

FEDERAL RESERVED WATER RIGHTS/ INDIAN RESERVED WATER RIGHTS

IN THE CASE OF ALL FEDERAL ENCLAVES
(RESERVED LANDS) — NATIONAL PARKS,
NATIONAL FORESTS, MILITARY RESERVATIONS,
INDIAN RESERVATIONS — CONGRESS HAS THE
POWER TO RESERVE ENOUGH WATER TO
FULFILL THE PURPOSES OF THE FEDERAL
RESERVATION

TWO KEY ISSUES ARE
PRIORITY DATE AND QUANTITY OF THE
RIGHT:

PRIORITY DATE OF THE FEDERAL WATER RIGHT IS GENERALLY THE DATE OF THE RESERVATION. THIS IS CRITICAL IN PRIOR APPROPRIATION SYSTEMS BECAUSE THE DATE OF THE RESERVATION IS USUALLY EARLIER THAN STATE WATER RIGHTS ESTABLISHED BY USE OR PERMIT

QUANTITY OF THE FEDERAL RESERVED WATER RIGHT IS AN AMOUNT SUFFICIENT TO FULFILL THE PURPOSES OF THE RESERVATION. FOR MOST NATIVE AMERICAN WATER RIGHTS, AMOUNT FOR AGRICULTURE IS THE AMOUNT REQUIRED TO IRRIGATE “THE PRACTICABLY IRRIGABLE ACREAGE ON THE RESERVATION” (PIA).

CASES SPLIT ON WHETHER PIA INCLUDES AN ECONOMIC COMPONENT AND THE EXTENT TO WHICH VIABILITY OF AN AGRICULTURAL PROJECT INCLUDES SUBSIDIES BY GOVERNMENT. ARIZONA SUPREME COURT HAS REJECTED THAT STANDARD AND INDICATED IT SHOULD BE BASED MORE ON THE REASONABLE NEEDS OF THE TRIBE

SPECIAL PROBLEMS OCCUR WHEN:

- A) RESERVATION TERMINATED SO NO LANDS TO BE IRRIGATED, OR
- B) WHERE RESERVATION LAND ALLOTTED TO INDIVIDUAL TRIBAL MEMBERS OR EVEN NON-TRIBAL MEMBERS, OR
- C) WHERE THERE IS JURISDICTION OVER PEOPLE'S BEHAVIOR — (“INDIAN COUNTRY” BUT WHERE THERE IS NO REMAINING LAND WHERE WATER COULD BE PUT TO BENEFICIAL USE.) CAN THE AUTHORITY TO “REGULATE” PEOPLE'S BEHAVIOR BE CONVERTED INTO A PROPERTY RIGHT? THE POWER TO TAX OR REGULATE OTHERS' PROPERTY IS NOT THE SAME AS THE POWER TO OWN IT. AND, IT IS EVEN MORE COMPLICATED WHERE IT IS NOT A PRIOR APPROPRIATION SYSTEM, BUT RATHER, A RIPARIAN SYSTEM WHERE EVERYONE SHARES SHORTAGES. IN THAT CASE, WHAT IS THE TRIBE'S SHARE?

INDIAN WATER RIGHTS

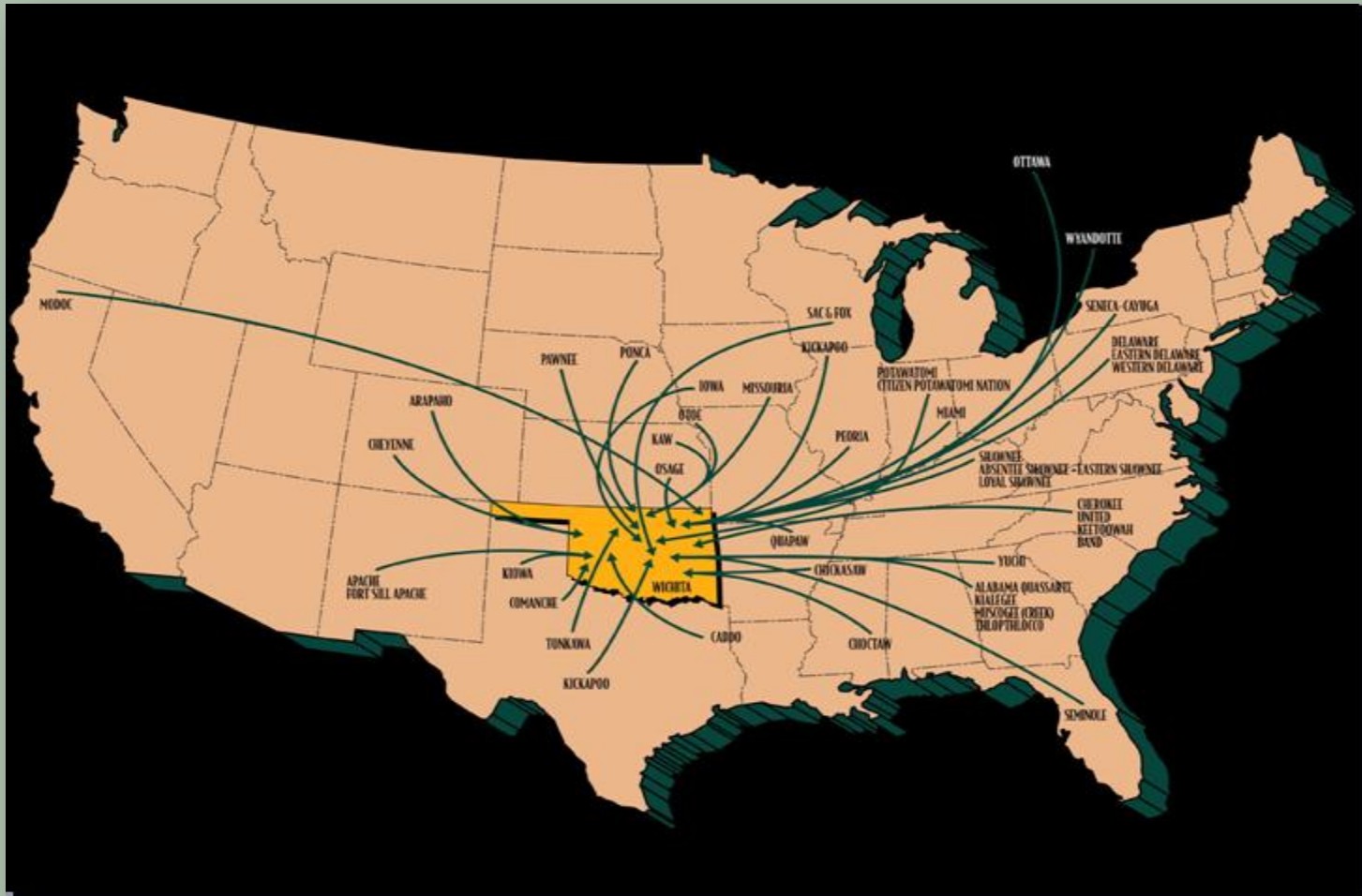
General

- *Winters* – water implied as part of Reservation
- Lands set aside for tribes
 - Protect tribes and members from settlement
 - Assimilation (agrarian society)
- Western U.S. – appropriation
 - Priority in time
 - Beneficial use (quantification)
 - U.S. deference to state law

INDIAN WATER RIGHTS

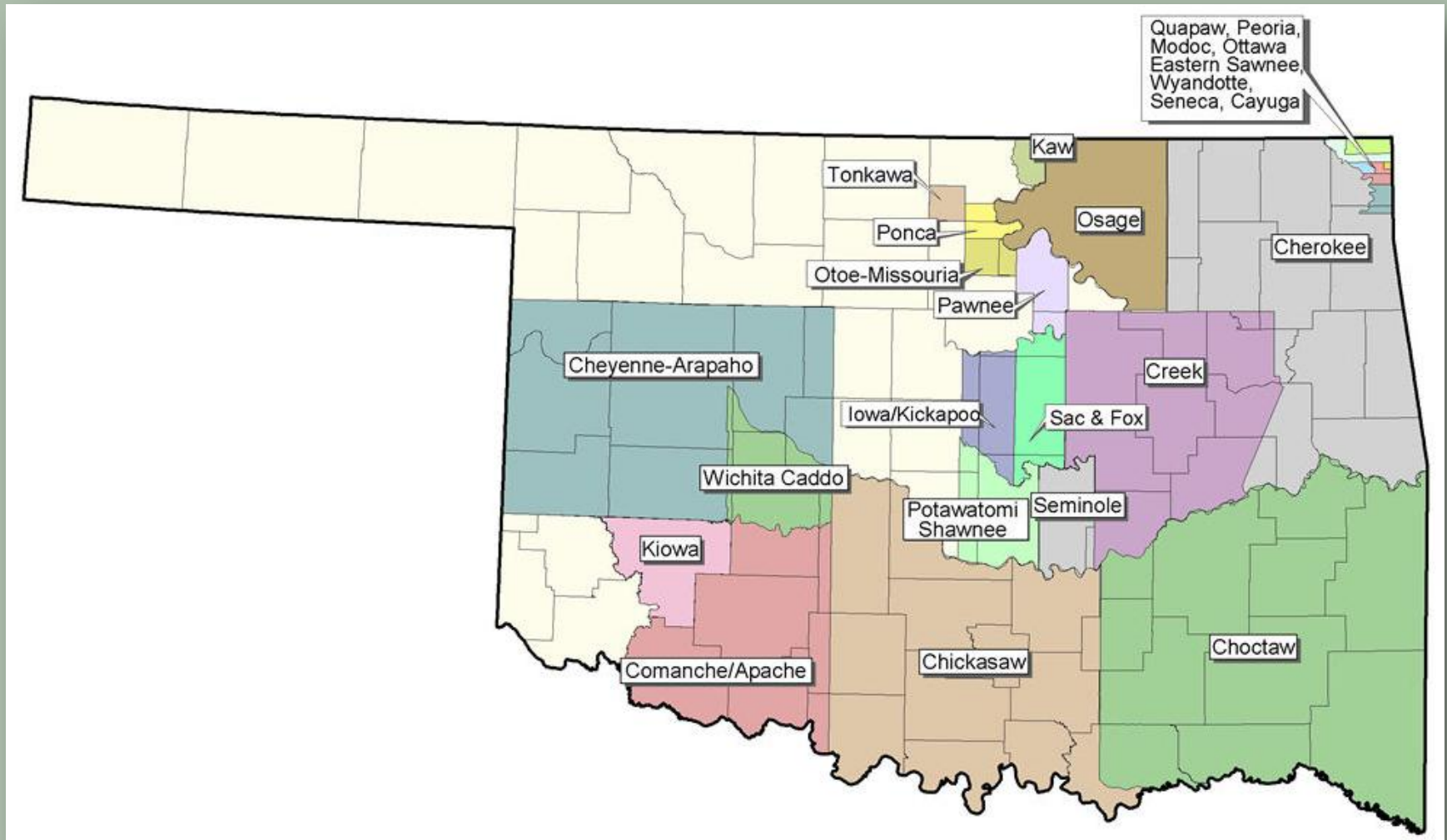
Oklahoma Pre-Statehood

- Removal/patents and other treaties



INDIAN WATER RIGHTS

Oklahoma Original Tribal Areas

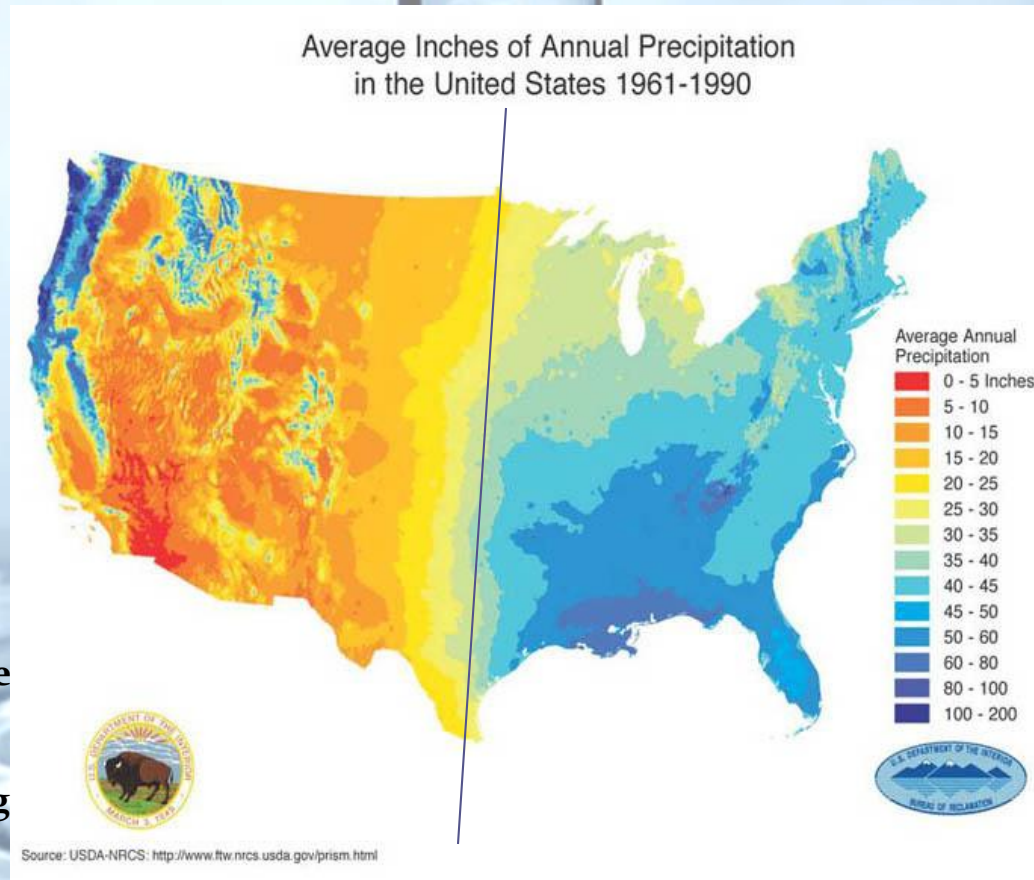


State Water Systems

Appropriation

Riparian

- Water treated as a commodity, severed from land
- Divert water from course
- Apply to “beneficial use”
- Quantified & Dated
- Like mining claims, based on “use it or lose it” and “first in time, first in right”
- Use need not be appurtenant to source
- Transferable
- Scarcity — No Sharing



- Based on land ownership
- Reasonable Use
- Correlative Right
- Not lost through non-use
- May initiate new use at any time
- Not quantifiable
- Scarcity — Equitable sharing

Winters Rights



Like riparian rights, *Winters* rights:

- (1) arise from land ownership
- (2) are not lost through nonuse, and
- (3) may be asserted at any time.

Like appropriation rights, but unlike riparian rights, reserved rights:

- (1) are quantifiable
- (2) are not subject to sharing during shortages
- (3) have priority dates for allocation during times of shortage

However, priority dates established at the time of the land reservation, not the date of initial beneficial use.

Further, *Winters* rights not based on diversion and beneficial use, but are based on the existence of reserved land in need of water.

Five Tribes Water Doctrine



- Created by Treaty Conveyance during “peculiar circumstances” of establishment of the Indian Territory
- Extraordinary treaty terms used to advance federal policy of removal
- *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970)
 - Compare rule for riverbed ownership
 - Conveyance by treaty based on contemporaneous understanding and intentions
 - Established permanent homeland
 - Promised complete governance
 - No United States interest in retaining
 - Promised no state ever to encompass territory
 - Special title in fee to Nations; not ‘ordinary Indian title’
 - Canons of Construction
 - Concurrence by Justice Douglas
- Broadest Purpose, uses, scope, etc.

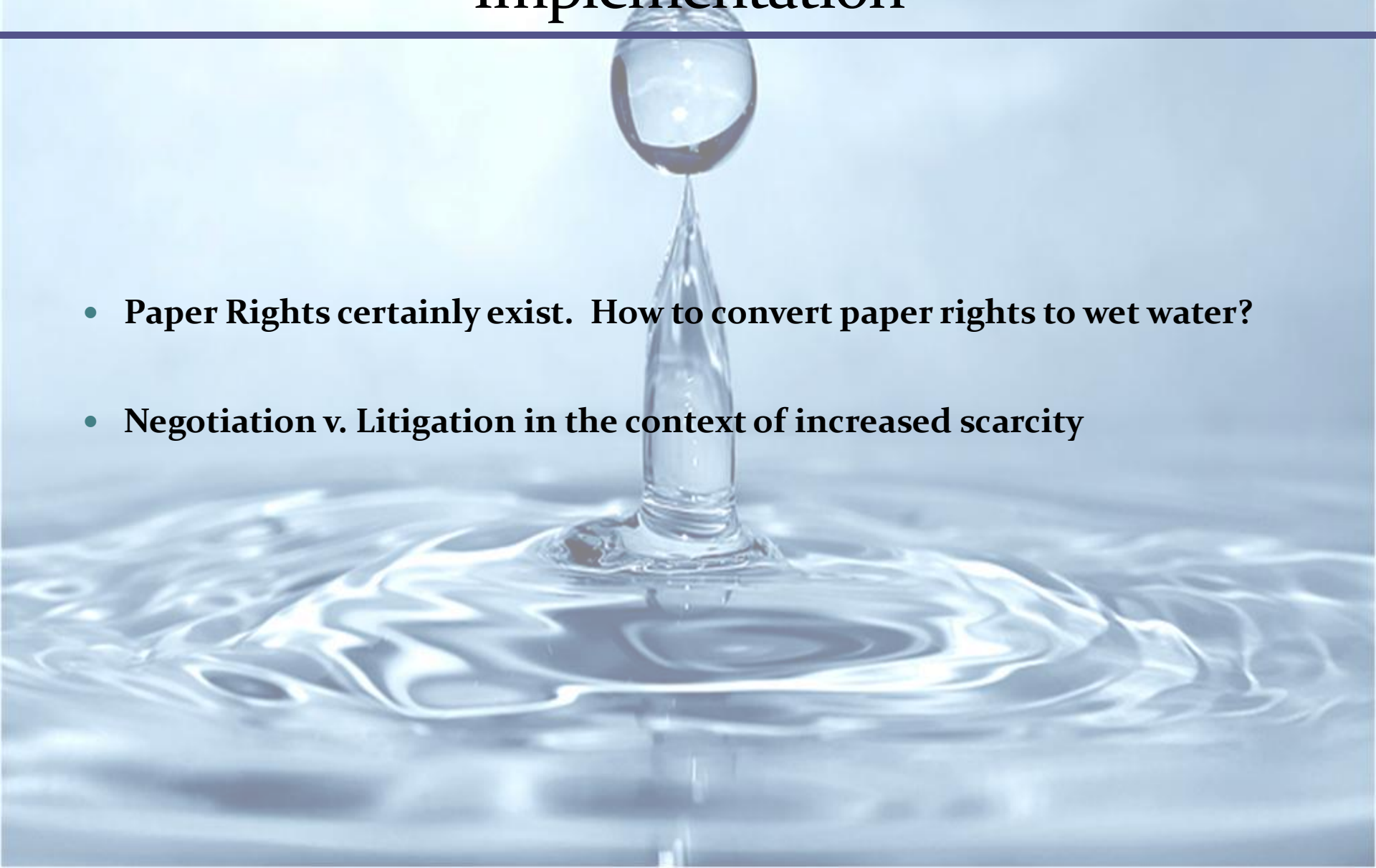
Reserved Rights: Termination

(However Created)

- **Only Congress may terminate**
- **Congress must explicitly or clearly express its intent to terminate, which will not be lightly inferred**
 - **Relevant Federal Statutes Silent as to Water**
 - Dawes Act
 - Curtis Act
 - Five Tribes Enabling Act of 1906
- **Statehood and Equal Footing Doctrine**
 - **No effect on supremacy of federal power to determine rights**
 - **No effect on rights vested prior to statehood**
 - **Oklahoma Enabling Act disclaimed all right to tribal property and reserved federal authority over it**
 - ***United States v. Grand River Dam Authority* (1960) (water rights to non-navigable streams in Cherokee territory did not pass to Oklahoma upon statehood)**

Reserved Rights: Enforcement and Implementation

- **Paper Rights certainly exist. How to convert paper rights to wet water?**
- **Negotiation v. Litigation in the context of increased scarcity**



INDIAN WATER RIGHTS and COMPREHENSIVE WATER PLAN

- 1980 OCWP
 - recognized *Winters*, but stated no reservations in Okla. and Indian population demand considered
- 1995 Update - claims, resultant uncertainty
 - study forming of permanent committee with inclusive membership to address issues
 - develop mutually acceptable negotiation system
 - identify projects warranting cooperative action

INDIAN WATER RIGHTS and COMPREHENSIVE WATER PLAN 2012 Update

- Professor Robertson
 - Oct. 2008 independent contract
 - 20 meetings
 - Issues and concerns discussed
- Feb 2011 Report - recommendations

INDIAN WATER RIGHTS and COMPREHENSIVE WATER PLAN

- Alternatives to address uncertainty
 - Traditional: stream system adjudication suit
 - McCarren Amendment waiver by U.S. trustee
 - Round robin proceedings – costly, time consuming
 - IWR settlements – resolves part of adjudication
 - Certainty - court and Congress approvals
 - Non-traditional: negotiated compact
 - No adjudication (not in court) – citizens bound
 - Congress approval

INDIAN WATER RIGHTS – NEGOTIATIONS

- Current Oklahoma law – Governor or named designee can negotiate and enter cooperative agreements with federally recognized Tribal Governments (74 O.S. Sec. 1221)
- Effective upon approval of Joint Committee on State-Tribal Relations; EXCEPT –
- Cooperative agreements involving surface and/or groundwater resources effective on consent of Oklahoma Legislature authorizing such cooperative agreement

INDIAN WATER RIGHTS – NEGOTIATIONS

- Another model for negotiating:
 - Reserved Water Rights Compact Commission
 - Separate state agency within Montana DNRC
 - House, Senate, AG and Governor appointees
 - Address both Federal and Indian reserved rights
- Other issues:
 - 38 Tribes, allottees' claims, non-Indian transferees
 - Groundwater