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How Tribal Water Rights are Won in the West: Three Case Studies from the Northwest

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SPECIAL FEATURES

HOW TRIBAL WATER RIGHTS ARE WON IN THE WEST: THREE CASE STUDIES FROM THE NORTHWEST*

*Rebecca Cruz Guiao***

I. Introduction

The Klamath River Basin controversy in Oregon and California represents complex legal, social, economic, and environmental issues involving a myriad of interested parties from tribal, federal, state, local, and public interest organizations. An apparent end to the controversy came on February 18, 2010, when over fifty organizations signed the Klamath Basin Restoration Agreement ("KBRA") and the Klamath Hydroelectric Settlement Agreement ("KHSA").[1] At the signing of these agreements, Governor Arnold Schwarzenegger of California said, "[I]t's time to say *hasta la vista* to the Klamath dams," and later added, "I can see already the salmon are screaming, 'I'll be back.'"[2]

The KBRA and KHSA companion agreements provide a plan for restoration of the Klamath River, including removal of the four PacifiCorp dams on the Klamath River.[3] The KBRA and the KHSA are products of two years of work[4] from a settlement group involving a wide array of federal, tribal, state, and local governments, conservation organizations, and

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1. David N. Allen, *The Klamath Hydroelectric Settlement Agreement: Federal Law, Local Compromise, and the Largest Dam Removal Project in History*, 16 HASTINGS W. NW. J. ENVTL. L. & POL'Y 427, 432 (2010).

2. *Historic Klamath Restoration Agreements Signed*, KLAMATH RESTORATION AGREEMENTS, http://www.klamathrestoration.org/klamath-agreements-signed.html (last visited Oct. 17, 2012).

3. *Id.*

4. *Id.*

irrigation and ranching groups.[5] Of the four Klamath Basin tribes, the Klamath, Karuk, and Yurok Tribes participated in the settlement group and signed onto the agreements,[6] while the Hoopa Valley Tribe did not participate nor support the agreements.[7] State agencies from both California and Oregon participated, in addition to multiple federal agencies.[8] Therefore, tribal, federal, and state sovereigns all participated in the settlement process.

Another example of a tribal water rights settlement process is the water settlement involving the Confederated Tribes of the Warm Springs Reservation of Oregon. This settlement process differs greatly from the Klamath Basin process because this water settlement process only involved Warm Springs, the State of Oregon, and the United States, and excluded participation from interest groups in the region.[9] This water settlement process specifically quantified the tribal reserved rights of the Warm Springs and involved a negotiated settlement among the sovereigns of the federal government, who represented the Warm Springs and federal interests, the Warm Springs, and the State of Oregon.[10]

A third example of collaborative work towards protecting tribal water rights is the Confederated Tribes of the Umatilla Reservation's participation in the Umatilla Basin Water Commission. The Confederated Tribes are one of five parties in the Umatilla Basin Water Commission. The other parties include two local counties and two local water districts.[11] This commission was formed under an intergovernmental agreement pursuant to Oregon state laws to implement an aquifer recharge project.[12] This collaborative commission varies from the examples of the Klamath and the Warm Springs because the goal in this case was to work toward providing more

5. *Partners in Restoring the Klamath River*, KLAMATH RESTORATION AGREEMENTS, http://www.klamathrestoration.org/restoration-partners.html (last visited Oct. 17, 2012)

6. *Id.*

7. *Id.*

8. *Id.*

9. Beth S. Wolfsong, *Warm Springs Water Rights Settlement, in* BONNIE G. COLBY ET AL., NEGOTIATING TRIBAL WATER RIGHTS: FULFILLING PROMISES IN THE ARID WEST 127, 127 (2005).

10. *Id.*

11. *See* Martha O. Pagel, Attorney, Schwabe, Williamson & Wyatt, Address at Law Seminars International, Tribal Waters in the Pacific Northwest Conference: Case Study of the Umatilla Basin Aquifer Restoration Project (Apr. 12, 2011) (on file with author).

12. Shonee D. Langford, *Full Steam Ahead for the Umatilla Basin Aquifer Restoration Project*, W. WATER L. & POL'Y REP., Jan. 2010, at 67, 67.

water for the Umatilla Basin as a whole, not to specifically protect a particular party's water right.

The Klamath Basin tribes of the Klamath, Karuk, Yurok, and Hoopa Valley, the Confederated Tribes of the Warm Springs Reservation, and the Confederated Tribes of the Umatilla Reservation are in unique positions, as they are all federally recognized tribes.[13] As federally recognized tribes, they retain their sovereignty as governments in addition to any reserved treaty rights. Therefore, these tribes are not just considered stakeholders in a settlement process; instead, they should be recognized as sovereign governments possessing vested treaty rights.

This Comment will explore generally how tribes can work toward protecting their tribal reserved water rights by participating in negotiation processes and collaborative efforts with private, state, and federal interests. This Comment will also examine tribal interests and the extent of the tribes' involvement in the processes.

In Part II, this Comment explores the Warm Springs settlement process. It provides a brief introduction of the water rights issues on the Warm Springs reservation and then addresses the Warm Springs settlement itself, including how the Warm Springs tribes were able to protect their rights and interests through specific settlement provisions.

Part III of this Comment focuses on the Klamath Basin, giving a brief introduction of the Klamath Basin controversy and the backgrounds, interests, and treaty rights of the four Klamath Basin tribes. Further, Part III explores the Klamath, Karuk, and Yurok tribes' participation in the development of the Klamath Basin agreements.

Part IV explores the Confederated Tribes of the Umatilla Reservation's participation in the Umatilla Basin Water Commission, specifically discussing how the Commission and the Confederated Tribes were able to protect their tribal reserved water rights through participation in that commission.

This Comment concludes with a discussion on what lessons can be learned from the three case studies and how tribes can protect their reserved water rights through negotiation and collaborative efforts with state governments, local governments, and local interest groups. The Comment suggests that negotiation and collaboration in certain situations may be a

13. *Tribal Directory*, U.S. DEP'T OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, http://www.bia.gov/WhoWeAre/BIA/OIS/TribalGovernmentServices/TribalDirectory/index.htm (last visited Jan. 22, 2013)

more successful way for tribes to protect their water rights than through pure litigation.

II. Indian Water Rights

A. Prior Appropriation

In the western United States, the doctrine of prior appropriation generally controls water allocation. Under prior appropriation, the first appropriator of the water has the superior right to use it.[14] The date that the water was first put to use becomes the priority date of the water right.[15] This doctrine is based on the customary law of "first in time, first in right."[16] The first appropriators to put the water to beneficial use, known as senior appropriators, are granted a water right to that amount of water.[17] Those people who later divert water are known as junior appropriators and their rights to water are inferior to senior appropriators in times of water scarcity.[18]

Further, under the prior appropriation doctrine, a water rights holder may lose his or her water rights under the doctrines of abandonment or forfeiture. Abandonment "generally requires proof of intent to no longer use the water."[19] Forfeiture "is the failure to use the water for a specified period of time — in common colloquial parlance, 'use it, or lose it.'"[20] Thus, under prior appropriation, the water user must show intent to use the water in order to avoid losing the water right under the doctrine of abandonment. The user should also actually put the water to use in order to avoid losing it under the doctrine of forfeiture. Unlike other property rights, water rights are not static and instead can be lost depending on context and lack of use.

B. Tribal Reserved Rights

During the 1800s, hundreds of tribes signed treaties with the United States government, ceding much of their traditional territories but

14. COLBY ET AL., *supra* note 9, at 11.

15. *Id.*

16. PETER W. SLY, RESERVED WATER RIGHTS SETTLEMENT MANUAL 3 (1989).

17. COLBY ET AL., *supra* note 9, at 11.

18. *Id.*

19. Robert T. Anderson, *Indian Water Rights, Practical Reasoning, and Negotiated Settlements*, 98 CALIF. L. REV. 1133, 1137 (2010).

20. *Id.*; *see also* A. DAN TARLOCK ET AL., WATER RESOURCE MANAGEMENT: A CASEBOOK IN LAW AND PUBLIC POLICY 262–65 (6th ed. 2009) (discussing the water law concepts of abandonment and forfeiture).

preserving those rights that were not expressly ceded.[21] In 1905, the Supreme Court addressed questions of Indian treaty interpretation regarding off-reservation treaty fishing rights in *United States v. Winans*.[22] The United States Supreme Court held that the Yakama Tribe, through the treaty provision of "the right of taking fish at all usual and accustomed places," impliedly reserved the right to cross private property to reach those fishing places.[23] Thus, the Supreme Court determined the treaty reserved rights for fishing "imposed a servitude upon every piece of land as though described therein," reasoning that treaties are "not a grant of rights to the Indians, but a grant of right from them — a reservation of those not granted."[24] Interpreted from the *Winans* case, *Winans* rights are tribally reserved rights that are "necessarily and impliedly reserved by the tribes in order to give effect to their treaty rights."[25]

C. Federal Reserved Rights

In the 1908 decision of *Winters v. United States*,[26] the United States Supreme Court held that the United States, in establishing the Fort Belknap reservation, reserved enough water to support the purposes of the reservation.[27] As the Supreme Court stated, "The power of the government to reserve the waters and exempt them from appropriation under state laws is not denied, and could not be. . . . That the government did reserve them we have decided and for use which would be necessary continued through years."[28] The priority date of the water right is the date the federal government established the reservation.[29]

Winters rights and other federal reserved rights differ from state prior appropriative rights because they retain a priority date as of the establishment of the reservation. Additionally, the quantity of water is not based on continuous beneficial use, or first-in-time use, but on the purposes of the reservation.[30] The *Winters* doctrine, also known as the federal reserved rights doctrine, stands for the proposition that when the federal

21. COLBY ET AL., *supra* note 9, at 10.
22. 198 U.S. 371 (1905).
23. *Id.* at 381.
24. *Id.*
25. COHEN'S HANDBOOK ON FEDERAL INDIAN LAW 1172 (Nell Jessup Newton et al. eds., LexisNexis 2005) [hereinafter COHEN].
26. 207 U.S. 564 (1908).
27. *Id.* at 575.
28. *Id.* at 577.
29. *Id.*
30. SLY, *supra* note 16, at 4.

government establishes reservations for tribes, the federal government impliedly reserves enough water to support the purposes of the reservation.[31] The federal government holds these *Winters* rights in trust for the tribe as federal reserved rights. *Winters* rights generally have senior priority dates as many Indian reservations were established early in the process of non-Indian settlement of the western United States.[32]

In *United States v. New Mexico*,[33] although dealing with non-Indian federal reserved water rights, the Supreme Court further defined the scope of the federal reserved rights doctrine for a national forest. The Court stated, "Where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water."[34] In *New Mexico*, however, the Supreme Court "indicated that water may be reserved under the *Winters* doctrine only for the primary purposes of a federal reservation."[35] The Supreme Court "narrowly construed" reserved water rights "by making it clear that such rights would only be implied where needed to fulfill the 'primary purposes' of the reservation."[36]

The *Winters* Court did not address the standards for quantifying *Winters* rights.[37] It stated that enough water was reserved to support the purposes of the reservation.[38] For reservations having agricultural purposes, the Supreme Court case of *Arizona v. California* provided quantification by stating, "enough water [is] reserved to irrigate all the practicably irrigable acreage on the reservations."[39] This is known as the Practicably Irrigable Acreage ("PIA") standard.[40] The PIA standard "awards water for present and historical irrigation, for those tribal lands capable of sustaining irrigation in the future, and for growing crops in an economically feasible manner."[41]

An additional way of quantifying *Winters* rights is reserving enough water for a homeland purpose of the reservation, thus reserving enough

31. *Winters*, 207 U.S at 575.
32. COLBY ET AL., *supra* note 9, at 10.
33. 438 U.S. 696 (1978).
34. *Id.* at 702.
35. United States v. Adair, 723 F.2d 1394, 1408 (9th Cir. 1983).
36. Anderson, *supra* note 19, at 1145.
37. COLBY ET AL., *supra* note 9, at 10.
38. Winters v. United States, 207 U.S. 564, 577 (1908).
39. 373 U.S. 546, 600 (1963).
40. COLBY ET AL., *supra* note 9, at 11.
41. Anderson, *supra* note 19, at 1143.

water for domestic, commercial, municipal, and industrial uses.[42] This standard is known as "DCMI."[43] A DCMI claim is an additional way tribes can acquire more water to use on their reservation beyond just for agricultural purposes. With PIA and DCMI claims, tribes can claim enough water to make their reservations a permanent homeland:

> It is thus entirely consistent with Winters and its progeny to imply a sufficient reserved water right to fulfill the purposes of all the "reservations" made by a tribe; that is, to interpret the entire package of retained rights of a tribe . . . as part of its intention of preserving a "permanent home and abiding place."[44]

D. Winters *and* Winans *Rights*

Winters and *Winans* rights must be distinguished from each other. *Winters* rights are water rights that the federal government reserves when it sets aside Indian reservations.[45] *Winans* rights are those rights that are impliedly reserved by the tribes themselves in continued exercise of their treaty rights.[46] The following is an example of this distinction: "a *Winans* right to hunt or fish would imply sufficient water to continue this practice, and thus a *Winans* right preserves a pre-existing use of water, rather than creating a new use (such as the rights in *Winters*, which were set aside for the tribes to take up new agrarian pursuits)."[47] Further, the priority dates of these rights differ. *Winans* rights have priority dates of time immemorial,[48]

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42. *See* Mason D. Morriset, Attorney, Morisset, Schlosser & Jozwiak, Address at Law Seminars International Tribal Waters in the Pacific Northwest Conference: Introduction and Overview (Apr. 11, 2011).

43. *Id.*

44. Heidi K. Gudgell et al., *Nez Perce Tribe's Perspective on the Settlement of Its Water Right Claims in the Snake River Basin Adjudication*, 42 IDAHO L. REV. 563, 578 (2006) (citing Winters v. United States, 207 U.S. 564, 565 (1908)).

45. *Winters*, 207 U.S. at 577.

46. COHEN, *supra* note 25, at 1172.

47. Aubri Goldsby, Note & Comment, *The McCarran Amendment and Groundwater: Why Washington State Should Require Inclusion of Groundwater in General Stream Adjudications Involving Federal Reserved Water Rights*, 86 WASH. L. REV. 185, 189 n.33 (2011).

48. United States v. Adair, 723 F.2d 1394, 1415 (9th Cir. 1983) (stating that water rights "to support [the tribe's] hunting and fishing lifestyle . . . necessarily carry a priority date of time immemorial").

while *Winters* rights priority dates are the date of the establishment of the reservation.[49]

Both *Winters* and *Winans* rights are reserved rights held in trust by the federal government. This Comment will use the term "tribal reserved water rights" to discuss both types of rights. As *Winters* and *Winans* rights are not subject to abandonment and the "use it or lose it" principle of prior appropriation, these rights often "place[] a cloud of uncertainty over many water rights perfected under state law."[50] In response to the uncertainty of state water rights in relation to tribal reserved water rights, Congress enacted the McCarran Amendment[51] in 1953 to provide a limited waiver of the United States' sovereign immunity.[52] The Supreme Court has interpreted the McCarran Amendment to allow states to join the federal government in state general stream adjudications ("GSAs"),[53] and this includes tribal reserved water rights.[54] Therefore, states may join the federal government in state GSAs to determine federal reserved rights, which includes the tribal reserved water rights held in trust by the federal government.

E. Walton *Rights*

In *Colville Confederated Tribes v. Walton*,[55] the Ninth Circuit held that "[t]he full quantity of water available to the Indian allottee . . . may be conveyed to the non-Indian purchaser."[56] Thus, the *Winters* rights available to an individual Indian allottee may be conveyed to non-Indian buyers of reservation allotted lands. These are known as *Walton* rights.[57] There are, however, limitations on this type of transfer of water rights:

> The non-Indian successor acquires a right to water being appropriated by the Indian allottee at the time title passes. The non-Indian also acquires a right, with a date-of-reservation

49. *See* Winters, 207 U.S. 564, 577 (1908) (stating that the federal government reserved water rights on the date of Congress' establishment of the Fort Belknap Reservation); *see also* COLBY ET AL., *supra* note 9, at 10 ("The Court determined the priority date for these rights to be the date the reservation was established.").

50. COLBY ET AL., *supra* note 9, at 10.

51. 43 U.S.C. § 666 (2006).

52. *Id.*

53. *See* Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976).

54. *See* Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983).

55. 647 F.2d 42 (9th Cir. 1981).

56. *Id.* at 51.

57. Interview with Howard Arnett, Attorney, Karnopp Peterson LLP, in Bend, Or. (Mar. 22, 2011) [hereinafter Arntett Interview].

> priority date, to water that he or she appropriates with reasonable diligence after the passage of title. If the full measure of the Indian's reserved water right is not acquired by this means and maintained by continued use, it is lost to the non-Indian successor.[58]

Thus, Indian allottees may pass their *Winters* rights to non-Indians purchasing their property as long as the non-Indians appropriate the water with "reasonable diligence" and continually use the water.[59] This is another type of water right that may complicate tribal water rights issues on Indian reservations.

As discussed above, Indian water law is quite complicated. There are many differences among water rights held by non-Indians, federally reserved *Winters* rights, and tribally reserved *Winans* rights. These differences, in combination with scarce water resources, often lead to conflicts between non-Indians and Indians regarding who has the right to use the water. The following sections of the Comment will discuss three Northwest water conflicts and how tribes have worked with local communities to protect their own water rights, while also attempting to resolve these pervasive conflicts.

III. Confederated Tribes of the Warm Springs and the Warm Springs Water Settlement

> Ultimate sovereignty is vested in the people, who received that sovereign authority in the [] laws given by the Creator and by the land itself. . . . The Confederated Tribes shall always exercise our sacred national sovereignty in order to achieve the highest of all goals: to preserve our traditional cultural ways that have existed for so many centuries in harmony with our homeland; and to provide for the well-being of our people for the many centuries that lie ahead. We shall, as we always have, live in balance with the land and never use more of our precious natural resources than can be sustained forever.[60]

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58. *Colville*, 647 F.2d at 51.

59. *Id.*

60. CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION OF OREGON, *Declaration of Sovereignty* (June 25, 1992), *available at* http://www.warmsprings.com/Warmsprings/Tribal_Community/History__Culture/Treaty__Documents/Declaration_of_Sovereignty.html.

The Confederated Tribes of the Warm Springs Reservation ("Warm Springs") consists of three tribal groups: the Wasco, the Warm Springs, and the Paiutes.[61] Through the 1855 treaty, the Warm Springs and Wasco tribes ceded over ten million acres of their traditional territory to the United States government.[62] They also reserved the reservation, which consists of "high desert timberlands, mostly in the Deschutes River basin" in Central Oregon.[63] The tribes reserved "the exclusive right of taking fish in the streams running through and bordering said reservation . . . and at all other usual and accustomed stations, in common with citizens of the United States."[64] Further, they also reserved "the privilege of hunting, gathering roots and berries, and pasturing their stock on unclaimed lands [ceded lands], in common with citizens."[65]

The Wasco bands lived along the Columbia River.[66] The Wascoes "coexisted in a trading system founded on fishing, hunting, and gathering."[67] The second tribe of the Warm Springs referred to themselves as "Wana-thlama, the river people,"[68] and they lived along the tributaries of the Columbia.[69] The bands of the Warm Springs moved seasonally from village to village and "depended on game, salmon, roots, and berries."[70]

The third tribal group, the Paiute, lived across the Great Basin, including parts of Idaho, Oregon, California, Nevada, and Utah.[71] In 1879, thirty-eight Paiutes settled on the Warm Springs Reservation from the Yakama Reservation where the US Army placed them.[72] Other Paiutes followed over the next few years and they eventually settled on the southern part of

61. THE CONFEDERATED TRIBES OF WARM SPRINGS, http://www.warmsprings.com/ (last visited Oct. 26, 2012).

62. *Id.*; *see also* Elizabeth Woody, *The Confederated Tribes of the Warm Springs Reservation of Oregon: The Relationship Between Peoples, Good Government, and Sovereignty*, *in* THE FIRST OREGONIANS 193, 196 (Laura Berg ed., 2d ed. 2007).

63. Woody, *supra* note 62, at 196.

64. Treaty between the United States and the Confederated Tribes and Bands of Indians in Middle Oregon, June 25, 1855, 12 Stat. 963, 964 (1889).

65. *Id.*

66. *Chronology*, THE CONFEDERATED TRIBES OF THE WARM SPRINGS, http://www.warmsprings.com/Warmsprings/Tribal_Community/History__Culture/Chronology/ (last visited Oct. 16, 2012) [hereinafter *Warm Springs Chronology*].

67. Woody, *supra* note 62, at 199.

68. *Id.* at 198.

69. *Warm Springs Chronology*, *supra* note 66.

70. Woody, *supra* note 62, at 198.

71. *Id.* at 200.

72. *Id.* at 199–200.

the reservation, becoming members of the Confederated Tribes of the Warm Springs Reservation.[73]

The Deschutes River on the east, and the Metolius River to the south, border the reservation.[74] All the other waterways within the reservation begin and end on the reservation.[75] The history of development on the reservation differs from other reservations in the United States because this reservation was not as impacted by the practice of allotment.[76] Currently, ninety-nine percent of the reservation is held in trust by the federal government for the Warm Springs tribes.[77] Apart from a few parcels, there is little irrigation on the reservation due to non-arable land.[78] Because of the high desert topography of the reservation, containing plateaus and canyons, the Warm Springs did not historically irrigate its land as it was uneconomical to do so.[79]

A. Warm Springs Water Rights Settlement Agreement Process, Amendment and Supplemental Adjudication

The Reagan administration in 1982 announced a policy of negotiating tribal water rights, which "[grew] out of frustration with the glacial progress of Indian water cases," including one case that was filed in 1915.[80] James Watt, Reagan's Secretary of the Interior, stated the purpose of negotiation was to "speed the settlement of Indian water claims."[81] Beginning that same year, the Reagan administration encouraged tribes to settle water claims through negotiation.[82] Even before the Reagan administration announced its preference for negotiations, the Department of Interior had conducted "technical studies to support water rights negotiations" on forty-four reservations throughout the United States in 1980.[83] In 1982, Secretary Watt "ordered the BIA to select 'candidate tribes' that were 'ripe' for

73. *Id.* at 200.
74. Wolfsong, *supra* note 9, at 128.
75. Interview with Howard Arnett, *supra* note 57.
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. DANIEL MCCOOL, NATIVE WATERS: CONTEMPORARY INDIAN WATER SETTLEMENTS AND THE SECOND TREATY ERA 46 (2002). At this time, there were fifty unresolved cases still being litigated. *Id.*
81. *Id.*
82. *Id.* at 47.
83. *Id.*

negotiation."[84] Ultimately, the BIA chose five tribes, one of which was the Warm Springs.[85]

The Warm Springs was an ideal candidate for a water rights settlement.[86] This is because water right conflicts about the tribal reserved water rights were minimal due to the geography, geology, reservation land ownership patterns, demographics, and the water use system.[87] The Deschutes River and the Metolius River border the reservation, with all waterways within the boundary of the reservation ending in the reservation.[88] In addition, the Deschutes River's particular hydrology is unique as it has an even flow year round and this makes it easier to meet the needs of extractive uses of water.[89] There is only one *Walton* right on the reservation, so this minimizes the conflict between the Warm Springs and non-tribal members.[90]

Further, the Warm Springs has aggressively sought to purchase land back from non-tribal members and for the federal government to hold in trust. In particular, ninety-nine percent of the Warm Springs reservation is held in trust for the tribe.[91] Therefore, the conflicts that arise regarding tribal reserved water rights on the reservation involving non-tribal members are practically non-existent, and this made the Warm Springs' tribal reserved water rights ripe for negotiation.

The three parties to the proposed negotiated settlement process were the Warm Springs, the federal government, and the State of Oregon. In the 1980s, the parties explored the concept of negotiated water settlements, gathering their respective negotiation teams and addressing whether they had the authority to negotiate tribal reserved water rights.[92]

The first step in the Warm Springs water settlement process was establishing whether the parties of the Warm Springs, the State of Oregon, and the federal government had authority to participate in a water settlement negotiation process over the Warm Springs reserved rights.[93] In 1987, the state legislature passed laws that authorized the Oregon Water Resources Department ("OWRD") to negotiate with the Warm Springs and

84. *Id.*
85. *Id.*
86. Interview with Howard Arnett, *supra* note 57.
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*

authorized the Water Resources Director to act on behalf of water rights holders within the Warm Springs reservation.[94] The Warm Springs Tribal Council passed resolutions that authorized the Chairman and Secretary-Treasurer of the Tribal Council to execute a settlement agreement and designated a negotiation task force to negotiate their tribal reserved water rights for the reservation.[95] The Secretary of the Interior had the authority to enter into negotiations for the United States and, in his trust capacity, for the Warm Springs.[96]

The first formal negotiation session was in April of 1991 and fifteen sessions occurred between then and 1996, when the parties reached an agreement in principle.[97] The scope of the water rights settlement was limited only to resolving on-reservation tribal reserved water rights and the parties agreed not to pursue off-reservation claims during negotiations.[98] However, the Warm Springs explicitly did not relinquish their off-reservation water rights.[99] During the negotiations, the state did not deny the existence of the Warm Springs' reserved water rights.[100] The main issue during negotiations was quantification of those rights.

At the outset, the OWRD focused on the PIA standard.[101] The Warm Springs did not want to pursue this standard of quantifying its water rights as there was not much economically irrigable land on the reservation, and this standard of quantification would have left the Warm Springs with very little reserved water rights.[102] Instead, the parties used an alternative quantification process. The Warm Springs advocated for a contemporary use measurement where they selected a date as of September 26, 1996, "and the amount of water resources used, consumed, and reserved as of that date were deemed enough to satisfy their present and future water needs without

94. OR. REV. STAT. §§ 539.300–310 (2009); Interview with Reed Marbut, Attorney, Karnopp Peterson LLP, in Bend, Or. (Mar. 22, 2011).

95. Confederated Tribes of the Warm Springs Reservation Water Rights Settlement Agreement at 2 (Nov. 17, 1997), *available at* http://*soda.sou.edu/awdata/030813b1.pdf* (under "Recitals") (unpublished manuscript) (on file with author) [hereinafter Warm Springs Water Settlement Agreement]; *id.* art. II, § B, at 6.

96. *Id.* art. II, § C, at 6 (citing 25 U.S.C. §§ 2, 9 (2006); 43 U.S.C. § 1457 (2006)).

97. Interview with Reed Marbut, *supra* note 94.

98. Interview with Howard Arnett, *supra* note 57.

99. *Id.*

100. Interview with Reed Marbut, *supra* note 94.

101. *Id.*

102. Interview with Howard Arnett, *supra* note 57.

subjecting other water users to a call by the tribe."[103] Through the process, a major tribal concession was its agreement to not curtail existing state water rights with a priority date prior to January 15, 1991, in order to satisfy their earliest priority date water right.[104] This allowed for the non-tribal groups in the Deschutes Basin of municipalities, irrigation districts, and others to support the settlement.[105]

After fifteen formal negotiations among the three parties, they signed the Confederated Tribes of the Warm Springs Reservation Water Rights Settlement Agreement on November 17, 1997.[106] The Agreement was then amended in April of 2002 in order to clarify the Warm Springs's water right priority date[107] as September 26, 1996. However, Oregon had an instream water right with a priority date of January 16, 1991.[108] In order to address the Warm Springs's concern that its water right would be subordinate to Oregon's instream right, two additional negotiations were held in September and November 2001, and the parties agreed to amend the Agreement to set the Warm Springs's tribal reserved water right priority date as January 15, 1991.[109]

Another issue arose after the Agreement was signed and amended. The parties were concerned that not each individual water user's interests on the reservation had been adequately represented in the Agreement,[110] such as those non-Indians with potential *Walton* rights claims. The Director of the OWRD published a notice on September 21 and 28, 1999 "to commence adjudication of all claims to water within the Reservation the use of which was initiated on or before February 24, 1909, and all claims to water by

103. Wolfsong, *supra* note 9, at 129. A call is when a senior appropriator "request[s] priority administration" of his senior water right through the state agency that administers water rights. *See* J. David Aiken, *Hydrologically-Connected Ground Water, Section 858, and the* Spear T Ranch *Decision*, 84 NEB. L. REV. 962, 975 (2006) ("In some western states, senior appropriators may request priority administration from the state engineer [in Oregon, the Oregon Water Resources Department (OWRD)] by placing a priority call. The state engineer's office [in Oregon, the OWRD] will shut off diversions by sufficient upstream junior appropriators until there is sufficient streamflow for the senior. Even in times of shortage, the senior appropriator is entitled to the full amount of her appropriation, even if the appropriator's irrigation practices are inefficient according to current practices.").

104. Interview with Reed Marbut, *supra* note 94.

105. *Id.*

106. *Id.*

107. Wolfsong, *supra* note 9, at 129.

108. *Id.*

109. *Id.*

110. *Id.*

individuals whose rights are derivative of the Treaty."[111] The notice informed people of the Agreement and that they could file claims or exceptions to the Agreement. Individual notices were also sent to all landowners in the Deschutes Basin.[112] Fifteen exceptions were filed and a hearing was held for these exceptions.[113] The Deschutes County Circuit Court entered an order denying all of these exceptions.[114] The Warm Springs Water Settlement Agreement, the amendment, and the supplemental adjudication were entered as a final judgment and decree by the Deschutes County Circuit Court in the Deschutes River GSA.[115]

B. Warm Springs Water Rights Settlement Agreement and Amendment

The major provisions of the Agreement set forth the priority date for the tribal reserved water right, the scope and quantity of the tribal reserved water right, the use of the tribal reserved water right, and the administration of water rights on the reservation. Under the Agreement, the tribes retain the earliest priority date for their reserved water right in the Deschutes River Basin while existing state water rights have priority dates under state law.[116] The existing state water rights with a priority date prior to January 15, 1991 will not be curtailed to satisfy the tribal reserved water right.[117]

As for the scope and quantity of the tribal reserved water right, the tribal reserved water right "consists of water in amounts described [under Article IV.B] to satisfy the Treaty purposes."[118] First, the quantity of water is protected to satisfy existing out-of-stream tribal uses of "water for domestic, industrial, municipal, agricultural, and cultural needs."[119] Next, the Agreement set forth two categories of the tribal reserved water right: Category I and Category II. These two categories determine where and for

111. Final Judgment and Decree at 3, *In re* the Determination of the Relative use of the Waters of the Deschutes River and its Tributaries, No. 99-CV-0380-ST (Or. Cir. Ct., Deschutes Cnty., Jan. 7, 2003) [hereinafter Final Judgment and Decree].

112. *Id.*

113. *Id.* at 22.

114. *Id.*

115. Interview with Josh Newton, Attorney, Karnopp Peterson LLP, in Bend, Or. (Mar. 22, 2011); Final Judgment and Decree, *supra* note 111, at 23.

116. Warm Springs Water Settlement Agreement, *supra* note 95, art. IV, § C, at 15.

117. *Id.*; Confederated Tribes of the Warm Springs Reservation Water Rights Settlement Agreement, Amendment to art. III, § 10, at 1 (Apr. 2002) (unpublished manuscript) (on file with author).

118. Warm Springs Water Settlement Agreement, *supra* note 95, art. IV, § C, at 12.

119. *Id.* art. IV, § B, pt. 1, at 13.

what purpose the tribal reserved water right can be used.[120] Lastly, the tribal reserved water right protects "[i]nstream [f]lows in the Deschutes and Metolius Rivers for the benefit of the Aquatic Ecosystem of the Reservation," requiring 3,000 to 3,500 cubic feet per second (c.f.s.) of flow in the Deschutes River, depending on the time of the year, and requiring 1,150 to 1,240 c.f.s. of flow in the Metolius River.[121]

The off-reservation use of the tribal reserved water right "shall be subject to and in accordance with state, federal and tribal law applicable to transfers, distribution and regulation of water and siting, construction and operation of any off-Reservation facilities for the transportation or delivery of water."[122] However, the on-reservation tribal reserved water right is not subject to forfeiture for non-continuous use.[123] For the use of the tribal reserved water right on the reservation, the tribes "may authorize use of [it] . . . for any purpose."[124] The persons who may use the reserved water right are: the tribes and any person authorized by the tribes for use on the reservation, individual allottees within the reservation, individual Indian fee landholders within the reservation, *Walton* right holders using water on the reservation, and any person the tribes authorize to use the tribal reserved water right off reservation.[125]

A major part of the Agreement is the tribal administration of water rights on the reservation, including both tribal reserved water rights and state water rights, with the following key features.[126] First, the tribal reserved water right within the reservation "shall be administered by the Tribes."[127] Second, the tribal reserved water right can be fulfilled by groundwater use from the reservation.[128] Third, the "Tribes have authority to allocate the Tribal Reserved Water Right" on the reservation.[129] Fourth, the tribes have the authority to administer all state water rights on the reservation.[130]

State law governs the administration and enforcement of these rights.[131] The state and the tribes will agree upon a "qualified Tribal watermaster as

120. *See id.* art. IV, § B, pt. 2-4, at 13–14.
121. *Id.* art. IV, § B, pt. 5, at 14-15.
122. *Id.* art. IV, § D, at 15.
123. *Id.* art. IV, § E, at 16.
124. *Id.* art. IV, § F, at 16.
125. *Id.* art. IV, § G, pts. 1-5, at 16–17.
126. *Id.* art. V, § A, pts. 1–4, at 18-19.
127. *Id.* art. V, § A, pt. 1, at 18.
128. *Id.* art. V, § A, pt. 2, at 18.
129. *Id.* art. V, § A, pt. 3, at 18-19.
130. *Id.* art. V, § A, pt. 4, at 19.
131. *Id.*

agent for the enforcement of state water rights used on the Reservation and to resolve all disputes between users of a state water right, or disputes between users of a state water right and users of the Tribal Reserved Water Right," on the reservation.[132] Persons exercising state water rights within the reservation have the right to appeal a decision of the tribes to the Director of the Water Resources Department.[133] Lastly, the Agreement does not "limit or expand the State's authority to administer all rights to the use of surface water and ground water" off the reservation and no transfer of state water rights will be permitted in the Deschutes Basin unless there is no injury to the Tribal Reserved Water Right.[134]

Through the Settlement and the negotiations leading up to it, the Warm Springs were able to protect their tribal reserved water rights by quantifying the rights and entering those rights in a final decree in Oregon's Deschutes River GSA. Although the Warm Springs situation may differ from other tribal reserved water rights issues, it serves as one example of how a tribe may participate in formal negotiations with the state and federal government in order to quantify and protect their tribal reserved water rights.

IV. The Klamath Basin Controversy

The Klamath River watershed is about 12,000 square miles, which is about the size of Maryland.[135] The Klamath River begins in Upper Klamath Lake in dry, south central Oregon, fed by snowmelt from the Cascade Mountains.[136] The Klamath River flows into Northern California, where the Scott, Shasta, Salmon, and Trinity Rivers join the Klamath.[137] The Klamath winds through deep canyons and wet forests, then flows out into the Pacific Ocean.[138]

The Klamath Basin is divided into the Upper and Lower Basins, which are two very distinct regions.[139] The Upper Basin is mostly in south central

132. *Id.*

133. *Id.*

134. *Id.* art. V, § B, at 21.

135. HOLLY DOREMUS & A. DAN TARLOCK, WATER WAR IN THE KLAMATH BASIN: MACHO LAW, COMBAT BIOLOGY AND DIRTY POLITICS 23 (2008).

136. *Id.*

137. *Id.*

138. *Id.*

139. Holly Doremus & A. Dan Tarlock, *Fish, Farms, and the Clash of Cultures in the Klamath Basin*, 30 ECOLOGY L.Q. 279, 289 (2011).

Oregon, with part of it reaching into Northern California.[140] The Lower Basin is in the northwestern part of California and includes the Klamath's major tributaries and their watersheds.[141]

The Upper Basin is a high plateau ranging in elevation from 4000 to 6000 feet, with much of the land in use for agricultural purposes.[142] In 1905, the Bureau of Reclamation ("BOR") authorized the Klamath Project, which constructed dams, canals, and drains along the Upper Klamath for irrigation.[143] The Klamath Project supplies water to more than 200,000 acres of land, which otherwise would be unsuitable for agriculture because of the arid nature of the land and climate.[144] The farming and ranching families of the Upper Basin see farming and ranching "not as a business but as a way of life," whose "attachment to farming is tied to a sense of heritage and obligation to preceding and succeeding generations of basin farmers."[145] Alongside the irrigators of the Upper Basin are the Klamath and Modoc Tribes whose traditional major food sources are the *qapdo* and *c'waam*, the Lost River and shortnose sucker that live in the Upper Basin's shallow lakes and use the tributaries to spawn.[146]

In the Lower Basin, from below the Iron Gate Dam to the mouth of the Klamath River at the Pacific Ocean, the topography consists of steep mountains and forested slopes of the Klamath-Siskiyou bioregion.[147] The Lower Basin is sparsely populated and quite isolated due to topography.[148] The Lower Klamath's river environment of cold, clear, quick-running water is much different from that of the Upper Klamath.[149] Instead of suckers, the Lower Basin provides habitat for salmonids such as Coho salmon, Chinook salmon, and steelhead.[150] The Klamath salmon support commercial and recreational fisheries.[151] The Coho salmon of the Klamath River were listed

140. *Id.*

141. DOREMUS & TARLOCK, *supra* note 135, at 25.

142. *Id.* at 26.

143. Matthew G. McHenry, Comment, *The Worst of Times: A Tale of Two Fishes in the Klamath Basin*, 33 ENVTL. L. 1019, 1024 (2003).

144. *Id.*

145. DOREMUS & TARLOCK, *supra* note 135, at 29.

146. *Id.* at 27.

147. *Id.* at 30.

148. *Id.*

149. *Id.*

150. *Id.*

151. *The Struggle to Restore the Klamath*, KLAMATH RESTORATION AGREEMENTS, http://www.klamathriverrestoration.org/ (last visited Oct. 28, 2012); *see also* Doremus & Tarlock, *supra* note 139, at 289.

as an endangered species under the Endangered Species Act ("ESA") in 1997.[152] The economy of the Lower Basin is resource dependent and includes ocean commercial fishing, sport fishing in the rivers of the Lower Basin, and logging.[153]

A. Klamath Basin Tribes

The federally recognized tribes in the Klamath Basin consist of the Klamath Tribes in the Upper Basin and the Karuk, the Yurok, and the Hoopa Valley Tribes in the Lower Basin. These four tribes are federally recognized and each hold hunting and fishing rights on the Klamath River. Based on the treaties the tribes signed with the United States government ceding much of their territory to the United States, the tribes reserved rights for themselves, consisting of hunting, fishing, and gathering rights in the region they traditionally occupied.

1. The Upper Basin Tribes: Klamath Tribes

The Klamath Tribes consist of the Klamath, Modoc, and Yahooskin Tribes.[154] The Klamath Tribes' main food sources were the suckerfish and yellow water lilies found in the shallow lakes of the Upper Basin. The tribes dried the suckers and ground the lilies into flour.[155] In 1864, the Klamath Tribes signed a treaty with the United States, ceding "more than 23 million acres of land,"[156] which was 90% of their lands; but in return, "the treaty provided that they retained all of their hunting, fishing, and gathering rights."[157] The Klamath reservation was rich with resources and included parts of the Williamson and Sprague rivers and the Klamath Marsh. The Klamath Tribes used the reservation for timber and rangeland and "by the 1950s, they had created a sustainable timber and grazing economy."[158]

Congress terminated the Klamath Tribes' federal recognition in 1954,[159] which ended their legal statuses as Indians for legal and political purposes.[160] The Termination Act disestablished the Klamath reservation

152. Doremus & Tarlock, *supra* note 139, at 294 (citing 62 Fed. Reg. 24, 588 (May 6, 1997)).

153. DOREMUS & TARLOCK, *supra* note 135, at 33.

154. *The Klamath Tribes History*, THE KLAMATH TRIBES http://www.klamathtribes.org/history.html (last visited Oct. 28, 2012).

155. DOREMUS & TARLOCK, *supra* note 135, at 33.

156. *The Klamath Tribes History*, *supra* note 154.

157. McHenry, *supra* note 143, at 1025.

158. DOREMUS & TARLOCK, *supra* note 135, at 63.

159. *The Klamath Tribes History*, *supra* note 156.

160. DOREMUS & TARLOCK, *supra* note 135, at 64.

and allowed the sale of the valuable forestlands on the reservation.[161] However, the Termination Act specifically stated, "Nothing in this [Act] shall abrogate any water rights of the tribe and its members" nor shall the Act "abrogate any fishing rights or privileges of the tribe or the members thereof enjoyed under Federal treaty."[162] In 1986, Congress restored federal recognition of the Klamath Tribe but did not return any land.[163] Currently, the Klamath reservation is only 372 acres and is shared by the Klamath, Modoc, and Yahooskin band of Snake Indian tribes. The Klamath Tribes have about 1700 enrolled tribal citizens.[164]

In the case of *United States v. Adair*, the Ninth Circuit interpreted the 1864 treaty between the Klamath Tribes and the federal government to include the reserved right to exclusively "hunt, fish, and gather on its reservation."[165] The Ninth Circuit held that when "the Klamath Reservation was established, the Government and the Tribe intended to reserve a quantity of water flowing through the reservation not only for the purpose of supporting Klamath agriculture, but also for the purpose of maintaining the Tribe's treaty right to hunt and fish on reservation lands."[166] The court also held that the priority date for some of the water rights was time immemorial[167] and that the Klamath Termination Act did not abrogate the Tribes' water rights.[168] Due to this history, the Klamath Tribes' water rights for supporting fisheries in the Klamath Basin are unique from non-Indian water rights as they are "basically non-consumptive . . . [with] the right to prevent other appropriators from depleting the stream's waters below a protected level in any area where the non-consumptive right applies."[169]

2. The Lower Basin Tribes: Karuk, Yurok and Hoopa

The Karuk, Yurok, and Hoopa Valley Tribes occupy the Lower Basin along the Klamath River and the Trinity River, and the tribes traditionally relied on salmon runs as a main source for subsistence.[170] The Yurok (meaning "down the river") historically lived at the confluence of the Klamath and Trinity Rivers and the Karuk (meaning "up the river") lived

161. *Id.*
162. 25 U.S.C. § 564m (2006).
163. DOREMUS & TARLOCK, *supra* note 135, at 65.
164. *Id.*
165. United States v. Adair, 723 F.2d 1394, 1408 (9th Cir. 1983).
166. *Id.* at 1410.
167. *Id. at 1415.*
168. *Id.* at 1412.
169. *Id.* at 1411.
170. DOREMUS & TARLOCK, *supra* note 135, at 66.

farther north on the Klamath River.[171] The Hoopa lived along the Trinity River in the Hoopa Valley, which is the valley the Trinity River flows through prior to reaching the Klamath River.[172]

During the California gold rush, non-Indian miners and settlers came through the region in their search for gold, and conflicts developed between Indians and the newcomers.[173] To minimize the conflict, in 1853, the president created Indian reservations throughout Northern California via executive orders.[174] The president created the Klamath River Reservation along the Klamath River in 1855.[175] The Yurok willingly moved onto this reservation, as this was their traditional land, while the Hoopa and the Karuk chose not to move onto the reservation.[176] To address the Hoopa's refusal to move, the federal superintendent of Indian Affairs for California signed a treaty with the Hoopa, creating the Hoopa Valley Reservation, which ran twelve miles in length along the Trinity River downriver to the confluence of the Trinity and Klamath Rivers.[177]

In 1876, President Grant's executive order confirmed the creation of the Hoopa Valley Reservation.[178] An executive order in 1891 further extended the Hoopa Valley Reservation to include a strip of land within the Klamath River Reservation.[179] This strip of land connecting both the Klamath River and Hoopa Valley Reservations lead to conflicts between the Hoopa and the Yurok. Congress addressed this conflict through the 1988 Hoopa-Yurok Settlement Act, which "partition[ed] the reservation into two pieces, restoring the Hoopa Valley Reservation to its original square dimensions and creat[ed] a separate Yurok Reservation consisting of the lands added in the 1891 executive order."[180] The Karuk, instead of joining the Yurok on the Klamath River Reservation, went back to their traditional lands along the middle part of the Klamath River.[181] Although the Karuk never received a reservation of their own, today they have about 750 acres, which are held in trust by the United States.[182]

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171. *Id.*; Karuk Tribe of Cal. v. Ammon, 209 F.3d 1366, 1370 (9th Cir. 2000).
172. *Karuk Tribe of Cal.*, 209 F.3d at 1371.
173. *Id.*
174. *Id.*
175. *Id.*; Mattz v. Arnett, 412 U.S. 481, 483-84 (1973).
176. DOREMUS & TARLOCK, *supra* note 135, at 66.
177. *Id.*
178. *Karuk Tribe of Cal.*, 209 F.3d at 1372.
179. *Id.* at 1370.
180. DOREMUS & TARLOCK, *supra* note 135, at 68.
181. *Id.*
182. *Id.*

Currently, "both the economies and cultures of the Lower Basin tribes are in disarray."[183] Many of the Yurok "live below the poverty level; four-fifths are unemployed, and nearly half of the homes lack electricity and phone service."[184] Although the Hoopa are better off than the Yurok, their economy also suffers because of the remoteness of their reservation.[185] The Hoopa do run a casino, but it is an hour drive from Eureka, California, and there are competing casinos closer to the Eureka population.[186] Although "lacking any significant economic engine, [the Karuk] keep their culture alive, in significant part by continuing their traditional dip-net fishing for salmon at Ishi Pishi Falls."[187]

As for the Lower Basin's federally recognized rights, the Yurok and Hoopa both hold reserved salmon fishing rights.[188] The Karuk believe they also hold reserved fishing rights like the Yurok and the Hoopa Tribes.[189] Unfortunately for the Karuk, their legal argument is an uphill battle because they do not have a reservation or a ratified treaty like the other Lower Basin tribes.[190] As for the Yurok and Hoopa Tribes, the Court of Appeals for the Ninth Circuit decided in *Parravano v. Babbitt*, "[t]he 1876 and 1891 executive orders that created the extended Hoopa Valley Reservation and the 1988 Hoopa-Yurok Settlement Act vested the [Yurok and Hoopa] Tribes with federally reserved fishing rights."[191] The Ninth Circuit "emphasize[d] that Indian rights arising from executive orders are entitled to the same protection against non-federal interests as Indian rights arising from treaties."[192] Although the Ninth Circuit did not rule directly on the issue of reserving enough instream water rights to support the tribes' fisheries, under the *Adair* decision, it can be argued that the Yurok and the Hoopa do hold instream water rights to support their fisheries with time immemorial as the priority date.

183. *Id.*
184. *Id.* at 69.
185. *Id.*
186. *Id.* at 70.
187. *Id.*
188. Parravano v. Babbitt, 70 F.3d 539, 546 (9th Cir. 1995).
189. *See McHenry, supra* note 143.
190. *Id.*
191. *Parravano*, 70 F.3d at 547.
192. *Id.*

B. Klamath Basin Controversy: History and Potential Resolution

As stated above, the BOR authorized the Klamath Project in 1905.[193] The demands for water in the Upper Klamath under the Klamath Project continued to increase for almost a hundred years.[194] In addition to the water demands from irrigators, there were other demands from the Klamath River tribes, the ESA, hydropower, and the National Wildlife refuges in the Upper Basin.[195] The controversy in the Klamath Basin came to a head in 2001, one of the driest years on record.[196]

In January and February of 2001, BOR requested formal consultation under the ESA with both the National Marine Fisheries Service ("NMFS") and United States Fish and Wildlife Service ("FWS") because of the Klamath Project's effects on Coho salmon, shortnose suckers, and Lost River suckers.[197] As of April, BOR concluded that the volume of water flow into the Upper Klamath Lake during the months of April through September would be the lowest amount ever recorded.[198]

The FWS and NMFS issued draft Biological Opinions ("BiOps"), concluding that the suckers and Coho salmon were at risk under the ESA.[199] As required under the ESA and related regulations, the FWS and NMFS proposed "reasonable and prudent alternatives" ("RPAs") of minimum water flows in the Klamath River in order for the Klamath Project to not jeopardize the fish species.[200] However, the BOR notified the FWS and NMFS that the water flows forecasted for 2001 would not be enough to meet the requirements under the RPAs.[201] On April 6, 2001, FWS and NMFS issued their final BiOps on the Klamath Project's effects on the fish species, and both agencies found the Klamath Project would jeopardize the suckers and Coho salmon.[202] The FWS proposed minimum instream flows above the Iron Gate Dam and the NMFS proposed minimum instream flows below.[203] On the same day the agencies issued the final BiOps, the BOR also issued its Operation Plan for 2001, which used the conclusions in the

193. DOREMUS & TARLOCK, *supra* note 135, at 47.
194. McHenry, *supra* note 143, at 1027.
195. *Id.* at 1026.
196. *Id.* at 1027.
197. Kandra v. United States, 145 F. Supp. 2d 1192, 1198 (9th Cir. 2001).
198. *Id.*
199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.*

final BiOps and the RPAs proposed by the FWS and NMFS.[204] The Operation Plan had very little irrigation water to work with that summer and most irrigators in the Klamath Project did not receive water.[205]

Irrigators and farmers sued the Department of Interior in federal court, requesting injunctive relief.[206] They alleged that the Department of the Interior breached contracts and violated the ESA and National Environmental Policy Act ("NEPA").[207] In the case of *Kandra v. United States*, the federal district court judge denied the irrigators and farmers' request for an injunction and allowed the 2001 Operations Plan to remain in place.[208]

Then in 2002, under the Bush Administration, the BOR decided to provide enough water to meet the irrigation contracts and left the remaining water to the suckers and the Coho salmon.[209] Twenty-five percent less water flowed from Upper Klamath Lake to the Klamath River, where the spawning grounds of the Coho salmon and other fish are found.[210] In September of 2002, a huge amount of anadromous fish died in the Lower Klamath, as they travelled up the Klamath to spawn.[211] Estimates of the dead fish ranged from 15,000 to 30,000, the latter estimate being almost a third of the Klamath's salmon.[212] The dead fish included the listed Coho salmon, some endangered suckers, as well as Chinook salmon and steelhead.[213] In addition to the biological and fisheries issues on the Klamath River, the expiration of PacifiCorp's hydroelectric licenses for the five dams that comprise the Klamath Hydroelectric Project was fast approaching on March 1, 2006.[214] The additional issue of relicensing of these hydroelectric dams was added to the already complicated Klamath controversy.

Throughout the controversy, the various parties have used different methods, such as litigation, the political process, and collaborative processes, to reach some resolution in the Klamath Basin. One particular collaborative group of Klamath Basin stakeholders arose out of the Federal

204. *Id.* at 1199.
205. *Id.*
206. McHenry, *supra* note 143, at 1028.
207. *Id.*
208. *Kandra*, 145 F. Supp. 2d at 1211.
209. McHenry, *supra* note 143, at 1028.
210. *Id. at 1028-29.*
211. *Id. at 1029.*
212. *Id.*
213. *Id.*
214. DOREMUS & TARLOCK, *supra* note 135, at 176.

Energy Regulatory Commission's ("FERC") relicensing process for PacifiCorp's Klamath Hydroelectric Project.[215] This group included the Klamath Basin tribes of the Yurok, Karuk, and Klamath, irrigators, commercial and sport fisherman, and state and local governments.[216] They came together and developed two companion agreements.[217] These Agreements are products of five years of collaborative work among this diverse set of Klamath stakeholders and were developed as an alternative to FERC's relicensing of PacifiCorp's dams.[218] "Together the Klamath Basin Restoration Agreement ("KBRA") and the Klamath Hydroelectric Settlement Agreement ("KHSA") describe the removal of four large dams, a plan to balance water use in the Klamath Basin, and economic stability for all of the Klamath's diverse rural economies."[219] Forty-five organizations of federal agencies, tribes, counties, irrigators, conservationists, and fishing groups signed these Agreements.[220]

The current status of the Klamath Basin Agreements is that the Secretary of Interior must determine that removing the dams (1) will assist in the progress of salmonid fisheries restoration in the Klamath Basin, and (2) is in the public interest in order for the Klamath Basin Agreements to go forward.[221] Further, federal legislation to implement the agreements must also be passed.[222]

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215. *Id.* at 176.

216. *The Struggle to Restore the Klamath*, *supra* note 151.

217. *Id.*

218. *Id.*

219. *Id.*

220. Klamath Basin Coordinating Council, Second Annual Report: Klamath Basin Settlement Agreements 7 (Mar. 30, 2012), *available at* http://216.119.96.156/Klamath/2012/2ndAnnualReport.pdf.

221. Klamath Hydroelectric Settlement Agreement, 3.3.1, at 19 (Feb. 18, 2010), *available at* http://klamathrestoration.gov/sites/klamathrestoration.gov/files/Klamath-Agreements/Klamath-Hydroelectric-Settlement-Agreement-2-18-10signed.pdf. The KHSA set forth a schedule for Secretarial Determination, such that the Secretary using best efforts will make his determination by March 31, 2012. *Id.* 3.3.4, at 20. However, as of the date this article was submitted for publication, the Secretary of Interior has not yet made his determination and the process is currently in the review stages. *Klamath Basin Water Issues*, KLAMATHRESTORATION.GOV, http://klamathrestoration.gov/home (last visited Apr. 25, 2012). The Secretarial Determination is to be based upon existing studies and data, "further appropriate studies," environmental compliance such as review under the National Environmental Protection Act, and "other appropriate actions as necessary to determine whether to proceed with" removal of the dams. Klamath Hydroelectric Settlement Agreement, *supra*, 3.2.1, at 17. *See generally* KLAMATHRESTORATION.GOV, http://klamathrestoration.gov (last visited Apr. 24, 2012) (official website of the federal and state agencies

C. Tribal Issues within the Klamath Basin Agreements

1. Federal Trust Responsibility to Tribes and the Klamath Basin Agreements' Effects on Tribal Water Rights

As both federal agencies and tribes were involved in the Klamath Basin Agreements, the Yurok, Karuk, and Klamath Tribes' position is "that in order to meet Tribal Trust responsibilities of Tribes that actively fish the Klamath River, the United States is obligated to actively participate in these agreements. . . ."[223] Further, the Klamath Agreements do not "provide[] that any Indian tribe, whether it endorses the settlement agreements or not, will have its water rights 'terminated' or otherwise adversely affected."[224] In particular, there are two provisions within the KBRA dealing with tribal water rights: 1) the Yurok, Karuk, and Klamath Tribes agreeing to waive breach of trust claims against the United States,[225] and 2) the Yurok, Karuk, and Klamath Tribes agreeing to not assert their senior water rights against Klamath Reclamation Project farmers under certain circumstances.[226]

First, the Yurok, Karuk, and Klamath agree to "a 'complete waiver and release' of all claims against the United States for damage to tribal water and fishing rights that resulted from actions above the California-Oregon

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involved in implementation of the Klamath Basin Agreements and providing the most current information on the environmental review and Secretarial Determination process).

222. The Klamath Basin Economic Restoration Act was introduced in Congress on November 10, 2011, by Oregon Senator Jeff Merkley in the Senate and by California Representative Mike Thompson in the House. S. 1851, 112th Cong. (2011); H.R. 3398 112th Cong. (2011). The bills include bi-partisan recommendations which are based on the Klamath Basin Agreements and authorizes the government to implement economic development and restoration laid out in the Klamath Basin Agreements. *Id.*

223. *The Klamath Agreements Are Consistent with the United States' Tribal Trust Obligations*, KLAMATH RESTORATION AGREEMENTS, http://www.klamathriverrestoration.org/issues/2009-12-07-06-44-55.html (last visited Oct. 31, 2012).

224. *Id.*

225. Klamath Basin Restoration Agreement for the Sustainability of Public and Trust Resources and Affected Communities, 15.3.5(A)(i), at 86 (Fed. 18, 2010), *available at* http://klamathrestoration.gov/sites/klamathrestoration.gov/files/KlamathAgreements/Klamath-Basin-Restoration-Agreement-2-18-10signed.pdf [hereinafter KBRA] (discussing the Klamath Tribe's relinquishment and release of claims against the United States); *id.* 15.3.6(B)(i)(a)-(b), at 90 (discussing the Yurok Tribe's relinquishment and release of claims against the United States); *id.* 15.3.7(B)(i)(a)-(b), at 94.

226. KBRA, *supra* note 225, 15.3.6(A)(i)-(ii), at 89 (discussing the Yurok Tribe's assurance); *id.* 15.3.3(A)-(B), at 84 (providing the similarly worded the Klamath Tribe's assurance); *id.* 15.3.7(A)(i)-(ii), at 94 (discussing the Karuk Tribe's assurance).

border and that arose before the KBRA goes into effect."[227] Further, the Klamath Tribes agree to also relinquish and release claims against the United States "relating to the litigation of the Klamath Tribes' water rights in the KBA in Oregon" in specific cases of the KBA.[228]

Second, the Yurok, Karuk and Klamath Tribes provide conditional permanent assurances

> that the Tribe[s] will not assert (1) tribal water or fishing rights theories or tribal trust theories in a manner, or (2) tribal or trust water rights, whatever they may be, in a manner, that will interfere with the diversion, use or reuse of water for the Klamath Reclamation Project that is not precluded by the limitation on diversions of water as provided in Appendix E-1 in any administrative context or proceeding, or any judicial proceeding, or otherwise; *provided*, however, that these Assurances shall not include, and shall not be construed to extend to, rights under statutes of general applicability, including the Endangered Species Act.[229]

These conditional permanent assurances either become permanent and or terminate depending on whether conditions are met. In order for them to become permanent, the Secretary of the Interior must publish a notice in the Federal Register that the following conditions have been met:

> Implementation of the project water plan that limits diversions to the agreed upon water allocation rule, [p]rojects that increase the storage capacity of Upper Klamath Lake are completed, [f]ull funding is authorized to implement the water rights retirement program above Upper Klamath Lake, Drought Plan [is] adopted,

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227. CHARLES WILKINSON, ANALYSIS OF CERTAIN PROVISIONS OF PROPOSED KLAMATH BASIN RESTORATION AGREEMENT 1 (2009), *available at* http://klamathriverrestoration.org/images/stories/09-07-22_wilkinson_review.pdf (discussing specifically the Yurok Tribe's waiver of claims, but this is equally applicable to the other tribes' waiver of claims as this portion of the waiver provisions of each tribe is phrased exactly the same); KBRA, *supra* note 225, 15.3.5(A)(i), at 86 (discussing the Klamath Tribe's relinquishment and release of claims against the United States); *id.* 15.3.6(B)(i)(a)-(b), at 90 (discussing the Yurok Tribe's relinquishment and release of claims against the United States); *id.* 15.3.7(B)(i)(a)-(b), at 94.

228. KBRA, *supra* note 225, 15.3.5(A)(ii), at 86.

229. This is quoted from the Yurok Tribe's assurance provision in the KBRA, however, it is similarly worded to the other tribes' assurances. KBRA, *supra* note 225, 15.3.6(A), at 89 (discussing the Yurok Tribe's assurance); *id.* 15.3.3(A)-(B), at 84 (providing the similarly worded the Klamath Tribe's assurance); *id.* 15.3.7(A), at 93–94 (discussing the Karuk Tribe's assurance).

> Reintroduction Plan [is] finalized, [and] [d]ams are actually removed.[230]

The first of these conditions will greatly reduce the KWPU diversions and will limit the diversions to the agreed upon limits in the KBRA.[231] The diversion limitation, the increase in Upper Klamath Lake's storage capacity by 100,000 acre-feet, and the retirement of 30,000 acre-feet of water upstream from Upper Klamath Lake will increase water flows in the Klamath.[232] Further, with respect to Klamath Basin tribes, "[t]he United States, acting in its capacity as trustee for the Federally [] recognized tribes of the Klamath Basin"[233] stated that it will provide similar assurances as the Yurok, Karuk, and Klamath Tribes in that it will not assert the tribes' senior water rights so as to interfere with the diversions under the Klamath Reclamation Project as long as the conditions discussed above are met.[234]

2. Klamath Tribes' Waiver of Litigating over Klamath Project Water Users' Diversions

The Klamath Tribes have litigated their water rights claims since 1975 through the State of Oregon's Klamath Basin Adjudication ("KBA"), but they have yet to settle these claims.[235] The Klamath Tribes have encountered difficulties with this adjudication process, including contests against their claims by other water users in the Klamath Basin.[236] In exchange for the Klamath Tribes not asserting their senior tribal reserved water rights over the Klamath Project Water Users' diversions, the Klamath Project Water Users withdrew their challenges to the Klamath Tribes' claims in the KBA.[237] This removes one impediment from the Klamath Tribes' ability to get their claims adjudicated in the KBA.

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230. JOHN CORBETT & S. CRAIG TUCKER, TRIBAL SOVEREIGNTY, WATER RIGHTS, AND THE KLAMATH AGREEMENTS 1-2 (2009), *available at* http://klamathriverrestoration.org/images/stories/pdfs/09-11-04_tucker_and_corbett_Sovereignty.pdf.

231. *The Klamath Agreements Are Consistent with the United States' Tribal Trust Obligations*, *supra* note 223.

232. *Id.*

233. KBRA, *supra* note 225, 15.3.9, at 98.

234. *Id.*

235. OREGON WATER RES. DEP'T, RESOLVING THE KLAMATH 6 (1999), *available at* http://www.oregon.gov/OWRD/ADJ/docs/klamath_summary99.pdf. The KBA is a general stream adjudication which is conducted by the state and is permitted under the McCarran Amendment discussed in Part I of this Comment.

236. Carl V. Ullman, Attorney, Klamath Tribes, Address at Law Seminars International Tribal Waters in the Pacific Northwest Conference (Apr. 11, 2011).

237. KBRA, *supra* note 225, 15.3.2(B), at 79–80; *id.* app. E-6, at E-69–E-75.

3. Fisheries

The fisheries issue in the Klamath Basin is very important to the tribes as they reserved fishing rights in their treaties. The goals of the KBRA's Fisheries Program are "to: 1) restore and maintain ecological functionality and connectivity of historic fish habitats; 2) re-establish and maintain naturally sustainable and viable populations of fish to the full capacity of restored habitats; and 3) provide for full participation in harvest opportunities for fish species."[238] The goals of the Fisheries Program, if achieved, will be very beneficial to the Klamath Basin tribes' fishing rights as they will be able to exercise their rights with more fish available.

A major part of the KHSA is removal of the Klamath dams. Dam removal will provide great benefits to the fisheries including improving water quality, addressing issues with habitats downstream of the dams that cause fish diseases, and opening up "over 600 stream-miles of historic spawning habitat."[239]

Aside from dam removal, another important aspect of improving fisheries is that "[t]he KBRA calls for over $350 million dollars to be spent on restoring and reintroducing salmon, steelhead, and lamprey to over 600 stream-miles of historic habitat upstream of the dams."[240] Further, the KBRA includes provisions to increase instream flows in the Klamath River to benefit fish management.[241] The KHSA and the KBRA work together to restore the historic habitat of the salmonid species of the Klamath Basin with dam removal and funding for habitat restoration and fish reintroduction.

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238. Ed Sheets, Summary of the Klamath Basin Settlement Agreements 1 (May 2010), *available at* http://216.119.96.156/Klamath/Summary%20of%20Klamath%20Settlement%20Agreements%204-5-10.pdf (last visited Oct. 31, 2012).

239. *Klamath Agreements Can Restore Our Salmon and Sucker Fisheries*, KLAMATH RESTORATION AGREEMENTS, http://www.klamathriverrestoration.org/issues/fisheries.html (last visited Oct. 31, 2012). However, under the KHSA, in order for the dam removal to go forward, the Secretary of the Interior must evaluate the dam removal and determine whether dam removal is appropriate. The Secretary of the Interior must decide whether removing the four PacifiCorp dams: "1) will advance restoration of salmonid fisheries of the Klamath Basin; and 2) is in the public interest, which includes but is not limited to consideration of potential impacts on affected local communities and tribes." Sheets, *supra* note 238, at 1.

240. *Klamath Agreements Can Restore Our Salmon and Sucker Fisheries*, *supra* note 239.

241. Sheets, *supra* note 238, at 3–4.

4. Endangered Species Act

As discussed above, the ESA is greatly entangled in the Klamath Basin controversy even though nothing in the Klamath Agreements affects the operation of the ESA.[242] In fact, the KBRA specifically states, "In the implementation of this Agreement, Public Agency Parties shall comply with all applicable legal authorities, including Authorizing Legislation, National Environmental Policy Act, Endangered Species Act, Clean Water Act, and other Applicable Law."[243] Further, the KBRA "establishes a process to develop general conservation plans or habitat conservation plans that would be designed to assist non-federal parties to comply with the ESA."[244]

The Klamath Basin controversy seems to be coming to a solution with the KBRA and KHSA. Supporters of these agreements state that "[i]f implemented, these agreements will bring about the most comprehensive river basin restoration effort in US history and serve as a model for resolving contentious struggles over resources in diverse rural communities."[245] These agreements if implemented will bring positive impacts for tribes in the Klamath, including restoration of the Klamath and the health of the Klamath's fisheries and ecology. Further, the Klamath Tribes have been litigating their water rights in Oregon since 1975 and the Klamath Agreements are a step forward in this process as they remove impediments to resolving the Tribes' water rights in the state adjudication.[246] As a comprehensive solution to the Klamath Basin controversy, the Klamath Agreements will hopefully bring resolution to the Klamath Basin and settle the conflicts among the diverse communities in the area.

V. Umatilla Basin Water Commission and Aquifer Restoration Project

> "The CTUIR [Confederated Tribes of the Umatilla Indian Reservation] lost a tremendous amount of resources and culture from the time of Lewis and Clark in 1804 and the 1855 Treaty

242. *See The Klamath Agreements DO NOT Affect the Endangered Species Act*, KLAMATH RESTORATION AGREEMENTS, http://www.klamathriverrestoration.org/issues/endangered-species-act.html (last visited Oct. 31, 2012) ("In no way, shape, or form is the applicability of the ESA limited through the Klamath Agreements.").

243. KBRA, *supra* note 225, 2.1, at 13.

244. Sheets, *supra* note 238, at 7.

245. *The Struggle to Restore the Klamath*, *supra* note 151.

246. *See supra* note 241–42 and accompanying text.

> signing, but we can never go backward to make things right. That is done. It is over. The only way we are going to recover what we have lost of our original reservation promise is to move forward using the sovereign powers we have retained. We have to learn how to use our sovereign powers to rebuild our nation and take our place in this world."[247]

The Confederated Tribes of the Umatilla Indian Reservation ("CTUIR") consist of the Cayuse, Umatilla, and Walla Walla Tribes.[248] Their homelands extended to the interior Columbia Plateau, along the Columbia and Snake Rivers and their tributaries in what is now recognized as portions of Washington, Oregon, and Idaho.[249] Their land is comprised of 6.4 million acres.[250] In 1855, chiefs and headmen from the Cayuse, Umatilla, and Walla Walla tribes signed a treaty with United States representatives Governor Isaac Stevens and General Joel Palmer, ceding much of their homeland and retaining the Umatilla Reservation of 250,000 acres.[251] In the Treaty of 1855, "[t]he three Tribes also reserved rights in the Treaty, which include the right to fish at 'usual and accustomed' sites and to hunt and gather traditional foods and medicines on public lands within the ceded areas."[252]

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247. Antone Minthorn, *Wars, Treaties, and the Beginning of Reservation Life*, *in* AS DAYS GO BY: OUR HISTORY, OUR LAND, AND OUR PEOPLE THE CAYUSE, UMATILLA, AND WALLA WALLA 61, 86 (Jennifer Karson ed., 2006).

248. *Our Homeland*, CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION, http://www.umatilla.nsn.us/homeland.html (last visited Apr. 20, 2011). There is much diversity in the CTUIR, as the tribes were comprised of "kinship communities . . . recognized by relations." Roberta Conner & William L. Lang, *Early Contact and Incursion, 1700–1850*, *in* AS DAYS GO BY: OUR HISTORY, OUR LAND, AND OUR PEOPLE THE CAYUSE, UMATILLA, AND WALLA WALLA, *supra* note 247, at 23, 24. Further,

> [t]hese communities did not share homogenous identities. Particularities due to village remoteness or easy accessibility, differences in obtainable foods and herbs, divergence in clothing due to climate, greater or lesser use of livestock due to available grazing, and variations in size of village all played into the dynamic identities of the ancestors whose descendants now compromise the Confederated Tribes of the Umatilla Indian Reservation.

Id.

249. Phillip E. Cash Cash, *Oral Traditions of the Natitaytma*, *in* AS DAYS GO BY: OUR HISTORY, OUR LAND, AND OUR PEOPLE THE CAYUSE, UMATILLA, AND WALLA WALLA, *supra* note 247, at 5.

250. *Quick Facts*, CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION, http://www.umatilla.nsn.us/CTUIR%20info%20packet.pdf (last visited Oct. 31, 2012).

251. *Id.*; Minthorn, *supra* note 247, at 68.

252. *Quick Facts*, *supra* note 250.

The Cayuse lived in the area of the Columbia Plateau from the Cascade Mountains to the Blue Mountains and fished along the Columbia River's tributaries.[253] The Umatilla lived along the north and south sides of the Columbia River from where the Umatilla River joins the Columbia River and downstream to Willow Creek.[254] The Walla Walla lived along the Columbia River as well as in the areas where the Snake, Yakama, and Walla Walla Rivers join the Columbia River.[255] For the three tribes, "[t]he [Columbia] river system was the lifeblood of the people and it linked many different people by trade, marriage, conflict, and politics. The people fished, traded, and traveled along the river in canoes and over land by foot."[256] Today, the Umatilla Reservation is made up of 172,000 acres in northeastern Oregon, as the federal government reduced the size of the Umatilla Reservation in the 1800s.[257] The population of the CTUIR is approximately over 2,800 citizens.[258]

The CTUIR has been involved for four decades[259] in collaborative efforts regarding water in the Umatilla Basin to protect fish runs in the basin.[260]

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253. *Our Ancestors' Way of Life*, CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION http://www.umatilla.nsn.us/hist1.html#wayoflife (last visited Oct. 30, 2011).

254. *Id.*

255. *Id.*

256. *Id.*

257. *Quick Facts*, *supra* note 250.

258. *Id.*

259. E-mail from John Barkley, Chairman, Tribal Water Commission, Confederated Tribes of the Umatilla Indian Reservation, to Rebecca Guiao, Student, Lewis and Clark Law School (Apr. 18, 2012, 23:28 PDT) (on file with author) (stating that the CTUIR "is in its 4th decade of collaboration in the basin which has resulted in effective relationships").

260. *See id.* (stating that "it's been [the CTUIR's] position since the early 80s that it's far more constructive and productive (and less expensive) to negotiate."); Janet C. Neuman, *Run, River, Run: Mediation of a Water-Rights Dispute Keeps Fish and Farmers Happy – For a Time*, 67 U. COLO. L. REV. 259, 267 (1996). "In fact, the [CTUIR] had pursued a strategy of negotiation so actively over the years that it had acquired a name – 'The Umatilla Doctrine.'" *Id.* at 276 n.81. In the 1960s and 1970s, the CTUIR began to ramp up their efforts to protect fisheries in the Umatilla River. *Id.* at 271. The CTUIR worked with the congressional delegation from Oregon, the Bureau of Reclamation, and irrigators in the Umatilla Basin to develop federal legislation enacted in the late 1980s to restore instream flows for fish while also meeting the needs of the irrigators. *Id.* at 272; *see also* E-mail from John Barkley, *supra* note 259 ("[The CTUIR] developed the Umatilla Basin Project Act I & II which provided a 'bucket-for-bucket' exchange of Columbia River water for Umatilla River water that was left as instream flow . . . enabl[ing] [the CTUIR] to restore salmon runs."). In 1991, water issues again became an issue in the Umatilla Basin and the CTUIR spearheaded a mediation effort to address these issues. Neuman, *supra*, at 277–78. For more

The following section, however, will focus on the more recent developments of the Umatilla Basin Water Commission and the CTUIR's involvement in the Commission and other local ground water issues to protect their own rights.

A. Umatilla Basin and the Water Commission

The Umatilla Basin encompasses parts of Umatilla and Morrow Counties, in addition to the Umatilla Reservation. Soon after the Cayuse, Umatilla, and Walla Walla Tribes signed the Treaty of 1855, settlers moved into the newly ceded territory and began to appropriate water from the Umatilla River for irrigation.[261] By 1909, the river's flow had been fully appropriated during the summertime flow.[262] To meet the demands of the Umatilla Basin, the Bureau of Reclamation built the Umatilla Basin Project ("Project") between 1906 and 1927.[263] The Project helps with irrigation through "a series of storage and diversion dams and length canals."[264] The water from the Project is distributed over more than 34,000 acres.[265] Unfortunately, with Project's development came the destruction of the salmon runs in the Umatilla River. By the year 1926, experts observed there were no more Chinook or Coho salmon in the Umatilla River.[266]

The 1950s and 1960s brought an increase in irrigated land as farmers started to use ground water in the Umatilla Basin.[267] Unfortunately, the high use of ground water since that time has led to decreasing ground water levels, with "many wells hav[ing] experienced total water declines of anywhere from 100 to 450 feet."[268] With these precipitous drops in ground water levels, the OWRD "designated four critical ground water areas in the Umatilla River Basin between 1976 and 1991."[269] These critical ground water areas make up over 600 square miles.[270] With designated critical

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information on the previous water issues in the Umatilla Basin and analysis of the mediation in the early 1990s, see Neuman, *supra.*

261. Langford, *supra* note 12, at 67.

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.* at 67–68.

267. *Id.* at 68.

268. *Id.*

269. *Id.* Under ORS 537.730, the OWRD may authorize critical groundwater areas if "[g]round water levels in the area in question are declining or have declined excessively." *Id.* (citing OR. REV. STAT. § 537.730).

270. *Id.*

ground water areas, no further appropriation of ground water is permitted and "in some subareas, existing water uses have been curtailed."[271]

In order to manage allocation of water in the critical ground water areas, the OWRD developed rules for these critical areas.[272] The OWRD must find the "sustainable annual yield" of the ground water aquifer, which is "the volume of water that can be pumped on an annual basis while maintaining reasonably stable water levels, and to limit annual ground water withdrawals accordingly."[273] In the Umatilla Basin, the OWRD cut back ground water use "to about 30 percent of the total amount of water for which existing groundwater rights have been issued," which translates to about 127,000 acre-feet of irrigation rights to ground water that are not satisfied every year.[274]

In order to address the unavailability of water in the Umatilla Basin, the Oregon Legislature passed a law[275] in 2008 that allocated funds for a feasibility study, directing the OWRD to determine whether diverting water from the Columbia River to recharge aquifers in the Umatilla Basin would be feasible.[276] The Legislature also required the OWRD to determine if the aquifer recharge could benefit fish and habitats through increased flows in the Umatilla River.[277]

The feasibility study showed that the amount of water needed in the Umatilla Basin was 159,000 acre feet, which included the 114,000 acre-feet for ground water irrigation rights that had to be restricted with the critical area designation, the 27,000 acre-feet to increase flows in the Umatilla River, the 7000 acre-feet for domestic and municipal use, and the 11,000 acre-feet to replenish the basalt aquifer.[278] To address the needs for water in the Umatilla Basin, the proposed project would take water from the Columbia River during the October, and also December through March to recharge an aquifer in the Umatilla Basin.[279] The feasibility study suggested the implementation of three Supply, Storage, Recovery, and Distribution ("SSRD") systems to benefit different areas throughout the Umatilla Basin.[280] Besides providing more water for irrigation, domestic, and

271. *Id.*
272. *Id.*
273. *Id.*
274. *Id.*
275. *Id.* at 69.
276. *Id.*
277. *Id.*
278. *Id.*
279. *Id.*
280. *Id.*

municipal uses, the "proposed SSRD systems are also intended to contribute to instream flow restoration in the Umatilla River through increased groundwater discharge to the river."[281] The proposed project is known as the Umatilla Basin Aquifer Restoration Project.[282]

During this time, in 2009, local governments, the CTUIR, and other interested groups formed the Umatilla Basin Water Coalition. The Coalition then decided to form the Umatilla Basin Water Commission ("Commission") to have an entity authorized with implementation of the Project.[283] The Commission was formed by an intergovernmental agreement among the CTUIR, Umatilla County, Morrow County, Westland Irrigation District, and County Line Water Improvement District.[284] The intergovernmental agreement is pursuant to Oregon state law that encourages cooperation among governments.[285] Specifically, the local governments were able to enter into the intergovernmental agreement with CTUIR under Oregon law.[286]

The purposes of the Commission are to implement the first stage of the project including, "contracting for design and engineering plans, applying to OWRD for initial water use authorizations, and contracting for construction of monitoring wells and other facilities as may be needed for preliminary testing of the proposed aquifer storage and recovery system."[287] Further, the Commission may choose to continue to develop the Project or work on other water projects.[288] The Commission has a board of directors, which consists of a representative from each of the intergovernmental agreement parties.[289] Although the Commission was originally formed to address all groundwater issues in the Umatilla Basin, its focus is now in the Lower Umatilla Basin.[290]

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281. *Id.* at 70.

282. *Id.* at 67.

283. J.R. Cook, Executive Director, Umatilla Basin Water Commission, Address at Law Seminars International Tribal Water in the Pacific Northwest Conference (Apr. 12, 2011).

284. Langford, *supra* note 12, at 67.

285. MARTHA O. PAGEL, CASE STUDY OF THE UMATILLA BASIN AQUIFER RESTORATION PROJECT: LEGAL FRAMEWORK 1 (Apr. 12, 2011) (citing OR. REV. STAT. § 190.003–190.110).

286. OR. REV. STAT. § 190.110 (2009).

287. Langford, *supra* note 12, at 70.

288. *Id.*

289. *Id.*

290. E-mail from John Barkley, *supra* note 259.

B. How the CTUIR's Participation in the Commission Benefits The Tribes

The Commission involves broad and diverse interests from across the Umatilla Basin. As stated by John Barkley, Chairman of the CTUIR Tribal Water Commission, "Establishment of the [Commission] stems from a long standing policy of the CTUIR to seek solutions together. Coming to understand our respective needs and rights had laid the foundation to build upon stronger relationships."[291] Further, the CTUIR views its participation in the Commission as a way to make water more available in the Umatilla Basin to protect its instream rights for salmon and for their PIA and DCMI claims.[292]

As water resources in the Umatilla Basin are over allocated, the CTUIR sees the Commission and the Project as creative solutions to create new water sources in an attempt to meet the needs of everyone in the Umatilla Basin.[293] The CTUIR does not view its participation in the Commission as denigrating their sovereignty since they are working with local governments; instead it views working with local governments and agencies as an exercise of tribal sovereignty.[294] The successes from the creation of the Commission and the Project's development are that the participating parties are developing partnerships in the Basin by getting to know each other and sharing ideas, they are able to collaborate on creative solutions, they are able to establish trust among all parties, and they are attempting to form "a beneficial balance to meet their respective needs."[295]

The CTUIR's extensive collaborative involvement through the last few decades has "served as an impetus for [the CTUIR's] tribal water rights settlement" and efforts to begin a water rights settlement process.[296] Recently, a federal assessment team worked with the CTUIR to determine their reserved water rights.[297] The federal assessment team determined that the CTUIR has valid claims and the scope of their claims consist of PIA, DCMI, and instream flows.[298] Further, the CTUIR Tribal Water Commission and Board of Trustees approved agreements with the State of

291. *Id.*

292. John Barkley, Chairman, Tribal Water Commission, Confederated Tribes of the Umatilla Indian Reservation, Address at Law Seminars International Tribal Waters in the Pacific Northwest Conference (Apr. 12, 2011).

293. *Id.*

294. *Id.*

295. *Id.*

296. E-mail from John Barkley, *supra* note 259.

297. Barkley, *supra* note 292.

298. *Id.*

Oregon and Westland Irrigation District in order to submit a "Joint Letter Requesting a Federal Negotiating Team."[299]

From the CTUIR's long-standing commitment to collaborative efforts since the 1980s, and more recently in the its involvement in the Commission, those in the Umatilla Basin have long since moved away from litigation and conflict, and instead have demonstrated their commitment to work collaboratively and to develop solutions to meet each other's needs.

VI. Conclusion: Tribes Can Adequately Protect Their Tribal Reserved Rights through Negotiations and Collaborative Processes

The Warm Springs, the Klamath Basin tribes, and the CTUIR have demonstrated that tribes can be successful using alternatives to litigation to protect their tribal reserved water rights.[300] Each of the tribes participated in slightly different processes in order to protect their reserved water rights. First, the Warm Springs participated in a formal negotiations settlement regarding their water rights with the State of Oregon and the federal government. In these negotiations, each party was an independent sovereign (although the federal government was working to protect tribal interests) and each party respected the authority of the other parties. The scope of this

299. E-mail from John Barkley, *supra* note 259.

300. However, it should also be noted that even water settlement agreements and other collaborative efforts can be contentious. The current Navajo-Hopi Little Colorado Water Rights Settlement Act of 2012, which has been introduced in the Senate by Arizona senators John McCain and John Kyl and introduced to the house by Arizona representative Ben Quayle, is a product of lengthy negotiations involving thirty stakeholders in the Little Colorado River Basin yet has received criticism and concerns from Navajo and Hopi communities. Anne Minard, *Little Colorado Water Rights Bill Met with Protests from Navajo and Hopi Communities*, INDIAN COUNTRY TODAY, Apr. 14, 2012, http://indiancountrytodaymedianetwork.com/2012/04/14/little-colorado-water-rights-bill-met-with-protests-from-navajo-and-hopi-communities-108320; *Navajo Nation President Shelly and Water Rights Commission to Hold Public Forums on Water Rights Bill*, INDIAN COUNTRY TODAY, Apr. 5, 2012, http://indiancountrytodaymedianetwork.com/2012/04/05/navajo-nation-president-shelly-and-water-rights-commission-to-hold-public-forums-on-water-rights-bill-106499. The Navajo and Hopi tribes participated in these negotiations, in addition to industry interests and state and federal governments. Minard, *supra*. However, this water rights settlement has encountered protests from Navajo and Hopi communities, regarding "densely constructed obligations and waivers that even [the Navajo Nation's water attorney] says are confusing, and in at least one case, poorly written." *Id.* For criticisms of the Navajo-Hopi Little Colorado Water Rights Settlement Act of 2012, see Ed Becenti, *Senate Bill 2109 Seeks to Extinguish Navajo and Hopi Water Rights*, NATIVE NEWS NETWORK (Apr. 4, 2012), http://www.nativenewsnetwork.com/senate-bill-2109-seeks-to-extinguish-navajo-and-hopi-water-rights.html.

negotiation was fairly narrow in only addressing on-reservation tribal reserved water rights.[301] Through this negotiation process, the Warm Springs were able to protect their tribal reserved water rights through actual quantification and in such a way that their water rights will be protected at both the state and the federal level.[302]

Second, the Klamath Basin tribes of the Klamath, Yurok, and the Karuk chose to participate in a basin-wide negotiation process involving federal entities, state and local governments, and public interest and local interest groups.[303] The scope of these negotiations was quite broad, as they dealt with removal of the Klamath River dams, water quantity and quality, economic development and other issues important to the basin as a whole.[304] The tribes were not able to protect their water rights by quantifying them, but they were able to protect their reserved rights of fishing by securing basin-wide ecosystem restoration in order to recover the fisheries in the basin.[305] In addition, the Klamath Basin Agreements brought together parties from diverse backgrounds, and through the process of developing the Agreements, created friendships among people historically considered adversaries.

Third, the CTUIR, through the Umatilla Basin Water Commission, is participating in a collaborative intergovernmental effort with local governments and local irrigation districts.[306] As discussed above, the Commission has the authority to implement the Umatilla Basin Aquifer Recovery Program in order to recharge depleted aquifers in the Umatilla Basin and to make more water available to users.[307] The Commission is developing creative solutions for water use in the Umatilla Basin in addition to making more water available for instream use to support fish populations in the Umatilla River.[308] Thus, the CTUIR is able to protect its reserved fishing rights by putting more water instream for fish populations and making more water available in a water-depleted area, thereby resolving their tribal reserved water rights in a less contentious environment.

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301. *See supra* Part II.C.
302. *Id.*
303. *See supra* Part III.C.
304. *Id.*
305. *Id.*
306. *See supra* Part IV.B.
307. *Id.*
308. *Id.*

There are certainly difficulties that can arise through tribal participation in negotiation and collaborative processes, and these processes may not be the answer for every tribal water rights issue. First, one of the major challenges of tribal participation in negotiation and collaborative processes is non-Indian parties' recognition of tribal sovereignty. For example, in the Klamath Basin Agreements, "some parties [were] reluctant to recognize, or [were] downright hostile to, tribal sovereignty."[309] Second, another major challenge is being able to agree upon certain provisions that clearly delineate different parties' rights. Third, negotiation and collaborative processes are time consuming and resource intensive, requiring high input from those representing the parties involved. Fourth, negotiation and collaboration often do not provide the proper forum in which to implement the settlement agreements. Thus, additional time and energy is required to enforce agreements and to hold parties accountable. Lastly, not all tribal water rights issues may be resolved through alternatives to litigation and it is important to note this is not a cure-all for conflicts over tribal water rights.

But from the above three case studies, we see there are litigation-free methods tribes can choose to resolve and protect their reserved rights. In the western United States, many communities of non-Indians and Indian tribes face conflicts over the scarce resource of water. These conflicts have historically created hostile and adverse situations, pitting non-Indian consumptive water users against tribes, environmentalists and others supportive of non-consumptive water uses.

Negotiations and collaborative processes can help resolve these issues or at least help resolve them in part. As Oregon's former governor Ted Kulongoski stated at the signing of the Klamath Basin Agreements, "You have shown the way. Conflict is not inevitable, and solutions are not unreachable. All that is needed is good faith among neighbors, fair dealing, hard work, and an abiding commitment to future generations."[310] Alternative processes to litigation may provide a way for tribes and their non-Indian neighbors to resolve deeply embedded issues over the limited water resources of the West, and to address the pervasive conflicts between

309. E-mail from Carl Ullman, Attorney, Klamath Tribes, to Rebecca Guiao, Student, Lewis and Clark Law School (Apr. 5, 2011, 09:09 PST) (on file with author).

310. Press Release, Governor Ted Kulongoski, Governor Kulongoski Signs Historic Klamath Basin Agreement (Feb. 18, 2010), *available at* http://www.klamathrestoration.org/images/stories/press_releases/10-2-18__Klamath_Basin_Signing_Ceremony_kulongoski.pdf.

Indians and non-Indians in ways that benefit all parties and future generations.