



Adjudicating the Upper Columbia River Basin - Federal Perspectives

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ARE THE AUTHOR'S OWN AND DO NOT
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INTRODUCTION

This Presentation addresses the following themes:

- Federal Participation in Basin Adjudications
- Tribal and Federal reserved water right claims – Background and Caselaw
- Addressing Tribal Reserved water right claims in state court adjudications through litigation and settlement

Why Adjudications? Federal Focus

- Basin adjudications are a critically important component of western water rights administration:
 - Determine validity of claims
 - Administer water rights in priority
 - Determine whether unappropriated water is available in the basin
- Adjudications can proceed in state or federal courts
 - Federal court examples
 - Orr Ditch (Nevada)
 - Aamodt (New Mexico)
 - U.S. v. Anderson (Washington; Chamokane Creek/Spokane Indian Reservation)
 - State court examples
 - Snake River Basin Adjudication
 - Yakima (Acquavella) Adjudication
- As detailed below, over the past four decades, most basin adjudications have proceeded in state courts to address tribal and federal claims for water.

Federal Reserved Water Right Doctrine

- The reserved rights doctrine arose out of U.S. Supreme Court decisions determining an implied right for water for Indian reservations based in federal law. The Court has expanded the doctrine to include water for reservations of federal land.
 - *Winters v. US*, 207 U.S. 564 (1908)
 - *Arizona v. California*, 373 U.S. 546 (1963)
 - *See, In the Matter of the Determination of the Rights to the Use of the Surface Waters of the Yakima River Drainage Basin*, 850 P.2d 1306, 1331 (Wash. 1993) (*Acquavella*)
 - *See also: Mecham, The Winters Reserved Water Rights Doctrine in the 21st Century: Further Definition through Litigation*, 65 RMMLF-INST 25 (2019)
- Reserved water rights have attributes that may create tension with water rights established under state laws.
 - Priority date: date of reservation or (for some tribal rights) time immemorial
 - Not subject to abandonment or forfeiture due to non-use
 - Reserved rights for instream flows compete with appropriative rights

Federal Reserved Water Right Doctrine - Focus on Tribal Reserved Water Rights

- Courts have determined that reserved water rights for Indian reservations exist and represent a property interest held in trust by the United States, with a priority date no later than the date of the reservation's establishment.
- However, determining the water rights of a particular tribe and tribal reservation must be done on a case-by-case basis.
- Absent the resolution of inchoate tribal reserved claims through litigation or settlement:
 - Tribes encounter significant difficulties using and protecting tribal water resources;
 - A cloud remains on neighboring appropriative water rights.

Federal Reserved Water Right Doctrine - Focus on Tribal Reserved Water Rights (cont.)

- In 1978, the General Accounting Office reported on efforts to resolve reserved rights:
 - [R]eserved water rights are a source of growing uncertainty and intensifying controversy in the Western States because the quantity and nature of such rights, with certain exceptions, have not been determined. Reservation-related water resources are often the main source of water supply . . . off the reservations. The lack of information on the amount of reserved water rights makes it virtually impossible for potential water users and State administrators to determine what, if any, waters are available for appropriation under State law . . .

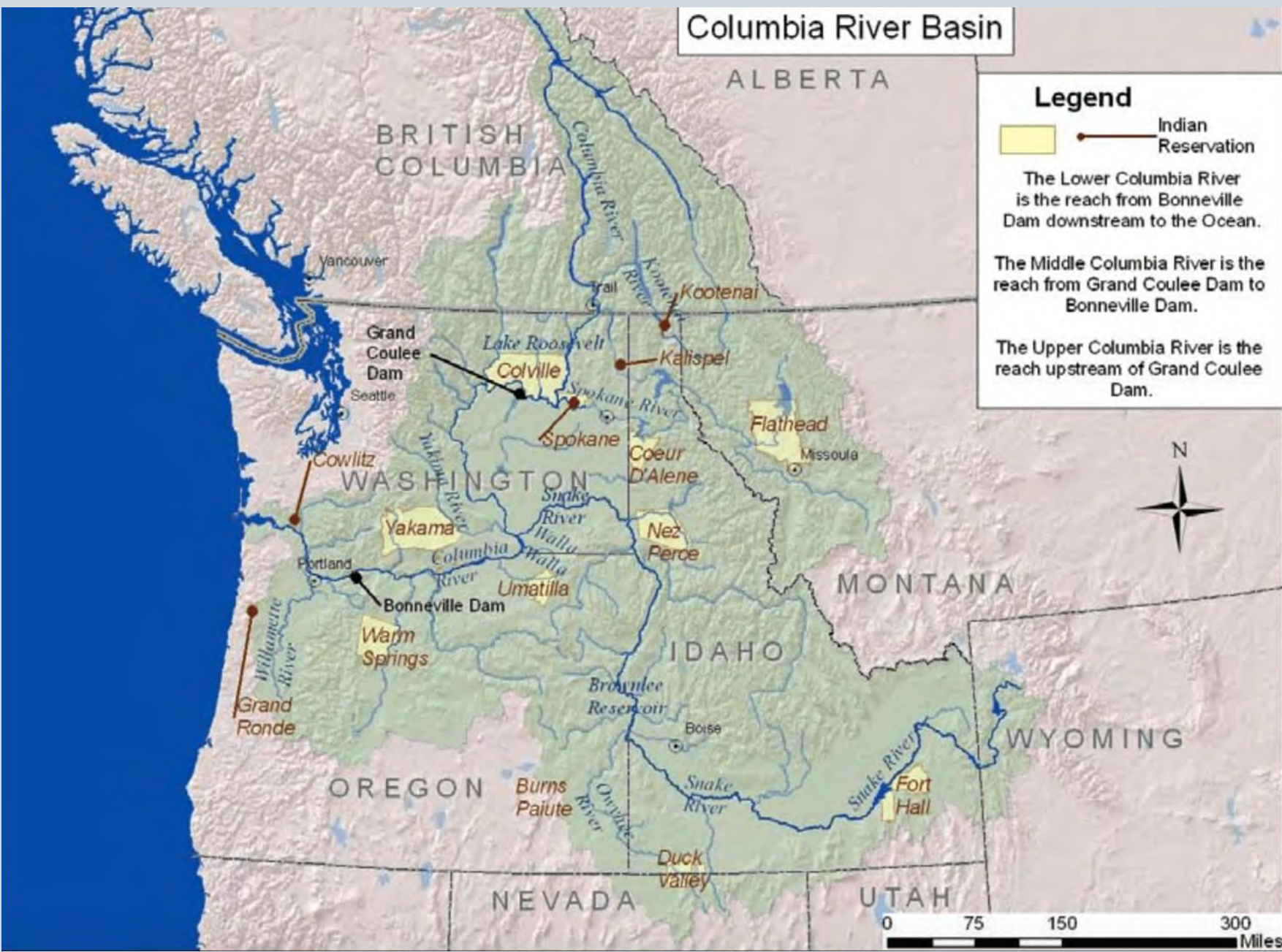
- The General Accounting Office also observed that unresolved issues about Tribal reserved water rights were “causing disagreements and polarized viewpoints”:
 - Questions and disagreements concern such matters as the definition, scope, and quantification of reserved rights; the appropriate judicial forum for resolving the disputes; the respective authority in Federal and State governments to administer the reserved rights; and compensating those who may suffer loss by the exercise of reserved rights.
 - GAO, CED-78-176, “Reserved Water Rights for Federal and Indian Reservations: A Growing Controversy in Need of Resolution,” at ii (Nov. 16, 1978)
 - See also, National Water Commission, *Water Policies for the Future: Final Report to the President and to the Congress of the United States* (Washington: GPO, 1973) (Indian Water Rights chapter at page 473)

- These issues and concerns continue to be relevant.
 - See, Congressional Research Service, *Indian Water Rights Settlements* (March 28, 2023), <https://crsreports.congress.gov> R44148

Adjudicating Tribal Reserved Claims in State Court

- The Washington Department of Ecology's report on advancing new basin adjudications focused in part on need to address tribal claims to water.
- A federal law, the "McCarran amendment," waives federal sovereign immunity and allows a state court to adjudicate federal and tribal water right claims, if the adjudication is comprehensive in nature.
 - 43 U.S.C. § 666
- Ecology has expressed the intent to proceed with an upper Columbia basin adjudication in Washington state court.

Columbia River Basin



BRITISH COLUMBIA

ALBERTA

Vancouver

Grand Coulee Dam
Seattle

Lake Roosevelt
Colville

Spokane River
Spokane

Kalispel

Coeur D'Alene

Flathead

Missoula

WASHINGTON

Yakama

Nez Perce

Cowlitz

Portland

Bonneville Dam

Warm Springs

IDAHO

Brownlee Reservoir

Boise

MONTANA

WYOMING

OREGON

Burns
Paiute

Duck Valley

UTAH

0 75 150 300 Miles

Adjudicating Tribal Reserved Claims - Litigation v. Settlement

- To date in Washington, some tribal water right claims have been resolved through litigation:
 - Yakima basin (*Acquavella*) adjudication (Yakama Nation)
 - *U.S. v. Walton* (Colville Reservation – No Name Creek)
 - *U.S. v. Anderson* (Spokane Reservation – Chamokane Creek)
- No comprehensive tribal water right settlements have been reached in Washington.
 - A partial groundwater settlement was reached on the Lummi Reservation
 - *United States ex rel. Lummi Indian Nation v. Washington, Dep't of Ecology, 2007 U.S. Dist. LEXIS 84384*

Adjudicating Tribal Reserved Claims - Litigation v. Settlement (cont.)

- Tribal water rights settlements have been reached in several western states.
- For more than four decades, the United States has supported resolving tribal water right claims through negotiations if possible.
 - *See, Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims*, 55 Fed. Rg. 9223 (March 12, 1990).
- Most tribal water right settlements require approval by Congress.
- At the request of the Confederated Tribes of the Colville Reservation, the Department of the Interior appointed a federal assessment team to evaluate the potential to resolve Colville Tribal water right claims through negotiations.



CLOSING THOUGHTS
