

Tribal/Federal Reserved Water Rights Nuts and Bolts

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Key cases:

Winters v. United States, 207 U.S. 564 (1908) (water rights were impliedly reserved by an 1888 Congressionally-ratified agreement establishing the Fort Belknap Reservation).

United States v. Winans, 198 U.S. 371 (1905) (certain rights were necessarily reserved by Tribes to give effect to treaty-reserved rights to take fish at usual and accustomed fishing grounds).

Cappaert v. United States, 426 U.S. 128 (1976) (where the federal government reserves land from the public domain it impliedly reserves water rights sufficient to accomplish the reservation's purpose).

United States v. New Mexico, 438 U.S. 696 (1978) (United States, in setting aside National Forest from other public lands, reserved only sufficient water to achieve the reservation's primary purpose).

Arizona v. California, 373 U.S. 546 (1963) (quantifying Tribal water rights by reference to a "practically irrigable acreage" standard for both present and future needs).

United States v. Adair, 723 F.2d 1394 (9th Cir. 1983) cert. denied sub nom *Oregon v. United States*, 467 U.S. 1252 (1984) (Klamath Tribe is entitled to reserved water rights, with a priority date of time immemorial use, sufficient to support exercise of Treaty-reserved hunting and fishing rights despite termination and loss of the Reservation).

Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir. 1981) (non-Indian successor-in-interest to land previously allotted to Tribal members with appurtenant water rights obtains reserved water rights subject to certain limitations, i.e. rights being used at time of transfer of ownership plus any additional water put to beneficial use with reasonable diligence, rights subject to use-or-lose rules; Tribe, not the state, has regulatory authority over the use of water).

Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976) (United States may be joined in state general stream adjudication to determine tribal reserved water rights; for "wise judicial administration" reasons federal courts with concurrent jurisdiction over federal reserved water rights should generally abstain from hearing a case in favor of state-court adjudication).

Agua Caliente Band v. Coachella Water Dist., 849 F.3d 1262 (9th Cir. 2017) cert. denied sub nom *Desert Water Agency v. Agua Caliente Band of Cahuilla Indians*, 583 U.S. ____ (2017) (United States impliedly reserved water rights when it established the Agua Caliente Reservation; Tribe’s reserved water rights extend to appurtenant groundwater).

Arizona v. Navajo Nation, 599 U.S. 555 (2023) (1868 treaty between the United States and the Navajo Nation did not impose a duty on the federal government to take affirmative steps to secure water for tribe absent express treaty/statutory language).

Federal statutes:

25 U.S.C. § 177 (“Indian Non-Intercourse Act” 1834 as currently codified) (prohibits alienation of Indian lands without approval of the federal government).

25 U.S.C. §415 (1955) (authorizes leases of restricted Indian lands for development or utilization of natural resources with approval of the Secretary of Interior).

43 U.S.C. § 666 (“McCarran Amendment” 1952) (waives the United States’ sovereign immunity in lawsuits regarding ownership and management of water rights; federal government may be joined in state general stream adjudications to determine tribal reserved water rights).

25 U.S.C. § 381 (Irrigation lands section of the “General Allotment Act” 1887) (Secretary of Interior may prescribe rules/regulations to secure equal distribution of water for irrigation on an Indian reservation).

Other resources:

Felix S. Cohen, *Cohen’s Handbook of Federal Indian Law* (LexisNexis 2005) (Chapter 19 – Water Rights – addresses Tribal and individual rights to water including regulatory and adjudicative jurisdiction over water rights).

John Shurts, *Indian Reserved Water Rights: The Winters Doctrine in its Social and Legal Context, 1880s-1930s* (Univ. Okla Press 2000) (Extensive study of the *Winters* case, its history, and subsequent impacts).

John E. Thorson, Sarah Britton, and Bonnie G. Colby, eds., *Tribal Water Rights: Essays in Contemporary Law, Policy, and Economics* (Univ. Ariz. Press 2006) (discussion of state-tribal-federal relations in water management, quantification of tribal water rights, Indian water rights settlements, and tribal water rights management).

Washington State Office of Attorney General, *An Introduction to Washington Water Law* (2000) (Chapter VIII – federal reserved water rights – describing *Winters* Doctrine, quantification of reserved rights, regulation and adjudication of federal reserved water rights).

Lloyd Burton, *American Indian Water Rights and the Limits of Law* (Univ. Kansas Press 1991) (exploration of the historical underpinnings of Tribal water rights and policy, discussion of legal issues and dispute resolution approaches to Tribal/non-Tribal water rights conflicts).