

CALIFORNIA TRIBAL WATER RIGHTS

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Water rights in California have a long and complicated history. The interplay between state water law and tribal water rights is especially complex in California for several reasons.

First, while other western states operate under a prior appropriation system, California maintains a system of both property-based rights and prior appropriation rights.¹

Second, over 100 federally-recognized Indian tribes are located in California – by far, more tribes than in any other state. As discussed herein, a tribe’s individual history plays an important role in defining their water rights, thus requiring a review of each tribe’s history in order to accurately quantify each tribe’s rights. No historical reviews have been completed for the majority of California Indian tribes.

Third, California contains over 300 individual Indian allotments, located both on reservations and in the public domain. Each of these requires its own historical review, but to date there have been nearly zero reviews of individual allotments.

California Water Rights System: A Brief Overview

California water law is unique from most other states in that California maintains a “hybrid” water rights system, recognizing both property-based water rights and water rights not tied to land ownership.² Property-based rights (“riparian rights”) are the rights of a landowner whose land either touches a waterway or overlies the water. The California Constitution requires that all water use in the state be “reasonable,” including use of riparian rights. Thus, riparian rights are shared (“correlative”) among upstream and downstream landowners with no consideration given for prior use.

In addition to the riparian rights doctrine, California also utilizes a doctrine of prior appropriation which provides for water rights not tied to land ownership. Appropriative rights are quantified and operate under a priority system – “first in time, first in right” over other appropriative users (not, as discussed below, over riparian users). In essence, they belong to anyone who first puts water to a specific “beneficial use,” a term which has been very broadly

¹ California Water Code § 1200 et seq.

² *People v. Shirokow*, 26 Cal.3d 301, 307 (1980).

defined in the California Code of Regulations and has also been left open to further interpretation by the State Water Resources Control Board.³ Appropriative water rights remain valid so long as the water continues to be “beneficially” used.

Riparian rights are typically superior to prior appropriative rights. In dry times, a riparian landowner may take all of the water to which he or she is reasonably entitled before an appropriative user may take their share.⁴ In other words, riparian users in dry times must share their losses in equal proportion with other riparian users, but take precedence over appropriative users. However, this superiority is subject to the California Constitution’s requirement of reasonable use.

Tribal Water Rights

Federally reserved waters on Indian reservations are governed by the *Winters* doctrine, which has evolved over more than a century in federal courts, and since 1955 in state courts as well. Two landmark U.S. Supreme Court cases, *Winters v. U.S.*⁵ and *U.S. v. Rio Grande Dam & Irrigation Co.*,⁶ established several key principles: 1) federally reserved lands have a right to use sufficient water to fulfill the “primary purpose” of the reservation, and 2) these water rights cannot be destroyed by state water law or by water users acting in accordance with state law.

Evaluation of a tribe’s water rights requires a determination of two factors – the date on which the land became federally reserved (the “priority date”), and the amount of water needed to fulfill the “primary purpose” for which the land was federally reserved.

Priority Date of Reserved Rights

Federally reserved water rights have priority over all other water rights dating from the time when the reservation was first created.⁷ In California, where there are no treaty tribes⁸, the

³ 23 CCR § 659 et seq.

⁴ *United States v. State Water Resources Control Board*, 182 Cal.App.3d 82, 101-102 (1986).

⁵ *Winters v. United States*, 207 U.S. 564 (1908).

⁶ *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690 (1899).

⁷ *Winters*, 207 U.S. at 577.

⁸ In 1851-1852, federal agents negotiated treaties with one-third to one-half of all California tribes. These treaties would have set aside approximately 8% of the state’s acreage for California tribes, provided federal recognition of those tribes, and provided assistance with transition to an agrarian lifestyle. At the same time, Congress passed the Land Claims Act of 1851, providing that all lands in California would pass into the public domain unless claimed within two (2) years. Under pressure from California statesmen, Congress failed to ratify the negotiated treaties and secretly sealed them away without informing the tribes that they had not been ratified. Congress also failed to

“priority date” is usually the date of the executive order or statute which created the Indian tribe’s reservation. However, it is important to understand that the priority date in some cases is actually earlier than the creation of the reservation. For instance, the priority date of tribes whose reservation occupies land which was originally a military base, Indian boarding school, or other type of federal land is actually the date of creation of the military base, Indian boarding school, or other type of federal land. This is but one example of a situation where a careful examination of a tribe’s individual history is essential.

It is also important to understand that there is no requirement that the Indian people of a reservation actually used the water from the priority date. Unlike water rights under state law, federally reserved rights do not expire if the water is not used.⁹ As a result, Indian tribes may decide to use their water rights later than other users and still have a senior right to sufficient water for the purposes of their reservation. Only landowners who have made continuous beneficial use of water since before the priority date will have a right senior to that of the tribe. In practical terms this means that, once asserted, tribal water rights can have a significant impact on the quantity of water available to non-Indians both in the present and in the future.

Primary Purpose and Quantification

The U.S. Supreme Court has limited the federal government’s ability to reserve tribal water rights to no more than the quantity of water necessary to fulfill the “primary purpose” of the reservation.^{10, 11} Thus, an examination of the purpose for which the land was federally reserved is crucial. With over 100 federally recognized Indian tribes in California, making a determination as to the primary purpose for each reservation is a daunting but necessary task in order to quantify the associated reserved water rights.

In recognition of the importance of finality in water adjudications, the U.S. Supreme Court has found that tribal water rights must be quantified for both present and future uses. The

inform the tribes that they would lose unclaimed lands within two years under the Land Claims Act. As a result of these highly questionable actions, most California tribes lost their land, and as a result also lost their tribal cohesiveness and ability to govern. Many of the tribes who agreed to these unratified treaties have still not been acknowledged by the federal government. Source: The Advisory Council on California Indian Policy (ACCIP). Recognition Report – Equal Justice for California. Washington, D.C.: The Council, submitted to Congress September 1997, pp. 10-11.

⁹ Felix Cohen, *Cohen’s Handbook of Federal Indian Law*, 1169 (Nell Jessup Newton 5th ed., LexisNexis Mathew Bender 2005) (1941).

¹⁰ *Cappaert v. United States*, 426 U.S. 128, 141 (1976).

¹¹ *United States v. New Mexico*, 438 U.S. 696, 702 (1978).

method most commonly used is the “practicably irrigable acreage” (PIA) method. The PIA method quantifies the amount of water needed to irrigate arable lands on the reservation.¹² The weight of authority holds that federally reserved rights include both groundwater and surface water.^{13, 14} The federal McCarran Amendment¹⁵ provides for a limited waiver of sovereign immunity so that the United States, as trustee of tribal resources, can be joined in state general stream adjudications to determine tribal water rights.¹⁶

Together, a tribe’s priority date and primary purpose quantity must be used to determine the tribe’s water rights. This mechanism allows states to permanently quantify tribal water rights, and to allow for informed planning by providing certainty in the allocation of limited water resources.

Individual Indian Allotments

Allotments made to individual Indian persons can be divided into two categories – first, lands on Indian reservations which were allotted to individual members of federally-recognized tribes under the General Allotment Act of 1887 (“Dawes Act”); second, lands on the public domain which were allotted to individual members of both federally-recognized and non-federally-recognized tribes.

One of Congress’ intentions in passing the Dawes Act was to encourage Indian persons to adopt an agricultural lifestyle. Both the Dawes Act and the U.S. Supreme Court have recognized that on-reservation allotments are entitled to a proportional share of a tribe’s federally reserved water rights.^{17, 18} Thus, individual allotments located on a reservation must be included in the total acreage used when calculating a tribe’s PIA.

Public domain allotments located off of Indian reservations are subject to the same principles as Dawes Act allotments and other federally reserved lands with respect to water

¹² *Arizona v. California*, 373 U.S. 546 (1963).

¹³ *Cappaert*, 426 U.S. at 143.

¹⁴ *In re General Adjudication of All Rights to Use Water in Gila River System and Source*, 195 Ariz. 411 (1999).

¹⁵ 43 U.S.C. § 666.

¹⁶ *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 819 (1976).

¹⁷ 25 U.S.C. § 381.

¹⁸ *United States v. Powers*, 305 U.S. 527, 532 (1939); see also *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 50 (9th Cir.), cert. denied, 454 U.S. 1092 (1981); *United States v. Ahtanum Irrigation District*, 236 F.2d 321, 342 (9th Cir. 1956), cert. denied, 352 U.S. 988; *United States v. Adair*, 478 F. Supp. 336, 346 (D. Or. 1979) (These cases so holding rely primarily on Section 7 of the General Allotment Act, 25 U.S.C. § 381).

rights.^{19, 20} That is, the water rights attached to a public domain allotment are determined by application of the priority date and the primary purpose as discussed above.

Conclusion

In general, California's water allocation plan does not account for tribal water rights which have not yet been quantified. The exact count of tribes whose water rights have been accurately quantified is unclear, but what is clear is that the tally is far below the total number of federally-recognized tribes in the state. Furthermore, there is no evidence to suggest that the water rights of any public domain allotment have been accurately quantified and incorporated into water allocations. Not properly accounting for reserved tribal water rights will inevitably limit the ability of public entities, businesses, tribal governments, and individual landowners to formulate reliable, long-term water usage plans.

¹⁹ 25 U.S.C. § 334.

²⁰ *United States v. Jackson*, 280 U.S. 183, 196 (1930).