



# *As Long as the Water Shall Flow* Bringing Water to Tribal Homelands

**By Jeanette Wolfley**

*Water is beautiful. Water is sacred. Water is life.*

*That is what we are taught. That is what we believe. And so the tribal traditions persist, and knowledge systems thrive in tribal communities. Water has enabled tribes to survive for thousands of years. Indeed, the reverence for water and its blessings continue to support and shape the tribal political, social, economic, and cultural climate in Indian communities throughout the United States. Today, water remains vital for tribal self-sufficiency, economic development, and providing security for present and future generations.*

The current federal policy era, known as Indian self-determination,<sup>1</sup> has also promoted revitalization for tribal communities and people and has enabled tribes to reclaim and develop governance strategies to make decisions to control lands, natural resources, and economic growth and to determine their future on their own terms. This energy has spurred Indian tribes to seek preservation and protection of a critical, valuable natural resource: water. Federal statutes and policies encourage the protection and preservation of tribal lands, including all its natural and cultural attributes, guaranteed by treaties, executive orders, and statutes. And in this era of self-determination, tribal governments have assumed the lead role in protection of water quality, securing water for lands, preserving fishery and wildlife habitats, and participating in the development of hydropower facilities and their relicensing. Indeed, a whole host of fundamental water issues face tribes in addition to the pressing issues of climate change, species and biodiversity conservation, pollution control, use of natural resources, individual property rights, and land use, to name a few.

The fundamental exercise of sovereignty by tribal governments includes not only power to allocate water and manage water systems but also the responsibility to establish a governmental infrastructure and institutions that provide for sound decision-making. Accordingly, critical component of water endeavors are tribal institutional-building; enacting and implementing tribal laws and regulations; creating tribal boards, commissions, and administrative agencies; establishing water polices and strategies; and general good governance. This article reviews the tribal efforts to preserve and protect water for their communities and build the necessary institutions to fully implement and utilize water for their future. It also raises issues that still must be addressed to fully bring water to tribal communities and provide economic development.

## Water Adjudications and Settlements

“Absolute undisturbed use and occupation” and “permanent home” are common phrases expressed in Indian treaties and agreements entered into with the United States more than 100 years ago. In some respects, simple expressions. Yet, in the area of Indian water law, these phrases have been utilized by tribes and recognized by courts as the foundation for securing precious water for tribal people and communities throughout the West. Moreover, a priority implicit in Indian land tenure is maintaining a homeland in which both present and future generations of the tribes may live and flourish, because tribal individuals and families reside on secure land bases that have supported and nourished their ancestors for thousands of years past, and that continue to be the core and integral foundation of tribal existence.

Tribes across the country relinquished millions of acres of ancestral land in exchange for assurances of a retained, permanent homeland of smaller size in which they would remain free from federal and state interference and the intrusions of non-Indian settlers. These promises are memorialized in the various treaties executed by tribal leaders and federal agents and confirmed by the U.S. Senate. Indeed, for people with close physical and spiritual connections to the water and earth, preserving the new reservation land bases was essential to preserving tribal cultures. In many respects, the promise of tribal sovereignty has survived only because of the measured separatism<sup>2</sup> made possible by the retained tribal land base.

Importantly, treaty promises have not been expressly repealed or amended. Today, these treaty provisions are the beginning point for modern federal Indian law and policy in the area of water law. To tribes,

the primary task always has been not just to survive but to build a viable homeland for their people. The original promise of separatism set forth in the treaties and agreements has faced challenges and bumps in the road by settlers encroaching on tribal lands, breach of treaty provisions by the federal government, changes in society, the inconsistent federal Indian policies adversely impacting Indian people and lands, and hostile judicial decisions. Still, tribes remain resilient and seek to ensure that water is available for their homelands, for their people.

In 1908, the U.S. Supreme Court in an early Indian water rights case, confirmed the 19th-century treaty promises of a viable tribal homeland. In *Winters v. United States*,<sup>3</sup> the Court established what is known as the *Winters* doctrine, which is relied upon by most tribes seeking to secure water rights in general stream adjudications pending in state courts in virtually every western state. The now-landmark case of *Winters v. United States*, involving the Milk River along the Fort Belknap Indian Reservation in northern Montana, simply states that when the federal government established a reservation, the government implicitly reserved a quantity of water necessary to fulfill the purposes of the reservation. Accordingly, when the United States sets aside lands as Indian reservations, it reserves water to provide a home for the Indian tribes residing on those lands. Additionally, the priority of the *Winters* rights dates back to the establishment of the reservation.

There are also other categories of Indian water rights: aboriginal<sup>4</sup>, Pueblo<sup>5</sup>, and rights acquired under state law, which can be used in various combinations in presenting an Indian reservation's water rights claims.

Reservation purposes are implied after an examination of the original documents establishing an Indian reservation. Generally, all treaties, agreements, or executive orders imply, if not explicitly recite, that the reservation was established to become the “permanent home” for the said Indian tribe. Other reservations were established with the broad intent that the Indians become “pastoral and civilized people” (e.g., nomads to agriculturalists). Thus, all Indian reservations necessarily imply that the tribe reserved water for the broad purpose of developing a permanent homeland. These broad purposes entitle a tribe to sufficient water for agricultural, livestock, domestic, cultural, recreational, and other future uses.

In *Winters*, the United States brought suit on behalf of the Gros Ventre and Assiniboine Indians of the Fort Belknap Reservation in northern Montana to halt upstream diversions by non-Indians who had been using waters from the Milk River since 1900. The center line of the Milk River formed the northern boundary of the reservation, and the residents of the reservation used the water primarily for agricultural irrigation. Non-Indian diverters built dams and canals on the Milk River upstream from the reservation and “deprived the United States and the Indians of the use [of the water].”<sup>6</sup> The non-Indian diverters claimed that they were prior appropriators of the water and were therefore entitled to the right to divert the Milk River.

The Supreme Court found that the language of the Act of May 1, 1888,<sup>7</sup> (1888 Act), which created the Fort Belknap Reservation, was decisive. That Act ratified the Gros Ventre and Assiniboine cession of “a very much larger tract which the Indian had the right to occupy and use, and which was adequate for the baits and wants of the nomadic and uncivilized people.”<sup>8</sup> In exchange for their cession, the Gros Ventre and Assiniboine tribes agreed to remain within the confines of the Fort Belknap Reservation, undisturbed by non-Indians. The tribes also agreed to give up their hunting and gathering lifestyle “and to become a pastoral and civilized people.”<sup>9</sup>

The treaty did not mention water rights. However, the arid land that became the Fort Belknap Reservation could not support such a pastoral lifestyle without irrigation from the Milk River. Accordingly, the Court held that the Indians could not have ceded their rights to water for use on the reservation under the 1888 Act, contrary to the arguments of the non-Indian diverters. The Court rhetorically stated:

The Indians had command of the lands and the waters—command of all their beneficial uses, whether kept for hunting, “and grazing roving herd of stock,” or turned to agriculture and the arts of civilization. Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate? And, even regarding the allegation of the Answer as true, that there was springs and streams on the reservation flowing about 2,900 inches of water, the inquiries are pertinent. If it were possible to believe affirmative answers, we might also believe that the Indians were awed by the power of the government or deceived by its negotiations. Neither view is possible. The government is asserting the rights of the Indians.<sup>10</sup>

The Supreme Court recognized that treaty-reserved water rights encompass those rights that the tribes did not relinquish in their cessions of territory to the United States. The non-Indian diverters did not, as a result, have prior appropriative rights to divert the Milk River upstream from the reservation, since the Gros Ventre and Assiniboine tribes never ceded the Milk River’s waters.<sup>11</sup> Instead, the tribes had senior paramount water rights at least as early as the establishment of the Fort Belknap Reservation. The tribal water rights are superior to most non-Indian water appropriators because the creation of Indian reservations predate the majority of non-Indian property rights and use of water.

Despite this 1908 landmark decision, the reserved water rights lay dormant, as the tribes nor the United States on behalf of tribes asserted their senior water rights in rivers or streams. Instead water was diverted for federal irrigation and reservoir projects by the federal government, farmers used and appropriated water, and booming municipalities and urban areas over-appropriated water systems. In the absence of quantification, non-Indians have been using Indians’ water for many decades.

Presently, relying upon the *Winters* doctrine, Indian tribes in state river-basin adjudications face daunting challenges as they struggle to protect and preserve their water rights for their communities and peoples. Nearly all Indian water rights disputes begin in the context of river adjudications or litigation. Entering into negotiations or litigating the tribal water rights and securing a water settlement is not a simple process under the best of circumstances—and rarely are best circumstances pervasive when so many competing interests are coveting the precious resource: water. Yet, tribes have successfully crafted creative solutions in settlements with the federal and state governments whereby the tribal strategies respect and reinforce their own cultural values based upon their traditions.

From 1978 through 2013, Congress enacted 30 Indian water settlement acts into law, which were successfully negotiated among tribes, states, and federal government. Numerous other water settlements have been concluded without congressional approval, e.g., the Confederated Tribes of the Warm Springs Reservation in the state of Oregon and the Assiniboine and Sioux tribes of the Fort

Peck Reservation in Montana.<sup>12</sup> Importantly, settlements are much more than just a water settlement; they are major government-to-government agreements involving the sovereignty of tribes, and the settlements decide issues of control of water for the future for tribes.

At the heart of every negotiated tribal water settlement act is a quantification of the tribal right to water. In nearly all settlements, tribes are required to relinquish their right to future claims to reserved water rights forever, and their water claims against the United States. These are major concessions tribes make in settlements. In exchange, the tribes bargain for and receive guarantees of direct funding as part of the deal from the United States and states in developing their water resources; receive long-overdue water supplies; may negotiate for funds to develop their water for other purposes; and are permitted to market their water to non-Indians off reservation, allowing tribes to gain economic benefits from their water resources.

Tribes in negotiated settlements also receive the promise of “wet” water. Most settlement agreements become the subject of federal legislation, with an act authorizing appropriations for water development or management projects, or more generally for economic development purposes. Tribes with litigated “paper” rights to water face enormous obstacles in getting that water into use, but tribes with negotiated rights should have a stronger, more definite guarantee of federal financial assistance to bring water to Indian lands. Unfortunately, the reliance on Congress to allocate federal funds to carry out the provisions of the settlement and the piecemeal approach to funding has resulted in long delays for assistance despite tribes signing agreements. The settlement process is also vulnerable to budget cuts. The federal government must provide long-term, stable funding for water settlements to expedite and fully implement the negotiated agreements. Also, all too often, the United States has agreed to major water delivery projects to serve non-Indian users at the expense of settling senior Indian claims. Finally, the United States’ trust responsibility to fully secure water to tribal communities must not end when the negotiated agreement is signed; there must be a continued federal commitment and action taken to fully implement the agreement provisions.

As part of this settlement process, in addition to reserving water, tribes are able to secure funding; economic development; restoration of wetlands; technical assistance; fishing habitats; new water delivery systems; and leasing of their water to federal, state, and regional entities to meet their particular water needs. Water banking and water marketing by tribes through leases with downstream junior water users, such as cities, power companies, states, and federal agencies, provide an opportunity to raise revenues for tribal governmental services and projects. Under the prior appropriation water system in the West, the impacts of increasing water scarcity fall most heavily on junior water users, because senior water users—those with an early priority date, such as tribes—have the first right to use the scarce water supplies. Accordingly, junior water users have incentives to buy or rent more senior water rights. A well-functioning water market established to support the transfer of senior tribal water rights would reduce such pressures and the impacts of climate change on junior users. The development of tribal water marketing should be more fully supported by the states and federal governments in tribal water settlement negotiations.

Not all tribes need a water settlement or are in the process of settling to provide for water leasing and economic development. Under the current federal law, however, there are restrictions

on tribal water leasing unless agreed to in a water settlement or approved by Congress. There needs to be a change in the federal law. A solution is the enactment of a federal law, such as the Helping Expedite and Advance Responsible Tribal Ownership (HEARTH) Act<sup>13</sup>, to ensure that tribes may lease water and provide certainty to junior water users, and a reallocation of water in the prior appropriation system. The HEARTH Act permits tribes to opt out of the Department of Interior secretarial approval requirement when seeking to lease their lands by promulgating their own leasing regulations, although the Secretary of Interior must still approve the tribal leasing regulations.<sup>14</sup> Such an act or amendments are consistent with the ongoing efforts to modernize federal laws governing management of Indian trust lands. Water transfers could be accomplished through a tribal lease without approval of the secretary of Interior. Such federal legislation should be seriously explored for the benefit of tribes and junior water users.

Negotiation or litigation of tribal water rights can be expensive and time-consuming and can produce complications in their implementation. Each tribe must determine—based on its cultural traditions, economic conditions, competing demand for water, and climate, to name a few factors—whether it is in the best interest of the tribe to negotiate or litigate its reserved water rights. And each will rely upon the solemn promises made by the United States to tribes in treaties to provide a permanent livable homeland.

### **Tribal Regulation of Activities Affecting Reservation Water Quality**

In addition to tribes quantifying their water rights, many tribes are securing clean water for their community residents. There are surface water streams, creeks, rivers, springs, and water resources that flow through or originate on reservation. When these water resources flow onto and through the reservation, a tribe has a para-

*At the heart of every negotiated tribal water settlement act is a quantification of the tribal right to water. In nearly all settlements, tribes are required to relinquish their right to future claims to reserved water rights forever and their water claims against the United States.*

Several tribes have chosen to litigate their reserved water rights in exhaustive and uncertain state river adjudications rather than seek settlement negotiations. Some argue that state court adjudication of *Winters* rights provides locally elected state judges with the opportunity to decide federal water rights issues, which may not be in the best interest of tribes. Certainly, the case of *In re General Adjudication of All Rights to Use Water in Big Horn River System*<sup>15</sup> is an example of a case adversely affecting the Shoshone and Arapaho tribes of the Wind River Reservation—a case in which the two tribes and the United States on their behalf litigated their reserved water rights in the Wyoming state courts. For instance, the Wyoming Supreme Court held that, under the practicably irrigable acreage standard to quantify reserved water rights, it could not be applied to water purposes other than irrigation, such as to preserve instream flows for fishery preservation; refused to apply the *Winters* doctrine to groundwater; and required the tribes to seek state permission to alter the use of their water.<sup>16</sup> The case is ongoing.

In sharp contrast to the Wyoming Big Horn River case, in the case of *In re General Adjudication of All Rights to Water in the Gila River Sys. & Source*,<sup>17</sup> several tribes litigated their reserved rights to water in the Arizona state courts. The Arizona Supreme Court accepted most of the tribes' arguments relating to reserved water rights. It held that *Winters* applied to both surface and groundwater. The Arizona Court rejected the use of the practicably irrigable acreage standard (limiting the reservation's purpose to agriculture) to quantify the tribes' water rights. Instead, the state court utilized a homelands standard, considering myriad factors, such as tribal history, culture, geography, topography, natural resources, economic development, and past water use.

mount interest in managing, regulating, and setting standards for all sources of pollution to the water bodies. Notably, a water system is a unitary resource, and, therefore, the actions of one user (Indian or non-Indian) affect other users in the system. Accordingly, polluting activities of non-Indians upstream from a reservation, adjacent to the reservation, and on fee lands within the reservation impact the cultural and ceremonial beliefs, health, and welfare of tribal members and residents of the reservation.

Tribal governments are directly responsible and accountable for the health and welfare of their people and reservation residents and are in the best position to meet their people's needs and community interests. One of the basic governmental services performed by tribes is providing clean water and sewer systems to their communities. Accordingly, tribes are in the process of defining their tribal authority by planning and developing the basic frameworks and institutions for protecting and preserving water quality and managing solid waste contamination and pollution caused by industrial society. Regulating polluting activities and other threats to lands, waters, and vital cultural resources is imperative for tribes to continue their way of life and maintain a homeland on which present and future generations of the tribe may flourish.

It is well-established that Indian tribes are sovereign entities "possessing attributes of sovereignty over both their members and territory,"<sup>18</sup> and that "tribal sovereignty is dependent on, and subordinate to, only the Federal government, not the States."<sup>19</sup> "Perhaps the most basic principle of all Indian law is the principle that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather, inherent powers of a limited sovereignty which has never been extinguished."<sup>20</sup>

In *United States v. Wheeler* the Supreme Court stated,

The sovereignty that Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a result of their independent status.<sup>21</sup>

The common message enunciated by these cases is that Indian tribes have retained inherent sovereign powers over both their members and their territory, unless there exists specific legislation to the contrary or divestiture by implication. Indian tribes also retain the inherent sovereign authority to exercise “some forms of civil [regulatory] jurisdiction over non-Indians on their reservations.”<sup>21</sup>

In the area of water quality regulation, Congress in 1987 amended the Clean Water Act<sup>22</sup> to provide for tribes to assume control over water resources within the reservation, similar to the delegation provided to states for state lands. The Environmental Protection Agency (EPA) is the primary agency to review and approve a tribe’s authority to regulate water quality and has determined that the standard of inherent tribal authority over non-Indians requires a tribe to show that potential impacts of regulated activities are serious and substantial. In addition, a tribe must demonstrate that the reservation waters are used by the tribes or its tribal members and that the waters and important habitats are subject to protection under the Clean Water Act. Once a tribe makes this initial showing of treatment as a state (TAS), the EPA will presume the tribe has adequately demonstrated jurisdiction over fee lands unless an appropriate governmental entity submits comments showing a lack of tribal jurisdiction.<sup>23</sup>

The federal appellate courts have consistently upheld and affirmed EPA’s approval of tribal applications to establish water quality standards and programs under the Clean Water Act. In *City of Albuquerque v. Browner*,<sup>24</sup> the U.S. Court of Appeals for the Tenth Circuit rejected the city of Albuquerque’s challenge to the EPA’s approval of water quality standards set by the Pueblo of Isleta, located downstream from the city. The heart of the issue focused on the differing state and tribal water quality standards for the Rio Grande River, which flows through the city and then the Pueblo. The Tenth Circuit held that Congress authorized tribes to establish tribal water quality standards under the Clean Water Act, even where the tribal water-quality standards were stricter than the federal standards. The Pueblo’s water quality standards were upheld, and the first such tribal standards were approved by the EPA.

Also in 1996, in *Montana v. EPA*,<sup>25</sup> the state of Montana and other local communities filed a lawsuit against the EPA challenging the EPA’s approval of the Confederated Salish and Kootenai tribes’ TAS application to administer a water quality program under § 303 of the Clean Water Act for all lands and surface water within the Flathead Reservation. In the case, the state of Montana, along with other municipalities whose wastewater treatment facilities discharged into reservation water, unsuccessfully contested the tribes’

inherent civil regulatory authority over lands owned by non-Indians. The court agreed with EPA’s analysis of inherent tribal authority over reservation lands owned in fee by non-Indians, and agreed with EPA’s operating rule that requires a tribe to show that “the potential impacts of regulated activities are serious and substantial.”<sup>26</sup> In the case, the tribes explicitly asserted that water quality impairment by non-Indians would have a serious and substantial effect on the health and welfare of the tribes, and EPA “found the Tribes possessed inherent authority to set water quality standards for all surface waters within the Reservation.”<sup>27</sup> The U.S. Court of Appeals for the Ninth Circuit upheld the grant of TAS to the tribes.<sup>28</sup>

In 2001, the U.S. Court of Appeals for the Seventh Circuit, in *Wisconsin v. United States Environmental Protection Agency*,<sup>29</sup> affirmed the EPA’s approval of a tribe’s TAS application for purposes of establishing tribal water quality standards for all bodies of water within the Mole Lake Reservation and rejected the state of Wisconsin’s challenge to EPA’s action. The tribe sought to protect subsistence and ceremonial activities and the economic-development harvesting and selling of wild rice. In bringing this case, Wisconsin challenged the tribe’s inherent authority to regulate water quality on the reservation. In reaching this conclusion, the court stated that “once a tribe has shown that impairment of the waters on the reservation would have a serious and substantial effect on the health and welfare of the tribe, the EPA presumes that there has been an adequate showing of inherent authority.”<sup>30</sup> The court found that since “the Band has demonstrated that its waters are essential to its survival, it was reasonable for EPA, in line with the purposes of the Clean Water Act and the principles of *Montana*, to allow the tribe to regulate water quality on the reservation, even though that power entails some authority over off-reservation activities.”<sup>31</sup> The court upheld the EPA’s grant of TAS status to the tribe.

Tribal governments will likely continue to be faced with challenges relating to jurisdiction over non-Indian activities occurring within reservation lands, particularly if there is a mix of Indian- and non-Indian-owned lands creating significant checker-boarding of land ownership. However, the EPA’s policies of tribal self-determinations and the willingness to recognize tribes as sovereign nations has greatly contributed to federal judicial decisions upholding tribal environmental authority, particularly with regard to water. Tribal governments are setting water quality standards to protect myriad water uses, including drinking water, commercial and municipal uses, and vital cultural and ceremonial uses occurring on reservation.

### **Tribal Governance Building**

As tribal governments pursue preservation of their reserved water rights and protection of water quality, the development of tribal environmental programs and water departments are essential governmental foundations. And once tribes develop standards, they must have the capacity to enforce the standards. Tribal water institutions also create avenues for the public and local communities to participate in policy-making and establish mechanisms for consultation with the community.

Certainly, providing for a tribal community’s future is no small task. Institutional building requires the implementation of the laws and regulations, setting standards and review of issues by tribal environmental boards, in a manner that recognizes the interest of its citizenry and, in the case of tribal governments, tribal members and nonmembers residing on the reservation. Good governance requires the set of laws

governing the actions of individuals to be maintained through an impartial and effective legal system. “Good governance also informs the community, educates its citizens, builds public trust, and seeks to improve both the citizens’ and community’s quality of life. Responsive government also includes the capacity to comprehend and respond to the individual community member’s needs and priorities and to mediate conflicts with the community through an established process.”<sup>32</sup>

Tribal water and environmental program decisions affect the entire social, cultural, and spiritual beliefs, as well as the political fabric, of a community, because such decisions impact tribal members’ communal rights to live on, use, harvest, conserve, and transfer lands within the reservation, and the land itself, as a com-

of tribes. However, this does not mean that tribal standards of due process should be disregarded simply because they are not written.

Tribal definitions of due process can be adopted by tribal environmental and water programs and incorporated into their procedures by working with individual community representatives who can assist in the articulation of the due process within the local tribal context. These tribal standards can be used to define comment periods, hold public hearings, gather comments in the community, and generally ensure public participation. Customary law and the articulation of tribal standards, definitions and principles relating to fairness, thoughtful deliberation, honesty, the opportunity to speak before a collective decision is made, respect for each other, and harmony and

*Tribal governments will likely continue to be faced with challenges relating to jurisdiction over non-Indian activities occurring within reservation lands, particularly if there is a mix of Indian- and non-Indian-owned lands creating significant checker-boarding of land ownership.*

munity. Accordingly, tribal members have a legitimate stake in the decisions affecting the environment and land base, and, indeed, on many reservations individual tribal members may own a majority of the land base as a result of the allotment era.<sup>33</sup>

Often, certain individuals—traditional and religious tribal leaders—advocate the importance of cultural integrities to preserve the beauty and stability of the community, to protect the health and welfare of the residents, and to plan for future generations. These voices, comments, and opinions serve an important role in the tribal institutional setting. “Tribal members expect and request their tribal leadership to recognize, as many tribal leaders do, the responsibilities they have to the membership, such as informing the membership of proposed tribal government actions and enabling the membership to voice an opinion in support or in opposition to governmental decision-making impacting their rights, natural resources, welfare, and daily lives.”<sup>34</sup> Similarly, promotion of local tribal participation is crucial to the credibility and sustainability of tribal reforms in water policy, laws and regulations. “Indeed, the impetus for establishing tribal environmental programs is to clean up contamination, confront ecological degradation, improve the overall quality of life for tribal community members, and preserve the treaty-reserved homelands.”<sup>35</sup>

In addition to developing water quality standards to protect tribal uses and traditions, tribes have opportunities to establish boards and commissions to oversee the regulations of tribal water resources and to develop due process and public participation standards based on tribal traditions.<sup>36</sup> Providing due process and meaningful public involvement is a concern of industry and community members in the area of tribal rulemaking, permit application, and administrative hearings and decisions, but it does not mean that tribes need to adopt a cookie-cutter style of non-Indian due process concepts. Tribes have customs and traditions utilized by tribal courts and other dispute resolution processes. Many tribal institutions apply and draw upon customary law to some extent. Applying customary law is not always simple, because the customs are often contained in the oral traditions

balance with the community should be recognized and given due consideration by tribal water programs when they begin to consider and articulate public participation and fair treatment policies.

## Conclusion

In conclusion, tribes are in the best position to control the management of water on their reservations, and they can and should play a more prominent role with state and federal policy-makers in the upcoming decades concerning the modifications to water statutes, as water adjudications are carried out, water settlements are negotiated with Indian tribes, and the issuances of new water permits are reviewed. The desire of competing water users for certainty, flexibility, and providing water to junior users in the West cannot be completely met without the participation of tribes through water marketing transfers. To better accomplish this feat, a change in the federal laws is necessary to support a greater role for tribes themselves in the negotiation and approval of tribal water marketing agreements. Funding of Indian water settlements too, once congressional approval is obtained, is vital to implementing the reserved water rights of tribes and providing water to the guaranteed homelands.

Although Indian tribes have unique histories, cultures, and traditions, they share two things: survival and water. Tribes have survived. In our daily prayers, we thank the Creator for all that has been given us and the blessings of water and all its elements. And tribes will continue to survive as long as the water shall flow. ☉



*Jeanette Wolfley, a member of the Shoshone-Bannock Tribes, is an assistant professor at the University of New Mexico School of Law. Prior to joining the UNM faculty, she practiced in the area of Federal Indian law representing Indian tribes and individuals on a wide variety of issues including water rights adjudications.*

## Endnotes

<sup>1</sup>The era of Indian self-determination (1961–present) is a federal government policy of promoting and strengthening tribal governments as self-governing institutions, reducing federal government interference in tribal government affairs, and supporting tribal administration of federal Indian programs.

<sup>2</sup>Charles Wilkinson describes “measured separatism” in *AMERICAN INDIANS, TIME AND THE LAW*, 18 (1986):

Implicit ... was not only the expectation that each tribe would remain a people, but also the perception that a homeland, separate and distinct from the surrounding white culture, was a requisite element of that survival. ...

The essence of these laws, then, as viewed both by Indian tribes and by the United States, was to limit tribes to significantly smaller domains but also to preserve substantially intact a set of societal conditions and tribal prerogatives that existed then.

<sup>3</sup>207 U.S. 564 (1908).

<sup>4</sup>Some Indian reservations are in the ancestral homeland of the current tribal members. If an Indian tribe is residing on a reservation that encompasses part of its ancestral homeland, one basis for a water rights claim is aboriginal rights.

<sup>5</sup>Indian reservations in New Mexico can have pueblo water rights, which are recognized as federal rights. The residents of the pueblos had legal water rights recognized by the Spanish and, later, the Mexican governments. Under the terms of the Treaty of Guadalupe Hidalgo, the United States agreed to honor the water rights granted to the Pueblo Indians. In *New Mexico ex rel. State Engineer v. Aamodt*, the federal court ruled Pueblos are entitled to aboriginal water rights based on how many acres each had historically irrigated (historically irrigated acreage, or HIA) at any time between 1846 and 1924. The court also ruled that the Pueblos were entitled to satisfy their rights either from surface water or hydrologically connected groundwater. 618 F.Supp. 993 (D.N.M. 1985). See the *Aamodt* Litigation Settlement Act of 2010, Pub. L. No. 111-291, 124 Stat. 3064 (Pueblos of Nambé, Pojoaque, San Ildefonso, and Tesuque).

<sup>6</sup>*Winters*, 207 U.S. at 567.

<sup>7</sup>Ch. 213, 25 Stat. 113.

<sup>8</sup>*Winters*, 207 U.S. at 576.

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

<sup>10</sup>*Id.*

<sup>11</sup>The principal that, in treaties between Indian tribes and the United States, those rights that were not expressly relinquished were reserved for the benefit of the tribe arose three years before *Winters* in an off-reservation fishing-rights case involving Yakama Indians in Washington. In *United States v. Winans*, 198 U.S. 371 (1905), the Court upheld the rights of the Yakama Indians to fish off reservation on the Columbia River by reasoning the Yakama Nation reserved a fishing right by implication when they entered into a treaty with the United States: “[T]he treaty was not a grant of rights to the Indians, but a grant of right[s] from them, a reservation of those not granted.” *Id.* at 381.

<sup>12</sup>For a listing of negotiated water settlements, see *American Indian Water Rights Settlements*, UTTON TRANSBOUNDARY RESOURCES CENTER, available at [uttoncenter.unm.edu/pdfs/American\\_Indian\\_Water\\_Right\\_Settlements.pdf](http://uttoncenter.unm.edu/pdfs/American_Indian_Water_Right_Settlements.pdf).

<sup>13</sup>Pub. L.112-151 (2012).

<sup>14</sup>See Bryan Newland, *The Hearth Act: Transforming Tribal Development*, *THE FEDERAL LAWYER*, April 2014, at 66.

<sup>15</sup>753 P.2d 76 (Wyo. 1988), *aff'd on equally divided court*, 492 U.S. 406 (1989).

<sup>16</sup>835 P.2d 273, 278-79 (Wyo. 1992) (Big Horn III).

<sup>17</sup>35 P.3d 68 (Ariz. 2001).

<sup>18</sup>*United States v. Mazurie*, 419 U.S. 544 (1975).

<sup>19</sup>*Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 154 (1980).

<sup>20</sup>Felix Cohen, *Handbook of Federal Indian Law* 122 (1942 ed.) (emphasis added).

<sup>21</sup>435 U.S. 313, 323 (1978). The sovereignty principles established in *Mazurie* and *Wheeler* have been reaffirmed by the Supreme Court in more recent cases, including *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983); *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 851 (1985); and *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

<sup>22</sup>*Montana v. United States*, 450 U.S. 544, 565 (1981).

<sup>23</sup>33 U.S.C. § 1377(e). The EPA chose a case-by-case basis to determine if a tribe possesses the inherent authority over waters in light of the evolving case law. See 56 Fed. Reg. at 64877 (Dec. 12, 1991).

<sup>24</sup>56 Fed. Reg. at 64878.

<sup>25</sup>97 F.3d 415 (10th Cir. 1996).

<sup>26</sup>941 F.Supp. 945 (D. Mont. 1996), *aff'd*, 137 F.3d 1135 (9th Cir.), *cert. denied*, 525 U.S. 921 (1998).

<sup>27</sup>*Id.* at 951.

<sup>28</sup>137 F.3d 1135 (9th Cir. 1998)

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

<sup>30</sup>266 F.3d 741 (7th Cir. 2001), *cert. denied*, 535 U.S. 1121 (2002).

<sup>31</sup>*Id.* at 744 (citing 56 Fed. Reg. at 648779).

<sup>32</sup>*Id.* at 750.

<sup>33</sup>Jeanette Wolfley, *Tribal Environmental Programs: Providing Meaningful Involvement and Fair Treatment*, 29 J. ENVTL. LAW AND LITIGATION 389, 401 (2014).

<sup>34</sup>*Id.* at 402.

<sup>35</sup>*Id.* at 403.

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

<sup>37</sup>*Id.* at 409-421.