

Indian Water Rights 101

A Summary of the Fundamentals

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Historically, Federal Water Development Excluded Tribal Nations

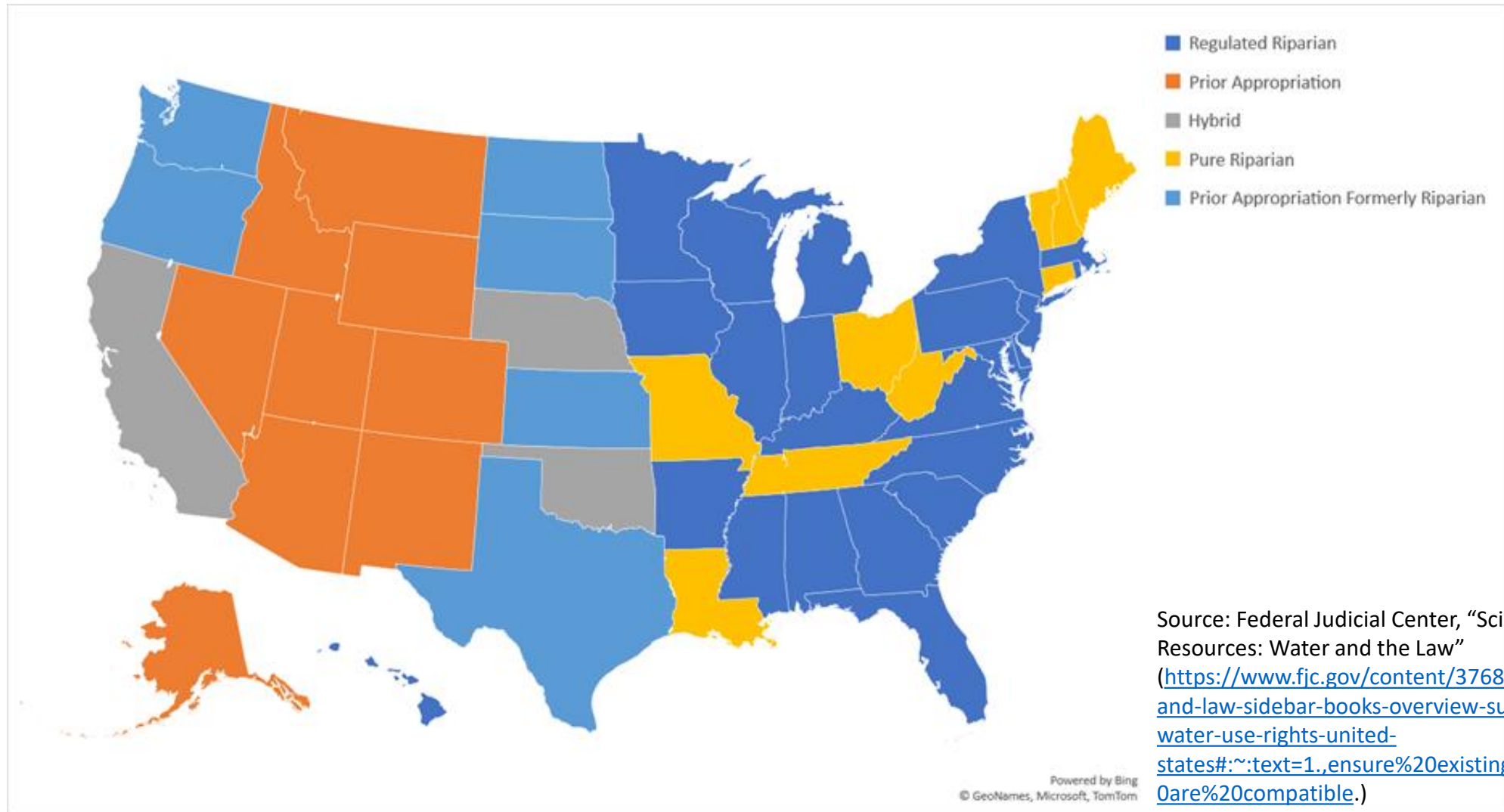
- Indian water rights were largely left undeveloped and unprotected until the mid- to late 1900s.
- Federal policy supported extensive build up of western water projects to benefit non-Tribal communities, leaving Indian Country behind.
- See [*NARF's About Tribal Water Right Settlements.*](#)



Water Law Basics

- Water rights are generally governed by state law. Tribal Nations assert their federal reserved water rights in the context of these state water law systems.
- The Western U.S. predominantly determines water rights using the **prior appropriation** doctrine.
 - Right to water is determined by the order people appropriate it and put it to beneficial use (a use deemed valuable by society – fishing, irrigation, hydropower, etc.) – often described as “first in time is first in right.”
- The Eastern U.S. (east of the 100th Meridian) determines water rights using the common law **riparian** doctrine.
 - Right to water is determined by property ownership abutting water source.
 - Riparian land ownership rights exist anywhere in the U.S., subject to state and federal law.
- Water rights can be either **consumptive** or **non-consumptive**.
 - A “consumptive” use removes water from a source and diminishes the available water, such as irrigation water absorbed by plants.
 - A “non-consumptive” use does not withdraw water, such as maintaining instream flows.

WATER LAW DOCTRINES



Federal Reserved Indian Water Rights

- Includes **water for present & future uses**.
- **Not subject to forfeiture or abandonment**.
- **Priority date** set by the date the reservation was created or time immemorial, depending on the nature of the right.
- **Water quantity** is determined by the **purposes of the reservation**, based on express or implied language in treaties, Executive Orders, and/or other federal documents creating reservation.
- Includes both **consumptive** and **non-consumptive** uses of water necessary to accomplish the purposes of the federal reservation.
- Typically **held in trust** by United States.
- While not required to be adjudicated in state court, typically state court proceedings are used to **quantify** federal reserved Indian water rights. However, states **must apply federal law when interpreting federal reserved Indian water rights**. [See NARF's General Stream Adjudications.](#)



The *Winters* Doctrine

- “*Winters* rights” refer to the doctrine established in the U.S. Supreme Court case *Winters v. United States*, 207 U.S. 564 (1908).
- The ***Winters* doctrine** holds that when the federal government reserves land for a federal purpose, such as creating an Indian reservation, it also **implicitly reserves sufficient water** to fulfill the **purposes of the reservation**.
 - Applies to all federal reservations, not just Indian reservations.
- *Winters* water rights **vest on the date the reservation is created** and are superior to the rights of later appropriators.
- The *Winters* doctrine encompasses water rights necessary to **support on-reservation activities**, if such activities are essential to the Tribal Nation's way of life and were intended to be protected by treaties or agreements.





Purposes of Reservation

- Under *Winters*, the primary inquiry related to quantifying any reserved water rights is the **purposes** for which the reservation was initially made.
- The “purposes of the reservation” inquiry is subject to the Indian **Canons of Construction**, which require interpretation to be deferential to historical context, what the Tribal people would have understood the agreement to mean, the actual negotiations, and “the practical construction adopted by the parties.” *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999); see also Alex Tallchief Skibine, [Textualism and the Indian Canons of Statutory Construction](#), Mich. J. of Law Reform (Aug. 2022).
- A fundamental difference between Indian reservations and other federal reservations is that **Indian reservations were set aside by the federal trustee as homelands**, while other federal reservations – such as national forests and national parks – were set aside for proprietary interests of the federal government. Compare *Arizona v. California*, 373 U.S. 546, 600-601, decree entered, 376 U.S. 340 (1964) (Indian reservations), with *United States v. New Mexico*, 438 U.S. 696 (1978) (national forest).

Winans Rights

- “Winans” rights are **express rights reserved by a Tribe in a treaty to continue tribal practices**, as opposed to *Winters* rights which are implied rights reserved by the federal government. *United States v. Winans*, 198 U.S. 371 (1905) (Tribe reserved in its treaty access to “usual and accustomed” fishing locations along the Columbia River).
- For example, a Tribe with *Winans*-based fishing rights may claim water rights necessary to support that fishery, even if the treaty does not mention water rights.
- *Winans* can serve as a different basis for recognition of implied federal reserved water rights and *Winans*-based rights are most common in the Pacific Northwest where traditional fishing and gathering practices were expressly reserved in treaties.

For more on how *Winans* rights have been interpreted, see *Washington v. Washington State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979), *modified sub nom. Washington v. U.S.*, 444 U.S. 816 (1979) (affirmative right to harvest fifty percent of available fish).



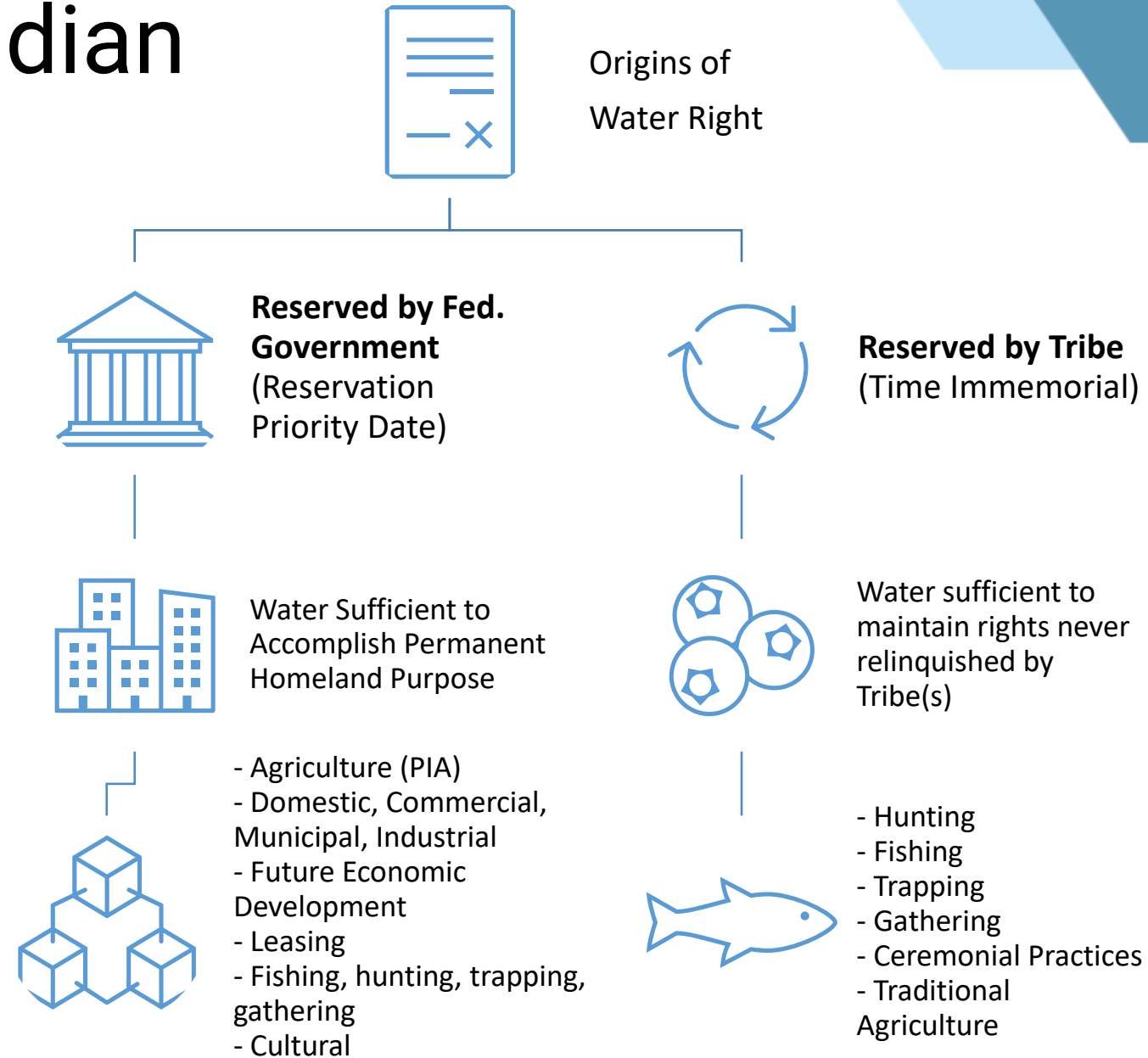
Quantifying Federal Reserved Indian Water Rights



- There are several commonly used quantification methods, depending on the purposes of the reservation:
 - **Practicably Irrigable Acreage (PIA) Standard** quantifies the amount of water needed to irrigate arable lands on a reservation. *Arizona v. California*, 373 U.S. 546 (1963). This does not restrict the use of the water to only agriculture.
 - **Permanent Homeland Theory** looks at multiple factors, focused on what is required to develop, preserve, produce, or sustain food and other economic resources of the reservation, whether new or representative of continued traditional ways of life. See *In re the General Adjudication of All Rights to Use Water in the Gila River System*, 35 P.3d68 (Ariz. 2001).
 - **Historically Irrigable Acreage** quantifies water rights based on the amount “necessary for domestic uses and to irrigate” reserved lands. *New Mexico ex rel. Reynolds v. Aamodt*, 618 F. Supp. 993 (D.N.M. 1985).
 - **Habitat Need**: if the purpose of the reservation was to continue and preserve activities that require water to remain instream, such as hunting, fishing, trapping, or gathering, the measure of the reserved Indian water right is a needs-based analysis of the amount of water necessary to maintain the fishery and other resources. *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 48 (9th Cir. 1981).



Quantifying Indian Water Rights



Federal Reserved Rights and Off-Reservation Water Sources

- Federally reserved water rights can enjoin off-reservation water uses against junior appropriators. See *Winters*; *Cappaert v. U. S.*, 426 U.S. 128 (1976).
- Off-reservation **instream flows** often needed to support on-reservation fishing, hunting, gathering and other subsistence rights. See *Baley v. United States*, 942 F.3d. 1312 (Fed. Cir. 2019) (Klamath River salmon).
 - In *Baley*, a Biological Opinion issued by U.S. Fish and Wildlife Service or NOAA Fisheries was helpful in establishing the minimum instream flow requirement based on the Tribal Nation's right to the endangered species at issue.
- However, Tribal Nations have faced difficulty getting the United States to assert off-reservation instream flow claims on their behalf.

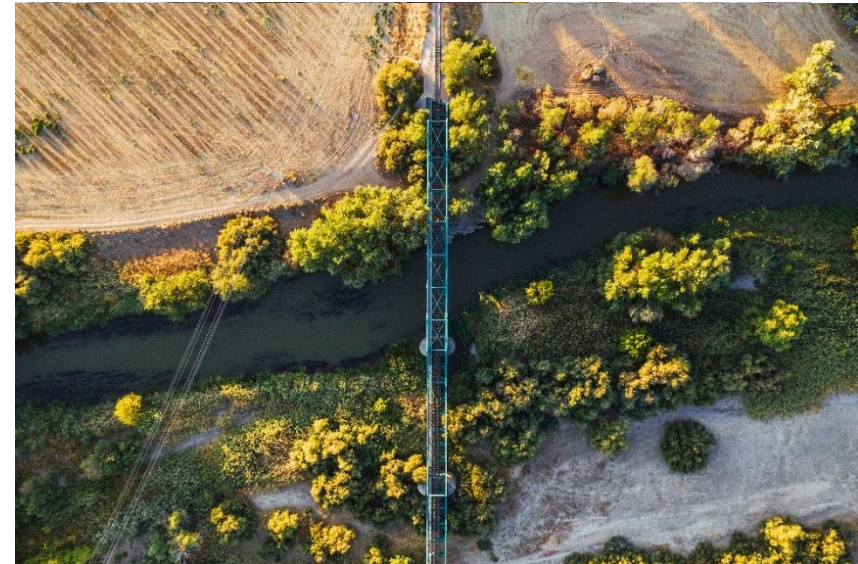


Groundwater Rights

- Federal reserved rights may be satisfied from **both surface and groundwater** appurtenant to reservation. See *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, 849 F.3d 1262 (9th Cir. 2017).
- Groundwater may be more readily available than surface water, and may be the only source.
- Groundwater may also be higher quality than the available surface water.
- A Tribe can prevent junior appropriators from diverting groundwater until the Tribe's reserved water rights are fulfilled.

For more on how groundwater rights have been interpreted, see:

- *New Mexico v. Aamodt*, 537 F.2d 1102 (10th Cir. 1976).
- *In re Gen. Adjudication of All Rts. to Use Water in Gila River Sys. & Source*, 195 Ariz. 411 (1999).



Allottee and *Walton* Rights

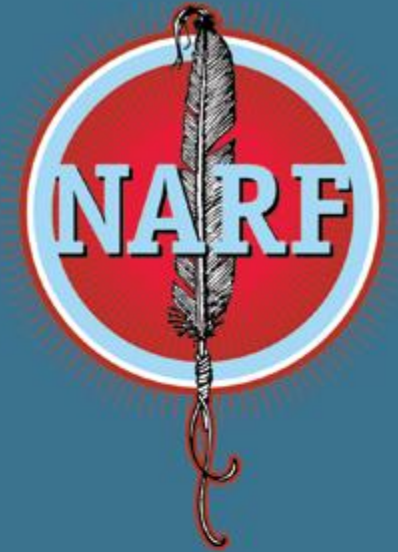


- Under the General Allotment Act, or Dawes Act, Congress allotted parcels of reservation land to individual Tribal members. The allottees also gained a *pro rata* share of the federal reserved water right associated with the allotted land.
- The allottee's water right then carries the **priority date** of the reserved water, which is usually the date of the reservation establishment. This is typically senior to other water rights in the basin.
- When the allottee sells their land, the new owner acquires the opportunity to develop a **Walton water right**, which would carry the same priority date as the Tribal allottee. *Colville Confederated Tribes v. Walton*, 460 F. Supp. 1320 (E.D. Wash. 1978).
- However, an allottee's non-Indian successor must meet certain elements to develop the *Walton* right or he will lose the right.



Water Rights in Alaska

- Water in Alaska remains plentiful, but largely unquantified.
 - Less than 1% of rivers and streams have flow measurements.
 - Less than 1% of freshwater resources have withdrawals, diversions or impoundments.
- Water rights in Alaska have not been contested or defined to the same extent as in the lower 48.
 - **Federal reserved water rights** may apply to Alaska Native Allotments, the one Reservation in Alaska, or other land held in trust by the federal government. However, those rights have yet to be asserted.
 - **Aboriginal water rights** don't apply to freshwater in Alaska because the Alaska Native Claims Settlement Act extinguished aboriginal title.
 - **Winans water rights** likely don't apply because Alaska Tribes do not have treaty or Executive Order reservations.
- Alaska has an opportunity to avoid the mistakes made in western states leading to scarcity, overallocation, and ecosystem destruction.
 - Alaska's instream flow laws enable protection of fish and water quality.
 - Hydropower design can prioritize fish survival.





Additional Resources

- Arizona State University, LibGuides, Indian Water Law – <https://libguides.law.asu.edu/indianlaw/water>
- National Indian Law Library (NILL), Research Guides, “Native American Water & Land Rights” - <https://narf.org/nill/resources/water.html>
- WATER LAW IN A NUTSHELL 372-73, 376-77 (6th ed. 2021).
- COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 19 (2012 ed.) and § 21 (2024 ed.).
- Susan M. Williams, “Overview of Indian Water Rights” <https://opensiuc.lib.siu.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1283&context=jcwre>
- Robert T. Anderson, Indian Water Rights and the Federal Trust Responsibility, 46 Nat. Res. J. 399 (2006), <https://digitalcommons.law.uw.edu/faculty-articles/388>
- Robin Kundis Craig, et al, *Water Law*, Foundation Press (2017).
- Lloyd Burton, *American Indian Water Rights and the Limits of Law*, University Press of Kansas (1991).