyoming shall own any instream flow water right.’” *Id.* at 293 and 196.

<sup>39</sup> See e.g., “In Arizona, any person can appropriate unappropriated water for recreation, wildlife, and fish...” *Id.* at 290.

<sup>40</sup> *Id.* at 296.

<sup>41</sup> Covell, *supra* note 33, at 4.

<sup>42</sup> Ferguson et al, *supra* note 26.

of the instream flow rights and reservations were reserved with a junior appropriation date.<sup>43</sup> Thus the effectiveness of the reservations and instream flow protection was limited, as junior rights will only restrict water extraction after the senior appropriators get their share. If the rights available are the most junior in a heavily appropriated stream and in a environment of drought, there will not be enough water to fulfill all the consumptive use rights let alone maintain water in the watercourse.

Montana aimed to address these shortfalls by later legislating a new water-leasing program. Water leasing denotes a broad array of contractual arrangements designed to temporarily transfer ownership of a water right or the use of such right. A basic method involves the transfer of a consumptive use right appurtenant to the watercourse into a non-consumptive use right. From the original point of diversion, the lease or contract will designate a “protected reach,” i.e. designated area up river where the amount of water will be protected in stream through monitoring and enforcement. Another way to describe this type of instream flow leasing strategy is simply “to contract with a user to ensure that the right will remain unexercised.”<sup>44</sup>

The Montana leasing law is voluntary and focused on dewatered stream segments. The law authorizes senior water rights holders to temporarily lease or change a portion of their water right to instream flows to benefit fish.<sup>45</sup> The program enables a group or individual to contractually convert their consumptive appropriation, or a portion of that consumptive appropriation if the lease accompanies an upgrade of efficiency, and designate it to instream flows.<sup>46</sup> The instream water right is also limited to the amount historically consumed. Additionally, the right carries over the priority date of the original consumptive right, and

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<sup>43</sup> *Id.* at 5.

<sup>44</sup> James B. Crammond. *Leasing Water Rights for Instream Flow Uses; A Survey of Water Transfer Policy, Practices, and Problems in the Pacific Northwest*. 26 *Envtl. L.* 225 (1996). At 227.

<sup>45</sup> Ferguson *et al*, *supra* note 26, at 5.

<sup>46</sup> *Id.* at 6.



therefore, that amount of water is unavailable to junior water users through the protect stream reach.<sup>47</sup>

Under the Montana leasing scheme, the lease is restricted to a thirty year maximum time period, DNRC approval, and a purpose to benefit fish. Thus, the water-leasing program does not allow the lease to be for any other purpose. It also doesn't allow the lessee to enforce the right against junior users, but does allow the lessor to delegate its authority for enforcement.<sup>48</sup>

While Montana's instream flow leasing program has had a measurable impact and been deemed by some as a "valuable tool" to protected instream flows, the program has also faced criticism.<sup>49</sup> One of the biggest problems is due to the extensive administrative approval process that has proven to be extremely burdensome.<sup>50</sup> Montana's leasing statute states that the lease applicant "shall prove by a preponderance of evidence that: (a) the temporary change authorization for water to maintain and enhance instream flow to benefit the fishery resource, as measured at a specific point, will not adversely affect the water rights of other persons; and (b) the amount of water for the proposed use is needed to maintain or enhance instream flows to benefit the fishery resource."<sup>51</sup>

The condition that changes in water use not adversely effect or injure other water rights holders is common across several states and stems from the traditional common water law rule of no harm. The general premise in the limitation is to avoid water rights holders changing their use to one that is going to result in additional consumption, i.e. a net reduction in return flows or a change in the timing of return flow that will adversely impact downstream appropriators.<sup>52</sup>

However, the situation is distinct surrounding a change in use to instream flows, as the use is non-

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 8.

<sup>50</sup> Ferguson *et al* describe that the "application process... requires exhaustive research on the past, current, and proposed use of the water right." *Id.*

<sup>51</sup> Mont. Code Ann. Sec. 85-2-408. (2005).

<sup>52</sup> Lawrence J. MacDonnell. *Environmental Flows in the Rocky Mountain West: A Progress Report*. 9 Wyo. L. Rev. 355. (2009), at 25.

consumptive. If the original water rights holder is senior they should theoretically have the ability to make a call on other junior rights holders upstream regardless of whether their water right is a consumptive use right or an instream flow right.<sup>53</sup> Such a change shouldn't implicate the rights of downstream water users either, as there should be an actual increase in water flowing downstream. The extent that the no adverse affect condition impacts instream flow protection depends on the state, the state's administrative review process, and the location of the water right in relation to other appropriations in the same stream.

Beyond the limitations on instream flows in Montana, the various restrictions on instream flow protection across the western states have largely resulted in a de facto "second-class status" that continue to frustrate western stream flow restoration.<sup>54</sup> Despite the significant progress, most western states still adhere to the main characteristics of prior appropriation and prioritize consumptive water uses. Tuholske bluntly reminds us, "while government agencies and private organizations laud recent changes to prior appropriation that make the system more fish-friendly, the regime is still firmly entrenched as the dominant paradigm in western water law."<sup>55</sup> Also looking at the situation from a wider perspective, Zellmer concludes that across the country, "relatively few river miles have been protected by state water law"<sup>56</sup>

Outside of the state regulatory context, federal legislation continues to play an influential part in western water use and has had a more tangible role in protecting water instream. The Endangered Species Act, Federal Powers Act, Clean Water Act, and Wild and Scenic Rivers Act all have a key presence in the management of water in the West. The impact of federal laws and regulations on protecting instream water is covered extensively in the literature and will not be

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<sup>53</sup> In Montana, the Supreme Court answered this dilemma in *Hohenlohe v. DNRC*, here the court found the DNRC's rejection of an instream flow permit to be arbitrary and capricious and clarified that the change had no practical difference as the upstream rights were all junior and thus, "the effect of a call for an upstream junior would be the same regardless of whether Hohenlohes put the water back into Little Prickly Pear Creek or continued to divert it." *Hohenlohe v. DNRC* 357 Mont. 438, 240 P.3d 628 (2010).

<sup>54</sup> MacDonnell, *supra* note 52, at 23.

<sup>55</sup> Tuholske, *supra* note 11, at 6.

<sup>56</sup> Zellmer, *supra* note 18, at 285.

discussed further here.<sup>57</sup> However, it is important to note that these federal laws have added an additional layer of complexity into the state's broad governmental role in water quantity management.

The other federal interest in Western water allocation has been on behalf of Tribal Nations and Tribal water rights. Tribal reserved water rights and efforts to protect instream flows have faced some of the same limitations as state instream flow protection efforts and even more resistance in their forced integration into state water law systems. To understand the legal nature of tribal reserved water rights and the foundation for tribal instream flow protection efforts one must first look into Supreme Court case law.

## B. Tribal Reserved Water Rights

This section outlines the broad legal contours of Indian water rights and their intersection with instream flows. The section first proceeds through a discussion of case law surrounding *Winters* and aboriginal reserved water rights. Next the section briefly considers the inconsistent state court context for adjudicating tribal water rights since the passage of the McCarran Amendment. Finally, this section quickly discusses the convoluted case law surrounding Tribal civil jurisdiction and the implications for tribes protecting instream flows.

### 1. *Winters v. United States* (1908)

The foundational judicial precedent for American Indian water rights came in 1908. In *Winters v. United States*, the Supreme Court heard a dispute between non-native irrigators with state recognized off-reservation appropriations of water on the Milk River, and Tribal irrigation on the Fort Belknap Indian Reservation in a season of drought.<sup>58</sup> The Court ultimately affirmed an injunction limiting the non-Indian irrigators to the extent that their use was injuring the needs

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<sup>57</sup> For a brief overview of how these federal statutes impact instream flows see Zellmer's discussion, *Id.* at 303.

<sup>58</sup> *Winters v. United States*, 207 U.S. at 564. (1908). [Herein after *Winters*]. Robert T. Anderson, *Indian Water Rights: Litigation and Settlements*, 42 *Tulsa L. Rev.* (2006), at 24.

of the tribe.<sup>59</sup> In reaching this conclusion, the Court held that even though water was not explicitly mentioned within the treaty, it was implicitly reserved to meet the agricultural purpose of the Fort Belknap Reservation's creation.<sup>60</sup> The Court rejected Montana's argument and the accompanying prior appropriation system of allocation, holding that there was a paramount Federal interest stemming from the Treaty of 1888. Thus deciding that the establishment of the Fort Belknap Reservation carried with it an implicitly reserved senior reservation of water to fulfill the purpose of the reservation, not subject to state law.<sup>61</sup>

*Winters* set fundamental precedent that Native American Tribes have reserved water rights, of a fundamentally different nature than state water rights, necessary to meet the purposes of each federal Indian reservation. Additionally, the *Winters* decision further explained that Indian reserved water rights come with a priority date at the time the reservation was established and/or ratification of the applicable treaty. As most reservations and treaties were ratified prior to most Western settlement and state water allocation, *Winters* set significant precedent in terms of the hierarchy of seniority. Therefore establishing that many tribes across the West hold the most senior water rights. This has significant implications for tribes attempting to assert instream flow protections against non-native appropriations. Under this precedent, the tribes should have the authority to make a call on junior appropriators if their rights are being implicated.

While the case set landmark precedents and solidified Tribal water rights into the legal landscape, the court did not clarify much else. The justices did not explain who reserved the rights, and therefore who has the authority to determine those rights. Did Tribes retain inherent jurisdiction? Did the U.S. reserve the right on behalf of tribes?<sup>62</sup> Further, there were significant questions surrounding quantification, i.e. the amount, purpose, and use of tribal reserved rights to

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<sup>59</sup> *Id.* at 25.

<sup>60</sup> The decision relied on the past precedent established in *Worcester* and *Winans* that any treaty ambiguities should be interpreted in favor of the Indians. In *Worcester* and *Winans*, the Supreme Court clarified the Federal Indian Law rules, i.e. "canons of construction," for interpreting treaty language, describing that treaties should be liberally construed "from the standpoint of the Indians," and that to the extent tribes do not cede rights in negotiations, they are retained. *Worcester v. Georgia* 31 U.S. 515, 518 (1832) and *United States v. Winans*. 198 U.S. 371 (1905).

<sup>61</sup> *Id.*

<sup>62</sup> Anderson, *supra* note 58 at 26, and Tarlock *supra* note 12, at 863.

water. For example, what is the purpose of the reservation? Does it extend to non-consumptive uses of water, i.e. for the protection of instream flows?

The language and concepts described in *Winters* were simple and brief, leaving a legacy of legal uncertainty and the development of reserved water rights parameters to future litigation.<sup>63</sup> As one legal scholar reflects “historical context aside, *Winters* is still striking for the number of questions it does not answer.”<sup>64</sup> Unfortunately, this context of ambiguity set the stage for varying interpretations and substantial judicial inconsistency in later interpretation of tribal reserved water rights.<sup>65</sup>

## 2. Arizona v. California (1963)

For fifty years, the questions surrounding the “purpose,” quantification, and use of Indian reserved water rights were largely unanswered. In 1963, the Supreme Court addressed some of these questions in *Arizona v. California*. In this case, the Court affirmed the central *Winters* holding and rejected Arizona’s arguments against tribal reserved water rights. The Court clarified that the reserved water rights for the five Indian reservations along the Colorado River would be measured under a “Practically Irrigable Acres” (PIA) standard. The PIA standard is a system for interpreting the amount of acres that could be practically irrigated on the reservation.<sup>66</sup> The Court specifically described this as an “amount of water necessary to irrigate all of the land on the reservation that can feasibly and economically be irrigated.”<sup>67</sup>

Although the Court reinforced the *Winters* doctrine in *Arizona v. California*, the PIA standard set a limited discourse on quantification by reducing the purpose of the tribes’ water rights to agriculture and seemingly consumptive uses. This brought up an important question; can reserved water rights quantified under the PIA standard be used for uses other than agriculture?

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<sup>63</sup> Cosens and Royster, *supra* note 3, at 9.

<sup>64</sup> Stephen H. Greetham. *Oklahoma’s 21<sup>st</sup> Century Water Challenges: Water Planning: An Opportunity for Managing the Uncertainties at the Tribal-State Interface?* 64 Okla. L. Rev. 593. (2012), at 3.

<sup>65</sup> Anderson, *supra* note 58, at 27.

<sup>66</sup> Getches et al, *supra* note 1, at 779.

<sup>67</sup> *Arizona v. California*, 373 U.S. 546 (1963). [Herein after *Arizona*].

In the water master's report, he described that the PIA standard "does not necessarily mean, however, that water reserved for Indian Reservations may not be used for purposes other than agriculture and related uses," and added that "the government could use the right for any purpose that may benefit the Indians."<sup>68</sup> Further the Court stated that PIA "constitutes 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>69</sup> Thus, *Arizona* rejected the notion that the PIA method was the exclusive method for quantification and use of *Winters* reserved rights.<sup>70</sup>

Multiple decisions have later interpreted *Winters* reserved rights to include purposes other than agriculture. In one of the most significant, the Arizona Supreme Court found a more comprehensive *Winters* reservation purpose for a "permanent homeland" was more applicable.<sup>71</sup> In some cases, the courts have also recognized the ability of tribes to designate their reserved rights for future non-consumptive uses even though they have been quantified for consumptive uses. In *United States v. Finch* (1976), the Ninth Circuit Court upheld rights to use reservation waters for fisheries and stated "we find it inconceivable that the United States intended to withhold from Indians the right to sustain themselves from any source of food which might be available on their reservation."<sup>72</sup> Further, in *Anderson* (1984), the Ninth Circuit found that Tribal reserved rights quantified for irrigation purposes could be later put to use by the tribe for instream flow purposes.<sup>73</sup>

### 3. Aboriginal Reserved Rights to Habitat Protection

Fundamentally different from tribal water rights implicitly reserved to fulfill a "new" purpose of a Federal Indian reservation, are tribal claims to pre-existing or aboriginal water

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<sup>68</sup> *Id.* and Tarlock et al, *supra* note 13, at 872.

<sup>69</sup> *Arizona v. California*, 439 U.S. 419, 422 (1979) (supplemental decree).

<sup>70</sup> Cosens and Royster, *supra* note 3, at 12.

<sup>71</sup> *In re General Adjudication of All Rights to the Gila River System and Source*. 35 P.3d 68 (Ariz. 2002).

<sup>72</sup> *United States v. Finch*, 548 F.2d 822 (1976). Getches et al, *supra* note 1, at 791.

<sup>73</sup> *United States v. Anderson*, 736 F.2d 1358, (9<sup>th</sup> Cir. 1984).

rights. Although the *Winters* reasoning has been applied by the courts in interpreting these aboriginal water rights, their legal foundation is based in the precedent describing off-reservation hunting and fishing reserved rights in *United States v. Winans*.<sup>74</sup>

The legal foundation for aboriginal instream flow reserved rights indirectly stems from the 1905 Supreme Court case *Winans v. United States*.<sup>75</sup> At issue in the case was whether the Winans brothers, two non-Indian private property owners, could exclude Yakima tribal rights to access fishing sites. The Yakima explicitly reserved the “right of taking fish at all usual and accustomed fishing places, in common with the citizens of the Territory, and of erecting temporary buildings for curing them” in the Yakima Treaty of 1855.<sup>76</sup>

In *Winans*, the Supreme Court decidedly recognized off-reservation reserved rights and set the bedrock principles for interpreting treaty language. The Court not only reaffirmed that Treaties are to be construed as Tribes would have understood them at the time, but it also created the reserved rights doctrine through its strong declaration that “the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted.”<sup>77</sup> Thereby acknowledging the Yakama Tribe’s aboriginal fishing right and historic use of fishing sites predating the Yakima Treaty of 1855. Ultimately the Court held that treaty rights are property rights and that the Winans’ could not exclude tribal fishers from their historic salmon fishing sites.<sup>78</sup>

In many of the Pacific Northwest tribe’s treaties negotiated under the territorial governor Isaac Stevens, there is treaty language that explicitly reserves rights to hunt and fish on and off-

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<sup>74</sup> *United States v. Winans*, 198 U.S. at 381 (1905). See also Judith V. Royster and Michael C. Blumm. *Native American Natural Resources Law; Cases and Materials*. Caroline Academic Press. (2002), at 384.

<sup>75</sup> *Id.*

<sup>76</sup> Treaty with the Yakima, June 9, 1855, 12 Stat. 951, 953 (1855) (ratified Mar. 8, 1859)

<sup>77</sup> See Blumm & Brunberg’s discussion that “This method of treaty interpretation, combined with the rule of construing the treaty language as the Indians would have understood, has profound consequences, since it means that treaties preserved all proprietary rights and sovereign control not conveyed away.” Michael C. Blumm & James Brunberg. “*Not Much Less Necessary...Than the Atmosphere They Breathed*”: *Salmon, Indian Treaties, and the Supreme Court—A Centennial Remembrance of United States v. Winans and Its Enduring Significance*. Nat. Res. J. 46. 1-56. (2006).

<sup>78</sup> See also Blumm & Brunberg’s insight, describing “Justice McKenna referred to the treaty as creating ‘a right in the land,’ impressing ‘a servitude upon every piece of land as though described therein,’ and fixing ‘easements’ as necessary to enable the fishing right to be effectively exercised.” *Id.* at 51.

reservation. The language employed in the Stevens treaties is distinct. Here, many of the treaties expressly reserve hunting and fishing rights on lands and waters ceded outside reservation boundaries. For example, the Hellgate Treaty of 1855 states, “The exclusive right of taking fish in all the streams running through or bordering said reservation is further secured to said Indians; as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory.”<sup>79</sup> Many of the Stevens treaty tribes in Pacific Northwest have similar treaty language that reserves the tribes right to hunt and/or fish in “all of the usual and accustomed places.” Aboriginal hunting and fishing rights have been legally recognized and strongly reinforced in several Supreme Court cases.<sup>80</sup> The extent that these rights extend to an implicit amount of water and a certain water quality is still relatively unclear. Although some courts have interpreted that these retained rights imply a degree of instream fish habitat protection,<sup>81</sup> for the most part, the degree of protection has come in a defensive form of injunctive relief rather than quantification.<sup>82</sup>

In *Colville Confederated Tribes v. Walton (1981)*, the court found dual purposes behind the creation of the reservation, including the “preservation of the tribes access to fishing grounds.”<sup>83</sup> In *Walton*, the court also held that the tribes were entitled to sufficient water to maintain a fishery, thus implicitly recognizing that such a fishing right includes a right to habitat protection.<sup>84</sup>

In an important United States Ninth Circuit Court of Appeals case, *United States v. Adair (1983)*, the court relied on both the reasoning of *Winters* and *Winans* and found that the Klamath

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<sup>79</sup> Treaty of Hellgate. Treaty of July 16, 1855, 12 Stat. 975 Ratified March 8, 1859. Accessed at <http://www.cskt.org/documents/gov/helgatetreaty.pdf>

<sup>80</sup> See generally: *United States v. Winans*, 198 U.S. 371 (1905); *Washington v. Fishing Vessel Assn.*, 443 U.S. at 658. (1979). *Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968); *Kimball v. Callahan*, 493 F.2d 564 (9th Cir. 1974); *Kimball v. Callahan*, 590 F.2d 768 (9th Cir. 1979).

<sup>81</sup> Edmund J. Goodman. *Indian Tribal Sovereignty and Water Resources: Watersheds, Ecosystems and Tribal Co-Management*. 20 J. Land Resources & Envtl. L. 185 (2000), at 8.

<sup>82</sup> For example legal scholar Ruth Langridge concludes that “The courts have indirectly acknowledged the right to habitat protection by providing tribes with injunctive relief including: enjoining dam construction; delaying marina and oil port construction; preventing the construction of a pen “fish farm”; and awarding water rights to protect treaty fisheries” (citations omitted). Ruth Langridge. *The Right to Habitat Protection*. 29 Pub. Land & Resources L. Rev. 41. (2008), at 2.

<sup>83</sup> *Colville Confederated Tribes v. Walton* 752 F.2d 397 (1985). Tarlock et al, *supra* note 12, at 901, 6<sup>th</sup>

<sup>84</sup> Langridge, *supra* note 74, at 2.



Tribe implicitly reserved aboriginal water rights accompanying the tribe's exclusive treaty rights to fish on their reservation.<sup>85</sup> In *Adair*, the court rejected an agriculturally singular standard of interpretation and found that one of the purposes of the Klamath reservation was to "secure a continuation" of the tribe's traditional hunting and fishing lifestyle.<sup>86</sup> Therefore, implicitly reserving a non-consumptive water right.<sup>87</sup>

These types of aboriginal reserved water rights have a different priority date because they predate the creation of the reservation; thus, having the priority date of "time immemorial."<sup>88</sup> Theoretically under the *Winans*, *Winters*, and *Adair* precedents, tribes can assert aboriginal water rights to instream flows that predate the establishment of the reservation if they can show that the treaty or other instrument that created the reservation confirmed uses of water requiring a certain amount of streamflow. However, the treaty language drives the court's analysis. For those tribes that did not explicitly reserve treaty rights to hunt and fish, they will likely face a significantly tougher legal environment for asserting claims for aboriginal instream flow rights.

Despite the examples where courts have acknowledged tribal aboriginal rights to instream flows for fisheries and/or recognized that tribes may change *Winters* reserved rights to future instream flow purposes, tribal efforts to protect and restore instream flows have faced substantial judicial inconsistency and significant opposition at the state court level. Although Tribal water rights quantification and litigation should be an inherent matter of federal law and heard in federal courts, in 1952 Congress waived federal sovereign immunity through the McCarran Amendment. Therefore, forcing tribes to be joined in state court general stream adjudications.

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<sup>85</sup> *United State v. Adair*, 723 F.2d 1394, 1414 (9<sup>th</sup> Cir. 1983), *cert. denied*, 467 U.S. 12.

<sup>86</sup> *Id.*

<sup>87</sup> The court further describes that "the holder of such a right is not entitled to withdraw water from the stream for agricultural, industrial, or other consumptive uses (absent independent consumptive rights). Rather, the entitlement consists of the right to prevent other appropriators from depleting the streams waters below a protected level in any area where the non-consumptive right applies." *Id.*

<sup>88</sup> *Id.*

#### 4. The McCarran Amendment (1952)

The McCarran Amendment was passed by Congress and requires that the federal government waive its sovereign immunity in state court cases involving the general adjudication of water rights on a river stream. Despite major tribal opposition, in 1976 in *Colorado River Water Conservation District*, the Supreme Court found that the McCarran Amendment applied to Indian reserved water rights and that they would be adjudicated in Colorado state court.

In *Arizona v. San Carlos Apache* (1983), the Supreme Court again affirmed the *Colorado River Conservation District* holding. These cases settled and essentially reaffirmed state jurisdiction over tribal water right adjudication; despite entrenched precedent of Tribes generally having sovereign immunity from state jurisdiction and regulation.<sup>89</sup> The federal and tribal concerns expressed in the *San Carlos* case have been exemplified by state court decisions since the McCarran Amendment, and have further limited tribal reserved water rights.

#### 5. Big Horn Adjudication (1988)

Only one set of Tribal reserved water rights has run through the entire quantification litigation process from state adjudication to the United States Supreme Court.<sup>90</sup> In the Big Horn litigation, the Eastern Shoshone and Northern Arapaho Tribes on the Wind River Reservation were forced into Wyoming state court under the McCarran Amendment and in part sought recognition of reserved rights to instream flow protections. The tribes claims were met with harsh consideration however, as the Wyoming Supreme Court construed the Wind River Reservation reserved rights very narrowly and did not recognize the tribes' right beyond consumptive use for irrigation.<sup>91</sup>

In *Big Horn I*, the Wyoming Supreme Court held that the reservation's purpose was agricultural. Thereby not including any recognition of aboriginal rights for fisheries or wildlife,

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<sup>89</sup> *Worcester v. Georgia* 31 U.S. 515 (1832), *Williams v. Lee* 358 U.S. 217 (1959).

<sup>90</sup> Getches et al, *supra* note 1, at 767.

<sup>91</sup> *In Re General Adjudication of All Rights to Use Water in the Big Horn River System*. WY 753 P.2d 76. (1988).

and/or rights for aesthetics, mineral, industrial, or groundwater uses.<sup>92</sup> Thus, the court limited the reservation's purpose severely, ignoring any larger "permanent homeland" purpose interpretation. The Wyoming court discussed that reserved water rights for fisheries (i.e. instream flows) were only recognized where "a treaty provision explicitly recognized an exclusive right to take fish on the reservation or the right to take fish at traditional off-reservation fishing grounds, in common with others."<sup>93</sup> Further, the court described that there was insufficient evidence to imply a reserved right for wildlife preservation "absent a treaty provision."<sup>94</sup> This inference, however, discounted established canons of treaty construction and overlooked the tribe's historic reliance on wildlife.<sup>95</sup> As one legal scholar simply concludes, the Wyoming Supreme Court's "approach is plainly incorrect."<sup>96</sup> Despite the suspect interpretation and departure from past precedent, the controversial holding did not get reversed.<sup>97</sup>

The United States Supreme Court affirmed the Wyoming decision, without an opinion, in a split four-to-four vote with Justice O'Connor disqualifying herself because of a conflict of interest.<sup>98</sup> Despite the judicial finality, the conflicts on the Wind River Reservation over instream flows continued. The tribes soon attempted to apply a portion of their adjudicated PIA allocation toward instream flow protection.<sup>99</sup> However, the dispute was soon back in the Wyoming Supreme Court in *Big Horn III* (1992) and yet again the Tribes claims were denied. In a divided plurality decision, the court found that the Tribes could not apply their reserved water rights towards instream flows when they might deny non-Indian appropriators their full allocations.<sup>100</sup> Although,

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<sup>92</sup> Getches et al, *supra* note 1, at 803.

<sup>93</sup> Tarlock et al, *supra* note 12, at 914.

<sup>94</sup> *Id.* at 915.

<sup>95</sup> David M. Staton. *Is There A Reserved Water Right for Wildlife on the Wind River Indian Reservation? – A Critical Analysis of the Big Horn River General Adjudication.* 35 S.D. L. Rev. 326. (1990), at 7.

<sup>96</sup> Robert T. Anderson. *Indian Water Rights Practical Reasoning, and Negotiated Settlements.* 98 Cal. L. Rev. 1133. (2010), at 10.

<sup>97</sup> *Id.* at 6.

<sup>98</sup> Getches et al, *supra* note 1, at 809.

<sup>99</sup> Tarlock et al, *supra* note 12, at 922.

<sup>100</sup> *Id.*

the questionable logic employed in the decision was final, its value as precedent is uncertain, as the case was not appealed again to the Supreme Court.

In Blumm *et al*'s article, *The Mirage of Indian Reserved Water Rights and Western Streamflow Restoration in the McCarran Amendment Era: a Promise Unfulfilled*, they describe that tribes have faced significant challenges in their attempts to restore streamflow and/or protect implicit rights to instream flows through litigation.<sup>101</sup> Beyond the notorious *Big Horn* litigation example, they describe that the Nez Perce also fought for reserved instream flow rights in the Snake River Basin Adjudication in Idaho State Court. These claims were met with egregious opposition from the state court judge, as the court also ignored past precedent and held that there were no water rights implicit in the Tribes off reservation reserved treaty rights to fish.<sup>102</sup> Further, Blumm *et al* note that other state courts have not done much better, as the Yakima's efforts at protecting their treaty fishing rights were "largely rejected" in a 1993 Washington Supreme Court case that "invented out of the whole cloth the concept of 'diminished' reserved rights."<sup>103</sup>

In state court quantifications under the force of the McCarran Amendment, Tribes have faced a hostile environment for recognition of instream flow reserved rights. However, Tribes have also faced challenges in federal courts. For example, in the 2005 Ninth Circuit Court case, *Skokomish Indian Tribe v. United States*, the court held that the Skokomish Tribe did not reserve an on-reservation water right for the benefit of fisheries because it wasn't a "primary" purpose in the treaty.<sup>104</sup>

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<sup>101</sup> Blumm *et al*, *supra* note 4.

<sup>102</sup> Blumm *et al* discuss that not only did the Idaho State Court Judge, Barry Wood, himself hold water rights in the Snake River Basin, but his interest was also conflicted as his family's water rights were implicated in the Snake River Basin Adjudication. *Id.* footnote 277, at 1198.

<sup>103</sup> *Id.* at page 1202.

<sup>104</sup> *Skokomish Indian Tribe v. United States*. 410 F.3d 506 (9th Cir. 2005)

Even though Stevens treaty tribes have had more success in asserting implicit instream flow rights for the preservation of fisheries and treaty rights through litigation,<sup>105</sup> Blumm *et al* conclude that “in practice the McCarran Amendment Era has reduced these claims to mere bargaining chips rather than vehicles for achieving the purpose of reservations through stream flow restoration.”<sup>106</sup> For example, even though the Ninth Circuit set such noted precedent in *Adair*, Blumm et al note that the Klamath continue to face obstacles in protecting instream flows through state court quantification. They describe that “the Klamath are perhaps the best example of the mirage: over thirty years after initiating federal court litigation, the tribes – despite consistent success on the merits of their claims – have yet to see any improvements in streamflows essential to their treaty fishing rights, as the glacier movement of Oregon quantification inches forward.”<sup>107</sup>

## 6. Background on Jurisdiction and Control

Instream flow regulation and enforcement hinges on the extent of the tribe’s ability to not only control water users within the reservation’s boundaries, but also the users that are off-reservation and upstream. Tribal authority to control water use within reservation boundaries is complicated by land ownership patterns and the parameters on tribal civil jurisdiction.

The majority of the reservations across the country have fractured and fragmented tribal land ownership due to the destructive legacy of the Allotment Era.<sup>108</sup> Allotment largely resulted in a complicated checkerboard mixture of Indian and non-Indian land ownership within each reservation’s boundary.<sup>109</sup> Allotted lands are problematic for tribal water administration for

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<sup>105</sup> For example: *Colville Confederated Tribes v. Walton*, *Muckleshoot Indian Tribes v. Trans Canada Enterprises*, *Joint Board of Control of the Flathead, Mission, and Jocko Irrigation Districts v. United States*, *United States v. Anderson*, 591 F. Supp. 1 (E.D. Wash 1979). Getches et al 791

<sup>106</sup> Blumm *et al*, *supra* note 4, at 1161.

<sup>107</sup> *Id.*

<sup>108</sup> *Supra* note 1, at 141.

<sup>109</sup> Mathew L.M. Fletcher. *A Unifying Theory of Tribal Civil Jurisdiction*. Arizona State Law Journal, Forthcoming (2014), at 10.

multiple reasons. The first basic reason is that the courts have recognized that non-Indian purchasers of allotted lands (herein after “*Walton* rights”) also obtain rights to some of the tribe’s reserved water rights.<sup>110</sup> Thus on any given reservation, not only do individual tribal members of allotted lands have reserved rights to water, but non-Indians who have purchased allotted lands can also claim reserved rights, and furthermore, non-Indian owners of fee land within the reservation may also claim state based appropriations.<sup>111</sup>

The fragmented land ownership setting of most reservations and addition of *Walton* rights might not have had any inherent implications for tribal water administration if it weren’t for the subsequent Supreme Court case law limiting Tribal regulatory jurisdiction over non-members.<sup>112</sup> In 1981, the Supreme Court set controversial precedent and fundamentally restricted the tribal exercise of civil regulatory jurisdiction over non-members on non-tribal lands in *Montana v. United States*. In the case, the Court found that the Crow Tribe could not exercise jurisdiction to regulate nonmember hunting and fishing on non-Indian owned land within the reservation.<sup>113</sup> They held that tribal authority to exercise civil jurisdiction over nonmembers was completely precluded absent two exceptions.

The first exception allows for tribal jurisdiction where there is a consensual relationship between the nonmember and the tribe, i.e. some form of consent (commercial dealings, contracts, leases, or other arrangements). The second exception allows for tribal jurisdiction where the nonmember activity has a direct effect on the tribe, tribal economy, and/or health and welfare of the tribe. By not clearly defining the parameters of tribal civil jurisdiction, the Supreme Court opened the door to future disputes and increasing difficulty in tribal regulation.

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<sup>110</sup> *Colville Confederated Tribes v. Walton*, 647 F. 2d 42 (1981), at 8.

<sup>111</sup> *Walton* rights are based on the number of irrigable acres the original Indian allottee owned and have the same priority date as the creation of the reservation. However, these rights cannot be enlarged and can be lost to non-use if the non-Indian purchaser does not continue to appropriate and maintain the water use. *Id.* at 9

<sup>112</sup> Legal expert Matthew Fletcher, remarks “One of the most important and defining controversies of federal Indian law is whether American Indian tribes can exercise jurisdiction over nonmembers.” Fletcher, *supra* note 123, at 2.

<sup>113</sup> See *Montana v. United States*, 450 U.S. at 550-56.

In relation to reserved rights water administration, the Supreme Court has not directly addressed tribal authority to regulate non-Indian water rights. However, in 1981, the Ninth Circuit Court decided an important dispute between the Confederated Tribes of Colville and a non-Indian owner (Walton) of allotted land within the reservation boundaries, who held a Washington state permit to appropriate both surface and groundwater in the No Name Creek Basin.<sup>114</sup> At issue in the case was the tribe's ability to regulate and enjoin Walton's water appropriation. Not only did the Court recognize the tribe's implied treaty reservation of water for fish, but it also held that the Colville have a reserved right to "the quantity of water necessary to maintain the Omak Lake Fishery."<sup>115</sup>

The Court eventually concluded that the state's regulation of water within the Colville Reservation was preempted by the creation of the reservation. However, the Court qualified its strong assertion with some interesting language,<sup>116</sup> and ultimately conditioned its holding that the usual federal deference to state water administration "is not applicable to water use on a federal reservation, *at least where such use has no impact off the reservation*" (emphasis added).<sup>117</sup> Thus, the holding was evidently contingent on the fact that the No Name Creek basin occurred and was located entirely within the Colville Reservation. This holding left a glaring question; how far does the "no impact" stipulation extend? Does the tribe's exercise of authority only extend until it implicates off reservation water users?

Three years later in 1984, the Ninth Circuit Court decided another dispute and came to the opposite conclusion in relation to the State's authority over non-Indian water use within the Spokane Reservation. Here, the context was much different than on the Colville, where the surface water in question, Chamokane Creek originates outside the reservation and flows out of

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<sup>114</sup> *Colville Confederated Tribes v. Walton*, 647 F. 2d 42 (1981), at 4.

<sup>115</sup> *Id.* at 6.

<sup>116</sup> For example the court also states "the geographic facts of this case make resolution of this issue somewhat easier than it otherwise might be." *Id.* at 10.

<sup>117</sup> *Id.* at 11.

the reservation into the Spokane River.<sup>118</sup> In this case the ninth circuit concluded that neither Montana exception was present.<sup>119</sup> Thus, the Court held that the state, not the tribe, had the authority to “regulate the use of *excess* waters by non-Indians on non-tribal, i.e. fee, land” (emphasis added).

Although the Court found that the state had jurisdiction, it qualified it’s holding specifically by limiting the authority to excess waters. Further, the decision’s precedent was narrowed with its discussion that “adequate protections existed” to protect the tribes reserved rights as they had been quantified through the adjudication process.<sup>120</sup> However, even though the Court cautions their holding to suggest that the states jurisdiction only extends so far and that the two sovereigns have shared interests in water management, the decision arbitrarily concluded that the states ability to regulate excess waters has no effect on the tribal right to self determination. By removing the tribes ability to govern surplus water within the reservation and emphasizing the weight of the state’s interest, the court’s final holding introduces further uncertainty into whether or not tribes can regulate non-Indian water use within the borders of the reservation. Although the court did not recognize any state authority to regulate the tribe’s reserved rights, it does introduce doubt into whether or not tribes can exercise regulatory enforcement over non-Indian water use within the reservations boundaries.<sup>121</sup> This further complicates a tribe’s ability to administer tribal water uses whenever there are state governed water users whether they are junior or not. Ultimately this represents further erosion of the tribe’s sovereignty.

What is evident from this line of case law is that tribal jurisdiction over non-members is an unclear question and depends on numerous factors: e.g. citizenship of the person (Member Indian, non-member Indian, non-Indian), land ownership of the individual landowner, extent of

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<sup>118</sup> *United States v. Anderson*, 736F.2d 1358. (1984).

<sup>119</sup> Finding that the state’s exercise of authority within the reservation did not have a direct effect on the “political integrity, the economic security, or the health and welfare of the tribe.” (*Montana Test*) *Id.*

<sup>120</sup> See Nania and Guarino’s discussion, *supra* note 5, at 39.

<sup>121</sup> Nania and Guarino conclude that *Anderson* does not suggest that states can regulate tribal use of their reserved water rights, however, their analysis does not discuss how the court’s holding might have implications for tribal authority over non-Indian water use within the reservation boundaries. Nania and Guarino, *Id.* at 39.



control the tribe is asserting, historical and traditional use of the land, character of the area, whether the regulation applies equally to members and non-members, if there is any congressional abrogation or implicit divestiture, if there is a consensual relationship, and/or if there is a direct impact on the tribe, tribal economy, and/or health and welfare of the tribe. Therefore, settlement provisions that simply reserve a tribe's authority over all water resources within the reservation do not necessarily preclude state jurisdiction or clarify the jurisdictional complications of tribal instream flow protection.<sup>122</sup>

#### **IV. Tribal Water Settlements and Instream flows**

The complicated legal background discussed above provides the context in which tribes must decide to either endure adversarial state water adjudications or pursue a strategy of negotiated settlement to protect instream flows. From a tribal perspective, this decision is tough. The fallout from the Big Horn litigation and other unsuccessful tribal efforts to protect stream flows through litigation set a precedent that tribes strongly want to avoid.<sup>123</sup> With state court departures from past precedent and the canons of treaty construction, tribes now face considerable uncertainty when litigating their water rights. Thus, state court quantifications pose daunting risks and represent the potential for long-term consequences. This uncertainty explains why most tribes have shifted away from state court adjudications and instead sought alternative methods of water rights quantification through negotiated agreements. The monetary costs, judicial risks, long term implications, and potential for practical solutions are major factors that have led both tribes and states to negotiate and enter into settlements rather than litigation. Although most tribes have been forced to make major concessions through settlements, the settlements have resulted in

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<sup>122</sup> The *Anderson* court specifically states, "because water per se lies within the exterior boundaries of an Indian reservation does not necessarily negate a states interest in overseeing its usage along with the other in-state water systems" *supra* note 117.

<sup>123</sup> Not only were the Wind River tribe's claims for instream flow rights met with harsh judgment and their ability to change the use of their reserved irrigation rights to non-consumptive uses erroneously rejected by the courts, but the tribes ultimately could not access or benefit from the irrigation rights that were awarded without any funding for infrastructure. See Blumm *et al* discussion, *supra* note 4, starting at 1171.

“wet” water, access, funding, and much more flexibility. How well the settlements integrate tribal water rights and future uses into state systems of allocation is still an open question though, as many are still in the early stages of implementation.

As of 2014, thirty settlements have been federally recognized. Twenty-eight of those thirty have been approved by Congress.<sup>124</sup> Additionally, over forty Indian Reservations have been involved in settlement processes affecting their tribal water rights.<sup>125</sup> Each tribal water settlement is unique and distinctly tailored to the legal and historical context of that reservation and tribe.<sup>126</sup> However, there are several common themes across the range of tribal water rights settlements that have implications for protecting instream flows.<sup>127</sup>

The flexibility of the settlement agreements is apparent, as many reflect diverse approaches to quantifying each tribe’s reserved water rights. In addition, most of the settlements reflect a broad interpretation of the reservation’s purpose and authorize a wide degree of tribal authority over water resources.<sup>128</sup>

Most of the provisions within the settlements recognize and articulate the *Winters* consumptive use rights, release legal and historical claims, and designate monetary allocations for water access and development.<sup>129</sup> Thus, the central focus in many of the settlements is on quantification and the development of consumptive water uses. For example, the majority of the tribal water settlements in Arizona are operating in the context of the Central Arizona Project (CAP) and the settlements reflect authorization of consumptive use CAP allocations.

While, many of the settlements are focused on infrastructure, access, and extractive water uses, most also reserve the authority to put their reserved right allocation to any use within the reservation boundaries. Thus, reserving the potential authority to change *winters* rights quantified

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<sup>124</sup> Getches et al, *supra* note 1, at 828.

<sup>125</sup> *Id.*

<sup>126</sup> Tarlock et al, *supra* note 16, at 768.

<sup>127</sup> See e.g., Hawkins concisely summarizes of some of the main themes of the 30 tribal water rights settlements, *supra* note 3, at 4.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

consumptively and designate instream flows at a future date. Some of the settlements go further by outlining specific tribal authority to dedicate water for instream purposes.

Although most of the settlements specifically waive and release legal claims to aboriginal water flows,<sup>130</sup> there are a few settlements that assert aboriginal instream flow water rights.<sup>131</sup> As discussed above in the background section on aboriginal reserved rights to habitat protection, aboriginal claims for instream flows are dependent on treaty language. Only three of the tribal water rights settlements that have been federally legislated involve Steven's treaties. Therefore, further illustrating the challenge of asserting aboriginal instream flow rights without explicit fishing and hunting reserved rights.

Nonetheless, the provisions related to tribal authority to protect aboriginal instream flows are also subject to various limitations. In some cases these limitations are significant. Across the settlements, states have imposed a variety of conditions in attempt to reduce and/or limit tribal water uses and authority for the purpose of protecting non-Indian users. The extent that these limitations may frustrate tribal efforts to protect water instream is an unclear question in many of the settlements. Under the convoluted case law at the intersection of tribal vs. state jurisdiction, many of the questions surrounding protecting instream flows come down to how the settlements frame the tribe's reserved rights water use, define the tribes water authority, and clarify administrative responsibilities. While some of the settlements detail these components to a great extent, others leave many questions unanswered.

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<sup>130</sup> Many of the settlements have similar language, for instance, in the White Mountain Apache Tribe Water Rights Quantification Agreement it states that the tribe, "hereby waives and releases any claim against the United States... under Federal, State, or other law for any and all: past, present, and future claims for Injury to Water Rights arising from time immemorial and, thereafter, forever that are based on aboriginal occupancy of land by the WMAT, its Members, or their predecessors" Exhibit 12.3, Section 2.0 page 752.

<sup>131</sup> For instance the Nez Perce, Fort Hall, and Confederated Tribes of Warm Springs Tribes each illustrate strong provisions tied to asserting tribal authority to protect instream flow rights.

## V. Findings

[See Appendix A]

The settlement findings have been categorized and organized alphabetically in the table attached as Appendix A. For each tribal water rights settlement, any explicit or indirect instream flow language and potential limitations on such authority were recorded in the first column. The second column details Tribal administrative authority that could be exercised to protect instream flows. Next, the table includes any definitions related to or directly defining instream flows. Finally the table includes marketing provisions and any language enabling the tribe to potentially lease their reserved water rights for instream flow purposes.

## VI. ANALYSIS

The following sections of analysis are grounded in the findings categorized in Appendix A. Five broad themes and issues emerged from my analysis of the settlements: First, most of the settlements have not asserted aboriginal instream flow rights nor defined instream flows. Second, there are significant restrictions imposed on Tribal authority to change *Winters* reserved rights water rights to non-consumptive uses. Third, there are direct and indirect limitations on tribal authority to enforce instream flow protections in many of the settlements. Forth, opportunities to market or lease water for non-consumptive uses off-reservation are severely constrained and largely undeveloped. Finally, the majority of the settlements do not fully clarify jurisdictional responsibilities needed to protect instream flows. Across the range of provisions related to protecting instream flows, the settlements that broadly define the tribe's use of their quantified water right, reserve explicit authority to protect instream flows, address groundwater regulation, and clarify jurisdictional responsibilities between the tribe and the state stand to avoid future legal ambiguity and conflict over tribal instream flow protection.

This discussion first describes the importance of definitions and the settlements' broad framing of water use. Next, the settlement provisions that describe and/or limit tribal water authority are introduced with the backdrop of jurisdictional complexity. The analysis then proceeds to discuss explicit instream flow provisions and the implications of the restrictions imposed. Finally, this discussion shifts to briefly analyze the potential for Tribal water marketing as another strategy to protect instream flows.

#### A. Definitions

There is considerable diversity in how the settlements quantify each tribe's reserved water right and frame tribal water use. As many of the settlements represent a first articulation of each tribe's reserved water rights, the specific words, terms, and legal language used to define water use, instream flows, and future uses are critical for later administration and legal interpretation.

It is clear that some tribes are much more focused on instream flow protection than others. The way that the settlements define instream flows varies greatly across the range of agreements. For example, most of the settlements leave the concept completely undefined and ambiguous. However, many contain definitions related to instream flows. While some of the defined terms and/or phrases appear on their face related to instream flows, some do not actually lead to instream flow protection.<sup>132</sup>

A few of the settlements include expansive definitions of "use" by explicitly including instream flows within the definition.<sup>133</sup> For instance, the Fort Hall Settlement explicitly redefines beneficial use to mean, "any use of water for DCMI, irrigation, hydropower generation, recreation, stockwatering, fish propagation and *instream flow* uses as well as any other uses that

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<sup>132</sup> For example, the Amdolt settlement defines the phrase "offset water" as a specific quantity of water provided to "offset adverse stream depletion effects" caused by diversions of water. The term is actually used to outline requirements to "offset" consumptive water use impacts on other Pueblo and non-Pueblo surface rights with other delivery of water. *See* Appendix A.

<sup>133</sup> The White Mountain Apache Settlement and the Gila River Settlement use identical language: "Use" ... "shall mean any beneficial use including instream flows, recharge, underground storage, recovery or any other use recognized as beneficial under applicable law." *Id.*

provide a benefit to the user of the water.”<sup>134</sup> In another example, the Chippewa Cree Settlement explicitly explains “non-consumptive use” as “a use of water that does not cause a reduction in the source of supply and in which substantially all of the water returns without delay to the source of supply, causing little or no disruption in stream or groundwater conditions.”<sup>135</sup>

Beyond broad definitions of “use,” several of the settlements include explicit definitions of “instream use.” Interestingly, these definitions also vary, some broadly incorporating a range of purposes, while others limited to protection of fish habitat. For example, the Fort Peck describes instream flows as meaning “the quantity of water scheduled to remain in a stream to maintain fish and wildlife purposes.”<sup>136</sup> This definition is comparatively much more limited than the Fort Hall Settlement, which defines “Instream Flow” as meaning “a quantity of water in a stream reach to maintain or to enhance the integrity of an ecosystem.”<sup>137</sup> Even more expansive is the Confederated Tribes of Warm Springs definition, which is defined simply as “a quantity of water remaining in a stream,”<sup>138</sup> therefore, accommodating any interest or purpose.

Although the merits of explicitly defining instream flows and “use” for a specific purpose are dependent on each tribe’s priorities, it logically follows that a more broad purpose and intent reflected in the settlement definition allows for later adaptation and more flexibility, e.g. should a tribe want to protect water instream for recreation rather than fish, fifty years down the road.

Further, in light of all of the legal uncertainty surrounding Tribal reserved water rights, it is clear that by including a definition of instream flows, the settlement language will likely facilitate a more clear path for implementation of instream flow protection. If a tribe deems protecting instream flows to be a priority or could foresee instream flow protection being a priority in the future, they should include instream flow uses in the quantification of their reserved rights and define instream flows. By expressly including definitions, the settlement

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<sup>134</sup> *Id.* at 9.

<sup>135</sup> *Id.* at 3.

<sup>136</sup> *Id.* at 11.

<sup>137</sup> *Id.* at 9.

<sup>138</sup> *Id.* at 24.

language is clarifying intent and a more durable argument for such authority.

Including a specific definition in the settlement terms also allows the Tribes to cross-reference the settlement language with other implementation efforts like the adoption of a tribal water code. For example, in the Shoshone-Bannock Tribal Water Resources Code, the tribe utilizes identical definitions for “beneficial use” and “instream flows” as the ones exhibited in their settlement.<sup>139</sup> By removing ambiguity and striving for consistency, the legal uncertainty behind intent or later interpretation should be limited.

Explicitly defining “use” and “instream flows” in the settlement definitions and reframing tribal water rights with these terms are not enough by themselves to enable tribes to protect instream flows. These definitions should also tie directly to the tribe’s reservations of authority and any methods or mechanisms intended for enforcing instream flow protection.

#### B. Authority

Ultimately, instream flow protection comes down to questions of jurisdiction and authority, therefore the language used in the descriptions of authority within each settlement are critical for determining the tribes’ future control over water resources and their ability to protect water instream. While some of the settlements recognize specific instream flow rights and articulate instream flow language to a great extent, most of the settlements simply reserve broad tribal authority over water resources within the reservation.<sup>140</sup> In most of the latter cases, the language focuses on each tribe’s ability to change, transfer, or dedicate their quantified waters reserved water rights to any purpose and/or use within the reservation. This flexibility reflects the future use precedent detailed in the *Arizona* holding, and the recognition that tribes can change the use of quantified reserved water rights for non-consumptive uses in *Anderson*.

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<sup>139</sup> Shoshone-Bannock Tribal Water Resources Code, Sect. H.3. and H. 10. 2007.

<sup>140</sup> In some instances the settlements describe tribal ownership over water resources within the reservation, where other settlements simply imply it. This discrepancy parallels the context that most of the settlements do not reflect explicit hunting and fishing rights expressed within each tribe’s relative treaty, unlike those tribes in the northwest with Stevens Treaty language.

The Fort Peck settlement exemplifies this standard reservation of authority by declaring, “within the Reservation, use of the water in the exercise of the Tribal Water Right for any purpose may be authorized by the Tribes without regard to whether such use is beneficial as defined by valid state law.”<sup>141</sup> Another similar declaration occurs in the Northern Cheyenne,<sup>142</sup> Jicarilla Apache,<sup>143</sup> Navajo,<sup>144</sup> Ak-Chin,<sup>145</sup> Crow,<sup>146</sup> San Carlos Apache, Shivwits band of Paiute, Ute, and Fort McDowell<sup>147</sup> settlement agreements. Under any of these broad declarations there is the apparent autonomy for the tribe to dedicate water towards protecting instream flows within the reservation. However, many of the reservations of authority are subject to limitations. The most apparent is the “within the reservation” phrase. Limiting authority to the reservation boundaries does not necessarily resolve the issues at the heart of protecting instream flows.

Depending on the where the reservation is situated, both surface and groundwater water uses off-reservation may have substantial impacts on instream flows within the reservation boundaries. Further, tribes may not be able to regulate non-member water users even within the reservations boundaries. Considering the uncertain case law discussed above in the background section on tribal civil jurisdiction, tribes may have difficulties enforcing instream flows against non-member water use not only outside of the reservation but inside the reservation’s borders as well.

#### 1. Settlement Limitations on Tribal Authority Within the Reservation

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<sup>141</sup> See Appendix A.

<sup>142</sup> “The Tribe may authorize use of the Tribal Water Right on the Reservation for any purpose without regard to whether such use is beneficially defined under state law” *Id.*

<sup>143</sup> “The Tribe will be free to determine both the use to which the water will be applied and the need to construct any facilities” *Id.*

<sup>144</sup> “The Navajo Nation’s water rights... may be used for non-irrigation purposes or transferred to other places of use” *Id.*

<sup>145</sup> “The Ak-Chin Indian Community... shall have the right to devote the permanent water supply provided for by this Act to any use, including agricultural, municipal, industrial, commercial, mining, recreational, or other beneficial use” *Id.*

<sup>146</sup> “The Tribal Water Right may be used within the reservation for any purpose allowed by Tribal and federal Law” *Id.*

<sup>147</sup> “The water made available to FMIC under this agreement may be put to any beneficial use or reuse on the FMIC Reservation without restriction except to the extent restrictions are specifically set forth in this agreement” *Id.*



Beyond the broad “within the reservation” limitation language, more specific limitations occur in some of the settlement’s other sections on the use of tribal reserved water rights. These restrictions can be categorized as either subjecting portions of the Tribe’s reserved rights water use to state law and/or placing a non-impairment qualification on any Tribal water use transfers or changes.

For instance, in the Fallon Paiute settlement, the Tribe’s use of the Newlands Reclamation Project water is “subject to applicable laws of the State of Nevada.”<sup>148</sup> Even though Nevada recognizes instream flow as a potential beneficial use,<sup>149</sup> the Tribe’s ability to dedicate water for instream flows is subjected to state authority and would likely face state regulations responsive to non-native appropriators concerns.

Several similar limitations describe that such a change or transfer cannot have an adverse affect on other appropriators, i.e. no harm, injury, or impairment to state based appropriations.<sup>150</sup> For instance, in the Crow Water Compact, “adverse affect” is defined as meaning “interference with or to interfere with the reasonable exercise of a water right.”<sup>151</sup>

Another limitation is exemplified within the Northern Cheyenne settlement. Here the language used connects adverse affect with water management by stating that “the Tribe may not exercise the water right set forth in this paragraph in a manner that adversely affects a water right finally decreed in any general adjudication of the Rosebud Creek basin or, ... a water right recognized under state law.”<sup>152</sup>

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<sup>148</sup> Appendix A.

<sup>149</sup> Zellmer, *supra* note 15, at 295.

<sup>150</sup> See e.g., the Taos Pueblo authorization of use and the language used in the Navajo settlement. First, the Taos Pueblo settlement declares, “regardless of the means used for quantifying the Pueblo’s water rights the Pueblo may devote such rights to any use,” however, the section then proceeds to qualify that changes are “subject to non impairment of state recognized allocations.” In the Navajo settlement, there is comparable language that broadly reserves the Tribes authority to use water for “non-irrigation purposes or transferred to other places of use,” however, the section also requires that such a change not impair other water rights in the San Juan River Basin in New Mexico. See Appendix A.

<sup>151</sup> Water Rights Compact entered into by the State of Montana, the Crow Tribe, and the United States of America. 1999. Art. II.3, page 2.

<sup>152</sup> *Id.*

Settlement limitations on a tribe's authority to change water use may constrain a tribes ability to protect future instream flows, however, the presence of these settlement limitations is not necessarily prohibitive. For example, Blumm et al, describe that the Pyramid Lake Paiute Tribe successfully "asserted" their water rights under Nevada water rights processes and transferred a portion of the tribe's reserved rights quantified for irrigation into instream flow rights under state law.<sup>153</sup> However, an important legal factor leveraged in the Pyramid lake Paiute's stream flow restoration efforts was the presence of two federally listed fish species under the Endangered Species Act, i.e. the Lahonton Cutthroat Trout and Cui-ui.<sup>154</sup>

The settlement provisions that subject the tribes reserved water right to state law and/or limit changes to alleviate impairing non-Indian appropriations suggest that in some instances where jurisdictional authority is not clarified in the settlement, tribes might have to rely on states to administer changes to quantified reserved rights to instream flow rights and enforce them against non-Indian users. Further, tribes will also have to rely on states to deny non-Indian off-reservation permit applications for surface water, groundwater, and changes in use where they impair or adversely affect the tribe's reserved rights. Depending on the jurisdictional context, tribes may also have to rely on states to deny these applications on-reservation as well.<sup>155</sup> Whether or not the states defer to tribal administration or take an active role in implementing tribal instream flow protection efforts depends on the settlement and the state's political disposition. As Nania and Guarino caution, "if tribes application of federal reserved rights contradicts state laws, state officials may hesitate to enforce these uses."<sup>156</sup> The difficult context for protecting instream flows through state regulatory systems coupled with the fact that the

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<sup>153</sup> Blumm *et al*, *supra* note 4, at 1193.

<sup>154</sup> *Id.*

<sup>155</sup> Hawkins describes the issue for many reservations by stating "Tribal water allocations rarely enjoy enough hydrologic separation from state-based water rights to simply ignore non-tribal impacts after quantification. Accordingly, tribes may see harm to quantified settlements rights if state administer refuse to curtail junior priority non-tribal water uses." *supra* note 3, at 6.

<sup>156</sup> Nania and Guarino exemplify this statement by reminding readers of Wyoming's blatant opposition against recognizing the Wind River Tribe's efforts at protecting instream flows. *supra* note 5, at 48.

courts continue to resist tribal regulatory jurisdiction over non-members,<sup>157</sup> further illustrates that tribe's should explicitly establish their authority to put reserved water rights to future instream flow use and the expressly allocate administrative roles to do so within each settlement agreement.<sup>158</sup>

### C. Express Instream Flow Provisions and Administrative Responsibilities

Beyond the more broad reservations of authority, several of the Tribal water settlements specifically articulate authority to protect water instream. The settlement instream flow provisions range greatly from settlement to settlement and, unsurprisingly, are subject to certain parameters imposed by states. Some of these provisions detail administrative responsibilities while others do not. The extent that the limitations may frustrate tribal instream flow protection efforts in the future is yet to be determined but is up for interpretation. The following discussion centers on the language and limitations used within the settlements that have explicit instream flow provisions.

#### 1. Short Instream Flow Sections

Several of the express provisions related to instream flows are relatively brief. For instance, the Fort McDowell, San Carlos Apache, and Ute settlements all include short sections related to minimum flow requirements. In the Fort McDowell settlement there is a short provision that requires the state to establish a minimum flow requirement in the Verde River below Bartlett Dam. Although the section is straightforward, it creates an exception in times of drought, thus negating most of its value for preserving instream flows when the environmental conditions would most call for it.

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<sup>157</sup> According to Indian Law expert Mathew Fletcher, the Supreme Court has not “approved of tribal civil regulatory jurisdiction authority over nonmembers” for almost thirty years despite thousands of instances where tribes have “successfully asserted civil jurisdiction over nonmembers without consent and without dispute.” Fletcher, *supra* note 123, at 13.

<sup>158</sup> Another legal expert, Judith Royster notes that “As prior and paramount rights, tribal reserved water rights are due protection from state interference.” Whether this principle will be adequately realized post settlement remains to be seen. *supra* note 6, at 7.

Another brief instream flow provision is illustrated in the San Carlos Apache settlement. Here, the settlement authorizes and directs the Tribe to maintain a “pool of stored water for fish, wildlife, recreation, and other purposes” behind the Coolidge Dam.<sup>159</sup> However, this authorization is also tempered with language that qualifies the directive to designate the “Active Conservation Capacity... as it is not being used by the Secretary to meet the obligations of San Carlos Irrigation Project for irrigation storage.”<sup>160</sup> Thus, subordinating the instream flow provision under the priority of irrigation.

In both the Colorado Ute and Chippewa Cree settlements there are instream flow sections related to fish and wildlife that are detailed to a greater extent. However, the conditions imposed to protect non-Indian uses seem to also limit the practical application of the strategy in times of drought.

In the Colorado Ute settlement, the Tribe reserved the right to use a “maximum of 800 acre feet per annum for fish and wildlife development” from the Delores Project.<sup>161</sup> While this appears to give the Tribes the authority for utilizing this water for instream flow purposes, the effect of the reservation seems limited, as the Tribes allocations are to share the priority with all other decreed and senior water rights in the Delores Project. Further, the settlement specifically states that “the sharing of shortage in the project’s water supply shall govern the actual amount of agricultural irrigation water and water for fish and wildlife development delivered to the tribe whether or not...” the amount is actually achieved.<sup>162</sup> Thus, meaning that in times of shortage all of the water users will share, leaving the tribe with a more limited ability to designate water for instream flow purposes during drought.

In the Chippewa Cree settlement, there are instream flow sections titled “Fish and Wildlife Enhancement” relating to evaporative loss. In these sections, the settlement authorizes the tribe to

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<sup>159</sup> See Appendix A.

<sup>160</sup> *Id.*

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

<sup>162</sup> *Id.*

make a change in use or transfer of water for the purpose of fish and wildlife habitat enhancement subject to some convoluted limitations. The settlement limits the tribe's ability to convert uses for fish and wildlife enhancement to only certain areas and constrains the mechanisms to do so to "physical or operational modifications or impoundments." Thus, the strategy is restricted to repairing or relocating dams or reservoirs. This option is further complicated as the settlement qualifies this use as a consumptive use; conditions that any relocation have a priority date at the time of the compact (1990); and states that the use not impact a state appropriator with a senior priority date.<sup>163</sup> The effectiveness of this type of strategy thus appears limited, and very dependent on the right set of circumstances/locale.

Another interesting provision in the Chippewa Cree settlement requires the tribe to set minimum pool standards for the Bonneau Reservoir on the reservation. This section establishes the tribe as the main administrator of the reservoir, but limits control by stating "any change in use of the water stored in Bonneau Reservoir from irrigation to other purposes shall be without adverse effect on downstream water uses recognized under state law with a priority date before the date of change." Thus, effectively limiting the tribe's ability to designate releases or additional storage for instream flow purposes to not impairing state appropriations.

## 2. More Expansive Instream Flow Provisions

Contrary to the short examples above, six of the 30 Tribal water rights settlements go much further in describing instream flow rights and authority. The Fort Peck, Zuni, Taos Pueblo, Confederated Tribes of Warm Springs, Fort Hall, and Nez Perce settlements have the most expansive provisions relating to instream flow protection. The extent that the conditions involved limit the substantive nature of protecting instream flows in these settlements is also subject to interpretation.

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<sup>163</sup> The language used confusingly states that the tribe may not make a change for fish and wildlife enhancement provided that "the new point of diversion or place of use does not change to a place from upstream of to downstream of, or from downstream of to upstream of the location of the point of diversion of a water right recognized under state law with a priority date before the date of the compact is ratified..." *Id.*

i. Fort Peck Settlement

Within the Fort Peck water compact there is an explicit section on instream flows that authorizes the tribe to establish a schedule of instream flows to “maintain any fish or wildlife resource in those portions of streams, excluding the mainstem of the Milk River, which are tributaries of the Missouri River that flow through or adjacent to the Reservation.”<sup>164</sup> Further, the section explicitly states that the instream flows are a part of the Tribal Water Right, clearly recognizing the *Winters* foundation, and assigns an 1888 priority date. Interestingly, the compact does signify that the tribes use or allocation of instream flows “shall be counted as a consumptive use of surface water.”<sup>165</sup> This clause indicates that the Tribe’s use of water for instream flows be counted against the total amount reserved and quantified for consumptive use, however, it makes administration confusing when a non-consumptive use is counted and defined as a consumptive use.

The instream flow section within the Fort Peck settlement also contains a disincentive on the tribe allocating a large amount of water for instream flow protection. The settlement states that the Tribe may only establish instream flows pursuant to this section and that the Tribe may only change the use of water for maintenance of instream flows to another purpose with the consent of the State.<sup>166</sup> Thus, water that the Tribe dedicates to instream flows cannot be changed back into consumptive uses without state approval.

Despite the limitations to the Tribe’s authority for instream flows, there is another substantive provision in the Fort Peck compact relating to enforcement. In a later section on administration the compact includes a provision that connects surface and groundwater regulation to instream flow protection by asserting that “neither the State nor the Tribes shall authorize or continue to use ground water without the consent of the other if such use will: ... result in the

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<sup>164</sup> *Id.*

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

<sup>166</sup> *Id.*

degradation of instream flows established pursuant to section L of Article III.”<sup>167</sup> This provision appears to be a substantive obligation on both parties to tightly manage groundwater and its impact on surface water flows.

ii. Zuni Settlement

The Zuni settlement reserves significant instream flow protection goals in the form of a wetland and lake restoration project. In section 1.7 of the Zuni water rights settlement agreement, the Tribe details that the restoration project will include “aggradation of the Little Colorado River, enhancement of river flows, and reintroduction and maintenance of native animal and plant species essential for religious and sustenance activities.” The settlement clearly asserts that the Tribe will use “5,500 acre feet per annum,” from a combination of unappropriated surface water, water from Zuni Lands upstream of the reservation, acquired surface water rights, and underground water.<sup>168</sup> While the other three sources are straightforward, the water from Zuni lands upstream of the reservation is defined later as a combination of Zuni lands held in trust or Zuni lands held in fee.

The force of authority behind the wetlands restoration project is tempered by several constraints though. Firstly, the goal of appropriating unappropriated waters for restoration seems largely aspirational in the dry and fully appropriated context of northern New Mexico. Secondly, in section 1.8, the settlement explains that it is the “objective” of the parties that the acquisition of surface water will be on a *voluntary* basis “so that the wetlands goals for the Zuni Heaven Restoration will be met without disrupting existing surface water or underground water use by other water users.”<sup>169</sup>

The settlement also details the conditions imposed on new well development within the “Zuni Protection Area” by stating that the Tribe retains claims for injury or impairment against

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<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

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

“new non-exempt wells.”<sup>170</sup> However, this is problematic as the provision removes exempt wells from the Tribes authority. Thus, the tribe cannot regulate new groundwater well use that falls under a certain amount. At the outset this may not seem like an issue, however, with each additional exempt well developed in a limited aquifer, there will eventually be impacts on other surface and groundwater uses.

Further, the next provision places the burden of proof onto the Tribe and the United States to prove injury. Therefore, assigning a difficult administrative burden on the Tribe for any objections and/or disputes against another new proposed well water use. The settlement provides another option for dispute resolution between well users and the Tribe’s protection area in the form of a “Pumping Protection Agreement Exception.” In this exception, the settlement outlines the procedure for users to enter into agreements with the Tribe should they agree to limit the capacity of their well water use.<sup>171</sup>

The Zuni Settlement<sup>172</sup> also includes an administrative section that clarifies jurisdiction between the Tribe and state.<sup>172</sup> Although the settlement describes that the state does not have jurisdiction over water uses on the Zuni Reservation, the settlement describes that the “Decree Court retains jurisdiction over the Judgment and Decree and the Settlement Agreement” and starkly removes the Tribe’s ability to make a call against decreed rights.<sup>173</sup> Thus, removing the tribe’s ability to enforce water regulation against any non-Indian appropriators. Despite these limitations the settlement does have other substantive implementation language linked to enforcement of the wetland restoration project.<sup>174</sup> One of these sections directs “Underground Water Quality Monitoring.” Here, the settlement requires that the Salt River Project Agricultural Improvement and Power District (SRP) fund and implement groundwater well monitoring.

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<sup>170</sup> Zuni Settlement Art. 5.2.A. & 5.7.

<sup>171</sup> In exchange for limiting well water use, the user is exempted, as the Tribe waives any right to make claims of injury or objections against the new well water use. *See* Appendix A.

<sup>172</sup> *See* Art. 8.2. *supra* note 158, at 29. *See also* Nania and Guarino, *supra* note 5, at 60.

<sup>173</sup> The latter provision, Art. 10.3., states that, “The Zuni Tribe of the United States shall not enforce the priority of non-Norviel Decree water rights that it holds against Norviel Decree water rights.” *Id.* at 32.

<sup>174</sup> *See* Nania and Guarino discussion of the “prohibition of development on the Zuni River.” *supra* note, at 61.



iii. Taos Pueblo Settlement

Similar to the Zuni settlement, the Taos Pueblo also expressly describes instream flow restoration goals to restore surface and subsurface water in a wetland area (“Buffalo Pasture”) on the reservation. However, the mechanisms for doing so are further developed and subject to fewer constraints.

The settlement authorizes the “Buffalo Pasture Recharge Project,” which directs several actions intended to offset and mitigate groundwater depletion effects.<sup>175</sup> One of the primary mechanisms for restoration described, is an agreement between the Tribe and the Town to “limit diversions and consumption from the Town wells that are within immediate vicinity of the Buffalo Pasture” in exchange for the construction of a new well field further away.<sup>176</sup> In addition, this section explicitly restricts some groundwater consumption, e.g. from the “Howell Well” and the “Mitchell Well.”<sup>177</sup>

The Settlement also expressly recognizes the Tribe’s authority to designate water for instream flows. In section 5.5.3, the settlement states “the Pueblo shall be entitled to change the place or purpose of use and point of diversion of any of its HIA Right available... to the maintenance of instream flows on Pueblo Lands to meet its traditional and cultural needs.”

However, the extent of this provision is then confusingly conditioned with a declaration that such use “shall not Impair the water rights of any party.”<sup>178</sup> The settlement does include a definition of the term, but simply directs that “Impair” has the same meaning as outlined under New Mexico water law.<sup>179</sup> This settlement qualifier would have a substantial limiting effect on a tribal transfer to instream flow if the tribe wouldn’t retain an aboriginal or senior priority date. If

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<sup>175</sup> These restoration methods include, groundwater well offsets and limitations, construction of new groundwater wells, and funding for the water rights acquisition. Zuni Indian Tribe Water Rights Settlement Agreement in the Little Colorado River Basin (2000).

<sup>176</sup> *Id.* at Section 6.2.4.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at Section 5.5.2.

<sup>179</sup> *Id.* at Section 2.20.

the state interprets regulatory enforcement as impairment this would also be problematic as the surface waters of the Taos Valley are fully appropriated.

The settlement does, however, attempt to resolve impairment and groundwater issues in an “Offsets and Mitigation” section. In one interesting line, the settlement qualifies that “The Parties will not be liable or obligated for instream flow protection so long as they offset their surface water depletion effects resulting from their Future Groundwater Diversions.”<sup>180</sup> The primary mitigation measure is directed through the “Settlement Model” describe shortly after in section 7.2. Here, the “Settlement Model” is described as a “calibrated numerical groundwater flow model” and hydrologic tool that can be used to calculate groundwater level changes, depletion effects, and simulate future declines or withdrawals. The Settlement Model also includes steps for conflict resolution and the creation of a technical committee with representation from each party. The state engineer is then designated as having oversight over the technical committee and final approval. Finally, the settlement details federal appropriations related to implementation funding for the Buffalo Pasture Recharge Project in section 9.

iv. Warm Springs Settlement

Unlike many of the other settlement’s instream flow provisions, the instream flow language and authority expressed in the Confederated Tribes of Warm Springs Settlement is extensive, and more clearly an expression of aboriginal instream flow rights. The settlement begins by recognizing that the Tribes have a “long standing commitment” to the protection of instream flows “necessary to sustain the Aquatic Ecosystem for the benefit of fish and wildlife on the reservation.” The second provision quantifies a huge portion of the Tribes reserved water rights for non-consumptive use by directing that,

“Category 1 Water<sup>181</sup> in the amount of the entire natural flow of the Warm Springs River, the Whitewater River, Jefferson Creek, Mariel Creek, Shitike Creek... and their

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<sup>180</sup> See Appendix A..

<sup>181</sup> Category 1 Water is defined in Art. III. 5 as “all surface water within the exterior boundary of the reservation, but not including water in the Deschutes and Metolius Rivers, Pelton Lakes, and the Willamette River Basin.” *Id.*

tributaries for Instream Flows to sustain and enhance the aquatic ecosystem of the Reservation for the benefit of the fish and wildlife resources of the Deschutes River Basin which shall be protected and preserved for such purposes in perpetuity” (Footnote added).

Thus, forcefully designating the entire amount of water flowing through twenty-three creeks and their tributaries to be protected for instream flows in perpetuity.

The explicit instream flow protections continue in section five where the settlement sets minimum stream flow amounts for the Deschutes and Metolius rivers.<sup>182</sup> Interestingly, the settlement doesn’t specifically define these or the Category 1 Water rights as aboriginal instream flow rights nor assign an explicit priority date to the Tribe’s reserved rights. Instead it includes a section that declares that the “Tribal Reserved Water Right shall be earlier than any other water right in the Deschutes River Basin,” but continues to describe that “Existing State Water Rights shall not be curtailed in favor of the Tribal Reserved Water Right.”<sup>183</sup> On its face, this language would be considerably problematic if the settlement didn’t also describe the reservations unique context; that the non-Indian water rights on the reservation are few, and thus the “potential for conflict... is negligible.”

Despite the extent of instream flow protection exhibited in the “category 1” quantification, the settlement does exhibit additional compromises on behalf of the Tribe. One of which is the Tribe’s agreement not to enforce regulation against state rights with a seniority prior to 1991.<sup>184</sup> Another is a settlement section that subjects off reservation reserved rights use to state law.<sup>185</sup>

Nevertheless, the settlement also includes extensive language related to administration and implementation. In section 4, the Tribe reserves the right to administer “water rights

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<sup>182</sup> For example, the settlement sets a July minimum stream flow amount of 3000cfs for the Deschutes River in Art. III.B.5.a. *Id.*

<sup>183</sup> *Id.* at Art. III.C.

<sup>184</sup> Rebecca Cruz Guiao. *How Tribal Water Rights are Won in the West: Three Case Studies From the Northwest*. 37 *Am. Indian L. Rev.* 283. (2012-2013). at 7.

<sup>185</sup> Confederated Tribes of Warm Springs Reservation Water Rights Settlement Agreement 1997. Art. IV. D.

established under State Law and *Walton* Rights established pursuant to federal law.”<sup>186</sup> Although the following line qualifies that state water rights be governed under state law, the section asserts that a “Tribal watermaster” will be established for all enforcement and dispute resolution.<sup>187</sup> Additionally, the settlement clearly describes, “Water rights established under State Law and *Walton* Rights established pursuant to federal law or the interests of their successors within the Exterior Boundaries of the Reservation shall be administered by the Tribes.”<sup>188</sup> Further, the state administrative settlement section even places an obligation on the state to preclude non-Indian water use transfers that might impact the Tribes right.<sup>189</sup>

The Warm Springs settlement’s significant recognition of instream flow protection is largely due to the location and historical nature of the Warm Springs Reservation. Water conflict within the reservation is described as “negligible” because the reservation was not allotted, and the unique nature of the areas hydrology.<sup>190</sup> Thus, the extent that other tribes can relate to the context of the Warm Spring Reservation is limited, but nonetheless the instream flow provisions serve as valuable examples.

v. Fort Hall Settlement

Parallel to the Warm Springs settlement, the Shoshone-Bannock Tribes on the Fort Hall Reservation reserved considerable authority to protect instream flows in their negotiated settlement agreement. Early on, the Tribe’s reserved water rights are quantified to include 581,031 AFY from the Snake River Basin “for present and future irrigation, DCMI, instream flow, hydropower and stock water uses.”<sup>191</sup>

After quantification, the primary section on instream flows follows in section 7.4 and is titled “Instream flows, on and adjacent to the reservation.” Here the settlement outlines three

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<sup>186</sup> See Appendix A.

<sup>187</sup> *Supra* note 185, Art. V.A.4.

<sup>188</sup> *Id.* at Art. V.B.

<sup>189</sup> The specific language states that “No transfer of a State water right in the Deschutes Basin shall be made unless the State finds that no injury to the Tribal Reserved Water Right shall result.” *Id.* at Art. V.B.

<sup>190</sup> See Rebecca Cruz Guiao’s insightful discussion, *supra* note 172, at 6.

<sup>191</sup> Fort Hall Indian Water Rights Settlement Agreement of 1990. Art. 5.6.2.

main provisions that reserve authority for the protection of instream flows. The first provision, declares that the Tribes are entitled to use excess storage water for instream flows from the American Falls Reservoir and the Palisades Reservoir. This authority is limited to water “not used, exchanged, or rented” and is constrained to river reaches on or adjacent to the reservation. The settlement does not explain the phrase “adjacent to the reservation,” thus the extent that this authority extends beyond the reservation is ambiguous.

The second provision is the most broadly encompassing, and states that the Tribes “shall have the right to use the natural flows of all waters arising wholly within and traversing only reservation lands for instream flows.”<sup>192</sup> The first part is clear, that the authority extends to waterways that begin and end within the reservations boundaries. However, the second part is somewhat confusing. Using the term “only” to modify reservation lands introduces some uncertainty in the extent of this authority. For example, does the word “only” limit this authority implicitly to tribally owned lands held in trust? Or does it extend to imply to any reservation lands within the reservation? Although this clause does appear to be a significant reservation of authority, the Tribe should theoretically have authority over using waters within and traversing reservation lands owned by the Tribe regardless of it being expressly reserved.

The third provision, reserves the right of the Tribe to specifically designate a certain amount of storage rights for instream flows on the Blackfoot River.<sup>193</sup> This provision is merely limited by a prior notice requirement.

In the Fort Hall settlement, the Shoshone–Bannock Tribes also reserve the specific authority to change a water use to instream flows but are also subject to no injury prohibitions.<sup>194</sup> Interestingly, this settlement clarifies that a person claiming injury from the Tribes change in use must “first require mediation before the Intergovernmental Board prior to seeking judicial relief”

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<sup>192</sup> See Appendix A.

<sup>193</sup> *Id.*

<sup>194</sup> Section 7.6., *supra* note 179, at 53.

and also has the burden of proof.<sup>195</sup> By assigning a dispute resolution process where both parties have representation, this example illustrates a more equitable approach to sharing authority. The settlement also outlines that the Board can make mitigation recommendations. If the board fails to mediate the dispute, the settlement allows for judicial relief.

Further in the water administration section of the Fort Hall settlement, there is broad language that directs the state, the Tribe, and the Feds to work cooperatively. The settlement describes that the Tribe shall have jurisdiction over the Tribes water rights, while the State shall have jurisdiction over any states rights. Another provision enables both parties (tribe and state) to inspect water-monitoring devices within the reservation. In addition, the settlement directs congressional funding for water monitoring devices to be installed within the reservation.

vi. Nez Perce Settlement

The Nez Perce settlement is also recognized for the extent of its recognition of instream flow protection. In Article I, the settlement includes several unique provisions related to the Tribes authority to manage water and protect instream flows for fish restoration. In the first section, the settlement quantifies the tribes consumptive use right and establishes that the tribe has discretion to administer the right pursuant to a Tribal water code. The following section then states that the United States will establish a 50 million dollar fund to assist the Tribe in “acquiring land and water rights, restoring/improving fish habitat, fish production, agricultural development, cultural preservation, and water resource development of fisheries related projects.”<sup>196</sup> In another section, the settlement details a “flow augmentation plan” agreement between multiple parties over the water management of the Dworshak Reservoir with the intent to benefit fisheries.

The Nez Perce reserved water rights settlement also has some provisions related to off-reservation instream flows. One brief section of the settlement reserves the Tribes rights to access and use water from “springs and fountains” on Federal lands outside the reservations boundaries.

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<sup>195</sup> Section 7.8.3. *Id.* at 55.

<sup>196</sup> Nez Perce Water Settlement, Mediators Term Sheet attached to the Snake River Water Rights Act of 2004. Art I.B.

On the opposite side of the spectrum, the settlement exhibits a significant concession by waiving the tribe's legal claims to off-reservation instream flows on the Snake River.

In Article II, the settlement outlines the off-reservation component for the Salmon and Clearwater Rivers. The settlement interestingly directs the State of Idaho to establish instream flow water rights "pursuant to state law" on the streams within the Salmon and Clearwater Basins.<sup>197</sup> The rights are held by the Idaho Water Resource Board (IWRB), a state administrative agency, "in amounts that are negotiated by the parties in consultation with local communities."<sup>198</sup> Thus, not only are these rights subject to state interpretation and control but they are also subject to local community input. While this might be great step for local involvement, accommodating the interests of non-Indian appropriators is going to circumscribe the extent of instream flow protection and resembles the precedents established in *Winters* and *Winans* very little.

The settlement continues to qualify these instream flow rights by stating that they will also be "subordinated to water rights existing on or before the date of the agreement and to future domestic, commercial, industrial, and municipal water rights."<sup>199</sup> Although, this doesn't mention future agricultural uses, this provision essentially makes the instream flow rights not only junior to these uses in the present, but also junior in the future. The extent that this state instream flow program will protect the Tribe's off-reservation interests in protecting instream flows appears limited.<sup>200</sup>

#### D. Water Use Off-Reservation

The challenges to tribal authority and jurisdiction are especially acute with any tribal efforts to protect or use water off-reservation. As water law authority Dan Tarlock asserts, "The

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<sup>197</sup> See Appendix A.

<sup>198</sup> *Id.*

<sup>199</sup> *Supra* note 196, at Art.II.A.3.

<sup>200</sup> Blumm *et al* solemnly conclude, "it remains to be seen whether the 2006 SRBA settlement will enable the tribe to successfully transform its treaty fishing rights and water rights into sustainable and meaningful instream flows that can help restore its damaged fishing culture." Blumm *et al*, *supra* note 4, at 1201.

use of *Winters* rights off of a reservation is one of the major unresolved controversies in Indian Water Law.”<sup>201</sup> Many of the settlements have attempted to “resolve” these issues by subjecting the tribes’ authority and any exercise of reserved water rights off reservation to significant limitations and state law.<sup>202</sup> The restrictive conditions imposed on tribal authority are most extensive in regards to water use off reservation.

Some of the settlements subject the tribe’s authority off reservation to very tight limitations. For instance, in the Chippewa Cree settlement, there is a controlling provision that subordinates the Tribe’s authority over any water rights upstream of the reservation.<sup>203</sup> This essentially removes the Tribes authority over any of the users upstream and removes the tribe’s ability to protect instream flows on the reservation where they would have needed to make a call on upstream diversions.

In the Tohono O’odham settlement there is also a unique clause that is possibly the most explicit in its limitation of the tribe’s jurisdictional authority. In section 18.11, the settlement asserts that the Agreement between the parties does not represent a “consensual relationship between any non-Indian Party and the Nation so as to provide a basis for the Nations legislative, executive or judicial jurisdiction or authority over non-Indian Parties to this agreement.”<sup>204</sup> Therefore, expressly preventing the Tribe’s jurisdiction over non-Indians outside the Reservation.<sup>205</sup>

#### 1. Marketing as a Potential Strategy for Instream Flow Protection

Many of the settlement limitations surrounding tribal water use authority parallel the conditions imposed on settlement authorization of tribal water marketing. Tribal marketing of

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<sup>201</sup> A. Dan Tarlock, *Sec. 9:48 Law of Water Rights and Resources* (2014).

<sup>202</sup> Tarlock discusses that many of these restrictions are directly imposed for the benefit of non-Indian users. *Id.*

<sup>203</sup> See Appendix A.

<sup>204</sup> *Id.*

<sup>205</sup> The clause goes on the explicitly state in Section 18.11 that “The activities, rights or duties conducted outside the exterior boundaries of the Nation’s Reservation shall not be construed as conduct that threatens or affects the political integrity, economic security or health and welfare of the Nation so as to provide a basis for the exercise of the Nation’s legislative, executive or judicial jurisdiction or authority over the non-Indian Parties to this Agreement under *Montana v. United States.*” *Id.*



water rights is labeled under several different terms including marketing, leasing, banking, transfers, and exchange efforts.<sup>206</sup> Both consumptive water marketing and non-consumptive water marketing could be utilized to protect instream flows. Theoretically a tribe could market consumptive use reserved water rights to a downstream off reservation water user and therefore be indirectly protecting a certain amount of water through the stream reach between the reservation and that consumptive use. Non-consumptive water marketing would however be more direct. Theoretically a tribe could also non-consumptively lease their reserved water right to an outside entity, thereby extending protection of a certain amount of water over a designated stream reach. Despite these straightforward possibilities, water marketing as a potential tool for protecting instream flows is much more complicated in practice. Similar to the categories discussed above, the tribal water leasing provisions involved in the settlements have considerable variability and are subject to many types of limitations.

Almost all of the settlements authorize tribes to lease their water rights. In some instances the extent of the authority to lease or transfer their water rights is implied while in other instances it is explicit. The parameters of tribal marketing have not been tested in federal courts and are therefore largely uncertain under the law.<sup>207</sup> For instance, the tribes' ability to lease water off reservation under the Nonintercourse Act without congressional approval is unclear.<sup>208</sup> However, most of the tribal water settlements expressly authorize tribal water marketing, albeit subject to strong limitations. Many of these authorizations have stipulations for secretarial approval and oversight, while others do not. Some restrict off reservation leasing within the state while others do not. Some are focused on leasing for consumptive uses, while most of the others do not differentiate between non-consumptive and consumptive marketing options.

In many of the off reservation marketing provisions in the settlements there is language that concisely subjects off reservation water marketing to state law. The Chippewa Cree,

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<sup>206</sup> Hawkins, *supra* note 3, at 10.

<sup>207</sup> Getches *et al*, *supra* note 1, at 830.

<sup>208</sup> For discussion surrounding this legal grey area *see* Nyberg's discussion, *supra* note 15, at 2.

Colorado Ute, Duck Valley, Jicarilla Apache, and Warm Springs settlements all use broad language that subjects off reservation marketing to state law. For instance, the Warm Springs settlement illustrates this by stating, “Use of the Tribal Reserved Water Right off the Reservation shall be subject to and in accordance with state, federal and tribal law.”<sup>209</sup>

Other settlements use more specific and detailed language when conditioning the tribes marketing authority under state law. For example, the Ute settlement describes that as a condition to lease a portion of the Tribe's water right, the right “shall be changed to a State water right, but shall be such a State water right only during the use of that right off the reservation, and shall be fully subject to State laws.”<sup>210</sup> Additionally, the Ute settlement exhibits another unique limitation that prohibits the tribe from leasing water into or in the Lower Colorado River Basin.<sup>211</sup>

The extent that state law restrictions frustrates a tribe’s ability to market water for instream flow purposes, depends not only on the specific settlement language used, but also the state’s statutory scheme, the circumstance of the watershed, and the political presence of other appropriators. For example, in Montana, if a tribe is subject to the state’s statutory scheme for permit approval and they intend to market water for instream flows off reservation, the tribe would have to first go through the state’s administrative process and survive non-native objections and appeals. Further, as discussed above about Montana’s instream flow leasing scheme, the lease has to go through an extensive approval process that requires the lease to prove by a preponderance of the evidence that the lease will not adversely affect any other appropriators. Thus, the tribe would have to prove that its senior instream flow rights would not limit any junior appropriations.

Several of the settlements qualify off reservation water marketing to include prohibitions against the impairment or adverse affect to non-Indian appropriations. As discussed in the analysis above, the degree to which this language prevents off reservation instream flow leasing

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<sup>209</sup> See Appendix A.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

is unclear in some instances. For example, in the Amdolt settlement, marketing is constrained by a non-impairment of non-Pueblo groundwater rights restriction.<sup>212</sup> Here, the settlement explicitly states, “neither the transferee nor the transferring Pueblo shall make a priority call for any such transferred Future Basin Use against Non-Pueblo water rights.”<sup>213</sup> This language essentially denies the tribe’s ability to, not only transfer any consumptive use rights to instream flow rights, but also enforce them.

Subjecting the tribe’s authority to market water off reservation to state law does not necessarily preclude the tribe from marketing water off reservation however. For instance, the Jicarilla Apache have leased water off reservation in a number of instances for both consumptive and non-consumptive purposes.<sup>214</sup>

In the Jicarilla Apache settlement there is a section that affirms an agreement between the parties to coordinate and cooperate in planning and management of the Navajo Dam and San Juan-Chama project. The section outlines the parties’ intent to coordinate to provide for “downstream flows necessary to maintain and protect existing fisheries and other resources, with particular emphasis on endangered species.”<sup>215</sup> Since the settlement’s ratification, the Tribe has leased a portion of their reserved water right allocation to the Bureau of Reclamation to protect stream flows for the endangered Silvery Minnow.

Some of the marketing provisions actually include water conservation language. For example, in one unique marketing example, the Fallon Paiute settlement reserves federal authority to acquire water rights for wetlands habitat restoration.<sup>216</sup> Another brief example is illustrated in the Fort Belknap settlement which states that the Milk River Coordinating

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<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> Nyberg, *supra* note 15, at 7.

<sup>215</sup> See Appendix A.

<sup>216</sup> The provision authorizes the secretary “to acquire by purchase or other means water and water rights, with or without the lands to which such rights are appurtenant, and to transfer, hold, and exercise such water and water rights and related interests to sustain, on a long-term average, approximately 25,000 acres of primary wetland habitat” and further states that “the secretary is authorized to acquire water and water rights...to transfer, hold, and exercise such water and water rights and related interests to assist the conservation and recovery of the Pyramid Lake fishery” *Id.* at 7.

Committee (a collaborative board that includes tribal representation) may “allocate banked water for storage, or may market or allocate banked water to alleviate shortage... or allocated:... to meet critical environmental needs...”<sup>217</sup>

Although non-consumptive leasing represents potential for Tribes to protect instream flows, the context for water marketing in most states is largely undeveloped, controversial, and complex.<sup>218</sup> For the most part, the settlements reflect this complicated context and have therefore imposed significant limitations to protect non-native appropriators. A full analysis of the potential for tribal water marketing for instream flow protection is needed but beyond the scope of this research.

## VII. IMPLEMENTATION

The challenges to implementing tribal instream flow protection are many.<sup>219</sup> These challenges range from the state limitations imposed within each settlement agreement, to a lack of scientific and hydrologic accounting of water resources coming into and flowing out of reservations, to the substantial legal grey area involved in understanding the parameters of tribal civil jurisdiction. As legal scholar Edmund Goodman remarks “The legal institutions as well as the on the ground infrastructure are, in many instances, simply insufficient to the task of protecting tribal instream flows.”<sup>220</sup> Without clear settlement guidelines surrounding surface and groundwater regulation where those uses may impact the tribe rights, instream flow enforcement will likely lead tribes into future conflict.

Despite the challenges surrounding instream flow protection; there are several strategies that exist both within and outside of the negotiated settlement agreement paradigm. In Julie Nania and Julia Guarino’s article, *Restoring Sacred Waters; A Guide To Protecting Tribal Non-consumptive Water Uses in the Colorado River Basin*, they comprehensively describe that tribes

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<sup>217</sup> *Id.*

<sup>218</sup> See Nyberg’s discussion of a few of the criticisms of tribal water leasing and the counter arguments, *supra* note 15, at 4.

<sup>219</sup> See Nania and Guarino discussion, *supra* note 5, at 1.

<sup>220</sup> Goodman, *supra* note 81, at 7.

have also utilized Tribal water codes, Federal environmental laws (i.e. Endangered Species Act, Clean Water Act), conservation easements, and even creative irrigation strategies to protect non-consumptive uses of water.<sup>221</sup>

One of the fundamental means of implementing settlements and protecting non-consumptive uses they describe is through tribal water codes.<sup>222</sup> They discuss that even though the development of water codes require a high degree of capacity, resources, and investment, they represent an “important step in taking control of water resources and may have substantial long term benefits.”<sup>223</sup> One of the major barriers to adopting tribal water codes, and instream flow protections for that matter, is the federal moratorium on their approval.<sup>224</sup> Thus, for those tribes with Indian Reorganization Act constitutions with stipulations for secretarial approval, they may not be able to adopt tribal water codes. However, many of the settlements explicitly call for the adoption of tribal water codes as a primary means of implementing settlement provisions.<sup>225</sup> In addition, some tribes do not have these requirements and are not subject to secretarial approval, e.g. Navajo Nation Water Code.

Having instream flow regulation and enforcement through tribal water codes alone does not necessarily give Tribes jurisdictional power over non-Indian allocations. For example, in the *Big Horn III* and *Holly v. Confederated Tribes & Bands of Yakima Indian Nation* the tribal water code assertion for complete jurisdiction and enforcement over non-members within the reservation were rejected and deemed to be invalid without consent or agreement from the state.<sup>226</sup> Thus, continuing to demonstrate the importance of clearly allocated administrative and jurisdictional responsibilities within the settlements.

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<sup>221</sup> Nania and Guarino *supra* note 5.

<sup>222</sup> *Id.* at 3.

<sup>223</sup> *Id.* at 73.

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

<sup>225</sup> Judith Royster’s assessment concludes that “One-third of the twenty seven water settlement acts contain specific provisions for tribal water codes” and only a few require secretarial approval. *Climate Change and Tribal Water Rights: Removing Barriers to Adaptation Strategies*. 26 Tul. Envtl. L.J. 197. (2013).

<sup>226</sup> *Id.* at 74.

Nania and Guarino highlight instances of successful tribal water code administration and provide detailed recommendations for incorporating non-consumptive uses in Tribal water codes.<sup>227</sup> In their discussion, many of the tribal water code provisions they advocate for also apply in negotiating and drafting settlement language. For example, they recommend that Tribes seeking to protect instream flows should negotiate to include specific statements of instream flow authority, include non-consumptive uses as permissible uses, detail the method of protecting a non-consumptive use, and/or include provisions that directly protect specific water resources.<sup>228</sup>

## VIII. ANALYSIS SUMMARY

Although there are strategies outside of the negotiated settlement context, the barriers to implementation and enforcement underscore the importance of the bedrock settlement provisions that quantify each tribes water rights and their authority over water resources. Across the range of settlement provisions detailing tribal authority over reserved rights water use and administration, it is clear that states have forcefully sought to protect non-Indian appropriations and have leveraged against any tribal authority to enforce instream flow protections off-reservation. The extent that these limitations preclude instream flow protection depends on the settlement, the state context, and how courts will interpret future jurisdictional uncertainties. In some of the tribal water rights settlements it is evident that the limitations on tribal water use, authority, and jurisdiction will greatly constrain the extent that tribes will be able to protect instream flows. In others, it is equally evident that instream flow protection is a fundamental priority, and thus detail administrative mechanisms to do so.

Many of the tribal water rights settlements demonstrate important components of instream flow protection. This thesis research identifies the following settlement components as fundamental to tribal instream flow protection:

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<sup>227</sup> *Id.* at 76.

<sup>228</sup> *Id.* at 79.

1. Clear inclusion of non-consumptive uses in quantifying the tribe's reserved water rights use;
2. A declaration of Tribal authority to allocate reserved water rights directly to instream flow uses;
3. Establishing methods or enforcement mechanism to protect reserved water instream;
4. Allocation of administrative roles for instream flow enforcement and monitoring between tribal water resource departments and state water resource departments;
5. Authorization of Tribal groundwater regulation;
6. State obligations to monitor and restrict off-reservation uses that might impact tribal instream flow designations (or consumptive uses for that matter);
7. Allocation of resources and funding for instream flow management programs and enforcement;
8. Asserting an active tribal role in dispute resolution processes.

By addressing each of these components in settlement agreements, a tribe will have a much greater and more durable approach to implementing instream flow protection. Although none of the settlements fully exhibit all of these components in concert, the proposed Confederated Salish and Kootenai Tribal Water Compact (hereinafter the CSKT Compact) goes the furthest in its recognition of aboriginal instream flow rights and addresses each of these eight areas.

#### A. Proposed Confederated Salish and Kootenai Water Compact

The CSKT Compact recently passed through the Montana State Legislature on April 24<sup>th</sup>, 2015. Although yet to be federally approved by Congress, the compact represents the most extensive settlement recognition of tribal authority to protect instream flows. The compact also illustrates the most extensive recognition of off-reservation aboriginal instream flow rights by far.

The CSKT Compact clearly differentiates the Tribe's consumptive reserved water rights and the tribe's aboriginal water rights accompanying its retained rights to take fish exclusively on the

reservation and in all of the “usual and accustomed places” in the Hellgate Treaty of 1855.<sup>229</sup> Where other settlements waive claims to aboriginal instream flow rights, the CSKT Compact strongly begins with the assertion that the CSKT claim “aboriginal water rights and, pursuant to said Treaty, reserved water rights to fulfill the purposes of the Treaty and the Reservation.”<sup>230</sup> Thus, emphasizing the distinction between their aboriginal and *Winters* water rights.

In contrast to other settlements that do not define instream flows, the CSKT Compact includes four specific definitions surrounding instream flows.<sup>231</sup> In addition, there is an entire section titled “Instream Flow Rights On Reservation” that quantifies and asserts the tribe’s instream flow rights to include “natural instream flows,” “Interim Instream Flows,” “Minimum Reservoir Pool Elevations in Flathead Indian Irrigation Project Reservoirs,” “High Mountain Lakes Water Right,” and “Wetland Water Right” among others. In each category the aboriginal instream flow rights are described in further detail. For example, the tribe’s “Wetland Water Right” describes that the Tribes have “the right to all naturally occurring water necessary to maintain the Wetlands identified in the abstracts of water right attached hereto as Appendix 16” and has a priority date of time immemorial.<sup>232</sup>

The Compact also describes in detail each off-reservation aboriginal instream flow right, river by river. For example, it details that the CSKT instream flow right on the Swan River has a priority date of time immemorial, has a year round period of use, with a purpose to maintain and enhance fish habitat, and finally describes an enforceable flow rate.<sup>233</sup> The compact also outlines

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<sup>229</sup> *Supra* note 79 “The exclusive right of taking fish in all the streams “running through or bordering said reservation is further secured to said Indians; as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory.”

<sup>230</sup> Proposed Water Rights Compact Entered into by the Confederated Salish and Kootenai Tribes, the State of Montana, and the United States of America. January (2015), at 5. Accessed at <http://dnrc.mt.gov/divisions/reserved-water-rights-compact-commission/confederated-salish-and-kootenai-tribes>

<sup>231</sup> The compact defines instream flows, “Minimum Enforceable Instream Flows,” “Natural Flow,” and “Target Instream Flows,” *Id.* at Art II, 44, 48, 50, & 64.

<sup>232</sup> *Id.* at Art. III.C.1.d.

<sup>233</sup> *Id.* at Art III.D.2.



a shared management approach including instream flow rights co-owned between the tribe and Montana Fish, Wildlife, and Parks.<sup>234</sup>

The CSKT Compact does, however, include considerable compromises to protect state appropriators. Not only did the CSKT release and waive all claims in the Bitterroot River Basin, but the Tribes agreed to relinquish their right to exercise the Tribal water right to make a call against any non-irrigation water right as well as against groundwater irrigators that use less than 100 gallons per minute.<sup>235</sup> For instance, each off-reservation instream flow section restricts the Tribes ability to make a call against certain users or water uses.<sup>236</sup> Additionally in some cases the CSKT Compact “suspends” the tribes ability to enforce minimum streamflow levels so long as certain dams remain on the river.<sup>237</sup> The Tribes also agreed to exempt certain off-reservation water users from enforcement by stating that the tribe and the United States agree to “relinquish their right to exercise the Tribal Water Right to make a Call against any water right located upstream of the Flathead Reservation in Basins 76I, 76J, and 76LJ” except for surface water irrigators in particular locations and large groundwater irrigators.<sup>238</sup>

Despite these limitations and exceptions the CSKT Compact is none-the-less remarkable in its extensive detail of implementation and management. For example the compact directs procedures for resolving disputes, allocates administrative responsibilities between the state and the tribe, authorizes an adaptive management approach in the form of a “shared shortages provision,” requires monitoring through a “comprehensive water measurement program,” and

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<sup>234</sup> The compact directs that the Tribes and MFWP “shall meet and confer on a biennial basis... to discuss the exercise of the rights identified in Article III.D.4.a, with a goal of establishing a joint plan for the exercise of these rights. Notwithstanding this planning process, the Tribes and MFWP each retain(s) the unilateral right to exercise each water right identified in Article III.D.4.a as each deem(s) appropriate.” *Id.* at Art. III.D.4. page 24.

<sup>235</sup> See Summary of the Proposed Compact and Ordinance for the Flathead Reservation Water Rights Settlement. January 8, (2015) at page 4. Accessed at [http://www.cskt.org/water/2015-1-8\\_summary\\_proposed\\_compact\\_and\\_ordinance.pdf](http://www.cskt.org/water/2015-1-8_summary_proposed_compact_and_ordinance.pdf)

<sup>236</sup> See the non-irrigator and exempt groundwater irrigator exceptions. *Supra* note 230 at Art. III.G. page 29.

<sup>237</sup> E.g. the compact states that the tribe’s ability to enforce the Mainstem Instream Flow Right in the Kootenai River “shall be suspended so long as Libby Dam remains in existence and the Army Corps of Engineers’ operations of that dam are conducted consistently with the 2008 Federal Columbia River Power System Biological Opinion.” *Id.* at D.1.e.

<sup>238</sup> *Id.* at Art. III.G.4. page 32.

creates a “Compact Implementation Technical Team.”<sup>239</sup> Even though the CSKT relied on a unique legal context and their strong treaty language guaranteeing hunting and fishing on and off-reservation, the compact clearly demonstrates that the fundamental components of instream flow protection can actually be achieved.

## IX. CONCLUSIONS

Tribal reserved water rights settlements are settlements of sovereignty. Not only do the settlements interpret enduring principles of federal Indian law stemming from Treaty interpretation, i.e. the federal Indian law canons of construction, but they also affirm Tribal reserved rights to water and ultimately confirm Tribal authority over reservation water resources. The thirty federally recognized settlements represent historic and extensive negotiations between tribes, states, and the federal government, and shape the parameters of how tribes will govern their reserved water rights in the future. These settlement parameters will have lasting implications for watersheds across the West.

The extractive and utilitarian legacy of the prior appropriation system has not only resulted in the de facto prioritization of consumptive uses in western state water law, but has also carried over to influence the parameters on tribal authority in the thirty tribal water rights settlement agreements. As discussed in the background section on prior appropriation and instream flow law above, state tools to protect water for instream flow purposes have been largely constrained in the prior appropriation states. Thus, resulting in a complicated and limited ability for states to protect water for instream flows. The context for tribes to protect water instream is even more complex and difficult. The settlement limitations on Tribal authority do little to simplify this context and in many cases appear to frustrate the extent tribes will be able to protect non-consumptive uses of water.

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<sup>239</sup> For instance, one section even details the procedure for resolving disputes of lease terms Art. IV.B.7.g., Adaptive management approach. *Id.* at Art IV.E.F.

The non-impairment and “no adverse affect” stipulations on tribal changes and transfers of their reserved water rights use, in some of the settlements, also represent a reversal of the *Winters* and *Winans* principles that tribal reserved water rights are senior and not subject to state law.

The implications for tribal instream flow protection are especially important to consider in the context of a changing climate. With the potential for significant changes in water resource availability and supply across western watersheds, the importance of adaptation in water management is even greater. The extent of autonomy tribes have to freely make water management decisions and the extent that states and federal governments take those decisions into account to actively protect tribal reserved water rights are critical to tribal adaptation in water management.<sup>240</sup>

The *Winters* doctrine of tribal reserved water rights includes the Supreme Court’s recognition that tribes should be able to dedicate water to future uses in order to accommodate the needs of the reservation over time.<sup>241</sup> Having the flexibility to dedicate and protect water for non-consumptive uses on the reservation will be increasingly important in a future of changing water availability and supply. As one legal scholar notes “a tribe’s ability to shift water from agricultural use to instream flows, for example, may be central to the tribe’s ability to respond to climate change pressures on water resources.”<sup>242</sup> This type of flexibility is recognized in some of the settlements but not all.

Overall, the potential for tribes to protect instream flows ranges greatly across the settlements. On one hand you have the CSKT Water Compact, which recognizes aboriginal reserved rights to instream flows and the tribes’ sovereign authority to administer them. On the other, you have settlements quantified completely in consumptive use terms and subject to

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<sup>240</sup> *Id.* at 2.

<sup>241</sup> See *Arizona* discussion above in background section on Tribal Reserved Water Right, and Royster’s discussion that “Nothing in the PIA standard for quantification, the stated, was to ‘constitute a restriction of the usage of [the water rights] to irrigate or other agricultural application,’” *supra* note 213, at 7.

<sup>242</sup> *Id.*

significant state restrictions against changing their reserved water rights use. Although some tribes have much stronger claims for aboriginal instream flow rights and authority based on treaty language, tribes with *Winters* reserved rights should nonetheless be able to put their reserved water rights to non-consumptive uses. If some tribes are limited in their ability to designate reserved water rights to future instream flows and protect them against junior non-Indian water users, where is the recognition of their seniority and sovereignty? For example, outright settlement provisions that prohibit impairing state recognized appropriations, and/or settlement provisions that remove tribal authority to call non-Indian water users as evidenced in the Amdolt Settlement and Tohono O’odham settlement erode the future use precedent of *Arizona*,<sup>243</sup> and ultimately do not reflect the precedents established in *Winters* nor the principles outlined in *Winans*.

Many of the settlements recognize significant authority for tribes to designate water for non-consumptive uses within the reservation boundaries. However, designation is only the first step. Instream flow protection denotes enforcement and regulation on other users when there are scarce water resources. For some tribes, barriers against instream flow enforcement are going to be more pervasive than others based on the history of the reservation, land ownership patterns, the state context, the specific settlement language used, and other hydrologic, legal, and geographic factors. As described above in the section on jurisdiction, the civil regulatory uncertainties surrounding tribal authority over non-Indian water users represents one of the most problematic barriers for future instream flow enforcement and is not clarified in several of the settlements.

Another connected challenge facing tribal instream flow protection revolves around effective groundwater regulation. The Fort Peck, Zuni, Taos Pueblo, and CSKT Compact instream flow sections all reflect how important it is to regulate surrounding groundwater depletions and exhibit different strategies to address it. However, the larger context for regulating

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<sup>243</sup> *Id.*

groundwater and connecting the management of all water in a single system, i.e. conjunctive management, has proven to be a significant task even for many western states.<sup>244</sup> The primary problem is that the law historically failed to understand how connected surface and groundwater resources are.<sup>245</sup> For example, completely different legal regimes exist to manage groundwater and surface water in some states, while the impacts of these different allocations of water have rarely been holistically taken into account within each watershed.<sup>246</sup> Not only do states face substantial barriers in regulating and monitoring groundwater use and exempt wells, but the challenge is even greater for tribes that cannot adopt tribal water codes and have to wade through layers of legal uncertainty and political opposition prior to managing water conjunctively.<sup>247</sup> Although some of the settlements address tribal rights to groundwater and their authority to administer it, many do not do so to the extent necessary for restoring and/or effectively protecting instream flows in the future.<sup>248</sup>

Ultimately the transboundary nature of water and the barriers to tribal administration combine to necessitate a more coordinated and shared approach to future water management and the protection of instream water flows similar to the approach exhibited in the CSKT Compact. On most reservations the waters do not originate within reservation boundaries and there are tribal reserved water rights and state rights to water in excess of tribal reserved rights.<sup>249</sup> Further, under principles of federal Indian law many tribes have an “extraterritorial” reach of authority that extends beyond reservation boundaries.<sup>250</sup> Thus, the extent that tribes will be able to protect

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<sup>244</sup> Royster, *supra* note 6, at 1.

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> For example Royster describes, “Over the past twenty years or more, as courts have ruled on the issue, no uniform approach to tribal groundwater rights has emerged. Judicial approaches range from no right to groundwater, to a conditional right to groundwater, to fully realized rights to groundwater.” *Id.* at 4.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.* at 1.

<sup>250</sup> Goodman concludes that “inherent tribal sovereignty has been recognized as a source of tribal extraterritorial government authority.” *supra* note 81, at 3.

instream flows, i.e. regulate the state rights either on or off-reservation that impact a protected stream reach, will often depend on how well the two coordinate their approaches.<sup>251</sup>

Edmund Goodman describes four principles to guide integrating Tribes as co-managers.<sup>252</sup> First, tribes should be recognized and respected as sovereign governments; second, tribes should be integrated into and be able to participate in the decision making process “from the earliest stages of policy formation, problem identification and development of solutions to water quality and allocation problems;” third, tribal input should be given a degree of deference; and fourth; there should be joint mechanisms for dispute resolution.<sup>253</sup> Even though the principles are focused broadly, each has implications for evaluating the instream flow components of the negotiated settlements and their subsequent implementation.

Considering the legal inconsistency, inflexibility, and adversarial nature of state court quantifications discussed in the background section above, the negotiated settlement agreements clearly give tribes a much greater opportunity to be recognized and involved as sovereigns at the outset.<sup>254</sup> The settlements have only partially realized this opportunity however, and could go much further in their recognition of tribal authority to jointly manage water resources with the states.

Goodman’s fourth recommendation is especially relevant for the future of tribal instream flow implementation. It is evident that the dispute resolution procedures outlined in the settlements are an important component for future instream flow administration. The durability of Tribal administrative decisions and enforcement of instream flows will eventually depend on the institutional processes for resolving disputes and where they are held. The extent that the settlements as a whole incorporate tribes in joint dispute resolution processes appears varied, but

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<sup>251</sup> Hawkins accurately concludes that “Even in cases where tribes have clearly delineated a primary Tribal administrative role for managing water, Tribes will still need to work with the state water administrative agency to prevent harm to Tribal water rights from off-reservation, non-tribal uses.” *Supra* note 3, at 10.

<sup>252</sup> *Id.* at 16.

<sup>253</sup> Goodman, *supra* note 81, at 16.

<sup>254</sup> It is also clear that some of the settlement processes have treated tribes as sovereigns more adequately than others, e.g. Montana Reserved Water Rights Compact Commission vs. the Snake River Basin Adjudication.

should be assessed further. Many of the settlements do not dictate administration to a very detailed extent.<sup>255</sup> However, several of the settlements detail dispute resolution process and set up joint mechanisms for dispute resolution.<sup>256</sup> Nonetheless, some of the joint boards and committees established in the settlements to resolve disputes also use vague language and leave aspects undefined.<sup>257</sup> Thus, deferring some administrative conflicts to future negotiation or litigation.<sup>258</sup>

Through over a century's worth of case law and the accumulation of thirty tribal reserved water rights settlements, the power to protect reserved water rights instream under the principles of *Winans*, *Winters*, and inherent tribal sovereignty have yet to be fully realized or respected.<sup>259</sup> The direct and indirect limitations on tribal authority to protect reserved water rights in non-consumptive ways is a further erosion of the foundational principles set forth in the *Winters* Doctrine. Although the settlements have removed considerable uncertainty, resolved outstanding legal issues, and resulted in significant benefits to the both the tribes and states involved, the future of shared administration and implementation hold a host of additional questions and issues. Future settlements should not only recognize aboriginal instream flow rights and tribal authority to utilize reserved rights for protecting instream flows of water, but also more broadly reflect the governmental role that tribal nations are due as sovereign water managers.

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<sup>255</sup> See Michael Nelson's discussion of post decree administration in *The Winter Centennial*, *supra* note 3, at 151. See also Felix S. Cohen's handbook of Federal Indian Law § 19.05[2], at 1254.

<sup>256</sup> See discussion of the Montana reserved water rights compact commission approach. *Id.* at page 152

<sup>257</sup> For example some of the settlements do not specifically detail where disputes will be heard/appealed to and instead direct the conflict to a "court of competent jurisdiction." *Id.*

<sup>258</sup> See Hawkins discussion, *supra* note 3, at 9.

<sup>259</sup> For a clear and concise description of inherent tribal sovereignty see Goodman, *supra* note 73, at 2.

## Tribal Water Rights Settlements & Instream Flows Table

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**Table Guide:**<sup>260</sup>

<p><b>Tribes</b> – This section labels the tribe or tribes implicated in each settlement</p>	<p>This section includes the <b>State</b> involved in the Settlement, and the Agreement <b>Year</b> and/or Enabling Legislation Year</p>
<p>Instream Flow Language</p>	<p>This section includes settlement language that explicitly mentions or implicitly relates to instream flow water use, instream flow protection, and/or instream flow limitations</p>
<p>Authority</p>	<p>This section includes examples of settlement language that reserve the authority that might be used to directly or indirectly protect instream flow</p>
<p>Definitions</p>	<p>This section depicts definitions related to instream flows</p>
<p>Marketing</p>	<p>This section includes language related to water marketing, leasing, and/or transferring water rights, thereby directly or indirectly reserving the authority to protect instream flows.</p>

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<sup>260</sup> The language highlighted in each settlement table is not intended to be a comprehensive list of all the definitions, authority, marketing provisions, and explicit language related to protecting instream flows within each settlement document. The provisions expressed herein are meant to offer interesting examples of the language and terms used, and highlight some of the limitations involved.



**1) Ak-Chin Water Rights Settlement (1973)**

<b>Tribes – Ak-Chin</b>	<b>Arizona, Federally Legislated in 1978</b>
Instream Flow Language	Consumptive use focused
Authority	Implied authority for future instream flow authorization <ul style="list-style-type: none"> <li>▪ “The Ak-Chin Indian Community... shall have the right to devote the permanent water supply provided for by this Act to any use, including agricultural, municipal, industrial, commercial, mining, recreational, or other beneficial use”<sup>261</sup></li> </ul>
Definitions	-
Marketing	Lease Authorization <ul style="list-style-type: none"> <li>▪ “The community is authorized to lease or enter into options to lease... to exchange or dispose of water to which it was entitled for the beneficial use”<sup>262</sup></li> <li>▪ Subject to secretarial approval<sup>263</sup></li> <li>▪ Consumptive vs. non-consumptive leasing options not specified</li> </ul>

<sup>261</sup> 2000 Amendment to the Ak- Chin Water Rights Settlement Act of 1978, Section 2.(b) (Ak-Chin Indian Community Act of 1978, Pub. L. No. 95-328, 92 Stat. 409, as amended, Pub. L. No. 98-530. 98 Stat. 2698 (1984), as amended, Pub. L. No. 102-497, Sec. 10, 106 Stat. 3258 (1992), as amended, Pub. L. No. 106-285, 114 Stat. 878 (2000).

<sup>262</sup> *Id.*

<sup>263</sup> *Id.* at (b) & (c)

## 2) Ute Indian Water Compact<sup>264</sup> (1980)

Tribe(s) – Ute	Utah, 1980
Instream Flow Language	<p>Minimum Stream Flows</p> <ul style="list-style-type: none"> <li>▪ “As a minimum, the Secretary shall endeavor to maintain continuous releases into Rock Creek to maintain twenty-nine cubic feet per second during May through October and continuous releases into Rock Creek of twenty-three cubic feet per second during November through April, at the reservation boundary.”<sup>265</sup></li> </ul>
Authority	<p>Use quantification explicitly recognizes instream flows</p> <ul style="list-style-type: none"> <li>▪ “The quantities of water apportioned hereby include all water rights of every nature and description derived from the reserved water rights doctrine, from all sources of water, both surface and underground, and includes all types and kinds of uses, whether municipal, industrial, recreational, instream uses, sale, lease, or any other use whatsoever”<sup>266</sup></li> </ul> <p>Authority Limitation</p> <ul style="list-style-type: none"> <li>▪ Administration over the main sources directed to the state engineer, while administration over the canal distributions directed to the US and the Tribe.<sup>267</sup></li> </ul>
Definitions	-
Marketing	<p>Authorized</p> <ul style="list-style-type: none"> <li>▪ “The Tribe may voluntarily elect to sell, exchange, lease, use, or otherwise dispose of any portion of a water right confirmed in the Revised Compact off the Uintah and Ouray Indian Reservation...”<sup>268</sup></li> <li>▪ Consumptive vs. non-consumptive leasing options not specified</li> </ul> <p>Limitations</p> <ul style="list-style-type: none"> <li>▪ “...as a condition precedent to such sale, exchange, lease, use, or other disposition, that portion of the Tribe's water right shall be changed to a State water right, but shall be such a State water right only during the use of that right off the reservation, and shall be fully subject to State laws”</li> <li>▪ “None of the waters secured to the Tribe in the Revised Ute Indian Compact of 1990 may be sold, exchanged, leased, used, or otherwise disposed of into or in the Lower Colorado River Basin”<sup>269</sup></li> </ul>

<sup>264</sup> The actual terms of the Ute water compact were not accessed, therefore the following information is from the Ute enabling legislation and the Approval document of the Ute Water Compact.

<sup>265</sup> Ute Enabling Act Section 505 (d), page 56

<sup>266</sup> Ute Water Compact, Art III.

<sup>267</sup> “The Utah State Engineer, in a manner consistent with the agreements and covenants contained herein, shall have general administrative supervision of all surface and ground waters apportioned to the United States in trust for the Ute Indian Tribe and others, including measurement, apportionment, and distribution thereof, to the points of diversion from the main sources” Id. at Section 503

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

### 3) Fort Peck Indian Water Rights Settlement (1985)

Tribe(s) – Assiniboine and Sioux	Montana, 1985
Instream Flow Language	<p>“Instream Flows”</p> <ul style="list-style-type: none"> <li>▪ At any time within five years after the effective date of this Compact, the Tribes may establish a schedule of instream flows to maintain any fish or wildlife resource in those portions of streams, excluding the mainstem of the Milk River, which are tributaries of the Missouri River that flow through or adjacent to the Reservation. These instream flows shall be a part of the Tribal Water Right with a priority Date of May 1, 1888. Water remaining in a stream to maintain instream flows pursuant to such a schedule shall be counted as a consumptive use of surface water”<sup>270</sup></li> </ul> <p>Disincentive/limitation</p> <ul style="list-style-type: none"> <li>▪ “The Tribes may change the use of water for maintenance of instream flows to another purpose only with the consent of the State”<sup>271</sup></li> </ul> <p>Regulation of Ground Water</p> <ul style="list-style-type: none"> <li>▪ “neither the State nor the Tribes shall authorize or continue to use ground water without the consent of the other if such use will: ... result in the degradation of instream flows established pursuant to section L of Article III”<sup>272</sup></li> </ul>
Implied Authority	<p>Purposes</p> <ul style="list-style-type: none"> <li>▪ “Within the Reservation, use of the water in the exercise of the Tribal Water Right for any purpose may be authorized by the Tribes without regard to whether such use is beneficial as defined by valid state law.”<sup>273</sup></li> </ul>
Definitions	<p>“Instream flow”</p> <ul style="list-style-type: none"> <li>- “means the quantity of water scheduled to remain in a stream to maintain fish and wildlife purposes.”<sup>274</sup></li> </ul>
Marketing	<p>Off reservation marketing authorized and subject to the following limitation</p> <ul style="list-style-type: none"> <li>▪ “Outside the reservation, any use of water in the exercise of the Tribal Water Right shall be beneficial as defined by valid state law on the date the tribes give notice to the state of a proposed use outside the reservation.”<sup>275</sup></li> </ul>

<sup>270</sup> Fort Peck- Montana Compact, MCA 85-20-201 (1985). At Art. III.L.1.

<sup>271</sup> *Id.* at Art. III.L.2.

<sup>272</sup> *Id.* at Art. V.D.1.(a) & (b)

<sup>273</sup> *Id.* at Art. III.D.

<sup>274</sup> *Id.* at Art. II(15)

<sup>275</sup> *Id.* at Art. III.D.

#### 4) Colorado Utes Indian Water Rights Final Settlement Agreement (1986)

Tribes – Southern Utes & Mountain Utes	Colorado, 1988
Instream Flow Language	<p>“Fish and Wildlife Development”</p> <ul style="list-style-type: none"> <li>▪ Tribe reserved the right to use a “maximum of 800 acre feet per annum for fish and wildlife development” from the Delores Project.<sup>276</sup></li> </ul> <p>Limitation</p> <ul style="list-style-type: none"> <li>▪ “The sharing of shortage in the project’s water supply shall govern the actual amount of agricultural irrigation water and water for fish and wildlife development delivered to the tribe whether or not...” the amount is actually achieved.<sup>277</sup></li> </ul>
Authority	<p>Change of non-project Reserved Water Rights</p> <ul style="list-style-type: none"> <li>▪ “The Tribes may change their non-project reserved water rights from the types of use, places of use, amounts, times of use or location of points of diversion”</li> <li>▪ However, “no change shall be allowed unless the Tribes... first file an application for a change in water rights in the Colorado District Court... and the court grants such change.”<sup>278</sup></li> <li>▪ “A change of water right shall be granted... if the change does not increase the Tribes consumptive use or injure other water rights.”<sup>279</sup></li> </ul> <p>Water Rights quantified in consumptive use terms</p> <ul style="list-style-type: none"> <li>▪ Animas Plata Project water limited to municipal, industrial water, agricultural irrigation water uses.<sup>280</sup></li> </ul> <p>River and Creek reserved rights quantified “for direct flow diversion”(s).<sup>281</sup></p>
Definitions	None
Marketing	<p>Leasing Authorized</p> <ul style="list-style-type: none"> <li>▪ Authorizes off reservation use and leasing subject to state and federal law.<sup>282</sup></li> </ul>

<sup>276</sup> Colorado Utes Indian Water Rights Final Settlement Agreement of 1988. Pub. L. No. 100-585, 102 Stat. 2973. At Art. III.1.iii. page. 7

<sup>277</sup> *Id.* at page 8

<sup>278</sup> *Id.* at page 55

<sup>279</sup> *Id.*

<sup>280</sup> *Id.* at page 27

<sup>281</sup> *Id.* at page 44

<sup>282</sup> *Id.* at page 60

### 5) Seminole Indian Water Rights Settlement (1987)

<b>Tribe(s) – Seminole</b>	<b>Florida, 1987</b>
Instream Flow Language	<p>Restrictions on the Tribes consumptive water use</p> <ul style="list-style-type: none"> <li>“The Tribe must give reasonable assurances that any proposed consumptive water use: ... will not have a significant impact on lawful land uses including wetlands... will not cause significant environmental impacts... is a reasonable beneficial use... will not interfere with presently existing legal uses of water and users of water protected under the Compact.”<sup>283</sup></li> </ul> <p>Additional stipulations for management</p> <ul style="list-style-type: none"> <li>“The Tribe must give reasonable assurances that the proposed surface water management systems: ... will not cause significant adverse water quality and quantity impacts... will not cause significant adverse impacts on surface and groundwater levels and flows”<sup>284</sup></li> </ul>
Authority	<p>Broad policy proclamations</p> <ul style="list-style-type: none"> <li>“The parties to the compact recognize that the general public interest is served by supporting the self determination goals of the Tribe, by protecting and enhancing the environment, and by exercising prudence in the use of natural resources”<sup>285</sup></li> </ul>
Definitions	none
Marketing	none

### 6) Salt River Pima-Maricopa Indian Community Water Rights Settlement Agreement (1988)

<b>Tribe(s) – Salt River Pima-Maricopa</b>	<b>Arizona, 1988</b>
Instream Flow Language	Quantification focus is on consumptive use in the form of irrigation.
Authority	<p>Implicit authority to use water beyond consumptive use within the reservation</p> <ul style="list-style-type: none"> <li>Use disclaimer; “There are no restrictions on the purposes for which water may be used within the SRPMIC Reservation”<sup>286</sup></li> <li>e.g. “For irrigation or other use”<sup>287</sup></li> </ul>
Definitions	none
Marketing	<p>Off reservation leasing authorized but with the following limitations</p> <ul style="list-style-type: none"> <li>“Salt River Pima Maricopa Indian Community (SRPMIC) will not transport either Kent Decree water, stored water, Additional Stored water, Cities’ exchange water, or groundwater pumped within the boundaries of the SRRD lands or uses outside that portion of the SRPMIC Reservation within the exterior boundaries of SRRD.”<sup>288</sup></li> </ul>

<sup>283</sup> Water Rights Compact Among the Seminole Tribe of Florida, Florida and South Florida Water Management District, Art. III.B

<sup>284</sup> *Id.* at Art. IV.A.

<sup>285</sup> *Id.* at 1.

<sup>286</sup> Salt River Pima-Maricopa Indian Community Water Settlement Agreement of 1988, Section 16.2

<sup>287</sup> *Id.* at Section 6.1

<sup>288</sup> *Id.* at Section 16.1

**7) San Luis Rey Indian Water Rights Settlement<sup>289</sup> (1988)**

<b>Tribe(s) – La Jolla, Rincon, San Pasqual, Pauma, and Pala Bands of Mission Indians</b>	<b>California, 1988</b>
Instream Flow Language	-
Authority	Indian Water Authority <sup>290</sup> <ul style="list-style-type: none"> <li>▪ Explicit recognition of authority limited to recognition as an entity with powers to adopt ordinances, enter into agreements, and manage funding</li> <li>▪ Water management authority unstated/unspecified</li> </ul>
Definitions	-
Marketing	Implicit authority <ul style="list-style-type: none"> <li>▪ “POWER TO ENTER INTO AGREEMENTS.—The Indian Water Authority may enter into such agreements as it may deem necessary to implement the provisions of this title and the settlement agreement.”<sup>291</sup></li> </ul>

<sup>289</sup> The settlement terms for the San Luis Rey water settlement were not accessed, therefore the following information is limited to, and taken from the enabling act, i.e. the San Luis Rey Indian Water Rights Settlement Act. Pub. L. No. 100-675, title I, 102 Stat. 4000 (1988).

<sup>290</sup> *Id.* at Section 107.

<sup>291</sup> *Id.* at Section 107(b)(2).

**8) Fallon Paiute Shoshone Indian Tribes Water Rights Settlement and Truckee-Carson-Pyramid Lake Paiute Indian Water Rights Settlements<sup>292</sup> (1990)**

<p><b>Tribe(s) – Fallon Paiute Shoshone &amp; Pyramid Lake Paiute</b></p>	<p><b>Nevada, 1990</b></p>
<p>Instream Flow Language</p>	<p>Lake Tahoe Allocation</p> <ul style="list-style-type: none"> <li>▪ “Regulation of streamflow for the purpose of preserving or enhancing instream beneficial uses shall not be changed to the gross diversion allocation of either state”<sup>293</sup></li> </ul> <p>Truckee River Allocation</p> <ul style="list-style-type: none"> <li>▪ “All uses of water for commercial, irrigated agriculture within the Truckee River basin within California initiated after the date of enactment of this title shall not impair and shall be junior and subordinate to all beneficial uses in Nevada, including, but not limited to, the use of water for the maintenance and preservation of the Pyramid Lake fishery.”<sup>294</sup></li> </ul> <p>Water Rights Acquisition</p> <ul style="list-style-type: none"> <li>▪ “The secretary is authorized to acquire water and water rights...to transfer, hold, and exercise such water and water rights and related interests to assist the conservation and recovery of the Pyramid Lake fishery”<sup>295</sup></li> </ul>
<p>Authority</p>	<p>Fallon Paiute authority</p> <ul style="list-style-type: none"> <li>▪ “All water rights appurtenant to the Reservation that are served by the Newlands Reclamation Project, including Newlands Recreation Project water rights added to the Reservation under subsection (A) of this section, may be used for irrigation, fish and wildlife, municipal and industrial, recreation, or water quality purposes, or for any other beneficial use subject to applicable laws of the State of Nevada.”<sup>296</sup></li> </ul> <p>Pyramid Lake Tribal Authority</p> <ul style="list-style-type: none"> <li>▪ “The Pyramid Lake Tribe shall have the right to change points of diversion, place, means, manner, or purpose of use of the water so decreed on the reservation.”<sup>297</sup></li> </ul>
<p>Definitions</p>	<p>-</p>
<p>Marketing</p>	<p>Wetlands Water Acquisition provision (federal authority)</p> <ul style="list-style-type: none"> <li>▪ Authorization “to acquire by purchase or other means water and water rights, with or without the lands to which such rights are appurtenant, and to transfer, hold, and exercise such water and water rights and related interests to sustain, on a long-term average, approximately 25,000 acres of primary wetland habitat”<sup>298</sup></li> </ul> <p>Off reservation Marketing Authorized</p>

<sup>292</sup> These two settlements have been consolidated because the two settlements were enabled by the same piece of legislation, and the actual settlement terms of the agreements were not accessed. Truckee-Carson-Pyramid Lake Water rights Settlement Act and Fallon Paiute Shoshone Indian Tribes Water Rights Settlement Act of 1990. Pub. L. No. 101-618, title I & II, 104 Stat. 3289, as amended, Pub. L. No. 109-221, Sec. 104, 120 Stat. 336 (2006).

<sup>293</sup> Section 204.(b)(2)(E)

<sup>294</sup> *Id.* at (c)(1)(H)

<sup>295</sup> Action mandated to occur with consultation with the Pyramid Lake Tribe. *Id.* at Section 207. (c)(1)

<sup>296</sup> Section 103. (E)

<sup>297</sup> *Id.* at (c)(4)

<sup>298</sup> Section 206. (a)(1)

## 9) Fort Hall Indian Water Rights Settlement (1990)

Tribe(s) – Shoshone-Bannock	Idaho, 1990
Instream Flow Language & Authority	<p>“Instream flows on and adjacent to the Reservation”<sup>299</sup></p> <ul style="list-style-type: none"> <li>▪ “The tribes shall be entitled to use storage water accrued to the federal contract storage space listed in Art.7.3.1 not used, exchanged, or rented pursuant to Art7.3 for instream flows for river reaches on or adjacent to the Reservation”</li> <li>▪ “The Tribes shall have the right to use the natural flows of all waters arising wholly within and traversing only reservation lands for instream flows.”</li> <li>▪ “The Tribes shall have the right to use up to 15,000 AFY from the storage water rights described in Art. 7.1.19 and 7.1.20 for instream flows in reaches of the Blackfoot River.”</li> </ul> <p>Instream flow language in the Congressional legislation</p> <ul style="list-style-type: none"> <li>▪ The Tribes shall have the right to use any or all water accruing to federal storage space held in trust for the Tribes under the Michaud Act for instream flows for river reaches on or adjacent to the Reservation...<sup>300</sup></li> </ul> <p>Instream Flow Disclaimer</p> <ul style="list-style-type: none"> <li>▪ “The Tribes and the United States reserve the right to assert federal reserved water rights claims for instream flows in the Salmon River Basin, the Clearwater River basin, and the Snake River basin below Hells Canyon Dam...”<sup>301</sup></li> </ul>
Definitions	<p>“Beneficial Use”</p> <ul style="list-style-type: none"> <li>- “Means any use of water for DCMI, irrigation, hydropower generation, recreation, stockwatering, fish propagation and <i>instream flow uses</i> as well as any other uses that provide a benefit to the user of the water.”<sup>302</sup></li> </ul> <p>“Instream Flow”</p> <ul style="list-style-type: none"> <li>- “Means a quantity of water in a stream reach to maintain or to enhance the integrity of an ecosystem.”<sup>303</sup></li> </ul> <p>“Stockwater”</p> <ul style="list-style-type: none"> <li>- “Means the use of water solely for livestock or <i>wildlife</i> consumption including associated losses”<sup>304</sup></li> </ul>
Marketing	<p>Off reservation marketing authorized</p> <p>“Shoshone-Bannock Water Bank”</p> <ul style="list-style-type: none"> <li>- Means the Tribal water bank established pursuant to Idaho Code 42-1761 to provide for rental of stored water outside the reservation.”<sup>305</sup></li> </ul> <p>“The Tribes may transfer or lease within the reservation all or any portion of the tribal water rights set forth... if it is to any beneficial use...”<sup>306</sup></p> <ul style="list-style-type: none"> <li>▪ Subject to notice requirements<sup>307</sup></li> </ul>
Enforcement	<p>“The Tribes or the United States shall install or cause to be installed monitoring devices for administration of Tribal water rights within the reservation to the same extent as required of other water users in Idaho.”<sup>308</sup></p>

<sup>299</sup> Fort Hall Indian Water Rights Settlement Agreement of 1990 Art. 7.4

<sup>300</sup> Fort Hall Indian Water Rights Act of 1990. Pub. L. No. 101-602, 104 Stat. 3059 (1990). At Section 6.(c)

<sup>301</sup> Supra note 50, at Art. 11.5

<sup>302</sup> *Id.* at Art. 4.8

<sup>303</sup> *Id.* at Art.4.28

<sup>304</sup> *Id.* at Art.4.52

<sup>305</sup> *Id.* at Art.4.47

<sup>306</sup> *Id.* at Art. 7.5

<sup>307</sup> *Id.* at Art. 8.5

<sup>308</sup> *Id.* at Art. 8.2.8



**10) Northern Cheyenne Water Rights Compact (1991)**

<b>Tribe(s) – Northern Cheyenne</b>	<b>Montana, 1991</b>
Instream Flow Language	none
Authority	<p>Purpose</p> <ul style="list-style-type: none"> <li>▪ “The Tribe may authorize use of the Tribal Water Right on the Reservation for any purpose without regard to whether such use is beneficially defined under state law”<sup>309</sup></li> <li>▪ Quantification generally phased as a right to “divert or use” implying discretionary authority.<sup>310</sup></li> <li>▪ “Off the Reservation, any use of the Tribal Water Right shall comply with Article III.B.”<sup>311</sup> i.e. subject to state law and no adverse effect clause<sup>312</sup></li> </ul> <p>Subject to state based allocations and the no adverse effect clause</p> <ul style="list-style-type: none"> <li>▪ “The Tribe has a right to divert or use or permit the diversion or use from Rosebud Creek and its Tributaries, for any purpose... The Tribe may not exercise the water right set forth in this paragraph in a manner that adversely affects a water right finally decreed in any general adjudication of the Rosebud Creek basin or, ... a water right recognized under state law...”</li> </ul>
Definitions	none
Marketing	<p>Off reservation marketing allowed but subject to state law and no adverse effect.<sup>313</sup></p> <ul style="list-style-type: none"> <li>▪ Consumptive vs. non-consumptive leasing options not specified</li> </ul>

<sup>309</sup> Id. at Art. II.D.

<sup>310</sup> Montana, Northern Cheyenne Tribe and the United States of America Water Rights Compact, MCA 85-20-301. At Art.II.A.2.

<sup>311</sup> Id. at Art.II.D.

<sup>312</sup> Id. at Art.III.B.2. & 4.iii.

<sup>313</sup> Id.

**11) Jicarilla Apache Water Settlement (1992)**

Tribe(s) – Jicarilla Apache	New Mexico, 1992
Instream Flow Language	<p>“Fish and Wildlife Coordination”</p> <ul style="list-style-type: none"> <li>▪ The Tribe and the Department of the Interior agree to work with the state of New Mexico and effected water users to assure... quantities and timing of deliveries to provide for downstream flows necessary to maintain and protect existing fisheries and other resources, with particular emphasis on endangered species.”<sup>314</sup></li> </ul>
Authority	<p>Purpose</p> <ul style="list-style-type: none"> <li>▪ “The Tribe will be free to determine both the use to which the water will be applied and the need to construct any facilities”<sup>315</sup></li> </ul> <p>“Water Conservation”</p> <ul style="list-style-type: none"> <li>▪ “The Tribe shall develop an effective water conservation program which shall contain definite water conservation objectives, appropriate economically feasible water conservation measures, and time schedules for meeting those objectives.”<sup>316</sup></li> </ul>
Definitions	None
Marketing	<p>Marketing off reservation</p> <ul style="list-style-type: none"> <li>▪ “In order to preserve opportunities for Indian reservation development while at the same time allowing for other economical water resources development, it is the intent of this contract that the Jicarilla Apache Tribe, if it does not or cannot put the water supply secured to it under this contract to use, may exercise the right to market such water”<sup>317</sup></li> </ul> <p>Subcontracting limitations</p> <ul style="list-style-type: none"> <li>▪ Subcontracting water off reservation to third parties subject to the “conditions and requirements of state law”<sup>318</sup></li> </ul>

<sup>314</sup> 1992 Contract between the United States and the Jicarilla Apache Tribe, At Section 12.(b)

<sup>315</sup> *Id.* at “Explanatory Recitals” page 1

<sup>316</sup> *Id.* at Sec. 20

<sup>317</sup> *Id.*

<sup>318</sup> *Id.* at Section 11.(a)

**12) San Carlo Apache Tribe Water Rights Settlement Agreement (1992)**

<b>Tribe(s) – San Carlos Apache</b>	<b>Arizona, 1999</b>
Instream Flow Language	Special instream flow provision with stipulations <ul style="list-style-type: none"> <li>“In order to permit the Tribe to maintain permanently a pool of stored water for fish, wildlife, recreation, and other purposes, the Secretary shall designate for the benefit of the Tribe such Active Conservation Capacity behind Coolidge Dam on the Gila River in Arizona as is not being used by the Secretary to meet the obligations of San Carlos Irrigation Project for irrigation storage.”<sup>319</sup></li> </ul>
Authority	Implicit Authority to use water for instream flows within the reservation <ul style="list-style-type: none"> <li>“The Tribe and the United States acting on behalf of the Tribe shall have the permanent right to the on-Reservation Diversion and use of all the Surface Water in all the tributaries within the Reservation...including the right to fully regulate and store such water”<sup>320</sup></li> <li>“The water rights of the Tribe and the United States acting on behalf of the Tribe subject to this agreement may be used for any beneficial purpose on the reservation.”<sup>321</sup></li> </ul>
Definitions	none
Marketing	Off reservation Leasing Language <ul style="list-style-type: none"> <li>“To authorize the Tribe to lease or to enter into an option or options to lease the water to which the Tribe is entitled under the Tribal CAP Delivery Contract, as amended, within Maricopa, Gila, Graham, Greenlee, Pinal and Pima Counties for terms not exceeding one hundred years and to renew such leases.”<sup>322</sup></li> <li>Consumptive vs. non-consumptive leasing options not specified</li> </ul> Limiting language <ul style="list-style-type: none"> <li>“Any exchange of the Tribe’s CAP water supplies for water supplies in the Salt River basin upstream of modified Roosevelt Dam shall be contingent upon SRP’s agreement (which shall not be unreasonably withheld) that such exchange does not adversely affect the water rights of SRP and its shareholders’ lands within the SRRD, or SRP’s generation of energy”<sup>323</sup></li> </ul>

<sup>319</sup> San Carlo Apache Tribe Water Rights Settlement Agreement of 1999. At Section 8.2

<sup>320</sup> *Id.* at Section 4.2.1

<sup>321</sup> *Id.* at Section 4.6

<sup>322</sup> *Id.* at Section 11.1.(c)

<sup>323</sup> *Id.* at Section 12.1

**13) Fort McDowell Indian Community Water Settlement (1993)**

<b>Tribe(s) – Yavapai</b>	<b>Arizona, 1993</b>
Instream Flow Language	<p>Minimum Flow Requirement</p> <ul style="list-style-type: none"> <li>▪ “SRP shall maintain a minimum flow in the Verde River below Bartlett Dam by releasing no less than 100 cubic feet per second of water...from Bartlett Dam at all times”<sup>324</sup></li> <li>▪ Subject to appropriation in times of drought<sup>325</sup></li> </ul>
Authority	<p>Use Authority</p> <ul style="list-style-type: none"> <li>▪ “The water made available to FMIC under this agreement may be put to any beneficial use or reuse on the FMIC Reservation without restriction except to the extent restrictions are specifically set forth in this agreement”<sup>326</sup></li> </ul>
Definitions	none
Marketing	<p>Off reservation leasing authorized</p> <ul style="list-style-type: none"> <li>▪ Authorized in “Pima, Pinal, or Maricopa counties” subject to secretarial approval and 100 year term limit<sup>327</sup></li> </ul>

<sup>324</sup> Fort McDowell Indian Community Water Settlement of 1993, at 16.1. page 30 (State based responsibility)

<sup>325</sup> See e.g. “The minimum flow may be interrupted because of drought, for compliance with the provisions of Art. VIII and IX of the November 22, 1946 Agreement between the Salt River Valley Water Users’ Association and the City of Phoenix...” *Id.* at 16.2

<sup>326</sup> *Id.* at 15.

<sup>327</sup> *Id.* at 20.1

**14) Yavapai-Prescott Tribe Water Rights Settlement (1996)**

Tribe(s) – Yavapai- Prescott	Arizona, 1996
Instream Flow Language	No explicit mention of instream flow authority, consumptive use focused.
Authority	Language centers around storage, diversion, and use (undefined) <sup>328</sup>  On reservation use limitation, implicit instream flow authority <ul style="list-style-type: none"> <li>▪ “The water made available to the Tribe from the various sources under this Agreement is solely for use on the Reservation, except as otherwise provided. The water made available to the Tribe under this Agreement may be put to <i>any beneficial use</i> or reuse on the Reservation <i>without restriction.</i>”<sup>329</sup></li> </ul>
Definitions	None
Marketing	Allowed <ul style="list-style-type: none"> <li>▪ For example: explicit authority to lease “effluent” water on and off the reservation<sup>330</sup></li> <li>▪ Consumptive vs. non-consumptive leasing not specified</li> </ul>

<sup>328</sup> E.g. “The parties to this agreement, except as provided in sections 13(a) and 13(b) of the Act, recognize, ratify, confirm and declare to be valid the Tribe’s right and entitlement to store, divert and beneficially use CVID surface water pursuant to this Paragraph 6.0” Yavapai-Prescott Tribe Water Rights Settlement (1996). At Section 6.5

<sup>329</sup> *Id.* at Section 12.3

<sup>330</sup> For instance, the “effluent generated on the Reservation may either be used on the reservation or sold to off-Reservation users, in accordance with the Water Service Agreement” *Id.* at Section 4.4

**15) Warm Springs Water Rights Settlement Agreement (1997)**

Tribe(s) – Wasco and Paiute	Oregon, 1997
Instream Flow Language	<p>Recitals</p> <ul style="list-style-type: none"> <li>▪ “Whereas, the Tribes have a long history of protection of Instream Flows on the Reservation to sustain, preserve, and enhance fisheries and have as their most important objective the maintenance of healthy, viable fish stocks, both resident and anadromous, in the Deschutes Basin”<sup>331</sup></li> </ul> <p>Protection of Fish and Wildlife</p> <ul style="list-style-type: none"> <li>▪ The parties further recognize the importance of tributary waters in providing long term protections of the Deschutes River fisheries beyond the Reservation Boundaries and their mutual desire to exercise their respective authority in a cooperative manner in order to establish appropriate measures for the long term protection of the resident and anadromous fisheries<sup>332</sup></li> <li>▪ Category 1 Water in the amount of the entire natural flow of the Warm Springs River, the Whitewater River, Jefferson Creek... and their tributaries for Instream Flows to sustain and enhance the aquatic ecosystem of the Reservation for the benefit of the fish and wildlife resources of the Deschutes River Basin which shall be protected and preserved for such purposes in perpetuity.<sup>333</sup></li> </ul> <p>Seniority</p> <ul style="list-style-type: none"> <li>▪ “The Priority Date of the Tribal Reserved Water Right shall be earlier than any other water right in the Deschutes River Basin.”<sup>334</sup></li> </ul> <p>Use Authority</p> <ul style="list-style-type: none"> <li>▪ “Except for Category I water... and Category II Water... the Tribes may authorize use of the Tribal Reserved Water Right on the Reservation for any purpose.”<sup>335</sup></li> </ul> <p>Limitation</p> <ul style="list-style-type: none"> <li>▪ “No non-consumptive uses may be converted to consumptive uses”<sup>336</sup></li> </ul>
Authority	<p>Tribal Administration</p> <ul style="list-style-type: none"> <li>▪ “Water rights established under State Law and Walton Rights established pursuant to federal law or the interests of their successors within the Exterior Boundaries of the Reservation shall be administered by the Tribes.”<sup>337</sup></li> </ul>
Definitions	<p>“Instream flow”</p> <ul style="list-style-type: none"> <li>▪ “Means a quantity of water remaining in a stream”<sup>338</sup></li> </ul>
Marketing	<p>Off Reservation Use</p> <ul style="list-style-type: none"> <li>▪ “Use of the Tribal Reserved Water Right off the Reservation shall be subject to and in accordance with state, federal and tribal law”<sup>339</sup></li> <li>▪ Subject to no injury prohibition<sup>340</sup></li> <li>▪ Consumptive vs. non-consumptive leasing not specified</li> </ul>

<sup>331</sup> Confederated Tribes of Warm Springs Reservation Water Rights Settlement Agreement (1997). At 3.

<sup>332</sup> *Id.* Art. III. B.

<sup>333</sup> *Id.* at Art. IV. B. 2.

<sup>334</sup> *Id.* at Art. IV. C.

<sup>335</sup> *Id.* at Art. IV. F.

<sup>336</sup> *Id.* Art. IV. 1.

<sup>337</sup> *Id.* at Art. V.A.4.

<sup>338</sup> *Id.* at Art III. (14)

<sup>339</sup> *Id.* at Art IV.D.

<sup>340</sup> *Id.* at Art. V.B.

Enforcement	“Water Rights established under State Law and Walton Rights established pursuant to federal law or the interests of their successors within the Exterior Boundary of the Reservation shall be administered by the Tribes. Administration and enforcement of the state water rights used on the reservation shall be governed by State law.” <sup>341</sup>
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## **16) Chippewa-Cree Tribe Settlement (1999)**

<b>Tribes – Chippewa Cree</b>	<b>Montana, 1999</b>
Instream Flow Language	<p>Convoluted language and limitations on the “Fish and Wildlife Enhancement” provision</p> <ul style="list-style-type: none"> <li>▪ “Use of the Tribal water right for fish and wildlife enhancement is a consumptive use”<sup>342</sup></li> <li>▪ Qualifies that the Tribe may not make a change in use to fish and wildlife enhancement unless meeting several stipulations, including that any relocation not impact a state appropriator with seniority.<sup>343</sup></li> </ul> <p>Bonneau Reservoir</p> <ul style="list-style-type: none"> <li>▪ “Minimum Pool” requirements shall be established by the Tribe<sup>344</sup></li> </ul>
Authority	<p>Administrative authority</p> <ul style="list-style-type: none"> <li>▪ The tribe reserves authority to administer the Tribe’s water rights both on and off reservation, with the stipulation that issues that may impact state and federal law will be resolved in a “court of competent jurisdiction”<sup>345</sup></li> </ul> <p>Implied instream flow use authority</p> <ul style="list-style-type: none"> <li>▪ “The Tribal Water Right may be used by the Tribe or persons authorized by the Tribe”<sup>346</sup></li> </ul> <p>Authority Limitation,</p> <ul style="list-style-type: none"> <li>▪ “The Tribal Water Right shall be subordinate to water rights recognized under state law upstream from any point on the reservation with a priority date before the ratification of this Compact.”<sup>347</sup></li> </ul>
Definitions	<p>“Fish and Wildlife Enhancement”</p> <ul style="list-style-type: none"> <li>- “Means the use of water to improve existing habitat for fish and wildlife use, protection, conservation or management through physical or operational modifications or impoundments”<sup>348</sup></li> </ul> <p>“Non Consumptive Use”</p> <ul style="list-style-type: none"> <li>- “Means a use of water that does not cause a reduction in the source of supply and in which substantially all of the water returns without delay to the source of supply...”<sup>349</sup></li> </ul>

<sup>341</sup> *Id.* at Art. V. A. 4.

<sup>342</sup> Chippewa Cree Water Rights Compact 1997, MCA 85-20-601. At Art III.A.4..

<sup>343</sup> *Id.* In this instance, impact is inferred, “The tribe may not make a change in use or transfer to fish and wildlife enhancement... provided that... the new point in diversion or place of use does not change to a place from upstream of to downstream of, or from downstream of to upstream of the location of the point of diversion of a water right recognized under state law with a priority date before the date the Compact is ratified by the State and the Tribe, whichever date is later.”

<sup>344</sup> *Id.* at Art. IV.B.1.A. page 26

<sup>345</sup> *Id.* at Art. IV.A.2. page 20

<sup>346</sup> *Id.*

<sup>347</sup> *Id.* at Art.IV.A.8. page 26

<sup>348</sup> *Id.* at Art.II.22. page 3

<sup>349</sup> *Id.* at Art II.35. page 4

Marketing	<p>Authorization for marketing off reservation<sup>350</sup></p> <ul style="list-style-type: none"> <li>▪ “Off reservation Changes in Use or Transfer of the Tribal Water Right”</li> <li>▪ Subject to limitations: e.g. term limit (100 years), no permanent alienation, no transfers outside the Missouri river drainage/watershed, AND special provisions that require the application and authorization for the use, change in use, or transfer under <i>state law</i>.</li> </ul>
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### **17) Shivwits Band of Paiute Water Rights Settlement Agreement (2001)**

<b>Tribe(s) – Shivwits Band of Paiute</b>	<b>Utah, 2001</b>
Instream Flow Language	<p>Explicit Instream flow reservations in the Federal enabling law</p> <ul style="list-style-type: none"> <li>▪ “The Santa Clara Project shall release instream flow water from the Gunlock Reservoir into the Santa Clara River for the benefit of the Virgin Spinedace”<sup>351</sup></li> </ul>
Authority	<p>Broad reservation of Authority</p> <ul style="list-style-type: none"> <li>▪ “The Shivwits Band may use the Shivwits Water Rights for any use permitted by Tribal or Federal Law”<sup>352</sup></li> </ul>
Definitions	none
Marketing	<p>“Use or Lease”</p> <ul style="list-style-type: none"> <li>▪ “The Shivwits Band may use or lease the Shivwits Water Right for either or both of the following: (1) For any purpose permitted by Tribal or federal law anywhere on the Shivwits Band Reservation... (2) For any beneficial use off the Shivwits Reservation in accordance with the St. George Water Reuse Agreement, the Santa Clara Project Agreement, the Settlement Agreement and all applicable Federal and State law”</li> </ul>

<sup>350</sup> *Id.* at Art. IV.A.7.b. page 21

<sup>351</sup> Shivwits Band of Paiute Indian Tribe of Utah Water Rights Settlement Act, Pub. L. No 106-263, 114 STAT. 741. At Section 6. (b).

<sup>352</sup> Shivwits Band of Paiute Indian Tribe of Utah Water Rights Settlement Agreement. At Section 3.2



**18) Fort Belknap Compact (2001)**

<b>Tribe(s) – Gros Ventre and Assiniboine</b>	<b>Montana, 2001</b>
Instream Flow Language	None
Authority	<p>Purposes</p> <ul style="list-style-type: none"> <li>▪ “The water rights...of this article III may be used within the reservation for any purpose allowed by Tribal and federal law, including fish and wildlife purposes, provided that, Non Exempt new Development, Change in Use, or Transfer of any portion of the Tribal Water Right, is subject to the terms and conditions of section A of Art. IV”<sup>353</sup></li> <li>▪ Exemptions allow: <ul style="list-style-type: none"> <li>○ “Use of the Tribal Water Right quantified for the People’s Creek Basin within the Reservation for any purpose allowed by Tribal or federal law.”</li> </ul> </li> <li>▪ Non Exempt developments/changes/transfers <ul style="list-style-type: none"> <li>○ Subject to No Adverse Effect Clause (No harm/injury to senior state based appropriations)<sup>354</sup></li> </ul> </li> </ul> <p>“Non-irrigation purposes”<sup>355</sup></p> <ul style="list-style-type: none"> <li>▪ “The Tribes have the right to use or authorize the use of water for non-irrigation purposes developed prior to the Effective Date of this Compact in the Milk River Basin 40J within the reservation”</li> <li>▪ “Non-irrigation purposes” not explicitly defined</li> </ul>
Definitions	None
Marketing	<p>Off reservation marketing authorized</p> <ul style="list-style-type: none"> <li>▪ Establishment of the Milk River Coordinating Committee (MRCC) and the Milk River Watershed Improvement Trusts/ Water Bank</li> <li>▪ Authorizes water MRCC to “allocate banked water for storage, or may market or allocate banked water to alleviate shortage... Banked water may be marketed or allocated:... to meet critical environmental needs...”<sup>356</sup></li> </ul>

<sup>353</sup> Fort Belknap-Montana Compact (2001). MCA 85-20-1001. At Art. III.A.6.

<sup>354</sup> *Id.* at Art. IV.A.5.a.

<sup>355</sup> *Id.* at Art. III.A.1.(2)d.

<sup>356</sup> *Id.* at Art. IV.C.8.

## 19) Zuni Heaven Indian Water Rights Settlement (2002)

Tribe(s) – Zuni	Arizona, 2002
Instream Flow Language	<p>Wetland Restoration project</p> <ul style="list-style-type: none"> <li>▪ “The restoration project will include aggregation of the Little Colorado, enhancement of river flows, and reintroduction and maintenance of native animal and plant species essential for religious and sustenance activities...the Zuni Tribe will use a minimum of 5,500 acre-feet of water per annum”</li> <li>▪ Sources include unappropriated surface water, acquired surface water rights</li> <li>▪ Voluntary acquisition limitation<sup>357</sup></li> </ul>
Authority	<p>Authorization of on-reservation uses</p> <ul style="list-style-type: none"> <li>▪ “The Zuni Tribe shall use water made available to it under this Settlement Agreement on the Zuni Heaven Reservation for any use it deems advisable.”<sup>358</sup></li> <li>▪ “State law does not apply”<sup>359</sup></li> </ul> <p>Authorization of off-reservation use</p> <ul style="list-style-type: none"> <li>▪ “The Zuni Tribe may use water appurtenant to its Zuni Fee Lands outside the Zuni Heaven Reservation for any purpose permissible under state law”<sup>360</sup></li> </ul>
Definitions	<p>“Wetland Restoration Project”</p> <ul style="list-style-type: none"> <li>▪ “Means the restoration to near original condition and the maintenance of wetland areas on the Zuni Heaven Reservation, and may include a reservoir or other short-term storage facility.”<sup>361</sup></li> </ul>
Marketing	<p>Marking limitations</p> <ul style="list-style-type: none"> <li>▪ “The Zuni Tribe or the United States shall not, however sell, lease, transfer, or transport water made available to it for use on the Zuni Heaven Reservation to any other place...” provided severance under state law.<sup>362</sup></li> </ul>
Other	<p>Groundwater withdrawal enforcement<sup>363</sup></p> <ul style="list-style-type: none"> <li>▪ Pumping Protection Agreement Exception<sup>364</sup></li> </ul>

<sup>357</sup> See e.g. “It is the objective of the parties to provide for the Zuni Tribe’s acquisition of surface water on a voluntary basis so that the wetland restoration goals for the Zuni Reservation will be met without *disrupting* existing surface water or underground water use by other water users” Amended to the Zuni Indian Tribe Water Rights Settlement Agreement in the Little Colorado River Basin. At Art. 1.8.

<sup>358</sup> *Id.* at Art. 8.2

<sup>359</sup> *Id.*

<sup>360</sup> *Id.* at Art. 8.1

<sup>361</sup> *Id.* at Art. 2.42

<sup>362</sup> *Id.* at Art. 8.2

<sup>363</sup> See e.g. “The Zuni Tribe and the United States retain claims against new non-exempt wells or withdrawals from those new wells, under state or federal law, for groundwater rights and for injury to surface water rights, injury to groundwater rights and injury to water quality” *Id.* at Art. 5.7.

<sup>364</sup> Allows landowners to enter into an agreement limiting their withdrawal in exchange for a claim waiver. *Id.* at Art. 5.7.B.

## 20) Tohono O’odham Settlement Agreement (2003)

Tribe(s) – Tohono O’odham	Arizona, 2003
Instream Flow Language	Consumptive Use focused
Authority	<p>On reservation Use</p> <ul style="list-style-type: none"> <li>▪ “The Nation may use water listed in paragraph 4.1 for any use”<sup>365</sup></li> </ul> <p>Express limitation of authority</p> <ul style="list-style-type: none"> <li>▪ No consent to jurisdiction over non-Indians outside the Reservation “This Agreement should not be construed as a commercial dealing, contract, lease or other arrangement that creates a consensual relationship between any non-Indian Party and the Nation so as to provide a basis for the Nations legislative, executive or judicial jurisdiction or authority over non-Indian Parties to this agreement under <i>Montana v. United States</i>.”<sup>366</sup></li> </ul>
Definitions	None
Marketing	<p>Off reservation leasing</p> <ul style="list-style-type: none"> <li>▪ “The Nation may use water listed in paragraph 4.1. outside the Nation’s Reservation and within the State as follows: ... water derived from Marketable Credits may be leased, exchanged, forborne or otherwise transferred by the Nation for any direct or indirect use outside the State”<sup>367</sup></li> <li>▪ Cannot be leased out of state</li> <li>▪ 100 year term limit<sup>368</sup></li> </ul>

<sup>365</sup> Tohono O’odham Tribal Water Settlement Agreement. At Art. 4.2.

<sup>366</sup> *Id.* at Art. 18.11.

<sup>367</sup> *Id.* at Art. 4.4.

<sup>368</sup> *Id.* at Art. 11.1.

## 21) Nez Perce Tribe Water Rights Settlement (2004)

Tribe(s) – Nez Perce Tribe	Idaho, 2004
Instream Flow Language	<p>Salmon/Clearwater Off Reservation Instream Flows</p> <ul style="list-style-type: none"> <li>▪ “Idaho will establish, pursuant to state law, instream flow water rights, to be held by the Idaho Water Resource Board (IWRB), on the streams within the Salmon and Clearwater Basins”<sup>369</sup></li> <li>▪ “The IWRB will establish pursuant to state law instream flow water rights...in amounts that are negotiated by the parties in consultation with local communities”<sup>370</sup></li> <li>▪ “In negotiation of the quantification of instream flows, the parties will take into consideration the present hydrograph and the status of state-granted water rights on each stream.”<sup>371</sup></li> <li>▪ “The instream flows will be subordinated to water rights existing on or before the date of the agreement and to future domestic, commercial, industrial, and municipal water rights”<sup>372</sup></li> </ul> <p>Salmon/Clearwater Instream Flow Program</p> <ul style="list-style-type: none"> <li>▪ Language detailing Cooperative Agreements, Monitoring, and Enforcement responsibility<sup>373</sup></li> </ul> <p>Snake River Flow Component</p> <ul style="list-style-type: none"> <li>▪ Incidental take coverage extended to federal and private actions, minimum flow establishment, and articulation of a flow augmentation program.<sup>374</sup></li> <li>▪ E.g. “The minimum instream flows established by the Swan Falls Agreement shall be decreed in the SRBA to the Idaho Water Resources Board”</li> </ul> <p>Snake River Waiver</p> <ul style="list-style-type: none"> <li>▪ “The United States on behalf of the Nez Perce Tribe waive and release (1) all claims for water rights within the Snake River Basin in Idaho;(2) injuries to such water rights; and (3) injuries to the Tribes treaty rights to the extent that such injuries result or resulted from flow modifications or reductions in the quantity of water available in the Snake River Basin.”<sup>375</sup></li> </ul> <p>Enforcement language</p> <p>“IDWR will regulate the delivery of instream flow water rights and protect from diversion water to satisfy such instream flows through the designated stream reaches, subject to priority and to the subordinations specified in section II.A.3.”<sup>376</sup></p>
Authority	<p>Quantification limitations</p> <ul style="list-style-type: none"> <li>▪ “The Tribe’s on-reservation, <i>consumptive</i> use reserved water right will be quantified in the amount of 50,000 AF per year, with a priority date of 1855. This water right will be established so as to allow for irrigation, DCMI, hatchery and cultural uses, at the discretion of the tribe”<sup>377</sup></li> </ul>
Definitions	none

<sup>369</sup> Mediators Term Sheet attached to the Snake River Water Rights Act of 2004. Pub. L. No. 108-447, 118 Stat. 2809. At Art. II.A.1.

<sup>370</sup> *Id.*

<sup>371</sup> *Id.* at Art.II.A.2.

<sup>372</sup> *Id.* at Art.II.A.3.

<sup>373</sup> *Id.* at Art.II.B.1.a.

<sup>374</sup> *Id.* at Art.III.

<sup>375</sup> *Id.* at Art IV.D.1.

<sup>376</sup> *Id.* at Art.IIA.9.

<sup>377</sup> *Id.* at Art.I.A.

Marketing	<p>Off reservation marketing language</p> <ul style="list-style-type: none"> <li>▪ “The Tribe may rent this water within the State of Idaho through the state water bank of water banks.”<sup>378</sup></li> <li>▪ “The Tribe without further approval of the Secretary [of the Interior], may lease water to which the Tribe is entitled under the consumptive use reserved water right through any State water bank...subject to the same rules and requirements that govern any other lessor of water to the water bank.”<sup>379</sup></li> </ul>
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## **22) Gila River Indian Community Water Rights Settlement (2004)**

<b>Tribe(s) – Gila River</b>	<b>Arizona, 2004</b>
Instream Flow Language	Consumptive Use focused
Authority	<p>Implicit Authority to allocate water for instream purposes</p> <ul style="list-style-type: none"> <li>▪ “The Community shall have the right, subject to applicable Federal law, to allocate Water to all users on the Reservation pursuant to the Water Code and manage, regulate, and control the use on the Reservation and on Off-Reservation Trust Land of: (1) all of the Water Rights granted or confirmed to the Community by this Agreement, and (2) the right to an allocation of water for irrigation purposes recognized by Subparagraph 4.1.1 for the benefit of allotted lands within the Reservation.”<sup>380</sup></li> </ul>
Definitions	<p>"Use"</p> <ul style="list-style-type: none"> <li>- “Shall mean any beneficial use including instream flows, Recharge, underground storage, recovery or any other use recognized as beneficial under applicable law.”<sup>381</sup></li> </ul>
Marketing	<p>Authority to lease</p> <ul style="list-style-type: none"> <li>▪ “The Community shall have the sole authority, subject to Secretaries approval pursuant to section 205(a)(2), to lease, distribute, exchange, or allocate the CAP water described in this subsection”<sup>382</sup></li> </ul> <p>Consumptive use focused leasing agreements</p> <ul style="list-style-type: none"> <li>▪ E.g. “The Community shall lease to any or all of the Cities, and the Cities shall lease from the Community, forty-one thousand (41,000) acre-feet of the CAP Indian Priority Water per year for a term of one hundred (100) years from the later of: (1) January 1, 2005, or (2) thirty (30) days after the Enforceability Date.”<sup>383</sup></li> </ul>

<sup>378</sup> *Id.*

<sup>379</sup> Snake River Water Rights Act of 2004, Sec. 7.(g).

<sup>380</sup> 2005 Amended and Restated Gila River Water Settlement Agreement, Art. 23.1

<sup>381</sup> *Id.* at Art. 2.1.76

<sup>382</sup> Gila River Indian Community Water Rights Settlement, Arizona Water Settlements Act of 2004. Pub. L. No. 108-451, 118 Stat. 3478. At Section 204(b)(2)

<sup>383</sup> *Supra* note 70, at Art. 17.1

### 23) Soboba Indian Water Rights Settlement (2006)

Tribe(s) – Soboba	California, 2008
Instream Flow Language	None
Authority	<p>The Tribal Water Right quantified consumptively; solely by the amount the tribe can “pump” (Groundwater focused)</p> <ul style="list-style-type: none"> <li>▪ “The prior and paramount right, superior to all others, to pump 9,000 AFA from the Basin for any use on the reservation and lands now owned or hereafter acquired by the Soboba Tribe”<sup>384</sup></li> </ul>
Definitions	None
Marketing	<p>Leasing</p> <ul style="list-style-type: none"> <li>▪ “The Soboba Tribe may enter into contracts and options to lease or contracts and options to exchange water made available to it under this settlement agreement, or enter into contracts and options to postpone existing water users or postpone undertaking new or expanded water uses. Any such water thereby made available to others shall only be used by participants, or other users within the area of, the WMP.”<sup>385</sup></li> </ul>

<sup>384</sup> Soboba Band of Luiseno Indians Settlement. At Art 4.1.A

<sup>385</sup> *Id.* at Art.4.3.C

## 24) Crow Tribe Water Rights Compact (1999)

Tribe(s) – Crow	Montana, 2007
Instream Flow Language	<p>Bighorn Lake Instream Flow<sup>386</sup></p> <ul style="list-style-type: none"> <li>▪ “All other water” outside MT Power Company allocations and the Tribes reserved rights shall be used for “flood control, production of power, maintenance of instream flows, maintenance of lake levels and carryover storage”</li> </ul> <p>"Streamflow and Lake Level Management Plan"<sup>387</sup></p> <ul style="list-style-type: none"> <li>▪ MT legislature intent to “provide enforceable mechanisms that protect the long term biological viability of the blue ribbon wild trout fishery on the Bighorn River from the Yellowtail Afterbay Dam to the Two Leggins diversion.”<sup>388</sup></li> </ul>
Authority	<p>Reserved Water Right Purposes and Limitations</p> <ul style="list-style-type: none"> <li>▪ Subject to Article IV, “the Tribal Water Right may be used within the reservation for any purpose allowed by Tribal and federal Law”<sup>389</sup></li> <li>- E.g. “The Tribe may change the source of water from the Natural Flow of the Bighorn River to surface flow or storage of any tributary within the Bighorn River Basin within the Reservation...subject to the terms and conditions in Section C.2. (a), of Article IV.”<sup>390</sup></li> <li>▪ Article IV = No adverse effect to state recognized appropriations</li> </ul>
Definitions	<p>“Natural Flow”<sup>391</sup></p> <ul style="list-style-type: none"> <li>- “Means water that would exist in the Bighorn River and its tributaries in the absence of human intervention”</li> </ul>
Marketing	<p>Authorized<sup>392</sup></p> <ul style="list-style-type: none"> <li>▪ Subject to “no adverse effect”</li> </ul>

<sup>386</sup> Crow Compact, MCA 85-20-901. At Art.III.A.1.b.2. pg. 5.

<sup>387</sup> *Id.* at Art. III.A.7.

<sup>388</sup> *Id.* at Art.III.A.7.

<sup>389</sup> *Id.* at Art III.B.5.

<sup>390</sup> *Id.*

<sup>391</sup> Art. II.15.

<sup>392</sup> Art. III.C.2.c.

## 25) Navajo Nation Indian Water Rights Settlement (2009)

Tribe(s) – Navajo	New Mexico, 2009
Instream Flow Language	Consumptive use focused <ul style="list-style-type: none"> <li>▪ e.g. “Reserved rights for historic, existing and future municipal, industrial, commercial and domestic uses”<sup>393</sup></li> </ul>
Implied Authority	On reservation authority <ul style="list-style-type: none"> <li>▪ “The Navajo Nation’s water rights, described in subparagraph 3(a), which are to be serviced under the Settlement Contract as described in subparagraphs (a) and (b) of this paragraph, may be used for non-irrigation purposes or transferred to other places of use”<sup>394</sup></li> <li>▪ Subject “to (vii) no showing is made to and accepted by the Court pursuant to subparagraph 5(e)(2) that a change would or does impair other water rights in the San Juan River Basin in New Mexico.”<sup>395</sup></li> </ul>
Definitions	None
Marketing	Subcontracting of Navajo CAP water authorized <ul style="list-style-type: none"> <li>▪ “The Nation may enter into subcontracts for the delivery of project water under the contract to third parties for any beneficial use in the state of New Mexico”<sup>396</sup></li> <li>▪ Subject to settlement contract conditions, secretarial approval, 99-year term limit, no alienation, etc.</li> </ul> Water Leases not Requiring Subcontracting <ul style="list-style-type: none"> <li>▪ “The Nation may lease, contract, or otherwise transfer to another party or another purpose or place of use in the state of New Mexico... a water right that... is decreed to the Nation under the Agreement; and is not subject to the contract”<sup>397</sup></li> <li>▪ Consumptive vs. non-consumptive leasing options not specified</li> </ul>

<sup>393</sup> Partial Final Judgment and Decree of the Water Rights of the Navajo Nation, No. CIV 75-184, Section 8. Pg. 26

<sup>394</sup> San Juan River Basin in New Mexico Navajo Nation Water Settlement Agreement. At Art. 5 (e)

<sup>395</sup> *Id.*

<sup>396</sup> Navajo Nation Water Settlement & Northwestern New Mexico Rural Water Projects Acts of 2009, Pub. L. No. 111-11, Sec. 10701, 123 Stat. 991 (2009). At Part IV Section 10701. (c)

<sup>397</sup> *Id.* at (d)(1)(A)



## 26) White Mountain Apache Tribal Water Rights Settlement<sup>398</sup> (2009)

<b>Tribe(s) – White Mountain Apache</b>	<b>Arizona, 2012</b>
Instream Flow Language	None
Authority	<p>Tribal Authority</p> <ul style="list-style-type: none"> <li>▪ “The Tribe shall have the sole authority to lease, distribute, exchange, or allocate the Tribal CAP water described in paragraph (1).”<sup>399</sup></li> <li>▪ Subject to secretarial approval</li> <li>▪ “The Tribe may use tribal CAP water on or off the reservation for any purpose”<sup>400</sup></li> </ul> <p>Quantification in terms of max diversion amounts<sup>401</sup></p>
Definitions	<p>“Use”</p> <ul style="list-style-type: none"> <li>▪ “Shall mean any beneficial use including instream flows, recharge, underground storage, recovery or any other use recognized as beneficial under applicable law.”<sup>402</sup></li> </ul>
Marketing	<p>Marketing expressly authorized, albeit limited to the CAP allocation<sup>403</sup></p> <ul style="list-style-type: none"> <li>▪ “The WMAT may, on approval of the Secretary, enter into contracts or options to lease, contracts to exchange, or options to exchange WMAT CAP Water within Maricopa, Pinal, Pima and Yavapai counties, Arizona, providing for the temporary delivery to any individual or entity of any portion of the WMA T CAP Water”<sup>404</sup></li> <li>▪ Subject to lease payments for “CAP Fixed OM&amp;R Charges and all CAP Pumping Energy Charges associated with the leased water”</li> <li>▪ Consumptive vs. non-consumptive leasing options not specified</li> </ul>

<sup>398</sup> Amended and Restated White Mountain Apache Tribe Water Rights Quantification Agreement

<sup>399</sup> White Mountain Apache Tribe Quantification Act of 2010, Pub. L. No. 111-291, title III, 124 Stat. 3064, 3073. At Section 305. (b)(2)

<sup>400</sup> *Id.* at Section 306. (a)(5)

<sup>401</sup> See e.g. “Divert for Use,” *Supra* note 138, at 4.1.2, 5.3.

<sup>402</sup> *Id.* at Section 2.73

<sup>403</sup> “Except for Use of WMAT CAP Water as provided in Paragraph 7.0, no Water available for Use by the WMAT or by the United States acting in its capacity as trustee for the WMA T under this Agreement and the Act may be sold, leased, transferred or used outside the boundaries of the Reservation or Off-Reservation Trust Land other than pursuant to an exchange.” *Id.* at section 4.7

<sup>404</sup> *Id.* at Section 7.4

## 27) Duck Valley Water Rights Settlement<sup>405</sup> (2010)

<b>Tribe(s) – Shoshone-Paiute</b>	<b>Nevada, 2009</b>
Instream Flow Language	None
Authority	<p>Authority</p> <ul style="list-style-type: none"> <li>▪ Quantification limited to consumptive terms<sup>406</sup></li> <li>▪ “The Tribe shall have the right to the entire flow of all springs and creeks originating within the exterior boundaries of the reservation”<sup>407</sup></li> </ul> <p>Conflicting Implementation language</p> <ul style="list-style-type: none"> <li>▪ Compromised seniority for limiting upstream appropriations<sup>408</sup></li> </ul> <p>Federal enabling act focused on funding/appropriations/funding management</p> <ul style="list-style-type: none"> <li>▪ Funding authorization for Fish and Wildlife Purposes<sup>409</sup></li> </ul>
Definitions	None
Marketing	<p>Off reservation use authorized<sup>410</sup></p> <ul style="list-style-type: none"> <li>▪ “The Tribe may also use its water right, or authorize others to use its water right off the reservation”</li> <li>▪ Subject to state law</li> </ul> <p>Tribal Marketing Exception</p> <ul style="list-style-type: none"> <li>▪ “Notwithstanding any language in the Agreement to the contrary, nothing in this subtitle authorizes the Tribe to use or authorize others to use the tribal water rights off the reservation”</li> </ul>

<sup>405</sup> Agreement To Establish the Relative Water Rights of the Shoshone-Paiute Tribes of the Duck Valley Indian Reservation and the Upstream Water Users, East Fork of the Owyhee River (2010).

<sup>406</sup> The settlement quantification language gives broad authority, however may be limited to consumptive use discretion as it is discussed in terms of consumptive use, i.e. “The Tribe may divert, consume and store its water, or authorize others to divert, consume and store tribal water, up to the full tribal allocation, for any purpose that may be authorized by the governing body of the tribe, consistent with this Agreement” Art.II.1e.

<sup>407</sup> Art. III.1.a.

<sup>408</sup> See e.g. “The parties agree that the respective water rights of the Tribe and the Upstream Water Users shall be administered without regard to priority dates” Art. V.1.

<sup>409</sup> See e.g. “The Tribes may use amounts from the Development Fund for any of the following purposes...(iv) To restore or improve fish and wildlife habitat; (v) For fish or wildlife production, water resource development...” Section 10807. (b)(2)(B)

<sup>410</sup> Art. III.1.f.

## 28) Taos Pueblo Water Rights Settlement (2012)

Tribe(s) – Taos Pueblo	New Mexico, 2010
Instream Flow Language	<p>“No effects on natural ponds or lakes”</p> <ul style="list-style-type: none"> <li>▪ “Nothing in this Settlement Agreement shall be construed as authorizing any human diversion or consumption of water from or affecting any natural ponds or lakes within the Blue Lake Wilderness Area”<sup>411</sup></li> </ul> <p>Buffalo Pasture Protections</p> <ul style="list-style-type: none"> <li>▪ “Restoration, preservation, and protection of the Buffalo Pasture have been central negotiation goals...the Pueblos development and implementation of the Buffalo Pasture Recharge Project...to restore and maintain surface and subsurface water levels within the Buffalo Pasture...the limitation of groundwater diversions and consumption from certain existing Town and EPWSD municipal wells as described in Article 6...”<sup>412</sup></li> <li>▪ Pumping limitations/regulation<sup>413</sup></li> <li>▪ Offset and mitigation requirements<sup>414</sup> <ul style="list-style-type: none"> <li>○ “The parties will not be liable or obligated for any instream flow protection so long as they offset their surface water depletion effects resulting from their Future Groundwater Diversions as set forth in Art. 7.”<sup>415</sup></li> </ul> </li> </ul> <p>“Instream Flows”</p> <ul style="list-style-type: none"> <li>- Subject to the other provisions of this Settlement Agreement, the Pueblo shall be entitled to change the place and purpose of use and point of diversion of any portion of its HIA Right available for exercise... to the maintenance of instream flows on Pueblo Lands to meet traditional or cultural needs. Such instream flows shall not impair the water rights of any party.”<sup>416</sup></li> </ul>
Authority	<p>Water Uses</p> <ul style="list-style-type: none"> <li>▪ “Regardless of the means used for quantifying the Pueblo’s water rights the Pueblo may devote such rights to any use.”<sup>417</sup></li> <li>▪ Changes subject to non impairment of state recognized allocations<sup>418</sup></li> </ul>
Definitions	<p>“Buffalo Pasture”</p> <ul style="list-style-type: none"> <li>- Means the natural wetland...which has cultural and religious significance to the Pueblo”<sup>419</sup></li> </ul>
Marketing	<p>Off reservation marketing authorized</p> <ul style="list-style-type: none"> <li>▪ “The Pueblo may market water rights secured to it under this Settlement Agreement and the partial Final Decree”<sup>420</sup></li> </ul> <p>Limitations</p> <ul style="list-style-type: none"> <li>▪ Subject to the Secretary of the Interior approval<sup>421</sup></li> <li>▪ Off reservation marketing subject to state law<sup>422</sup></li> <li>▪ Off reservation marketing “shall not Impair water rights”<sup>423</sup> <ul style="list-style-type: none"> <li>○ Implicit limitation on potential instream flow leasing</li> </ul> </li> </ul>

<sup>411</sup> Taos Pueblo Indian Water Rights Settlement 2012. At Art. 5.5.5.

<sup>412</sup> *Id.* at Art 3.2

<sup>413</sup> *Id.* at Art. 6.2.4.

<sup>414</sup> *Id.* at Art. 7.1.

<sup>415</sup> *Id.* at Art. 7.1.

<sup>416</sup> *Id.* at Art. 5.5.3.

<sup>417</sup> *Id.* at Art. 5.5.2.

<sup>418</sup> *Id.*

<sup>419</sup> *Id.* at Art. 2.8

<sup>420</sup> *Id.* at Art. 5.5.1.1

<sup>421</sup> *Id.*

<sup>422</sup> *Id.* at Art.5.5.1.3.1.

<sup>423</sup> *Id.* at Art. 5.5.1.3.2.

## 29) Amdolt Settlement (2012)

<b>Tribes - Pueblos of Nambe, Pojoaque, San Ildefonso &amp; Tesuque</b>	<b>New Mexico, 2012</b>
Instream Flow Language	None - use rights quantified in terms of diversion and consumption <sup>424</sup>
Authority	<p>Limitations on change in use</p> <ul style="list-style-type: none"> <li>▪ “Each Pueblo may change the point of diversion, place of use, or purpose of use of that Pueblo’s Existing Basin Use Rights on that Pueblo’s land, provided that the owner of any non-pueblo ground water rights which suffers impairment as a result of such change shall be entitled to compensation”<sup>425</sup></li> </ul>
Definitions	<p>“Offset water”</p> <ul style="list-style-type: none"> <li>- “Means any quantity of water provided to offset adverse stream depletion effects caused by a particular diversion of water”<sup>426</sup></li> </ul>
Marketing	<p>Transfer authorization and limitation</p> <ul style="list-style-type: none"> <li>▪ “A Pueblo may change the point of diversion, place or purpose of use of (“transfer”)</li> <li>▪ “Neither the transferee nor the transferring Pueblo shall make a priority call for any such transferred Future Basin Use against Non-Pueblo water rights”<sup>427</sup></li> </ul> <p>Marketing limitation</p> <ul style="list-style-type: none"> <li>▪ Off-reservation non-impairment of non-Pueblo groundwater rights limitation<sup>428</sup></li> </ul>

<sup>424</sup> Aamdolt Settlement Section 2012. At 2.4

<sup>425</sup> *Id.* at Section 2.3.3.

<sup>426</sup> *Id.* at Section 1.6.24, Pg. 6

<sup>427</sup> *Id.* at Section 2.4.4.4.1

<sup>428</sup> *Id.* at Section 2.3.4.

**30) CSKT Compact (2015)**

<p><b>Tribes – Confederated Salish and Kootenai Tribes</b></p>	<p><b>Montana, 2015</b></p>
<p>Instream Flow Language &amp; Authority</p>	<p>Recitals</p> <ul style="list-style-type: none"> <li>• WHEREAS, the Confederated Salish and Kootenai Tribes claim aboriginal water rights and, pursuant to said Treaty, reserved water rights to fulfill the purposes of the Treaty and the Reservation;</li> <li>• WHEREAS, the Parties agree to protect Tribal Instream Flows, Existing Uses, and Historic Farm Deliveries to Flathead Indian Irrigation Project irrigators</li> </ul> <p>“Instream Flow Rights on Reservation”<sup>429</sup></p> <ul style="list-style-type: none"> <li>• Natural Instream Flows. The Tribes have Instream Flow rights in the quantities and locations identified in the abstracts of water right attached hereto as Appendix 10.</li> <li>• FIIP Instream Flows. The Tribes have Instream Flow rights in the quantities and locations identified in the abstracts of water right attached hereto as Appendix 11.</li> <li>• Interim Instream Flows. Until such time as the Instream Flow water rights set forth in Article III.C.1.d.ii become enforceable pursuant to Article IV.C, the Tribes shall be entitled to enforce the interim Instream Flows</li> <li>• The priority date for the Instream Flow water rights set forth in this Article III.C.1.d is time immemorial.</li> <li>• Wetland Water Right. The Tribes have the right to all naturally occurring water necessary to maintain the Wetlands identified in the abstracts of water right attached hereto as Appendix 16. The priority date for the Wetland water rights set forth in this Article III.C.1.f is time immemorial.</li> </ul> <p>Instream Flow Water Rights Off of the Reservation.</p> <ul style="list-style-type: none"> <li>• Kootenai River, Swan River, Lower Clarke Fork River, North Fork of Placid Creek, Kootenai River Tributaries Aboriginal Instream Flow Rights             <ul style="list-style-type: none"> <li>○ Includes description of the flow rates, priority dates (time immemorial), purpose (maintenance and enhancement of fish habitat to benefit the instream fishery), and enforcement.</li> </ul> </li> <li>• Limitations             <ul style="list-style-type: none"> <li>○ E.g. Swan River instream flow enforcement limitations: “The Tribes, and/or the United States on behalf of the Tribes, shall be entitled to make a Call to enforce this water right only against junior users the purpose of whose rights is irrigation and whose source of supply is surface water, or against junior users the purpose of whose rights is irrigation”</li> <li>○ “Call may be made only when the average daily flow drops below the enforceable level for the previous 24-hour period”</li> </ul> </li> </ul> <p>Co-ownership of Instream and Public Recreation Water Rights Held by MFWP.</p> <ul style="list-style-type: none"> <li>• “The Tribes shall be added as a co-owner with MFWP of the Water Rights Arising Under State Law held by MFWP for Instream Flow and recreation purposes that are identified on the tables attached hereto as Appendix 28 and Appendix 29”</li> </ul>

<sup>429</sup> Art. III.C.1.d.

	<ul style="list-style-type: none"> <li>• As co-owners, the Tribes and MFWP shall meet and confer on a biennial basis, or on such other timeframe as the Tribes and MFWP may mutually agree, to discuss the exercise of the rights identified in Article III.D.4.a, with a goal of establishing a joint plan for the exercise of these rights”</li> </ul> <p>Enforceable levels</p> <ul style="list-style-type: none"> <li>• The enforceable levels of these water rights are identified in the table attached hereto as Appendix 31. The minimum enforceable level of this right is 700 cfs at the location of USGS gage #1234000 at Bonner, and 500 cfs at the location of USGS gage #12334550 at Turah.”</li> </ul> <p>Other Limitations</p> <ul style="list-style-type: none"> <li>• Call Protection <ul style="list-style-type: none"> <li>○ “Non-Irrigators. The Tribes, on behalf of themselves and the users of any portion of the Tribal Water Right set forth in this Compact, and the United States agree to relinquish their right to exercise the Tribal Water Right to make a Call against any Water Right Arising Under State Law whose purpose(s) do(es) not include irrigation”</li> </ul> </li> </ul>
Definitions	<p>““Instream Flow”</p> <ul style="list-style-type: none"> <li>• “Means a stream flow retained in a watercourse to benefit the aquatic environment. Instream Flow may include Natural Flow or streamflow affected by regulation, diversion, or other modification. A water right for Instream Flow purposes is quantified for a stream reach and measured for enforcement purposes at a specified point.”<sup>430</sup></li> </ul> <p>“Minimum Enforceable Instream Flows” or “MEFs”</p> <p>“Means the schedule of monthly minimum enforceable streamflow levels that are set forth in Appendix 3.1.”</p> <p>“Natural Flow”</p> <ul style="list-style-type: none"> <li>• “Means the rate and volume of water movement past a specified point on a natural stream, produced from a drainage area for which there have been no effects caused by diversion, storage, import, export, return flow, or changes in consumptive use.”</li> </ul> <p>“Target Instream Flows” or “TIFs”</p> <ul style="list-style-type: none"> <li>• “Means the schedule of monthly Instream Flow levels, defined for normal and wet Natural Flow years that are identified in Appendix 3.1.”</li> </ul>
Marketing	<ul style="list-style-type: none"> <li>▪ Authorized <ul style="list-style-type: none"> <li>○ “Pursuant to the terms and conditions of this Compact, the Tribes may Lease, for use on or off the Reservation, any portion of the Tribal Water Right set forth in Article III.C.1.a, b, i, and j; provided, that either the Tribes or its assignee, on behalf of the Tribes, first comply with the procedures for changing the use of water rights set forth in subsections iii and iv of this Article IV.B.6.a, as applicable.”<sup>431</sup> <ul style="list-style-type: none"> <li>▪ E.g. subject to state approval</li> </ul> </li> <li>○ Lease of 11,000 Acre-Feet per Year of Water From Hungry Horse Reservoir for Off-Reservation Mitigation.<sup>432</sup></li> </ul> </li> </ul>

<sup>430</sup> Art. II.44.

<sup>431</sup> Art. IV.B.6. page 35

<sup>432</sup> Art. IV.B.7. page 40