The Water Report™
Water Rights, Water Quality & Water Solutions in the West

In This Issue:

Upcoming Stories:

Buying/Leasing Instream Rights

Small System ASR

Biotic Ligand Model & Water Quality Standards

& More!

TRIBAL GROUNDWATER RESOURCES

MANAGEMENT CONSIDERATIONS UNDER CURRENT LAW

by Christopher Payne, Snell & Wilmer LLP (Phoenix, AZ)

Introduction

In the arid southwest, water is the most important and precious natural resource. In some communities, groundwater is the primary source, and often sole source, of water for domestic, agricultural irrigation, industrial, and cultural uses. Consequently, management of groundwater resources is critical to sustain a clean and reliable groundwater supply for current and future generations. This article examines the options available for tribal groundwater management under the current legal framework.

Efforts to create and implement effective water resource management plans for tribal communities generally require the quantification of water rights, an understanding of the mechanisms available under federal and state law to protect water rights, and the development of groundwater management codes. In developing water resource management plans, tribes should consider: the interaction between federal and state water law impacting tribal rights to surface water and groundwater; tribal authority to manage and protect groundwater resources; the relationship between tribes and neighboring water users; and federal and state laws, regulations, and programs addressing groundwater utilization, recharge, and conservation. Thus, the development of an effective tribal water resource management plan requires not only an understanding of Tribal claims and rights, but also an understanding of the state and federal legal framework surrounding surface water and groundwater rights as well as the scope of protection available for groundwater rights under tribal, federal, and state laws.

The *Winters* Doctrine Provides Federal Reserved Water Rights to Tribes

Under the *Winters* doctrine, when Congress creates a federal reservation of land, it impliedly reserves sufficient water to fulfill the purposes of the reservations. *See Winters v. United States*, 207 U.S. 564 (1908). Prior to addressing the ability of tribes to manage groundwater resources within their lands, *Winters* rights (also referred to as "federal reserved water rights") must first be addressed. In *Winters*, the United States Supreme Court held that when Congress authorized land to be set aside for the Fort Belknap Indian Reservation in Montana, it impliedly reserved sufficient water to fulfill its purpose for creating the reservation, namely to provide a permanent tribal homeland with an agricultural economy. Specifically, in *Winters*, the United States brought suit against water users located on lands near the Fort Belknap Reservation for damming and diverting the waters of the Milk River, which abutted the reservation. In defense, the water users argued that: (i) their water right rights had been perfected under state law; (ii) the Tribe's water right was extinguished upon Montana statehood; and (iii) not allowing the water users to continue to divert water would prevent them from irrigating their own lands. The Court rejected the water users' arguments, holding that a reserved water right attached to the land when the United States created the Fort Belknap Reservation. Notably, the Court indicated that the priority date of the reserved water right coincided with the creation date of the Fort Belknap Reservation, and consequently, the reserved water right was superior to any water rights later perfected under state law. In addition, the Court held that under the reserved

Tribal Groundwater

Colorado River Allocations

Non-Indian Reserved Rights

Primacy Purpose

Adjudications

State Courts

The Water Report
(ISSN 1946-116X)
is published monthly by
Envirotech Publications, Inc.
260 North Polk Street,
Eugene, OR 97402

Editors: David Light
David Moon

Phone: 541/ 343-8504
Cellular: 541/ 517-5608
Fax: 541/ 683-8279
email:
thewaterreport@yahoo.com
website:
www.TheWaterReport.com

Subscription Rates:
$299 per year
Multiple subscription rates available.

Postmaster: Please send address corrections to
The Water Report,
260 North Polk Street,
Eugene, OR 97402

Copyright© 2016 *Envirotech Publications, Incorporated*

right doctrine, Indian water rights do not depend on putting water to beneficial use (a legal concept critical to state-based prior appropriation legal regimes) and as a result, cannot be lost due to non-use.

The *Winters* case was the first to establish the existence of federal reserved water rights, and many subsequent cases have refined the scope of those rights. For example, *Arizona v. California* addressed the allocation of the waters of the Colorado River among several states, the federal government, and various tribes. 373 U.S. 546 (1963). In deciding *Arizona v. California*, the US Supreme Court extended the *Winters* Doctrine to non-tribal federally reserved lands. The Court held that the creation of reservations was "not limited to land, but included waters, as well." *Id*. at 598. The Court found that inherent in the definition of reserved water rights is a reservation of water for future use. Finally, the Court confirmed that the creation date of a reservation is the priority date for a reserved water right. It is important to note, however, that unlike Indian reserved water rights, non-Indian federal reserved water rights are limited to the minimal amount required to meet the original primary purpose of the reservation. *See Cappaert v. United States*, 426 U.S. 128 (1976); *see also United States v. New Mexico*, 438 U.S. 696 (1978).

Thus, under the *Winters* Doctrine, as modified by subsequent case law, when Congress creates a reservation it impliedly reserves sufficient water, from the then unappropriated water available, to fulfill the primary purpose for which the reservation was created. Because there were very few non-Indian water uses in existence at the time most Indian reservations were created, Indian reserved water rights generally pre-date and are superior to the majority of water rights held under state law. In fact, most Indian reserved water rights are junior only to pre-existing vested state rights.

Although *Winters* reserved rights are federal-law rights, they are often adjudicated in state courts as part of state-law based comprehensive general stream adjudications under the McCarran Amendment. The McCarran Amendment of 1952 authorizes joinder of the United States in comprehensive general stream adjudications, including the adjudication of Indian reserved water rights. 43 U.S.C. § 666. Although tribes themselves may not be joined in state general stream adjudication proceedings without their consent, tribes are required to either waive their sovereign immunity and intervene or permit the federal government to litigate on their behalf. *See Colo. River Water Cons Dist. v. United States*, 424 U.S. 800 (1976). Further, even though the McCarran Amendment did not divest federal courts of jurisdiction to hear reserved water rights cases, the Supreme Court has instituted an abstention doctrine in favor of state general stream proceedings. As a result, the litigation of tribal *Winters* right claims will often occur in state court.

Winters Rights & Groundwater

WINTERS RIGHTS HAVE NOT BEEN UNIVERSALLY RECOGNIZED AS INCLUDING GROUNDWATER

The *Winters* case and its progeny involve federal reserved right claims to surface water but do not expressly address whether *Winters* rights also include groundwater. Moreover, there has been no uniform approach created by federal or state laws or court systems to address tribal claims to reserved groundwater rights. As discussed below, the few courts that have addressed whether tribes have a reserved right to groundwater have ranged from finding no reserved water right to groundwater, to finding only a conditional reserved right to groundwater, to finding a fully unconditional reserved right to groundwater. This variance in the application of the reserved right doctrine to tribal groundwater claims has impacted the ability of some tribes to plan for and manage their water resources.

The application of the *Winters* doctrine to groundwater has been litigated in a few federal courts, as well as a limited number of state courts under the McCarran Amendment. Several lower federal court decisions in the 1980s suggested that groundwater might, or should, be an available source to satisfy Indian reserved water rights. *See e.g., Gila River Pima-Maricopa Indian Community v. United States*, 695 F.2d 559, 561 (Fed. Cir. 1982) ("Gila River water and groundwater constituted the intended sources for irrigation of the Gila River Reservation."); *New Mexico ex rel Reynolds v Aamodt*, 618 F. Supp. 993, 1010 (D.N.M. 1985) (holding that Pueblo water rights include groundwater that is "physically interrelated to" surface water sources). However, the question of whether *Winters* rights apply to groundwater was not directly addressed by any court until 1988.

In 1988, the Wyoming Supreme Court held that although the Shoshone and Arapaho Tribes of the Wind River Reservation were entitled to a *Winters* right to surface water, they had no *Winters* right to groundwater. *In re Gen. Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76, 100 (Wyo. 1988) (*Big Horn River System*). The Wyoming Supreme Court found that the "logic which supports a reservation of surface water to fulfill the purpose of the reservation also supports reservation of groundwater." However, the Court ultimately determined there exists no reserved right to groundwater, in part because no prior case law had applied the reserved water doctrine to groundwater. *Id.* at 99. As a result, the Court held that because there is no reserved right to groundwater, the use and allocation of all groundwater is presumptively a matter of state law.

 Copyright© 2016 Envirotech Publications; Reproduction without permission strictly prohibited.

Tribal Groundwater

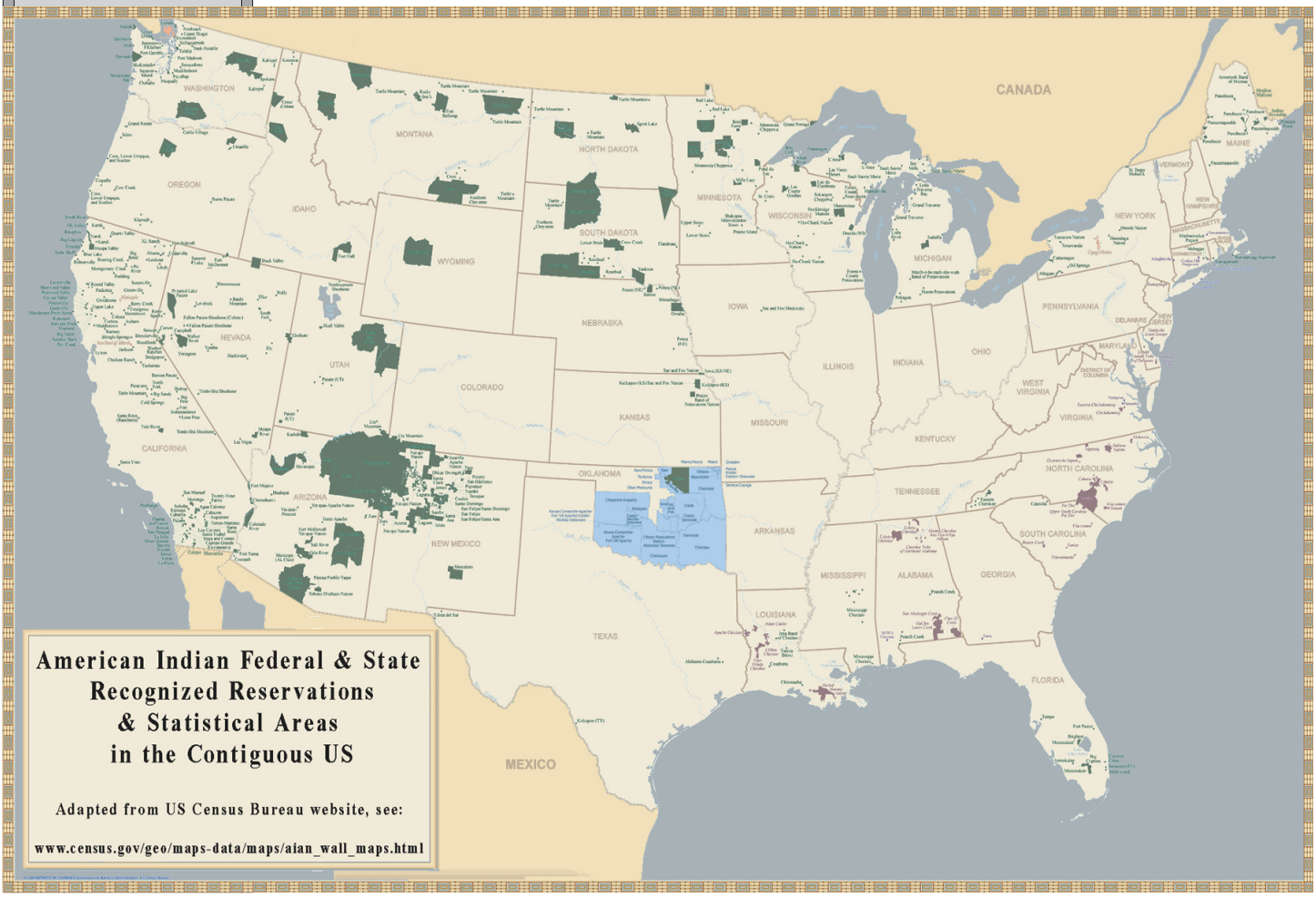
Arizona Holdings

Federal Law Protection

Montana & Washington

Even though the Wyoming Supreme Court was the first state Supreme Court to directly address the issue of a tribal reserved right to groundwater, the *Big Horn River System* no-reserved water right approach to groundwater has not been adopted by any other court (though *Pyramid Lake Paiute Tribe of Indians v. Ricci*, 245 P.3d 1145 (Nev. 2010) did construe a federal water decree as excluding groundwater rights for the Pyramid Lake Paiute Tribe). In fact, the Arizona Supreme Court rejected *Big Horn River System* in 1999, ruling instead that the federal reserved right doctrine provided a conditional right to groundwater. *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 989 P.2d 739 (Ariz. 1999). Specifically, the Arizona Supreme Court held that a "reserved right to groundwater may only be found where other waters are inadequate to accomplish the purpose of a reservation." *Id.* at 748. The Court, however, did not describe when or how surface water would be considered "inadequate." Rather, the Court ruled that the determination of whether groundwater is necessary to accomplish the purpose of a reservation is a "fact-intensive inquir[y] that must be made on a reservation-by-reservation basis." *Id.* Importantly, the Court also determined that a federal reserved groundwater right may be subject to protection beyond what state law can provide, holding that once a reserved right to groundwater is established, federal law may be invoked to protect groundwater from subsequent diversion under state law rights to the extent such protection is necessary to protect the reserved right. *Id.* at 750.

In contrast, at least two courts have found that an unconditional right to groundwater is implicit in the *Winters* doctrine. In 2002, the Montana Supreme Court held that groundwater quantification "is simply another component" of the determination of Indian water rights. *Confederated Salish & Kootenai Tribes of the Flathead Reservation v. Stults*, 59 P.3d 1093 (Mont. 2002). Similarly, in 2005 a federal district court in Washington State ruled that groundwater — whether or not hydrologically connected to surface water — was part of a tribe's reserved water right. *United States v. Wash. Dep't of Ecology*, 375 F. Supp.2d 1050 (W.D. Wash. 2005). This case, however, was subsequently vacated after the parties reached a settlement. *See United States ex rel. Lummi Indian Nation v. Wash. Dep't of Ecology*, 2007 WL 4190400 (W.D. Wash. Nov. 20, 2007), *aff'd*, *U.S. ex rel. Lummi v. Dawson*, 328 Fed. App'x. 462 (2009). *See also* Water Briefs, *TWR* #46: December 15, 2007.



Copyright© 2016 Envirotech Publications; Reproduction without permission strictly prohibited.

Tribal Groundwater

Water Settlements

Uniformity Lacking

Restrictions

Reserved Rights Litigation (California)

Uncertainty

Regulation of Private Users

Water Code Moratorium

DOI Oversight

DOI Position

Despite the inconsistent treatment by the courts, many tribes have been able to secure a reserved right to groundwater through water settlements. In fact, of the nearly 30 Indian water settlements that were enacted by Congress between 1978 and 2010, approximately half contain some provision addressing the right to groundwater; though there has been little uniformity in the groundwater provisions of these water rights settlements. For example, some settlements specified a quantity of groundwater for tribal use or set a limit on tribal pumping of groundwater, while other settlements provided tribal communities with the express right to use groundwater beneath their lands. *See, e.g., The Water Right Claims-Ak-Chin Indian Community Act of 1978*, Pub. L. No. 95-328, §2(b), 92 Stat. 409 (1978); *Shivwits Band of the Paiute Indian Tribe of Utah Water Rights Settlement Act of 2000*, Pub. L. No. 106-263, §7(a)(3), 114 Stat. 737 (2000); *Zuni Indian Tribe Water Rights Settlement Act of 2003*, Pub. L. No. 108-34, § 8(e), 117 Stat. 782 (2003)); *Salt River Pima-Maricopa Indian Community Water Rights Settlement Act of 1988*, Pub. L. No. 100-512, 102 Stat. 2549 (1988)); *Southern Arizona Water Rights Settlement Act of 1982*, Pub. L. No. 97-293, §§ 303(c) & 306(a), 96 Stat. 1261 (1982) (Papago Tribe, now the Tohono O'Odham Nation); *Southern Arizona Water Rights Settlement Act of 2004*, Pub. L. No. 108-451, §307(a)(1), 118 Stat. 3478 (2004) (Tohono O'Odham Nation).

Restrictions on groundwater use have also been incorporated into settlements. *See, e.g., Jicarilla Apache Tribe Water Rights Settlement Act*, Pub. L. No. 102-441, 106 Stat. 2237 (1994).

In addition, at least one tribe has sought recently to establish a reserved water right to groundwater through litigation. *See Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.,* No. EDCV 13-883-JGB, 2015 WL 1600065 (C.D. Cal.). In this compliant — filed by the Agua Caliente Band of Cahuilla Indians in the US District Court for the Central District of California on May 14, 2013 — the Band alleges that excessive groundwater pumping has caused overdraft of the Coachella Valley Groundwater Basin and asserting a reserved right to the groundwater resources with a priority date of "time immemorial" for the purpose of providing and sustaining a tribal homeland on the lands of the Agua Caliente Reservation. The Band seeks related declaratory and injunctive relief, including declarations that it possesses a groundwater right in the sub-basins "in sufficient quantities to foster, promote, and fulfill the homeland purposes for which the lands of the tribe's reservation were set aside for the tribe and its members, both for all present and future purposes." *See* Moon, *TWR* #134: April 15, 2015 for more details.

The absence of a clearly defined tribal reserved water right to groundwater may make it difficult for some tribal communities to effectively develop and implement water resource management plans. In these situations, tribal communities may not be able to determine whether they have a reserved groundwater right or quantify their right. Further, tribal communities which only have a reserved right to surface water, and in some circumstance those with a conditional right to groundwater, may not have any right to use groundwater on their lands unless that right is acquired under state law.

Water Code Hurdles

SOME TRIBES UNABLE TO ENACT TRIBAL WATER CODES DUE TO A "MORATORIUM" ENACTED IN 1975

Indian tribes have the right to regulate the conduct of their members (*see United States v. Wheeler*, 435 U.S. 313, 322 (1978)) — a right which ostensibly extends to the regulation of tribal members' use of water. Utilizing their inherent sovereign powers over tribal land and natural resources, some tribes have enacted water codes in an attempt to regulate all users of reservation water, sometimes including nonmembers. However, the law governing tribal authority to enact water codes to regulate nonmembers is not well-established, and over the years, there has been confusion among tribes and private water appropriators. *See generally* Thomas W. Clayton, *The Policy Choices Tribes Face When Deciding Whether to Enact a Water Code*, 17 Am. Indian L. Rev. 523 (1992). In fact, the US Department of the Interior (DOI) was sufficiently concerned about the potential for conflict inherent in tribal water codes that in 1975, the US Secretary of the Interior imposed what some have called a "moratorium" on the approval of tribal water codes submitted by tribes subject to the Indian Reorganization Act. Thus, even though developing and implementing water codes is typically a matter of political priority and legislative compromise, in contrast to non-tribal governments, the development and implementation of water codes for some tribes will also require the approval of the DOI, not only for the specific code provisions, but also for the authorization simply to enact a water code.

In 1975, the Secretary of the Interior "imposed a moratorium on the approval of water codes in order to permit the DOI to promulgate guidelines for approval." *See American Indian Law Deskbook A* § 8:22 at n. 1 (2015). The Secretary's order provides in part as follows:

> Our authority to regulate the use of water on Indian reservations is presently in litigation. I am informed, however, that some tribes may be considering the enactment of water use codes of their

Copyright© 2016 Envirotech Publications; Reproduction without permission strictly prohibited.

Tribal Groundwater

> own. This could lead to confusion and a series of separate legal challenges that might lead to undesirable results. I ask, therefore, that you instruct all agency superintendents and area directors to disapprove any tribal ordinance, resolution, code, or other enactment which purports to regulate the use of water on Indian reservations and which by the terms of the tribal governing document is subject to such approval or review in order to become or to remain effective, pending ultimate determination of this matter.

See Memorandum from the Secretary of the Interior, *Rogers C.B. Morton, to the Commissioner of Indian Affairs* (Jan. 15, 1975); *see also Memorandum from the Solicitor of the Interior, John D. Leshy to Deputy Secretary David Hayes regarding Tribal Water Rights Settlements and Allottees* (Jan. 19, 2001) (describing the "January 15, 1975, memorandum from Secretary Morton directing the Bureau of Indian Affairs to disapprove any tribal ordinance, resolution code or other enactment purporting to regulate the use of water on Indian reservations"). Under this moratorium — absent approval by the Secretary of the Interior — any tribal law that purports to regulate the use of water must be disapproved by the DOI, pending the creation of DOI rules for tribal water codes pursuant to 25 U.S.C. § 381. *American Indian Law Deskbook A* § 8:22 at n. 1; *Holly v. Totus*, 655 F. Supp. 548, 552 (E.D. Wash. 1983), *aff'd in part, rev'd in part sub nom. Holly v. Watson Totus*, 749 F.2d 37 (9th Cir. 1984). The moratorium only applies to tribes that are subject to the Indian Reorganization Act. *Id*. Although DOI rules have been proposed in the decades succeeding the Secretary's order, no rules have ever been consummated by the DOI. *Id.* To date, the moratorium is still in effect, although DOI made one exception in 1985 when it approved the tribal water code included in the water rights compact between the State of Montana and the Assiniboine and Sioux Tribes of the Fort Peck Reservation.

Moratorium Limit & Exception

The current state of the law regarding the moratorium on the approval of tribal water codes may frustrate the ability of some tribes to exercise self-determination by enacting their own water codes. In support of the DOI's position on tribal water codes, some have argued that there have been few tribes that have requested approval of water codes over the past several decades. While that may be the case, it does not account for the possibility that some tribes may not have attempted to develop water codes due to the existence of the moratorium.

Non-Regulatory Options

For those tribes who are not able to enact comprehensive water codes due to the moratorium, non-regulatory approaches to encourage groundwater conservation and employ best management practices may be established. Such approaches could include establishing groundwater monitoring plans to record pumping information, water depth, and water quality, and establishing voluntary water conservation and public education programs. Tribes could also consider the creation of tribal ordinances that set forth general tribal interests and direct the development of water management plans. In addition, for tribes that operate water systems, tribes may also consider implementing conservation measures, such as encouraging water conservation through rate structures and the use of water meters. Finally, tribes could consider partnering with state and local entities to encourage water management and regulation.

Management Plans

Conclusion

INTERGOVERNMENTAL COOPERATION

Sovereignty Issues

Tribes have long been recognized as sovereign entities, "possessing attributes of sovereignty over both their members and their territory." *United States v. Wheeler*, 435 U.S. 313, 323 (1978). As a result, the authority of states and local governments to assert their own regulatory authority on tribal land is limited. Just as tribes cannot regulate off-reservation activities, states cannot regulate activities of a tribe or its tribal members within its lands unless expressly permitted by Congress. Because watersheds and groundwater basins — as a matter of nature — extend beyond the boundaries of tribal lands, states must consider existing reserved water rights as they develop management plans for water near tribal lands and they must work with tribal governments in developing and managing shared groundwater resources.

Off-Reservation Impacts

Groundwater pumping and water use occurring off-reservation may impact groundwater and surface water uses on-reservation and vice-versa, and as a result, state and local governments should work with tribes to ensure tribal rights, priorities, and needs are incorporated into state-wide and regional watershed plans. These types of intergovernmental efforts can serve to supplement, or at times be in lieu of, the direct exercise of tribal regulatory authority over water. In addition, some tribes regulate groundwater through intergovernmental agreements as part of comprehensive water rights settlements. Because states generally have no regulatory jurisdiction over tribal water rights, states and local jurisdictions should recognize the benefit that can come from cooperating with tribes regarding the regulation of water and implementation of effective basin-wide water policies.

Settlements & Cooperation

Copyright© 2016 Envirotech Publications; Reproduction without permission strictly prohibited.

Tribal Groundwater

Water Quality Protection

Partnering Options

Finally, in addition to protecting tribal water resources through the exercise of their sovereign powers, tribes may — with the approval of the US Environmental Protection Agency (EPA) — consider protecting their water resources through federal laws and regulations, such as the Clean Water Act and the Safe Drinking Water Act. Both of these acts provide tribes with authority to protect their water resources, including provisions that authorize EPA to treat a tribe as a state by approving tribal administrative and regulatory programs. (*See* Moon & Light, *TWR* #52: June 15, 2008; Water Briefs, *TWR* #139: Sept. 15, 2015). In fact, over 50 tribes are currently recognized by EPA as having inherent jurisdiction over their waters — including jurisdiction over non-members and water use on non-member fee lands. EPA's regulations have been upheld by the courts as "reflecting appropriate delineation and application of inherent Tribal regulatory authority over non-consenting nonmembers." *Montana v. EPA*, 137 F.3d 1135, 1141 (9th Cir. 1998). Tribes that exercise authority under these Acts to regulate water use on a reservation-wide basis should consider partnering with state and local entities to efficiently manage and regulate water use and water quality.

For Additional Information:
Chris Payne, Snell & Wilmer LLP, 602/ 382-6153 or cwpayne@swlaw.com

Chris Payne, an Associate at Snell & Wilmer LLP in Phoenix, AZ, has a practice concentrated on both transactional and litigation matters in the areas of natural resources and real estate, including water, mining, environmental, and real estate law. His practice includes: assisting clients with water rights; mineral title and permitting; environmental permitting and compliance; retail and commercial leasing; and real property purchase and sale transactions. Chris has represented clients in both administrative and judicial actions involving water, mining, and environmental law. He has assisted clients with issues involving groundwater and surface water rights and supplies, including representation in the Arizona State stream adjudications; litigated claims involving state-based and federal reserved water rights; assisted clients with mineral title, mineral development and mineral permitting issues; and advised clients about compliance with local, state and federal environmental permits and regulations. Previously, Chris worked as a civil engineer for one of the largest architectural and civil engineering firms in the nation. His background and experience as an engineer included: preparing environmental assessments; environmental impact statements and construction drawings; conducting water supply and water development studies; floodplain delineation; solid waste planning; and grading and drainage design.

 Copyright© 2016 Envirotech Publications; Reproduction without permission strictly prohibited.