

# Tribal Water Rights: an Introduction

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Presented by:

Mason D. Morisset, Attorney at Law

In Consultation with:

Herb Becker, Attorney at Law

# 1. Tribal Water Rights - The Beginning: The *Winters* Doctrine

- ▣ Settlers were sued in the early 1900's by the United States which sought to restrain them from constructing water works which would prevent water from flowing to the Fort Belknap Reservation in Montana. The Settlers argued that the reservation for the Tribe was for land only and that the Tribe did not have a right to demand that water flow to the reservation.

- ▣ In rejecting these arguments, the Court noted that the United States had the power to reserve water in connection with a land reservation for Indians, the Indians would have assumed they would have sufficient water and that the Government did impliedly reserve such water. *Winters v. United States*, 207 U.S. 564, 577 (1908)

# The Winters Doctrine

- ▣ The Winters Doctrine reserves water rights for Indian Country by necessary implication. That is, when making reservations through treaties, executive orders, or statutes, it is assumed the United States would not have reserved land for the tribes without the water necessary to make the land habitable. These water rights entitle tribes to the amount of water that is necessary for the primary purpose of the reservation as a home land. *Winters v. United States*, 207 U.S. 564 (1908)

# The Winters Doctrine - Restated

- ▣ This Court has long held that when the federal government withdraws its land from the public domain and reserves it for federal purposes, the government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators. ...The doctrine applies to Indian reservations and other federal enclaves, encompassing water rights in navigable and non-navigable streams.
  - *Cappert v. United States*, 426 U.S. 128, 138 (1976)

## 2. Tribal Water Rights: The *Winans* Doctrine

- ▣ In 1905, in one of the seminal cases on Indian Treaties, the Supreme Court held:
- ▣
- ▣ “The right to resort to the fishing places in controversy was a part of the larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment,
- ▣ *U.S. v. Winans*, 198 U.S. 371, 380-381 (1905)

## From this ruling, the *Winans* Doctrine has Emerged, Supporting Water as Necessary for Fishing Rights

- ▣ Fish need flows in rivers for spawning, migration and maturation purposes. The concept that the treaties also require enough water to protect fishery habitat and fish migration has been applied in specific cases by the Ninth Circuit

# Examples of Instream Flows Rights:

- ▣ 20 cfs to maintain suitable water temperatures for fish spawning. *U.S. v. Anderson*, 736 F.2d 1358 (9th Cir. 1984).
- ▣ 350 acre feet per year to reestablish a fishery to replace salmon runs terminated by dam building. *Colville Confederated Tribes v. Walton (Colville II)*, 752 F.2d 397, 404-05 (9th Cir. 1985).
- ▣ Instream rights exist sufficient to prevent appropriators from depleting stream flows from “the protected level.” *U.S. v. Adair*, 723 F.2d 1394, 1411 (9th Cir. 1983) cert. denied 467 U.S. 1252 (1984).



### 3. An Implied Promise to Protect Resources: The Rule of Law

- In litigation concerning the protection of flows and fish passage, the federal courts have held that the treaties include an *“implied promise that neither the negotiators nor their successors would take actions that would significantly degrade the resource....”* *U.S. v. Washington*, No. 9213, Subproceeding 01-1, USDC, WD Wash, Order of August 22, 2007, Docket No. 388
- (As of December, 2013, the case is on appeal to the Ninth Circuit. *U.S. v. Washington*, Cause No. 13-35474. Briefing is still underway.)

# 4. Some Key Legal Concepts

# a. Priority Dates for Tribal Water Rights

- ▣ Where right is based on the establishment of a reservation, the date of the reservation. *Cappert v. United States*, 426 U.S. 128, 138 (1976)
- ▣ Where right is based on a treaty, time immemorial. *See, e.g. U.S. v. Adair*, 723 F.2d 1394, 1412-15 (9th Cir. 1983), *Joint Board of Control v. U.S.* 832 F.2d 1127, 1131-32 (9th Cir. 1987)

## b. Tribal water rights are not lost despite non-use.

- ▣ Creation of a federally reserved water right on an Indian reservation is not dependent on beneficial use, and reservation retains its priority despite non-use. *In re General Adjudication...Gila*. 35 P.3d 68 (Arizona 2001)(*Gila V*)

## c. How do you determine – How much water?

- ▣ The measure of the reserved right on those reservations designed to transform Indians into agrarians is “practicably irrigable acreage”.
- ▣ *Arizona v. California*, 373 U.S. 546, 600 (1963)

# The PIA Standard for determining quantity

- ▣ Tribal entitlement for agrarian reservations is usually measured by that water which would irrigate all 'practicably irrigable acreage' of reservations. (PIA) However, whether or not reservation land is being used for agriculture is irrelevant. If the land could be cultivated through irrigation, the tribe is entitled to the water. *Arizona v. California*, 373 U.S. 546 (1963) This doctrine applies to groundwater. *See: Cappert v. U.S.* 426 U.S. 128 (1976)

# What is PIA?

- ▣ A. Physically capable of sustained irrigation, and
- ▣ B. Irrigable at a reasonable cost.
  
- ▣ *Adjudication of Big Horn System, 753 P. 2d 76, 101-105 (Wyo. 1988) Aff'd w/out opinion, 492 U.S. 406, reh'g denied, 492 U.S. 938 (1989)*
  
- ▣

## d. PIA, However, is not the only standard

- ▣ Tribes are not limited to using the water for agriculture; the water can be used for other purposes. *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9<sup>th</sup> Cir. 1981) *cert denied*, 475 U.S. 1010 (1986)



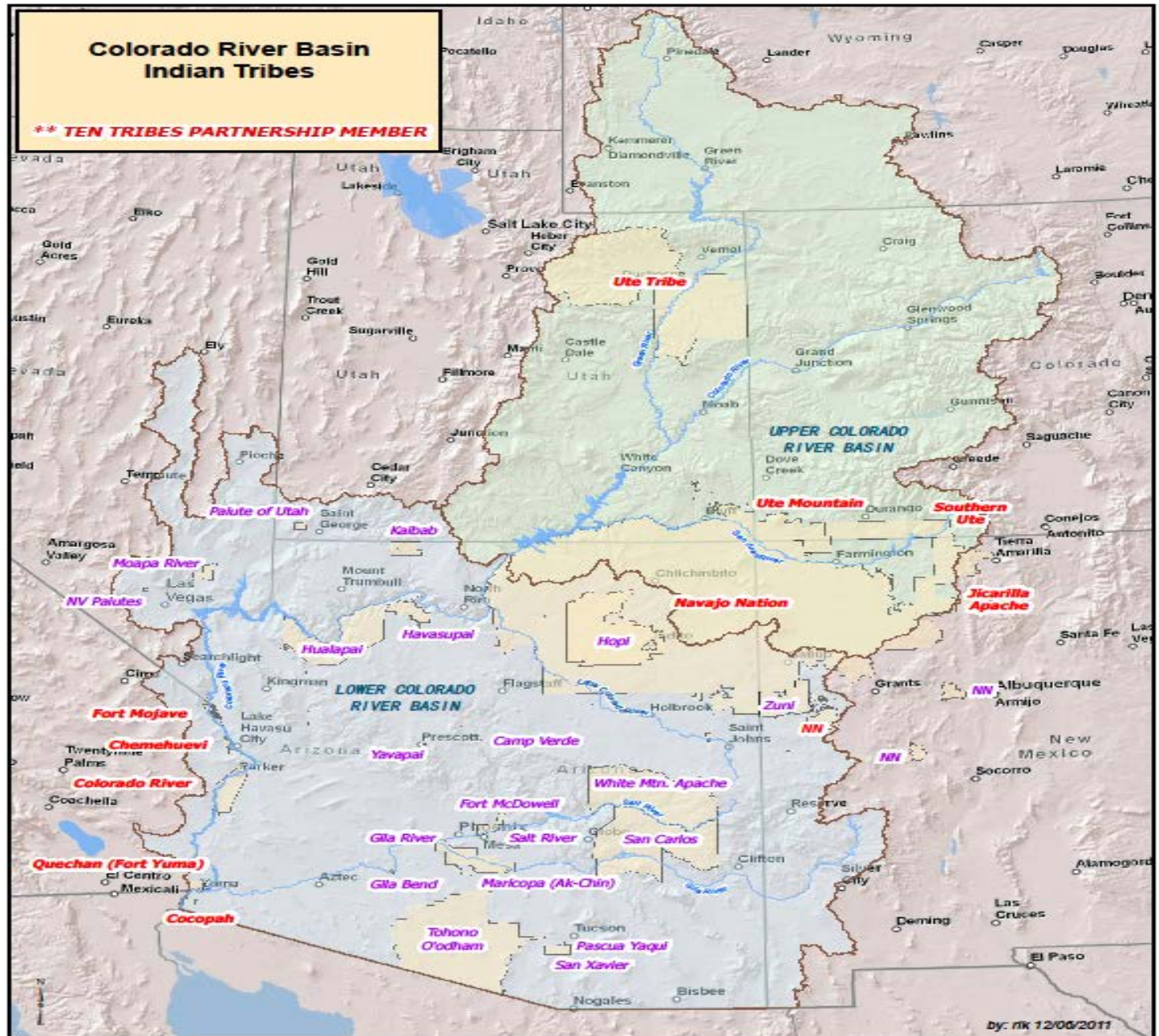
# Other Factors to Consider in Quantifying Tribal Water Rights

- ▣ Quantification of a Tribe's rights is to be based on "homeland purpose" and inclusive of history, culture, proposed and actual water uses, geography, natural resources, economic base, present and future populations, and topography) *Gila River V*, 35 P.3d 68 at 78 (2001)

# 5. Tribal Interests in the Colorado River

# Colorado River Basin Indian Tribes

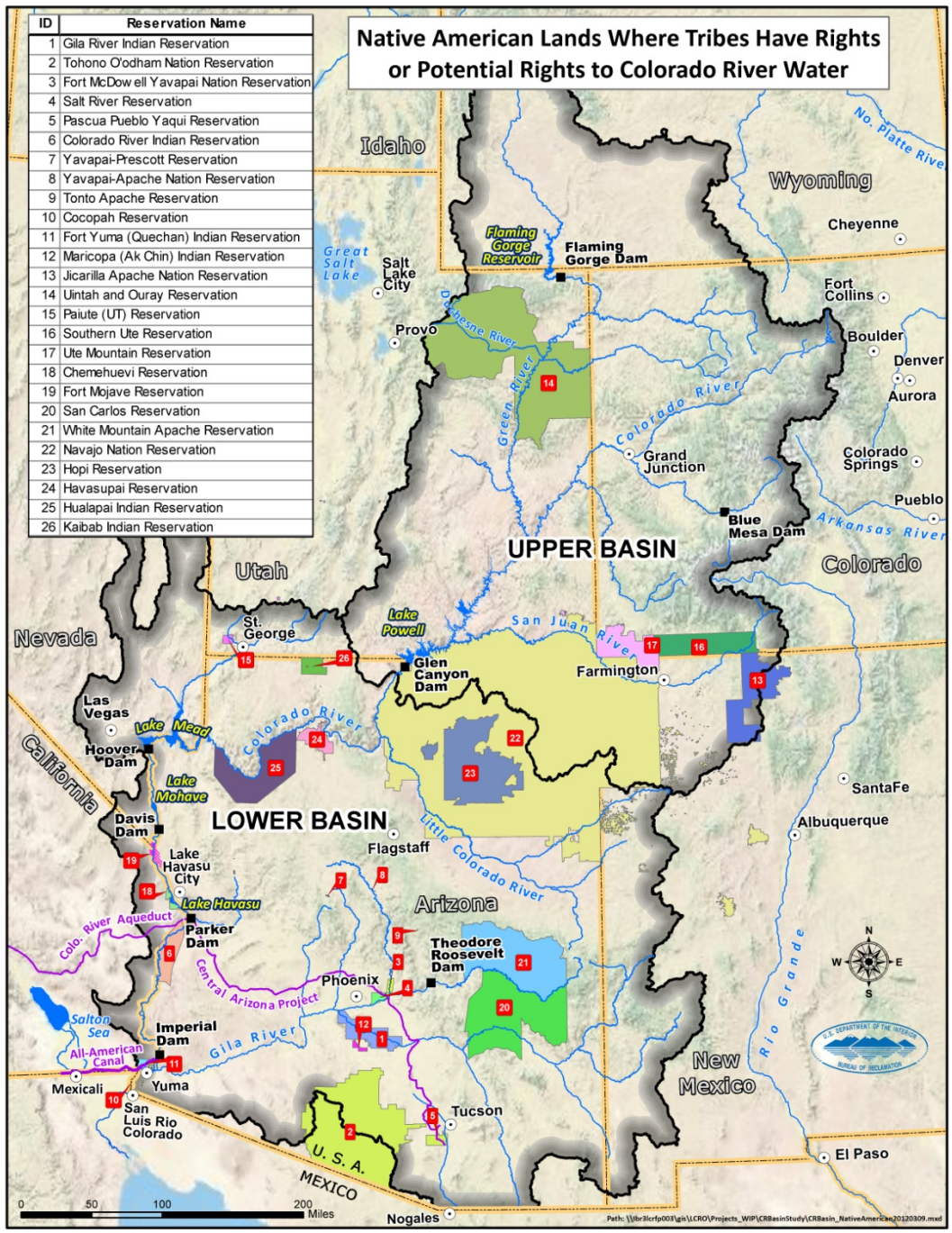
**\*\* TEN TRIBES PARTNERSHIP MEMBER**



by: nk 12/06/2011

## Native American Lands Where Tribes Have Rights or Potential Rights to Colorado River Water

ID	Reservation Name
1	Gila River Indian Reservation
2	Tohono O'odham Nation Reservation
3	Fort McDowell Yavapai Nation Reservation
4	Salt River Reservation
5	Pascua Pueblo Yaqui Reservation
6	Colorado River Indian Reservation
7	Yavapai-Prescott Reservation
8	Yavapai-Apache Nation Reservation
9	Tonto Apache Reservation
10	Cocopah Reservation
11	Fort Yuma (Quechan) Indian Reservation
12	Maricopa (Ak Chin) Indian Reservation
13	Jicarilla Apache Nation Reservation
14	Uintah and Ouray Reservation
15	Paiute (UT) Reservation
16	Southern Ute Reservation
17	Ute Mountain Reservation
18	Chemehuevi Reservation
19	Fort Mojave Reservation
20	San Carlos Reservation
21	White Mountain Apache Reservation
22	Navajo Nation Reservation
23	Hopi Reservation
24	Havasupai Reservation
25	Hualapai Indian Reservation
26	Kaibab Indian Reservation



## TRIBAL WATER RIGHTS ARE SUBSTANTIAL IN THE COLORADO RIVER BASIN.

Figure C-15 of Technical Memorandum C to the Colorado River Basin Supply and Demand study, states that tribal rights comprise about 2.9 maf in the Basin with about 1.36 maf of those rights in the Upper Basin and 1.56 in the Lower Basin

# Arizona v. California (1963) – 5 Lower Colorado River Indian Reservations

Nevada

California

Arizona

Mexico

Fort Mojave  
Indian Res.

Chemehuevi  
Indian Res.

Colorado River  
Indian Reservation

Fort Yuma  
(Quechan)  
Indian  
Reservation

Cocopah Indian



# Total Adjudicated Rights of Five “Lower” Colorado Tribes in 2006 Decree.

▣ Chemehuevi:	11,340 AFY
▣ Fort Yuma:	77,966 AFY
▣ Colorado River:	719,248 AFY
▣ Fort Mojave:	132,789 AFY
▣ Cocopah:	9,707 AFY
▣ TOTAL:	951,050 AFY

# Thanks for Listening

- Mason Morisset is the senior member of his law firm. He received his Bachelor's Degree from Lewis and Clark College in Portland, Oregon in 1963, a Masters Degree in political science from the University of Washington in 1965, majoring in American government and constitutional law and his law degree from the University of California at Berkeley in 1968.
- He has over 45 years of litigation experience in treaty rights, water rights, natural resource protection, defense of tribal sovereignty, and jurisdiction. He has participated in numerous U.S. Supreme Court appeals and successfully argued three cases to that court; *Antoine v. Washington*, (1974) *Washington v. Fishing Vessel Association*,(1979) and *Arizona v. California*, (2000).
- He is a frequent lecturer and has presented more than 80 lectures on water rights, treaty rights, sovereignty, and jurisdiction. He is the author of a number of papers and law review articles on these subjects.