Water and Tribal Authority: Managing Legal Uncertainties

Western States Land Commissioners Association
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Water Law: Some General Observations

- Any and all “water right” systems arise from and manifest localized community goals and concepts of a hierarchy of values as among good, bad, better, and worse—i.e., law-based limits.

- In turn, those “water right” systems must be applied in the real world context of what water can be found where and in what condition—i.e., science-based limits.

- And overarching it all is the inescapable fact that things change—our legal systems, our communities and their value hierarchies, and the very environment itself—which requires a constant reassessment and balancing of certainty versus flexibility.
Water Law:
Western State Water Law Systems

[Map of Western United States with different symbols and notations indicating water law systems.]
### Water Law: Those Systems Compared

<table>
<thead>
<tr>
<th>Issue</th>
<th>Riparianism</th>
<th>Prior Appropriation</th>
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<tbody>
<tr>
<td>Initiation</td>
<td>Ownership of land appurtenant to water</td>
<td>Diversion of water to beneficial use</td>
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<tr>
<td>Scope</td>
<td>Reasonable use of water</td>
<td>Use of water diverted for beneficial use</td>
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<tr>
<td>Location of use</td>
<td>Reasonable places</td>
<td>No inherent limits</td>
</tr>
<tr>
<td>Allocations during shortage</td>
<td>Proportionate reductions</td>
<td>Priority</td>
</tr>
<tr>
<td>Transferability</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Loss of right</td>
<td>Loss of land or unreasonable use</td>
<td>Non-use, abandonment, forfeiture</td>
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“The Indians had command of the lands and the waters—command of all their beneficial use, whether kept for hunting, and stock, or turned to agriculture and the arts of civilization. Did they give up all this? Did they reduce the area of their occupation and give up their water which made it valuable or adequate?”

— Winters v. United States (1908)
Tribal Water Rights: In Historical Context – Part I

1905 – Winans
1908 – Winters
Federal Indian Water Law: A Gross Oversimplification

Federal Act of Reservation

Winans – Preservation of aboriginal right; retrospective and preserving

Winters – Establishment of a future right; prospective and reserving

Past

Time

Future
Tribal Water Rights: Basic Principles

- Tribal water rights include both sovereign (i.e., regulatory) and proprietary (i.e., ownership) elements

- Tribal water rights are governed by federal law, not state law (aboriginal use rights, reserved rights, Pueblo rights, etc.)

- Tribal water rights have been generally recognized as including elements analogous to both riparian and appropriative rights, though does not land on all fours with either; furthermore, while they are generally recognized, those tribal rights remain largely undefined and apart from most (but not all) current water-use administration systems

**Issue:** Unresolved questions about the tribal-state water right interface ultimately affect resource management
Tribal Water Rights: Answering the Questions – First Wave

• **First-wave approach** – Litigation, growing from conflicts that arose within prior appropriation doctrine systems

  ➢ Can quantify the nature and extent of all rights in a defined water system, including tribal water rights

  ➢ Can define such rights *inter se*

  ➢ Can establish a “final decree” that provides basis for future administration within a unified system

  ➢ Cannot resolve the intercommunity, political issues
Tribal Water Rights:
In Historical Context – Part II

1970s – Policy shift

1990 – Crit. And Pro.
Tribal Water Rights: Answering the Questions – Second Wave

- **Second-wave approach** – Negotiation, growing from frustration with litigation and typically framed by federal criteria and procedures for approving tribal water settlements

  - Can obtain same result as litigation (*i.e.*, definition of *inter se* rights and establishment of integrated/coordinated administration)

  - Can provide for localized solutions, implementation rules

  - Can provide the three Rs—rights, relationships, and resources
Tribal Water Rights: Shifting from Conflict to Planning

- Answering the legal questions frames and defines the key sovereign and proprietary interests

- Those answers then establish the law-based boundary conditions for future water management decisions—helping determine what needs must be met and values must be served

- The science and policy driven exercise of water planning occurs within those legal boundary conditions
Water Planning – A Third Wave?: Why Governments Do Water Plans

- To balance (i.e., prioritize) competing demands within realistic supply and funding parameters

- To prompt high-level policy discussions of water management issues

- To protect regional water interests

- To address the needed balancing of certainty and flexibility mindful of on-the-ground facts—i.e., the science-based boundary conditions
Water Planning – A Third Wave?:
Defining the Boundary Conditions

- What supplies are legally available?
- What uses/demands are legally protected?
- What uses/demands are the most socially valuable?
- Whose say is relevant in defining those social values?
- Who “splits the baby” in the event of conflict?
- How will boundary condition uncertainties be handled?
Water Planning – A Third Wave?: Dealing With Uncertainty

- **1980 Oklahoma approach** – Presume no tribal water rights

- **1995 Oklahoma Water Plan Approach** – Recognize uncertainty and recommend engagement

- **Current Oklahoma Water Plan Approach** – Recognize uncertainty, educate leaders as to some of the core questions, recommend engagement, and integrate a “margin-of-error”

- **Current California Water Plan Approach** – Establish a State Water Plan Tribal Advisory Committee

- **Current Chickasaw-Choctaw Water Plan Approach** – Use state planning documents as point of departure for conduct of tribal planning and refinement of use-value parameters and assessments
Thank you!

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