

Basic Principles of American Indian Water Law

By Robert T. Anderson¹

I. Federal and Indian Reserved Water Rights

Introduction

The landmark case involving reserved water rights in general, and Indian reserved water rights in particular, is *Winters v. United States*, 207 U.S. 564 (1908). In *Winters*, the Court construed an agreement (confirmed by Congress) between the Indians of the Fort Belknap Reservation and the United States, which established the Fort Belknap Reservation in Montana. Act of May 1, 1888 ch. 213, 25 Stat. 113. In the agreement, the Indians surrendered most of their larger reservation and retained the Fort Belknap Indian reservation.

The case arose over a dispute between non-Indian settlers and the Indians over the use of the waters of the Milk River for irrigation purposes. The non-Indians claimed paramount rights to use the water based on state law that followed the prior appropriation doctrine. In evaluating the rights of the Indians, the Court noted:

The reservation was a part of a very much larger tract which the Indians had the right to occupy and use and which was adequate for the habits and wants of a nomadic and uncivilized people. It was the policy of the Government, it was the desire of the Indians, to change those habits and to become a pastoral and civilized people. If they should become such the original tract was too extensive, but a smaller tract would be inadequate without a change of conditions. The lands were arid and, without irrigation, were practically valueless. And yet, it is contended, the means of irrigation were deliberately given up by the Indians and deliberately accepted by the Government.

207 U.S. at 576.

The Court upheld the power of the federal government to exempt waters from appropriation under state water law, and held that the government had in fact reserved the waters of the Milk River in order to fulfill the purposes of the agreement between the Indians and the United States. *Id.* See Nell Newton, et al., COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 19 (2012). The case dealt only with current needs and did not address the future needs of the Indians.

The reservation of water for federal or Indian purposes and its exemption from appropriation under state law can occur either before or after statehood. *Arizona v. California*, 373 U.S. 546, 597-

¹ Professor of Law and Director, Native American Law Center, University of Washington School of Law; Oneida Indian Nation Visiting Professor of Law, Harvard Law School (2009-2020)

98 (1963), *decree entered*, 376 U.S. 340 (1964). The power to do this derives from the Indian Commerce Clause, the Property Clause, and other sources. Cohen, *supra* at 581-82.

A. Federal Reserved Rights

In *Cappaert v. United States*, 426 U.S. 128 (1976) the Court concluded that the establishment of Devil's Hole National Monument carried with it an implied reservation of water:

[W]hen the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators.

Id. at 138.

While this general rule is based in part on the *Winters* doctrine, in *United States v. New Mexico*, 438 U.S. 696 (1978) that the Court drew distinctions between Indian and non-Indian reserved rights. In *New Mexico* the Court narrowly construed reserved water rights for National Forests by making it clear that such rights would only be implied where needed to fulfill the “primary purposes” of the reservation and only if that primary purpose would be “entirely defeated” without an implied reservation of water. *See*, Sax, *et al.*, Legal Control of Water Resources, at 805-817 (3d ed. West 2000). The Court accordingly denied the United States’ claims to water for fish and wildlife purposes.

Other cases follow.

- *United States v. City and County of Denver*, 656 P.2d 1 (Colo. 1982)(rejecting United States’ claim that Multiple Use and Sustained Yield Act (MUSYA) can serve as basis for instream flow claims for National Forests; also dealing with claims for a number of other federal reservations);
- *United States v. City of Challis*, 988 P.2d 1199 (Idaho 1999)(rejecting claims based on MUSYA);
- *State of Alaska v. Babbitt*, 72 F.3d 698 (9th Cir. 1995), *cert. denied*, 516 U.S. 1036 (1995)(reserved rights for various classes of reservations in Alaska in the context of a federal subsistence hunting and fishing law applicable only to Alaska; implemented at 64 Fed. Reg. 1276 (Jan. 8, 1999), *affirmed*, 247 F.3d 1042 (9th Cir. 2001 *en banc*);
- *United States v. Idaho (In Re SRBA)*, 959 P.2d 449 (Idaho 1998), *cert. denied*, 526 U.S. 1012 (1999)(federal reserved rights exist for stock watering purposes on public domain lands);
- *Potlatch Corp. v. United States*, 12 P.3d 1260 (Idaho 2000)(Wilderness Act does not create implied reserved rights for Wilderness areas in Idaho; recognizing express reservation of water for Hells Canyon National Recreation Area);
- *United States v. Idaho*, 23 P.3d 117 (Idaho 2001)(reserved water rights not established by

reservation of islands as part of the Deer Flat National Wildlife Refuge on the Snake River).

B. Establishment and Measure of Indian Reserved Rights

1. Quantification & Priority Dates

The leading case is *Winters v. United States*, 207 U.S. 564 (1908), which resulted in an injunction against non-Indian interference with the Indian rights for irrigation, but it was not until *Arizona v. California*, 373 U.S. 546 (1963) that the Court announced a standard for quantification of Indian reservations with an agricultural purpose for present and future needs. The Court ruled that the quantity of water reserved would be measured by practicably irrigable acreage: “Those acres susceptible to sustained irrigation at reasonable costs.”

- *Conrad Inv. Co. v. United States*, 156 F. 123 (D. Mont. 1907)(water rights quantified on irrigable acreage basis);
- *Skeem v. United States*, 273 F. 93 (9th Cir. 1921)(water reserved for present and future irrigation purposes; water not lost by leasing allotments);
- *United States v. Walker River Irrigation Dist.*, 104 F.2d 334 (9th Cir. 1939)(limiting water rights to Indians’ current use);
- *United States v. Ahtanum Irr. Dist.*, 236 F.2d 321(9th Cir. 1956), cert. *denied*, 352 U.S. 988 (1957)(rights extend to "ultimate needs of the Indians as those needs and requirements should grow to keep pace with the development of Indian agriculture upon the reservation");
- *Arizona v. California*, 439 U.S. 419, 422 (1979)(approving Special Master’s finding that water quantified for agricultural purposes could be put to other uses);
- *In re The General Adjudication of All Rights to Use Water in the Big Horn River System*, 835 P.2d 273 (Wyo. 1992) (Big Horn III)(denying tribe right to use irrigation water for instream flow purposes).
- *State of New Mexico ex rel. Reynolds v. Aamodt*, 618 F. Supp. 993 (D. N.M. 1985) (Pueblo water rights for irrigation have aboriginal priority, but are limited to amount historically used from 1846-1924);
- *United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984)(reserved water rights for irrigation of reacquired tribal land have priority as of date of reacquisition; date of reservation if water put to use and not lost to nonuse; tribe may use water for any lawful purpose);
- *In re The General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76 (Wyo. 1988) (Big Horn II) (reserved water rights doctrine applied to agricultural lands), *aff’d by equally divided court*, 492 U.S. 406 (1989) (O’Connor, J. abstaining);

- *New Mexico ex rel. Martinez v. Lewis*, 861 P.2d 235 (N.M. Ct. App. 1993)(priority date is date of peace treaty with United States)
- *Confederated Salish and Kootenai Tribes v. Clinch*, 992 P.2d 244 (Montana 1999)(State Department of Natural Resources can not issue permits that may interfere with unquantified Indian reserved rights; such rights are “owned” by the tribe and thus protected by the Montana constitution);
- *In re All Rights to Use Water in the Gila River System*, 35 P.3d 68 (Arizona 2001)(practicably irrigable acreage not the sole measure of Indian reserved rights; prescribes multi-faceted inquiry to determine tribal water needs in general stream adjudications);
- *Nevada v. United States*, 463 U.S. 110, 128 (1983)(United States is not *disqualified* from representing dual interests in litigation where Congress has assigned conflicting management responsibilities to the federal government; prior participation in comprehensive suit to quantify Indian rights precludes later suit for instream flows).

2. Groundwater

The Arizona Supreme Court has held that the federal reserved water rights doctrine applies to groundwater. *In re All Rights to Use Water in the Gila River System*, 989 P.2d 739 (Arizona 1999), *cert. denied, sub. nom., Phelps Dodge Corp. v. United States*, 120 S.Ct. 2705 (2000). Earlier, the Wyoming Supreme Court had agreed that it made sense to apply the doctrine to groundwater, but declined to do so on the ground that no other court had done so. *In re All Rights to Use Water in the Big Horn River System*, 753 P.2d 76 (Wyo. 1988), *aff'd by equally divided court*, 492 U.S. 406 (1989) (O'Connor, J. abstaining). See *State of New Mexico ex rel. Reynolds v. Aamodt*, 618 F. Supp. 993 (D. N.M. 1985) (Pueblo water rights extend to groundwater). In a case arising on the Lummi Indian Reservation, *United States v. Washington*, No. C01-0047Z (W.D. Washington) the federal district court for the district of Washington held that the reserved rights doctrine extends to groundwater. (Order dated Feb. 24, 2003).

3. Instream Flows & Fisheries

The *Adair* litigation has resulted in the clearest statement of the law surrounding reserved water rights for non-consumptive uses:

"In creating the [Klamath] Reservation by treaty in 1864 the Government reserved land from the public domain to preserve the Tribe's hunting, fishing, trapping and gathering rights and to encourage agriculture. The treaty granted the Tribe an implied right to as much water on the Reservation as was necessary to fulfill these purposes." In *Adair II*, the Ninth Circuit could not have been more clear that it intended to "prevent other appropriators from depleting the streams and waters below a protected level in any area where the non-consumptive [water] right applies." *Adair II*, 723 F.2d at 1411."

United States v. Adair, 187 F.Supp.2d 1273, 1275-76 (D. Or. 2002)(clarifying “as currently exercised” language in prior case as equivalent to moderate standard of living; and placing burden

on non-Indian parties to demonstrate that amount claimed by Indians was not necessary to provide a moderate living). Article I of the Klamath Treaty expressly provides that the Tribe will have exclusive on-reservation fishing and gathering rights. 16 Stat. 708.

- *United States v. Adair*, 723 F.2d 1394 (9th Cir.), *cert. denied*, 467 U.S. 1252 (1984)(water rights extend to instream flows and minimum lake levels to protect fisheries where Tribes have retained fishing rights);
- *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F.Supp. 252, 256 (D.D.C. 1973)(Secretary of Interior must meet exacting fiduciary standards in operating water project and cannot avoid difficulties by making a “judgment call” to placate conflicting claimants to water);
- *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981), *cert. denied*, 454 U.S. 1092 (1981) (water reserved for the purpose of maintaining a tribal fishery; and there may be more than one primary purpose; also setting out tests for former reservation lands distributed under allotment acts);
- *Kittitas Reclamation Dist. v. Sunnyside Valley Irrig. Dist.*, 763 F.2d 1032 (9th Cir. 1985)(district court acted properly to order release of water from Reclamation project to protect salmon redds);
- *Joint Board of Control v. United States*, 832 F.2d 1127 (9th Cir. 1987)(tribal right to water for fisheries is senior to non-Indian users of Indian irrigation project and is not subject to equitable apportionment);
- *Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476 (D.C. Cir. 1995)(U.S. has prosecutorial discretion whether to assert alleged tribal water rights and court will not order U.S. to file instream flow claims based on Fort Bridger Treaty);
- *State of Montana v. Confederated Salish & Kootenai Tribes*, 712 P.2d 754, 763-764 (Mont. 1985)(quantification standards differ depending upon the purpose for which the water was reserved and can include water for fisheries); *Confederated Salish & Kootenai Tribes v. Flathead Irrig. & Power Project*, 616 F. Supp. 1292, 1293-94, 1297-98 (D. Mont. 1985)
- *Department of Ecology v. Yakima Res. Irr. Dist.*, 850 P.2d 1306 (Wash. 1993)(reserved rights for irrigation flows and instream flows for fisheries; court finds diminishment of that right based on Indian Claims Commission judgment); Superior Court explicitly held that the Yakama Nation’s instream flow right extended off the reservation to support usual and accustomed fisheries. *Department of Ecology v. Acquavella*, No. 77-2-01484-5, Memorandum Opinion at 9-10 (Yakima County Superior Ct. Sept. 4, 1994).
- *In re SRBA*, Case No. 39576, Consolidated Subcase No. 03-10022 (Idaho Dist. Ct., Nov. 10, 1999)(rejecting claim of instream flow water rights outside of Nez Perce Reservation); *see also, United States v. Idaho*, 51 P.3d 1110 (Idaho 2002)(rejecting attempt to set aside district court decision on conflict of interest grounds).

- In a brief recently filed in the Idaho Supreme Court, the United States Justice Department relied on the foregoing authorities for the proposition that, “these federal and state court decisions lead ineluctably to the conclusion that, at a minimum, water rights for fishery purposes were reserved on all streams located within the exterior boundaries of the 1855 [Nez Perce] Reservation and outside of that boundary, for all other streams where there is evidence of Nez Perce “usual and accustomed” fishing places.” *In Re: SRBA*, Case No. 39576, Subcase No. 10022, Brief of Appellant United States at 28 (Nov. 22, 2003). The Nez Perce Treaty language is virtually identical to fisheries reservation language in the Stevens Treaties with Washington Tribes.

4. Allotments

- *United States v. Powers*, 305 U.S. 527 (1939)(reserved water rights attach to allotments where water is necessary to fulfill the purposes to be served by allotment);
- *Skeem v. United States*, 273 F. 93 (9th Cir. 1921)(applying *Winters* Doctrine to allotted lands; water right unaffected by leasing);
- *Colville Confederated Tribes v. Walton*, 460 F. Supp. 1320 (E.D. Wash. 1978) (*Walton I*), *rev'd on other grounds*, 647 F.2d 42 (9th Cir. 1981), *cert. denied*, 454 U.S. 1092 (1981) (priority date of former reservation lands distributed under allotment acts); *see also*, *Walton II*, 752 F.2d 397 (9th Cir. 1985);
- *In re The General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76 (Wyo. 1988) (Big Horn II)(non-Indians purchasers of allotments obtain rights with reservation priority date to water actually used by allottee, plus water put to use within a reasonable time by the non-Indian), *aff'd by equally divided court*, 492 U.S. 406 (1989) (J. O'Connor, abstaining); *see also*, *In re General Adjudication of All Rights to Use Water in the Big Horn River System*, 803 P.2d 61 (Wyo. 1990)(Big Horn III); *In re General Adjudication of All Rights to Use Water in the Big Horn River System*, 899 P.2d 848 (Wyo. 1995); *In re General Adjudication of All Rights to Use Water in the Big Horn River System*, 48 P.3d 1040 (Wyo. 2002)(allotments and due diligence requirements).
- *Hackford v. Babbitt*, 14 F.3d 1457 (10th Cir. 1994)(allottees shared in right to right with priority as of date of reservation).

5. Regulation

- *Holly v. Totus*, 655 F.Supp. 557 (E.D. Wash. 1985), *aff'd*, 812 F.2d 714 (9th Cir. 1987)(Yakima Nation Water Code, adopted in May, 1977, is invalid as to non-member use of excess waters on or passing through the Yakima Indian Reservation);
- *Colville Confederated Tribes v. Walton*, 752 F.2d 397 (9th Cir. 1985)(tribe may regulate non-Indian use of water on fee land on stream wholly located within reservation);
- *United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984)(state has authority to regulate non-Indian use on fee land where stream extends on and off reservation).

C. Adjudication & McCarran Amendment Issues

The McCarran Amendment, adopted in 1952, provides that:

Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

43 U.S.C. § 666.

The waiver has been interpreted to allow States to: 1) join Indian water rights and Indian tribes in their general stream adjudications; 2) separate proceedings for determination of surface water and groundwater; 3) devise non-traditional judicial or administrative processes for determination of such rights, so long as the rights are eventually subject to *de novo* judicial review. States have not been permitted to exact exorbitant filing fees from Indian tribes or the United States. The leading cases follow.

- *Dugan v. Rank*, 372 U.S. 609 (1963)(McCarran Amendment waiver applies only to *general* stream adjudications.
- *United States v. District Court for Eagle County*, 401 U.S. 520 (1971)(Colorado's ongoing adjudication scheme sufficiently comprehensive to meet requirements of McCarran Amendment);
- *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976)(McCarran Amendment waiver applies to Indian reserved water rights held in trust by the United States);
- *Arizona v. San Carlos Apache Tribes*, 463 U.S. 545, 574 (1983)(McCarran Amendment waives Indian tribal sovereign immunity in all states);
- *United States v. Idaho*, 508 U.S. 1 (1993)(McCarran Amendment waiver does not permit States to require federal government to pay exorbitant state court filing fees);
- *United States v. State of Oregon*, 44 F.3d 758 (9th Cir. 1994), *cert. denied*, 516 U.S. 943

(1996)(administrative process culminating in judicial review is a suit within scope of the waiver; groundwater need not be included in adjudication to satisfy comprehensiveness requirement).