**Reserved Treaty Rights**

# INDIAN RESERVED RIGHTS IN THE 21ST CENTURY

### RECENT DEVELOPMENTS IN THE PACIFIC NORTHWEST

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## INTRODUCTION

The Bonneville Power Administration (BPA) is the federal agency charged by Congress with marketing and transmitting hydropower generated at federal dams in the Columbia River basin. In 1947, when BPA was an agency located within the Department of the Interior, BPA published a newsletter — "*BPA Currents*" — which reported on the various happenings at the agency.

The July 25, 1947, edition included a report, excerpted below, on a topic that resonates today:

**Dams v. Fish**

DAMS VERSUS FISH

> The Columbia Basin Inter-agency Committee held a two day hearing on the subject of dams versus fish in the Columbia Basin area…to discuss the Department of Interior's proposal that upstream dams be constructed before additional structures were placed in the downstream areas in order to allow a ten-year program of study and analysis of the fishing interests… .
>
> The hearing was opened with a statement regarding the position of the Department of the Interior… . [T]he general conclusions of the Department could be summarized as follows:
>
> > "…The Department agrees that interests of the Columbia River fisheries should not be allowed indefinitely to retard full development of the other resources of the river… . [T]he overall benefits to the Pacific Northwest from a thorough going development of the Snake and the Columbia are such that the present salmon run must, if necessary, be sacrificed.
> >
> > "This means to the Department that the Government's efforts should be directed toward ameliorating the impact of an ultimate and inevitably full development of the river's [hydropower and irrigation] resources upon the immediately injured interests and not toward a vain attempt to hold still the hands of the clock."

**Unregulated Harvests**

In 1947, before the advent of full hydropower development, salmon runs in the Columbia River (once the largest salmon-producing river in the world), were already facing significant impacts from habitat destruction and unregulated commercial fishing. Commercial harvest interests in particular profoundly impacted and sought to suppress the exercise of Indian reserved fishing rights, as addressed, for example, in the *United States v. Winans* decision discussed below.

**Salmon Protection**

Fast forward to 2016. On the one hand, full hydropower development of the Columbia and lower Snake Rivers essentially has been achieved, and there is even a 1960s era treaty with Canada that allowed full hydropower development of the entire Columbia basin. On the other hand, the decision to unilaterally "sacrifice" salmon runs, and, by extension, Indian reserved rights to fish those runs, has been rejected by the courts in a series of decisions that have important implications for the future of the Columbia River basin.

**Reserved Rights' Impact**

In this article, I will make the case that: (a) the days of ignoring or sidestepping Indian reserved rights when discussing, licensing, allocating, adjudicating or otherwise addressing interests in water resources, natural resources and land use planning in the Columbia basin are waning if not gone; and (b) legal practitioners in these areas are well advised to have a basic understanding of and factor in the roles that Indian reserved rights play in any decision relating to Columbia basin natural resources. I first briefly describe the legal context of Indian reserved or treaty rights with an emphasis on how they apply in the Pacific Northwest. Second, I provide a survey of recent examples from and near the Columbia River basin that illustrate the reach and impact of Indian reserved rights today.

## INDIAN RESERVED OR "TREATY" RIGHTS IN THE PACIFIC NORTHWEST

### LEGAL FOUNDATIONS

The terms "Indian reserved rights" and "Indian treaty rights" are often used interchangeably and have significant overlap in meaning. For purposes of this article, the points made about Indian reserved rights also relate to Indian treaty rights.

*The views expressed in this paper are the author's own and are not intended to represent or reflect the positions of the Office of the Solicitor or the Department of the Interior.*

 

## Reserved Treaty Rights

**Stevens Treaties**

**Instream Flow Reserved**

**Reservation of Rights**

**Off Reservation Rights**

**Harvestable Allocation**

**Livelihood**

### Indian Reserved Rights to Fisheries

**Treaty Negotiations and *United States v. Winans***

In the Pacific Northwest, a discussion of rights reserved by Indian tribes begins with the treaty negotiations carried out between the United States and tribes ranging from the Puget Sound to central Oregon to the upper reaches of the Columbia River basin in Montana. In 1854 and 1855, a series of similar Indian treaties were entered into between the United States, represented by Washington Territory Governor Isaac Stevens, and numerous tribes in the Pacific Northwest. A common attribute of these "Stevens treaties" is the express reservation of tribal aboriginal hunting, fishing, and gathering rights on-and off-reservations. In most of these treaties, tribes reserved to themselves the "exclusive right of taking fish in all streams running through and bordering" the Reservation. They also expressly reserved the right to fish at usual and accustomed fishing sites off the Reservation "in common" with non-Indian settlers. These and similar terms found in Indian treaties, discussed further below, have been found by state and federal courts to support reserved instream flow water rights for tribal fisheries.

A major legal test of Indian reserved rights in the Northwest played out in the United States Supreme Court (Supreme Court) in the 1905 case of *United States v. Winans*, 198 U.S. 371 (1905). Members of the Yakama Nation had been blocked from a traditional fishing site on the Columbia River by landowners who had obtained a patent for the land from the United States. The Supreme Court, reversing the US Court of Appeals for the Ninth Circuit (Ninth Circuit), held that "the treaty was not a grant of rights to the Indians, but a grant of rights from them, *a reservation of those [rights] not granted*." (emphasis added). *Id.* at 381. Turning to the access issue, the Court found that the right "imposed a servitude upon every piece of land as if described therein." *Id.*

**Adjudicating the Extent of Tribal Reserved Fishing Rights**

Despite the *Winans* decision, states in the Northwest for decades refused to recognize this unique legal right of the Stevens treaty tribes to fish off their reservations. By the late 1960s, the United States and individual Indians had initiated litigation to confirm and adjudicate the extent of the reserved fishing rights of several Northwest tribes, which from time immemorial had harvested salmon. *United States v. Washington* adjudicated the reserved fishing rights of Stevens treaty tribes in the Puget Sound area, and *United States v. Oregon* adjudicated the rights of Columbia basin Stevens treaty tribes to the Columbia basin fishery.

In these cases, the courts found that the phrase "the right of taking fish...in common with all citizens" gives the Treaty tribes the right to take up to fifty percent of the harvestable fish in the area where fishing rights had been reserved. *See, e.g., United States v. State of Washington*, 384 F. Supp. 312 (W.D. Wash. 1974). This allocation was upheld by the US Supreme Court in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n,* 443 U.S. 658 (1979), often referred to as the *Fishing Vessel* decision. The Court determined that fifty percent was a ceiling rather than a floor, and that the fishing clause guaranteed "so much as, but no more than, is necessary to provide the Indians with a livelihood — that is to say, a moderate living." *Id.* at 686. These same allocation principles have been applied to the Columbia basin in *United States v. Oregon*.

### *US v. Oregon*

NOAA Fisheries has this helpful summary of *US v. Oregon* on its website: *United States v. Oregon* (302 F. Supp. 899) is the on-going federal court proceeding that enforces and implements the Columbia River treaty tribes' reserved fishing rights. In his 1969 decision, Judge Robert C. Belloni ruled that state regulatory power over Indian fishing is limited because treaties between the United States and the Nez Perce, Umatilla, Warm Springs and Yakama tribes in 1855 reserved the tribes' exclusive rights to fish in waters running through their reservations and at "all usual and accustomed places, in common with the citizens of the United States [or citizens of the territory]." In this case, the court held that the state is limited in its power to regulate treaty Indian fisheries. Among other things, the court held that the state may only regulate when reasonable and necessary for conservation, provided: reasonable regulation of non-Indian activities is insufficient to meet the conservation purpose, the regulations are the least restrictive possible, the regulations do not discriminate against Indians, and voluntary tribal measures are not adequate.

In 1974, Judge George Boldt decided in a case referred to as *United States v. Washington* (384 F. Supp. 312) that Belloni's "in common with the citizens of the United States [or citizens of the territory]" was, in fact, 50 percent of all the harvestable fish destined for the tribes' traditional fishing places. The following year, Judge Belloni applied the 50/50 standard to *United States v. Oregon* and the Columbia River.

Fisheries in the Columbia River have subsequently been managed subject to provisions of *United States v. Oregon* under the continuing jurisdiction of the federal court. The Columbia River Fish Management Plan provided a framework for management from 1988 through 1998, although certain provisions were modified during that time to address concerns related to the increasing number of ESA-listed species. After 1998, fisheries were managed through a series of short term agreements among the parties, the duration of which ranged from several months to five years. The 2008-2017 *United States v. Oregon* Management Agreement provides the current framework for managing fisheries and hatchery programs in much of the Columbia River Basin.

See: www.westcoast.fisheries.noaa.gov/fisheries/salmon_steelhead/united_states_v_oregon.html

 

**Reserved Treaty Rights**

**Winters**

**Implied Reservation**

**Flow for Fisheries**

**Minimum Flow**

**Tribal Reserved Rights to Water: *United States v. Winters***

**Tribal Reserved Water Rights Doctrine**

A few years after the *Winans* decision, the Supreme Court issued its seminal decision addressing tribal reserved water rights: *United States v. Winters* 207 U.S. 564 (1908). Writing for the Court, Justice Joseph McKenna (the same justice who authored the *Winans* decision) explained that, when a reservation of land for the Indians was established, adequate water to meet the purposes of the reservation was also impliedly reserved. As Professor Royster has explained:

> Tribal water rights arise by implication through interpretation of the treaties, statutes, agreements, and executive orders creating Indian country. Nothing in those federal documents speaks expressly to water, but the Supreme Court has held, ever since the foundational *Winters* decision in 1908, that water was nonetheless reserved for the tribes. In part, this reservation stems from the canons of construction, which in turn are an expression of the federal trust obligation. The Indians, the Court found, would not have agreed to settle on the reserved tract of land without the water to make it livable. And in part, the reservation of water rights stems from the federal government's power to reserve water from appropriation, a power that it impliedly exercised when it set land aside in trust for the tribes.

[Royster, Judith V., *Indian Water and the Federal Trust: Some Proposals for Federal Action*, 46 Nat. Resources J. 375 (citations omitted).]

**Adjudication of Tribal Water Rights in the Pacific Northwest**

In the Pacific Northwest, the reach of these Indian reserved water rights can be extensive. A number of court decisions have focused, for example, on the underlying need for — and right to — water to support the on-and off-reservation fisheries reserved by the tribes. For instance, early in the adjudication of all water rights in the Yakima River basin the state trial court established that the United States generally holds in trust for the Yakama Nation an Indian reserved water right with a priority date of time immemorial for "the specific 'minimum instream flow' necessary to maintain anadromous fish life in the river, according to the annual prevailing conditions as they occur [in the Yakima river and its off-reservation tributaries]." *Amended Partial Summary Judgment Entered As Final Judgment Pursuant to Civil Rule 54(b)* at 7-8 (Nov. 29, 1990). This ruling was upheld on appeal to the Washington Supreme Court. *See Washington Dep't of Ecology v. Yakima Reservation Irrigation District*, 850 P.2d 1306 (Wash. 1993).


In *Kittitas Reclamation Dist. v. Sunnyside Valley Irrig. Dist.*, 763 F.2d 1032 (9th Cir. 1985), the Ninth Circuit upheld a trial court's order requiring the US Bureau of Reclamation to release water stored in federal reservoirs for the protection of the Yakama Nation's Chinook salmon treaty fishery outside the boundaries of the Yakama Reservation. In another case brought in the 1980s, the Confederated Salish and Kootenai Tribes of the Flathead Reservation (CSKT) in Montana (the eastern-most Stevens treaty tribe with reserved fishing rights) challenged federal irrigation project operations that depleted streams on the Reservation. The federal courts confirmed that the CSKT treaty language reserving the "exclusive right of taking fish" on-reservation also reserved to the Tribes instream flow water rights in all of the streams running through or bordering the Flathead Reservation. *See, e.g., Joint Board of Control et al. v. United States et al.*, 832 F.2d 1127 (9th Cir. 1987). The courts denied local irrigation districts' arguments that the instream flow rights should be shared equitably with the irrigation diversion rights of the local federal irrigation project, and instead concluded that the priority date for the Tribes' reserved flow rights was "time immemorial" and must be fully satisfied before the junior irrigation water rights could be exercised.

 

**Reserved Treaty Rights**

## INDIAN RESERVED RIGHTS IN ACTION

### RECENT EXAMPLES

To illustrate the nature and reach of tribal reserved rights in the Northwest, what follows it is a sampling of recent developments where rights reserved by tribes in the Northwest have influenced water and other natural resource decisions and operations — sometimes far away from any Indian reservation. As seen by this inventory, the range of situations where Indian treaty rights are at play is broad. In sum, it seems safe to say that, contrary to the implication in the 1940s era BPA newsletter quoted above, these tribal reserved rights increasingly are being recognized and are not on the sacrificial block.

### The "Culverts" Decision

**Continuing Jurisdiction**

In both *United States v. Oregon* and *United States v. Washington*, the federal district courts have retained continuing jurisdiction and have overseen various sub-proceedings over the years, including a sub-proceeding in *United States v. Washington* that made headlines this year. As discussed below, the rulings in the case have direct implications for the Columbia basin.

**Culvert Replacement**

In *United States v. Washington*, 827 F.3d 836 (9th Cir. 2016), a three judge panel of the Ninth Circuit ruled unanimously that the reserved fishing rights of the Stevens treaty tribes include the right to a healthy fishery. The panel further held that the federal district court correctly found that the State of Washington must restore habitat by replacing hundreds of culverts that block access to streams for salmon spawning and rearing. As David Moon, editor of *The Water Report*, stated "[t]he precedents set by the decision could have significant ramifications for the state and federal governments due to its recognition that [reserved] treaty rights for fishing necessarily include a right to a healthy fishery." *See* Moon, *TWR* #149.

**Habitat Protection Vacated**

The underpinnings of this case go back nearly four decades. In 1980, Judge William H. Orrick, Jr., who oversaw the *United States v. Washington* proceedings at that time, found that the Stevens' treaty language — "the right to take fish in usual and accustomed grounds" — implied a broader right to habitat protection for the fisheries subject to that right. *United States v. Washington*, 506 F. Supp. 187 (W.D. Wash. 1980). Sitting en banc (i.e., with all judges of the court present), the Ninth Circuit vacated the trial court's decision on environmental habitat protections. The Ninth Circuit in the 1980 decision "held that the issue was too broad and varied to be resolved in a general and undifferentiated fashion, and that the issue of human-caused environmental degradation must be resolved in the context of particularized disputes." 827 F.3d at 846.

**"Particularized Dispute"**

In 2001, the tribes, joined by the United States, alleged such a "particularized dispute" and asserted that "Washington State…had violated, and was continuing to violate, the Treaties by building and maintaining culverts that prevented mature salmon from returning from the sea to their spawning grounds, prevented smolt (juvenile salmon) from moving downstream and out to sea; and prevented very young salmon from moving freely to seek food and escape predators." 827 F.3d at 841. The litigation, which proceeded for 15 years, resulted in both the trial and appellate courts finding that:

**Habitat Obligation**

> [I]n building and maintaining barrier culverts Washington has violated, and continues to violate, its obligation to the Tribes under the fishing clause of the Treaties. The United States has not waived the rights of the Tribes under the Treaties, and has not waived its own sovereign immunity by bringing suit on behalf of the tribes. The district court did not abuse its discretion in enjoining Washington to correct…barrier culverts… .

827 F.3d at 865.

This decision also set down a sobering marker for the federal government. As an affirmative defense, the State of Washington asserted that "if its barrier culverts violate the Treaties, so too do the United States' barrier culverts…" referencing the fact that federal land management and highway agencies also have culverts that block salmon habitat. 827 F.3d at 855. The Ninth Circuit rejected this argument based on sovereign immunity and standing grounds, *Id.*, but went on to opine:

**US Obligation**

> Washington seeks an injunction requiring the United States to correct its barrier culverts on the ground that the United States is bound by the Treaties in the same manner and to the same degree as the State. Washington is, of course, correct that the United States is bound by the Treaties. Indian treaty rights were "intended to be continuing against the United States…as well as against the state." *Winans*, 198 US at 381-82. Our holding that Washington has violated the Treaties in building and maintaining its barrier culverts necessarily means that the United States has also violated the Treaties in building and maintaining its own barrier culverts.

827 F.3d at 856.

 

## Reserved Treaty Rights

**Wharf Impact**

**Political v. Factual**

**Tribal Fishing Grounds**

**Fishing Sites Impacts**

**Fishery Management**

**Consultation with Tribes**

**Columbia River Treaty**

**The US Army Corps of Engineers' Decision to Reject Permit for Coal Terminal**

Another potentially far-reaching natural resources decision directly linked to tribal reserved rights occurred earlier this year. The company SSA Marine sought a permit from the US Army Corps of Engineers (Corps) to build and operate a large coal shipping terminal near the City of Bellingham, Washington. On May 9, 2016, the Corps found that the proposed terminal would impact the treaty-protected fishing rights of the Lummi Nation based on the fact that the proposed trestle and associated wharf would take up 122 acres over water. The Bellingham Herald reported: "The Corps may not permit a project that abrogates treaty rights," said Col. John Buck, commander of the Corps' Seattle District.
It is interesting to note the reaction of SSA Marine:

> "This is an inconceivable decision. Looking at the set of facts in the administrative summary it's quite obvious this is a political decision and not fact based," Bob Watters, PIT president, said in the release. "We are very disappointed that the GPT project has become a political target rather than being addressed on the facts. The terminal promises to deliver substantial benefits through economic development, the creation of family wage jobs, and the generation of significant taxes."

*See* www.bellinghamherald.com/news/local/article76545117.html#storylink=cpy.

The record of decision developed by the Corps, however, shows that the Lummi Nation provided extensive and detailed information about its fishing rights in the vicinity of the proposed terminal. For anyone who is or will be pursuing a permitting process in the Columbia basin that implicates tribal fishing grounds, it will be important to address the issues raised in this decision from the Corps. *See* Water Briefs, *TWR* #148.

This Corps decision not to grant a permit based on impacts to Indian reserved fishing sites is not an outlier. As early as 1973, a federal district court ordered the Corps and BPA to operate federal dams on the Columbia in a manner that would not "impair or destroy any fishing rights…secured by Treaty with the Indians." *Confederated Tribes of Umatilla Reservation v. Calloway,* Civ. No. 72-211 (D. Oregon Aug. 17 1973) (*Slip Op* at 7). This case is discussed in the article: *The Indian Piscary Profit and Habitat Protection in the Pacific Northwest: A Property Rights Approach*, M. Blumm & B. Swift, 69 U. Colo. L. Rev. 407, 464, (1998). *See also, Confederated Tribes of Umatilla Reservation v. Alexander,* 440 F. Supp. 553 (D. Oregon 1977). In a recent article, the author explained that in this case, the court "issued a declaratory judgment stating that the constructing of a dam on Catherine Creek would 'impair access to… traditional [fishing] stations' by covering them in 200 feet of water, and 'prevent all wild fish from swimming upstream.' Importantly, the court concluded, "the treaty right to fish at all the usual and accustomed stations will be destroyed.'" *See "Salmon is Culture, and Culture is Salmon": Reexamining the Implied Right to Habitat Protection as a Tool for Cultural and Ecological Preservation*, W. Furlong 37 Pub. Land & Resources L. Rev. 113 (2016).

**Tribes as Co-Managers of Columbia Basin Fisheries**

The influence of Indian reserved rights goes beyond the specific court and administrative decisions addressing the scope and application of those rights. Many of the tribes in the Columbia basin have developed considerable expertise as fisheries managers who actively participate in all relevant forums at the technical, policy, and legal levels. For decades now, courts have recognized the importance of considering the views and information from tribal and other fisheries managers in the ongoing efforts to improve conditions in the Columbia for anadromous fish runs.

In *Natural Resources Information Center v. Northwest Power and Planning Council*, 35 F.3d 1371 (9th Cir. 1994), plaintiffs challenged the fish and wildlife plan issued by what is now known as the Northwest Power and Conservation Council (Council). The Ninth Circuit found that the Council, when formulating the plan, did not adequately consider the information and positions of state and tribal fishery co-managers and remanded the plan for further consideration of that information. Similarly, in one of the early cases challenging the adequacy of Columbia basin federal dam operators' compliance with the federal Endangered Species Act (ESA) with respect to ESA-protected salmon, Judge Marsh found that the National Marine Fisheries Service did not adequately consider the views and positions of state and tribal fisheries co-managers. *Idaho Dep't of Fish and Game v. National Marine Fisheries Service,* 850 F. Supp. 866 (D. Oregon 1994).

More recently, Columbia Basin tribes came together in force to participate collectively in a region-wide review and recommendation process for the Columbia River Treaty with Canada. This treaty, ratified in 1964, set out agreements between the two countries to coordinate hydropower development and generation and flood control. As the treaty can be renewed or rescinded beginning in 2024, BPA and the Corps sponsored a review of the treaty. Many tribes actively participated in this review and were instrumental in advocating that any renewal of the treaty include consideration of a properly functioning ecosystem for the basin in both countries. RE: Columbia River Treaty *see* Miller, *TWR* #101; Bankes & Cosens, *TWR* #105 & #129; US Entity, *TWR* #117; and Christensen, *TWR* #125.

## Reserved Treaty Rights

### Montana Agreement

### Instream Flows

### Montana Compact

**Off-Reservation Flow Protections**

PROPOSED SETTLEMENT OF WATER CLAIMS OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES

Similar to tribal reserved fishing rights, the scope and nature of tribal reserved water rights for flows and other purposes are being actively addressed in the courts and also in negotiations. In one example, the State of Montana and the Confederated Salish and Kootenai Tribes recently reached agreements to settle all of CSKTs' water right claims, including extensive off-reservation instream flow claims. Figure 2 below shows the extensive range of the Indian reserved instream flow claims filed by both the United States and CSKT in the Montana general stream adjudication. These claims for flow protections reflect the claimants' assessment that the Tribes' use of river basins (green on the map) for fisheries historically extended throughout many basins in Montana on both the west and east side of the Continental Divide. Figure 3 highlights the basins where the State, CSKT and the federal government agreed to a more limited range of instream flow protections on the west side of the Divide. CSKT also agreed to certain restrictions on the exercise of these instream flow rights to protect existing uses of water.

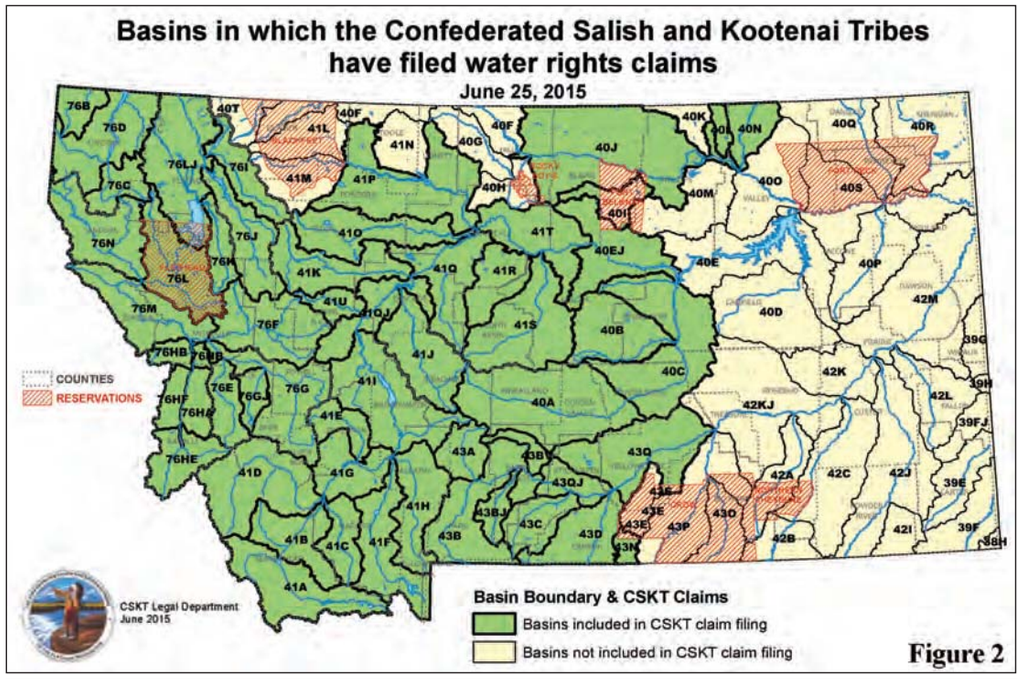

Figure 2

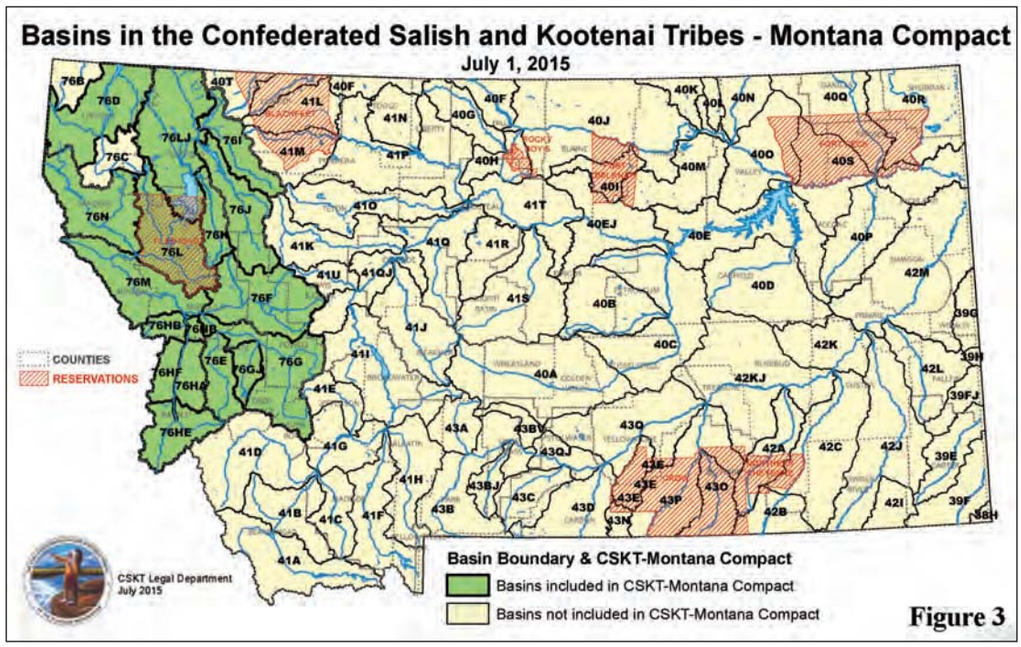

Figure 3

 

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**Off-Reservation Compromises**

Thus, through the process of negotiating all of CSKTs' water right claims, the parties were able to resolve the significant legal cloud that the time-immemorial Indian reserved flow claims had created on the arguably junior non-Indian water right claims throughout more than one-half of Montana. It is interesting to note that the State of Montana agreed in the settlement that CSKT will hold Indian reserved instream flow water rights with a time-immemorial priority date on the Kootenai and Clarks Fork Rivers in western Montana. CSKT in turn concluded that it could compromise on some of the off-reservation reserved right water claims based on the benefits it would receive overall in the settlement. The federal government currently is evaluating this agreement. [The CSKT water rights compact and related materials are online at: http://dnrc.mt.gov/divisions/reserved-water-rights-compact-commission/approved-compacts].

Other tribal water settlements in the Northwest have accomplished the objective of improving or protecting instream flows for streams that sustain tribal reserved fisheries, but have accomplished those protections under state water law, not federal reserved water law. *See, e.g.*, Mecham, *TWR* #83.

## CONSIDERATION OF INDIAN TREATY RIGHTS IN EPA DECISION-MAKING

### CURRENT EFFORTS BY THE US ENVIRONMENTAL PROTECTION AGENCY

**Trust Responsibility**

Over the past year, US Environmental Protection Agency (EPA) has made great strides in recognizing at the highest levels the federal government's trust responsibility and recognizing the importance of tribal waters, tribal sovereignty, and the need to better protect water resources that tribes rely upon.

**Guidance v. Rules**

- In February 2016, EPA developed guidance to enhance EPA's consultations with tribes where Indian treaty rights may be affected by a proposed EPA action. *See* Water Briefs, *TWR* #153.
- In May 2016, EPA issued an interpretive rule for Treatment of State for Clean Water Act programs that will enable streamlining of the application process, which will encourage an increased number of tribes coming under "Treatment as States" (TAS). On September 16, Administrator McCarthy signed the final EPA rule on TAS for tribes for Section 303(d) of the federal Clean Water Act, which will enable eligible tribes to obtain authority to identify impaired waters on their reservations and establish "Total Maximum Daily Loads" for impaired streams, a significant development for tribal governments. *See* Water Briefs, *TWR* #148.
- On September 19, Administrator McCarthy signed an Advance Notice of Proposed Rulemaking for Tribal Baseline water quality standards which will seek feedback from tribal governments and others on a potential future federal promulgation of water quality standards for tribal waters that do not currently have EPA-approved **w**ater **q**uality **s**tandards (WQS). Currently fewer than 50 of over 300 federally recognized tribes with Indian reservations have WQS effective under the CWA. EPA conducted a tribal consultation process over the summer and is hoping to continue to receive feedback from tribal governments on potential standards which could address the use of cultural and traditional uses as specific designated uses, the use of limited fish consumption rates and how antidegradation can protect significant tribal resources.

These and other initiatives have a direct focus on tribes and their water resource protections and management.

## TRIBAL TREATY RIGHTS MEMORANDUM OF UNDERSTANDING

### FEDERAL INTERAGENCY COORDINATION & COLLABORATION FOR PROTECTION OF TRIBAL RIGHTS

**Protective MOU**

Finally, in a very recent development, I note that several federal department and agency heads have signed or are in the process of signing a Memorandum of Understanding (MOU) setting out commitments "to protect tribal treaty rights and similar tribal rights relating to natural resources through consideration of such rights in agency decision-making processes and enhanced interagency coordination and collaboration." This MOU can be found at:
MOU Regarding Interagency Coordination and Collaboration for the Protection of Tribal Treaty Rights: https://www.epa.gov/sites/production/files/2016-09/documents/13sep16_interagency_treaty_rights_mou_final.pdf.

## CONCLUSION

**Treaties' Scope**

The brief survey in this paper provides ample illustration of the scope and application of Indian reserved rights in modern day decisions affecting water, land and natural resources. Also, and not coincidentally, the examples demonstrate that tribal governments are themselves at the forefront articulating, exercising, and defending their reserved rights. While it is possible that some decisions affirming tribal reserved rights may be modified or reversed on appeal, it is also true that the jurisprudence

 

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on tribal treaty and reserved rights over the past few decades has generally reaffirmed and strengthened the original holdings in the *Winans* and *Winters* Supreme Court decisions. An understanding of how tribal reserved rights are exercised and are entitled to be protected is important for those involved in decisions that may affect those rights.

**For Additional Information:**
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**Duane Mecham** currently is Acting Deputy Director for the Secretary's Indian Water Rights Office within the US Department of the Interior. This Office oversees the Department's Indian water rights settlement program and provides high level policy guidance to the Secretary and the bureaus and offices of the Department on matters concerning Indian water rights settlements. He will soon return to his position as senior attorney in the Department's Regional Solicitor's Office based in Portland, Oregon. He advises several Interior agencies on tribal and federal water rights matters and on Endangered Species Act compliance issues arising out of impacts of federal hydropower and irrigation projects on salmon in the Columbia and other river basins. He was the chair of the federal government's negotiation team for the Nez Perce water right claims in Idaho and has been appointed as chair of the Umatilla (Oregon) and Salish-Kootenai (Montana) federal negotiation teams. He would like to express his deep appreciation to Mary Lou Soscia, Columbia River Coordinator for the US Environmental Protection Agency, who provided extensive background on the EPA initiatives to acknowledge and integrate tribal rights into its decisions.

**Stockwater Rights**

# STOCKWATER RIGHTS ON STATE & FEDERAL LAND

### OWNERSHIP OF STATE-BASED STOCKWATER RIGHTS

by Rachel Meredith, Bloomquist Law Firm (Helena, MT)

## INTRODUCTION

**Private Appropriation on Public Lands**

Private appropriation of water on state and federal land is heavily fact-dependent. This article is intended to act as a primer for those who find themselves defending or asserting private appropriations on those lands. While ownership of a private claim may ultimately vest in a state or federal agency, such a result is not a default.

## BACKGROUND

**Montana's Wise Use Act**

In 1973, the Montana legislature passed the Water Use Act (WUA), creating significant changes in the way Montana administers water right appropriations. The WUA took effect July 1, 1973 and created: (1) a system for the adjudication of existing water rights (those water rights existing prior to July 1, 1973, that were perfected in accordance with state customs, laws, and judicial decrees); and (2) a system for changing existing water rights and appropriating new water rights after July 1, 1973. Mont. Code Ann. § 85-2-101, et seq.

**Adjudication**

Montana's first foray into adjudicating existing water rights occurred in the Powder River Basin in 1973. In 1979, after six years of intensive basin investigation that yielded few results, the Montana Legislature sought measures to increase efficiency in the process. To this end, the legislature passed Senate Bill 76, which established a deadline for Montanans to file water right claims with the Montana Department of Natural Resources and Conservation (DNRC), and established the Montana Water Court (Water Court) and the Montana Reserved Water Rights Compact Commission. Mont. Code Ann. §§ 85-2-221, 2-15-212.

Under the WUA, adjudication began with water users being required to file statement of claim forms for the use of water by April 30, 1982 — after which they were examined by DNRC. Mont. Code Ann. § 85-2-221. Once examined, these claims were released to the public for objection and eventual case consolidation before the Water Court. Mont. Code Ann. § 85-2-212, et seq.

At the beginning of the adjudication, many water users filed claims and appeared in the Water Court without the assistance of counsel or consultant. While knowledgeable about how each water right was

 