The Study

(REF)

The Water Study deeply explains California's legal environment for Winters water rights. The following chapters are broken into chapters that begin with the purpose and finishes with strategic considerations and further research. Each chapter is broken into smaller sections and is meant to guide you through the complex topics. Using the site's built-in search function allows for a more targeted approach if you know more about what you seek. We are excited you are joining us on this journey in learning and elevating the conversation on Winters water rights in California. (REF)

Water is an essential cultural, spiritual, and economic resource for California Indians.

This project aims to unravel the legal complexities of water rights in order to empower California Tribes with the knowledge to better advocate for their water.

Introduction and Purpose

(REF) January 28, 2024

Introduction

The purpose of this Study is to provide a current review of the factual and legal status of water rights possessed by California Indian tribes as well as individual Indians (allottees) with interests in allotted trust lands (allotments). This Study will present a framework for analyzing California Indian water rights and offers suggested strategies for California tribes and allottees on how to protect and secure their rights.

This study builds on the work CILS commenced in 1990 and 1991. Under contract with the Bureau of Indian Affairs (BIA), CILS prepared a final "California Indian Water Rights and Reconnaissance Report" in 1991. The report provided historical information on the majority of federally recognized California tribes at that time, as well as a reconnaissance-level analysis of tribal water rights. The principal author of CILS' 1991 report was Attorney Margaret B. Crow Rosenfeld. The CILS report was only made available upon request to the Department of Interior. The BIA assumed the responsibility of distributing copies of the report but never made the report public beyond providing copies upon request.

This Study stands on the shoulders of the 1991 report, expanding and deepening the treatment of relevant topics and updating legal authorities. The Study also covers new features of California state law that tribes, including unrecognized tribes, may want to participate in, for example, Tribal Beneficial Uses, Integrated Regional Water Management projects, and the Sustainable Groundwater Management Act. Most importantly, the Study is publicly available, and accessible via a dedicated subdomain of CILS' website: www.water.calindian.org. The use of a dedicated subdomain allows users to search the content of the Study, and only the Study. CILS' goal is to keep this resource up to date and current as best we can. Your comments, input and feedback are appreciated and can be submitted to water@calindian.org.

For a variety of reasons, the subject matter of this Study is unique when compared to water regimes in other states. Our research confirmed that in the realm of the legal history of federal-Indian relations in California, the exception is often the rule. The desire to simplify and categorize is thwarted by the unique circumstances of the interaction between the federal government and California Indians. From the repudiation and sealing of the eighteen treaties, to the relatively large number of public domain allotments, to the lingering effects of the termination period, the legal history differs significantly from that which is familiar to practitioners of Indian law in other states. Indian water rights issues cannot be meaningfully analyzed without an understanding of this historical and legal context.

As we prepared this Study, multiple actors within California are in the process of determining what sustainable yields of groundwater will be under the California's 2014 Sustainable Groundwater Management Act (SGMA). Currently, plans for the majority of California's groundwater basins have not been finalized which provides tribes an opportunity to participate in the SGMA process. [1]

The uniqueness of California set it apart from other states and tribes, the legal structure of allocating California water rights utilizes both a prior appropriation system and a system of riparian and correlative rights. [2] Additionally, California contains nearly one-fifth of all federally-recognized tribes in the country, and nearly one-third of all federally recognized tribes in the contiguous lower forty-eight states. [3] Unlike many Indian reservations in the United States, reservations in California were not created by treaty. Additionally, California's state government has recently passed laws regulating groundwater [4], introduced the concept of Tribal Beneficial Uses into the regulatory regime overseeing water quality, and created systems for integrated water management that can bring together multiple stakeholders, including tribes that are not federally recognized. These differences combine to create complex and challenging questions regarding strategies, best practices, and the legal status of Indian water rights in this state – questions to which there is no single, simple answer.

Purpose

Water is a scarce and sacred resource for many tribal communities. In 2016, the Lakota phrase "Mni Wiconi," or "Water is life" was heard in many tribal communities as a call to protest the Dakota Access Pipeline on the Standing Rock Sioux Tribe's reservation in the Dakotas. When looking at this Study, CILS sought to update its original 1991 Reconnaissance Report and make it accessible beyond a legal audience. The purpose of this updated and expanded Study is to create a useful tool for California's indigenous people. The Study was written so that readers can focus on the sections relevant to them.

During the course of creating both the 1991 report and this Study, CILS compiled a significant amount of historical information that may be useful for assessing and utilizing water rights. CILS hopes to compile that data into an accessible and public-facing database that will supplement the Study and exist as a free tool via this website. In the meantime, CILS will make primary source documents available as capacity permits via hyperlinks in the footnotes.

Currently, CILS is implementing a 2023-2028 Strategic Plan.[5] CILS envisions a future where all Native Americans have access to services and resources to thrive. CILS' mission is to protect and advance Indian rights, Indian self-determination, and tribal nation-building. A primary goal of CILS' is to meet client needs and provide high-quality, high-impact services at no or low cost. This Study is in line CILS' Strategic Plan by providing free publicly accessible information to help California Native Americans navigate this complex and increasingly important area of law.

Introduction Footnotes:

1. As of April 2023, only 12 of 117 submitted GSPs have been approved. To review the current status of submitted GSPs see SGMA Groundwater Management (SGMA) Portal - Department of Water Resources (ca.gov). https://water.ca.gov/Programs/Groundwater-Management/SGMA-Groundwater-Management/Groundwater-Sustainability-Plans.

2. See Cal. Water Code § 1200 - 1202.

3. There are 109 federally recognized tribes located within California's borders, and there are 574 federally recognized tribes within the United States. California separately has largest number of Native American residents of any state, however the majority are members of out of state tribes, a function of the federal relocation policies of the 1960s and 1970s.

4. See section on the Sustainable Groundwater Management Act (SGMA). At this time we note that, as a PL 280 state, California does not have civil regulatory jurisdiction on Indian trust land and Tribal participation in SGMA's processes is voluntary. See Strategies section for the pros and cons of participation that a Tribe may want to consider.

5. CILS' 2023 – 2028 Strategic Plan may be found at www.calindian.org/about/ www.calindian.org/about/

Context and Definitions and Methodology

(REF) January 23, 2024

Context & Definitions

Water as a Property Right

Water rights are a form of property. Water rights under state law in California are usufructuary rights[2], meaning that the owner has a right to use that water, but does not own the water itself, and the right is not an unlimited right.[3] The California Constitution requires all use of water to be "reasonable and beneficial."[4] State law differentiates between different types of water (e.g., surface water running through one's property, percolating groundwater appurtenant to one's property, appropriated surface water, and underground streams and rivers).

However, for tribes and individual Native Americans with an allotment, federal law determines such tribes and individuals' water rights. Such water rights are associated with Indian trust lands and referred to as *Winters* (a.k.a. "reserved") water rights. A *Winters* or "reserved" water right is the right to enough water to fulfill the purpose for which the federal government reserved the land. For this reason, such rights are also known as "implied" water rights. *Winters* rights are property rights; in the context of *Winters* rights appurtenant to Indian trust land, water rights are property rights that the federal government has a trust responsibility to those interests as a fiduciary.[5] Unlike appropriative rights under state law, Winters rights do not require a showing of beneficial use and are not lost through non-use.

Water as a Cultural Resource

While water is a property right, it is also a cultural resource. In 2018, California implemented a process of officially recognizing the cultural aspects of water as an official Tribal Beneficial Use.[6] A key strategic consideration for tribes is working with California Regional Water Boards to recognize specific cultural practices and resources within a watershed[7].

Water as an Assertion of Sovereignty

Water is a critical resource necessary for economic development and the continuation of traditional ways of life; protecting water is a core responsibility of a sovereign government. Tribal assertion of sovereignty over water is necessary to continue protecting tribal sovereignty at large.

Definitions

Term	Definition
Allotment	"Allotment is a term of art in Indian law… [i]t means a selection of specific land awarded to an individual allottee from a common holding." Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128, 142, 92 S. Ct. 1456, 1466, 31 L. Ed. 2d 741 (1972)
Appropriative Rights	"An appropriative right is the right to take either surface or subsurface waters in excess of waters reasonably and beneficially used by riparian or overlying owners for use with nonriparian or nonoverlying land or for the public water supply. It is established pursuant to statute by the actual taking of water for nonriparian or nonoverlying uses." 3 Cal. Real Est. § 9:29 (4th ed.)
Assignment	"The legal concept of assignment refers to the transferability of all types of property…" Amalgamated Transit Union, Loc. 1756, AFL-CIO v. Superior Ct., 46 Cal. 4th 993, 1001 (2009).
Groundwater Adjudication	"When water users within a basin are in dispute over legal rights to the water, a court can issue a ruling known as an adjudication. Adjudications can cover an entire basin, a portion of a basin, or a group of basins and all non-basin locations between. The court decree will define the area of adjudication. The court typically appoints a watermaster to administer the court's decree." Accessed at California Department of Water Resources, Adjudicated Areas, on May 22, 2023.
Groundwater	There is no agreed upon definition of groundwater, but the United States Geological Survey defines it as "Groundwater is water that exists underground in saturated zones beneath the land surface. The upper surface of the saturated zone is called the water table." USGS, "What is Groundwater" accessed at What is groundwater? | U.S. Geological Survey (usgs.gov) on May 19, 2023.

Indian Country	"Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." 18 USC 1151. Accordingly, "Indian Country" includes all trust lands, as well as any fee land or rights of way inside the bounds of any Indian reservation.
Overlying Right	"An overlying water right is analogous to the rights of a riparian owner in a stream. It is the right to extract and use water underneath the land that flows beneath, or percolates to, the surface for use on the surface of the land. The right is based on ownership of the land and is appurtenant to the land." 3 Cal. Real Est. § 9:29 (4th ed.)
Priority Date	'The rights of appropriators among themselves, unlike those of riparian or overlying owners, are subject to a rule of priority, and "senior appropriators—those who acquired their rights first in time—are entitled to satisfy their reasonable needs, up to their full appropriation, before more junior appropriators become entitled to any water."' 3 Cal. Real Est. § 9:32 (4th ed.)
Public Domain Allotment	Public Domain Allotments (PDAs) "are tracts of land reserved from federally controlled territory in the United States held as trust or restricted fee parcels by Native American persons who do not live on reservations." Rubin, Erin The Yale Law Journal Forum, "Water Rights of Public Domain Allotments," February 17, 2023.
Riparian Rights	"A riparian right is the right of a landowner to take water from a stream that abuts his or her land for use on the riparian land. The riparian right must be exercised for use in relation to the riparian land, and not for export to other lands. Riparian rights only arise from a natural watercourse and not an artificial channel or body of water, such as an artificial, man-made lake or pond." 3 Cal. Real Est. § 9:29 (4th ed.)
Safe Yield	Safe yield is generally considered equal to the average replenishment rate of the aquifer from natural and artificial recharge. Evaporation, transpiration and basin outflow are also factored in to replenishment rates. Accessed at Safe Yield – Water Education Foundation on May 22, 2023

Surface Water	"Water diffused over the surface of land, or contained in depressions therein, and resulting from rain, snow, or which rises to the surface in springs, is known as 'surface water.'" Contra Costa Cnty. v. Pinole Point Properties, LLC, 235 Cal. App. 4th 914, 928, 186 Cal. Rptr. 3d 109, 119 (2015)
Sustainable Yield	"Sustainable yield" means the maximum quantity of water, calculated over a base period representative of long-term conditions in the basin and including any temporary surplus, that can be withdrawn annually from a groundwater supply without causing an undesirable result. Cal. Water Code § 10721(w) (West).
Tribal Beneficial Use	Tribal Beneficial Uses are a group of beneficial uses that can help protect activities specific to Native American cultures and their uses of California waters, including the consumption of non-commercial fish or shellfish. Tribal Beneficial Uses can also be referred to as cultural uses of water. Accessed at Tribal Beneficial Uses – Cultural Uses of Water | California State Water Resources Control Board on May 22, 2023.
Trust Land	"[A]ny lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power." 25 U.S.C.A. § 2703(4)(B) (West)

Methodology

Due to the unique nature of California water law and the increased complexity of tribal water rights within that California system, a standard methodology was used for this report. From that methodology, a framework for reviewing matters related to *Winters* rights and assessing tribal and public domain allotment owner water interests in California. This methodology and framework combine for a holistic approach to understanding and strategizing around California tribal water opportunities

This study began with a review of the pervious study drafted in 1991. Topic areas were then assigned to various contributors to update the 1991 study and add topics and details that are relevant to current issues in California water and federal Indian Law.

Each section's research utilized legal research software to update the law, regulations, and secondary sources. California Indian Legal Services in partnership with several individuals and organizations including Carbon A List, Owens Valley Indian Water Commission, UCLA, Stanford University, and the Bureau of Indian Affairs, provided research, drafting, and review contributions.

While there are a multitude of methods and issues around water, tribes, and California, this team focused efforts on *Winters* rights and the strategic importance of water rights to tribes, while briefly addressing adjacent issues.

Assumptions

The core assumption of this work was that the legal landscape surrounding *Winters* rights in California changed significantly since the previous study. This assumption was largely validated as the team tackled challenging issues including new California groundwater regulations and recent caselaw.

Context and Definitions and Methodology Footnotes:

2 Id.; See Cal. Water Code § 102 (West), "All water within the State is the property of the people of the State, but the right to the use of water may be acquired by appropriation in the manner provided by law." ↑

3 Abatti v. Imperial Irrigation Dist., 52 Cal. App. 5th 236, 256 (2020), as modified on denial of reh'g (Aug. 5, 2020)ff. ↑

4 See J Judith V. Royster, Indian Water and the Federal Trust: Some Proposals for Federal Action, 46 Nat. Resources J. 375 (2006). ↑

5 See Protecting Water Quality for Tribal Beneficial Uses, accessed at https://www.waterboards.ca.gov/tribal_affairs/docs/2022/tbu-basin-amendment-09202022.pdf, on June 9, 2023 ↑

6 See Strategies for Tribes supra. ↑

7 Note that California's Sustainable Groundwater Management Act defines groundwater as, "means water beneath the surface of the earth within the zone below the water table in which the soil is completely saturated with water, but does not include water that flows in known and definite channels unless included pursuant to Section 10722.5." Cal. Water Code § 10721(g) (West). ↑

History

(REF) January 28, 2024

"So little is known here of the condition and situation of the Indians in that region that no specific instructions can be given at present." [1]

With these words in his letter of appointment, the first Indian agent appointed to serve in California was sent out from Washington, D.C. on April 14, 1849. Unfortunately, in the period that followed, federal and state authorities did not take steps to increase their understanding of the "condition and situation" of California Indians. Instead, in the quarter-century that followed this statement, federal and state policies, authorities, and resources converged with, and directly funded, vigilante violence to effect a genocide of California's indigenous population. [2] Between 1846 and 1870, California's Native American population plunged from perhaps 150,000 to 30,000.[3] By 1880, census takers recorded just 16,277 California Indians – a decline of nearly 90% of California's indigenous population in three and a half decades. [4]

The first step in assessing California Indian water rights is to review and understand the unique history of what Professor Benjamin Madley has called the "California Indian

Catastrophe." [5] The next step, is to review and understand the history of the specific tribe or allotment in regard to the legal authority that created the trust land. A brief review of the unique history of the relationship between the federal government and California Indian tribes, as well as allotees, is necessary in order to understand the intentions of the government in the acquisitions of land (i.e. the federal purpose of the reservation or allotment that form the current land bases for California Indian tribes and allottees. [6]

Colonization of California & Unratified Treaties

The physical violence inflicted upon California's indigenous population in the mid to late 19th century was accompanied by a 'legal violence' that affects California Native Americans to this day, including their water rights. Under California law, and water law in the western United States generally, water rights correspond to dates of priority, i.e. older rights are superior to younger rights. The 'legal violence' of which we write was the denial of land and water rights to California's first peoples via the Treaty of Guadalupe Hidalgo with Mexico and then the eighteen repudiated and unratified treaties.

On February 2, 1848, the United States and the Republic of Mexico signed the Treaty of Guadalupe Hidalgo, ending the Mexican-American War. [7] On March 10, 1848, the U.S. Senate ratified the treaty, resulting in Mexico ceding the present day states of California, Nevada, Utah, New Mexico, and most of Arizona and Colorado to the United States. [8]

California became a state on September 9, 1850.[9] In 1851, Congress authorized President Fillmore to appoint three Indian Commissioners to negotiate treaties with the Indians of California. Between March 17, 1851 and January 7, 1852, Oliver M. Wozencraft, George W. Barbour, and Redick McKee negotiated 18 treaties with representatives of 119 California tribes, in which Indian leaders agreed to surrender almost all of their land in return for promises of protection, clothing, blankets, tools, food, education. [10] However, this did not come to pass, primarily due to opposition of the California congressional delegation. [11] The representatives, and the state legislators, opposed the treaties because the Indians would have retained high-quality agricultural lands and lands with valuable mineral rights, namely gold. In July of 1852 the United States Senate met in a secret session and unanimously voted to repudiate all of 18 treaties, and then placed them and all associated documents under an injunction of secrecy. [12] They remained hidden from the public for over fifty years, until 1905. The eighteen unratified treaties would have created nineteen reservations totaling 11,700 square miles (~7.5 million acres, and ~7.5% of the State of California. [13] Other estimates put this figure at 8.5 million acres [14].

In 1851, the year after California was admitted as a state, Congress passed the California Land Act. [15] The Land Act of 1851 imposed a system of determining land ownership in California. The law required landowners who claimed title under the previous Mexican government to file their claim of title with a commission within two years. [16] The purpose of the California Land Act was to resolve competing ownership claims in favor of the new sovereign, the United States. Under the previous sovereigns of Spain and Mexico, indigenous title to land was by and large acknowledged and respected.[17] Any claims of title under the previous Mexican system not proven by evidence to the commission's

satisfaction were denied, and the property passed to the public domain, i.e. the United States federal government became the landowner. [18]

In this way, in a few short years in the early 1850s, the United States effectively dispossessed California Indians of their land and broke the promises contained in the 18 unratified treaties. As a result of the combination of the California Land Act of 1851 and the unratified and sealed treaties of 1851-52, most California Indians became homeless resulting in an indigenous population in California that, by and large, held neither land nor appurtenant water rights.

Establishment of Indian Trust Land in California

Early California Reservations

Although the Senate rejected the 18 treaties, the incentive to deal with the Indians in California continued to increase in conjunction with a rapid increase of white settlement brought on by the Gold Rush. A renewed effort to segregate and confine Indians in defined areas resulted from increased conflict over land and campaigns of vigilante violence, which in many instances was directly funded by state and federal dollars. [19]

On March 3, 1853, Congress passed an Act which provided for the survey and settlement of the public lands of [20] Section 6 of this Act ostensibly protected Indian tribes then in possession of any tract of land from losing their occupancy rights to non-Indians under the Homestead and Preemption laws of 1841. At least on paper, the effect of this section was supposed to make any land patents issued to private parties already occupied by Indians either void or subject to the Indians' rights of use and occupancy, including rights to use of water.

The words of this federal law, however, did little to counter the violence and dispossession underway in the mid-19th century. Very few if any California Indians derived any meaningful legal rights to the land they had previously possessed or occupied.

During the 1850s, the federal government established several military reservations and appropriated funds to defray the costs of "collecting" and "removing" all Indians in the vicinity to these installations and provide for their subsistence [21].

The following military reservations were established and, in most cases, abandoned, in the following years:

Name	Established Date	Abandoned Date
Kings River Farm	1854	1862
Tule River	1856	–
Mendocino Reservation	1856	1864
Nome Cult Farm (Round Valley Reservation)	1856	–
Nome Lackee	1857	1862

Klamath River	1857	1862
Fresno Reservation	1857	1861
Smith River Reservation	1862	1869

Federal neglect caused harsh conditions that led many Indian residents to leave these early reservations and return to their traditional territories. Such conditions included violent incursions by neighboring white settlers, disease, inadequate funding to feed and clothe the Indians at these reservations, and fraud in the management of the funds appropriated for the reservations.

California Reservations – 1864 to 1873

In 1864, Congress passed what is commonly referred to as the "Four Reservations Act", which provided that "there shall be set apart by the President, and at his discretion, not exceeding four tracts of land, within the limits of the state, to be retained by the United States for the purposes of Indian reservations, which shall be of suitable extent for the accommodation of the Indians... ."22 Under the authority of the Act three reservations were established: the Hoopa Valley Reservation, the Tule River Reservation, and Round Valley Reservations, the latter two having been established previously in different form.23 It is unclear whether this Act created any more reservations24.

The Indians who remained at the earlier military reservations that were abandoned were removed to the new or expanded reservations. For example, the Indians from the Mendocino and Nome Lackee (military) Reservations were removed to Nome Cult Indian Farm, which was expanded to become the Round Valley Indian Reservation. The Indians held at Fort Tejon / Tejon Pass, who had not escaped and returned to their homelands in the Owens Valley, were removed to Tule River Reservation. To this day there are many familial ties between the Owens Valley and Tule River Indians due to this history. The Indians from the Klamath River and Kings River Farm were removed to Smith River Reservation. When that reservation was abandoned in 1869, some of the residents moved to the Hoopa Reservation.

While the concept of reservations was not unfamiliar in the history of federal-Indian relations in the rest of the United States, the implementation of the system in California brought Indians and white settlers in closer proximity and concentration than seen previously. Unlike the relatively isolated Indian Country of present-day Oklahoma (at least initially), the contemporaneous reservations in California had defined borders and were often closely surrounded by settlements. In the northern and central areas of the state, this was largely a product of the rapid increase of the white population due to the gold rush. The Missions in the southern portion of the state, geographically removed from the gold rush, also provided a historical example of concentrating the native population in close proximity to white settlements.

The reservation system began to contract in 1860, and by 1869 only the Hoopa, Round Valley, and Tule River Reservations were still in existence. During this period, considerable

vigilante and state-sponsored violence against California Indians persisted, and the goal of the federal and nascent state governments remained to exterminate, segregate, and/or remove Indians from areas desired for white settlement and resource extraction. For example, in July of 1863, the U.S. Army forcibly marched approximately 1000 Owens Valley Paiutes 250 miles south to the San Sebastian Indian Reservation near Fort Tejon / Tejon Pass.[25] Superintendent Austin Wiley in 1864 advocated for northern California Indians to be sent to Santa Catalina Island off the coast of southern California.[26] Although the Commissioner of Indian Affairs rejected this latter idea as "impractical," it illustrates the continued desire and policy of those in power to remove Indians from beyond the areas of contact with any white settlers, just as the tribes of present-day Georgia had been forcibly removed to Indian Territory (present day Oklahoma) on the infamous Trail of Tears in the 1830s.

The Modoc War of 1872-1873 in northern California generally marks the end of the California Native American genocide, and of an express policy of state violence toward the state's indigenous population.[27] From 1851 through 1873, the federal government's creation of any Indian reservations in California was an extension of a general federal and state policy to exterminate, segregate, and/or remove California's native peoples from areas desired for white settlement. In the period that followed, the motivations underpinning the establishment of trust land in California expanded beyond methods of military strategy and a means of incarceration. The establishment of trust land was still offered as a way to help 'solve' what was often referred to as the 'homeless Indian problem', and thus advanced similar goals as earlier establishment of reservations in California. However, after the conclusion of the California Indian Wars, trust land in California began to be established, at least in part, in order to remedy past wrongs.

California Reservations – 1874 to 1904

In 1871, Congress passed the Indian Appropriations Act, which ended the practice of treaty-making between the United States and Native American tribes.[28] Thus, no reservations in California were ever established by treaty. The period from 1874 to 1904 falls between the conclusion of the California Indian Wars in 1873 and the unsealing of the 18 unratified treaties in 1905.[29] During this period, the federal government created a number of small reservations in southern California for "Mission Indians" and several other reservations which were subsequently abandoned.

During this period, individual California Indians also received a number of allotments. The Indian Homestead Act of March 3, 1875[30] extended the benefits of the Homestead Act of 1862 to Native Americans. The Native American homesteader followed the same procedures as a non-Indian homesteader, but title was placed in federal trust for five years. Native American homesteaders had to relinquish their tribal ties but could retain their share of tribal funds. The amended Indian Homestead Act of 1884[31] eliminated the tribal severance requirement and filing fees. It also extended the federal trust period from five to twenty-five years. Lastly, in 1877 Congress passed the General Allotment Act or "Dawes Act", named after the Act's author, Senator Henry Dawes of Massachusetts.

Both the Indian Homestead and Dawes Acts permitted the allotment of land for individual Indians from the public domain, rather than from formerly tribal / reservation land. During this period, the federal government issued 2,058 allotments for California Indians in the late 19th century, of which 1,797 remained by 1906.[32]

The 1890 report from the Commissioner of Indian Affairs recorded a total Native American population in California as only 15,283, which represents a population reduction by 96% from the conservative estimate of California's indigenous population in 1851 at 150,000.[33] In 1891, Congress enacted the Act for the Relief of the Mission Indians in the State of California, which established a commission to "arrange a just and satisfactory settlement of the Mission Indians residing in the State of California, upon reservations which shall be secured to them as hereinafter provided."[34] "Mission Indians" refer to the Native Americans who were forcibly relocated from their homelands to live and work at the Franciscan missions established in southern California under primarily Spanish rule between 1796 and 1823. The Act of 1891 provided for a Mission Indian Commission to select reservations for each band and village of Mission Indians. Today there are over 35 distinct Tribes of Mission Indians, including both federally recognized and unrecognized tribes. The Commission's report recommended the creation of multiple reservations for Mission Indians, and the Act of 1891, along with a series of Executive Orders, led to the creation of small, scattered reservations of varying quality for Indians in southern California.[35]

At the turn of the 20th century, besides the small and scattered reservations of the Mission Indians in southern California, there were only four other tribal reservations in existence in California, the Hoopa Valley Reservation and Round Valley Indian Reservation, in the northern part of the state, and the Digger (now Tuolumna Bank of Mi-Wuk Indians) Reservation and Tule River Reservation in central California.[36]

Trust Land Established in the Wake of the Unratified Treaties becoming Public – 1905 to 1919

In 1905 when the unratified treaties from 1851-52 became unsealed, public sentiment demanded that action be taken to determine and accommodate the needs of California Indians, and Congress responded by authorizing an investigation. By this time, the United States Congress had outlawed making treaties with Indian Tribes for over thirty years.[37] As a result, ratifying new treaties with California tribes was not possible under federal law.

C.E. Kelsey, a San Jose attorney active in Indian affairs[38], was appointed a Special Agent for the purpose of reporting on the conditions. The Kelsey Report, based on his personal trip through the state, spurred Congress to authorize the expenditure of $100,000 in 1906 for the purpose of providing for the California Indians.[39] From 1906 through the 1910s, the federal government passed a series of appropriations that provided funds to purchase small tracts of land for so-called 'homeless Indians' in central and northern California, resulting in what has been referred to as the Rancheria System in California[40].

C.E. Kelsey reported to Congress in 1906 that public domain allotments "have been the salvation of the Indians there, and the distress, disease and death which follows in the wake of eviction has been unknown among them."[41] However, Kelsey also noted that only a

"small number" of such allotments were "fit to live upon."[42] Of the 2,058 public domain allotments initially apportioned in California, only 1,797 remained by 1906, and of those approximately 900 (just over half) were either located in "absolute desert" or "in the Sierra Nevada Mountains where the land, or rather rocks, incline up at an angle of 45 degrees or more".[43] Of the allotments issued during this period at least 321 still exist today[44].

From 1906 forward, congressional authorizations of funds for California Indians appeared almost annually. These funds were used to provide services on existing reservations and to acquire additional lands for Indians not residing's on reservations.

In 1919, Congress ended the practice of establishing Indian reservations from the public domain by any method other than an Act of Congress (e.g., by "Executive Order, proclamation, or otherwise").[45] However, Acts of Congress could still delegate such authority to other parts of the Executive Branch, such as the Secretary of the Interior, and did so[46].

Public Domain Allotments in California

In the 19th century, the Homestead Act of 1862 promoted and authorized the settlement of public domain lands including lands in other states that had been acquired from Indian tribes by treaties, however the law was restricted to United States adult citizens or persons eligible for citizenship.[47] As most Indians did not become U.S. Citizens until the passage of the Indian Citizenship Act in 1924, they could not benefit from the Homestead Act of 1862.

In 1875 and 1884, Congress passed and then amended the Indian Homesteading Act.[48] This law had the "purpose and effect [of] extend[ing] to the Indian wards of the United States" the benefits of the federal homesteading laws.[49] Under the law, Indians received trust patents for homestead lands, which were held in trust by the United States "for sole use and benefit of the Indian for a period of twenty-five years."[50] Either upon the completion of 25-years or at the discretion of the Secretary if the Indian was found to be "competent", the United States would convey a final fee patent to "the Indian or his widow and heirs in fee and discharge[] the trust."[51]

Providing for allotments from the public domain was of particular importance in California. At the turn of the 20th century, only a third of the total population of California Indians resided on the existing reservations. And even those lands were woefully inadequate for the Indians that resided on those reservations.[52] As described above, the shortage of land for California Indians was due to a combination of: (1) the 1851 Land Act and the resulting refusal to recognize Indian legal title as was done under Spanish and Mexican regimes,[53] (2) non-Indians obtaining homesteading patents and then evicting Indians from their lands, [54] and (3) the

decision by Congress to repudiate and place under seal the eighteen treaties. [55] Undeniably, Congress's refusal to ratify the eighteen treaties, which would have reserved about 5.5 million acres in northern California and 2 million acres in southern California – was the most consequential of these reasons.[56] The creation of a handful of reservations in northern California in the mid-19th century did nothing to protect the land ownership of

Indians who were systematically evicted from their lands by white settlers taking advantage of homesteading laws and federal policy that refused to recognize preexisting Indian title[57].

The issuance of public domain allotments in the 19th early 20th centuries did help many landless California Indians, at least initially.[58] In other situations, the federal government apparently assisted applications for public domain allotments in clusters to provide a land base of landless Indian communities.[59] Sadly, the reality today is that many if not most public domain allotments have a large number of owners with undivided interests, a result of the application of state probate law that when someone dies without a will, his or her interests pass to the decedent's living heirs in equal shares, as tenants in common. This means that the person owns a percentage of the whole land but no specific land area within the allotment. It is as if the co-owners shared a pie that has yet to be cut. Since owners do not own any particular piece of the land, it is difficult to manage their respective share. The result is that many public domain allottee interest holders cannot use their land.

In the beginning of the 20th century the federal government began to address fractionation of allotted trust land. by passing the Indian Land Consolidation Act (ILCA) of 1983. ILCA went through several reiterations due to legal challenges to the Act's provision allowing small allotment interests automatically escheating to the allottee's tribe without just compensation or due process. With many trials and errors, ILCA has become effective through a series of amendments The Indian Land Consolidation Act Amendments of 2000 implemented a "buy back" pilot program. In 2004, this 'buy back' pilot program became permanent.[60] Also in 2004, Congress passed the American Indian Probate Reform Act (AIPRA) which substantially amended ILCA with the amendments becoming effective in 2006. The primary purpose of AIPRA was to attempt to address fractionation by creating uniform national rules for intestate (having no will) succession and the probate of trust estates. Significantly, AIPRA created two sets of rules for intestate succession, depending on how much of the allotment the deceased Indian owned – at least 5%, or less.[61] In general, AIPRA's rules reduce fractionation by reducing, or in some cases eliminating, the number of instances by which a decedent's children receive equal undivided interests in their deceased parent's trust estate. Unfortunately, AIPRA still allows for many fact scenarios whereby fractionation increases.[62]

Termination and Restoration

Between the early 1950s and the late 1960s, the federal government enacted a policy of terminating the federal trust relationship with numerous tribes across the country. This period is known as the "Termination Era." In plain language, termination meant an end to a tribe's legal status as a federally recognized tribe. This era was disastrous for many native people overall, and it is one of the darker stains on the more recent history of federal-tribal and Native American relations.

Specific to California, in 1958, Congress passed the Rancheria Act, which terminated the federal trust relationship with 41[63] Indian tribes in California.[64] The Act affected approximately 10,000 acres of Indian land in the state. Separate Congressional Acts terminated the Koi Nation of the Lower Lake Rancheria and the Coyote Valley Band of

Pomo Indians.[65] The termination of the federal trust relationship with California tribes continued through 1967.

Two other Tribes bear mentioning in this section, although they were never terminated by an Act of Congress. The Ione Band of Miwok Indians was not terminated by an Act of Congress but was treated as terminated until they restored formal federal recognition in 1994.[66] The Tejon Indian Tribe was affiliated with one of the first established military reservations in California in 1853 (the Sebastian Indian Reservation). The Tribe was federally recognized, but due to administrative error, the Bureau of Indian Affairs failed to continue to recognize Tejon as federally recognized. Tejon gained a formal reaffirmation of its federal recognition in 2011[67]. Neither the Ione Band of Miwok Indians nor the Tejon Indian Tribe had any trust lands prior to obtaining / regaining federal recognition. Accordingly, when these Tribes obtained federal recognition, there was no restoration of any federally reserved *Winters* rights because there was no trust land to restore.

Beginning in the late 1970s (and often with CILS as legal counsel), terminated tribes and tribal members started challenging the terminations in court. In multiple cases, the government had obligations to the members of terminated tribes that it failed to meet. Tribes, individual tribal members, and class actions of tribal members filed lawsuits essentially arguing breach of contract, and in some cases fraud. In addition to litigation, a handful of California tribes were unterminated via Acts of Congress. The result was that many, but not all, of California's terminated tribes were restored to federally recognized status. At the time of this writing, 33 of California's terminated tribes have been restored to federally recognized status.

The Indian Water Rights section of this study contains an introductory analysis of what these tribal restorations may mean for the respective tribes' Indian water rights. To our knowledge, this analysis and summary does not exist anywhere else. However, each tribe's history, specific legal means of restoration, as well as the events subsequent to restoration could all affect a tribe's claims for water rights. It is outside the scope of this Study to do a full and complete analysis for each restored tribe. Instead, in the Indian Water Rights section of the Study, an initial analysis of the restoration judgments will provide an overview of the restoration history and a starting place for a full and complete analysis

Indian Lands in California TodayCalifornia land today that is recognized as Indian Country came to be by a variety of legal means. Most of the tribal and individual trust land in California was created in the following three ways:

1. Lands reserved by the United States pursuant to the Mission Indian Relief Act of 1891;[68]
2. Lands set aside from the public domain by Secretarial Order, Executive Order and/or other actions of the executive branch; and
3. Lands purchased by the Secretary of the Interior pursuant to various Acts of Congress appropriating monies for the purchase of lands for California Indians.

The remaining balance of Indian Country in California came about by a variety of methods: gift, exchange, intragovernmental transfer, court actions, and lands taken into trust after

the restoration of terminated tribes. Each reservation may also have more than one category of land acquisition, for example, an Executive Order reservation that was enlarged by purchase.

There is no tribal or Indian trust land in California created by treaty. The 18 treaties signed in 1851-52 were never ratified by the United States Senate, and were instead placed under seal until the turn of the 20th century. The U.S. Congress ended the century-long practice of treaty making with the Indian Appropriations Act of 1871.[69] Of the handful of reservations in California that predate 1871 and remain in existence today, all were formed by acts of Congress.

When considering federally reserved water rights (i.e. Winters rights, discussed below), the specific way that a reservation was created, or under what authority an allotment was issued, does not matter. All Indian reservations and allotments[70] are entitled to Winters rights, whether the trust land was created by treaty, federal statute, or by the U.S. president or designee (e.g. the Secretary of the Interior) through an executive order, and even if the implementing document is silent as to water rights.[71] As Winters rights are an implied right, it is generally accepted that they do not apply when a water right is explicitly created in the statute or Executive Order that reserved the land[72].

History Footnotes: (REF)

1 Handbook of North American Indians: California, "Treaties" by Robert Heizer, p. 702 (citing U.S. Congress. Senate Journal 1853:2.) Adam Johnson was appointed on April 14, 1849. ↑

2 See Benjamin Madley, An American Genocide: The United States and the California Indian Catastrophe, 1846-1873, 2016. ↑

3 Benjamin Madley, An American Genocide: The United States and the California Indian Catastrophe, 1846-1873, page 3, First edition, 2016. ↑

4 Benjamin Madley, An American Genocide: The United States and the California Indian Catastrophe, 1846-1873, page 3, First edition, 2016. ↑

5 Benjamin Madley, An American Genocide: The United States and the California Indian Catastrophe, 1846-1873, page 3, First edition, 2016. ↑

6 The ACCIP Recognition Report listed several historical events unique to the History of California's indigenous population: "(1) the federal government's negotiation of 18 treaties with California tribes during the 1850's and the Senate's refusal to ratify those treaties; (2) the 96% reduction in the population of California's tribal people brought about by the unprecedented onslaught of white miners and settlers during the Gold Rush era and the drive for statehood for California; (3) the BIA' s creation of lists or "rolls" of California Indians for purposes of distributing land claims judgments; (4) the federal government's provision of services to "the California Indians" as a group, including creation of public domain allotments for many California Indians who were not settled on rancherias or reservations; and (5) the termination of 40 California tribes during the 1950s and 1960s. Moreover, there has always been, and continues to be, a blatant federal neglect of the California tribes." The Advisory Council on California Indian Policy, The ACCIP Recognition Report: Equal Justice for California (1997), 9. ↑

7 National Archives, Treaty of Guadalupe Hidalgo, February 2, 1848, https://www.archives.gov/milestone-documents/treaty-of-guadalupe-hidalgo. ↑

8 National Archives, Treaty of Guadalupe Hidalgo, February 2, 1848 test link↑

9 9 Stat. 452 ↑

10 Benjamin Madley, An American Genocide: The United States and the California Indian Catastrophe, 1846-1873, page 165, First edition, 2016. ↑

11 Cong. Globe (1st Sess. 32 Cong.) Part III, p. 2103 ↑

12 While the injunction of secrecy is an important part of the history of the unratified treaties, it should also be noted that this appears to have been standard practice at the time for all many unratified treaties. See Harry Kelsey, The California Indian Treaty Myth, Southern California Quarterly, 225, 233 (Fall 1973), HYPERLINK "https://www.militarymuseum.org/TreatyMyth.pdf" HYPERLINK "https://www.militarymuseum.org/TreatyMyth.pdf" https://www.militarymuseum.org/TreatyMyth.pdf ↑

13 Benjamin Madley, An American Genocide: The United States and the California Indian Catastrophe, 1846-1873, page 165, First edition, 2016. ↑

14 The Advisory Council on California Indian Policy, The ACCIP Recognition Report: Equal Justice for California (1997), 11. ↑

15 An Act to Ascertain and Settle Private Land Claims in the State of California (a.k.a. the "The California Land Act of 1851"), 9 Stat. 631. ↑

16 An Act to Ascertain and Settle Private Land Claims in the State of California (a.k.a. the "The California Land Act of 1851"), 9 Stat. 631. ↑

17 See William Wood, The Trajectory of Indian Country in California: Rancherias, Villages, Pueblos, Missions, Ranchos, Reservations, Colonies, and Rancherias, Tulsa Law Review, Vol44, Issue II (Winter 2008), 320-31. ↑

18 While it is difficult to prove a negative, it is the understanding of this Study's authors that no California Indians obtained title to land via the Land Commission established by the Land Act of 1851, which operated only during the narrow period between 1852 and 1856. These four years were also a time of intense, and often government sponsored, vigilante violence. ↑

19 See discussion in An American Genocide of The 1856 Congressional Funding Bill and the 1857 Militia Funding Bill, through which Congress allocated federal dollars to reimburse first California bondholders for their funding of genocidal killing, and then reimbursed the state directly for its funding of past militia activity. Benjamin Madley, An American Genocide: The United States and the California Indian Catastrophe, 1846-1873, page 250-54, First edition, 2016. ↑

20 Act of March 3, 1853, 10 Stat. 244. ↑

21 Act of March 3, 1853, 10 Stat. 244.The Act appropriated $125,000 "for defraying the expenses of the removal and subsistence of the Indians of California, to three military reservations" to be established in accordance with a plan submitted by the Superintendent of Indian Affairs in the state. 10 Stat. 686, 698. The same act further appropriated $150,000 for "collecting, removing, and subsisting the Indians of California (as provided by law,) on two additional military reservations, to be selected as heretofore, and not to contain exceeding twenty-five thousand acres each . . . . Provided, That the President may enlarge the quantity of reservations heretofore selected, equal to those hereby provided for, and shall not expend the amount herein appropriated unless, in his opinion, the same shall be expedient . . ." 10 Stat. 686, 699. Our research has not determined precisely which 3-5 reservations were established under the specific authority of that Act, or if the President enlarged the quantity of reservations to create more than 3-5 under the authority of this act. ↑

22 The Act of April 13, 1864, 39 Stat. 39, 40. ↑

23 The Advisory Council on California Indian Policy, The ACCIP Recognition Report: Equal Justice for California (1997), 11-12, fn n. 28. ↑

24 To clarify, there were Executive Order reservations established after 1864 but the authority under which the President was acting is not clearly delineated. For example, several reservations were established in southern California for Mission Indians (tribes) by President Ulyssess S. Grant in 1875, which was sixteen years before passage of the Relief of the Mission Indians in the State of California Act of 1891. ↑

25 Benjamin Madley, An American Genocide: The United States and the California Indian Catastrophe, 1846-1873, page 315, First edition, 2016. ↑

26 Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior pp. 128-132 (1864). ↑

27 See, Brendan C. Lindsay, Murder State: California's Native American Genocide 1846-1873 (2012); Benjamin Madley, An American Genocide: The United States and the California Indian Catastrophe, 1846-1873 (2016). ↑

28 The Act of Mar. 3, 1871, 16 Stat. 544, 566, now codified as 25 U.S.C. § 71, provides: "No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be invalidated or impaired." ↑

29 The 18 unratified treaties did not become public on their own but as a result of a concerted effort of non-Indian reformers, namely the Northern California Indian Association. See Larisa K. Miller, The Secret Treaties with California's Indians, Prologue 38, 44 (Fall/Winter 2013), https://www.archives.gov/files/publications/prologue/2013/fall-winter/treaties.pdf ↥

30 18 Stat. 420. ↥

31 23 Stat. 96. ↥

32 Kelsey Report at 9. ↥

33 The Advisory Council on California Indian Policy, The ACCIP Recognition Report: Equal Justice for California (1997), 12. ↥

34 26 Stat. 712 (1891). Congress later amended the Relief Act to authorize the Secretary to select trust patents from the public lands for Mission Indians to help fulfill the goal of establishing a land base for them. See 34 Stat. 1015, 1023 (1907). ↥

35 Report of Mission Indian Commissioners, Albert Smiley et al. (Dec. 7, 1891); Larisa K. Miller, Counting Context: C. E. Kelsey's 1906 Census of Nonreservation Indians in Northern California, 38:2 American Indian Culture and Research Journal 41, 42 (2014), http://dx.doi.org/10.17953/aicr.38.2.l62h2r5280246383 Retrieved from https://escholarship.org/uc/item/6k18q3f9. ↥

36 Larisa K. Miller, Counting Context: C. E. Kelsey's 1906 Census of Nonreservation Indians in Northern California, 38:2 American Indian Culture and Research Journal 41, 42 (2014), http://dx.doi.org/10.17953/aicr.38.2.l62h2r5280246383 Retrieved from https://escholarship.org/uc/item/6k18q3f9. .https://escholarship.org/uc/item/6k18q3f9. This 2014 article cites 3 reservations besides the Mission Indian Reservations, however the Digger Reservation was also in existence at this time. OIA annual report for 1900--"Reports Concerning Indians in California," Annual Report of the Commissioner of Indian Affairs for the Fiscal Year Ended June 30, 1900, H.R. Doc. No. 56-5, pt. 1, at 203-213 (1900). The OIA annual report for 1905 (H Doc no. 5, 59-1) indicates the authority for the Digger reservation (page 490): "Act of Mar. 3, 1893 (27 Stat. 612), provides for purchase of 330 acres; not allotted." Before 1924, the Me-Wuk people were referred to as Digger Indians. Today, this is one of two reservations of the tribe known as the Tuolumne Band of Me-Wuk Indians. ↥

37 "Indian Appropriations Act of 1871 ~ P.L. 41-120". 16 Stat. 544. March 3, 1871 (available at https://govtrackus.s3.amazonaws.com/legislink/pdf/stat/16/STATUTE-16-Pg544.pdf) ↥

38 C. E. Kelsey was a field worker and director of the Northern California Indian Association (NCIA), an "organization of white reformers bent on educating, civilizing, and uplifting the landless California Indians embarked on a campaign to provide them with relief in the early 1900s." Larisa K. Miller, The Secret Treaties with California's Indians, Prologue 38, 39 (Fall/Winter 2013), https://www.archives.gov/files/publications/prologue/2013/fall-winter/treaties.pdf ↥

39 34 Stat. 325 (3 Kapp. 193, 200). ↥

40 Department of Interior, Indian Affairs, Who We Are – Pacific Regional Office, https://www.bia.gov/regional-offices/pacific, accessed 2/20/2023. ↥

41 See Kelsey Report at 9. ↥

42 See Kelsey Report at 9. ↥

43 See Kelsey Report at 9 ↥

44 Further research is necessary to establish the exact number of public domain allotments that exist within California. In 2021, CILS requested and received a list of public domain allotments from the BIA that identified 321 unique allotments. Approximately ten years prior, CILS had determined, based off of documentation provided by the BIA, that approximately 420 public domain allotments existed in California. As of this writing in January 2024, CILS has not been able to resolve this discrepancy. ↥

45 41 Stat. 3, 34 (codified at 43 U.S.C. § 150) (". No public lands of the United States shall be withdrawn by Executive Order, proclamation, or otherwise, for or as an Indian reservation except by act of Congress.Land may be withdrawn from the public domain for use as an Indian reservation only by action of Congress.") ↥

46 See, e.g., 25 U.S.C. §§ 465, 467 (transferred to 25 U.S.C. §§ 5108, 5110, respectively). ↥

47 The Homestead Act, 12 Stat. 392, Public Law 37-64, May 20, 1862, https://www.archives.gov/milestone-documents/homestead-act. ↥

48 18 Stat. 420; 23 Stat. 96. ↥

49 United States v. Jackson, 280 U.S. 183, 189 (1930). ↥

50 23 Stat. 96; see also United States v. Jackson, 280 U.S. 183, 189 (1930). ↑

51 Id. It is worth noting here that a significant amount of allotted Indian trust land was lost due to the issuance of fee patents and the termination of the trust relationship. Once a fee patent issued, property taxes could be assessed on the land. If an Indian allottee was unable to make the land profitable by the conclusion of the twenty-five year trust period, the land could be easily lost to state seizure as a result of unpaid property taxes. This practice and policy of the Federal government ended in 1934 with the passage of the Indian Reorganization Act. ↑

52 C.E. Kelsey, Report of Special Agent for California Indians, at 2 (March 21, 1906) ("Kelsey Report"). ↑

53 See id. at 3; see also Chunie v. Ringrose, 788 F.2d 638 (9th Cir. 1985) (holding that aboriginal title was exhausted by failure of Indians to establish the aboriginal claims in conformity with the Act of March 8, 1851 to settle land claims derived from Spanish or Mexican law). ↑

54 Kelsey Report at 3, 8-9. ↑

55 Kelsey Report at 3-4; Robert F. Heizer, Treaties, in 8 Handbook of North American Indians 701, 704 (William C. Sturtevant 1978). ↑

56 Kelsey Report at 9. ↑

57 See Kelsey Report at 9. ↑

58 As with former-reservation allotments, and for the same reasons, many public domain allotments suffer from high levels of fractionation resulting in many owners (often scores of owners, and in some cases more than one hundred). Separately, by the early 20th century, there apparently few areas of decent land left to allot. Kelsey's 1906 report: "The present allotting agents…cannot create land" and "the time has gone by when either the desert allottees or the mountain allottees can secure other allotments from the public domain." ↑

59 See, e.g., Washoe Tribe v. Greenley, 674 F.2d 816, 817 n.1 (9th Cir. 1982). ↑

60 U.S. Department of the Interior – Indian Affairs, Land Consolidation Program, https://www.bia.gov/regional-offices/great-plains/indian-land-consolidation-program. ↑

61 For a very good resource explaining the rules set forth in AIPRA, see the University of Montana's Inheriting Indian Land Fact Sheets (https://www.montana.edu/indianland/factsheets.html). ↑

62 For example, the American Indian Probate Reform Act's rules contain multiple instances whereby grandchildren step into the shoes of their deceased parents to inherit ownership interests by right of representation in equal shares to their aunts or uncles, the living children of the Indian decedent grandparent. A different rule that divided such ownership interests only among living children (i.e., a rule that did not allow a grandchild to benefit by right of representation), would do more to further the goal of reducing fractionation. Yet, this scenario is less equitable to the grandchild who's parent happened to predecease the grandparent, when compared to the grandchild's cousins, children of the aunt or uncle heir, who are still eligible to receive an ownership interest in the trust asset via their living parent. This balancing of interests complicates the seemingly simple goal of reducing fractionation by making it difficult to render any changes to federal Indian probate rules, as AIPRA did in 2004, because any change will result in someone receiving the proverbial short end of the stick. ↑

63 "Alexander Valley, Auburn, Big Sandy, Big Valley, Blue Lake, Buena Vista, Cache Creek, Chicken Ranch, Chico, Cloverdale, Cold Springs, Elk Valley, Guidiville, Graton, Greenville, Hopland, Indian Ranch, Lytton, Mark West, Middletown, Montgomery Creek, Mooretown, Nevada Cit, North Fork, Paskenta, Picayune, Pinoleville, Robinson, Rohnerville, Ruffeys, Scotts Valley, Smith River, Strawberry Valley, Table Bluff, Table Mountain, Upper Lake, Wilton." 72 Stat. 619 (August 18, 1958) amended by PL 88-419, 78 Stat. 390 (August 11, 1964). ↑

64 72 Stat. 619 (August 18, 1958) amended by PL 88-419, 78 Stat. 390 (August 11, 1964). This Act is commonly known as the "Termination Act." Of the 41 Tribes terminated by this Federal law, CILS' research indicates that, as of January 2024, 33 California Tribes have been restored to federally recognized status. ↑

65 Public Law 443 [H. R. 585] 70 Stat. 58 and Public Law 751 [H. R. 11163] 70 Stat. 595 terminated Koi Nation and authorized a government taking of their land; Public Law 85-91 71 Stat. 283 authorized the sale of Coyote Valley's land, and they were treated as terminated. ↑

66 https://ionemiwok.net/, accessed 01/21/2024 at 12:02 pm PST. https://ionemiwok.net/↑

67 https://web.archive.org/web/20131103034413/http://www.nativenewsnetwork.com/tejon-indian-tribe-gains-federal-reaffirmation.html, accessed 01/21/2024 at 12:07 pm PST. https://web.archive.org/web/20131103034413/http://www.nativenewsnetwork.com/tejon-indian-tribe-gains-federal-reaffirmation.html↑

68 26 Stat. 712 (January 12, 1891). ↑

69 The Act of Mar. 3, 1871, 16 Stat. 544, 566, now codified as 25 U.S.C. § 71, provides: "No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be invalidated or impaired." ↑

70 See section of study discussing Indian Water Rights of public domain allotments. While there are no published cases holding that Public Domain Allotments are entitled to Winters rights, the logic of the caselaw on federal reserved water rights strongly favors such rights for public domain allotments. ↑

71 Stephen L. Pevar, The Rights of Indians and Tribes, 4th Ed., p. 207, Oxford University Press (2012); See also State of Ariz. v. State of Cal. (1963) 373 U.S. 546, 598 ("We can give but short shrift at this late date to the argument that the reservations either of land or water are invalid because they were originally set apart by the Executive."). ↑

72 For example, in the Owens Valley in Eastern California, the reservations of 3 tribes (Bishop Paiute Tribe, Big Pine Paiute Tribe of the Owens Valley, and Lone Pine Paiute Shoshone Reservation) were created pursuant to federal legislation that enabled the exchange of land between the federal government (public domain Indian allotments held in trust for individual Indians and their heirs) and the Los Angeles Department of Water & Power. Because the federal legislation explicitly provided for the exchange of water rights, or at least the possibility of such an exchange, there is no need to discern any 'implied' Winters rights. A separate issue, however, unique to this specific circumstance, is whether the Winters rights of the former public domain allotments, which the Los Angeles Department of Water & Power obtained in exchange for the land that makes up the present day reservations of the 3 tribes, was accurately quantified and considered in determining the amount of water rights to which the 3 tribes are rightfully owed in the exchange. While the land exchange occurred over 80 years ago in 1939, this matter is still unresolved today between LADWP and the 3 Tribes. ↑

Term	Definition
Allotment	"Allotment is a term of art in Indian law… [i]t means a selection of specific land awarded to an individual allottee from a common holding." Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128, 142, 92 S. Ct. 1456, 1466, 31 L. Ed. 2d 741 (1972)
Appropriative Rights	"An appropriative right is the right to take either surface or subsurface waters in excess of waters reasonably and beneficially used by riparian or overlying owners for use with nonriparian or nonoverlying land or for the public water supply. It is established pursuant to statute by the actual taking of water for nonriparian or nonoverlying uses." 3 Cal. Real Est. § 9:29 (4th ed.)
Assignment	"The legal concept of assignment refers to the transferability of all types of property…" Amalgamated Transit Union, Loc. 1756, AFL-CIO v. Superior Ct., 46 Cal. 4th 993, 1001 (2009).
Groundwater Adjudication	"When water users within a basin are in dispute over legal rights to the water, a court can issue a ruling known as an adjudication. Adjudications can cover an entire basin, a portion of a basin, or

	a group of basins and all non-basin locations between. The court decree will define the area of adjudication. The court typically appoints a watermaster to administer the court's decree." Accessed at California Department of Water Resources, Adjudicated Areas, on May 22, 2023.
Groundwater	There is no agreed upon definition of groundwater, but the United States Geological Survey defines it as "Groundwater is water that exists underground in saturated zones beneath the land surface. The upper surface of the saturated zone is called the water table." USGS, "What is Groundwater" accessed at What is groundwater? | U.S. Geological Survey (usgs.gov) on May 19, 2023.
Indian Country	"Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." 18 USC 1151. Accordingly, "Indian Country" includes all trust lands, as well as any fee land or rights of way inside the bounds of any Indian reservation.
Overlying Right	"An overlying water right is analogous to the rights of a riparian owner in a stream. It is the right to extract and use water underneath the land that flows beneath, or percolates to, the surface for use on the surface of the land. The right is based on ownership of the land and is appurtenant to the land." 3 Cal. Real Est. § 9:29 (4th ed.)
Priority Date	'The rights of appropriators among themselves, unlike those of riparian or overlying owners, are subject to a rule of priority, and "senior appropriators—those who acquired their rights first in time—are entitled to satisfy their reasonable needs, up to their full appropriation, before more junior appropriators become entitled to any water."' 3 Cal. Real Est. § 9:32 (4th ed.)
Public Domain Allotment	Public Domain Allotments (PDAs) "are tracts of land reserved from federally controlled territory in the United States held as trust or restricted fee parcels by Native American persons who do not live on reservations." Rubin, Erin The Yale Law Journal Forum, "Water Rights of Public Domain Allotments," February 17, 2023.

Riparian Rights	"A riparian right is the right of a landowner to take water from a stream that abuts his or her land for use on the riparian land. The riparian right must be exercised for use in relation to the riparian land, and not for export to other lands. Riparian rights only arise from a natural watercourse and not an artificial channel or body of water, such as an artificial, man-made lake or pond." 3 Cal. Real Est. § 9:29 (4th ed.)
Safe Yield	Safe yield is generally considered equal to the average replenishment rate of the aquifer from natural and artificial recharge. Evaporation, transpiration and basin outflow are also factored in to replenishment rates. Accessed at Safe Yield – Water Education Foundation on May 22, 2023
Surface Water	"Water diffused over the surface of land, or contained in depressions therein, and resulting from rain, snow, or which rises to the surface in springs, is known as 'surface water.'" Contra Costa Cnty. v. Pinole Point Properties, LLC, 235 Cal. App. 4th 914, 928, 186 Cal. Rptr. 3d 109, 119 (2015)
Sustainable Yield	"Sustainable yield" means the maximum quantity of water, calculated over a base period representative of long-term conditions in the basin and including any temporary surplus, that can be withdrawn annually from a groundwater supply without causing an undesirable result. Cal. Water Code § 10721(w) (West).
Tribal Beneficial Use	Tribal Beneficial Uses are a group of beneficial uses that can help protect activities specific to Native American cultures and their uses of California waters, including the consumption of non-commercial fish or shellfish. Tribal Beneficial Uses can also be referred to as cultural uses of water. Accessed at Tribal Beneficial Uses – Cultural Uses of Water | California State Water Resources Control Board on May 22, 2023.
Trust Land	"[A]ny lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power." 25 U.S.C.A. § 2703(4)(B) (West)

Water Rights in California Indian Country

(REF) June 27, 2024

This section of the Study discusses the doctrine of federal reserved water rights for Indian lands was first enunciated by the United States Supreme Court in *Winters v. United States*.[1] The doctrine is based on the principle that both Indian tribes and the federal government possess the power to reserve water rights for the use of Indians on reservations. The nature of the reserved

water rights associated with California Indian reservations depend upon an analysis of the purposes for the establishment of each reservation. Discussion of Public Domain Allotments and Aboriginal Rights are also covered.

Traditional Federal Reserved Water Rights

"Winters rights" is an oft-used term which refers to both the original tenets of the doctrine and additions through subsequent case law, it is instructive to examine the original case to understand the factual and legal context in which the case arose.

The case started in the spring of 1905 on the Fort Belknap Indian Reservation on the Milk River in Montana. Congress established the reservation in 1888.[2] Due to a severe drought and off-reservation upstream diversions, there was insufficient water to irrigate the extensive crops planted by the tribal members. To protect the Tribe the government filed suit in federal district court to enjoin twenty-one upstream water users from the diversions that deprived the reservation of its necessary water supply. The injunction was issued on June 26, 1905, barring diversion of any water from the Milk River, and modified July 8, 1905, to bar only such use as would interfere with the amount of water claimed by the government on behalf of the members.

The government did not craft and present to the court the reserved rights doctrine as we know it today. In fact, the complaint for injunctive relief rested on three grounds:

1. "Prior appropriation" (a state's method of allocating water rights) as established by filings by the Reservation Superintendent in 1898 and actual beneficial use thereof;
2. "Riparian rights"[3] (a state's method of allocating water rights) due to the location of the Reservation on the Milk River; and
3. Rights pursuant to the agreement establishing the Reservation.

The "prior appropriation" theory and the "riparian rights" theory (see "Definition" section) both were advanced due to the lack of consensus on whether Montana was a pure prior appropriation state. The first ground was abandoned when it was discovered that filings had not been made by the Superintendent on behalf of the Tribes and that the beneficial use by the Indians post-dated the upstream users. In addition, the quantity used was less than initially thought. Because the Milk River formed a reservation boundary, the riparian rights theory was the next strongest basis for claiming the irrigation water critically needed on the Reservation. However, the argument relied upon by the district court in issuing the injunction, and which was upheld on two appeals to the Ninth Circuit, rested on rights pursuant to the 1888 agreement establishing the Reservation. The district court held that the combination of the purposes for establishing the Reservation, which were to assist the Indians in becoming "self-supporting, as a pastoral and agricultural people," and the arid nature of the state, which made irrigation necessary for agriculture, required a holding that the upstream diverters should not be allowed to interfere with the reasonable needs of the Tribes.[4]

The Ninth Circuit affirmed and suggested that the reasonable needs of the Tribes might expand beyond the 5,000 miner's inches, or about 90,455 acre-feet, claimed. [5] The Supreme Court's brief decision upheld the injunction. The Court noted that,

"The reservation was a part of a very much larger tract which the Indians had the right to occupy and use and which was adequate for the habits and wants of a nomadic and uncivilized people. It was the policy of the Government, it was the desire of the Indians, to change those habits and to become a pastoral and civilized people. If they should become such the original tract was too extensive, but a smaller tract would be inadequate without a change of conditions. The lands were arid and, without irrigation, were practically valueless. And yet, it is contended, the means of irrigation were deliberately given up by the Indians and deliberately accepted by the Government. The lands ceded were, it is true, also arid; and some argument may be urged, and is urged, that with their cession there was the cession of the waters, without which they would be valueless, and 'civilized communities could not be established thereon.'"[6]

The agreement between the Tribes and the United States required water to achieve the goal of creating a self-supporting agricultural and pastoral site for tribes that were surrendering the balance of their lands:

"On account of their relations to the Government, it cannot be supposed that the Indians were alert to exclude by formal words every inference which might militate against or defeat the declared purpose of themselves and the Government, even if it could be supposed that they had the intelligence to foresee the 'double sense' which might sometime be urged against them."[7]

The circumstances surrounding the agreement as well as the relationship between the federal government and Indian tribes led to an implication that water was set aside as of the date of that agreement.[8]

Modern discussion of federal reserved water rights for Indian reservations revolves around whether a tribe or the federal government reserved the water in question.[9] At the beginning of colonization, tribes already possessed rights, including water rights, as sovereign governments that were, in part, diminished under duress through conflict, treaties, and legislation.[10] The question then is which rights were given up and which rights were retained. On one level, this discussion stems from genuine issues regarding the authority upon which the *Winters* decisions were based. On another level, the discussion emphasizes a philosophical issue regarding the positions of two sovereign nations to the treaties and agreements that created many Indian reservations.[11] A careful reading of the *Winters* Ninth Circuit decision reveals that the *Winters* courts recognized the tribes' original authority over their lands and resources, and then, later, their rights to reserved water.[12] The *Winters* Ninth Circuit opinion concluded:

"In conclusion, we are of opinion that the court below did not err in holding that, 'when the Indians made the treaty granting rights to the United States, they reserved the right to use the waters of Milk River, at least to an extent reasonably necessary to irrigate their lands. The right so reserved continues to exist against the United States and its grantees, as well as against the state and its grantees. '"[13]

The tribes had aboriginal title to the lands that became the Fort Belknap Reservation which was superior to all but the United States. After the initial treaty between the U.S. and the tribes, as the superior sovereign in title, the federal government was the holder of the ultimate fee and could clearly control, consistent with the treaty, the public domain through reservation and

subsequent water withdrawals for this purpose.[14] The act of creating a tribal reservation also reserved the necessary, "land, the minerals below the land's surface, the timber on the land, and the right to use needed water on the reservation, referred to as reserved water rights."[15] *Winters* rights stem from a tribe's treaty obligations to give up some water rights that they had reserved for themselves prior to colonial settlement for an amount that satisfies the needs of the reservation. The federal government reserved ownership of water rights for tribes to establish a permanent home as part of treaties where land was ceded.[16] If a tribe can show a treaty-based right that recognizes fishing or hunting prior to the treaty, then a separate line of cases outside of *Winters* is commonly referenced as "*Winans rights."*[17]

The basic elements of the Indian reserved rights doctrine, which differ from the doctrine of prior appropriation used in some states to allocate water rights are:

1. The priority date of the water right is the date of reservation not the date of first beneficial use.[18]
2. The water right is not based upon actual use and therefore cannot be lost through non-use.
3. The quantity of water reserved is based upon the present and future needs of the Indians rather than upon actual use at the time of the creation of the reservation.[19]
4. Once quantified, it is possible for the place of use and nature of use to be changed.[20]

The *Winters* right may greatly impact existing water users because of its enduring nature but also provides an opportunity for tribes to assert sovereignty over their precious resource for economic, cultural, and spiritual benefits.[21]

Application of the Winters doctrine in California

The *Winters* case stands for the proposition that both Indian tribes and the federal government possess the power to reserve water rights for the use of tribes on reservations. [22] In California, Indian reservations were not established through bilateral agreements between tribes and the federal government but rather through the unilateral action of the federal government. (see "History" section). The reserved water rights associated with those reservations stem from the sovereign authority granted by the Property Clause, the Indian Commerce Clause, and the Supremacy Clause of the United States Constitution. As elsewhere, the nature of the reserved water rights associated with California Indian reservations depends upon an analysis of the purposes for the establishment of each reservation. In California, several reservations were created through the actions of the Department of Interior while others were created solely through Executive Orders. Careful analysis of the circumstances surrounding the establishment of each of these reservations is necessary to determine when, how and why the reservation was created. As seen in some cases, circumstances may indicate that t date of the reserved water rights were established earlier than the Executive Order establishing the reservation.[23] For purposes of this Study, *Winters* rights associated with California reservations established by Executive and/or Secretarial Order, by statute, and through restoration will be considered in turn.

Winters Rights Attach to All Federal Land Reserved for a Purpose, No Matter the Method of Reservation

The Supreme Court, in *Arizona v. California I,* directly addressed and dismissed the argument that *Winters* does not apply to reservations established by Executive Order.[24] Additional caselaw

since *Arizona I* also confirmed that the method of federal reservation does not preclude application of *Winters* rights[25] including cases involving allotments.[26]

California's Executive Order & Secretarial Order Reservations

Due to the failure of the United States Senate to ratify the 18 treaties negotiated with certain California Indian tribes, there are no reservations in California established by treaty. By the time the unratified treaties became public, the treaty-making era had ended. In 1871, Congress passed an act which effectively ended future treaty-making, while expressly validating existing treaties.[27] Indian reservations established after 1871 occurred through agreements ratified by Congress, acts of the executive branch ratified by Congress explicitly or by acquiescence, and by statute. There are thirty-four reservations in California established pursuant to Executive Orders and Secretarial Orders. As with all reservations, no matter the method by which it was created, an analysis of the reservation's *Winters* rights begins with the government's purpose in establishing those reservations.

As discussed briefly above, there is no doubt that courts consider Executive Order reservations to be equivalent to treaty reservations for purposes of *Winters* rights.[28] In response to the argument of the state of Arizona that water rights cannot be reserved by Executive Orders, the United States Supreme Court held:

"In our view, these reservations, like those created directly by Congress, were not limited to land, but included waters as well. Congress and the Executive have ever since recognized these as Indian Reservations. Numerous appropriations, including appropriations for irrigation projects, have been made by Congress. They have been uniformly and universally treated as reservations by map makers, surveyors, and the public. We can give but short shrift at this late date to the argument that the reservations of either land or water are invalid because they were originally set apart by the Executive."[29]

The Ninth Circuit also has held that Executive Order reservations are to be accorded the same reserved water rights analysis as Indian reservations created in other manners:

"We see no reason to believe that the intention to reserve need be evidenced by treaty or agreement. A statute or an executive order setting apart the reservation may be equally indicative of the intent. While in the *Winters* case the court emphasized the treaty, there was in fact no express reservations of water to be found in that document. The intention had to be arrived at by taking account of the circumstances, the situation and the needs of the Indians and the purpose for which the lands had been reserved."[30]

The court emphasized that because the reserved rights doctrine is a doctrine of implication, the intent of the government governs the question of whether water was reserved. [31] The Executive and Secretarial Orders establishing California reservations were issued between 1851 and 1942.[32] The President had specific congressional authority to establish reservations pursuant to the Indian Appropriations Act of 1851.[33] Some Orders were issued pursuant to the Mission Indian Relief Act of 1891.[34]

The Indian Reorganization Act (IRA) (25 U.S.C.§§ 5101-5129). provides authority for the Secretary of Interior to issue Orders designating lands as Indian reservations and to acquire lands for that purpose. The IRA does not exclude California from the Secretary's authority under the IRA. The Department of Interior has interpreted the IRA as an implicit, if not express, repeal of the Four Reservations Act.[35] Pursuant to this interpretation by the Solicitor's Office, several California Indian tribes have had their lands designated as "reservations" to remove any doubt about their status. Two of these reservations include the Hopland Indian Reservation and the Coyote Valley Indian Reservation. Applying the traditional "*Winters* analysis" to the Executive Order and Secretarial Order reservations involves a determination of the purposes for which these reservations were established and, thereby, the needs a tribe has for which the government reserved water. Since these reservations are considered in the same light as reservations created by treaty or statute, the case law on Indian federal reserved water rights stemming from treaties is applicable to California's reservations as well. To determine the purposes for which a reservation was created, tribal advocates should begin with the language of the Executive Order or Secretarial Order itself but should also understand the tribe's specific factual and historical circumstances leading up to the creation of the reservation to make the best argument possible that the 'purpose' of the reservation requires water. Other factual circumstances that could affect the purpose determination vary among the reservations, in particular when the reservations were established, and intervening actions such as termination.

Trust lands of Unterminated Tribes

A unique challenge in the analysis of many California tribes' water rights is the effect of termination and restoration. As discussed in the History section, between the mid-1940s and mid-1960s, Congress enacted a termination policy—the primary vehicle in California being the Rancheria Act of 1958—seeking to end federal supervision over tribes by terminating their federal recognition and dismantling their land base.[36] Subsequent litigation and legislation have restored the federal recognition of many[37] terminated tribes in California, but not all unterminated tribes were able to restore their original land bases. This section will discuss the restoration of 31 tribes who were terminated by the Rancheria Act of 1958 in addition to 2 tribes terminated by separate Acts of Congress: the Koi Nation and the Coyote Band of Pomo Indians.

Any federally recognized tribe with trust land has federally reserved water rights / *Winters* rights, unless the enabling Executive Order, legislation, or treaty creating the reservation explicitly determines the status of the tribe's water rights.[38] Thus, the important question when it comes to analyzing a restored tribe's water rights is not whether the tribe has *Winters* rights attached to its reservation, but what the priority date of those rights are. What are the strengths and weaknesses of a restored tribe's potential arguments that their priority date should date back to the creation of the original reservation? This was our central focus and guiding question in this analysis.

The most famous restoration case, *Tillie Hardwick v. U.S.* (1983)[39], restored federal recognition to 17 terminated tribes, and created a pathway to potentially partially restore original reservation/rancheria lands for at least 15 of those 17 tribes.[40] Other litigation restored the federal recognition of an additional 13 tribes, with differing language regarding the potential for original reservation/rancheria land boundary restoration (California Indian Legal Services represented the plaintiffs in the *Tillie* Hardwick case, as well as most other restorations via litigation). Finally, 3

additional terminated California tribes have regained recognition through the legislative process. For each restored tribe, CILS reviewed the initial determinative document(s) that restored the tribe to federally recognized status, and then conducted a preliminary analysis of the language in the document(s) to assess how it could affect the tribe's reserved water rights, and specifically the priority date. This factual analysis is discussed below.

If a restored tribe's current reservation include lands that were part of the tribes' original reservation pre-termination, then the tribe potentially has a strong argument to assert a claim for reserved water rights with a priority date dating back to the establishment of the original reservation.

Restored tribes seeking a priority date from when their original reservations/rancheria was established can look to helpful caselaw concerning the status of "restored lands." For example, in a case involving the Wind River Reservation in Wyoming, the Tribe's 1868 reservation was diminished through an Act of Congress in 1905. Through years of protracted litigation over the allocation of water rights to the Big Horn River, the Wyoming Supreme Court held that lands owned by either Indian allottees or non-Indian-owners who had purchased from Indian allottees in the ceded portion of the reservation retained water rights with the original 1868 priority date, as would the tribes if they were to purchase or acquire lands in the ceded portion of the original reservation.[41] While there are significant legal differences between a congressional Act to "disestablish" a reservation and one that "terminates" a tribe and its reservation, [42] it could be argued that lands taken into trust after restoration are very similar to the reacquired lands of the Wind River Reservation and thus, provides precedent for asserting traditional *Winters* doctrine rights with the original priority date. This analogy may be particularly appropriate in those circumstances in which, at the time of restoration, the lands were patented in fee to associations of members of the terminated tribes and thus have never left Indian ownership.

The first step in analyzing if an unterminated tribe may be able to claim reserved water rights is determining whether the restoration judgement, if a lawsuit, or the law itself, if an Act of Congress, provided a means for tribes to reacquire land within the original boundaries of their reservation. This analysis is very fact specific due to the uniqueness of each tribes' history, the specific means of restoration, and in many cases the events subsequent to restoration could also affect the tribes' water rights. It is outside the scope of this Study to do a full and complete analysis of these factors for each restored tribe. Instead, this Study provides an initial analysis of the restoration judgments (or Acts) that will give tribes a starting place for a full and complete analysis.

This Study gathered and evaluated the initial restoration documents for each of the restored tribes in California, conducted a preliminary analysis, and divided them into three categories: (1) Original Rancheria Boundaries Restored as "Indian Country" and Clear Pathway Established for Reacquiring Trust Land Within; (2) Potential Pathway to Restoration of Original Rancheria Boundaries; and (3) Original Rancheria Land Unavailable, Ineligible, or Otherwise Not Restorable. The primary focus of our analysis was limited to whether a given tribe was provided a pathway to restore land to trust that was formerly part of its pre-termination reservation at the time it was unterminated, and thus whether the tribe could use that fact scenario to argue for reserved water rights with the pre-termination priority date. This study should provide a starting

place for tribal advocates, and should not be viewed as providing a conclusive or final answer to any of the complex questions that arise regarding restored tribes' water rights. We did not address or analyze matters of quantification of restored tribes water rights, for example. Our focus was necessarily limited, and nothing herein should be read as the final word on questions related to restored tribes' water rights. We hope and expect that Tribal Advocates will build on this work and continue to develop novel legal arguments and theories to advocate for expanded water rights for restored tribes.

Lastly, we would be remiss if we did not mention some of the significant challenges that tribes seeking to assert *Winters* rights with a priority date of the original Reservation may face. We are referring generally to the specific requirements of some of the restoration judgments, and the problematic and partial implementation of those requirements, which prevented many unterminated tribes from meaningfully effecting the restoration of their Reservation land back into trust.[43] The Advisory Council on California Indian Policy, in its 1997 "Final Reports and Recommendations to the Congress of the United States" summarizes the problems as follows:

"Judgments and settlements in the un-termination cases usually stipulated a time limit for actions that had to be taken to secure a privately owned parcel's eligibility to be held in trust. While these time limits seemed reasonable when entered, it soon became clear that many rancheria residents were confused about these requirements. The BIA's refusal to accept fractional interests created additional problems. In cases where the reservation boundaries had not been restored, any delay by the BIA in accepting lands into trust caused problems for the residents, as many counties continued to assess taxes on Indian-owned fee lands. Thus, even after restoration was achieved through litigation, tribes and individuals were forced to litigate against counties to prevent further diminishment of their land base through tax sales."[44]

Original Boundaries of Reservation Restored as "Indian Country" and Clear Pathway Established for Reacquiring Trust Land Within Original Boundaries

As briefly discussed above, restored tribes with restoration judgments that restored the original boundaries of their Rancheria as "Indian Country" and provided a clear pathway to reacquire land into trust within those boundaries likely have the best argument to assert a claim of federal reserved rights dating back to the original creation of the reservation. A reserved right is potentially superior to adjacent water rights and could thus be extremely valuable. The majority of tribes restored by judgments providing a clear path for reacquisition were those party to the *Tillie Hardwick* case, discussed first (above?). Tribes that had their lands restored by other litigation or other means are discussed later in the Study.

Tribes Whose Land was Restored by the *Tillie Hardwick* Case

The resolution of the *Tillie Hardwick* case occurred in two phases, 1) a main Stipulation for Judgment in 1983 that applied to all 17 of the plaintiff tribes, and 2) a series of smaller secondary Stipulations between one or a group of plaintiff-tribes and the respective counties where the tribes were located. The first "Stipulation for Entry of Judgment" was last signed by the parties on July 19, 1983, received by the Court on July 21, 1983, Filed on August 2, 1983, and made a Judgment of the Court on December 22, 1983. Paragraph 5 of the Stipulation explicitly makes no "determination of whether or to what extent the boundaries of the rancherias . . . shall be

restored", and the Court retained jurisdiction to resolve this issue in further proceedings, and did so over the following 3-10 years it took to complete all of the secondary tipulations. Thus, the first Stipulation for Judgment restored the subject tribes to federally recognized status and stayed for later tribe-specific determinations regarding the restoration of the boundaries of the tribes' reservations / rancherias.

While the 1983 tipulation did not determine whether the land of any specific reservation/rancheria was restored, it did set out the process by which unterminated tribes and tribal members could use to obtain their former trust lands.[46] While analyzing whether such actions occurred, and to what extent, for each unterminated tribe is outside the scope of this tudy, such an analysis will be critical to assessing the relative strength of any restored tribe's argument for reserved water rights with a pre-termination priority date. Tribes that were able to follow the process and place land within the boundaries of the tribe's former reservation/rancheria back into trust will likely have the strongest argument for water rights with a priority date corresponding to the initial establishment of the reservation/rancheria. The 1983 Stipulation also made clear that it would "not affect any vested rights created" by the distribution plans of the Rancheria Act.[47] Meaning any transfer of former trust land parcels that occurred because of termination – both to Indians and non-Indians – would not be undone. As we will see below, this was a common feature of most untermination resolutions. In sum, untermination litigation generally restored the wrongfully terminated tribe's federally recognized *status* and created a *process* by which tribes could partially restore their trust land but did not void post-termination land transfers or recreate the reservation/rancheria lands that existed prior to termination.

A series of additional Stipulated Judgments and Orders on partial otions for Summary Judgment determined the status of land inside each tribe's former reservation/rancheria boundaries and dealt with a series of county-specific matters (e.g., property taxes), constituting the second phase of the *Hardwick* Stipulated Judgments.[48] In this second phase, at least 15 of the 17 tribes[49] that were unterminated by the *Tillie Hardwic*k case also had the entirety of their original reservation or rancheria boundaries restored as "Indian Country." However, designating an area of a former rancheria as "Indian Country" is not the same thing as restoring land within those boundaries as tribal trust lands. The designation of "Indian Country" was most likely included for jurisdictional purposes, and not to designate the status of ownership of any particular parcel of land. Restoring land to trust status was still possible *in some cases for some parcels* of former reservation land, but not for other parcels that had passed out of tribal and Indian trust status during the 25 years of termination, between 1958 and 1983. The Stipulation says that, despite some of the former reservation land passing out of Indian hands, all of it was "Indian Country." This situation is similar to that of allotments that have passed out of trust and are now owned by non-Indians. The land still remains inside the boundaries of the reservation and as such is is part of the tribe's "Indian Country" and the tribe retains limited jurisdiction over the land. The effort to have the entire area within the exterior boundaries of the original reservation restored as "Indian Country", regardless of the status of owners, non-Indian and Indian alike, appears to have been for the purpose of divesting the county of the authority to tax trust parcels within the formal boundaries of the reservation/rancheria. For 2 of the 17 tribes restored through *Tillie Hardwick*, Cloverdale and Potter Valley, we could not locate any second Stipulation determining the status of the former reservation (boundaries?) land. However, for these two

tribes, our research found other indications that no land was restored as part of the process of regaining federal recognition, however this research was not conclusive.

Below is a list of all 17 tribes that were unterminated by *Tillie Harwick*, with asterisks to indicate the two tribes for which we could not obtain a second Stipulated Judgment providing a means to reacquire land within the original boundaries of their reservation/rancheria:

- *Bear River Band of the Rohnerville Rancheria,*
- *Big Valley Band of Pomo Indians,*
- *Blue Lake Rancheria of the Wiyot, Yurok, and Hupa Indians,*
- *Buena Vista Rancheria of Me-Wuk Indians,*
- *Chicken Rancheria of Me-Wuk Indians,*
- *Cloverdale Rancheria of Pomo Indians***
- *Elk Valley Rancheria,*
- *Greenville Rancheria of Maidu Indians,*
- *Mooretown Rancheria,*
- *Northfork Rancheria,*
- *Picayune Rancheria of Chukchansi Indians,*
- *Pinoleville Pomo Nation,*
- *Potter Valley Tribe***
- *Quartz Valley Indian Community,*
- *Redding Rancheria,*
- *Redwood Valley Rancheria, and*
- *Tolowa Dee-ni' Nation (formerly Smith River Rancheria).*

In addition to the language of the second Stipulations for the above-named tribes that the original boundaries of the reservations/rancheria were restored as "Indian Country" the Stipulations detail a procedure and timeline through which the tribes could reacquire land into trust within the boundaries of their original reservation for the benefit of the tribe. Whether each tribe has a strong claim for *Winters* rights with a pre-termination priority date will usually depend on whether they reacquired such land within the timeline and process delineated by their Stipulated judgement.[50] If so, such tribes likely have a very strong argument for reserved water rights pursuant to the *Winters* doctrine with a date of priority going back to the creation of the original reservation. These second Stipulations also addressed past and future property taxes and other matters that concerned the specific county or counties in which the reservation/rancheria was located.

Tribes Whose Land was Restored by Other Litigation

Tribes that were unterminated and had part or all of their original reservation restored as "Indian Country" and provided a path to reacquire land within those boundaries for the benefit of the tribe by other litigation include ***the Big Sandy Rancheria of Mono Indians***[51]***, the Habematolel Pomo of Upper Lake***[52]***, the Wiyot Tribe (formerly Table Bluff Reservation)***[53]***, and the Table Mountain Rancheria***.[54] Each of these tribes were restored by a separate lawsuit, and each restoration Judgment specifically stated that the original boundaries of the former rancheria was reestablished as "Indian Country" as defined under 18 USC 1151, however such reestablishment did not affect the ownership rights and interests of non-Indian persons owning any parcel withing

the boundaries of the former reservation. If these tribes reacquired land in trust for the benefit of the tribe within the procedure outlined by their restoration Judgment (by individual Indian owners of land distributed to them pursuant to termination electing to convey that land back to the tribe to be held in trust), they very likely have a strong argument for reserved water rights pursuant to the *Winters* doctrine with a date of priority going back to the creation of the original reservation/rancheria. This is generally the same outcome as the landmark *Tillie Hardwick* litigation, however the respective judgments had slightly different language.

Potential Pathway to Restoration of Tribal Trust Land with Reserved Water Rights Dating back to Establishment of Original Reservation

In contrast to the tribes discussed above, some judgments or Acts of Congress that restored a tribe did not restore the tribe's former reservation boundaries as "Indian Country," but did include a potential pathway for the tribe to subsequently reacquire land into trust within their original reservation/rancheria boundaries (and such land, if put into trust, *would then* be included in the tribes' "Indian Country"). As discussed further below, the Wilton Rancheria's restoration Judgment specifically authorizes future acquisitions and "contiguous" land to be restored as the Tribe's Rancheria. . For the United Auburn Indian Community, the Act of Congress that restored the Tribe left open the possibility for former reservation lands to be conveyed back into trust but did not specifically state whether such future conveyances would be considered as restoration to its pre-termination trust status for the benefit of the tribe. Thus, these and similarly situated tribes have potential pathways to restore their original reservation/rancheria boundaries and potentially restore reserved water rights, although the strength of a claim for reserved water rights may be weaker than the tribes restroed through litigation discussed in the previous section.

The *Wilton* Case: The Wilton Rancheria

Formerly two tribes, the Wilton Miwok Rancheria and the Me-Wuk Indian Community of Wilton Rancheria, the Wilton Rancheria was restored as a combined single tribe in the combined cases of *Wilton Miwok Rancheria v. Salazar* and *Me-Wuk Indian Community of the Wilton Rancheria v. Salazar* in 2009. The restoration Judgment states that the Department of the Interior "agrees to accept in trust status any land within the boundaries of the former Rancheria" that meet certain criteria (primarily, being owned by Indians of the Rancheria), and that such land will be defined as "Indian Country" pursuant to 18 USC § 1151. Additionally, the Judgment states that any land taken into trust for the benefit of the Tribe that is within *or contiguous to* the Rancheria will be considered "restored land" as defined by 25 U.S.C. § 2719(b)(1)(B)(iii).

In our view, the "restored land" language is significant and should create a legal continuity spanning from before termination to untermination in 2009. Thus, in regard to any such land accepted into trust status since the untermination in 2009, the Wilton Rancheria may have a strong argument for reserved water rights pursuant to the *Winters* doctrine dating back to the creation of the original Rancheria due to the inclusion of land "contiguous to" the Rancheria as eligible for being taken into trust.

Robinson Rancheria

The Robinson Rancheria was unterminated by the 1977 *Duncan v. Andrus* case.[55] The final Judgment notes that 77% of the Rancheria's useable acreage had passed into non-Indian ownership, and that many of those non-Indian owned parcels had secured their own wells.[56] The Judgment declares that only parcels that remain in the possession of Indian distributees or their Indian transferees have the option to re-convey their land in trust status. There is an implication that the fact that the non-Indian owners had secured their own wells on their parcels may have been a crucial factor in the court's decision not to restore the remaining Indian-owned land to the Tribe, although this is not directly addressed.

While the Judgment does not restore any of the original Rancheria as "Indian Country", it does state that Indian distributees or transferees who still remain in possession of part of the 27% of the original Rancheria may reconvey their parcel into trust specifically for the benefit of the Tribe.[57] If any Indian owners of these original Rancheria parcels did reconvey said land to the Tribe , the Tribe would have a strong argument for the reestablishment of *Winters* rights with a priority date aligned with the establishment of the original reservation.

Legislative Untermination of the United Auburn Indian Community

The United Auburn Indian Community was restored by federal legislation, the "Auburn Indian Restoration Act," in 1994.[58] Only two other terminated California tribes have been restored by Acts of Congress, discussed below. However, the Auburn Indian Restoration Act is the only one of the three that addresses former trust lands of the Rancheria. The Act merely states that land within the former Rancheria boundaries is *eligible* for trust status.

The Act does not restore former Rancheria boundaries as "Indian Country," nor does it clearly state that future acquisitions within those boundaries would be deemed "reestablished" or "restored" for the Tribe, as is clearly outlined in the *Wilton* judgment. However, the fact that land within the former Rancheria boundaries is eligible to be accepted into trust for the Tribe opens the door to argue that such lands could be considered "restored." If such an argument was successful, then the Tribe may be able to further argue for reserved water rights using both the *Winters* doctrine and the precedent set by the *Wind River Reservation* case, discussed above. However, nothing in the Act indicates a legislative intent to 'restore' trust status back to the date of the original reservation, which cuts against a potential *Winters'* rights argument. At the very least, we would expect that a Tribe's application to place land located within the boundaries of the former Auburn reservation into trust would receive priority or expedited approval from the BIA.

Scotts Valley Case I: Encompassing the Scotts Valley Band of Pomo Indians the Guidiville Rancheria

The 1991 *Scotts Valley* case[59] restored federal recognition to four tribes via separate stipulated judgments: the Scotts Valley Band of Pomo Indians, the Guidiville Rancheria,[60] the Lytton Band of Pomo Indians, and the Mechoopda Indian Tribe of Chico Rancheria. Due to some differences in the Stipulations as well as different post-termination histories (vis a vis trust land), we will discuss the Scotts Valley and Guidiville Tribes here, and the Lytton and Mechoopda in the following section.

For Scotts Valley and Guidiville, the United States agreed to accept into trust status "any land within the boundaries" of the tribes' former Rancherias that were: 1) currently in Indian ownership, and 2) had been deeded as a direct consequence of termination.[61] Tribal members could elect to convey their land to the U.S. to be held in trust for either the Tribes, members of thetTribes, an entity which may be formed to govern either Rancheria, or other individuals without regard to membership in or affiliation with either Tribe, so long as the individual was related by blood or a spouse and is otherwise eligible to hold land in trust as an Indian.[62] Trust land conveyed back to the Tribes will have the strongest arguments for a restoration of *Winters* rights with a priority date going back to the original reservation.

For all four Tribes, *future* land acquisitions within the former reservation/rancheria boundaries of the respective Tribe were also eligible to be accepted into trust for the Tribes' benefit, if certain requirements were met. The specific requirements differed based on the county where the Tribe's original reservation was located. Because such land was originally part of the Tribe's reservation/rancheria and the ability to restore it to trust was part of the same process that unterminated the Tribe, we believe the Tribes could make strong arguments that such reacquired land should be entitled to reserved water rights with a priority date of the establishment of the original reservation.

Notably, all four of the Tribes stipulated *not* to seek to reestablish the former boundaries of their respective reservations, and that nothing in the settlement was to be construed as reestablishing the former boundaries.[63] This stands in contrast to other restored tribes' Stipulations that restored the former boundaries of the Tribes' rancherias to the status of "Indian Country" as defined by 25 USC § 1151. Ultimately, none of the Stipulations that we have reviewed restored or reestablished the boundaries of the terminated reservations (i.e., brought them back in full for the benefit of the Tribe, irrespective of and voiding any individual Indian and non-Indian ownership of parcels deeded from the former rancheria lands). It is notable, however, that the stipulations resolving this lawsuit on behalf of these four Tribes said this so explicitly, and did not take the step of restoring the former rancheria boundaries as "Indian Country." Regardless, we maintain that pathways provided for Scotts Valley and Guidiville to restore former rancheria land to trust for the benefit of the Tribe, leave open strong arguments for reserved water rights with a priority date dating to the establishment of the Tribes' original reservations/rancherais, provided the tribes were able to take those steps and restore former rancheria land to trust.

Our research indicates that the Mechoopda and Lytton Tribes were unable to reestablish trust land within the bounds of their former reservations/rancheria. Accordingly, they are treated in more detail in the following section.

Original Reservation/Rancheria Land Unavailable, Ineligible, or Otherwise Not Restorable

Finally, many restored California tribes did not have their land base restored as "Indian Country," nor were they provided a pathway to bring their former reservation/rancheria land into trust. Because federally reserved water rights are appurtenant to federal reservations *of land*, we do not believe there is a compelling factual or legal basis for restored *Winters* rights for these Tribes. While we could not conduct a complete legal analysis and thus should not foreclose any legal arguments these restored tribes may make in the future, the water rights attached to any

post-restoration land acquisitions will most likely date only as far back as the parcel's acceptance into trust, and not the establishment of the unlawfully terminated original reservation.

Scotts Valley Case II: the Lytton Band of Pomo Indians and the Mechoopda Indian Tribe of Chico Rancheria

As discussed above, the *Scotts Valley* litigation resulted in the untermination of four Tribes via three Stipulated Judgments. The Mechoopda and Lytton Tribes are discussed herein.

The Mechoopda Indian Tribe's Stipulated Judgment was unique in that the federal government agreed to take into trust a specific parcel within the exterior bounds of the former Rancheria: a parcel that the Tribe had used – and agreed to continue to use – as a cemetery. [64] The Tribe's former rancheria is located in the center of the City of Chico, and half the former reservation was occupied by the California State University, Chico campus.[65] At the time of untermination only two parcels of the former rancheria remained in Indian ownership, and of the two one's future use was restricted to remain a cemetery.[66] Although the federal government agreed to take the cemetery parcel into trust and the Indian owners of the other parcel had the option to return their parcel to trust, it appears that neither happened: as of 2004, the Mechoopda Tribe did not have any lands held in trust by the United States.[67] If the Tribe was unable to restore any former reservation trust lands, as appears to be the case based on our limited research, it will face a greater challenge establishing reserved water rights with the older priority date on any post-termination acquired trust lands.

The Lytton Tribe's Stipulation was less favorable than those for the other three Tribes. With respect to the land within the exterior boundaries of the Tribe's former rancheria, a Department of Interior policy prevented the Secretary of the Interior from accepting land into trust for any use inconsistent with the General Plan of Sonoma County.[68] Our research did not extend to the requirements of the County's General Plan in effect in 1991, but it would appear from this language that Lytton would have faced additional hurdles in any efforts to restore former reservation land to trust.

Legislative Untermination of the Federated Indians of Graton Rancheria and the Paskenta Band of Nomlaki Indians

Both the "Paskenta Band Restoration Act"[69] of 1994 and the "Graton Rancheria Restoration Act" [70] of 2000 provide a means for the Tribes to bring land that meets particular criteria into trust and become part of the Tribe's reservation. However, neither law has any provision regarding the Tribe's original Rancheria or reservation boundaries. Nor is there any indication of legislative intent to make land acquisition after the laws' enactment for restoration of pre-termination tribal land. In regard to water rights, both Acts explicitly state that nothing in the law shall "expand, reduce, or affect in any manner" the Tribes' water rights. Neither Act restores any land to trust status for the Tribe, only allows future acceptance of land into trust. Thus, because the original reservation/rancheria lands were not restored and the Acts explicitly state that water rights are not affected, our preliminary analysis concludes that neither Tribe likely has a strong claim for reserved water rights related to former reservation/rancheria land under the *Winters'* doctrine.

Tillie Hardwick: the Cloverdale Rancheria of Pomo Indians and the Potter Valley Tribe

As discussed above, we were unable to locate and analyze the final restoration Order / Stipulated Judgment for 2 of the 17 tribes restored by *Tillie Hardwick*: Cloverdale and Potter Valley. While not conclusive, or research and various sources, including the Tribes' published websites, indicate that neither Tribe had trust land restored at the time their federal recognition was restored. Unfortunately, and despite being party to the *Tillie Hardwick* case, without restored lands, it is unlikely that either Tribe has a strong argument to make a claim for reserved rights under the *Winters* doctrine with a priority dating back to the establishment of their former Rancheria or reservation lands.

***Smith v. U.S.*: The Hopland Band of Pomo Indians**

The Hopland Band of Pomo Indians was restored to federal recognition by the 1978 case *Smith v. U.S.*[71] Unique for tribal restoration cases, the litigation was brought by an individual plaintiff rather than the Tribe itself. The court found that the Tribe had not been lawfully terminated because the United States had failed its fiduciary obligations to the Tribe and its members under the terms of law that effected termination by failing to reach an agreement with the Tribe regarding improvements to the Tribe's water supply. However, the United States' premature conveyance of the Rancheria land with its water system to a non-Tribal owner was not to be cancelled, despite this being the primary means by which the United States failed its fiduciary obligation.[72] There is a clear pattern in the restoration Judgments that courts are not willing to undo land purchases to non-Indian owners when considering restoring reservation/rancheria boundaries for unterminated Tribes.

The district court found that the Tribe had been wrongfully terminated and allowed the plaintiff the option to re-convey into trust status his remaining two parcels that he had not lost to forced tax sales.[73] Subsequently, the court allowed a class representing Indian distributees and their heirs to intervene in the action. The parties to that action Stipulated a Final Judgment, which was entered by the district court on March 18, 1986.[74] The Stipulated Judgement contains no discussion of restoring the Tribe's boundaries, nor any indication that the Tribe could return land into trust status to restore the original reservation/rancheria. There is no clear indication in this Judgment that the Tribe had any lands restored, nor does it explicitly authorize requests to claim future land acquisitions as "restored" lands. However, the use of the word "reconvey" (rather than "convey") leaves room for a colorable argument that the intention of the court to restore terminated trust lands rather than just transfering new lands into trust. Accordingly, the argument for the restoration of tribal lands along with the original appurtenant *Winters* rights would likely be more difficult to make in the *Hopland* case than in other examples discussed above in sections 1 and 2.

That said, the court arguably did not *completely* close the door on restoration either. The court's March 1978 decision in the *Smith* case, which predates the Stipulated Final jJudgment in 1986, states that "[s]ince the Rancheria has not been lawfully terminated" it "should not be treated as terminated".[75] The court's decision further directs the U.S., as trustee to the unterminated Tribe, and in recognition of its "continuing" fiduciary obligation to the Tribe, to hold a referendum in which the Tribe may elect to "cancel" the conveyance of certain lands.[76] Thus, while the court did not go so far as to explicitly hold that tribal lands had been "restored", at least for certain wrongfully conveyed lands the court *permitted* the Tribe to vote and decide whether or not to

reverse the conveyance and "cancel" the grant deeds that effected transfer of title from the Tribe to non-Indians.

Further research is needed to determine the outcome of the mandated referendum, which is outside the scope of this Study. Because the final Stipulated Judgment does not discuss the Tribe's original land base, we have categorized Hopland in the category in which tribes' original trust land is probably not restorable.

Federal Takings: The Coyote Valley Band of Pomo Indians and the Lower Lake Rancheria (Koi Nation)

The Coyote Valley Band of Pomo Indians and the Koi Nation of Lower Lake Rancheria were both subject to the taking of their land for compensation by the federal government, and thus their former Rancheria land is unavailable for "restoration". In a 1976 filing in the *Knight v. Kleppe* case, the Northern District Court of California found that the Coyote Valley Band of Pomo Indians had not been terminated, but rather their land base had been taken by the Act of July 10, 1957 (PL 85-91, 71 Stat. 283) in connection with a dam project and for just compensation.[77] The case implies that the Coyote Valley Band had been essentially treated as terminated. Regardless of whether the Coyote Valley Band had ever been truly terminated, their original Rancheria lands were subject to a federal taking and were not restored.

The Koi Nation of Lower Lake Rancheria was similarly subject to a federal taking of its land for compensation, and therefore the original Rancheria land was unavailable for restoration at the time that the Tribe's federal recognition was restored.[78]

As of the writing of this Study in 2024, it appears unlikely that the United States will re-convey the former Rancheria land to either Tribe: one is now a municipal airport, and the other was conveyed to the Army Corps of Engineers for a dam. Thus, it will likely be difficult for either the Coyote Valley Band of Pomo Indians and the Koi Nation of Lower Lake Rancheria to make a strong claim to restore land into trust within their former reservation/rancheria boundaries. If the Tribes are unable to restore land into trust within their former reservation/rancheria boundaries, they will be unable to reestablish priority water rights related to their original lands.

Conclusion

In conclusion, unterminated California tribes whose original reservation/rancherai boundaries were restored to "Indian Country" by their untermination Judgment and were able to reacquire trust land within those boundaries have the best basis to argue for reserved water rights under the *Winters* doctrine with a priority date tied to the establishment of the pre-termination reservation/rancheria. While the arguments are not a strong, Tribes with the ability to acquire land within their former reservation/rancheria boundaries, and who have not been foreclosed to the possibility of having such lands deemed "restored", also have decent arguments using both the *Winters* doctrine and the *Wind River Reservation.* Finally, Tribes who were explicitly barred from having former reservation/rancheria boundaries deemed "restored," or whose original reservation/rancheria lands are unavailable or otherwise ineligible for conveyance into trust, will face the greatest challenges in establishing *Winters* rights with the original priority date of their pre-termination.

Allotments & *Winters* rights

What is an allotment?

As defined in Section 2 of the Study, an "allotment" is a parcel of land granted by the federal government to an individual Indian. The land maybe a "trust allotment" meaning it owned by the United States in trust for an Indian, or a "restricted allotment" which is owned by an Indian subject to a restriction on alienation (cannot be sold or encumbered without permission from the United States) and cannot be taxed.

The Allotment policy is rooted in the federal era of Assimilation that began with a treaty with the Iowa Tribe in 1854.[79] The primary purpose of allotments during this era was to break up tribal land holdings, resulting in "the dissolution of the tribes and the extinguishment of tribal territories."[80] The practice became widespread after the 1887 Dawes Act also known as the General Allotment Act[81] and the 1906 Burke Act.[82] Initially, allotments were subject to a 25-year trust period where the federal government held the allotted land in trust and at the end of that term would issue a fee patent to the allottee.[83] Congress extended the trust period under the Indian Reorganization Act in 1934, until such time it provided otherwise.[84] Congress ultimately extended the trust period indefinite to all allottees in 1990[85] , and has consistently repudiated the policy of allotments since 2000 recognizing the damage it caused.[86]

Allotments Within Reservation Boundaries

Allotments are entitled to a number of property rights, including water rights.[87] Under Ninth Circuit precedent, where land was allotted from an Indian reservation, Congress granted to allottees "the appurtenant right to share in reserved waters," which means the allottee shares in the water equitably.[88] In describing "the nature of the right," the Ninth Circuit has established that: (1) "the extent of an Indian allottee's right is based on the number of irrigable acres he [or she] owns"; (2) "the Indian allottee's right has priority as of the date the reservation was created"; and (3) the Indian allottee does not lose by non-use the right to share of reserved water."[89] But, where a reservation is "disestablished" and the land is placed into the public domain and opened to non-Indian homesteading, the *Winters* rights are extinguished unless those lands are reacquired by a tribe.[90] If reacquired and returned to "tribal [trust] status," the priority date becomes the date of reacquisition:

"On return of the property to tribal status, it becomes necessary to utilize the *Winters* doctrine to assure that the Tribe has sufficient water to 'fulfill the very purposes for which [the] reservation was created.' *United States v. Adair,* 723 F.2d at 1409 (citing *United States v. New Mexico,* 438 U.S. 696, 702, 98 S.Ct. 3012, 3015, 57 L.Ed.2d 1052 (1978)). We treat these lands in a manner analogous to that of a newly created federal reservation and find that the purposes for which *Winters* rights are implied arise at the time of reacquisition by the Tribe. *See Cappaert v. United States,* 426 U.S. 128, 138–144, 96 S.Ct. 2062, 2069–2072, 48 L.Ed.2d 523 (1976) (discussing the scope and nature of *Winters* water rights on federal lands). Therefore, we hold that the Tribe is entitled to an implication of *Winters* rights with a priority for these rights as of the date of reacquisition, rather than an original, date-of-the-reservation priority."[91]

Like the treaty at issue in *Winters*, the General Allotment Act itself does not explicitly state that allotments are entitled to reserved water rights. The General Allotment Act was passed twenty years prior to the *Winters* decision. However, the Act does grant authority to the Secretary of the Interior to administer Indian reservation irrigation projects to distribute water to individual Indians. The Act provides:

"In cases where the use of water for irrigation is necessary to lend the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior is authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservation; and no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor."[92]

The Supreme Court interpreted this section to imply that individual allottees are entitled to a just distribution of reserved water rights where "[t]he patented lands had no value for agriculture without water; they were selected for homes and individual farming." [93] The Ninth Circuit has construed this section similarly.[94]

Non-Indian Acquisition of Allotment Land within Reservation Boundary

When a non-Indian purchases an allotment from an allotee within the boundary of the reservation, those rights flow to the purchaser and are then governed by the applicable state appropriation rules.[95] The purchaser gets the treaty or *Winters* right priority date[96], making the water right valuable, but the reserved status no longer applies and the right may be lost to non-use, commonly called a "*Walton* right." The tribe does retain civil regulatory authority over elements related to water such as groundwater drilling if it is demonstrated that such drilling or other conduct"… threatens or has some direct effect on the health and welfare of the tribe.[97]

Public Domain Allotments

Where an allotment is granted from the public domain, there has been no authoritative answer as to whether the *Winters* doctrine applies. However, a public domain allotment (PDA) is reserved from federal lands and often is similar in character to lands reserved as part of a reservation.[98] Non-reservation Indians in California have taken advantage of the provisions of the General Allotment Act which permit the issuance of allotments from public domain land.[99] Many PDAs remain in trust status with appurtenant trust water rights. There are approximately 322 – 423 PDAs under the jurisdiction of the Bureau of Indian Affairs (BIA), Central California Agency.[100] The PDAs that remain in trust are usually the original 160-acre parcels, although some have been partitioned. Due to the length of time since the issuance of the original allotment, most current PDAs are owned by numerous heirs of the original allottee.[101]

Because PDAs are trust lands they fall within the jurisdiction of the BIA. The water rights of PDAs have never been fully evaluated. In many areas, such as the Sierra foothills, PDAs are in areas of increasing development and the water supplies are vulnerable to trespass. Because these allotment boundaries are often uncertain, determining physical or legal trespass against water is difficult. It is unknown how many PDA water sources may have been subject to state

proceedings which resulted in determining appurtenant water rights that have negative impacts on PDAs water rights.

In the absence of contrary authoritative caselaw, a *Winters*' rights analysis suggests PDAs can have reserved water rights. [102]

Connecting Public Domain Allotments to Winters Rights

For clarity, at the time of this writing, there has been no definitive authority in case law that affirms or disaffirms the application of *Winters* rights to PDAs. When analyzing whether a PDA has a *Winters* right there are two key arguments that can be persuasive and build off precedent: (1) invoking the Indian Canons of Construction, and (2) that there is a trust responsibility between the federal government and that individual allottee which would require a baseline responsibility for the federal government to secure enough water to serve the primary purpose of the allotment.[103]

Indian Canons of Construction

The Indian Canons are a statutory interpretation tool that looks at omissions and ambiguities in statutes, contracts, and treaties and interprets those omissions and ambiguities liberally and in favor of the tribe or Native Americans.[104] The Indian Canons are part of the analysis for determining water rights for Indian Country.[105] PDAs fall within the definition of "Indian Country" (see "Definition" section) and should be treated no differently in the context of statutory and treaty interpretation.[106] The Canons can be applied to the question of whether *Winters* rights apply to PDAs because there is silence on how water rights were handled when the PDAs were allotted.[107] This leaves a court with the task of looking at the context surrounding the statute's enactment that authorized the creation of the PDA and the purpose of that particular allotment. A court looking at the context will need to consider the history we cover in this Study and additional relevant historical context specific to that allotment, including the authorizing Acts for that allotment.[108] The application of the Canons is not always consistent since each case has a unique history; however, the overriding focus should be an interpretation that silence does not disfavor a tribe or a Native American individual. In the case of PDAs, the Canons should create a presumption that a water right is implied with the creation of the PDA and a *Winters* analysis is an appropriate method for establishing and quantifying that right.

Trust Responsibility

In addition to the Indian Canons, a PDA holder can point to the underlying trust responsibility the federal government retains over "Indian Country" lands.[109] As we established, PDAs are treated as "Indian Country" and the federal government's trust responsibility applies the same to PDAs as anywhere in "Indian Country".[110] Specifically, courts require pointing to an express statement of a fiduciary responsibility that the government undertakes to show a fiduciary relationship exists and that such fiduciary duty was breached.[111] That statement is contained in the statute under 25 U.S.C.A. § 5108 *Acquisition of lands, water rights or surface rights; appropriation; title to lands; tax exemption and states*:

"The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians… [t]itle to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation."

Additionally, the amount of control the federal government exerts over an asset is also an indication of the government express responsibility and establishing a specific trust relationship.[112]

A plain reading of this statute indicates the trust duty the Secretary of Interior has assumed over water rights and includes PDAs. This underlying trust responsibility, paired with the Indian Canons, creates a presumption that the *Winters* analysis applies to PDAs as much as reservation land.[113]

Aboriginal water rights

Under the doctrine of the "right of discovery" the Untiled States had sole authority to acquire the ownership of all lands held by tribes and native inhabitants. Having lost legal title to their land, tribes and native people were found to have retained "aboriginal title" which is the superior right of occupancy and to use the land with all incidents of use including hunting, fishing, and water. Unfortunately, as the superior landowner, the United States also has the sole authority to extinguish aboriginal title through various federal actions.

In finding the extinguishment of most aboriginal title in California, courts have considered: (1) the unratified status of the 18 California treaties; (2) whether the tribe was issued a patent in their lands under the California Land Claims Act of 1851; (3) the use of military force to remove California Indians from their ancestral lands; (4) removal of tribes to reservations; (5) the federal government setting aside aboriginal lands as national forests or reserves for the purpose of public use, recreation and conservation; and finally (6) the settlement of Indian claims through monetary compensation (i.e. Court of Claims and the Indian Claims Commission.) Where one factor appears ambiguous, the courts will look to a series of federal actions to see if taken cumulatively they demonstrate congressional intent to extinguish. It is beyond the scope of this Study to analysis each and every federal action taken in California that may have extinguished aboriginal title, but some federal actions are note worth.

As previously discussed in the "History" section of the Study, numerous California tribes whose title was predicted on a Mexican land grant lost their lands by failing to timely file their claim under the California Land Claims Act of 1851. Regardless, many tribes continued to occupy their land which effectively established their aboriginal title and a claim to water necessary to sustain their occupancy. Such a claim was advanced by a southern California who was found to have lost legal title to their land by its failure to file under the Act of 1851, but the tribe's continued occupancy of its land preserved its aboriginal title and water rights. The court

concluded that the failing to file a claim under the 1851 Act the tribe lost both legal and aboriginal title, any re-establish aboriginal title after that was ultimately extinguished once the tribe acquired its reservation stating "… , an aboriginal right of occupancy is fundamentally incompatible with federal ownership."[114]

The denial of the tribe's claim for aboriginal water rights was not appealed to the 9th Circuit Court of Appeals. *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District*, 849 F.3d 1262 n. 5 (9th Cir. 2017). There is some debate among scholars on whether failure to file a claim under the Act of 1851 resulted in a tribe and individual losing both legal and aboriginal title.[115]

Other acts of extinguishment of aboriginal title in California have been attributed to the compensation paid to tribes and California Indians through land settlement awards issued by the Court of Claims in 1944 and Indian Claims Commission 1964. The complexity of these settlements with regard to who were the members of the various petitioning groups ("Indians of California", tribes, and tribal organizations) and what land and title claims were being compensated for is detailed in Bruce S. Flushman & Joe Barbieri's 1986 law review article, *Aboriginal Title: The Special Case of California*.[116] Flushman and Barbieri conclude through their research and analysis that all aboriginal title in California has been extinguished but:

"*Despite the inevitable conclusion that aboriginal title has been extinguished, the issue is still not a dead letter. Even if not raised in the context of a suit to recover for loss of aboriginal lands as in the Maine litigation, claims of aboriginal title are likely to recur in cases (as in Gemmill, Wilson and Dann) where aboriginal title is used as a defense to a charge of trespass or illegal hunting or fishing. No doubt claims of aboriginal title will continue to be raised in other contexts as well. Even if they have little chance of success, such claims will nevertheless serve as a reminder of events that should not go unnoticed or be forgotten by future generations*."[117]

Aside from overcoming the hurdle of extinguishment, just establishing the elements of an individual aboriginal title claim as a defense to a claim of trespass or ejectment is difficult. To successfully establish aboriginal title the plaintiff/defendant (depending on the proceeding) must show that the land prior to being patented or opened to the public domain:(1) was occupied by their ancestors from time immemorial to the exclusion of all others; (2) the land was enclosed, cultivated and improved; and (3) the party must live on or use the precise land for which aboriginal title is claimed.[118]

Water Rights in California Indian Country Footnotes

1 Winters v. United States, 207 U.S. 564 (1908). ↑
2 Act of May 1, 1888, ch. 213, 25 Stat. 113. Congress passed a bill incorporating an agreement between the Gros Ventres and Assiniboine Tribes and the United States which provided for this reservation and government services while opening the balance of former Indian lands to settlement. See Winters, 207 U.S. at 575-576. ↑
3 Prior Appropriation and Riparian Rights are foundational water terms that are defined in the definitions section and explored further in the discussion of limited state authority over Winters rights. ↑

4 Winters 207 U.S. at 576-577 (1908). For an analysis of the unpublished trial court opinion see Hundley, "The 'Winters' Decision and Indian Water Rights: A Mystery Reexamined" West. Hist. Q. 17 (January 1982). ↑
5 See 143 F. 740, 749 (9th Cir. 1906) ("In conclusions, we are of opinion that the court below did not err in holding that, 'when the Indians made the treaty granting rights to the United States, they reserved the right to use the waters of Milk River, at least to an extent reasonably necessary to irrigate their lands."). In a related case concerning the Blackfeet Indian Reservation, the Ninth Circuit made clear that the reserved water rights could expand if future need expanded. Conrad Inv. Co. v. United States, 161 F. 829, 835 (9th Cir. 1908) ("Having determined that the Indians on the reservation have a paramount right to the waters of Birch creek, it follows that the permission given to the defendant to have the excess over the amount of water specified in the decree should be subject to modification, should the conditions on the reservation at any time require such modification."). ↑
6 Winters v. United States, 207 U.S. at 576 (1908). ↑
7 Winters v. United States, 207 U.S. at 577. ↑
8 The treaty did not expressly state that water rights were created, but they were implied to sustain a Tribal community. This is typical of many treaties and executive orders. One exception is the Mission Indian statutes, the San Luis Ray River Tribes, which do mention water. ↑
9 See Hundley, infra at p. 18 n.4 for a compilation of articles on this subject. For a modern review, see A. Dan Tarlock, Tribal Justice and Property Rights: The Evolution of Winters v. United States, 50 NAT. RESOURCES J. 471, 480–81 (2010). ↑
10 See United States v. Adair (9th Cir. 1983) 723 F.2d 1394, 1412-1413, for a list of cases supporting the proposition that tribes gave away some rights while retaining others through treaties and other concessions of sovereignty. ↑
11 On yet another level the diverging views on whether the Tribe reserved to itself all rights not granted or whether the United States reserved the water rights from the public domain for the use of the Indians, has at least one practical effect on the determination of Indian water rights. If a tribe retained rights, including water rights, the priority date for such rights would be time immemorial. If the United States reserved the water rights from the public domain, the rights might have a priority date of as of the date of establishment of the reservation. See also, Herbert A. Becker, "'They Had Command of the Lands and The Water...All Their Beneficial Uses...': Indian Water Rights in the West" Volume 2, No. 1 Rivers 66 (1991). ↑
12 See Winters v. United States, 143 F. 740, 742 (9th Cir. 1906) explaining the original rights reserved in the initial treaty with the U.S. government, "By the terms and provisions of this treaty the Ft. Belknap Indians reserved to themselves the 'uninterrupted privileges of hunting, fishing, and gathering fruit, grazing animals, curing meat, and dressing robes. 'citing Article 3 of Treaty, 11 Stat. 647." See also 143 F. 740 at 748 for a discussion of federal authority over reservations versus land in the public domain. ↑
13 Winters v. United States, 143 F. at 749 (9th Cir. 1906). ↑
14 143 F. 740 at 748. The Ninth Circuit reaffirmed the power of the federal government to reserve land and water without needing to expressly reaffirm prior reservations each time public lands are opened. ↑
15 See Arizona v. Navajo Nation, 599 U.S. 555, 143 S. Ct. 1804, 1812 (2023). ↑
16 See Navajo Nation v. United States Dep't of the Interior, No. CV-03-00507-PCT-GMS, 2019 WL 3997370, at *3 (D. Ariz. Aug. 23, 2019), rev'd and remanded sub nom. Navajo Nation v. U.S. Dep't of the Interior, 996 F.3d 623 (9th Cir. 2021). "Later decisions distilled Winters into a

black-letter rule of law: '[W]hen the United States withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation.' Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District, 849 F.3d 1262, 1268 (9th Cir. 2017) (citing Cappaert v. United States, 426 U.S. 128, 138 (1976)). ↑
17 See United States v. Winans (1905) 198 U.S. 371, 381. The court clearly states that fishing rights were not given to tribes, but already existed and were recognized as such. ↑
18 The priority date for water rights for certain uses may be time immemorial. See United States v. Adair, 723 F.2d 1394, 1414 (9th Cir. 1983). ↑
19 This quantity is often computed through a determination of the amount of water needed to irrigate the "practicably irrigable acreage" on the reservation. Arizona v. California, 460 U.S. 605, 617 (1983), decision supplemented, 466 U.S. 144 (1984). This is not however the exclusive method of determining tribal reserved water rights. United States v. Walker River Irr. Dist., 104 F.2d 334, 339–40 (9th Cir. 1939) creating a reasonable needs quantification method. ↑
20 For example, water rights quantified pursuant to the Practically Irrigable Acreage analysis are not limited to agricultural uses. ↑
21 See Winters v. United States, 143 F. at 742 (9th Cir. 1906). ↑
22 United States v. Walker River Irr. Dist., 104 F.2d 334, 336 (9th Cir. 1939). ↑
23 16 Stat. 544, 566 (codified at 25 U.S.C. §71). ↑
24 Arizona v. California, 373 U.S. 546, 598 (1963). ↑
25 United States v. Walker River Irrigation Dist., 473 F. Supp. 3d 1150, 1156 (D. Nev. 2020); See Parravano v. Babbitt, 861 F. Supp. 914, 923 (N.D. Cal. 1994), aff'd, 70 F.3d 539 (9th Cir. 1995) (applying reasoning to a fishing rights dispute). ↑
26 Colville Confederated Tribes v. Walton, 647 F.2d 42, 50 - 51 (9th Cir. 1981). The court explains that Congress has the power to reserve water for allotted lands and that those allottees', "right has a priority as of the date the reservation was created." We can infer that this applies regardless of the method of reservation and an analysis on method would be part of the attempt to set a priority date and quantify the allottees' water rights. ↑
27 16 Stat. 544, 566 (codified at 25 U.S.C. §71). ↑
28 Executive Order reservations are considered equivalent to all other reservations for all other purposes. See Cohen at pp. 34 -35 (1982 ed.) for a discussion of the development of the definition of "Indian country" and for examples of federal statutes and case law considering all lands set aside for Indian purposes equal under the law ↑
29 Arizona v. California, 373 U.S. 546, 598 (1963). The reservations in this case were all created by executive order, but for the Colorado River Reservation which was created by an Act of Congress and expanded by executive order. ↑
30 United States v. Walker River Irr. Dist.,104 F.2d at 336. ↑
31 Id. ↑
32 Note that Congress repealed the president's ability to establish reservations by executive order after 1919 except for those reservations in Alaska now known as Alaska Native Corporations. ↑
33 207 U.S. 564 (1908). ↑
34 26 Stat. 712-714 (1891). ↑
35 This interpretation is contained in a memorandum from Scott Keep of the Office of the Solicitor in Washington, D.C. to the Superintendent of the Central California Agency which authorized the issuance of proclamations designating Indian lands to be Indian reservations. ↑

36 Advisory Council on California Indian Policy, "Final Reports and Recommendations to the Congress of the United States – The ACCIP Termination Report" (1997), 7, citing Robert N. Clinton et al., American Indian Law (3rd Ed. 1993), 158. ↑
37 As of January 2024, there are 33 California tribes that have been unterminated: Bear River Band of the Rohnerville Rancheria, Big Sandy Rancheria of Mono Indians, Big Valley Band of Pomo Indians, Blue Lake Rancheria of the Wiyot, Yurok, and Hupa Indians, Buena Vista Rancheria of Me-Wuk Indians, Chicken Rancheria of Me-Wuk Indians, Cloverdale Rancheria of Pomo Indians of Pomo Indians, Coyote Valley Band of Pomo Indians, Elk Valley Rancheria, Federated Indians of Graton Rancheria, Greenville Rancheria of Maidu Indians, Guidiville Rancheria, Habematolel Pomo of Upper Lake, Hopland Band of Pomo Indians, Koi Nation, Lytton Band of Pomo Indians, Mechoopda Indian Tribe of Chico Rancheria, Mooretown Rancheria of Maidu Indians, Northfork Rancheria of Mono Indians, Paskenta Band of Nomlaki Indians, Picayune Rancheria of Chukchansi Indians, Pinoleville Pomo Nation, Potter Valley Tribe, Quartz Valley Indian Community, Redding Rancheria, Redwood Valley Rancheria (formerly Little River Band of Pomo Indians of the Redwood Valley Rancheria), Robinson Rancheria Band of Pomo Indians, Scotts Valley Band of Pomo Indians, Tolowa Dee-ni' Nation (formerly Smith River Reservation), Table Mountain Rancheria, United Auburn Indian Community, Wilton Rancheria, and the Wiyot Tribe (formerly Table Bluff Reservation). ↑
38 See Arizona v. California, 373 U.S. 546, 598 (1963) (reserved rights doctrine based on Article IV, § 3 of the Constitution "to reserve water rights for its reservations and its property"); Cappaert v. United States, 426 U.S. 128, 138-39 (1976) (reserved rights doctrine applies to "Indian reservations and other federal enclaves"). ↑
39 Tillie Hardwick v. United States, (1983) C-79-1710-SW. The plaintiffs were represented by California Indian Legal Services. ↑
40 We were unable to locate the ultimate judgment or order in Tillie Hardwick that restored two tribes, Cloverdale and Potter Valley. Accordingly, we were unable to conduct a complete preliminary analysis for the reserved water rights of these two tribes. See discussion of Tillie Hardwick below. ↑
41 In re the General Adjudication of All Rights to Use Water in the Big Horn River Basin, 753 P.2d 76, 114 (Wyo. 1988). ↑
42 Wyoming v. EPA, 849 F.3d 861 (10th Cir. 2017) (Big Horn I concerned the allocation of water rights, specifically the priority dates for those rights. 753 P.2d at 83. The special master's conclusion that the 1905 Act did not sever the 1868 priority date for water rights, see id. at 92, is not determinative on the issue of diminishment—the issues are mutually exclusive, and Wyoming is not relitigating the water rights determination.) ↑
43 Some Tillie Hardwick stipulations include language that made a tribe's eligibility to have land taken into trust contingent on whether the tribe had voted to organize under the Indian Reorganization Act (IRA) of 1934. The stipulations state that the authority of the Secretary of the Interior was limited, and the Secretary could only take land into trust for "IRA tribes". Amendments to the IRA in 1994 eliminated this limitation and allows any tribe, regardless of whether they organized under the IRA to have land taken into trust by the Secretary. The Supreme Court added a new and different limitation which requires that all tribes seeking land be taken into trust demonstrate it was "under Federal jurisdiction" in 1934, when the IRA was passed. (Carcieri v. Salazar, 555 U.S. 379 (2009). For some restored tribes and tribes in general, the new Carcieri requirement is as much a barrier as the former limitation found in the Tillie

Hardwick stipulations (See, Big Lagoon Rancheria v. California, 741 F.3d 1032 (9th Cir. 2014) amended on denial of rehearing en banc 789 F.3d 947 (2015). ↑
44 Advisory Council on California Indian Policy, "Final Reports and Recommendations to the Congress of the United States – The ACCIP Termination Report" (1997), 18. ↑
46 Tillie Hardwick First Stipulation for Judgment, executed July 1983, Ordered December 22, 1983, ¶¶ 6-8 ↑
47 Tillie Hardwick First Stipulation for Judgment, executed July 1983, Ordered December 22, 1983, ¶ 10. ↑
48 The following stipulations and partial summary judgment made determinations about the status of former-reservation lands of tribes restored by Tillie Hardwick: 1) March 5, 1986 Stipulation for Judgment: Rohnerville, Blue Lake, Redwood Valley, Pinoleville, Big Valley, Greenville, and Chicken Ranch; 2) March 2, 1987 Stipulation for Judgment: Smtih River and Elk Valley; 3) May 14, 1987 Stipulation for Judgment: Buena Vista Rancheria; 4) June 18, 1987: North Fork and Picayune / Chukchansi; 5) June 10, 1988 Stipulation for Judgment: Mooretown; 6) February 7, 1992 Stipulation for Judgment: Redding (ordered May 20, 1992); 7) March 14, 1989 Order Granting Plaintiff's Motion for Partial Summary Judgment: Quartz Valley. As discussed elsewhere, we were unable to locate second stipulations for Cloverdale and Potter Valley. ↑
49 Tillie Hardwick First Stipulation for Judgment, executed July 1983, Ordered December 22, 1983, ¶ 10. ↑
50 This is the case for many if not most of the stipulations effecting the restoration of California tribes that CILS reviewed. ↑
51 See Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir. 1981), cert. denied, 454 U.S. 1092 (1981). See also David H. Getches, Water Rights on Indian Allotments, 26 S.D. L.Rev. 405, 425 (1981); Richard B. Collins, Indian Allotment Water Rights, 20 Land & Water L.Rev. 421, 426-27, 443-46 (1985). ↑
52 U.S. Department of the Interior, Indian Affairs, Fee to Trust Land Acquisitions: Transfer land to be held in trust by the United States on behalf of an individual Indian or a Tribe, https://www.bia.gov/bia/ots/fee-to-trust. ↑
53 Table Bluff Band of Indians v. Andrus, 532 F.Supp. 255 (1981). ↑
54 Table Mountain Rancheria Ass',n et al. v. James Watt, et al., Case No. C-80-4595-MHP, Judgment (June 18, 1983). ↑
55 Duncan v. Andrus (N.D. Cal. 1977) 517 F.Supp. 1, 1. This case was litigated by California Indian Legal Services. ↑
56 Duncan v. Andrus (N.D. Cal. 1977) 517 F.Supp. 1, 4. ↑
57 Duncan v. Andrus (N.D. Cal. 1977) 517 F.Supp. 1, 6. ↑
58 108 Stat. 4533; 25 U.S.C. 130007. ↑
59 Duncan v. Andrus (N.D. Cal. 1977) 517 F.Supp. 1, 4. ↑
60 Scotts Valley and Guidiville's claims were resolved in a Stipulation for Entry of Judgment file March 15, 1991. ↑
61 Scotts Valley and Guidiville Stipulated Entry for Judgment, March 15, 1991, p. 6. ↑
62 Scotts Valley and Guidiville Stipulated Entry for Judgment, March 15, 1991, p. 9-10. ↑
63 Scotts Valley and Guidiville Stipulated Entry for Judgment, March 15, 1991, ¶14, p. 14; Lytton Stipulation of Entry of Judgment, March 22, 1991, ¶16, p. 12-13. ↑
64 We were unable to locate the stipulated judgement in this litigation that resolved the claims of the Mechoopda Indian Tribe of Chico Rancheria, however the stipulation is discussed at length

in a 2004 federal lawsuit that concludes that Tribe did not meet the "Indian Lands" requirement of the Indian Gaming Regulatory Act because it had no land in Trust and the one parcel it owned (still in fee) inside the exterior boundaries of the former rancheria was restricted in use to a cemetary. (Mechoopda Indian Tribe of Chico Rancheria, Cal. v. Schwarzenegger (E.D. Cal., Mar. 12, 2004, No. CIV.S-03-2327WBS/GGH) 2004 WL 1103021, at *9. (The stipulated judgment for the Mechoopda Tribe was entered as the court's order on April 17, 1992).). ↑
65 Mechoopda Indian Tribe of Chico Rancheria, Cal. v. Schwarzenegger (E.D. Cal., Mar. 12, 2004, No. CIV.S-03-2327WBS/GGH) 2004 WL 1103021, at *1-2. ↑
66 Mechoopda Indian Tribe of Chico Rancheria, Cal. v. Schwarzenegger (E.D. Cal., Mar. 12, 2004, No. CIV.S-03-2327WBS/GGH) 2004 WL 1103021, at *2. ↑
67 Mechoopda Indian Tribe of Chico Rancheria, Cal. v. Schwarzenegger (E.D. Cal., Mar. 12, 2004, No. CIV.S-03-2327WBS/GGH) 2004 WL 1103021, at *8. ↑
68 Lytton Stipulation of Entry of Judgment, March 22, 1991, p. 4-5. ↑
69 Paskenta Band Restoration Act, Pub. L. 103-454 § 301 (25 U.S.C. § 1300m et seq.) ↑
70 Graton Rancheria Restoration Act, 114 Stat. 2939 (25 U.S.C. § 1300n et seq.) ↑
71 Smith v. U.S. (N.D. Cal. 1978) 515 F.Supp. 56. This litigation was brought by California Indian Legal Services. ↑
72 For a concise summary of the Smith litigation, see Hopland Band of Pomo Indians v. U.S. (Fed. Cir. 1988) 855 F.2d 1573, 1575–1576. ↑
73 Smith v. U.S. (N.D. Cal. 1978) 515 F.Supp. 56, 60-61. ↑
74 CILS was unable to locate this final stipulation, however the history of the case and the result of the stipulation is retold in a case from the U.S. Court of Appeals for the Federal Circuit from 1988. Hopland Band of Pomo Indians v. U.S. (Fed. Cir. 1988) 855 F.2d 1573, 1575–1576. ↑
75 Smith v. U.S. (N.D. Cal. 1978) 515 F.Supp. 56, 60. ↑
76 Smith v. U.S. (N.D. Cal. 1978) 515 F.Supp. 56, 62. ↑
77 Knight v. Kleppe, Nos. C-74-0005 WTS & C-73-0034 WTS (Consolidated Actions), Northern District of California (1976), ¶ 21, p. 9. CILS represented the Plaintiffs in this lawsuit. ↑
78 The Koi Nation of Lower Lake Rancheria was never actually terminated. Two years prior to the Rancheria Act of 1958, the federal government passed the "Lower Lake Act", which authorized the Secretary of the Interior to sell the Tribe's land, and it did (for Lake County to build a municipal airport). Despite being treated as terminated by the BIA for decades, no federal law ever actually effectuated termination. (Koi Nation of Northern California v. United States Department of Interior (D.D.C. 2019) 361 F.Supp.3d 14, 26, amended sub nom. Koi Nation of Northern California v. United States Department of the Interior (D.D.C., July 15, 2019, No. CV 17-1718 (BAH)) 2019 WL 11555042). ↑
79 The relevant language from the treaty establishing the ability for the federal government to create allotments, "assign to each person or family such portion thereof as their industry and ability to manage business affairs may, in his opinion, render judicious and proper; and Congress may hereafter provide for the issuing to such persons, patents for the same, with guards and restrictions for their protection in the possession and enjoyment thereof." TREATY WITH THE IOWA, 1854., 10 Stat. 1069. ↑
80 Judith V. Royster, The Legacy of Allotment, 27 Ariz. St. L.J. 1, 6 (1995). ↑
81 24 Stat. 388 (1887); codified at scattered sections, 25 U.S.C. § 33641 et seq. ↑
82 25 U.S.C. § 348. ↑

83 An Indian could be issued a fee patent if the BIA found him/her to be "competent". This caveat resulted in numerous fee patents being issued prior to the 25 yr. period and the loss of Indian land through tax foreclosure and sale to non-Indians ↑
84 "The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are hereby extended and continued until otherwise directed by Congress." 25 U.S.C. § 5102. ↑
85 In 1990, Congress applied Indian Reorganization Act provisions to all allottees: "(1) all Indian tribes, (2) all lands held in trust by the United States for Indians, and (3) all lands owned by Indians that are subject to a restriction imposed by the United States on alienation of the rights of the Indians in the lands." 25 U.S.C. § 5126. ↑
86 See the notes in 25 U.S.C. § 2201, citing the Indian Land Consolidation Act Amendments of 2000; findings. Act Nov. 7, 2000, P. L. 106-462, Title I, § 101, 114 Stat. 1991; See H.R. REP. 108-656, 1-4, 2004 U.S.C.C.A.N. 1952, 1952-55 (the legislative report addressing continued work to repair the damage caused by the allotment policy). ↑
87 See, e.g., United States v. Powers, 305 U.S. 527, 533 (1939) (Allotments made for exclusive use of a tribe then passed to native American individuals conveyed in fee, the right to use some portion of tribal waters essential for cultivation passed to the individual owners.);See also dissenting opinion from Justice Gorsuch reaffirming Powers, Arizona v. Navajo Nation_, No. 21-1484, 2023 WL 4110231, at *17 (U.S. June 22, 2023)(Justice GORSUCH, with whom Justice SOTOMAYOR, Justice KAGAN, and Justice JACKSON join, dissenting). ↑
88 Colville Confederated Tribes v. Walton, 647 F.2d 42, 50 (9th Cir. 1981), writ of cert. denied, 454 U.S. 1092 (1981). ↑
89 Id. at 51. Non-Indians who obtain title to an allotment from an Indian are also entitled to Winters rights; however, once the land passes ownership to a non-Indian, the right is subject to being lost through non-use. ↑
90 United States v. Anderson, 736 F.2d 1358, 1362-63 (9th Cir. 1984) (citing California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935)). ↑
91 United States v. Anderson at 1363. ↑
92 25 U.S.C. § 381. ↑
93 United States v. Powers, 305 U.S. 527, 533 (1939). ↑
94 See Colville Confederated Tribes v. Walton, 647 F.2d 42, 49-50 (9th Cir. 1981), writ of cert. denied, 454 U.S. 1092 (1981). ↑
95 In re Gen. Adjudication of All Rights to Use Water in Big Horn River Sys., 753 P.2d 76, 113 (Wyo. 1988), "In Colville Confederated Tribes v. Walton, supra 647 F.2d at 50, the court reiterated that Indian allottees have a reserved water right and relied upon United States v. Ahtanum Irrigation District, 236 F.2d 321, 342 (9th Cir. 1956), for the proposition that 'non-Indian purchasers of allotted lands are entitled to 'participate ratably' with Indian allottees in the use of reserved water.'" ↑
96 In re Gen. Adjudication of All Rights to Use Water in Big Horn River Sys., 753 P.2d 76, 112 (Wyo. 1988); In re CSRBA Case No. 49576 Subcase No. 91-7755, 448 P.3d 322, 362 (2019) (applying Anderson to a transfer of water right from allotted lands to a non-Indian purchaser). ↑
97 Colville Confederated Tribes v. Walton, 647 F.2d 42, 52 (9th Cir. 1981), "A tribe's inherent power to regulate generally the conduct of non-members on land no longer owned by, or held in trust for the tribe was impliedly withdrawn as a necessary result of its dependent status. Montana v. United States, 450 U.S. [**27] 544, 101 S. Ct. 1245, 1257, 67 L. Ed. 2d 493 (1981). Exceptions to this implied withdrawal exist. A tribe retains the inherent power to exercise civil

authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the health and welfare of the tribe. Id. This includes conduct that involves the tribe's water rights. See id. at n.15. ↑
98 See Rubin, Erin, Yale Law Journal Forum, "Water Rights of Public Domain Allotments," February 17, 2023 (citing In re Carmen, 165 F. Supp. 942, 946 (N.D. Cal. 1958)). ↑
99 24 Stat. 388 [1 Kapp. 33] (codified at scattered sections of 25 U.S.C. §§ 331 et. seq). ↑
100 The Central California Agency reported 132 public domain trust allotments. The Northern California Agency reported 175 public domain trust allotments. The Southern California Agency reported approximately 30 trust allotments. These figures may include allotments from national forest lands pursuant to 25 U.S.C. § 337. ↑
101 See "Indian Allotments and Co-Ownership" for a brief overview on the impacts of fractionated interests in California accessed at https://www.calindian.org/indian-allotments-and-co-ownership/, December 2, 2020. https://www.calindian.org/indian-allotments-and-co-ownership/↑
102 See Rubin, Erin, Yale Law Journal Forum, "Water Rights of Public Domain Allotments," February 17, 2023 ↑
103 Although note a recent ruling by the Supreme Court pf the United States casts some doubt as to the responsibilities the Court might hold the federal government accountable to when those responsibilities are not defines in a statute, treaty, or regulation. Arizona v. Navajo Nation, 143 S. Ct. 1804, 1814 (2023). ↑
104 Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985); see also San Carlos Apache Tribe v. Becerra, 53 F.4th 1236, 1240 (2022) (applying the Indian canon to statute and government contract language). ↑
105 Navajo Nation v. U.S. Dep't of the Interior, 26 F.4th 794, 802 (9th Cir.), cert. granted sub nom. Dep't of Interior v. Navajo Nation, 143 S. Ct. 398 (2022), and cert. granted sub nom. Arizona v. Navajo Nation, 214 L. Ed. 2d 197, 143 S. Ct. 398 (2022) ↑
106 See Petition of Carmen, 165 F. Supp. 942, 945–46 (N.D. Cal. 1958), aff'd sub nom. Dickson v. Carmen_, 270 F.2d 809 (9th Cir. 1959) (discussing how a public domain allotment is part of Indian Country); see also Rubin, Erin, Yale Law Journal Forum, "Water Rights of Public Domain Allotments," February 17, 2023. ↑
107 See Rubin, Erin, Yale Law Journal Forum, "Water Rights of Public Domain Allotments," February 17, 2023 (discussing the application of the Indian canons to Public Domain Allotment's claims to Winters Rights). ↑
108 See History section of Water Study. ↑
109 See infra Protection and Assertion of Indian Reserve Rights in a Mixed System for more detail on how the trust responsibility affords protection of Winters rights for tribes. ↑
110 Fort Mojave Indian Tribe v. United States, 32 Fed. Cl. 29, 33 (1994); See Moving Beyond the Current Paradigm: Redefining the Federal-Tribal Trust Relationship for This Century: In Collaboration with the American Indian Law Center, Inc.: SYMPOSIUM ARTICLE: Indian Water and the Federal Trust: Some Proposals for Federal Action, 46 Nat. Resources J. 375. ↑
111 Arizona v. Navajo Nation, 143 S. Ct. 1804, 1813 (2023). ↑
112 United States v. Mitchell, 463 U.S. 206, 224–25 (1983) (explaining there is a limited trust relationship stemming from the General Allotment Act and more specific trust relationship related to claims for mismanagement of timber resources was evident in the pervasive control of the federal government over those timber resources.) ↑

113 While Arizona v. Navajo limits the actions required by the federal government to quantify reserved water rights in the absence of express treaty, statute, or regulatory language, it did acknowledge application of Winters analysis and the existence of reserved water rights. Arizona v. Navajo Nation, 143 S. Ct. 1804, 1811-12 (2023). ↑
114 Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District, (Not Rpt. in F. Supp.) (2015 WL 13309103). ↑
115 Bruce S. Flushman & Joe Barbieri, Aboriginal Title: The Special Case of California.17 Pac. L. J. 391 (1986) 428-434; William Wood, The Trajectory of Indian Country in California: Rancherias, Villages, Pueblos, Missions, Ranchos, Reservations, Colonies, and Rancherias, 44 Tulsa L. Rev. 317 (2013) p. 343, n. 140. ↑
116 Bruce S. Flushman & Joe Barbieri, Aboriginal Title: The Special Case of California.17 Pac. L. J. 391 (1986). ↑
117 Bruce S. Flushman & Joe Barbieri, Aboriginal Title: The Special Case of California.17 Pac. L. J. 391 (1986), p. 460. ↑
118 Cramer v. United States, 261 U.S. 219, (1923); United States v. Dann, 873 F.2d 1189 (9th Cir.1989); and Barber v. Simpson, 2006 WL 6358357 (Nev.

State Authority Over Federal Indian Water Rights

(REF) January 31, 2024

State System and Tribal Rights

While federal law establishes some water rights, the federal government may defer to states to quantify and allocate those rights and resources, including Indian reserved *Winters* water rights. Other times, there are settlements and adjudications where a federal court decides allocation and quantification. This creates a complex interaction where state law may intersect with but, in most cases, does not directly interfere with reserved water rights.

In California, water appropriation is controlled by state statute[1] and administered by the State Water Resources Control Board (SWRCB). California principally follows a prior appropriation system (see "Definitions" section) of water rights, keeping in mind California also recognizes some riparian rights (see "Definitions" section). To review, under prior appropriation, water users who make beneficial use of a water supply obtain rights to that water under a seniority system based on the date the water was first put to beneficial use (termed the "priority date").[2] Indian reserved water rights in the west are typically senior in priority to non-Indian uses under state prior appropriation law because such rights were established before non-Indian uses of the water (most Indian reservations, and therefore water rights, predated non-Indian settlements). [3] In addition, Indian reserved water rights do not depend on putting water to beneficial use but rather are recognized as a tribe's original or federally-granted ownership of reservation territory.[4] However, most tribal water rights were not quantified when reservations were established, meaning that they must often be adjudicated under protracted processes pursuant to state water law, or settled by mutual agreement between the tribe and competing water users.

At the same time, for new water rights, water is available only if it is previously unappropriated and is used in a reasonable and beneficial manner.[5] The SWRCB must consider the public interest[6] and assess the proposed use in light of all other beneficial uses that may be made of the water.[7] The SWRCB may condition the permit[8] and may reserve jurisdiction to amend or revise the permit under certain circumstances.[9] So long as the appropriator completes the diversion and application of the water with due diligence per the terms of the permit, the SWRCB will then grant the appropriator a license.[10] The use of appropriated water, its place of use, and its point of diversion may be permitted by the SWRCB if no other users are injured.[11]

Whether an Indian reservation may have water rights based upon state permits and licenses, separate from any federal water rights, is a fact-based inquiry: either the permits and licenses exist, or the permits and licenses do not exist. For lands that tribes purchase in fee, as opposed to trust land, this will involve a search of both the deed records and the water permit filings by the predecessor in interest to the United States. While this is labor-intensive, it raises no legal issues unique to California.[12]

Having understood the foundational principles governing water rights in California and the federal deference to state systems, let's delve into specific legal cases and amendments that have shaped this arena, starting with the McCarran Amendment and the Colorado River.

State Courts vs. State Legislature: The McCarran Amendment and Colorado River

While the federal government may defer to state systems for water rights allocation, there are key legal provisions that guide this process. One such provision is the McCarran Amendment, which significantly affects how Indian reserved water rights are adjudicated and acts as a limited waiver of tribal sovereign immunity. This section delves into its implications, particularly through the lens of the Supreme Court case, *Colorado River Water Conservation Dist. v. United States*.

The McCarren Amendment

In *Colorado River Water Conservation Dist. v. United States*,[13] the Supreme Court held that the McCarran Amendment allows state courts to adjudicate Indian reserved water rights.[14] In so doing, the Court 'reasoned water rights were "highly interdependent" and, therefore, actions seeking the allocation of water essentially involve the disposition of property and are best conducted in unified proceedings.'[15] As a result, when a general stream adjudication is occurring in state courts, concurrent suits brought by Indian tribes seeking the adjudication of their rights are subject to consolidation with general stream adjudication or dismissal.

Even still, there are some limits to state authority to adjudicate Indian reserved water rights under the McCarran Amendment. Most importantly, the federal government's waiver of sovereign immunity under the McCarran Amendment is limited to comprehensive, general stream adjudications in which the rights of all competing claimants are adjudicated.[16] That is, the waiver does not subject the federal government, nor tribes whose rights are federally derived, to private suits from a particular claimant. In addition, states cannot require the federal government to pay exorbitant state court filing fees.[17] States can, meanwhile, conduct an administrative process culminating in judicial review to adjudicate such water rights and may separately adjudicate surface water and groundwater rights.[18]

State Court Adjudication vs. Settlement

An important consequence of the McCarran Amendment has been the increasing trend of tribes adjudicating reserved water rights through settlement negotiations rather than outright adjudication via litigation in state court. In fact, since 1990, the Department of the Interior has followed an express policy that Indian water rights should be resolved through negotiated settlements rather than litigation.[19] Many tribes perceive state courts as being unfriendly to their interests, and water rights adjudication in state court has often held poor results for tribes.[20] Of course, litigation of reserved tribal rights can be costly and span many years, also pushing tribes towards settlement. Meanwhile, "though administration of Indian reserved water rights poses a federal question, for a variety of practical and political reasons the modern trend in negotiated settlement of reserved rights has been to expressly subject tribal water uses to state administration."[21] Consequently, state agencies in California hold substantial influence over the administrative issues that arise surrounding Indian reserved water rights adjudications. Relevant agencies administering such issues in California include the California Department of Water Resources (CDWR), the appropriate regional water quality board, and the SWRCB, with state courts providing review of administrative decisions. Typical issues within negotiated settlements include when a tribe holding a reserved water right seeks to change the point of diversion, purpose, or place of use of a perfected water right. These issues may lead to litigation if not resolved through a negotiated settlement.[22]

After learning more about the McCarran Amendment and limited state authority in adjudications, it is essential to consider how these rules apply to specific types of land. The next section provides insight into state authority over Indian land owned in fee (non-trust land).

State Authority over Indian Land owned in Fee (non-trust land)

Fee Land on Reservations

Fee land within the bounds of reservations and owned by tribal members is subject to federal and tribal regulatory jurisdiction.[23] However, the ability of tribes to regulate the water rights of *non-members* holding fee land within Indian Country is not absolute—tribal regulations must be justified under a test (commonly known as the ("Montana "test) created by the Supreme Court.

In *Montana v. United States*,[24] the Supreme Court examined whether a tribe could regulate hunting and fishing by non-Indians on land that non-Indians owned in fee simple on a reservation. The Court held that, in general, tribes could not regulate such activities, just as tribes cannot "exercise criminal jurisdiction over non-Indians."[25] The Court did, however, provide two exceptions. First, a "tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."[26] Second, a "tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[27] The Court, however, found neither exception applied to hunting and fishing by non-Indians in the case at issue.

Putting all of this together, federal courts have held the tribes can only regulate the water rights of non-Indian owners of fee land within the boundaries of a reservation if one of the *Montana* exceptions are met. For instance, in *Confederated Salish & Kootenai Tribes of Flathead Reservation v. Namen*,[28] the Ninth Circuit held a confederation of Tribes had the authority under *Montana* to regulate the water rights of non-Native Americans who owned fee lands within the reservation. Relying on the second exception (health and welfare) of *Montana*, the court reasoned use of the bed and banks of a bordering lake by the non-members had the potential to affect the economy, welfare, and health of the Tribes, thereby justifying tribal regulation.[29] Later, in *Montana v. United States EPA*,[30] the Ninth Circuit upheld the Environmental Protection Agency's regulations[31] implementing the process by which a tribe could obtain "Treatment as a State" status and authority to adopt water quality standards for the reservation that would apply to all landowners on the reservation even those non-Indians with fees land. The EPA had approved the tribe's water quality standards after finding the activities of the non-members posed such serious and substantial threats to tribal health and welfare and that tribal regulation was essential.[32]

State and Tribal Authority Over Water that Passes Through a Reservation but Intersects with

Non-Indian Users

When it comes to water rights, the complexities do not end at reservation boundaries. This section addresses the often-tricky terrain of regulating water resources that not only pass through Indian reservations but also intersect with non-Indian users.

States and tribes may disagree over managing water resources that cross Indian reservations but include non-Indians. Courts must balance state and tribal authority while following the Supreme Court precedent in *Montana*. In situations where the water resource is wholly contained within reservations and the only non-Indian users affected are those owning fee land within the boundaries of a reservation, courts are likely to deny state authority to regulate the water resource. In *Colville Confederated Tribes v. Walton*,[33] the Ninth Circuit held the state of Washington did not have the authority to grant water permits on reservation lands to a non-Indian fee owner over a water system that was non-navigable and located entirely within a reservation. The court reasoned that allowing Washington to regulate the water system would have jeopardized tribal uses of the water system for agricultural and fishing purposes—that is, that regulation of the water system was "critical to the lifestyle of its residents and the development of its resources."[34]

Meanwhile, where the water resource originates or flows outside of the reservation, courts are likely to allow the state to exercise regulatory authority over the resource. In *United States v. Anderson*,[35] the Ninth Circuit held the state of Washington could exercise regulatory authority over excess waters generated by a water basin that did not originate in and flowed outside of an Indian reservation. Two factors grounded the court's decision. One, the court reasoned state regulation would not "infringe on the tribal right to self-government nor impact on the Tribe's economic welfare because those rights have been quantified" and a federal water master had been appointed to monitor compliance.[36] Second, given the basin originated and flowed outside the reservation, the court reasoned the state had a substantial interest in being allowed to exercise regulatory authority over the excess waters.[37]

Establishing a water right priority date for allotments under state prior appropriation law may differ from state to state. California law provides little guidance on this issue, but the Wyoming Supreme Court has held that non-Indian purchasers of allotments obtained rights with the allottee's reservation priority date so long as the water was used within a reasonable time by the non-Indian.[38] In addition, the court held the same standard applies to lands reacquired by Indian purchasers. The Ninth Circuit Court also explains that the right transferred from the Indian allotment owners to a non-native allotment owner would carry with it the original priority date; otherwise, there would be a diminution in the value of that right.[39] However, the non-Indian purchaser is subject to state laws regarding forfeiture and reductions to that water correct quantity through non-use or non-beneficial uses.

Non-Allotment-Derived Fee Land Off Reservation by Indian or Tribes

Fee land owned off the reservation by Indians or tribes is subject to state regulation and state court adjudication just as any other fee land. Tribes and allotment owners should consider this difference when purchasing or selling fee lands and their associated water rights.

State Authority over Tribal Water Rights

This section provides a deep dive into how federal and state governments interact to regulate water resources, with a particular focus on California's approach and its implications for Indian reservations.

State System and Tribal Rights Therein

The federal government may defer to states to allocate water resources while maintaining certain federal water rights, including Indian reserved water rights. This creates a complex interaction where state law may intersect with but, in most cases, does not directly interfere with Indian water rights.

In California, the appropriation of water is controlled by state statute[40] and administered by the State Water Resources Control Board (SWRCB). As noted above, California principally follows a prior appropriation system of water rights (keeping in mind California also recognizes some riparian rights).[41] To review, under prior appropriation, water users who make beneficial use of a water supply obtain rights to that water under a seniority system based on the date the water was first put to beneficial use (termed the "priority date").[42] Indian water rights are typically senior in priority to non-Indian uses under state prior appropriation law because such rights were established before non-Indian uses of the water (most Indian reservations, and therefore water rights, predated non-Indian settlements).[43] In addition, Indian reserved water rights do not depend on putting water to beneficial use but rather are recognized as a tribe's original or federally-granted ownership of reservation territory.[44] However, water rights were not quantified when reservations were established, meaning they must often be adjudicated under protracted processes pursuant to state water law.

At the same time, for new water rights, water is available only if it is previously unappropriated and is used in a reasonable and beneficial manner.[45] The SWRCB must consider the public interest[46] and assess the proposed use in light of all other beneficial uses that may be made of the water.[47] The SWRCB may condition the permit[48] and may reserve jurisdiction to amend or revise the permit under certain circumstances.[49] So long as the appropriator completes the diversion and application of the water with due diligence in accordance with the terms of the permit, the SWRCB will then grant the appropriator a license.[50] The use of appropriated water, its place of use, and its point of diversion may be permitted by the SWRCB if no other users are injured.[51]

The question of whether an Indian reservation may have water rights based upon state permits and licenses, separate from any federal water rights, is a fact-based inquiry: either the permits and licenses exist or the permits and licenses do not exist. For purchased lands, this will involve a search of both the deed records and the water permit filings by the predecessor in interest to the United States.[52] While this is a labor-intensive task, it raises no legal issues unique to California.

Having peeled back the layers of state authority over tribal water rights, our next move is to explore the more specific regulatory and legal frameworks that further define this complex interaction.

Creations of State Law that Apply or Can Apply in Indian Country

Although reserved Indian water rights are largely a function of federal law, creations under California state law can also impact water in and adjacent to Indian Country. The following is a look at California riparian and appropriative water rights jurisprudence in the context of impacts to Indian Country within California.

State riparian rights

Navigating the labyrinth of water rights takes us next to the domain of state riparian rights. California is a state where riparian rights are not only legal constructs but also constitutional mandates. This section offers a comprehensive overview of these rights, their limitations, and their implications for various stakeholders, including tribes.

General attributes and limitations of riparian rights

Riparian water rights are recognized in California's state constitution[53] but are defined through case law. Riparian rights are an inherent attribute of lands contiguous to definable natural channels or bodies of water. They are superior to most appropriative rights, are correlative[54] between riparians, and cannot be lost through nonuse.[55] Riparian landowners are entitled to whatever portion of the natural flow[56] of the waterbody they can use in a reasonable and beneficial manner and need not apply for state permission to exercise their rights, except in adjudicated watersheds. Riparian rights may not be assigned to other lands. Riparian rights not used are considered dormant riparian rights in California.[57]

California courts and the State Water Resources Control Board (SWRCB) limit the reach of riparian rights where possible. However, the courts have also restricted the state's ability to limit riparian rights because of their protection under the California Constitution and concerns over the uncompensated taking of recognized property rights.[58] Many advantages to riparian rights, viewed as fundamental attributes of such rights in riparian states, do not exist in California.

Source of title rule and contiguity of reservation lands

In California, the severance of riparian rights from the land is always permanent. The subdivision of riparian parcels (adjacent to / or 'touching' water bodies) erases the riparian rights of any subdivided piece not subsequently abutting the waterbody—even if such the severed parts are later united—unless there is a clear intent to preserve riparian rights on the nonabutting parcels.[59] Grants of riparian rights to nonriparians are allowed, but they proportionately reduce the original riparian's rights.[60] Severance

from water bodies is a component of issues faced by both terminated and unterminated tribes, as well as, public domain allotment owners.[61]

Watershed limitation

Riparian rights apply only to lands within the watershed, even if out-of-watershed lands are part of the parcel contiguous to the waterbody.[62]

Reasonable and beneficial use

Article XIV, Section 3 of the California Constitution subjects riparian rights to the same requirement of reasonable and beneficial use that attaches to appropriative rights.[63] State law declares domestic use to be the highest use, followed by irrigation.[64] Historically, reasonable use has not been a substantial impediment for most water users. However, the state and the courts have been more willing to scrutinize the reasonableness of the methods used to divert and apply water.[65] On the other hand, some uses (such as maintenance of instream flows for protection of fisheries) which previously had not been recognized as beneficial are now sanctioned.[66]

Adjudication of unexercised rights

Once the State Water Board files a notice of general adjudication for a stream,[67] it may choose to relegate unexercised[68] riparian rights to the lowest priority.[69] Lowering the priority of riparian rights has yet to occur for federally reserved water rights. It may also prioritize any future water uses ahead of the unexercised right until the riparian owner exercises the right.

Until a waterbody is adjudicated, however, the state may not diminish riparian rights. While any claimant may petition for an adjudication and the Board must grant the petition where it is in "the public interest and necessity,"[70] the Board has traditionally waited until the streams seemed fully appropriated and an adjudication appeared necessary to quiet a continuing controversy.[71] The possibility for a *Winters* right to disrupt the determination of the Board may cause friction between tribal, state, federal authorities when a stream is fully appropriated.

Limitation of Riparian Rights for Municipal Uses

Municipalities cannot acquire riparian rights by virtue of bordering or encompassing waterbodies;[72] but where municipalities own riparian lands, they enjoy the same rights as other riparians.[73] This means that a municipality may not be able to rely upon its riparian rights to provide water to its nonriparian residents[74], or, at a minimum, may be allowed to distribute only that quantity of water that its riparian rights would allow it to use on its riparian parcels.[75] Municipal riparian rights could also be limited by the constitutional requirement of "reasonable use" or equity based considerations which courts have applied to maintain a certain degree of proportionality among riparian water users.[76]

Prescription

Prescriptive water rights are those that are obtained through adverse possession. Riparian rights may be gained/lost by prescription where actual, open and notorious, exclusive, hostile and adverse use of the water under claim of title by either an appropriator or another riparian has continued uninterrupted for five years and the injured riparian fails to file suit.[77] A downstream user cannot prescript against an upstream riparian since, by definition, the taking of water after it has passed the riparian's property is not adverse to the riparian's interests. Nor can prescriptive rights to water be acquired against the state subsequent to passage of the Water Commission Act in 1914.[78]

State Riparian Rights of Federal Reserved Lands

In *In re Waters of Hallett Creek*, the court concluded that federal reserve lands have riparian rights under state law and that Congress did not relinquish state-granted riparian rights for the lands reserved from the public domain. At issue in *Hallett Creek* was whether the Desert Land Act subordinated federal riparian water rights for public domain lands to the rights of subsequent appropriators.[79] In *Hallett Creek*, the California Supreme Court established that under the state allocation system, the federal government holds the same rights as any other property owner. The court clarified that the Desert Land Act did not abdicate the federal government's interest in public domain waters, but it did subordinate its riparian rights to those of earlier appropriators.[80] Additionally, the ruling highlighted that the Desert Land Act did not apply to federally reserved lands, meaning that the federal government's riparian rights remained primary for meeting the water needs of these lands, unaffected by the traditional reserved water rights hierarchy.[81] Understanding how a federal riparian right is treated is critical to understanding when public domain allotments or other federal grants of land or water are controlled by state law or the *Win*ters doctrine.

Unexercised to riparian rights may be limited by the state

As we continue our deep dive into water rights, we now focus on unexercised riparian rights. This is a nuanced area where legal frameworks give the SWRCB the authority to limit these rights under specific conditions. Particularly in California, this section unravels how unexercised rights interact with existing water rights, and what this means for various stakeholders, including tribes.

At present

In whole stream adjudications, the court in *In re Waters of Long Valley Creek Stream System* found that the SWRCB may subordinate unexercised riparian rights below those of all water rights authorized prior to their exercise.[82] Unused riparian rights cannot be extinguished altogether, but considering the uncertainty and inefficiency that unquantifiable water rights pose, the Board can limit their "scope, nature, and priority" where doing so furthers the reasonable and beneficial use of water.[83] Under the guise of reasonable and beneficial use, the court has redefined the riparian right so that state power to control its exercise is significantly enlarged.[84] The practical effect is to convert adjudicated water systems into pure appropriation systems.[85]

In the future

Although the court in *In re Waters of Long Valley Creek Stream System* referred only to whole stream adjudications, there is no apparent reason, applying the court's rationale, that the Board could not reprioritize unused riparian rights in any dispute properly before it[86] *Long Valley Creek* is premised on the idea that the state's constitutional policy of reasonable and beneficial use of water[87] is furthered by the clarity and certainty that reprioritization would yield. Therefore, any time that the Board has the authority to make a determination on claims to water rights, this interest would be served by assigning unused riparian rights the lowest priority possible.

Tribal claims to California riparian water rights

Riparian rights may benefit Indian reservations in a variety of contexts, including a significant adjunct to federal reserved rights. There are factual scenarios in which use and assertion of riparian rights may be preferable to an assertion of reserved rights. Reservations with unfavorable priority dates may benefit from a riparian rights claim which places them in an equal position to the other riparians on the stream.[88] Reservations which may not gain sufficient reserved rights under a strict interpretation of the "primary purposes" (*Winters*) doctrine may claim riparian rights for other purposes.

The Supreme Court explicitly stated in *United States v. New Mexico* [89] that the federal government can use state law to assert water rights for federal reserved lands in addition to any recognized reserved rights. The California Supreme Court, in *In re Waters of Hallett Creek Stream System*,[90] further clarified that the United States never relinquished state riparian rights for its reserved lands (though it subordinated its rights on non-reserved "public domain" lands). Thus, tribes needing more water than their reserved rights confer, can assert riparian rights for any reasonable and beneficial uses occurring on their lands within the watershed and contiguous to the waterbody, subject only to pre-reservation (or pre-patent, in the case of tribal lands acquired by the United States from private entities) appropriations.[91] Reservations established for a purpose which may be narrowly interpreted may claim additional water for modern uses pursuant to rights as riparian owners.

Since riparian rights cannot be lost by nonuse, proof that water has been used reasonably and beneficially in the past for purposes roughly commensurate with the purposes for which riparian rights are now (or later) being asserted should protect those rights from the deprioritization allowed for by *In re Waters of Long Valley Creek Stream System*.[92] It is possible, however given the tone *of Long Valley Creek*, and the lack of any case law on the issue, that the Board, in watershed adjudications, may be able to prioritize presently exercised riparian and appropriative rights over the riparian rights of tribes which have not exercised them for a certain period of time and/or where a certain amount of notice has been given. Since many of the state's waters are fully assigned, relegating these rights to lowest priority will generally yield very little water.

With a clearer understanding of how unexercised riparian rights are managed and can be limited, we are well-positioned to explore the broader complexities of appropriative water rights and their intersectionality with state and tribal rights.

California appropriative rights

California appropriative water rights are regulated and administered by the SWRCB. Tribal water rights may be established by state permits and licenses, or with the McCarren Amendment which allows lawsuits concerning some federal water rights to be adjudicated in state courts and administrative proceedings. Appropriative rights depend on the date of application and pre-1914 claims can be made with a priority date of the reservation's establishment but not necessarily the borders.

The California system

The appropriation of water is controlled by state statute[93]and administered by the SWRCB. Water is available only if it is previously unappropriated and is to be used in a reasonable and beneficial manner.[94] The Board must consider the public

interest[95] and assess the proposed use in light of all other beneficial uses that may be made of the water.[96] The Board may condition the permit[97] and may reserve jurisdiction to amend or revise the permit under certain circumstances.[98] So long as the appropriator completes the diversion and application of the water with due diligence in accordance with the terms of the permit, the Board will then grant the appropriator a license.[99] The use of appropriated water, its place of use, and its point of diversion may be permitted by the Board if no other users are injured.[100]

Tribal rights to state appropriation rights

The question of whether an Indian reservation may have rights based upon state permits and licenses is a fact-based inquiry: either the permits and licenses exist or the permits and licenses do not exist. For purchased lands, this will involve a search of both the deed records and the water permit filings by the predecessor in interest to the United States. While this is a labor-intensive task, it raises no legal issues unique to California.

Which Rights Rule? Federal vs. State Rights & Dates of Priority

Federal preemption of state water right systems have a nuanced past and depends on the right. For example, a federal entity that is using water as an appropriator and lacks express authority from Congress that preempts a state's authority, will have to comply with state water right regulations. We highlight specific situations where there are changes in deference to state water regulation in the context of tribal water concerns.

Federal Deference to State Water Regulation

Federal deference to state water regulations is acknowledged as a practical approach to state water regulation but does not limit Congress from expressly stating a directive that alters this deferential approach.[101] The Ninth Circuit has ruled that "state law will control the distribution of water rights to the extent that there is no preempting federal directive" and the "clear general deference to state water law" to hold that state law applies to transfers and change of use proceedings for federal reserved water rights.[102] For *Winters* rights, precedence established federal preemption, ""the concept that [reserved] rights are created by federal law to protect the intent of the original treaties runs throughout the reserved rights cases, and, while in Indian hands, reserved rights cannot be abridged or diminished by state law."[103]

However, the *New Mexico* decision limits those protections to the "primary purpose" of the reservation and leaves an opening for state regulation of secondary purposes for water.[104] This reasoning is not without critique and is potentially worth challenging considering recent litigation in the Ninth Circuit over *Winters* groundwater rights.[105]

Armed with a comprehensive understanding of both riparian and appropriative rights in California, we are well-equipped to explore the even more intricate layers of water law.

Priority Date

Priority date controls both *Winters* and state appropriative water rights. Appropriative rights in California depend on the date application for that right is submitted post-1914, and when it was claimed pre-1914. The state's priority system is still controlling but recognizes the priority date of a *Winters* right at the establishment of the reservation.[106] It is the 'official' act of establishment of the reservation that controls the *Winters* right date not when the boundary lines are actually drawn and marked.[107]

Limited State Authority over Groundwater

This section of the study provides an overview of groundwater rights under California law and an overview of the Sustainable Groundwater Management Act (SGMA). It also provides an overview of the groundwater system in California and groundwater laws. It also provides a case study of the Agua Caliente Band of Cahuilla Indians ("Agua Caliente Tribe") litigation that established a *Winters* right to the underlying groundwater in a landmark Ninth Circuit Court of Appeals decision. (See full case study below). The Agua Caliente Tribe's case was a response to a dispute with the Coachella Valley Water District ("CVWD") and the Desert Water Agency ("DWA"). The District Court affirmed that Agua Caliente Tribe did not lose its groundwater right through non-use but having a *Winters* groundwater right does not guarantee standing to adjudicate the scope of that right.

***Winters* Doctrine Applies to Groundwater: Agua Caliente Tribe v. Coachella Water District**

In the Ninth Circuit, the leading case on *Winters'* rights attaching to groundwater is *Agua Caliente v. Coachella Water District*.[108] Agua Caliente Tribe established that *Winters r*ights starts with assessing historical documentation establishing the primary purpose for why the federal government set aside lands for a tribe.[109] That purpose extends to groundwater because it follows the same logic as surface water, essentially that it would be unthinkable to set aside land for the primary purpose of a homeland and leave it without water to support that tribe adequately:

"The federal purpose for which land was reserved is the driving force behind the reserved rights doctrine. 'Each time [the] Court has applied the "implied-reservation-of-water-doctrine," it has carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be entirely defeated.' Id. at 700."[110]

The Ninth Circuit reasoned that once the primary purpose is established, then the next requirement to consider is whether the water is "appurtenant" to the reservation, i.e., whether the water to which the tribe seeks a right is sufficiently connected to the reservation for the right to attach. The Court could not find a reason groundwater should be treated separate than surface water and that groundwater should be considered impliedly reserved by the federal government,

"Appurtenance, however, simply limits the reserved right to those waters which are attached to the reservation. It does not limit the right to surface water only. *Cappaert* itself hinted that impliedly reserved waters may include appurtenant groundwater when it held that 'the United States can protect its water from subsequent diversion, whether the diversion is of surface or groundwater.' If the United States can protect against groundwater diversions, it follows that the government can protect the groundwater itself."[111]

The Court recognized what was already true, that *Winters* rights apply to water necessary to fulfill a liberally construed definition of the primary purpose of a reservation, which were established for many California displaced tribes.[112]

Groundwater rights under California law: The Sustainable Groundwater Management Act (SGMA)

The SGMA[113] was enacted in 2014 as the first statewide regulation of groundwater in California's history. SGMA created local government authorities called Groundwater Sustainability Agencies (GSAs) that would need to create Groundwater Sustainability Plans (GSPs) to reach "sustainable yield" for overdrafted, high, and medium priority groundwater basins. The state can step in and take control of a GSA if it does not show progress in meeting the sustainable yield targets. Critically important for tribes is an understanding of how tribal governments are part of SGMA, GSAs, and GSPs as a landowner, sovereign government, and community stakeholder.

An overview of California groundwater

Before we delve into SGMA, we need to understand the larger California groundwater scheme that SGMA operates within.

About 40 percent of California overlies groundwater basins, which support nearly half of the state's water uses.[114] No permit system applies to groundwater.[115] Overlying groundwater users share a "correlative" right to the waters that they overlie,[116] paramount to the rights of all other users,[117] though they may only take that quantity of water which they can put to reasonable and beneficial use.[118]

Exporting groundwater

Groundwater may be exported outside its basin of origin if it is acquired from overlying owners through purchase, condemnation, or prescription, or is "surplus",[119] but export in the latter case must cease whenever overlying uses are no longer satisfied.[120] Among exporters of groundwater, prior appropriation is the rule.[121] Conflicts between groundwater pumpers can result from either overdrafting of the aquifer, or well interference where no overdrafting is occurring.[122]

Categories of groundwater rights

Groundwater rights in California are generally classified in three categories: overlying, appropriative, and prescriptive.[123] An overlying right is the right of a landowner to pump groundwater from underneath that land for beneficial use on the land overlying the water basin in which the land is located.[124] In general, absent any adverse possession action, overlying landowners do not lose their rights to water use if they do not exercise them.[125]

An appropriative right is defined in California as:

"… [I]s the right to take either surface or subsurface waters in excess of waters reasonably and beneficially used by riparian or overlying owners for use with nonriparian or nonoverlying land or for the public water supply. It is established pursuant to statute by the actual taking of water for nonriparian or nonoverlying uses." 3 Cal. Real Est. § 9:29 (4th ed.)"

An appropriative right is often summarized as the ability to move water from a water source in one location and use it for a beneficial purpose in another location. However, in the groundwater context that right is limited to "surplus water," or water that is not needed for the reasonable beneficial use of those having prior rights.[126] This surplus water can be appropriated on privately owned land for non-overlying use, such as devotion to public use.

In California, a groundwater prescriptive right is a type of water right. It is the right to take water from the water source as a form of occupancy that confers a prescriptive title to the occupier.[127] A prescription right can be gained by an appropriator under certain circumstances, such as using groundwater to which it is not legally entitled in a manner that is actual, open and notorious, hostile and adverse to the original owner, continuous and uninterrupted for the statutory period of five years, and under claim of right. [128] Acquiring a prescriptive right in groundwater rearranges water rights priorities among the water users, elevating the priority to equal that of an overlying landowner.[129] However, prescriptive rights may not be claimed on surplus or excess water.[130]

Reasonable and Beneficial Use As with all water use in California, per California's Constitution, water use is restricted to that which is deemed reasonable and beneficial.[131] In other words, the overlying landowner may only take the precise amount of water that is reasonably needed for beneficial use on the overlying land.

However, determining "reasonably needed" and beneficial use spawn important considerations in groundwater allocation.

Overdrafted basins

Because both the hydrological cycle and pumping rates vary over time, it can be difficult to determine when an overdraft is occurring.[132] The current standard applied by the courts defines an overdraft as the amount by which the pumping rate exceeds the aquifer's annual safe yield plus "temporary surplus."[133] Temporary surplus is the amount of unused surface water in wet years which normally would flow out of the basin, were it not for space in the aquifer (created by the pumping) to capture it. Overdrafted basins were covered by DWR Bulletin 118 and then updated through the SGMA process. Overdrafted groundwater basins are listed on DWR's website.[134]

Correlative rights

Overlying groundwater rights are analogous to riparian rights to surface water. Each owner of land that overlies a common groundwater supply has a right to reasonable, beneficial use of the water of that supply on or in connection with the overlying land. The use of each overlying landowner is "correlative" with the rights of all other owners of land overlying the same groundwater supply. In the event of insufficiency of the supply for the requirements of the overlying landowners, the water may be apportioned among them all by a court decree. There is no priority in time among overlying pumpers. SGMA does not alter previous or future adjudications except that judges are encouraged to keep sustainable yield in mind when determining correlative rights in a groundwater adjudication.[135] There is no statutory adjudication procedure available to groundwater users,[136] but the courts will determine each user's "reasonable share" of water in cases of aquifer overdraft.[137] The courts are instructed to develop a "physical solution" where possible and may impose one even if the parties do not agree.[138] The correlative rights doctrine does not protect the aquifer at its original level in all instances. If maintaining the natural water table requires the prohibition of virtually all withdrawals, such an injunction may be found to violate the constitutional policy of reasonable and beneficial use.[139]

Prescribed rights

Groundwater rights may not be acquired by prescription prior to an overdraft since overlying users would not be adversely affected prior to that time.[140] In *Pasadena v.* Alhambra[141] the State Supreme Court used the prescription doctrine to allocate rights between parties who had been overdrafting an aquifer for several decades.[142] Since all of the parties had been invading the rights of each other and all were, or should have been, aware of the resulting overdraft, the Court concluded that each user therefore acquired "mutual prescriptive rights."[143] Thus, the groundwaters were apportioned between the existing users based upon their historical use, but proportionally reduced to achieve an overall safe yield.

The mutual prescription doctrine seemed to threaten all groundwater rights in overdrafted basins, but the State sSpreme Court eventually revisited the doctrine and significantly narrowed its scope in *Los Angeles v. San Fernando*. [144] Recognizing that mutual prescription created a "race to the pumphouse" once overdraft begun and concluding that prescription against cities was prohibited even if carried out by other cities,[145] the Court in *Los Angeles v. San Fernando* held mutual prescription inapplicable. While San Fernando had calmed the fears of public entities, mutual prescription could have worked against the correlative rights of private parties. To protect themselves, private overlying owners may: 1) obtain a declaratory judgement establishing their rights;[146] 2) obtain injunctive relief against appropriators within five years after overdraft begins;[147] or 3) exercise their correlative rights at some point each five years.

After the *City of Barstow v. Mojave Water Agency* case, the Court made concessions by emphasizing the importance of the priority of water rights system through classifying right holders in groups and apportioning the water based on the priority system for each group.[148] The path in many determinations of groundwater rights is to first determine if mutual prescription is present within each class of users, while prioritizing overlying water right holders' access to the safe yield, then apportioning the rest to appropriators using creative physical solutions.[149]

Unexercised correlative rights

Since correlative rights cannot be lost through nonuse,[150] overlying landowners are free to inaugurate new uses at a future date to the detriment of existing users. Unlike riparian rights, however, the courts have not yet allowed unexercised correlative rights to be quantified or subordinated to exercised rights.[151] In *Wright v. Goleta Water Dist*. the court held that stare decisis and the lack of a statutory adjudication procedure for groundwater prevented it from quantifying unexercised correlative rights, even though all parties desired quantification.[152]

SGMA and Cal. Civ. Proc. Code 830(b) encourage judges to consider sustainable yield when determining correlative rights in a groundwater adjudication. Groundwater rights may not be acquired by prescription prior to an overdraft, however, in the *Pasadena v. Alhambra* case the court used a mutual prescription doctrine to allocate rights between parties who had been overdrafting an aquifer. This has been significantly limited by the *Los Angeles v. San Fernando* case, however, with prescription against cities being prohibited. Private overlying owners may protect themselves by obtaining a declaratory judgement, injunctive relief against appropriators, or exercising their correlative rights every five years. Correlative rights cannot be lost through nonuse, but the courts have not yet allowed unexercised correlative rights to be quantified or subordinated.

Municipal groundwater uses

Public use of groundwater, even where all recipients of the water overlie the aquifer, is not treated as an overlying use.[153]Unless a municipality acquires correlative rights through purchase, condemnation or prescription, their correlative rights apply only to city property.[154]

Tribal claims to groundwater

Indian reservations are entitled to water rights for groundwater under both their reserved rights and under state law. The determination of the federally reserved right to groundwater follows the traditional analysis regarding the water's use and the reservation's purpose for the tribe's reserved right to water. In California, a federal district court has determined that federally reserved water rights for Indian reservations include groundwater as well as surface water.[155].

Case Study: Agua Caliente Band of Cahuilla Indians Asserting *Winters* Rights to an Overdrafted Groundwater Basin

As mentioned earlier the Agua Caliente Tribe established a *Winters* right to the underlying groundwater in a landmark Ninth Circuit Court of Appeals decision.[156] The lessons from the first phase of the litigation and subsequent ongoing issues are critical to future tribal groundwater claims.

Background

The Coachella Valley Water District ("CVWD") and the Desert Water Agency ("DWA") filed an interlocutory appeal after the District Court found that the Agua Caliente Tribe had a *Winters* right to groundwater.[157] The Court found that the "United States impliedly reserved appurtenant water sources, including groundwater, when it created the Tribe's reservation in California's arid Coachella Valley."[158]

The Agua Caliente Tribe, CVWD, and DWA had several years of attempted negotiation and collaboration on settling this issue before it went to court. The dispute centered primarily on degrading groundwater conditions in the parties' shared groundwater basin due to overdraft and mixing imported Colorado River water into the basin, increasing the Total Dissolved Solids ("TDS") of the water, reducing water quality. The litigation was broken into three phases, with the first phase set to determine whether there is a *Winters* right to groundwater, prior to quantifying that right in phase two, and addressing water quality in phase three.

Phase One: Does the Winters Doctrine Apply to Groundwater?

The Ninth Circuit reviewed the line of decisions concerning *Winters* rights for both Indian and non-Indian cases to determine that water set aside for the primary purpose of a homeland for a tribe implies setting aside the underlying groundwater, affording it the same status as *Winters* rights for surface water.[159] This means that the groundwater right is not a correlative right under state law, the Agua Caliente Tribe need not show historical pumping to claim a *Winters* groundwater right, and citing *New Mexico*, the groundwater right is tied to the water needed for the purpose of the reservation at the time of that reservation's establishment.[160]

However, once the existence of a *Winters* right to groundwater is established, more inquiry is required to address how much water is available to the Tribe under the *Winters* right and of what quality.

Post Phase One: Standing for Quantification and Quality

After the Agua Caliente Tribe established a *Winters* right to its groundwater, it attempted to push forward the quantification of that right and address potential water quality impacts to the groundwater from increased TDS coming from imported Colorado

River water.[161] The summary judgment sought by the Agua Caliente Tribe required proper "standing" (meaning the Tribe has suffered an injury or damage to its water right) to bring a quantification claim and to address the harm that importing water from the Colorado River may have to the groundwater basin.

The District Court affirmed that the Agua Caliente Tribe did not lose its groundwater right through non-use but having a *Winters* groundwater right does not guarantee standing to adjudicate the scope of that right. This is demonstrated by the tribe's use of groundwater or an "invasion of its legally protected interest"[162] The District Court citied *Crow Creek Sioux Tribe v. United States*[163] in its explanation that the *Winters* right is still a usufructuary right, right of use, that a "tribe cannot be injured by an 'action that does not a affect [its] ability to use sufficient water to fulfill the purposes of the [r]eservation."[164] This means that the tribe must present some evidence of injury to its ability to use sufficient water to fulfill the purposes of the reservation or it will not get past summary judgment. The Agua Caliente Tribe was not pumping water and did not have concrete plans to use the groundwater that they had a *Winters* right to, which means there was no injury to the Tribe's ability to use the groundwater.

Agua Caliente Tribe asserted that the quantification action did not need an actual or imminent injury because it was similar to a quiet title action to clarify the uncertainty around the scope of the *Winters* groundwater right.[165] The District Court rejected this argument.[166]

Lessons for Asserting Winters Claims to Groundwater

At the heart of the legal issues preventing the quantification of the *Winters* right is an actual or imminent injury. While it was a major victory to link *Winters* rights with groundwater, the Tribe failed to plead facts showing harm or imminent harm to its *Winters* right. The lesson to future assertion of the *Winters* groundwater right is to actively engage in using the tribe's water right (pumping) or create plans for using water such as economic development or a culturally important heritage site that needs to be maintained via the groundwater resource. The Ninth Circuit has yet to weigh in on these procedural hurdles set forth by the District Court.

Asserting Sovereignty

Tribal participation in a Groundwater Sustainability Agencies (GSA) (discussed above) under the SGMA can serve as a powerful way to assert sovereignty over water resources. While tribes have inherent sovereign rights, the recognition and enforcement of these rights in practice can be challenging. Active involvement in a GSA provides tribes a voice in regional water management decisions, enhancing their capacity to protect and exercise their water rights.

Through this participation, tribes can negotiate directly with other water users and stakeholders in the region. They can highlight their water-related concerns, propose solutions, and form alliances to protect their interests. This can prove instrumental in achieving favorable outcomes in any potential water rights settlements.

Furthermore, involvement in the GSA allows tribes to raise the importance of their beneficial uses of water, which could include cultural, environmental, and economic uses. This could enhance the recognition and respect for tribal water rights and uses in the broader community, thus strengthening their sovereignty over water resources.

In summary, while participation in a GSA may present certain administrative or political challenges, it can offer significant benefits for tribes in terms of protecting and asserting their water rights and sovereignty.

Settlement vs. Adjudication: Pros and Cons for Tribes

Departments of Justice and Interior

Tribes who embark on establishing a *Winters* right claim must be mindful of the role and involvement of the federal government. The federal government holds the title to tribal and Indian water in trust and has a significant interest in its own right and as trustee, in protecting tribal Indian water rights.[167] So, whether a tribe or allottee seeks to negotiate or litigate their water rights, the federal government will be at the table which for most tribes and allottees with few resources can mean welcome support and expertise needed to advance their claim.

It is policy of the Department of the Interior that Indian water rights should be resolved through negotiated settlements rather than litigation The nonpartisan Congressional Research Service's (CSR) in its 2023 report to Congress on "*Indian Water Rights Settlement*"[168] states that from 1978 to 2023, there were 39 Indian water rights settlement cases. Of these 35 were approved by Congress and 4 were administratively approved through the Department of Justice and Interior.

No doubt, a tribe or allottee will be strongly encouraged to work toward settling their water claims once the federal government becomes part of their case. But there is a strong case to be made why settlement is the preferred option over litigation.

The Pros of Settlement

Adjudications are typically long, complex legal proceedings that can be very expensive. They require extensive research, expert testimony, and often years of litigation. While adjudications can confirm a tribe's water rights, they cannot provide funding for tribes to develop those rights. This means that even if a tribe is successful in an adjudication, it may not have the resources necessary to put its water rights to beneficial use, such as building the infrastructure necessary for irrigation, drinking water systems, or power generation.

On the other hand, because most water rights settlements are approved by Congress, settlements can include funding provisions. These might cover the costs of infrastructure development, water quality improvement projects, and other needs. However, the amount of funding (appropriated through Congress) provided through settlements can vary widely and may not fully cover the tribe's needs.

Ability to Lease Water Rights

Settlements often include provisions allowing tribes to lease their water rights, which can provide a source of income and/or be used to secure beneficial partnerships or agreements. For example, a tribe might lease its water rights to a nearby city or agricultural operation in exchange for a consistent revenue stream or other benefits. Leasing can be a way for tribes to monetize their water rights without permanently giving them up. However, it's important to note that not all settlements permit leasing, and the terms can vary widely.

In contrast, adjudications do not generally provide the same authorization. This means that if a tribe's water rights are confirmed through adjudication, they would likely need separate congressional approval to lease those rights. This can be a lengthy and uncertain process, with no guarantee of success.

Clear Responsibilities

Another aspect to consider when weighing settlements versus adjudications is the clarity of responsibilities, particularly those of the federal government. Water rights law is complex and multifaceted, and the federal government, as noted above, has a trust responsibility to protect tribal resources, which includes water.

In an adjudication, it can be challenging to demonstrate a clear violation of this trust responsibility. The process may require extensive evidence and complex legal arguments. Moreover, the outcome of an adjudication is often uncertain, which can create additional risk for tribes.

Settlements, however, can provide more certainty and clarity. They can establish clear responsibilities for the federal government, such as obligations to fund infrastructure projects, manage water resources, or take other actions to protect and enhance tribal water rights. However, the details of these responsibilities can vary widely between settlements, and tribes must negotiate carefully to ensure their needs and interests are adequately protected.

The Cons to Settlement

The 2023 CSR's report highlight that not all tribal communities support settling their water right's claims, voicing concerns:

- Permanent quantification of their water rights through settlements may limit the abilities of tribes to develop in the future;
- Settlements may limit tribes to a particular set of uses (e.g., agriculture) and prevent potential opportunities for greater economic yields in the future;
- Negotiating their claims in exchange for infrastructure funding, is viewed as the process akin to the "first treaty era," when Indian tribes forfeited their lands; and
- Courts may be more favorable to tribes and allow for greater gains through litigation.[169]

State Authority Over Federal Indian Water Rights Footnotes

1 The Water Commission Act (provisions regulating prior appropriation codified at Cal. Wat. Code S 1200 et. seq.) initiated the statutory system of prior appropriation in 1914. Only surface waters may be appropriated. ↑

2 See In re Water of Hallett Creek Stream Sys., 44 Cal. 3d 448 (1988) ("Under the prior appropriation doctrine, a person who diverts or appropriates water from a watercourse and puts it to a reasonable and beneficial use acquires a right to that use which is superior to the rights of later appropriators.") ↑

3 See, Anderson, Sarah. "The International Regulation of Transboundary Groundwater Resources." Stanford Journal of International Law, Vol. 53, 2017, pp. 204. Available at: https://law.stanford.edu/wp-content/uploads/2017/01/anderson_article.pdf.

See also Cynthia Brougher, Indian Reserved Water Rights Under the Winters Doctrine: An Overview, Congressional Research Service (June 8, 2011), accessible at: untitled (nationalaglawcenter.org). ↑

4 See, e.g., Baley v. United States, 134 Fed. Cl. 619, 678 n. 28 (2017). ↑

5 Cal. Const. Article XIV, § 3; Cal. Wat. Code § 1375. ↑

6 Water Rights: Public Trust Resources, California State Water Resources Control Board (Oct. 6, 2017). https://www.waterboards.ca.gov/waterrights/water_issues/programs/public_trust_resources/↑

7 Id. ↑

8 Water Rights Applications: Permitting and Licensing Program, California State Water Resources Control Board (Jun. 11, 2021). https://www.waterboards.ca.gov/waterrights/water_issues/programs/applications/↑

9 Id. ↑

10 Id. ↑

11 The 2009 Code Commission notes that, "[t]he general rule prior to the Water Commission Act was well settled that an appropriator could change the purpose of the use of the water so long as the change was not injurious to others. (See San Bernardino v. Riverside (1921) 198 P. 784, 186 Cal. 7, at 28). Cal. Water Code § 1700 (West) ↑

12 As mentioned in our discussion in Hallet Creek System tribes may have both reserved water rights and state water rights. ↑

13 424 U.S. 800 (1976). ↑

14 Id. at 809-11 ("Thus, bearing in mind the ubiquitous nature of Indian water rights in the Southwest, it is clear that a construction of the Amendment excluding those rights from its coverage would enervate the Amendment's objective."). ↑

15 Id. at 819. ↑

16 See The McCarran Amendment, The United States Department of Justice (May 12, 2015), https://www.justice.gov/enrd/mccarran-amendment. ↑

17 United States v. Idaho, 508 U.S. 1 (1993). ↑

18 United States v. Oregon, 44 F.3d 758 (9th Cir. 1994), cert. denied, 516 U.S. 943 (1995). Note that the McCarren Amendment requires a comprehensive adjudication which is not well defined. ↑

19 Indian Water Rights Settlements, Congressional Research Service (Apr. 16, 2019), https://sgp.fas.org/crs/misc/R44148.pdf ("These agreements allow tribes to quantify their water rights on paper, while also procuring access to water through infrastructure and other related expenses."). ↑

20 See Elizabeth McCallister, Water rights: The McCarren Amendment and Indian Tribes' Reserved Water Rights, 4 Am. Indian L. Rev. 303 (1976). ↑

21 Christian Termyn, Federal Indian Reserved Water Rights and the No Harm Rule, 43 Colum. J. Envtl. L. 533, 535 (2019). ↑

22 See, e.g., In re Gen. Adjudication of All Rights to Use Water in Big Horn River Sys., 835 P.2d 273, 279 (Wyo. 1992) ("We hold that the Tribes, like any other appropriator, must comply with Wyoming water law to change the use of their reserved future project water from agricultural purposes to any other beneficial use."). ↑

23 Not to confuse "regulation" of water which is federal and tribally controlled with earlier discussion on the state's authority to quantify and adjudicate tribal and Indian water rights. ↑

24 450 U.S. 544 (1981). ↑

25 Id. at 565 ("[T]he inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."). ↑

26 Id. ↑

27 Id. ↑

28 665 F.2d 951 (9th Cir. 1982). ↑

29 Id. at 964 ("Such conduct, if unregulated, could increase water pollution, damage the ecology of the lake, interfere with treaty fishing rights, or otherwise harm the lake, which is one of the most important tribal resources. Hence the challenged ordinance falls squarely within the exception recognized in Montana."). ↑

30 137 F.3d 1135 (9th Cir. 1998). ↑

31 40 C.F.R. § 131.8(a) (2013). ↑

32 United States EPA, 137 F.3d at 1141 ("[D]ue to the mobile nature of pollutants in surface water it would in practice be very difficult to separate the effects of water quality impairment on non-Indian fee land from impairment on the tribal portions of the reservation: 'A water system is a unitary resource. The actions of one user have an immediate and direct effect on other users.'") (citing Colville Confederated Tribes v. Walton, 647 F.2d 42, 52 (9th Cir. 1981)). ↑

33 647 F.2d 42 (9th Cir. 1981). ↑

34 Id. at 52-3 ("Where land is set aside for an Indian reservation, Congress has reserved it for federal, as opposed to state needs. Because the [the water system at issue] is located entirely within the reservation, state regulation of some portion of its waters would create the jurisdictional confusion Congress has sought to avoid."). ↑

35 736 F.2d 1358 (9th Cir. 1984). ↑

36 Id. at 1365-66 ("[T]he political and economic welfare of the Tribe will not suffer adverse impact from the state-regulated use of surplus waters by nonmembers on non-Indian lands."). ↑

37 Id. ↑

38 In re General Adjudication of All Rights to Use Water in the Big Horn River System, 753 P.2d 76 (Wyo. 1988) (Big Horn II), aff'd by equally divided court, 492 U.S. 406 (1989) (O'Connor, J., abstaining). ↑

39 Colville Confederated Tribes v. Walton, 647 F.2d 42, 51 (9th Cir. 1981). ↑

40 The Water Commission Act (provisions regulating prior appropriation codified at Cal. Wat. Code S 1200 et. seq.) initiated the statutory system of prior appropriation in 1914. Only surface waters may be appropriated. ↑

41 See Section of water study on riparian rights. ↑

42 See In re Water of Hallett Creek Stream Sys., 44 Cal. 3d 448 (1988) ("Under the prior appropriation doctrine, a person who diverts or appropriates water from a watercourse and puts it to a reasonable and beneficial use acquires a right to that use which is superior to the rights of later appropriators.") ↑

43 See, e.g., Colville Confederated Tribes v. Walton, 752 F.2d 397, 405 (9th Cir. 1985) ("Where reserved rights are properly implied, they arise without regard to equities that may favor competing water users." (citing Cappaert v. United States, 426 U.S. 128, 138-39 (1976))). ↑

44 See, e.g., Baley v. United States, 134 Fed. Cl. 619, 678 n. 28 (2017). ↑

45 Cal. Const. art. X, § 2; Cal. Wat. Code § 1375. ↑

46 Water Rights: Public Trust Resources, Cal. State Water Res. Control Bd. (last updated Oct. 6, 2017), (accessed Feb. 10, 2023). https://www.waterboards.ca.gov/waterrights/water_issues/programs/public_trust_resources/↑

47 Id. ↑

48 Water Rights Applications: Permitting and Licensing Program, Cal. State Water Res. Control Bd. (last updated Sept. 23, 2022), (accessed Feb. 11, 2023) https://www.waterboards.ca.gov/waterrights/water_issues/programs/applications↑

49 Id. ↑

50 Id. ↑

51 Id. ↑

52 The SWRCB maintains a database to track existing water rights called the Electronic Water Rights Information Management System "ERIMS," https://www.waterboards.ca.gov/waterrights/water_issues/programs/ewrims/. ↑

53 Cal. Const. art. X § 2; Cal. Wat. Code §§ 100, 101. ↑

54 In times of shortage, riparians must share any reductions in water usage. ↑

55 Colorado v. New Mexico (1982) 459 U.S. 176 [103 S.Ct. 539, 74 L.Ed.2d 348] (". . . riparian rights originate from land ownership and remain vested even if unexercised"). ↑

56 Waters stored seasonally or longer, diverted from another watershed, or groundwater reaching the waterbody as return flow are not part of natural flow. State Water Resources Control Board, Information Pertaining to Water Rights in California, (1990) at 3 (hereinafter SWRCB Pamphlet). ↑

57 See https://www.waterboards.ca.gov/waterrights/board_info/faqs.html ("However, riparian rights are not lost by non-use. A person who has a riparian right, but is not currently using water, has a "dormant" riparian right. He or she can begin using water under that dormant right at any time. If the new riparian use results in a junior water right holder not having enough water, the junior water right holder must decrease his or her diversion and use of water until the senior water right holder has enough water to meet his or her reasonable needs. Riparian right holders on a stream course all have the same priority. If there is not enough water available for competing riparian users, they must share the available supply according to their needs. Generally, in this situation, water used for interior domestic purposes, such as drinking, cooking and bathing, has the highest priority.") ↑

58 In re Waters of Long Valley Creek Stream System (1979) 25 Cal.3d 339, 358-359, 364. ↑

59 Miller & Lux v. James (J.G.) Co. (1919) 179 Cal. 689, 691, 178 P. 716 (express provision in conveyance). ↑

60 See, Carlsbad Mutual Water Co. v. San Luis Rey Development Co. (1947) 78 Cal.App.2d 900, 178 P.2d 844. Courts have treated such grants as estoppels running with the land, Spring Valley Water Co. v. Alameda County, (1927) 88 Cal.App. 157, 262 P. 318, or easements burdening the land. Wright v. Best (1924) 19 Cal.2d 368, 121 P.2d 702. But see, SWRCB Pamphlet, at 4 ("The riparian right cannot be transferred for use upon another parcel of land"). ↑

61 See infra Section VI Water Rights in Indian Country, for more discussion on the impact of severance on the priority date of water rights. ↑

62 See, Rancho Santa Margarita v. Vail (1938) 11 Cal.2d 501, 528, 81 P.2d 553. ↑

63 That riparians have no right whatsoever to use water unreasonably (even though the use is beneficial) was finally settled in Joslin v. Marin Municipal Water District (1967) 67 Cal.2d 132, 429 P.2d 889, 60 Cal.Rptr. 377 (gravel miner not entitled to recover against utility district which restricted flow and diminished gravel deposits). ↑

64 Cal. Wat. Code § 106. ↑

65 Cal. Wat. Code § 100.5, enacted in 1980, removed a significant common law obstacle to finding a water usage unreasonable. Conformity with local custom in the use, method of use, or method of diversion of water is now but one factor to be weighed in determining the reasonableness of a use, rather than automatic proof of reasonableness. ↑

66 Cal. Wat. Code § 1243 (use of water for recreation and fish and wildlife resources is a beneficial use); Cal. Wat. Code §1257.5 (instream water needs must be considered in permitting appropriations). See e.g., National Audubon Society v. Superior Court of Alpine County (1983) 33 Cal.3d 419, 189 Cal.Rptr. 346 (public trust doctrine requires state to exercise continuous supervision over navigable waters). ↑

67 Cal. Wat. Code § 2500 et. seq. ↑

68 See Regulation and Adjudication of Indian Water Rights for a discussion of the McCarren Amendment and its impact on the assertion of Winters rights. ↑

69 In re Waters of Long Valley Creek Stream System (1979) 25 Cal.3d 339. The true import of this doctrine is clear: In the Long Valley Creek adjudication, existing water uses already required more water than the creek could provide. Anderson, at 65. ↑

70 Cal. Wat. Code § 2525. ↑

71 V. Gleason, Water Rights, Water Supply, & Water Related Law, California Continuing Education of the Bar, (1988) p. 26, § 2.6.1. The SWRCB undertakes general adjudications fairly infrequently. One current adjudication in which unexercised riparian rights may be at issue is that of San Gregorio Creek. Informal communication with the Division of Water Rights, State Water Resources Control Board, June 28, 1991. ↑

72 Antioch v. Williams Irr. Dist. (1922) 188 Cal. 451, 205 P. 688; 4 Summary of California Law (Witkin), (1987) at 935, §757. ↑

73 United States v. Fallbrook Public Utility Dist. (1965) 347 F.2d 48. The court rejected Fallbrook's assertion that municipal uses are not proper riparian uses, finding no municipal/nonmunicipal distinction in California law. Id. at 54. ↑

74 Antioch v. Williams Irr. Dist. (1922) 188 Cal. 451, 205 P. 688. ↑

75 See Source of Title Rule for discussion on the assignment of riparian rights. ↑

76 See, e.g., Nat'l Audobon Soc'y v. Superior Court, 658 P.2d 709, 725 (Cal. 1983) (calling reasonable use "an overriding feature of California water law"); Peabody v. City of Vallejo, 40 P.2d 486, 491-92, 499 (Cal. 1935) (concluding that "the rule of reasonable use as enjoined by section 3 of article 14 of the Constitution applies to all [emphasis added] water rights enjoyed or asserted in this state, whether the same be grounded on the riparian right or [analogies thereof like appropriative rights]"). ↑

77 See, e.g., Pasadena v. Alhambra (1949) 33 Cal.2d 908, 926-27, 207 P.2d 17; Peck v. Howard (1946) 73 Cal.App.2d 308, 167 P.2d 753. Any applicable taxes must also be paid during the five-year period. ↑

78 People v. Shirokow (1980) 26 Cal.3d 301, 605 P.2d 859, 162 Cal.Rptr. 30, (the Water Commission Act of 1914 initiated the permit system as the exclusive method for acquiring an appropriative right to unappropriated waters). Note that prescription is not an option against tribes. ↑

79 In re Water of Hallett Creek Stream Sys., 44 Cal. 3d 448, 466-67. ↑

80 In re Water of Hallett Creek Stream Sys., 44 Cal. 3d 448, 466. ↑

81 In re Water of Hallett Creek Stream Sys., 44 Cal. 3d 448, 468-69. ↑

82 In re Waters of Long Valley Stream System, 25 Cal. 3d 339, 358-59 (1979). ↑

83 Id. ↑

84 Id. at 348 ("[T]o the extent that a future riparian right may impair the promotion of reasonable and beneficial uses of state water, it is inapt to view it as vested."). ↑

85 See William Attwater & James Markle, Overview of California Water Law, 19 Pac. L. J. 957, 983 (1988). ↑

86 See, Freyfogle, at 1536 (suggesting that the language of Hallett Creek actually foreshadows expansion of the Long Valley Creek doctrine). ↑

87 Cal Const. art. XIV, § 3. ↑

88 This presumes the actual use of water by the Tribe before any formal claim. See supra discussion of deprioritization of unexercised riparian rights at Unexercised to riparian rights may be limited by the state. ↑

89 (1978) 438 U.S. 696, 98 S.Ct. 3012, 57 L.Ed.2d 1052. ↑

90 44 Cal. 3d 448 (1988). ↑

91 See discussion on Pre-Reservation, Pre-Patent Appropriations. ↑

92 25 Cal. 3d 339 (1979). ↑

93 The Water Commission Act (provisions regulating prior appropriation codified at Cal. Wat. Code § 1200 et. seq.) initiated the statutory system of prior appropriation in 1914. Only surface waters may be appropriated. See discussion on Correlative Rights. ↑

94 Cal. Const. art. XIV, § 3; Cal. Wat. Code § 1375. ↑

95 Cal. Wat. Code §§ 1255, 1256. ↑

96 Id. at § 1257. ↑

97 Id. at § 1381. ↑

98 Id. at § 1394. ↑

99 Id. at §§ 1396, 1410, 1610 et. seq. ↑

100 Id. at §§ 1702, 1701. ↑

101 California v. United States, 438 U.S. 645, 669-73 (1978). While this case is limited to reclamation projects, the broader point of Congressional impact in water regulation and between the federal and state governments is useful. ↑

102 U.S. v. Alpine Land & Reservoir Co., 697 F.2d 851, 858 (1983) (quoting California v. U.S., 438 U.S. 645 (1978)); U.S. v. Orr Water Ditch Co., 914 F.2d 1302, 1307-08 (1990). ↑

103 In re General Adjudication of All Rights to Use Water in the Big Horn River System, 48 P.3d 1040, 1047 (2002). See also Colo. River Water Conservation Dist. v. United States, 424 U.S. 800 (1976); Winters v. United States, 207 U.S. 564, 577 (1908) (establishing Winters rights as property of the federal government and federal supremacy). ↑

104 U.S. v. New Mexico, 438 U.S. 696, 702 (1978). ↑

105 See infra Case Study: Agua Caliente Band of Cahuilla Indians Asserting Winters Rights to an Overdrafted Groundwater Basin. A potential expansion of what a primary purpose could mean in the context of Winters rights with an emphasis on the current and future needs for that primary purpose. ↑

106 Arizona v. California, 373 U.S. 546, 600 (1963); Hackford v. Babbitt, 14 F.3d 1457, 1469 (10th Cir. 1994); State ex rel. Greely v. Confederated Salish & Kootenai Tribes, 712 P.2d 754, 764 (Mont. 1985); see also Winters v. United States, 207 U.S. 564, 577 (1908). ↑

107 See United States v. Walker River Irrigation Dist., 104 F. 2d 334, 338 (9th Cir. 1939) (federal government left instructions to reserve land for Walker River Paiute Tribe, "initiated the establishment" of a reservation). ↑

108 Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist., 849 F.3d 1262 (9th Cir. 2017) ↑

109 "For over one hundred years, the Supreme Court has made clear that when the United States "withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." Cappaert v. United States, 426 U.S. 128, 138, 96 S. Ct. 2062, 48 L. Ed. 2d 523 (1976) (citing U.S. Const. art. I, § 8; U.S. Const. art. IV, § 3); see also Winters v. United States, 207 U.S. 564, 575-78, 28 S. Ct. 207, 52 L. Ed. 340 (1908); Colville Confederated Tribes v. Walton, 647 F.2d 42, 46 (9th Cir. 1981). Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist., 849 F.3d 1262, 1268 (9th Cir. 2017). ↑

110 Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist., 849 F.3d 1262, 1269 (9th Cir. 2017). ↑

111 Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist., 849 F.3d 1262, 1271 (9th Cir. 2017). ↑

112 See Section VI. D. 4. Groundwater rights under California law for more details on the Agua Caliente case. ↑

113 Cal. Wat. Code, § 10720; Cal. Code Regs. tit. 23, § 350. ↑

114 A. Schneider, Groundwater Rights in California, Governor's Commission to Review Water Rights Law, Staff Paper No. 2, (1977) at 1. ↑

115 "Subterranean streams flowing through known and definite channels" are not groundwater under California law, and are subject to the permit system. Cal. Wat. Code § 1200. Groundwater is underground "percolating" water. If the status of underground waters is unknown, they are assumed to be percolating. City of Los Angeles v. Pomeroy (1899) 124 Cal. 597, 57 P. 585. Since 1970, groundwater users have been required to notify the state of all well development or deepening. Cal. Wat. Code §§ 13750-13751. These provisions have no effect on water rights. ↑

116 Katz v. Walkinshaw (1903) 141 Cal. 116, 74 P. 766, invented the correlative rights doctrine of "fair and just" apportionment of use among overlying landowners, using the laws of eastern states as a basis, to replace the English common law rule of absolute ownership. Id. at 135. Like riparian rights, correlative rights are appurtenant to the overlying lands. See, e.g., United States v. 4.105 Acres of Land in Pleasanton 68 F.Supp. 279 (N.D. Cal. 1946). ↑

117 Allen v. California Water & Tel. Co. (1946) 29 Cal.2d 466, 176 P.2d 8. ↑

118 Cal. Const., Article XIV, Section 3 (reasonable and beneficial use applies to all waters of the state). ↑

119 Surplus water has been defined as "any water not needed for the reasonable and beneficial uses of those having prior rights." Pasadena v. Alhambra (1949) 33 Cal.2d 908, 925, 207 P.2d 17. ↑

120 See, e.g., Corona Foothill Lemon Co. v. Lillibridge (1937) 8 Cal.2d 522, 66 P.2d 443; Pasadena v. Alhambra (1949) 33 Cal.2d 908, 925-26, 207 P.2d 17. ↑

121 San Bernardino v. Riverside (1921) 186 Cal. 7, 198 P. 784. ↑

122 Well interference happens when a deeper well (usually pumping water at a fast rate) draws the water table down below the reach of shallower wells nearby. The aquifer might not be overdrafted, in which case the water table would remain at its natural level in a different part of the groundwater basin. Were the pumping to cease, the water table would eventually rise to its original level. ↑

123 City of Pasadena v. City of Alhambra (1949) 33 Cal.2d 908, 925. ↑

124 Id. ↑

125 Wright v. Goleta Water Dist. (1985) 174 Cal.App.3d 74, 84. ↑

126 Cal. Water Code § 1201. ↑

127 Cal. Civ. Code § 1007. ↑

128 Santa Barbara Channelkeeper v. City of San Buenaventura, 19 Cal. App. 5th 1176, 1184 (2018). ↑

129 City of Santa Maria v. Adam, 248 Cal. App. 4th 504, 511 (2016). ↑

130 See Cal. Wat. Code. § 105, Cal. Civ. Code § 107. Excess or surplus water is in the public trust and, as such, cannot be claimed through prescription. ↑

131 (Central & West Basin Water Replenishment Dist. v. Southern Calif. Water Co. (2003) 109 Cal. App. 4th 891, 904-905, citing Calif. Const., Art. X, § 2. ↑

132 For example, a pumping rate that causes an overdraft during a dry period might nevertheless be sustainable over long periods of time. ↑

133 Los Angeles v. San Fernando (1975) 14 Cal.3d 199, 278-80, 537 P.2d 1250, 123 Cal.Rptr. 1. San Fernando also distinguished native waters from imported waters reaching the aquifer. Id. at 288. ↑

134 For a map and list visit DWR's website at https://water.ca.gov/programs/groundwater-management/bulletin-118/critically-overdrafted-basins. ↑

135 See Cal. Wat. Code, § 10720.5 and Cal. Civ. Proc. Code § 830(b)(4). ↑

136 The adjudication of surface waters provided for in Cal. Wat. Code § 2500 et. seq., explicitly exempts percolating groundwaters. Id. § 2500. See also, discussion on Unexercised Correlative Rights. ↑

137 San Bernardino v. Riverside (1921) 186 Cal. 7, 198 P. 784; Cohen v. La Canada Land & Water Co. (1904) 142 Cal. 437, 439-440, 76 P. 47. ↑

138 Lodi v. East Bay Municipal Utility Dist. (1936) 7 Cal.2d 316, 341, 60 P.2d 439. ↑

139 Hillside Water Co. v. Los Angeles (1938) 10 Cal.2d 677, 76 P.2d 681. ↑

140 San Fernando 14 Cal.3d 199, 282. ↑

141 33 Cal.2d 908 (1949), 207 P.2d 17. ↑

142 The significant water users in this case were appropriators, rather than overliers. See discussion on Municipal Groundwater Rights. ↑

143 33 Cal.2d at 932. ↑

144 (1975) 14 Cal.3d 199, 537 P.2d 1250, 123 Cal.Rptr. 1. The court in Wright v. Goleta Water Dist. (App. 2 Dist. 1985) 174 Cal.App.3d 74, 265, 219 Cal.Rptr. 740, interprets San Fernando as overruling the mutual prescription doctrine of Pasadena. ↑

145 Cal. Civ. Code § 1007 bars prescription against any property "dedicated to or owned by the state or any public entity." ↑

146 Burr v. Maclay Rancho Water Co. (1908) 154 Cal. 428, 98 P. 260. ↑

147 Los Angeles v. San Fernando at 278. Parties must receive "notice of adversity in fact" before the statute of limitations begins. Id. at 283 (emphasis in original). ↑

148 ARTICLE: A Flexible Framework or Rigid Doctrine? Assessing the Legacy of the 2000 Mojave Decision for Resolving Disputes Over Groundwater in California. ↑

149 Id. ↑

150 Burr v. Maclay Rancho Water Co. 154 Cal. 428. ↑

151 See discussion of Adjudication of Unexercised Rights under Riparian Rights. ↑

152 The court recognized that doing so would only be a "logical extension" of In re Waters of Long Valley Stream System (1979) 25 Cal.3d 339, 559 P.2d 656, 158 Cal.Rptr. 350, however. ↑

153 San Bernardino v. Riverside (1921) 186 Cal. 7, 31, 198 P. 784 (municipality is not entitled to correlative rights of its residents, unless it has acquired the rights from the landowners). Pasadena v. Alhambra (1949) 33 Cal.2d 908, 926, 207 P.2d 17, reaffirms the public entity exception. ↑

154 San Bernardino at 31. ↑

155 United States v. Fallbrook Utility District, Interlocutory Judgement No. 41, Civ. No. 1247-SC-C (S.D. Cal.). This judgement applied to the Pechanga, Cahuilla and Ramona Indian reservations. The adjudication is on-going. ↑

156 Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist., 849 F.3d 1262 (9th Cir. 2017). ↑

157 Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist., 849 F.3d 1262, 1265 (9th Cir. 2017). ↑

158 Id. ↑

159 Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist., 849 F.3d 1262, 1270-72 (9th Cir. 2017). ↑

160 Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist., 849 F.3d 1262, 1272 (9th Cir. 2017); see infra Section VII D(2) Correlative Rights. ↑

161 Agua Caliente Band v. Coachella Valley Water Dist., No. EDCV 13-00883 JGB (SPx), 2019 U.S. Dist. LEXIS 115346 (C.D. Cal. Apr. 19, 2019). ↑

162 Id. ↑

163 900 F.3d 1350 (Fed. Cir. 2018). ↑

164 Agua Caliente Band v. Coachella Valley Water Dist., No. EDCV 13-00883 JGB (SPx), 2019 U.S. Dist. LEXIS 115346, at *29 (C.D. Cal. Apr. 19, 2019). ↑

165 Id. at 32. ↑

166 Id. at 38. Please note that the District Court has granted the Tribe to ”supplement” its complaint with facts that it argues demonstrate standing. Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water United States District Court, C.D. California, July 8, 2020 Not Reported in Fed. Supp.2020 WL 5775174. ↑

167 Agua Caliente Band of Cahuilla Indians v. Coachella et al., 162 F.Supp.3d 1053 (U.S. Dist, Ct. C.D. CA 2014). ↑

168 https://crsreports.congress.gov https://crsreports.congress.gov↑

169 Id. CSR p. 15. ↑

Strategies and Recommendations

(REF), January 23, 2024

Protections and Remedies

Water rights are usufructuary, or right of use, meaning that the water right holder has a property interest in the water, but not absolute ownership. The following looks at those property interests that should be considered when strategizing approaches to protecting *Winters* rights.

Water Quantity

Winters rights provide water adequate to sustain the reservation’s primary purpose, which, as we have shown, is quantifiable and based on an analysis of the relevant documents that established the reservation. In *Adair*, the court explained that Klamath Tribes have an implied right under the treaty that established the reservation to water to the extent necessary to accomplish hunting, fishing, and gathering on the former reservation, these activities being a primary purpose of the Klamath reservation.[1] This type of entitlement includes the right to prevent appropriators from utilizing water in a way that depletes adjoined water sources below a level that damages the habitat of the fish the Tribes have a right to take.[2] Though the activity may be off-reservation, there is still a protected interest in the ability to utilize water sufficient for the primary purpose of the reservation.[3]

Additionally, four areas related to water quantity that should be considered as part of efforts to protect water quantity interests:

1. Documentation: Maintain thorough documentation of the exercise of water rights, as this can be crucial in legal disputes. Records of traditional or historical usage, any agreements or licenses, and any instances of conflict can all be valuable evidence.
2. Alienability and Transferability: It is important for the Tribe to clarify the extent to which water rights can be sold, leased, or otherwise transferred. This includes understanding restrictions under both federal and state law. Any proposed transfers should be carefully evaluated for potential impacts on tribal sovereignty and long-term water security.
3. Easements and Right of Way: Just as with land, easements and right of way can be significant issues with water. This can come up, for instance, in the context of water infrastructure like pipelines and canals that cross tribal lands.
4. Protection of Water Sources: Usufructuary rights (or right of use) include the responsibility to protect and conserve the resource for future use. This means advocating for policies and practices that prevent depletion and pollution of water sources, both within and potentially beyond reservation boundaries[4].

Water Quality

The State Water Resources Control Board (SWRCB) has the authority to regulate water rights to improve water quality.[5] However, water quality on tribal and Indian lands is the responsibility of the federal Environmental Protect Agency (EPA) unless the tribe choses to administer its is own water quality program with the approval of EPA [6] The quality of the water is part of the property interest in the water and can impact the ability to use that water for the intended beneficial purpose such as fisheries health and traditional fishing practices and may relate to cultural practices under a Tribal Beneficial Use.[7].

We provide six additional areas that tribes can focus on to protect water quality applicable to *Winters* and non-*Winters* rights:

- i. Water Quality Monitoring: Implementing a robust water quality monitoring program is a proactive strategy to ensure that water quality standards are maintained. Such a program would entail regular sampling and analysis of reservation waters for various contaminants and pollutants. The results of this monitoring can be used to identify any potential water quality issues and act swiftly to address them.
- ii. Advocacy for Stricter Water Quality Standards: Tribes can work to influence state and federal water quality standards to be more stringent, ensuring a higher quality of water for tribal lands. This could involve lobbying at the state or federal level, or even litigating in court to push for better water quality standards. Tribes can also participate at the administrative level with the appropriate regional boards and the SWRCB.
- iii. Collaboration with Neighboring Jurisdictions: Tribes can collaborate with neighboring jurisdictions to address water quality issues. For instance, if a source of pollution is identified outside the reservation but is affecting water quality within the reservation, tribes can work with the neighboring jurisdiction to address the source of the pollution.
- iv. Education and Outreach: tribes can invest in education and outreach to raise awareness about the importance of water quality among tribal members and the wider community. This could involve workshops, public meetings, or even school programs aimed at educating people about the importance of maintaining water quality and the role they can play in doing so.
- v. Tribal Water Quality Standards: Tribes can develop their own water quality standards that are more stringent than state or federal standards. Under the Clean Water Act, tribes can be granted Treatment as a State (TAS) status, which allows them to set their own water quality standards. These standards would be enforceable on reservation lands, providing an additional layer of protection for tribal water quality.
- vi. Leverage Federal Laws: In addition to the Clean Water Act, various other federal laws such as the Safe Drinking Water Act and others allow TAS status and can be leveraged by tribes to ensure the protection of their water resources. Legal action can be taken under these laws if water quality standards are not being met, offering another avenue for tribes to protect their water quality.

These strategies are not mutually exclusive and can be used to create a comprehensive water quality protection strategy.

Tribal Beneficial Uses

“Tribal Beneficial Uses” are Native American uses of California waters that once established and recognized by the SWRCB become protected under state law.[8] Tribal Beneficial Uses are also referred to as “cultural” and is broadly defined uses of water. The SWRCB defined Tribal Beneficial Uses in 2017 as:

- Tribal Tradition and Culture, which are "[u]ses of water that support the cultural, spiritual, ceremonial, or traditional rights or lifeways of California Native American Tribes, including, but not limited to: navigation, ceremonies, or fishing, gathering, or consumption of natural aquatic resources, including fish, shellfish, vegetation, and materials."[9]
- Tribal Subsistence Fishing, defined as, "[u]ses of water involving the non-commercial catching or gathering of natural aquatic resources, including fish and shellfish, for consumption by individuals, households, or communities of California Native American Tribes to meet needs for sustenance."[10]
- Subsistence Fishing, which adopts the definition for Tribal Subsistence Fishing but does not include "California Native American Tribes."

Under state law each of the nine California Regional Water Boards must develop and adopt a Basin Plan. It is within the discretion of the individual Water Board, however, as to whether to include tribal beneficial uses into the Plan. Tribes should reach out to their Regional Water Board and request inclusion of one or more Tribal Beneficial Uses. The tribe's request should be detailed, descriptive and include:

- Use the SWRCB's 2017 definitions in identifying the tribe's specific beneficial use, and
- Designate all of the bodies of water within the basin which have one or more beneficial uses.

This is an important opportunity for tribes and allotees to engage in to ensure recognition of tribal beneficial uses and protect those uses as water right interests. [11]

The Federal Trust Relationship

As briefly discussed in Section 5, the federal government holds the title to tribal and Indian water in trust which creates a dual duty to protect water rights as title owner but also as trustee. As also shown in Section 5, the federal government is an active party in negotiations and litigation involving establishing and protecting *Winters* rights.

While *Winters* rights are trust assets due federal protection, one scholar has noted that "Tribal water rights exist in a sort of trust limbo. They are trust assets due protection from the federal government. But the government is, in almost all circumstances, under no legal obligation to act and under no cloud of legal liability if it fails to act." [12]

Breach of Trust Claims

Forcing the federal government to act to protect Indian water rights can be challenging and depends largely on what action(s) under federal law or regulation the government failed to perform or did perform to the determent of the tribe. The Supreme Court has recently reiterated what is required to succeed on a breach of trust claim against the government. The Court's guidance is as follows:

- An Indian tribe must establish, among other things, that the text of a treaty, statute, or regulation imposes certain duties on the federal government;
- The federal government expressly accepted the duty and responsibility;
    - a treaty, statute, or regulation must expressly state or show the government's acceptance of a specific rights-creating or duty-imposing language,
- Asserting a "general" trust duty (i.e. duty to protect) is not sufficient to support a breach of trust clam; and
- Unless Congress says otherwise, the federal government is not a private trustee, and its trust obligations are established and governed by treaty, statute, or regulation, rather than by the common law of trusts.[13]

Evaluating a case for a breach of trust claim will require careful analysis of the Executive Orders, federal judgments, federal law(s) and regulations that govern a tribe's specific reservation and water rights. Other documents might further support the federal government's specific duties and responsibilities and acceptance of the same.

Breach of Trust: Government's Conflict of Interest

Congress requires the federal government to advance both tribal interests in water but also represent the federal government's interests, which can create a conflict. The Ninth Circuit acknowledged such conflict finding: "Of course, the government remains under a firm obligation to represent the Tribe's interests forcefully despite its other representative obligations. [citing *Nevada v. United States*, 463 U.S. at 142]. The government's failure to do so might well give rise to some claim for breach of duty."[14]

The Court of Claims in *Fort Mojave Indian Tribe v. United States* entertained a breach of trust claim by the tribe against the government founded on its dual representation which resulted in the government not pursuing sufficient water for the tribe. While there was evidence of a conflict of interest the Court decided that there needed to be a clear showing that the federal government acted in a manner other than good faith to promote the tribe's interests. [15] Since the *Fort Mojave* water litigation had spanned 30 years, making the necessary showing was a challenge given the context and litigation strategy at play for a particular phase of the proceedings.

Tribes should be mindful of the federal government's dual role in tribal water rights negotiations and litigation and ensure that government is not compromised and breaching its trust obligations to the tribe.

Breach of Trust: Damages

The "Indian Tucker Act" (28 U.S.C. § 1505) is a jurisdictional statute that allows Indians to sue the federal government for money damages in the Court of Federal Claims if the plaintiff can "demonstrate that the source of substantive law he relies upon 'can fairly be interpreted as mandating compensation by the Federal Government for the damages.'" [16]

In the context of a breach of trust claim against the federal government for money damages, the tribe or Indian must present federal law, regulations or some official federal action that establish: (1) a trust duty that the federal government expressly accepted; and (2) that failing to preform that duty entitles the tribe/Indian to money damages.

As discussed above, establishing that a trust duty exists, and that federal government expressly accepted the trust responsibility can be challenging. Pursuing money damages for the federal government's breach of its duty adds an additional burden for the tribe to meet. However, every case must be evaluated on its on facts and applicable law.

It is crucial for tribes to fully understand and utilize their rights to protect their water interests. Whether it's through enforcing federal regulations, addressing conflicts of interest, or seeking damages for breaches of trust, tribes have a variety of legal mechanisms at their disposal to safeguard their *Winters* rights and other water rights interests. It is important to note that while there may be challenges in demonstrating certain breaches of trust, such as a clear showing of conflict of interest, these avenues can and should be pursued if a tribe feels its interests have been compromised. Additionally, the potential for claiming damages under the Indian Tucker Act serves as an effective recourse for tribes in the event of a breach of trust. The appropriate pursuit of these remedies is not just a matter of law but also a reinforcement of tribal sovereignty and the ongoing efforts to uphold the rights and interests of California Indian communities.

Marketability of Indian Water Rights

The marketability of Indian water rights presents opportunities for tribes to engage in economic development activities while maintaining control over their water resources. The ability to market these rights can provide financial benefits, improve water management, and increase tribal influence over regional water use. However, the extent to which these rights can be marketed depends on the type of rights held by the tribe and the specific legal and regulatory conditions.

Marketing Federal Reserved Rights / Winters Rights

Under the Winters rights doctrine, tribes have the right to enough water to fulfill their reservations. However, these rights are only marketable with express authorization from Congress, which can be granted as part of a water rights settlement. [17] This authorization is crucial as it allows tribes to lease or otherwise convey their *Winters* rights to other parties, potentially providing a significant source of revenue and increasing their influence over regional water use. For example, passage of the of the Colorado River Indian Tribes Water Resiliency Act of 2022, allows the Colorado River Indian Tribes (CRIT) to transfer water and to forgo diversion to benefit downstream users, providing additional paths to market water for tribes. [18]

Water Quantity Markets

In the context of water quantity markets, marketed reserved tribal water (if approved by the federal government) is often converted into a state water right during off-reservation use or is otherwise subject to state rules, except for forfeiture for non-use.[19] This means that tribes can sell or lease their water rights for use off-reservation, but the water will generally be subject to state law while it is being used off-reservation. The primary legal barrier to tribal water marketing is the Nonintercourse Act, which restricts the conveyance of tribal lands without congressional consent.[20] Because water rights are considered a part of the land, they fall under this restriction.

Protections for Water Market and Banking Participation

Several protections exist for tribes participating in water markets and groundwater banking operations. These include market and water banking specific accounting rules in the form of protocols and management rules that track water as it moves into, threw,

and out of the system in compliance with SWRCB and federal regulations on the storage and transfer of water. This provides a level of transparency and accountability that can help prevent mismanagement or misuse of tribal water resources.

Another important protection is the "No Injury Rule," which ensures that any transfer of water rights does not harm other legal water users. This can provide assurance to tribes that their water rights will be respected and protected in the market.

For groundwater, the local Groundwater Sustainability Agency (GSA) governs the impacts to groundwater users due to the exchange of water under the Sustainable Groundwater Management Act (SGMA). The GSA can mitigate potential impacts and conflicts between groundwater users, making it an important entity for tribes to engage with in their water marketing efforts. These protections together provide a more secure environment for tribes to participate in water markets and groundwater banking operations, thereby turning their water rights into economic opportunities for transfers of groundwater while safeguarding their water resources.[21]

Options for Non-*Winters* Water Rights or Authorized Rights

Tribes and allotment owners may have water rights that are not *Winters* rights that may be marketed through various mechanisms authorized by California and local water districts. Transferring water for on or off-reservation uses, such as mining and natural resources development, could put tribes in a position of "brokering" much of the nation's western water supply.[22] While an in-depth analysis on how to market non-*Winters* rights water is beyond the scope of this Study, tribes and allottees do have options to market their non-federal reserved water should they choose to.

To ensure their rights are being protected, tribes should consider participating in their regional Integrated Regional Water Management group to build relationships, fund projects and increase representation in regional water decisions.

Strategies for Tribes

A review of federal and state water law and highlighting the gray areas can illuminate strategic opportunities for California tribes. The following are common topics that highlight the importance of strategic water resource planning.

Funding Projects through the Integrated Regional Water Management (IRWM) Process

A unique feature of California water law is the collaborative IRWM process. Under the state 2002 Regional Water Management Planning Act regional water management groups are formed that span multiple jurisdictions and distribute decision-making power among multiple stakeholders. The IRWM groups can then apply for funding for water management projects, which have historically been funded by voter-approved bond measures, which the 2002 law still permits. IRWM groups and projects are overseen by the California Department of Water Resources.

IRWM incentivizes multiple stakeholders to work together to secure funding for water projects that benefit the region. As such, participation in IRWM groups provides tribes a unique opportunity to participate in regional water decisions and 'get in the room' to build relationships with representatives from multiple regional agencies.

Examples of water management projects that have been funded through the IRWM process include ecosystem and habitat restoration, invasive species removal, wastewater reuse and desalination, water use efficiency projects, and repairs and upgrades of water infrastructure, among others.

IRWM regulations do not require tribes to be federally recognized, so IRWM is a unique opportunity for unrecognized tribes to have a seat at the table, build relationships, and directly participate in regional decision-making about water management.

IRWM planning also presents an avenue to address the specific water-related concerns of disadvantaged communities and tribal communities by emphasizing the inclusion of these communities and specific provisions to ensure they have meaningful opportunities to participate.

IRWM plans are encouraged to include strategies for addressing the needs of disadvantaged communities, including drinking water quality issues, water affordability challenges, and other infrastructure needs. Similarly, the plans also consider the traditional, cultural, and environmental needs of tribal communities, both recognized and unrecognized. These provisions can assist in addressing the historical inequities that these communities have faced regarding water resources. For more information about funding and engagement around Disadvantaged Communities, or DACs, visit the DWR DAC Involvement Program webpage at DAC Involvement Program (ca.gov) and the SWRCB Sustainable Water Solutions program webpage at Office of Sustainable Water Solutions | California State Water Resources Control Board.

Furthermore, IRWM provides a platform for disadvantaged and tribal communities to voice their concerns and contribute to regional water management solutions. It encourages active participation and representation of these communities in the decision-making process. This approach enables these communities to secure funding for water projects that directly benefit

them. For example, they can advocate for projects that improve local water infrastructure, enhance water quality, or expand access to clean, affordable water.

As of this writing, stakeholders have established 48 regional water management groups covering over 87 percent of California and 99% of its population.[23] Tribes that want to participate in the IRWM process should begin by identifying the IRWM Region(s) located in their area by going to the California Department of Water Resources' Water Management Planning Tool (interactive online map) and checking the box titled "IRWM Regions" under View Layers.[24] Once you have identified your IRWM Region(s), you may contact one of four regional California Department of Water Resources offices (Northern Region: Red Bluff; North Central Region: West Sacramento; South Central Region: Fresno; Southern Region: Glendale).[25]

Tribes may also participate in the IRWM Roundtable of Regions[26] and reach out directly to the California Department of Water Resources' Tribal Policy Advisor at tribalpolicyadvisor@water.ca.gov. This could facilitate funding opportunities for tribes and those on the NAHC list that are eligible for Prop 1 funding to assist IRWM.

Strategic Considerations for Tribal Beneficial Uses

As discussed previously Tribal Beneficial Uses can protect tribal cultural and traditional uses of California's waters. To ensure tribal specific Tribal Beneficial Use is recognized and included in a Basin Plan, tribes are encouraged to contact their Regional Water Board by requesting a government-to-government consultation or a meeting with Regional Water Board staff to discuss inclusion. For additional information on the process and how to get involved contact the SWRCB Tribal Liaison at tribal-liaison@waterboards.ca.gov and follow updates as the regulatory process evolves at Regional Water Board Progress Updates on Tribal Beneficial Uses | California State Water Resources Control Board.

However, this strategy is not always a welcomed approach by the State Water Resources Control Board as evident by the pending, as of 2022, litigation surrounding the addition of Tribal Beneficial Uses to the Bay-Delta Plan.[27] The litigation is premised on a Civil Rights Act Title VI and an APA claim requesting a rulemaking that would, "adopt CWA-compliant water quality standards for the Bay-Delta, including designating Tribal Beneficial Uses and adopting flow-based, temperature, and HAB criteria that protect beneficial uses and tribal reserved rights."[28]

Economic Development: Leasing Water through contracts and markets

Natural resources, including water, provide significant economic development opportunities for tribes. Tribally owned water may be leased or used directly to support a range of economic development projects such as renewable energy generation (like hydroelectric power), agriculture, tourism, and recreational activities. For tribes with *Winters* rights, express congressional authorization is required to transfer or lease these rights, which can then open new revenue streams and economic possibilities. In all cases, the water right must be quantified before it can be transferred.

The rules from *California Water Law and Policy*[29] provide useful guidelines that this Study adapted for tribes considering leasing or transferring their water for economic development, and possessing the requisite authority to do so:

1. Consider adopting a policy that water can be transferred if no legal user is injured, thereby ensuring that any water transfer respects existing water rights and does not negatively impact other water users. This is important in maintaining a fair and balanced water management system.
2. Knowing the distinction between native or imported water, a distinction that may affect the extent of protection and rights associated with the water.
3. Recognizing both junior and senior right holders as legal users provides an inclusive and comprehensive framework that protects all legitimate interests in the water resources, promoting fairness and stability in water management.
4. Ensure that a transfer of native water up to the quantity consumptively used will not cause injury will provide tribes with an important guideline on how much water they can transfer without risking legal disputes or damaging their relationships with other water users.
5. Finally, understanding the *California Water Law and Policy* rule regarding imported water which allows tribes to transfer an amount up to the previous maximum quantity diverted without injuring other water rights. However, environmental conditions may still limit these transfers, reflecting the need to balance economic development with environmental sustainability.

These rules or considerations offer valuable principles for tribes to navigate the complex waters of water rights management. By understanding and leveraging these rules, tribes can maximize their economic development opportunities while ensuring sustainable and equitable use of their water resources.

Contracts Play a Large Role

When it comes to leasing and transferring water rights, there are a few types of legal agreements that a tribal government in California may want to consider. Each type of agreement has its own strengths and weaknesses and should be chosen based on the tribe's specific needs, resources, and goals. Note that these agreements can be used in both *Winters* rights context and outside of federal reserved rights. However, *Winters* rights will likely need congressional approval through a water settlement or other approval legislation for these agreements to operate.

1. Lease Agreements: A lease agreement allows the tribe to retain ownership of the water rights while permitting another party to use the water for a specific period of time. This type of agreement is particularly useful if the tribe wants to generate income from its water rights without permanently transferring them.
2. Option Agreements: An option agreement gives another party the right, but not the obligation, to lease or purchase the tribe's water rights later. This type of agreement can provide the tribe with income in the form of option fees and may also be used to manage risk or hedge against future uncertainty.
3. Transfer Agreements: A temporary transfer agreement is possible through leasing land or through leasing or selling water directly through a water market contract. In a permanent transfer agreement, the tribe would permanently transfer its water rights to another party, which would congressional approval and is not a recommended route for tribes since it is a permanent loss of that water.
4. Conjunctive Use Agreements: This type of agreement allows for the coordinated management of surface water and groundwater resources. For a tribe with both types of water rights, a conjunctive use agreement could provide flexibility and resilience, particularly in the face of climate change and water scarcity.
5. Forbearance Agreements: In a forbearance agreement, the tribe agrees to forego its use of the water in exchange for compensation. This can be a useful tool in times of drought or other water shortages.

Before entering these agreements, a tribe should seek legal counsel's advice and conduct due diligence. This may include evaluating potential partners, assessing the value of the water rights, and considering the potential environmental, social, and cultural impacts of the agreement. Moreover, in the context of *Winters* rights, tribes should remember that they will likely need express authorization from Congress to lease or transfer these rights. This is often handled in water rights settlements. The ability for a tribe to enter contracts to market their federal reserved water rights is still an open legal question and could invite legal challenges. As always, tribal governments need to consider their immunity and waiver of sovereignty provisions, which are outside the scope of this Study but warrant attention.

These rules are equally applicable to surface and groundwater

For groundwater, the existence of an adjudication or express Groundwater Sustainability Agency (GSA) rules may provide for transfers within a groundwater basin with less restrictions or different systems. These systems, whether the result of an adjudication or a GSA's rules, can provide additional opportunities for tribes to leverage their *Winters* rights or other water resources for economic benefit. For example, the Fox Canyon Water Market is based on a groundwater adjudication and has specific rules for the transfers of groundwater.[30]

Fox Canyon Water Market, based in California, operates within a groundwater adjudication and has specific rules for the transfers of groundwater. Fox Canyon's rules create a total cap set on water extraction from the groundwater basin, and individual entities are allocated a certain amount of extraction rights. These rights can then be sold or leased to other entities within the system.

For tribes, this could provide a structured and potentially lucrative way to market their water rights. Tribes could potentially lease or sell their extraction rights, turning their water resources into a steady stream of revenue. This could also provide tribes with greater control over how water resources in their area are used, allowing them to help prevent over-extraction and maintain the sustainability of the groundwater basin.

In areas managed by a GSA under California's Sustainable Groundwater Management Act (SGMA), there may be specific rules that allow for the transfer of groundwater rights. SGMA specifically recognizes federally reserved groundwater rights which would be useful to participating in groundwater markets.[31] These rules could make it easier for tribes to market their water rights within the GSA's area. Like adjudicated areas, this could provide tribes with a way to generate revenue from their water rights and increase their influence over regional water use.

In summary, groundwater adjudications and GSA rules can provide tribes with more opportunities and mechanisms to market their water rights, thereby enabling them to leverage their *Winters* rights for economic development. However, tribes should

carefully evaluate these opportunities and consider potential legal, environmental, and socio-cultural implications before proceeding.

Putting it all Together: A Hypothetical Scenario

Utilizing a mix of strategies above, we present a hypothetical scenario where a tribe, depending on its surface and groundwater rights and resources, could bolster economic and cultural development for the benefit of the community.

The Naidni Tribe in California is facing a growing water crisis due to the ongoing drought. The Tribe is looking for strategies to secure its water rights and develop its water resources. In an effort to do this, the Tribe enters into a water lease agreement, after a settlement of its 1858 *Winters* rights[32], with a local water district that will provide funds to the tribe for economic development projects. The Tribe uses the funds to create a Regional Water Management Task Force that works with local communities and tribes providing decision-making power to multiple stakeholders. The Tribe also works to secure funding for projects, such as habitat and ecosystem restoration, wastewater reuse and desalination, water use efficiency projects, and repairs and upgrades of water infrastructure.

Also, the Tribe works to ensure their beneficial uses of water are recognized and protected by California. They do this by working with Regional Water Boards to add their tribal beneficial uses to the specific basin plans. These uses include Tribal Tradition and Culture, Tribal Subsistence Fishing, and Subsistence Fishing. These efforts also allow enhancements to eco-tourism and the ancillary development for a convenience store, gas station, and small hotel.

Finally, the Tribe looks for economic development opportunities for their community. Water is a vital element for tribal housing development, and the Tribe uses it to construct community buildings and housing, install infrastructure, landscape, and develop sustainable housing projects. These projects are funded through a groundwater banking and lease operation developed with the local GSA and water districts to provide additional funds for the tribe and flexible water management opportunities for the non-tribal stakeholders. Partnering with solar energy development firms and utilizing clean energy grant funding, development with well managed water resources results in a carbon neutral elder center and housing project.

The above scenario is an ideal situation but is not far from reality with the proper strategic, financial, and legal efforts in place.

Framework for Analyzing California Indian Winters Rights

We are hopeful that this Study provides a framework for analyzing California Indian *Winters* rights and a roadmap to guide for your analysis. The following is a suggestive approach in evaluating individual tribal and allottee water rights.

Historical Analysis

Understanding the historical context is paramount to assessing *Winters* rights. This involves a review of the tribe's history, the creation of the reservation or public domain allotment, and the determination of the priority date for the *Winters* water right. Click here to explore the Study's History section.

Understanding the Primary Purpose

Determining the primary purpose of establishing each reservation or allotment will be crucial. This can be established through the method of creation/implementing legal authority and historical documents like Executive and Secretarial Orders, the General Allotment Act, the Indian Reorganization Act, and Indian Cannons of Construction. See how the 9th Circuit analyzed 'primary purpose' in *Agua Caliente Tribe v. Coachella Water District* in the Strategies and Recommendations Section of the Study, by clicking here.

Recognizing Differences between Prior Appropriation Doctrine and *Winters* Rights

There are fundamental differences between the doctrine of prior appropriation (state law) and *Winters* rights (federal reserved rights). These differences revolve around the priority date, the notion of use and non-use, and the future needs of the tribes. See a discussion of the differences here.

Allotments formerly part of a Tribal Reservation

When allotments exist within the exterior boundaries of a reservation, they have the same priority date as the reservation and a proportionate share of the original reservation's federally reserved *Winters* rights. However, if the allotment passes out of trust, its water right is subject to reduction through non-use. Read more about allotments within the bounds of reservations here.

Public Domain Allotments

The lack of clear case law establishing *Winters* rights for public domain allotments makes analysis challenging. However, in the view of this Study's authors, the reasoning from existing case law regarding *Winters* rights in general militates strongly in favor of *Winters* rights attaching to public domain allotments.[33] Read more about public domain allotments here.

Unterminated Tribes

Unterminated tribes present unique cases for *Winters* rights analysis. Factors like restored lands, trust allotments, and rights of non-Indian successors to the water rights of Indian allottees will have to be considered. These factors are relevant because:

1. They affect the priority date of water rights, which is crucial in determining the strength and value of those rights in relation to other water users.
2. They create a complex patchwork of water rights within restored reservations, potentially including tribal rights, individual Indian allottee rights, and non-Indian successor rights.
3. They necessitate a case-by-case analysis for each unterminated tribe, as the specific circumstances of termination, restoration, and land status vary significantly among tribes.
4. They require consideration of both the original reservation establishment and the restoration process when determining water rights.
5. They may involve legal questions that haven't been definitively settled, such as the status of water rights for public domain allotments.

These factors are relevant because they significantly complicate the application of the *Winters* doctrine to unterminated tribes, requiring careful analysis of each tribe's unique history, land status, and restoration process to determine the extent and priority of their water rights. Read CILS' preliminary analysis of the water rights of California's unterminated tribes here.

Groundwater

Groundwater has affirmatively been determined to be subject to the *Winters* rights doctrine. However, determining the extent or quantity of *Winters* rights is often a complex process much like surface water quantification. The quantity of groundwater reserved is that amount necessary to fulfill the purpose of the reservation, considering both present and future needs. For groundwater, factors like the hydrological connection to surface water, the intended use of the water, and traditional practices of the tribe will all be relevant. Read more here.

Establishing a Riparian Right

Riparian rights refer to the legal rights of owners of land along the course of a river, stream, or sometimes a lake. The riparian doctrine grants the landowner the right to reasonable use of the water, which typically includes domestic uses and often extends to other uses like irrigation, provided they do not significantly harm other riparian users.

In cases where priority dates for reserved / *Winters* rights are unfavorable, such as an appropriative right with a junior date, tribes may consider pursuing riparian rights through land purchase, which could offer an older priority date or greater quantity of water to augment their *Winters* right. Note however that a federally reserved right, including *Winters* rights, are superior to state riparian rights even if those state water rights were secured and used continuously before the federal reservation. For example, if a reservation of land is made adjacent to a river, that reservation is not subject to the same restrictions as the other California riparian right holders on the river even though there were landowners using their riparian rights prior to the reservation. Riparian rights are also normally subject to diminishment for lack of beneficial use and are subject to reduction during curtailment, but note that if those riparian rights are fulfilling a tribe's *Winters* rights (e.g., well on reservation is dry), they are superior to other riparians in that they are not subject to curtailment (unless there is a water settlement in which the tribe agreed to be bound by additional restrictions on water use and availability). Read about the *Hallet Creek* decision and riparian rights on tribal trust lands here.

Aboriginal Water Rights

Asserting aboriginal water rights faces many hurdles discussed in the Study. Analysis should consider whether the tribe is located on its aboriginal land, whether it has relinquished these rights, and if the United States has taken aboriginal title either by extinguishment or compensation. Read more about aboriginal water rights here.

A Checklist for Incorporating the Water Rights Framework

The following is a proposed checklist for incorporating the above framework to cover the basic points when researching and analyzing *Winters* rights in California.

Historical Analysis

- Identify the tribe's original territory and traditional water uses.
- Review the documents that established the tribe's reservation to determine if there is language that addresses the tribe's rights related to domestic water, fishing, gathering, etc.
- Note important dates like when was an Executive Order issued, a statute passed, or land purchased for the tribe.
- Review the unique history of the tribe and the size of the reservation.
- Understanding Primary Purpose
    - Review tribal culture and traditions related to water uses.
    - Identify the primary purpose for the establishment of each reservation or allotment based on the method of creation/implementing legal authority and historical documents.
    - Determine the water right's establishment date for the trust land's primary purpose.

Water Quantification Methodologies

- Assess water quantification methodologies like practicably irrigable acreage and reasonable needs.
- Document current and projected water needs for domestic, agricultural, cultural, and ecological purposes.

Observe Differences Between Prior Appropriation Doctrine and *Winters* Rights

- Understand and determine the priority date of a *Winters* water right.
- Note that a *Winters* water right is not based on actual use and cannot be lost through non-use.
- Locate or estimate the quantity of water reserved through the state system and through the federal reserved rights.
- Understand that once quantified, determine the place of use and nature of use.

Allotments Formerly Part of a Tribal Reservation

- Determine if there are allotments involved and review their history.
- Conduct a specific analysis if the allotted land passed out of trust before being returned to tribal trust status.

Public Domain Allotments

- Determine if Public Domain Allotments are involved.
- Prepare for settlement or litigation to establish whether *Winters* rights attach to Public Domain Allotments.

Unterminated Tribes

- Conduct a restored lands analysis of documents that restored the tribe's land (Court order, legislation, Settlement Agreements, etc.).
- Conduct an analysis of individual trust allotments or assignments affected by termination and restored to trust status through untermination.

Establishing a Riparian Right

- Understand whether a tribe may wish to pursue a riparian right with an older priority date or with a greater quantity of water.
- Research whether there is land purchased in fee by a tribe that has a riparian right.
- Revenue Generating Opportunities
- Identify opportunities for generating revenue from water rights, such as leasing.

Protections and Dispute Resolution

- Implement water rights protections like monitoring, compact negotiation, and enforcement.

- Note options for dispute resolution like litigation, settlement negotiations, mediation, and arbitration.

Intergovernmental Coordination

- Coordinate with tribal, federal, state, and local authorities on water rights and management.

Recommendations for Future Work

- GIS mapping as a record and communications tool for water resources, rules, and climate risks.
- Focused research on federal reserve rights quantification methods and how they impact tribal claims to water.
- Tribal study and recommendation on water infrastructure, marketability policy, and economic development.
- Building strategic partnerships with federal and state agencies, local governments and other stakeholders in the water management process.
- Developing tools to facilitate data collection and exchange among tribes and other stakeholders.
- Educating tribal members on water rights related issues, including the ability to market water rights, how to participate in regional water decisions and how to protect their water rights.
- Increasing representation in regional water decisions such as participating in IRWM groups.
- Conducting comprehensive research on tribal water rights: analyzing past court cases and water rights settlements, conducting a tribe-by-tribe analysis for each unterminated tribe, to identify strategies for tribes to use in negotiating and litigating water rights.
- Conducting a survey and analysis of California tribes' efforts to quantify their water rights; developing strategies for future quantification efforts.
- Developing public relation campaigns to raise the visibility of tribal water rights issues and increase public support for tribes' water rights.
- Investigating potential opportunities to obtain funding for water projects through IRWM and other sources.
- Building upon existing water rights statutes, tribal codes, and policies to provide additional resources to protect water rights.
- Exploring water rights settlement and adjudication processes and other strategies like partnering with other stakeholders or negotiating water agreements.
- Utilizing technology to address climate change impacts on water resources, such as predictive modeling and data collection.
- Strategic planning and workshops to create deeper strategies for each tribe and tribal organization.

Strategies and Recommendations Footnotes:

Footnotes

1 U.S. v. Adair, 723 F.2d 1394, 1408-09 (9th Cir. 1983); See also In re CSRBA Case No. 49576 Subcase No. 91-7755, 165 Idaho 517, 448 P.3d 322, 334-35 (2019). ↑

2 Baley v. United States, 942 F.3d 1312, 1337 (Fed. Cir. 2019). ↑

3 In the case of the Klamath Tribes, as mentioned in the paragraph, these rights extend to the water necessary for hunting, fishing, and gathering activities. Therefore, if a third party's diversion of water resources off the reservation leads to a depletion of water levels to an extent that it negatively impacts the habitat of fish or other resources crucial for the Klamath Tribes' traditional activities, it would be considered an infringement on their reserved water rights. The protection of these rights is not confined to the physical boundaries of the reservation but extends to maintaining the ecological conditions necessary for the tribes to exercise their rights effectively. ↑

4 Consider that Article X, sec. 2 of Cal. Constitution requires that all California waters not be wasted, which can translated to conservation goals, and the applicability of this section to tribal waters. ↑

5 The SWRCB has conditioned water rights for the CVP/SWP on compliance with water quality plans per the Porter-Cologne Act, Cal Wat Code Div. 7 § 13000 et seq. ↥

6 HRI, Inc. v. E.P.A., 198 F.3d 1224 (10th Cir. 2000). See also, Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir. 1981); See also United States v. Ahtanum Irrigation Dist., 236 F.2d 321, 328 (9th Cir. 1956) citing Federal Power Comm. v. State of Oregon, 349 U.S. 435, 444, 75 S.Ct. 832, 99 L.Ed. 1215, on limited state authority over tribal waters court finding: "The United States was not a party to that suit, although as the pretrial order recites, it had knowledge that the adjudication was proceeding and it had an opportunity to appear therein but decided against it. It is too clear to require exposition that the state water right decree could have no effect upon the rights of the United States. Rights reserved by treaties such as this are not subject to appropriation under state law, nor has the state power to dispose of them." ↥

7 Tribal Beneficial Use discussed below. ↥

8 https://www.waterboards.ca.gov/tribal_affairs/docs/tbu_fact_sheet_v04.pdf.
https://www.waterboards.ca.gov/tribal_affairs/docs/tbu_fact_sheet_v04.pdf.↑

9 Id. ↥

10 https://www.waterboards.ca.gov/tribal_affairs/docs/tbu_fact_sheet_v04.pdf.
https://www.waterboards.ca.gov/tribal_affairs/docs/tbu_fact_sheet_v04.pdf.↑

11 In-stream uses and the relationship to fisheries have winters rights implications related to the purpose of the reservation and if there are specific uses of water explicit in a treaty, contract, settlement, adjudication or other controlling document. ↥

12 Judith V. Royster, Indian Water and the Federal Trust: Some Proposals for Federal Action, 46 NAT. RESOURCES J. 375, 382 (2006). Note that The Navajo Nation, Arizona v. Navajo Nation, 537 U.S. (2023) (5-4 decision), limit the duty of the federal government to act to limited duty of the federal government to acts only when express language in treaties, statutes, and perhaps executive orders requires action. Tribes must look hard at these sources of law to determine the federal government's responsibility. ↥

13 Arizona v. Navajo Nation, 599 U.S. 555 (2023). ↥

14 Nevada v. United States, 463 U.S. 110, 135 (1983). ↥

15 Fort Mojave Indian Tribe v. U.S. (Fed. Cl. 1994) 32 Fed.Cl. 29, aff'd (Fed. Cir. 1995) 64 F.3d 677. ↥

16 Untied States v Mitchell, 463 U.S. 206 (1983) ("Mitchell II"). ↥

17 Judith V. Royster, Indian Water and the Federal Trust: Some Proposals for Federal Action, 46 NAT. RES. J. 375, 394-95 (Spring 2006); see also, Justin Nyberg, The Promise of Indian Water Leasing: An Examination of One Tribe's Success at Brokering Its Surplus Water Rights, 55 NAT. RES. J. 181 (Fall 2014). ↥

18 117 P.L. 343, 2023 Enacted S 3308, 117 Enacted S 3308, 136 Stat. 6186. ↥

19 Judith V. Royster, Moving Beyond the Current Paradigm: Redefining the Federal-Tribal Trust Relationship for This Century: In Collaboration with the American Indian Law Center, Inc.: SYMPOSIUM ARTICLE: Indian Water and the Federal Trust: Some Proposals for Federal Action, 46 Nat. Resources J. 375, 394 – 395, Spring 2006. ↥

20 25 U.S.C. § 177. ↥

21 Note that transfers are less burdensome and costly within a GSA since the GSA is able to regulate more effectively within in its own GSP and jurisdictional boundary, as opposed to, transferring water from a groundwater bank in on jurisdiction to another. This depends on the GSA, GSP, and agreements a groundwater bank has in place with its users. ↥

22 Karen Crass, Eroding the Winters Right: Non-Indian Water Users' Attempt to Limit the Scope of the Indian Superior Entitlement to Western Water to Prevent Tribes from Water Brokering, 1 Denv. Water L. Rev. 109 (Fall 1997). ↥

23 Integrated Reg'l Water Mgmt., Cal. Dept. of Water Res. (2023) https://water.ca.gov/Programs/Integrated-Regional-Water-Management (accessed Feb. 11, 2023). ↥

24 Water Mgmt. Planning Tool, Cal. Dept. of Water Res., https://gis.water.ca.gov/app/boundaries/ (accessed Feb. 11, 2023). ↥

25 Id. ↥

26 IRWM Roundtable of Regions, www.roundtableofregions.org (accessed Feb. 11, 2023). ↥

27 Yadav-Randan, Krisha, "State Water Resources Control Board Considering Amendments to the Bay-Delta Plan to Incorporate Tribal Beneficial Uses" accessed at State Water Resources Control Board Considering Amendments to the Bay-Delta Plan to Incorporate Tribal Beneficial Uses (somachlaw.com) on June 2, 2023. ↑

28 Title VI Complaint and Petition for Rulemaking For Promulgation of Bay-Delta Water Quality Standards, accessed at Microsoft-Word-2022-12-16-Draft-Bay-Delta-Petition-and-Complaint-FINAL.docx-1.pdf (somachlaw.com) on June 2, 2023. https://somachlaw.com/wp-content/uploads/2023/05/Microsoft-Word-2022-12-16-Draft-Bay-Delta-Petition-and-Complaint-FINAL.docx-1.pdf↑

29 1 California Water Law and Policy § 10.02 (2020). ↑

30 See Maven's Notebook, "Groundwater Markets: A case study of the Fox Canyon Groundwater Market," accessed at GROUNDWATER MARKETS: A case study of the Fox Canyon Groundwater Market – MAVEN'S NOTEBOOK | Water news (mavensnotebook.com) on June 2, 2023. ↑

31 The reference to federally reserved groundwater rights in the Sustainable Groundwater Management Act in California can be found in California Water Code § 10720.3(d). This provision states that in the adjudication of rights to the use of groundwater and in the management of a groundwater basin or subbasin by a groundwater sustainability agency or by the board, federally reserved water rights to groundwater shall be respected in full. ↑

32 Water rights that have a priority date before 1914, when the state of California officially began requiring an application and permitting process for new water rights. ↑

33 Gila River Pima-Maricopa Indian Cmty. v. United States, 231 Ct. Cl. 193, 208-09, 684 F.2d 852, 862 (1982). Note that cases involving the Indian Claims Act must look to the recent case, Arizona v. Navajo Nation, 537 U.S. (2023). ↑

Public Domain Allotments (PDA) MAP

(REF)

In partnership with AQUAOSO, we built an interactive map to show where Public Domian Allotments exist in California and their proximity to water rights logged in the California Department of Water Resources Electronic Water Rights Information System known as "eWRIMS".

MAP LINK

https://aquaoso.maps.arcgis.com/apps/webappviewer/index.html?id=a16deac30dec495185fc35771f3584ab

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