

Overview of Water Rights and Tribal Strategies to Address the Drought

15th Annual Conference
California Indian Law Association
October 16, 2015
Jackson, CA

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Overview

- Historic California Drought and Critical Issues & Questions
- Overview of California Water Rights
 - Surface Water
 - Groundwater
- Overview of Winters Federally Reserved Water Rights
 - *Winters* Doctrine
 - Quantification of the Reserved Right
 - Application of *Winters* Rights to Groundwater
 - *Agua Caliente Band v. Coachella Valley Water District et al.*
- Potential Tribal Strategies

Historic California Drought

- Water years of 2012-14 stand as California's driest three consecutive years, and currently almost half of California is at exceptional drought conditions.
- Snowpack in the Sierra Nevada mountains lower than it has been for a 500 year period and rising average temperatures.
- Loss of groundwater. For example, from 2004 to 2013, the **Colorado River Basin estimated to have lost 53 million acre feet** (almost equal to the volume of Lake Mead) with more than **75%** of that loss **from groundwater**.
- Subsidence. Two main subsidence bowls in the San Joaquin Valley have been mapped. Subsidence of 37" near Corcoran between 2006-2010, and an additional 13" between May 2014 –January 2015.

Historic California Drought

- Population growth: estimated to increase from 38 million to 50 million by 2049
- Increased reliance on groundwater in drought up from 30% of State's water use to about 46%; some communities 100% reliant upon groundwater.
- Drought impacts to tribes (e.g. in May the IHS identified **10 tribal water systems at high risk due to drought** conditions); as of July a total of **nine tribes issued emergency proclamations** (includes tribes in north and central areas of the State).

State Actions Regarding Drought and Water Management

- Sustainable Groundwater Management Act
- Water Bond
- Mandatory Water Use Restrictions in the Governor's Executive Order B-29-15
- Groundwater and drought related bills signed in 2015
- Dialogue and consultation with tribes, local governments, and water management agencies

Critical Questions for Tribes

- What is the status of the water source? Paper water rights vs. actual wet water.
- What is the quality of the available water source?
- What are the Tribe's water rights (federally reserved water rights and water rights under state law)?
- What are the ongoing or potential impacts to the Tribe's water sources that may affect access and quality?
- What are the Tribe's immediate and long-term needs?
- What are the Tribe's immediate and long-term strategies?

California Surface Water System

California's Bifurcated Surface Water System blends the doctrines of riparian water rights and appropriative rights.

- **Riparian Doctrine:**
 - Rights **appurtenant to riparian property and run with the land**, and are not generally lost by non-use and no priority date
 - A right to a share of the water flowing past the property is available for a **reasonable and beneficial use**. Rights are generally unquantified
 - **Must be used on the riparian property**
 - Water is restricted from being dammed or contained
 - California recognizes the primacy of a landowner's share of riparian rights
 - **In times of shortage the riparian users must curtail their use proportionately among themselves**. But the system is self-reporting, and the efficacy of state attempts to limit riparian users in time of shortage is questionable.

California Surface Water System

- Prior Appropriation Doctrine
 - Appropriative rights do not attach to a particular parcel
 - Water may be diverted and used for a beneficial use on non-riparian parcels
 - For appropriative rights exercised after 1914, permission is required from the State Water Resources Control Board through a permitting process
 - Priority system based upon the date of initial diversion, know as the priority date. **Priority system” “First in time, first in right.”**
 - **In times of shortage the rights of junior water users are curtailed first.**

California's Groundwater System

Correlative Rights

- Courts have found that groundwater is subject to the “reasonable use” standard that prohibits waste.
- California does not have an enforceable set of statewide groundwater management standards, but **groundwater has been regulated on a piecemeal basis by local water districts and adjudications**. There are many adjudicated basins allocating groundwater rights
- **Overlying Landowner Rights**
 - **Overlying landowners have a right to reasonable use** that is superior to other users, but rights are **usufructuary only** and confer not right of ownership

California's Groundwater System

Correlative Rights

- Appropriative Groundwater Rights
 - Water in excess of the needs of the overlying owners could be pumped and used on non-overlying lands on a first-in-time, first-in-right basis
 - **An appropriative groundwater right is not subject to a permitting process.**
 - **Where overlying owners made full use of available supplies, appropriative rights were extinguished.**
 - **Where there was insufficient water to meet even the needs of the overlying owners, the courts have applied the Correlative Rights Doctrine to apportion the available groundwater among the overlying landowners.**

Sustainable Groundwater Management Act (SGMA)

- Requires high and medium priority basins to be managed under a groundwater sustainability plan by 2020 and 2022 respectively.
- Groundwater Sustainability Agencies (GSAs) are authorized, among other things, to **require the registration of groundwater extraction facilities**, require a groundwater extraction facility to be equipped with water-measuring device, **regulate groundwater pumping**, and impose certain charges.
- The **SGMA amends the water code to clarify that federally reserved water rights to groundwater must be respected in full in the adjudication or management of groundwater by a groundwater sustainability agency or by the State Water Resources Control Board; in the case of a conflict between federal and state law in such adjudication or management, federal law shall prevail. See Cal. Water Code § 10720.3(d).**

2015 California Legislation

- On October 9, Governor Brown signed into law numerous bills related to water rights and water conservation
- **A.B. 1390 and S. 226**, two interrelated bills governing the general adjudication of ground water rights. **AB 1390 establishes methods and procedures for comprehensive groundwater adjudications**, and expressly recognizes *Winters* rights: providing for the **conduct of a comprehensive adjudication consistent with, among other things, *Winters v. United States* and any other federal laws regarding the determination of federal or tribal water rights, as applicable.** Requires notice of a general adjudication action to be provided to tribes.
- Allows a party with rights to extract and use water in a groundwater basin to **initiate a lawsuit**. Revises **intervention rules to allow a GSA, a city, or county to intervene. No express intervention right provided for tribes.** Allows any person to intervene upon demonstrating that the person holds fee simple ownership in a parcel in the basin, or extracts or stores water in the basin.” To be added as §837(c) Cal. Code of Civil Proc.

Federal Reserved Water Rights

Winters Doctrine

- In addition to potential water rights under state law, tribes may have federally reserved water rights under the doctrine articulated in the case of *Winters v. United States*, 207 U.S. 564 (1908).
- **Winters doctrine: when the United States set aside land for tribes (or created an Indian reservation), it also impliedly reserved water rights for the benefit of the tribes.**
- Reserved rights attached to the land when the federal government created the reservation, giving rise to the “**priority date.**”
- Federally reserved were **paramount to rights later perfected under state law.**
- Federally reserved rights **not subject to state law requirements of use or forfeiture** and are not be lost or diminished if not put to a “useful” purpose.

Quantification of *Winters* Rights

- The Supreme Court refined the *Winters* doctrine in *Arizona v. California*, 373 U.S. 546 (1963) (*Arizona I*) **Adopted a quantification method for water rights: “practicably irrigable acreage” (PIA)** *Id.* at 600-01. Recognizing that one of the purposes of the reservation was for agrarian use, the Court approved a special master’s decree quantifying the right under PIA, based on the tribes’ showing that “the land is capable of sustained irrigation based on arability and engineering feasibility, and that it is capable of irrigation at a reasonable cost.” *Id.*

Quantification of *Winters* Rights

- **Primary vs. Secondary purposes.** *United States v. New Mexico*, 438 U.S. 696, 702 (1978) (a non-Indian reserved rights case involving the reserved water right for a national forest). The Court drew a **distinction between primary use** and secondary use to guide the implied reserved water rights analysis. **Water rights are reserved to fulfill the primary purpose of the reservation, but not the secondary purpose.**

Quantification of *Winters* Rights

- ***Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981) (*Walton II*).**
 - **Applied the *New Mexico*, but noted distinctions relevant to identifying the specific purposes of an Indian reservation.**
 - **The “general purpose, to provide a home for the Indians, is a broad one and must be liberally construed.” *Id.* at 47. Noted that “the reservation was created for the Indians, not for the benefit of the government.” *Id.***
 - **The need of the Indians “to maintain themselves under changed circumstances. This vision of progress implies a flexibility of purpose.” *Id.* The court noted that this vision of progress implies a flexibility of purpose. *Id.* n. 9.**
 - **Not limited to one primary purpose.** One purpose was to provide a homeland for the Indians to **maintain their agrarian society** and the other to **preservation of the tribe’s access to fishing grounds.** *Id.* 47-48.
- ***U.S. v. Adair*, 723 F. 2d 1394, 1410 (1983).**
 - **Considered reserved rights of the Klamath Reservation, found that the reservation was established to reserve a quantity of water not only for the purposes of supporting **Klamath agriculture**, but also for the purpose of maintaining the **Tribe’s treaty right to hunt and fish** on reservation lands.**

Quantification of *Winters* Rights

- *In re the General Adjudication of All Rights to Use Water in Gila River Sys. & Source*, 35 P. 3d 68 (2001) (***Gila River V***)
 - Relying on language from *Winters* and *Walton II* and the federal policies promoting self-determination and economic self-sufficiency, developed the **concept that the purpose of the Indian reservation is to provide a permanent homeland**.
 - Citing *Arizona I*, the Court found that the United States reserved water rights “**to make the reservation[s] livable.**” *Id.* at 72-73. **This allocation was intended to “satisfy the future as well as the present needs of the Indian Reservations.”** *Id.*
 - Held that the purpose of a federal Indian reservation is to serve as a “permanent home and abiding place” to the Native American people living there and that the permanent **homeland concept allows for this flexibility and practicality.** *Id.* at 76.
 - **Rejected the PIA methodology**, and found that the **lower court must be given the latitude to consider other information it deems relevant to determining tribal water rights**, requiring only that proposed uses be reasonably feasible. (1) development projects need to be achievable from a practical standpoint—they must not be pie-in-the-sky ideas that will likely never reach fruition; and (2) projects must be economically sound.

Quantification of *Winters* Rights

- ***U.S. v. Wash. Dept. of Ecology***, No. 2:01 CV 00047Z, 2005 WL 1244797 (unreported) followed the primary-secondary distinction laid out in New Mexico, but found that there were **two primary purposes: (1) agricultural and (2) domestic**, and found that the **PIA methodology would not be appropriate for quantifying domestic use**. *Id.* at 8.
- **Rejected the “homeland” concept adopted in Gila River V**. Noted that no federal court has ever found an impliedly reserved water right by first looking to the modern day activities of the Indian nation, and found that the **“homeland purpose” theory adopted in Gila River V is contrary to the “primary purpose” doctrine** under federal law. *Id.* at 9. Stated that the appropriate inquiry under federal law requires a **primary purpose determination** based on the intent of the federal **government at the time the reservation was established**. *Id.*

Application of *Winters* Rights to Groundwater

- ***Cappaert v. United States***, 426 U.S. 128. (1976), a non-Indian reserved water rights case pertaining to the reservation of water for the Devil's Hole monument.
- Technically not a groundwater case because the Court found that the pool at Devil's Hole was surface water even though it was 50 feet below the cave entrance. But the Court found that the federal government held reserved rights to water appurtenant to the National Monument and that the **United States can protect its water from subsequent diversion whether the diversion is of surface or groundwater**, and that **distant groundwater pumping could be enjoined to protect the federal reservation**. *Id.* at 144-47.
- *In re Gen. Adjudication of All Rights to Use Water in Big Horn River Sys.*, 753, P.2d 76 (Wyo. 1999), the Wyoming Supreme Court declined to extend *Winters* doctrine to groundwater because no case doing so was cited to the court. But also recognized that the logic supporting a reservation of surface water also supports a reservation of groundwater. **An outlier decision.**

Application of *Winters* Rights to Groundwater

- *In re General Adjudication of All Rights to Use Water in the Gila River Sys. & Source*, 989 P.2d 739 (Ariz. 1999) (***Gila River III***). Arizona Supreme Court held that **groundwater not subject to prior appropriation under state law was susceptible to federal reserved *Winters* right** (Id. At 741, 745), and that “[f]ederal reserved rights extend to groundwater to the extent groundwater is necessary to accomplish the purpose of the reservation.” Id. at 751.
- Held that the federal reserved rights holders are entitled to greater protection from groundwater pumping than water users who hold only state rights to the extent that greater protection may be necessary to maintain sufficient water to accomplish the purpose of the reservation.
- ***Wash. Dept. of Ecology at 13***, found that the ***Winters* rights extended to groundwater** and stated that it was unaware of any federal precedent that would require adherence to *Gila River III*, permitting reserved groundwater rights only where surface waters are inadequate to provide for the needs of the Reservation.

Agua Caliente Band v. Coachella Valley Water District et al.

- Provides a helpful framework for reviewing the issues presented by *Winters* federally reserved rights. The court **partitioned** the case **into three phases**:
1. In Phase I the court considered the following **two issues**: **(i) the existence of the Tribe's asserted federal reserved right to groundwater under the *Winters* doctrine**; **(ii) the Tribe's asserted aboriginal right to use groundwater.**
 2. Phase II will consider: **(i) the ownership of pore space** beneath the reservation; **(ii) the legal question of whether a right to a quantity of groundwater encompasses a **right to water of a certain quality****; and **(iii) certain equitable defenses** raised by Defendants.
 3. Phase III will undertake the fact-intensive tasks of **(i) quantifying the Tribe's rights** to groundwater and pore space; and **(ii) crafting appropriate injunction.**

Order on Phase 1 in *Agua Caliente*

- Identified two questions to determine if the Tribe has a reserved right in the groundwater: **(i) whether the reserved right is necessary to fulfill the purposes of the reservation;** and **(ii) whether the reserved water is appurtenant** to the reserved land. *Agua Caliente*, Case No. EDCV 13-883-JGB, Order GRANTING IN PART and DENYING IN PART Plaintiffs’ and Defendants’ motions for partial summary judgment, at 7.
- Found that the documents contemporaneous with the **creation of the Tribe’s reservation** are vague, but that they “do admit that the reservation intended to **provide the Tribe with a home, and intended to do so with some measure of permanence.**” *Id.* Citing *Walton*, states that the **general purpose, to provide a home** for the Indians, is a broad one and must be **liberally construed**, and that the court must “**both construe the general purpose of the Tribe’s reservation broadly, and take account that *Winters* rights anticipate increased or novel future uses.**” *Id.* Applying those tenets, the **Court ruled** that “**the reservation implied at least some water use; but exactly how much is not a question presented by Phase I of this case.**” *Id.*
- Found **no aboriginal right** to use water

Water Districts' Interlocutory Appeal

On October 9, Water Districts filed an interlocutory appeal challenging the Phase I Order. The Districts make several arguments including:

- The order is **inconsistent with *New Mexico's*** requirements because **overlying landowners have correlative rights** to use groundwater and the **Tribe's claimed reserved right is not necessary to accomplish the primary reservation purposes.**
- Rationale of the *Winters* doctrine does not support extension to groundwater here because the Tribe's primary reservation needs are met under State doctrine of correlative rights, which are not subject to first in time, first in right priority rule.
- Tribe was not using groundwater when the reservation created
- If Tribe has a federally reserved right to groundwater, it would not be subject to constitutional rule requiring reasonable and beneficial use.

Potential Strategies

- Surface and groundwater assessments
- Water quality assessments and potential actions to protect water quality
- Assessment of water rights under State law
- Consider potential litigation seeking a declaration of federally reserved Winters rights
- Participation in any ongoing general stream or groundwater adjudication
- Water rights settlement legislation
- Intergovernmental activities and agreements

Discussion

- Questions/Comments?
- Thank you.

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