OVERVIEW OF INDIAN WATER RIGHTS

Susan M. Williams
Partner
Gover, Stetson & Williams, P.C.

In the American West, a right to use water is regulated by state laws founded on the principle of "first in time, first in right." In times of water shortage, the oldest water right is satisfied in full before junior water rights are satisfied. In the East, a right to use water is governed by the state common law-based riparian system, in which water runs with land ownership. In addition to these state water rights, the United States Supreme Court long has recognized that federal and Indian water rights also exist and must be satisfied in the water priority system.

Federal Indian water rights are defined and governed by a body of federal law that recognizes that Indian tribes have unique property and sovereignty rights in the water on their reservations. Generally, the Supreme Court has upheld tribal government jurisdiction over both tribal members and activities on the Indian reservations. And, within the last twenty years, tribes increasingly are quantifying and using their federal water rights, subject to tribal and federal laws governing the regulation of the water. Because Indian reservations were established before most water uses began in the west, tribes often hold the oldest and, thus, most valuable water rights. Indians have occupied land since time immemorial and thus also have strong ancient priority claims to water for tribal uses. The courts examine what water was reserved for use on the Indian reservations, how tribal water rights are quantified and used, and how these water rights are regulated and enforced. Because of the great value of federal Indian water rights in homes of increasing water scarcity, Indian water rights are under attack in the courts and in political arenas. The lone doctrines of Indian water law, however, likely will remain undisturbed.

RESERVATION

Federal Indian water rights are substantively governed by federal law. *Cappaert v. United States*, 426 U.S. 128 (1976); *In re General Adjudication of All Rights to Use Water in Big Horn River System*, 753 P.2d 76 (Wyo. 1988), *aff'd by split decision*, 492 U.S. 406, *reh'g denied*, 492 U.S. 938, *cert. denied*, 492 U.S. 926 (1989) ("*Big Horn I*"). Three species of federal Indian water rights exist: aboriginal, Pueblo, and Winters rights.

Federal water rights for lands that tribes have occupied since time immemorial are accorded a priority date of time immemorial and are known as aboriginal water rights. *United States v. Klamath & Moadoc Tribes*, 304 U.S. 119 (1938); *United States v. Adair*, 723 F.2d 1394, 1410 (9th Cir.1983), *cert. denied*, 467 U.S. 1252 (1983) ("Adair"). New Mexico Pueblo water rights also have early priority dates derived from Spanish land grants and the United States Treaty of Guadalupe Hidalgo with Mexico. For a full discussion of Pueblo water rights, *see*, Charles T. DuMars, *et al.*, *Pueblo Indian Water Rights*, (1984).

Most federal Indian water rights are based on *Winters v. United States*, 207 U.S. 564 (1908) ("*Winters*"). In agreeing with the federal government to the creation of reservations, the tribes agreed to vast land cessions in return for guarantees that certain lands would be permanently reserved for Indian use and occupation. The tribes reserved to themselves every incident of ownership and, implicitly, sovereignty not expressly relinquished to the federal government or unequivocally abrogated by the federal government. *United States v. Winans*, 198 U.S. 371, 381 (1905). In *Winters*, the Supreme Court held that when Indian reservations were established, the tribes and the United States implicitly reserved, along with the land, sufficient water to fulfill the purposes of the reservations. In reaching this decision, the Court reasoned:

> The Indians had a command of the lands and the waters--command of all their beneficial use, whether kept for hunting, "and stock," or turned to agriculture and the art of civilization. Did they give up all this? Did they reduce the area of their occupation and give up their water which made it valuable or adequate?

Winters at 576.

Some courts have held that non-Indians who purchase former Indian allotment lands pursuant to the general

Allotment Act acquire the right to use whatever federal water right the Indian allotment had, with the same priority date as the reservation. Indian lands held in trust by the United States for individual Indians, known as allotments, are entitled to use a reasonable share of any tribal water right computed on the basis of agricultural purposes. *See* Getches, *Water Rights on Indian Allotments*, 26 S.D.L. Rev. 405 (1981). To ensure that federal Indian water is used primarily for the benefit of the tribes, special rules apply to the use by non-Indians of tribal *Winters* water rights on former allotments. *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 52 (9th Cir.), *cert. denied*, 454 U.S. 1092 (1981) ("*Walton*").

QUANTIFICATION AND SCOPE OF USE

Indian water rights, although created and vested as of the date of the reservation, are not quantified unless litigation or congressional action has determined the size of the right. The federal McCarran Amendment, 43 U.S.C. § 666, waives the United States' sovereign immunity from suit for purposes of adjudicating Indian water rights in state court general stream adjudications. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). *Winters* water rights have been found to exist for a variety of purposes including agricultural, *Big Horn I*; fisheries, *Adair*; and general homeland purposes, *Adair*.

Although in *Big Horn I*, the first state general stream adjudication to reach the United States Supreme Court, the Court found that the tribes were not entitled to a reserved right for groundwater, as compared with surface water. However, a number of other cases that have addressed the matter more directly and comprehensively have found that tribal *Winter's* rights may be satisfied from both surface and groundwater. *New Mexico v. Aamodt*, 537 F.2d 1102 (10th Cir. 1976), *cert. denied*, 429 U.S. 1121 (1977). Satisfaction of *Winters* rights from either groundwater or surface water is logical, as most surface and groundwater is interrelated.

The United States Supreme Court has recognized that to achieve the important goal of finality in water adjudications, Indian water rights must be quantified for both present and future uses. The most commonly used method for quantifying Indian water rights is the practicably irrigable acreage ("PIA") method. The PIA method quantifies the amount of water needed to irrigate arable lands on the reservation. *Arizona v. California*, 373 U.S. 546 1963, *decree entered*, 376 U.S. 340 (1964); *Big Horn I*.

Importantly, once quantified on the basis of particular purposes, tribes can dedicate the use of their reserved water for uses other than the purpose upon which the right was quantified. *See Arizona v. California*, *supra*; Memo Sol. Int., Feb. 1, 1964, *reprinted* in 2 *Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs*, 1917-1974, at 1930 (Washington: Government Printing Office, n.d.). Thus, PIA and other quantification methods are a basis for quantifying but not restricting the use of the *Winters* rights.

In some instances, tribes are awarded water based on future need, but the tribes have no present use for the water. In these circumstances, tribes have sought to lease their water to non-tribal users to create needed tribal income. Congress in several instances has expressly authorized such leases, and some case law supports tribal rights to lease their water for non-tribal use, especially on the reservations. The federal Non-Intercourse Acts, however, require congressional permission for Indian property interests to be alienated even on a temporary or lease basis. Indian rights to lease their *Winters* water have proven quite controversial in the water-scarce western states, because non-Indian junior water users have become accustomed to using Indian water for free.

ADMINISTRATION

A debate continues regarding which sovereign has jurisdiction over water use on the reservations, where there exist state, federal, and tribal concerns or any combination thereof. In *Walton*, the Tribe was held to have jurisdiction over Indian reserved and Walton rights to the exclusion of the state. In *Big Horn I*, the court established a seemingly dual administration scheme that appears to be under judicial supervision, where the Tribes administer tribal water rights and the state monitors non-Indian on-reservation water rights.

Some courts are wary of tribal administration over non-Indians in certain factual settings where non-Indians are the majority in the specific area in question. *See Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989) (Yakima Nation did not have authority to zone fee land areas owned in significant part by nonmembers, but had authority to regulate areas owned by Indians). On the other hand, in *Walton*, 647 F.2d at 52, the court expressly recognized important tribal interests in regulating both Indian and non-Indian water use on the reservation.

Tribes contend that they have regulatory authority over water use by non-Indian successors-in-interest to allottees, or *Walton* rights holders, because of basic principles of tribal sovereignty in matters that directly affect the tribes' welfare, and because the non-Indians have entered into a consensual relationship with the tribes to share in the use of the Tribe's treaty-based water. *Walton*, 647 F.2d at 52; *Montana v. United States*, 450 U.S. 544, 565-66 (1981). Also, the treaty-based water right derives from the Tribes' ownership and has never been abrogated. The United States Supreme Court long has confirmed tribal sovereignty in instances such as these. Reservation water use and quality regulation by tribes, and not states, is essential to protecting the significant interests tribes have in reservation water resources. Principles of sound water regulation compel tribal regulation of all users along a river, not just Indian users. Tribes have special congressional mandates supporting tribal regulation of water quality on the reservation. *See* Public Health Service Act, 42 U.S.C.A. §§ 300f-300j-26 (Safe Drinking Water Act); Federal Water Pollution Control Act, 33 U.S.C.A. §§ 1251-1387 (Clean Water Act).