

INDIAN TREATY WATER RIGHTS



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

- Congress impliedly reserved water sufficient to make the land valuable
- The priority date is the date of the reservation
- The intent of Congress for the purpose of the reservation is determined as of the date of the treaty, not based on later developments (federal rule; *contra*, In re General Adjudication of All Rights to Use Water in Gila River System & Source, 35 P.2d 68 (Ariz. 2001), which looks to a “Homeland” purpose)

- Winters reserved rights include surface water
 - Winters v. United States, 207 U.S. 564 (1908)
- Winters reserved rights also extend to groundwater
 - Cappaert v. United States, 426 U.S. 128, 142 (1976)

“No cases of this Court have applied the doctrine of implied reservation of water rights to groundwater.”
 - United States and Lummi Indian Nation v. Ecology, 375 F.Supp.2d 1050, 1058 (2005)

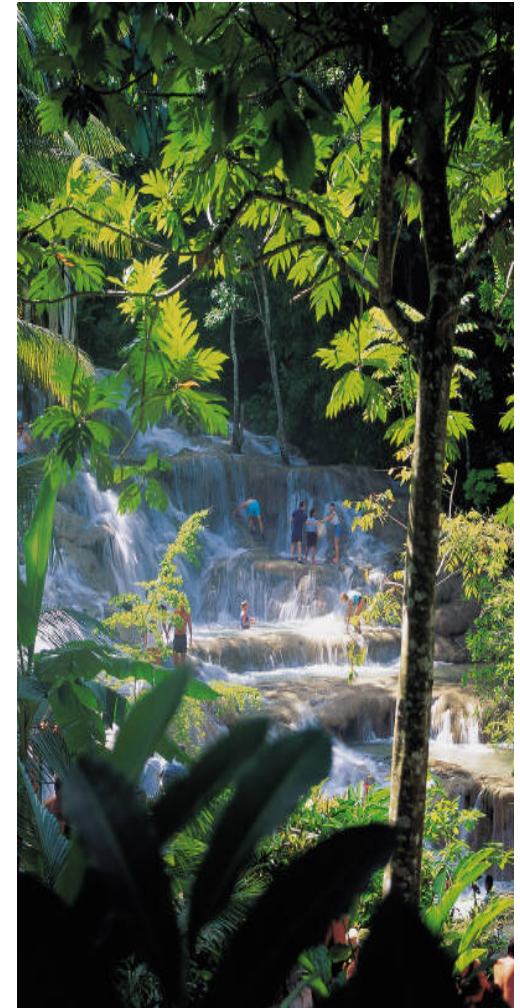
“Reserved Winters rights on the Lummi Reservation extend to groundwater....”

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

- Look to the purpose of the reservation to quantify the right
- Estimates of future population are unreliable (“How many Indians there will be and what their future needs will be can only be guessed.”)
- For an agricultural purpose, practicable irrigable acreage (PIA) is the measure
- Look to economics at time the quantification is determined (most valuable crops, most cost effective irrigation methods, etc.)

Arizona v. California (cont.)

- Once quantified by PIA, the water may be used for any purpose
- The water right vests at the date of the treaty, not when water is actually first put to use
- The water right is not lost by non-use when in the hands of the tribe or its members



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

- Water rights are reserved only for the primary purposes of a reservation
- Water for secondary purposes must be obtained through the state process
- The amount reserved is only “that amount of water necessary to fulfill the purpose of the reservation, no more....”

NOTE: this case did not involve an Indian reservation, but the Gila National Forest

United States v. Preston, 353 F.2d 353 (1965)

- A tribal member owns a portion of the reserved water for the reservation the minute that the reservation is created
- The tribal member's share becomes appurtenant to his land the minute he acquires an allotment of land



Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir. 1981) (Walton II)

- Water is reserved only for the primary purpose(s) of a reservation, not for secondary purposes
- Federal reserved rights for consumptive purposes transfer with the land when the land is sold, including sale to a non-member of the reservation

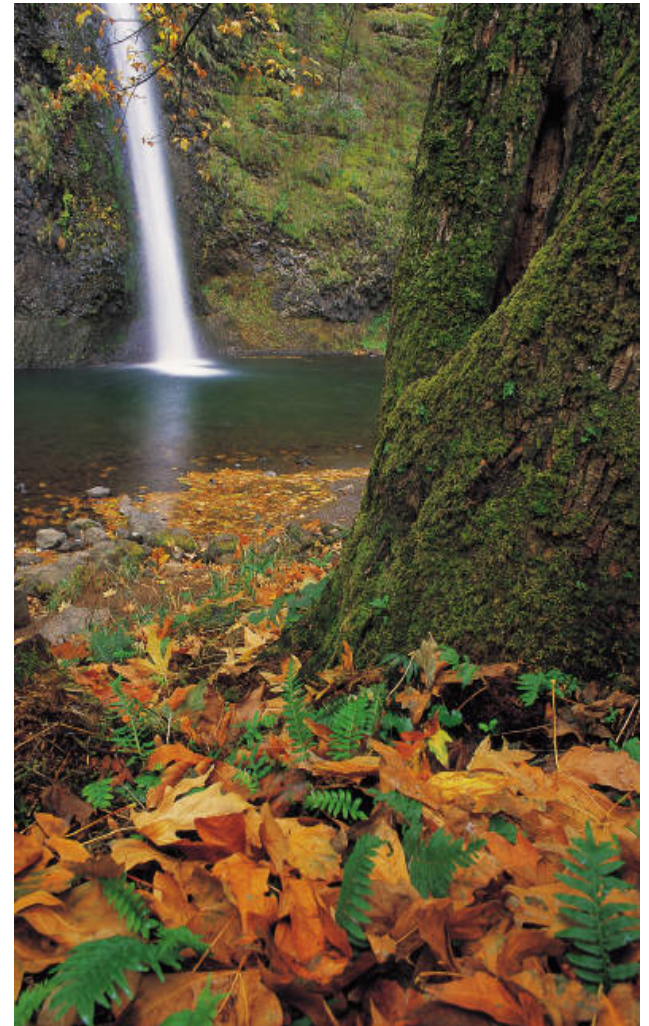


Colville Confederated Tribes v. Walton (cont.)

- An Indian owner's right to transfer a portion of the reserved water right for consumptive purposes is necessary to avoid a diminishment of the treaty right
- A non-member's right to water is changed from a present perfected right in the hands of the Indian member to an inchoate right that must be perfected (water put to beneficial use) within a reasonable time or it will be lost

United States v. Anderson, 736 F.2d 1358 (9th Cir. 1984)

- If a tribe reacquires land from a non-member, it acquires only the water rights that have not been lost by non-use



United States v. Adair, 723 F.2d 1394 (9th Cir. 1983)

- Reserved water rights for nonconsumptive purposes (e.g., hunting and fishing) belong to the tribe, and are not lost or diminished when the land is sold
- The tribe's nonconsumptive water rights are not transferable



US & Lummi Indian Nation v. Ecology, 375 F.Supp.2d 1070 (2005)

- Holds that Winters rights extend to groundwater
- Otherwise, follows federal case law cited above



US & Lummi Indian Nation v. Ecology (cont.)

- Rejects the US and Lummi contentions that:
 - all reserved water rights remain in the tribe's ownership, and only a limited right to use is transferred when the land is sold
 - when a water right is lost by non-use by a non-Lummi, the water right reverts back to the Lummi Nation
 - water is reserved for a broad "Homeland" purpose

US & Lummi Indian Nation v. Ecology (cont.)

- Leaves open whether water for population can be proved by population projections
- Currently in settlement negotiations: trial date of June 1, 2006 has been struck pending consent of principals to settlement negotiated by the attorneys

