

Timeline of U.S. American Indian Water Law and Policy

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1786-1790 The U.S. federal government consolidates federal jurisdiction over all dealings with Indian nations (people and lands). This can be seen in the Northwest Ordinance enacted in 1786 which stated that the utmost good faith should always be observed towards Indians in the federal protection of their property, rights, and liberty. Three years later the Commerce Clause was added to the U.S. Constitution and stated that Congress had the exclusive power over states to regulate commerce with all foreign nations including Indian nations. The following year in 1790, the Indian Trade and Intercourse Act (Non-Intercourse Act), was passed by Congress to clarify that Indian affairs were to remain under federal and not state control, that Indian people and lands were to be federally protected from outside aggression and encroachment, that their lands were not to be sold to non-Indians without Congressional approval, and that Indians affairs were to be left to Indians themselves in their own territory (called “Indian Country”) (Calloway 2004, Deloria 1988, Flanders 1998).

1789-1871 The first Indian agents are assigned under the Department of War to negotiate treaties with tribes in 1789 (treaty making abolished by Congress in 1871). The primary purpose of these treaties was to get Indians to cede lands and forgo any future claim over them. In exchange for these lands and peace, the federal government promised the provision of rations and other trade items, and protection from future violence and encroachment on their remaining lands and resources. Like treaties with all foreign nations, they had to be approved by Congress, and once confirmed were binding international law and are considered sacred political covenants by a number of tribes (Calloway 2004, Deloria 1988, Flanders 1998). The lands that were ceded to the U.S. government were turned into public domain and given or sold to settlers under public colonization land laws, such as the Preemption Act of 1841 and the Homestead Act of 1862.

1823-1832 Supreme Court decisions extinguish aboriginal title to Indian lands, and establish federal trusteeship over them. In 1823 the Court, under Justice John Marshall, issued its decision in the case of *Johnson vs. McIntosh*, which argued that title to all Indian lands had transferred to the U.S. government because of the colonial “doctrine of discovery.” As such, Indian aboriginal title to their lands as sovereign nations had been extinguished, and Indian nations could not sell their lands to anyone they wished. In 1831, the Court decided the case of the *Cherokee Nation vs. Georgia*, wherein the Cherokee Nation had brought suit against the state of Georgia for enacting state laws that abridged their sovereignty, and which they argued were illegal under the U.S. Constitution. The Court, through Marshall’s decision, agreed that the state did not have the jurisdiction to pass such laws, but stated that Indian nations were to be understood as “domestic dependent nations” and that their relationship to the federal government was as a ward to a guardian. While Indian communities were in this state of dependent pupilage, the federal government was to hold title to their lands and resources in trust for them, just as a trustee does

for a minor. The decision a year later in the case of *Worcester vs. Georgia* would clarify federal jurisdiction and this trust relationship further (Calloway 2004, Flanders 1998). The trust relationship has long provided a basis for government abuse and neglect of Indian resources, and is now a powerful political tool for affirming the government's responsibility to act in the interest of Native people and to protect their resources.

1849 The Indian Office and its trust responsibility are transferred from the Department of War to the newly created Department of the Interior. Under new leadership, and under a secretariat created specifically to administer public land laws, the Indian Office in the Department of the Interior shifted federal Indian relations towards a policy of containment and cultural assimilation (O'Brien 2005, Ruffing 1979). It should come as no surprise, that conflicts of interest and structural inequality would be built into a government system that gave authority and administration over Indian affairs and lands to a government agency that was also tasked with administering and turning expropriated Indian lands over to the hands of non-Indian colonizers.

1867 Congress first makes appropriations for irrigation projects on Indian reservations (Pisani 1996)

1890s Regular annual federal expenditures on Indian irrigation projects, become an important tool in the federal government's allotment and "civilization" project. In 1891, Congress began making regular appropriations for the construction and repair of irrigation canals, dams, and drainage works and the sinking of artesian wells (Clark 1986, Pisani 1996), appropriating \$700,000 alone between 1894 and 1901 (Golze 1961: 22). Most of these projects, like many other projects undertaken by the Indian Office, were poorly planned and ineffective. The Indian Office repeatedly asked Congress to appropriate money for more skilled engineers, but funding was insufficient and superintendents with little skills were hired as political appointees. It would not be until 1905 that a chief engineer would finally be assigned to oversee Indian irrigation projects (Clark 1985). The irrigation projects often ran over budget, and were paid for through the sale of Indian allotments. Although most of these projects were inadequate, the irrigation service believed that they provided valuable object lessons for the Indian laborers who built them, since it gave them the opportunity to earn wages (albeit from the sale of their own lands), to learn trades skills, and to learn the value of regularity, thrift, industry, independence, and individualism (Pisani 1996: 166-7). The only problem was that by the end of the 19th century, non-Indian colonizers would have already over-appropriated many of the streams and rivers of the West, and no where in federal or state laws, were there provisions for setting aside water for the vast settlement and agricultural reforms the Indian Office was undertaking. Further complicating the matter was the fact that states had sole jurisdiction over water rights to the exclusion of the federal government, and the federal government claimed sole jurisdiction over Indian affairs to the exclusion of states.

1908 Supreme Court Decision in *Winters v. United States*, 207 U.S. 564 1908., originates the Winters Doctrine. After the passing of the Dawes Act in 1887, the federal government renegotiated its 1855 treaty with the Gros Ventre and Assinboine people on the Fort Belknap reservation in Montana, to drastically reduce the size of the reservation (Clark 1985, Flanders 1998, Hundley 1979). In exchange for settling down to an agrarian lifestyle on the small arid reservation, the people living there would receive funds and services for building houses and for

undertaking agriculture. The federal government would transfer the surplus land over to the public domain and open it to settlement under public land laws. Over the next twenty years a number of settlers moved upstream of the reservation and began to form irrigation companies to divert water from the reservation's only source of reliable water, the Milk River. Their diversions were completely legal and in compliance with state prior appropriation laws. But, by 1905, the Indian Agent of the reservation reported that something had to be done to stop upstream diversions or else crops would fail and starvation would be rampant. In 1907 a court issued a restraining order to enjoin the upstream settlers from diverting water. The settlers lost the suit and then appealed to the Supreme Court, arguing that the reservation had been reduced in size for the very reason that those lands could be opened to settlement by "civilized persons," and settlement required diversion of water. The government argued on behalf of the tribes that the reservation had been reduced in size to promote their "civilization" by limiting their range and encouraging them to take up settled agriculture (Clark 1985, Hundley 1979).

In this 1908 case, known as *Winters vs. U.S* (Winters was the last name of one of the settlers), the Supreme Court decided that when the tribes had agreed to cede their lands to the U.S. government, it was implied that they would be inhabitable, which required access to water. Water rights were thus impliedly reserved. The amount of water reserved was not only enough to meet the needs at the time of the creation of the new reservation boundaries, but into the future, since the reservation's success depended on making it self-sufficient through irrigated agriculture. Thus the water had explicitly been reserved to promote agriculture and the "arts of civilization" (AIPC 1972, Clark 1985). Because Indians affairs were under the jurisdiction and trusteeship of the federal government, these implied, reserved, and expanding water rights were not subject to state prior appropriation laws, but could be administered in cooperation with state laws since they could be quantified and their priority date theoretically could be set as the date the reservation was created. Furthermore, because of the nature of the government's on-going civilization project, these rights would not be subject to forfeiture through non-use as is the case under state laws (AIPC 1972, Hare 1996, Schmandt et al 1998).

The Supreme Court decision, which created the evolving legal theory of the Winters Doctrine, was extremely vague on a number of important points. It was not clear from the language of the decision who did the reserving of the right. Was it the U.S. government or was it the tribes? If it was the government, then the priority date of the right could be set according to the date of the creation of the reservation, and granted on the basis of why the reservation was created, a task that could be accomplished by looking at historical and legislative records (Clark 1985, Hare 1996). If the Indian people themselves had reserved their rights, by not signing away anything they did not specifically mention, then the priority date was since time immemorial, since in most cases Indian people had occupied the land reserved for them since long before Euro-American colonizers came along. Their water rights then included rights to all water to make their reservation livable then and into the future and were prior and paramount to all other claims (AIPC 1972, Clark 1985). The decision also did not clarify whether or not reserved rights applied to all reservations or only those created by treaty. And it did not specify how the right was to be quantified and whether it could be used for activities other than agriculture (Clark 1985). What it did specify was that Indian water rights were unlike those granted under prior appropriation or riparian common law (Hundley 1979), that they were beyond the jurisdiction of individual states, and that the protection and fiscal responsibility the trust relationship afforded to Indian lands also applied to Indian waters.

1939 The Supreme Court rules in the case of *U.S. vs. Walker River Irrigation District*, that reserved rights applied to reservations created by executive order or Congressional act, and that the amount of water reserved was that which was sufficient to water the amount of acreage that by experience could be irrigated (Clark 1985).

1939 U.S. Supreme Court rules in *U.S. vs. Powers* that water rights were appurtenant to the land within the reservation, that is, they could not be sold off-reservation (BIA 1978).

1952 Congress passes the McCarren Amendment to the Reclamation Act which returns substantial power to states with respect to the management of water. The McCarren Amendment requires that the federal government waive its sovereign immunity in cases involving the general adjudication of water rights. Prior to this legislation, the federal government had reserved the right not to be included in general basin adjudications conducted under state law. The McCarren Amendment, however, recognized that the exemption of the federal government from these adjudications would undermine the state's water allocation systems. Therefore, any federal agency claiming a federal reserved water right must participate in the state's adjudication process (USBLM 2006).

1963 The most significant modification of the Winters Doctrine came in the 1963 Supreme Court case of *Arizona vs. California* which was filed by Arizona to determine how much water California, Arizona, and Nevada were each entitled to from the Colorado River and its tributaries. The federal government intervened on behalf of the Indian nations and the federal lands that were affected. The federal government used the opportunity successfully as a test case to claim reserved rights for other federal lands (Burton 1989). The Supreme Court relied on the 1908 *Winters* decision in its decision and ruled that the amount of water reserved by each Indian community would be quantified based on the civilizing project of turning Indians into sedentary farmers, by the amount of acreage on each reservation that could be "practicably irrigated" (Brown and Ingram 1987, Burton 1989, Veeder 1969). The standard of "practicably irrigable acreage" (PIA) would finally set a standard for quantifying reserved ("Winters") water rights 45 years after the original case that defined them. But the process of that quantification would prove to be lengthy and require significant technological, agricultural, hydrological, and economic expertise (Hare 1996). Cost benefit analysis was to be used to determine what lands were practicably irrigable, and the outcome could differ greatly depending on the person doing the quantifying and which discount rates s/he used (Burton 1989).

1971 The Secretary of the Interior creates a water rights office in the Bureau of Indian Affairs (Clark 1985).

1971 *United States v. District Court for Eagle County* 401 U.S. 520 decides that Federal water rights can be adjudicated in state courts under the McCarran amendment to the Reclamation Act. No Indian water rights were directly involved in the case (BIA1978). Even though Indians were not specifically included an all-inclusive statement in the amendment said that it applied to all federal enclaves regardless of their origins. It was feared that the decision would undermine the Winters Doctrine by opening the way for quantification of reserved water rights and hostile state courts (Clark 1985: 628-9).

1975 The Attorney General adds a new section (The Indian Resource Section) to the Lands Division of the Department of Justice to handle litigation in which the United States was acting as trustee for Indians, as in water rights cases (Clark 1985: 632).

1976 The Supreme Court decides in the *United States v. Colorado River Water Conservation District* 424 U.S. 800, also known as the Akins decision, that Indian water rights are to be treated the same as Federal Rights and must first be adjudicated in state courts (BIA 1978). It was “a serious jurisdictional defeat for tribes” (Burton 1989: 159). In this decision the court found that while state courts had no jurisdiction over Indians affairs without their consent or unless expressly conferred by Congress. States did have jurisdiction over water as was implied in the McCarran amendment, regardless of whether the federal government was a water proprietor or trustee within the state (as in the case of federal reserved rights on both federal lands and Indian reservations). The Court argued that subjecting Indian water rights to legal challenge in state courts would imperil these rights no more than a suit brought in a Federal District Court. Dissenting Justices on the Court however, insisted that the trust relationship was based on Federal law and should properly be maintained. They argued that Federal courts had more knowledge and experience in interpreting Federal statutes, regulations, and Indian treaties and were thus more likely to uphold the government’s trust responsibility to protect tribal rights and interest in water. In the end, the Court refused to recognize the difference between water rights held by the United States for its own public purpose and those held in trust for private use by Indians, arguing that Indian water rights did come within the purview of the McCarran Amendment (Clark 1985: 629).

1976 The Supreme Court decides in the *United States v. Cappaert* 426 U.S. 128 that groundwater is within purview of Federal reserved water rights and that these rights (and by implication Indian water rights) exist to fulfill the purpose for which the federal reservation of land was created (BIA 1978). In this decision the Supreme Court handed down a decision which enjoined groundwater appropriators from pumping water to the extent that it interfered with the purpose for which a nearby national monument had been created. Although the case did not involve Indian water rights it did cite “Winters” for the ruling and would by implication apply to Indian as well as public land reservations (Clark 1985: 627).

1980s As costly litigation and adjudications drags on, the Department of the Interior begins to urge tribes during the 1980s to negotiate settlements with states out of court (Burton 1989). Many Indian communities have been unhappy about this pressure, since in principle it represents an infringement on Indian sovereignty and state venues have historically proven unfavorable to Indian interests.

1987 Congressional amendment of the Clean Water Act which allowed qualifying tribes to be treated as states, and interpreted by the EPA to allow them to set their own water quality standards (Kono 2001). The right of tribes to do so, was confirmed in a 1996 10th Circuit Federal Court of Appeals decision in a case involving Isleta Pueblo and the City of Albuquerque (Lederman 1998), and is considered a major victory in the federal recognition not only of American Indian rights to clean water, but Indian sovereignty and the upholding of the Federal trust relationship.

Water Law Definitions

Aboriginal: being the first of its kind in a region (NMOSE 1987)

Adjudication: court proceeding which determines the ownership, nature, priority and extent of a water right (NMOSE 1987)

Appropriation: the diversion or impoundment of water for beneficial use (NMOSE 1987)

Beneficial Use: all uses of water, including agricultural, industrial, commercial, municipal and recreational, as long as there is no willful negligent waste (NMOSE 1987)

Declared Groundwater Basin: a defined geographic area in which the appropriation of ground water is regulated by the state engineer (NMOSE 1987)

Discovery: a pre-trial procedure in which information necessary to the case may be exchanged between adversarial parties (NMOSE 1987)

Diversion: changing the course of water from its natural source to a beneficial use with a man-made structure such as a ditch (NMOSE 1987)

Drainage Basin: a geographic area from which surface water flows, or is drained, into a specific river (NMOSE 1987)

Forfeiture: the loss of something due to the violation of a legal obligation; in many Western states for example, if a water right is not used for several consecutive years, it is subject to forfeiture after notice from the state engineer (NMOSE 1987)

Groundwater: water located beneath the surface of the earth (NMOSE 1987)

Hybrid Doctrine: The hybrid doctrine recognizes both riparian and appropriative water rights. Generally, states have this dual system because riparian rights were historically recognized, but the state has changed to an appropriative system. Hybrid states have integrated riparian rights into the doctrine of prior appropriation by converting riparian rights to appropriative rights. Generally, states have allowed riparian land owners to claim a water right by a certain time and incorporate it into the state's prior appropriation system. The riparian rights tend to be superior to the prior appropriative rights even if the water was not put to beneficial use until much later. Riparian rights are not recognized, however, if they are not claimed by a certain date (usually the date the state adopted the prior appropriation doctrine), or are not put to use within a certain number of years. States that have a hybrid system include California, Kansas, Nebraska, North and South Dakota, Oklahoma, Oregon, Texas, and Washington (USBLM 2006).

Hydrographic Survey: "the collection of field, historic and other data to determine the ownership, nature, priority and extent of water rights in a stream or groundwater basin" (NMOSE 1987)

Join: “to name individuals as parties to a lawsuit” (NMOSE 1987)

Offer of Judgment: proposed agreement between the state and a water right claimant describing the nature, extent and priority of the water right (NMOSE 1987)

Order to Show Cause: “a court order requiring a person to appear and show why the court should not do a certain act” (NMOSE 1987)

Practical Irrigability: “a standard used to quantify federal reserved water rights for Indian reservation lands; describes the amount of land than can be economically irrigated with present technology” (NMOSE 1987)

Prior Appropriation Doctrine: “a legal doctrine which entitles the first person to divert a beneficially use water the better right; the user with the earliest priority is entitled to receive the full appropriation before those with later priorities (NMOSE 1987)

Riparian Rights Doctrine: comes from English common law, anyone living on the banks of a water source has the legal right to divert water, so long as it does not impair other water users by diminishing the flow or quality of the water. The water right is tied to land ownership (appurtenant to the lands on the water source’s banks), and is reserved regardless of whether it is exercised or not by the land owner (whether or not s/he diverts water). The right is not an absolute private property right in water, but a correlative and conditional right, existing only in relationship to other users and their rights to undiminished and unpolluted flows (Clark 1987, Pisani 1996, Smith 1975). Riparian rights, since they are tied to riparian land ownership and must not interfere substantially with water flows, do not provide for the conveyance of water to lands beyond those immediately next to water sources. (Lee 1980, Newell 1906, Pisani 1996).

Surface water: water flowing in natural watercourses on the earth’s surface, including lakes and springs (NMOSE 1987)

Water right: “a legal right to divert or impound water for a specific beneficial use” (NMOSE 1987)

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