

WATER QUALITY AND THE WINTERS DOCTRINE

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Virtually all Indian tribes have reservations, either formal territories set aside for their use or tribal lands held in trust by the federal government. When these lands were originally set aside for the tribes, the right to a quantity of water was also reserved for tribal use. But a quantity of water means little if the water is polluted or otherwise degraded in quality. Tribes today have a variety of mechanisms available, primarily under the Clean Water Act, to regulate and manage reservation water quality. Nonetheless, the Clean Water Act does not offer a way to protect against water quality degradation from upstream water diversions and uses. For that, tribes must turn to their reserved water rights and assert a right not only to a quantity of water, but to water of a quality sufficient for the tribes' needs.

TRIBAL RESERVED RIGHTS TO A QUANTITY OF WATER

Under the *Winters* doctrine of Indian water rights, water was impliedly reserved for tribal use whenever lands were set aside as reservations.¹ Enough water was reserved to fulfill the purposes for which the reservation was created. If the reservation was created to transform tribal communities into agrarian societies, then sufficient water was reserved for irrigation purposes, with a priority date equal to the date on which the reservation was created. If the reservation was created to provide a homeland for the tribe, then water was reserved not only for agricultural uses, but also for other purposes subsumed within the homeland concept. And if the reservation was created in part to preserve historical tribal uses such as fisheries, then sufficient water was reserved for those purposes as well, with a priority date of time immemorial.

In every case litigating tribal water rights, the courts have determined that either one of the purposes of the reservation, or sometimes the sole purpose, was agriculture. All tribes whose water rights have been quantified thus have water for irrigation purposes. But this quantity generally includes water for certain other purposes as well, purposes that are subsumed within the agricultural appellation. These subsumed uses include water for such purposes as livestock watering, domestic

use, and municipal use. In some cases, courts have construed the purpose of the reservation more broadly, awarding water for fisheries preservation to tribes that were historically dependent upon the fishery resource.

Tribes thus use their reserved water rights for a wide variety of purposes. Most of these purposes involve consumptive uses of water: irrigation, livestock watering, household use, domestic use, and the like. Other uses such as fisheries preservation and recreation require an instream flow right. Tribes awarded an instream flow right under the *Winters* doctrine may not use the water for a consumptive purpose, but tribes may, as a general rule, freely determine the use to which their consumptive water rights can be put.

Each of these uses requires water of varying quality. Water that is used for human consumption needs to be of high quality, water that is dedicated for fish and wildlife preservation less so, and water that is destined for irrigation may often be of even lower quality. Nonetheless, each use requires water that is clean enough to support that use. And thus water quality becomes as crucial to tribes as water quantity.

TRIBAL APPROACHES TO ENSURING WATER QUALITY

In recent years, tribes have begun to assert their rights under the Clean Water Act (CWA) to regulate and manage the quality of surface waters within their reservations.² Congress amended the CWA in 1987 to provide that tribes may, by meeting certain statutory requirements, be "treated as states" for most purposes of the federal statute.³ Using the programs of the CWA, tribes may thus assert control over reservation water quality in a number of ways.

First, tribes may take primary responsibility (primacy) for setting water quality standards (WQS) for reservation waters.⁴ Under the WQS program, tribes first determine the uses for each body of water within the reservation and then establish quality standards for the receiving body of water that will maintain or achieve those uses.

Second, tribes may regulate the discharge of pollutants from point sources--discrete and confined conveyances--located within the reservation. Tribes may do so directly by taking primacy for the National Pollutant Discharge Elimination System (NPDES) permit program. A tribe with primacy for the NPDES program may issue discharge permits for point sources within the reservation, permits which include both technology-based effluent standards and any additional limitations necessary to achieve the WQS set for the receiving body of water. Tribes may also regulate point source discharges indirectly under the § 401 program. In general, if a tribe does not take primacy for the NPDES program, the federal Environmental Protection Agency (EPA) will issue discharge permits for point sources within the reservation. But under § 401, the tribe may review the federal permits for compliance with tribal WQS and either certify the permitted discharge, certify it with conditions, or refuse certification.

Third, tribes may have a voice in the regulation of off-reservation point sources located upstream of tribal territories. If the EPA issues NPDES permits within a state, the permit limitations must protect the WQS of downstream tribes.⁵ Even if the state itself issues NPDES permits, the state is required by the CWA to consider the WQS of downstream tribes in setting effluent limitations. The state must provide notice to downstream tribes, and either accept or explain its rejection of any written recommendations provided by the tribes. If a downstream tribe is dissatisfied with the upstream state's decision, it may request that the EPA veto the state-issued NPDES permit.

Fourth, tribes may take primacy within their reservations for the nonpoint source pollution program of the CWA. Nonpoint sources--primarily agricultural runoff and return flows, as well as runoff from silvicultural and urban areas--presently constitute the primary source of surface water pollution. Under § 319 of the CWA, tribes may identify reservation waters that cannot maintain WQS without control of nonpoint sources, identify the nonpoint sources that contribute to the nonattainment, identify best management practices to control nonpoint sources, and design programs to implement those practices. In addition to taking primacy under the § 319 management program, tribes may also exercise some control over nonpoint sources under the § 401 certification program. One court has recently held that § 401 certification is required for a federal cattle grazing permit on national forest lands,⁶ and cattle grazing is a nonpoint source of water pollution.

The range of programs available to tribes under the CWA thus offers substantial opportunities to protect the quality of reservation waters. But none of the CWA programs reaches one of the most important sources of water pollution: water uses authorized by state water-allocation systems.⁷ Water allocation decisions made under state appropriation laws can adversely affect water quality in a number of ways. Water use can result in depletion degradation because the consumptive use of water leaves less water in the stream to dilute pollutants. Water use can result in pollution migration because pre-existing pollution can migrate to and contaminate other waters. And water use can result in incidental pollution because pollutants can enter the waters from other than point sources.

When these effects result from state-law appropriation of waters upstream of reservations, nothing in the CWA offers tribes any way to control the degradation of water quality. (If the state appropriation is within the reservation, a tribal nonpoint source pollution program may offer the tribe some rudimentary control over any resulting degradation.) If tribes wish to manage the degradation of reservation water quality from upstream state allocations, they must look "elsewhere" than the federal water pollution statute. And that elsewhere may be the *Winters* doctrine of tribal reserved rights to water.

TRIBAL RESERVED RIGHT TO WATER QUALITY

Without the *Winters* doctrine, tribes adversely impacted by state water use decisions may be limited to challenging specific state allocation permits. For example, an Alaska Native village successfully challenged state diversion permits for placer gold mining on the grounds that the mining diversions could potentially dewater the stream. The village used the stream for a subsistence and a commercial fishery, and argued that at least 50% of the stream flow was necessary to maintain the fish habitat. The court found that the state had failed to adequately consider these fish and wildlife concerns when it issued the water rights permits.⁸

This type of administrative challenge to state water uses, however, is too piecemeal to protect the quality of tribal waters. It may work quite well where a particular use will demonstrably result in lower water quality. But it fails to address the systemic problem of water quality degradation arising from the cumulative impacts of multiple state allocation permits. For that problem, the

Winters doctrine of reserved water rights may offer a solution.

At times, the issues of water quantity and water quality are inseparable. A certain quantity of water may be necessary to maintain the desired quality of the water. For example, the shallower the water is in a stream, the warmer the water is likely to be. And yet fish species may need water that is sufficiently cold to permit optimum spawning and growth, or even survival. As noted earlier, fishery-dependent tribes generally have a reserved right to sufficient water to maintain the fishery resource. And that reserved right should include enough water to maintain the desired water temperature: to avoid depletion degradation by warming the waters beyond the tolerance of the native species. On that basis, one court awarded the Spokane Tribe enough water to maintain an instream temperature of 68 degrees or less.⁹

At other times, a tribe may receive the quantity of water called for under its *Winters* rights, but the quality of the water may make it unusable for the purposes for which it was intended. For example, all tribes have reserved rights to water for agricultural purposes. But if the water provided at the reservation border is so degraded that it cannot be used for irrigation, then the water right is essentially meaningless.

This is the situation of the San Carlos Apache Tribe. Under the 1935 Globe Equity Consent Decree, the Tribe holds the right to 6000 acre feet from the Gila River during the irrigation season "from the natural flow in said river."¹⁰ Historically, the Tribe used the Gila River water to irrigate a variety of crops, including crops that are salt-sensitive. Today, however, the water which reaches the San Carlos Reservation is too saline to support traditional salt-sensitive crops.

The salinity results from water use by non-Indian irrigators upstream of the San Carlos Reservation. In *United States v. Gila Valley Irrigation District*,¹¹ the court traced the increased salinity to two upstream irrigation practices. First, irrigators supplement Gila River water with groundwater, which is higher in salts than the stream water. Agricultural return flows are thus higher in salts as well. Moreover, groundwater tends to be used more in years when surface flows are low, and so higher-saline water is being added to the river at times when the natural flow is less able to dilute the salts. In addition, groundwater pumping lowers the water table, so that stream water is lost to the groundwater, exacerbating the problems. Pumping from the upper aquifer also

causes water from an underlying aquifer, which is even higher in salt content, to seep upward into the usable groundwater. Second, irrigators upstream of the reservation sometimes divert the entire flow of the Gila River. The river is then recharged entirely with agricultural return flow, which has absorbed salts from the soils to which the water was applied.

The court noted that the Tribe's ability to produce crops was dependent not only on the quantity of water needed for irrigation, but also on water of sufficient quality to grow the crops. Accordingly, the court determined that the upstream irrigators were required to limit their diversions as necessary to achieve the required water quality on the San Carlos Reservation. The court ordered the parties to negotiate a proposed plan, but in the meantime reinstated a prior injunction that requires the upstream irrigators to allow the Tribe's 6000 acre feet to pass undiverted so long as the Tribe was actually asserting its right to the water.

The *Gila Valley* case represents a major step toward full tribal control over water quality concerns. The court's explicit recognition that water quantity and water quality are necessarily linked is the prerequisite to a *Winters* right to water quality. And yet it is only common sense. If the reason for the *Winters* right to a quantity of water is to fulfill the purposes for which reservations were set aside, and those purposes will fail without water of adequate quality, then the *Winters* right must include a right to water quality.¹²

The San Carlos Apache case is the paradigm. The Tribe is guaranteed its right to 6000 acre feet per year during the irrigation season. But the right means little if the water that reaches the reservation is too saline to support traditional agricultural uses. And so the *Gila Valley* court recognized, as courts should in all *Winters* rights litigation, that the right to a quantity of water is inseparable from the right to water of adequate quality to fulfill the purposes for which the quantity was reserved.

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ENDNOTES

1. *Winters v. United States*, 207 U.S. 564 (1908); see generally Judith V. Royster, *A Primer on Indian Water Rights*, 30 TULSA L.J. 61 (1994).
2. Clean Water Act, 33 U.S.C. §§ 1251-1387. See generally GOVER, STETSON AND WILLIAMS, SURVEY OF TRIBAL ACTIONS TO PROTECT WATER QUALITY AND THE IMPLEMENTATION OF THE CLEAN WATER ACT (1994).
3. CWA § 518, 33 U.S.C. § 1377(e).
4. *See Montana v. U.S. Environmental Protection Agency*, 941 F. Supp. 945 (D. Mont. 1996).
5. *City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996).
6. *Oregon Natural Desert Ass'n v. Thomas*, 940 F. Supp. 1534 (D. Ore. 1996). The Confederated Tribes of the Warm Springs Reservation intervened as a plaintiff in the case.
7. See generally DAVID H. GETCHES, LAWRENCE J. MACDONNELL, AND TERESA A. RICE, CONTROLLING WATER USE: THE UNFINISHED BUSINESS OF WATER QUALITY PROTECTION (1991).
8. *Tulkisarmute Native Community Council v. Heinze*, 898 P.2d 935 (Alaska 1995).
9. *United States v. Anderson*, 6 Indian L. Rep. F-129 (E.D. Wash. 1979).
10. *United States v. Gila Valley Irrigation Dist.*, 804 F.Supp. 1 (D. Ariz. 1992), *aff'd in part and vacated in part*, 1994 U.S. App. LEXIS 17033 (9th Cir. 1994).
11. 920 F. Supp. 1444 (D. Ariz. 1996).
12. See Margaret S. Treuer, *An Indian Right to Water Undiminished in Quality*, 7 HAMLINE L. REV. 347 (1984).