

TRIBAL WATER SOVEREIGNTY: AUTHORIZING INDIAN WATER MARKETING IN THE COLORADO BASIN

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In January 2023, Congress passed the Colorado River Indian Tribes Water Resiliency Act, authorizing the Colorado River Indian Tribes to lease part of its Colorado River water allocation to off-reservation users. The law grants the Colorado River Indian Tribes some of the rights that are already enjoyed by private water users, and creates an important source of revenue for the tribal government. In its broader context, however, the Act only further complicates the legal situation of tribal water leasing in the Colorado basin. Rights vary dramatically from tribe to tribe, with a patchwork system of exemptions to the general prohibition on tribal water leasing resulting in an uneven and fundamentally unfair system. Some tribes are effectively able to lease water at will; others are entirely prohibited from doing so; and still others are limited, by law or by settlement, to leasing only from certain bodies of water or to certain other water users.

This Comment argues that Congress should consider uniform legislation to cut through this regulatory thicket, authorizing all basin tribes to lease their water rights to off-reservation users. Taking as its model the recent Colorado River Indian Tribes Water Resiliency Act, which passed with wide widespread bipartisan support in both chambers of Congress, this Comment argues that similar legislation could garner support from municipal water users and environmental groups that have been skeptical of previous efforts to expand tribal water leasing. It concludes by discussing remaining obstacles to this proposal and its prospects for success in a future Congress.

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INTRODUCTION

In the twenty-third year of a historic drought,¹ cities, states and tribes that rely on water from the Colorado River may soon have to make hard choices. Reservoirs have dropped to record lows, and deep cuts to water supply loom on the horizon—if only to keep the lights on.² As climate change intensifies future droughts and diminishes the snowpack that feeds the Colorado,³ water users will eventually face a “difficult Basinwide reckoning.”⁴ Although a wet winter has temporarily alleviated the drought, and a heavier-than-normal snowpack appears likely to keep the river’s power plants online through 2024,⁵ one wet year will not make up for decades of sustained overuse.⁶

Though often excluded from the conversation,⁷ the thirty federally recognized Indian tribes of the Colorado River basin have a keen interest in the river’s future. Roughly twenty-five percent of the basin’s water is legally

1. See A. Park Williams, Benjamin I. Cook & Jason E. Smerdon, *Rapid Intensification of the Emerging Southwestern North American Megadrought in 2020-2021*, 12 NATURE CLIMATE CHANGE 232, 234 (2022) (identifying the current period as the driest such period in at least 1,200 years).

2. See Jonathan Thompson, *Powell’s Looming Power Problem*, HIGH COUNTRY NEWS (Apr. 11, 2022), <https://perma.cc/WPU8-VRTB>.

3. See Carl J. Talsma, Katrina E. Bennett & Velimir V. Vesselinov, *Characterizing Drought Behavior in the Colorado River Basin Using Unsupervised Machine Learning*, 9 EARTH & SPACE SCI. e2021EA002086, at 18 (2022).

4. KEVIN WHEELER ET AL., CTR. FOR COLO. RIVER STUD., ALTERNATIVE MANAGEMENT PARADIGMS FOR THE FUTURE OF THE COLORADO AND GREEN RIVERS 114 (2021).

5. Jonathan P. Thompson, *Pondering Page, Arizona (and Lake Powell)*, LAND DESK (Mar. 22, 2023), <https://perma.cc/E2TW-JLLP>.

6. Ian James, *Drought-Ravaged Colorado River Gets Relief from Snow. But Long-Term Water Crisis Remains*, L.A. TIMES (Apr. 10, 2023, 5 AM PT), <https://perma.cc/3QDC-KLJ5>.

7. See Annie Snider, *Shrinking Colorado River Hands Biden His First Climate Brawl*, POLITICO (Feb. 4, 2023, 7:00 AM EST), <https://perma.cc/5C4W-J7GN> (“[Tribes] haven’t been in the room for negotiations involving the states and the federal government.”); Rowan Moore Gerety, *The Forgotten Sovereigns of the Colorado River*, POLITICO MAG. (July 7, 2023, 4:30 AM EDT), <https://perma.cc/73JE-SVWB> (“[T]he federal government was trying to plan for the need to cut water allocations across the basin without the involvement of the tribes that—at least nominally—controlled a quarter of the river’s flow.”).

allocated to the tribes; a dozen of those thirty have unresolved water rights claims, meaning that share will only grow.⁸ Despite this legal entitlement, however, limited water infrastructure means that many tribes are unable to translate their “paper water” into available wet water.⁹ The Navajo Nation, for example, holds a right to 714,500 acre-feet of water in Utah and New Mexico, with vast unquantified rights in Arizona; nevertheless, around a third of Navajo Nation residents lack running water in their homes.¹⁰

In January 2023, President Biden signed into law the Colorado River Indian Tribes Water Resiliency Act, authorizing the Colorado River Indian Tribes (CRIT) to lease part of its Colorado River water to off-reservation users.¹¹ Among other purposes, the leasing revenue will be used to expand access to water on the reservation.¹² This arrangement benefits all parties: the tribes generate revenue from the lease, while municipal governments have a new, secure source of water with which to stave off water shortages.

The Act’s passage is a small victory for tribal sovereignty, affording CRIT similar leasing rights to those that many private water users already enjoy.¹³ But the Act’s effects are limited to a single tribal government. Many other tribes in the Colorado basin lack leasing authority, while still others have narrowly circumscribed powers—able to lease water only from only certain bodies of water or to certain users. This situation is created by federal law that generally prohibits tribes from leasing their water to off-reservation users, with a patchwork system of exemptions created through individual water rights settlements, as well as statutes like the CRIT Water Resiliency Act. While the Act opens a new revenue stream for CRIT, as well as offering a new trading partner for Arizona water users, tribes in similar situations that lack the resources or political clout to win the passage of similar legislation are, for now, simply out of luck.

In three parts, this Comment argues that Congress should consider uniform legislation to authorize all tribes in the Colorado basin to lease their water rights off-reservation along the same terms outlined in the CRIT Water Resiliency Act. Part I outlines how current federal law presents significant barriers to tribal water

8. Anna V. Smith, Jessie Blaeser & Joseph Lee, *Tribal Nations Fight for Influence on the Colorado River*, HIGH COUNTRY NEWS (Nov. 16, 2022), <https://perma.cc/FL6F-CKNF>; see also WATER & TRIBES INITIATIVE, THE STATUS OF TRIBAL WATER RIGHTS IN THE COLORADO RIVER BASIN 7 tbl.3 (2021) (listing the twelve tribes with unresolved water claims).

9. See Reid Peyton Chambers, *Reflections on the Changes in Indian Law, Federal Indian Policies and Conditions on Indian Reservations Since the Late 1960s*, 46 ARIZ. ST. L.J. 729, 768-69 (2014).

10. See Kyle Dunphey, ‘A 100-Year Tragedy’ for Tribes in the Colorado River Basin, DESERET NEWS (Dec. 19, 2022, 8:00 PM PST), <https://perma.cc/PW2M-T6WR>.

11. Debra Utacia Krol, *Biden Signs Bills that Secure Long-Sought Water Rights and Land for 5 Arizona Tribes*, ARIZ. REPUBLIC (updated Jan. 6, 2023, 8:35 PM MT), <https://perma.cc/TS83-SQRD>.

12. *Id.*

13. *But cf.* Moore Gerety, *supra* note 7 (noting that CRIT was not a party to talks that would require CRIT to give up 45,000 acre-feet of water without compensation).

leasing. Part II discusses the CRIT Water Resiliency Act as a model for alleviating those barriers, exploring the benefits to tribes, municipal users, and the environment from tribal water leasing along the terms authorized by the Act. Part III concludes by discussing the prospects for uniform legislation authorizing tribal water leasing, as well as potential tribal opposition to such legislation and additional reforms necessary to realize the potential of tribal water leasing.

I. FEDERAL LEGAL BARRIERS TO TRIBAL WATER LEASING

This Part discusses existing barriers to tribal water leasing. As a preliminary obstacle, many tribes have not quantified their water rights. The doctrine of federal reserved water rights states that each tribe reserved water rights at the moment its reservation was created, but this reservation does not quantify those rights. Instead, quantification must wait for either a state court adjudication or a federal law settling the tribe's water right; many tribes are still waiting for such a quantification. Once quantified, the Nonintercourse Act bars tribes from leasing their water rights off-reservation unless specifically authorized to do so by Congress.¹⁴

A. Lack of Quantification

Tribes that lack a legally quantified water right will logically find it difficult to lease their water.¹⁵ In *Winters v. United States*, the Supreme Court affirmed that, when the federal government set aside public-domain land for Indian tribes, it implicitly reserved water rights for the tribes.¹⁶ The quantity of these rights, as the Supreme Court clarified over half a century later, is enough water to irrigate all of the "practicably irrigable acreage" on the reservation.¹⁷ Some courts have identified additional implied water rights where necessary to create a "homeland" for Indian tribes,¹⁸ such as water rights to support tribal hunting and

14. 25 U.S.C. § 177.

15. *But see* GARY WEATHERFORD, MARY WALLACE & LEE HEROLD STOREY, THE CONSERVATION FOUND. & JOHN MUIR INST., LEASING INDIAN WATER: CHOICES IN THE COLORADO RIVER BASIN 48-49 (1988) (noting that Indian water *claims* have successfully been leased on a handful of occasions, but that the risk that another party will contest the claim's validity means that a quantified water right provides a more secure basis for leasing).

16. *Winters v. United States*, 207 U.S. 564, 577 (1908); *see also* *United States v. New Mexico*, 438 U.S. 696, 702 (1978) ("Where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water."). This Comment does not discuss pueblo water rights, which have a different origin, but have largely not been quantified. *See* Justin Nyberg, *The Promise of Indian Water Leasing: An Examination of One Tribe's Success at Brokering Its Surplus Water Rights*, 55 NAT. RES. J. 181, 184-85 (2015).

17. *Arizona v. California*, 373 U.S. 546, 600 (1963).

18. *See, e.g., In re* Gen. Adjudication of All Rts. to Use Water in the Gila River Sys. & Source (*Gila V*), 35 P.3d 68, 81 (Ariz. 2001).

fishing.¹⁹ Notably, Western water law ranks water rights by date of first use; water rights for agriculture are considered to date to the time the reservation was created, while some of the water rights for hunting and fishing have been recognized as having a priority date of time immemorial.²⁰ This fact means Indian water rights are typically senior to those of most non-Indian appropriators—a feature that, when combined with the possibly significant volume of water at issue, “strikes widespread fear into the hearts of non-Indian water users.”²¹

But translating this indeterminate water right into a number—a specific quantity of water to which the tribe is entitled—can be an arduous process. Quantifying a water right takes, on average, twenty-two years, with twenty-three tribes still midway through the process and over a hundred more not yet begun.²²

Tribes seeking to assert their water rights have two options. The first is to engage in a state-court general stream adjudication, which ultimately results in a binding opinion defining every appropriator’s water right.²³ This option is increasingly disfavored, both as a result of perceived hostility to tribes and tribal water rights in state courts²⁴ and because state-court adjudications often result in tribes winning substantial “paper” legal rights to water, but no financial resources with which to develop it.²⁵ The second alternative, more common today, is to negotiate a settlement instead of pursuing the general stream adjudication to completion. Although negotiations are themselves often arduous, the resulting settlements can better reflect on-the-ground realities.²⁶ Very few tribes have the resources necessary to make much use of the large water right that *Winters* envisions tribes as using for irrigated agriculture; instead, most would prefer

19. See, e.g., *Colville Confed. Tribes v. Walton*, 647 F.2d 42, 48 (9th Cir. 1981) (observing that “providing for a land-based agrarian society . . . was not the only purpose for creating the reservation” and recognizing an implied water right for a tribal fishery); *United States v. Adair*, 723 F.2d 1394, 1409-10 (9th Cir. 1983) (identifying a water right to support game and fish).

20. Robert T. Anderson, *Water Rights, Water Quality, and Regulatory Jurisdiction in Indian Country*, 34 STAN. ENV’T L.J. 195, 204, 210 (2015).

21. Reid Peyton Chambers & John E. Echohawk, *Implementing the Winters Doctrine of Indian Reserved Water Rights: Producing Indian Water and Economic Development Without Injuring Non-Indian Water Users?*, 27 GONZ. L. REV. 447, 448 (1991).

22. Leslie Sanchez, Bryan Leonard & Eric Edwards, *Beyond “Paper” Water: The Complexities of Fully Leveraging Tribal Water Rights*, FED. RSRV. BANK OF MINNEAPOLIS (May 3, 2022), <https://perma.cc/M8MK-W8UJ>.

23. See, e.g., *In re Gen. Adjudication of All Rts. to Use Water in the Big Horn River System*, 753 P.2d 76, 96 (Wyo. 1988).

24. See Robert H. Abrams, *Reserved Water Rights, Indian Rights and the Narrowing Scope of Federal Jurisdiction: The Colorado River Decision*, 30 STAN. L. REV. 1111, 1143-44 (1978).

25. CHARLES V. STERN, CONG. RSCH. SERV., R44148, INDIAN WATER RIGHTS SETTLEMENTS 2 (2023).

26. See MATTHEW L.M. FLETCHER, PRINCIPLES OF FEDERAL INDIAN LAW 321 & n.111 (2017); see also *In re Gen. Adjudication of All Rts. to Use Water in the Gila River Sys. & Source*, 224 P.3d 178, 185-187 (Ariz. 2010) (discussing objections by Apache tribes to the Gila River Indian Community water settlement).

“wet reservation water, green money, and a broad range of water uses better suited to the culture and actual needs of individual reservations.”²⁷

B. Legal Barriers to Off-Reservation Leasing

Once tribes have quantified their water right, federal law still generally bars off-reservation leasing of tribal water rights. Tribes may freely lease water on their own reservations,²⁸ but the Nonintercourse Act generally forbids the “purchase, grant, lease, or other conveyance of lands . . . from any Indian nation or tribe.”²⁹ Whether “lands” in the statute includes water rights technically remains unsettled, but most parties understand federal authorization to be required to market tribal water rights to off-reservation users.³⁰ Given the absence of any general federal statute authorizing the lease of water rights, as exists for tribal land, exemptions to the Nonintercourse Act for water marketing are understood to require separate legislation.³¹

Tribes that quantify their water rights through a state-court adjudication likely require standalone federal legislation to authorize them to market their water. Negotiated settlements, by contrast, must be approved by Congress, and often take the opportunity to address whether and how tribes are authorized to market their water.³² Several limit tribes to only marketing water from specific sources or forming contracts with specific users, such as named municipalities.³³ These limits result from tribes lacking a uniform right to sell or lease their water; instead, they often must bargain for this authorization in the context of a broader water rights settlement. This often yields only a limited right, the contours of which vary by tribe.³⁴

II. EXPANDED WATER LEASING AS A POLICY SOLUTION

The Colorado River Indian Tribes Water Resiliency Act³⁵ seeks to expand

27. A. Dan Tarlock, *Tribal Justice and Property Rights: The Evolution of Winters v. United States*, 50 NAT. RES. J. 471, 497 (2010).

28. *See Skeem v. United States*, 273 F. 93, 96 (9th Cir. 1921).

29. 25 U.S.C. § 177.

30. *See* FLETCHER, *supra* note 26, at 322; COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 19.03[7][c], at 1229-30 (Nell Jessup Newton ed., 2012) (mentioning that the Secretary’s authority to authorize leasing is an “open question” under existing statutes).

31. *See* COHEN’S HANDBOOK, *supra* note 30, § 19.03[7][c], at 1229-30; Steven J. Shupe, *Indian Tribes in the Water Marketing Arena*, 15 AM. INDIAN L. REV. 185, 198 (1990) (noting that “no reputable water buyer” will lease without explicit law).

32. COHEN’S HANDBOOK, *supra* note 30, § 19.05, at 1252.

33. *Id.* § 19.05, at 1252 & n.70 (mentioning that the latter restriction is particularly common in the Southwest, often limiting tribes to marketing water within the state or to particular municipalities).

34. *See* Denise D. Fort, Professor, Univ. of N.M. Sch. of L., Speech at the American Bar Association 30th Annual Water Law Conference: Policy Questions Concerning Tribal Water Marketing (Jan. 9, 2012), <https://perma.cc/F6PC-G6BL>.

35. Pub. L. No. 117-343, 136 Stat. 6186 (2023).

tribal water leasing by authorizing the Colorado River Indian Tribes to lease part of its apportioned water rights to other water users in the Lower Basin. The Act is notable for the size of the water right at issue: CRIT has first-priority rights to 662,402 acre-feet per year, making it the largest Colorado River rights-holder in Arizona.³⁶ The Act is also notable for the limit it places on water leasing: all leased water has to come out of the tribe's existing consumptive use, which is primarily agricultural.³⁷ The tribe accordingly plans to fallow some fields, install more efficient irrigation systems, and plant less water-intensive crops in order to free up water to lease.³⁸ Unlike many other water-leasing authorizations for Southwestern tribes, however, the Act does not restrict CRIT to forming lease agreements with only a specific list of municipalities,³⁹ instead broadly authorizing the tribe to form leases with "any person" in the Lower Basin portion of Arizona.⁴⁰

Unlike water rights settlements, which often include federal appropriations that draw political opposition,⁴¹ the CRIT Water Resiliency Act does not require any federal spending; all it does is permit CRIT to lease part of its water right. As a result, its journey through Congress was remarkably smooth, passing by unanimous consent in the Senate and a 397-12 vote in the House.⁴² This wide margin suggests Congress may be amenable to further efforts to expand tribal water leasing, and has prompted suggestions from policy advocates that the time might be right to seek uniform legislation authorizing tribes to lease their water.⁴³ The potential benefits of expanding water leasing for tribes, non-Indian water users, and—under the conditions in the CRIT Water Resiliency Act—environmental uses are discussed in detail below.

A. Leasing as a Mechanism for Tribal Economic Development

Tribal water leasing can provide an essential source of revenue for tribes, potentially generating more income than putting the water to use on the reservation. As of 2015, total annual tribal revenues from water leasing were

36. Press Release, Colorado River Indian Tribes, CRIT Proposes Landmark Federal Legislation That Will Help Arizona Drought Relief and Provide Economic Opportunities for Tribal Members (Nov. 16, 2020), <https://perma.cc/QB9H-HNML>.

37. § 4(a), 136 Stat. at 6187; *see also* U.S. BUREAU OF RECLAMATION, COLORADO RIVER BASIN TEN TRIBES PARTNERSHIP TRIBAL WATER STUDY, at 5.8-5 (2018) (discussing current tribal water use).

38. Debra Utacia Krol, *Amid Drought, One Tribe Seeks to Offer Water for Lease, Another Moves to Conserve More*, ARIZ. REPUBLIC (Dec. 13, 2021, 6:00 AM MT), <https://perma.cc/H2JF-JG8L>.

39. COHEN'S HANDBOOK, *supra* note 30, § 19.05, at 1252 & n.70.

40. § 4(a), 136 Stat. at 6187.

41. *See* DEMOCRATIC STAFF OF THE H. COMM. ON NAT. RES., WATER DELAYED IS WATER DENIED: HOW CONGRESS HAS BLOCKED ACCESS TO WATER FOR NATIVE FAMILIES 11, 15 (2016) (discussing congressional hurdles to the approval of water rights settlements).

42. Cong. Rec. H9980-81 (Dec. 21, 2022) (vote on S. 3308).

43. *See* Tate Watkins, *One Small Step for Native American Water Rights*, REASON (Jan. 20, 2023, 12:00 PM), <https://perma.cc/6QLM-Z59U>.

estimated at only \$19 million.⁴⁴ The potential value of leasing, however, has been illustrated by recent forbearance agreements, similar to leases,⁴⁵ in which the State of Arizona and the federal government are collectively paying tribes hundreds of millions of dollars to forego their water use and ensure sufficient water stays in the Colorado River.⁴⁶ Tribes with water rights to the Colorado could realize substantial revenues from marketing their water to large, water-strapped southwestern cities like Phoenix and Las Vegas, as well as the Metropolitan Water District of Southern California—one estimate suggests that, if fully realized, tribal water leasing could produce up to \$1.6 billion in annual revenue.⁴⁷

Tribes can reinvest these revenues in on-reservation economic development, multiplying the economic impact of water leasing. Leasing provides a source of immediate, stable revenue that tribes can use to develop more sustainable long-term economic uses on their reservations.⁴⁸ One study has observed that tribes may use water leasing as a means of bringing in capital to facilitate on-reservation development.⁴⁹ In addition to economic development, these revenues can also be used to fund essential social services. In CRIT's case, the tribes plan to use leasing revenue to provide for more efficient irrigation systems, schools, housing, a substance abuse treatment program, and a nursing home on the reservation.⁵⁰

Notably, leasing can provide revenue to all tribes with federally recognized reservations, regardless of factors like the distance of the reservation from major metropolitan areas that might otherwise complicate efforts to develop tribal economies.⁵¹ As such, leasing could be a particularly valuable alternative for tribes that face barriers to economic development—though those same barriers

44. Brett Bovee, *Establishing and Preserving Tribal Water Rights in a Water Stressed West*, WATER RES. IMPACT, July 2015, at 5, 10.

45. See David H. Getches, *Management and Marketing of Indian Water: From Conflict to Pragmatism*, 58 U. COLO. L. REV. 515, 546 (1988) (noting these agreements have “many attributes of a lease”). Forbearance agreements are effectively one-off leases with “slightly more onerous” terms. See Leslie Sanchez, *Addressing Institutional Barriers to Native American Water Marketing*, in THE FUTURE OF WATER MARKETS: OBSTACLES AND OPPORTUNITIES 17, 24 n.1 (Eric Edwards & Shawn Regan eds., 2022).

46. Howard Fischer, *Arizona to Spend Another \$30M on Plan to Leave More Water in Lake Mead*, ARIZ. DAILY STAR (updated June 23, 2023), <https://perma.cc/UBH5-LQLJ>; Ken Ritter & Terry Tang, *Tribe, US Officials Reach Deal to Save Colorado River Water*, ASSOCIATED PRESS (Apr. 6, 2023, 6:26 PM PDT), <https://perma.cc/7GQV-G88N> (discussing a \$223 million agreement between the federal government and the Gila River Indian Community).

47. Leslie Sanchez, Bryan Leonard & Eric C. Edwards, *The Long-Term Outcomes of Recognizing Indigenous Property Rights to Water* 25 (Fed. Rsrv. Bank of Minneapolis Ctr. for Indian Country Dev., Working Paper No. 2022-01, 2022).

48. Bovee, *supra* note 44, at 9-10.

49. Sanchez, Leonard & Edwards, *supra* note 47, at 35-36.

50. Felicia Fonesca, *Biden Signs Water Bills Benefiting 3 Tribes in Arizona*, ASSOCIATED PRESS (Jan. 6, 2023, 7:58 AM PDT), <https://perma.cc/KX5W-M4NZ>.

51. Lee Herold Storey, Comment, *Leasing Indian Water off the Reservation: A Use Consistent with the Reservation's Purpose*, 76 CALIF. L. REV. 179, 217 (1988).

may also prevent tribes from initiating a protracted and expensive water rights adjudication in the first place.⁵²

B. Benefits to Non-Indian Western Communities from Water Leasing

Non-Indian water users will also likely benefit from expanded Indian water leasing. This may appear counterintuitive because downstream water users may currently use water for free that tribes, in theory, hold superior rights to but, in practice, are unable to develop. But tribal water rights, unlike other water rights, cannot be lost through non-use.⁵³ Tribes that retain superior “paper” rights to water may eventually develop those rights, threatening existing water users and injecting uncertainty into the Western water rights system. Leasing from tribes allows users to secure their water rights and ensure the continued viability of existing enterprises.

Leasing tribal water rights permits non-Indian businesses and municipalities to secure high-priority water rights.⁵⁴ Tribal rights are often senior to all other water rights in a basin; non-Indian users that lease their water from tribes can therefore gain access to a highly reliable and secure source of water, ensuring continued supply even in times of drought and avoiding costly water reductions.⁵⁵ The possibility of leasing these “secure, stable water supplies” from tribes serves to align the interests of tribes and cities: tribes receive revenue, while cities ensure the security of their water supplies.⁵⁶

Non-Indian water users may balk at the prospect of paying to lease water that they are currently enjoying for free, but they are only able to use that water for free because the tribe has not yet exercised its superior water right.⁵⁷ Notably, this problem is unique to tribal water rights; any other senior appropriator with unexercised water rights would have long ago forfeited those rights by non-use. Tribal rights, however, cannot be lost by non-use, and a tribe may assert its superior water right at any time.⁵⁸ As a matter of law, a tribe that begins to use all of the water to which it is entitled, but previously did not exercise its right to

52. See Suhina Deol & Bonnie Colby, *Tribal Economies: Water Settlements, Agriculture, and Gaming in the Western U.S.*, 163 J. CONTEMP. WATER RSCH. & EDUC. 45, 56-58 (2018) (finding that tribes with greater agricultural revenues were more likely to have successfully quantified their water rights, both because they have a greater incentive to do so and because quantification is “costly and time consuming”).

53. COHEN’S HANDBOOK, *supra* note 30, § 19.01, at 1205-06.

54. Storey, *supra* note 51, at 216.

55. See STERN, *supra* note 25, at 15 (noting “better water reliability” as a benefit of tribal water marketing).

56. Nyberg, *supra* note 16, at 188.

57. DANIEL MCCOOL, *NATIVE WATERS: CONTEMPORARY INDIAN WATER SETTLEMENTS AND THE SECOND TREATY ERA* 168 (2002). Daniel McCool, not unfairly, describes this as a fear that “water-rich tribes might treat western states the same way the states have treated them.” *Id.* at 169.

58. See COHEN’S HANDBOOK, *supra* note 30, § 19.03[1], at 1211 (“From its inception, then, the *Winters* doctrine contemplated that junior non-Indian users could forfeit their water when tribes asserted their reserved rights.”).

use, cannot be understood to injure other appropriators—downstream users are simply out of luck.⁵⁹ And many tribes plan to develop their water use, primarily through irrigated agriculture, in the near future—in part to exercise greater influence in coming negotiations over the Colorado River.⁶⁰ Several proposals also exist to protect junior appropriators from the most severe effects of new tribal water use, including state and federal compensation schemes.⁶¹ The most obvious, of course, is water marketing,⁶² though this may prove unsatisfactory where the leased water is to be used by municipalities with which existing non-Indian agricultural users cannot financially compete.⁶³

Leasing tribal water removes this source of uncertainty for non-tribal water users, who may be willing to pay a substantial premium for highly secure water rights,⁶⁴ and who in times of shortage might find tribal water a cheaper alternative to other sources.⁶⁵ Where this use becomes conceptually more difficult—and much more controversial—is when tribes begin to lease water to which they are legally entitled, but which they have not yet put to use.⁶⁶ A blanket authorization for leasing along the CRIT Act model would, however, side-step these concerns by limiting tribes to leasing water they are currently consuming. This limit may disadvantage tribes that have not yet fully developed their water rights, but nothing would stop those tribes from putting their water to use on reservation, or from securing rights to additional leasing through a settlement act.

C. Environmental Benefits of Tribal Water Leasing

Critics of tribal water leasing have noted that greater water access for Western municipalities might bring with it a bevy of environmental harms, as non-Indian users borrow water to “advance reckless urban growth, expand

59. See *United States v. Orr Water Ditch Co.*, 390 F. Supp. 2d 1245, 1254-55 (D. Nev. 2004).

60. See U.S. BUREAU OF RECLAMATION, *supra* note 37, at 5.11-5 to -6 (2018) (calculating future water development by Colorado Basin tribes); Michael Elizabeth Sakas, *Historically Excluded from Colorado River Policy, Tribes Want a Say in how the Dwindling Resource Is Used. Access to Clean Water Is a Start*, COLO. PUB. RADIO NEWS (Dec. 7, 2021, 7:42 AM), <https://perma.cc/5EYH-TRFY>.

61. See Judith V. Royster, *A Primer on Indian Water Rights: More Questions than Answers*, 30 TULSA L.J. 61, 83 n.132 (1994) (collecting proposals).

62. COHEN’S HANDBOOK, *supra* note 30, § 19.03[1], at 1211 n.14 (noting that the National Water Commission has suggested water marking and, failing that, federal compensation to injured state water-rights holders).

63. See WEATHERFORD, WALLACE & STOREY, *supra* note 15, at 50-51.

64. See Karen Crass, *Eroding the Winters Right: Non-Indian Water Users’ Attempt to Limit the Scope of the Indian Superior Entitlement to Western Water to Prevent Tribes from Water Brokering*, 1 U. DENV. WATER L. REV. 109, 111 & n.9 (1997).

65. See Getches, *supra* note 45, at 545.

66. See BARTON H. THOMPSON, JR., JOHN D. LESHY, ROBERT H. ABRAMS & SANDRA B. ZELLMER, *LEGAL CONTROL OF WATER RESOURCES: CASES AND MATERIALS* 1117 (6th ed. 2018).

heavily polluting industries, or enable more wasteful irrigation.”⁶⁷ The limitations of the CRIT Act serve to address these concerns and encourage conservation. The Act requires leased water to come out of the tribes’ prior consumptive use, ensuring no additional water will be drawn from the Colorado River. This limit necessarily imposes a cap on growth; in the words of CRIT Chairwoman Amelia Flores, “the river will stay whole.”⁶⁸

On balance, water leasing under the terms of the Act may actually result in increased in-stream flows. It cannot, as discussed above, result in additional water being drawn from the river, and it allows governments and private nonprofits to lease water that they can then dedicate for in-stream flow. This is not a new concept; for example, in 2013, the U.S. Bureau of Reclamation leased 5,300 acre-feet from the Jicarilla Apache Nation to protect the endangered Rio Grande silvery minnow.⁶⁹ Other tribes have deliberately chosen to lease their water to downstream users, using the seniority of their water right to ensure increased in-stream flows through the reservation.⁷⁰ Similar uses may be planned for CRIT’s water: in promoting the legislation, Arizona Senator Mark Kelly argued that leased water could be used for habitat restoration.⁷¹

This limitation may have little appeal for tribes that are currently using only a small fraction of their water right, or that have water rights on rivers that are not already fully allocated. Tribes have historically received little assistance in developing their water rights,⁷² and many tribes may lack significant water to lease.⁷³ It is true that this proposal would disproportionately benefit tribes with existing water use to conserve. Tribes that lack significant current use may, however, still be able to lease some water through conservation, even if the total amount is a fraction of their legal right. The resulting revenue, assuming off-reservation leasing proves more lucrative than on-reservation use, can still be put toward developing the tribe’s full water right, enabling those tribes to take greater advantage of their water rights in the long term.

67. Jesse Harlan Alderman, *Winters and Water Conservation: A Proposal to Halt “Water Laundering” in Tribal Negotiated Settlements in Favor of Monetary Compensation*, 31 VA. ENV’T L.J. 1, 32 (2013).

68. Michael Zogg, *Flores Urges Senate to Pass CRIT Water Resiliency Act*, PARKER PIONEER (Ariz.) (Mar. 24, 2022), <https://perma.cc/7KGQ-22DW> (quoting CRIT Chair Amelia Flores).

69. Nyberg, *supra* note 16, at 195; *see also* Moore Gerety, *supra* note 7 (reporting on a recent agreement between the Jicarilla Apache Nation and the Nature Conservancy in which the Conservancy agreed to buy water from the Nation for \$190 per acre-foot).

70. Jessica Lowrey, Note, *Home Sweet Home: How the ‘Purpose of the Reservation’ Affects More Than Just the Quantity of Indian Water Rights*, 23 COLO. J. INT’L ENV’T L. & POL’Y 201, 221-22 (2012).

71. Zogg, *supra* note 68 (quoting Sen. Mark Kelly).

72. *See* Crass, *supra* note 64, at 123 (noting that tribes have been asked to forego water projects “simply because their projects were last in priority for completion”); McCool, *supra* note 57, at 168.

73. *See* McCool, *supra* note 57, at 168.

D. Restoring Tribal Sovereignty over Tribal Resources

Beyond the practical benefits for both tribes and municipalities, authorizing water leasing reaffirms tribal sovereignty. As the Supreme Court has recognized, Indian tribes are “separate sovereigns pre-existing the Constitution.”⁷⁴ Although water rights are one of the “critical elements necessary for tribal sovereignty,”⁷⁵ tribes face unique restrictions on their ability to lease water beyond those imposed on states or private landowners. Authorizing tribes to lease their water, as CRIT chairwoman Amelia Flores put it, “restores the tribes’ sovereign control over its water rights.”⁷⁶

Restrictions on water leasing display a troubling relationship to the assimilationist policy underlying *Winters*, which reserved tribal water rights so that tribes might be made into “a pastoral and civilized people.”⁷⁷ Allowing off-reservation use undermines *Winters*’s goal of converting tribes into farmers, but this antiquated and paternalistic aim has already been largely abandoned in Indian water law—tribes are free to put what is, after all, their water to any on-reservation use they please.⁷⁸ While the agricultural focus of *Winters* survives in the “practicably irrigable acreage” standard, even that has increasingly been recast as claiming the water necessary to sustain a tribal homeland.⁷⁹ If the contemporary purpose of *Winters* rights is to “create a permanent homeland for tribes, and not to force Indians into a permanent agricultural lifestyle,” tribes should be able to put their *Winters* rights to any use that they determine will most improve the lives of tribal members on the reservation.⁸⁰ In some cases, that may involve leasing water rights for off-reservation use. Recognizing tribal leasing authority affords tribes the autonomy to decide their best courses of economic development for themselves.

III. THE FUTURE OF TRIBAL WATER LEASING ON THE COLORADO

Given the benefits of tribal water leasing, Congress should consider uniform

74. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978).

75. *City of Albuquerque v. Browner*, 97 F.3d 415, 418 (10th Cir. 1996).

76. Amelia Flores, Opinion, *Colorado River Indian Tribes Should Be Able to Lease Some Water to Others in Arizona*, ARIZ. REPUBLIC (Jan. 5, 2022, 6:00 AM MT), <https://perma.cc/Y6QK-MLFV>.

77. *Winters v. United States*, 207 U.S. 564, 576 (1908).

78. *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 48 (9th Cir. 1981) (“When the Tribe has a vested property right in reserved water, it may use it in any lawful manner.”); see also WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* 541 (7th ed. 2020) (noting the logical inconsistency between permitting tribes to make any use of their agricultural water on-reservation and forbidding them from leasing it to non-Indian lessees); Getches, *supra* note 45, at 543 (same).

79. See Robert S. Pelcyger, *The Winters Doctrine and the Greening of the Reservations*, 4 J. CONTEMP. L. 19, 27 (1977) (“[T]here does not appear to be any basis for distinguishing between agriculture and the other purposes for the establishment of Indian reservations.”); *Winters*, 207 U.S. at 576 (recognizing a water right to support “the arts of civilization”).

80. Lowrey, *supra* note 70, at 220.

legislation authorizing Colorado basin tribes to market their water rights to off-reservation users under the terms of the CRIT Water Resiliency Act.⁸¹ This legislation could be modeled on the existing statute that permits tribes to enter into energy development leases on their own initiative.⁸² Such legislation would save tribes the trouble of pursuing individual legislation through authorizations or settlement acts, instead ensuring that all tribes can market their water on an equal footing.⁸³ Such general legislation could establish standards for water marketing, with the Secretary of the Interior authorized to approve water leases that they judge to meet those standards; alternatively, tribes could be empowered to develop general water marketing plans, with the autonomy to enter into individual leases without secretarial approval.⁸⁴ Less dramatically, Congress could seek to establish tribal water leasing as a “default” for water rights settlements while maintaining the underlying system where Congress must approve every settlement.⁸⁵

At least one Arizona tribe, the Gila River Indian Community, raised this proposal in opposing the CRIT Water Resiliency Act, arguing that it is simply unfair that some tribes have leasing authority and others do not.⁸⁶ This “piecemeal approach to tribal water marketing,” the Governor of the Gila River Indian Community wrote, “has resulted in inequities among Arizona tribes.”⁸⁷ At the same time, he wrote, the Community could support “more general legislation” that authorized the same water marketing for both tribes currently unable to market their water rights and those that, through settlement negotiations, accepted more stringent restrictions than those imposed through the CRIT Water Resiliency Act.⁸⁸

But tribal water marketing is not uniformly popular, and authorizing tribes to market their water would not necessarily translate into economic prosperity for every tribe. This Part surveys opposition to water marketing among some tribal members, as well as some reforms to the settlement process that could allow more tribes to take advantage of the benefits of water marketing.

81. Sanchez, *supra* note 45, at 22.

82. See Judith V. Royster, *Indian Water and the Federal Trust: Some Proposals for Federal Action*, 46 NAT. RES. J. 375, 397 (2006) (proposing such legislation).

83. Sanchez, *supra* note 45, at 22-23.

84. See Judith V. Royster, *Climate Change and Tribal Water Rights: Removing Barriers to Adaptation Strategies*, 26 TUL. ENV'T L.J. 197, 218 (2013) (proposing these two alternatives).

85. Fort, *supra* note 34, at 5.

86. Krol, *supra* note 38. Conversely, any uniform authorization would have to account for tribes that have already signed settlements limiting their water-marketing authority. See MCCOOL, *supra* note 57, at 175 (noting this problem).

87. Letter from Stephen Roe Lewis, Governor, Gila River Indian Cmty., to Ariz. Dep't of Water Res. (Jan. 8, 2021), <https://perma.cc/DF6H-V45F>.

88. *Id.*

A. Tribal Opposition to Water Leasing

Not all tribes will want to market their water rights even if authorized to do so. For many tribes and tribal members, water is religiously and culturally significant, and commodifying water for lease to non-Indian users may undermine these values.⁸⁹ In the Colorado basin, for example, leaders of the Fort Mojave Tribe responded to CRIT's water leasing by noting that they plan to continue using their Colorado River water on their lands, because "land without water is nothing."⁹⁰ More cynically (though not without justification), some tribal members may suspect that leased water will be gone for good, regardless of any contractual safeguards—or that, in seeking the temporary economic returns of water leasing, tribal leaders may turn their reservations into a second Owens Valley.⁹¹

Beyond religious and political objections, there is also an economic case against off-reservation water marketing. While off-reservation leasing can produce immediate revenues, on-reservation uses may employ more tribal members and generate more secondary economic activity on the reservation itself, which may lead some tribes to conclude that off-reservation leasing is not in their economic interests.⁹² It is worth noting, however, that on-reservation agricultural water use is often dominated by large non-Indian farms, suggesting the tribal benefits from on-reservation use may be more limited than it appears.⁹³

More concerning may be the limits that long-term leases could impose on future on-reservation economic development.⁹⁴ Many water settlement acts impose 99- or 100-year limits on leases. While these are theoretically maxima, Judith Royster notes that such limits often serve to encourage leases of precisely that length, which can amount to a de facto alienation of tribal water rights for several generations.⁹⁵ Deals that may initially seem attractive may look less attractive in future decades,⁹⁶ and some tribes may respond to this possibility by declining to market water altogether.

In order to address these concerns, leases should include opt-out clauses and

89. See STERN, *supra* note 25, at 158; MCCOOL, *supra* note 57, at 170 (quoting an Acoma Pueblo man as asking, at a symposium on Indian water settlements, "How would you like to sell your mother?").

90. Ian James, *'A Living Spirit': Native People Push for Changes to Protect the Colorado River*, L.A. TIMES (Jan. 30, 2023, 5:00 AM PT), <https://perma.cc/A86Q-BAHU>.

91. See MCCOOL, *supra* note 57, at 170 (noting the view among some Indians that water marketing is "a devious way for Anglos to take Indian water in the second treaty era the way they took land in the first treaty era").

92. Storey, *supra* note 54, at 218.

93. See Getches, *supra* note 45, at 544.

94. Scott B. McElroy, *Water Development in Indian Country: Current Issues Involving Indian Country Water Resources*, 2005 ROCKY MTN. MIN. L. INST. 16-1, 16-19 (Paper No. 16, 2005).

95. Royster, *supra* note 84, at 218.

96. *Cf. Uetrict v. Chi. Parking Meters, LLC*, 64 F.4th 827, 829-30 (7th Cir. 2023) (describing Chicago's 75-year lease of its parking meters as "foolish, short-sighted, or worse").

should generally be for shorter terms than the 99- or 100-year norm.⁹⁷ As Justin Nyberg illustrates in his study of the Jicarilla Apache Nation's water-leasing program, short- or medium-term leases can still prove financially rewarding for tribes, and even municipal water users seeking long-term leases may be satisfied with 40- or 50-year leases with early termination provisions and price escalator clauses that ensure the tribe receives a fair value for its water.⁹⁸ It is unclear how to best counter the default effect of the 100-year limit, but the Jicarilla Apache example demonstrates that tribes can find ways to lease on profitable terms for shorter periods.

B. Expediting Water Rights Settlements

Litigation is costly, but the main alternative—water rights settlements—are themselves expensive, time-consuming, and require favorable political conditions in Congress to become finalized.⁹⁹ These settlements typically involve tribes reducing their water rights claim to an amount that existing users can live with, in exchange for federal and state funds sufficient to allow the tribe to convert its “potential ‘paper right’ into wet water,” often accompanied by an authorization to lease their water off-reservation.¹⁰⁰ The Gila River Indian Community, for example, negotiated a settlement that granted the tribe around 40% of its *Winters* claim, but that bundled that recognition with substantial federal funding for water development projects and rights to use federal water delivery systems.¹⁰¹

These settlements, unfortunately, have their own unique barrier: unlike settlements in private litigation, Congress typically must enact Indian water rights settlements into law, which can require waiting years for favorable political conditions.¹⁰² Tribes that are not facing imminent water shortages and competing demands for water are generally unlikely to engage in the settlement process given the high bargaining costs involved.¹⁰³ But quantifying water rights

97. See Nyberg, *supra* note 16, at 189-90; see also Sanchez, *supra* note 45, at 21 (noting the importance of affording tribes the “ongoing flexibility” to negotiate short-term leases).

98. Nyberg, *supra* note 16, at 197-99.

99. See DEMOCRATIC STAFF OF THE H. COMM. ON NAT. RES., *supra* note 41, at 15-16 (citing TRIBAL WATER WORKING GRP., WATER IN INDIAN COUNTRY: CHALLENGES AND OPPORTUNITIES (2012)).

100. ROBERT T. ANDERSON, SARAH A. KRAKOFF & BETHANY BERGER, AMERICAN INDIAN LAW: CASES & COMMENTARY 806 (4th ed. 2020).

101. Press Release, Dep't of the Interior, Interior Secretary Norton Signs Landmark Arizona Water Rights Settlements (Dec. 22, 2005), <https://perma.cc/XH6G-YV4G>; see S. Joshua Newcom, *Peace on the Gila: Pending Gila River Indian Community Settlement Tied to CAP Repayment*, RIVER REP. (Summer 2001), <https://perma.cc/TG9T-68CQ> (noting the GRIC asserted a claim to roughly 1.5 million acre-feet).

102. DEMOCRATIC STAFF OF THE H. COMM. ON NAT. RES., *supra* note 41, at 15-17 (noting that Congress did not approve any Indian water rights settlements between 2011 and 2016).

103. See Leslie Sanchez, Eric C. Edwards & Bryan Leonard, *The Economics of Indigenous Water Claim Settlements in the American West*, 15 ENV'T RSCH. LETTERS 904027, at 6-7, 9 (2020). Interestingly, some research suggests greater poverty may also motivate tribes

is an essential prerequisite to engaging in any form of water marketing, including leasing and forbearance agreements.

Specific settlement agreements, particularly when accompanied by proposals to authorize water leasing, may draw political opposition from states, sometimes because tribal water marketing may upset existing state-law priority systems or interstate water allocations,¹⁰⁴ and sometimes for the simpler reason that existing users want to continue to use tribal water for free.¹⁰⁵ These political tensions are particularly acute when water marketing may cross state or basin lines.¹⁰⁶ The complexities of the congressional budgeting process often also require tribes to wait until generally more pro-spending Democrats control Congress before settlements can be authorized, potentially adding years of delay.¹⁰⁷ Even once tribes quantify their rights and gain the power to lease, individual leases may require federal approval and can take years to negotiate.¹⁰⁸

In addition to a uniform authorization for tribal water leasing, Congress can encourage further water marketing by developing a streamlined approval process for the tribal water rights settlements that are a prerequisite to effective leasing. The “Bishop process” for settlement approval, required during the last GOP-controlled Congress, has been criticized as “add[ing] unnecessary length and complexity” to the negotiating process.¹⁰⁹ Reforms to make it easier for tribes to quantify their water rights should accompany leasing authorization. Even though tribes have senior water rights, political opposition will only grow as non-Indian uses expand and climate change further reduces available water in the Colorado basin,¹¹⁰ putting a priority on quantifying tribal water rights now.¹¹¹

to pursue quantification. See Ryan Young, Bonnie Colby & Gary Thompson, *Tribal Water Rights, Community Economies and Adaptive Water Institutions in the Western United States*, 9 J. NAT. RES. POL’Y RSCH. 74, 90-92 (2019).

104. Chambers & Echohawk, *supra* note 21, at 466. For the particular concerns that arise in interstate water transfers, see generally Chris Seldin, Comment, *Interstate Marketing of Indian Water Rights: The Impact of the Commerce Clause*, 87 CALIF. L. REV. 1545 (1999).

105. See STERN, *supra* note 25, at 15.

106. See MCCOOL, *supra* note 57, at 165-67 (describing intense non-Indian political opposition to out-of-state water leasing by the Southern Ute and Ute Mountain Ute tribes in southern Colorado).

107. See STERN, *supra* note 25, at 7-8 (identifying thirty-five settlements, twenty-two of which were approved by Democratic-controlled Congresses and only eight by Republican-controlled Congresses); DEMOCRATIC STAFF OF THE H. COMM. ON NAT. RES., *supra* note 41, at 15.

108. See, e.g., Lily Altavena, *Gilbert Approves 100-Year Water Lease with San Carlos Apache Tribe*, ARIZ. REPUBLIC (updated July 23, 2018, 7:05 AM MT), <https://perma.cc/GQ55-BCJ7> (observing that “[i]t took eight years and the change of a presidential administration” to finalize a lease between the town of Gilbert and the San Carlos Apache Tribe, in part due to opposition from the Bureau of Reclamation).

109. DEMOCRATIC STAFF OF THE H. COMM. ON NAT. RES., *supra* note 41, at 16-17.

110. See Talsma, Bennett & Vesselinov, *supra* note 3, at 18.

111. See Bobby Magill, *Tribal Water Rights to Play Role in Colorado River’s Dry Future*, BLOOMBERG L. (Dec. 15, 2022, 10:25 AM PST), <https://perma.cc/7CUQ-2GV7> (quoting Jay Weiner, water counsel to the Quechan and Tonto Apache tribes).

CONCLUSION

By passing the CRIT Water Resiliency Act, Congress has shown an interest in tribal water marketing as a solution to water shortages in the Colorado basin. Congress should build on this reform by considering uniform legislation that would authorize basin tribes—and, if possible, all tribes—to market their water along the same lines as the CRIT. Such legislation would ensure tribes are all able to benefit from this revenue source along equal terms, while also allowing non-Indian appropriators to secure their future water rights and potentially increasing in-stream flows. While some tribes have legitimate concerns about water marketing and not all will choose to lease water, authorizing tribes to choose whether to engage in water marketing reaffirms tribal sovereignty and ensures decisions about tribal economic development will be made by tribes.