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## Valuing Sacred Tribal Waters Within Prior Appropriation

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Michelle Bryan\*

## VALUING SACRED TRIBAL WATERS WITHIN PRIOR APPROPRIATION

*One must 'see' water as more than an object of utility, as more than a mere 'thing' to be manipulated by technology for the convenience of humankind. One must take seriously, take as real, the meaning of water, the symbolism of water. This, for most of us, is a risk. Will we disappear if we set aside temporarily our dearly beloved . . . view of reality, or will we expand our consciousness into new possibilities for meaning, for understanding . . . ?<sup>1</sup>*

—Walter L. Brenneman

### ABSTRACT

*Throughout the world water plays a central role in the spirituality of indigenous peoples. Focusing on the American West, this article first describes how tribal water needs touch upon the sacred and then explains how both federal law and state prior appropriation doctrine fail to adequately protect these important sacred views of water. Pivoting away from the classic federal law arguments, the article then advocates for an evolution in state water law regimes to provide yet unrecognized protections for tribal sacred waters. Because international law plays an increasing role in this issue, the article also explores case studies from Ireland, Kenya, and New Zealand, where sacred waters are being protected from development. Using these international models for inspiration, the article then focuses on specific first steps where prior appropriation law can begin its evolution.*

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\* Professor of Law, University of Montana School of Law, Natural Resources & Environmental Law Program. My deepest thanks to the University College Cork in Cork, Ireland, for hosting me as a visiting scholar as I worked on this article. And to the peoples of Ireland in general, for their kind hospitality and spirit. And always, to my daughter Amelia, for sharing in the adventure. My thanks as well to Professors Monte Mills, Jason Robison, Barbara Cosens, Maylinn Smith, and Robin Craig for their helpful feedback on earlier drafts of this piece, and to students Emily Slike and Hannah Cail for their great assistance.

1. Walter L. Brenneman, Jr., *The Circle and the Cross: Reflections on the Holy Wells of Ireland*, 45 NAT. RESOURCES J. 789, 805 (2005).

## INTRODUCTION

Across the many cultures and places of our planet are peoples who believe water is sacred. This panhuman phenomenon occurs among the Judeo-Christian, Muslim, Shinto, Chinese, Buddhist, Greek, Roman, Celtic, Zulu, and a myriad of other belief systems.<sup>2</sup> “Water is perceived cross-culturally as the *fons et origo*, the source of all existence.”<sup>3</sup> And in shared geographic spaces, this sacredness evolves and becomes more complex over time.<sup>4</sup>

The American West is no exception to sacred conceptions of water. Since time immemorial, American Indian cultures have viewed water as a centerpiece of their beliefs, ceremonies, and places. Some tribes have successfully retained a limited universe of those sacred waters within the sanctuary of their reservation boundaries. Fewer still have obtained extraterritorial protection of sacred waters by virtue of treaty language or land transfers. But the vast majority of sacred waters have become lost to tribal domain, now falling within federal, state, or private lands—lands upon which state water law wields extraordinary influence.

In an era when indigenous sacred waters have become protected by international law, and the West is making space for new, emerging water values, it is time to begin a conversation about how our water law regimes can safeguard sacred waters.

The prevailing paradigm of “Western, liberal construction of nature has led to the near exclusion of indigenous cosmologies and peoples from mainstream law and policy. . . .”<sup>5</sup> And so it is with the West’s state-based doctrine of prior appropriation, which values and protects diversionary, utilitarian, consumptive uses of water—a doctrine conceptually at odds with sacred tribal waters. To date, federal law has been the medium through which we have sought to reconcile the competing interests of tribal water use and state-based water rights. The *Winters Doctrine*,<sup>6</sup> spurred along by the McCarran Amendment,<sup>7</sup> has led to adjudication of tribal “reserved” water rights—rights which largely fall within reservation boundaries and which exist outside of state law. But even when adjudication yields

2. CELESTE RAY, *THE ORIGINS OF IRELAND’S HOLY WELLS* 1 (Archaeopress Archaeology ed., 2014) (calling this spiritual veneration of water “hydrolatry”).

3. Brennenman, Jr., *supra* note 1, at 789 (citing MIRCEA ELIADE, *PATTERNS IN COMPARATIVE RELIGION* 188 (1996)).

4. RAY, *supra* note 2, at 7 (“Each well site has its own biography and depositional and ritual practices associated with sacred springs have surely evolved over time with changes in religion, population and even ecology and climate.”). Montezuma’s Well, discussed *infra* Part I.A., is a prime example of this phenomenon, with the original peoples residing around the well now gone, but successor tribes treating it as a sacred water.

5. Catherine J. Iorns Magallanes, *Maori Cultural Rights in Aotearoa New Zealand: Protecting the Cosmology that Protects the Environment*, 21 WIDENER L. REV. 273, 273 (2015); *see also* FILKRET BERKES, *SACRED ECOLOGY* 11 (Routledge 3d ed. 2012).

6. *See Winters v. U.S.*, 207 U.S. 564 (1908) (recognizing a tribal water right implied within a treaty or other document creating a reservation, in an amount “sufficient to fulfill the purposes of the reservation”). For a fuller explanation of these federal-based rights, *see infra* Part II.B.

7. 43 U.S.C. § 666 (1952) (waiving federal sovereign immunity in state court general stream adjudications to determine federal and tribal water rights); *see also* *Colo. River Water Cons. Dist. v. United States*, 424 U.S. 800 (1976); *see also* *Arizona v. San Carlos Apache Tribe of Ariz.*, 463 U.S. 545 (1983).

clarity about the quantity and priority date of tribal water rights, it rarely reaches the subject of sacred waters.<sup>8</sup> This is true even for the limited number of tribes that have successfully protected off-reservation tribal water rights, as those rights have focused on fishing and gathering, rather than sacred water use.<sup>9</sup> Thus, for the many sacred waters located beyond reservation boundaries, a tribe may be unable to obtain a federal-based water right.<sup>10</sup> Outside of tribal water rights adjudication, a host of other federal laws and policies also angle toward the situation but leave many gaps in protection, often placing competing public interests above tribal needs.<sup>11</sup> At the end of the day, off-reservation sacred waters are vulnerable to diversion, consumption, contamination, and other impacts that damage the very essence of what makes them sacred.

At first blush, state-based water law may not appear a ready solution. After all, Indian law is grounded in federal law, and tribes work valiantly to remain outside of state jurisdiction. And while some tribes have successfully acquired sacred lands protections under federally brokered deals with states,<sup>12</sup> state prior appropriation has historically been a recalcitrant legal regime, heavily weighted toward protecting senior users with consumptive uses. Charles Wilkinson counts it among the American West's immovable "lords of yesterday" for good reason.<sup>13</sup>

But we must face the reality that federal law alone has proved unable to adequately protect sacred waters on any broad scale throughout the West. Even as this article is written, the largest gathering of American Indian tribes in recent history has assembled to protest the U.S. Army Corps-approved Dakota Access Pipeline and its desecration of off-reservation sacred sites on the Missouri River that once belonged to the Standing Rock Sioux, Osage Nation, and Iowa Tribe.<sup>14</sup>

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8. The primary methodology for quantifying tribal water is an agriculture-based approach of "practically irrigable acreage." See *Arizona v. California*, 373 U.S. 546, 600–01 (1963).

9. A limited number of tribes have successfully negotiated or litigated for instream flows to support aboriginal fishing rights in their usual and accustomed places, although even then, with mixed success. See, e.g., *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983); see also Proposed Water Rights Compact Entered Into By the Confederated Salish and Kootenai Tribes, the State of Montana, and the United States of America, Jan. 2015 [hereinafter PROPOSED CSKT-MONTANA COMPACT] (Congressional ratification still pending), [http://dnrc.mt.gov/divisions/reserved-water-rights-compact-commission/docs/cskt/2015-proposed\\_compact.pdf](http://dnrc.mt.gov/divisions/reserved-water-rights-compact-commission/docs/cskt/2015-proposed_compact.pdf) [<https://perma.cc/ANL8-VDXT>]; see also Michael C. Blumm & Jane G. Steadman, *Indian Treaty Fishing Rights and Habitat Protection: The Martinez Decision Supplies a Resounding Judicial Reaffirmation*, 49 NAT. RESOURCES J. 653 (2009); David A. Bell, *Columbia River Treaty Renewal and Sovereign Tribal Authority Under the Stevens Treaty "Right-to-Fish" Clause*, 36 PUB. LAND & RESOURCES L. REV. 269 (2015). But at the end of the day, there are very few tribal reserved rights settlements or decrees that specifically recognize sacred water. This article thus focuses on sacred water as a separate, distinct category from those uses typically recognized under a reserved rights theory.

10. Tribes can and should argue for both on- and off-reservation treaty rights for sacred waters when the governing language of treaties, statutes, Executive Orders, or other federal instruments support such rights.

11. See discussion *infra* Part II.

12. See, e.g., discussion of the Taos Pueblo's Blue Lake restoration, *infra* Part II.C.

13. See generally CHARLES F. WILKINSON, *CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST* xiii, 3–27 (Island Press ed., 1992).

14. See Jack Healy, 'I Want to Win Someday': Tribes Make Stand Against Pipeline, N.Y. TIMES, Sept. 8, 2016, <http://www.nytimes.com/2016/09/09/us/dakota-access-pipeline-protests.html?action=click&contentCollection=U.S.&module=RelatedCoverage&region=EndOfArticle&pgtype=article>

On deeper inspection, prior appropriation, for all its faults, has revealed a surprising capacity to accommodate uses of emerging social value—the best example being instream flow for recreation and fisheries.<sup>15</sup> We have further seen that these emerging uses have not displaced established water rights, but rather made water markets more vibrant and responsive to our modern needs.<sup>16</sup> Such accommodations have not happened overnight, nor without great effort and compromise, but they do reveal the potential to transform the way we value and govern our water use. Thus, for sacred waters falling outside of tribal reserved rights or other tribal protection, prior appropriation may just be worth another look.

Prior appropriation is, after all, intended to protect our social values for water. And our social values have long included the protection of culture, religion, and treasured places within the western landscape.<sup>17</sup> Nationally, our laws recognize basic rights of religious exercise and expression,<sup>18</sup> as well as the protection of historic and cultural heritage.<sup>19</sup> Further, we have begun incorporating traditional ecological knowledge into our educational systems and decision making processes,<sup>20</sup> recognizing that along with traditional cultural protections comes attendant protections for our natural resources and human communities.<sup>21</sup>

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[<https://perma.cc/NJ8D-S6BM>]; see also Alexander Sammon, *A History of Native Americans Protesting the Dakota Access Pipeline*, MOTHER JONES, Sept. 9, 2016, <http://www.motherjones.com/environment/2016/09/dakota-access-pipeline-protest-timeline-sioux-standing-rock-jill-stein> [<https://perma.cc/FMD7-X5NM>].

15. Lawrence J. MacDonnell, *Environmental Flows in the Rocky Mountain West: A Progress Report*, 9 WYO. L. REV. 335 (2009) (“This regional shift in how people view rivers has been slow but sure. In a sense, it is revolutionary. It turns upside down 100 years of effort to put every drop of water to some kind of direct human use, in which water undiverted was water wasted, in which success was measured by how much water was beneficially consumed”); see also Adell Louise Amos, *The Use of State Instream Flow Laws for Federal Lands: Respecting State Control While Meeting Federal Purposes*, 36 ENVTL. L. 1237 (2006); Michael F. Browning, *Instream Flow Water Rights in the Western States and Provinces*, 56 ROCKY MTN. MIN. L. INST. 9–1 (2010).

16. These new uses may be treated as junior, or result from the voluntary change of a historic water right to instream flow. They do not jump ahead of senior, established water rights. See generally MacDonnell, *supra* note 15, at 338–41, 385–86.

17. Waters are connected to a uniqueness of place, or “placehood,” that is increasingly recognized as a societal value. Brennenman, Jr., *supra* note 1, at 796.

18. E.g., U.S. CONST. amend. I; American Indian Religious Freedom Act, 42 U.S.C. §§ 1996–1996b (2012); but see discussion *infra* Part II.C.1 (discussing how these rights are often displaced by competing federal policies).

19. E.g., National Historic Preservation Act, 54 U.S.C.A. §§ 300101–307108 (West 2016); Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001–3013 (2012).

20. “Traditional knowledge refers to the knowledge, innovations and practices of indigenous and local communities around the world. Developed from experience gained over the centuries and adapted to the local culture and environment, traditional knowledge is transmitted orally from generation to generation. It tends to be collectively owned and takes the form of stories, songs, folklore, proverbs, cultural values, beliefs, rituals, community laws, local language, and agricultural practices, including the development of plant species and animal breeds . . . Traditional knowledge is mainly of a practical nature, particularly in such fields as agriculture, fisheries, health, horticulture, and forestry.” *Introduction to Traditional Knowledge, Innovations, and Practices—Article 8(j)*, CONVENTION ON BIOLOGICAL DIVERSITY, <https://www.cbd.int/traditional/intro.shtml> [<https://perma.cc/JB9Q-HF3F>]. See also ROBIN WALL KIMMERER, *BRAIDING SWEETGRASS: INDIGENOUS WISDOM, SCIENTIFIC KNOWLEDGE AND THE TEACHINGS OF PLANTS* 3–10 (2014); Ray Barnhardt & Angayuqaq Oscar Kawagley, *Indigenous Knowledge Systems and Alaska Native Ways of Knowing*, 36 EDUC. &

Internationally, the right of indigenous peoples to practice their “spiritual and religious” beliefs and “cultural traditions and customs,” along with the right to access sacred places, is legally protected under the U.N. Declaration on the Rights of Indigenous Peoples.<sup>22</sup> So, too, is the right to “. . . maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions . . .” and, most on-point, the right to “*maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources.*”<sup>23</sup>

Several countries have passed laws and entered treaties that implement these sacred water protections, including Ireland’s laws governing holy wells, Kenya’s creation of sacred ecological zones, and New Zealand’s granting of legal rights to indigenous river systems. The United States joined the international community in committing to uphold these principles in 2010.<sup>24</sup> Announcing U.S. support, former President Obama stated that these principles—“including the respect for the institutions and rich cultures of Native peoples—are ones we must always seek to fulfill . . . what matters far more than words, what matters far more than any resolution or declaration, are actions to match those words.”<sup>25</sup>

Without question, there are other legal regimes that should also protect sacred tribal waters, such as federal land management plans, local land development codes, and environmental review procedures. This article, however, will focus on the notable absence of sacred tribal values within prior appropriation—the predominant system for regulating water use in the West. This

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ANTHROPOLOGY Q. 1, 8–23 (2005); Gregory Cajete, *Philosophy of Native Science*, in AMERICAN INDIAN THOUGHT: PHILOSOPHICAL ESSAYS 45–57 (Anne Waters ed., 2004); CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 3–16 (1983); Vine Deloria, Jr. Deloria, *Philosophy and the Tribal Peoples*, in AMERICAN INDIAN THOUGHT: PHILOSOPHICAL ESSAYS 3–11 (Anne Waters ed., 2004); LINDA TUHIWAI SMITH, DECOLONIZING METHODOLOGIES: RESEARCH AND INDIGENOUS PEOPLES 1–19 (2nd ed. 2002); Bryan M. J. Brayboy et al., *Reclaiming Scholarship: Critical Indigenous Research Methodologies*, in QUALITATIVE RESEARCH: AN INTRODUCTION TO METHODS AND DESIGN 423–50 (Stephen D. Lapan et al. eds., 2012).

21. See generally BERKES, *supra* note 5, at 1–52; Charles R. Menzies & Caroline Butler, *Introduction to TRADITIONAL ECOLOGICAL KNOWLEDGE AND NATURAL RESOURCES MANAGEMENT*, 1–17 (Charles R. Menzies ed., 2006).

22. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295/ U.N. Doc. 07-58681, annex, ¶¶ 11–12 (March, 2008), [http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf) [<https://perma.cc/NQ8B-WLUX>].

23. *Id.* at ¶¶ 25, 31(1) (emphasis added).

24. Office of the Press Secretary, *Remarks by the President at the White House Tribal Nations Conference*, THE WHITE HOUSE (Dec. 16, 2010), <https://www.whitehouse.gov/the-press-office/2010/12/16/remarks-president-white-house-tribal-nations-conference> [<https://perma.cc/WTQ3-SF3D>]. The Advisory Council on Historic Preservation has also adopted a plan to support the UN Declaration by issuing guidance on how to protect indigenous rights during the Section 106 review process under the NHPA. See *infra* fn. 108 and related text. Officially, the U.S. position is that the UN Declaration is non-binding, but the Executive Branch under former President Obama expressly supported it through its policies and administration of federal law. U.S. DEP’T. OF STATE, ANNOUNCEMENT OF U.S. SUPPORT FOR THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, INITIATIVES TO PROMOTE THE GOVERNMENT-TO-GOVERNMENT RELATIONSHIP & IMPROVE THE LIVES OF INDIGENOUS PEOPLES, <http://www.state.gov/documents/organization/184099.pdf> [<https://perma.cc/KTR9-CCPR>].

25. Office of the Press Secretary, *supra* note 24.

particular regime change is important not only for the legal protections it may afford, but also as a meaningful acknowledgement that the West today places value on waters sacred to the native peoples who have long called this place home.

In Part I, this article illustrates a few of the myriad ways in which tribal water needs in the West touch upon the sacred. This part then explains how prior appropriation fails to reflect these important sacred views of water. To provide a fuller picture, Part II briefly identifies some of the related federal laws and policies that touch upon sacred waters, but fail to provide robust protection. In recognition that sacred waters protection is an emerging global value, Part III shifts to international models where protection of sacred water is already taking place. Here may lie ideas worth incorporating into the West's water governance. Part IV then suggests some possible starting places to better align prior appropriation doctrine with sacred water values. The article concludes that our society is at a place where sacred tribal waters can and should be addressed, and that prior appropriation is a logical point of beginning.

## I. LACK OF PROTECTION IN THE AMERICAN WEST

Although some sacred waters may safely reside within tribally controlled lands,<sup>26</sup> most are far more likely to fall outside of a tribe's sphere of protection. Before U.S. settlement, the American West was occupied by several hundred tribal groups and bands who lived, hunted, and worshipped in sacred spaces distributed across the vast landscape.<sup>27</sup> Today, tribes occupy a small fraction of these original lands.<sup>28</sup> At current count, there are some 567 federally recognized tribes and another 200 tribes awaiting federal recognition.<sup>29</sup> Recent population estimates reflect that nearly 5 million people in the U.S. identify as American Indian, in whole or in part.<sup>30</sup> In many cases, tribes were relocated to places far removed from their aboriginal territories. In others, tribes retained some of their aboriginal territory, but nonetheless suffered the extensive loss of culturally significant lands and resources. These lands are "filled with places that are memorialized in tribal

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26. Even when sacred waters are located within protected areas, they remain vulnerable. Waters can originate upstream of a reservation boundary and thus be affected in terms of both quality and quantity by the time they reach a tribe. And on many reservations, tribes may be deemed to lack jurisdiction to regulate certain activities on non-Indian lands within the reservation. *See, e.g., Montana v. U.S.*, 450 U.S. 544 (1981); *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1998).

27. *See Early Indian Tribes, Culture Areas, and Linguistic Stocks—Western U.S.*, in *THE NATIONAL ATLAS OF THE UNITED STATES OF AMERICA* (Arch C. Gerlach ed., 1970), <http://www.lib.utexas.edu/maps/histus.html> [<https://perma.cc/UP8J-UBBU>].

28. Between 1887 and 1934, tribes lost over 90 million acres of land nationwide. NAT'L CONGR. OF AMERICAN INDIANS, *AN INTRODUCTION TO INDIAN NATIONS IN THE U.S.*, [http://www.ncai.org/about-tribes/indians\\_101.pdf](http://www.ncai.org/about-tribes/indians_101.pdf) [<https://perma.cc/5QH3-94S4>].

29. Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 81 Fed. Reg. 86 (May 4, 2016), <http://www.bia.gov/cs/groups/xraca/documents/text/idc1-033010.pdf> [<https://perma.cc/KA32-YXTG>]; DAVID GETCHES ET AL., *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 9 (6th ed. 2011). There are also over 60 tribes that have been recognized by states. AMERICAN INDIAN LAW DESKBOOK § 2:5 (West ed., 2016).

30. GETCHES ET AL., *supra* note 29, at 13 (3.1 million identified as American Indian and another 1.8 million identified as American Indian in combination with another race).

oral traditions, stories, and songs and that are often still visited. . . . [T]ribes have never really relinquished or disregarded their connections to these places.”<sup>31</sup>

The sheer number of tribes and American Indian peoples, coupled with the vastness of important lands lost to those peoples, leaves little doubt that the American West today, with its myriad of federal, state, and private land holdings is host—whether wittingly or unwittingly—to waters venerated by millions of people. This part begins by illustrating a few of the ways in which tribes value water as sacred, and then discusses how existing state water law falls short of protecting such values.

### A. A Diversity of Sacredness Around Water

Given the large number of tribes in the West, as well as the privacy in which many tribes hold their sacred beliefs, it is impossible to capture the variety and complexity of tribal views on sacred waters.<sup>32</sup> Scholars nonetheless concur that the American West is populated by peoples who view specific waters and locations as sacred in a variety of ways,<sup>33</sup> including through ceremonial uses, beliefs in water as spirit, and in creation stories and other significant cultural narratives.

#### 1. Ceremonial Water

Sacred water often serves a central role in tribal ceremonies. The Confederated Tribes of Warm Springs (Wasco, Walla Walla, and Paiute) in Washington State, for example, drink sacred waters at the beginning of their annual long house ceremony.<sup>34</sup> The Tribes also follow traditional law that requires their caretaking of the ecosystem, including the waters that are tied to their salmon, berries, and roots.<sup>35</sup> In the words of the Tribes: “Water is, and has been, central to the culture, religion, and subsistence of the Tribe since time immemorial. Unwritten laws of the Tribe have controlled use of water for thousands of years.”<sup>36</sup>

The Tribes adopted the first federally approved water code in the nation,<sup>37</sup> obtained treatment-as-state status (TAS) under the federal Clean Water Act,<sup>38</sup> and created their own water quality standards,<sup>39</sup> including protections for waters in

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31. Dean B. Suagee & Peter Bungart, *Taking Care of Native American Cultural Landscapes*, 27 NAT. RESOURCES & ENV'T, no. 4, Spring 2013, at 23, 23.

32. Nor can we trust entirely the non-tribal ethnographic resources that have attempted to document tribal views and uses of sacred water.

33. *E.g.*, AMERICAN INDIAN MYTHS AND LEGENDS xi-xii (Pantheon et al. eds., 1984); Suagee & Bungart, *supra* note 31, at 23.

34. Jonathan Smith, Confederated Tribes of Warm Springs, Address at the University of Oregon School of Law Symposium: Drought in the American West Symposium (Sept. 25, 2015), <https://law.uoregon.edu/explore/jell-symposium-media> [<https://perma.cc/JP8X-LXSW>].

35. *Id.*

36. WARM SPRINGS TRIBAL CODE, ch. 433, § 433.001.

37. *Id.*

38. Clean Water Act, 33 U.S.C.A. § 1377(e) (West 2014).

39. *See generally*, WARM SPRINGS TRIBAL CODE, ch. 432 (2014), <https://www.epa.gov/sites/production/files/2014-12/documents/confederated-tribes-warmsprings.pdf> [<https://perma.cc/U2K6-UMUJ>].

“archaeologically and culturally significant areas.”<sup>40</sup> The Tribes protect the cultural and religious use of water at a quality that will support and maintain “spiritual practices which involve . . . contact with water; uses of a water body to fulfill cultural traditional, spiritual or religious uses; use of water for instream flow, habitat for fisheries and wildlife, [and] preservation of habitat for berries, roots and other vegetation significant” to tribal peoples.<sup>41</sup>

Despite these robust on-reservation protections, the Tribes hold concerns about water quality contamination, temperature change, and attendant habitat impacts, along with the loss of sacred sites due to inundation from off-reservation damming of water. The Tribes’ water code elucidates the difficulty of protecting its sacred waters, which originate off reservation: “[N]ot all waters running through or bordering the Reservation arise on the Reservation and some have significant water quality problems. Among the most significant are the waters in the Deschutes River, generated primarily from the upper basin, and from which the Tribe draws most of its domestic and municipal water.”<sup>42</sup>

## 2. *Water as Spirit*

Water is also sacred to peoples who view it as alive. For example, the Northern Cheyenne Tribe, located in the Tongue River Valley in Montana, believe that the Earth’s physical elements, including water, are animated with spirit.<sup>43</sup> “According to Cheyenne theology, all things in the universe have spirits. This includes people, plants, animals, all types of water (rivers, creeks, springs, ground water and swamps).”<sup>44</sup> The Tribe also historically “did not use water that had stood all night—they called it dead, and said that they wished to drink living water.”<sup>45</sup> Still today, over 97% of tribal members believe that springs have spiritual value and over 90% recognize water as important to their spiritual way of life.<sup>46</sup>

Rivers, streams, and springs are a central feature of Northern Cheyenne ceremonies. Sacred waters are used in sweat lodge ceremonies, in medicine, and to wash off sacred earth paints.<sup>47</sup> The tribe also makes prayer cloth and tobacco

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40. *Id.* at § 433.020(b).

41. *Id.* at § 432.015

42. *Id.* at § 433.001.

43. NORTHERN CHEYENNE TRIBE, THE NORTHERN CHEYENNE TRIBE AND ITS RESERVATION: A REPORT TO THE U.S. BUREAU OF LAND MANAGEMENT AND THE STATE OF MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION, at ch. 2, 2-3 (2002) (submitted as part of Final Statewide Oil and Gas Environmental Impact Statement and Proposed Amendment of the Powder River and Billings Resource Management Plans (Jan. 2003)), [http://www.blm.gov/mt/st/en/fo/miles\\_city\\_field\\_office/og\\_eis/cheyenne.html](http://www.blm.gov/mt/st/en/fo/miles_city_field_office/og_eis/cheyenne.html) [<https://perma.cc/9X4P-3GZ9>].

44. *Id.* at ch. 7, 7-8.

45. GEORGE BIRD GRINNELL, THE CHEYENNE INDIANS: THEIR HISTORY AND LIFEWAYS 17 (Joseph A. Fitzgerald ed., 2008), <http://salmon.net.dn.ua/Litera/history-&-culture/George-%20BGrinnell-The-Cheyenne.pdf> [<https://perma.cc/DT52-F2SC>].

46. NORTHERN CHEYENNE TRIBE, *supra* note 43 at 7-12 (citing the 2010 Northern Cheyenne Reservation Survey on Traditional Economy and Subsistence).

47. *Id.* at 2-32, 2-33; GRINNELL, *supra* note 45, at 184-85.

offerings at sacred springs.<sup>48</sup> The Tribe has published the following summary of its sacred water beliefs:

Surface water is alive, ever moving, and has spiritual qualities. Springs are the homes of spirits. Offerings are commonly left at springs today. For example, . . . people leave offerings at and clean up [a sacred spring] when it is polluted by vandalism. There are three varieties of spirits that live in springs. The first have short brown hair/fur like prairie dogs. The second type is white and furry. They do not want to associate with anyone. Thunder always strikes around them. People should not frequent springs associated with these spirits. The third type is black. These spirits/animals come out to pay their respects when ceremonies are held.

. . .

The conceptual meaning of water to us would be the physical manifestation of the essence of life, of life itself, the fabric of life. The Sacred Buffalo Hat came to us out of the waters of the Great Lakes Region.

. . .

There are [also] special prayers for digging wells. Ground water represents the quiet nature of the earth. It should not be disturbed.<sup>49</sup>

Some of these sacred waters are located off of the Northern Cheyenne Reservation, requiring the Tribe to seek accommodation for its practices on private, state, and federal lands.<sup>50</sup> The Tribe has noted that “although some of the ceremonial people know of other areas lying on private lands off the reservation . . . they often refrain from going to these areas to hold their ceremonies because of the hostility of some of the landowners in these areas.”<sup>51</sup> As discussed further below, coalbed methane development on federal lands near the reservation also threatens the Tribe’s sacred waters and cultural resources.<sup>52</sup>

### 3. *Sacred Water Locations*

Sacred water also can arise at a particular location of significance, such as Montezuma Well in central Arizona. This well, circled by cave formations and prehistoric dwellings, is considered to be the birthplace of the Apache and the now-

48. NORTHERN CHEYENNE TRIBE, *supra* note 43, at 2-33; *see also* GREG CAMPBELL, TRADITIONAL PLANT USE STUDY: BENT’S OLD FORT NHS AND SAND CREEK MASSACRE NHS, ch. 5 (2004) (on file with author).

49. NORTHERN CHEYENNE TRIBE, *supra* note 43, at 7-11–7-12; *see also* GRINNELL, *supra* note 45, at 201 (describing water spirits and monsters).

50. NORTHERN CHEYENNE TRIBE, *supra* note 43, at 2-33; *see also* CAMPBELL, *supra* note 48.

51. NORTHERN CHEYENNE TRIBE, *supra* note 43, at 2-33.

52. *Id.* at 2-34. For a discussion of the impacts of coalbed methane development in this region, *see generally* Michelle Bryan, *Montana v. Wyoming: An Opportunity to Right the Course for Coalbed Methane Development and Prior Appropriation*, 5 GOLDEN GATE U. ENVTL. L. J. 297, 311–12 (2012).

vanished Sinagua Tribe.<sup>53</sup> “Even today it is a sacred spot for many local tribes. Hopi, Yavapai, Apache and Navajo all visit the Well to gather its sacred water [for rain ceremonies and healing properties].”<sup>54</sup> Surrounded by desert and located on National Park Service lands, the Well is something of a marvel. It provides a “constant supply of warm, 74 degree water” and “[o]ver 1.5 million gallons of water flows into the Well every day, a rate that has not fluctuated measurably despite recent droughts . . .”<sup>55</sup>

The Well has also served many non-tribal uses over time. Residents rely upon the Well for irrigation and livestock watering.<sup>56</sup> A nearby ranch claimed the first water right under Arizona law in 1870.<sup>57</sup> Prior to the Well’s placement in the national park system, exploiters also painted advertising on the cave walls overhanging the well, dug up graves, and sold boat rides.<sup>58</sup> Still today, the Well remains open to the general public for viewing as a tourist attraction.<sup>59</sup> Experts have also concluded that present day land development and increased groundwater pumping on adjacent lands pose a threat to the Well.<sup>60</sup>

In neighboring Nevada, the Hualapai people similarly locate their place of origin to a “free-flowing spring that erupts from the rocks in a small canyon at the base of a mountain known as *Wikaahmé* or Spirit Mountain,” near the Grand Canyon.<sup>61</sup> With an aboriginal territory that spanned over five million acres,<sup>62</sup> and a

53. JACK BECKMAN, A HISTORY OF MONTEZUMA WELL 10 (1990), [https://www.pggp.com/well\\_document/A%20History%20of%20Montezuma%20Well.pdf](https://www.pggp.com/well_document/A%20History%20of%20Montezuma%20Well.pdf) [https://perma.cc/J85U-G6VH].

54. *About Montezuma Well*, FRIENDS OF THE WELL, [http://www.friends-of-the-well.org/about\\_well.html](http://www.friends-of-the-well.org/about_well.html) [https://perma.cc/5ZQH-6BP2]; see also BECKMAN, *supra* note 53, at 25.

55. *Exploring Montezuma Well*, NAT’L PARK SERV., <https://www.nps.gov/moca/planyourvisit/exploring-montezuma-well.htm> [https://perma.cc/3AMR-2JVT].

56. *Id.*

57. BECKMAN, *supra* note 53, at 11.

58. *Id.* at 11; Melissa Philibeck, *Little House in the Verde Valley*, RANGER REVIEW, Aug. 15, 2010, at 1, <https://www.nps.gov/moca/learn/news/upload/Issue-6.pdf> [https://perma.cc/3USZ-3JJ8]; JOSH PROTAS, A PAST PRESERVED IN STONE: A HISTORY OF MONTEZUMA CASTLE NATIONAL MONUMENT ch. 2 (2002), [https://www.nps.gov/parkhistory/online\\_books/moca/chap2.htm](https://www.nps.gov/parkhistory/online_books/moca/chap2.htm) [https://perma.cc/9SRE-KWQM].

59. *Exploring Montezuma Well*, *supra* note 55.

60. Northern Arizona University, *Montezuma Well*, ARIZONA HERITAGE WATERS, [http://www.azheritagewaters.nau.edu/loc\\_montezumawell.html](http://www.azheritagewaters.nau.edu/loc_montezumawell.html) [https://perma.cc/8DWP-6447] (“More than 90 percent of the springs in northern Arizona have been dewatered or are ecologically impaired because of groundwater pumping, development, or modification for livestock or human use.”)

61. Suagee & Bungart, *supra* note 31, at 23.

62. Connie L. Stone, *People of the Desert, Canyons and Pines: Prehistory of the Patayan Country in West Central Arizona* 27, in BUREAU OF LAND MANAGEMENT, CULTURAL RESOURCE SERIES MONOGRAPH NO. 5 (1987), [http://www.blm.gov/style/medialib/blm/wo/Planning\\_and\\_Renewable\\_Resources/coop\\_agencies/new\\_documents/az.Par.30456.File.dat/arizona\\_6.pdf](http://www.blm.gov/style/medialib/blm/wo/Planning_and_Renewable_Resources/coop_agencies/new_documents/az.Par.30456.File.dat/arizona_6.pdf) [https://perma.cc/NB6T-KPF8]. According to the Tribe:

The Hualapai Tribe has continued to maintain constant cultural and historical affiliation with the territory, water, riparian and riverine resources of the Colorado River and the Grand Canyon. Hualapai ancestral home-lands and resources extended from the Colorado River’s junction with the Little Colorado River on the northeast, downriver to the southwestern confluence of the Bill Williams and Santa Maria Rivers.

modern reservation comprising only one million acres,<sup>63</sup> tribal members have deep connections to off-reservation springs, rivers, and other water sources, even “deriving their group names from the places that were their main home base,” such as *Haka’sa Pa’a* or Pine Springs People.<sup>64</sup> The Tribe currently lacks the security of decreed tribal water rights, and its aboriginal territory lies in areas of competing state water demands from agriculture, subdivision development, and mining.<sup>65</sup>

The Hualapai are also one of several tribes who objected to the federal government’s authorization of Arizona’s Snowbowl ski resort in the San Francisco Peaks. In a highly publicized decision discussed further below, the Ninth Circuit Court of Appeals in *Navajo Nation v. U.S. Forest Service*<sup>66</sup> heard evidence of the Hualapai’s spiritual belief that:

[T]he mountain and its water and plants are sacred and have medicinal properties. . . . Hualapai religious ceremonies revolve around water, and they believe water from the Peaks is sacred. In their sweat lodge purification ceremony, the Hualapai add sacred water from the Peaks to other water, and pour it onto heated rocks to make steam. In a healing ceremony, people seeking treatment drink from the water used to produce the steam and are cleansed by brushing the water on their bodies with feathers. At the conclusion of the healing ceremony, the other people present also drink the water. A Hualapai tribal member . . . testified that the Peaks are the only place to collect water with those medicinal properties, and that he travels monthly to the Peaks to collect it from Indian Springs, which is lower on the mountain and to the west of the Snowbowl. The water there has particular significance to the Hualapai because the tribe’s archaeological sites are nearby.<sup>67</sup>

The principal concern of the Hualapai and other tribes, which the court ultimately found unpersuasive, was the ski resort’s use of state-based water rights in the form of treated sewage effluent purchased from the City of Flagstaff.<sup>68</sup>

The above examples of sacred water repeat themselves as variations on a theme throughout the tribes and places of the American West. They also echo across the globe, including with many traditional Irish people, the indigenous

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HUALAPAI DEPARTMENT OF CULTURAL RESOURCES, ABOUT THE HUALAPAI NATION 9–10 (2nd ed., 2010), <http://hualapai-nsn.gov/wp-content/uploads/2011/05/AboutHualapaiBooklet.pdf> [<https://perma.cc/DVT8-VUDQ>].

63. *About Hualapai*, HUALAPAI TRIBE, <http://hualapai-nsn.gov/about-2/> [<https://perma.cc/TLK3-X7R6>].

64. Suagee & Bungart, *supra* note 31, at 23.

65. See generally ARIZONA DEPT. OF WATER RESOURCES, ARIZONA WATER ATLAS VOL. 4: UPPER COLORADO RIVER PLANNING AREA 28, 40–47, 200 (2009), [http://www.azwater.gov/AzDWR/StatewidePlanning/WaterAtlas/UpperColoradoRiver/documents/Volume\\_4\\_final\\_web.pdf](http://www.azwater.gov/AzDWR/StatewidePlanning/WaterAtlas/UpperColoradoRiver/documents/Volume_4_final_web.pdf) (“[P]opulation projections forecast will double by the year 2030. . . .”).

66. *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058 (9th Cir. 2008).

67. *Id.* at 1101–02.

68. 1 FOREST SERV. SW. REGION, U.S. DEP’T OF AGRIC., FINAL ENVIRONMENTAL IMPACT STATEMENT FOR ARIZONA SNOWBOWL 3-201 (2005), [http://www.fs.usda.gov/Internet/FSE\\_DOCUMENTS/stelprd3831728.pdf](http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprd3831728.pdf) [<https://perma.cc/2VX2-P927>].

communities of Kenya, and the Maori of New Zealand, discussed below. With such a numerosity of beliefs and peoples valuing sacred water, it is timely and necessary to ask whether the primary state laws that govern water use in the West reflect and protect these sacred values. The simple answer is that they currently do not.

## B. The Absence of Sacred Tribal Value in Western Water Law

The American West is home to the state-based prior appropriation doctrine and its attendant philosophy of maximizing the diversion, transfer, and storage of water as an extractive and beneficial resource to help communities and economies thrive. This philosophy, and the laws that perpetuate it still today, were not designed with sacred, *in situ* water uses in mind.

Natural resources historian Donald Worster has called the West a “hydraulic society,”<sup>69</sup> in which we have diverted, channeled, stored, piped, and transported water from its original source to the places where we live and work. In Worster’s words:

Here then is the true West which we see reflected in the waters of the modern irrigation ditch. It is, first and most basically, a culture and society built on, and absolutely dependent on, a sharply alienating, intensely managerial relationship with nature. Were Thoreau to stroll along such a ditch today, he would find it a sterile place for living things . . . Quite simply, the modern canal, unlike a river, is not an ecosystem. It is simplified, abstracted Water, rigidly separated from the earth and firmly directed to raise food, fill pipes, and make money . . . The American West can best be described as a modern *hydraulic society*, which is to say, a social order based on the intensive, large-scale manipulation of water and its products in an arid setting.<sup>70</sup>

Undergirding this hydraulic society is the legal regime of prior appropriation, which protects the diversion and consumption of water for “beneficial use,” by order of seniority. This socio-legal approach taps into the classical construction of nature as something to be controlled by humans.<sup>71</sup> “In deep contrast with this Western, liberal view, indigenous views of the environment continue . . . [to consider] humans as being part of nature and acknowledging and reflecting humankind’s interdependence with nature.”<sup>72</sup>

Charles Wilkinson, as noted, counts western water law among the “lords of yesterday”—those “controlling legal rules that . . . arose for good reason in a particular historical and societal contest, the westward expansion of the nineteenth century[,]” but which “simply do not square with the economic trends, scientific

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69. DONALD WORSTER, *RIVERS OF EMPIRE: WATER, ARIDITY FAND THE GROWTH OF THE AMERICAN WEST* 7 (Oxford U. Press 1992) (1985).

70. *Id.* at 5, 7 (emphasis in original).

71. Magallanes, *supra* note 5, at 276–77 (rooting this construction in the Neolithic Revolution or Agricultural Revolution when humans cleared land and redirected water for agricultural purposes).

72. *Id.* at 279.

knowledge, and social values of the modern West.”<sup>73</sup> Along similar lines, Anthony Arnold describes water law as “maladaptive” due to its “rigid rules that impede adaptation and [] fragmented structure that fails to address interconnected water problems and decisions.”<sup>74</sup>

The challenge for the modern American West, then, is to reframe our current water law system to meaningfully embrace both realities—the utilitarian and the sacred. In doing so, our laws will push us to innovate, collaborate, and better protect the multiple values we place on water today. In particular, we should focus on those controlling state rules that run most counter to sacred water: beneficial use, diversion, seniority, abandonment for non-use, and an economically driven “public interest” requirement.

### 1. *Beneficial Use*

Under western water law, a water right cannot arise unless water is put to a use that society deems beneficial. In addition to domestic use (drinking water, household use, gardens, etc.), the classic beneficial uses centered upon “productive” activities that generated an economic benefit such as mining, irrigation, and livestock watering. As the West developed, this list expanded to include growing municipalities, railroads, power companies, and other industries. The notion of leaving water in place was traditionally viewed as non-use, and thus not susceptible to protection as a water right.<sup>75</sup> Lawrence MacDonnell aptly characterizes the historic bias of western water law as “100 years of effort to put every drop of water to some kind of direct human use, in which water undiverted was water wasted, in which success was measured by how much water was beneficially consumed.”<sup>76</sup> It was not until the 1970s that western states began recognizing instream flow for fisheries and recreation as a beneficial use that can enjoy legal protection through a water right.<sup>77</sup>

Sacred waters are presently outside of the beneficial use lexicon. Indeed, the very word *use* connotes a value that may be at odds with a tribe’s conception of

73. WILKINSON, *supra* note 13, at xiii.

74. Craig Anthony (Tony) Arnold, *Adaptive Water Law*, 62 U. KAN. L. REV. 1043, 1049 (2014).

75. See generally A. DAN TARLOCK, *LAW OF WATER RIGHTS AND RESOURCES* § 5:66 (2016) (explaining that putting water to beneficial use is “implicit in the principle [of a] water right,” as illustrated by state permitting schemes).

76. MacDonnell, *supra* note 15, at 336.

77. MacDonnell, *supra* note 15, at 341–376; see Browning *supra* note 15, § 9.03[2]; see generally Amos, *supra* note 15 (discussing state and federal instream flow laws). Lawrence MacDonnell summarizes the various western states’ approaches as follows:

There are now established means under state law in every Rocky Mountain state except New Mexico and Utah to keep unappropriated water instream for environmental benefits. The states have taken different approaches. Four of the states—Colorado, Idaho, Montana, and Wyoming—have enacted special legislation providing specific rules and procedures by which water may be protected instream (referred to as either instream flows or minimum flows). Court decisions in Arizona and Nevada have determined that environmental flows may be appropriated under existing state water laws. In New Mexico, there is an opinion of the Attorney General that appropriations for environmental flows may be possible with some kind of diversion structure—an option not yet tested. Utah law allows changing existing rights to instream flow but does not authorize appropriations for environmental flows.

MacDonnell, *supra* note 15, at 338.

water as living spirit, birthplace, or other source of the sacred. While there is no evidence of a state having precluded an application for sacred water use, there is presently no western state that includes sacred waters among the categories of allowable beneficial uses.<sup>78</sup> Nor is there evidence that any western state (outside the realm of federal tribal water rights) has explicitly considered sacred tribal water as a protectable interest when considering applications for new water rights or changes of use.<sup>79</sup> Thus, tribes with sacred waters in the West presently have no explicit ability to protect those waters under state water rights systems.<sup>80</sup>

## 2. Diversion

Diversion is a foundational principle in western water law. At a time when the prevailing water uses were off-stream uses such as mining and irrigation, diversion was a litmus test for whether a claimant truly had developed an enforceable water right, or was merely speculating.<sup>81</sup> Because sacred tribal waters tend to be valued *in situ*, they run counter to this traditional requirement of diversion. As western states moved to modern statutory schemes to regulate water, it became possible for state legislatures to create more flexibility concerning the classic diversion requirement. In the case of flows for fishery and recreation, for example, states have expressly amended their water codes or issued judicial decisions that create a pathway for such non-diversionary uses. A similar pathway may be possible for sacred rights as well, as discussed below.<sup>82</sup>

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78. ARIZ. REV. STAT. ANN. § 45-151(A) (1995); CAL. CODE REGS. tit. 23, §§ 659–74 (1987); COLO. CODE REGS. § 402-8:4(4.3)(1) (2014); IDAHO ADMIN. CODE R. 37.03.03.010(08) (2015); MONT. CODE ANN. § 85-2-102(4)(a)–(f) (2013); NEV. REV. STAT. §§ 533.006–.560 (2015); N.M. CODE R. § 19.26.2.7(D) (2005); OR. ADMIN. R. 690-300-0010(5) (2012); UTAH ADMIN. CODE r. 655-16-5(1)(b) (2015); WASH. ADMIN. CODE § 173-500-050(4) (2015); 17-3 WYO. CODE § 2(d)(3)(a)–(f) (1974). Some might argue that Hawaii and California have come close. If one includes the Hawaii Water Code, there is beneficial use recognized for “traditional and customary” rights associated with the gathering of certain water-dependent plants and animals—something akin to the Stevens Treaty rights discussed *supra* note 9. HAW. REV. STAT. ANN. §§ 174C-(2)(c) (policy of protecting), 174C-3 (“instream flow”), 174C-49(a)(2) (permit criteria); *see also* HAW. CONST. art. 12, § 7; *In re Contested Case Hearing on Water Use Permit Application Filed by Kukui (Molokai), Inc.*, 116 Haw. 481, 507–08, 174 P.3d 320, 346–47 (Haw. 2007). It is not clear that these rights have been explicitly extended to sacred water use independent of gathering rights.

The California State Water Resources Control Board currently has a proposal under consideration that would be the first of its kind to add tribal “traditional and cultural uses” to uses protected under state water quality law. STATE WATER RES. CONTROL BD., STATE OF CAL., RES. NO. 2016-0011, DIRECTING STAFF TO DEVELOP PROPOSED BENEFICIAL USES PERTAINING TO TRIBAL TRADITIONAL AND CULTURAL, TRIBAL SUBSISTENCE FISHING, AND SUBSISTENCE FISHING 3–4 (2016), [http://www.swrcb.ca.gov/board\\_decisions/adopted\\_orders/resolutions/2016/rs2016\\_0011.pdf](http://www.swrcb.ca.gov/board_decisions/adopted_orders/resolutions/2016/rs2016_0011.pdf) [<https://perma.cc/F23X-LG45>]; *see discussion infra* Part IV.B (discussing sacred water rights as a beneficial). While not part of its water rights legal regime, the California proposal points in the direction where state water law must also evolve.

79. Interviews with Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming water agency officials (June and July 2016) [hereinafter Interviews] (on file with author) (indicating that they are not aware of any such proceedings).

80. Again, the focus here is on water not protected under treaty or otherwise part of a federal Indian reserved water right, compact, or decree.

81. *See* TARLOCK, *supra* note 75, §§ 5:68–:69.

82. *See generally supra* note 15.

### 3. Seniority Based on Use

To avoid a free-for-all of competing water claims, and to provide certainty in water rights, the prior appropriation doctrine created a seniority system of “first in time, first in right.” The earliest user on a system can take all the water she requires for her beneficial use, standing in line ahead of subsequent, junior users.<sup>83</sup> In times of shortage, this means that some junior users may receive reduced water or no water at all. Historically, this has also meant that a watercourse can be entirely dewatered to fulfill water rights. “[W]ater users perceived pumping a stream dry not merely as an allowed outcome, but a desired one.”<sup>84</sup> Here again, sacred waters currently have little protection under a system that protects the most senior, diversionary uses and allows complete removal of water from a system.

### 4. Abandonment Through Non-Use

Another bedrock concept of prior appropriation is the “use it or lose it” rule—that leaving water in place, or otherwise failing to beneficially use water over a period of time, can result in loss of a protectable water right.<sup>85</sup> Here too, states have carved out explicit exceptions for instream flow water rights to assure those rights-holders that they will not risk loss of the right due to non-use.<sup>86</sup> Sacred waters not put to traditional use could similarly be viewed as a non-use unless the law provides otherwise.

### 5. Public Interest

Beginning in the late 1800s, as states shifted to agency-issued permits for water rights, most state water codes began requiring not only that water use be beneficial, but also that it promote the “public interest.”<sup>87</sup> At its best, public interest review can help state agencies condition use permits or decide between competing proposals to protect the public and existing water users.<sup>88</sup> Critics of public interest review nonetheless note that it is vague, subjective,<sup>89</sup> and frequently used to promote economic development above other interests.<sup>90</sup> Indeed, past court decisions have not only sanctioned, but have gone so far as to require, that public

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83. TARLOCK, *supra* note 75, at § 5:31–32.

84. Dave Owen, *The Mono Lake Case, the Public Trust Doctrine, and the Administrative State*, 45 U.C. DAVIS L. REV. 1099, 1111 (2012).

85. TARLOCK, *supra* note 75, at § 5:91.

86. *See, e.g.*, MONT. CODE ANN. § 85-2-404(4) (West 2015); OR. REV. STAT. §§ 537.348–350 (West 2016). Similarly, under federal law, tribal reserved rights generally are not subject to abandonment for nonuse. *See also In re General Adjudication of All Rights to Use Water in Gila River System and Source* (Gila V), 201 Ariz. 307, 311, 35 P.3d 68, 72 (Ariz. 2001).

87. Douglas L. Grant, *Two Models of Public Interest Review of Water Allocation in the West*, 9 U. DENV. WATER L. REV. 485, 488 (2006).

88. *Id.* at 506.

89. Grant, *supra* note 87, at 487, 491 (Grant characterizes the term as “vacuous” and “bog[ged] down in ambiguity and subjectivity”); Lawrence J. MacDonnell, *Prior Appropriation: A Reassessment*, 18 U. DENV. WATER L. REV. 228, 291 (2015) (“To be effective, state laws need to give clear direction to decision makers respecting the public values to be considered.”); *see generally* Michelle Bryan Mudd, *Hitching Our Wagon to a Dim Star: Why Outmoded Water Codes and “Public Interest” Review Cannot Protect the Public Trust in Western Water Law*, 32 STAN. ENVTL. L. J. 283, 307–27 (2013).

90. Grant, *supra* note 87, at 490, 493.

interest review “maximize economic benefits from the water resource”<sup>91</sup>—a value that does not necessarily align with protecting sacred waters. To the extent western states have defined public interest in their water codes, there is no explicit mention of sacred waters among the interests to be considered.<sup>92</sup> Nor does sacred water appear to have been raised as a public interest issue in agency water permit proceedings.<sup>93</sup> Thus here, too, changes in state water codes are necessary.

This brief overview yields two important truths about prior appropriation. First, the doctrine is deeply rooted in and biased toward water uses far different than sacred tribal waters. Second, as will be developed below, prior appropriation is, at bottom, a value-based system susceptible to evolution when people demand recognition of a new water value. While these truths appear to be in tension, our gains with instream flow protection, alongside emerging international legal models for sacred waters, suggest such an evolution is possible.

Before elaborating on these topics in earnest, it is first important to outline the related federal laws that touch upon sacred tribal waters and illustrate why a shift in state water law policy is necessary to help fill the gaps in federal protection.

## II. EXISTING FEDERAL REGIMES THAT FALL SHORT

Although state-based prior appropriation is the focus of this article, there are several federal laws and policies that touch upon sacred waters and provide important context. And while this list of laws and policies is numerous, the important takeaway is that “[federal] law does not offer protection for sacred tribal places just because they are sacred.”<sup>94</sup> By exploring how these laws fall short, it becomes apparent that a shift in western state water law could both extend protection to places beyond federal jurisdiction and serve as an important catalyst in strengthening federal resolve to protect those sacred waters within its control. Undoubtedly, it will take a combination of changes to all of these laws to create the appropriate safety net for sacred waters in the West.

### A. Cultural Resource Laws

To begin, there are several federal laws and policies that provide limited procedural protections when tribal cultural resources are involved.

- **Executive Order 13175**<sup>95</sup> contains the overarching agency requirement to regularly and meaningfully consult and collaborate with tribal officials in “the development of federal policies . . . that have tribal implications.”<sup>96</sup> This Order underlies the more specific statutory and regulatory

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91. *Id.* at 493 n. 38; see also Amber Weeks, *Defining the Public Interest: Administrative Narrowing and Broadening of the Public Interest in Response to the Statutory Silence of Water Codes*, 50 NAT. RESOURCES J. 255, 264–70 (2010) (citing several case studies).

92. See also Bryan, *supra* note 89, at 292 (analyzing several public interest statutes).

93. Interviews, *supra* note 79.

94. Suagee & Bungart, *supra* note 31, at 24.

95. Consultation and Coordination with Indian Tribal Governments, 65 Fed. Reg. 67249 (Nov. 6, 2000).

96. *Id.* at § 5.

consultation processes discussed below. While Executive Order 13175 has undoubtedly resulted in greater agency contact with tribes, agencies vary in their level of commitment to consultation.<sup>97</sup> The order also has little teeth because of its provision that it “is intended only to improve internal management of the executive branch, and is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the United States, its agencies, or any person.”<sup>98</sup>

- The **American Indian Religious Freedom Act (AIRFA)** acknowledges the rights of Native Americans to practice their traditional religions, including “access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.”<sup>99</sup> **Executive Order 13007** supports AIRFA by directing federal land managing agencies to accommodate tribal access to, and ceremonial use of, sacred sites on federal lands, as well as to avoid physical damage to those sites.<sup>100</sup> Although AIRFA requires tribal consultation when proposed federal actions might limit religious practices or access to sacred sites,<sup>101</sup> the courts have held that it, too, is merely a policy statement and does not “create a cause of action or any judicially enforceable individual rights.”<sup>102</sup> Indeed, the case law applying this provision is dominated by unsuccessful tribal claims seeking to prevent development in sacred areas.<sup>103</sup>
- The **National Historic Preservation Act (NHPA)**<sup>104</sup> requires that federal land managers “prior to the expenditure of any Federal funds . . . [or]

97. See, e.g., Healy, *supra* note 14 (discussion of Standing Rock Sioux).

98. Consultation and Coordination with Indian Tribal Governments, 65 Fed. Reg. 67249 § 10 (Nov. 6, 2000); see, e.g., Carattini v. Salazar, No. CIV-09-489-D, 2010 WL 4568876, at \*7 (W.D. Okla. Nov. 3, 2010).

99. Protection and Preservation of Traditional Religions of Native Americans, 42 U.S.C. § 1996–1996(b) (2012).

100. Indian Sacred Sites, 61 Fed. Reg. 26771 (May 24, 1996). A related, more general law on point is the Religious Freedom Restoration Act, which prohibits the federal government (but not states) from “substantially burden[ing] a person’s exercise of religion even if the burden results from a rule of general applicability,” unless the government has a compelling interest and uses the least restrictive means of furthering that interest. Free Exercise of Religion Protected, 42 U.S.C. §§ 2000bb-2000bb-4 (2012).

101. See *Havasupai Tribe v. United States*, 752 F. Supp. 1471, 1488 (D. Ariz. 1990). The U.S. Forest Service has made this consultation mandate more concrete through its report U.S. DEP’T OF AGRIC. & U.S. FOREST SERV., U.S.D.A. POLICY AND PROCEDURES REVIEW AND RECOMMENDATIONS: INDIAN SACRED SITES (2012), <http://www.fs.fed.us/spf/tribalrelations/documents/sacredsites/SacredSitesFinalReportDec2012.pdf> [<https://perma.cc/VXY2-ESWG>].

102. *Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439, 455 (1988); see also *Havasupai Tribe*, 752 F. Supp. 1471 (D. Ariz. 2014) (“AIRFA requires the federal agency to consider, but not necessarily defer to Indian religious values. It does not prohibit agencies from adopting land uses that conflict with traditional Indian religious beliefs or practices.”); COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 14.03[2][c][B], at 969 (Nell Jessup Newton ed., 2012).

103. E.g., *Havasupai Tribe v. United States*, 752 F. Supp. 1471, 1488 (D. Ariz. 1990) (uranium mine allowed in national forest); *New Mexico Navajo Ranchers Ass’n v. Interstate Commerce Commission*, 850 F.2d 729 (D.C. Cir. 1988) (railroad allowed to over Navajo lands to serve nearby coal mines).

104. National Park Service and Related Programs, 54 U.S.C.A. §§ 300101 to 307108 (West 2015).

issuance of any license . . . take into account the effect of the undertaking on any historic property.”<sup>105</sup> This law could potentially cover sacred water sites, if they are capable of listing on the National Register.<sup>106</sup> The NHPA specifies that federal agency duties include consultation with tribes that “attach religious and cultural significance to [eligible] property.”<sup>107</sup> The Advisory Council on Historic Preservation has also adopted a plan to support the U.N. Declaration on the Rights of Indigenous Peoples by issuing guidance on how to protect tribal rights during the Section 106 review process under the NHPA.<sup>108</sup>

Critics observe, nonetheless, that “[w]hile tribal consultation may take place, this is a process in which nonnative values take precedence in most cases.”<sup>109</sup> Indeed, tribes suing for inadequate agency consultation under the NHPA have been unsuccessful.<sup>110</sup> There are additional concerns that tribal information shared in the consultation process loses its confidentiality.<sup>111</sup> Ultimately, the NHPA is merely another procedural safeguard,<sup>112</sup> and does not mandate protection of cultural properties.<sup>113</sup> Moreover, outside the realm of federal lands and federal agency action, sacred sites are unlikely to fall within the ambit of the NHPA.

105. Effect of Undertaking on Historic Property, 54 U.S.C.A. § 306108 (West 2016) (commonly referred to as “Section 106”).

106. Eligibility for Inclusion on National Register, 54 U.S.C.A. § 302706(a) (West 2016) (“Property of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined to be eligible for inclusion on the National Register.”); *see also* Criteria for Evaluation, 36 C.F.R. § 60.4 (2016).

107. Eligibility for Inclusion on National Register, 54 U.S.C.A. § 302706(b) (West 2016); Initiation of the Section 106 Process, 36 C.F.R. § 800.3(f)(2) (2016). Executive Order 11593, 36 Fed. Reg. 8921 (May 13, 1971), supports the NHPA by requiring federal agencies to “administer the cultural properties under their control in a spirit of stewardship and trusteeship for future generations,” including a charge to locate, inventory, and nominate properties to the National Register. *Id.* at § 2(a). It also directs agencies to ensure that cultural resources are not inadvertently damaged, destroyed or transferred. *Id.* at § 2(b).

108. ADVISORY COUNCIL ON HISTORIC PRES., SECTION 106 AND THE U.N. DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: INTERSECTIONS AND COMMON ISSUES: ARTICLE 18 AND SECTION 106 (2013), <http://www.achp.gov/docs/UNDeclaration106.pdf> [<https://perma.cc/X2JP-NUS9>].

109. Suagee & Bungart, *supra* note 31, at 25.

110. *See, e.g.,* Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058 (9th Cir. 2008) (finding U.S. Forest Service’s consultation process adequate concerning use of recycled wastewater for commercial ski resort located on sacred mountain); San Juan Citizens Alliance v. Norton, 586 F.Supp.2d 1270 (D.N.M. 2008) (upholding U.S. Bureau of Land Management’s consultations with Navajo Nation regarding oil and gas leases affecting two sacred sites).

111. Suagee & Bungart, *supra* note 31, at 25. Here again, the Standing Rock Sioux’s loss of sacred sites just days after they were disclosed in court documents provides a tragic example. *See supra* note 14 and accompanying text.

112. *See* Presidio Historical Ass’n v. Presidio Trust, 811 F.3d 1154, 1169 (9th Cir. 2016) (“Our court has consistently held that ‘the NHPA, like NEPA, is a procedural statute requiring government agencies to “stop, look, and listen” before proceeding’ when their action will affect national historical assets”).

113. *See* Recordation of Historic Property Prior to Alteration or Demolition, 54 U.S.C.A. § 306103 (West 2016); *see also* Suagee & Bungart, *supra* note 31, at 25 (“If a site cannot be avoided or otherwise preserved in situ in the face of some undertaking, excavation commonly takes place, and the site . . . ceases to exist”).

- The **Archaeological Resources Protection Act** (ARPA) requires federal land managers to notify affected Indian tribes prior to issuing a permit that “may result in harm to, or destruction of, any religious or cultural site” on federal lands or Indian lands.<sup>114</sup> The law also authorizes civil and criminal penalties for knowing violations.<sup>115</sup> Its reach, however, does not extend to private lands, and, like the NHPA, it provides procedural notice requirements but no substantive guarantee of protection.
- The **Native American Graves Protection and Repatriation Act** (NAGPRA) could potentially protect tribal human remains and related sacred objects affiliated with a sacred water location.<sup>116</sup> Here again, the primary reach of the law is to federal lands where such remains and objects may be found.<sup>117</sup> Further, this law is directed more toward the ownership and repatriation of the remains, rather than leaving a source area under protection.<sup>118</sup>
- The **National Environmental Policy Act** (NEPA)<sup>119</sup> requires federal agencies conducting environmental reviews to consider the social and cultural impacts that a proposed action may have on a Tribe.<sup>120</sup> Nonetheless, as a procedural statute, NEPA does not ultimately prevent those impacts from occurring, but simply requires they be disclosed and other alternatives considered.<sup>121</sup>

As this overview demonstrates, federal cultural resource laws are largely implicated when federal agencies undertake permitting, funding, or activities on federal lands. There are a host of private activities beyond their protective reach. Further, these laws do not provide absolute, substantive protection of sacred tribal resources, but instead offer limited procedural safeguards. Even when these procedural safeguards are followed, agencies often exercise their discretion to prioritize other interests above those of sacred waters.

## B. Laws Creating Tribal Water Authority

Another suite of laws relates to tribal ownership and regulation of waters within reservation boundaries.<sup>122</sup> As a backdrop to these laws, it is important to

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114. Excavation and Removal, 16 U.S.C. §§ 470aa, 470cc (2012).

115. *Id.* at § 470ee.

116. 25 U.S.C. §§ 3001–02 (2012).

117. *Id.* at § 3001.

118. *Id.* at § 3002.

119. 42 U.S.C. § 4321 (2012).

120. 40 C.F.R. §§ 1508.8, 1508.27 (2016). Executive Order 12898, which focuses on environmental justice, bolsters NEPA’s requirements by directing federal agencies to avoid impacts on poor or minority populations. *See* Executive Order 12898, 59 Fed. Reg. 7629 (Feb. 11, 1994).

121. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

122. Again, there are limited cases where tribes have obtained some off-reservation water rights for fishing. *See supra* note 8.

note that Tribes also hold inherent tribal sovereignty over the resources within their territory, subject to Congressional limitations or implied divestiture.<sup>123</sup>

- The **Clean Water Act** authorizes federally recognized tribes that qualify for treatment-as-state (TAS) status to adopt their own water quality standards, including standards for ceremonial waters.<sup>124</sup> The Pueblo of Isleta in New Mexico is the most frequently discussed example, due to a federal court decision upholding their ceremonial water quality standards.<sup>125</sup> In that case, the City of Albuquerque had to treat its upstream wastewater discharges to a higher standard that met tribal requirements. Although the specifics of the Tribe's ceremonies are confidential, it has disclosed that they involve "immersion and intentional or incidental ingestion of water."<sup>126</sup>

While hailed as a valuable tool, tribal CWA authority to protect against off-reservation impacts is limited to the specific scenario of upstream point source pollution. The CWA also requires a tribe to be both federally recognized and have the capacity to administer a water quality program. As illustrated by the above discussion of the Warm Springs Tribe,<sup>127</sup> the law does not directly address upstream, off-reservation depletions of water quantity, nor upstream nonpoint sources of pollution. A tribe's CWA authority also does not extend to protecting sacred waters beyond the specific stream system that falls within reservation boundaries.

- Under the **Tribal Reserved Rights Doctrine** (or Winters Doctrine),<sup>128</sup> many tribes in the West have obtained water rights deemed to implicitly arise under the documents creating a tribe's reservation—whether by treaty, Congressional act, or executive order.<sup>129</sup> Tribes can typically use these water rights for a variety of tribal purposes within reservation boundaries. A small number of tribes have even obtained water rights for off-reservation flows to support fishing in their aboriginal territories.<sup>130</sup> Although tribal reserved rights could in theory be adapted to protect

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123. *United States v. Wheeler*, 435 U.S. 313, 323, 98 S. Ct. 1079, 1086 (1978) ("But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status."), superseded on unrelated grounds by Indian Civil Rights Act 25 U.S.C. §§ 1301–03 (2012) as to inherent power of Indian tribes to exercise criminal jurisdiction over all Indians.

124. 33 U.S.C.A. § 1377(e) (West 2016). For a listing of tribes with TAS status, see *EPA Approvals of Tribal Water Quality Standards*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/wqs-tech/epa-approvals-tribal-water-quality-standards> [<https://perma.cc/BF6M-LVSH>].

125. *City of Albuquerque v. Browner*, 97 F.3d 415, 428 (10th Cir. 1996).

126. *Id.*

127. See *supra* Part I.A.

128. See *supra* note 6 and related text.

129. *Id.*; see also AMERICAN INDIAN LAW DESKBOOK §§ 8:6, 8:9 (West 2016); LONNIE E. GRIFFITH, JR., 41 AM. JUR. 2D INDIANS § 81 (2016).

130. For example, the Yakama, Warm Springs, Nez Perce, and Umatilla Tribes. See *Fisheries Timeline*, COLUMBIA RIVER INTER-TRIBAL FISH COMMISSION, <http://www.critfc.org/about-us/fisheries-timeline/> [<https://perma.cc/34XG-YGGX>]. As noted, while fishing rights may overlap with sacred waters, sacred waters deserve separate, explicit protection in their own right. See *supra* note 9.

sacred waters within tribal areas, examples of water settlements that mention this purpose are exceedingly rare.<sup>131</sup>

One such example is the Zuni Tribe's water rights settlement, which restores water to a sacred site known as Zuni Heaven<sup>132</sup>— a center of tribal ceremony, burial, and cultural activities that was dried up by upstream water projects and diversions. The tribe negotiated reserved water rights to restore flows to the area, including the "Sacred Lake, wetlands, and riparian area."<sup>133</sup> In a second example, the Taos Pueblo negotiated a settlement for water rights to recharge Buffalo Pasture, a wetland sacred to the tribe, located in the water-depleted Taos Valley of New Mexico.<sup>134</sup>

While groundbreaking, these success stories demonstrate that the stars must truly align for tribes and sacred waters, requiring a strong legal argument under their creation documents, along with other political, legal, financial, and land ownership leverage that is not available to all tribes. As with the previous list of federal cultural resource laws, these laws also have a limited geographic scope that falls largely within reservation boundaries or on other lands over which a tribe holds an ownership or use interest. Thus, these sources of authority, while extremely important, are not immediately applicable to sacred water locations outside a tribe's sphere of control.

### C. Waters within Federal Lands

It is also necessary to dispel the myth that sacred waters situated on federal lands are automatically protected. As intimated above, federal laws and policies that encourage the protection of sacred places are weighed against the various, competing legal mandates that govern federal lands management. Rebecca Tsosie has eloquently criticized the U.S. government for failing to honor its trust duties when it treats tribal interests as co-equal with, and capable of being outweighed by, other public interests in federal lands.<sup>135</sup> Further, even when a federal agency exercises its discretion to protect a sacred resource on federal lands, development activities outside of those lands can have profound hydrologic and quality impacts on the sacred waters.

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131. This conclusion is drawn from discussions with scholars who have studied tribal water settlements, along with a query of the Native American Water Rights Settlement Project database. See *Native American Water Rights Settlement Project*, U.N.M. DIGITAL REPOSITORY, <http://digitalrepository.unm.edu/nawrs/> (last visited Jan. 28, 2017).

132. Zuni Indian Tribe Water Rights Settlement Act of 2003, Pub. L. 108–34, 117 Stat. 782 (2003).

133. *Id.* at § 4(b)(2).

134. ABEYTA WATER RIGHTS ADJUDICATION: SETTLEMENT AGREEMENT AMONG THE UNITED STATES, TAOS PUEBLO, THE STATE OF NEW MEXICO, THE TAOS VALLEY ACEQUIA ASSOCIATION, AND ITS 55 MEMBER ACEQUIAS, THE TOWN OF TAOS, EL PRADO WATER AND SANITATION DISTRICT, AND THE 12 TAOS AREA MUTUAL DOMESTIC WATER CONSUMERS' ASSOCIATION §§ 5.3, 7.3 (Dec. 12, 2012).

135. Rebecca Tsosie, *The Conflict Between the "Public Trust" and the "Indian Trust" Doctrines: Federal Public Land Policy and Native Nations*, 39 TULSA L. REV. 271 (2003).

### 1. *Competing Mandates*

One need not look far for examples of federal agencies prioritizing other public values over sacred tribal values. For instance, when sacred waters arise within national parks, federal park managers must balance protecting the resource with providing for “public enjoyment.”<sup>136</sup> The specific mandate for the Montezuma Well, for example, is to “provide for the protection, preservation and enjoyment by the public of a prehistoric cliff dwelling, other prehistoric ruins, and a spring-fed limestone sink.”<sup>137</sup> Visitor contact (including a visitor center and sewage system), livestock grazing, and agricultural uses are considered compatible with the Well’s designation.<sup>138</sup>

National forests and lands under the jurisdiction of the U.S. Bureau of Land Management (BLM) face an even trickier task of “multiple use” that introduces economic development and public recreation as additional values to be accommodated and weighed.<sup>139</sup> Drawing on the earlier example of the Northern Cheyenne,<sup>140</sup> the Tribe notes how coalbed methane development has trumped tribal spiritual interests:

BLM management decisions to develop land traditionally used by the Northern Cheyenne may adversely affect their access to, or utilization of, areas for ceremonial and cultural activities. For example, the construction of roads for coal bed methane development may increase accessibility to remote areas, which have been used for prayer and fasting activities. Seclusion is required for these activities. . . . Construction of fences may restrict the collection of plants for medicinal purposes and mineral resources used in ceremonies by religious practitioners. . . . Increased noise levels associated with some development activities can make areas unsuitable for fasting, prayer and making offerings. The modification of landforms by construction activities required by oil and gas development can also affect Native American practices and values by interfering with the respectful treatment of dead and spiritual aspects of the environment.<sup>141</sup>

Case law yields several additional examples of discretionary agency decisions in which non-tribal activities were deemed more important than sacred tribal resources. In the *Navajo Nation v. U.S. Forest Service*<sup>142</sup> example discussed

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136. 54 U.S.C.A. § 100101 (West 2017).

137. DEP’T. OF INTERIOR & NAT’L PARK SERV., STATEMENT FOR MANAGEMENT: MONTEZUMA CASTLE NATIONAL MONUMENT 2 (1991), [https://archive.org/stream/statementformana91mont/statementformana91mont\\_djvu.txt](https://archive.org/stream/statementformana91mont/statementformana91mont_djvu.txt).

138. *Id.* at 4, 16.

139. 43 U.S.C. § 1701(a)(8)(2012) (discussing federal BLM lands); 16 U.S.C. §§ 475, 528–31 (2012) (relating to national forests).

140. *See supra* Part I.A.2.

141. NORTHERN CHEYENNE TRIBE, *supra* note 43, at 7–21. *See* Bryan, *supra* note 52, at 311–15, 329–32 (for a fuller discussion of potential impacts in the Yellowstone Basin and the legal deficiencies in addressing these impacts).

142. *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058 (9th Cir. 2008).

above, the Navajo, Hopi, Havasupai, Hualapai, Yavapai–Apache, and White Mountain Apache were all unsuccessful in stopping the federal government from authorizing the Snowbowl ski resort, even though its recycled wastewater is placed in sacred areas within the Cocino National Forest where tribal members pray, gather plants for medicine bundles, and conduct religious ceremonies. The tribes argued that the wastewater desecrated the mountain, which they believe to be a living entity, that it devalued their religious exercise, and that it would even cause human and natural disasters.<sup>143</sup> Nonetheless, the public benefit of enjoying federal lands for recreation was upheld, with the court concluding that the tribe would not suffer a substantial burden upon the exercise of its religious beliefs and practices.<sup>144</sup>

In the recent *La Cuna De Aztlan Sacred Sites Protection Circle Advisory Committee v. U.S. Dep't of Interior* decision,<sup>145</sup> construction of a solar electric generating facility on BLM lands in the Mojave Desert prevented members of several Indian tribes from accessing parts of the Salt Song Trails for religious purposes (“sad as it may be”).<sup>146</sup> There, the court cited an oft-quoted line that “[t]hrough Native Americans may have some rights to use sacred sites, ‘those rights do not divest the Government of its right to use what is, after all, its land.’”<sup>147</sup> And in *Lyng v. Nw. Indian Cemetery Protective Ass'n*, the U.S. Supreme Court upheld an agency permit for timber harvesting and related road building through sacred sites in the Chimney Rock section of Six Rivers National Forest in northwestern California.<sup>148</sup>

While tribal success is not the norm, there are examples of hard-fought victories<sup>149</sup> such as the U.S. Department of Interior’s recent cancellation of energy drilling leases in the Badger-Two Medicine area—a place sacred to the Blackfeet but located on BLM lands.<sup>150</sup> Or the permanent protection of the Taos Pueblo’s “most sacred shrine,” Blue Lake, through the repatriation of land from national forest to tribal ownership in the 1970s.<sup>151</sup> This sacred water source is the location of tribal ceremonies, considered the birthplace of the Taos Pueblo and “where the spirit of the Indian god is still living today.”<sup>152</sup> Because the Tribe believes that the “presence of outsiders destroys the power of all ceremonial acts,” its peoples’

143. *Id.* at 1062–65.

144. *Id.* at 1070.

145. *La Cuna De Aztlan Sacred Sites Prot. Circle Advisory Comm. v. U.S. Dep't of Interior*, No. CV 11-00400 DMG, 2013 WL 4500572 (C.D. Cal. Aug. 16, 2013) (unpublished).

146. *Id.* at \*1, \*10.

147. *Id.* at \*10 (quoting *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 453 (1988)).

148. *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 442, 450–453 (1988).

149. See generally Martin Nie, *The Use of Co-Management and Protected Land-Use Designations to Protect Tribal Cultural Resources and Reserved Treaty Rights on Federal Lands*, 48 NAT. RESOURCES J. 585 (2008) (for a compelling piece on the merits of collaborative solutions).

150. See *Too Sacred to Develop*, BLACKFEET NATION, [http://www.badger-twomedicine.org/\[https://perma.cc/3MVA-YSUE\]](http://www.badger-twomedicine.org/[https://perma.cc/3MVA-YSUE]).

151. Sarah Merfeld, *Taos Blue Lake: The Taos Pueblo and Their Struggle to Regain Blue Lake, Indigenous Religious Traditions*, COLORADO COLLEGE, <http://sites.coloradocollege.edu/indigenous-traditions/sacred-lands/taos-blue-lake/> [https://perma.cc/ZDF6-L63J]; see also *What is Blue Lake?, About*, TAOS PUEBLO, <http://taospueblo.com/about/> [https://perma.cc/U3G5-38YL] (last modified 2016).

152. Merfeld, *supra* note 151.

entire way of life was threatened when the lake became a popular camping and recreation destination during the early 1900s.<sup>153</sup> The Tribe believed that without Blue Lake, they would cease to exist as a group.<sup>154</sup> The return of the Lake is thus considered among the most significant events in the Tribe's history.<sup>155</sup> But for every Blue Lake and Badger-Two Medicine, which are negotiated political settlements, there remain untold numbers of sacred sites vulnerable to the vagaries of competing uses, political pressures, and agency discretion. The rarity of these success stories underscores the need for a more broad-based legal solution available to all tribes in the West.

## 2. *External Threats Near Federal Lands*

Even when the balance of competing federal land mandates tips toward protecting sacred waters, there is the hydrologic reality that nearby development and state-based water uses can undermine that protection. Again using the Montezuma Well example, park managers note that:

Increasingly intense human disruption of aquifers and native ecosystems leaves the future of springs and the narrowly adapted endemic species they support in jeopardy. . . . More than 90 percent of the springs in northern Arizona have been dewatered or are ecologically impaired because of [state-based] groundwater pumping, development, or modification for livestock or human use.<sup>156</sup>

This concern exists even though the National Park Service holds half the water rights to the Well. Private agriculture, gravel mining, diversion and impoundment of stream waters, climatological changes, and housing development all place pressure on groundwater supply (both its quantity and quality due to septic tanks), creating concern that Montezuma Well could dry up or become polluted. "Increasing development on lands adjacent to and surrounding the Monument results in direct and indirect impacts, i.e., mining, feral animals, woodcutting, freeway, subdivisions, water demands, and visual intrusions to the cultural and natural setting."<sup>157</sup> Water consumption under state-based water rights can threaten the Well's integrity,<sup>158</sup> and "there currently exists no means for alerting management to imminent adverse, and possibly irreversible, effects to this resource attribute from external water use."<sup>159</sup>

Both the North Cheyenne Tribe and the Hualapai Tribe hold similar concerns for their sacred waters. In Montana, private coalbed methane groundwater

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153. *Id.*

154. *Id.*

155. TAOS PUEBLO, *supra* note 151.

156. Larry Stevens & Jerri Ledbetter, *Montezuma Well*, NORTHERN ARIZONA UNIVERSITY, [http://www.azheritagewaters.nau.edu/loc\\_montezumawell.html](http://www.azheritagewaters.nau.edu/loc_montezumawell.html) [<https://perma.cc/Q482-KZQV>].

157. U.S. DEP'T. OF INTERIOR & NAT'L PARK SERV., *supra* note 137.

158. U.S. DEPT. OF INTERIOR & NAT'L PARK SERV., WATER RESOURCES MANAGEMENT PLAN: MONTEZUMA CASTLE AND TUZIGOOT NATIONAL MONUMENTS 6 (1992), [https://www.nature.nps.gov/water/planning/management\\_plans/montezuma\\_screen.pdf](https://www.nature.nps.gov/water/planning/management_plans/montezuma_screen.pdf) [<https://perma.cc/9N22-4EM5>].

159. *Id.* at 68.

pumping on private and federal lands is broadly allowed under state water law, and can contaminate and deplete sacred, off-reservation groundwater and springs of the Northern Cheyenne.<sup>160</sup> Aboriginal areas within the Grand Canyon, which are no longer within the control of the Hualapai Tribe, are also threatened by competing water demands from agriculture, subdivision development, and mining interests that hold state-based water rights.<sup>161</sup>

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This walk through the complex field of federal law reveals that sacred water protections at the national level are far from secure. While procedural safeguards may lead to consideration of sacred values, competing uses are just as likely prevail in the end. And when we move outside of federal agency lands and purview, even these modest protections are unlikely to apply. To the extent sacred water values are expressed in state water law, it may help tip the scales in federal management decisions and extend protections where federal decisions cannot reach—onto state and private lands where sacred waters exist. Lest we think this is an improbable proposition, three case studies of sacred water protection from other nations can help inspire our progress.

### III. LOOKING OUTSIDE THE WEST: INTERNATIONAL FRAMEWORKS FOR PROTECTION

Incorporating sacred values within prior appropriation need not be a radical endeavor. In Part IV, we will see that this paradigm shift shares striking parallels with the emerging instream flow protections in the West, as well as California's current efforts to add sacred water protections to its water quality laws. But by expanding our horizon beyond the West, we also see that this paradigm shift is happening elsewhere on the planet, signaling a global adaptation in the way we see and value water. As noted, the U.N. Declaration on the Rights of Indigenous Peoples requires this paradigm shift of all signatory nations.<sup>162</sup> And some nations have stepped to the fore in their efforts. A few examples, drawn from a variety of cultures, geographies, and legal approaches, merit exploration here. And while none provide a perfect fit for our needs in the American West, they serve to inspire the possibility of legal protection, as well as the creativity with which we can approach our own efforts.

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160. MILES CITY FIELD OFF., BUREAU OF LAND MGMT., FINAL STATEWIDE OIL AND GAS ENVIRONMENTAL IMPACT STATEMENT AND PROPOSED AMENDMENT OF THE POWDER RIVER AND BILLINGS RESOURCE MANAGEMENT PLANS, 4-62–64, 4-99 (2003), [https://www.blm.gov/mt/st/en/fo/miles\\_city\\_field\\_office/og\\_eis.html](https://www.blm.gov/mt/st/en/fo/miles_city_field_office/og_eis.html) [<https://perma.cc/WN94-25ZH>]; see generally Bryan, *supra* note 52 (summarizing state laws on coalbed methane groundwater pumping).

161. See ARIZONA DEP'T OF WATER RESOURCES, *supra* note 65, at 46–47.

162. See Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295/ U.N. Doc. 07-58681, annex, at 10–12 (March, 2008), [http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf) [<https://perma.cc/NQ8B-WLUX>]. Again, the U.S. under former President Obama has lent its support, but has not agreed to be bound by the Declaration. See Office of the Press Secretary, *supra* note 24 and accompanying text.

### A. Ireland – Site Protection

Ireland's landscape is rich in spiritual sites such as prehistoric fort rings, grave sites, and holy wells associated with different peoples at different stages of the country's history. Interestingly, while many of these sites are considered relics of the past, holy wells persist as places of spiritual veneration still today. The documented wells in Ireland were recently numbered around 3,000.<sup>163</sup> Many of these wells date to pagan times, when a pre-Christian society considered them to have supernatural properties.<sup>164</sup> As Catholicism later became the prevailing belief system, these sites, rather than being eradicated, were assumed into the new religion but recast as holy wells named for Saints<sup>165</sup>—a process called syncretism.<sup>166</sup> Stories of holy wells figure largely into Irish written literature and lore from the Iron Age on through Christian era transition.<sup>167</sup> And despite their restyling as Christian sites, some locals retain a parallel belief that the wells retain pre-Christian properties.

Holy wells or blessed wells (*toibreacha/tobur naofa* or *toibreacha/tobur beannaithe*, respectively) are water sources such as springs, bogs, or ponds that are sites of religious devotion, distinct from human-created wells because they generally arise on their own in pools, rock cavities, or even tree cavities.<sup>168</sup> Some have protective structures placed around or over them, and others are unadorned.<sup>169</sup> Since Christian times, many are said to be “blessed with a cure” for a particular problem.<sup>170</sup> In pre-Christian times, it is believed that pagan wells provided passage to the Celtic Other World, and provided wisdom, fertility, and power.<sup>171</sup> These sites are also considered places of pilgrimage (*turas*), where visitors circumambulate the well, offer prayers at particular stations, and proffer a gift or votive.<sup>172</sup> Holy wells are often associated with stones, wider areas of ritual, or larger sacred landscapes.<sup>173</sup>

On certain days of the year (pattern days), local community members will also gather well-side for liturgy (called “folk liturgy” because of its variation from sanctioned liturgy by religious officials).<sup>174</sup> Similar sites and devotional practices

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163. RAY, *supra* note 2, at 4.

164. *Id.* at 9 (“Some Irish holy well sites that are still in ritual use have been venerated for centuries, and others for well over a millennium.”). *Id.* (Ray is careful to note that they lack definitive proof that every well has pagan origins, but there is recurrent evidence that “some wells clearly do have pagan pasts.”).

165. RAY, *supra* note 2, at 3; Brenneman, *supra* note 1, at 801 (citing the example of St. Brigid, “the Christian redaction of the Celtic mother goddess Brigid, a goddess of the fertility of the earth and especially water and intuitive wisdom,” for whom several modern Irish holy wells are named.). Brenneman, *supra* note 1, at 792.

166. Brenneman, *supra* note 1, at 803.

167. RAY, *supra* note 2, at 65.

168. *Id.* at 1–2.

169. *Id.* at 2.

170. *Id.*

171. Brenneman, *supra* note 1, at 798, 800, 802.

172. RAY, *supra* note 2, at 4; Brenneman, *supra* note 1, at 802.

173. RAY, *supra* note 2, at 5.

174. *Id.* at 4.

appear in Wales, Scotland, and England and echo elsewhere across Europe.<sup>175</sup> Anthropologist Celeste Ray describes these wells as more than mere “isolated sites,” but rather “foci of sacred landscapes that are interconnected at multiple scales through patronage and ritual practice.”<sup>176</sup> In Celtic times, these wells were considered to have a *genius loci* or spirit inhabiting the place.<sup>177</sup> Religious scholars have ventured to conclude that sacred wells have “greater historical continuity than any other phenomenon within the history of religions.”<sup>178</sup>

Ireland’s sacred water sites qualify for protection under the umbrella of monument law, coupled with planning and development law. To be candid, this complex combination of legal schemes is not neat and tidy. But there are some compelling ideas within this complexity that merit consideration for us in the American West.

### 1. Monument Law

Ireland’s National Monuments Act<sup>179</sup> creates a Record of Monuments that fall within the purview of the Minister for Arts, Heritage and the Gaeltacht.<sup>180</sup> The Act defines monuments to include any “prehistoric or ancient . . . ritual . . . site,” and includes places both “above or below the surface of the ground or the water.”<sup>181</sup> This definition is broad enough to include naturally occurring holy wells, and indeed, numerous wells are listed in the Record of Monuments.<sup>182</sup> Aside from the recording of monuments, the Act provides additional protection for “national monuments”—those within the Record of Monuments that are of national importance.<sup>183</sup>

175. *Id.* (noting Greece, Austria, Hungary, Russia, Poland, and Denmark as examples).

176. *Id.* at 10; Brenneman, *supra* note 1, at 793 (noting that they “radiate power to the surrounding area”).

177. RAY, *supra* note 2, at 39.

178. Brenneman, *supra* note 1, at 791 (citing ANN ROSS, PAGAN CELTIC BRITAIN 46–59 (1996)).

179. National Monuments Act 1930 (Act No. 2/1930) (Ir.), <http://www.irishstatutebook.ie/eli/1930/act/2/enacted/en/html>.

180. National Monuments (Amendment) Act 2004 § 4 (Act. No. 22/2004) (Ir.), <http://www.irishstatutebook.ie/eli/2004/act/22/section/4/enacted/en/html#sec4>.

181. National Monuments Act 1987 § 11 (Act No. 17/1987) (Ir.), <http://www.irishstatutebook.ie/eli/1987/act/17/section/11/enacted/en/html#sec11>. *Archaeological Survey of Ireland*, NATIONAL MONUMENT SERVICE, <http://webgis.archaeology.ie/NationalMonuments/WebServiceQuery/Lookup.aspx> [https://perma.cc/R9MY-9QQ4] (Archaeologists include holy wells among ritual sights: “Ritual site—holy well: A well or spring, though in some unusual cases a natural rock basin, which usually bears a saint’s name and is often reputed to possess miraculous healing properties. These may have their origins in prehistory but are associated with devotions from the medieval period (5th–16th centuries AD) onwards”).

182. *Records of Monuments and Places*, NAT’L MONUMENT SERV., <http://www.archaeology.ie/publications-forms-legislation/record-of-monuments-and-places> [https://perma.cc/5XC3-5STS] (containing searchable records by county).

183. National Monuments Act 1930 § 2 (Act No. 2/1930) (Ir.), <http://www.irishstatutebook.ie/eli/1930/act/2/section/2/enacted/en/html#sec2>. There is also a Register of Historic Monuments, which contains a smaller subset of monuments, based on a 1987 amendment to the NMA. *Id.* at § 5 (1987 amendments). The primary distinction is that landowners of monuments in the Register received direct notification of the listing and thus face a heightened penalty for violations of the NMA. Aside from this distinction the Record has largely supplanted the Register. Interview with Seán

In the 1990s, Ireland conducted extensive monument surveys throughout the country.<sup>184</sup> Notably, such sites may occur on government-owned land or privately owned land. In situations of privately owned land, the Minister or a local authority may also agree to act as a guardian of the monument.<sup>185</sup> For example, private owners of land containing a ritual site can elect through a deed instrument to transfer the site area under guardianship, while retaining full ownership of their land.<sup>186</sup> While the property interest in such monuments remains vested in the owner, the State assumes responsibility for maintenance and care.<sup>187</sup> Appropriate limitations can be placed on the level of public access to the monument.<sup>188</sup> The Minister may also acquire a national monument compulsorily.<sup>189</sup> The Minister or local authority can then adopt bylaws governing the care and management of national monuments of which they are an owner or guardian.<sup>190</sup>

Regardless of the ownership arrangement, monuments in the Record are subject to a notice provision prior to undertaking activities that might affect the monument. Under this notice provision, the Minister has two months to assess whether the potentially impacted monument is a “national monument,” and, if so, whether the proposed activity should be denied or granted with mitigating conditions.<sup>191</sup> For monuments that meet the definition of a “national monument,” no work that may impact the monument may be undertaken without the Minister’s express consent.<sup>192</sup> The Minister also has the power to issue a Preservation Order for national monuments in danger.<sup>193</sup> Violations of the Act can result in fines and

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Kirwan, Senior Archaeologist, National Monuments Service, Department of Arts, Heritage and the Gaeltacht, Custom House, in Dublin, Ireland (May 10, 2016).

184. Kirwan Interview, *supra* note 183 (listing 120,000 known locations).

185. *Id.*

186. National Monuments Act 1930 § 2 (Act No. 2/1930) (Ir.), <http://www.irishstatutebook.ie/eli/1930/act/2/section/5/enacted/en/html>.

187. *National Monuments in State Care: Ownership & Guardianship*, NAT’L MONUMENT SERV. (Feb. 25, 2010), <http://www.oireachtas.ie/parliament/media/committees/pac/correspondence/2014-meeting1180603/%5BPAC-R-1288%5D-Correspondence-3A.4-OPW-Appendix-4B.pdf>.

188. National Monuments (Amendment) Act of 1994 § 11 (Act No. 17/1994) (Ir.), <http://www.irishstatutebook.ie/eli/1994/act/17/enacted/en/html>; *see also* NAT’L MONUMENTS SERV., *FRAMEWORK AND PRINCIPLES FOR THE PROTECTION OF ARCHAEOLOGICAL HERITAGE* 42 (1999), <http://www.archaeology.ie/sites/default/files/media/publications/framework-and-principles-for-protection-of-archaeological-heritage.pdf>.

189. NAT’L MONUMENTS SERV., *supra* note 188, at 41.

190. National Monuments (Amendment) Act of 1987 § 9 (Act No. 17/1987) (Ir.), <http://www.irishstatutebook.ie/eli/1987/act/17/enacted/en/html>.

191. National Monuments (Amendment) Act of 1987 §§ 5(8), (10) (Act No. 17/1987) (Ir.), <http://www.irishstatutebook.ie/eli/1987/act/17/enacted/en/html>.

192. National Monuments (Amendment) Act of 1930 § 14 (Act No. 2/1930) (Ir.), <http://www.irishstatutebook.ie/eli/1930/act/2/section/14/enacted/en/html#sec14>.

193. National Monuments (Amendment) Act of 1954 § 3 (Act No. 37/1954) (Ir.), <http://www.irishstatutebook.ie/eli/1954/act/37/section/3/enacted/en/html#sec3>; NAT’L MONUMENTS SERV., *supra* note 188, at 39.

imprisonment,<sup>194</sup> and the Minister has in recent years more actively pursued prosecutions.<sup>195</sup>

A key distinction between Ireland's law and the NHPA and other U.S. cultural resource laws discussed above, is its jurisdictional reach. The law applies beyond government lands or actions, to purely private action on private lands, with the Irish government having the ability to serve as guardian of a sacred site on both public and private lands.

## 2. *Planning & Development Law*

Ireland's Planning & Development Act picks up where the National Monument Act leaves off by providing protections for other monuments not protected under a "national monument" status.<sup>196</sup> In Ireland, counties are required to have land use development plans that include objectives for protecting archaeological and cultural resources.<sup>197</sup> Development proposals must in turn address these county planning objectives and take account of monuments occurring on the land proposed for development.<sup>198</sup> Proposals that "would injure or interfere with a historic monument," "adversely affect the . . . cultural heritage of the Gaeltacht," or "have a significant adverse effect on any other areas designated for conservation due to their cultural heritage" can be denied, and the law expressly denies a landowner any legal claim for compensation based on the denial.<sup>199</sup>

## 3. *European Union Influences*

Because Ireland is a member of the European Union (EU), an overlay of protection under the EU's provisions on cultural heritage,<sup>200</sup> the EU's Environmental Impact Assessment Directive,<sup>201</sup> and the European Convention on the Protection of the Archaeological Heritage also influence Ireland's cultural laws.<sup>202</sup> Many of these EU requirements are implemented through Ireland's

194. National Monuments (Amendment) Act of 1987 § 17.1 (Act No. 17/1987) (Ir.), <http://www.irishstatutebook.ie/eli/1987/act/17/section/17/enacted/en/html#sec17>.

195. Interview with Seán Kirwan, Senior Archaeologist, National Monuments Service, Department of Arts, Heritage and the Gaeltacht, Custom House, in Dublin, Ireland (May 10, 2016).

196. Planning and Development Act of 2000 (Act No. 30/2000) (Ir.), <http://www.irishstatutebook.ie/eli/2000/act/30/enacted/en/html>; Kirwan Interview, *supra* note 183.

197. Planning and Development Act of 2000 § 10(2) (Act No. 30/2000) (Ir.), <http://www.irishstatutebook.ie/eli/2000/act/30/enacted/en/html> ("[A] development plan shall include objectives for—(c) the conservation and protection of the environment including, in particular, the archaeological and natural heritage . . . ; (d) the integration of the planning and sustainable development of the area with the social, community and cultural requirements of the area and its population; . . .").

198. *Id.* at § 175(12).

199. Planning and Development Act of 2000, Fourth Schedule, § 191 (Act No. 30/2000) (Ir.), <http://www.irishstatutebook.ie/eli/2000/act/30/schedule/4/enacted/en/html#sched4>; *see also* NAT'L MONUMENTS SERV., *supra* note 188, at 48.

200. Treaty on the European Union, art. 3, Dec. 19, 1992–Aug. 19, 1993, 1757 U.N.T.S. 30615 [hereinafter EU Treaty]; Consolidated Version of the Functioning of the European Union, art. 167, §13 2012 O.J. (C 326) 122 [hereinafter TFEU].

201. Council Directive 2014/52, art. 3(1)(d), 2014 O.J. (L 124) 8.

202. Ireland ratified the 1992 European Convention on the Protection of the Archaeological Heritage (the "Valletta Convention") in 1997. Article 1 of the Convention requires signatories to "protect the

environmental impact assessment for development proposals.<sup>203</sup> As Ireland's National Monument Service has noted, "[f]ull consideration of the protection of the archaeological heritage when undertaking, approving or authorising development is essential."<sup>204</sup> Specifically, environmental impact assessments should state whether the proposal's location is within a "landscape[] of historical, cultural or archaeological significance"<sup>205</sup> as well as describe "the aspects of the environment likely to be significantly affected . . . including in particular: . . . architectural and archaeological heritage, and the cultural heritage . . ."<sup>206</sup> This also may entail the carrying out of archaeological assessment including, where appropriate, test excavation.<sup>207</sup>

To help streamline the review process for major industries in Ireland, such as road building, railways, and forestry, the government has entered into Codes of Practice in which the government and industry players agree to certain precautionary measures in the handling of protected places. In the Code of Practice between *Coillte* (Irish Forestry Board) and the Minister for the Environment and Local Government,<sup>208</sup> for example, the industry pays for archaeological investigation, monitoring, and mitigation as a standard practice during all phases of forestry management, including initial planning stages.<sup>209</sup>

Ireland, then, couples the documentation of sacred sites with notice and environmental review provisions that build in certain safeguards (including denial authority) when planned land uses might impact a sacred site such as a holy well. Importantly, this law is not limited to national government lands or actions; it extends into activities on local and privately held lands, and includes innovative collaborations among private landowners, county government, and national agency officials.

## B. Kenya – Spiritual Rights Within Ecosystem Protection

Kenya, Africa, is home to many indigenous groups and local communities that view sacred places as part of their cosmology and are gaining legal ground in the protection of those places. To these people, sacred natural sites are holy places that serve both spiritual and ecosystem functions:

Sacred Sites are special reserved [holy] places where our elders go to pray and talk to our Gods. These places mean so much to

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archaeological heritage as a source of the European collective memory and as an instrument for historical and scientific study." NAT'L MONUMENTS SERV., *supra* note 188, at 19.

203. Planning and Development Act of 2000, § 172 (Act No. 30/2000) (Ir.), <http://www.irishstatutebook.ie/eli/2000/act/30/enacted/en/html>.

204. NAT'L MONUMENTS SERV., *supra* note 188, at 12.

205. Planning and Development Regulations, Schedule 7, § 2(h) 2001 (SI 600/2001)(Ir.), <http://www.irishstatutebook.ie/eli/2001/si/600/made/en/print#sched7>.

206. *Id.* at Schedule 6, § 2(b).

207. NAT'L MONUMENTS SERV., *supra* note 188, at 27.

208. COILLTE & DEP'T OF THE ENV'T AND LOCAL GOV'T, CODE OF PRACTICE BETWEEN COILLTE AND THE MINISTER FOR THE ENVIRONMENT AND LOCAL GOVERNMENT (undated), <https://www.archaeology.ie/sites/default/files/media/publications/cop-coillte-en.pdf>.

209. *Id.* at 6.

our Indigenous communities and deserve [a lot] of attention and protection.” Custodial communities have Stories of Origin to explain how the Sacred Natural Sites and Territories were created, why such places are sacred, and what the laws and customs of the Sacred Natural Sites are. These differ from one community and Sacred Natural Site to another but a common understanding is that the Sacred Natural Sites were created by God, or the Creator, and revealed to the ancestors of the custodial community, who respected and transferred the Story of Origin and the laws and customs orally over generations. It is also understood that these Sacred Natural Sites play a vital role in maintaining the health and resilience of the ecosystems out of which the community is born. Sacred Natural Sites play different roles in the ecosystems and for the communities, some are special places for thanksgiving in times of good harvests; other Sacred Natural Sites are special places for offerings for healing and restoring health, such as during droughts and epidemics. Only Custodians within the communities can enter the Sacred Natural Sites for special reasons and in accordance with the customs of the Sacred Natural Sites.<sup>210</sup>

In Kenya and other African nations, increasing awareness is placed on the value of sacred natural sites as “critical places within ecosystems, such as forests, mountains, rivers and sources of water, which are of ecological, cultural and spiritual importance, and exist as a network embedded within a territory.”<sup>211</sup> In this context, sacred water locations could be protected as parts of larger ecosystem designations.<sup>212</sup>

As a starting place, the 2010 Kenya Constitution “recognises the rights of people, including marginalised and indigenous peoples, to participate in a cultural life of their choice.”<sup>213</sup> Although this “right to culture” is relatively new, legal scholars envision that it can support sacred sites in two key ways. First, the right to culture can work alongside the Constitution’s new provision establishing a land category called “community land” holdings, which can return sacred ancestral lands back into indigenous ownership or management.<sup>214</sup> The Constitution states that “community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest.”<sup>215</sup> These lands can include shrines and other ancestral lands, and can be managed according to the

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210. ADAM HUSSEIN ADAM, *RECOGNISING SACRED NATURAL SITES AND TERRITORIES IN KENYA: AN ANALYSIS OF HOW THE KENYAN CONSTITUTION, NATIONAL AND INTERNATIONAL LAWS CAN SUPPORT THE RECOGNITION OF SACRED NATURAL SITES AND THEIR COMMUNITY GOVERNANCE SYSTEMS* 20 (2012), [http://cmsdata.iucn.org/downloads/gaiasns\\_1.pdf](http://cmsdata.iucn.org/downloads/gaiasns_1.pdf).

211. *Id.* at 8.

212. *Id.* at 29–30.

213. CONSTITUTION art. 11(1)(2), [44(1)] (2010) (Kenya), <http://www.kenyalaw.org/klr/fileadmin/pdfdownloads/Acts/ConstitutionofKenya2010.pdf>.

214. HUSSEIN ADAM, *supra* note 210, at 29–30.

215. CONSTITUTION art. 63 (2010) (Kenya).

customary law of the community.<sup>216</sup> The use or alienation of these lands is restricted to prevent harm to local indigenous peoples.<sup>217</sup>

Second, the right to culture can be treated as a protected value within environmental review. Kenya's Environmental Management and Coordination Act<sup>218</sup> finds that the environment constitutes the "foundation of national economic, social, *cultural and spiritual* advancement" and protects the "traditional interests of local communities customarily resident within or around a lake shore, wetland, coastal zone or river bank or forest."<sup>219</sup> The Act requires that no action be taken "which is prejudicial to the traditional interests of the local communities customarily resident within or around such forest or mountain area."<sup>220</sup> The Act also requires that the concept of biological diversity (a required component of environmental review) must integrate traditional knowledge of indigenous and local communities.<sup>221</sup> Importantly, the Act also includes access to sacred sites as an integral part of the country's right to a clean and healthy environment.<sup>222</sup>

While Kenya's integration of cultural and environmental rights with the repatriation of indigenous sacred lands is relatively untested, it provides an important model that blends land designation, land management, traditional environmental review, and indigenous forms of knowledge. The model also moves beyond the narrow concept of an isolated "site," as is the norm in U.S. law, and into a landscape-scale level of protection.<sup>223</sup>

### C. New Zealand – Rivers with Rights

A discussion of international approaches would not be complete without New Zealand, where certain rivers are afforded sacred status by treaty.<sup>224</sup> The Maori of New Zealand believe that waters, among other aspects of the natural world, are "alive and inter-related . . . infused with mauri (that is, a living essence or spirit)."<sup>225</sup> For the Maori, all elements of creation, including people, are the ancestors of these living spirits, "related through whakapapa [genealogy]."<sup>226</sup> The

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216. *Id.*

217. *Id.*

218. Environmental Management and Co-Ordination Act (2012) Cap. 387 (Kenya), [http://www.vertic.org/media/National%20Legislation/Kenya/KE\\_Environmental\\_Management\\_Act\\_Subsidary.pdf](http://www.vertic.org/media/National%20Legislation/Kenya/KE_Environmental_Management_Act_Subsidary.pdf).

219. *Id.* at Preamble, § 43 (emphasis added).

220. *Id.* at § 48(2).

221. *Id.* at § 51(f).

222. *Id.* at § 3(2).

223. U.S. scholars have advocated for a broader interpretation of the NHPA for this reason. Saugee & Bungart, *supra* note 31, at 26 (noting that sometimes "it is not so much a particular place that matters but rather how that place fits within the landscape, how it connects to other important places . . .").

224. See generally Magallanes, *supra* note 5; Iorns Magallanes, *Native American Values and Laws of Exclusion*, in ENVIRONMENTAL LAW AND CONTRASTING IDEAS OF NATURE: A CONSTRUCTIVIST APPROACH (Keith Hirokawa ed., Cambridge 2014).

225. TE TAUMATA TUARUA, KO AOTEAROA TĒNEI: A REPORT INTO CLAIMS CONCERNING NEW ZEALAND LAW AND POLICY AFFECTING MĀORI CULTURE AND IDENTITY 17 (2011), [https://forms.justice.govt.nz/search/Documents/WT/wt\\_DOC\\_68356416/KoAotearoaTeneiTT2Vol1W.pdf](https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_68356416/KoAotearoaTeneiTT2Vol1W.pdf) (cited in Magallanes, *supra* note 5, at 273).

226. Magallanes, *supra* note 5, at 273.

rivers are the arteries of Papatuankuku [the earth, and parent], and each has a mauri [spirit or life force], “which may be lessened if humans interfere with that flow.”<sup>227</sup>

Similar to the perspective of the Warm Springs and Northern Cheyenne Tribes, discussed above, the Maori view themselves as guardians or stewards of their ecosystem (an obligation known as *kaitiakitanga*).<sup>228</sup> For the Maori, much like the aforementioned Hualapai, a failure to protect this ancestor could result in harm to their society.<sup>229</sup> “[B]ecause water has its own spirit and life force, it needs to be carefully maintained so as not to diminish or lose that spirit.”<sup>230</sup> For example, Maori rules forbid mixing human waste with water—“the unclean with the clean—diminishes the life force of the clean, life-giving water.”<sup>231</sup> Sewage discharge into an ancestral river would be a violation of the “tribe’s cultural relationship with the river.”<sup>232</sup> Similarly, under Maori rules, the spirits of two separate rivers should not be mixed. This means that the diversion of one river through a hydro-electric power station and into another river would “extinguish[] the life force of both rivers . . .”<sup>233</sup>

In 1975, the New Zealand government formed the Waitangi Tribunal to resolve Maori grievances over New Zealand’s treaty violations.<sup>234</sup> As a result of tribunal reports, there has been a “wider public acceptance of the need not only to redress the past grievances [of the Maori] but also to better respect and uphold the Treaty in current law and practice . . .”<sup>235</sup> The focus of the Tribunal has been on restoration of the peoples’ relationship with resources, rather than simple economic compensation.<sup>236</sup>

New Zealand legal scholar Catherine Iorns Magallanes writes eloquently of this legal trajectory toward protection of sacred Maori values:

[D]espite historic difficulties, New Zealand has in fact been recognizing Maori cosmology in law, particularly since the 1980s, and this recognition is increasing. New Zealand laws and policies have recognized the rights of Maori to hold such views of their relationship with the environment and to have those relationships protected. This recognition has been undertaken in a wide variety of ways, from simply acknowledging that a view

227. *Id.* at 280 n. 32 (citing WAITANGI TRIBUNAL, *TE KAHUI MAUNGA: THE NATIONAL PARK DISTRICT INQUIRY REPORT* 93 (2013)).

228. *Id.* at 281 n. 34 (citing WAITANGI TRIBUNAL, *supra* note 225 at 237).

229. *Id.* at 282 n. 39 (citing WAITANGI TRIBUNAL, *THE WHANGANUI RIVER REPORT* 108 (1999)).

230. *Id.* at 292–93 nn. 95–98 (citing reports of the Waitangi Tribunal). The Maori also believe in *taniwha*—a serpent-like being inhabiting waterbodies. *Id.* at 292.

231. *Id.*

232. *Id.*

233. *Id.* (citing reports of the Waitangi Tribunal).

234. The Waitangi Tribunal was established by an Act of Parliament, the Treaty of Waitangi Act 1975. This was a time of increasing Maori protests about treaty violations. “By establishing the Waitangi Tribunal, Parliament provided a legal process by which Māori Treaty claims could be investigated.” *Past, Present & Future of the Waitangi Tribunal*, WAITANGI TRIBUNAL, <http://www.waitangitribunal.govt.nz/about-waitangi-tribunal/past-present-future-of-waitangi-tribunal/> [https://perma.cc/8VF6-4N8S].

235. Magallanes, *supra* note 5 at 295.

236. *Id.* at 292.

exists, to legally requiring it to be upheld, to implementing fundamental aspects of that view in law. Thus, for example, decision-makers might have to take such views into account and even uphold them in the face of competing interests. The rights of Maori to practice and fulfill their guardianship or *kaitiakitanga* role have been recognized through cogovernance regimes of the natural estate.<sup>237</sup>

In the area of water particularly, a New Zealand court has held that when granting a water right, the government must consider evidence of prejudice to the “spiritual, cultural and traditional relationships . . . with natural water” held by a “particular and significant group of Maori people.”<sup>238</sup> In that case, the discharge of animal effluent into a river was under review.<sup>239</sup> A second court has held that impacts to Maori should receive “primacy” when balancing competing factors.<sup>240</sup>

These ideas were later incorporated into the country’s Resource Management Act of 1991, which requires *inter alia* due regard for *kaitiakitanga*, particularly where there is an ancestral link with a resource.<sup>241</sup> While there are valid concerns about the Resource Management Act being violated, giving rise to Maori grievance claims, the overall effect has been to “enable[] attention to be paid to such Maori interests in decision-making. . . .”<sup>242</sup> Iorns Magallanes again summarizes:

The protection provided . . . has thus ranged from the need to consult with relevant Maori over the impact of a development proposal on their interests to rejection of development proposals because they interfere with Maori values and their spiritual relationship with the site proposed to be developed. Cases rejecting such interference have concerned a wide range of matters, including the discharge of sewage effluent into the sea, the location of a road being too close to old burial sites, a television aerial being too close to and thereby interfering with Maori metaphysical relationships with a battle site, and a wind farm being too close to—and interfering with Maori metaphysical relationships with—a mountain of spiritual significance.<sup>243</sup>

New Zealand law further recognizes that sacred locations requiring protection extend beyond physical or archaeological remains to metaphysical places where Maori have a spiritual relationship with a natural resource.<sup>244</sup>

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237. *Id.* at 283, 295.

238. *Huakina Dev. Trust v. Waikato Valley Auth.* [1987] NZHC 130, [1987] 2 NZLR 188 at 223 (N.Z.) (cited in Magallanes, *supra* note 5, at 296).

239. *Id.* at 191.

240. *Envtl. Def. Soc’y v. Mangonui Cnty. Council*, [1989] NZCA 17, [1989] 3 NZLR 257 (cited in Magallanes, *supra* note 5, at 296).

241. Magallanes, *supra* note 5, at 297.

242. *Id.* at 299.

243. *Id.* at 299–300 (citations omitted).

244. *Heritage New Zealand Pouhere Taonga Act of 2014*, § 6 (N.Z.) (defining *wāhi tapu* and *wāhi tūpuna*).

A further outgrowth of the Waitangi Tribunal's work has been reparations via settlement agreements between the Maori and the government of New Zealand.<sup>245</sup> These settlements contain a cultural redress component designed to "recognize and restore the claimants' spiritual, cultural and/or traditional associations with the natural environment—especially in relation to spiritually and culturally significant sites and resources—as well as to recognize and restore their cultural authority."<sup>246</sup> Reparation options have included:

- using Maori place names in lieu of English names;
- Maori use of certain Crown-owned land for gathering traditional foods and other natural resources;
- consultation protocols to ensure Maori input on government decisions affecting their natural resources;
- Maori appointments to advisory bodies and the creation of joint governance bodies for certain natural resources;
- tribal ownership and management of certain reserve land and cultural sites, including the beds of rivers and lakes; and
- creation of separate legal status for river systems sacred to the Maori.<sup>247</sup>

This last feature merits further discussion. Leading up to the Waikato River Settlement Agreement,<sup>248</sup> the Waikato Tainui Maori, who share ancestry with the Waikato River and are its guardians, suffered loss of river access, river pollution, and flow reduction due to agriculture and hydropower uses. The settlement now recognizes that the river has metaphysical qualities and represents the life force of the tribe.<sup>249</sup> The settlement also gave the river its own shared governance body comprised of Maori and government representatives who use both mainstream science and traditional Maori knowledge in their decision making.<sup>250</sup> This use of Maori knowledge "is not mere lip-service consultation."<sup>251</sup>

Going a step further, the Whanganui River Settlement Agreement of 2014<sup>252</sup> recognized the ancestral relationship, long expressed through the saying "*Ko au te awa, to te awa ko au*" (I am the river and the river is me), between the river and the Whanganui Maori, as well as the Whanganui Maori's stewardship

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245. Magallanes, *supra* note 5, at 308–09 (citations omitted).

246. *Id.* at 307 (citations omitted).

247. *Id.* at 308–09 (citations omitted).

248. Waikato River Settlement Act 2010, (N.Z.), <http://www.legislation.govt.nz/act/public/2010/0024/latest/DLM1630002.html>.

249. *Id.* at pmbl. cl. (1), § 8(3); *see also* Magallanes, *supra* note 5, at 311 (citing same).

250. Waikato River Settlement Act 2010, § 20 (N.Z.), <http://www.legislation.govt.nz/act/public/2010/0024/latest/DLM1630002.html>; *see also* Magallanes, *supra* note 5, at 312.

251. Magallanes, *supra* note 5, at 312.

252. WHANGANUI IWI & THE CROWN, RURUKU WHAKATUPUA: WHANGANUI RIVER DEED OF SETTLEMENT - TE MANA O TE IWI O WHANGANUI (Aug. 5, 2014) [hereinafter WHANGANUI RIVER DEED OF SETTLEMENT], <https://www.govt.nz/dmsdocument/5950.pdf> [<https://perma.cc/LT3S-H8MJ>]; RURUKU WHAKATUPUA - TE MANA O TE AWA TUPUA (Aug. 5, 2014) [hereinafter RURUKU WHAKATUPUA], <https://www.govt.nz/dmsdocument/5947.pdf> [<https://perma.cc/4PU6-PTMK>].

duty over those waters.<sup>253</sup> The Environmental Court had previously determined that non-tribal water uses have caused damage to the spirituality of the people: “To take away part of the river . . . is to take away part of the *iwi* [tribe]. To desecrate the water is to desecrate the *iwi*. To pollute the water is to pollute the people.”<sup>254</sup> The settlement thus recognizes the river as “an indivisible and living whole.”<sup>255</sup> In this way the Settlement Agreement goes further than simply awarding restoration damages. It requires New Zealand to statutorily recognize the river “as a legal entity with standing in its own right”—a legal entity to be known as *Te Awa Tupua*, guided by certain intrinsic values.<sup>256</sup>

**1 . . . Ko te Awa te mātapuna o te ora (The River is the source of spiritual and physical sustenance)** Te Awa Tupua is a spiritual and physical entity that supports and sustains both the life and natural resources within the Whanganui River and the health and wellbeing of the *iwi*, hapu and other communities of the River.

**2 . . . E rere kau mai te Awa nui mai te Kahui Maunga ki Tangaroa (The great River flows from the mountains to the sea)** Te Awa Tupua is an indivisible and living whole from the mountains to the sea, incorporating the Whanganui River and all of its physical and metaphysical elements.

**3 . . . Ko au te Awa, ko te Awa ko au (I am the River and the River is me)** The *iwi* and hapū of the Whanganui River have an inalienable interconnection with, and responsibility to, Te Awa Tupua and its health and wellbeing.

**4 . . . Ngā manga iti, ngā manga nui e honohono kau ana, ka tupu hei Awa Tupua** (The small and large streams that flow into one another and form one River) Te Awa Tupua is a singular entity comprised of many elements and communities, working collaboratively to the common purpose of the health and wellbeing of Te Awa Tupua.<sup>257</sup>

These intrinsic values must be upheld in environmental decisions affecting the river system,<sup>258</sup> and an official Guardian (comprised of two persons, one tribally

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253. WHANGANUI RIVER DEED OF SETTLEMENT, *supra* note 252, at cls 2.1–2.25, 2.98, 3.2–.21; *see also* Magallanes, *supra* note 5, at 313 (citing same).

254. Ngati Rangi Tr. v. Manawatu-Wanganui Reg'l Council, A67/2004, 318 (NZEnvC May 18, 2004 (N.Z.)) (overruled by Genesis Power Ltd. v. Manawatu-Wanganui Reg'l Council, [2006] NZRMA 536); Magallanes, *supra* note 5, at 300 n. 131 (quoting same).

255. WHANGANUI RIVER DEED OF SETTLEMENT, *supra* note 252, cl. 4.4.3; Magallanes, *supra* note 5, at 314 (citation omitted).

256. WHANGANUI IWI & THE CROWN, TUTOHU WHAKATUPUA, cl. 2.1.2 (Aug. 30, 2012), <https://www.govt.nz/dmsdocument/3706.pdf> [<https://perma.cc/2TB7-4XQK>]; Magallanes, *supra* note 5, at 315 (quoting same).

257. RURUKU WHAKATUPUA, *supra* note 252, at cl. 2.7; Magallanes, *supra* note 5, at 315 (quoting same).

258. Nonetheless, Professor Iorns Magallanes differentiates approaches like that used for the Whanganui River from the classic “rights of nature” approach because the New Zealand approach is premised on cultural rights of a peoples rather than environmental protection in and of itself. *See* Iorns Magallanes, *supra* note 5, at 324–26.

appointed, one appointed by the Crown) is charged to promote, protect, and act on behalf of *Te Awa Tupua*.<sup>259</sup> Title to the riverbed will also vest in the name of *Te Awa Tupua*.<sup>260</sup>

It is difficult to imagine a similar round of treaty reparation agreements emerging with the numerous tribes in the vast American West.<sup>261</sup> But the key ingredients within New Zealand's approach—legal recognition of sacred water values and indigenous laws, protection of those values and laws during environmental review and permitting, and shared governance of water—are extremely valuable as we consider approaches for western water law.

#### IV. HOW WE MIGHT BEGIN IN THE WEST

With so many different laws impacting sacred tribal waters, there are a dizzying number of paths to legal reform. We could focus on greater protection of sacred waters during federal environmental review, or a stronger tribal role in federal lands management. We could strengthen meaningful tribal consultation by making it an enforceable legal right. State and local land use regulations could also embrace development review and mitigation requirements to address impacts to sacred waters. These and other ideas are undoubtedly fodder for future scholarship.

For the time being, this part will focus on the universe of state water law, vast in and of itself, as the principal legal regime governing the waters of the West.<sup>262</sup> Unlike land use regulation, with its variable application among local jurisdictions, state water law affords a more uniform approach throughout a state system. And though variability exists among the various western states, their common touchstone of prior appropriation creates shared policy influences and shifts. Further, state water law expands the narrow reach of protection beyond federal lands and actions, and has the potential to avoid the “multiple use” mandate that often preempts tribal interests during federal decision making.<sup>263</sup>

A state water law system that values sacred waters could also trigger positive federal changes. Perhaps it is time for some movement from the bottom up. As Robin Kundis Craig has aptly noted, the federal government has a long history of and “predilection for preferring state law in the context of water allocation.”<sup>264</sup> If the western states begin articulating a sacred water value, federal

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259. Magallanes, *supra* note 5, at 316 (citing RURUKU WHAKATUPUA, *supra* note 252, at cl. 3.8–9).

260. RURUKU WHAKATUPUA, *supra* note 252, at cl. 6.1; Magallanes, *supra* note 5, at 316.

261. Since the U.S. Congress eliminated the Executive's treaty-making powers with Tribes in 1871, treaties are not technically possible, although a compact or some other type of agreement might reach a similar result. *See* Indian Appropriation Act of March 3, 1871, 16 Stat. 544, 566 (codified at 25 U.S.C. § 71 (2012)).

262. As Robin Kundis Craig and others point out, water law today is that of dynamic federalism with shared federal-state governance, and an increasing federal role through federal and Indian reserved rights, water infrastructure projects, and endangered species protection. *See* Robin Kundis Craig, *Adapting Water Federalism to Climate Change Impacts: Energy Policy, Food Security, and the Allocation of Water Resources*, 5 ENV'T'L & ENERGY L. & POL'Y J. 183 (2010).

263. This potential exists if sacred waters can be protected as a state water right subject to the no-injury rule. *See infra* note 283 and related text.

264. Craig, *supra* note 262, at 195.

agencies may in turn begin placing more weight on tribal spiritual interests during permitting and planning on federal lands.<sup>265</sup>

State water law stands to benefit greatly as well. Protecting sacred waters opens new possibilities for incorporating a tribal expertise currently missing in state water rights review, and similarly transforms the usual set of stakeholders working on shared water governance.

For these reasons and more, state water law is a worthy starting place. Conceptually, there are two key legal shifts that will make the most significant difference in valuing sacred tribal waters within prior appropriation: (1) considering sacred water in the states' public interest tests for new or changed water rights; and (2) adding sacred tribal water as an express beneficial use capable of protection as a water right.

#### A. Sacred Water as Part of Public Interest

As discussed in Part I, western states now have codified criteria that apply when a party seeks a new water right or change of use.<sup>266</sup> Among those criteria, states generally specify that the proposed water use must be in the public interest.<sup>267</sup> A modest first step, then, would be for states to add sacred water as a value to be weighed in an agency's public interest review. While no single value is dispositive under public interest review, the explicit listing of sacred water would be a vast improvement. Presently, sacred waters are not listed as a public interest consideration in any state, nor is there evidence of sacred waters being raised *sua sponte* during public interest review.<sup>268</sup> Thus, even this minor legal foothold could create large shifts in the types of evidence and public discourse surrounding a water rights proposal.

For states with a closed statutory definition of public interest, this step may require a statutory amendment. Alaska's eight delimited topics that apply when considering public interest, for example, would require an amendment to include sacred values.<sup>269</sup> For states with a more open-ended definition, change

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265. There are notable examples of agency decisions to weigh spirituality more heavily. *See, e.g.*, *Access Fund v. U.S. Dep't Agric.*, 499 F.3d 1036 (9<sup>th</sup> Cir. 2007) (upholding United States Forest Service decision to prohibit rock climbing on Cave Rock, a culturally significant tribal site on Lake Tahoe); *Bear Lodge Multiple Use Assoc. v. Babbitt*, 2 F. Supp. 2d 1448 (D. Wyo. 1998) (upholding voluntary seasonal climbing restriction at Devil's Tower National Monument for Indian religious practices).

266. *Supra* Part I.B.

267. *See* Grant, *supra* note 87, at 486.

268. Interviews, *supra* note 79 (referring to matters outside the context of tribal or federal reserved rights).

269. ALASKA STAT. § 46.15.080(b) (West 2016):

(b) In determining the public interest, the commissioner shall consider:

- (1) the benefit to the applicant resulting from the proposed appropriation;
- (2) the effect of the economic activity resulting from the proposed appropriation;
- (3) the effect on fish and game resources and on public recreational opportunities;
- (4) the effect on public health;
- (5) the effect of loss of alternate uses of water that might be made within a reasonable time if not precluded or hindered by the proposed appropriation;
- (6) harm to other persons resulting from the proposed appropriation;

would be at the regulatory level through either amended regulations or modified policy guidance. Nevada, for example, delegates authority to the State Engineer to define the public interest considerations relevant to a proposed water use.<sup>270</sup> For other states that lack a definition altogether, or have a catch-all category, a strong argument exists that sacred value already falls within the scope of public interest. Oregon provides an example of this latter category:

Conserving the highest use of the water for all purposes, including irrigation, domestic use, municipal water supply, power development, public recreation, protection of commercial and game fishing and wildlife, fire protection, mining, industrial purposes, navigation, scenic attraction *or any other beneficial use to which the water may be applied for which it may have a special value to the public.*<sup>271</sup>

Even with such open-ended provisions, however, an amendment explicitly recognizing sacred values will create a greater paradigm shift. Indeed, Oregon, Alaska, and other states have taken this very step to explicitly include instream flow-based uses like wildlife, fish and game, recreation, and scenic amenities within the public interest.<sup>272</sup>

By expressly incorporating sacred value as part of the public interest, the American West will create a system that proactively and consistently considers impacts to sacred tribal waters. Agencies, applicants, and the public will come to expect that evidence related to sacred values will be gathered and considered<sup>273</sup> alongside other traditional evidence such as flow data, efficiency of the diversion, and potential harm to other water users. This proactive review reduces the risk of discovering, after a water use takes effect, that it causes irretrievable injury to a tribe's sacred water.

Additionally, because water proposals often involve private water uses on private lands, the inclusion of sacred waters within a state's public interest test affords additional review for actions that fall outside federal law. This approximates Ireland's proactive review of development, even on private lands involving no government action, which can reduce the chance of harm to holy wells.<sup>274</sup> The Kenya and New Zealand models similarly contemplate an advance consultation with indigenous groups to ensure sacred values are not compromised

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(7) the intent and ability of the applicant to complete the appropriation; and

(8) the effect upon access to navigable or public water.

270. NEV. REV. STAT. § 533.370(2) (2015); *Pyramid Lake Paiute Tribe of Indians v. Washoe Cty.*, 918 P.2d 697, 698–700 (Nev. 1996) (interpreting a previous version of § 533.370).

271. OR. REV. STAT. ANN. § 537.170(8)(a) (West 2016) (emphasis added).

272. *See, e.g., id.*; ALASKA STAT. § 46.15.080(b) (West 2016).

273. Admittedly, this process will require careful protection of any information about the sacred site that a tribe considers confidential. One model is the Advisory Council on Historic Preservation's *Policy Statement on the Confidentiality of Information about Indian Sacred Sites*. *See* ADVISORY COUNCIL ON HISTORIC PRES. ET AL., POLICY STATEMENT ON CONFIDENTIALITY OF INFORMATION ABOUT INDIAN SACRED SITES (July 2015), <http://www.achp.gov/docs/sacred-sites-mou-policy-statement-july-2015.pdf> [<https://perma.cc/UT2D-P9NR>]. This could also potentially require exemptions from state freedom of information laws.

274. *See* Part III.A, *supra*.

by proposed uses.<sup>275</sup> Here, too, is an opportunity to echo the federal model of tribal consultation so that both state and federal government agencies act consistently toward sacred tribal values in their decision making processes.<sup>276</sup>

## B. Sacred Water as Beneficial Use

Although inclusion of sacred tribal waters in public interest review is a significant improvement, it does not go the full distance. Due to the myriad of values considered within public interest review, tribes can ultimately suffer a fate similar to that experienced under federal “multiple use” mandates, with other public values ultimately outweighing sacred tribal values.<sup>277</sup>

Stronger still would be the express recognition of sacred water as a beneficial use for which a state water right can arise. This strategy follows a somewhat tested path. For example, the federal government already has legal authority to apply for state-based water rights in areas where it lacks federal reserved water rights. On federal grazing lands, for example, the BLM typically does not hold federal water rights and may seek state water rights for watering livestock and wildlife.<sup>278</sup> States have also created special categories of beneficial use for the federal government, such as Montana’s definition of “appropriation,” which includes instream flows held by the U.S. Forest Service.<sup>279</sup>

Additionally, sacred water rights can follow the path of instream flow rights, which have been grafted onto traditional prior appropriation doctrine to protect *in situ* uses of water while still honoring existing appropriative rights as well. Here again, an express amendment to a state’s statutory definition of beneficial use is the most logical course. For example, Montana evolved its traditional concept of beneficial use by amending its statutory definition to include “fish and wildlife” and “recreational” uses.<sup>280</sup> These amendments triggered ancillary changes to the state’s water code, such as exempting instream flow uses from the traditional rules applicable to abandonment,<sup>281</sup> and allowing changes from diversionary to instream flow uses to retain their original priority date.<sup>282</sup>

Once authorized as a beneficial use, sacred water rights could arise as new water rights with priority dates junior to other existing state users on a water system. While junior rights admittedly offer little comfort in over-appropriated

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275. See Parts III.B and III.C, *supra*.

276. See discussion Part II.A, *supra*. At the federal level, agencies have signaled an intent to use tribal consultants to provide the necessary expertise for assessment of tribal impacts. U.S. DEP’T OF DEFENSE ET AL., MEMORANDUM OF UNDERSTANDING REGARDING INTERAGENCY COORDINATION AND COLLABORATION FOR THE PROTECTION OF INDIAN SACRED SITES 2–3 (Nov. 30, 2012), [http://www.achp.gov/docs/SacredSites-MOU\\_121205.pdf](http://www.achp.gov/docs/SacredSites-MOU_121205.pdf) [<https://perma.cc/6ZP5-AX4W>].

277. See discussion of Rebecca Tsosie’s critique of tribal trust versus public trust, *supra* note 135 and accompanying text.

278. See, e.g., Order Granting Partial Summary Judgment, Lower Missouri River Division Beaver Creek Tributary of Milk River Basin (40M), Case 40M-300 (Mont. Water Ct. Nov. 16, 2016) (on file with author).

279. MONT. CODE ANN. § 85-2-102(1)(d) (West 2016).

280. *Id.* at § 85-2-102(4).

281. *Id.* at § 85-2-404.

282. *Id.* at § 85-2-407(5).

basins, such rights do enjoy the protection of the “no-injury” rule, under which state agencies are obligated to reject or apply mitigating conditions to new uses or proposed changes that may injure a junior.<sup>283</sup> In such situations, a tribe would have the same powers of other state water rights holders, with standing to assert that its sacred water right is protected from injury by new proposals. By building sacred water rights impacts into agency review, states can thus move even closer toward the types of prospective review afforded to the Maori under New Zealand water law, to indigenous peoples under Kenya’s Environmental Management and Coordination Act, and to holy wells under Ireland’s planning and development review.<sup>284</sup>

Further, as sacred water rights become legally recognized, tribes are positioned to acquire existing, senior water rights and seek agency approval to change them into sacred water rights. Again, this type of conversion is already well established for instream flow rights, under which senior, consumptive uses located on historically dewatered stream reaches may be converted to instream flow rights while retaining an early priority date.<sup>285</sup>

California’s Water Resources Control Board provides another kindred path. At the request of tribes in the state’s North Coast region, the Board is moving toward a new use designation for tribal cultural and fisheries uses in its state water quality laws.<sup>286</sup> The Board adopted Resolution 2016-0011, which provides a new beneficial use category called “tribal traditional and cultural,” with the following supporting finding:

The State Water Board recognizes the importance of identifying and describing beneficial uses unique to California Native American tribes. Tribes have cultural practices and ways of life that they wish to preserve and pass on to future generations. Changes to California’s waters, along with new sources of contamination and pollution to those waters, which are part of their native heritage, present distinctive challenges to the tribes and their members. In many of these areas, tribal members are unaware of issues with water quality and the dangers they may present. Providing beneficial use categories and descriptions designed to protect Native American uses of waters is an important step in ensuring that tribes have the opportunity to continue to practice their culture.

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The Tribal Traditional and Cultural beneficial use is related to traditional and cultural Native American practices that involve either water contact activities or the gathering and use of materials from waters. Examples of the Tribal Traditional and

283. TARLOCK, *supra* note 75, at § 5:76 (“A junior appropriator has a right to the continuation of stream conditions as they existed at the time the junior appropriated the water.”). *See, e.g.*, MONT. CODE ANN. §§ 85-2-311(1)(b)–402(2)(f) (West 2016).

284. *See supra* notes 197–205, 218 and 237, and accompanying text.

285. *E.g.*, MONT. CODE ANN. §§ 85-2-408–436 (West 2016).

286. CALIFORNIA WATER RES. CONTROL BD., TRIBAL TRADITIONAL AND CULTURAL, TRIBAL SUBSISTENCE FISHING AND SUBSISTENCE FISHING BENEFICIAL USES: STAKEHOLDER OUTREACH DOCUMENT (June 2016) (on file with author).

Cultural beneficial use include water ceremonies and other religious practices associated with waters, the gathering of materials from waters, and the use of those materials for either food, medicines, or other traditional uses, such as basket weaving. These uses may be also be threatened by PBTs that accumulate in plants and animals. Other examples of constituents that may threaten these uses include high levels of bacteria, cyanotoxins, and nutrients.<sup>287</sup>

Although the California proposal applies to water quality review under the Clean Water Act, and is not part of the state's water rights code, it nonetheless provides a parallel model of how a state permit review process can incorporate, analyze, and mitigate impacts to sacred tribal waters. As the first state effort at creating a sacred beneficial use category, Resolution 2016-0011 is thus important to monitor.

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While elegantly simple on the surface, these recommended changes to state water law unquestionably pose political and practical challenges. As the long struggle for instream flow rights reveals, changes make existing water rights holders nervous about their historic water uses being lost or curtailed. It is important, then, to provide by law that no new permit or changed use for sacred waters can issue if injury to existing water rights is demonstrated. This certainly represents a compromise of interests. Tribes would undoubtedly prefer that state-based sacred water rights receive a time immemorial priority date (similar to what they may get for a tribal reserved water right under federal law), since their water uses predate other state-based water uses. On the other hand, a tribal concession on priority date has often been a key ingredient in negotiated state-tribal-federal compacts involving Indian reserved water rights under federal law.<sup>288</sup>

And tribes have much to gain in such a state compromise. Beyond obtaining rights unavailable under federal law, tribes become stronger players in the joint management of shared water resources, bringing their unique forms of knowledge and expertise about the waters within their aboriginal territories.<sup>289</sup> For example, in areas where water users are working alongside federal and state wildlife agencies to ensure fisheries protection, such as on the Blackfoot River in southwestern Montana,<sup>290</sup> tribes can become integral partners in protecting waters while also obtaining protections for off-reservation sacred waters. In this way, tribes can approximate some of the shared governance scenarios emerging in New

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287. *Id.* at 4, 6.

288. *E.g.*, PROPOSED CSKT-MONTANA COMPACT, *supra* note 9 (subordinating certain tribal priority dates to allow for protections of non-Indian water users, in exchange for other tribal rights and financial compensation).

289. *See generally* Nie, *supra* note 149 (discussing of federal-tribal management agreements, which could extend by equal measure to state level management agreements).

290. *See generally* Vivaca Crowser, *FWP Restricts Fishing on Blackfoot Tributaries to Protect Bull Trout*, BLACKFOOT CHALLENGE (Aug. 20, 2013) <http://biz170.inmotionhosting.com/~blackf22/Clone/fwp-restricts-fishing-on-blackfoot-tributaries-to-protect-bull-trout/> [<https://perma.cc/9WW8-U7MK>]

Zealand and Kenya, or the joint public-private management of holy sites occurring on private lands in Ireland.<sup>291</sup>

On a practical level, there will also be many thorny implementation questions, including how to best incorporate traditional tribal knowledge (both cultural and ecological) into agency review, how to demarcate the place of use for particular forms of sacred waters, how to measure injury when sacred waters are involved, how to protect the privacy of sacred tribal places, and how to place calls on junior users in times of shortage. While daunting, the alternative prospect—of leaving sacred water unprotected and at risk of permanent loss—would, in the words of Charles Wilkinson, “be painful . . . even immoral . . . because it should not be so hard to mesh the needs of the lands and the waters and the people. They ought to be the same. In the last analysis, they are the same.”<sup>292</sup>

### CONCLUSION

As both the doctrine of prior appropriation and international norms continue to evolve, space has opened up to address the overlooked but critical question of protecting sacred tribal waters that fall outside the protective sphere of tribal jurisdiction and federal law. The U.S. commitment to protecting tribal sacred places is growing but not reliable, and the use of state-based water law, as a value-based system, offers a potential starting place that can extend and deepen protections beyond those afforded under federal law. International examples inspire this work, and national pioneers in the areas of instream flow, shared watershed governance, and tribally sensitive water quality protection are showing us possible paths forward. In the vast space of our American West, home to millions of acres on which American Indian tribes have and continue to engage in spiritual practices, it is time to begin protecting that which tribal peoples value so deeply.

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291. *See generally supra* Part III.

292. WILKINSON, *supra* note 13.



