

INDIAN RESERVED WATER RIGHTS

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INTRODUCTION

The unique system for determining Indian water rights derives from a variety of sources including treaties, land grants, statutes and case law. The system of Indian water rights is separate from both of the two major water rights systems in the United States—the Riparian System in the east and the Appropriative (or Prior Appropriation) System in the west. Indian water rights are determined by the "Winters Doctrine" defined by the United States Supreme Court in *Winters v. United States*. Water law is comprised of dual state and federal doctrines, causing much controversy and conflict in some areas of water law including quantification and administration of tribal water rights. State courts have jurisdiction to adjudicate tribal water rights under the McCarran Amendment. However, the federal Indian trust relationship imposes a moral obligation on the federal government to protect Indian Tribes from adverse state actions.

In addition, questions of fairness pervade the issue of Indian water rights. On one side are the non-Indian farmers, ranchers, industries, and municipalities who relied on secure water rights, which the Winters Doctrine makes highly insecure. On the other side are Indian tribes who unwillingly provided the water that built the federal and state reclamation systems and supplied non-Indians with water, to the detriment of the tribes.

SYSTEMS OF ADMINISTERING WATER RIGHTS

The Riparian System, which governs water rights primarily in the water-abundant eastern states, is based on the principle that the owner of land adjacent to a water body has a right to reasonable use of that water. Such a water right stays with the land and cannot be separated from it in such a manner that the land owner could sell his water right while still retaining ownership of the land. A riparian water right continues to exist regardless of whether the land owner uses the water. The chief limitation on a riparian water right is that use of the water cannot interfere with another riparian owner's reasonable use of his own water. If a drought occurs, all users along the source will experience a reduction in their right.

The Appropriative System, which governs water rights in most western states where water is scarce, is based on the principle that a water right belongs to the first user to appropriate the water and put it to beneficial use. This water right is separate from the land, and the owner of the right can sell it while maintaining ownership of the land adjacent to the water source. The water right is retained only as long as the owner of the right puts the water to beneficial use, in other words, the appropriative right is a "use it or lose it" right that can be lost through non-use. Appropriative water rights are also characterized by a "first in time, first in right" principle, meaning that an earlier user is guaranteed the right to take the same amount of water from the source regardless of the number of later appropriators and their water needs. Furthermore, during drought conditions the entire share of water to which the last appropriator in time is entitled will be lost before the share of water for the next latest appropriator is reduced.

INDIAN WATER RIGHTS

The Winters Doctrine

The system of Indian water rights is based on the Winters Doctrine, which is neither riparian nor appropriative but does contain elements of each of these systems. Winters rights are reserved water rights established by the federal government when it creates an Indian reservation by treaty, statute or executive order. Reservation of the water right is implied by the purpose for establishing the reservation, which can be a narrow purpose such as to promote an agricultural lifestyle or a broader purpose to provide a “permanent homeland and abiding place” for a tribe.

Four fundamental principles characterize Winters rights. First, establishment of Indian reservations implicitly reserves for the use of the tribes that amount of water which is needed to fulfill the purposes for which the lands were set aside. Second, the reserved right of tribes to continue pre-existing or aboriginal practices such as fishing, hunting, gathering, and historical agriculture implicitly reserves sufficient water to support those activities. Such aboriginal water uses predate the formation of reservations and are considered to have existed as of time immemorial. Third, tribal reserved water rights are, as a matter of federal Indian law, paramount over subsequent state-law water rights. This principle is supported by the Interstate and Indian Commerce Clauses and the Property Clause of the Constitution, which individually and collectively give the federal government plenary power over Indian water rights, which are reserved in perpetuity unless Congress extinguishes them. Fourth, similar to riparian rights, tribal reserved water rights are not lost by non-use of the water.

Courts are split on whether tribes have a groundwater right under the Winters Doctrine and also whether Winters rights encompass a right to a certain water quality standard. Winters rights probably are protected against impairment of water quality as well as diminutions in quantity because it is difficult to draw a meaningful distinction between quantity and quality of water for purposes of the Winters doctrine. For example, both irrigation and fisheries protection require water of adequate quality for the intended uses.

Priority and Quantity Under the Winters Doctrine

Winters rights are reserved as of the date of creation of the reservation. The fact that Winters rights take a priority date from the establishment of a reservation (or earlier if an aboriginal use right is claimed) significantly differentiates these rights from appropriative rights, which take a priority date from the time the water is first put to beneficial use. Non-tribal, competing water users who put water to beneficial use prior to the date of the creation of the reservation will take precedence over Winters rights, but those users with later priority dates are subordinate to the tribe. Tribal reserved water rights are, therefore, senior to most other rights in the West and can theoretically arise at any time to defeat (or reduce the priority status of) a vested water right under the prior appropriation system. Because Winters rights exist apart from, and sometimes in opposition to, state water rights determined by the appropriative system, state water officials administering streams in prior appropriation states have no records of the existence of reserved rights, their location, their amount, or their priority. All of these factors make the existence of tribal reserved water rights potentially destabilizing and a source of contention.

The quantity of water reserved for a given tribe under the Winters Doctrine is based on the Practically Irrigable Acreage (PIA) standard, which is the amount of water sufficient to irrigate all

practically irrigable acreage on the reservation. Four factors are used to determine PIA: (1) irrigation suitability of the lands as determined by soil survey, (2) availability of adequate surface or groundwater to serve potentially irrigable land (3) the possibility of a water delivery system, and (4) the economic feasibility of proposed agricultural development. The court-developed PIA standard determines the purposes for which Indians can use their water (qualification) by applying a method for determining the amount of water allocable to tribes on reservations (quantification). One criticism of the PIA standard is whether it is appropriate, let alone equitable, as it favors large land-holding reservations and restricts tribes to using water only for irrigation, thus preventing them from marketing the water or using it for mineral development or tourism.

History of Application of the Winters Doctrine

The immediate impact of the 1908 Winters decision on the amount of water tribes actually received was negligible. During the fifty-year period following the decision, the United States' policy was to encourage the settlement of the West through large irrigation projects on streams that flowed through or bordered Indian reservations and the creation of family-sized farms on arid lands. As a result, the government ignored its duty as trustee for the tribes to prosecute water rights on their behalf. Indian water issues remained inchoate for more than half a century after Winters, largely because few federally funded irrigation projects were constructed for Indians and the US was far more interested in encouraging non-Indian settlement than it was in developing and protecting Indian water resources. Even today, Winters water rights are difficult for tribes to obtain.

Winters rights are generally recognized in the West, not in the East. Given the underlying rationale for tribal reserved water rights, Winters rights should be applied in the East as well. The purpose behind reserving land on which tribes can live and maintain their traditional aboriginal practices is the same regardless of where the land is located. This purpose carries with it the implicit right to sufficient water for such reserved lands.

NON-WINTERS INDIAN WATER RIGHTS

The Winters Doctrine does not directly apply to the Indian Pueblos of New Mexico. Instead, the federal court has set a different standard for the quantification of Pueblo water rights known as the Mechem Doctrine. This doctrine focuses on the quantity of water that a Pueblo used within its grant lands between the 1846 Treaty of Guadalupe Hidalgo and the 1934 Pueblo Lands Act. The quantity of water used between 1846 and 1934 has a first in time priority date that is senior to all colonial-era water rights.

There also are Indian "aboriginal rights," which are qualitatively different from Winters rights. They are broader than reserved tribal water rights because they can support traditional, customary activities and are not restricted by the "purposes" of the reservation. Since aboriginal rights attach to a tribe's ancestral lands, not the reservation, aboriginal rights predate Winters rights. Therefore, aboriginal water rights always will be senior to other competing uses. Because aboriginal rights attach to ancestral lands, their existence is independent of federal or state laws (including treaties) regardless of whether the federal government has subsequently reserved those lands or federally recognized the tribe. Since aboriginal water rights do not depend on federal reservation of land or a federal trust relationship, these rights are not dependent on the federal government and, thus, not subject to its control.

Eastern tribes, like many western tribes, possess aboriginal rights entitling them to fish on their

ancestral lands unless these rights have been specifically abrogated by a treaty or otherwise eliminated by Congress. When tribes ceded their land to settlers, they did not cede the aboriginal fishing rights that attached to the land, including the right to sufficient water to support their activities. Thus, treaties do not create aboriginal rights; rather, they generally confirmed the continued existence of these rights. As long as these tribes continue to occupy their traditional homelands, aboriginal rights continue in force.

CONCLUSION

To provide a sense of the magnitude of Indian water rights, in a 1984 report to the Western Governors' Association the Western States Water Council calculated that these water rights might equal "45 million acre-feet per year, an amount more than three times the annual flow of the Colorado River." There might be "significant dislocations in local water-based economies should Indians receive their just entitlement of water."

Indian water rights are a significant issue, and still an unknown. The fear of "a "call" of water rights" in response to severe drought combined with Indians' superior rights led to a negotiated settlement in the San Juan Basin in northwestern New Mexico. This settlement, and others like it, should be encouraged. Settlements offer both tribes and states advantages over protracted litigation. Negotiated settlements are flexible to accommodate local needs, and they provide cheaper and faster resolution of difficult issues. Tribes receive 'wet' water rather than mere paper rights. States and non-Indian water users gain the desired certainty of water rights.