

The background of the slide is a photograph of a vast, open landscape. In the foreground, there is a field of tall, dry grass with some green patches. In the middle ground, several people are visible, appearing to be working or tending to the land. They are silhouetted against the bright sky. The sky is a deep blue with some wispy white clouds. The overall scene suggests a rural or agricultural setting, possibly a reservation or a natural preserve.

SCBA FOURTEENTH ANNUAL INDIAN LAW CONFERENCE

TRIBAL, STATE, AND LOCAL WATER RIGHTS AND RESPONSIBILITIES

Mel Tonasket ,
Gene Joseph

Confederated Tribes of the Colville Reservation

FEDERAL RESERVED WATER RIGHTS

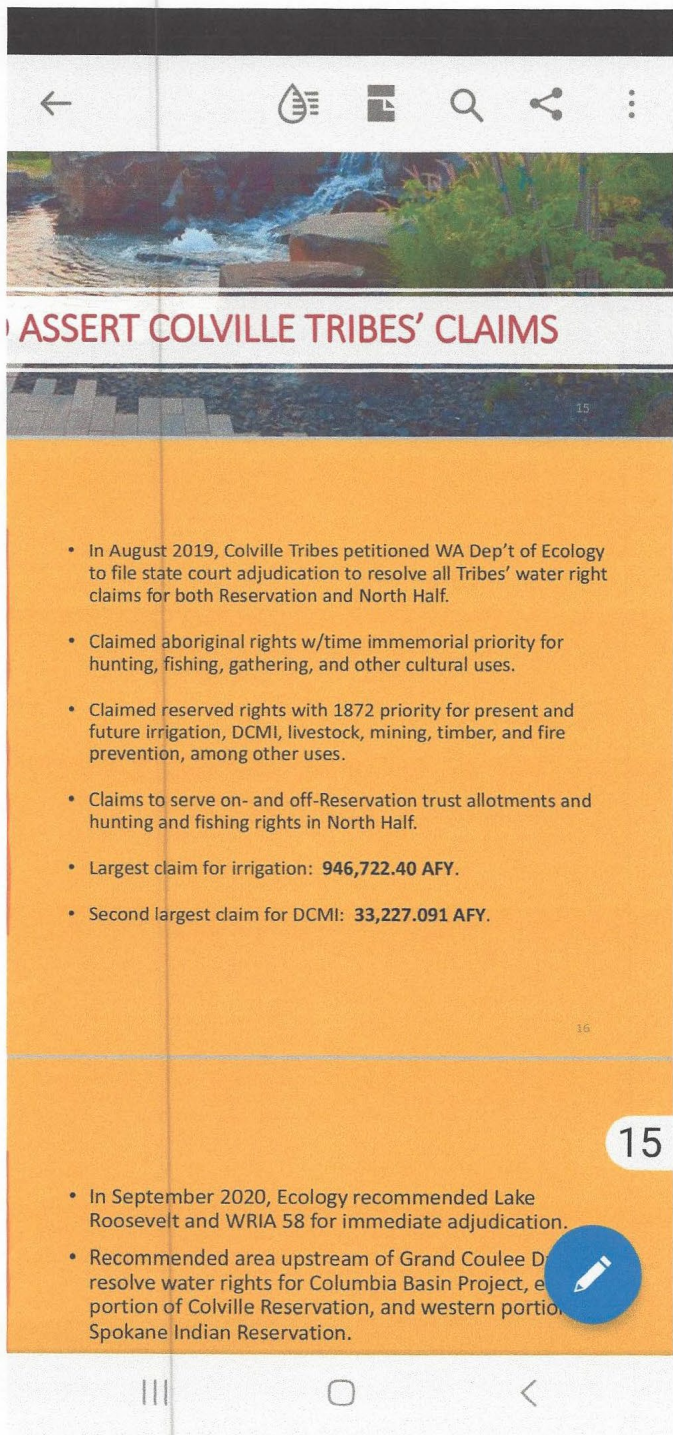
Federal reserved water rights have been recognized since the early twentieth century and form the basis for numerous water rights disputes. See *Winters v. United States*, 207 US 564 (1908). State adjudications of water rights often implicate federal claims. The reserved rights doctrine was developed in *Winters v. United States*, 207 US at 577 and provides the federal government with a water right at the time land is set aside for a federal purpose—if necessary to fulfill that purpose. *Id.* At 576.

In *Winters*, the Court held that the Fort Belknap Indian Reservation had an implied water right dating back to the day the reservation was established. *Winters*, 207 U.S. at 576; COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 19.02, at 1172 (Nell Jessup Newton et al. eds., 2005). In determining that an implied water right existed, the Court looked at the purposes of the reservation, *Winters*, 207 U.S. at 576, the practical need for water, *Id.*, and Indian law canons of construction. *Id.*; COHEN, note 25, § 19.02, at 1172. The U.S. Supreme Court has addressed the merits of the *Winters* doctrine as well as its application to non-tribal lands. The Court's 1963 decision in *Arizona v. California*, 373 US 546 (1963) answered any questions about the doctrine's vitality by extending the *Winters* doctrine to other, non-Indian, federal reservations of land.

The federal government has water rights in all waters set aside for a federal purpose. *Cappaert v. United States*, 426 U.S. 128, 138 (1976). The most common way of resolving federal and state water rights claims is through general stream adjudications. In order to make these adjudications more efficient, Congress passed the McCarran Amendment. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 819 (1976).

The McCarran Amendment waives federal sovereign immunity, enabling states to include federal water rights in general stream adjudications. 43 U.S.C. § 666(a) (2006). In order for the waiver to take effect, however, the adjudication must be sufficiently "comprehensive." All claimants to a water source must be included in the adjudication to meet the comprehensiveness requirement. The adjudication must be more than a mere attempt by private parties to establish their water rights with respect to the federal government. *Dugan v. Rank*, 372 U.S. 609, 617–19 (1963).

The United States may challenge a state's general stream adjudication. *United States v. Dist. Court in and for the Cnty. of Eagle Colo.*, 401 U.S. 520, 522 (1971). Specifically, the United States may move to dismiss an adjudication on the grounds that it is insufficiently comprehensive to support a waiver of federal sovereign immunity. *United States v. Oregon*, 44 F.3d 758, 768 (9th Cir. 1994).



ASSERT COLVILLE TRIBES' CLAIMS

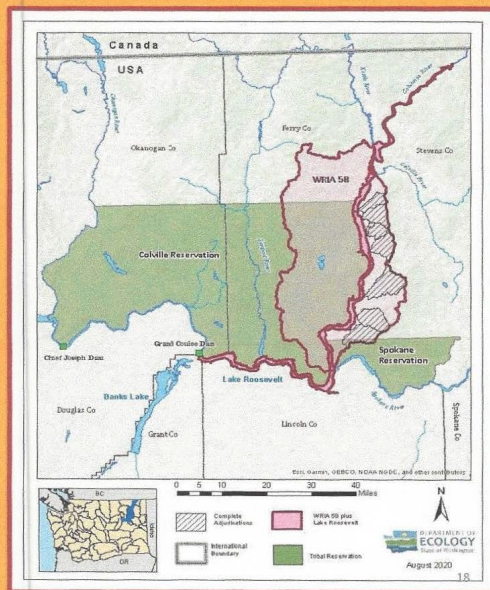
- In August 2019, Colville Tribes petitioned WA Dep't of Ecology to file state court adjudication to resolve all Tribes' water right claims for both Reservation and North Half.
- Claimed aboriginal rights w/time immemorial priority for hunting, fishing, gathering, and other cultural uses.
- Claimed reserved rights with 1872 priority for present and future irrigation, DCMI, livestock, mining, timber, and fire prevention, among other uses.
- Claims to serve on- and off-Reservation trust allotments and hunting and fishing rights in North Half.
- Largest claim for irrigation: **946,722.40 AFY.**
- Second largest claim for DCMI: **33,227.091 AFY.**

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- In September 2020, Ecology recommended Lake Roosevelt and WRIA 58 for immediate adjudication.
- Recommended area upstream of Grand Coulee Dam to resolve water rights for Columbia Basin Project, eastern portion of Colville Reservation, and western portion of Spokane Indian Reservation.

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- Recommended area upstream of Grand Coulee Dam to resolve water rights for Columbia Basin Project, eastern portion of Colville Reservation, and western portion of Spokane Indian Reservation.
- Excluded Okanogan River and mainstem Columbia River below Dam.
- Also excluded Sanpoil River and other tributaries above Dam.
- In May 2021, the state legislature approved the recommendation, appropriated initial funds, and authorized Ecology to file suit.

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Introduction to WRIA 58

The Middle Lake Roosevelt Watershed or Water Resource Inventory Area (WRIA) 58 is defined as the area that drains to Lake Roosevelt upstream of the mouth of the Spokane River and downstream of the mouth of the Colville River. Lake Roosevelt is a reservoir of the Columbia River created by Grand Coulee Dam. It is located in northeast Washington, in an eastern portion of Ferry County and a western portion of Stevens County.

Source limitations

This watershed has administrative restrictions known as Surface Water Source Limitations (SWSLs), which limit most water sources in the watershed. This determination comes from the Washington Department of Fish and Wildlife that flows be protected to maintain fish populations.

Tribal interests

The reservation for the Spokane Tribe and the Colville Confederated Tribes make up much of the lands located within WRIA 58. The tribes are concerned about maintaining flows and fish habitat in the watershed and water right applications and mitigation plans are routinely sent to them for their review. Federally Reserved Rights are not quantified at this time and thus the legal availability of water in these areas is undetermined.

Existing water rights

Water rights have been issued in the Middle Lake Roosevelt Watershed for over 100 years, and as a result most water in the watershed is already legally spoken for or “appropriated.”

Numerous adjudications have taken place in the basin. Prior adjudications are an indication that most, if not all, of the available water has already been allocated. Adjudicated tributary subbasins include: Alder Creek, Corus Creek, Cheweka Creek, Harvey Creek, Jennings Creek, Magee Creek, O-Ra-Pak-En Creek, Quilisascut Creek, and Stranger Creek.

Map

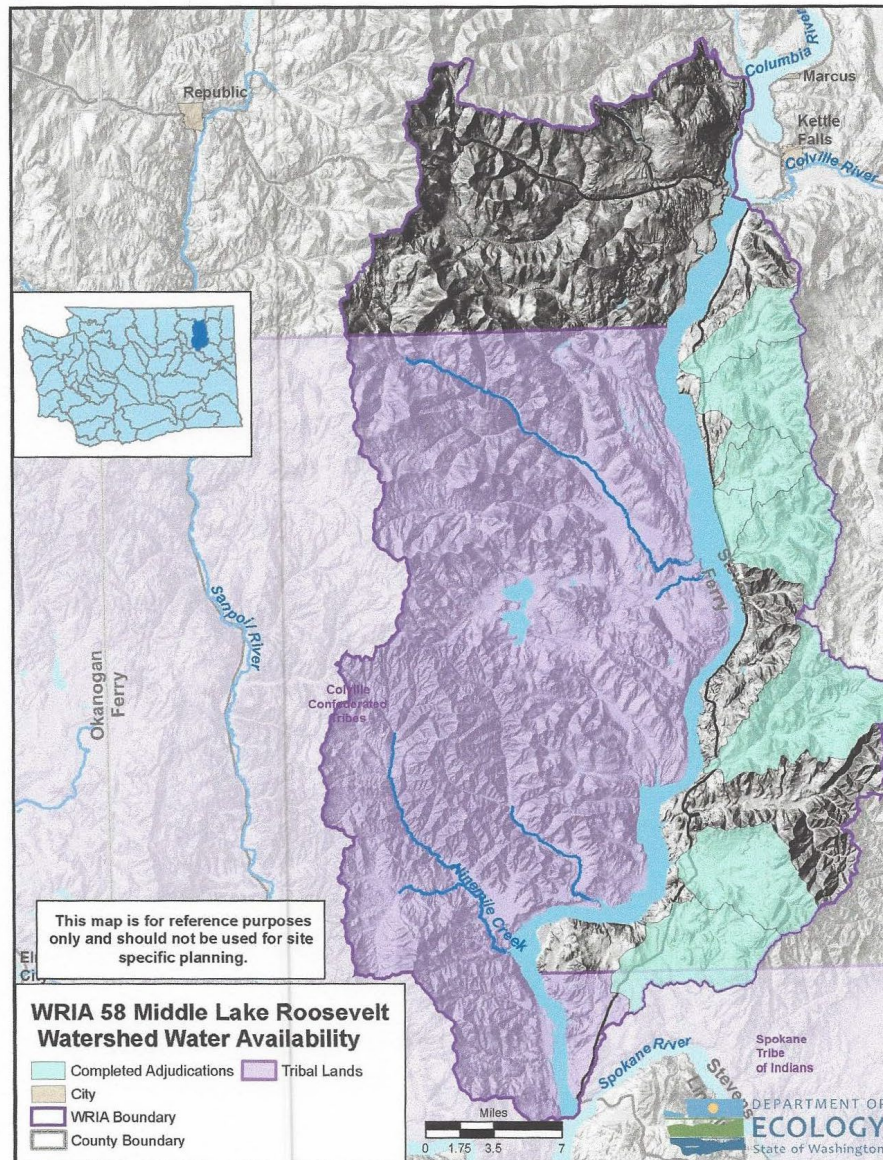
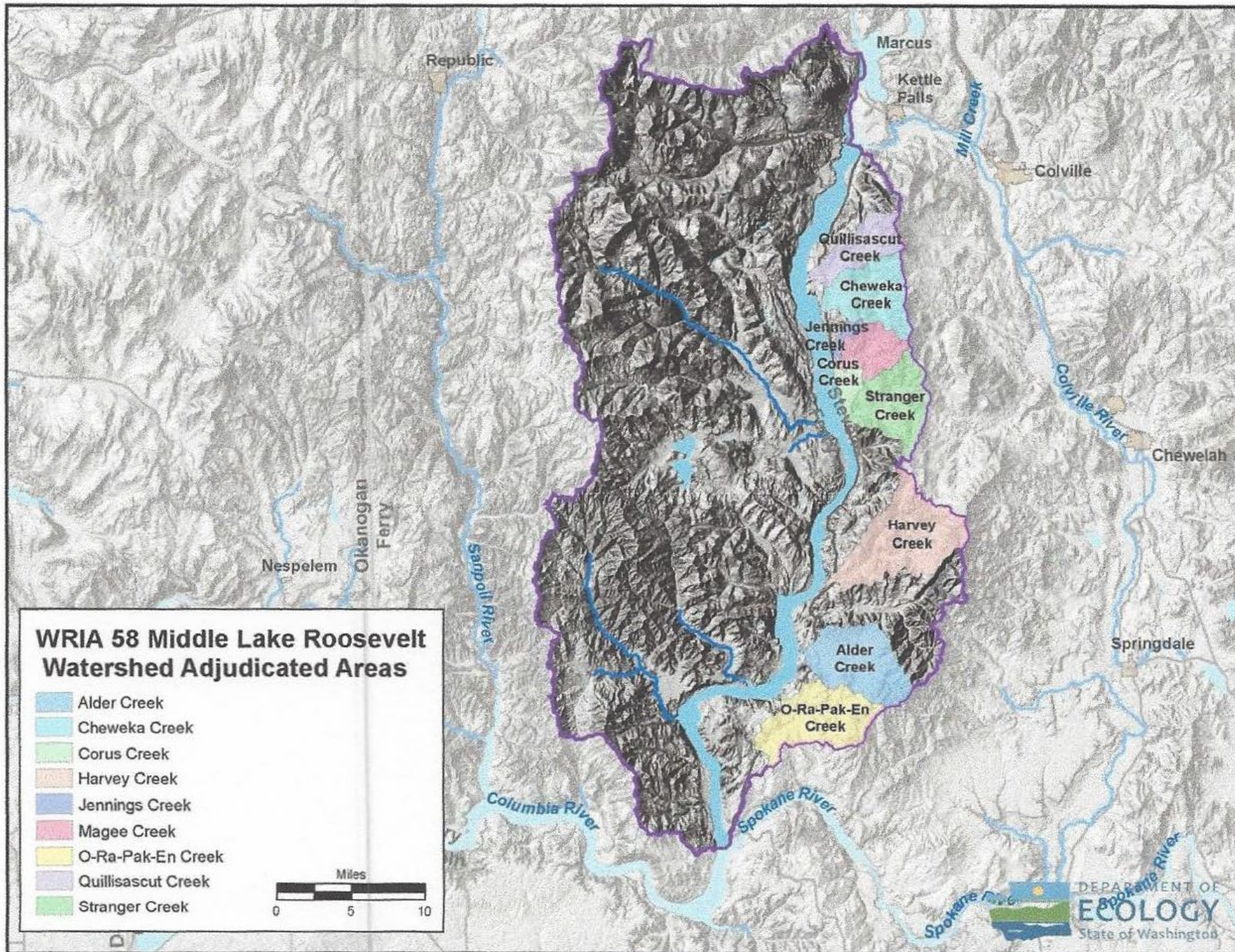


Figure 2 WRIA 58 Middle Lake Roosevelt Watershed Water Availability.



- As tribal trustee, U.S. is required party in any adjudication of tribal water rights.
- 1952 McCarran Amendment waived U.S. immunity in comprehensive state court stream adjudications, so state and federal courts both have jurisdiction.
- Comprehensiveness typically means all claimants on all tributaries must be parties.
- Lingering question about whether U.S. immunity was waived in suits involving tribal claims, so such cases often continued to be filed in federal court.
- In 1976, Supreme Court settled issue in *CO River Water Conservation District v. United States* and held McCarran Amendment waived U.S. immunity even if tribal claims are involved.

- Since 1976, nearly all general stream adjudications filed in state court.
- Cases filed in federal court have been dismissed or stayed in favor of state court proceedings (the only two exceptions in New Mexico involved special circumstances not applicable here).
- Examples in WA:
 - (1) *Walton* (Colville Tribes/No Name Creek) – filed in federal court in 1970;
 - (2) *Anderson* (Spokane Tribe/Chamokane Creek) – filed in federal court in 1972; and
 - (3) *Acquavella* (Yakama Nation/Yakima River) – first filed in federal court in 1977, but court stayed case in favor of subsequent state court action.

State	River System	Year Filed	State Court	Federal Court	Notes
					law and that the McCarran Amendment did not prohibit removal to federal court, but nonetheless remanded the case back to state court because not all the defendants had joined the removal petition. ²⁰ In 1983, the State moved to dismiss the state action and the case was dismissed without prejudice.
Utah	Virgin River	1980	X		In 1980, the State filed suit in state court to adjudicate the water rights of the Virgin River, including the rights of the Shivwits Band of Paiute Indians. ²¹ In 2000, Congress approved a settlement of the Tribe's water rights.
Washington	No Name Creek	1970		X	In 1970, the Colville Tribes filed suit in federal court to enjoin non-Indian allottees from using water from No Name Creek, which lies entirely within the Colville Reservation. The U.S. and State intervened, and in 1973 the U.S. filed an identical suit in federal court against the State and allottees. The cases were consolidated. In 1981, on appeal of the District Court judgment, the Ninth Circuit held that the Tribes has reserved water rights for permanent homeland purposes (including replacement fisheries), non-Indian allottees may use a portion of the Tribes' reserved waters, and the State has no authority to regulate water within the Reservation. ²²
Washington	Chamokane Creek	1972		X	In 1972, the U.S. filed suit in federal court to adjudicate the water rights of the Chamokane Creek system, including the rights of the Spokane Tribe. The federal district court entered judgment in 1979 and awarded the Tribe reserved water rights, including for fishery purposes. ²³

²⁰ *In re Gen. Adjudication of All Rights to Use Water & Water Rights on Mo. River*, 531 F. Supp 449, 451 (D.S.D. 1982).

²¹ *In re Gen. Adjudication of All Rights to Use Water in Virgin River Drainage Area in Utah*, CV No. 7596 (Utah 5th Jud. Dist. filed July 21, 1980).

²² *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981).

²³ *United States v. Anderson*, 591 F. Supp. 1 (E.D. Wash. 1982), *aff'd in part, rev'd in part*, 736 F.2d 1358 (9th Cir. 1984).

State	River System	Year Filed	State Court	Federal Court	Notes
Washington	Yakima River	1977	X		In April 1977, the Yakama Nation filed suit in federal court to adjudicate its water rights in the Yakima River watershed. ²⁴ In response, in October 1977, the State filed suit in state court to adjudicate the same water rights, including those of the Yakama Nation. In 1979, the federal court stayed the federal action in deference to the state action. The litigation in state court continued for decades until 2021, when the Washington Supreme Court affirmed the trial court's 2019 decree. ²⁵
Washington	Omak Creek	1980	X	X	In 1980, an adjudication of the water rights of Omak Creek, which lies entirely within the Colville Reservation, was filed in federal court. Limited information is available online, but it appears that a similar adjudication was filed in state court in Okanogan County shortly before the federal action. A primary issue was the state court's jurisdiction to adjudicate tribal water rights, so my best guess is that the U.S. removed the case to federal court. In any event, in May 1990 the Colville Tribes filed a statement of position in the federal case, but shortly thereafter the court granted the State's motion to dismiss for unknown reasons. ²⁶ In 2002, the Washington Department of Ecology reported to the legislature that the state adjudication of Omak Creek was "incomplete." ²⁷
Wyoming	Big Horn River	1977	X		In 1977, the State filed suit in state court to adjudicate all the water rights of the Big Horn River system, including the rights of several Indian tribes. ²⁸ One month later, the U.S. removed

²⁴ *Confederated Tribes & Bands of Yakima Indian Nation v. United States*, No. CIV-77-129 (E.D. Wash. filed Apr. 28, 1977).

²⁵ *Washington v. Acquavella*, 498 P.3d 911 (Wash. 2021).

²⁶ *Washington v. Boy Scouts*, No. 2:80-cv-00275 (E.D. Wash. filed June 9, 1980).

²⁷ Wash. Dep't of Ecology, *2002 Report to the Legislature, Streamlining the Water Rights General Adjudication Procedures* at 24, Pub. No. 02-11-019 (Dec. 2002).

²⁸ *In re Gen. Adjudication of All Rights to Use Water in Big Horn River Sys.*, No. 4993 (Wyo. Dist. Ct. filed Jan. 24, 1977)

A Century Ago, This Water Agreement Changed the West. Now, the Region Is in Crisis

Much has changed since the Colorado River Compact was signed in 1922



Margaret Osborne

Daily Correspondent

November 28, 2022



The Colorado River passes through the Grand Canyon. Dean Fikar via Getty Images

The Colorado River has long been regarded as the "lifeline of the Southwest." It supplies water to 40 million people in

seven states, 29 Native American tribes and parts of Mexico. Farmers use it to irrigate nearly 5.5 million acres of agricultural land.

One hundred years ago this month, the signing of the Colorado River Compact laid the foundation for how water from the river is used today. But the signers of the 1922 agreement had no way of knowing what the future would bring. Decades of overuse because of faulty science and population growth—along with climate change—have all reduced the river's flow and the water levels in the nation's largest reservoirs, Lake Mead and Lake Powell. Now, the basin is facing a crisis.

"The conditions that we're experiencing now are far worse than anyone anticipated them to ever be," Crystal Tulley-Cordova, principal hydrologist at the Navajo Nation Department of Water Resources, tells *Smithsonian* magazine.

So, how did the situation evolve into what it is today? And what comes next for the basin? Here are five things you should know about the 1922 agreement for its 100th anniversary.

Where is the Colorado River?

The 1,450-mile-long river begins in the Rocky Mountains of Colorado. It passes through Lake Powell, the Grand Canyon and Lake Mead before ending in Mexico's Sonoran Desert. Altogether, its drainage basin spans about 246,000 square miles, representing 8 percent of the land in the continental United States.

While the river historically stretched all the way to the Gulf of California, damming and overuse have prevented the water from regularly flowing into the gulf since the 1960s.

What is the Colorado River Compact?

In the early 1920s, states in the Colorado River Basin grew concerned about their shares of water in the river. California was growing rapidly, and some feared it would establish priority access to the water.



The Colorado River Basin spans about 246,000 square miles. USGS

Delph Carpenter, an attorney in Colorado, proposed that the states should come together to negotiate river water allocation. The states took 11 months to reach an agreement: the Colorado River Compact. It divided states in the watershed into an Upper Basin and a Lower Basin, which would each receive 7.5 million acre-feet of water per year. From there, the basins were left to figure out how to split up the water among themselves.

In the decades following the compact, subsequent court cases, treaties and agreements hammered out exactly how the water would be distributed. Together, these are called the "Law of the River."

Who was involved, and who was not?

The compact was signed by delegates from seven states—Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming—as well as a representative from the federal government, Secretary of Commerce Herbert Hoover. It was the first time so many states had come together to make an agreement—a momentous occasion in U.S. history.

But while Native Americans had been using water in the river for millennia and had legal rights to it, per a 1908 Supreme Court

case, they were left out of the agreement, as was Mexico.

All states ratified the compact except for Arizona. Its then-governor said the compact put Arizona at a disadvantage, because it would be forced to compete directly with California for water. Arizona later joined the agreement in the early 1940s, and the two states still face bitter disputes over water today.



The Colorado River Compact was signed by delegates from seven U.S. states. Water Education Foundation

One century later, what has changed?

While the Law of the River still governs water use, conditions have shifted drastically in the 100 years since the compact was signed. Hoover predicted the basin's population, which was about 457,000 in 1915, would quadruple. Today, the river serves 40 million people—more than 20 times his prediction.

And states are now using more water than is sustainable. The 1922 negotiations allocated water use based on data from an unusually wet period in history, Brad Udall, a senior water and climate research scientist at the Colorado Water Institute at Colorado State University, tells *Smithsonian* magazine. Now, with reduced water in the river and its reservoirs, these allocations are outdated. The signers likely knew their agreement would create a long-term problem, some experts say, but they ignored the research and forged ahead anyway.

"Uses are somewhere on the order of about 15 million acre-feet. The historical flow since 2000 is around 12 million acre-feet," Udall says. "We've got a 3 million acre-foot imbalance."

Meanwhile, climate change is reducing the mountain snowpack that feeds the river, and it's also causing more evaporation. Warmer, drier conditions have thrown the entire basin into a 23-year-long drought that is ongoing. But Udall and other scientists argue the word "aridification" is a more accurate term, since the conditions are unlikely to change.

"Since 2000, the basin has been in a state of profound imbalance," Udall says. "As a result, the Colorado River reservoirs, the nation's two largest reservoirs, have declined by roughly 70 percent."

The water shortage has forced the federal government to take drastic action—it has ordered cuts to water usage and reduced downstream releases from the Glen Canyon and Hoover dams, which form Lake Powell and Lake Mead, respectively. But even these measures haven't been enough.

Native American tribes, which were excluded from the original 20th-century negotiations, have inherent rights to the diminishing water supply—a combined total of about 20 percent of the river's historical flow. But many tribes are still fighting for these rights to be recognized.

"While people are conserving, we're trying to develop our water," Tulley-Cordova says. "A large population of our nation still don't have running water."

Jack Schmidt, director of the Center for Colorado River Studies at Utah State University, tells *Smithsonian* magazine the situation is dire. One more extremely dry winter—on par with the record-breaking dry conditions that occurred in 2002—will either drain Lake Powell or force the government to take unprecedented emergency action, he says.

"We're in abject crisis right now," Schmidt says. "We're on the edge of that cliff. We're about to fall off."

What's next for the basin?

The basin faces an immediate crisis of dry conditions this winter. But it also faces the long-term crisis of overuse, says Schmidt.

"We must, as a nation, reduce our long-term use rates to be consistent with the supply," he says. "That's just basic checkbook accounting."

In 2026, several current agreements regarding water usage will expire, forcing new compromises to be made about water allocation. So far, though, no one has decided what those new rules will look like.

"I don't know where we're going. I don't know that anybody would tell you where we're going. But if we don't make decisions fast, nature's going to make them for us," Udall says. "The real threat here is that we empty these two reservoirs and then become reliant on an annual allocation that nature provides, instead of an annual allocation that we humans decide what's best for us."

But Udall says one reason to remain optimistic is that relationships between states and entities in the basin are good. And moving forward, Tulley-Cordova says that continuing to forge these relationships will be key.

"It's not to say that we all agree on the way things should be done," she says. "But the best [strategy for] talking about a complicated subject is not assuming what the other person's priorities, needs, and challenges and opportunities are."

Still, scientists say action must be taken—and soon. With Lake Mead and Lake Powell at historic lows and the states failing to cut back their water use, it's only a matter of time before nature forces the states to make uncomfortable decisions.

"It's going to be a wild ride. That much, I can tell you," Udall says. "We're in a deep hole here."



Margaret Osborne

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