

## **CALIFORNIA/TRIBAL WATER RIGHTS**

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.<sup>1</sup>

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.<sup>2</sup> Property-based rights (“riparian rights”) is 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 defined in the California Code of Regulations and has also been left open to further interpretation by the State Water Resources Control Board.<sup>3</sup> 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.<sup>4</sup> 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.*<sup>5</sup> and *U.S. v. Rio Grande Dam & Irrigation Co.*,<sup>6</sup> 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.<sup>7</sup> In California, where there are no treaty tribes<sup>8</sup>, the 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.<sup>9</sup> 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.<sup>10, 11</sup> 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 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. The weight of authority holds that federally reserved rights include both groundwater and surface water. The federal McCarran Amendment 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.

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. 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 rights. 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.

## Ten Tribes Partnership:

There are 29 Tribes with reservations within the Seven Colorado River Basin States with vested water rights in excess of 2,900,000 acre feet to the Colorado River. Typically, those tribes have senior water rights on the river.

The tribes were not included in the 1922 Colorado River Compact, which allocated water between the Upper and Lower Basins, but Congress expressly provided that nothing in the 1922 compact would affect the United States' obligation to the tribes. According to Hoover Dam documents, then-Secretary of Commerce Herbert Hoover, on behalf of the United States, commented that the provision relating to the obligation of the United States was inserted in the compact as "merely a declaration that the states, in entering into the agreement, disclaim any intention of affecting the performance of any obligations owing by the United States to Indians. It is presumed that the states have no power to disturb these relations, and it was thought wise to declare that no such result was intended.

The Hoover Dam documents also reveal that Utah's position was that the 1922 compact was designed so that the "rights of Indian Tribes are protected" and Wyoming read the 1922 compact provision relating to Indian Tribes as "advisable by reason of the fact that the United States has heretofore entered into certain treaties with the different Indian Tribes that must be respected and can in no manner be affected by any later agreement."

The use of Colorado River water by Indian tribes and tribal members began well before the 1922 compact. Since time immemorial, tribal members have made use of the river's floods to irrigate bottom lands. Congress recognized the importance of irrigated agriculture to the tribes of the Colorado River as early as 1867 when it authorized the expenditure of \$50,000.00 to construct an irrigation canal on the Colorado River Indian Reservation, making this the first federally funded irrigation project in the United States. Legislation also was enacted in 1904 authorizing the United States to utilize new reclamation policies to expand irrigation on the Fort Yuma and Colorado River Indian reservations.

In the years since the 1922 compact, both the United States and the Tribes have continued to increase their presence with regard to the Colorado River. Congress authorized Parker Dam and Reservoir, built in the mid-1930s, to provide water to Southern California via the Colorado River Aqueduct and also to provide water for expanded irrigation of the Colorado River reservations, as well as to control floods, improve navigation, regulate river flows, provide storage, and generate electricity and other beneficial uses. Congress authorized the taking of as much of the "tribal and allotted lands of the ... Chemehuevi Reservation in California" as was necessary for the construction of Parker Dam. All of the fertile bottom lands of the Chemehuevi Reservation were condemned and all of the Indian residents of the reservation were dispossessed of their land and relocated off the reservation in order to construct the dam and create Lake Havasu. In the 1940s, Congress also authorized the Head gate Dam, again for river stabilization and the delivery of additional waters to the Colorado River Reservation. The next significant involvement by the United States in the Indian waters of the Colorado River occurred in the 1963 proceedings of *Arizona vs. California* in the United States Supreme Court.

This litigation was prompted by Arizona's need for a determination of its share of water from the Colorado River in order to obtain federal appropriations for the Central Arizona Project. Numerous issues arose among the southwestern states, the tribes and the federal government concerning the allocation of Colorado River water. The United States intervened to assert, among other things, the reserved water rights of the five Indian reservations on the lower reaches of the mainstream of the Colorado River; the Fort Mojave Indian Tribe, the Chemehuevi Indian Tribe, the Colorado River Indian Tribes, the Quechan Indian Tribe of the Fort Yuma Reservation and the Cocopah Indian Community.

In *Arizona vs. California*, the U.S. Supreme Court found that the Secretary of the Interior had a statutory duty to respect the "present perfected rights" as of the date of Boulder Canyon Project Act was passed and that the water rights of the five Indian reservations were included in those "present perfected rights" entitled to priority. In addition, *Arizona vs. California* established the standard for quantifying those reserved water rights that those five tribes are entitled to for agricultural purposes. In addition to confirming substantial water rights for the Fort Mojave Indian Tribe, the Chemehuevi Indian Tribe, the Colorado River Indian Tribes, the Quechan Indian Tribe and the Cocopah Indian Community, the Court's decision brought into sharp focus the importance of tribal reserved water rights in the West.

Since then United States and Tribes have begun the process of securing reserved water rights for the other tribes in the Colorado River Basin. Each of these actions has been designed to quantify Colorado River water rights and to provide the tribes with economic resources so as to permit development of their reservations, including development of their water resources. For example, in 1962 Congress authorized the Navajo Indian Irrigation Project (NIIP) and, at the same time, the San Juan-Chama Project. And in 2009, by the Act of March 30th, 2009, P. L. 111-11,123 Stat. 991 approved the Navajo Nation's settlement of its San Juan River water rights that it reached with the State of New Mexico and the United States.

In 1988, Congress enacted the Colorado Ute Settlement Act, which quantified all of the water rights of the Southern Ute Indian Tribe and the Ute Mountain Ute Indian Tribe. Some of those water rights are in direct stream flow and others in storage projects such as the Pine River Project and the Dolores Project. For example, under the Dolores Project, the Ute Mountain Ute Tribe is developing 22,500 acre-feet for the irrigation of agriculture.

A critical component of the Colorado Ute Indian settlement is the construction of the Animas-La Plata project to, among other things, provide water supplies for both tribes for irrigation and municipal and industrial purposes. Under the settlement, each tribe received a development fund to assist in reviving their impoverished economies.

In 1992, Congress enacted the Jicarilla Apache Tribe Water Rights Settlement Act. This settlement, like the Colorado Ute Indian settlement, represents a full and final settlement of the future use water rights claims of the Jicarilla Apache Tribe to the waters of the Colorado River. Under the Jicarilla Apache settlement, the Secretary of the Interior is to make available to the tribe up to 32,000 acre-feet per year depletion from the Navajo Reservoir, Navajo River and San Juan-Chama Project. This water, like waters secured to the Colorado Ute Indians, may be used for a variety of purposes including

leasing of water that is otherwise compatible with applicable law. The Jicarilla Apache Tribe was provided with a development fund in recognition of historic claims against the United States and others for use in strengthening its reservation economy.

The 1992 Ute Indian settlement provided the Northern Ute Tribe with a substantial development fund to compensate for the failure of the federal government to complete Central Utah Project storage facilities for the Northern Ute Tribe. The act provides substantial economic benefits to the tribe in an effort to place it on the same footing that it would have enjoyed had there been construction of the facilities contemplated in the 1985 deferred agreement which permitted construction of the Strawberry collection system of the Bonneville unit. The act also provides Congress' consent to the 1990 Ute Water Compact, which quantifies the tribe's reserved water right. The act recognizes that the compact also must be approved by the tribe and the state of Utah, neither of which has done so.

These actions carry forward the United States' trustee obligation to assist the tribes of the Colorado River in fully developing their resources. The tribes believe that is the meaning of the phrase in the 1922 compact, "...nothing in this compact shall affect the obligations of the United States to the Indian tribes."

In 1992, the Ten Tribes formed the Colorado River Basin Tribes Partnership for the purpose of strengthening tribal influence over the management and utilization of Colorado River water resources. This led to active participation by the Partnership in negotiations with the seven states and, during 1996, the Ten Tribes Partnership formally joined the Colorado River Water Users Association, with three of its members serving on the CRWUA board of trustees. There are ten tribes comprising the Colorado River Basin Tribes Partnership: the Chemehuevi Indian Tribe; the Cocopah Indian Community; the Colorado River Indian Tribes; the Fort Mojave Indian Tribe; the Jicarilla Apache Tribe; the Navajo Nation; the Northern Ute Tribe; the Quechan Indian Tribe of the Fort Yuma Reservation; the Southern Ute Indian Tribe; and the Ute Mountain Ute Indian Tribe.

Since 1992, the Ten Tribes have worked with the seven basin states, the United States, and CRWUA to develop and promote solutions to areas of mutual concern. A major area of coordination of state and tribal efforts concerns the impact caused by the federal implementation of the Endangered Species Act on the use of Colorado River water rights. In addition, the tribes have actively participated in the ongoing business of CRWUA, serving on various committees and assisting in the development of CRWUA resolutions.

The Ten Tribes believe the future management of Colorado River water resources will necessarily involve changes in policy and use that will be significantly different from past practices. As demand increases, members say, the need for greater flexibility in expanding the economic uses of the water supplies will require new ways of using this unique and valuable resource by all the parties on the river. The tribes believe that their involvement in CRWUA, one of the most respected water users organizations in the Colorado River Basin, will assure a more beneficial and profitable utilization of Colorado River water resources for all parties.