SLIDES: Indian Water Rights

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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

1855 Reservation

1874 Reservation

1888 Reservation
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

- Practically 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 (9th Cir. 1981) (instream flows to support replacement fishery)

- *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983) (right to maintain stream flows to a protected level)


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
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?


- Waivers of Tribal claims v. U.S.
Sources

- Western States Water Newsletter