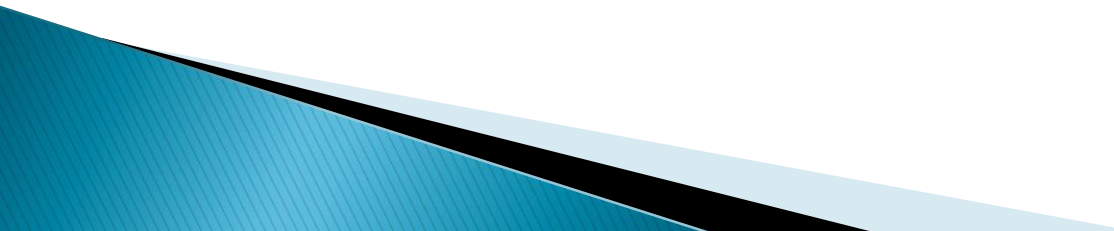


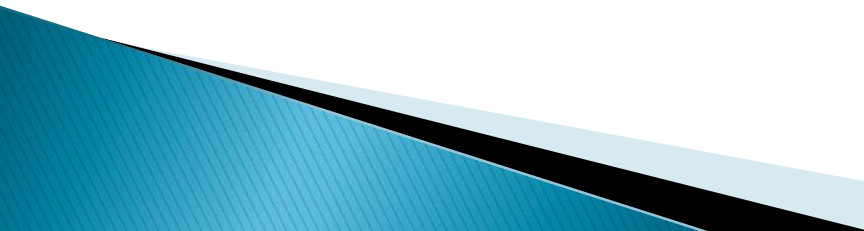
Indian Reserved Water Rights: An Overview

Wayne Stone
Water Rights Specialist
Great Plains Regional Office
(605) 226-7621


Water Rights: 101

- ▶ There are two prominent water law systems within the United States
 - ▶ The Riparian Doctrine
 - ▶ The Prior Appropriation Doctrine
 - ▶ Indian Reserved Water Rights share principles with both of these doctrines
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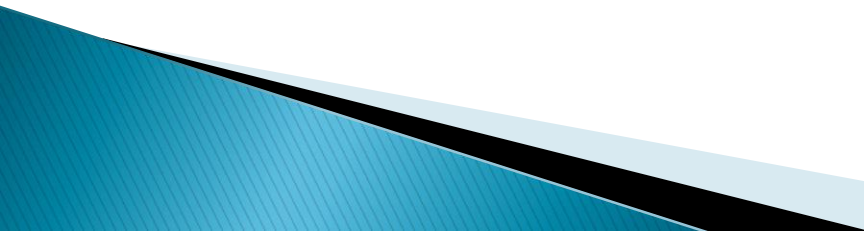
The Riparian Doctrine

- ▶ Developed in the Eastern United States
 - ▶ Rights belong owners of land that border the water body (the riparian zone)
 - ▶ Right of reasonable use shared with other riparian land owners
 - ▶ Right cannot be lost by nonuse. Shortages must shared among all riparian users
 - ▶ Right is appurtenant to the land and generally not severable from the land
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Prior Appropriation Doctrine

- ▶ Developed in the West
 - ▶ Right of beneficial use
 - ▶ Stated in terms of a definite quantity
 - ▶ Right may be terminated by abandonment or forfeiture
 - ▶ Generally transferable
 - ▶ Land ownership adjacent to a water body is not a requirement
 - ▶ Senior appropriators must be fully satisfied before junior appropriators
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Indian Reserved Water Rights

- ▶ Like Riparian law, Indian Water Rights arise from title to land rather than from diversion
 - ▶ May be asserted at any time and are not forfeit by nonuse
 - ▶ Like Prior Appropriation, Indian Water Rights have a priority date and quantification
 - ▶ Because Indian Water Rights date back at least as early as the reservation, they are often the most senior in the basin, but many have not quantified
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Winters v. United States

207 U.S. 564 (1908)

- ▶ Dispute between Indians at Ft. Belknap Reservation and non-Indians upstream on the Milk River in Montana
- ▶ Non-Indian settlers had established rights under Montana law
- ▶ Court held Indians had an implied reserved water right vesting on the date of establishment of the reservation
- ▶ This date prior to creation of the state
- ▶ Right not forfeit through non-use

Quantification

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

- ▶ U.S. Constitution, art. IV, § 3 authorizes Congress “to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”
- ▶ The Property Clause is the constitutional basis for power of congress to reserve water for use on public lands including Indian reservations

Quantification, cont.

- ▶ The Court in *Arizona v. California* 373 U.S. 546 (1963) found that Congress delegated that authority when it gave the President the power to establish Indian reservations by Executive Order
- ▶ The Special Master reasoned, and the Court agreed, that “the only feasible and fair way” to measure the reserved rights of the Colorado River tribes was based on water needed for “practicably irrigable acreage” (PIA) on the reservations

Quantification, cont.

- ▶ While the Court endorsed the PIA standard, it did not technically adopt it. “Rather than adopt the Master’s decree... we will allow the parties, or any of them, if they wish, to submit... the form of decree to carry this opinion into effect.” This has led to some to question the precedential value of the Court’s decision in *Arizona*.

The McCarran Amendment

66 Stat. 549, 560 (43 U.S.C. § 666)

- ▶ Rider on an appropriations bill in 1952
- ▶ Waiver of sovereign immunity permitting joinder of the U.S. in adjudication of water rights in state courts
- ▶ *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), held Indian water rights can be adjudicated in state courts where the U.S. is sued in its role as trustee for the Tribes

State Court Adjudication

- ▶ The PIA standard was applied by Wyoming, *In re Rights to Use Water in the Big Horn River* 753 P.2d 76 (Wyo. 1988) and affirmed by an equally divided Court in *Wyoming v. United States*, 492 U.S. 406 (1989)
- ▶ The Court was divided because Justice O'Connor recused herself.
- ▶ O'Connor authored a draft opinion including a “sensitivity analysis which would have altered the PIA standard

State Court Adjudication, cont.

- ▶ In a later phase of the Big Horn Adjudication, the Wyoming Court held that water rights quantified under the PIA standard could not be changed to instream flow uses for fish without complying with state law procedures for change of use
- ▶ The Arizona Supreme Court, in the Gila River Adjudication, 35 P.3d 68 (Ariz. 2001) abandoned the agricultural standard in favor of the purposes of “Indian self-determination and economic self-sufficiency”

Allottee Rights

Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir. 1981)

- ▶ In 1887, Congress passed the General Allotment Act aka the Dawes Act giving the President the power to allot portions of reservations to individual Indians. This led to forced sales when Indian allottees couldn't pay state taxes creating a "checkerboard" effect of fee and trust land within a reservation
- ▶ *U.S. v. Powers*, 305 U.S. 527 (1939) held allottees succeed to some portion of tribal water rights

Allottee rights, cont.

- ▶ *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981) (“Colville I”), cert. denied, 454 U.S. 1092 (1981), modified, 752 F.2d 397 (9th Cir. 1985) (“Walton II”), cert. denied, 475 U.S. 1010 (1986)
- ▶ *Walton* held that an allottee’s share of a tribe’s reserved water is equal to the percentage of the entire reservation’s irrigable acreage that is located on the allottee’s land.
- ▶ It also held that a non-Indian successor acquires the reserved right, but loses the right if the successor does not put the water to beneficial use

Groundwater

- ▶ The Supreme Court has never addressed whether a reservation's groundwater is included in its reserved water right
- ▶ Wyoming refused to extend the Winters Doctrine to include groundwater because no other court had explicitly done so. *In re Rights to Use Water in the Big Horn River*, 753 P.2d 76 (Wyo. 1988)
- ▶ *U.S. v. Oregon*, 44 F.3d 758, (9th Cir. 1994) held that a failure to include groundwater in a general stream adjudication does not invalidate it on “comprehensiveness” grounds

Groundwater, cont.

- ▶ *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 989 P.2d 739, (Ariz. 1999) held that the Winters Doctrine applies to groundwater only when “other waters are inadequate to accomplish the purpose of a reservation”
- ▶ The court further concluded that as a holder of a federal reserved water right, an Indian tribe with a federal reserved right in groundwater would enjoy greater protection from groundwater pumping by others than do holders of state law rights, to the extent that the greater protections were necessary to accomplish the purpose of reservation. *Id.* at 420, 989 P.2d at 749.

End Presentation

