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Indian Law - Water Law - Transferability of Reserved Rights from the Indian Allottee to the Non-Indian Purchaser: Are the Purposes of the Reservation and the Interests of the Tribe Really Served - Colville Confederated Tribes v. Walton

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CASE NOTES

INDIAN LAW—WATER LAW— Transferability of Reserved Rights from the Indian Allottee to the Non-Indian Purchaser: Are the purposes of the reservation and the interests of the tribe really served? Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir. 1981), *petition for cert. filed*, 50 U.S.L.W. 3133 (U.S. Aug. 18, 1981) (No. 81-321).

On July 2, 1872, the Colville Indian Reservation was established by executive order[1] as the homeland for the Colville Confederated tribes.[2] The Reservation, located in a mountainous, semi-arid region of north central Washington, completely encompasses No Name Creek within its exterior boundaries. No Name Creek is a small, non-navigable stream that arises from springs located on, and immediately adjacent to, the northern portion of lands which are held in fee by defendants Boyd Walton, Jr., his wife, Kenna Jeanne Walton and Wilson Walton and Margaret Walton, his wife.[3] The creek flows southerly across the Waltons' land, allotted Indian land and tribal lands before it enters Omak Lake.[4]

In 1906, Congress ratified an agreement with the tribe providing for the distribution of reservation lands to individual tribal members pursuant to the General Allotment Act of 1887[5] and for disposition of the remainder by entry and settlement.[6] In 1917, a line of seven allotments was created in the No Name Creek watershed. The middle three allotments are owned by Walton, a non-Indian. These lands were not irrigated by the original Indian allottee. However, in 1946, this land was

1. Exec. Order of July 2, 1872, *reprinted in* KAPPLER, 1 INDIAN AFFAIRS: LAWS AND TREATIES 915-16 (1904).
2. Hereinafter they will be referred to as the Tribe or the Colvilles.
3. Hereinafter they will be referred to as Walton.
4. Colville Confederated Tribes v. Walton, 460 F. Supp. 1320, 1334 (E.D. Wash. 1978).
5. The purpose of this Act was to provide for the allotment of lands in severalty to Indians on the various reservations and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes. The General Allotment Act of 1887, ch. 119, 24 Stat. 388 (current version at 25 U.S.C. §§ 331-334, 348, 349, 381 (1976)). The Act provides for assignment of tribal lands to tribal members in parcels of a limited size. 25 U.S.C. § 331 (1976). Furthermore, the allottees are issued patents with the title to be held in trust by the United States for a twenty-five year period. During this period the land could not be encumbered or alienated. This period could be extended by the President in his discretion if he deems it advisable. After the twenty-five year period expired, the United States could convey the land by patent to the individual Indian in fee, discharged of the trust and free of all encumbrances. 25 U.S.C. § 348 (1976).

   In 1934, Congress enacted the Indian Reorganization Act which provided for the discontinuance of allotments for tribes that adopted the system of government set forth in the Act. 25 U.S.C. §§ 461, 478 (1976). Additionally, the trust periods and the restrictions on alienation were extended indefinitely. 25 U.S.C. § 462 (1976). However, the Colvilles did not organize under the Indian Reorganization Act. MAXFIELD, NATURAL RESOURCES LAW ON AMERICAN INDIAN LANDS 318 (1977). [Hereinafter cited as MAXFIELD].
6. Act of March 22, 1906, 34 Stat. 80, 81. This agreement was effectuated by a Presidential proclamation in 1916. 39 Stat. 1778 (1916).

sold to another Indian[7] who, in 1948 when Walton purchased the land, was irrigating approximately thirty-two acres. Walton now irrigates 102 acres and uses additional water for domestic and stock watering purposes.[8] The Walton land is bordered on the north and south by allotments held in trust by the United States for the Colville Indians.

The Tribe brought suit in 1970 to enjoin Walton from using No Name Creek waters, claiming that the Tribe's reserved water rights were superior to Walton's rights. The Colvilles also claimed that there was an insufficient amount of water to satisfy both parties' needs.[9] Walton claims to have succeeded to a reserved right from the Indian allottees to irrigate all of their irrigable acreage or, alternatively, to a right to irrigate at least the thirty-two acres that were under irrigation at the time of the conveyance.[10] The district court held that an Indian allottee may not transfer his implied reserved water rights to a non-Indian.[11] Consequently, the court found that Walton succeeded to the water right to irrigate the thirty-two acres under irrigation at the time of acquisition, with a priority date of actual appropriation of water for that use.[12]

The Ninth Circuit Court of Appeals reversed the decision of the district court by holding that an Indian allottee may transfer the "full" amount of his reserved water rights to a non-Indian purchaser.[13] Consequently, the non-Indian purchaser acquires the Indian allottee's priority date. In addition, the non-Indian receives the amount of water appropriated by the Indian at the time of the conveyance and that amount of water that he, the non-Indian, appropriates with reasonable diligence after the passage of title.[14] This note will focus on the ability of an Indian allottee to transfer his reserved water rights to a non-Indian purchaser and on the detrimental results of such a transfer.[15]

7. This second purchaser of the middle three allotments was not a member of the Colville Tribes. Colville Confederated Tribes v. Walton, *supra* note 4, at 1324.
8. *Id.* at 1334.
9. *Id.* at 1323.
10. *Id.* at 1324.
11. *Id.* at 1328.
12. *Id.* at 1329.
13. Colville Confederated Tribes v. Walton, 647 F.2d 42, 51 (9th Cir. 1981) [hereinafter cited in text as *Colville*].
14. *Id.*
15. An additional controversial holding by the court was that the state was without authority to regulate water within the Reservation's boundaries. The fact that No Name Creek is a non-navigable stream entirely within the Reservation's boundaries made this decision somewhat easier for the court. *Id.* at 52.

RESERVED WATER RIGHTS

To determine the respective water rights of the parties in question, a brief history of the implied reserved water rights doctrine is beneficial. In 1908, the Supreme Court in *Winters v. United States*[16] established the doctrine of implied reservation of water. The *Winters* doctrine provides that when the United States reserves public domain for a federal purpose, including Indian reservations, there is an implied reservation of appurtenant water needed to accomplish the purpose of the reservation.[17] The *Winters* Court held that the reservation of water rights was made on the date the reservation was created.[18]

This judicial doctrine has been amplified and refined by several decisions since 1908. In *United States v. Powers,*[19] a Supreme Court case relied upon by some courts to resolve issues similar to the ones in the *Colville* case, the Court cautiously addressed the question of transferability of reserved rights. The *Powers* Court concurred with the respondent non-Indian purchasers that some portion of the right to use the Tribe's waters passed to the purchaser.[20] The Court did not, however, "consider the extent or precise nature of respondent's [non-Indian purchaser's] rights in the waters."[21] The Supreme Court has not had the opportunity to address the transferability issue since *Powers.*[22]

In *Arizona v. California,*[23] the Supreme Court held that reserved water rights for Indians can be set aside by executive order as well as by treaty or Act of Congress.[24] Also, in adopt-

16. 207 U.S. 564 (1908) [hereinafter cited in text as *Winters*].
17. Cappaert v. United States, 426 U.S. 128, 138 (1976) [hereinafter cited as *Cappaert*].
18. Winters v. United States, *supra* note 16, at 577. *See also* Cappaert v. United States, *supra* note 17; Arizona v. California, 373 U.S. 546, 600 (1963).
19. 305 U.S. 527 (1938) [hereinafter cited in text as *Powers*]. In *Powers,* the United States sought to enjoin Thomas Powers, a non-Indian purchaser of allotted Indian lands, from taking water from certain non-navigable streams within the Crow-Indian Reservation.
20. *Id.* at 532.
21. *Id.* at 533.
22. *But see* United States v. Ahtanum Irrigation District, 338 F.2d 307 (9th Cir. 1964); Scheer v. Moody, 48 F.2d 327 (D. Mont. 1931).
23. *Supra* note 18 [hereinafter cited in text as *Arizona*]. In *Arizona,* the basic controversy was over the amount of water each state had a legal right to use from the navigable Colorado River and its tributaries.
24. *Id.* at 598. In *Arizona,* five Indian reservations, with the United States acting in their behalf, asserted water rights in the mainstream of the Colorado River. One of those reservations, the Colorado River Reservation, was created by Congressional Act. The other four reservations were created by Executive Order. *Id.* at 596. *See generally* Trelease, *Indian Water Rights for Mineral Development,* in MAXFIELD, *supra* note 5, at 217 [hereinafter cited as Trelease]; U.S. DEP'T OF THE INTERIOR, FEDERAL INDIAN LAW 665 (1958).

ing the ruling of the Special Master, the *Arizona* Court said, "the water was intended to satisfy the future as well as the present needs of the Indian Reservations."[25] Where the purpose of the reservation's creation was to transform the Indians into an agrarian people, these needs were determined to be best quantified by measuring the reservation's "practicably irrigable acreage."[26]

In the most recent Supreme Court decision regarding reserved water rights, *United States v. New Mexico*,[27] the Court reemphasized that the water quantity reserved was that needed to "fulfill the purpose of the reservation, no more."[28] This opinion stressed that federal reserved water rights exist only for the "primary purposes" of the reservation, not for "secondary uses" making water valuable.[29] Additionally, within the language of the opinion, the Court recognized the water needs of private and state appropriators and the necessity to consider those needs when determining a reserved rights question.[30]

25. Arizona v. California, *supra* note 18, at 600. *See* United States v. Ahtanum Irrigation District, *supra* note 22, at 327; Conrad Investment Co. v. United States, 161 F. 829, 832 (9th Cir. 1908).

26. Arizona v. California, *supra* note 18, at 600. The Court in *Cappaert*, however, determined that the amount of water necessary to fulfill the purpose of the reservation was only the amount to keep a surface water "pool" at the necessary level to preserve an endangered fish species. Cappaert v. United States, *supra* note 17, at 141. In *Cappaert*, the dispute centered around Devil's Hole, a deep cavern on federal land that was reserved as a national monument in 1952. The United States sought to enjoin the Cappaert's pumping of irrigation groundwater which was from the same source as that supplying the Devil's Hole "pool."

27. 438 U.S. 696 (1978) [hereinafter cited in the text as *New Mexico*]. In *New Mexico*, the basic controversy was as to the amount of water the United States impliedly reserved when it established the Gila National Forest in 1899.

28. *Id.* at 700 (citing Cappaert v. United States, *supra* note 17, at 141).

29. United States v. New Mexico, *supra* note 27, at 702. The *New Mexico* Court said:
> Where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water. Where water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator. *Id.*

Even though the *New Mexico* decision specifically addressed reserved rights on national forests, it does not seem presumptuous to assume that this reserved rights analysis applies to all federal reservations, including Indian reservations. The Supreme Court has applied the reserved water rights doctrine to all types of land reserved for a federal purpose. Therefore, it should be a reasonable assumption that the *New Mexico* analysis applies to reserved rights on Indian reservations.

30. *Id.* at 705. The concern of the Court, in this regard, would be heightened when presented with the question in *Colville* regarding the transferability of reserved rights from the Indian allottee to the non-Indian purchaser. The impact of allowing such a transfer in "full" would be devastating to the needs of other public and private appropriators. This is because of the special nature of the reserved right. The date-of-reservation priority date, the open ended nature of the right (the lack of requirement for quantification of the right) and the non-abandonment aspect of the right from non-use of the water would all allow the non-Indian purchaser to "buy into" an appropriation senior and paramount to other non-Indian appropriators. The ability of a non-Indian to do so would severely damage the water needs of others governed by the doctrine of prior appropriation.

THE COURT'S ANALYSIS IN *Colville*

The Ninth Circuit Court of Appeals in *Colville* applied the facts of the case before it to the general rule "that termination or diminution of Indian rights requires express legislation or a clear inference of Congressional intent gleaned from the surrounding circumstances and legislative history."[31] The court reasoned that restricting transferability of reserved water rights by an Indian allottee to a non-Indian purchaser is a " 'diminution of Indian rights' that must be supported by a clear inference of Congressional intent."[32] The court, after determining Congress' intent when enacting the General Allotment Act of 1887, concluded that Congress did not intend for transferability restrictions to survive the twenty-five year trust period.[33] Therefore, the court held that the absence of a clear Congressional intent to continue restrictions meant there is "no basis for limiting the transferability of that right" to share in reserved waters.[34]

When determining the nature of the right acquired by Walton, the court concluded that "the full quantity of water available to the Indian allottee . . . may be conveyed to the non-Indian purchaser."[35] The court arrived at this decision by a three-step rationale:

1) Just as the Indian's right is limited by the number of irrigable acres he owns, so is the non-Indian's.
2) The Indian's priority date, as of the date the reservation was created, is the principal aspect making the right more valuable than other water user's rights and therefore is acquired by the non-Indian.
3) The non-Indian purchaser acquires a right to appropriated water at the time of conveyance. Additionally, he acquires a right, with a date-of-reservation priority date, to water appropriated by him with reasonable diligence after the passage of title. The non-Indian will lose the reserved water right that he acquired if he does not continually use the full amount of water.[36]

31. Colville Confederated Tribes v. Walton, *supra* note 13, at 50 (citing Bryan v. Itasca County, 426 U.S. 373, 392-93 (1975); Mattz v. Arnett, 412 U.S. 481, 504-05 (1972)).
32. *Id.* at 50.
33. *Id.*
34. *Id.*
35. *Id.* at 51.
36. *Id.*

ANALYSIS OF THE COURT'S OPINION

Transferability of Reserved Rights

The decision arrived at in *Colville* seems to be contrary to the rationale of the reserved rights doctrine and to the established policy to protect Indian cultural interests. As the *New Mexico* Court stated, "Where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude . . . that the United States intended to reserve the necessary water."[37] As noted earlier, the *New Mexico* Court went on to say that water was not reserved for "secondary uses" of the reservation.[38]

Given its holding that the grant of reserved rights is limited, the Court in *New Mexico* determined that the initial purposes for creating national forests were carefully defined by Congress in the Organic Administration Act of 1897.[39] A contention presented by the United States that the Multiple Use Sustained Yield Act of 1960[40] intended to expand the purposes of national forests and, thus, increase the amount of reserved water was rejected by the Court. The Court felt that these purposes expressed in the 1960 Act were secondary to the primary purposes established by the 1897 Act.[41]

Applying this rationale to the *Colville* facts, the "primary purposes" for the creation of the Reservation are to be derived from the executive order establishing it. The *Colville* court[42] determined that a liberal construction[43] of the executive order demonstrates that the purposes for creating the Reservation were 1) to provide the Indians with a homeland to maintain their agrarian society, and 2) to preserve the Tribe's access to fishing grounds.[44] The inference by the *Colville* court that Con-

37. United States v. New Mexico, *supra* note 27, at 702. For full quotation *see* note 29 *supra*.
38. *Id.*
39. 16 U.S.C. §§ 473-475, 477-482 (1976). The purposes included in this Act were to 1) secure favorable water flows, and 2) furnish continuous supply of timber. 16 U.S.C. § 475 (1976).
40. 16 U.S.C. §§ 528-531 (1976). This Act expanded the purposes for which national forests were established to include outdoor recreation, range, timber, watershed, and wildlife and fish management. 16 U.S.C. § 528 (1976).
41. United States v. New Mexico, *supra* note 27, at 708.
42. Rather than a question of fact, it is a question of law when determining the government's intention for establishing a federal reservation. Therefore, the appellate court can make this determination. Trelease, *supra* note 24, at 219.
43. The rule of liberal construction, that agreements or treaties entered into with the Indians shall be read in favor of the Indians, applies to executive orders creating reservations. Colville Confederated Tribes v. Walton, *supra* note 13, at 47 n.9 (citing United States v. Winans, 198 U.S. 371, 381 (1905)).
44. Colville Confederated Tribes v. Walton, *supra* note 13, at 47-48.

gress intended, in the General Allotment Act, to allow for the transfer of allotted lands, and also, the reserved water rights appurtenant to those lands, would be analogous to extending reserved water rights to "secondary uses" provided for by the Multiple Use Sustained Yield Act of 1960 in *New Mexico.*[45]

Under the *Colville* facts, to allow the Indian allottee to transfer his reserved water rights to Walton in full would not serve to meet the primary purposes for the reservation of those rights. Walton's purpose for use of the water is to sustain his own agricultural livelihood, not to satisfy the Colville's need for a homeland and fishery. Therefore, the primary purposes for reservation of the water rights would be lost upon transfer to Walton, a non-Indian. Thus, "when the purpose fails, the right should fail."[46]

This is not to say that the transfer of reserved water rights from an Indian allottee to a non-Indian purchaser can never fulfill the purposes for creation of the reservation. There has been a suggestion that an Indian allottee may need to transfer *some* of his land to gather enough capital to practicably irrigate his remaining land.[47] Also, an Indian allottee may sell his land to a private educational institution that was developed to teach Indians agricultural practices.[48] Therefore, if the transfer of land would be consistent with the primary purposes of reservation creation, the non-Indian should be able to receive *some* portion of the reserved water rights.

A further concern to consider when addressing the transferability issue is whether the *Colville* decision would be an advancement of tribal interests. The General Allotment Act

45. *See* Dufford, *Water For Non-Indians on the Reservation: Checkerboard Ownership and Checkerboard Jurisdiction*, 15 GONZ. L. REV. 95, 118 (1979). Professor Dufford feels that inferring from the General Allotment Act that Congress intended to allow Indians to transfer reserved water rights to non-Indians, as *Colville* did, is not convincing. He said:
In effect, this would mean that Congress' purpose was positively to promote the sale of Indian allotments to non-Indians. Such a purpose is wholly inconsistent with the provisions for holding allotments in trust for twenty-five years. The initial trust status of allotments indicates a purpose to encourage the retention of Indian ownership. . . . The idea was to prevent non-Indians from gobbling up the land which had been given to Indians. . . .
Id. at 117.

46. *Id.* at 116.

47. Comment, *The Water Rights of Klamath Indian Allottees*, 59 OREGON L. REV. 299, 323 (1980). However, the sale of all the Indian allotee's land to the non-Indian, under this suggestion, would be inconsistent with the purposes of the reservation. *Id.*

48. Dufford, *supra* note 45, at 116. Under this suggestion, the transfer of all of the Indian allottee's land could be consistent with the reservation's purposes.

was an attempt by so-called "friends of the Indian" to assimilate the Indians into the civilized American society.[49] However, one opponent of this Act, Senator Teller of Colorado, recognized the strong desire by the Indians to retain their cultural heritage. Senator Teller "recognized the inherent objection of the Indian mind to land in severalty. . . . He knew that it was part of the Indian's religion not to divide their land. . . ."[50]

The federal government, with the enactment of the Indian Reorganization Act of 1934,[51] adopted the policy towards Indians of cultural survival instead of cultural destruction.[52] This Act gave Indians new opportunities including Indian self-government and conservation of Indian lands and resources.[53] Even though the Colvilles did not reorganize under this Act,[54] it is apparent from their adamant contentions in *Colville* that they continue to adhere to the existence of one tribal nation.[55] The ability of an individual Indian allottee to transfer reserved water rights to a non-Indian would seem to counter Indian cultural values.

The benefit to an individual allottee is apparent. His ability to transfer reserved water rights appurtenant to his land would greatly increase the value of the land. However, this individual benefit would be detrimental to the tribe as a whole by decreasing the amount of water reserved for the benefit of the entire tribe. Furthermore, the transferability of such a valuable water right could cause opportunists to exert added pressure upon the allottee to sell his land. This may lead to an increase in the frequency of transfers of allotted lands by Indian allottees and, thus, a break up of reservation lands. The ultimate result may be a dissolution of the tribe as one nation.

A restriction on the transferability of reserved water rights may deter an Indian allottee from transferring his land at all. If the valuable reserved water right is not transferable

49. MAXFIELD, *supra* note 5, at 29.
50. *Id.* at 30.
51. 25 U.S.C. §§ 461-492 (1976). *See* note 5 *supra*.
52. MAXFIELD, *supra* note 5, at 30.
53. *Id.* at 34.
54. *See* note 5 *supra*.
55. The Tribe sought to enjoin Walton from interfering with *tribal* use of *tribal* reserved waters. Colville Confederated Tribes v. Walton, *supra* note 4, at 1323, 1325.

with the land, it would be less economically beneficial to the Indian to sell the land or to the non-Indian to buy it. Consequently, there would be less pressure put on the Indian to sell his land. The tribe's interests, therefore, would be served by keeping the land and the reserved water rights in Indian ownership.

Diminution of Indian Rights

The *Colville* court, in holding that the restriction on transferability of reserved water rights is a "diminution of Indian rights", relied upon *Bryan v. Itasca County*[56] and *Mattz v. Arnett.*[57] However, these two Supreme Court decisions are distinguishable from the *Colville* case. The *Bryan* Court was faced with the question of whether state tax laws were applicable to an Indian within a reservation absent express Congressional intent to do so.[58] The Court in *Mattz* was presented with the question of whether the opening of the reservation land to allotment was a termination of the reservation absent express Congressional language.[59] The Courts in *Bryan* and *Mattz,* therefore, were concerned with the diminution of rights that Indians possessed.

In *Colville,* however, the court applied this "diminution rule" to a right that the Indian allottee does *not* possess, i.e., the right to transfer the "full amount" of his reserved water rights in such a manner that defeats the purpose of their reservation. As noted above, the ability of an Indian to transfer his reserved water rights seems limited to fulfilling the purposes for reservation creation. Therefore, absent this fulfillment, the Indian allottee should not possess a right that is susceptible to diminution.

The Powers Decision

Walton argued that, in *Powers,* there would have been grounds for an injunction if an Indian allottee could not transfer his reserved water right to the non-Indian purchaser.[60] Therefore, Walton contended that *Powers* holds that an Indian allottee can transfer those reserved water

56. *See* note 31 *supra* [hereinafter cited in text as *Bryan*].
57. *See* note 31 *supra* [Hereinafter cited in text as *Mattz*].
58. Bryan v. Itasca County, *supra* note 31, at 390.
59. Mattz v. Arnett, *supra* note 31, at 505.
60. Colville Confederated Tribes v. Walton, *supra* note 13, at 50 n.13.

rights.[61] In addition, some courts and scholars have interpreted the Supreme Court's decision in *Powers* to say that the transfer carries with it the appurtenant water rights.[62]

However, a clear reading of the language in *Powers* reveals only that there can be a transfer of *some* rights. But the Court did not consider the question of whether the non-Indian purchasers were entitled to reserved rights nor did it address the question regarding the amount of water to which they were entitled.[63] The *Powers* decision, thus, is not directly on point and therefore not conclusive on the transferability issue.

The Nature of the Right Acquired by Non-Indian Purchasers

In *Colville,* as noted earlier, the Court of Appeals determined that the Indian allottee can transfer his "full" reserved water right to the non-Indian purchaser.[64] The court considered three aspects of the allottee's reserved right to reach this conclusion.

First, the court reasoned that, because the non-Indian purchaser is unable to acquire more extensive reserved rights than the Indian seller and the Indian's right is based on the number of irrigable acres he owns, then, the non-Indian's right is determined by the number of irrigable acres he owns.[65] The Indian allottee is, in fact, entitled to a just share of the reserved water rights at the time of the allotment of land.[66] As noted above, the Supreme Court has recognized "practicable irrigable acreage" as the best way to determine the amount of water reserved when the purpose of the reservation was to transform the Indians into an agrarian society.[67] Therefore, the allottee would be entitled to a just share of that total reser-

61. *Id.*

62. *See* cases cited note 22 *supra*; Palma, *Consideration and Conclusions Concerning the Transferability of Indian Water Rights,* 20 NAT. RESOURCES L. J. 91, 96 (1980); Trelease, *supra* note 24, at 222, 231; Leaphart, *Sale and Lease of Indian Water Rights,* 33 MONT. L. REV. 266, 269-70 (1972); Veeder, *Indian Prior Rights to Use of Water,* 16 ROCKY MTN. L. INST. 631, 657 (1971).

63. *See* text accompanying note 21 *supra;* Dufford, *supra* note 45, at 112-13 n.62.

64. Colville Confederated Tribes v. Walton, *supra* note 13, at 51.

65. *Id. See* text accompanying note 36 *supra.*

66. *See* Scholder v. United States, 428 F.2d 1123, 1126 (9th Cir. 1970); Sequendo v. United States, 123 F. Supp. 554, 558 (S.D. Cal. 1954). *See generally* Trelease, *supra* note 24, at 231.

67. *See* text accompanying note 26 *supra.* Even though the Supreme Court in *Cappaert* and *New Mexico* allowed the reservation of water rights for purposes of the reservation other than irrigation, that water (for spawning and a fishery in *Colville*) should not be part of the Indian allottee's reserve here.

vation amount determined by his proportionate share of the watershed.[68]

However, the total just share of the allottee's reserved rights should not be alienable to the non-Indian purchaser. The transfer of this right, as noted before, would not meet the purposes of the reservation's establishment. The district court in *Colville* concluded, therefore, that because this transfer defeats the purpose for the implied reservation of water, that right is completely lost.[69] This conclusion was reinforced by the Supreme Court in *Montana v. United States*[70] when the Court said, "treaty rights with respect to reservation lands must be read in light of the subsequent alienation of those lands."[71] That conclusion, however, would be inconsistent with the advancement of tribal interests. The most just result would be to allow the amount of the reserved water right not used by the allottee to revert to the tribe.[72]

Assuming that the reserved right has not been quantified (as in *Colville*), the tribe may receive more water than is necessary to fulfill the purposes for which the remaining land was reserved. This reveals one problem with basing quantification on "practicably irrigable acreage." However, it would be reasonable to allow the tribe a change of use of the water they received. The tribe should be able to use this water for present needs other than agriculture or fishing. The Court in *Arizona* seemed to permit this when it affirmed the Special Master's ruling in which he said, "the United States asks only for enough water to satisfy future agricultural and related uses. This does not necessarily mean, however, that water reserved for Indian reservations may not be used for purposes other than agriculture and related uses . . . ."[73]

68. The *Colville* court refers to this amount as "ratable share." Colville Confederated Tribes v. Walton, *supra* note 13, at 51.
69. Colville Confederated Tribes v. Walton, *supra* note 4, at 1329.
70. ____ U.S. ____, 101 S. Ct. 1245 (1981). In *Montana*, the dispute was between the United States, as fiduciary for the Crow Tribe, and the State of Montana. The United States sought a declaratory judgment quieting title to the bed of the Big Horn River in the United States as the Tribe's trustee. In addition, the United States sought a declaration that the United States and the Tribe possessed sole authority to regulate hunting and fishing on all lands within the reservation including lands owned by non-Indians.
71. *Id.* at 1256 (interpreting Puyallup Tribe v. Washington Game Department, 433 U.S. 165, 174 (1977)).
72. *Cf.* Dufford, *supra* note 45, at 114 n.63. (Dufford feels that the full reserved right, including the amount appropriated by the allottee at the time of transfer, should revert to the tribe).
73. Rifkind, *Report of Special Master, Arizona v. California* 265 (1960). *See, e.g.*, Trelease, *supra* note 24, at 225.

Secondly, the *Colville* court held that the non-Indian purchaser should acquire the same priority date as the Indian allottee held.[74] Applying this holding, Walton would have a priority as of the date the reservation was created, July 2, 1872. But this ability of the non-Indian purchaser to receive the Indian's priority date is unjust to other non-Indians. Even though his actual use could be created after a competing state water user's, he could become a senior appropriator.[75] Such a benefit to the non-Indian purchaser would undercut the prior appropriation system. Thus, it would seem that there is no justification for reversing priorities between non-Indians.[76] Furthermore, such a benefit to the non-Indian would not serve to advance tribal interests. A water right reserved specifically for the Colville Reservation that is acquired by a non-Indian with a date-of-reservation priority date can only be detrimental to the cultural survival of the Tribe. As noted earlier, because of added pressure put on the allottee to sell this valuable land, there would be an increased frequency of such transfers which would result in the dissolution of reservation lands and, possibly, the tribe as one nation.

Even though the deprivation of a water user's priority is a deprivation of a valuable water right,[77] the inequity, to the tribe and non-Indians alike, of the priority reversal in this instance should not be allowed. It would be more equitable to give the non-Indian what another state or private appropriator would take. Consequently, the priority date for rights acquired by the non-Indian purchaser should be the date of actual appropriation of water for irrigation by the Indian allottee.[78]

Finally, the *Colville* court determined that Walton acquired a right to water currently appropriated by the Indian allottee at the time of the conveyance.[79] Furthermore, Walton acquired a right, with a date-of-reservation priority date, to water that he appropriates with reasonable diligence after the

74. Colville Confederated Tribes v. Walton, *supra* note 13, at 51. *See* text accompanying note 36 *supra*.
75. Dufford, *supra* note 45, at 116 n.68. This is because by the special nature of a reserved right it is almost always "senior." *See* note 30 *supra*.
76. Dufford, *supra* note 45, at 116 n.68.
77. Colville Confederated Tribes v. Walton, *supra* note 13, at 51; Veeder, *supra* note 62, at 662 (citing Nichols v. McIntosh, 19 Colo. 22, 34 P. 278, 280 (1893)).
78. *See* Colville Confederated Tribes v. Walton, *supra* note 4, at 1329.
79. Colville Confederated Tribes v. Walton, *supra* note 13, at 51. *See* text accompanying note 36 *supra*.

conveyance.[80] Walton should have the right to irrigate the thirty-two acres under irrigation at the time he acquired his land. But this should not be a reserved right, as noted before, but simply a right he acquires through prior appropriation. Likewise, the amount of water appropriated with reasonable diligence by the non-Indian should not be considered a reserved right, but a right acquired through prior appropriation.[81] This appropriation with reasonable diligence would have a priority date as of the date the non-Indian establishes use.

The Direction the United States Supreme Court Should Take

The *New Mexico* decision should give some guidance when predicting the Court's direction on this transferability issue. As noted before, the *New Mexico* analysis should apply to all federal enclaves, including Indian reservations.[82] Therefore, it would seem evident that the transferability of Indian's reserved water rights to non-Indian purchasers would almost always fail to meet the purposes of the reservation.

Furthermore, the *New Mexico* Court stated in dictum that:

> When . . . a river is fully appropriated, federally reserved water rights will frequently require a gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators. This reality has not escaped the attention of Congress and must be weighed in determining what, if any, water Congress reserved for use on the national forests.[83]

This language indicates a concern by the majority for the needs of private and state appropriators in the arid Western United States. This concern of the Supreme Court should direct it towards the position taken by the district court in *Colville*. The transferability of *Winters* doctrine rights from an Indian allottee to a non-Indian purchaser would result in inequities to other non-Indians that the Court seems to have a desire to avoid.[84] In addition to this concern, the Court should

80. *Id.*
81. Throughout the history of the prior appropriation doctrine there has existed a general principle "that the validity of an appropriation of water as against intervening rights depends upon its being completed within reasonable time with the exercise of due diligence." HUTCHINS, 1 WATER RIGHTS LAWS IN THE NINETEEN WESTERN UNITED STATES 373 (1971).
82. *See* note 29 *supra*.
83. United States v. New Mexico, *supra* note 27, at 705.
84. *See* note 30 *supra*.

also "weigh" the resulting detriment to the Colville tribal members.

CONCLUSION

The court in *Colville* allowed the Indian allottee to transfer his "full" amount of reserved water rights to the non-Indian purchaser in what would appear to be a contravention of the principles established in *Winters* and its progeny. The court based its decision upon a distinguishable general rule controlling the diminution of Indian rights and a Congressional Act subsequent to the executive order establishing the "primary purposes" of the Colville Reservation. Based upon established law, the transferability of these rights should be limited to situations that would continue to fulfill the purposes of the reservation.

Furthermore, a balancing of the equities would show that, even though the Indian allottee and the non-Indian purchaser would benefit, the adverse effects would be felt by the tribe and the non-Indian appropriators. Because the water was impliedly reserved to fulfill the purposes of the reservation, substantial consideration should be given to the interests of the tribe.

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