

# "Hirst, Foster, Boldt, and Beyond: Indian Law Preceding RCW Chapter 90.94," American Water Rights Association Washington State Conference

Speaking Engagement  
October 16, 2018  
Seattle, WA

## Related Services

Native American Law

This presentation will provide a high level overview of foundational tribal water rights cases, including:

- *United States v. Winans*, 198 U.S. 371 (1905): Under the “reserved rights doctrine,” tribes retain all rights not expressly granted to the United States in a treaty. Such rights can only be abrogated by express language in a treaty or congressional act, and cannot be abrogated by silence. The Supreme Court in *Winans* held that the northwest tribes’ treaty fishing right imposed “a servitude upon every piece of land subject to the treaty.”
- *Winters v. United States*, 207 U.S. 564 (1908): In *Winters*, the Supreme Court held that establishment of a reservation necessarily reserved water rights sufficient to serve the purpose of the reservation.
- *Arizona v. California*, 373 U.S. 546 (1963): Addressing the quantification of reserved water rights of several tribes along the Colorado River, the Supreme Court found that the “only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage,” and used the “practicably irrigable acreage” standard to quantify those rights.
- *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983): In *Adair*, the Ninth Circuit held that “[a] reserved right for hunting and fishing purposes consists of the right to prevent other appropriators from depleting the stream waters below a protected level in any area where the non-consumptive right [of hunting or fishing] applies.” There

were dual purposes for establishing the reservation in this case – (1) a “livable” homeland with (2) protected fishing and hunting rights.

- *United States v. Washington/Culverts*: A treaty fishing right without fish is no treaty right at all. In the recent Culverts decision, the 9th Circuit held (and the Supreme Court affirmed by an equally divided court) that Washington State violated the northwest tribes’ treaty fishing right by establishing culverts that blocked salmon passage.