

# Indian Reserved Water Rights in Oklahoma

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## I. INTRODUCTION

## II. STATE WATER LAW

### A. The Riparian Doctrine

### B. The Appropriation Doctrine

### C. The Dual-System

## III. FEDERAL AND INDIAN RESERVED RIGHTS

### A. Creation and Characteristics

1. Winters Doctrine — Uncontroversial source of rights.
  - Creation: implicit in Indian country and federal reservation of land
  - Characteristics
  - Winters Rights and the State Systems
2. Five Tribes Water Doctrine (may also apply to a few other tribes)
  - Creation: conveyed by treaties
    - *Choctaw Nation v. Oklahoma* and the “peculiar circumstances” of the Indian Territory
  - Characteristics

### B. Termination

1. Only by Congress
2. No federal statute expresses Congressional intent to terminate tribal water rights in Oklahoma
3. Statehood conditioned on Oklahoma disclaimer of all right and title to tribal property.

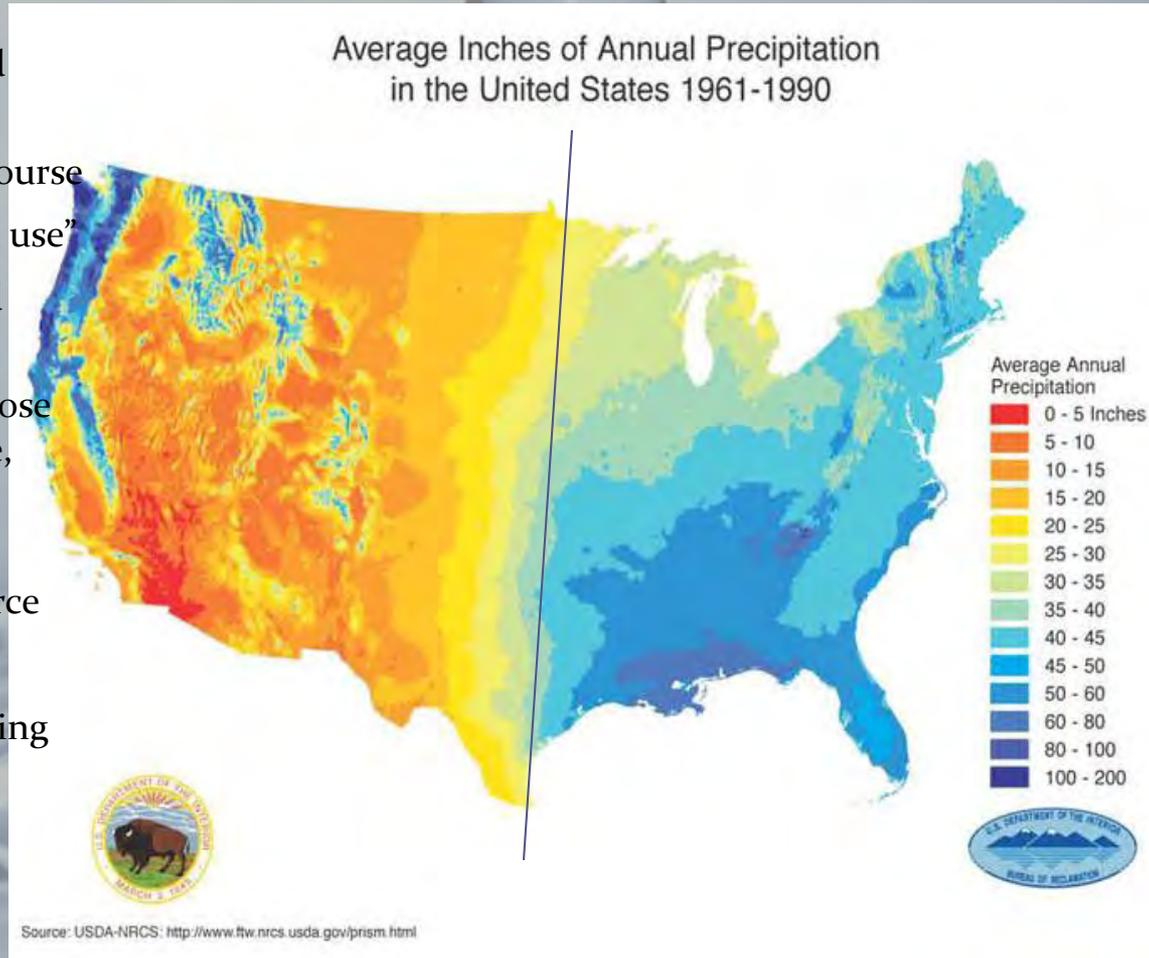
## IV. ENFORCEMENT AND NEGOTIATION

# State Water Systems

## Appropriation

## Riparian

Average Inches of Annual Precipitation  
in the United States 1961-1990



- 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

# Sources of Tribal Water Rights in Oklahoma

## Federal

## State Law

<i>Winans</i>	<i>Winters</i>	Five Tribes Water Doctrine	Oklahoma Riparian Rights
<i>United States v. Winans</i> 198 U.S. 371 (1905)	<i>Winters v. United States</i> 207 U.S. 564 (1908)	<i>Choctaw Nation v. Oklahoma</i> 397 U.S. 620 (1970)	
Implied from Hunting or Fishing Right	Implied from reservation of land	Conveyance by Treaty	Federal and tribal users may have rights within state system
Little Relevance in Oklahoma	Characteristics	Characteristics	Not part of today's discussion
	Termination Enforcement		

# *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

