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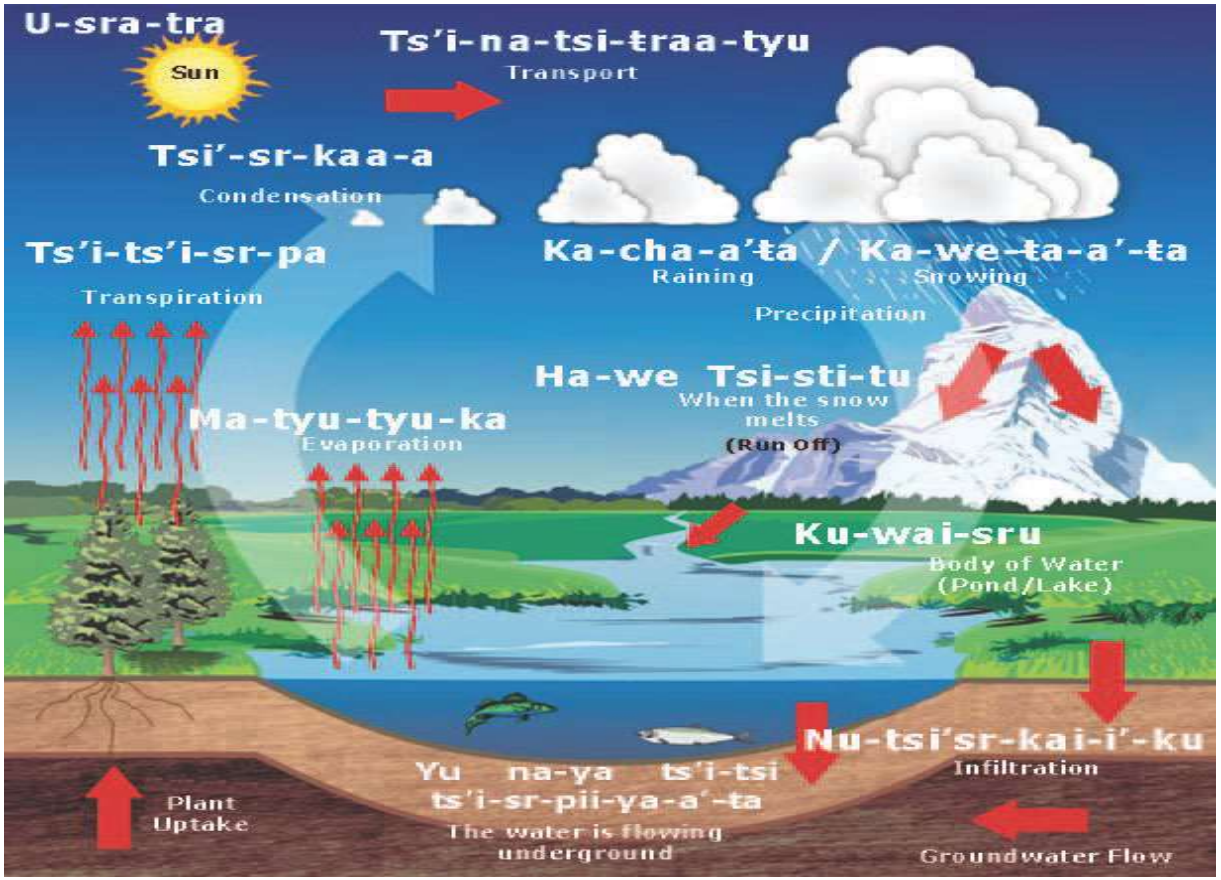
INDIAN WATER RIGHTS



Slide 1

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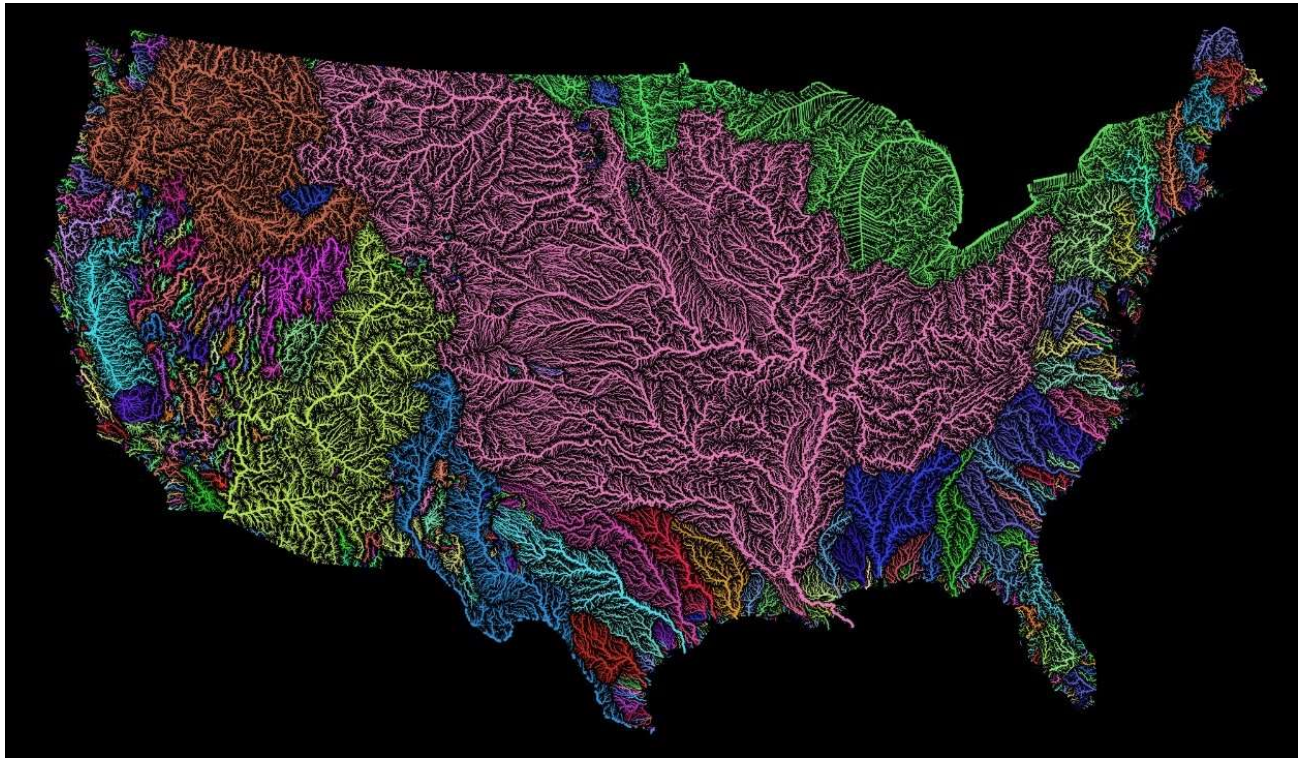
Santa Ana Pueblo Schematic of Hydrologic Cycle

- Cover depicts drawing of **Hydrologic Cycle** as understood by Santa Ana Pueblo. It includes precipitation, evaporation, infiltration, condensation, transpiration, transport and runoff. Santa Ana schematic in their own language (dialect of Keresan) clearly includes surface and groundwater.

Rivers and Water Basins Have Been Here for Millions of Years



We, as a Species (Present on Continent for 25,000 Years or Less), Are Greatly Interrupting Water Ways

- Indigenous people's knowledge of water precedes Spanish, French, British, Mexican and U.S. colonial regimes in what is now lower 48 states. There were megadroughts in 1100s and 1300s, and this knowledge of water scarcity may have been passed on in traditional oral histories and informed their worldview.

Federal Reserved Water Rights

- Federal government defers to states to allocate certain public water resources within state.
- Federal government maintains **certain federal water rights**, though, which **exist separate from state law**, e.g., water allocation related to federal lands, including Indian reservations.

Indian Reserved Water Rights

- Indian reserved water rights were first recognized by U.S. Supreme Court in *Winters v. United States* in 1908. Under *Winters* doctrine, when Congress reserves land (e.g., for an Indian reservation), Congress also reserves water sufficient to fulfill purpose of reservation. *Winters v. United States*, 207 U.S. 564, 575-77 (1908).

Doctrine of Federal Reserved Water Rights

- Doctrine of federal reserved water rights generally traces its origins to the seminal decision of *Winters v. United States*, 207 U.S. 564 (1908).
- In *Arizona v. California*, 373 U.S. 546 (1963), Court held that reserved rights doctrine is not limited to Indian reservations, but also applies to all federally reserved public lands, such as national forests, national recreation areas, and national wildlife refuges.
- Thus it was recognized starting in 1908 that federal government reserved certain waters that are exempt from appropriation under state law.

Conflict between Federal and State Water Rights

- Federal government retains right and obligation to manage federal lands under Constitution. This right and obligation includes authority to reserve water rights and mitigate against impacts of exercise of privately held water rights on public lands.
- Congress is charged with directing Executive Branch's implementation of those rights and obligations.
- Federal government's role to balance privately held water rights allocated under state law with federal government's interest in managing public lands in best interests of American people fraught with conflict due to water being finite resource, western aridity, drought, growing population, competing water uses and unquantified reserved water rights.

Conflict between Federal and State Water Rights (con't)

- Federal government's role to balance privately held water rights allocated under state law with federal government's interest in managing public lands in best interests of American people fraught with conflict due to water being finite resource, western aridity, drought, climate change, growing population, competing water uses and unquantified reserved water rights.

Federal Government's Extensive Role in Water Management

- Department of the Interior now manages 492 dams and operates 338 reservoirs with a total storage capacity of 245 million acre-feet of water, serving 31 million people. Interior manages more than 530 million acres of surface land, 409 units of national park system, and 566 national wildlife refuges. Interior also must uphold federal trust responsibility to Indian Tribes with 567 federal recognized Tribes.

Why Don't Tribes Have Sovereign Right to Use Water?

- Application of Doctrine of Discovery
- Legal status of tribes as Limited Domestic Dependent Nations completely under sovereignty and dominion of United States.
- Due to federal water law vacuum, settlers developed their own customs, laws, and judicial interpretations to administer allocation of public water resources within states.
- Water use rights and access governed by state law thus vary by region across country, though water itself is a public resource.
- In general, riparian doctrine was applied in eastern United States.
- In general, prior appropriation doctrine was applied in western United States.

Indian Legal Conflict -Self-Dealing of Chief Justice Marshall, U.S. Supreme Court

Throughout late 1820s, legal conflict over ownership of Indian lands led issue to U.S. Supreme Court.

All of main political leaders and financiers of time were engaged in land speculation: George Washington, Benjamin Franklin, James Madison, John Marshall, Henry Knox, Alexander Hamilton and Thomas Jefferson.

Thomas Marshall's Land Speculation – Kentucky Surveyor

- In 1780, Thomas Marshall (U.S. Supreme Court Chief Justice John Marshall's father) purchased land in Kentucky territory.
- Superintendant of Lord Fairfax's Estate
- Surveyor Kentucky
- Daniel Boone - Deputy Surveyor
- Great demand due to interest in acquiring land. Title could not be established without survey.

Thomas Marshall's Land Speculation - Collector of Revenue for Kentucky

- Dangerous job due to tax on whiskey distillers who refused to pay -- People of Lexington hung Thomas Marshall in effigy. Profitable due to fees collected.
- **Before end of 1780's, Thomas Marshall claimed over 400,000 acres in Kentucky.**

Chief Justice John Marshall's Personal Interest in *Johnson v. M'Intosh*

- John Marshall's land claims in Virginia - chain of title originating in English crown.
- In order to pay for purchases he practiced law. Later he was appointed Secretary of State and then Justice of U.S. Supreme Court.
- He would locate military warrants land, purchase treasury warrants, have his father survey, and claim them.
- When *Johnson v. M'Intosh*, 21 U.S. 543 (1823) came before Court, it afforded then Chief Justice Marshall opportunity to bolster legitimacy of his family's land claims **to over 600,000 acres in Virginia and Kentucky**. https://www.umass.edu/legal/derrico/marshall_jow.html

Conflicting Land Titles in *Johnson v. M'Intosh*

- Thomas Johnson had acquired title to land he purchased in Virginia from members of Illinois and Piankeshaw Indian tribes. There was no dispute that Chiefs conveying land had authority or that Tribes were in possession of lands they sold.
- William M'Intosh had a land warrant from U.S. government, a conveyance of "public lands" to a citizen. These "public lands" were Indian lands that had been granted by Crown of England and devolved to states or United States.
- **Question was whose title would prevail.**
- **Could Indians convey title to land which could be recognized in courts of United States?**

Robertson, Lindsay, *Conquest by Law, How the Discovery of America Dispossessed Indigenous Peoples of Their Lands*, March 2006

- University of Oklahoma Law Professor Robertson, in researching *Johnson v. M'Intosh,* found fifty years of corporate records of the Illinois and Wabash Land Companies in 1991 still intact, preserved by a descendant (Jasper Brinton) of last corporate secretary of Illinois and Wabash Land Companies, John Hill Brinton.
- University of Oklahoma Law Digital Collection consists of 263 original manuscripts, five hand-drawn maps and seven published documents which relate to **United Illinois and Wabash Land Companies Collection** Companies' efforts to acquire title to Indian lands during period 1775 to 1823.

Fraudulent Case

- These corporate records document how Illinois-Wabash Land Company retained attorney Robert Goodloe Harper to bring Johnson v. M'Intosh case on behalf of Illinois-Wabash Land Company who had acquired significant land base from Indian tribes. Harper based Illinois-Wabash Land Company case on frontier claim so that a decision at circuit court could be appealed directly to Supreme Court.
- Attorney Harper needed defendant who would lay claim to over 2,000 dollars' worth of property so that case could be heard in federal court. He chose William M'Intosh, a fur trader who lived in the region. He chose plaintiff, Johnson, He chose federal judge to hear case.
- Illinois-Wabash Company then funded entire court proceeding, including prosecution and defense.

Fraudulent Case

- Harper selected great Daniel Webster—powerful orator – as his co-counsel to argue case before U.S. Supreme Court. Harper chose less-qualified attorneys to argue M'Intosh's case, paid them, and told them what to argue. Harper lost possibly because of Chief Justice Marshall's self-interest in case.
- Chief Justice Marshall's decision considered history of colonization and character of indigenous peoples.

Historical Basis – Spanish Law - 1493

- *Inter Caetera*, May 3, 1493 – Pope Alexander VI granted lands discovered by Christopher Columbus to King Ferdinand and Queen Isabella of Spain
- "…that Catholic faith and Christian religion be exalted and everywhere increased and spread .. that barbarous nations be overthrown … **provided however they at no time have been in the actual temporal possession of any Christian owner**."

Historical Basis – English Law - 1496

- 1496, Queen Elizabeth - commission to Cabot's "**to discover countries then unknown to Christian people, and to take possession of them in the name of the King of England**."
- 1578, Queen Elizabeth - charter to Gilbert "to discover and take possession of such remote, heathen, and barbarous lands, **as were not actually possessed by any Christian prince or people**."

France

- France claimed all Canada and Louisiana based on its discovery when Indians occupied almost whole area.

Holland

- Under orders of East India Company, Holland claimed country from Delaware River (Delaware, Maryland, New Jersey, Pennsylvania) to Hudson River in New York.

Avoiding War between European Countries Simple – Title Is Based on Discovery, Consummated by Possession

- To avoid conflicting settlements and consequent war between colonizing European countries, they adopted principle that "**discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession**."

European Wars to Sustain Claim to Disputed Claims of Discovery

- Great Britain and France engaged in war over conflicting claims of discovery.
- Great Britain won all lands east of Mississippi under Paris Treaty of 1763.

Title by Discovery Absolute

- No distinction was made between vacant lands and lands occupied by Indians.

United States Acceded to Doctrine of Discovery of European Predecessors

- **Throughout late 1820s, legal conflict over ownership of Indian lands led issue to U.S. Supreme Court.**
- In *Johnson v. M'Intosh*, 21 U.S. 543 (1823), Chief Justice Marshall held that "The United States … maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty as the circumstances of the people would allow them to exercise."

Title by Conquest Is Acquired and Maintained by Force

- "The title by conquest is acquired and maintained by force. The conqueror prescribes its limits… the conquered shall not be wantonly oppressed… **Most usually they are incorporated with the victorious nation and become subjects or citizens of the government with which they are connected."**

Indians Were Fierce Savages Whose Occupation Was War

- **"But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war,** and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country was to leave the country a wilderness; to govern them as a distinct people was impossible, because they were as brave and as high spirited as **they were fierce, and were ready to repel by arms every attempt on their independence**."

Inevitable Consequence Was European Enforcement of Their Claims by Sword

- "What was the inevitable consequence …? The Europeans were under the necessity **either of abandoning the country, and relinquishing their pompous claims to it, or of enforcing those claims by the sword**, and by the **adoption of principles adapted to the condition of a people with whom it was impossible to mix."**

Conquest Gives a Title which Courts of Conqueror Cannot Deny

- Chief Justice Marshall explicitly refused to engage critical philosophical questions:
- "We will not enter into the controversy, whether agriculturists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits. **Conquest gives a title which the Courts of the conqueror cannot deny…**"

Indians Have Only Right Of Occupancy

- **The Court held that Indians have only a right of occupancy in land they claimed, not title that can be conveyed because they**
  (1) were not Christian when European discovery of New World occurred;
  (2) land belonged to United States as victor in Revolutionary War by which they derived title from Crown under European doctrine of discovery; and
  (3) new Republic wielded sword of conquest.

Courts Should Decide Each Case on "Narrowest Grounds"

- Courts should decide each case on "narrowest grounds" – addressing no more than is necessary to resolve dispute before it. This was not done in this case.
- Chief Justice expanded question presented to all land purchases by individuals or companies from Indian tribes, not just the Johnson/M'Intosh parcel.

Johnson's Purchase Was Void Ab Initio

- British Proclamation of 1763 prohibited private purchase of American Indian land. Land purchases were to be made by Crown officials "at some public Meeting or Assembly of the said Indians."
- Johnson's purchase from Indians was void ab initio.
- **This alone would have settled case**.

Broad Ruling Due to Magnitude of Interest

- Chief Justice Marshall recognized exceeding boundaries of case in following statement in Court's decision: "After bestowing on this subject a degree of attention which was more required by the magnitude of the interest in litigation…"

Censoring Chief Justice Marshall

- Three months after the chief justice delivered the Johnson opinion, Thomas Jefferson complained to Justice William Johnson, "This practice of Judge Marshall, of travelling out of his case to prescribe what the law would be in a moot case not before the court, is very irregular and very censurable." *Conquest by Law*, p. 92.

Fraudulent Case of *Johnson v. M'Intosh* Still Good Law Today

- Notwithstanding fraud perpetrated upon U.S. Supreme Court by parties in *Johnson v. M'Intosh*, it is still being used by courts to decide property rights cases brought by American Indians against U.S. and against non-Indians.

- **"... "all the nations of Europe, who have acquired territory on this continent, have asserted in themselves, and have recognised in others, the exclusive right of the discoverer to appropriate the lands occupied by the Indians.**
- "Thus has our whole country been granted by the crown while in the occupation of the Indians. ... The governments of New England, New York, New Jersey, Pennsylvania, Maryland, and a part of Carolina, were thus created… These various patents cannot be considered as nullities...."

Cherokee Nation v. Georgia
30 U.S. 1 (1831)

- Another decision by Chief Justice Marshall further set the stage for degrading tribal sovereignty.
- State of Georgia enacted laws that abolished Indian right to sovereignty, self government, and land. President Jackson and Congress refused direct request of Cherokee Nation for federal intervention to uphold tribal treaty rights against Georgia's legislative encroachments on Cherokee tribal sovereignty.

Federal Government Offered No Help to Cherokees Against State Encroachment

- As executive and Congressional branches of federal government took no action on behalf of Cherokees, Cherokees filed a claim in U.S. Supreme Court – third branch of our government system. Question was whether U.S. Supreme Court had jurisdiction over case.
- Under U.S. Constitution, U.S. Supreme Court has original jurisdiction over disputes between states, and disputes between United States and a foreign state.

Supreme Court had to determine whether an Indian tribe is a state or foreign nation or some other entity.

Tribes Are Not Foreign Nations

- **Those which reside within acknowledged boundaries of United States can, with strict accuracy, not be denominated foreign nations.**

Domestic Dependent Nations

- "They may, more correctly, perhaps, be denominated **domestic dependent nations**. They occupy a territory to which we assert a title independent of their will… Meanwhile **they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian**."

Completely under Sovereignty and Dominion of United States

- "They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their Great Father. They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States that any attempt to acquire their lands, or to form a political connexion with them, would be considered by all as an invasion of our territory and an act of hostility."

Distinguished from Foreign Nations and States in Constitution

- Constitution empowers Congress to "regulate commerce with foreign nations, and among the several States, and with the Indian tribes." Thus they are distinguished from foreign nations and states.

Proper Subject for Judicial Inquiry and Decision – Political Question??

- "The case **requires us to control the Legislature of Georgia, and to restrain the exertion of its physical force**…. It savours too much of the **exercise of political power** to be within the proper province of the judicial department."

Split Decision

- Court's decision was a split of 2, 2, and 2. Two justices held that Indian tribes have no sovereignty at all; two justices held that Indian tribes were limited dependent sovereigns, and two justices held that Indian tribes were foreign nations with all attributes. Practical effect was that there was no government branch which would stop Georgia in its actions against Cherokees.

Tribal Self-Determination Still Limited

- Current U.S. federal policy stresses government-to-government relations between federal government and tribes and self-determination by tribes. However, most Indian land is held in trust by the United States and federal law still regulates political and economic rights of tribal governments.

***Worchester* Overruled Part of Doctrine of Discovery Assigning Fee Title to Discovering Sovereign**

- Nine years later, in *Worcester v. Georgia,* 31 U.S. 515 (1832), Chief Justice Marshall overruled his opinion in *Johnson v. M'Intosh* that doctrine of discovery gave fee title to discovering sovereign.
- **It was too little, too late. Indian Removal Act had been passed in1830. Tribes were being voluntarily or forcibly removed from southeast to Indian Territory in Oklahoma.**
- **His position was itself rejected in 1835 Supreme Court term in *Mitchel v. United States.***

Back to Indian Reserved Water Rights -*Winters v. U.S.*

- Case involved tribal rights to water associated with Fort Belknap Reservation located in what would later become Montana.
- Fort Belknap Reservation was created by an agreement in 1888 between tribal parties and the U.S. government.
- Government policy - seeking to transform American Indians from “a nomadic and uncivilized people ... to become a pastoral and civilized people” by providing them lands to develop for such purpose required water for agriculture.

Fort Belknap Reservation, Montana

Winters v. U.S.

- In 1900, non-Indian defendants built large and substantial dams and reservoirs, and, by means of canals and ditches and waterways, diverted waters of Milk River from its channel, above points of diversion by United States and Indians which deprived United States and Indians of use of water.

Water Shortages in Montana by 1905 – Only 25 Years After Fort Belknap Reservation Established

- By 1905, this resulted in area experiencing water shortages that ultimately resulted in *Winters* lawsuit being filed to enforce Fort Belknap Reservation rights to water against non-Indian water users.

Indian Reserved Water Rights Continuous & Expansive

- U. S. Supreme Court explained that lands provided under Fort Belknap agreement for purpose of developing an agrarian society "were arid and, without irrigation, were practically valueless." Water was thus necessary for agriculture.
- U. S. Supreme Court held that federal government **did** reserve water rights for Fort Belknap Reservation and for a use which would be necessarily continued through the years.

Scope of *Winters* Rights

Priority and extent of Indian reserved water rights is affected by

- purposes of Indian reservation,
- date when Indian reservation was created,
- quantification of water sufficient to accomplish those purposes, and
- sources of water that may be used to fulfill particular water rights.

Amount **must** satisfy present and future needs of reservation.

Vest on date that Congress reserves land and are not lost if tribe does not maintain continuous use.

Allotments Received Share of Water Rights

- U.S. Supreme Court ruled in 1939, *U.S. v. Powers*, 305 U.S. 529 (1939), that when tribal land is converted into allotments, trust allottees succeed to portion of tribal waters needed for agriculture.
- Also a non-Indian successor in interest to trust allottee acquires that allotment's reserved water right, but loses that right if non-Indian successor does not put water to beneficial use.

Aboriginal Right to Water
United States v. Adair

- *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983) - Ninth Circuit held Klamath Tribe of Oregon possessed aboriginal title to certain lands, hunting, and fishing rights, and "by the same reasoning, **an aboriginal right to the water used by the Tribe as it flowed through its homeland.**" *Id.* at 1413.

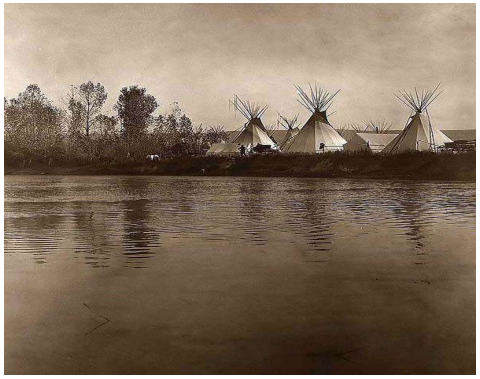
Aboriginal Right to Water
United States v. Adair

- Thus, court held, Tribe possessed continuing water right on Klamath Reservation to support its hunting, fishing and gathering lifestyle which required water "necessary to support productive habitat." This right carried priority date of "time immemorial." Richard Griffin & Claudia Antonacci, *Agua Caliente and the Argument for Aboriginal Rights to Groundwater,* 19 U. Denv. Water Law Rev. 316 (2016).

Aboriginal Rights - Fishing, Hunting, Gathering, Pasturing, Agricultural, Communal Living, Spiritual, Art



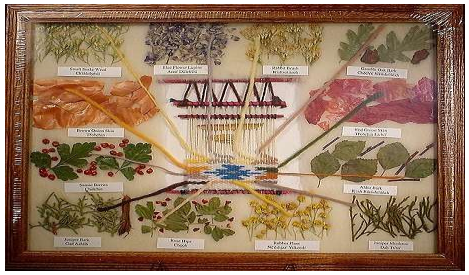


Importance of Aboriginal Sites

Acoma Pueblo Water Carrier

Navajo Sandpainting & Plant Dyes



Need for Cottonwood

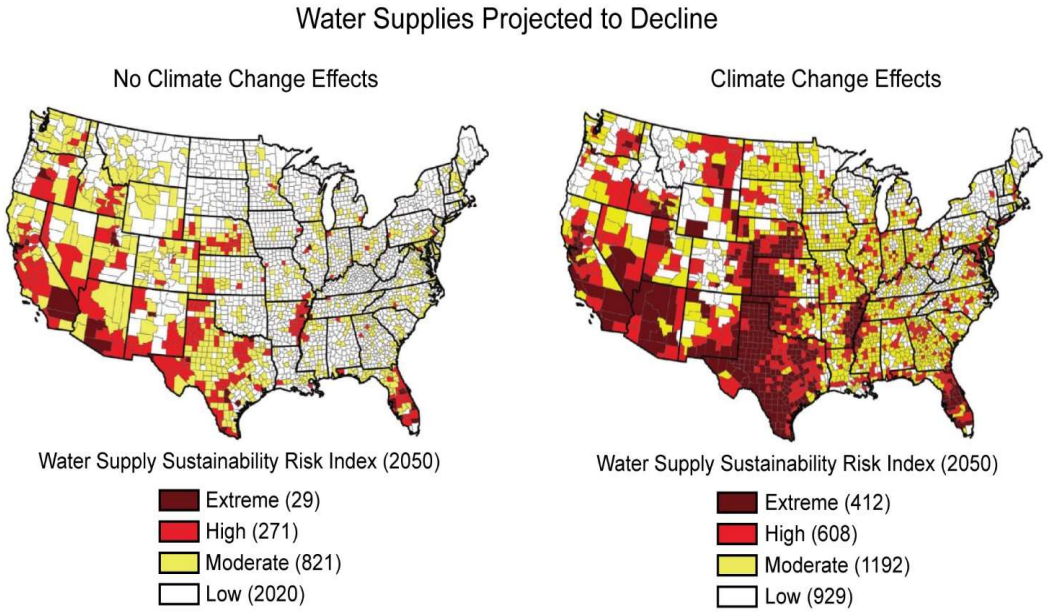
Navajo's Sacred Mountains – In States of Colorado, New Mexico, Arizona & Utah, Not on Navajo Reservation

Case Law Re Aboriginal Water Rights Unclear

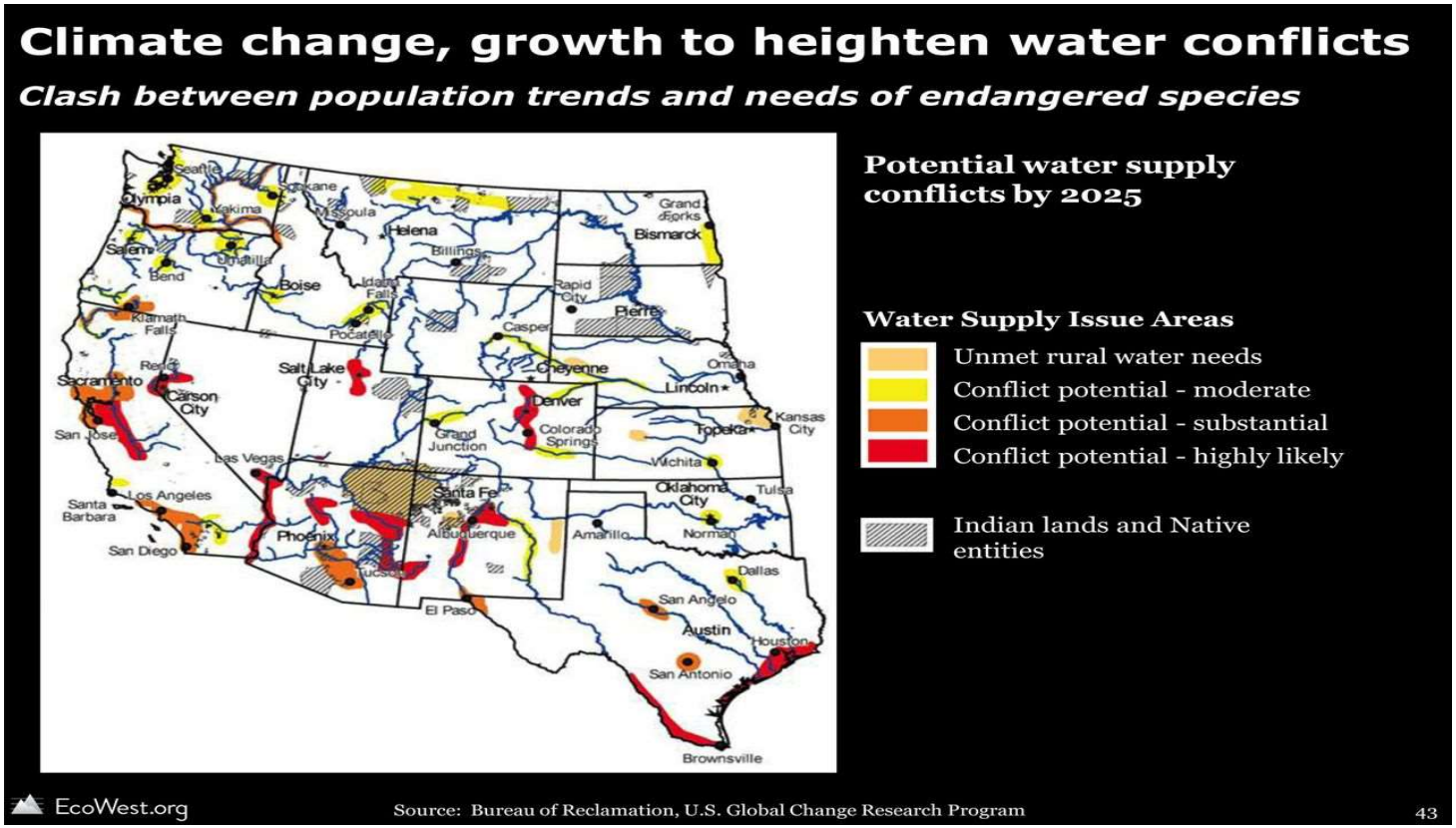
- Case law regarding aboriginal water rights is unclear. Recognition of aboriginal rights can be crucial to tribes, primarily when 1) a federal reserved rights claim is not available; or 2) priority date guaranteed by reserved right is not early enough to preserve tribe's access to water.
- Excellent discussion of this issue in Richard Griffin & Claudia Antonacci, *Agua Caliente and the Argument for Aboriginal Rights to Groundwater,* 19 U. Denv. Water Law Rev. 316 (2016).

Allocation of Scarce Water Resources

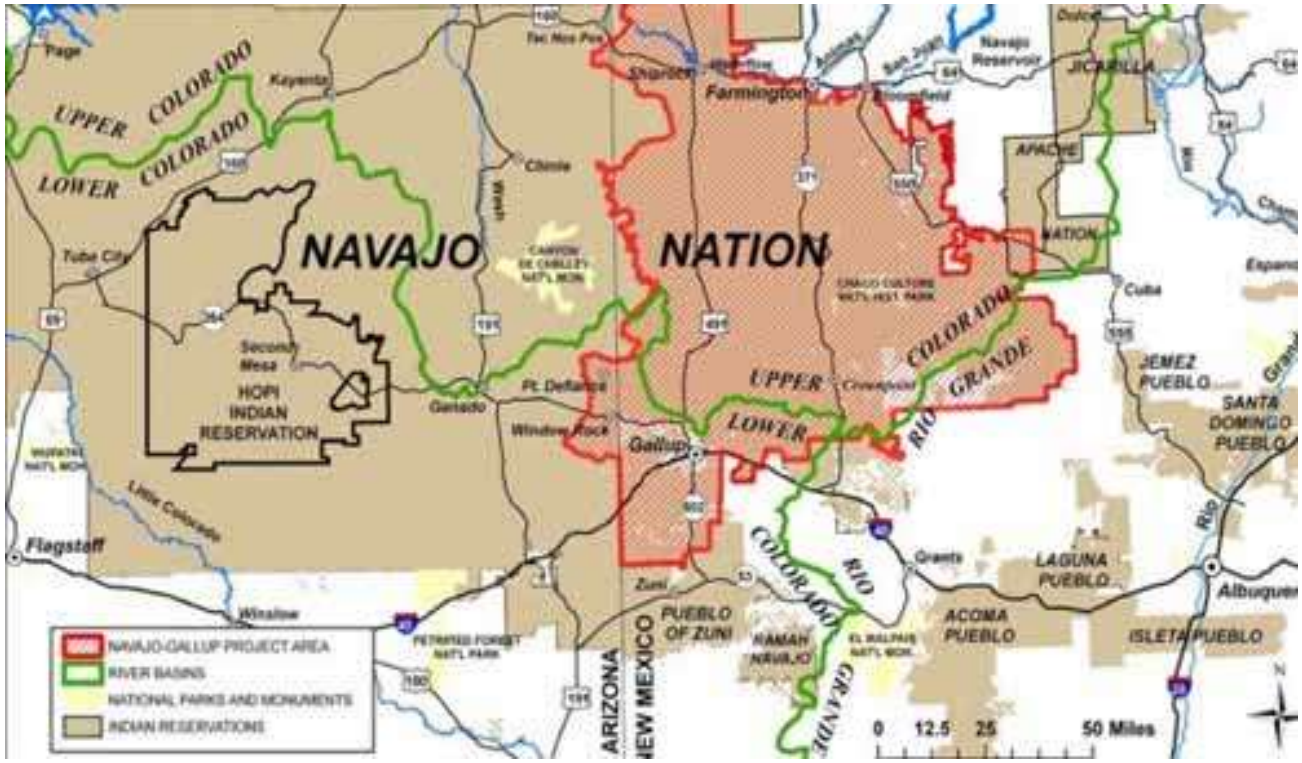
- As need for water grows with development of new industries and growing populations, tension arising from allocation of scarce water resources highlights difficulties that often surround reserved water rights, particularly in western states. (Bureau of Land Management Chart)



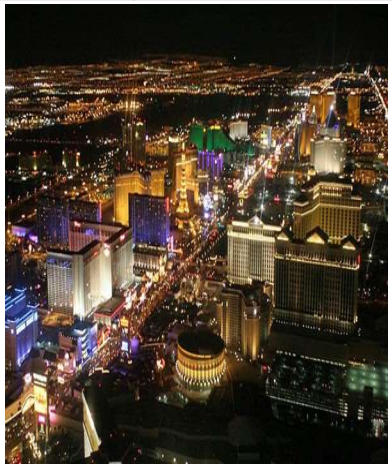
Water Conflicts in West – Where Many Indian Nations Have Their Lands Bureau of Reclamation Chart

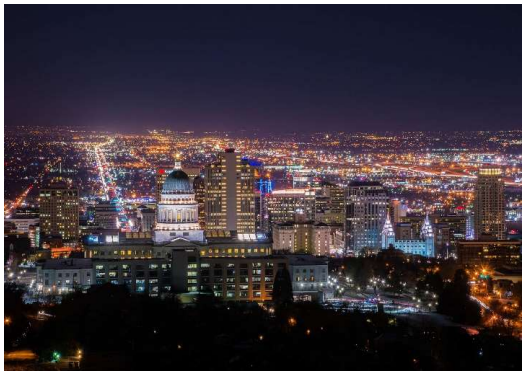


Navajo Nation Is Almost Size of West Virginia
300,460 Enrolled Tribal Members as of 2015

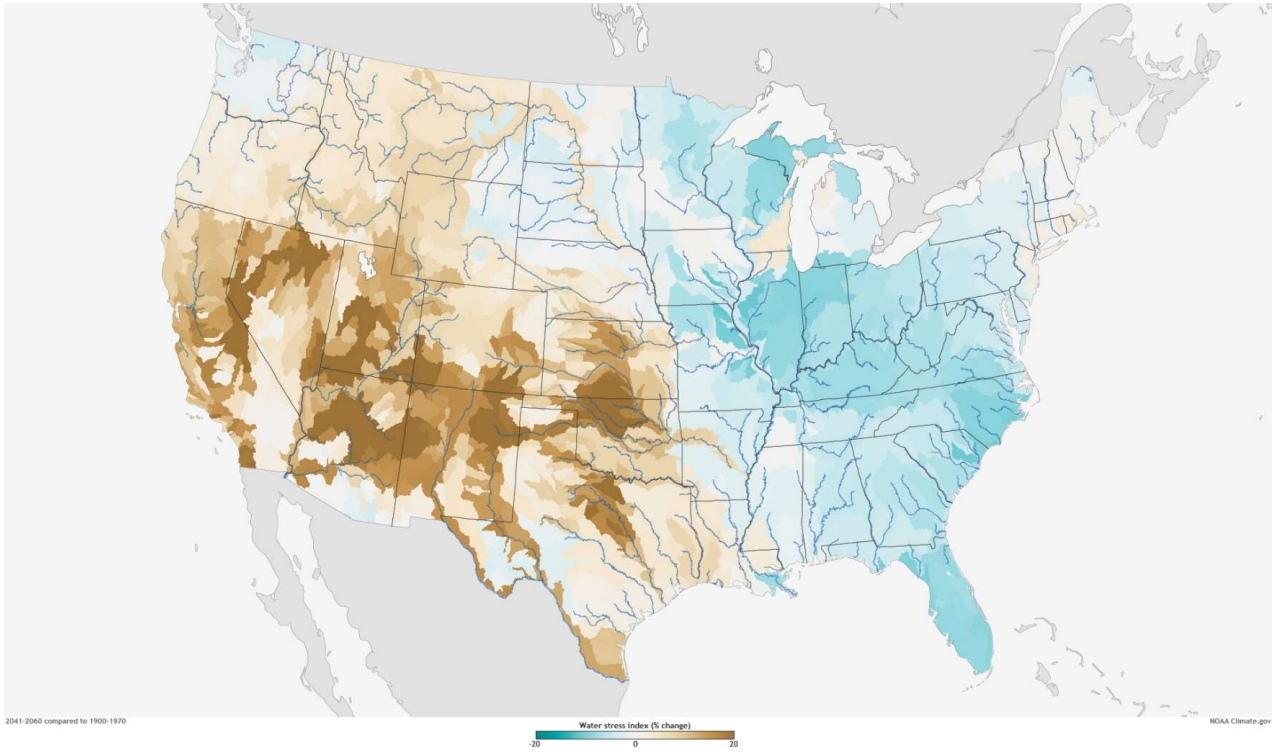


Competing Uses - Los Angeles, Las Vegas, Phoenix, Denver, Albuquerque, Salt Lake, Oklahoma City

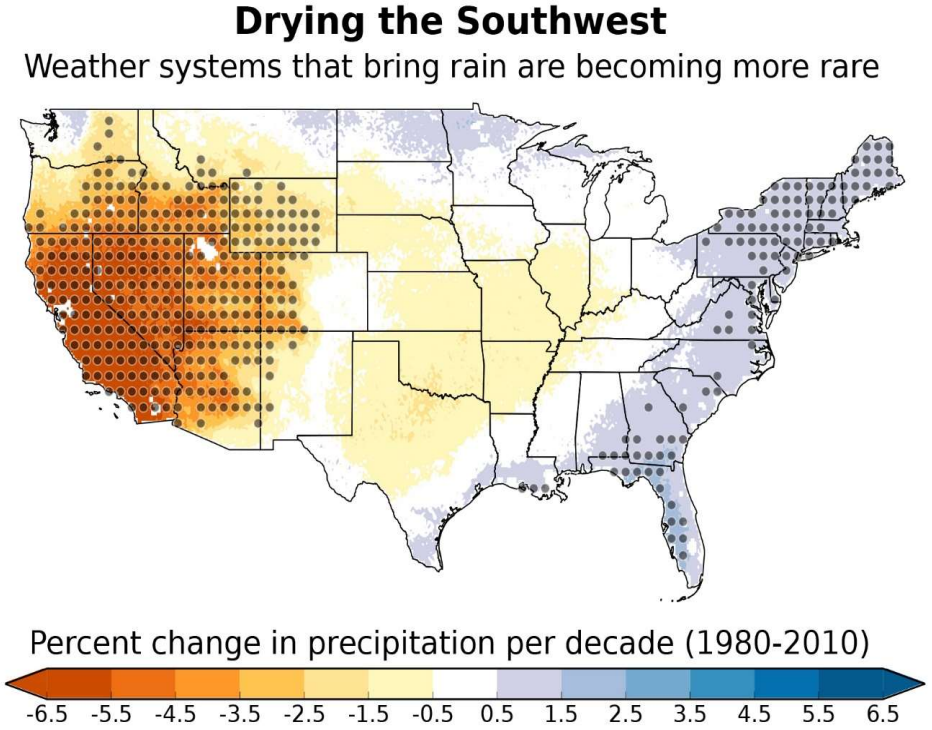




Water Stress Areas in US



Climate Change -- Added Factor in Scarcity



Western States - Prior Appropriation

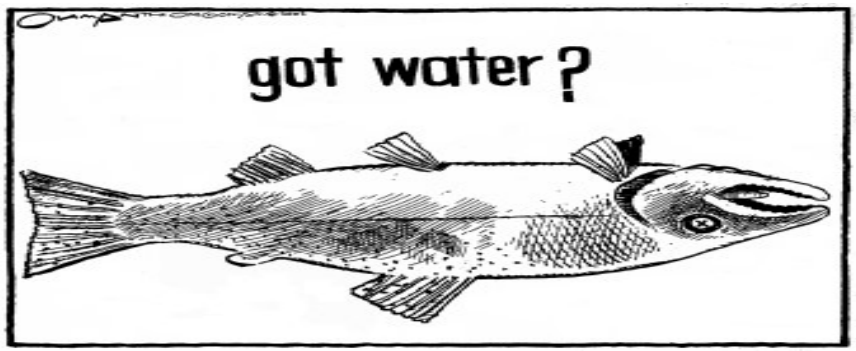
- Western states generally follow some form of **prior appropriation system of water allocation.**
- Prior appropriation system allocates water to users based on order in which water rights were properly acquired.
- Because Indian reserved water rights date back to government's reservation of land, these water rights often pre-date other private water users' claims appropriated under state law. For example, the Navajo Reservation was set aside by Treaty in 1868, so certain Navajo reserved water rights date back to 1868.

Prior Appropriation Doctrine
"First In Time, First In Right"

- Attributes are :
- basis of right is beneficial use;
- right is stated in terms of definite quantity, nature of use and time of use;
- right may be terminated by abandonment or forfeiture;
- priority date is the date on which beneficial use began;
- right is transferable;
- land ownership adjacent to stream is not requirement to obtain water right; and
- senior appropriators' rights must be fully satisfied before junior appropriators' rights are satisfied.

Contentious

- In times of shortage, junior users may receive none of their allocations after senior users (which may include tribes) take their share.



- Water rights appropriated under state law may be reduced in subsequent litigation based on current technological determinations on water actually needed for irrigation which may have been overstated in prior state decrees.

Indian Reserved Water Rights Probably Not Quantified

- Although prior appropriation system's reliance on seniority provides a degree of certainty to water allocation, Indian reserved water rights were probably not quantified at time reservation was set aside.

Quantifying Indian Reserved Water Rights

- Other water users may not know whether, or the extent to which, Indian reserved water rights have priority.
- Because of these uncertainties, Indian reserved water rights are often litigated or negotiated in settlements and related legislation.

Quantification Standard

In 1963, U.S. Supreme Court approved special master's decision on Indian reserved water rights that used quantification standard based on agricultural water requirements. *Arizona v. California*, 373 U.S. 546 (1963).

Determining Practicably Irrigable Acreage

Three-step process for determining reservation's agricultural water requirements based on practicably irrigable acreage.

First, soil scientists determine largest area of arable land that can reasonably be considered for an irrigation project.

Second, engineers develop an irrigation system based on available water supply and arable land base.

Third, economists evaluate crop patterns, yields, pricing, and net returns for crops that irrigation project might support.

Fort Mojave Indian Tribe v. United States, 32 Fed. Cl. 29, 35 (1994)

PIA Standard Not Applied By All Courts

Arizona Supreme Court in 2001 refused to simply apply precedential PIA standard for quantifying Indian reserved water rights. It stated:

A permanent homeland requires water for multiple uses, which may or may not include agriculture. … Limiting an Indian reservation's purpose to agriculture, as the PIA standard implicitly does, assumes that the Indian peoples will not enjoy the same style of evolution as other people, nor are they to have the benefits of modern civilization. *In Re the General Adjudication of All Rights to Use Water in the Gila River System and Source,* 35 P.3d 68 (Ariz. 2001).

In re Gila River Suggests Other Factors in Quantifying Indian Reserved Water Rights

Other potential factors include:

(1) tribe's history of and cultural need for water;

(2) nature of land and associated resources of reservation;

(3) tribe's economic status and proposed economic development to extent that they involve a need for water;

(4) historic reliance of tribe on water for proposed purpose; and

(5) tribe's current and projected population. *In re Gila River*, 35 P.3d at 79-81.

Primary Purpose Standard in Federal Reserved Water Rights Cases

While federal reserved water rights may be applied only for **primary purposes of reservations**, not for secondary purposes, Arizona Supreme Court refused to apply this strict standard to Indian reserved water rights.

In *Cappaert v. U.S.*, 426 U.S. 128 (1976), Supreme Court held that federal reserved water rights are limited to the "**amount of water necessary to fulfill the purpose of the reservation, no more.**"

In *United States v. New Mexico,* 438 U. S. 696 (1978), Supreme Court further clarified that the test for federal reserved water rights is **whether "the purposes of the reservation would be entirely defeated" without that water.**

Courts Divided on Purpose of Use in Indian Reserved Water Rights Cases

- Other courts have rejected this broad interpretation, noting the inherent risks in placing no limits on water rights associated with an Indian reservation and accordingly limiting Indian reserved water rights only to purposes that were specifically contemplated when reservation was created.

Changes in Water Use by Tribe

Once quantified, some court decisions have allowed Indian reserved water rights to be used for purposes other than those considered in quantification of right.

U. S. Supreme Court approved a special master's decision noting that quantification based on **standard measured by agriculture purposes did not prohibit tribe from putting water to use for other purposes**. See ***Arizona v. California*, 439 U.S. 419 (1979).**

Other courts, however, **have refused to allow tribes to change their water use** from purpose contemplated when reservation was created.

Water Sources

Indian reserved water rights do not necessarily require that water source be encompassed within reserved lands.

Rather, courts have allowed tribes to draw water from various sources as necessary to fulfill reservation purpose, limiting potential sources only to extent that waters must be unappropriated at time reservation was created.

Water Quality

When degradation of water quality would undermine water's use for reservation purposes, courts have recognized water quality as another element of Indian reserved water rights.

Federal courts have ruled that reserved water rights holders can seek legal protection from water quality degradation by other water users. Reserved water **right impaired when other users' actions increased salinity of water used by tribe for irrigation of agricultural crops**. *United States v. Gila Valley Irrigation District,* 961 F.2d 1432 (9 Cir. 1992).

Mining Contamination

Groundwater

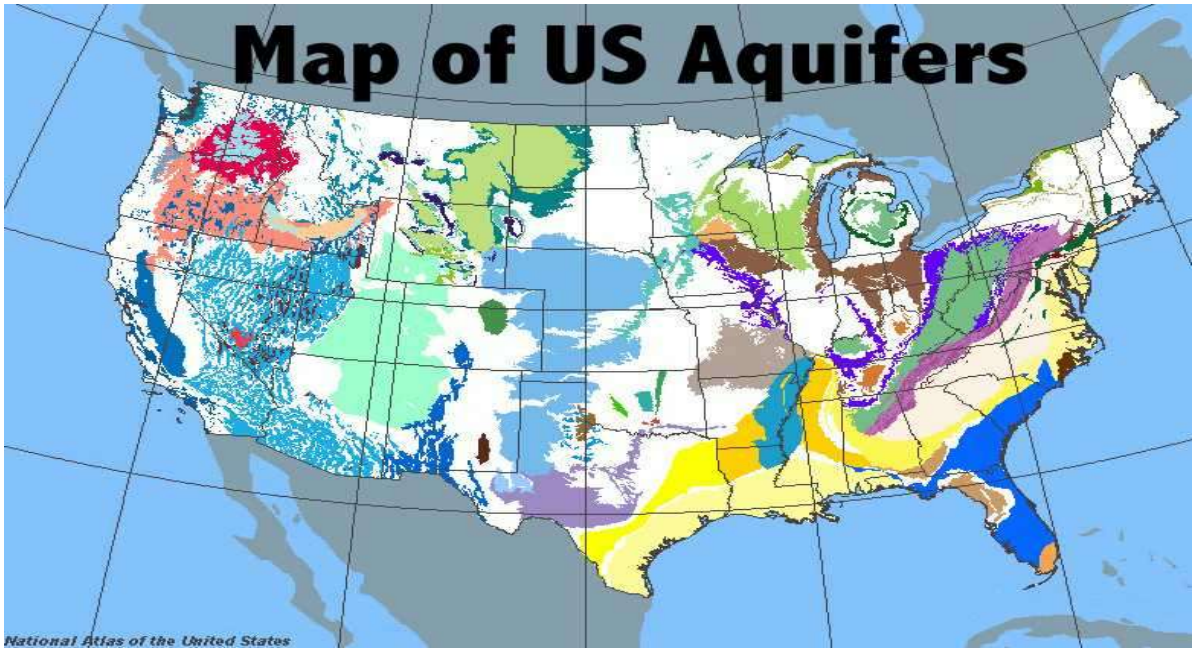
Most Western states handle groundwater and surface water under separate regulatory and judicial controls. Arizona has a "reasonable use" standard while California applies a correlative-rights standard.

In Colorado, there are four different types of groundwater each with its own allocation system: tributary groundwater, nontributary groundwater, not nontributary groundwater and designated groundwater.

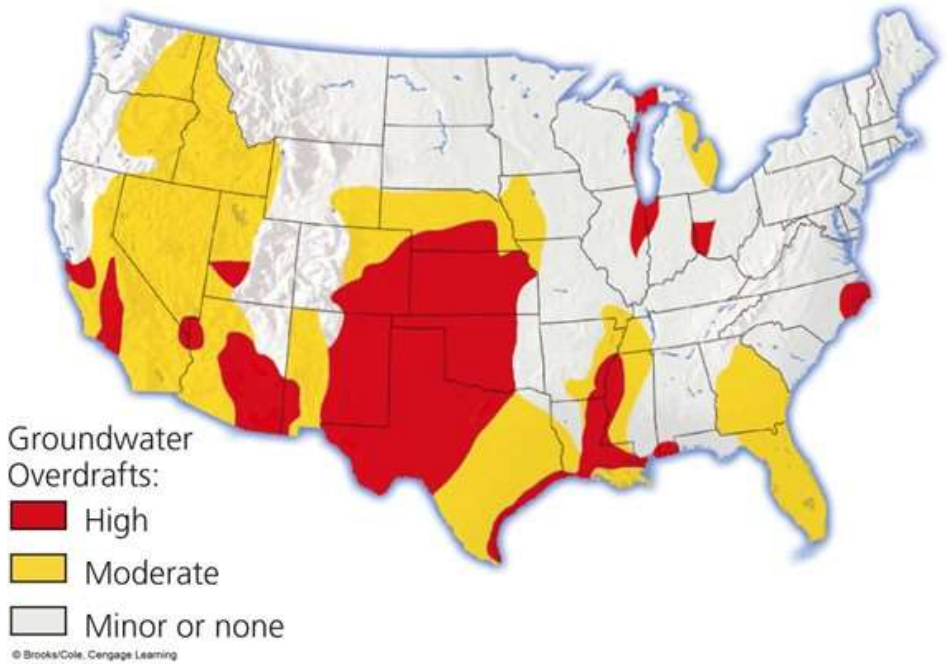
An important question on which courts had disagreed is whether Indian reserved water rights may draw from groundwater, or if they are limited to surface water.

Aquifers in US

- An aquifer is an underground layer of water bearing permeable rock, rock fractures or unconsolidated materials (gravel, sand or silt) from which groundwater can be extracted using a water well.



Groundwater Overdrafts in US, Problematic for Tribes without Quantified Rights



Agua Caliente Band of Cahuilla Indians Groundwater Case

- The reservation of the Agua Caliente Band of Cahuilla Indians overlies the Coachella Valley groundwater basin in California. Surface water is virtually nonexistent in the valley for the majority of the year.
- Groundwater is perhaps the most critical water resource for California's water future.
- Band brought suit to declare tribe's water rights as senior rights in Coachella Valley under federal law and to quantify them.

Coachella Valley, California

Agua Caliente Band of Cahuilla Indians Groundwater Case

- On **March 7, 2017,** Ninth Circuit ruled that Agua Caliente Band of Cahuilla Indians has reserved right to water, and groundwater is water source available to fulfill that right.
- Defendant water districts petitioned the U.S. Supreme Court for a **writ of certiorari on July 5, 2017**.

Supreme Court Denied Certiorari on November 27, 2017

- U.S. Supreme Court announced that it would not hear the appeals submitted by the California water agencies. Tribal Chairman Jeff L. Grubbe responded to the decision, “Because of the Supreme Court’s decision, the favorable rulings from the federal district court and the Ninth Circuit Court of Appeals recognizing and protecting the Reservation’s federal water right are now settled law.”

Method for Quantification and Actual Quantification Yet to Be Decided

- With this “phase one” part of the trial decided, Tribe, United States, and state water agencies are addressing “phase two” legal issues. Phase two will deal with (a) method for quantifying Tribe’s share, (b) whether there is right to water of certain quality, and (c) whether Tribe owns groundwater storage space under its reservation.
- “Phase three” legal issues of the case include actual quantification.

236 Tribes in Western U.S. with Groundwater Rights Not Quantified

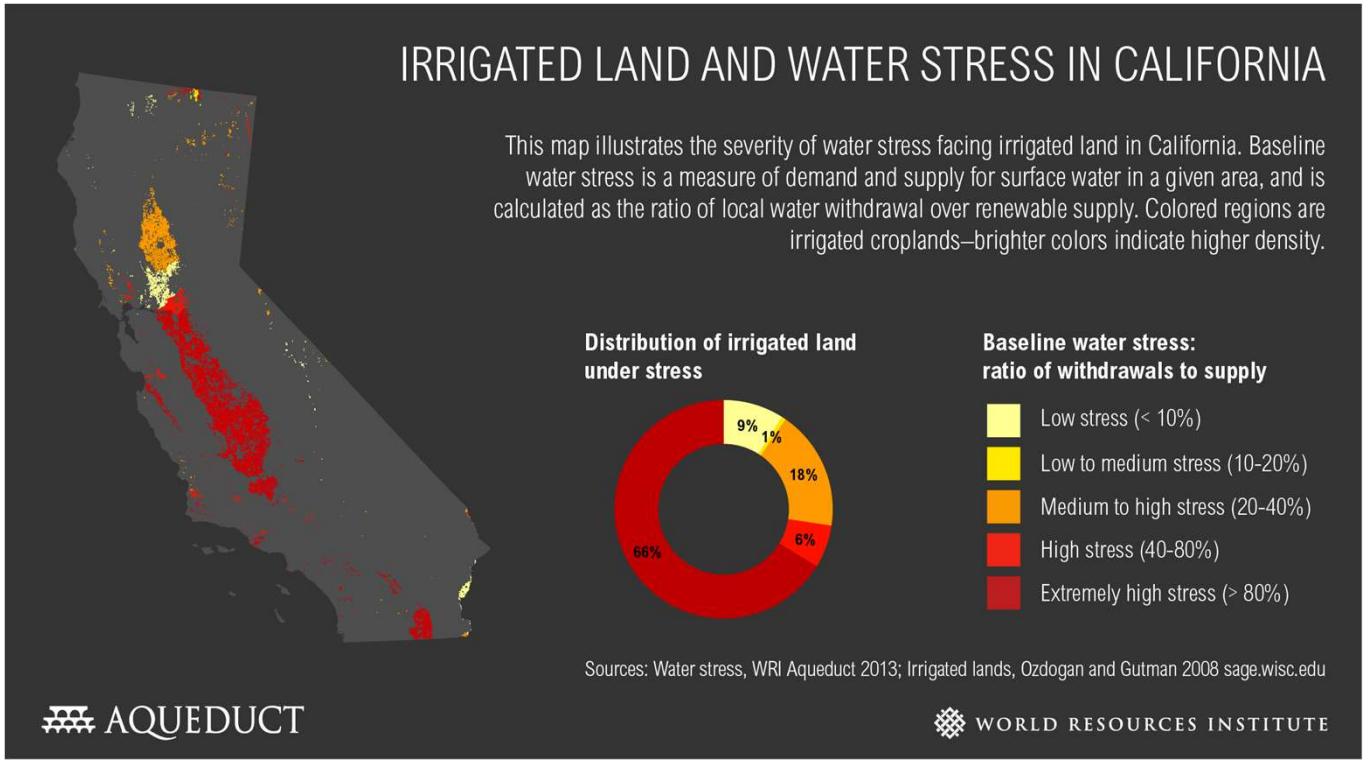
- Before Agua Caliente ruling in late 2017, tribal rights exclusively for groundwater made up just 4 percent of all tribal freshwater rights in 17 western states.
- As many as 236 tribes in the western U.S. have lands with groundwater rights that have not been finally quantified in court or in settlements.
- Now, more tribes will likely seek to resolve their rights to control and use water from the aquifers beneath their land.

Agua Caliente Band Case Breaks New Ground

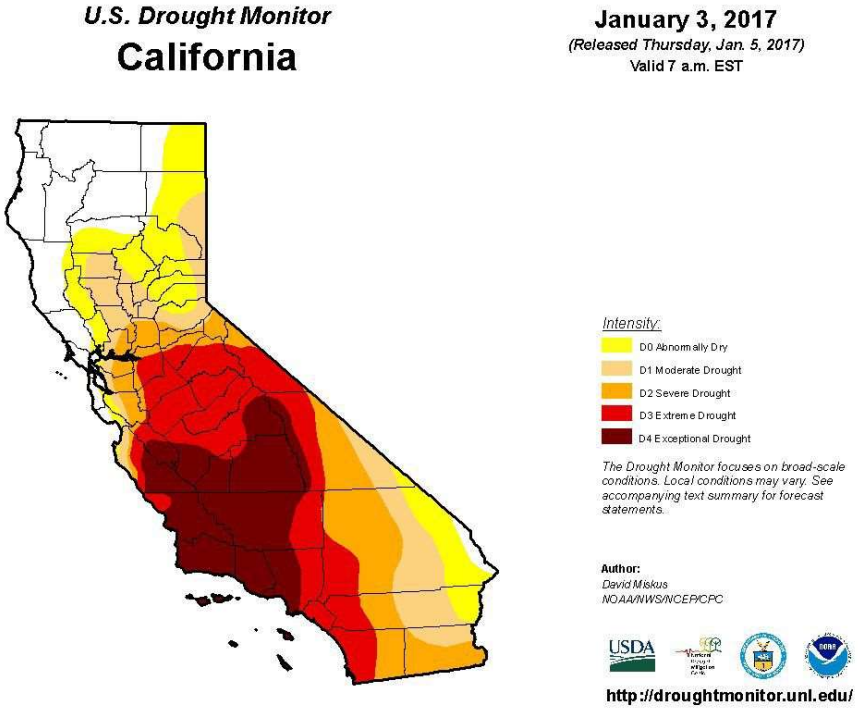
- While Agua Caliente Band case breaks new ground, it remains to be seen what legal and practical issues will arise.
- Whatever the outcome in the courts, however, Congress has constitutional authority over substance and extent of federal water law and could alter this legal landscape with future legislation.

Southern California Indian Tribes

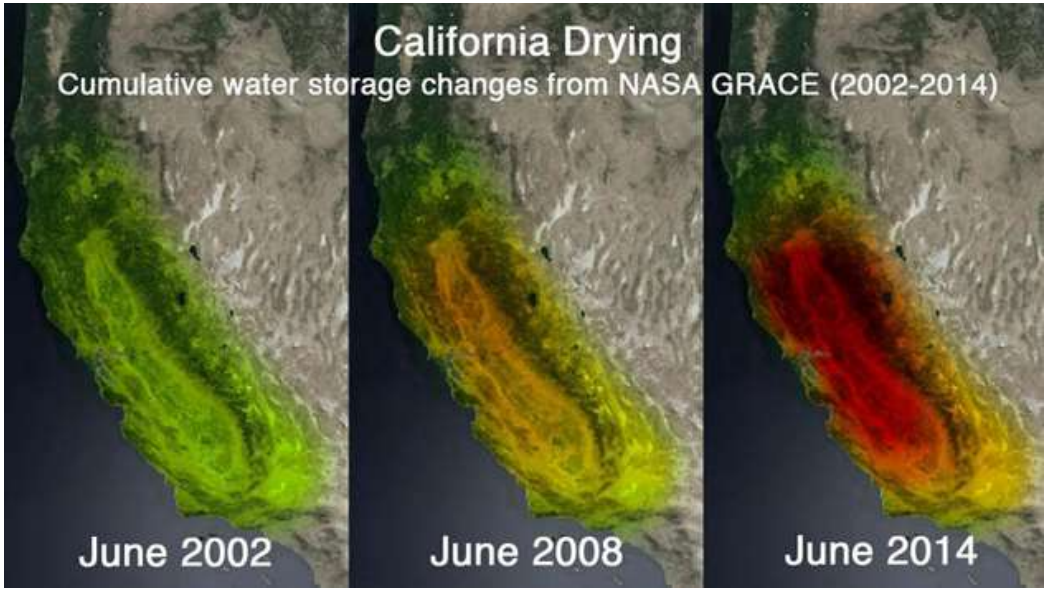
Water Stress & Irrigated Land in CA



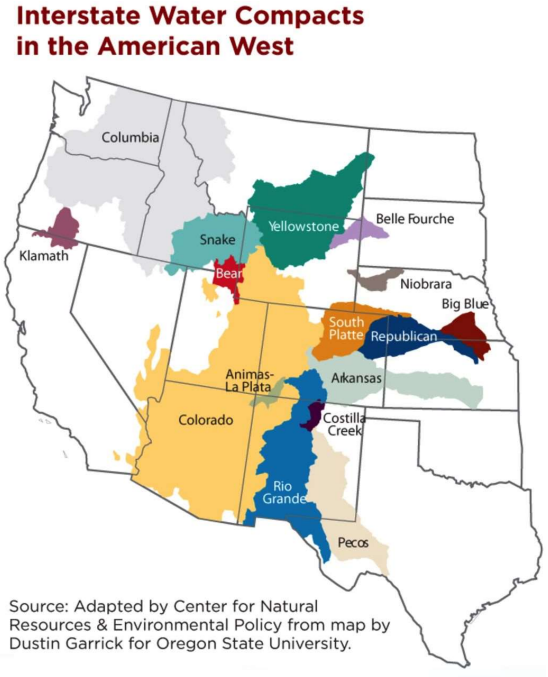
California Drought Conditions



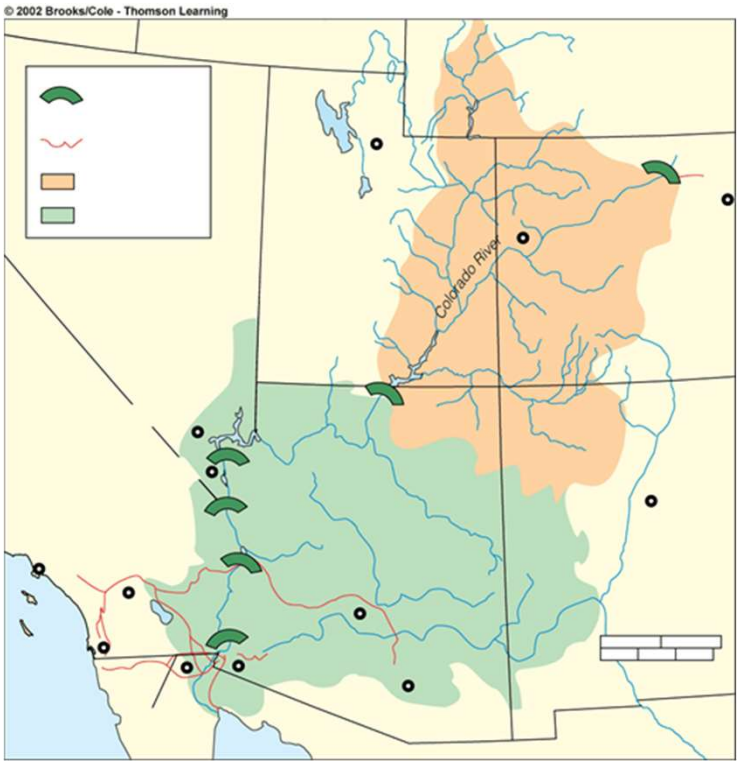
Groundwater Depletion in CA



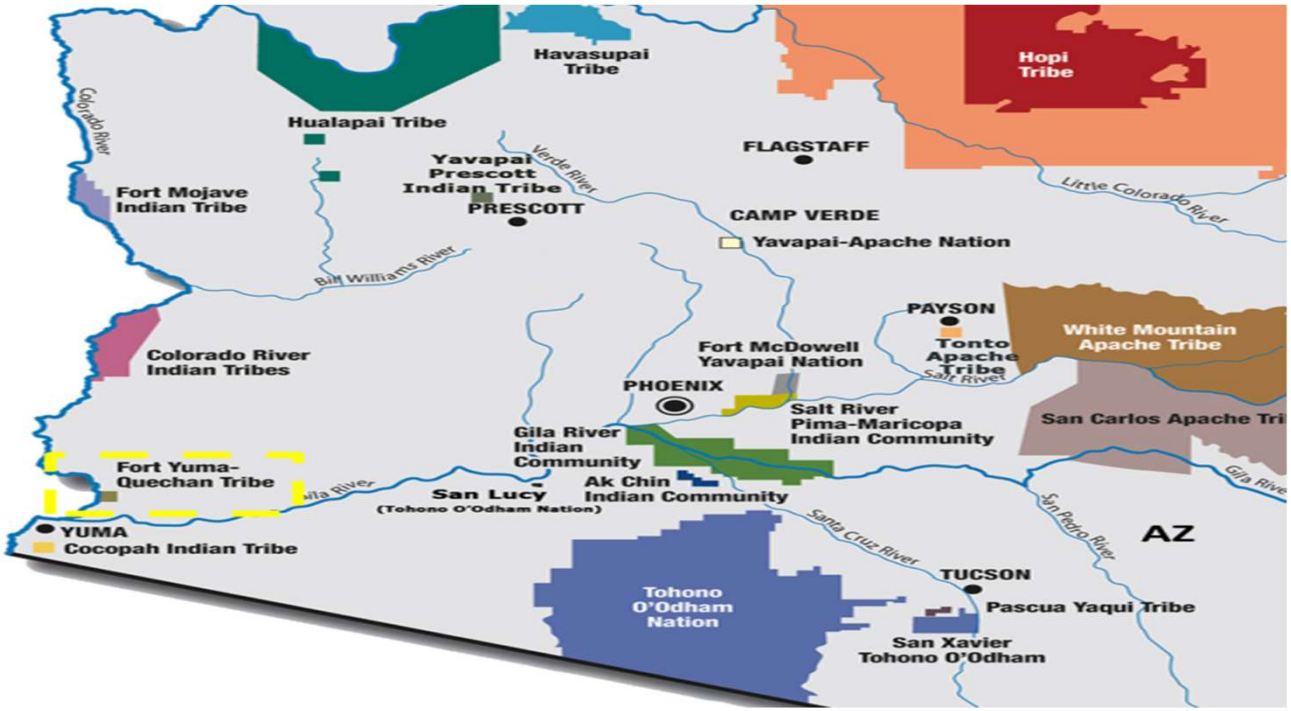
Interstate Water Compacts in American West



Upper and Lower Colorado River Basin



Tribes in Colorado River Basin – Impending Colorado River Basin Tribal Water Study by Bureau of Reclamation and Ten Tribes Partnership



Colorado - 1 International Treaty, 9 Compacts, 2 Court Decrees, 2 Agreements, 1 Settlement Act

- Pertaining to Rio Grande, Tijuana, and Colorado Rivers, Animas-La Plata, South Platte, Republican, Costilla, Arkansas, North Platte and Laramie Rivers, Pot Creek, Sand Creek.
- Involving:
- Countries: Mexico
- States: Nevada, New Mexico, Utah, Wyoming, Nebraska, Texas, Kansas and Arizona
- Indian Nations: Southern Ute and Ute Mountain Ute Tribes

Colorado - 1 International Treaty, 9 Compacts, 2 Court Decrees, 2 Agreements, 1 Settlement Act

- **International Treaties**
- Mexican Treaty on Rio Grande, Tijuana, and Colorado Rivers – **1945**
- **Interstate Compacts**
- Colorado River Compact **1922** Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming
- La Plata River Compact **1922** Colorado and New Mexico
- South Platte River Compact **1923** Colorado and Nebraska
- Rio Grande River Compact **1938** Colorado, New Mexico, and Texas
- Republican River Compact **1942** Colorado, Kansas, and Nebraska
- Costilla Creek Compact 1944 (**Rev. 1963**) Colorado and New Mexico
- Upper Colorado River Compact **1948** Colorado, New Mexico, Utah, Wyoming, and Arizona
- Arkansas River Compact **1948** Colorado and Kansas
- Animas-La Plata Project Compact **1969** Colorado and New Mexico

Colorado - 1 International Treaty, 9 Compacts, 2 Court Decrees, 2 Agreements, 1 Settlement Act

- **U. S. Supreme Court Cases**
- Nebraska v. Wyoming, 325 U.S. 589 (**1945**) North Platte River
- Wyoming v. Colorado, 353 U.S. 953 (**1957**) Laramie River
- **Agreements**
- Pot Creek Memorandum of Understanding – 2005 (1958) Colorado and Utah
- Sand Creek Memorandum of Agreement – 1997 Colorado and Wyoming
- **Settlement Act**
- Colorado Ute Indian Water Rights Settlement Act of **1988**
- Colorado Ute Indian Water Rights Settlement Act Amendments of **2000**

Compacts Did Not Impair Water Rights of Tribes

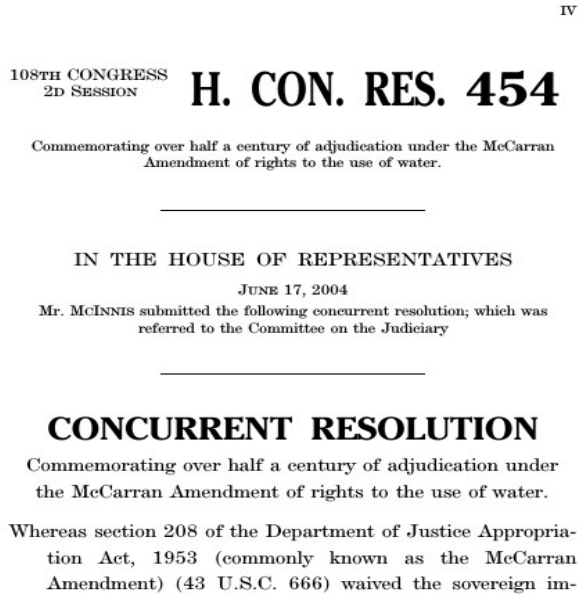
- Rio Grande River Compact 1938 Colorado, New Mexico, and Texas
  - Nothing in this compact shall be construed as affecting the obligations of the United States of America to Mexico under existing treaties, or to the Indian tribes, or as impairing the rights of the Indian tribes.

Stream System Water Right Adjudications

Water rights are formalized through stream system water right adjudications. Filed in state court, involve all water users on a designated stream system within state's boundaries, apply federal and state law, require extensive technical work, take decades to complete and are very expensive.

McCarran Amendment (1952)

Congress passed McCarran Amendment under which state courts could hear disputes involving Indian reserved water rights.



IV

108TH CONGRESS
2D SESSION

H. CON. RES. 454

Commemorating over half a century of adjudication under the McCarran Amendment of rights to the use of water.

IN THE HOUSE OF REPRESENTATIVES

JUNE 17, 2004

Mr. MCINNIS submitted the following concurrent resolution; which was referred to the Committee on the Judiciary

---

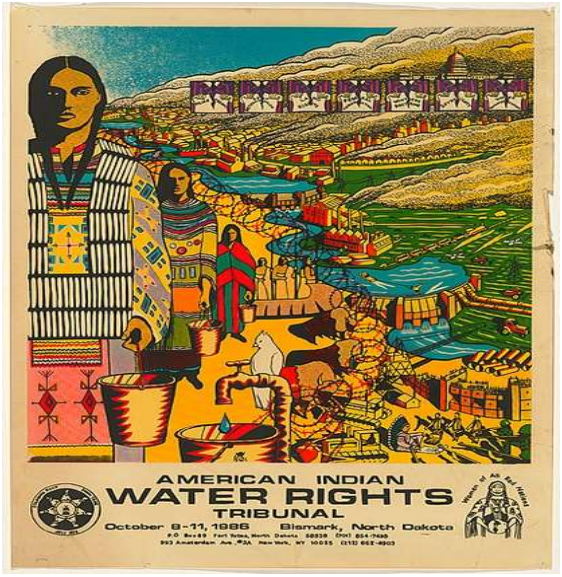
CONCURRENT RESOLUTION

Commemorating over half a century of adjudication under the McCarran Amendment of rights to the use of water.

Whereas section 208 of the Department of Justice Appropriation Act, 1953 (commonly known as the McCarran Amendment) (43 U.S.C. 666) waived the sovereign im-

Pursuing Negotiated Settlements

Prospect of having state courts adjudicate Indian reserved water rights , which courts many tribes consider hostile, has been one of primary motivations for pursuing negotiated settlements.



Settlements Can Address Source, Quantity, Type, Use, Quality and Marketability of Water and Required Infrastructure

In addition to identifying and quantifying water source, settlements can

- address **type** of water (e.g., groundwater, surface water, effluent water, stored water);
- types of **uses** that are held under reserved water rights (e.g., domestic, municipal, irrigation, instream flows, hunting and fishing, etc.);
- water **quality** issues; and
- **ability to market, lease, or transfer** reserved water.

As of 2015, 20 of 29 congressionally enacted settlements permitted some form of marketing, leasing, or transferring of water.

DOI Entities

DOI Entities

- Within DOI, two entities coordinate Indian water settlement policy.
- **Working Group on Indian Water Settlements**, established in 1989 and comprised of all Assistant Secretaries and the Solicitor - responsible for making recommendations to Secretary of the Interior.
- Secretary of the Interior's Indian Water Rights Office (**SIWRO**) is responsible for coordinating Indian water rights settlements and interfacing with settlement and implementation teams in field.
- **Federal teams** typically are composed of representatives from Bureau of Indian Affairs **(BIA),** Bureau of Reclamation (**Reclamation**), U.S. Fish and Wildlife Service **(F&W)**, **Office of the Solicitor**, and Department of Justice (**DOJ)**.

Negotiated Settlements Preferred, Rather Than Litigation

1990 DOI Policy Statement, "Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims" expressed the **position that negotiated settlements , rather than litigation, are the preferred method of addressing Indian water rights.**

Indian Tribes don't want paper water rights. ***"I'd rather be upstream with a shovel and a ditch than downstream with a decree." --*** **Western Water Aphorism**

Settlement Can Take Decades

Four steps:

Pre-negotiation,

negotiation,

settlement, and

implementation.

Settlement Authorization or Approval

Settlement is presented for congressional authorization if required.

If Congressional approval not required, settlement approved administratively by Secretary of the Interior or U.S. Attorney General or judicially by judicial decree.

>$3.5 Billion Dollars

As of FY2015, federal government had authorized Indian Water Rights Settlements with more than $3.5 billion dollars in federal expenditures to construct and operate projects to deliver this water.

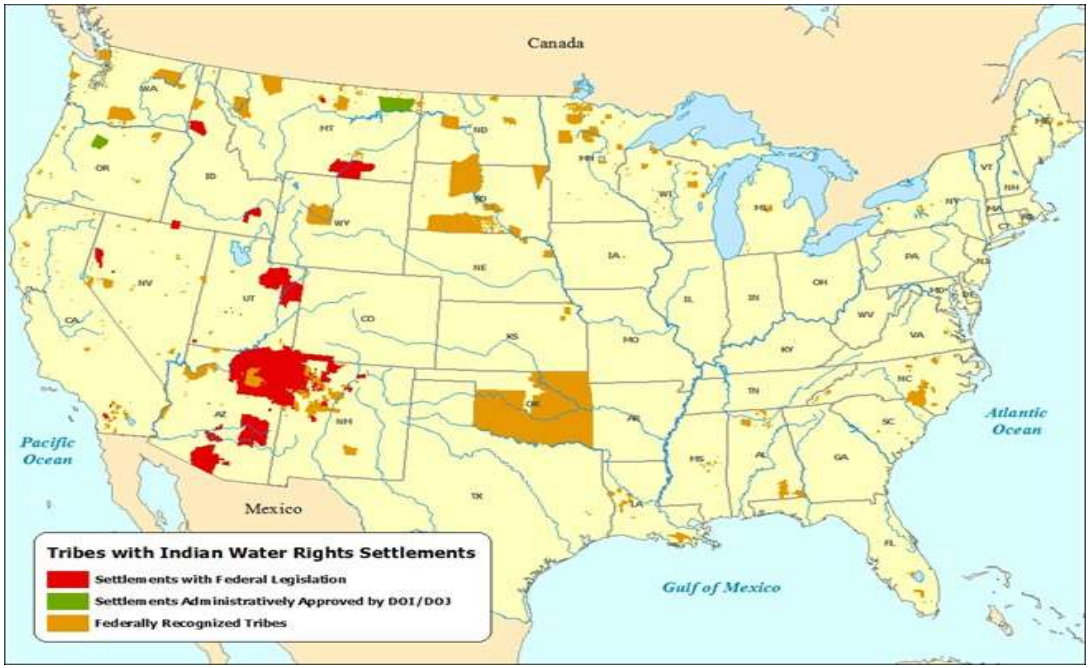
Funding Sources Drying Up

- **Examples of Funding Sources**
- **Discretionary Funding**
- **Discretionary Spending or Spending that Is Subject to Appropriations**
- **Combined Mandatory/Discretionary Funding**

Funding Sources Drying Up

- **Redirection of Existing Receipt Accounts**
- Other water rights settlements have been funded through additional mechanisms, including redirection of funds accruing to existing federal receipt accounts.
- **Judgment Fund**
- Another potential source of payment for Indian water rights settlements could be the Judgment Fund, which is a permanent indefinite appropriation available to pay all judgments against the United States that are "not otherwise provided for" by another funding source.

Tribes (40) with Indian Water Rights Settlements (36)

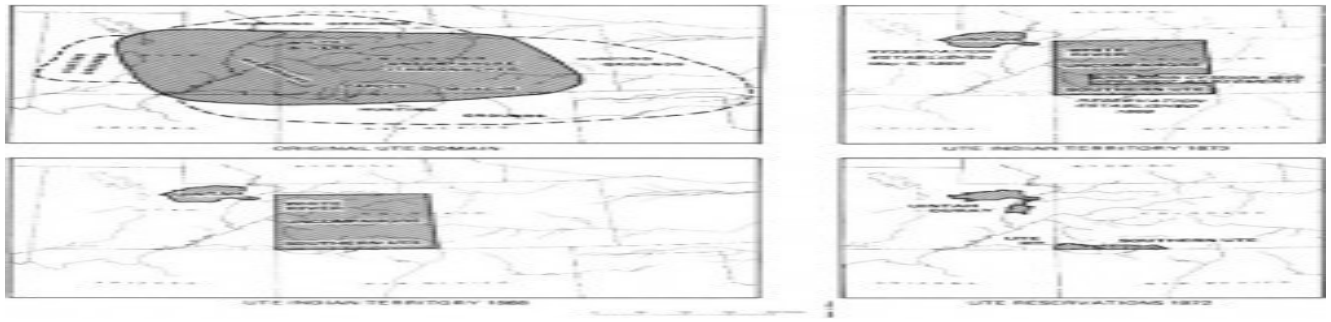


Indian Water Rights Settlements To Date - 36

- As of February 2017, 36 Indian water rights settlements have been federally approved with 40 individual Indian tribes.
- Of these, 32 settlements were approved and enacted by Congress and 4 were administratively approved by U.S. Departments of Justice and the Interior.
- Federal government is involved in these settlements pursuant to its tribal trust responsibilities.

Colorado Ute Indian Water Rights Settlement Act of 1988

- Colorado Ute Indian Water Rights Settlement Act of 1988 (**Southern Ute and Ute Mountain Ute Tribes**) recognized tribal water rights for surface water and tributary groundwater. Colorado Ute Indian Water Rights Settlement Act Amendments of 2000. Project facilities include Ridges Basin Dam and Reservoir, Lake Nighthorse, Durango pumping plant, pipeline for delivery of Navajo Nation water supplies, among others.



Lake Nighthorse, Southern Colorado

- Part of Animas La Plata Project, settlement between federal government, State of Colorado, and Southern Ute and Ute Mountain Utes. Provides water storage. Water will be shared by Utes and five other entities, including State of Colorado, Animas-La Plata Water Conservancy, Navajo Nation, San Juan Water Commission and La Plata Conservancy District. **Fully two-thirds of water will be set aside for tribes**. It took forty years to complete.
- Only problem, per UMUT member, Manuel Heart, is “It's like a pitcher on a high shelf we can't reach.”

Lake Nighthorse, Southern Colorado

Arizona Settlement Acts

Arizona Settlement Acts

Ak-Chin Water Use Amendments Act of 2000, Pub. L. No. 106-285; Ak-Chin Water Use Amendments Act of 1992, Pub. L. No. 102-497; Act of Oct. 19, 1984, Pub. L. No. 98-530; Act of July 28, 1978, Pub. L. No. 95-328.

Southern Arizona Water Rights Settlement Amendments Act of 2004, Pub. L. No. 108-451; Southern Arizona Water Rights Settlement Technical Amendments Act of 1992, Pub. L. No. 102-497; Southern Arizona Water Rights Settlement Act of 1982, Pub. L. No. 97-293.

Salt River Pima-Maricopa Indian Community Water Rights Settlement Act of 1988, Pub. L. No. 100-512.

Fort McDowell Indian Community Water Rights Settlement Act of 1990, Pub. L. No. 101-628.

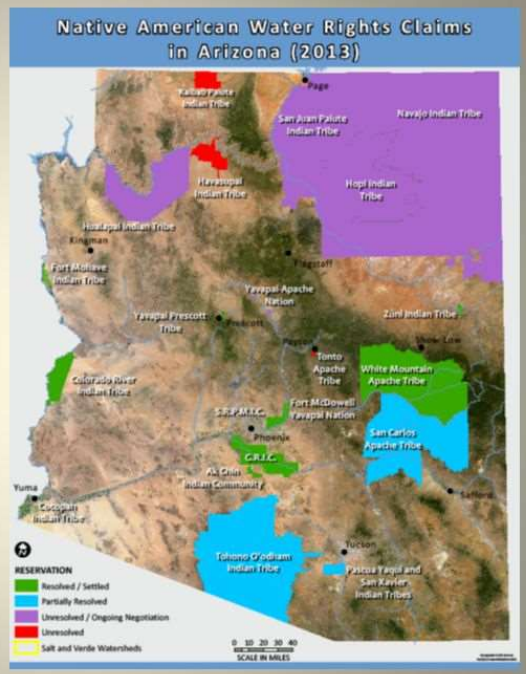
San Carlos Apache Tribe Water Rights Settlement Act of 1992, Pub. L. No. 102-575.

Yavapai-Prescott Indian Tribe Water Rights Settlement Act of 1994, Pub. L. No. 103-434.

Zuni Indian Tribe Water Rights Settlement Act of 2003, Pub. L. No. 108-34.

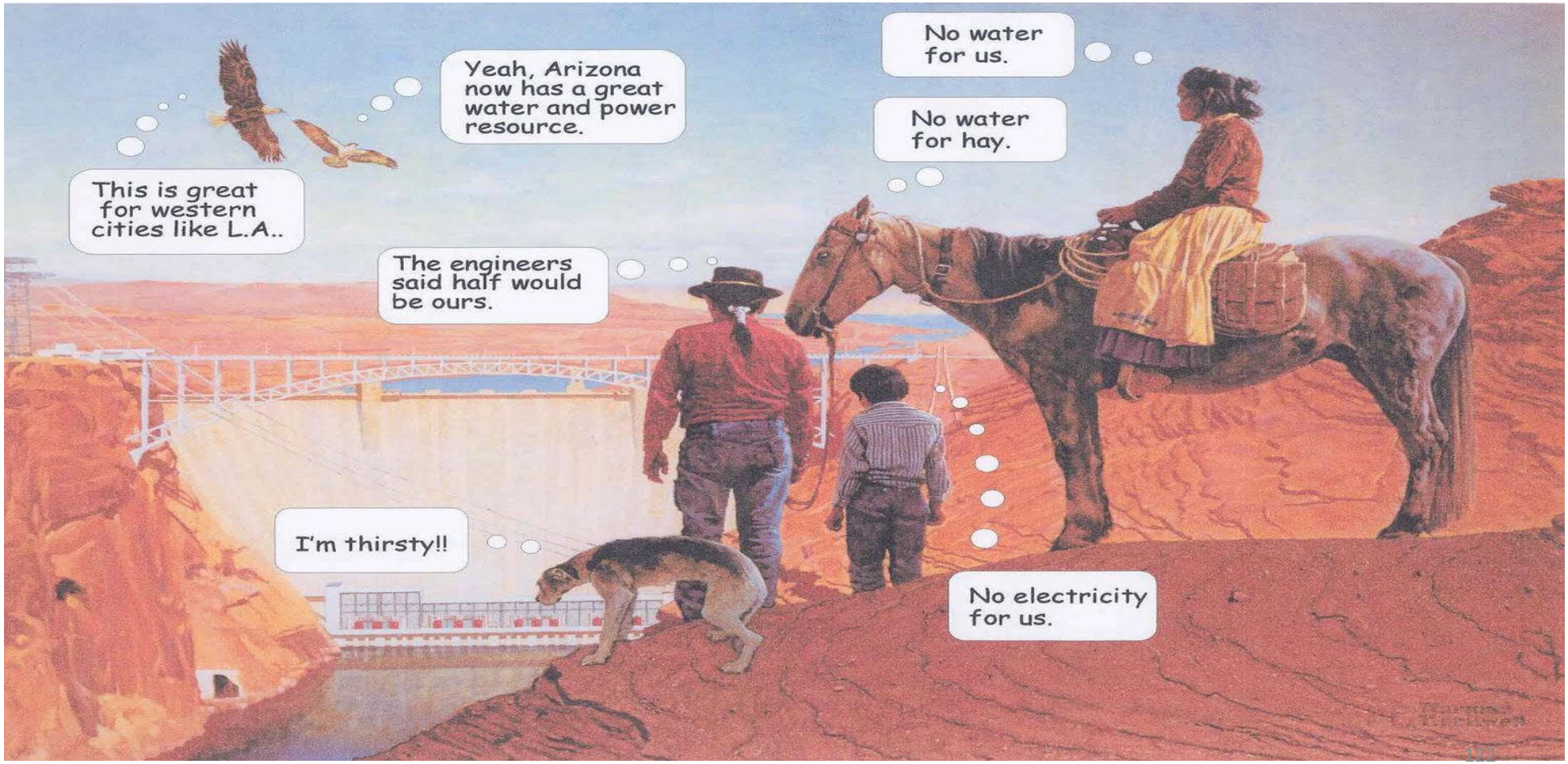
Gila River Indian Community Water Rights Settlement Act of 2004, Pub. L. No. 108-451.

White Mountain Apache Water Rights Quantification, Title III of Claims Resolution Act of 2010, Pub. L. No. 111-291.



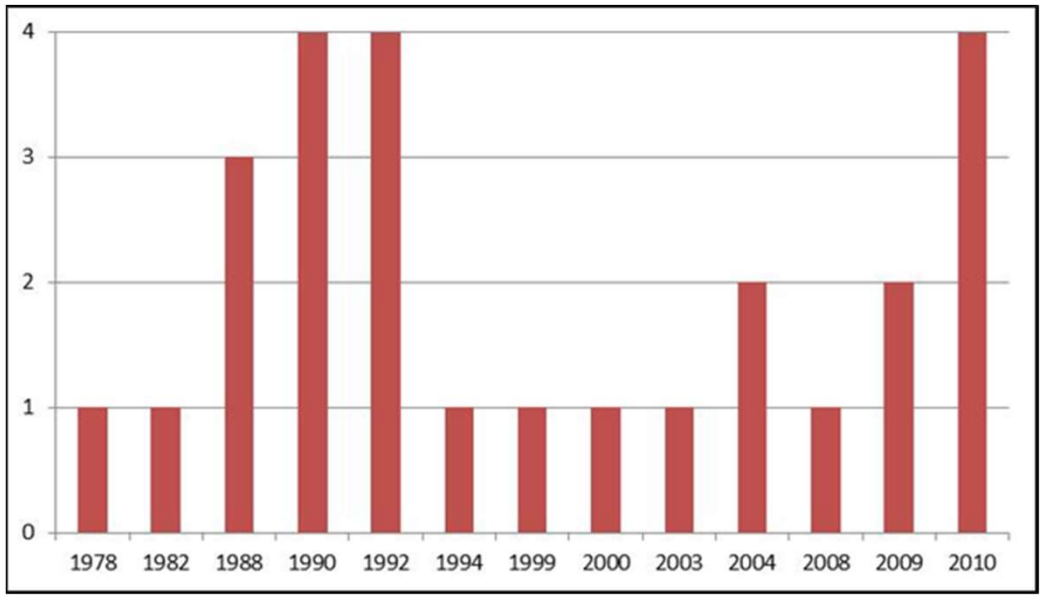
12

Navajo Perspective

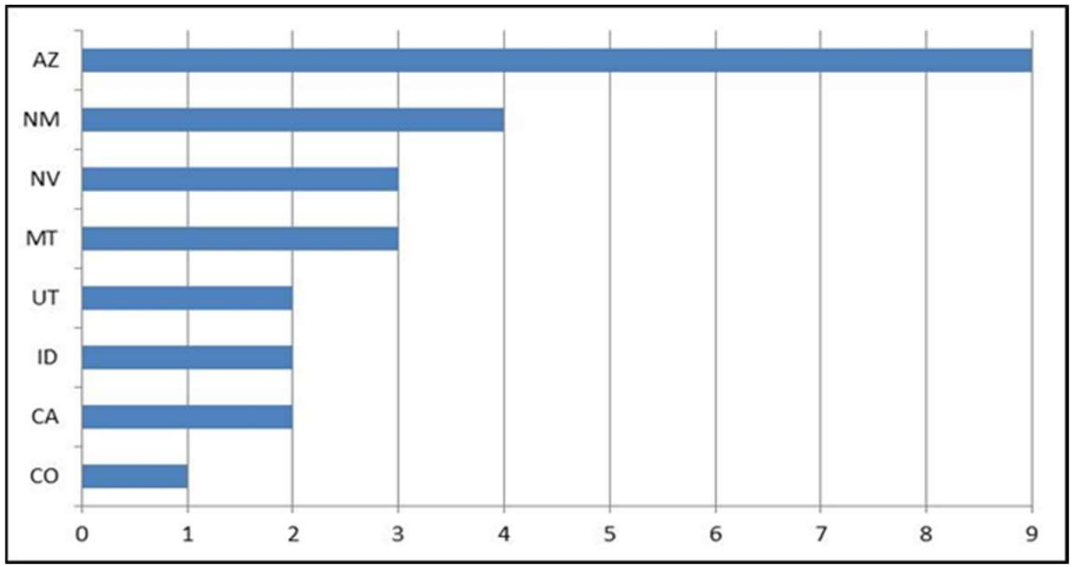


40 Percent of People Living in One Area of Navajo Nation Have No Access to Running Water, So Darlene Arviso Drives Her Tanker and Delivers Clean Water – 250 Homes on Her Route - 2015

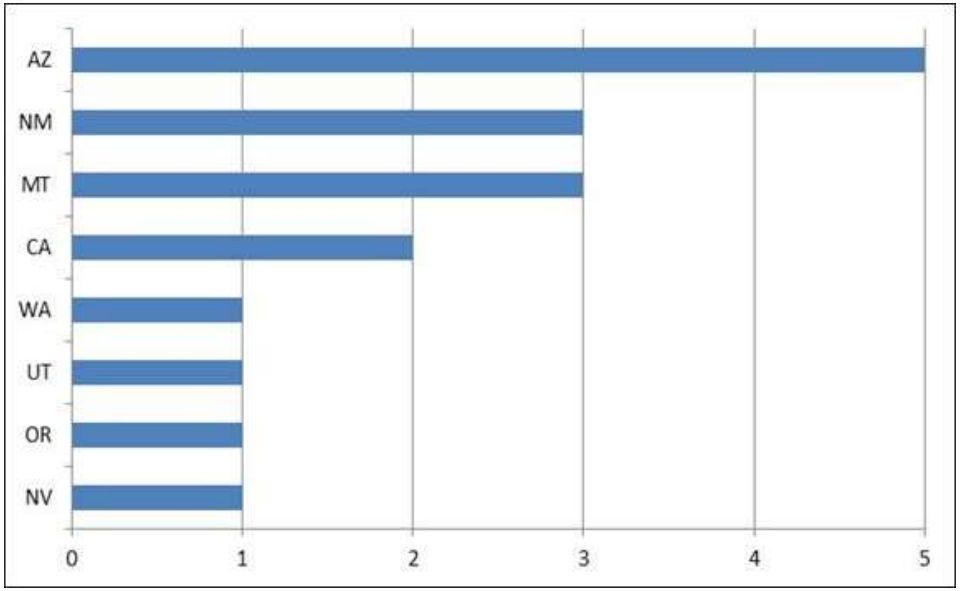
Number of Indian Water Rights Settlements by YEAR of Federal Legislation



Indian Water Rights Settlements with Federal Legislation by STATE



Active Indian Water Rights Negotiations by State



Interior Secretary Jewell, Deputy Secretary Connor Celebrate (4) Indian Water Rights Settlements

- January 13, 2017
- Included leaders from:

  Blackfeet Tribe,

  Choctaw and Chickasaw Nations,

  La Jolla, Rincon, San Pasqual, Pauma and Pala Bands of Mission Indians, and

  Pechanga Band of Luiseño Mission Indians.

$3 Billion ---Pechanga Settlement, Southern California; Oklahoma 1st Choctaw & Chickasaw; San Luis Rey, Southern California; Blackfeet Tribe - Montana

Future Cases and Settlements

- Currently pending litigation of Indian water rights involves about 50 Indian tribes in 12 states.
- Many more requests for federal litigation assistance are pending.

New Water Infrastructure

- Primary challenge is availability of federal funds to implement ongoing and future agreements.
- Indian water rights settlements often involve construction of major new water infrastructure to allow tribal communities access to water.

Central Arizona Project

- The Central Arizona Project 336 mile canal delivers Colorado River water to cities, farms, and tribes in the interior of Arizona.

White Mountain Apache Settlement

- First authorized as part of the Claims Resolution Act of 2010 to Gila and Little Colorado Rivers in Arizona.
- Bill approving funding of approximately $200 million project signed by President Trump on August 1, 2018.

New Mexico Water Basins, Pueblo Water Rights Differ

19 Pueblos in New Mexico

Different Sovereigns
Spanish Law (to 1821); Mexican Law (to 1848)

- King of Spain granted formal title to Pueblo people in 1689 – land grants.
- Mexico took over sovereignty from Spain by virtue of the Treaty of Cordova on August 21, 1821. Mexican government affirmed it would protect property of all inhabitants of New Spain. Mexico exercised sovereignty over the area from 1821-1848 but recognized Pueblos' title.
- After Mexican–American War, Mexico ceded most of what is today New Mexico to United States in 1848 under Treaty of Guadalupe Hidalgo.
- Under Treaty of Guadalupe Hidalgo, U.S. confirmed Pueblos' title.
- Spanish law (to 1821) or Mexican law (1821-1848).

Historically Irrigated Acreage

- In ***New Mexico v. Aamodt***, 618 F.Supp. 983 (1985), **Federal District Court of New Mexico** held that because **Pueblos** had occupied their land and used water since aboriginal time, their **water rights were prior and paramount to all others**. **Quantity was fixed at amount necessary to irrigate any and all lands under cultivation between 1848 (Treaty of Guadalupe Hidalgo) and 1924 (Pueblo Lands Act).** This is known as the **Historically Irrigated Acreage doctrine**. *Aamodt i*s the only case in which Historically Irrigated Acreage has been applied, and issue has never reached U.S. Court of Appeals or Supreme Court.

Quantification for New Mexico Pueblo Water Rights

- **Pueblos** argue that the **proper standard is the amount of practicably irrigable acreage ("PIA") from federal reserved rights cases.**
- **Defendants** argue **proper quantification for water rights is actual, historical use by Pueblos based on *Aamodt* decision**. Defendants further argue neither operation of Spanish or Mexican law conferred a water right apart from actual use.

Questions???

- Thank you for coming.
- Please feel free to ask any questions.