

# The doctrine of reserved water rights.

## What Are Federal and Tribal Reserved Water Rights?

The doctrine of reserved water rights evolved to ensure that Indian reservations and public lands set aside by the federal government would have sufficient water to fulfill the purposes for which they were established. Whereas most western water rights (state-based appropriative rights) have a priority date based on when water was first put to beneficial use, federal reserved water rights have a priority date that goes back at least as far as the date on which the lands were set aside.

The reserved water rights doctrine is rooted in a number of judicial decisions, beginning with a U.S. Supreme Court decision that has come to be called the Winters Doctrine. The case of *Winters vs United States* involved a dispute between Native Americans of the Ft. Belknap Reservation and nonnative settlers over the use of the Milk River in Montana. When the water use of the settlers upstream from the reservation interfered with the Indians' water need for large Irrigation diversions, the U.S. government filed a lawsuit on the reservation's behalf.

*The Winters* decision held that when Congress created the Ft. Belknap Reservation, sufficient water to make the Indians a "pastoral and civilized People" was implicitly set aside. Therefore, although the normative settlers had perfected their water rights under Montana state law, the water right of the Indians of Ft. Belknap was prior, or senior in use.

The rationale used in the *Winters* decision on behalf of Native Americans also applies to public lands held by the federal government for national parks, wildlife refuges, national forests, military bases, wilderness areas, or other Public purposes. It holds that when Congress authorized the establishment of federal land, it implicitly intended to reserve enough water to fulfill congressional purposes. Subsequent judicial decisions authorize federal reserved water rights on lands set aside by statute, treaty, or executive order. They are defined by the documents that set the land aside (treaty, executive order, statute) and recognized within individual states by negotiation or litigation.

Unlike state rights under prior appropriation systems, federal reserved water rights may remain unused for many years, they are not subject to abandonment or relinquishment. This fact generates much concern on the part of state water administrators and water rights holders who fear that existing water allocation regimes will be disrupted once reserved rights are exercised.

Regardless of the uncertainty such reserved rights create, states cannot prevent the eventual exercise of these federal property rights in water. Federal reserved rights are limited to the purposes of the reservation of land and to quantities sufficient to fulfill these purposes. A federal case, *United States vs. New Mexico*, ruled that when

quantifying federal reserved rights, quantities are limited to the minimum amount necessary to fulfill the purposes for which the land was set aside.

Reserved water rights can be quantified in several ways. The most common method is adjudication. For Indian water rights, one mechanism is the practicably irrigable acreage (PIA) standard. Developed in another lawsuit (*Arizona v. California*), PIA is determined by examining soil characteristics, hydrology, engineering, and economics to determine the quantity of water associated with a federal reserved water right. Irrigable lands would also be identified, and the physical and financial feasibility of building water delivery systems would be established.

Another way to determine water quantities involved in a reserved water right is through a negotiated agreement. For example, Montana established a Reserved Water Rights Compact Commission to negotiate federal and tribal reserved water rights. Several compacts have been negotiated: with the Ft. Peck Reservation, with the Northern Cheyenne Reservation, and with the National Park Service for Glacier and Yellowstone National Parks. The states of Colorado, Arizona, California, and Utah have also reached reserved water rights agreements through negotiation. Tribal-State Compacts often require a federal settlement act from Congress to fund and fulfill the agreement.

Once reserved water rights have been quantified, such rights may be used for purposes different from those for which they were quantified. For example, the Native American tribes along the Colorado River may choose to change the use of their reserved water right which was quantified for agricultural use-to Industrial use. Federal approval is often required before a Tribe can change uses or lease reserved water.