



# Indian Reserved Water Rights Under the *Winters* Doctrine: An Overview

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## Summary

Although the federal government has authority to regulate water, it typically defers to the states to allocate water resources within the state. The federal government maintains certain federal water rights, though, which exist separate from state law. In particular, federal reserved water rights often arise in questions of water allocation related to federal lands, including Indian reservations. Indian reserved water rights were first recognized by the U.S. Supreme Court in *Winters v. United States* in 1908. Under the *Winters* doctrine, when Congress reserves land (i.e., for an Indian reservation), Congress also reserves water sufficient to fulfill the purpose of the reservation.

As the need for water grows with the development of new industries and growing populations, the tension arising from the allocation of scarce water resources highlights the difficulties that often surround reserved water rights, particularly in the western states. Western states generally follow some form of the prior appropriation system of water allocation. The prior appropriation system allocates water to users based on the order in which water rights were properly acquired. Because Indian reserved water rights date back to the government's reservation of the land for the Indians, these water rights often pre-date other water users' claims. Although the prior appropriation system's reliance on seniority provides a degree of certainty to water allocation, Indian reserved water rights may not have been quantified at the time of reservation. Because *Winters* did not dictate a formula to determine the quantity of water reserved, courts apply different standards to quantify tribal reserved water rights. As a result, other water users may not know whether, or the extent to which, Indian reserved water rights have priority. Because of these uncertainties, Indian reserved water rights are often litigated or negotiated in settlements and related legislation.

This report will examine the creation of Indian reserved water rights under the *Winters* doctrine. It will analyze the scope of the doctrine, including the purposes for which the water right may be claimed and the sources from which the water may be drawn. It will also discuss various quantification standards that courts have used in attempting to clarify Indian reserved water rights. Finally, it will examine the effect of the McCarran Amendment, through which Congress extended jurisdiction to state courts to hear disputes involving Indian reserved water rights.

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## Introduction

Although allocation of water resources is generally a matter of state law, the federal government may also allocate water rights. Under the Supreme Court's 1908 *Winters v. United States* decision, when Congress creates an Indian reservation, the water necessary to fulfill the reservation's purposes is reserved implicitly.<sup>1</sup> Although this doctrine appears to be fairly straightforward, the scarcity of sufficient water in more arid parts of the country has resulted in contentious debate over the requirements of *Winters* and its impact on competing water rights. Because federal reserved water rights under the *Winters* doctrine often have not been quantified but are generally senior to other water rights, the rights of more junior water users can be affected significantly, when these federal rights are exercised.

This report provides background on Indian reserved water rights under *Winters*. It analyzes the scope of these rights, including the water sources that may be used to fulfill the rights and the quantification standards courts commonly use to clarify the rights. The report also examines the effect of the McCarran Amendment, through which Congress authorized state courts to adjudicate Indian reserved water rights.

## The *Winters* Doctrine of Reserved Water Rights

In *Winters*, the Supreme Court examined tribal rights to water associated with the Fort Belknap Reservation located in what would later become Montana.<sup>2</sup> The Fort Belknap Reservation was created by an agreement in 1888 between tribal parties and the U.S. government. At the time, the government had a policy seeking to transform Native Americans from “a nomadic and uncivilized people ... to become a pastoral and civilized people” by providing them lands to develop for such purposes.<sup>3</sup>

By 1905, the area experienced water shortages that ultimately resulted in the *Winters* lawsuit being filed to enforce tribal rights to water against non-Indian water users who had been diverting water from the region.<sup>4</sup> In announcing its decision, the Court explained that the lands provided under the agreement for the purpose of developing an agrarian society “were arid and, without irrigation, were practically valueless.”<sup>5</sup> The Court also noted that ambiguities in the agreement, such as the status of the water rights related to the land, are to be “resolved from the standpoint of the Indians,” as a rule of interpretation.<sup>6</sup> The Court held that:

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<sup>1</sup> *Winters v. United States*, 207 U.S. 564, 575-77 (1908). Reserved water rights established under the *Winters* doctrine are only one form of Indian water rights and will be the focus of this report. Other forms of Indian water rights include rights commonly referred to as *Winans* rights and Pueblo Indian rights, but these are beyond the scope of this report.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 576.

<sup>4</sup> Cohen's Handbook of Federal Indian Law § 19.02, LexisNexis/Matthew Bender 2009.

<sup>5</sup> *Winters*, 207 U.S. at 576.

<sup>6</sup> *Id.* See also CRS Report 97-589, *Statutory Interpretation: General Principles and Recent Trends*, by Larry M. Eig.

The power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be. That the Government did reserve them we have decided, and for a use which would be necessarily continued through the years.<sup>7</sup>

The Court has continued to recognize the principle derived from *Winters* in both Indian and non-Indian contexts. In 1976, the Court noted that it “has long held that when 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.”<sup>8</sup>

## Scope of *Winters* Rights

Under the *Winters* doctrine, the priority and extent of Indian reserved water rights is affected by the purposes of the Indian reservation, the date when the Indian reservation was created, the quantification of water sufficient to accomplish those purposes, and the sources of water that may be used to fulfill the particular water rights.

## Effect on State Water Allocation

Although the federal government may act under a number of constitutional authorities to regulate water, in most instances it has deferred to the states. States either adhere to a riparian or prior appropriation system of water allocation. In a riparian system, landowners adjacent to a waterway share a common right to use the water, with a limitation of reasonableness.<sup>9</sup> In times of water shortages, all riparian rights holders must share the burden of the shortage proportionally.

Other states, typically the drier western states, use a prior appropriation system of water rights. Under prior appropriation, water users who make beneficial use of a water supply, regardless of their location relative to it, obtain a right to that water under a seniority system that reflects the order in which the right was obtained.<sup>10</sup> The date that the user put the water to beneficial use is known as the priority date. Some states incorporate elements of both the riparian and appropriation doctrines.

Because riparian rights’ holders must share the burden of any water shortage proportionally, Indian reserved water rights generally do not have a noticeable impact in riparian jurisdictions. In prior appropriation systems, recognition of a tribe’s water rights is often times more contentious because, in times of shortage, junior users may receive none of their allocations after a tribe with senior takes its share under the *Winters* doctrine. Tribes often have seniority because the laws, treaties, executive orders, and other legal agreements that created the Indian reservations (and thus the priority date for purposes of seniority) predate other settlement of the area.<sup>11</sup> Allocation of scarce water is further complicated by the fact that a tribe’s reserved water rights under the

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<sup>7</sup> *Winters*, 207 U.S. at 577 (citations omitted).

<sup>8</sup> See *Cappaert v. United States*, 426 U.S. 128, 138 (1976).

<sup>9</sup> See generally A. Dan Tarlock, *Law of Water Rights and Water Resources*, ch. 3 “Common Law of Riparian Rights” (2008).

<sup>10</sup> See generally *id.* at ch. 5 “Prior Appropriation Doctrine.”

<sup>11</sup> See, e.g., *Winters*, 207 U.S. 564 (statute); *United States v. Adair*, 723 F.2d 1394 (9<sup>th</sup> Cir. 1983) (treaty); *Arizona v. California*, 373 U.S. 546 (1963) (executive order).

*Winters* doctrine are not lost if the tribe does not maintain continuous use of the rights. As a result, junior rights holders may be unaware that a tribe has senior reserved rights, leaving the junior rights holder with little or no allocated water in some instances.<sup>12</sup>

Tribes may also acquire water rights under state law. That is, if water is available under the state water allocation system and a tribe requires water beyond what it receives under its federal reserved water rights, it may seek to acquire state water rights to supplement its federal reserved rights.

## Purposes of Reserved Water Rights

Under *Winters*, the reserved water rights are tied to the purpose (and in some cases, purposes) of the reservation, as embodied in the particular law, treaty, agreement, or executive order that created the reservation. It is unclear, however, whether the primary purpose standard the Supreme Court adopted when applying *Winters* in non-Indian reserved water rights cases governs Indian reserved water rights. Under the primary purpose standard, reserved water rights may be applied only for the primary purposes of reservations, not for secondary purposes.<sup>13</sup> In *Cappaert*, the Supreme Court held that water rights are limited to the “amount of water necessary to fulfill the purpose of the reservation, no more.”<sup>14</sup> In *United States v. New Mexico*, the Supreme Court further clarified that the test is whether “the purposes of the reservation would be entirely defeated” without that water.<sup>15</sup>

Lower courts generally define Indian reservation purposes broadly, which reflects the reasoning in *Winters* that Indian reservations were created in order to transform and sustain a new lifestyle for the tribe. In one case, the Arizona Supreme Court refused to limit Indian reserved rights to only the primary purpose of a reservation.<sup>16</sup> The court noted the importance of providing the Indians with “a permanent home and abiding place,” as well as the need for “broader interpretation [of the purposes of Indian reserved rights] in order to further the federal goal of Indian self-sufficiency.”<sup>17</sup> The court emphasized the need for a broad interpretation of the purposes of the reservation, recognizing that it is difficult to ascertain “the true reasons for which Indian reservations were created.”<sup>18</sup> Similarly, the U.S. Court of Appeals for the Ninth Circuit interpreted the primary purpose of a reservation to encompass a number of related purposes.<sup>19</sup> It found that the primary purpose of a reservation was to create a homeland for the tribe, which

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<sup>12</sup> See *Winters*, 207 U.S. 564. See also Cohen’s Handbook of Federal Indian Law § 19.03[1].

<sup>13</sup> *Id.* at 702 (“Where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude . . . that the United States intended to reserve the necessary water. Where water is only valuable for a secondary use on the reservation, . . . Congress intended . . . that the United States would acquire water in the same manner as any other public or private appropriator.”).

<sup>14</sup> *Cappaert*, 426 U.S. at 141. Although the *Winters* doctrine has generally been extended to non-Indian reservations, certain aspects of the reserved right may be treated differently in Indian rights contexts as compared to non-Indian rights contexts.

<sup>15</sup> *United States v. New Mexico*, 438 U.S. 696, 700 (1978).

<sup>16</sup> *In re General Adjudication of All Rights to Use Water in the Gila River System and Source*, 35 P.3d 68, 74-75 (Ariz. 2001).

<sup>17</sup> *Id.* at 74 (internal quotations and citations omitted).

<sup>18</sup> *Id.* at 75.

<sup>19</sup> *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47 (9<sup>th</sup> Cir. 1981).

included water rights that could be used not only for irrigation but also for fishing.<sup>20</sup> Other courts have rejected such broad interpretations, noting the inherent risks in placing no limits on the water rights associated with a reservation and accordingly limiting water rights only to purposes that were specifically contemplated when the reservation was created.<sup>21</sup>

## Changes in Water Use

Although state law generally restricts changes in water use from the originally designated purpose of the water right, Indian reserved water rights are not subject to such restrictions. As discussed later in this report, courts quantify the amount of Indian reserved water rights based on the purposes of the reservation. Once quantified, some decisions have allowed Indian reserved water rights to be used for purposes other than those considered in the quantification of the right.<sup>22</sup> Other courts, however, have refused to allow tribes to change their water use from the purpose contemplated when the reservation was created. For example, the Wyoming Supreme Court refused to permit tribes to apply their reserved rights to instream flows.<sup>23</sup>

## Water Sources

Finding the water to fulfill a water right is often the most controversial element of water rights claims, particularly in times of shortage. The question of which water sources may be used to fulfill reserved rights is not clearly resolved. Although Indian reserved rights generally attach to whatever water sources may be within or adjacent to the reserved lands, it is generally understood that reserved rights do not necessarily require that the water source be encompassed within the reserved lands.<sup>24</sup> Rather, courts have allowed tribes to draw water from various sources as necessary to fulfill the reservation purpose, limiting the potential sources only to the extent that the waters must be unappropriated at the time the reservation was created.<sup>25</sup> In other words, an Indian reserved water right cannot trump senior rights that existed at the time of reservation.

One question on which courts have disagreed is whether the reserved water right may draw from groundwater, or if it is limited to surface water. In *In re Big Horn*, the Wyoming Supreme Court rejected applying the *Winters* doctrine to groundwater.<sup>26</sup> While acknowledging that groundwater

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<sup>20</sup> *Id.*

<sup>21</sup> See, e.g., *In re General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76, 96-99 (Wyo. 1988) (finding that the sole purpose of the treaty creating a reservation at issue was agriculture, even though the treaty also implied that the tribe may engage in a number of other activities).

<sup>22</sup> The Supreme Court approved a special master's decision noting that a quantification based on a standard measured by agriculture purposes did not prohibit the tribe from putting the water to use for other purposes. See *Arizona v. California*, 1960 Term, No. 8 Orig. Report of Simon H. Rifkind, Special Master 254-66 at 265-66 (Dec. 5, 1960); *Arizona v. California*, 439 U.S. 419 (1979).

<sup>23</sup> *In re General Adjudication of All Rights to Use Water in Big Horn River System*, 835 P.2d 273, 279 (Wyo. 1992). Instream flows generally refer to water that remains in the river.

<sup>24</sup> See *Cappaert*, 426 U.S. at 138-39; *Arizona v. California*, 373 U.S. at 598-99; *Winters*, 207 U.S. at 565. See also *United States v. Ahtanum Irrigation Dist.*, 236 F.2d 321, 325 (9<sup>th</sup> Cir. 1956).

<sup>25</sup> See *Arizona v. California*, 373 U.S. 546 (1963).

<sup>26</sup> *In re Big Horn*, 753 P.2d at 99-100.

and surface water sources are often connected, the court held that there was no precedent for applying the *Winters* doctrine to groundwater.<sup>27</sup>

On the other hand, the Arizona Supreme Court has held that reserved rights may include claims to groundwater, if the groundwater is necessary to fulfill the purpose of the reservation.<sup>28</sup> Finding that the government's reservation must have contemplated water "from whatever particular sources each reservation had at hand,"<sup>29</sup> the court explained that the "significant question for the purpose of the reserved rights doctrine is not whether the water runs above or below the ground but whether it is necessary to accomplish the purpose of the reservation."<sup>30</sup> Although the court recognized that many possible water sources could be used to fulfill reserved rights claims, it also noted that groundwater should only be claimed if other sources were insufficient to accomplish the purpose of the reservation.<sup>31</sup>

## Water Quality

When degradation of water quality would undermine the water's use for reservation purposes, courts have recognized water quality as another element of Indian reserved water rights. Federal courts have ruled that reserved water rights holders can seek legal protection from water quality degradation by other water users. Specifically in *United States v. Gila Valley Irrigation District*, the Ninth Circuit approved a district court's finding that a reserved water right was impaired when other users' actions increased the salinity of water used by a tribe for irrigation of agricultural crops.<sup>32</sup>

## Quantification

While the Supreme Court recognized Indian reserved water rights in *Winters*, it only provided that the extent of such rights were those necessary to fulfill the purpose of the reservation. Quantification of reserved rights was left for later judicial interpretation.

## Practicably Irrigable Acreage Standard

In 1963, the Supreme Court approved a special master's decision on Indian reserved water rights that used a quantification standard based on agricultural water requirements in *Arizona v. California*.<sup>33</sup> Faced with a choice between a subjective standard favored by states seeking flexibility and an objective standard that would fix the amount of water reserved, the special master in the interstate water dispute endorsed the latter, using what is known as the practicably irrigable acreage standard (PIA). The PIA reflects the agricultural purposes of creating

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<sup>27</sup> *Id.*

<sup>28</sup> *In re* General Adjudication of All Rights to Use Water in the Gila River System and Source, 989 P.2d 739, 745-48 (Ariz. 1999).

<sup>29</sup> *Id.* at 747.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 748.

<sup>32</sup> *United States v. Gila Valley Irrigation District*, 117 F.3d 425 (9<sup>th</sup> Cir. 1997), *aff'g* 920 F. Supp. 1444 (D. Ariz. 1996).

<sup>33</sup> 373 U.S. 546.



reservations under the *Winters* doctrine, basing the quantification of reserved water rights on the amount of lands that can be feasibly and reasonably irrigated. In reviewing the special master's decision, the Supreme Court rejected a proposed quantification "measured by the Indians' 'reasonably foreseeable needs,' which, the Court pointed out, means by the number of Indians."<sup>34</sup> The Court explained that such a basis was unworkable as it could only be guessed.<sup>35</sup> The Court held that "the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage."<sup>36</sup> The Court's reasoning in *Arizona* emphasized the importance of the water right to the land reservation. Finding it "impossible" that Congress and the Executive branch would reserve land that was mostly desert without providing water as well, the Court noted that "water from the river would be essential to the life of the Indian people and to the animals they hunted and the crops they raised."<sup>37</sup>

The Court's approval of the special master's decision, however, did not require adoption of the PIA standard as a matter of law and other courts have interpreted quantification of *Winters* rights differently.<sup>38</sup> The Wyoming Supreme Court has applied the PIA using a two-part test to determine which lands would qualify for purposes of quantification of the water right.<sup>39</sup> Under the test, those lands include 1) those physically capable of sustained irrigation and 2) those which are irrigable at a reasonable cost.<sup>40</sup> The U.S. Supreme Court reviewed the decision but because the Court was evenly divided in its decision, no definitive ruling was issued.<sup>41</sup> Rather, without a majority of the Court agreeing on an outcome for the case, the Wyoming Supreme Court's opinion was affirmed.<sup>42</sup>

## Other Quantification Standards

The PIA standard has not been applied by all courts, however. The Arizona Supreme Court rejected the standard because it had the potential to treat tribes inequitably based on their geographic location; because it imposed an agricultural lifestyle that was not necessarily productive in the current times; and because it posed a risk that accounting for every potentially irrigable acre would in some cases result in "an overabundance of water."<sup>43</sup> The court explained that creating "a permanent homeland requires water for multiple uses, which may or may not include agriculture."<sup>44</sup> The court further explained that "the PIA standard, however, forces tribes to prove economic feasibility for a kind of enterprise that, judging from the evidence of both

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<sup>34</sup> *Id.* at 600-01.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 601. The quantification approved by the Court called for about one million acre-feet of water for about 135,000 irrigable acres of land. *Id.* at 595-96.

<sup>37</sup> *Id.* at 598-99.

<sup>38</sup> The special master's decision approved in *Arizona v. California* specifically noted that applying the PIA standard did not mean "that water reserved for Indian Reservations may not be used for purposes other than agriculture and related uses." *Arizona v. California*, 1960 Term, No. 8 Orig. Report of Simon H. Rifkind, Special Master 254-66 at 265-66 (Dec. 5, 1960). The Court approved application of the PIA standard in that case because the parties had agreed that reserved rights could be used for purposes other than agriculture. *See Arizona v. California*, 439 U.S. 419 (1979).

<sup>39</sup> *In re Big Horn*, 753 P.2d at 100-01.

<sup>40</sup> *Id.* at 101.

<sup>41</sup> *Wyoming v. United States*, 492 U.S. 406 (1989).

<sup>42</sup> *Id.*

<sup>43</sup> *In re Gila River*, 35 P.3d at 77-79.

<sup>44</sup> *Id.* at 78 (internal quotations omitted).

federal and private willingness to invest money, is simply no longer economically feasible in the West.”<sup>45</sup> The court instead offered a number of potential factors for consideration in the quantification: 1) the tribe’s history of and cultural need for water; 2) the nature of the land and associated resources of the reservation; 3) the tribe’s economic status and the proposed economic development to the extent that they involve a need for water; 4) historic reliance of the tribe on water for the proposed purpose; and 5) the tribe’s current and projected population.<sup>46</sup>

## **Adjudication of Indian Reserved Water Rights**

Indian reserved water rights are subject to adjudication by federal and state courts. Federal courts have historically been authorized via federal question jurisdiction to determine Indian reserved water rights under the *Winters* doctrine. In 1952, however, Congress enacted an appropriations rider known as the McCarran Amendment that waived federal sovereign immunity in specified forms of water adjudications. Although the language does not explicitly mention Indian water rights, the McCarran Amendment gives consent to join the federal government in state lawsuits regarding adjudication of water rights in river systems and the administration of those rights.<sup>47</sup>

The Supreme Court has held that the McCarran Amendment allows state courts to adjudicate Indian reserved water rights.<sup>48</sup> As a result, the McCarran Amendment has had a significant effect on Indian water law. As evidenced in the varying outcomes of decisions related to the scope and quantification of Indian reserved water rights, the states have not interpreted the requirements of *Winters* uniformly, adding to the complexity of determining a tribe’s reserved water rights.

The grant of state jurisdiction over the adjudication of Indian reserved water rights has resulted in a contentious debate over the appropriate forum for such claims.<sup>49</sup> The Court has explained that Congress’ enactment of the McCarran Amendment indicated a policy supporting “the availability of comprehensive state systems for adjudication of water rights” and noted that concurrent federal proceedings may lead to duplicative and possibly contradictory judgments.<sup>50</sup> However, concerns exist regarding the expansion of jurisdiction over federal water rights to state courts. Tribes have long considered state courts to be hostile, and the prospect of having those same courts adjudicate Indian reserved water rights has been one of the primary motivations for pursuing negotiated settlements.<sup>51</sup> Also, some have questioned the ability of state trial courts to adjudicate Indian water law issues, which often involve complicated federal legal issues.<sup>52</sup>

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 79-81.

<sup>47</sup> 43 U.S.C. § 666.

<sup>48</sup> *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 809-11 (1976). *See also* *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 566-69 (1983).

<sup>49</sup> *See* Stephen M. Feldman, *The Supreme Court’s New Sovereign Immunity Doctrine and the McCarran Amendment: Toward Ending State Adjudication of Indian Water Rights*, 18 Harv. Envtl. L. Rev. 433 (1994).

<sup>50</sup> *Colorado River Water Conservation District*, 424 U.S. at 819.

<sup>51</sup> *See* Daniel McCool, *Native Waters: Contemporary Indian Water Settlements and the Second Treaty Era 75-76* (2002).

<sup>52</sup> *See* Feldman, *supra* note 49.

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