

CURRENT NORTHWEST NATURAL RESOURCE ISSUES: IN-STREAM FLOWS, WATER QUALITY, AND FISH CONSUMPTION RATES

United States v. Anderson: A Case Study over Four Decades

Spokane, Washington

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I. Indian Water: Reserved Rights Generally

A. Development of the *Winters* Doctrine

1. *U.S. v. Winans*, 198 U.S. 371 (1905) (Brought by U.S. to enjoin Winans and other non-Indians from obstructing off-reservation fishing at "usual and accustomed fishing sites." Supreme Court applied generally the reserved rights doctrine in off-Reservation (Yakima) fishing context).

a. Treaty rights are rights reserved by tribes, not rights granted to them.

2. *Winters v. U.S.*, 207 U.S. 564 (1908)

a. Facts: Homesteaders, who had perfected water rights under Montana law, diverted water from the Milk River upstream of the Fort Belknap Indian Reservation in such quantities as to deny sufficient water for Indians to farm.

b. Held: Although homesteaders began using the water before Indian farmers did, and the treaty was silent as to water rights, the Tribes had prior water rights based on "necessary implication." It was inconceivable that the Indian reservation would have been agreed to without sufficient water to make the lands useful.

3. *Arizona v. California*, 373 U.S. 546 (1963) (Reservations along the Colorado River were intended to facilitate Indian agriculture, thus Tribes are entitled to quantity sufficient to irrigate all

"practicably irrigable acreage." Right includes "the future as well as the present needs of the Indian Reservations.").

4. *Arizona v. California*, 376 U.S. 340 (1964) (permitting retained jurisdiction).

B. Development of the Federal Reserved Rights Doctrine

1. *Federal Power Commission v. Oregon*, 349 U.S. 435 (1955) (Congress' long-recognized power to reserve water from appropriation can be implied. Congressional intent to so reserve need not be express.)

a. *See also, Arizona v. California*, 373 U.S. 546 (1963).

2. *Cappaert v. U.S.*, 426 U.S. 128 (1976) (United States' claim to sufficient quantity of water to preserve the habitat of the pupfish in Devil's Hole, within the Death Valley National Monument, was upheld. Rights sufficient to fulfill the purposes of a reservation of federal public lands will be inferred. The pumping of water from nearby agricultural wells was, therefore, enjoined).

a. Recognizes the interconnected nature of surface and ground waters.

3. *U.S. v. New Mexico*, 438 U.S. (1978) (United States' implied reserved water rights are limited to the amount necessary for the specific purposes of the public land's reservation. The national forest at issue was created in 1899, when the Forest Service's purposes as stated in its Organic Act were limited to only two -- "to conserve the water flows and to furnish a continuous supply of timber for the people." Thus, the United States' claims to water for "aesthetic, environmental, recreational, or wildlife-preservation purposes" were rejected).

a. *Contra*, National Park Service Act, which expresses concern for wildlife. 16 U.S.C. §17j.

b. *Also*, 1960 Multiple Use Sustained Yield Act, expanding national forest purposes to include wildlife but not reserving additional water for existing national forests. 16 U.S.C. §528 *et seq.*

C. Present Status and Application of Federal Reserved and Indian Water Rights Law. See generally, *United States v. Anderson*, 591 F.Supp. 1 (E.D. Wash. 1982); *United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984).

1. Establishment. Federal reserved and Indian *Winters* rights are established by Act of Congress, treaty, or executive order pursuant to Congressional delegation.

2. Primary Purposes. Primary, or principal, purposes are provided in the documents establishing the reserved rights.

3. Quantity. The quantity reserved is that which is necessary to fulfill the primary or principal purposes of Reservation

a. Amount may change over time as needs change, so long as they are within the original purposes for establishing the Reservation.

4. Priority and Use. The "first in time first in right" component of Prior Appropriation applies as of the date the right is established.

a. But the "use" component of Prior Appropriation is not required for perfection of the right. "Use it or lose it" doesn't apply.

b. For *Winters* rights, the priority date may be "time immemorial" where aboriginal rights continue.

c. Once adjudicated, water can be used for other purposes.

United States v. Anderson, 736 F.2d 1358 (9th Cir. 1984).

5. Groundwater

a. The *Cappaert* Court stated: "we hold that the United States can protect its water from subsequent diversion, whether the diversion is of surface or groundwater."

6. Jurisdiction. The McCarren Amendment, 43 U.S.C. Sec. 666 (enacted in 1952), waives the United States' sovereign immunity in state or federal general stream adjudications.

Sec. 666(a). Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration

of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit.

Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976) (federal adjudication dismissed in favor of subsequently filed state adjudication).

7. Negotiated Water Rights Compacts: an alternative to adjudication

a. Requires Congressional ratification.

II. The District Court *U.S. v. Anderson* case: Quantity and Quality under the *Winters* doctrine

A. The Adjudication Generally. Filed in 1972 by the United States against the State of Washington and water users in the Chamokane Creek Basin. The Spokane Tribe intervened. A Memorandum Opinion and Order, and a Judgment were issued in 1979, both of which were re-affirmed by the District Court in 1982 and by the U.S. 9th Circuit Court of Appeals in 1984.

B. Scope of *U.S. v. Anderson*. Judge Marshall Neill's 1979 Memorandum Opinion and Order stated:

1. "This Judgment is a final adjudication of the water rights in the Chamokane Creek Basin."

2. "Defendants include the State of Washington in its governmental and proprietary capacities and all other persons and corporations that claim an interest in the waters of Chamokane Creek, its tributaries or its groundwater basin."

C. Groundwater. After acknowledging that the "creek and ground water system are interrelated," Judge Neill held that "[w]here surface and groundwaters are hydraulically related, as they are in this case, the reservation of water applies to ground as well as surface water."

D. Future Needs. The Court also stated: "This Judgment is a final adjudication of the water rights in the Chamokane Creek Basin [and]...is designed to meet the future as well as the present needs of the Tribe."

E. Retained Jurisdiction. "The Court, however, does retain jurisdiction over the adjudication ... and it is decreed that the Tribe may apply for modification of this Judgment upon a showing of a substantial change in circumstances, unanticipated in the Court's quantification ... resulting in a need for water greater than the amount which has been reserved to the plaintiffs for the Tribe's future needs."

F. Water Master. The judge appointed a Water Master to administer the Chamokane Creek Basin water. The Water Master's powers include cutting off water to users who fail to comply with proper orders and directions, requiring users to install measuring devices, and requiring installation of devices to measure and record water temperatures.

1. The State of Washington was recognized as having on-Reservation jurisdiction over "excess" or "surplus" waters claimed by non-Indian fee landowners since such jurisdiction would not violate the federal pre-emption or infringement doctrines.

G. Agriculture Purpose of the Reservation: Water Quantity

1. After finding that agriculture is a purpose of the Spokane Indian Reservation, the Court quantified the Tribe's rights based on its "practicably irrigable acreage."

The Tribe had agreed to the Reservation "with a view of establishing our permanent homes thereon and engaging in agricultural pursuits." Agreement of Aug. 18, 1877 at Spokane Falls, W.T. *Quoted in, Northern Pacific Rwy. Co. v. Wismer*, 246 U.S. 716 (1917).

2. The priority date was set for two different classes of lands:
 - a. For lands that were held by the Tribe without transfer to non-Tribal interests, the priority date is 1877, when the Reservation was formed.
 - b. For lands that had transferred out of Tribal ownership then reacquired, the priority date is the date of reacquisition.

H. Fishery Purpose of the Reservation: Water Quantity/Quality

1. Judge Neill stated the following in his 1979 Memorandum Opinion and Order. "The Court finds that the quantity of water needed to carry out the reserved fishing purposes is related to water temperature rather than simply to minimum flow. The native

trout cannot survive at water temperature in excess of 68 degrees F. The minimum flow from the falls in Lower Chamokane Creek which will maintain the water at 68 degrees F. varies, but is at least 20 cfs. The Court therefore holds that the plaintiffs have a reserved right to sufficient water to maintain the water temperature below the falls at 68 degrees F. or less, provided that at no time shall the flow past the falls be less than 20 cfs."

2. Judge Quackenbush in 1982 on motions to reconsider: "If, however, over a period of time, flow and temperature records demonstrate that 20 c.f.s. flow is not realistically related to the maintenance of water temperature at 68 degrees or below, the judgment is subject to modification."

3. The Tribe's priority date for its instream fish right is "1877, the date of the founding of the Reservation, and possibly earlier...."

4. In 1987, the Court modified the instream flow provision and modified the jurisdictional line that distinguished between the Water Master and the State, describing "excess" water as that not being used by adjudicated holders.

a. Regulation or curtailment of holders of rights with priority dates of 1988 or later would occur when the creek's flows dropped to 27 cubic feet per second.

b. Curtailment of rights holders pre-dating 1988 would occur when Chamokane's flows dropped to 24 cubic feet per second.

I. Waters excluded from regulation under *Anderson*

1. domestic use, because it was determined to have a *de minimis* impact on Chamokane Creek

2. *de minimis* stockwatering use (*ie.*, limited to the land's carrying capacity)

3. groundwater in the Upper Chamokane Basin, because it was found to not be interconnected with the rest of the Basin's surface and groundwater system

III. Ninth Circuit Appeal of *U.S. v. Anderson*, 736 F.2d 1358 (9th Cir. 1984) reversed in part and upheld in part the District Court holdings.

A. Scope. The 9th Circuit found the case scope to be the same as the District Court.

1. "Defendants include the State of Washington, acting in its governmental and proprietary capacities, and all other persons or corporations who might have an interest in the disputed water rights which were the subject of the litigation."

2. "The Plaintiffs sought an adjudication of water rights in the Chamokane Basin, a hydrological system including Chamokane Creek, its tributaries and its groundwater basin."

B. The State of Washington's on-Reservation jurisdiction was upheld.

C. Re-acquired Lands. The 9th Circuit held:

1. Re-acquired homestead lands would have a priority date as of the date of re-acquisition.

2. Re-acquired allotment lands would have a priority date as of the date of the Reservation's creation.

D. Change of Use. The 9th Circuit upheld the Tribe's right to use its agricultural, out of stream right, to enhance its instream fishery.

IV. The New Millenium

A. The new Water Master identified several questions related to his enforcement authority.

1. How is *de minimis* use defined for domestic users?

2. Is it like Washington's exempt well statute, *ie.*, up to ½ acre of lawn and garden?

3. Are the 500 wells that have been drilled in the Basin since the original adjudication impacting the system?

3. How should users who submitted claims to Washington's claims registry be regulated?

4. Is the Upper Chamokane Basin really not connected to the rest of the system?

B. In 2006, the Court ordered that several factual and legal questions be addressed. The U.S. Geological Survey was contracted with for the purpose of addressing factual questions like the Upper Basin's connectivity with the rest, and whether, given the 500 new wells, domestic use remains *de minimis*.

C. U.S.G.S. completed its studies in 2013, concluding that the Upper Basin is interconnected with the surface and groundwater system of the rest of the Basin, and that *de minimis* domestic use has a calculable effect on Chamokane Creek's surface and groundwater flows.

D. The three government parties filed three briefs each in 2013 to address the questions the Court had raised in 2006. In late 2014, the Court requested additional briefing, resulting in two more briefs being filed by each government. The issues include:

1. Whether the Upper Basin groundwater should be included in the case?

a. Tribe's main concern is Washington Supreme Court's position on well exemption for unlimited stockwater. *Five Corners Family Farmers v. State of Washington*, 173 Wn. 2d 296 (2011).

2. Whether domestic and stockwater users should be brought into the case, and how?

a. Would address monitoring and enforcement issues when uses are not *de minimis*

3. How to address any Registry Claimants who had timely filed their claims but who may not have been included in the adjudication?

a. Primary focus here is on consumptive use

4. What are the respective regulatory authorities of the Water Master and the State?

a. How to address existing and future exempt wells?

5. Whether 1982 Tribal change of use from out of stream agriculture to instream fishery enhancement was complete?

a. If so, Water Master regulation would occur at 94/97 cfs instead of 24/27 cfs

E. Tribal Public Records Request turned up 320 claims had been submitted to the Claims Registry by June, 1974.

F. Stay tuned, hearing was held on February 12.