

# Indian Water Rights

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January 2007

- Indian reserved water rights are based on federal law
- State water rights in the west are based on the “prior appropriation” doctrine

# State Water Rights

Prior appropriation – “first in time is first in right”

Water must be *diverted* for a *beneficial use* as defined by state law

Appurtenant to the land where it is used

Right may be lost if not used – “use it or lose it”  
(usually little state enforcement)

# Federal Power over Indian Affairs

- “The Congress Shall have Power To . . . regulate Commerce with foreign nations, among the several States, and with the Indian Tribes.”  
U.S Constitution, Art. I, § 8, cl.3
- Treaty Power
- Supremacy clause (state law must bow to federal law)

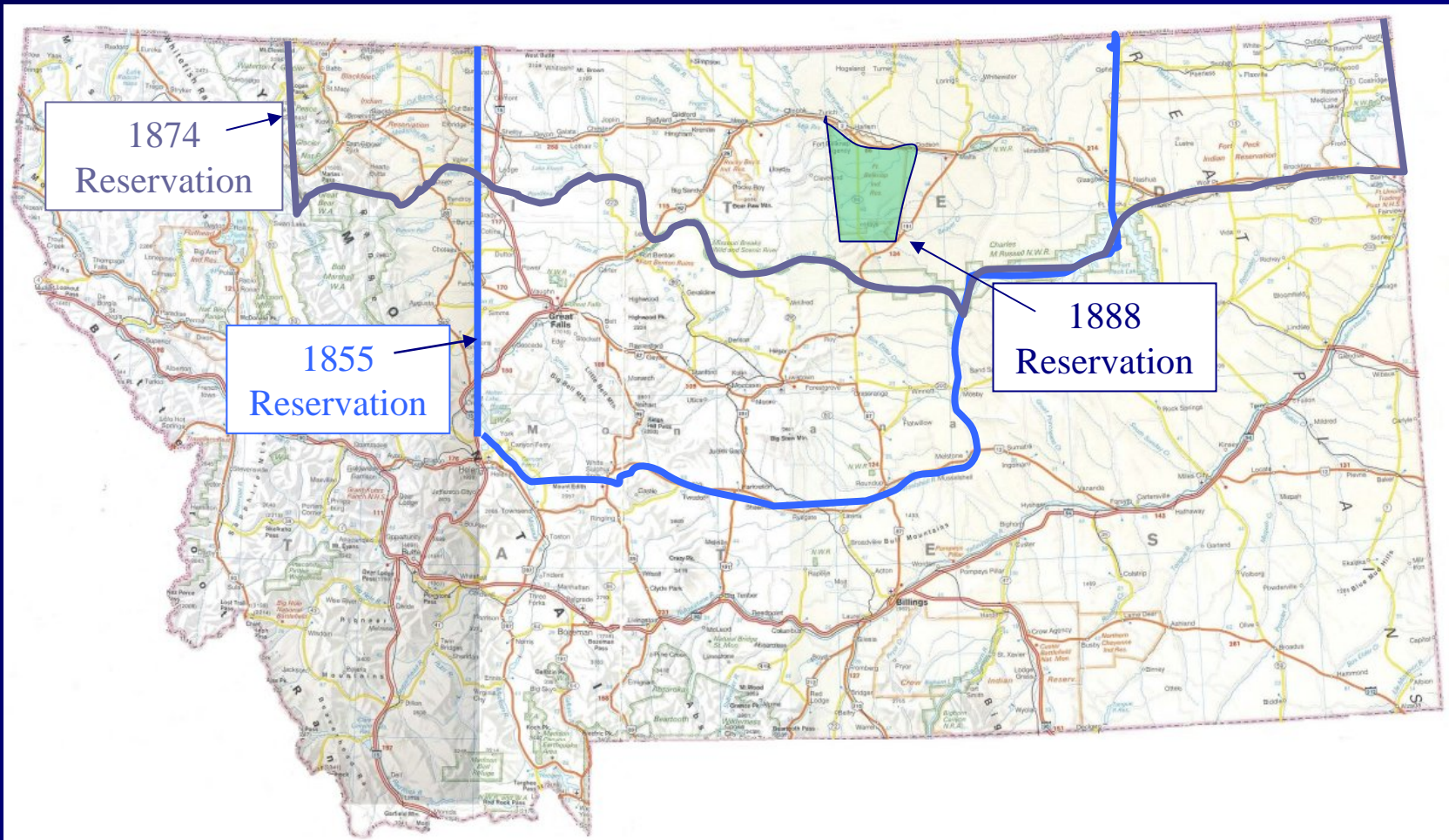
# Nature of Treaty Rights

- Treaties are not grants to the Indians but reservations of rights not surrendered
- Interpreted as the Indians would have understood the terms
- Additional rights may be implied to give effect to the treaty (e.g., access and water)

# Indian Reserved Water Rights

- United States v. Winans ( 1905)
- Winters v. United States (1908)
- Arizona v. California (1963)

# Fort Belknap Indian Reservation in 1888



# Non-Indian water use for irrigation precedes Indian use



# Post-Winters Developments

- Open-ended decrees (lack of certainty)
- Allotment water rights recognized (U.S. v. Powers)
- Extensive non-Indian development

# Jurisdiction

- McCarran Amendment, 43 U.S.C. 666 (waives U.S. immunity from suit in state court “general stream adjudications”)

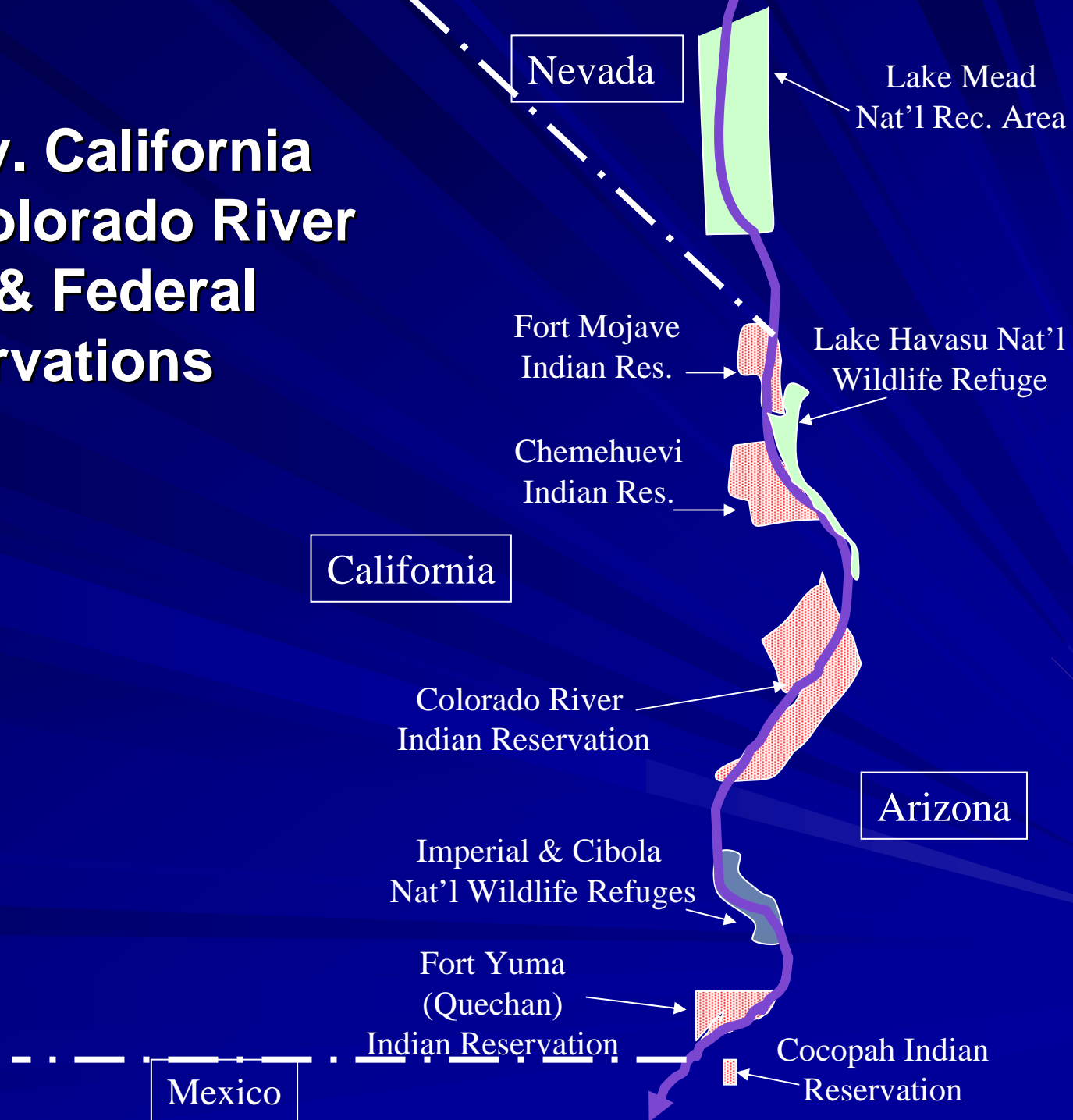
Allows state courts to determine federal and Indian reserved rights in state courts

Tribal rights may be determined even if the tribe is not a party to the suit

# Arizona v. California (1963)

- Water rights litigation over agricultural reservations
- Sufficient water reserved to meet present and future needs of the reservation
- Practicably irrigable acreage (PIA) is the measure

# Arizona v. California (1963) – Colorado River Indian & Federal Reservations



# Determining PIA

- How much land is arable (can support crops)?
- How much of the arable land can support irrigation?
- Is the hypothetical project economically feasible?
- Court awards enough water to irrigate the practicably irrigable acreage

# Tribal Water Right Claims

- Homeland (religious, cultural, domestic, commercial, municipal, industrial uses)
- Fisheries
- Agriculture

# Instream Flow Protection

- *United States v. Adair*, 723 F.2d 1394 (9<sup>th</sup> Cir.)  
(right to maintain stream flows to a protected level)
- *Department of Ecology v. Yakima Res. Irr. Dist.*,  
850 P.2d 1306 (Wash. 1993)
- *United States v. Anderson*, 591 F.Supp.1 (E.D.  
Wash. 1982) (Water temperature)

# What's Next in Litigation?

- Phantom opinion in Wyoming v. United States (Wind River case)(courts should be “sensitive” to existing non-Indian uses) (Justice O'Connor)
- Gila River decision (PIA may give too much or too little – be reasonable) (AZ S.Ct.)
- What is “reasonable”? (state court decides)
- Endangered Species Act issues

# Settlements

- Twenty-two Indian water settlements since 1978
- Twenty-seven tribes involved in nineteen settlement efforts
- Lummi groundwater settlement before Judge Zilly

# Characteristics of Indian Water Settlements:

- Federal investment in water or water facilities.
- Non-federal cost-sharing.
- Creation of tribal trust fund.
- Limited off-reservation water marketing.
- Deference to state law.
- Concern for efficiency, conservation, environment.
- Benefits for Non-Indians

- *Cohen's Handbook of Federal Indian Law* (LexisNexis 2005)
- *American Indian Law in a Nutshell* (2004)
- *Indian Water Rights and the Federal Trust Responsibility*, 46 Nat. Resources J. 399 (2006).