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*Allotted tribal lands create troublesome questions for western water lawyers. In this article the author reviews the history of basic Indian reservation water rights created by the Supreme Court's landmark decision in Winters v. United States. He then explains the disposition of those rights when reservation lands are allotted. Finally, he discusses the difficult issues that arise when allotted lands pass from the federal trust, become subject to state law, and are transferred to non-Indians.*

Wherever there are Indian allotments and water is valuable, legal disputes have arisen over the federal water rights appurtenant to allotments. Although Congress has primary authority over the subject, it has provided only general legislative standards. The courts have been required to make most of the governing rules. They have recognized federal water rights appurtenant to Indian allotments, and at least some federal water rights have survived transfer of the allotments to non-Indian successors. Several questions remain unsettled.

Some of the uncertainty is part of the broader question of the general scope of federal Indian reservation water rights. Allotment water rights mostly derive from tribal rights, and allotment rights compete with the water rights that tribes retain. One issue is the proper measure of tribal water rights for irrigated agriculture, stock watering, domestic use, fisheries, and power generation. Another is whether tribes have federal water rights for other purposes, such as mining, manufacturing, or recreation.

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Other allotment water rights questions arise from transfers, trust removal, and subjection to state law. There have been disputes over how much of a tribe's federal water right passed to allotment owners when allotments were made, and over how much of an allottee's water right survives termination of the federal trust over the allotment and transfer to non-Indians. The last question can also be posed as one of federalism because state law applies to most former allotments, and undeveloped allotment water rights conflict with state water law.

Unlike most other questions about Indian water rights, the unsettled allotment issues do not place Indians squarely at odds with non-Indians. Rather, current owners of allotments and former allotments are arrayed against competing users of scarce water supplies. Tribes, Indians, and non-Indians can appear on either side in a particular case.

## INDIAN RESERVATION WATER RIGHTS[1]

### *Origin of Reservation Rights*

The federal government inherited the British royal monopoly over acquisition of land from Indian tribes. Throughout the nineteenth century, the federal government busily extinguished original tribal title to vast territories. Most of the land acquired was then sold or given to non-Indian farmers, ranchers, miners, loggers, railroads, and others, and to the states. Usually this enterprise was accomplished with at least nominal Indian consent by purchase from the tribes.[2]

An important part of the consideration Indians received was federal recognition of tribal ownership of smaller tribal domains. In time, the retained tribal lands came to be called Indian reservations, and the tribal title recognized as part of the consideration for tribal cessions was determined to be a federal property interest protected by the taking clause of the fifth amendment to the United States Constitution.[3] Most tribal reservations first recognized by the United States were later reduced by further tribal cessions, but the federal government also unilaterally set aside Indian reservations out of federal lands no longer in original Indian title. The process reached a rough equilibrium in the 1920s, leaving the Indian reservations of the present.[4]

The federal government's plan for Indians on reservations was cultural assimilation. Indians were to become self-supporting, Christian agriculturalists like their white neighbors. When the reservation scheme reached arid parts of the West, the question arose whether Indian reservations

1. Federal Indian water rights have been described both as "reserved rights" and as "reservation rights." Reservation rights is used in this article because it seems to facilitate descriptions. No doctrinal judgment is intended by this choice.

2. *See* Cohen, *Original Indian Title*, 32 MINN. L. REV. 28, 34-43 (1947).

3. *See* United States v. Sioux Nation of Indians, 448 U.S. 371, 407-24 (1980).

4. Since the 1920s, there have been new reservations established and older ones terminated, but the net effect is minor compared with previous events.

The equilibrium described in the text was in the forty-eight contiguous states. In Alaska, the principal settlement of original native title was made by the Alaska Native Claims Settlement Act of 1971, 43 U.S.C. §§ 1601-1628 (1982). Hawaii has a distinct history. *See* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 797-810 (1982 ed.).

had any water rights for agricultural uses. Various actions of Congress and the Executive in the late nineteenth century showed the expectation that Indian reservations would have irrigation water.[5] But the government was vague about the source and extent of Indian water rights and about their relation to state law water rights of non-Indian claimants. Reservation Indians had not been subject to state laws,[6] but the allotment laws ambiguously modified that rule.[7] Indian reservation water rights were left to the courts, and the legal rules that followed were influenced strongly by the facts of the earliest cases.

The water rights of reservation Indians owe their modern existence in part to the favorable, but not too favorable, facts of the Supreme Court's first case on the question, *Winters v. United States.*[8] *Winters* involved the Fort Belknap Reservation in Montana, a product of the cession and reduction process described above.[9] The middle of the Milk River formed Fort Belknap's northern boundary, and the river was the reservation's major natural water source. In 1889, the Bureau of Indian Affairs established an agency on the Milk River and diverted water from the river for the agency's domestic and irrigation needs.[10] An 1896 land cession generated tribal funds that were used to build irrigation works on Fort Belknap, and additional diversions from the Milk River began in 1898.[11]

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5. *See infra* notes 11, 17 and text accompanying notes 63-69.

6. *See* FELIX S. COHEN, *supra* note 4, at 259-70.

7. The Act of Feb. 8, 1887, ch. 119, § 6, 24 Stat. 390, provided that when an allotment was made, the "allottee" was subjected to state civil and criminal laws. Application of this section caused difficulties, and Congress amended it in 1906 to postpone imposition of state law until an allotment goes out of trust. Act of May 8, 1906, ch. 2348, 34 Stat. 182 (codified at 25 U.S.C. § 349 (1982)). The Supreme Court construed later statutes to amend the 1906 rule, so that former allottees within self-governing reservations are subject to state laws only to the very limited extent that other reservation Indians are. Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 477-79 (1976).

In any case, the original section 6 was never thought to affect issues about the land itself. The land was always treated as continuously governed by federal law during the trust period. *See, e.g.,* United States v. Rickert, 188 U.S. 432 (1903).

8. 207 U.S. 564 (1908).

9. An 1855 treaty and an 1874 statute set aside all of Montana east of the continental divide and north of the Missouri River as a reservation for several tribes. Act of Apr. 15, 1874, ch. 96, 18 Stat. 28; Treaty with the Blackfoot and others, Oct. 11, 1855, art. 4, 11 Stat. 657, 658.

Most of the 1874 reservation was ceded in 1888 with the tribes retaining three scattered reservations including Fort Belknap, named for a Civil War general who later became secretary of war. Act of May 1, 1888, ch. 213, 25 Stat. 113, ratifying agreements made with the tribes in December and January of 1886-87. The agreements make several references to agriculture, farms and cultivation, but none to irrigation or water.

The other two reservations defined by the 1888 statute also involve the Milk River. Some of its headwaters were on the Blackfeet Reservation, and it forms part of the boundary of the Fort Peck Reservation. These reservations were not involved in *Winters.*

10. *Winters,* 207 U.S. at 566; *see also* Hundley, *The "Winters" Decision and Indian Water Rights: A Mystery Reexamined,* 13 WEST. HIST. Q. 17, 23, 28, 32 (1982).

11. *Winters,* 207 U. S. at 566. *See* Act of June 10, 1896, ch. 398, § 8, 29 Stat. 321, 350 (ratifying an agreement with the Ft. Belknap Indians made Oct. 9, 1895). The Indians ceded the southern part of the 1888 reservation for $360,000 payable at $90,000 per year. The stated purposes for which the money could be used included "assisting the Indians to . . . irrigate their farms." *Id.* at 351 (art. II).

The Milk River arises on the east side of the continental divide in northern Montana and in southern Canada and flows east-south-east into the Missouri. Canadian claims were already a complication at the time of *Winters. See* Hundley, *supra* note 10, at 27, 41.

In the meantime, non-Indian settlers had begun diverting the river above the reservation. The Indian Service diversion of 1889 was prior to any lawful non-Indian diversions, but some of them antedated the 1898 Indian irrigation project.

In the spring of 1905, upstream diversions and a drought dried up the Milk before it reached Fort Belknap. Indian Service officials promptly sought legal protection for the reservation water supply, and the United States Attorney in Helena sued to enjoin twenty-one upstream irrigators. The federal circuit court granted a temporary restraining order and then a preliminary injunction, protecting the reservation's pre-existing use of 5,000 miner's inches of water.[12] The Ninth Circuit Court of Appeals affirmed in 1906 and the Supreme Court affirmed in 1908.[13]

The facts of *Winters* were favorable to the Indians. They had already put to use a substantial amount of water, and non-Indians had greedily taken all of it. But the facts were not too favorable. The United States Attorney filed his bill based primarily on the theory of prior appropriation by the Indian Service. He was a careful lawyer and alternatively alleged a federal riparian right and "other rights" to accomplish "the ends . . . for which . . . the reservation was created."[14] He had first believed the reservation diversions preceded those of the defendants, but they claimed in their answer that they had diverted before the principal reservation use began in 1898. This was probably fortuitous. Many other non-Indian irrigators were not sued, and it seems likely that some of them had appropriated after 1898.[15]

Out of such chances, the Fates shape the future. In his opinion sustaining a preliminary injunction, United States District Judge William H. Hunt gave life to the third legal theory hinted in the bill. He reasoned that the Indians' cession of the lands later acquired by the defendants had implicitly reserved to the Indians a water right in the Milk River sufficient for their reasonable needs.[16] The court obviated the issue of who actually diverted first, since the Indian right vested before any non-Indians were able to acquire land ownership in the Milk River watershed.

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12. *See* Hundley, *supra* note 10, at 19-33.

13. Winters v. United States, 143 F. 740 (9th Cir. 1906), *permanent injunction aff'd*, 148 F. 684 (9th Cir. 1906), *aff'd*, 207 U.S. 564 (1908).

14. *See* Hundley, *supra* note 10, at 23-24.

15. The United States tried to sue only upstream users who had appropriated after the Indian irrigation use began in 1898. The twenty-one defendants were hastily chosen from an estimated 225 to 250 non-Indian users of the Milk River. Hundley, *supra* note 10, at 23-24. The Government's complaint alleged that the 1898 reservation use began prior to defendants' appropriations. *Winters*, 207 U.S. at 566-67. Defendants claimed in their answer that their uses preceded 1898. *Id.* at 568-69. The Ninth Circuit decided that, "[t]he proofs show . . . [defendants'] appropriations of water, were made during the years 1895, 1900, and 1903." *Winters*, 143 F. at 742.

16. *See* Hundley, *supra* note 10, at 25-27. Judge Hunt stated in his opinion that the defendants could "acquire no rights to the exclusion of the reasonable needs of the Indians," and the Indians had "reserved the right to the use of the waters of Milk River, at least to an extent reasonably necessary to irrigate their lands." *Id.* at 26-27.

The case was affirmed by the appellate courts on the same theory.[17] Thus came Indian reservation water rights into the consciousness of water lawyers.[18]

The *Winters* decision defined the basic theory of Indian reservation water rights, which the federal courts have consistently followed. The theory has been applied to all federal reservations, and its leading statement by the modern Supreme Court involved a wildlife reserve:

> This Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators. Reservation of water rights is empowered by the Commerce Clause, Art. I, § 8, which permits federal regulation of navigable streams, and the Property Clause, Art. IV, § 3, which permits federal regulation of federal lands. The doctrine applies to Indian reservations and other federal enclaves, encompassing water rights in navigable and nonnavigable streams. . . .
>
> In determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether the Government intended to reserve unappropriated and

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17. The court of appeals quoted Judge Hunt's conclusion that the Indians were entitled to use Milk River water "at least to an extent reasonably necessary to irrigate their lands." *Winters*, 143 F. at 749. The opinion also referred to reservation uses for domestic and stock watering purposes. *Id.* at 741. The Supreme Court's opinion was less specific and used some language that suggested that the Indians were entitled to all the Milk River flow. *Winters*, 207 U.S. at 577. But the Court affirmed in all respects, and its opinion also recited domestic, stock watering, and irrigation uses. *Id.* at 576. In context, it agreed with the lower court's theory.

Justice Brewer dissented without opinion, probably because the decision conflicted with part of his opinion in Kansas v. Colorado, 206 U.S. 46 (1907).

Congress anticipated the *Winters* theory in the Act of Mar. 1, 1899, ch. 324, § 1, 30 Stat. 924, which authorized irrigation rights of way across the Uintah Reservation

> subject at all times to the paramount rights of the Indians on said reservation to so much of said waters as may have been appropriated, or may hereafter be appropriated or needed by them for agricultural or domestic purposes; and it shall be the duty of the Secretary of the Interior to prescribe such rules and regulations as he may deem necessary to secure to the Indians the quantity of water needed for their present and prospective wants. . . .

18. Early recognition of *Winters* appeared in S. WIEL, WATER RIGHTS IN THE WESTERN STATES 136 (2d ed. 1908).

It is easy to speculate about what might have occurred if any of the material circumstances in *Winters* had been different: If the 1905 officials of the Indian Service had not shown courage and dispatch; if the Department of Justice had not responded in kind; if any of these officials or Judge Hunt had shared the anti-Indian bigotry of the day, or the Judge had less legal imagination. The case might also have changed if the physical facts had been different. If the Indian reservation had not been making needed uses, there would have been no spur to action nor pressing equities for an Indian right. If the particular defendants had not made a colorable claim of prior use, the decision might have rested on prior appropriation by the Indian Service.

thus available water. Intent is inferred if the previously unappropriated waters are necessary to accomplish the purpose for which the reservation was created.[19]

*Priority of Reservation Water Rights*

The *Winters* Court held that water was reserved for the Fort Belknap Reservation under the federal laws and treaties recognizing the reservation. Because federal reservation rights are effective on the date a federal reservation is set aside and are superior to any rights vesting thereafter, they are relatively valuable, a point made by the facts of the *Winters* case.

There have been claims that because some Indian water rights are based on original Indian land title, the water rights should have a priority dating from the time of the tribes' first ownership or use, a very early priority indeed. These claims seem meritorious only when a tribe had a continuous, actual water use before federal recognition of its reservation.[20] In these cases, it is reasonable to infer treaty or federal intent to protect the tribes' existing use with a priority date of original use. No such intent can be inferred when a reservation purpose was new at the time the reservation was recognized, as was usually the case for irrigated agricul-

19. Cappaert v. United States, 426 U.S. 128, 138-39 (1976) (citations omitted).

20. There has been a debate among some commentators over whether the *Winters* holding was based on tribal reservation of water in original Indian title or instead on federal reservation of water. This debate has the unfortunate consequence of placing undue emphasis on the difference between reservations set aside by agreement with the Indians and those set aside by unilateral federal action. Federal law is the basic source of tribal reservation rights, and the proper question is the intended scope of the treaty, statute, or executive order setting aside a reservation.

The principal significance of bilateral agreements is that the Indians' understanding is a relevant factor in determining the scope of a treaty or agreement. But the Supreme Court's rules for construing Indian affairs statutes tend to minimize this difference. Whether a law is bilateral or unilateral in origin, the Court will interpret it generously to protect the Indians' reasonable expectations at the time. *See* Washington v. Fishing Vessel Ass'n, 443 U.S. 658, 675-76 (1979) (treaty); Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89 (1918) (unilateral act of Congress). An Indian reservation will be defined to protect the Indians' pre-existing possessory rights unless the contrary intent clearly appears. *See* United States v. Santa Fe Pac. R.R., 314 U.S. 339, 353-54 (1941).

Applied to water rights, this principle should protect actual prior uses, including instream uses, with their original priority. Any different rule would make the treaty or statute setting aside the reservation into an implicit impairment of Indian possessory rights. But the federal government's plan to convert Indians into farmers involved a new water use in most cases, so the priority of this use is usually the reservation date. A reservation set aside out of public domain and not in any existing Indian use at the time it is set aside necessarily establishes new uses with a reservation date priority.

The decided cases fit this analysis. In United States v. Adair, 723 F.2d 1394, 1412-15 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 3536 (1984), a reservation water right was recognized under an 1864 treaty for both irrigated agriculture and for hunting, fishing and gathering. The court held that the latter purposes were in pre-existing tribal use and had a priority date of first tribal use, characterized as "time immemorial." Irrigation was held to be a new use with an 1864 priority date. *See also* Arizona v. California, 373 U.S. 546, 600 (1963), in which the reservations were out of public domain and no pre-existing Indian uses were shown. The Court held that the water rights were "effective" on the reservation dates. *See also* United States v. Gila Valley Irrigation Dist., No. 59 Globe Eq., decree at 86 (D. Ariz. June 29, 1935) (decree of water with "immemorial date of priority" to Gila River Tribes, whose members had been irrigators before European contact; decree of water with reservation priority to Apaches, who had not previously irrigated).

ture. In most cases, the date of reservation priority is early enough that the question about an earlier original use date is immaterial.

*Quantity of a Reservation Right*

A difficult issue posed by federal reservation water rights is that of water quantity. In *Winters,* the United States proved pre-existing use of 5,000 miner's inches, and the trial court enjoined the defendants from interfering with reservation use of that amount. The decree was affirmed by the Supreme Court on the theory that the Indians had a right to their reasonable needs.[21]

Reasonable need is an imprecise standard, but it was sufficient for the *Winters* case and other early injunctive suits. The courts had to determine only the Indians' present uses that required immediate judicial protection. In no instance was the amount used so great or profligate to raise any doubt that the water was needed and the use was reasonable. But the seed of future difficulty was sown. The *Winters* theory logically included enough water for future Indian needs, and some courts explicitly said so.[22]

Reasonable need, without reference to the price of water or the cost of its development, is an inherently uncertain standard because the amount of water it is reasonable to use is a function of prices. Moreover, as Indian lands are developed and population grows, the Indians' reasonable needs grow. By contrast, one of the basic purposes of state water laws in the West is certainty of allocation. Under state prior appropriation law, surface water rights are limited to reasonably definite quantities actually put to use, making clear to a prospective user how much water remains unappropriated.[23]

For private users this conflict was largely theoretical because Indians lacked the capital to put most of their reservation water rights to use. Unused federal water rights do not require junior claimants to let the water remain in the stream.[24]

Federal, state, and local officials with broader planning concerns took a different view. As surface water sources in the West became fully appropriated, quiet title suits were brought to quantify all rights on stream systems. These actions required the courts to convert the open-ended standard of the Indians' future needs into fixed allocations. The courts met this problem in a pragmatic way. Some lower courts quantified reserva-

21. *See supra* notes 16, 17.

22. United States v. Ahtanum Irrigation Dist., 236 F.2d 321, 326-27 (9th Cir. 1956), *cert. denied,* 352 U.S. 988 (1957); Conrad Investment Co. v. United States, 161 F. 829, 831 (9th Cir. 1908); *see Winters,* 143 F. at 749, 207 U.S. at 576.

23. *See* Clark, *Introduction to Water Law of the Western States,* in 5 WATERS AND WATER RIGHTS (R. Clark ed. 1972).

24. This is apparent from the scope of the injunctions in *Winters* and in Conrad Investment Co. v. United States, 161 F. 829 (9th Cir. 1908). *See also* United States v. Ahtanum Irrigation Dist., 236 F.2d at 335, 340; Tweedy v. Texas Co., 286 F. Supp. 383, 386 (D. Mont. 1968); United States v. Hibner, 27 F.2d 909, 911-12 (D. Idaho 1928).

tion water rights for irrigation purposes as enough water to irrigate all of the Indians' arable land on the reservations.[25] In *Arizona v. California*, the Supreme Court refined the standard to be the quantity of water needed to irrigate all practicably irrigable Indian land on the reservation.[26]

Opponents of reservation rights argue that the practicably irrigable acreage standard is too generous to the Indians because it awards them the maximum amount of water they could ever protect under a reasonable needs test, an amount many of them will not need.[27] The Court's implicit answer was that the practicably irrigable acreage standard is the *quid pro quo* for achieving the certainty of a one-time quantification. Also, the standard reflects the moral footing of the reservation right in basic fairness to the Indians.

Other critics object that the Court's standard is too complex and uncertain.[28] But any realistic litigation standard will be complex. Most water quantification suits are already complicated by the large number of necessary parties.[29] And a quiet title action has the purpose and result of ending the uncertainty.[30] In context, the Court's practicably irrigable acreage standard is no more difficult than analogous damages adjudications that courts regularly undertake.[31] In summary, the practicably irrigable acreage standard is a reasonable measure of a reservation's water right for the purpose of irrigated agriculture.

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25. *E.g.*, United States v. Powers, 16 F. Supp. 155 (D. Mont. 1936), *vacated on this point*, 94 F.2d 783, 786 (9th Cir. 1938), *aff'd*, 305 U.S. 527 (1939); *cf.* United States v. Truckee-Carson Irrigation Dist., 649 F.2d 1286, 1289-95 (9th Cir. 1981) (describing trial court litigation in quiet title case between 1913-44), *aff'd in part, rev'd in part sub nom.* Nevada v. United States, 103 S. Ct. 2906 (1983).

26. 373 U.S. 546, 600-01 (1963), *decree entered*, 376 U.S. 340 (1964), *amended decree entered*, 383 U.S. 268 (1966), *modified*, 439 U.S. 419 (1979), *modified*, 460 U.S. 605 (1983).

27. *See id.* at 596-601 (1963) (arguments of the State of Arizona); Shrago, *Emerging Indian Water Rights: An Analysis of Recent Judicial and Legislative Developments*, 26 ROCKY MTN. MIN. LAW INST. 1105, 1113-17 (1980).

28. *See* Sondheim & Alexander, *Federal Indian Water Rights: A Retrogression to Quasi-Riparianism?*, 34 So. CAL. L. REV. 1 (1960).

29. Clyde, *Practical Aspects of Water Litigation and General Adjudication Proceedings*, in 6 WATERS AND WATER RIGHTS §§ 512, 530 (R. Clark ed. 1972).

30. In Arizona v. California, 460 U.S. 605, 615-28 (1983), the Court made it clear that Indian reservation rights are no exception to this rule. *See also* Nevada v. United States, 103 S. Ct. 2906 (1983).

Congress has provided any interested party with a statutory means to bring federal and Indian rights before a court having jurisdiction to quantify all water rights in a stream or other source. 43 U.S.C. § 666 (1982). *See* Arizona v. San Carlos Apache Tribe, 103 S. Ct. 3201 (1983); Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976).

31. The greatest difficulty is posed by the relative prices of crops, energy, and capital, especially the latter. The courts have assumed zero cost for undeveloped water. The amount of water decreed can shift very much with small changes in the discount rate used to calculate the feasibility of irrigation. New technology poses a related problem. *See* Report of the Special Master, General Adjudication of All Rights to Use of Water in the Big Horn River System and All Other Sources, State of Wyoming, No. 4993 (Wyo. Dist. Ct. Dec. 15, 1982) [hereinafter cited as Big Horn Master's Report]; *In re:* The General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources, State of Wyoming, No. 4993 (Wyo. Dist. Ct. May 10, 1983), *modified*, No. 101-234 (Wyo. Dist. Ct. June 8, 1984) [hereinafter cited as Big Horn Adjudication].

The Supreme Court in *Arizona v. California* was satisfied with its special master's resolution of these issues, a resolution based on prices and technology at the time of the quiet

*Purposes Defining Reservation Rights*

The practicably irrigable acreage standard meets the Indians' needs only for irrigation water. The reservation right extends to other purposes for which reservations were set aside. Indian reservations were established for the residence and support of Indian people, so that many water uses can be, and have been, claimed to be part of the reservation right.

Some uses other than irrigation have been recognized by the courts. The *Winters* Court included domestic and stock watering uses, but these require only modest amounts of water, negligible quantities when compared with irrigation.[32] Lower courts have sustained Indian claims to minimum stream flows needed to maintain Indian fisheries and water power uses.[33] These instream uses are important but nonconsumptive. They can be accommodated to state law water rights in many cases, although power uses may present future use problems.[34]

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title litigation. 373 U.S. 546, 600-01, (1973). But interest rates were more stable then than now, and the discount rate was the focus of more attention when *Arizona v. California* was reopened in 1980. *See* Burness, Cummings, Gorman & Lansford, *The "New" Arizona v. California; Practicably Irrigable Acreage and Economic Feasibility*, 22 NAT. RESOURCES J. 517 (1982).

An additional complication arises when a parcel of Indian trust land might be irrigated from more than one potential source. The courts have ignored this question when the Indians' water was already developed. *E.g., Winters*, 207 U.S. at 570. But in undeveloped water cases, an alternate source can affect Indian claims. *E.g.*, Colville Confederated Tribes v. Walton, 647 F.2d 42, 45 (9th Cir. 1981), *cert. denied*, 454 U.S. 1092 (1981).

32. Domestic use for cities is large but in many cases would probably be precluded as not foreseeable.

33. United States v. Adair, 723 F.2d 1394, 1412-14 (9th Cir. 1983) (fishing, hunting, gathering), *cert. denied*, 104 S. Ct. 3536 (1984); Muckleshoot Indian Tribe v. Trans-Canada Enterprises, Ltd., 713 F.2d 455 (9th Cir. 1983) (fishing), *cert. denied*, 104 S. Ct. 1324 (1984); Colville Confederated Tribes v. Walton, 647 F.2d 42, 48 (9th Cir. 1981) (fishing), *cert. denied*, 454 U.S. 1092 (1981); United States v. Walker River Irrigation Dist., 104 F.2d 334, 340 (9th Cir. 1939) (power); United States v. Anderson, No. 3643, slip. op. at 9-11 (E.D. Wash. July 23, 1979), *aff'd*, 736 F.2d 1358, 1365 (9th Cir. 1984); United States v. 5,677.94 Acres of Land, 162 F. Supp. 108, 114-15 (D. Mont. 1958) (power). *See* Federal Power Comm'n v. Oregon, 349 U.S. 435, 444 (1960) (power); 34 Op. Att'y Gen. 171, 178 (1924) (power).

The Court in *Arizona v. California* awarded a reservation right only for agricultural purposes, but no other uses were claimed. The court in the *Big Horn Adjudication* rejected claims for nonagricultural purposes for the Wind River Reservation. *See supra* note 31, No. 101-234, slip op. at 9-11, 17 (Wyo. Dist. Ct. June 8, 1984); *id.* No. 4993, slip op. at 14-20, 42, 60-63, 69 (Wyo. Dist. Ct. May 10, 1983).

Some courts have concluded that a decreed reservation right for one purpose ought to be transferable to another on-reservation use, at least to the extent that junior rights are not impaired. United States v. Anderson, No. 3643, slip op. at 11-12 (E.D. Wash. Aug. 23, 1982), *aff'd*, 736 F.2d 1358 (9th Cir. 1984). *See Walton*, 647 F.2d at 48 and authorities cited therein. Transfers to off-reservation uses are more controversial. *See Anderson*, No. 3643 slip op. at 17-20 (sustaining off-reservation use to process minerals mined on reservation but denying use unrelated to reservation); Big Horn Adjudication, *supra note* 31, No. 4993, slip op. at 20, 65 (Wyo. Dist. Ct. May 10, 1983) (tribes may sell, lease, or change uses of water within reservation but may not do so outside it). *See also* Trelease, *Indian Water Rights for Mineral Development*, in NATURAL RESOURCES LAW ON AMERICAN INDIAN LANDS 230-33 (P. Maxfield ed. 1977). In distinguishing between transfers within or without tribal reservations, these courts may be misstating the issue. Tribes ought to be able to transfer federal water rights for use on other Indian land, wherever located. But there is no authority to transfer tribal water rights for use on land owned by non-members of the tribe, wherever this land is located.

34. In order to quiet title for uses other than irrigation, a court must again compute a present value for the Indians' future needs. Present values for fishery uses should be readily

More difficult issues are posed by Indian claims to water for mining, industrial, or recreational reservoir uses that would be heavily consumptive and hard to limit by any standard akin to practicably irrigable acreage.[35] There are not yet any significant decisions on point. The courts may construe reservation rights not to include some of these uses by excluding uses not foreseeable at the times reservations were set aside.[36]

*Reservation Groundwater Rights*

The decided cases on reservation water rights have dealt almost entirely with surface water. The few cases involving groundwater, together with the reasoning of the surface water cases, make it likely that reservation rights to groundwater will be recognized where the requisite need can be shown.[37] But there are a number of questions about the definition of groundwater reservation rights.

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quantified because a minimum stream flow to sustain a pre-existing Indian fishery can be calculated with reasonable accuracy. *Anderson*, No. 3643, slip op. at 9-11. *Cf.* Cappaert v. United States, 426 U.S. 128, 141, 143 n.7 (1976) (minimum water level to sustain rare fish in desert pool). But other non-irrigation uses will have no convenient measure akin to practicably irrigable acreage. For example, power sites are readily identified but their present value is heavily dependent on future prices of power. Power uses may be limited to supplying power for other purposes defining the reservation right, that is, domestic, irrigation, and other agricultural uses.

35. Some mining uses of reservation water may be quantifiable without undue difficulty. But most mining, industrial, and recreational uses are more dependent on the relative prices of the product, energy, and capital, than are irrigation uses.

36. Because the Supreme Court, in *Arizona v. California*, based the reservation right solely on agricultural uses, opponents of the right cite the case as authority that there can be no reservation right for other uses. This argument is unlikely to succeed. When the principal value of a reservation is for fishing or timber harvesting, denying water for these purposes would be arbitrary and unfair, as a number of courts have recognized.

Tribal claims for heavily consumptive industrial or recreational uses are more likely to be rejected or reduced when these uses were not foreseeable at the time reservations were set aside. The *Winters* standard looks to the time of reservation recognition to determine reservation purposes. This standard could include any purpose that assists Indians in supporting themselves. But the need for a predictable reservation right will probably lead the courts to adopt a more specific foreseeability test. They might recognize water rights for some mining purposes but not for oil shale or synthetic fuels. Tribes will probably be able to apply reservation rights that are quantified by agricultural purposes to these modern uses.

A court might recognize additional reservation purposes as they are discovered or actually put to use, with a priority date of discovery or use. For example, discovery or development of a mineral deposit would add a water right sufficient to develop the deposit or a right to water actually used to develop the deposit, with a corresponding priority date. This theory has not been advocated for Indian reservations, but a version of it has been claimed for other federal reservations. *See* Federal Water Rights of the Nat'l Park Service, 86 Interior Dec. 553 (1979), *overruled*, 88 Interior Dec. 253 (1981).

A possible occasion to consider this theory was presented in *Walton*, 647 F.2d at 48. The tribes claimed water for a new fishery begun with introduced fish and for a supporting hatchery. The court sustained the claim and awarded it a reservation priority date. It is difficult to understand how this use could have been foreseen when the reservation was set aside. The court justified the new fishery as a replacement for a fishery on a different watershed that had been destroyed by dams. This was a reasonable justification to recognize the new fishery, but not to give it a reservation priority date.

37. The reported holdings sustaining groundwater claims involved groundwater connected with surface sources. In Cappaert v. United States, 426 U.S. 128 (1976), the Court affirmed a decree enjoining Cappaert's groundwater pumping to the extent that it interfered with a prior federal reservation of hydrologically connected surface water necessary to sup-

Groundwater supplies that fully renew annually may be treated like surface supplies, but most pumped supplies in the West either reach a new equilibrium at a lower water table or are steadily depleted. In these cases, if Indians have a prior right to the natural pressure level on their land, then other landowners overlying the same aquifer would often be precluded from pumping at all. For this reason, it seems likely that the courts will define reservation groundwater rights differently than surface rights.

Three state law doctrines suggest possible resolutions. The reasonable use and correlative right doctrines allocate groundwater rights based on surface ownership.[38] The modified prior appropriation doctrine allows junior appropriators to impair senior well-pressure rights to a reasonable extent but limits the overall number of appropriators using an aquifer.[39] Each of these systems is grounded on a rule of reason that shares use of an underground source among surface owners. The reservation groundwater right could be based on or fit within any of these doctrines.[40]

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port a rare fish. In *Walton*, 647 F.2d at 45, the court recognized reservation water rights in a "hydrological system, consisting of an underground aquifer and . . . creek," but no party made any argument against a reservation right in groundwater. In *Anderson*, No. 3643, slip op. at 4, the court held: "Where surface and groundwaters are hydraulically related, as they are in this case, the reservation of water applies to ground as well as surface water."

In Tweedy v. Texas Co., 286 F. Supp. 383, 385 (D. Mont. 1968), the court said there is a federal reservation right in groundwater, but like the surface right it is a right of use, not of absolute ownership. Since the plaintiffs could not show any impairment of their water uses, relief was denied. In Nevada v. United States, 165 F. Supp. 600 (D. Nev. 1958), *aff'd on other grounds*, 279 F.2d 699 (9th Cir. 1960), the state sued to enjoin federal pumping of underground water on a military reservation without a state-issued permit. The district court ruled that the United States did not need a permit. The court of appeals held that the suit was barred by sovereign immunity. *See also* Applicability to Indian Lands of Arizona Law Regulating Withdrawals of Ground Water, 61 Interior Dec. 209 (1953) (state groundwater law not applicable to reservation Indians). *Cf.* Arizona v. California, 376 U.S. 340 (1964) ("Consumptive use from the mainstream within a State shall include all consumptive uses of water of the mainstream, including water drawn from the mainstream by underground pumping . . . "); United States v. Smith, 625 F.2d 278 (9th Cir. 1980) (action by United States on behalf of Indian tribes against groundwater pumper alleged to interfere with Indians' surface water rights; no interference proved).

Groundwater on many Indian reservations has in fact been pumped, often under explicit statutory authority. *E.g.*, Act of Feb. 14, 1920, ch. 75, 41 Stat. 408, 414, 416, 423. In the *Big Horn Adjudication*, the court purported to deny any reservation water right in groundwater but sustained a right to all existing Indian groundwater uses. *Supra* note 31, No. 4993, slip op. at 37-42, 61, 64, 70 (Wyo. Dist. Ct. May 10, 1983).

Most commentators conclude that reservation groundwater rights will be recognized. *See, e.g.*, Meyers, *Federal Groundwater Rights: A Note on Cappaert v. United States*, 13 LAND & WATER L. REV. 377, 388 (1978).

38. *See* Clark, *Western Ground-Water Law*, in 5 WATERS AND WATER RIGHTS § 441 (R. Clark ed. 1972); Davis, *The Right to Use Water in the Eastern States*, in 7 WATERS AND WATER RIGHTS § 619 (R. Clark ed. 1976).

39. *See* Clark, *Ground Water Law: Problem Areas*, 8 NAT. RESOURCES LAWYER 377 (1975); Clark, *Ground Water Legislation in the Light of Experience in the Western States*, 22 MONT. L. REV. 42 (1960).

40. *See* Pelcyger, *Indian Water Rights: Some Emerging Frontiers*, 21 ROCKY MTN. MIN. L. INST. 743, 759-64 (1978).

*The Effect of Tribal Land Transfers on Reservation Water Rights*

The *Winters* Court's reasons to imply a reservation water right extend to any Indian reservation with recognized title that is dry enough to show need. The Supreme Court in *Arizona v. California* held that reservations set aside by unilateral action of Congress or the Executive have the same implied water right.[41] At one time the extent of tribal lands was very great, but most of this land has long since passed out of tribal ownership. The greater part was ceded to the United States, much was allotted in trust to individual members of tribes, and the rest has been retained in tribal trust.

*Winters* water rights did not survive outright cessions to the United States. Most of the lands acquired from tribes were opened to disposition under the public land laws. Public lands statutes required grantees of the United States to obtain new water rights under state law.[42] These laws necessarily had the effect of extinguishing federal reservation water rights when tribal ownership was unconditionally ceded to the United States.

In a few instances, lands acquired by the United States from Indian tribes were directly transferred to different federal reservations, such as national forests. In *United States v. Adair,* the government claimed that land transferred from an Indian reservation to a national forest and a wildlife refuge retained its reservation water right for purposes common to the Indian and successor reservations with a continuous priority dating from the founding of the Indian reservation.[43] The Ninth Circuit rejected that claim,[44] but a similar claim was sustained in *United States v. City and County of Denver.*[45] The Colorado Supreme Court held that land transferred from national forest to national park use had a continuous water right for purposes common to the two reservations dating from the founding of the forest reserve. These cases may be distinguishable because the circumstances in *City and County of Denver* showed a continuous reservation purpose more clearly than did the circumstances in *Adair.* In any case, the amount of water needed for national forest purposes is small and the use is not consumptive, so the issue is a minor one.[46]

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41. 373 U.S. 546, 598-600 (1963).

42. *See* California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 162 (1935); *Anderson,* 736 F.2d at 1362-63. This rule has been followed even when government diversion works were conveyed with the patent. Nevada Ditch Co. v. Bennett, 30 Or. 59, 102-05, 45 P. 472, 484-85 (1896). *See also* Story v. Woolverton, 31 Mont. 346, 78 P. 589 (1904) (military reservation).

This rule does not apply to tribal cessions in trust conditioned on future sales. If these lands are later restored to tribes, the original *Winters* right remains. Big Horn Master's Report, *supra* note 31, at 35-44, 270; Big Horn Adjudication, *supra* note 31, No. 4993, slip op. at 23 (Wyo. Dist. Ct. May 10, 1983).

Parcels within Indian irrigation projects may also be an exception to this rule. *See infra* text accompanying notes 94-112.

43. 723 F.2d 1394, 1417-19 (9th Cir. 1983), *cert. denied,* 104 S. Ct. 3536 (1984).

44. *Id.*

45. 656 P.2d 1, 30-31 (Colo. 1983).

46. *See* United States v. New Mexico, 438 U.S. 696 (1978); United States v. City and County of Denver, 656 P.2d 1, 20-34 (Colo. 1983).

The Supreme Court has held that allottees of tribal land acquired the right to use a portion of their reservations' water right.[47] But the nature and extent of the right acquired by allottees has not been established, and a number of cases have raised questions about how the end of the federal trust affects allottees' federal water rights. These issues are reviewed in the remainder of this article.

## THE ALLOTMENT SYSTEM

Allotment was a major federal policy to compel assimilation of tribal Indians. Beginning in 1854, most federal treaties recognizing tribal reservations gave individual Indians the right to obtain exclusive use of parcels of reservation land for agricultural self-support.[48] These treaty clauses were nominally consensual, but their prevalence and uniformity of wording strongly imply that they were essentially imposed on tribes. After 1871, allotment clauses continued to appear in agreements ratified by federal statute.[49] In 1887, Congress abandoned the veneer of consent and passed the General Allotment Act authorizing the President to require that reservations be allotted.[50] Separate agreements and statutes for particular reservations carried out the General Allotment Act's mandate.[51] Under one or more of these acts, most reservations were at least partially allotted.

After every Indian family on a reservation had received an allotment under the General Allotment Act or a special allotment act, the remaining tribal common land could be declared "surplus" and disposed of under the public land laws.[52] Sometimes these "openings" to non-Indian settle-

47. United States v. Powers, 305 U.S. 527 (1939).

48. *See* FELIX S. COHEN, *supra* note 4, at 613. There were fifty-seven such treaties from 1854 until treaty-making ended in 1871. *See* 11 CONG. REC. 1060 (1881) (listing all treaties providing for allotment).

All these treaty clauses entitled a tribal family to acquire exclusive use of a parcel of tribal land for agricultural purposes and authorized the President to protect improvements and allow some kind of succession on death. Some clauses expressly allowed patents to issue if the land was actually cultivated. *See, e.g.*, Treaty with the Eastern Band Shoshonees and Bannack, July 3, 1868, art. 6, 15 Stat. 673, 675; Treaty with the Oto and Missouri, Mar. 15, 1854, art. 6, 10 Stat. 1038, 1039.

49. In 1871, Congress formally ended the making of treaties with Indian tribes. Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 544, 566 (codified at 25 U.S.C. § 71 (1982)). The House of Representatives sought the statute because the House members objected to the Senate's exclusive role in treaty ratification. The government nevertheless continued to make formal agreements with Indian tribes that were ratified by statute. FELIX S. COHEN, *supra* note 4, at 107, 127. For decades after 1871, these agreements were commonly called "treaties," even by Congress and the courts. *See, e.g., Winters*, 143 F. at 743 ("the treaty of May 1, 1888").

50. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (codified as amended in scattered sections of 25 U.S.C. §§ 331-381 (1982)). Similar bills had been debated since 1879. All those seriously considered had included a requirement of tribal consent, until it was removed during the final debate in the House. *See* 18 CONG. REC. 225 (1886); FELIX S. COHEN, *supra* note 4, at 130-32.

51. *See* FELIX S. COHEN, *supra* note 4, at 613.

52. General Allotment Act, § 5, 25 U.S.C. § 348 (1982). *See* FELIX S. COHEN, *supra* note 4, at 131, 138, 613-14. Under this section, "surplus" land sales were to be made by agreements with tribes, retaining the traditional notion of tribal consent. But after 1904 a number of "surplus" land sales were mandated by Congress without tribal consent. *See, e.g.*, Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977).

ment ended the Indian reservation status of the area opened except for the islands of remaining trust allotments.[53] In other instances, the reservation boundaries remain intact.[54]

The General Allotment Act provided that allotments be held in trust by the United States for a fixed period of twenty-five years. Then they would be patented to allottees in unrestricted fee simple and made subject to state land laws.[55] But the trust period could be extended by executive order, a power frequently used.[56] In 1934, Congress ended the policy of automatic trust expiration, and since then all allotment trust periods have been extended indefinitely.[57]

Indian allotments may be transferred in trust to other Indians by intestate succession, devise, or voluntary inter vivos transfer.[58] Trust allotments may also be leased to non-Indians for agriculture, mining, or other purposes. They may go out of trust and be transferred in unrestricted fee to non-Indians, becoming subject to state tax and alienation laws.[59] But as already explained, the trust no longer expires automatically at the end of a fixed trust period. Federal statutes permit individual Indian allottees to have trust restrictions removed or to alienate free of restrictions if the Department of the Interior approves.[60] Estates of deceased allottees are administered by Interior, and allotments may pass free of trust to non-Indians by inheritance, devise, or sale.[61] In sum, Indian allotments are held in indefinite trust status unless an Indian owner elects to have the trust removed or dies and is succeeded by non-Indian heirs, devisees, or purchasers. Thousands of allotments have gone out of trust.[62]

*Recognition of Allotment Water Rights*

When tribal lands were allotted, the trust patents made no mention of water rights. Yet it is clear that Congress expected allottees in dry areas to have some right to irrigation water. Section 7 of the General Allotment Act states:

> In cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior is authorized to prescribe

53. Rosebud Sioux Tribe v. Kneip, 430 U.S. at 586-88.
54. Solem v. Bartlett, 104 S. Ct. 1161 (1984).
55. *See supra* note 7.
56. *See* FELIX S. COHEN, *supra* note 4, at 614.
57. *Id.* at 614-15.
58. *See id.* at 618-27, 632-38. The federal trust precludes any form of involuntary transfer. *Id.* at 618-19.
59. *See id.* at 413-29, 619-27, 632-38.
60. *See id.* at 619-22. Some years ago, the Government issued "forced" fee patents against the wishes of allottees. This policy was ended in 1921. *Id.* at 136-37.
61. *See id.* at 632-38. When fee patents are issued for allotments of deceased Indians or for inter vivos sales when the allottee has not been declared "competent," the grantor is the United States (trustee), not the allottee (beneficiary). When an allottee is found "competent" and gets a fee patent, a later sale or gift is in the allottee's name. This difference matters only if state law had some effect on an allottee after the fee patent was issued.
62. *Id.* at 138.

> such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations; and no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor.[63]

Section 7 is based on the concept that each allottee should have the use of the allotment's fair share of whatever irrigation water the reservation has, and it empowers the Secretary to assure allottees of their water shares.[64] But the Secretary's regulatory power has largely gone unexercised. We have no comprehensive administrative interpretation.[65] Nor does section 7 tell us the source or extent of allottees' water rights.

Some of the special allotment acts for particular reservations adverted to irrigation.[66] These also show Congress' understanding that Indian allottees would have water for irrigation, but the statutes again do not make clear the source or extent of allotment water rights.

Several statutes authorized the Secretary to acquire developed irrigation water supplies for reservation Indians as consideration for granting irrigation companies water access and ditch easements on Indian trust lands.[67] Most of these laws said nothing about the nature of the water rights acquired by the Indians or those of the companies.[68]

Congress has regularly provided tribal and federal funds for construction and maintenance of water supply and irrigation works on Indian reservations.[69] These appropriations statutes also lack any general definition of Indian water rights.

In the 1939 case of *United States v. Powers,* the Supreme Court reviewed what Congress and the Department of the Interior had done and held that allotments have an appurtenant right to the use of a share of the federal reservation water right.[70] But the case did not require the Court

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63. Ch. 119, § 7, 24 Stat. 390 (codified at 25 U.S.C. § 381 (1982)).

64. *See* United States v. Powers, 16 F. Supp. 155, 159-60 (D. Mont. 1936), *aff'd in part, rev'd in part,* 94 F.2d 783 (9th Cir. 1938), *aff'd,* 305 U.S. 527 (1939). Section 7 was added to an allotment bill in 1884 in the same form as later enacted. The Senate Indian Affairs Committee drafted it. *See* 15 CONG. REC. 2241 (1884). No committee report then or later explained it. It may have been added in response to a senator's objection during an earlier debate. *See* 11 CONG. REC. 785 (1881) (statement of Sen. Morgan).

The reference to "riparian proprietor" may reflect the drafters' assumption that only riparian allotments would have water rights based on the common law of water rights in the eastern states. *See* Anderson v. Spear-Morgan Livestock Co., 107 Mont. 18, 27, 79 P.2d 667, 669 (1938) (dictum). Other courts have ignored this part of the statute.

65. *See* United States v. Alexander, 131 F.2d 359, 361 (9th Cir. 1942).

66. *E.g.,* Act of May 30, 1908, ch. 237, 35 Stat. 558 (Ft. Peck Res.).

67. *E.g.,* Act of Feb. 15, 1897, ch. 228, § 8, 29 Stat. 527 (Gila River Res.); Act of July 23, 1894, ch. 152, § 2, 28 Stat. 118 (Yakima Res.).

68. *But see* Act of Feb. 10, 1891, ch. 129, § 1, 26 Stat. 745 (Umatilla Res.).

69. *See infra* text accompanying note 94.

70. 305 U.S. 527 (1939). *See also* United States v. Pierce, 235 F.2d 885, 891 n.6 (9th Cir. 1956).

to specify the nature or extent of allottees' rights, and the Court did not volunteer a clear definition.[71]

An allottee's right to use a share of tribal water should be measured by the same criteria used to measure the tribe's reservation right. Each allotment's share should be determined by reasonable water needs for allotment purposes.[72] Irrigation uses are limited to the water needed to irrigate the allotment's practicably irrigable acreage.[73]

Retained tribal rights for other purposes could pose problems. If a tribe retains a reservation right to maintain a fishery or power site or to operate a mine, it may be difficult to apportion the available water between tribal and allotment rights. Tribes have legislative authority over their members in Indian country and have some authority over non-Indians.[74] But allotment water rights are federal property interests protected against tribal as well as state infringement.[75] Tribal authority to allocate water between allotted and tribal land has not been tested.[76]

*Trust Transfers of Allotments*

Few trust allotments are now owned by original allottees. By the time the first allottees died or sold, most allotments remained undeveloped. It has consistently been assumed that trust transfers—mostly by intestate succession—implicitly include the allotment's water right. That is, the allotment heir has the same right as the original allottee to put to use a share of the reservation water right. This assumption seems plainly correct. The purposes of the federal allotment laws are the same for an Indian heir as for the ancestor.[77] Also, the rule of most water law systems is that appurtenant water rights are implicitly transferred with the land unless the written conveyance or the circumstances show a contrary

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71. *See infra* text accompanying notes 132-47.

The federal water right acquired by allottees could have been limited to water actually put to use before allotment, but this would make little sense. Most allotments were undeveloped when made and there was no system for allottees to acquire new water rights. Hence, the allotment right was at least an inchoate right to put to use a share of the tribal reservation right, as the courts have held or assumed. *See infra* note 126 and accompanying text.

72. The allotment laws' purpose was to distribute land for farming and grazing. *E.g.*, 25 U.S.C. § 331 (1982). Later, some allotments were made solely as home sites, and Congress allowed all allotments to be leased for mining. 25 U.S.C. § 396 (1982). It is uncertain whether a tribal reservation water right for mining, if one exists, would be divided by allotment.

73. *Walton*, 647 F.2d at 48, 51.

74. *Compare* New Mexico v. Mescalero Apache Tribe, 103 S. Ct. 2378 (1983) *with* Montana v. United States, 450 U.S. 544 (1981). *See also* FELIX S. COHEN, *supra* note 4, at 248-57.

75. *See* 25 U.S.C. §§ 348, 349, 381 (1982); Choate v. Trapp, 224 U.S. 665 (1912). *Cf.* Conroy v. Conroy, 575 F.2d 175 (8th Cir. 1978) (discussing tribal jurisdiction over trust allotments in a divorce action).

76. Disputes have arisen, however, between tribes and non-Indian owners of former allotments. *See infra* note 126 and Ninth Circuit cases cited therein.

77. *See* FELIX S. COHEN, *supra* note 4, at 128-32.

intent.[78] There is nothing about trust transfer of allotments to justify a departure from this rule.

Some Indians acquired trust allotments from public lands rather than tribal common lands.[79] Other allotments were acquired by purchase.[80] When these allotments were set aside in trust, the reservation water right theory may have applied to reserve unappropriated water sufficient for allottees' reasonable needs (including any water already in use on the allotment).[81] Neither public domain nor purchased allotments have yet appeared in reported water rights cases. If a reserved right is recognized, it would be subject to the rules applicable to allotments made out of tribal lands.[82]

*Water Rights of Leased Allotments*

Federal statutes allow trust allotments to be leased for agricultural, mining, or other purposes.[83] Mining leases may last until the minerals are commercially exhausted, and other leases may be made for long periods.[84] The leasing laws do not refer to water rights, nor do any other statutes expressly authorize water rights to be leased with the land. But some allotment lease statutes expressly apply only to "irrigable land," implying that an appurtenant water right may be leased with the land.[85] Another federal statute allows allotments within certain irrigation projects to be leased

78. *See* United States v. Anderson, 736 F.2d 1358, 1363 (9th Cir. 1984); Clark & Martz, *Classes of Water and Character of Water Rights and Uses*, in 1 WATERS AND WATER RIGHTS § 53.4 (R Clark ed. 1967).

79. FELIX S. COHEN, *supra* note 4, at 615, 627; General Allotment Act, § 4, 25 U.S.C. § 334 (1982). This section remains in force as do a few similar provisions. *See* 43 C.F.R. §§ 2530.0-3 to 2533.2 (1984).

80. *See* FELIX S. COHEN, *supra* note 4, at 615; 25 U.S.C. § 335 (1982) (applying General Allotment Act to purchased allotments).

81. The general rule on federal conveyances of public lands is stated in California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935). But federal policy always protected the Indians' possessory rights, a rule applied to individual Indians as well as tribes. *See* Cramer v. United States, 261 U.S. 219 (1923). Applied to water rights, this policy probably protects actual uses of water being made by Indians at the time a public domain allotment was patented.

82. An informal opinion of the Interior Solicitor concluded that public domain allotments have no implied reservation water right. Op. Solic. Dep't of Interior (August 19, 1955), *reprinted in* 2 OPINIONS OF THE SOLICITOR OF THE DEP'T OF THE INTERIOR RELATING TO INDIAN AFFAIRS 1688 (Gov't Printing Office 1978). The Solicitor's only reason was that no precedent recognized the right. This begs the question because no precedent denies a right either.

Public domain and purchased allotments are statutory Indian country. 18 U.S.C. § 1151(c) (1982). Some of them are subject to a nearby reservation tribal government and are jurisdictionally the same as allotments within reservations. FELIX S. COHEN *supra* note 4, at 346-47. Others are not subject to a tribal government and are probably subject to state law to a greater extent. *Id.* at 277-78, 350. Both categories should be distinguished from allotments out of tribal land where the surrounding reservation has been disestablished leaving the allotments outside any reservation. The latter category has been recognized to retain a reservation water right. *See* Skeem v. United States, 273 F. 93 (9th Cir. 1921); United States v. Hibner, 27 F.2d 909 (D. Idaho 1928).

83. 25 U.S.C. §§ 380, 390, 393-396, 403, 415-415d (1982).

84. *See* 25 C.F.R. §§ 162.1-162.20, 212.1-212.33 (1984).

85. 25 U.S.C. § 394 (1982) allows leasing of allotments that are "arid but susceptible of irrigation" by allottees unable to occupy or improve the land. *See* 25 U.S.C. § 402a (1982) (leases of irrigable land owned by tribes); Act of Apr. 30, 1908, ch. 153, 35 Stat. 70, 95, 97 (allotments on Uintah, Uncompahgre, and Wind River Res.).

with water rights.[86] More importantly, in 1921 the Ninth Circuit held that a general agricultural lessee of a trust allotment may use the reservation water right appurtenant to it.[87] There are no other reported cases, but the decision seems to have been followed by the Interior Department and lease parties, even for mining leases.[88] The current statute governing most allotment surface leases expressly allows leases for the purpose of developing the land's "natural resources."[89] The lease term probably includes water rights.[90]

No federal statute allows allotment water rights to be leased for use on land other than the allotments to which the rights are appurtenant. Water is not considered a mineral for purposes of federal mineral leasing laws, so water rights cannot be severed from the land by leasing.[91]

### WATER RIGHTS OF FORMER ALLOTMENTS

As shown above, owners of trust allotments made out of tribal lands implicitly acquired shares of the tribe's federal reservation water right. These shares pass to trust transferees of original allottees, and the shares may be used by lessees of allotments. In these situations, allotments are continuously held in federal trust and remain federal Indian country.[92] In all relevant respects, the property is subject only to federal law.

When allotments go out of federal trust, the protections and immunities of the federal allotment laws are removed. The land becomes subject to state or tribal law.[93] State and tribal law must recognize vested

86. 25 U.S.C. § 390 (1982) (San Carlos, Ft. Hall, Flathead, and Duck Valley Res.). *See* 25 C.F.R. § 162.13 (1984).

87. Skeem v. United States, 273 F. 93 (9th Cir. 1921). The land had been leased under what is now 25 U.S.C. § 403 (1982).

88. *See* United States v. Anderson, No. 3643, slip op. at 17-19 (E.D. Wash. Aug. 23, 1982), *aff'd*, 736 F.2d 1358 (9th Cir. 1984); Op. Solic. Dep't of Interior (Feb. 1, 1964), *reprinted in* 2 OPINIONS OF THE SOLICITOR OF THE DEP'T OF THE INTERIOR RELATING TO INDIAN AFFAIRS 1930 (Gov't Printing Office 1978) (approving lease of reservation land with its irrigation water right for a resort development and housing); Mining Lease between Sentry Royalty Co. and the Navajo Tribe (June 6, 1966) (contract no. 14-20-0603-9910) (coal lease with right to pump groundwater for coal slurry pipeline). Use of the federal water right for nonagricultural purposes could be based on either recognition of such purposes or on transfer of an irrigation-defined right to a different use.

89. 25 U.S.C. §§ 415-415d (1982).

90. *See* S. REP. No. 375, 84th Cong., 1st Sess. 3-4 (1955). The history does not specifically state that water rights were assumed to be included in the term "natural resources." But it refers to leases for irrigated agriculture and to farming leases calling for investment by the lessee, suggesting the assumption.

91. *See* Andrus v. Charlestone Stone Products Co., 436 U.S. 604, 605-07 (1978).

92. 18 U.S.C. § 1151 (1982). *See* FELIX S. COHEN, *supra* note 4, at 39-41.

93. Outside Indian country, the federal trust title is the only general source of federal preemption. Its removal subjects the land and events on it to ordinary state jurisdiction. *See* 25 U.S.C. § 349 (1982); FELIX S. COHEN, *supra* note 4, at 349-52, 380, 410-11. Within Indian country, removal of the federal trust title leaves the land subject to the general federal preemption protecting tribal self-government. On most matters, Indians and their property are subject to tribal rather than state jurisdiction. Tribal jurisdiction over allotments is then unfettered by the federal trust title. Non-Indians and their property in Indian country are subject to state jurisdiction when Indians are unaffected. Otherwise, they are subject to limited tribal jurisdiction. Mescalero Apache Tribe v. New Mexico, 103 S. Ct. 2378 (1983); *See* FELIX S. COHEN, *supra* note 4, at 348-49.

federal property rights, but neither the statutes governing removal of the federal trust nor the fee patents issued under those statutes explicitly refer to allotment water rights. The effects of trust removal and subjection to state law are left to the courts.

The courts have had difficulty deciding the effects of trust removal on federal water rights of former allotments and have had problems accommodating state law to federal rights. Some courts have held that no federal water rights survived removal of the federal trust, while others have held that non-Indian successors have federal rights similar to those of Indian allottees. Often cases have arisen many years after allotments went out of trust and were transferred to non-Indians. The courts have probably been influenced by the transferees'apparent reliance interests that have accrued during these years of delay.

Some courts have had difficulty because they have failed to recognize two important distinctions between classes of former allotments. First, former allotments within Indian irrigation or federal reclamation projects have a different history than other allotments. The nature of these projects and the statutes that govern them minimize problems of determining allotment water rights and of accommodating those rights to state water law.

The second distinction is between federal water rights that are developed and those that are undeveloped when non-project allotments go out of trust and are subjected to state law. Whatever part of their federal reservation water rights allottees put to use ought to be vested federal property rights that survive removal of the trust. This rule can be easily accommodated to western state water law because state water rights are based on developed uses of water.

When water rights of non-project allotments are undeveloped at the time they pass out of trust, arguments to limit or extinguish the rights are stronger. Undeveloped federal water rights conflict with state laws that limit water rights to amounts in beneficial use and that provide for forfeiture of water rights that are unused for extended periods. Policies of the federal allotment laws offer arguments against continuing protection of unused allotment water rights. It is not surprising that the courts have reached inconsistent results in adjudicating undeveloped water rights of former allotments.

*Water Rights of Former Allotments Within Irrigation Projects*

When the federal government bought land from Indian tribes, much of the money was kept in trust accounts in the Treasury subject to Congress' control. Congress "appropriated" these trust funds for various purposes it deemed beneficial to tribal owners, including development of reservation water supplies. Congress also appropriated federal funds for In-

dian reservation irrigation projects. Some were made reimbursable by tribes, others were gratuitous.[94]

Most Indian irrigation projects were built to serve allotments.[95] Eventually Congress and the Bureau of Indian Affairs realized that it was inequitable to use tribal funds to build and maintain projects that benefited only some members, so Congress began to require reimbursement from the landowners served. Some allottees' capital reimbursement obligations were deferred until the end of the trust. Others were payable during the trust.[96]

Before 1900, Indian reservation irrigation projects were managed locally by reservation superintendents. In that year, Congress provided for two Indian Service superintendents of irrigation. The central office grew into a separate irrigation division in the Bureau of Indian Affairs that became known as the Indian Irrigation Service.[97] But the Indian irrigation bureaucracy was overshadowed by the powerful Reclamation Service of the Department of the Interior.[98] Some Reclamation Service projects included Indian trust lands, and some Indian irrigation projects were built by the Reclamation Service and then turned over to the Indian Irrigation Service.[99] As a result, Reclamation Act procedures became entangled with Indian irrigation project management.

Under the Reclamation Act, projects were built with federal funds to serve lands in project areas. Lands previously in private ownership were served, but much project land was public domain reserved under the Reclamation Act for project purposes. Reclamation projects acquired water rights in conformity with state or territorial law by purchase, exchange, or condemnation, or by new appropriations. Farms to be irrigated were sold to entrymen with project water rights, and buyers had to reimburse the federal government for the capital costs of construction and water rights acquisition. This scheme was applied to lands for which irrigation was only planned, as well as for lands already irrigated when sold. Reimbursement was to begin only after water was actually delivered. Payment was spread over many years, and the land was subject to a lien until final payment was made.[100]

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94. *See* 25 U.S.C. §§ 13, 152, 153, 157, 158, 160, 161, 161a, 162a (1982); L. SCHMECKEBIER, THE OFFICE OF INDIAN AFFAIRS 237-42 (Johns Hopkins Press 1927).

95. The exceptions were in the Southwest, where some tribes had established agricultural systems that were allowed to continue.

96. *See* L. SCHMECKEBIER, *supra* note 94, at 241; Assessment of Charges on Lands Within Indian Irrigation Projects, 51 Interior Dec. 613 (1926).

97. *See* L. SCHMECKEBIER, *supra* note 94, at 238-42, 280-81; Officer, *The Indian Service and Its Evolution,* in THE AGGRESSIONS OF CIVILIZATION 65, 67, 69, 71 (S. Cadwalader & V. Deloria eds. 1984).

98. *See* Act of June 17, 1902, ch. 1093, 32 Stat. 388 (codified as amended at 43 U.S.C. §§ 371-473 (1982)); Burness, Cummings, Gorman & Lansford, *United States Reclamation Policy and Indian Water Rights,* 20 NAT. RESOURCES J. 807 (1980).

99. *See* L. SCHMECKEBIER, *supra* note 94, at 239-42.

100. *See* Sax, *Federal Reclamation Law,* in 2 WATERS AND WATER RIGHTS §§ 110-125, at 111-291 (R. Clark ed. 1967); Trelease, *Reclamation Water Rights,* 32 ROCKY MTN. L. REV. 464 (1960).

After 1902, parts of this scheme were imitated in Indian irrigation projects. Under the General Allotment Act, all tribal members were to be given allotments, and any remaining land could then be declared "surplus" and sold to the United States or opened to entry on the tribe's account.[101] When "surplus" lands were within Indian irrigation projects, they were sold to entrymen with express project water rights as under the Reclamation Act.[102] When allotments within irrigation projects went out of trust and were sold under federal control, the United States advertised and sold them with explicit project water rights in the same manner.[103]

For these reasons, owners of former Indian allotments within irrigation or reclamation projects own project water rights. Rights were expressly conveyed to them, and they paid for them, albeit aided by the generous subsidies of these projects.

Prior to 1902, many managers of Indian reservation water projects appropriated water without complying with state or territorial law.[104] But there was doubt about what was required, and there were instances when reservation superintendents at least filed notices of appropriation under state law.[105] After 1902, the Reclamation Act had an influence. Four statutes required specific Indian irrigation projects to appropriate water under state laws.[106] The Indian Service decided that some other projects

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101. *See supra* note 52 and accompanying text.

102. *See* Act of May 30, 1908, ch. 237, § 2, 35 Stat. 558 (Ft. Peck Res.); Act of May 29, 1908, ch. 216, § 15, 35 Stat. 444, 448 (Flathead Res.); Act of Dec. 21, 1904, ch. 22, § 5, 33 Stat. 595, 598 (Yakima Res.); Act of Apr. 21, 1904, ch. 1402, §§ 25-26, 33 Stat. 189, 224 (Yuma, Colorado River & Pyramid Lake Res.). The latter Act expressly refers to the Reclamation Act, and the Fort Peck Act expressly refers to state law. The Yakima Act is discussed in Status Unit of the Wapato Irrigation Project, 53 Interior Dec. 622 (1932).

103. *See* United States v. Heinrich, 12 F.2d 938, 940 (D. Mont. 1926), *aff'd on other grounds*, 16 F.2d 112 (9th Cir. 1926) (United States advertised project allotment for sale with "a perpetual water right"); Act of May 26, 1926, ch. 403, § 8, 44 Stat. 658, 660 (Crow Res.); Act of Mar. 3, 1921, ch. 135, § 6, 41 Stat. 1355, 1357 (Ft. Belknap Res.); Act of May 18, 1916, ch. 125, 39 Stat. 123, 140-42, 153-54 (Flathead, Ft. Peck, Blackfeet, Colville & Yakima Res.), *construed in* Patents in Fee, 45 Interior Dec. 600 (1917); Wind River Reservation — Repayment of Irrigation Construction Costs, 52 Interior Dec. 709 (1929); *Cf.*, Scholder v. United States, 428 F.2d 1123, 1127-29 (9th Cir.), *cert. denied*, 400 U.S. 942 (1970).

104. *See* 1906 COMM'NR IND. AFF. ANN. REP., H.R. Doc. No. 5, 59th Cong., 2d Sess. 82-84 (1907).

105. *See* Hundley, *supra* note 10, at 22-23 (state filings made for 1898 irrigation diversions in *Winters*); Big Horn Master's Report, *supra* note 31, at 105-06 (United States and Indians filed for some but not all diversions).

106. Act of May 30, 1908, ch. 237, § 2, 35 Stat. 558, 560 (Ft. Peck Res.); Act of Mar. 1, 1907, ch. 2285, 34 Stat. 1015, 1035 (Blackfeet Res.); Act of June 21, 1906, ch. 3504, 34 Stat. 375 (Uintah Res.); Act of Mar. 3, 1905, ch. 1452, art. III, 33 Stat. 1016, 1017, 1020 (Wind River Res.).

The Fort Peck and Blackfeet laws include provisions that would modify state water law in specific ways. In 1914, the Secretary reported to Congress on complications arising from the administration of these laws. *See* H.R. Doc. Nos. 1250, 1274, 63d Cong., 3d Sess. (1914) (Uintah and Wind River Res.). In the case of the Wind River Reservation, Wyoming's Congressman Mondell made great efforts to get the Indian Service to make state law filings. *See* 51 CONG. REC. 3661, 3673 (1914) (Rep. Mondell).

should make state filings for water rights already in use.[107] Then the first court decisions recognizing implied federal reservation water rights were handed down.[108] Congress did not again require that Indian projects appropriate under state law, and state law filings for Indian irrigation projects became irregular.

Later, a few courts expressly recognized federal reservation rights of Indian trust lands in both Reclamation Service and Indian Service projects.[109] Other irrigation projects have probably relied on federal reservation water rights at least in part. The projects have seldom generated controversies that require decisions about reservation rights. All lands irrigated by a project are treated equally. Costs are allocated on a per-acre basis throughout the project, and water shortages are suffered ratably among project lands.[110] And when projects actually irrigate Indian trust land or former allotments, few care whether the original water rights were federal or state, or whether the rights have reservation priority dates or project priority dates.[111]

Project allotment water rights that are federal in origin have survived trust removal and subjection to state law. This has occurred whether the project water rights were already developed or merely planned at the trusts' end. In some cases transfers were authorized by explicit statutes.[112] When the land was undeveloped, both the water right and the debt for reimbursement were deferred until water was actually delivered. The water right was not perfected until the debt was paid.

This explicit system was patterned after the Reclamation Act and is largely separate from the allotment laws governing non-project allotments. Therefore, the history of project allotments has little relevance to the question of disposition of federal water rights when non-project allotments go out of trust.

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107. Irrigation projects have been built on the Crow Reservation in Montana since 1885. In April 1905, the Indian Service directed the reservation superintendent to file notices of appropriation under state law for water previously in use. Record at 497, United States v. Powers, 305 U.S. 527 (1939).

108. Winters v. United States, 207 U.S. 564 (1908); United States v. Conrad Investment Co., 156 F. 123 (C.C.D. Mont. 1907), *aff'd*, 161 F. 829 (9th Cir. 1908).

109. *See* Nevada v. United States, 103 S. Ct. 2906 (1983) (reviewing 1944 decree according reservation priority date to reclamation project water right of Pyramid Lake Res.); United States v. Ahtanum Irr. Dist., 236 F.2d 321 (9th Cir. 1956), *cert. denied*, 352 U.S. 988 (1957); Big Horn Master's Report, *supra* note 31, at 328-29; Big Horn Adjudication, *supra* note 31, No. 4993, slip op. at 66-67 (Wyo. Dist. Ct. May 10, 1983).

110. *See* Sax, *supra* note 100, §§ 118.4, 123.2.

111. Whether peace and harmony continue after explicit adjudication of different priority dates is less certain. In the Big Horn Adjudication, the interim decree awarded project trust allotments an 1868 priority, all other projects lands (including former allotments) a 1905 priority, and the difference is significant. *See* Big Horn Master's Report, *supra* note 31, at 328-29; *see also* Big Horn Adjudication, *supra* note 31, No. 4993, slip op. at 66-67 (Wyo. Dist. Ct. May 10, 1983).

112. *See supra* note 103.

*Effects of Trust Removal on Water Rights Developed by Allottees*

Federal reservation water rights that Indian allottees put to use during the federal trust should be recognized as vested property rights that survive trust removal, subjection to state law, and conveyance to non-Indians. This protects allottees' investments in the land, and both buyers and sellers would reasonably expect this value to be transferred. In all states, developed water rights normally pass with land transfers, and removal of the federal trust should not counter this assumption. No substantial conflict with state law results because water put to use with a known priority date fits nicely into the prior appropriation system of the western states.

Not to allow developed water rights to survive trust removal would be contrary to the federal trust purpose of encouraging allottees to become self-sufficient farmers. Allottees wishing to develop their land using reservation water rights would be deterred from doing so if they would later be unable to enjoy or transfer the full value of developed water facilities. More fundamentally, failure to allow developed rights to survive removal of the trust and subjection to state law might be an unconstitutional taking.[113]

The Wyoming state courts have held that no federal reservation water rights survive the end of the federal trust and conveyance to non-Indians.[114] The courts did not distinguish between water rights developed during the trust and those not yet developed at the trust's end, although it appears that some developed rights were in fact involved.[115] To that extent, these cases were wrongly decided.

Only one court has distinguished developed water rights of former allotments from undeveloped rights. The United States District Court for the Eastern District of Washington, in *Colville Confederated Tribes v. Walton*, decided that state water law ought to apply fully and immediately

113. Indian trust allotment ownership is protected by the fifth amendment. Choate v. Trapp, 224, U.S. 665 (1912). Whether denying the right to transfer a developed right would constitute a taking seems a close question. The courts have sustained broad congressional power over Indian trust property. *E.g.*, Delaware Tribal Bus. Comm. v. Weeks, 430 U.S. 73 (1977). On the other hand, allottees were strongly encouraged by government agents to develop their land to fulfill the purpose of the allotment statutes. To strip the value of an allottee's investment at the trust's end would, at least in some situations, make a strong case for a taking.

114. Merrill v. Bishop, 74 Wyo. 298, 287 P.2d 620 (1955); Big Horn Master's Report, *supra* note 31, at 44-55. Supplemental and Final Report of the Special Master, *In re* The General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources, State of Wyoming, No. 4993, at 1-6 (Wyo. Dist. Ct. Jun. 1, 1984) [hereinafter cited as Supplemental Big Horn Master's Report]. The *Merrill* decision was arguably dictum on this point, but it was treated as a holding in the *Big Horn Adjudication*.

The *Big Horn* court also said that the state law priority date for former trust lands is the date of a state permit or the date the land went out of Indian ownership, whichever is earlier. Big Horn Adjudication, *supra* note 31, No. 4993, slip op. at 24, 63 (Wyo. Dist. Ct. May 10, 1983); *Id.*, No. 101-234, slip op. at 4-5, 15-16 (Wyo. Dist. Ct. Jun. 8, 1984). The latter standard is hard to understand. Possibly the court meant to refer to the project priority date for some of the land involved in the case. *See supra* text accompanying notes 100-10.

115. Supplemental Big Horn Master's Report, *supra* note 114, at 47.

after allotments go out of trust and are conveyed to non-Indians.[116] But the court sensed that it would be unfair to declare forfeiture of developed federal water rights based on the allottees' failure to comply with state water law.[117] So the court attempted a compromise. It held that the developed water rights continued after the trust's end and conveyance to non-Indians, but the court took away the water rights' reservation priority date. The court awarded priority based on the dates of the allottees' first use while the land was still in trust. In other words, the court awarded the priority dates that the water rights would have had if state law had applied to the allottees during the trust.

This was an ill-considered solution. It immediately made the former allotments' water rights junior to those of the tribe and of other owners who had the reservation priority date. In cases when the reservation priority date is quite senior on the watershed and the dates of an allottee's actual water use are junior to intervening appropriators, the *Walton* court's ruling could destroy the value of an allottee's investment. By contrast, if an allottee's dates of use are relatively senior on the watershed and much better than a new priority under state law, the court's ruling would allow valuable water rights to outlive the trust and be transferred. This holding could have led to arbitrary results, but it was reversed on appeal and no other court has reached a like decision.

There may have been instances in which allotments went out of trust and were transferred to non-Indians at a time when allottees had begun water diversion works but had not yet actually diverted some or all of the water contemplated. To protect allottees' investments, successors should be allowed to perfect the rights initiated by allottees and should enjoy the reservation priority date.

The state law doctrine of relation back supports this view. All western state water law systems recognize a landowner's right to a priority dating from the beginning of a water development project as long as the owner has given public notice of intent to develop.[118] Landowners may transfer unperfected water rights and if their successors finish development with reasonable diligence, the priority of the perfected rights will relate back to the date the prior landowners gave notice.[119]

When Indian allottees begin water development projects, state law does not require public notice of intent to develop because allottees' water rights are governed by federal law. Allottees can also obtain the early reservation priority date. In all other respects, recognition of allottees' rights

116. 460 F.Supp. 1320, 1326-29 (E.D. Wash. 1978), *rev'd*, 647 F.2d 42 (9th Cir. 1981), *cert. denied*, 454 U.S. 1092 (1982). A Wyoming district court and special master relied on the *Walton* district court's decision on this point. Big Horn Master's Report, *supra* note 31, at 44-47, 271, 343; Big Horn Adjudication, *supra* note 31, No. 4993, slip op. at 21-24, 63 (Wyo. Dist. Ct. May 10, 1983); Supplemental Big Horn Master's Report, *supra* note 114, at 2-6.

117. *Walton*, 460 F. Supp. at 1332-33.

118. *See infra* note 175 and accompanying text.

119. *See* Clark & Martz, *Nature of Property Rights in Water*, in 1 WATERS & WATER RIGHTS 358-59 (R. Clark ed. 1967).

to remove the trust and convey incompletely developed water rights subject to later perfection would merely put allottees on an equal footing with non-Indians who transfer similarly incomplete projects under state law.

If post-trust owners can perfect allotment water rights by completing developments begun by allottees, the successors must do so with reasonable diligence.[120] They then have the same rights they would have acquired if the allottees had finished their projects during the trust, including reservation priority dates.

If courts recognize developed and partially developed allotment water rights as vested property rights that survive trust removal and transfer to non-Indians, state law must respect the rights when the land comes under state jurisdiction. States can require former allotment owners to file notice and otherwise adhere to state recording and water management laws.[121] The water rights themselves will not present difficulties because the uses that define allotments' federal water rights are beneficial uses in every western state.[122] Water rights based on beneficial use and with known priority dates can simply be integrated into state systems.

### EFFECTS OF TRUST REMOVAL ON UNDEVELOPED ALLOTMENT WATER RIGHTS

Most former allotments were entirely undeveloped when taken out of trust.[123] Consequently, most reported cases on water rights of former allotments have involved claims to federal reservation water rights that were not developed, in any sense described above, during the trust period. That is, during the trust allotment water rights had not been converted to project rights with the project serving the allotments, nor had the allottees developed or begun to develop their reservation water rights.

It is a difficult question whether undeveloped federal water rights ought to continue after allotments pass out of trust and come under state jurisdiction. Unlike developed rights, undeveloped federal water rights do not involve investments by allottees that ought to be protected. Undeveloped reservation rights also substantially conflict with state laws that require beneficial use of water.[124]

#### *Court Decisions Allowing Post-Trust Perfection of Undeveloped Federal Water Rights*

The courts have rejected indefinite continuation of undeveloped federal water rights after removal of the federal trust and conveyance to non-

120. *See infra* note 175 and accompanying text. The consequences of the relation back doctrine are greater for former allotment owners because the priority awarded is usually much earlier than state law would recognize.

121. *See* 2 S. WIEL, WATER RIGHTS IN THE WESTERN STATES 1130 (3d ed. 1911).

122. *See supra* note 72. On state law beneficial uses, see D. GETCHES, WATER LAW IN A NUTSHELL 101-04 (1984).

123. *See* D. OTIS, THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS (F. Prucha ed. 1973).

124. *See* D. GETCHES, *supra* note 122, at 101. For the view that the beneficial use requirement is not necessarily the best policy, see Williams, *The Requirement of Beneficial Use as a Cause of Waste in Water Resource Development*, 23 NAT. RESOURCES J. 7, 9 (1983).

Indians.[125] But most decisions have allowed owners of former allotments to perfect as much of the undeveloped federal rights as they put to use with reasonable diligence after the trust ends.[126] As stated above, the Wyoming state courts have disagreed and have held that all federal rights expire when the trust ends and the land is conveyed to non-Indians.[127]

In *Colville Confederated Tribes v. Walton*, the Ninth Circuit sustained a former allotment owner's right to perfect undeveloped federal water rights with reasonable diligence.[128] The court reasoned that any other result would impair allottees' property rights, which may not be done without clear authority in federal law.[129] This is the classic circular argument of property law. The allottee was able to transfer a property interest because the allottee had a property interest. One could as easily decide that an allottee's right to the undeveloped part of the reservation water right is a mere opportunity to perfect the right while the land remains in trust, an opportunity that serves the trust purpose and expires when the land becomes subject to state law.

Other Indian immunities from state law expire automatically with transfer out of trust. The most notable is immunity from state taxes. While the land is in trust, this immunity has been held to be a property interest of allottees.[130] Yet allottees cannot transfer it.[131] It is not obvious why the undeveloped water right—which can also be characterized as an Indian immunity from state law—should receive different treatment.

The most important precedent on allotment water rights is the Supreme Court's 1939 decision in *United States v. Powers*.[132] *Powers* involved water rights of former allotments, and the decision appears to support a post-trust right to perfect undeveloped federal water rights. But the case has been treated as inconclusive on the issue, even by courts that have sustained post-trust perfection.[133]

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125. *See supra* note 114, *infra* note 126.

126. United States v. Anderson, 736 F.2d 1358, 1362 (9th Cir. 1984); *United States v. Adair*, 723 F.2d at 1417; Colville Confederated Tribes v. Walton, 647 F.2d 42, 50-51 (9th Cir. 1981), *cert. denied*, 454 U.S. 1092 (1981); United States v. Powers, 16 F. Supp. 155, 153 (D. Mont. 1936), *aff'd in part, rev'd in part*, 94 F.2d 783 (9th Cir. 1938), *aff'd*, 305 U.S. 527 (1939); United States v. Hibner, 27 F.2d 909, 912 (D. Idaho 1928).

Two opinions of the Montana Supreme Court seem to say the successor has the same right as the allottee with no reasonable diligence requirement, but the court was following *Powers* and probably meant no broader right. Lewis v. Hanson, 124 Mont. 492, 496, 227 P.2d 70, 72 (1951) (dictum); Anderson v. Spear-Morgan Livestock Co., 107 Mont. 18, 27, 79 P.2d 667, 669 (1938) (dictum).

127. *See supra* text accompanying notes 114-15.

128. *Walton*, 647 F.2d at 50-51.

129. *Id.*

130. Choate v. Trapp, 224 U.S. 665 (1912).

131. *See* 25 U.S.C. § 349 (1982); FELIX S. COHEN, *supra* note 4, at 413-16. State jurisdiction has been sustained to impose property taxes on non-Indian leaseholds of Indian trust land. Fort Mojave Tribe v. County of San Bernardino, 543 F.2d 1253 (9th Cir. 1976), *cert. denied*, 430 U.S. 983 (1977).

132. 305 U.S. 527 (1939).

133. *E.g., Walton*, 647 F.2d at 50 n.13.

*Powers* arose on the Crow Reservation in Montana. Beginning in 1885, the Interior Department used tribal funds to build irrigation works serving allotments on the reservation. Non-Indian buyers of Crow Reservation allotments outside the Indian irrigation projects diverted water in private ditches built after the government's diversions.[134] In the drought year of 1934, there was not enough water to go around. The United States sued to enjoin upstream, non-Indian diverters, claiming that they had no right to any water on the reservation. The allotment purchasers' principal answer alleged that they had bought undeveloped allotments, then had irrigated them with reasonable diligence. They claimed that this entitled them to a "just and equal share" of the reservation water right.[135]

The United States District Court for the District of Montana denied the government's claim and quieted title in the purchasers on the theory they had pleaded.[136] The Ninth Circuit affirmed dismissal of the government's claim but vacated the district court's decree quieting title in the purchasers because all owners on the stream system were not parties.[137] The Supreme Court affirmed and concluded: "The [United States has] shown no right to the injunction asked. We do not consider the extent or precise nature of respondents' rights in the waters. The present proceeding is not properly framed to that end."[138]

Based on this conclusion, some commentators have argued that *Powers* did not determine whether allotment successors can acquire undeveloped federal water rights.[139] All that the Court decided was that the purchasers in *Powers* had some right to water, enough to defeat the government's attempt to enjoin their diversions. The purchasers' rights might have been based on water rights developed by the allottees during the trust, or they might have been based on state law.

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134. United States v. Powers, 16 F. Supp. 155, 157-59 (D. Mont. 1936), *aff'd in part, rev'd in part*, 94 F.2d 783 (9th Cir. 1938), *aff'd*, 305 U.S. 527 (1939).

135. Record at 59-98, United States v. Powers, 305 U.S. 527 (1939) (affirmative defense of defendants Tschirgi).

136. *Powers*, 16 F. Supp. at 159.

137. *Powers*, 94 F.2d at 786.

138. *Powers*, 305 U.S. at 533.

139. *See* Dufford, *Water for Non-Indians on the Reservation: Checkerboard Ownership and Checkerboard Jurisdiction*, 15 GONZ. L. REV. 95, 112-13 n.62 (1979); Getches, *Water Rights on Indian Allotments*, 26 S. DAK. L. REV. 405, 423 (1981).

A related argument is that the theory of the United States as plaintiff in *Powers* would have denied the transfer of the reservation water right from the tribal beneficiary to allottees at the time trust allotments were first made. Neither the Court nor the parties focused on the question of a further transfer to successors when allotments went out of trust. Although this is true, the Court still had to recognize some defect in the Government's case against defendants, who were all successors. Nevertheless, this argument was accepted by the court in Colville Confederated Tribes v. Walton, 647 F.2d 42, 50 n.13 (9th Cir. 1981), *cert. denied*, 454 U.S. 1092 (1981). That court reached the same conclusion as *Powers*, but it did not view *Powers* as controlling.

In Merrill v. Bishop, 74 Wyo. 298, 307, 287 P.2d 620, 622 (1955), which involved the water rights of white owners of former allotments, the Wyoming Supreme Court cited *Powers* but said: "We do not find that case to have any particular bearing on the case at bar. . . ." No reasons were stated.

State law may allocate whatever water is available after the reservation water right is satisfied.[140] Non-Indians who homesteaded "surplus" tribal land within reservations have been acquiring state water rights since the 1890s.[141] A 1904 statute applicable only to the Crow Reservation had expressly authorized settlers to use reservation water supplies subject to the Indians' rights.[142] And a number of the *Powers* allotment purchasers—possibly all of them—had filed state law notices of appropriation.[143]

However, state water rights were not the basis of the *Powers* decision. Had they been, the Court would have had to determine whether the Indians' senior rights required abatement of the purchasers' diversions. Nor was the Court's opinion neutral on the question of the purchasers' federal water rights. The Court stated:

> Respondents maintain that under the Treaty of 1868 waters within the Reservation were reserved for the equal benefit of tribal members (*Winters v. United States*, 207 U.S. 564) and that when allotments of land were duly made for exclusive use and thereafter conveyed in fee, the right to use some portion of tribal waters essential for cultivation passed to the owners.
>
> The respondents' claim to the extent stated is well founded.[144]

Furthermore, the purchasers' pleadings asserted without contradiction that most of the water rights of the former allotments in *Powers* had

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140. Cappaert v. United States, 426 U.S. 128, 141, 143-46 (1976); Conrad Investment Co. v. United States, 161 F. 829, 833-34 (9th Cir. 1908). *Contra Walton*, 647 F.2d at 52. But on this issue, *Walton* is limited to the rare cases where a stream system is entirely within an Indian reservation. United States v. Anderson, 736 F.2d 1359, 1365 (9th Cir. 1984).

141. *See supra* text accompanying notes 42-43, 52-56.

142. The Act of Apr. 27, 1904, ch. 1624, 33 Stat. 352, ratified and amended an agreement with the Crow Tribe ceding the northern part of its reservation to the United States. Congress unilaterally added a new Article VIII providing:

> Art. VIII. The right to take out water upon the diminished reservation subject to any prior claim of the Indians thereto by reason of previous appropriation, and the right to construct, maintain, and operate dams, flumes, and canals upon and across the said diminished reservation for the purpose of irrigating lands within any portion of the ceded tract are hereby granted, such rights to be exercised by persons, companies, or corporations under such rules, regulations, and requirements as may be prescribed by the Secretary of the Interior.

*Id.* at 359.

There are several citations to the 1904 Act in the *Powers* record, but none to this section. It did not directly apply, because defendants were not irrigators on "the ceded tract" but were within "the diminished reservation." It is contrary to the Government's theory as stated in the text. It is arguably contrary to the defendants' theory, because it seems to make the water rights of allotment successors in "the ceded tract" junior to the Indians.

143. At the initial pleading stage, four defendants relied on claims of state law rights. Record at 117-33, *Powers*, 305 U.S. 527 (1939) (counterclaims of defendants Yates); *id.* at 147-52 (first counterclaim of defendants Dethlefsen). The other eleven who answered relied on claims of succession to federal rights. *Id.* at 59-101. After the pleading stage all defendants relied on federal rights claims. *Id.* at 229-52. But most of them placed in evidence state law notices of appropriation they had filed. *Id.* at 127-33, 489-91, 518-21. Since no party was basing its legal position on state law claims, the trial court did not determine their validity or extent.

144. *Powers*, 305 U.S. at 532.

been undeveloped when the land passed out of trust.[145] Hence, the claim that the *Powers* Court held that undeveloped federal water rights survive trust removal is stronger than has been assumed.

There may be reasons for the Supreme Court to reconsider the question. No party in *Powers* was asserting state law. The Court had no perspective on the decision's effect on state law appropriators who diverted before the allotment purchasers but whose rights would be junior to the purchasers' federal rights.[146] Moreover, the government argued only that no federal water rights passed from the tribe to the allottees.[147] There was no focus on the trust's end, conveyance to non-Indians, or the federal statutes governing these events. But a lower court would be justifiably reluctant to initiate a reexamination. A Supreme Court opinion like *Powers,* even if arguably dictum, casts a long shadow.

*Arguments Against Post-Trust Perfection of Undeveloped Federal Rights*

The decisions holding that undeveloped federal water rights of allotments may be perfected with reasonable diligence after the trust ends have been strongly criticized.[148] Critics argue that the continuing immunity from state water laws upheld in these decisions is not justified by the controlling federal statutes. The purpose of the allotment statutes is to assist Indian allottees to become self-sufficient agriculturalists. This purpose is rarely served by allowing non-Indian successors to acquire and perfect undeveloped federal reservation water rights.[149] The chance to get undeveloped water rights with an early priority date gives non-Indians a powerful incentive to induce Indians to sell undeveloped allotments. When this occurs, the federal purpose that allottees use the land to become self-sufficient is usually thwarted.

Critics of post-trust perfection also argue that non-Indian allotment successors did not expect to enjoy the undeveloped part of the allotments' federal water rights. They point out that non-Indian successors have usual-

145. Record at 43-166, 305 U.S. 527 (1939) (answers); Record at 167-228, *id.* (replies). Two defendants showed water uses developed during the trust by the Indian allottees from whom they had bought their land, although they also claimed additional water diverted after their purchase. Record at 152-59, *id.* (second counterclaim of defendants Dethlefsen); Record at 167-77, *id.* (reply).

146. The streams involved were not wholly within the Crow Reservation, although some off-reservation claims were in Wyoming, presenting an interstate complication. Record at 58, *Powers,* 305 U.S. 527 (1939).

147. *See supra* note 139.

148. *See* D. Getches, Water Law in a Nutshell, 312-14 (1984); Dufford, *supra* note 139, at 101-21; Getches, *supra* note 139, at 420-23; Note, 17 LAND & WATER L. REV. 155, 160-68 (1982); Note, *Colville Confederated Tribes v. Walton: Indian Water Rights and Regulation in the Ninth Circuit,* 43 MONT. L. REV. 247, 259-63 (1982); Note, 58 WASH. L. REV. 89, 95-100, 108-09 (1982).

149. This assumes that the consideration received by allottees will not be reinvested in productive assets, an assumption borne out by past events. *See* FELIX S. COHEN, *supra* note 4, at 136-38, 144.

ly sought to appropriate new water rights under state law.[150] If purchasers did not expect to acquire undeveloped federal water rights, presumably they did not pay allottees for them. They receive a windfall if courts later decide that they own undeveloped rights.

One consequence of any federal water right surviving the end of the trust and transfer to non-Indians is that the amount of land sharing in the reservation water right with its early priority date remains large. Aggressive non-Indian owners then compete with the tribe and with remaining trust allottees.[151] In times of shortage, there may be less water for each owner than needed. This consequence is justified for water rights developed by allottees during the trust, but it is questionable for undeveloped rights in which allottees have made no investments.

Critics of post-trust perfection advocate that the undeveloped part of an allotment's federal water right should expire when the allotment is taken out of trust and subjected to state jurisdiction.[152] They contend that this rule is more consistent with the purposes of the governing federal statutes, it is favored by the usual federalism theory that federal preemption of state law should not outlast the federal purpose, and it would reduce disruption of western state water law. Moreover, this rule would avoid the complexities caused by the post-trust perfection rule that most courts follow because the courts' rule requires adjudication of allotment successors' due diligence in perfecting undeveloped federal rights.[153]

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150. No study of this question has been found, but reported decisions show that many successors made state filings. *See supra* note 143; Colville Confederated Tribes v. Walton, 460 F. Supp. 1320, 1324, 1331-33 (E.D. Wash. 1978), *rev'd*, 647 F.2d 42, 51-53 (9th Cir. 1981), *cert. denied*, 454 U.S. 1092 (1981); Big Horn Master's Report, *supra* note 31, at 46; Supplemental Big Horn Master's Report, *supra* note 114, at 4-5.

151. See Getches, *supra* note 139, at 425.

A factor that determines who are the opposing parties to a case is the disposition of the part of the undeveloped water right, if any, that does not survive removal of the trust and transfer to non-Indians. In any western state, the water would first become available to meet shortages for holders of existing rights with the same priority date (the reservation date), then to holders of junior rights, usually under state law. In a particular case, the gain may be enjoyed by a tribe, by other allottees or successors, by non-Indians claiming under state law, or even by later federal reservations. Another factor is the reacquisition in trust of former allotments, usually by tribes. In this circumstance, tribes benefit from transfer of undeveloped rights. United States v. Anderson, 736 F.2d 1358 (9th Cir. 1984).

152. *See supra* note 148. This view was advocated by the United States in Colville Confederated Tribes v. Walton, 460 F. Supp. 1320, 1326-29 (E.D. Wash. 1978), *rev'd*, 647 F.2d 42 (9th Cir. 1981), *cert. denied*, 454 U.S. 1092 (1981). It was not accepted by either the district or appeals courts. *See supra* text accompanying notes 116, 126.

153. An alternative rule would eliminate the undeveloped right upon transfer to non-Indians unless the parties intended a transfer. Intent would be presumed in the case of gratuitous transfers by descent or devise but would have to be proved in the case of purchases, that is, it would have to be shown that transfer of the undeveloped water right was contemplated and that the right was paid for. This view was advocated by the United States after remand and in light of the appellate opinion in *Walton*. Memorandum for the United States, May 5, 1982, Colville Confederated Tribes v. Walton, Nos. 3421, 3831 (E.D. Wash. Aug. 31, 1983), *rev'd*, No. 83-4285 (9th Cir. Jan. 21, 1985). It was rejected by the district court based on law of the case. *Walton*, No. 84-3504, slip op. at 1-8. The United States did not appeal.

This theory seems doubtful for two reasons. First, it focuses on transfer rather than on application of state law. Second, when a property owner's intent to make a transfer is

*Arguments for Allowing Post-Trust Perfection*

Proponents of post-trust perfection have several responses to these arguments. Post-trust perfection accords Indian allottees more to sell or give to their successors. The available evidence suggests that Indian sellers have benefited very little from this right, but future Indian sellers might and gratuitous transfers to heirs and devisees present a more sympathetic case.[154]

Proponents can also point out that the conflict between the post-trust perfection rule and state water law is relatively minor. If allotment rights must be perfected with reasonable diligence, then they are treated like projects governed by the state law doctrine of relation back.[155] Some western states are in fact quite lenient in their definitions of reasonable diligence and allow a very long time to perfect.[156]

Proponents of post-trust perfection can partially answer the argument about buyers' expectations. While it is true that most non-Indian successors filed for state law water rights after acquiring former allotments, these filings were not clearly inconsistent with successors' later claims to federal water rights. Doubt about federal rights may have led cautious buyers to file in case the federal rights were not upheld. The Indian Service itself made many state law filings prior to *Winters.*[157] Some successors may have filed because it was the cheapest way to obtain cooperation of a district engineer or other state official hostile to federal rights. Also, owners of former allotments probably must comply with procedural state laws in order to retain and perfect federal water rights. In most western states they would have to file notices of appropriation. These arguments are undercut, however, by the fact that most allotment successors filed for new priority dates and did not claim reservation priority dates.

*Post-Trust Perfection Should Be Upheld*

If the courts were deciding the issue on a clean slate, a rule that an allotment's undeveloped federal water right expires when the allotment goes out of trust and becomes subject to state law is preferable because it is more faithful to the purposes of the governing federal statutes. This rule would not be inequitable because other Indian immunities from state law expire with the trust. Also, this rule would place buyers of former

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at issue, the question is whether the owner intended to transfer the interest or to retain it. Here, the proposed rule would extinguish a water right not intended to be transferred. The benefit would accrue to some third party appropriator usually unknown to the grantor. No grantor intends that result.

154. Another affirmative policy argument is that to some degree the post-trust perfection rule will promote alienability of land. But a basic purpose of the federal scheme is to restrain alienability.

155. *See infra* note 175 and accompanying text.

156. *See, e.g.,* Carbon Canal Co. v. Sanpete Water Users Ass'n, 10 Utah 2d 376, 353 P.2d 916 (1960).

157. *See supra* notes 104-108 and accompanying text.

allotments on an equal footing with homesteaders of ceded reservation common land who acquired under the public land laws.[158]

However, the issue is not a new one. Thousands of allotments have gone out of trust in the past. Some post-trust water uses have been continuous for very long periods. The resulting reliance interest is an important social value strongly reflected in the law of property.

Assessing the legitimate reliance interest of former allotment owners is complex, and there is evidence both for and against actual reliance.[159] One question already discussed is the inference to be drawn from the fact that most non-Indian buyers of former allotments filed for state water rights. This factor suggests that buyers did not rely on federal water rights, but it is inconclusive.

A related question is whether undeveloped federal water rights were reflected in allotment prices when allotments were conveyed out of trust. Limited evidence suggests that they were not.[160] More information could be obtained by reviewing Bureau of Indian Affairs appraisal practices. All sales directly out of trust require appraisals.[161] But the appraisals are unlikely to be helpful for several reasons. First, at the time of early transfers, undeveloped water rights in some locations had no positive value, that is, water was not yet scarce enough to make undeveloped rights worth more than new appropriations. Second, the valuation of undeveloped rights is difficult and has been worked out in concrete terms only recently. It would be hard to fault a 1920 appraiser for ignoring a value he had no practical way to measure. Third, it is quite possible that the appraisals will show no valuation of undeveloped water rights either for transfers in trust or for transfers out of trust. If so, the appraisals would ignore the undeveloped right transfer during the trust, which no one has questioned.[162]

The most important factor favoring a legitimate reliance interest is legal precedents. The first decision sustaining a post-trust right to perfect

158. *See supra* note 42 and accompanying text.

159. Judging the reasonable expectations of non-Indians who have acquired property from Indians is a difficult challenge for courts because many non-Indians believed that Indians should yield all their resources to the "superior" whites. For example, in the *Winters* case, the courts found the idea that the non-Indian defendants could take all Milk River water and leave the Indians none to be unreasonable, but many politicians disagreed. *See* Hundley, *supra* note 10, at 22, 27-28, 31-32, 36-37, 40-42. In other cases, the courts have bowed to the political will. *See e.g.*, United States v. Ahtanum Irr. Dist., 236 F.2d 321 (9th Cir. 1956), *cert. denied*, 352 U.S. 988 (1957).

160. Appraisals for two allotments acquired by non-Indians in the 1920s and a copy of the appraisal rules followed by the Department at that time are in the record of the *Walton* case. United States Exhibits 59, 60, Colville Confederated Tribes v. Walton, Nos. 3421, 3821 (E.D. Wash. 1983). These show that irrigable and irrigated acres were valued more than others, but they show no recognition that an appurtenant water right was being transferred.

161. *See* 25 C.F.R. § 152.24 (1984); 43 C.F.R. § 4.301 (1984). When a trust allotment is sold by the United States as grantor and trustee, there is an appraisal. When an allotment goes out of trust through a fee patent to an Indian allottee, heir, or devisee, there is usually no appraisal even if the patentee immediately sells the land.

162. *See supra* text accompanying notes 77-78.

undeveloped federal water rights was reported in 1928.[163] It was followed in *obiter dicta* several times thereafter, it was not seriously challenged until the 1970s, and it was reaffirmed in several recent decisions.[164] There may have been reasonable reliance on these precedents by allotment buyers or others who bought from them.

Even if *Powers* is not controlling, when it is considered with the more explicit precedents, the chances are significant that owners of former allotments have reasonably relied on acquiring undeveloped federal water rights. This consideration should outweigh the policy reasons favoring expiration of undeveloped rights at the trust's end, and the courts should continue to sustain the right to post-trust perfection of federal water rights if developed with reasonable diligence.

*When Undeveloped Federal Water Rights Are Lost*

None of the federal court opinions expressly addressed the question of when the diligence requirement arises. It could arise at the trust's end, or perhaps there must also be subjection to state law or conveyance to non-Indians or both. If all three events have occurred, a court need not consider the issue.

Subjection of a former allotment to state law ought to be an event relevant to the reasonable diligence requirement. It is state law that requires beneficial use of water as a condition of water rights ownership. Therefore, when allotments outside Indian reservation boundaries go out of trust, the diligence requirement should be imposed even if Indian allottees retain ownership. Whether the owners of former allotments are Indians or non-Indians, the land and its owners are subject to state law for all relevant purposes.[165]

Allotments within self-governing Indian reservations pose harder questions. If Indian allottees retain ownership, the land and its owners remain immune from state jurisdiction.[166] Even if the land is conveyed to non-Indians, it does not come under state jurisdiction for all purposes. In *Colville Confederated Tribes v. Walton,* former allotments owned by non-Indians were located on a water system entirely within a self-

163. United States v. Hibner, 27 F.2d 909 (D. Idaho 1928).

164. *See supra* note 126 and cases cited therein. *See also* Clyde, *Indian Water Rights* in 2 WATERS AND WATER RIGHTS § 145.1 (R. Clark ed. 1967); FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 220 (Gov't Printing Office 1941) ("The *Powers* case compels the view that the right to use water is a right appurtenant to the land within the reservation, and that unless excluded it passes to each grantee in subsequent conveyances of allotted land."); Op. Solic. Dep't of Interior (Mar. 14, 1958), *reprinted in* 2 OPINIONS OF THE SOLICITOR OF THE DEP'T OF THE INTERIOR RELATING TO INDIAN AFFAIRS 1829 (GOV'T PRINTING OFFICE 1978); TRELEASE, *Indian Water Rights for Mineral Development,* in NATURAL RESOURCES LAW ON AMERICAN INDIAN LANDS 222, 231 (P. Maxfield ed. 1977).

165. *See* FELIX S. COHEN, *supra* note 4, at 348-49.

166. *Id.* at 349-52, 380, 410-11.

governing Indian reservation.[167] The Colville Tribes claimed exclusive jurisdiction over the water against the State of Washington, and the Ninth Circuit sustained the claim. But the court required that the undeveloped federal water right be put to use with reasonable diligence. The court later held that the diligence requirement was a rule of federal law. State law on reasonable diligence was considered only for "guidance."[168] Therefore, the court imposed this requirement either because of the trust's end or because of the trust's end and conveyance to non-Indians. We cannot be sure which events triggered the diligence requirement because the court did not discuss the point.[169]

If the requirement of diligent perfection arises solely as a consequence of the trust's end, it would apply to reservation Indian owners of former allotments as well as to non-Indian owners. This would present troublesome questions in light of the manner in which former allotments held by reservation Indians have been treated. There was a period when the Bureau of Indian Affairs issued fee patents to Indians without their consent and sometimes over their objections.[170] At other times, the Bureau required allotments to be taken out of trust simply to make an inter vivos transfer to another Indian.[171] Even when Indians voluntarily took reservation allotments out of trust, the federal policy to assist reservation Indian self-sufficiency still applies to them.[172] In this situation, it is contrary to the allotment statutory scheme to end undeveloped water rights of former allotments if the Indian owners do not put the water to use with reasonable diligence.

An analogous question is posed by the Wyoming courts' expiration rule, which is advocated by critics of post-trust perfection.[173] Undeveloped federal water rights might expire solely as a consequence of trust removal, or the courts might also require that former allotments come under state jurisdiction, be conveyed to non-Indians, or both. In the Big Horn River Adjudication, which involved former allotments owned by reservation Indians, a Wyoming district court held that the federal water rights of these parcels did not expire when taken out of trust.[174] For federal water rights

167. 647 F.2d 42, 51-53 (9th Cir. 1981), *cert. denied*, 454 U.S. 1092 (1981). The water system is a creek and connected underground aquifer that empty into a saline lake without an outlet. The creek had no name before the litigation. Its denomination as "No Name Creek" by the litigants became a proper name during the case.

168. Colville Confederated Tribes v. Walton, No. 83-4285, slip op. at 5 (9th Cir. Jan. 21, 1985).

169. The tribal jurisdiction question was decided differently when the water source flowed outside a reservation as well as within, as is commonly the case. In United States v. Anderson, 736 F.2d 1358, 1363-66 (9th Cir. 1984), the court held that state jurisdiction then applies to reservation allotments acquired by non-Indians.

170. *See* Officer, *supra* note 97, at 66-68; *supra* note 60.

171. No statute generally authorizes inter vivos transfers. At the present time, the Bureau allows them under statutes authorizing trust removal from grantors together with statutes allowing new trust titles for grantees. *See* 25 C.F.R. § 151.3(b) (1984). For many years, some local Bureau officials refused to allow new trust titles for grantees.

172. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980).

173. *See supra* text accompanying notes 114-15, 152-53.

174. Big Horn Master's Report, *supra* note 31, at 128-34, 270-71, 330; Big Horn Adjudication, *supra* note 31, No. 4993, slip op. at 24, 67.

to expire under the Wyoming rule, the allotments must either be conveyed to non-Indians, or come under state jurisdiction, or both. The Wyoming court correctly refused to impose the state courts' expiration rule on former allotments still owned by reservation Indians.

*Reasonable Diligence*

As shown above, the majority rule allows allotment successors to perfect undeveloped federal water rights if done with reasonable diligence. Water rights that are partially developed by allottees during the trust present a compelling case for the same right. These rules require courts to decide how promptly allotment water rights must be perfected after allotments go out of trust.

Western state water law offers a possible standard in the relation back doctrine. Under that doctrine, a would-be appropriator may give notice of a planned diversion scheme or otherwise show the intent to appropriate. If the scheme is then pursued to completion within a reasonable time and with due diligence, the water right acquired has the priority date of the initial notice, rather than the later date of actual water diversion.[175] If this doctrine is applied to former allotments, the owners (at least those who are subject to state law) would have to give notice promptly after the trust ends and then develop their diversion projects with reasonable diligence. Having done so, they would be rewarded with the early reservation priority dates. The first court to sustain post-trust perfection of undeveloped federal water rights on former allotments seemed to refer to state law on relation back.[176]

Applied to undeveloped allotments, the relation back doctrine requires adjustment. When a would-be appropriator gives notice or forms an intent under state law, a specific diversion must already be proposed in order to make the notice meaningful. When an allotment goes out of trust and becomes subject to state law, there would have to be a reasonable planning time to formulate a project and give notice. But allotments are not large parcels, so this need not be long. States can propose standards appropriate to their laws.

The only reported case in which reasonable diligence in perfecting undeveloped federal water rights on former allotments has been adjudicated is *Colville Confederated Tribes v. Walton*.[177] The Ninth Circuit held that federal law controlled, but state law on reasonable diligence under the relation back doctrine would be examined for "guidance."[178] The court then applied state law precedents to the facts and determined how much water had been put to use within a reasonable time after the allotments

175. *See* D. GETCHES, WATER LAW IN A NUTSHELL 93-99, 147-48 (1984); F. TRELEASE, WATER LAW 98-99 (3d ed. 1979).

176. United States v. Hibner, 27 F.2d 909, 912 (D. Idaho 1928).

177. *Walton*, No. 83-4285 (9th Cir. Jan. 21, 1985).

178. *Id.* slip op. at 4-5.

had gone out of trust.[179] The decision reversed a federal district court's astonishing conclusion that water development begun more than twenty-three years after allotments went out of trust was undertaken with reasonable diligence.[180]

The Ninth Circuit's reference to state law for "guidance" appears to be an application of the rule that federal property law ordinarily adopts state law rules of decision.[181] The court had already determined that the former allotments involved in the case were governed by tribal rather than state law,[182] so this rule was arguably inappropriate. But the parties did not try to show that tribal law on the question would be any different from state law, so the court did not have to choose between conflicting laws.

## CONCLUSION

Federal water rights of Indian allotments have been gradually defined by adjudication. It is settled that allotments out of tribal land have an appurtenant right to use a proportionate share of the reservation water right for agricultural purposes. If a reservation has a federal water right for other purposes as well, its relation to the agricultural water rights of allotments complicates both quantification of rights and management of stream systems.

Disposition of federal reservation water rights is less settled when allotments go out of trust, become subject to state law, and are acquired by non-Indians. Results have varied from the rights' elimination to their full continuation subject to a loose requirement that they be put to use within a reasonable time. In part this is because courts see widely differing circumstances, and most cases involve particular reliance claims based on events of many years before.

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179. *Id.* slip op. at 9-12. Since 1917, Washington has required an appropriator to obtain a permit before undertaking a water use, then to begin and complete construction within the time allowed by the state supervisor of water resources. WASH. REV. CODE §§ 90.03.250, .320 (1962). In setting and extending time limits and assessing an applicant's diligence, the supervisor is to consider "the cost and magnitude of the project and the engineering and physical features to be encountered, and shall allow such time as shall be reasonable and just under the conditions then existing, . . . having due regard to the good faith of the applicant and the public interests affected." *Id.* § 90.03.320.

This section seems to require that an allotment successor who is subject to state law get a state permit soon after the trust ends, to give notice to other users. The state law's diligence standard after a permit is obtained might be applied by analogy to determine how promptly the permit should be sought.

180. Nos. 3421, 3831, slip op. at 2-7 (E.D. Wash. Aug. 31, 1983), *rev'd*, No. 83-4285, (9th Cir. Jan. 21, 1985). This proceeding followed the remand ordered in 647 F.2d 42 (9th Cir. 1981).

The court's August 31, 1983 opinion stated that the three allotments in question went out of trust and were acquired by non-Indian purchasers in 1921, 1923, and 1925. The Waltons acquired them by purchase in 1948. The district court awarded the Waltons a federal reservation water right to irrigate 104 acres, seventy-four acres of which were newly irrigated by the Waltons after 1948.

181. Wilson v. Omaha Indian Tribe, 442 U.S. 653, 671-76 (1979).

182. *See supra* note 167 and accompanying text.

Whenever allottees have invested in water development, the federal water rights actually or partially developed should be vested property rights that are not affected by the end of the trust or conveyance to non-Indians. States should be able to impose only procedural requirements such as notice. Any other rule would at times unfairly destroy the value of allottees' investments.

A more difficult question is whether undeveloped federal reservation water rights may be perfected after the trust ends. The policies of governing federal statutes and principles of federalism favor expiration of any portion of the right that is wholly undeveloped when allotments go out of trust and become subject to state law. But most reviewing courts have sustained post-trust perfection of undeveloped rights if put to use with reasonable diligence after the trust ends. One of these decisions, *United States v. Powers*, was affirmed by the Supreme Court. Whether *Powers* is a controlling precedent on post-trust perfection of undeveloped federal rights has been disputed, but one can make a good argument that it is. Since almost all adjudications of allotment water rights have been in the federal courts of the Ninth Circuit, the scope of *Powers* is a crucial question for other courts. *Powers* is doubtful enough to justify its reexamination, but it is likely to be followed. If it is, the principal issue remaining for the courts is to define the diligence required to perfect undeveloped federal water rights.