

Federal Reserved Water Rights

Case Studies in the
Quantification of Federal Reserved Water Rights on
Indian Reservations and Relevance to
The Proposed CSKT Compact

Prepared for the WPIC-- Compact Technical Work Group

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Overview and Context

- » Context: WPIC Technical Working Group on CSKT Compact Quantification, measurement, and management of federal reserved water rights , with comparative case studies



Quantification of Federal Reserved Water Rights

▶ Foundations

- law
- Science
 - Purpose of the reservation
 - amount of water necessary to fulfill purposes
 - Physical availability of water and required development
- Large potential impact requires informed decision-making

▶ Physical Measure of Federal Reserved Water Right

- Purpose of reservation--Treaty
- Quantification Measures
 - Practically Irrigable Acreage (PIA)
 - Other based on treaty language; Indian reservations have water for 'future uses'

▶ Quantification ← *Both processes use principles, purpose, measures, future uses*

- Adjudication
- Negotiation
- Common technical information needed for each

▶ Applications: Case Studies

- Case Studies: Big Horn Adjudication; Snake River Basin (Nez Perce); Montana Tribes, Other
- Proposed CSKT Compact

Foundations

▶ Law

- Federal Law
 - Winters Doctrine
 - Purpose of the Reservation
 - “Permanent home”, “homeland”
 - Treaty
 - Homestead, Reclamation, Settlement Laws & Acts
 - McCarran Amendment (1953)
- State Law
 - Constitution
 - Prior Appropriation
 - Statutes
 - Legislation

Legal Foundation

▶ Science

- Hydrologic measure
 - amount of water to fulfill purpose, current uses
 - Economic choices of community going forward
- Existing water uses
- State forum first
- Impact of federal reserved water rights on
 - State water law & administration
 - Existing uses/users, future uses, environment
 - Economy

Science foundation

Physical Measurement of the Federal Reserved Water Right on Indian Reservations

- ▶ **Purpose of the Reservation:** *geographically specific to reserved land*
 - Treaty:
 - Agriculture, other
 - Existing uses
 - Future uses

- ▶ **Congressional Acts, Laws, and federal regulations**
 - Reclamation laws and projects
 - Homestead, Mineral, Grazing laws
 - Indian Reorganization Act
 - McCarran Amendment
 - Indian Claims Commission

- ▶ **Case Law**
 - Issue Preclusion
 - Risk & Liability

Purpose and Geographic Scope of Federal Reserved Water Right derived from Treaty Language & Congressional Acts

Treaty, Relevant Congressional Acts	Nez Perce	CSKT
1855 Treaties negotiated by Gov. Stevens	Ceded all right, title and interest in aboriginal territory; <u>Agriculture</u> , industry, fishing & hunting, gathering; timber; permanent home	Ceded all right, title and interest in aboriginal territory; <u>agriculture</u> , industry, ranching fishing, hunting, gathering; permanent home
1863 Treaty with Nez Perce (reduced original treaty-determined reservation)	Reserved off reservation springs and fountains and permanent r-o-w for Tribes	NA
1904 Flathead Allotment Act	NA	Reaffirmed agricultural intent; allotted lands to individual Indians
1908 Amendment to FAA; 1909 Presidential Proclamation	NA	Open reservation to settlement; construction of irrigation project to serve all; US actively reserving or appropriating water rights under state law for irrigation
Indian Reorganization Act	NA	Consolidated unallotted lands; affirmed existing settler land ownership, water uses; prohibits purchase of lands within any reclamation project on an Indian Reservation

Purpose and Geographic Scope of Federal Reserved Water Right derived from Treaty Language & Congressional Acts

Treaty, Relevant Congressional Acts	Wind River (Big Horn) E. Shoshone & N. Arapaho	CSKT
1855 Treaty negotiated by Gov. Stevens		Ceded all right, title and interest in aboriginal territory; <u>agriculture</u> , industry, ranching fishing, hunting, gathering; permanent home. Set aside Flathead Indian Reservation from lands that were ceded
1868 Treaty of Ft. Bridger, and multiple treaties 1871 Northern Arapahos settled on half of Shoshone reservation	Multiple cessions of Shoshone lands, hot springs while retaining mineral, territorial, water and other rights. Ceded all right, title and interest in aboriginal territory; <u>Agriculture</u> , industry, fishing & hunting, gathering; permanent home	
1904 Flathead Allotment Act	NA	Reaffirmed agricultural intent; allotted lands to individual Indians
1908 Amendment to FAA; 1909 Presidential Proclamation	NA	Open reservation to settlement; construction of irrigation project to serve all; US actively reserving or appropriating water rights under state law for irrigation
1905 Wind River Irrigation Project [Riverton Project]; Wind River Indian Irrigation Project, both built by BuRec	Two irrigation projects built by BOR and BIA	NA
Indian Reorganization Act	NA	Consolidated unallotted lands; affirmed existing settler land ownership, water uses; prohibits purchase of lands within any reclamation project on an Indian Reservation

Other Factors for Consideration in Framework For Settlement or Adjudication of Federal Reserved Water Rights

Factor	Issue Preclusion	Primary Impact
Indian Claims Commission	Ceded lands rights; irrigation project development; allotted lands ownership, payment	CSKT Compact: (1) No basis for off-reservation water claims (not FRWR) compensation paid; (2) No basis for water use agreement (ownership of water, land) Federal: amount of compensation
Various homestead acts	Existing uses, land ownership and historic development, irrigation	WUA, UMO, federal role
Cobell Settlement	Mismanagement of timber, oil & gas; grazing (individuals)	Federal compensation in Compact
Salazaar Settlement	Mismanagement of natural resources (tribal governments)	Federal compensation
P.L. 93-638	What projects can or cannot be managed by Tribe	Water use agreement; unitary management ordinance

Amount of Water to Fulfill the Purpose of Reservation

- ▶ Practicably irrigable Acreage
 - Legal and technical precedent Arizona v. California and as guide for federal negotiation teams
 - Includes technical, economic feasibility, economic feasibility tests
 - Practical limitations
- ▶ On-reservation fish/hunt/gather
- ▶ Other—homeland, mineral, timber, subsistence, harvest fish (fresh or ocean)
- ▶ Future uses represent real economic choices for development

Federal Reserved Water Rights Decision–Making Negotiation and Adjudication

- ▶ Consistency with Federal and case law on federal reserved water rights (FRWR), Treaty of Hellgate, lawful federal trust responsibilities
- ▶ Consistency with state constitution, case law; open meeting laws, state liability to state water users and citizens, administrative procedures
- ▶ Precedent
 - Analysis of what issues that *should* be resolved in court.
 - Could a court challenge or invalidate any component of the compact?
 - Impact of compact on western states legal positions.
- ▶ Hydrologic information:
 - physical availability,
 - can/does it provide for tribal needs; what is impact of FRWR on users, state, economy, future growth, private property in various hydrologic conditions
- ▶ Regulatory implications

Law

Science

So far...

- Federal Reserved Water Right
- Purpose of Reservation
- Quantification standards
- Decision-Making
- Case Studies and CSKT Examples

Review of the CSKT Compact from these Standards...

Review and Comparison

- ▶ Framework for review
 - Negotiation and adjudication information needs and standards about the same
 - Assess CSKT Compact from background information just presented
 - Identify alternative quantification based on existing standards
- ▶ Comparative Alternative Development
 - Recognizes its limitations—only for comparison
 - Purpose is to show other alternatives
 - Contribute to a solution

Background Research

▶ Quantification

- 2003–2010 PIA analysis. Reported as “91,000 acres and 128,000 af practicably irrigable acreage” (10–18–10, Minutes CFBTF, p. 5)
- 2011–“More water than exists”
- 2012–no numbers upfront, in appendices for ease of administration
- Current instream flow of 270K af

Comparison

Component	Water Use	Alternative Total Annual Volume (Acre Feet)	Existing CSKT Compact Annual Volume (Acre Feet)
Irrigable Acreage(1)	1.4 acre feet per acre(2)	128,000	No amount specified
Wetlands	2.5 feet per year evaporation rate	28,750	No amount specified
On-reservation instream flow	Stream flow in cfs	270,000	10,330,000
Existing Uses	Acre feet/yr	6,000	
Future Uses & Development	Acre feet/yr	2,000 50,000	90,000
Flathead Lake			18,700,000
Off-Reservation Instream Flow			22,400,000
TOTAL		484,750	51,700,000

Questions for Consideration

- ▶ What is the volume of water necessary to fulfill the purposes of the Flathead Indian Indian Reservation?
 - Does that require all of the water claimed in the current compact abstracts, including Flathead Lake?
- ▶ A federal reserved water right will exist for the instream flow. How much water is required over and above existing instream flows?
 - What is the basis for the compact's increased on-reservation instream flows?
 - What are the effects on local streams and irrigation infrastructure of these increases?
- ▶ Are there sufficient data to support a compact of this scope and its components?