

2006

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## Recommended Citation

46 Nat. Resources J. 375 (2006).

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JUDITH V. ROYSTER\*

## Indian Water and the Federal Trust: Some Proposals for Federal Action

### ABSTRACT

*Indian tribal reserved rights to water constitute trust assets under the protection of the federal government. Nonetheless, the federal government's duty of protection, and remedies against the government if it fails in that duty, are seldom recognized by law. Congress could protect tribal water rights through enactment of comprehensive regulatory legislation, but such legislation would run counter to the modern trend of recognizing increasing tribal control over natural resources and would interfere with tribes' authority to manage their water. There are, however, a number of steps that Congress and the Department of the Interior could take in fulfillment of the federal trust responsibility for Indian water rights. These proposals, briefly outlined here, would assist tribes with the development and management of their water resources and remove obstacles to tribal authority over water that presently exist in federal law.*

### I. WATER RIGHTS AND THE TRUST CORPUS

There can be no doubt that tribal water rights form part of the trust corpus protected by the federal-tribal trust relationship. Water rights are federal rights impliedly reserved by the federal government for the tribes when Indian country<sup>1</sup> was established; as such, they are trust assets as much as the land itself<sup>2</sup> or constituent elements of the land such as timber and minerals.<sup>3</sup> Water rights settlement acts routinely

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1. Indian country is defined by statute as including all lands within reservations, dependent Indian communities, and trust and restricted allotments located off-reservation. See 18 U.S.C. § 1151 (2000). It is defined by common law as lands set aside for the use of Indians under the superintendence of the federal government. See, e.g., *United States v. John*, 437 U.S. 634, 649 (1978); see also COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 3.04, at 182-2000 (Nell Jessup Newton et al. eds., 2005).

2. Most tribal lands today are held in trust by the United States for the benefit of the governing tribe or tribes. See COHEN, *supra* note 1, § 15.03, at 967-69.

3. See, e.g., *United States v. Shoshone Tribe*, 304 U.S. 111, 116-18 (1938).

recognize this status by asserting that the tribal water resources at issue are held in trust for the tribes by the United States.<sup>4</sup> Moreover, water rights represent valuable property rights, and tribal interests in property are protected by federal law against alienation and encumbrance without federal consent.<sup>5</sup>

The political branches of the federal government—those charged by the Constitution with the development and conduct of Indian affairs policy<sup>6</sup>—have explicitly recognized the federal trust responsibility for tribal water rights. In the Western Water Policy Review Act of 1992, Congress expressly found that “the Federal Government recognizes its trust responsibilities to protect Indian water rights and assist Tribes in the wise use of those resources.”<sup>7</sup> The Department of the Interior has concurred. For example, in its criteria and procedures for participation in tribal water rights settlements, the Department states that “Indian water rights are vested property rights for which the United States has a trust responsibility, with the United States holding legal title to such water in trust for the benefit of the Indians.”<sup>8</sup>

Judicial decisions have substantially supported the position of the political branches. In the well-known water rights case *Pyramid Lake Paiute Tribe of Indians v. Morton*,<sup>9</sup> the district court relied on the Interior Department’s “fiduciary duty” to tribes relative to their water rights in striking down the Secretary’s allocation of excess water in the Truckee River. More directly, the claims court held in 1991 that “title to [tribal] water rights constitutes the trust property, or the res, which the government, as trustee, has a duty to preserve.”<sup>10</sup> The year before, however, the same court held that allottees’ water rights did not

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4. See Gila River Indian Cmty. Water Rights Settlement Act of 2004, Pub. L. No. 108-451, tit. II, § 204(a)(2), 118 Stat. 3478, 3502; Snake River Water Rights Act of 2004, Pub. L. No. 108-447, tit. X, § 7(a)(1)(A), 118 Stat. 2809, 3434; Confederated Tribes of the Warm Springs Reservation Water Rights Settlement Agreement, 1997, art. IV, § B, approved by Pub. L. No. 107-102, § 2(a), 115 Stat. 974.

5. 25 U.S.C. § 177 (2000).

6. The Constitution places the primary power for Indian affairs and Indian policy with Congress by way of the Indian Commerce Clause. See U.S. CONST. art. I, § 8, cl. 3. Indian affairs authority is also located in the treaty clause, investing both the President and the Senate with authority. *Id.* art. II, § 2, cl. 2; see also *United States v. Lara*, 541 U.S. 193, 200 (2004).

7. Reclamation Projects Authorization and Adjustment Act of 1992, Pub. L. No. 102-575, § 3002(9), 106 Stat. 4600, 4695 (codified by reference at 43 U.S.C. § 371 (2000)).

8. Working Group in Indian Water Settlements; Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims, 55 Fed. Reg. 9223 (Mar. 12, 1990) [hereinafter Working Group].

9. 354 F. Supp. 252 (D.D.C. 1972).

10. *Fort Mojave Indian Tribe v. United States*, 23 Cl. Ct. 417, 426 (1991).

constitute a trust corpus.<sup>11</sup> The cases are readily distinguishable, however, in part on the ground that the allottees in the earlier case had factual control over their water rights.<sup>12</sup>

The decisions affirming that tribal water rights are part of the trust corpus and subject to federal fiduciary obligations represent the better approach. Not only are those decisions consistent with the plain statements of the political branches, but also with the development of the implied reserved rights doctrine over the last century.

Tribal water rights arise by implication through interpretation of the treaties, statutes, agreements, and executive orders creating Indian country.<sup>13</sup> Nothing in those federal documents speaks expressly to water, but the Supreme Court has held, ever since the foundational *Winters* decision in 1908, that water was nonetheless reserved for the tribes. In part, this reservation stems from the canons of construction, which in turn are an expression of the federal trust obligation. The Indians, the Court found, would not have agreed to settle on the reserved tract of land without the water to make it livable.<sup>14</sup> And in part, the reservation of water rights stems from the federal government's power to reserve water from appropriation, a power that it impliedly exercised when it set land aside in trust for the tribes.<sup>15</sup>

Tribal water rights are generally reserved for two broad categories of purposes, both of which are grounded in the federal trust responsibility. First, under the *Winters* doctrine, water is reserved by the fact that land is reserved.<sup>16</sup> When lands were set aside for tribes, those reservations were held in trust with a guarantee of tribal protection in the lands. The guarantees necessarily carried with them a duty on the part of the government to ensure tribal use and enjoyment. The reservation of the water is, at least in part, a direct outgrowth of the federal government's trust responsibility to protect tribes in their reserved lands. As the Supreme Court noted in *Winters*, the reserved lands would have little value without the water necessary to make the reservation livable.<sup>17</sup>

Second, water is also reserved as necessary to preserve aboriginal practices that are intended to continue after the creation of

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11. *Grey v. United States*, 21 Cl. Ct. 285 (1990), *aff'd*, 935 F.2d 281 (Fed. Cir. 1991).

12. See Nell Jessup Newton, *Indian Claims in the Courts of the Conqueror*, 41 AM. U. L. REV. 753, 809-10 (1992).

13. See, e.g., *Winters v. United States*, 207 U.S. 564 (1908); *Arizona v. California*, 373 U.S. 546 (1963).

14. *Winters*, 207 U.S. at 576.

15. *Id.* at 577.

16. See *id.* at 576-78.

17. *Id.* at 576.

reservations. In particular, the Court has held that a reservation of traditional rights to fish necessarily implies those additional rights, such as access to the fishing places, needed to give effect to the fishing rights.<sup>18</sup> Thus, if one purpose of a land reservation is the preservation of the tribe's historic fishing rights, an instream flow necessary to maintain the fishery is impliedly reserved as well.<sup>19</sup> Water rights reserved to protect and maintain tribal fisheries should not be confined to fishing places within Indian country, but should extend to the tribes' traditional fishing grounds.<sup>20</sup> The reservation of water to protect traditional uses is, at least in part, a direct outgrowth of the federal government's trust responsibility to protect rights guaranteed to tribes in treaties and agreements.

The trust responsibility extends as well to federal representation of tribes in water rights adjudications<sup>21</sup> and settlement negotiations,<sup>22</sup> and any judicial decision binding on the United States as trustee is also binding on the represented tribes.<sup>23</sup> Nonetheless, there are substantial difficulties with federal representation in adjudications. First, although the federal government may institute suit on behalf of, and represent, tribes, its decision to do so is discretionary.<sup>24</sup> Unless a treaty, agreement, or statute provides otherwise, tribes cannot force the federal government to bring water rights claims on their behalf.<sup>25</sup>

Second, if the federal government does assume the responsibility of representing tribes in water rights adjudications, it has inherent conflicts of interest.<sup>26</sup> In general stream adjudications,<sup>27</sup> the federal government is responsible for representing not only the interests of the

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18. See *United States v. Winans*, 198 U.S. 371 (1905).

19. See *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981); *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983).

20. *But see In re SRBA*, Case No. 39576, Consolidated Subcase 03-10022, (Idaho Dist. Ct., Nov. 10, 1999) (holding that reserved rights are limited to reservation lands and thus finding that the Nez Perce Tribe had no water rights appurtenant to its off-reservation reserved fishing rights). The litigation eventually resulted in a settlement act. See also *Snake River Water Rights Act of 2004*, Pub. L. No. 108-447, 118 Stat. 2809.

21. See *Nevada v. United States*, 463 U.S. 110 (1983).

22. See *Working Group*, *supra* note 8.

23. See *Arizona v. California*, 460 U.S. 605, 626-27 (1983); *Nevada*, 463 U.S. at 135.

24. See *Pyramid Lake Paiute v. Morton*, 499 F.2d 1095, 1096 (D.C. Cir. 1974); *Rincon Band of Mission Indians v. Escondido Mut. Water Co.*, 459 F.2d 1082, 1084 (9th Cir. 1972).

25. *Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476, 1482 (D.C. Cir. 1995).

26. See generally Ann C. Juliano, *Conflicted Justice: The Department of Justice's Conflict of Interest in Representing Native American Tribes*, 37 GA. L. REV. 1307 (2003); see also Judith V. Royster, *Equivocal Obligations: The Federal-Tribal Trust Relationship and Conflicts of Interest in the Development of Mineral Resources*, 71 N.D. L. REV. 327, 348-58 (1995) (discussing conflicts in the context of water resources).

27. These adjudications are designed to resolve all water claims to a stream system, including tribal and federal claims.

Indian tribes, but also the interests of federal and public lands that may conflict with tribal rights.<sup>28</sup> Despite the clear competing obligations, and despite tribal allegations that the federal government has at times favored federal interests over tribal interests,<sup>29</sup> the Supreme Court held that, if Congress directs the government to represent both tribal and competing federal claims to water, the dual representation does not, by itself, breach the federal trust obligation.<sup>30</sup> The inherent federal conflicts are difficult for tribes to address. Tribes have been denied relief from alleged conflicts of interest raised after the fact because of the need for certainty and finality in water rights adjudications,<sup>31</sup> as well as those raised during adjudication.<sup>32</sup> Federal courts have held that tribes concerned about conflicts in federal representation should intervene as parties in the litigation.<sup>33</sup> Intervention, however, necessitates a waiver of tribal sovereign immunity and does not ensure that the tribes, rather than the federal government, control the course of the litigation.<sup>34</sup>

Tribes that can show a loss of water rights may recover substantial monetary damages from the United States.<sup>35</sup> But proving that the government has failed to obtain all of a tribe's reserved rights, or that the government has favored non-Indian water rights to the detriment of tribes, is difficult.<sup>36</sup> The foundational obstacle is that water rights do not fall neatly into the Court's categories for full enforceable fiduciary obligations: a comprehensive statutory/regulatory scheme giving the

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28. See 25 U.S.C. § 2 (2000); 43 U.S.C. § 1457 (2000).

29. See, e.g., *Nevada v. United States*, 463 U.S. 110 (1983).

30. *Id.* at 143-44.

31. See *id.*

32. See *White Mountain Apache Tribe v. Hodel*, 784 F.2d 921 (9th Cir. 1986) (stating that the tribe's claim that the United States would understate tribal claims to water "can not be dismissed as implausible" but could also not be "determined in advance of the fact").

33. *Id.* at 924-25; see also *New Mexico v. Aamodt*, 537 F.2d 1102, 1106 (10th Cir. 1976) (right to intervene under Fed. R. Civ. P. 24(a) if federal government has conflict of interest). In one case, a tribe was initially denied the right to intervene on the ground that the federal government was already representing the tribe's interests. See *Gila River Pima-Maricopa Indian Cmty. v. United States*, 684 F.2d 852, 860 n.5 (Cl. Ct. 1982). The tribe was, however, subsequently granted intervenor status. See *United States v. Gila Valley Irrigation Dist.*, 31 F.3d 1428, 1432 (9th Cir. 1994).

34. See Joseph R. Membrino, *Indian Reserved Water Rights, Federalism and the Trust Responsibility*, 27 LAND & WATER L. REV. 1, 18 (1992).

35. See COHEN, *supra* note 1, § 19.06, at 1225 n.400 (citing *N. Paiute Nation v. United States*, 30 Ind. Cl. Comm'n 210, 215-17 (1973); *Pyramid Lake Paiute Tribe v. United States*, 36 Ind. Cl. Comm'n 256 (1975)).

36. See *Fort Mojave Indian Tribe v. United States*, 32 Fed. Cl. 29 (1994), *aff'd*, 64 F.3d 677 (Fed. Cir. 1995); *Gila River Pima-Maricopa Indian Cmty. v. United States*, 9 Cl. Ct. 660 (1986), *aff'd*, 877 F.2d 901 (9th Cir. 1989); *White Mountain Apache Tribe of Ariz. v. United States*, 11 Cl. Ct. 614 (1987), *aff'd*, 5 F.3d 1506 (Fed. Cir. 1993) (opinion published at 20 Indian L. Rep. 2156 (1993)).

government full control, or a textual source establishing that the resources are held in trust, along with actual federal control of the resource.<sup>37</sup> In *United States v. Navajo Nation*, the Court emphasized the importance of locating the fiduciary duty in specific provisions.<sup>38</sup> And in the companion case of *United States v. White Mountain Apache Tribe*, Justice Thomas, writing for four justices, argued that an enforceable fiduciary duty exists *only* if the duty can be located in a specific textual provision.<sup>39</sup> Water rights fit uneasily within these categories. In consequence, Dean Newton has posited that "management of water rights is best analyzed as falling within the limited trust concept. There is no scheme imposing comprehensive duties on the Secretary of the Interior to manage tribal water. In addition, the Government does not manage tribal water resources on a day-to-day basis, owing in part to the unique origin of tribal water rights."<sup>40</sup> In breach of trust cases involving water, then, the greatest difficulty facing Indian tribes may lie in showing a statutory or regulatory duty that the government has breached. Even prior to the 2003 Supreme Court trust cases, for example, the Claims Court had held that the government has no duty to develop irrigation facilities for tribes<sup>41</sup> or to deliver irrigation water to allotments.<sup>42</sup>

Under some circumstances, the federal government may have sufficient control over water that enforceable duties arise.<sup>43</sup> In *Pyramid Lake Paiute Tribe v. Morton*,<sup>44</sup> the court held that, in allocating the excess waters of the Truckee River between a federal reclamation project and the reservation, the Secretary of Interior was obligated to fulfill the trust responsibility to the tribe, not to reconcile competing claims to water. That level of actual federal control, combined with the federal government's express recognition of trust responsibilities for tribal water resources, should be sufficient to satisfy the Court's approach to enforceable trust duties announced in *White Mountain Apache*.<sup>45</sup>

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37. See *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 473-75 (2003); *United States v. Mitchell*, 463 U.S. 206, 224-25 (1983) (*Mitchell II*).

38. 537 U.S. 488, 507-08, 511, 513 (2003).

39. *White Mountain*, 537 U.S. at 484-86 (Thomas, J., dissenting).

40. Newton, *supra* note 12, at 807.

41. *White Mountain*, 11 Cl. Ct. at 642; *Salt River Pima-Maricopa Indian Cmty. v. United States*, 26 Cl. Ct. 201 (1992).

42. *Grey*, 21 Cl. Ct. at 292.

43. Professor Juliano argues that federal representation of tribes in cases such as water rights adjudications, with the consequent federal "control" of the litigation, should itself be sufficient to create enforceable federal fiduciary duties. See Juliano, *supra* note 26, at 1369.

44. 354 F. Supp. 252 (D.D.C. 1972).

45. See *White Mountain*, 537 U.S. at 474-76.

The federal government may also have enforceable duties in those instances where a "special relationship" with respect to water exists. In one instance, a tribe was able to establish a right to relief based on the federal government's failure to take action once upstream diversions interfered with the water supply to the reservation.<sup>46</sup> The claims court held that "the actions taken by the United States in establishing the reservation in 1859 and in enlarging it thereafter, together with repeated recognition of the need to preserve or restore the water supply utilized by the Pimas and Maricopas in maintaining their commendable self-sufficient status, are consistent only with the existence of a special relationship between these Indians and the United States concerning the protection of their lands and the water supply they utilized on these lands."<sup>47</sup> The existence of a special relationship giving rise to enforceable fiduciary duties is, however, unlikely to extend to most tribes.

In some instances, provisions of water settlement acts may create actual federal control or establish a special relationship sufficient to give rise to enforceable fiduciary duties. One settlement act expressly recognizes the Department of the Interior's authority to administer water rights within the reservation.<sup>48</sup> Two others provide for federal water management plans.<sup>49</sup> Several acts call for the Secretary of the Interior to administer the tribes' reserved rights pending the development of an approved tribal water code.<sup>50</sup> Given the government's recognition of tribal water rights as trust assets, these provisions should be sufficient to establish enforceable fiduciary duties for federal mismanagement of the water if the Secretary's role under the settlement act constitutes actual control of the water rights.

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46. *Gila River Pima-Maricopa Indian Cmty. v. United States*, 684 F.2d 852 (Cl. Ct. 1982).

47. *Id.* at 862.

48. Colorado Ute Indian Water Rights Settlement Act of 1988, Pub. L. No. 100-585, § 9, 102 Stat. 2973, 2978.

49. An Act relating to the settlement between the United States and the Ak-Chin Indian community of certain water right claims of such community against the United States, Pub. L. No. 95-328, 92 Stat. 409 (1978), *as amended*, Pub. L. No. 98-530, § 6, 98 Stat. 2698, 2702 (1984) (providing for the establishment of a federal water management plan for the reservation); San Carlos Apache Tribe Water Rights Settlement Act of 1992, Pub. L. No. 102-575, § 3710(d), 106 Stat. 4600, 4750 (providing federal water management plan for reservation).

50. Snake River Water Rights Act of 2004, Pub. L. No. 108-447, § 7(b)(3), 118 Stat. 2809, 3435; Zuni Indian Tribe Water Rights Settlement Act of 2003, Pub. L. No. 108-34, 1 § 8(b)(1)(F), 117 Stat. 782, 795; Chippewa Cree Tribe of the Rocky Boy's Reservation Indian Reserved Water Rights Settlement and Water Supply Enhancement Act of 1999, Pub. L. No. 106-163, § 102(a), 113 Stat. 1778, 1783; Northern Cheyenne Indian Reserved Water Rights Settlement Act of 1992, Pub. L. No. 102-374, § 5(a), 106 Stat. 1186, 1188.



## II. PROPOSALS FOR FEDERAL ACTION CONSISTENT WITH TRUST PRINCIPLES

Tribal water rights exist in a sort of trust limbo. They are trust assets due protection from the federal government. But the government is, in almost all circumstances, under no legal obligation to act and under no cloud of legal liability if it fails to act.

Congress could create enforceable trust obligations for tribal water rights by enacting a comprehensive federal management scheme or placing the Department of the Interior in actual control of tribal water rights. Neither is likely or desirable. In the area of natural resources, Congress's recent history consists of restoring ever-increasing control over those resources to tribes and reducing the federal management role. Legislation over the last few decades in timber management,<sup>51</sup> grazing and agricultural land use,<sup>52</sup> and mineral development<sup>53</sup> has expanded tribal authority to act. The trend continues with the 2005 Indian Tribal Energy Development and Self-Determination Act.<sup>54</sup> Under this most recent statute, tribes may enter into energy resource agreements with the Department of the Interior.<sup>55</sup> Once the Secretary has approved an energy resource agreement, the tribe may enter into leases and agreements of all kinds for the development of its energy resources and grant rights of way for pipelines or electric distribution or transmission lines without the Secretary's specific approval of each instrument.<sup>56</sup> Against that backdrop of increased tribal authority over tribal resources, a new comprehensive federal scheme for water rights is highly unlikely to be enacted.

Nor would it be desirable. As matters stand, tribes exercise considerable control over their water rights, generally determining the appropriate use for their waters and the circumstances under which those uses may occur. Although tribes face substantial and well-documented obstacles in converting their paper water rights into actual or "wet" water and increased federal financial assistance is crucial,<sup>57</sup>

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51. National Indian Forest Resources Management Act, 25 U.S.C. §§ 3101-3120 (2000).

52. American Indian Agricultural Resource Management Act, 25 U.S.C. §§ 3701-3746 (2000).

53. Indian Mineral Development Act of 1982, 25 U.S.C. §§ 2101-2108 (2000).

54. 25 U.S.C. §§ 3501-3506 (2000).

55. *Id.* § 3504(e).

56. *Id.* § 3504(a)(2) & (b).

57. The federal government has traditionally favored irrigation projects that benefit non-Indians over water projects that benefit tribes. See DANIEL MCCOOL, *COMMAND OF THE WATERS: IRON TRIANGLES, FEDERAL WATER DEVELOPMENT, AND INDIAN WATER* 139-42 (1994).

actual federal control over Indian water rights would be an unwarranted interference in tribal authority over tribal resources.

Nonetheless, there are actions that Congress and the Department of the Interior could take to protect tribal water rights, actions that would be consistent with and further the federal trust responsibility. Proposals for such actions—two for the Department of the Interior and three for Congress—are outlined below. It may be entirely unrealistic to expect these proposals to result in action, but here they are anyway.

### A. Lift the Moratorium on Approval of Tribal Water Codes

There is one simple thing that the Department of the Interior could do: lift the moratorium on approval of tribal water codes. In 1975, the Secretary of the Interior mandated that any tribal law that “purports to regulate the use of water on Indian reservations” should be automatically disapproved.<sup>58</sup> In the 30 years since, the Department of the Interior has not promulgated rules authorizing review and approval of tribal water codes. Proposed rules were published twice in the years soon after the moratorium was imposed,<sup>59</sup> but final rules were never issued, and the idea has not appeared on the Department’s agenda of rules scheduled for development for 20 years.<sup>60</sup>

For many tribes, the moratorium is of little relevance. Tribes that do not require secretarial approval of their laws are not affected. The Navajo Nation, for example, which is not subject to a secretarial approval requirement,<sup>61</sup> adopted a water code in 1984.<sup>62</sup> Other tribes may seek exceptions from the moratorium<sup>63</sup> or build the right to adopt a water code into a water rights settlement.<sup>64</sup> At least six water rights settlement acts authorize or require the tribes to adopt water codes,<sup>65</sup> and several

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58. See Steven J. Shupe, *Water in Indian Country: From Paper Rights to a Managed Resource*, 57 U. COLO. L. REV. 561, 579–81 (1986).

59. See Use of Water on Indian Reservations, 42 Fed. Reg. 14,885 (Mar. 17, 1977); Regulation of Reserved Waters on Indian Reservations, 46 Fed. Reg. 944 (Jan. 5, 1981).

60. The item last appeared on the Department’s agenda in 1986. See Semiannual Agenda of Rules Scheduled for Review or Development, 51 Fed. Reg. 38,472, 38,517 (Oct. 27, 1986).

61. See *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195, 199 (1985).

62. NAVAJO NATION CODE tit. 22, § 7 (1984).

63. See Shupe, *supra* note 58, at 581–88.

64. The first water code approved by the Department of the Interior after the 1975 moratorium was the Fort Peck Tribal Water Code, authorized under a 1985 water-rights compact between the Fort Peck tribes and the State of Montana. See PETER W. SLY, RESERVED WATER RIGHTS SETTLEMENT MANUAL 155 (1988).

65. See Snake River Water Rights Act of 2004, Pub. L. No. 108-447, § 7(b), 118 Stat. 2809, 3434; Zuni Indian Tribe Water Rights Settlement Act of 2003, Pub. L. No. 108-34, § 8(b)(1)(F)(i), 117 Stat. 782, 795; Chippewa Cree Tribe of the Rocky Boy’s Reservation Indian

others provide for federal administration of tribal water rights until the tribe adopts an approved water code.<sup>66</sup>

Nonetheless, for any tribe with a constitution that requires secretarial approval of tribal laws, the Department's approach raises serious obstacles to tribal water management. Tribal water codes may set forth both procedures for obtaining use rights in reserved tribal waters and the substantive uses to which the water may be put. The ability to enact a water code is thus a fundamental adjunct to effective tribal use of reserved water rights and should be facilitated and encouraged by the federal government, not made more difficult. The water code provisions built into some water settlement acts benefit the specific tribes covered by the statutes, but the authority to enact a tribal water code should be recognized for all tribes. If the Department of the Interior must approve tribal water codes for those tribes whose constitutions so provide, then the Department should be willing to review the code of any tribe that submits one, without the necessity of the tribe's seeking an exception to a long-outdated moratorium.

## **B. Define the ESA Baseline to Include All Tribal Rights**

The Endangered Species Act (ESA)<sup>67</sup> requires the U.S. Fish and Wildlife Service<sup>68</sup> to determine the biological impacts of any proposed action "authorized, funded, or carried out" by a federal agency that may jeopardize a threatened or endangered species or adversely affect critical habitat.<sup>69</sup> The effects of such an action are assessed against a baseline of

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Reserved Water Rights Settlement and Water Supply Enhancement Act of 1999, Pub. L. No. 106-163, § 102(b)(2), 113 Stat. 1778, 1783; Yavapai-Prescott Indian Tribe Water Rights Settlement Act of 1994, Pub. L. No. 103-434, § 111(c), 108 Stat. 4526, 4531-4532; Seminole Water Rights Compact, § II(A)(6), VII(D), reprinted in *Seminole Indian Land Claims Settlement Act: Hearings on S. 1684 Before the Senate Select Comm. on Indian Affairs*, 100th Cong. 83-122 (1987), incorporated in Seminole Indian Land Claims Settlement Act of 1987, Pub. L. No. 100-228, § 7, 101 Stat. 1556, 1560 (current version at 25 U.S.C. § 1772e (2000)).

66. Zuni Indian Tribe Water Rights Settlement Act of 2003, Pub. L. No. 108-34, § 8(b)(1)(F)(ii), 117 Stat. 782, 796; Chippewa Cree Tribe of the Rocky Boy's Reservation Indian Reserved Water Rights Settlement and Water Supply Enhancement Act of 1999, Pub. L. No. 106-163, § 102(a), 113 Stat. 1778, 1783; Northern Cheyenne Indian Reserved Water Rights Settlement Act of 1992, Pub. L. No. 102-374, § 5(a), 106 Stat. 1186, 1188.

67. 16 U.S.C. §§ 1531-44 (2000).

68. Or the National Marine Fisheries Service in the case of anadromous fish or other species within its jurisdiction.

69. 16 U.S.C. § 1536(a)(2) (2000). This occurs as part of the "section 7 consultation process" where the agency proposing action "consults" with the Fish and Wildlife Service. For a brief description of the process, see *Cumulative Impacts Under Section 7 of the Endangered Species Act*, 88 I.D. 903, 906-08 (Aug. 27, 1981). In a 1997 secretarial order, the secretaries of the Interior and Commerce provided that whenever any agencies of their

existing activities that impact the species or habitat.<sup>70</sup> Although vested water rights form part of the baseline, relatively few tribal reserved rights to water are included. Even if tribal water rights have been recognized in a court decision or settlement act, they do not form part of the ESA baseline unless the rights are in actual use or there has been some agency action to develop the water right for which FWS has prepared a biological opinion.<sup>71</sup> The result is that vested junior non-Indian rights are included in the baseline determinations while senior tribal rights often are not.

After assessing the biological impacts of a proposed federal action, the Fish and Wildlife Service (FWS) may issue a "no jeopardy" biological opinion or a "jeopardy biological opinion" accompanied by "reasonable and prudent alternatives, if any."<sup>72</sup> The FWS may also provide non-binding "conservation recommendations."<sup>73</sup> The agency planning the action may then either forego the action or determine how to proceed with the action while avoiding or mitigating its impacts.<sup>74</sup> In

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departments were proposing actions under the ESA that might impact tribal resources or rights, "they shall consult with, and seek the participation of, the affected Indian tribes to the maximum extent practicable." Secretarial Order #3206: American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act (June 5, 1997), available at <http://endangered.fws.gov/tribal/Esatribe.htm>; see generally Charles Wilkinson, *The Role of Bilateralism in Fulfilling the Federal-Tribal Relationship: The Tribal Rights-Endangered Species Secretarial Order*, 72 WASH. L. REV. 1063, 1063-107 (1997).

70. See 50 C.F.R. § 402.02 (2006). The definition of "effects of the action" provides that it:

refers to the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline. The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process. Indirect effects are those that are caused by the proposed action and are later in time, but still are reasonably certain to occur. Interrelated actions are those that are part of a larger action and depend on the larger action for their justification. Interdependent actions are those that have no independent utility apart from the action under consideration.

*Id.*

71. See U.S. Dept. of the Interior, Report of the Working Group on the Endangered Species Act and Indian Water Rights § II.B (2000) [hereinafter Report of the Working Group].

72. 50 C.F.R. § 402.14(h)(3) (2006).

73. See *id.* § 402.14(j).

74. The agency proposing the action is in theory free to undertake it as proposed despite a jeopardy opinion, but the action would be subject to challenge as violating section

making such a determination, baseline uses are protected because the "jeopardy" is assessed against them. But new or additional uses may be curtailed or prohibited in order to protect the species or habitat. Where junior non-Indian water rights are part of the baseline, but senior tribal rights are not, there is a very real possibility that the senior tribal rights could be adversely affected or even barred to prevent jeopardy to protected species or habitat.<sup>75</sup>

This possibility contravenes the reserved water rights doctrine and the federal trust responsibility. One of the fundamental principles of the tribal reserved rights doctrine is that tribal water rights are not lost through non-use.<sup>76</sup> This principle derives in part from the fact that the tribal rights were reserved in perpetuity, and in part from the recognition that development of tribal water resources had not been a federal priority. The government's historic preference for funding reclamation projects that benefited non-Indians while providing little or no support for tribal projects is well-documented.<sup>77</sup> The principle against forfeiture for non-use helps counter this federal dereliction and provides trust protections for reserved, but unexercised, tribal water rights. If the unexercised tribal water rights do not form part of the ESA baseline, however, they may be lost or restricted on account of non-use, contrary to the reserved rights doctrine.

Moreover, tribal reserved rights to water are among the most senior—often *the* most senior—water rights on stream systems.<sup>78</sup> Assigning priority dates to tribal water rights is itself an accommodation to the prior appropriation system of state water rights in western states,

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7 of the ESA. See Tim Vollman, *The Endangered Species Act and Indian Water Rights*, 11 NAT. RESOURCES & ENV'T 39, 40 (1996).

75. See Report of the Working Group, *supra* note 71; see also Sandi B. Zellmer, *Indian Lands as Critical Habitat for Indian Nations and Endangered Species: Tribal Survival and Sovereignty Come First*, 43 S.D. L. REV. 381, 426-33 (1998); Vollman, *supra* note 74, at 42; Adrian N. Hansen, Note, *The Endangered Species Act and Extinction of Reserved Indian Water Rights on the San Juan River*, 37 ARIZ. L. REV. 1305, 1327-29 (1995).

76. See *Winters v. United States*, 207 U.S. 564, 574-78 (1908) (determining that Indian water rights vest at the date they are created, not when they are put to use); see also *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 51 (9th Cir. 1981) (holding that an Indian allottee's share of the tribal reserved water right is not lost through non-use).

77. See, e.g., LLOYD BURTON, *AMERICAN INDIAN WATER RIGHTS AND THE LIMITS OF LAW* 22-23 (1991); MCCOOL, *supra* note 57.

78. Tribal reserved rights to water generally carry a priority date of either time immemorial or the date the reservation was created. See, e.g., *Arizona v. California*, 373 U.S. 546, 600 (1963) (finding that the date of the creation of a reservation for water to make reservations agrarian is then the propriety date); *United States v. Adair*, 723 F.2d 1394, 1414 (9th Cir. 1983) (finding a time immemorial priority for water to support reserved aboriginal fishing rights). Because reservations were usually established before significant non-Indian appropriation rights were secured, tribal water rights commonly hold senior positions.

which is structured upon the first-in-time, first-in-right principle. That principle, at its core, provides that junior uses – those later in time – can be restricted or prohibited as necessary to protect senior uses.<sup>79</sup> Thus, as state-law appropriation rights and tribal reserved rights mesh into a workable system, junior non-Indian uses must give way, if necessary, to accommodate the institution of senior tribal rights. The ESA baseline approach reverses that basic principle and allows the possibility of severely impinging on senior tribal water rights while allowing junior non-Indian rights to continue unabated.

In July 2000, the Department of the Interior's Working Group on the Endangered Species Act and Indian Water Rights issued its final report and recommendations.<sup>80</sup> The Report noted the conundrum:

The inclusion of Indian water rights in an environmental baseline may, however, prevent another federal action from exhausting available water resources, short of jeopardizing listed species, before the Indian water right is exercised. The converse fear is that excluding Indian water rights from a Section 7 baseline may mean that listed species in the stream system may be taken to the edge of jeopardy before consultation on an Indian project.<sup>81</sup>

To address the problem, the Working Group recommended that the ESA baseline should include all Indian water rights that had been decreed in an adjudication, confirmed as part of a settlement act, or otherwise quantified by act of Congress.<sup>82</sup> Tribal commentators on the draft recommendations had argued that all Indian water rights, quantified or not, should be included in the baseline in order to protect the water rights; most states and non-Indian water users, as well as at least one member of the Working Group itself, opposed the "more modest" recommendation made by the Working Group.<sup>83</sup> In addition to its basic recommendation, the Working Group made three other related recommendations, which some members viewed as complementing the first and one member viewed as a preferable alternative.<sup>84</sup> These three

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79. See *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 805 (1976).

80. See Final Report and Recommendations of the Working Group on the Endangered Species Act and Indian Water Rights, 65 Fed. Reg. 41,709 (July 6, 2000); Report of the Working Group, *supra* note 71; Dep't of the Interior, Working Group on the Endangered Species Act and Indian Water Rights, Recommendations (2000) [hereinafter Working Group Recommendations].

81. Report of the Working Group, *supra* note 71.

82. Working Group Recommendations, *supra* note 80, Recommendation 2.A.

83. *Id.* Recommendation 2.A. Explanation.

84. *Id.*

recommendations, taken together, provide that, when a senior water right is the subject of proposed development, the proposal would trigger reinitiation of the ESA process concerning the existing junior use. "The purpose of such reinitiation would be to determine if, in light of the proposed senior project use, the cumulative effects on the listed species or critical habitat may require modification of the junior project."<sup>85</sup> The Working Group expressly noted that the reinitiation process was intended to apply to senior Indian water rights that had not formed part of the initial baseline.<sup>86</sup>

Despite its recommendations, the Working Group found a "need for further public dialogue and comment" before its primary recommendation on the baseline was implemented.<sup>87</sup> A notice in the Federal Register in July 2000 solicited further comments, with a deadline of October 4, 2000, and provided that no action would be taken to implement the Working Group's recommendations "until all comments have been received and analyzed."<sup>88</sup> No further action on the recommendations appears to have taken place since.

The Department of the Interior should revive the Working Group's recommendations. The ESA environmental baseline should, as the Working Group recommended, include not just tribal water rights in use or in actual development, but all tribal rights quantified through adjudication, settlement, or other act of Congress, whether those rights are in actual use or not.<sup>89</sup> In order to protect senior but unexercised tribal water rights and fulfill the federal trust responsibility, however, this should be the minimum requirement. Despite the concerns of the FWS about including unexercised tribal rights,<sup>90</sup> omitting those rights prejudices tribes. Omitting rights that have been quantified but are not yet developed disadvantages tribes with fewer financial resources to develop their water, and omitting rights that are not yet quantified injures tribes that are still struggling for recognition of their water rights.

Although including all tribal reserved rights, quantified or not, in the environmental baseline would best protect those rights, the Working Group's recommendations may, if properly implemented, offer a reasonable compromise. The recommendations provide that proponents of projects that may affect senior water rights, specifically

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85. *Id.* Recommendation 2.B. Explanation.

86. *Id.* Recommendations 2.B-2.D.

87. *Id.* Recommendation 2.A. Explanation.

88. Final Report and Recommendations of the Working Group on the Endangered Species Act and Indian Water Rights, 65 Fed. Reg. 41,709 (2000).

89. Working Group Recommendations, Recommendation 2.A.

90. See Report of the Working Group, *supra* note 71, § II.B.

including unquantified tribal rights, should be warned that they assume the risk that senior rights may be developed and affect the amount of water available to them.<sup>91</sup> When a project involving senior rights, specifically including Indian rights, is proposed, a reinitiation of the ESA process would be triggered,<sup>92</sup> and the burden would be on the proponents of the original project “to demonstrate how their project can be operated consistent with the ESA, without injuring senior water rights, including senior Indian water rights.”<sup>93</sup> If the reinitiation process is triggered automatically, and if the burden on the original proponents is substantial, these recommendations may provide some protection for unquantified tribal reserved rights. Nonetheless, it is likely unrealistic that water projects already in development or operation would be shut down to accommodate later-quantified tribal water rights.

The strongest trust protection for tribal reserved water rights, and thus the preferable alternative, is for all such water rights—quantified or unquantified, exercised or unexercised—to be included in the ESA environmental baseline. Failing that, the recommendations of the Working Group at least provide trust protections for quantified water rights and a process for possibly protecting later-quantified rights as they are developed. Despite its flaws, this approach is preferable to the current one of including in the baseline only those tribal water rights that are exercised or in development. The Department of the Interior, in the exercise of its federal trust responsibility for Indian water, should revise the current definition of the environmental baseline<sup>94</sup> to ensure that tribal reserved rights are included.

### C. Amend the McCarran Amendment

Virtually all western states provide for general stream adjudications designed to determine all rights to water in a particular stream system. The McCarran Amendment, enacted in 1952, expressly permits the joinder of the federal government in these state general stream adjudications.<sup>95</sup> Although the amendment waives the sovereign immunity of the United States and not the tribes, the Supreme Court has

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91. Working Group Recommendations, *supra* note 80, Recommendation 2.B.

92. *Id.* Recommendation 2.C.

93. *Id.* Recommendation 2.D.

94. See 50 C.F.R. § 402.02 (2006).

95. 43 U.S.C. § 666(a) (2000) (“Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source.”). The application of the amendment has been extended to state administrative proceedings that are subject to judicial review. See *United States v. Oregon*, 44 F.3d 758, 765–67 (9th Cir. 1994).



held that the federal government can be joined in a state general stream adjudication in order to determine tribal reserved rights to water.<sup>96</sup> The Court subsequently stated that, "although the McCarran Amendment did not waive the sovereign immunity of Indians as *parties* to state comprehensive water adjudications, it did (as we made quite clear in *Colorado River*) waive sovereign immunity with regard to the Indian *rights* at issue in those proceedings."<sup>97</sup> In a state general stream adjudication, then, tribes are consequently faced with an uncomfortable choice: reliance on the federal government to adjudicate tribal rights, or intervention as parties by waiving their sovereign immunity to suit.

Nothing in the McCarran Amendment divests federal courts of subject matter jurisdiction over Indian water rights cases. Tribal rights to water are federal questions, and the Court has been clear that adjudications of those rights are within the jurisdiction of the federal courts.<sup>98</sup> However, the Court also held that federal courts should generally abstain in favor of state general stream adjudications.<sup>99</sup> Despite this mandate, lower federal courts have sometimes declined to abstain in particular circumstances: for example, where no state water rights proceeding was underway,<sup>100</sup> or where the federal court was interpreting a federal consent decree.<sup>101</sup>

State courts are obligated to determine tribal rights to water according to federal law.<sup>102</sup> Not all state courts, however, have been scrupulous about this duty.<sup>103</sup> Although the Supreme Court has indicated its willingness to correct abuses through a petition for certiorari,<sup>104</sup> it denied review of the questions presented by the tribal party in the only state court water rights adjudication that it has

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96. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976).

97. *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 566 n.17 (1983).

98. *Colo. River*, 424 U.S. at 808-09.

99. *Id.* at 817-20; *see also San Carlos Apache*, 463 U.S. at 565-69.

100. *United States v. Adair*, 723 F.2d 1394, 1404-07 (9th Cir. 1983).

101. *Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist.*, 763 F.2d 1032, 1034-35 (9th Cir. 1985).

102. *San Carlos Apache*, 463 U.S. at 571.

103. *See, e.g., In re General Adjudication of All Rights to Use Water in the Big Horn River System*, 835 P.2d 273 (Wyo. 1992) (*Big Horn III*); *see generally* Stephen M. Feldman, *The Supreme Court's New Sovereign Immunity Doctrine and the McCarran Amendment: Toward Ending State Adjudication of Indian Water Rights*, 18 HARV. ENVTL. L. REV. 433, 444-53 (1994). Of course, neither have some federal courts. *See, e.g., United States v. Wash. Dep't of Ecology*, 375 F. Supp. 2d 1050 (W.D. Wash. 2005) (holding that the Lummi Reservation in the Pacific Northwest was established for domestic and agricultural purposes only; the holding, however, was limited to groundwater rights).

104. *Colo. River*, 424 U.S. at 812-13.

considered.<sup>105</sup> Moreover, any problems created by state court adjudication of tribal water rights may continue beyond the initial decree, because a state court that issues a general stream adjudication decree retains jurisdiction to execute, enforce, construe, and interpret it.<sup>106</sup>

A fundamental exercise of the trust obligation should be an amendment to the McCarran Amendment according Indian tribes the right to bring suit in federal court to assert, or to remove to federal court from a state general stream adjudication, questions of the scope and extent of tribal reserved rights to water. If an Indian tribe, or the United States on behalf of a tribe, initiates suit in federal court to determine tribal water rights, that suit should stay in federal court unless the tribe chooses to have the issues determined as part of a general stream adjudication. Federal courts should no longer have the option to abstain in favor of state general stream adjudications without the express consent of the tribal party. Similarly, if the United States is joined in a general stream adjudication to represent tribal interests, the tribal water rights issues should be removable to federal court. Removal should be available at the request of the tribe without the necessity of the tribe intervening in the state proceeding and therefore waiving its sovereign immunity from suit in that court. The United States should be authorized to remove the tribal issues to federal court upon the written request of the tribe.

#### D. Create a FOIA "Trust Exemption"

The Freedom of Information Act (FOIA)<sup>107</sup> mandates that federal agencies make available certain governmental documents upon a request from the public. Subject to nine exemptions, agencies must generally make available their opinions, policies, and other documents not already published in the Federal Register.<sup>108</sup> Two of the nine exemptions are of most relevance to Indian tribes: Exemption 4 for "trade secrets and commercial or financial information obtained from a person and privileged or confidential" and Exemption 5 for "inter-agency or intra-

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105. See *Wyoming v. United States*, 492 U.S. 406 (1989), *aff'g without op. by an equally divided Court*, *In re the General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76 (Wyo. 1988) (*Big Horn I*).

106. See *S. Delta Water Agency v. United States*, 767 F.2d 531, 541 (9th Cir. 1985); *Wyoming v. United States*, 933 F. Supp. 1030, 1035-36 (D. Wyo. 1996); *State Eng'r of Nev. v. S. Fork Band of the Te-Moak Tribe of W. Shoshone*, 114 F. Supp. 2d 1046, 1050-51 (D. Nev. 2000).

107. 5 U.S.C. § 552 (Supp. IV 2004).

108. *Id.* § 552(a).

agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."<sup>109</sup> Unless information supplied by or to an Indian tribe comes within one of FOIA's exemptions, the Department of the Interior or other federal agencies acting in their role as trustee can be compelled to disclose that information to the public.<sup>110</sup>

On at least two occasions, one successful, non-Indian parties in litigation with tribes over water rights have sought to use FOIA to obtain documents relevant to the tribes' legal theories and analyses of the case. Both cases involved information provided to the Department of the Interior in its capacity as trustee to tribes involved in on-going general stream adjudications.

In the successful case, *Department of the Interior v. Klamath Water Users Protective Ass'n*,<sup>111</sup> the Department of the Interior filed claims on behalf of the Klamath Tribes in a state water rights adjudication, although the Department was apparently not acting as the Tribes' counsel in the case.<sup>112</sup> The Department and the Tribes consulted and "exchanged written memorandums of the appropriate scope of the claims" to water.<sup>113</sup> The Klamath Water Users Protective Association, representing non-Indian water users with claims adverse to the Tribes, sought access to these and other documents under FOIA.<sup>114</sup> The federal government argued that the documents were protected under Exemption 5, but the Court held that none of the documents was exempt and, thus, all the information had to be provided to the adverse party in the water rights litigation.

The Court expressly rejected the government's argument that its trust responsibilities to the tribes protected the documents from disclosure. The Court recognized that the government is the trustee and had "no doubt" that "the candor of tribal communications with the Bureau [of Indian Affairs] would be eroded without the protections of the deliberative process privilege recognized under Exemption 5."<sup>115</sup> The Court also had no doubt that confidentiality "is conducive to a proper

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109. *Id.* § 552(b). Exemption 5 includes materials covered by attorney-client privilege and the work product doctrine.

110. *See* *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1 (2001).

111. *Id.*

112. *Id.* at 5-6.

113. *Id.* at 5.

114. *Id.* at 6. The other documents were in connection with the Department of the Interior's development of a plan to manage irrigation water in the Klamath River basin. *Id.* at 5.

115. *Id.* at 11.

discharge of [the government's] trust obligation."<sup>116</sup> Moreover, the Court recognized the Department's argument that "traditional fiduciary standards forbid a trustee to disclose information acquired as a trustee when it should know that disclosure would be against the beneficiary's interests."<sup>117</sup> Nonetheless, the Court held, the information sought did not fall within a strict reading of Exemption 5 and was therefore subject to disclosure.<sup>118</sup> It specifically refused to "read an 'Indian trust' exemption into the statute."<sup>119</sup>

In a subsequent case, the district court of Montana distinguished the Court's decision in *Klamath Water Users*. In *Flathead Joint Board of Control v. U.S. Department of the Interior*,<sup>120</sup> the Joint Board sought information under FOIA in connection with a general stream adjudication to which it and the Flathead Tribes were parties. The information requested was supplied to the government in connection with the adjudication and the related tribal negotiations with the state of Montana.<sup>121</sup> The government argued that many of the documents requested were protected under Exemption 5 or Exemption 4 of FOIA. Although the Supreme Court found Exemption 5 not applicable to the documents requested in *Klamath Water Users*, the Montana district court ruled that the exemption did generally apply to the information sought by the Joint Board. The district court noted that the information sought in *Flathead Joint Board* had been generated by the federal agencies, not the tribes, and that only those documents that the government generated for its own use and then disseminated to the tribes were subject to disclosure under FOIA.<sup>122</sup> In addition, the district court held in favor of the government on most of its claims of non-disclosure under Exemption 4 for privileged or confidential commercial or financial information. The court determined that the information requested by the Joint Board generally fell into this category because water rights are a valuable property right and an object of commerce.<sup>123</sup>

Although the Montana district court was able to distinguish the requests at issue in *Flathead Joint Board* from those in *Klamath Water Users*, Indian tribes should not be put in a position to worry about whether information supplied to the trustee in connection with water rights adjudications or settlements might be subject to a FOIA request by

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116. *Id.*

117. *Id.* at 15.

118. *Id.* at 15-16.

119. *Id.* at 15.

120. 309 F. Supp. 2d 1217 (D. Mont. 2004).

121. *Id.* at 1218.

122. *Id.* at 1224.

123. *Id.*

opposing parties. The interests so easily dismissed by the Supreme Court—confidentiality, candor, and the trustee's duty to protect the beneficiary's interests—are too important to be overridden by an opposing party's desire for an edge in litigation or negotiation. Indian tribes must have the ability to exchange legal analysis, theories, and litigation strategies with the federal trustees who often represent them without fear of disclosure.

The Court may have refused to read "an 'Indian trust' exemption" into FOIA,<sup>124</sup> but Congress should enact one. At the very least, the Indian trust exemption should protect information exchanged between the federal government and an Indian tribe in connection with or in anticipation of litigation or settlement negotiations. Confidential commercial or financial information is already protected under Exemption 4,<sup>125</sup> but the same protection should surely extend to legal theories, analyses, and strategies. The federal trust responsibility must extend to legal advice and consultation with the beneficiary tribes. If that federal responsibility is not safeguarded under FOIA's current exemptions, then it is incumbent on Congress to create a new exemption—an Indian trust exemption—to protect the legitimate interests of the Indian tribes and their trustee agencies.

### E. Authorize Tribal Water Marketing

Water marketing, generally defined as the sale or lease of water or water rights to other users,<sup>126</sup> is gaining traction in western appropriation states.<sup>127</sup> Commentators have long advocated the use of tribal water marketing as a means for tribes to capture the economic benefit of their water resources; marketing is particularly advantageous

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124. *Klamath*, 532 U.S. at 15.

125. See *Flathead*, 309 F. Supp. 2d at 1221.

126. See Steven J. Shupe, *Indian Tribes in the Water Marketing Arena*, 15 AM. INDIAN L. REV. 185, 186–93 (1990) (describing water marketing, including a variety of innovative marketing approaches other than sales or leases). One other alternative to water marketing is a deferral agreement under which the tribe agrees to forego the use of its water rights in exchange for payments. See David H. Getches, *Management and Marketing of Indian Water: From Conflict to Pragmatism*, 58 U. COLO. L. REV. 515, 546 (1988). A few tribes have entered into deferral agreements, see *id.* and Robert H. Abrams, *The Big Horn Indian Water Rights Adjudication: A Battle for the Legal Imagination*, 43 OKLA. L. REV. 71, 74 (1990), but the federal courts have never ruled on whether such agreements are subject to the strictures of the Nonintercourse Act. Professor Getches argues that a deferral agreement "effectively 'leases'" the water right and thus should be barred absent congressional consent. This legal uncertainty surrounding deferral agreements renders them not particularly useful to tribes seeking to capture the economic benefits of their water rights.

127. See James L. Huffman, *Water Marketing in Western Prior Appropriation States: A Model for the East*, 21 GA. ST. U. L. REV. 429, 445–47 (2004).

if the tribes wish to put their water to consumptive use but are financially unable to develop on-reservation water projects.<sup>128</sup>

An important indicator that water marketing is generally beneficial to and welcomed by tribes and acceptable to the federal government is that most of the tribal water settlement acts authorize it in some form. Although the specifics of the water marketing provisions vary from act to act,<sup>129</sup> the most common factor is the prohibition against permanent alienation of water rights. Some of the settlement acts specifically bar any permanent alienation.<sup>130</sup> Others are clear that tribes may market their water for a limited time period only,<sup>131</sup> and a significant number of the acts contain specific time limitations on the lease of tribal water rights.<sup>132</sup> Under most of the water marketing provisions, marketed tribal water is converted to a state water right during off-reservation use<sup>133</sup> or is otherwise subject to state rules other than forfeiture for non-use.<sup>134</sup>

The prevalence of water marketing provisions in the settlement acts demonstrates Congress's willingness to consent to the lease or encumbrance of tribal water rights. To date, however, that legislative approach has benefited only the few tribes with settlement agreements; the vast majority of tribes are unable to exercise the same authority. Nonetheless, the water rights of many of those tribes are presently in use by non-Indians. Under the prior appropriation regimes of the western states, any unused tribal water is available for use by junior non-Indian appropriators until it is claimed by the tribes. The result is that Indian water is in fact used by non-Indians—for free. Water marketing would permit tribes to capture the economic benefit of that non-Indian use.

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128. See, e.g., Getches, *supra* note 126, at 541–48; Shupe, *supra* note 126, at 196.

129. See COHEN, *supra* note 1, § 19.03[7][c], at 1192.

130. See, e.g., Shivwits Band of the Paiute Indian Tribe of Utah Water Rights Settlement Act of 2000, Pub. L. No. 106-263, § 7(e), 114 Stat. 737, 742; Chippewa Cree Tribe of the Rocky Boy's Reservation Indian Reserved Water Rights Settlement and Water Supply Enhancement Act of 1999, Pub. L. No. 106-163, § 102(b)(c), 113 Stat. 1778, 1783; Jicarilla Apache Tribe Water Rights Settlement Act of 1992, Pub. L. No. 102-441, § 7(b), 106 Stat. 2237, 2239.

131. See, e.g., Reclamation Projects Authorization and Adjustment Act of 1992 Title XXXVII: San Carlos Apache Tribe Water Rights Settlement Act of 1992, Pub. L. No. 102-575, § 3706(b)(3), 106 Stat. 4600, 4745.

132. The usual time limit specified is 99 or 100 years. See, e.g., San Carlos Apache Tribe Water Rights Settlement Act of 1992, Pub. L. No. 102-575, § 3706(b)(3), 106 Stat. 4600, 4745 (100-year maximum, renewable, for certain water); Jicarilla Apache Tribe Water Rights Settlement Act of 1992, Pub. L. No. 102-441, § 7(b), 106 Stat. 2237, 2239 (99-year maximum).

133. See, e.g., Reclamation Projects Authorization and Adjustment Act of 1992 Title V: Ute Indian Rights Settlement Act, Pub. L. No. 102-575, § 503(d), 106 Stat. 4600, 4652-4653.

134. See, e.g., Jicarilla Apache Tribe Water Rights Settlement Act of 1992, Pub. L. No. 102-441, § 7(a), 106 Stat. 2237, 2239.

The primary barrier to tribal water marketing is the Nonintercourse Act.<sup>135</sup> The Act, which prohibits any “purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto”<sup>136</sup> without federal consent, likely applies to tribal water rights. Whether water rights are considered lands<sup>137</sup> or interests “associated with land”<sup>138</sup> or simply property rights,<sup>139</sup> they are subject to the constraints of the Nonintercourse Act. Tribes would thus have no unilateral right to market their water without federal consent.

Congress may authorize the Secretary of the Interior to exercise federal consent to the lease or other encumbrance of tribal natural resources and has done so for virtually all resources other than water.<sup>140</sup> Although Congress has authorized the surface leasing of tribal lands and the statutory grant appears clearly to include the water rights appurtenant to the leased land,<sup>141</sup> Congress has never expressly authorized the sale or lease of Indian water rights apart from the land. Without that general statutory authority, neither Indian tribes nor the Secretary appears to have authority to market tribal water rights.<sup>142</sup>

When water marketing is authorized by a water settlement act, the act generally addresses the role of the Nonintercourse Act. A significant number of the statutes provide that the Secretary of the Interior must approve the marketing agreement.<sup>143</sup> On the other hand, two of the settlement acts state that the Nonintercourse Act does not

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135. 25 U.S.C. § 177 (2000).

136. *Id.*

137. *See* North Side Canal Co. v. Twin Falls Canal Co., 12 F.2d 311, 314 (D. Idaho 1926) (the word “land” is generally construed to include appurtenant waters; the statute at issue was not Indian legislation).

138. *See* Shupe, *supra* note 127, at 197.

139. *See* Richard B. Collins, *The Future Course of the Winters Decision*, 56 U. COLO. L. REV. 481, 489 (1985).

140. *E.g.*, 25 U.S.C. §§ 2101-2108 (2000).

141. 25 U.S.C. § 415(a) (2000) (authorizing surface leases for a variety of purposes, “including the development or utilization of natural resources in connection with operation under such leases”).

142. *See* *Big Horn I*, 753 P.2d at 100 (indicating that tribes had no right to market their water), *aff'd* by an equally divided court, *Wyoming*, 492 U.S. 938 (1989); *United States v. Ahtanum Irrigation Dist.*, 330 F.2d 897, 903 (9th Cir. 1964) (indicating that the Secretary had no authority to convey tribal water rights even though an earlier decision in the same case had upheld a secretarial agreement to distribute creek waters between the tribe and non-Indian landowners).

143. *See, e.g.*, Chippewa Cree Tribe of the Rocky Boy's Reservation Indian Reserved Water Rights Settlement and Water Supply Enhancement Act of 1999, Pub. L. No. 106-163, § 102(b)(c), 113 Stat. 1778, 1783; Jicarilla Apache Tribe Water Rights Settlement Act, Pub. L. No. 102-441, § 7(c), 106 Stat. 2237, 2239 (1992); Arizona Desert Wilderness Act of 1990, Etc. Title IV: Fort McDowell Indian Community Water Rights Settlement Act of 1990, Pub. L. No. 101-628, § 407(f), 104 Stat. 4469, 4486.

apply to the water rights subject to the acts,<sup>144</sup> apparently freeing the tribes to engage in water marketing without secretarial approval. A third approach requires the tribe to submit a water code for secretarial approval; once the code is approved, the tribe may lease its water through the state water bank without specific federal approval.<sup>145</sup>

Congress should enact a general tribal water marketing statute. The best model for authorizing legislation may be the Indian Tribal Energy Development and Self-Determination Act of 2005.<sup>146</sup> Under that statute, tribes may develop energy resource plans and enter into agreements with the Department of the Interior. Once a tribe has an approved energy resource agreement, it may enter into energy development leases and agreements of all kinds without the Secretary's specific approval of each action.<sup>147</sup> A similar structure could be enacted for water marketing. Congress could authorize those tribes that wish to engage in water marketing to submit plans to the Department of the Interior; once the marketing plans are approved, the tribe would be free to market its water as it saw fit, without secretarial approval of each specific transaction.

## CONCLUSION

Tribal water resources are trust assets, but largely outside the usual trust protections. As perhaps the most important tribal resource of this century, however, these resources deserve significantly more federal attention and protection than they have so far received. Five proposals to increase federal trust protection and further the federal trust responsibility are set out above. The Department of the Interior could lift its decades-old moratorium on approval of tribal water codes and could amend the regulatory definition of the environmental baseline under the Endangered Species Act. Congress could amend the McCarran Amendment, create a Freedom of Information Act trust exemption, and authorize tribal water marketing. Each of these actions would help free tribes to manage their water resources as the tribe chooses and remove federal impediments to the legal and practical use of tribal water. In an

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144. See Reclamation Projects Authorization and Adjustment Act of 1992 Title V: Ute Indian Rights Settlement Act, Pub. L. No. 102-575, § 503(b), 106 Stat. 4600, 4652; Colorado Ute Indian Water Rights Settlement Act of 1988, Pub. L. No. 100-585, § 5(a), 102 Stat. 2973, 2974.

145. Consolidated Appropriations Act, 2005 Division J, Title X: Snake River Water Rights Act of 2004, Pub. L. No. 108-447, § 7(g)(1), 118 Stat. 2809, 3435 (water leased through the state water bank is subject to state rules governing other lessors).

146. 25 U.S.C. §§ 3501-3506 (2000).

147. *Id.* § 3504.



age of government-to-government relations and federal support for tribal self-determination, the trust doctrine demands no less of the federal government.