Indian Reserved Rights and Groundwater

California Water Law - Recent Cases
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Does Indian reserved rights doctrine extend to groundwater?

- Trend in the courts is to answer “Yes.”

- “The Supreme Court has never expressly extended *Winters* to groundwater, but little, if any, doubt remains that Indian tribes have groundwater as well as surface water rights.” *Law of Water Rights and Resources* § 9:42.
Indian reserved rights

- Based on present and future necessity to fulfill the purposes of the reservation.

- Purposes of the reservation are broad and include to serve as a permanent homeland, “the home and abiding place of the Indians,” for “agriculture and arts of civilization,” “to develop, preserve, produce or sustain food and other resources of the reservation, to make it livable,” hunting and fishing.

- Priority date is establishment of reservation.

- Not lost by non-use.
**Winters v. United States, 207 U.S. 564 (1908)**

- Fort Belknap Reservation

- Water rights impliedly reserved when Reservation established in order to permit Indians to develop “agriculture and arts of civilization.” *Id.* at 576.

- “Did they [the Indians] reduce the area of their occupation and give up the waters which made it valuable or adequate?” *Id.* at 576. Court answered No.
Winters v. United States, 207 U.S. 564 (1908) (continued)

- Priority date is date of establishment of Reservation, not use.

- Courts enjoined present interference with uses the Indians planned to make.
Reserved rights implies for Indians “the waters without which their lands would have been useless,” in amounts necessary “to satisfy the future as well as the present needs of the Indian Reservations.” *Id.* at 600.

“It is impossible to believe that when Congress created the great Colorado River Indian Reservation and when the Executive Department of this Nation created the other reservations they were unaware that most of the lands were of the desert kind-hot, scorching sands-and that water from the river would be essential to the life of the Indian people and to the animals they hunted and the crops they raised.” *Id.* at 598-99.
Indian reserved rights applicable to executive order reservations. *Id.* at 598.

Decree included water drawn from the mainstream by underground pumping.
Cappaert v. United States, 426 U.S. 128, 143 (1976)

• “[W]hen the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators.” *Id.* at 138.

• “[S]ince the implied-reservation-of-water rights doctrine is based on the necessity of water for the purpose of the federal reservation,…the United States can protect its water from subsequent diversion, whether the diversion is of surface or groundwater.” *Id.* at 143.
Surface and groundwater are “integral parts of the hydroponic cycle” and lower court could enjoin the pumping of groundwater from adjacent land to protect surface water in underground pool at Devil’s Hole National Monument.
“[I]f the United States implicitly intended, when it established reservations, to reserve sufficient unappropriated water to meet the reservations’ needs, it must have intended that reservation of water to come from whatever particular sources each reservation had at hand. The significant question for the purpose of the reserved rights doctrine is not whether the water runs above or below the ground but whether it is necessary to accomplish the purpose of the reservation.” Id. at 419.

Federal reserved right to groundwater is greater than the rights of state appropriators, and “once a federal reservation establishes a reserved right to groundwater, it may invoke federal law to protect its groundwater from subsequent diversion to the extent such protection is necessary to fulfill its reserved right.” Id. at 422.
Deference to state law not a basis for declining to extend reserved rights doctrine to groundwater as “reserved rights doctrine [is] an exception to Congress’s deference to state water law.” *Id.* at 419 (citing *United States v. New Mexico*, 438 U.S. 696, 714 (1978)).

State law right to pump on equal basis with other users not a basis to deny extension of reserved rights to groundwater as it overlooks the superior and permanent nature of reserved rights. “A theoretical equal right to pump groundwater, in contrast to a reserved right, would not protect a federal reservation from a total future depletion of its underlying aquifer by off-reservation pumpers.” *Id.* at 420. “Some Indian reservations have been entirely “dewatered” by off-reservation pumping. . . .
"A reserved right to groundwater may only be found where other waters are inadequate to accomplish the purpose of a reservation." *Id.*

"[O]nce a federal reservation establishes a reserved right to groundwater, it may invoke federal law to protect its groundwater from subsequent diversion to the extent such protection is necessary to fulfill its reserved right." *Id.* at 422.
“[T]here is no distinction between surface water and groundwater for purposes of determining what water rights are reserved because those rights are necessary to the purpose of an Indian reservation.” *Id.* at 1098-99.

State permit could not be issued to pump groundwater on the Flathead Reservation until Tribes’ reserved rights were quantified.
Indian reserved rights extend to groundwater under the Lummi Reservation, whether or not connected to surface water.

Case settled. See 2007 WL 4190400
Noting the hydraulic connection between groundwater and surface water the court held that rights to pump groundwater could not be allocated to others if it interferes with Tribe’s decreed rights based on Indian reserved rights doctrine.
Indian reserved rights “extend to ground water as well as surface water.”
“The Pueblo water rights appurtenant to their lands are the surface waters of the stream systems and the ground water physically interrelated to the surface water as an integral part of the hydrologic cycle.”
United States entitled to reserved water right for the entire flow of artisan wells on public lands; court assumed “that the doctrine of federal reserved water rights applies to groundwater in the same way it does to surface water.” *Id.* at 95 n. 13.
“[T]he reserved water doctrine [sic] does not extend to groundwater” citing absence of prior case so deciding but finding “logic … supports reservation of groundwater.” Id. at 99-100.

Annual average almost a million acre feet of surface water, of which the Tribes received more than 500,000 acre feet, and groundwater uses were minimal and largely uncontested.
Water settlements have recognized tribes as having water rights to groundwater.


