4. Federal Reserved Water Rights:

a. The Winters Doctrine

Water rights on federal lands that are not based on state law are referred to as federal reserved water rights. The seminal case on reserved water rights is Winters v. United States, 207 U.S. 564 (1908). In Winters, a treaty establishing an Indian reservation did not expressly address water rights issues. The Supreme Court concluded, however, that water rights were impliedly reserved. The Court noted that the federal government reserved the Fort Belknap Indian Reservation out of a much larger area of arid land that the Gros Ventre and other Indians had the right to occupy and use and that communities could not be established without water. The court held that the reservation of lands necessarily implied a reservation of water rights to fulfill the purposes of the reservation.

The reserved rights doctrine also applies to non-Indian federal reservations. Federal Power Commission v. Oregon, 349 U.S. 435 (1955) (Pelton Dam case) (holding that a reservation of federal land for a particular purpose removed water sources on that land from appropriation pursuant to state law); Arizona v. California, 373 U.S. 546 (1963) (finding implied reserved water rights for a national forest, two wildlife refuges, and the Lake Mead National Recreation Area); Cappaert v. United States, 426 U.S. 128 (1976) (water reserved to effect the purpose the Devil’s Hole National Monument including preserving the endangered pupfish); and, United States v. New Mexico, 438 U.S. 696 (1978) (water in the Mimbres National Forest is reserved for timber needs and favorable conditions of surface flow).

b. How federal reserved water rights are different from state water rights

Federal reserved rights are presently perfected, vested rights, which means that they retain their date-of-reservation priority date, whether they have been put to use or not. In Arizona v. California, 373 U.S. 546, 600 (1963), the Supreme Court expressly held that: “the United States did reserve the water rights for the Indians effective as of the date the time the Indian Reservations were created. This means, as the Master held, that these water rights . . . are

---

1 In some cases, an Indian tribe’s federal reserved right retains an aboriginal, time immemorial priority date. United States v. Adair, 723 F.2d 1394 (9th Cir. 1983).
The term “perfected right” in the Decree was defined to include “water for the use of federal establishments under federal law whether or not the water has been applied to beneficial use.” Arizona v. California, 376 U.S. 340, 341 (1964).

- Water is set aside or “reserved” for present and future uses of reservation. Arizona v. California, 373 U.S. 546, 600 (1963) (reserved water rights of tribes were “intended to satisfy the future as well as the present needs of the Indian Reservations”). Under state laws, most water rights do not include a future use component, as they only vest when they are actually used (some state statutes authorize municipalities, for example, to acquire appropriative rights for future use).

- Unlike state water rights, federal reserved rights cannot be lost to non-use. The “use it or lose it” doctrine does not apply to federal reserved water rights. In Colville Confederated Tribes v. Walton, 647 F.2d 42, 51 (9th Cir. 1981) (“Walton II”) (“the Indian allottee does not lose by non-use the right to a share of reserved water. This characteristic is not applicable to the right acquired by a non-Indian purchaser”); Hackford v. Babbitt, 14 F.3d 1457, 1461, n.3 (10th Cir. 1994) (“unlike most other water rights, it is generally accepted that “Winters” rights held by Indians are neither created by use nor lost by nonuse”).

c. **Quantification of Reserved Water Rights**

A federal reserved water right is measured by the amount of water necessary to fulfill the purposes of the reservation. Cappaert v. United States, 426 U.S. 128 (1976). In United States v. New Mexico, 438 U.S. 696 (1978), a case dealing with federal reserved water rights for the Mimbres National Forest, the Supreme Court held that uses of water for “secondary” purposes must be acquired pursuant to state law and that Congress reserved “only that amount of water necessary to fulfill the purpose of the reservation, no more.” However, in United States v. Adair, 723 F.2d 1394 (9th Cir. 1983), the Ninth Circuit expressly held that, although the “primary-secondary” purposes distinction established in United States v. New Mexico provides “useful guidelines,” when quantifying Indian reserved water rights, the “primary-secondary” purpose doctrine was “not directly applicable to Winters doctrine rights on Indian reservations.” 723 F.2d at 1408-09.

d. **Consumptive and Non-Consumptive Uses of Water**

A federal reserved water right can incorporate both consumptive and non-consumptive water uses in the amount necessary to fulfill the reservation’s purposes. In Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir.) cert denied, 454 U.S. 1092 (1981), the Ninth Circuit ruled that when the United States created the Colville Reservation, the purpose of the Reservation was broader than to simply create a "land based agrarian society." 647 F.2d at 48. Because the Colvilles traditionally fished for both salmon and trout, the Court found that the Tribe was entitled to a non-consumptive reserved right for maintaining its fishing activities. This water right, the court held, was independent of and in addition to any consumptive reserved rights for agricultural purposes. See also United States v. Adair, 723 F.2d 1394 (9th Cir. 1983) (recognizing an Indian reserved water right to sustain a treaty-based fishing right).