# 2 Background on Federal Indian Reserved Water Rights

## 2.0 Introduction

This section presents a short description of the legal basis for and characteristics of Indian water rights, and the important differences between those rights and state law-based water rights. This background section includes the general principles of federal Indian water law and western prior appropriation law and is not intended to describe or affect any particular tribe's water rights.

### 2.1 The Origin of Federal Indian Reserved Water Rights

The seminal Indian reserved water rights case is *Winters v. United States*.[1] In *Winters*, the United States initiated a lawsuit to restrain settlers from constructing and maintaining water works to divert water from the Milk River which would prevent water from flowing to irrigate Indian lands on the Fort Belknap Indian Reservation in Montana. The Court found that the agreement creating the Fort Belknap Reservation sought to transition the Gros Ventre and Assiniboine Indians from a pastoral to an agrarian lifestyle, but that the reservation lands "were arid, and, without irrigation, were practically valueless."[2] Accordingly, the Court held that the establishment of the reservation impliedly reserved the amount of water necessary to irrigate its lands and to provide water for other purposes.[3] The Court also held that these reserved waters are exempted from appropriation under state law.[4] Federal Indian reserved water rights are often referred to as *Winters* rights.

As the trustee and holder of title to federal Indian reserved water rights, the United States has an obligation to protect Indian water rights and water resources for each beneficiary tribe.

### 2.2 Basic Characteristics of Federal Indian Reserved Water Rights

#### *2.2.1 Priority Date: Date of Reservation or Time Immemorial*

Federal Indian reserved water rights generally have one of two priority dates: date of reservation or time immemorial. Where the reserved rights are necessary to fulfill purposes created by the establishing document,[5] the priority date is the date of establishment of the reservation.[6] If, however, water is reserved so a tribe can continue its aboriginal uses, such water may have a time immemorial priority date.[7]

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[1] 207 U.S. 564 (1908).

[2] *Id.* at 576.

[3] *Id.* at 576-77.

[4] *Id.*; *see also United States v. Rio Grande Dam & Irrigation Dist.*, 174 U.S. 690, 703 (1899) (holding that the states' power to create water rights is subject to two limitations: (1) a state cannot "destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of the waters. . . ."; and (2) a state is limited by the federal navigation servitude).

[5] All reservations possess *Winters* rights whether established by treaty, statute, or executive order. *Arizona v. California,* 373 U.S. 546, 595-601 (1963) (*Arizona I)*.

[6] *See Winters*; *Arizona I*.

[7] *See, e.g. United States v. Adair*, 723 F.2d 1394, 1412-15 (9th Cir. 1983), *Joint Board of Control v. United States*, 832 F.2d 1127, 1131-32 (9th Cir. 1987).

### *2.2.2 Quantification: The Amount Necessary to Fulfill the Reservation's Purposes*

Federal Indian reserved water rights entitle tribes to the amount of water that is necessary to fulfill their reservation's purposes.[8] This includes a right to surface water and groundwater sources.[9] Various approaches are used to quantify federal Indian reserved water rights. In *Arizona v. California*, the United States Supreme Court established the "practicably irrigable acreage" (PIA) standard.[10] Under this standard, if land within a reservation can be cultivated through irrigation and if such irrigation is practicable applying relevant economic measures, then the tribe is entitled to the amount of water necessary for such irrigation. Another prominent measure for quantifying federal Indian reserved water rights is the "homeland" standard.[11] Under this standard, federal Indian reserved water rights are quantified based on the tribe's past, present, and future water needs, not just those needs tied to agriculture.[12] This can include water for a wide range of purposes, including hunting and fishing and commercial and other economic development purposes.[13] The Supreme Court rejected an "equitable apportionment" standard, used in some water cases, to allocate water between states, and adopted a "variable" standard of quantification based upon "reasonably foreseeable needs."[14]

## 2.3 Reserved Water Rights are Not Subject to State Law

Federal Indian reserved water rights are defined primarily by federal common law. Indian "[r]eserved water rights are 'federal water rights' and 'are not dependent upon state law or state procedures.'"[15] Although federal Indian reserved water rights are often adjudicated in state courts, state courts must apply federal law.[16]

These rights differ from state water rights in several respects. Water rights based on state law are largely fixed by the date and quantity of the landowner's initial use or appropriation of water. Laws of the western states (and the federal Reclamation laws) also require the "beneficial use" of

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[8] *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 201 Ariz. 307, 320, 35 P.3d 68, 81 (2001) ("*Gila V*") ("When an Indian reservation is created, the government impliedly reserves water to carry out its purpose as a permanent homeland. *See Winters*, 207 U.S. at 566-67, 577.").

[9] *Agua Caliente Band v. Coachella Valley Water Dist.*, 849 F.3d 1262, 1271 (9th Cir. 2017), *cert. denied*, 138 S.Ct. 468 (2017) ("We hold that the Winters doctrine encompasses both surface water and groundwater appurtenant to reserved land."); *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source,* 989 P.2d 739, 750 (Ariz. 1999) ("We have held that the federal reserved right extends to groundwater when groundwater is necessary to accomplish the purpose of a federal reservation."); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 19.03[2][a] ("Reserved rights presumably attach to all water sources—groundwater, streams, lakes, and springs—that arise on, border, traverse, underlie, or are encompassed within Indian reservations."). The Supreme Court specifically held that "the United States can protect its water from subsequent diversion, whether the diversion is of surface or groundwater." *Cappaert v. United States*, 426 U.S. 128, 143 (1976).

[10] *Arizona I*, 373 U.S. at 595-601.

[11] See *Gila V*, 201 Ariz.at 318, 35 P.3d at 79 ("[W]e decline to approve the use of PIA as the exclusive quantification measure for determining water rights on Indian lands.").

[12] *See id.* at 79-80 (identifying a multitude of factors to be considered in this analysis including history, culture, geography, natural resources, economic base, past water use, and present and projected future population).

[13] *See id.* at 80 (". . . the court should look to a tribe's economic base in determining its water rights . . . [e]conomic development and its attendant water use must be tied, in some manner, to a tribe's current economic station.").

[14] *Arizona I,* 373 U.S. at 597-601.

[15] *Colville Confederated Tribes v. Walton* (*Walton III*), 752 F.2d 397, 400 (9th Cir. 1985) (quoting *Cappaert,* 426 U.S. at 145 and citing *Adair*, 723 F.2d at 1411 n. 19).

[16] *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 571 (1983) ("State courts, as much as federal courts, have a solemn obligation to follow federal law.")

water (for example, for mining, irrigation, domestic, municipal, industrial, power production, stock watering, wildlife preservation, and recreation) and typically require the water to be diverted from its source. Failure to use the water for a period of time could result in loss of the right under state forfeiture or abandonment laws.

Conversely, federal Indian reserved water rights are quantified based on what is needed to accomplish the reservation's purposes, including past, present, and future uses, not on initial or current use of water.[17] These rights may be used for any lawful purpose on the reservation.[18] Federal Indian reserved water rights also cannot be lost because of non-use under state-law concepts such as abandonment and forfeiture.[19]

## 2.4 The Colorado River Compact

The 1922 Colorado River Compact apportioned the Colorado River between the Upper and Lower Colorado River Basins. The extent to which the Compact affects the rights of the Tribes is unclear. The Compact recognized and protected present perfected rights in the Colorado River system declaring such rights as unimpaired by the Compact.[20] The priority dates of most of the water rights of the Tribes predate the Compact and should be considered "present perfected rights" as that term is used in the Compact. In addition, the Compact also provided that "[n]othing in this compact shall be construed as affecting the obligations of the United States of America to Indian tribes."[21]

[17] *Arizona I*, 373 U.S. at 598, 600-01, 605; *Colville Confederated Tribes v. Walton* (*Walton II*), 647 F.2d 42, 47 (9th Cir. 1981).

[18] *Arizona v. California* (*Arizona II*), 439 U.S. 419, 422 (1979); *Walton II*, 647 F.2d at 48-49; *but see In re General Adjudication of the Big Horn River System*, 835 P.2d 273, 278-80, 285 (Wyo. 1992) (plurality and concurring opinion held 3-2 that tribes cannot devote *Winters* water for agricultural purposes instream to support fish).

[19] *Winters*, 207 U.S. at 577; *Hackford v. Babbitt*, 14 F.3d 1457, 1461 n.3 (10th Cir. 1994); *Walton II*, 647 F.2d at 51. Only Congress can diminish Indian rights. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202-03 (1999); *United States v. Dion,* 476 U.S. 734, 738-40 (1986); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n,* 443 U.S. 658, 690 (1979).

[20] Colorado River Compact, 1922, Nov. 24, 1922, Art. VIII.

[21] *Id*. at Art. VII.