

Water and Tribal Authority: Managing Legal Uncertainties

Western States Land Commissioners Association
Skirvin Hotel – Oklahoma City, OK

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Jan. 16, 2013

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



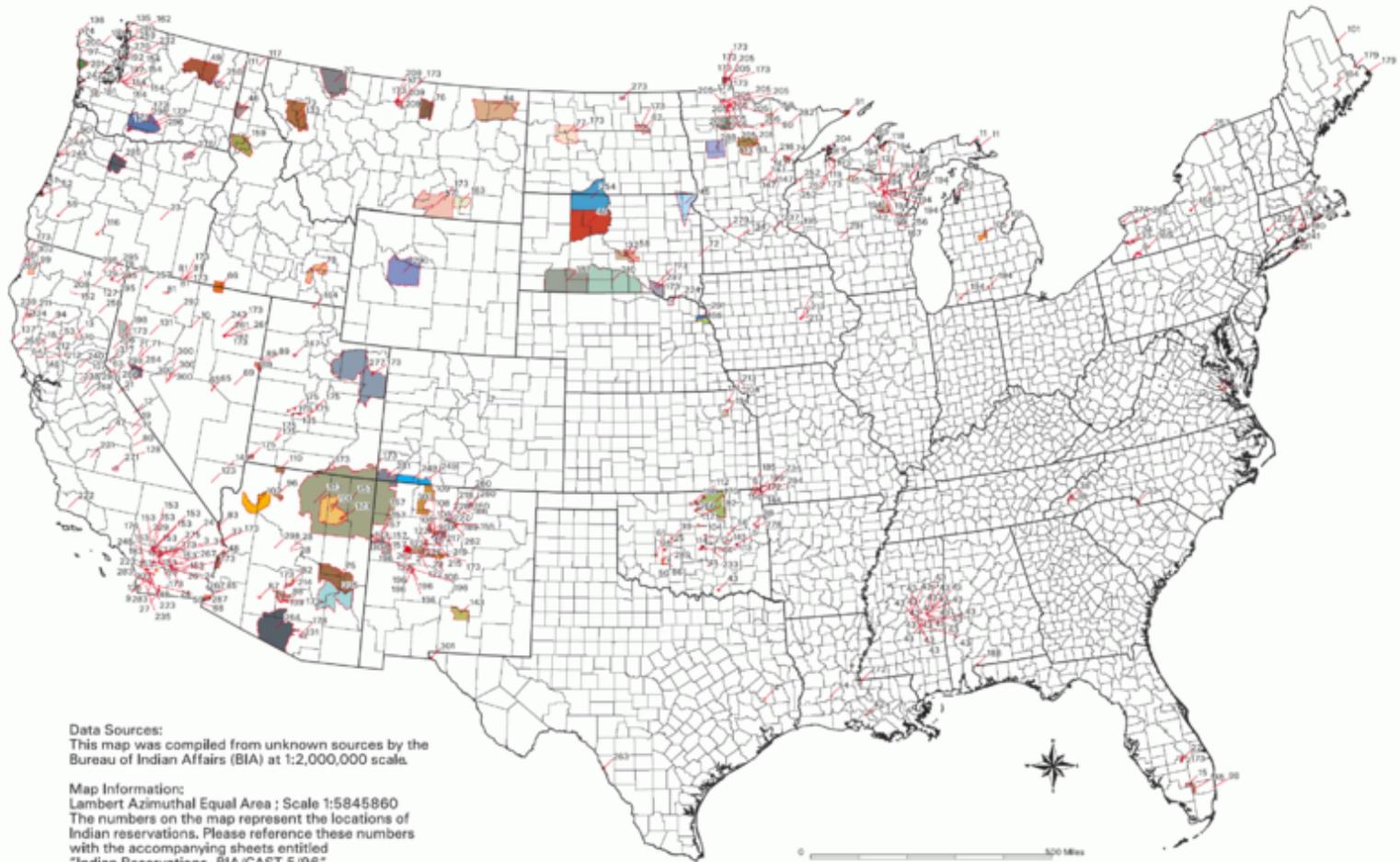
- Appropriation / Permit
- Appropriation / Permit / Pre-existing
Riparian Rights Confirmed
- Appropriation-Riparian
(Reasonable use)
- Appropriation-Riparian (Reasonable use)/
Permit
- Some Riparian Rights Persist

Water Law: Those Systems Compared

Issue	Riparianism	Prior Appropriation
Initiation	Ownership of land appurtenant to water	Diversion of water to beneficial use
Scope	Reasonable use of water	Use of water diverted for beneficial use
Location of use	Reasonable places	No inherent limits
Allocations during shortage	Proportionate reductions	Priority
Transferability	No	Yes
Loss of right	Loss of land or unreasonable use	Non-use, abandonment, forfeiture

Water Law: Tribal Land Bases

Indian Reservations in the Continental United States

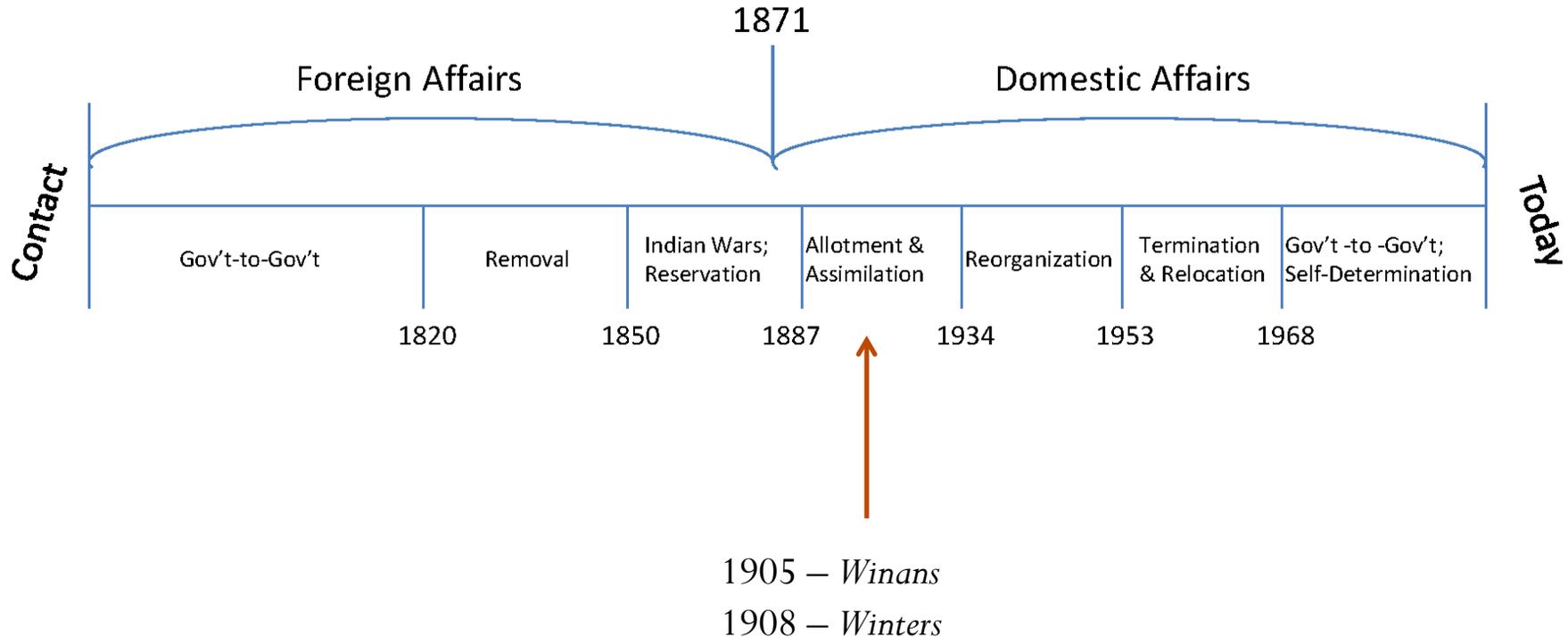


Federal Indian Water Law: Foundation – Reserved Rights

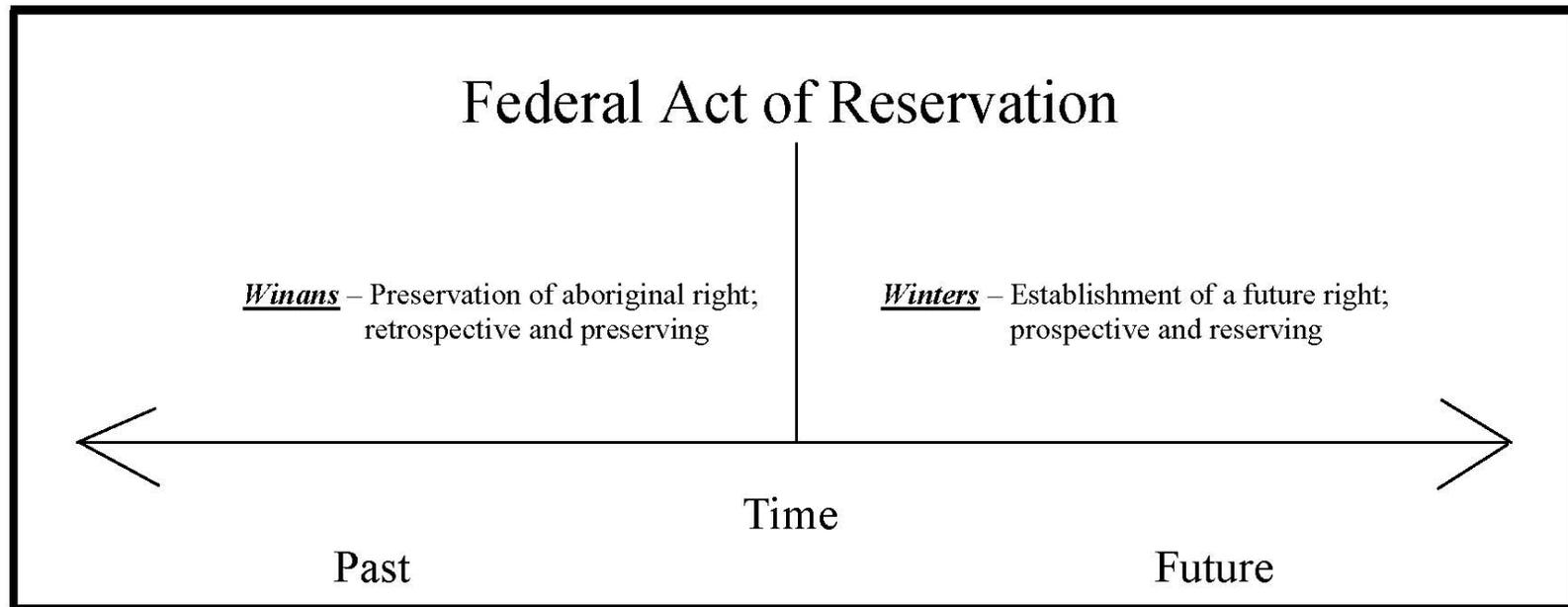
“The Indians had command of the lands and the waters—
command of all their beneficial use, whether kept for
hunting, and stock, or turned to agriculture and the arts of
civilization. Did they give up all this? Did they reduce the
area of their occupation and give up their water which made
it valuable or adequate?”

— *Winters v. United States* (1908)

Tribal Water Rights: In Historical Context – Part I



Federal Indian Water Law: A Gross Oversimplification



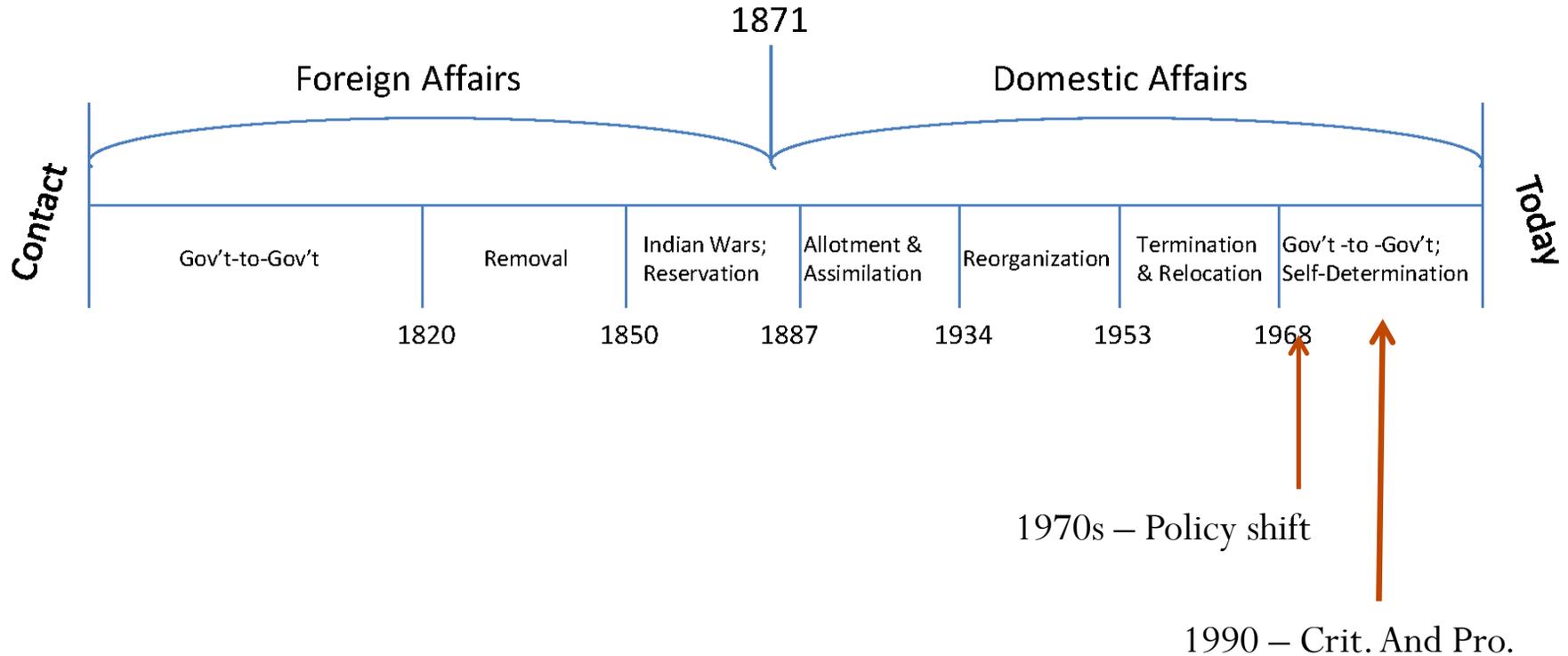
Tribal Water Rights: Basic Principles

- 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



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

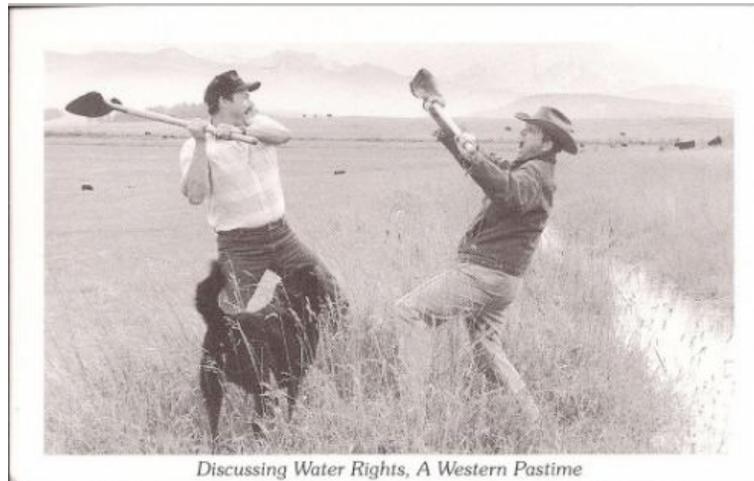
- Answering the legal questions frames and defines the key sovereign and proprietary interests
- Those answers then establish the law-based boundary conditions for future water management decisions—helping determine what needs must be met and values must be served
- The science and policy driven exercise 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?



Discussing Water Rights, A Western Pastime

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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