FOSTER PEPPER PLLC

Hirst, Foster, Boldt, and Beyond: Indian Law Preceding RCW Chapter 90.94

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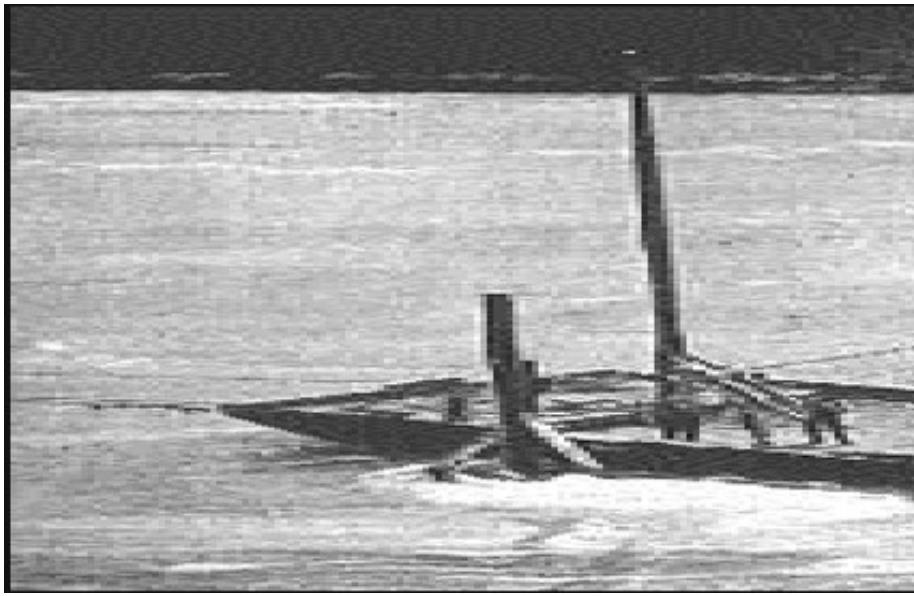
United States v. Winans, 198 U.S. 371 (1905)

- Reserved rights
- Fish wheel + private property obstructed Yakama Indians from exercising treaty fishing rights
- "The treaty was not a grant of rights to the Indians but a grant of right from them— a reservation of those not granted."

- Treaty rights "imposed a servitude upon every piece of land" subject to the treaty



United States v. Winans, 198 U.S. 371 (1905)

- "[T]he Indians were given a right in the land -- the right of crossing it to the river -- the right to occupy it [for fishing purposes]. No other conclusion would give effect to the treaty."

Treaty prohibits "us[ing] a device which gives [non-Indians] exclusive possession of the fishing places"
Right is "continuing against the United States and its grantees" and "the State and its grantees."

Isaac Stevens

Winters v. United States, 207 U.S. 564 (1908)

- Implicit rights
- US brought suit to restrain construction/maintenance of dams preventing streamflow to reservation
- "The Indians had command of the lands and the waters…. Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate?"
- *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, 849 F.3d 1262, 1265 (9th Cir. 2017): *Winters* doctrine does not distinguish between surface water and groundwater

Arizona v. California, 373 U.S. 546 (1963)

- Arizona, California, Nevada, New Mexico, Utah, United States
- → how much water each state has a legal right to use from the Colorado River
- Creation of several Indian reservations in AZ, CA and NV reserved enough water to irrigate the "practicably irrigable acreage"
  - ~~equitable apportionment~~
  - effective date = when the Indian reservations were created
  - →"present perfected rights" with priority under the Act

United States v. Adair, 723 F.2d 1394 (9th Cir. 1983)

- Water rights within former Klamath reservation
- Dual purposes for establishing reservation:
  - Livable homeland for agricultural purposes
  - Protected fishing and hunting rights
    - "no corollary in the common law of prior appropriations"

United States v. Adair, 723 F.2d 1394 (9th Cir. 1983)

- Tribe has "the right to prevent other appropriators from depleting the streams waters below a protected level in any area where the non-consumptive right [of taking fish] applies."
- Priority date of time immemorial
- Rights were not created by treaty; treaty confirmed the continued existence of rights

United States v. Washington: Culverts

- "The right of taking fish at all usual and accustomed grounds and stations"
  - What was the treaty bargain?
    - Stevens: the tribes would have "food and drink … forever"
    - Continued access to the treaty resource was critical in gaining the tribes' assent

United States v. Washington: Culverts

- Practical issue: the parties at treaty time thought the supply of salmon to be inexhaustible
  - → Do the treaties prohibit *any* decrease in the fish population?
  - → If not, what exactly *do* they prohibit?
    - State: "Large" decline" not justified by public interest
    - Tribes: "Substantial degradation
    - Where does the standard come from?

Culverts Oral Argument

- Suggests that the treaty right of "taking fish in common with all citizens" could simply be "what rights non-Indians enjoy, Indians also enjoy… You could read it as a provision for non-discrimination against Indians"

- "Basically, the right to take fish, to you, means the right to take fish if you decide you want to provide fish."

- "[We've held that] if you're going to degradate [the resource] for the benefit of the landowners, as opposed to the people entitled to fish, that you can't do that because you have to make sure that the Indians receive their fair amount of the catch."

Culverts Oral Argument

- "The treaty, which guarantees the right to all usual and customary fishing grounds, really means half of them?"
- Analogizes proposed standard to corporate stock declines
- On the public interest argument: "The point of a treaty I would have thought would have been to freeze in time certain rights and to ensure their existence in perpetuity, regardless of what other social benefits a later municipality might be able to claim."
- "I would have thought a treaty would have been the supreme law of the land and would have overridden any municipal interests"

Culverts Oral Argument

- "Where does this public interest theory come in in the treaty? I thought this was an agreement. I give you my land. You give me the right to take fish. And – let's make it even narrower here. I have the right that you will not put up obstructions on these streams such that I can't take fish."

- Treaty right should at least reflect that common law principle law forbidding blocking fish passage

Culverts Oral Argument

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Swinomish v. Dep't of Ecology, 311 P.3d 6 (Wash. 2013)

- Ecology established minimum instream flow requirements for the Skagit River system
  - amended rule reserved water from system for future year-round, noninterruptible out-of-stream uses, even in times of low stream flows that fall below established minimum instream flows
  - Swinomish challenged the rule
- Held:"overriding considerations" exception of RCW 90.54.020(3)(a) did not provide the Department with the authority to reserve out-of-stream year-round noninterruptible beneficial uses that would impair minimum instream flows
  - existing water rights could not be impaired merely by weighing the benefits that would flow from future beneficial uses without following the legal requirements for making a valid appropriation

Takeaways

- Indian tribes have well-established rights to large, but often still unquantified, amounts of water
  - →sufficient water to fulfill the purposes of the reservation
  - →sufficient water to fulfill treaty promises
  - Priority date:
    - Time immemorial for reserved rights
    - Date of establishment of reservation
- Indian reserved water rights are property rights that are predicated on federal law, and are not dependent on state substantive law
- Water rights to support an agricultural purpose are quantified according to irrigable acres; other purposes are quantified by other measures