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### SLIDES: Indian Water Rights

Robert T. Anderson

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# Indian Water Rights

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June 2009

# Federal Power over Indian Affairs

- “The Congress Shall have Power To . . . regulate Commerce with foreign nations, among the several States, and with the Indian Tribes.”  
U.S Constitution, Art. I, § 8, cl.3
- Treaty Power; Executive Orders
- Supremacy clause (state law must bow to federal law)

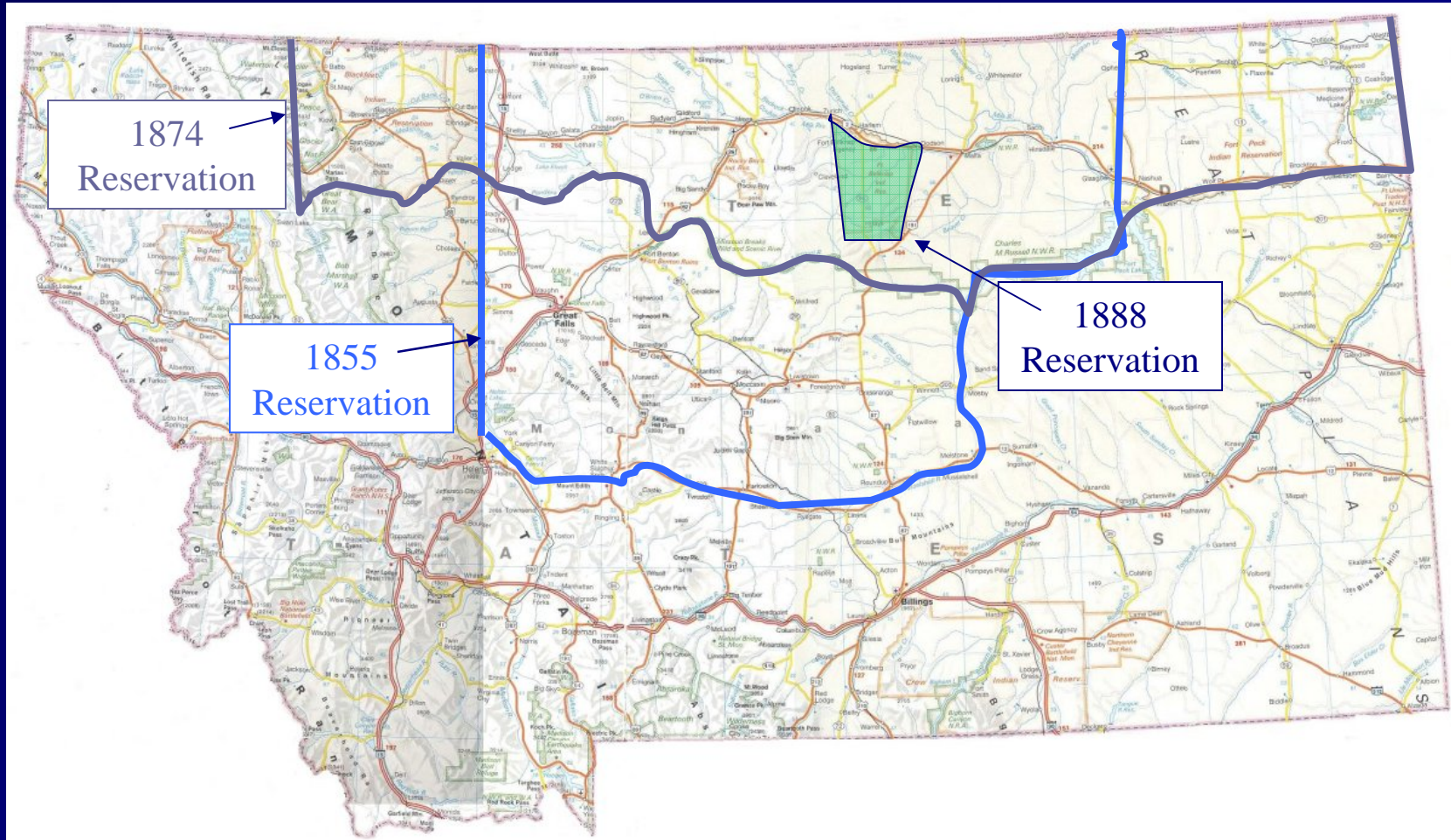
# Nature of Treaty Rights

- Treaties are not grants to the Indians but reservations of rights not surrendered
- Interpreted as the Indians would have understood the terms
- Additional rights are implied to give effect to the treaty (e.g., access and water)

# Indian Reserved Rights

- United States v. Winans ( 1905)
- Winters v. United States (1908)
- Arizona v. California (1963)

# Fort Belknap Indian Reservation in 1888



# Non-Indian water use for irrigation precedes Indian use



# Post-Winters Developments

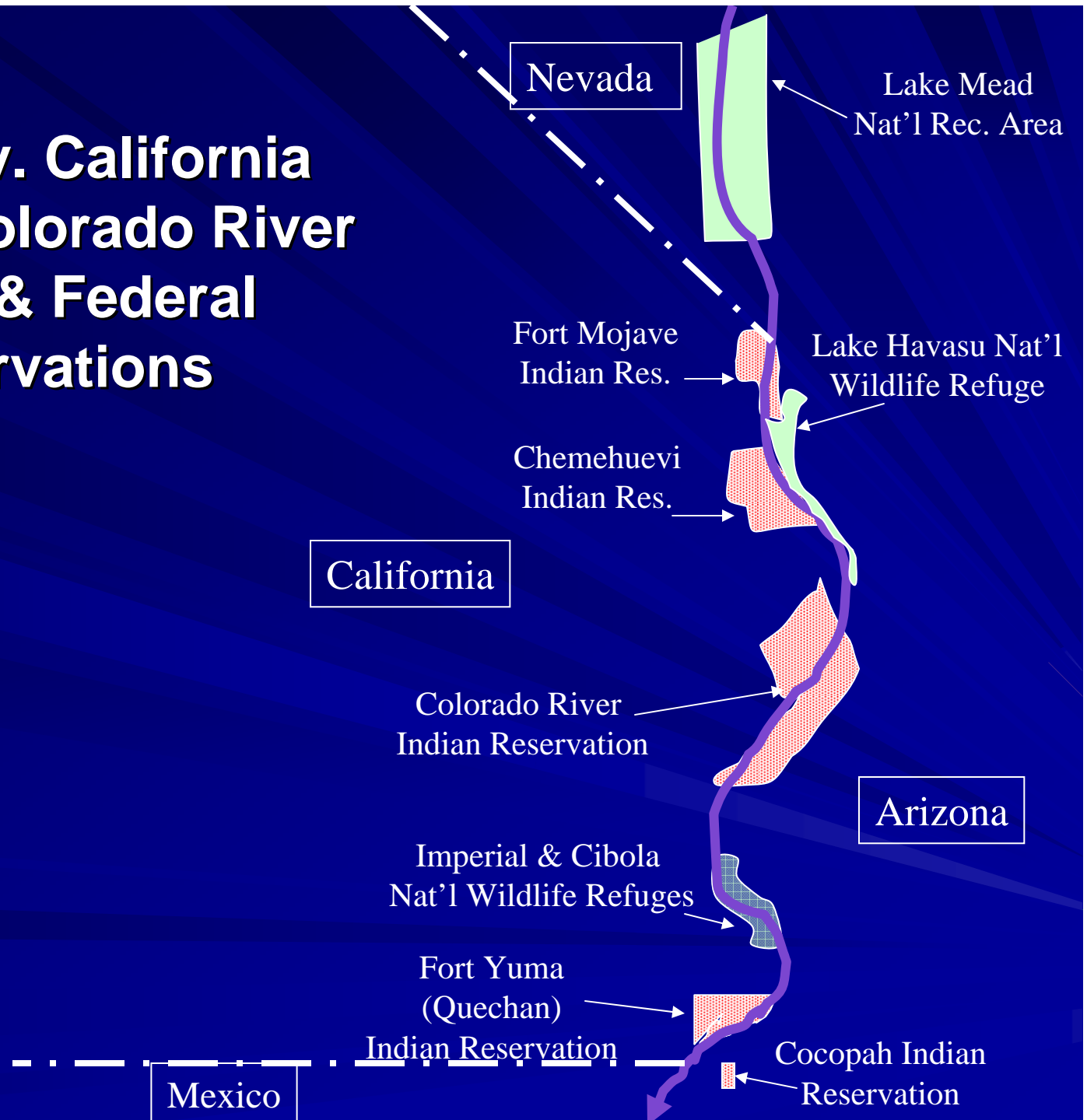
- Open-ended decrees (lack of certainty)
- Allotment water rights and transferability recognized (U.S. v. Powers)
- Extensive non-Indian development



# Arizona v. California (1963)

- Water rights litigation over agricultural reservations along Colorado River
- Sufficient water reserved to meet present and future needs of the reservation
- Practicably irrigable acreage (PIA) is the measure

# Arizona v. California (1963) – Colorado River Indian & Federal Reservations



# Determining PIA

- How much land is arable (can support crops)?
- How much of the arable land can support irrigation?
- Is the hypothetical project economically feasible?
- Court awards enough water to irrigate the practicably irrigable acreage – final quantification

# Jurisdiction

McCarran Amendment, 43 U.S.C. 666 (waives U.S. immunity from suit in state court “general stream adjudications”)

Allows state courts to determine federal and Indian reserved rights in state courts – utilized in 1970s and 80s in reaction to federal court litigation

Tribal rights may be determined even if the tribe is not a party to the suit

Federal courts have jurisdiction, but subject to the Colorado River abstention doctrine

# Tribal Water Right Claims

- Homeland (religious, cultural, domestic, commercial, municipal, industrial uses)
- Fisheries— instream flows
- Agriculture -- PIA

# Instream Flow Protection













- *Confederated Tribes of the Colville Reservation v. Walton*, 647 P.2d 42 (9<sup>th</sup> Cir. 1981) (instream flows to support replacement fishery)
- *United States v. Adair*, 723 F.2d 1394 (9<sup>th</sup> Cir. 1983) (right to maintain stream flows to a protected level)
- *Department of Ecology v. Yakima Res. Irr. Dist.*, 850 P.2d 1306 (Wash. 1993)
- *United States v. Anderson*, 591 F.Supp.1 (E.D. Wash. 1982) (water temperature)

# Allotments/Trust Lands

- Claims of non-Indian successors – Walton rights
- Public domain allotments; purpose of withdrawal
- Off-reservation trust lands; priority date of acquisition; unappropriated water

# Tulalip Reservation Trust Land Status

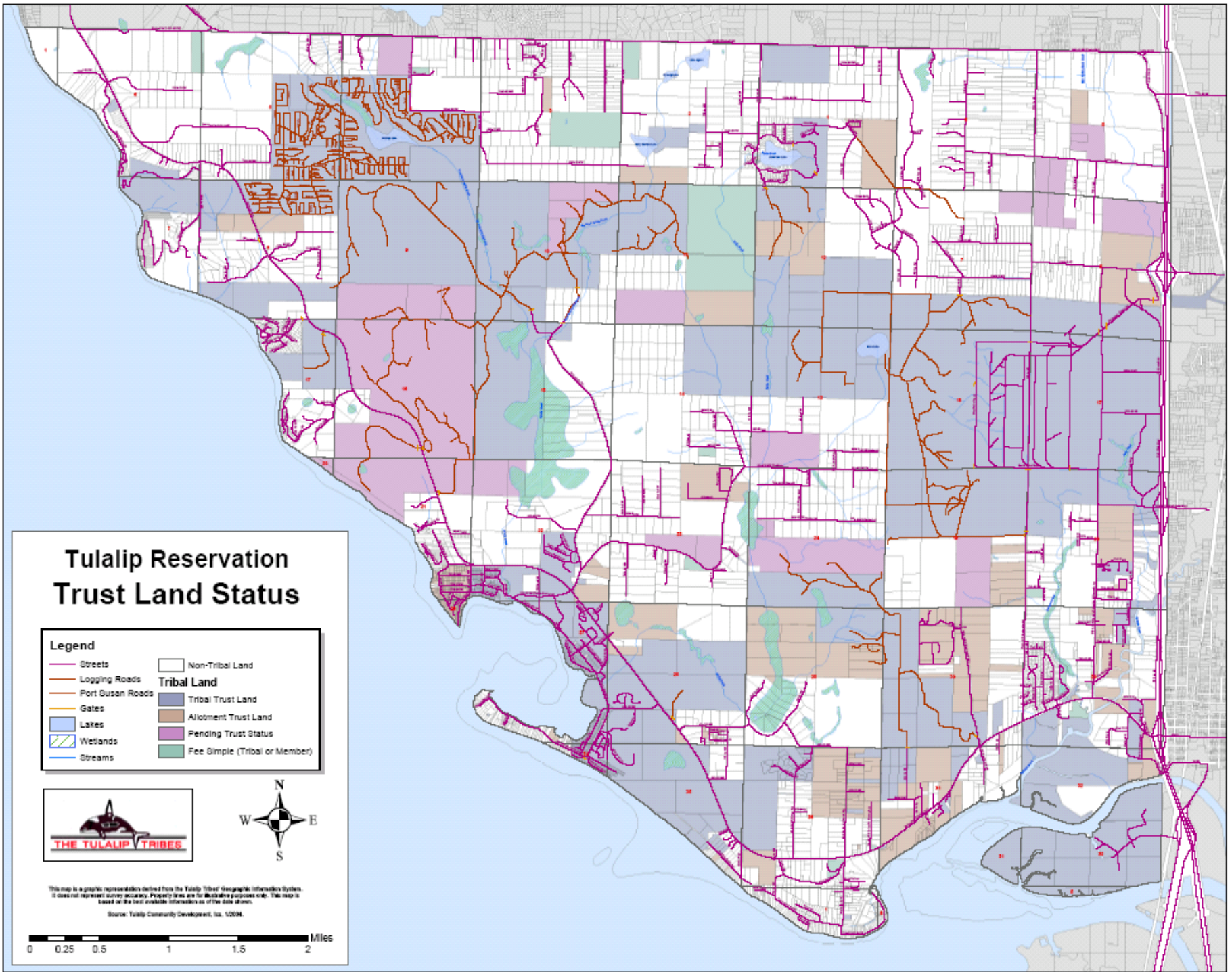
## Legend

 Streets	 Non-Tribal Land
 Logging Roads	<b>Tribal Land</b>
 Port Susan Roads	 Tribal Trust Land
 Gates	 Allotment Trust Land
 Lakes	 Pending Trust Status
 Wetlands	 Fee Simple (Tribal or Member)
 Streams	



This map is a graphic representation derived from the Tulalip Tribes' Geographic Information System. It does not represent survey accuracy. Property lines are for illustrative purposes only. This map is based on the best available information as of the date shown.

Source: Tulalip Community Development, Inc. 1/2004.





# Settlements

- Twenty-five Indian water settlements since 1978
- Omnibus Pub. Lands Bill, P.L. 111-11: Navajo (San Juan River Basin); Shoshone Paiute (Duck Valley)
- Twenty-five tribes involved in nineteen settlement efforts

# Pending Settlements

- S. 1105 (Pueblos, Rio Grande, N.M.)
- S 375 (Crow)
- S. 965 (Taos)
- S. 313 (White Mountain Apache)
- Blackfeet (MT, Tribal-State Agreement – not introduced)

# Recurring Issues

- Who should pay? Reclamation Fund?
- Criteria & Procedures, 55 Fed. Reg. 9223 (March 12, 1990)
- Waivers of Tribal claims v. U.S.

# Sources

- Cohen's Handbook of Federal Indian Law (LexisNexis 2005) (2009 Supp.)
- Western States Water Newsletter
- Anderson, Berger, Frickey & Krakoff, Federal Indian Law: Cases and Commentary (ThomsonWest 2008)