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COMMENT

INDIAN RESERVED WATER RIGHTS: AN ARGUMENT FOR THE RIGHT TO EXPORT AND SELL

INTRODUCTION

Water is the life-line of the arid West. Its possession means political and economic power.[1] One study estimates that Indian water rights, many of which are still unadjudicated, consist of about 45 million acre-feet per year or three times the annual flow of the Colorado River.[2] As the demand for water begins to exceed supply, focus on Indian water rights becomes increasingly intense.[3] An issue currently inciting divisive discussion is whether Indian water rights encompass the right to sell and export the water off-reservation.[4]

The federal government, in treaties, impliedly reserved Indian water rights to ensure the future viability of the reservation as a permanent homeland for the Indians.[5] Further, the firmly established doctrines of tribal sovereignty and federal preemption limit states in restricting tribal use of Indian water.

This comment examines the proper scope of Indian reserved water rights. It first explores the purpose of the treaties which define the implied water rights and concludes that their purpose was to create a permanent homeland, making a per se restriction on sale or export of the reserved water impermissible. Second, the relation of tribal sovereignty and federal preemption to state attempts to restrict the type of tribal water use is evaluated. Third, a practical consideration of the situation suggests that the various parties could benefit economically from allowing Indians to export and sell their water. This comment then suggests that negotiation, rather than litigation, may offer the best resolution to this difficult problem. Finally, the argument for reserved water export is applied to the situation in Wyoming where the Wind River Indians' water rights were recently adjudicated with Wyoming Supreme Court approval of a prohibition on Indian water export.[6]

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1. NATIONAL WATER COMMISSION, WATER POLICIES FOR THE FUTURE 39 (1973) [hereinafter NAT'L WATER COMM'N] ("Water is basic to our economic growth." Development of the water resource can have profound influence on regional development and population distribution).
2. Wilkinson, *Western Water Law in Transition*, 56 U. COLO. L. REV. 317, 323 (1985) (citing WESTERN GOVERNORS' ASSOCIATION, INDIAN WATER RIGHTS IN THE WEST (1984)).
3. Trudell, *Preface* to AMERICAN INDIAN LAWYER TRAINING PROGRAM, INDIAN WATER POLICY at 3 (1982). *See generally* Comment, *Leasing Indian Water Off the Reservation: A Use Consistent With the Reservation's Purpose*, 76 CALIF. L. REV. 179 (1988).
4. Shupe, *Off-Reservation Marketing of Indian Water*, in NATURAL RESOURCE DEVELOPMENT IN INDIAN COUNTRY 1 (1988).
5. Winters v. United States, 207 U.S. 564, 576-77 (1908).
6. In Re the General Adjudication of All Rights to Use Water in the Big Horn River System, 753 P.2d 76, 100 (Wyo. 1988).

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BACKGROUND

Reserved Water Rights

The doctrine of federally reserved Indian water rights was first recognized in 1908 in *Winters v. United States.*[7] In *Winters,* landowners upstream from the Fort Belknap Reservation in Montana were diverting water.[8] By so doing, they deprived the Indians of their asserted rights to the Milk River which bordered the reservation.[9] The Supreme Court found that the government and the Indians intended that the reservation be a permanent homeland where the Indians could become a "civilized people."[10] Further it found that the lands, being arid, were "practically valueless" without water.[11] The Court refused to accept the logical inconsistency that the United States reserved lands for the Indians without reserving the water necessary to give the lands any use or value. Thus, it found that the federal government had impliedly reserved water for the Indians.[12] The holding does not mention the scope of permissible uses except to say that they would continue "through years."[13] In sum, the Court established in *Winters* that when the United States creates an Indian reservation, the United States has the power to and does impliedly reserve for the Indians the water necessary to make the reservation meaningful.

Shortly after *Winters,* the Ninth Circuit decided *Conrad Investment Co. v. United States.*[14] As in *Winters,* upstream non-Indians were diverting water from a creek that flowed along Indian reservation boundaries. Here, the Conrad Company was diverting water from Birch Creek upstream from the Blackfeet Reservation.[15] The court addressed the scope of the Indian water rights. It acknowledged that future uses of the water could not be determined, but notwithstanding this uncertainty, held that the reservation of water for future requirements, as well as present, was within the treaty's terms.[16] This holding concerned the quantity, not the type, of reserved water use because use of the Indian water for purposes other than irrigation and domestic needs was not at issue.[17]

In 1956, the same court cited *Conrad* with approval in *United States v. Ahtanum Irrigation District.*[18] The Yakima Indians brought suit to establish and quiet title to the Indians' right to the use of the waters of Ahtanum Creek under an 1855 treaty.[19] An agreement in 1908 between

7. 207 U.S. 564 (1908).
8. *Id.* at 567.
9. *Id.*
10. *Id.* at 576.
11. *Id.*
12. *Id.* at 577.
13. *Id.*
14. 161 F. 829 (9th Cir. 1908).
15. *Id.* at 830.
16. *Id.* at 832.
17. *Id.* at 831-32.
18. 236 F.2d 321, 326 (9th Cir. 1956).
19 *Id.* at 323.

the Chief Engineer of the Indian Irrigation Service and non-Indian water users which specifically limited the percentage of natural water flow rights was the crucial question.[20] Although speaking in the context of agricultural uses of the reserved water, the court did not mince words regarding the validity of future uses of the reserved water: "The reservation was not merely for present but for future use. Any other construction of the rule in the Winters case would be wholly unreasonable."[21] Consistent with this observation, the *Ahtanum* court approved a flexible quantification of the Indian reserved rights in order to satisfy future needs.[22]

Although the Supreme Court recognized the existence of the Indians' valuable water rights in 1908 and an occasional case arose invoking *Winters*, neither the Indians nor the United States government, as trustee, substantially asserted them for many years.[23] Not until 1963, in *Arizona v. California*,[24] did Indian water rights again receive much attention. *Arizona v. California* involved adjudication of the Colorado River water between Arizona and California. Although the Indian water rights comprised only a minor segment of the case,[25] the Court formulated an important principle defining the quantification of Indian water rights. Like the Ninth Circuit in *Conrad* and *Ahtanum,* the Supreme Court held that the reserved water was meant to satisfy future, as well as present, Indian needs.[26] The Court, however, recognized the inadequacy of an open-ended quantification of the water rights and adopted the practically irrigable acreage standard (PIA) [27] as the only feasible method to quantifiy water.[28]

The Court published a Supplemental Decree[29] for *Arizona* which removed any doubts about the permissible uses of water rights quantified under PIA. The Court made it clear that PIA "shall constitute the *means* of determining quantity of adjudicated water rights but shall *not* constitute a *restriction* of the *usage* of them to irrigation or other agricultural application" (emphasis added).[30]

In 1976, the Supreme Court decided the non-Indian reserved water rights case of *Cappaert v. United States.*[31] There, the Devil's Hole National

20. *Id.* at 330-31.
21. *Id.* at 326.
22. *Id.* at 327. The "needs" considered in *Ahtanum* were agricultural only.
23. NAT'L WATER COMM'N, *supra* note 1, at 474-75.
24. 373 U.S. 546 (1963).
25. *Id.* at 595-601. They comprised 6 of 57 pages of the opinion.
26. *Id.* at 600.
27. The practicably irrigable acreage standard quantifies the amount of water necessary to irrigate all the land that is determined to be practicably irrigable. Determination of which land is practicably irrigable involves technical expertise as well as a policy decision about the meaning of "practicably." *See* Burness, Cummings, Gorman & Lansford, *Practically Irrigable Acreage and Economic Feasibility,* 23 NAT. RESOURCES J. 289 (1983).
28. 373 U.S. at 601.
29. Arizona v. California, 439 U.S. 419 (1979).
30. *Id.* at 422.
31. 426 U.S. 128 (1976).

Monument's water rights were at issue.[32] The Cappaerts' use of water was lowering the water in the Hole to the point of injuring the pupfish unique to the Hole.[33] The Court held that because one of the Monument's purposes was to preserve the pupfish, the federal government had reserved the water necessary to preserve the pupfish.[34] No more and no less water than necessary to effectuate the purpose was reserved.[35] This holding stands for the principle that the purpose of the federal reservation defines the scope of the water rights.

United States v. New Mexico[36] further clarified the relation of the purpose of the federal reservation to its impliedly reserved water rights. In order to determine the reserved water rights of the Gila National Forest, the Supreme Court established a test for determining which purposes of the National Forest created water rights.[37] The Court held that where water is necessary to fulfill the essential or primary purposes of the reservation, water rights arise.[38] Where water is only valuable for a secondary use of the federal reservation, no implied water rights attach.[39] Applying this test, the Court found no implied water rights for the purposes of aesthetics, recreation or fish-preservation in the Gila National Forest.[40]

In sum, the reserved water rights doctrine comprises several principles. First, when creating a reservation, Indian or otherwise, the United States impliedly reserves sufficient water to make the reservation meaningful and viable.[41] Second, the amount of reserved water is the amount necessary to effectuate the primary purpose of the reservation.[42] Third, in respect to Indian reservations, recognition of the evolving nature of a human community has led the courts to conclude that, in order to assure the continued viability of the reservation, future needs must be accommodated.[43] Consequently, the quantity of reserved water is not limited to present needs[44] nor is the type of use restricted to specific uses.[45]

Treaty Purpose

The federal government's purpose in establishing Indian reservations defines the scope of the Indian water rights. Treaties typically created the reservation. Their interpretation is key to determining the purpose of the reservation and the scope of the Indian water rights.

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32. *Id.* at 131.
33. *Id.* at 136.
34. *Id.* at 147.
35. *Id.*
36. 438 U.S. 696 (1978).
37. *Id.* at 702.
38. *Id.*
39. *Id.*
40. *Id.* at 705. It did find water rights for timber and watershed management, concluding that these were the primary purposes of the National Forests. *Id.* at 718.
41. *Winters*, 207 U.S. at 577.
42. United States v. New Mexico, 438 U.S. at 702.
43. Arizona v. California, 373 U.S. at 600.
44. *Ahtanum*, 236 F.2d at 327.
45. Arizona v. California, 439 U.S. at 422.

The Shoshone treaty,[46] which is at the heart of the Indian claims to the Big Horn, is representative of many Indian treaties. In *United States v. Shoshone Tribe of Indians,*[47] the Supreme Court interpreted the 1868 treaty between the United States and the Shoshone tribe. Consistent with an explicit reference in the treaty to a permanent homeland,[48] the Court held that the treaty evinced an intent to create a permanent homeland.[49]

The intent that the Shoshone reservation be a permanent homeland was not unique to the 1868 Shoshone treaty. The Supreme Court has repeatedly found that the purpose of Indian reservations was to provide a place where the Indians could be self-governing and become economically self-sustaining.[50] Although treaties differed, the words "forever" and "permanent" were typical to describe the duration of treaty guaranteed rights.[51] Furthermore, although numerous treaties mentioned a goal of developing farming,[52] recognition of other subsistence methods of hunting and fishing was common.[53]

The Ninth Circuit ruled on the purpose of the Colville Reservation and its effect on the Colville Indians' water rights in *Colville Confederated Tribes v. Walton.*[54] This decision was part of a long litigation concerning the respective rights of the Colville Confederated Tribes, the Indian allottees, and Walton, a non-Indian, to the No Name Creek Hydrological System.[55]

The court held that "the general purpose [of an Indian reservation], to provide a home for the Indians, is a broad one and must be liberally construed."[56] Applying this standard to the case, the court determined that providing for a land-based agrarian society was not the only purpose of the reservation.[57] Because of the traditional role of fishing in the Colville's lifestyle, preserving the tribes' access to fishing grounds was a purpose subsumed in the larger purpose of providing a home for the Indians.[58]

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46. Treaty with the Shoshonees and Bannacks, July 3, 1868, United States-Shoshonees-Bannacks, 15 Stat. 673 [hereinafter Shoshonee Treaty].
47. 304 U.S. 111 (1938).
48. Shoshonee Treaty, *supra* note 46, at art. IV.
49. 304 U.S. at 116.
50. *See, e.g.,* McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 174 (1973); Warren Trading Post v. Arizona State Tax Comm'n, 380 U.S. 685, 686 (1965); United States v. Shoshone Tribe, 304 U.S. 111 (1938).
51. Wilkinson and Volkman, *"As Long as Water Flows, or Grass Grows Upon the Earth" – How Long a Time is That?,* 63 CALIF. L. REV. 601, 602 (1975).
52. *See, e.g.,* United States v. Shoshone Tribe, 304 U.S. 111 (1938) (interpreting the Shoshonee and Bannack Treaty of 1868); Treaty with the Ute Indians, United States-Ute Tribe, March 2, 1868, 15 Stat. 619; Treaty with the Cheyenne Indians, United States-Cheyenne Tribe-Arapahoe Tribe, May 10, 1868, 15 Stat. 655.
53. *See, e.g.,* Washington v. Fishing Vessel Ass'n, 443 U.S. 658 (1979); Puyallup Tribe v. Department of Game, 391 U.S. 392 (1968).
54. 647 F.2d 42 (9th Cir. 1981) (*Walton I*).
55. Colville Confederated Tribes v. Walton, 752 F.2d 397, 399 (9th Cir. 1985) (*Walton II*).
56. *Walton I,* 647 F.2d at 47.
57. *Id.* at 48.
58. *Id.*

As such, the court found implied water rights to the No Name Creek for the development and maintenance of replacement fishing grounds, as well as for irrigation.[59]

Having established a broad standard with which to evaluate the purpose and the water rights of the Indian reservation, the court then ruled on the permissible uses of the water. Simply put, "When the Tribe has a vested property right in reserved water, it may use it in any lawful manner."[60] As support for its holding, the court referred to the Special Master's Report for *Arizona v. California* and held that "the purposes for which the reservation was created governed the quantification of reserved water, but not the use of such water."[61]

In sum, *Walton* provided two important holdings. First, the primary purpose of an Indian reservation must be broadly construed and can include several secondary purposes. Second, the purpose of the Indian reservation does not limit the subsequent use of the water rights.

The courts have not been alone in finding that reservations were intended to be permanent homelands. In 1924, the United States Attorney General analyzed the applicability of the General Leasing Act of 1920[62] to Indian land.[63] The Attorney General opined that Indian title is sacred and that Indian possession of land through treaty reservations was for perpetuity, excepting only some exercise of federal plenary power.[64] He noted that the treaties have recognized that Indians have equitable ownership of the reservations and have not limited it.[65] With this opinion the executive branch, like the judicial branch, acknowledged that Indian reservations were intended to be the Indians' permanent homes.

Tribal Sovereignty

The combination of tribal sovereignty and federal preemption limits state intrusion on tribal affairs.[66] Chief Justice Marshall established the idea of tribal sovereignty in *Worcester v. Georgia.*[67] Tribes are "distinct, independent political communities" within whose territories state law has

59. *Id.*
60. *Id.*
61. *Id.* (citing Report from Simon H. Rifkind, Special Master, to the Supreme Court, 265-66 Arizona v. California (December 5, 1960)).
62. 41 Stat. 437 (1920). The General Leasing Act effected a policy change from disposition of land within the public domain containing commercial quantities of minerals to leasing of that land.
63. 34 Opp. Att'y Gen. 171 (1924).
64. *Id.* at 180. This referred to the Congressional power recognized in Lone Wolf v. Hitchcock, 187 U.S. 553 (1903), to abrogate treaties.
65. 34 Opp. Att'y Gen. at 181.
66. Williams, *The Governmental Context for Development in Indian Country: Modern Tribal Institutions and the Bureau of Indian Affairs,* in NATURAL RESOURCE DEVELOPMENT IN INDIAN COUNTRY 5 (1988).
67. 31 U.S. (6 Pet.) 515 (1832).

no authority.[68] *Worcester* thus established a territorial bar to any state action within the reservations.[69]

In *Williams v. Lee*[70] the Supreme Court modified the per se territorial bar to state action. It established an "infringement test" to determine the validity of the state action. Where state action infringes on the right of the reservation Indians to self-government, it is invalid.[71]

The Supreme Court set forth an important test to evaluate state infringement in *Washington v. Confederated Tribes of the Colville Indian Reservation.*[72] The Indians ran a thriving business on the reservation selling state-tax free cigarettes manufactured off the reservation.[73] Washington wanted to tax the cigarettes, arguing that the Indians were simply selling their tax-exempt status.[74] The Supreme Court agreed, holding that a key factor in evaluating state infringement is whether the taxed revenue is generated on the reservation.[75] Where it is not, as with cigarettes manufactured off the reservation, taxation of the revenue does not infringe on tribal sovereignty.[76]

In *Crow Tribe of Indians v. Montana,*[77] the Ninth Circuit applied the "income generated on the reservation" test to development of the reservation's natural resources.[78] Montana attempted to tax coal mined on the Crow reservation.[79] Applying the infringement test, the court found that revenue received from the coal mining was income generated on the reservation.[80] Thus, state taxes on the coal, which reduced the coal's marketability, infringed on the tribal government and were struck down.[81]

In *McClanahan v. Arizona State Tax Commission*[82] the Supreme Court further addressed when a state action affecting reservation Indians is impermissible for lack of authority or jurisdiction. *McClanahan* focused on the federal preemption barrier to state action.[83] The Supreme Court stressed that the federal government's influence is pervasive in the area of Indian tribal government and that the state cannot intrude into areas the federal government has preempted.[84] Federal preemption thus became a major factor in determining whether state jurisdiction exists.

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68. *Id.* at 559-60.
69. *Id.* at 561 ("The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter...").
70. 358 U.S. 217 (1959).
71. *Id.* at 220.
72. 447 U.S. 134 (1980).
73. *Id.* at 144.
74. *Id.* at 142.
75. *Id.* at 156-57.
76. *Id.* at 158-59.
77. 819 F.2d 895 (9th Cir. 1987), *aff'd mem.*, 108 S. Ct. 685 (1988).
78. *Id.* at 899.
79. *Id.* at 897.
80. *Id.* at 902.
81. *Id.* at 903.
82. 411 U.S. 164 (1973).
83. *Id.* at 172.
84. *Id.* at 172-73.

The Supreme Court's most current analysis of tribal sovereignty vis-a-vis state action is *California v. Cabazon Band of Mission Indians.*[85] In *Cabazon* the state of California tried to apply its statute governing bingo games to bingo games on the Indian reservation.[86] California asserted jurisdiction under Public Law 280,[87] claiming that its bingo statute was criminal in nature. California's argument failed because the bingo statute was deemed an exercise of civil regulatory authority which is invalid under Public Law 280.[88]

The Court also tested California's jurisdiction under sovereignty-preemption analysis. Instead of finding an intrusion on tribal sovereignty or a federally preempted area as conclusively invalidating state action, the Court weighed state interests against tribal and federal interests,[89] suggesting a broadening of state jurisdiction over tribes.[90] Nonetheless, the barriers of federal preemption and tribal sovereignty prevailed. In *Cabazon,* federal preemption was easily found, as was state infringement on tribal sovereignty.[91]

McCarran Amendment[92]

In any discussion of state jurisdiction over Indian reserved water rights one must consider the McCarran Amendment. The McCarran Amendment waived federal immunity to suit in state court involving water rights adjudication. Its purpose was to enable states to comprehensively adjudicate their water.[93] By waiving federal immunity to state water adjudication proceedings, the Amendment allowed inclusion of federal claims which would otherwise materially interfere with state adjudicated water rights.[94]

In *United States v. District Court In and For Eagle County,*[95] the Supreme Court held that the McCarran Amendment's waiver included federal reserved water rights.[96] The Supreme Court extended the waiver to include Indian reserved water rights in *Colorado River Water Conservation District v. United States.*[97]

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85. 107 S. Ct. 1083 (1987).
86. *Id.* at 1084.
87. 28 U.S.C. § 1360 (1982). Public Law 280 transfers broad criminal but narrow civil jurisdiction to the states over Indian reservations. The grant of civil jurisdiction does not include civil regulatory authority. Bryan v. Itasca, 426 U.S. 373, 390 (1976). In respect to jurisdiction over Indian water rights, *see infra* notes 134-36 and accompanying text.
88. 107 S. Ct. at 1088-89.
89. *Id.* at 1092-95.
90. Williams, *supra* note 66, at 16.
91. 107 S. Ct. at 1094.
92. 43 U.S.C. § 666 (1982).
93. Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 551 (1983).
94. *Id. See also* United States v. District Court for Eagle County, 401 U.S. 520, 523 (1971) (federal reserved water rights are within the scope of the McCarran Amendment); Colorado River Conservation Dist. v. United States, 424 U.S. 800, 810 (1976) (Indian reserved water rights are within the scope of the McCarran Amendment).
95. 401 U.S. 520 (1971).
96. *Id.* at 524.
97. 424 U.S. 800, 811 (1976).

In *Arizona v. San Carlos Apache Tribe of Arizona*,[98] the Supreme Court further broadened state jurisdiction under the McCarran Amendment. It held that state jurisdiction applies when Indian tribes, as well as the United States, bring federal suits seeking to adjudicate only Indian water rights.[99] However, in a strongly worded paragraph, the Court warned the states about over-stepping their jurisdictional bounds:

> We also emphasize, as we did in *Colorado River*, that our decision in no way changes the substantive law by which Indian rights in state water adjudications must be judged. *State courts*, as much as federal courts, *have a solemn obligation to follow federal law*. Moreover, any state-court decision alleged to abridge Indian water rights protected by federal law can expect to receive, if brought for review before this Court, a particularized and exacting scrutiny commensurate with the powerful federal interest in safeguarding those rights from state encroachment (emphasis added).[100]

Thus, despite the McCarran Amendment, federal law continues to govern Indian water rights; traditional barriers of tribal sovereignty and federal preemption to state regulation of tribal property persist.

ANALYSIS

Analysis of the scope of Indian water rights has several components. Determining the treaty purpose lays the foundation for the water rights. Then caselaw regarding future uses of Indian water must be discussed. Next, consideration of tribal sovereignty and state jurisdiction over Indian water use is vital because of the inherent conflict between existent state water administration and developing Indian water uses. Finally, evaluation of practical effects of Indian water export rounds out the analysis.

Proponents of limiting Indian uses of their water by, for example, not allowing exportation, insist that Indian reservations had a narrow purpose with correspondingly limited water rights.[101] Where agriculture was important for sustenance, irrigation water was reserved; where fishing was important, sufficient water for fishing was reserved.[102] Thus, they argue, any use of water beyond those limited needs is invalid.[103]

United States v. New Mexico,[104] with its holding that only the primary purposes of federal reservations have implied water rights, appears at first glance to provide support to the argument for a narrow purpose. Important distinctions exist, however, between national forest reservations and Indian reservations, rendering this test inappropriate for determining

98. 463 U.S. 545 (1983).
99. *Id.* at 570.
100. *Id.* at 571.
101. DePalma, *Considerations and Conclusions Concerning the Transferability of Indian Water Rights*, 20 NAT. RESOURCES J. 91, 93-94 (1980).
102. *Id.* at 94.
103. *Id.*
104. 438 U.S. 696 (1978).

Indian reserved water rights.[105] Several courts have noted the difference between standards governing non-Indian federal reserved water rights and those governing Indian reserved water rights and consequently questioned the validity of strictly applying the *New Mexico* test to Indian water rights.[106] One authority suggests that the relevant test to ascertain Indian water rights should not be whether a particular use is primary or secondary, but whether it is completely outside the scope of an Indian reservation's purpose.[107]

Even if the *New Mexico* test is applied, the permanent homeland purpose of the Indian reservation has been found to be the primary purpose. The court in *Walton* applied the *New Mexico* test.[108] Nonetheless, it found the primary purpose to be the creation of a permanent homeland.[109] In order to quantify the water rights, the court found the narrower purposes of agriculture and fishery maintenance as well.[110] However, the primary permanent homeland purpose determined the *use* of the water rights. The court noted: "Permitting the Indians to determine how to use reserved water is consistent with the general purpose for the creation of the Indian homeland — providing a homeland for the survival and growth of the Indians and their way of life."[111]

The holdings in *Conrad*,[112] *Ahtanum*,[113] and *Arizona*[114] in respect to future use of water on the Indian reservation are consistent with an evolving, permanent homeland purpose. Because the reservation was to be a permanent homeland, water uses would necessarily change and develop. Thus future needs and uses must be accommodated and not limited by past uses. The Supreme Court's explicit statement in its Supplemental Decree for *Arizona* that water rights quantified by PIA were not restricted to agricultural uses[115] left no doubt that uses would be allowed to change as needs changed.

The various provisions in treaties for hunting and fishing rights,[116] as well as agricultural needs, also indicate that the federal government's over-arching purpose was to create a permanent Indian homeland, with all the diversity and change which that designation encompasses. The government was not singlemindedly set on transforming all Indians into farmers for perpetuity. There was some flexibility in the nature of the permanent homeland. The common denominator of the treaties, logically their

105. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 583 (1982).
106. *See Big Horn*, 753 P.2d at 96; State *ex rel.* Greeley v. Confederated Salish & Kootenai Tribes of Flathead Reservation, 712 P.2d 754, 766-68 (Mont. 1985); United States v. Adair, 723 F.2d 1394, 1408 (9th Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984).
107. COHEN, *supra* note 105, at 584.
108. 647 F.2d at 47.
109. *Id.*
110. *Id.* at 48.
111. *Id.* at 49.
112. 161 F. at 832.
113. 236 F.2d at 327.
114. 373 U.S. at 600.
115. 439 U.S. at 422.
116. *See supra* notes 52-53 and accompanying text.

primary purpose, was to provide a place where the Indians could be self-governing and self-sufficient. The primary purpose was no narrower.

The social and intellectual history of the treaty-making era sheds light on whether the federal government envisioned an evolving, rather than static, homeland. The second half of the nineteenth century witnessed the ascendency of Darwinism with its theory of evolution.[117] Two of the nation's foremost anthropologists, Lewis Morgan[118] and John Wesley Powell,[119] reflected this influence, expounding on the *progression* of human civilization from savagery through barbarism to civilization.[120]

This idea that human beings had specific stages through which they had to progress in the process of civilization, influenced the government's actions and statements.[121] Secretary of the Interior Carl Schurz's[122] comments reflected the government's views:

> To be sure, as to Indian civilization, we must not expect too rapid progress of the attainment of too lofty a standard. We can certainly not transform them at once into great statesmen, or philosophers, or manufacturers, or merchants, but we can make them small farmers and herders.[123]

The ultimate goal of complete civilization and assimiliation[124] stood intimately linked with the belief that intermediate steps, specifically becoming pastoral, were necessary.

The fact that some treaties focused on the establishment of an agricultural community thus indicates only that the government sought to foster a move by the Indians to the next stage in their development. The government was not trying to limit Indian development at the agricultural stage, but simply believed that an agricultural lifestyle was the requisite intermediate step to civilization. The government in fact contemplated that

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117. R. HOFSTADTER, SOCIAL DARWINISM IN AMERICAN THOUGHT 4-5 (1959) (Darwin's ORIGIN OF THE SPECIES was published in 1859. It was quickly and enthusiastically received in the United States and applied to biology and society).

118. *See generally* READER'S ENCYCLOPEDIA OF THE AMERICAN WEST 771-72 (H. Lamar ed. 1977) [hereinafter Lamar] (biographical background of Lewis Morgan).

119. *See generally Id.* at 957-59 (biographical background of John Wesley Powell).

120. *See* L. MORGAN, ANCIENT SOCIETY (1878) (An extended analysis of Indian societies which expounded Morgan's theories of society developing linearly through the stages of barbarism, savagery and then to civilization); F. HOXIE, BEYOND SAVAGERY: THE CAMPAIGN TO ASSIMILATE THE AMERICAN INDIANS, 1880-1920 (1977) (Analyzing the beliefs and influence of Powell in relation to Indian policy).

121. F. HOXIE, BEYOND SAVAGERY: THE CAMPAIGN TO ASSIMILATE THE AMERICAN INDIANS, 1880-1920 47 (1977).

122. Lamar, *supra* note 118, at 1091.

123. Schurz, *Present Aspects of the Indian Problem,* in AMERICANIZING THE AMERICAN INDIANS 15 (F. Prucha ed. 1973).

124. Assimilation of the Indians into American society so that the Indians would be "indistinguishable from his white brothers" was a goal of various reformers and statesmen alike in the second half of the nineteenth century. II F. PRUCHA, THE GREAT FATHER 610 (1984). *See generally* AMERICANIZING THE AMERICAN INDIANS (F. Prucha ed. 1973) (edited writings from 1880-1900 on the various issues surrounding Indian assimilation).

the reservation would ultimately be used by the assimilated Indians for the myriad of activities in which the "civilized" American society participates.[125]

The "purpose" limitation to federal water rights therefore should not restrict Indian water use solely to irrigation. First, binding caselaw holds that future Indian needs are to be accommodated.[126] Second, in the PIA context the Supreme Court has expressly held that the method of quantifying water rights which is based on the expected initial type of use of the reservation does not restrict the type of future uses.[127] Finally, policy arguments for restricted use, urging that the purpose of the Indian reservation was purely to establish an agricultural community, are inaccurate. The purpose of the reservation was to create a permanent homeland, no more, no less. To be permanent, the homeland must evolve, as will its water uses. Any use that benefits the Indians, economically or socially, in developing their homeland furthers the treaty's intent to provide a permanent, self-sustaining Indian homeland. Depending on the prevailing societal needs, technology and economy, these uses might include industry, instream flow or exportation. The federal government reserved the water rights for all such uses.

Due to historical state administration[128] and the lack of federal regulation, state attempts to restrict Indian sale and export of their reserved water are a reality.[129] Because the McCarran Amendment gives the states the authority to adjudicate Indian water rights,[130] the state courts may place restrictions on tribal water rights. The question thus arises whether the states have the authority to place limits on the type, as well as the quantity of Indian water use, in their exercise of water adjudication power. The historic barriers to state authority over Indian reservations are federal preemption and tribal sovereignty. In order to determine whether they preclude state jurisdiction over Indian water rights, one must evaluate the various factors in the water exportation scenario.

Federal preemption is pervasive, strong and conclusive in the area of Indian water rights. First, the federal government impliedly reserved water rights for Indians.[131] This reservation of Indian water rights was expansive, including not only the rights to current use, but also future use.[132] Furthermore, the Supreme Court has held that the federal act of

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125. *Big Horn*, 753 P.2d at 119 (Thomas, J.,dissenting).
126. Arizona v. California, 373 U.S. at 601.
127. Arizona v. California, 439 U.S. at 422.
128. NAT'L WATER COMM'N, *supra* note 1, at 459.
129. The states of California, Nevada and Arizona, for example, are seeking restrictions on the Colorado Ute Water Settlement provisions for Indian exportation of water. *See* Joint Statements of Department of Water Resources of Arizona, Colorado River Board of California, and Colorado River Commission of Nevada on H.B. 2642, before the Committee on Interior and Insular Affairs, September 16, 1987, *reprinted in* NATURAL RESOURCES DEVELOPMENT IN INDIAN COUNTRY (1988).
130. 43 U.S.C. § 666 (1982). *See supra* notes 92-100 and accompanying text.
131. *Winters*, 207 U.S. at 564.
132. Arizona v. California, 373 U.S. at 597.

reserving water rights is of such importance and supremacy that it will recognize the reservation of water rights without equities to state water rights.[133]

Public Law 280[134] also establishes Congress' preemption in the area of Indian water rights. Although Public Law 280 facilitates transfer of jurisdiction to states under specific circumstances,[135] Congress specifically stated that Public Law 280 did not allow alienation, encumbrance or regulation of water rights in a manner inconsistent with any federal action.[136] Clearly, Congress did not relinquish its interest in the area of water rights. Thus, even where Congress was limiting its own jurisdiction and expanding the states', it specifically refused to do so in respect to water rights.

Other federal legislation pertains to the issue of federal preemption. For example, the Indian Financing Act,[137] the Indian Self-Determination and Education Assistance Act of 1975,[138] and the Indian Child Welfare Act[139] all evince Congress' intent to encourage Indian tribal economic and governmental self-sufficiency.[140] Because water rights are vital and valuable,[141] the ability to use them fully and in an economically beneficial manner could contribute significantly to the development of a self-sustaining Indian economy and community.[142] State attempts to prohibit Indians from marketing their water, a possible source of significant revenue and capital development, then intrude into an area Congress has preempted.

Weighing the federal interests against the state's interests under *Cabazon*'s test for determining the validity of state action indicates state action is improper when it attempts to prohibit export. The tribal interests, supported by federal interests, are strong whereas the state interests are weak. Arguably, water is much more important to the development of tribal self-sufficiency than bingo and, as discussed, federal preemption in the area of Indian self-sufficiency is pervasive. On the other hand, the state interest of getting free water, instead of paying for it, is reciprocally weak.[143] Export and sale of non-Indian water are not so deleterious to the state that they prohibited it outright.[144] In other words, although it may be preferable to keep water in-state, this interest is not so strong

133. *Id.* ("[W]e are not convinced by Arizona's argument that each reservation is so much like a State that its rights to water should be determined by the doctine of equitable apportionment.").
134. 28 U.S.C. § 1360 (1982).
135. *See supra* note 87 and accompanying text.
136. 28 U.S.C. § 1360(b).
137. 25 U.S.C. §§ 1451-1543 (1982).
138. 25 U.S.C. §§ 450-450n (1982).
139. 25 U.S.C. §§ 1901-1963 (1982).
140. *See* COHEN, *supra* note 105, at 180-206.
141. NAT'L WATER COMM'N, *supra* note 1, at 39-40.
142. Getches, *Managing and Marketing Indian Water,* 58 U. COLO. L. REV. 515, 516-17 (1988).
143. *Cf.* Leo Sheep Co. v. United States, 440 U.S. 668 (1979) (Where the government can exercise eminent domain power and pay for the necessary property, the argument invoking the "easement by necessity" doctrine is not available.). Similarly the argument invoking state needs for water should not be available where money could buy the water rights.
144. NAT'L WATER COMM'N, *supra* note 1, at 260.

that the state has taken every action to further it. By prohibiting sale of Indian water, the state is infringing on Indian self-government in the quest for free water to which it has no legal right.[145] That cannot be a valid state interest.

States and those opposing Indian sale of water adamantly argue that they are fighting to keep the water available to state users.[146] Allowing the Indians to sell their water does not, however, lead to the inevitable result that the water is not available to the state. Although it is quite possible that better-financed commercial users could outbid state agricultural users, people within the state could pay the market price just as those outside of the state could. More importantly, if it is the state's interest to make the water available to its agricultural users the *state* should buy the Indian water and thereby keep the water in-state.

The sovereignty prong to barring state action rests on the *Williams'* test of infringement on tribal self-government. Given that water rights are the *sine qua non* for any development and existence in the West,[147] they are central to tribal self-government. Limits on their use thus necessarily infringe on the tribal government.

The "income generated on the reservation" factor of the infringement analysis[148] also applies. Minerals belong to the Indians[149] and as such are resources whose development and sale are not subject to the state action of taxation.[150] Likewise, water rights belong to the Indians.[151] By analogy, water rights, whose sale and export would be "income generated on the reservation," should not be subject to state action, specifically restrictions on sale and export.

States clearly have little room to exercise jurisdiction over Indian reserved water rights. The McCarran Amendment appears to have muddied, rather than cleared, the waters. Because it gave the states the power to quantify and adjudicate Indian water rights, states have attempted to extend that power to limit the type of Indian water use. The principles

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145. In prior appropriation systems, which prevail in the western United States, water is a species of property. Once a potential water user has met the requirements of intent to use water beneficially, diversion of that water, actual beneficial use of the water, and any other state procedural requirements, the appropriation is complete. A water user with a priority date more recent than another user's may only use water if the rights of the user with the older, that is more senior, permit are satisfied. However, because water rights are a form of property, they may be sold, assigned or mortgaged. They also cannot be taken involuntarily by state or federal governments without just compensation. D. GETCHES, WATER LAW IN A NUTSHELL 78-79, 87-88 (1984).

146. DePalma, *supra* note 101.

147. NAT'L WATER COMM'N, *supra* note 1, at 39.

148. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 155 (1980).

149. United States v. Shoshone Tribe, 304 U.S. 111, 118 (1938).

150. Crow Tribe v. Montana, 819 F.2d 895, 902 (9th Cir. 1987), *aff'd mem*, 108 S. Ct 685 (1988). *See supra* notes 77-81 and accompanying text.

151. State *ex rel.* Greeley v. Confederated Salish & Kootenai, 712 P.2d 754, 761 (Mont. 1985).

of tribal sovereignty and federal preemption, however, forbid such extension. The states do not have jurisdiction to dictate the type of Indian water use, only the quantity.

In sum, the principles of sovereignty and preemption bar states from exercising legislative or judicial powers which infringe on tribal governments and intrude into areas which the federal government has preempted. Restrictions on sale and export of Indian reserved water rights both infringe on tribal self-government and intrude into areas the federal government has preempted. As such they are invalid and impermissible.

Having discussed the legal theories which support allowing Indians to market their water, several practical and economic factors should be considered.

Arguments that Indian export and sale of water will negatively and inequitably affect non-Indian water users merit discussion. It is true that there may be less free, unused Indian water running through the ditches. That alone, however, does not justify restricting Indian use,[152] nor is it necessarily accurate. Relations between non-Indians and Indians have long been uneasy.[153] As a result, it is not inconceivable that Indians might be less than conservative with their own water, having little motivation during a drought to concern themselves with ensuring that the non-Indians downstream get free water.[154] On the other hand, if the Indians received consideration for a specified amount of their water, the Indians would have incentive to monitor their water use and ensure that the buyers of their water received it. Such a situation would allow more certainty for non-Indians and more fairness to the Indians. The non-Indians could buy that amount of Indian water on which they relied, if the Indians so desired, instead of relying on a vacillating and possibly non-existent source of free water. The Indians, on their part, would be receiving full value for their resources.

Other economic benefits to non-Indians associated with allowing sale and export also argue in favor of Indian export. Although the short-term appeal of free water is attractive, in the long term, free water to which one has no right is not beneficial. Commentators have warned of the deleterious effects of uncertainty as to water.[155] Non-Indian mineral and other development is less appealing because of the uncertain water sup-

152. P. MAXFIELD, M. DIETERICH & F. TRELEASE, NATURAL RESOURCES LAW ON AMERICAN INDIAN LANDS 212 (1977) [hereinafter MAXFIELD].

153. *See, e.g.*, United States v. Kagama, 118 U.S. 375, 384 (1886) ("Because of the local ill-feeling, the people of the States where they are found are often their deadliest enemies.").

154. *See, e.g.*, Casper Star Tribune, July 16, 1988, at 1, col. 1 (Report on the BIA cutting off water to non-Indian reservation ranchers at the request of the Wind River Indians. Although not specifically alleging intentional Indian water waste during the drought of 1988, non-Indian ranchers voiced their opinions that there was enough water around for everyone; waste was occurring).

155. NAT'L WATER COMM'N, *supra* note 1, at 483. The National Water Commission strongly encouraged developing a system where Indian water rights could be sold, exported and transferred believing that such a system was vital to resolution of conflicts and maximizing the water resource.

ply.[156] Little motivation exists to invest heavily when an essential resource may suddenly and unexpectedly dry up.[157] Buying or leasing a part of that renewable resource creates much greater certainty and assurance.

By the same token, the Indian economy would benefit significantly from an ability to market tribal water.[158] Presently, many tribes are receiving no value for their resource.[159] A major problem tribes face in their attempts to become self-sufficient and create their own economies is the lack of capital to fund development.[160] Selling or leasing water would be an immediate source of capital and provide some of the funds necessary to develop their reservations.[161] Some may argue that selling a resource will only diminish the Indian reservation.[162] That proposition, however, fails to recognize two key points. First, the disposition of water rights need not be permanent.[163] They may be limited in time. Second, and more important, if the movement is towards encouraging Indian self-sufficiency, such paternalism of deciding for the Indians what is good for them is highly inappropriate. The Indians should be free to do as they wish with their own resources within the bounds of developing a self-sufficient homeland.

In a judicial setting, where *Winters, Arizona, San Carlos,* and *Cabazon* are binding, Indians should not be prohibited from selling and exporting their water. Economic and equitable policy considerations likewise favor allowing some Indian water export, just as non-Indian water export is allowed. There is, however, a need for some regulation of Indian water users as there is for state water users. Although the influence of the free market on the water resource will have benefits, an entirely unregulated market of this vital resource is cause for alarm.[164] Further, a practical and workable resolution for the conflicting rights and needs of Indian and non-Indian water users is essential.

Several states and Indian tribes have chosen negotiation rather than litigation as the means to achieve a mutually satisfactory agreement.[165] This bilateral rather than unilateral decision making process makes sense. Both parties' concerns can be addressed with concessions and benefits balanced as the parties deem beneficial. Under one settlement, Indians

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156. MAXFIELD, *supra* note 152, at 212; Comment, *Indian Reserved Water Rights: The Winters of our Discontent,* 188 YALE L. J. 1689 (1979).
157. MAXFIELD, *supra* note 152, at 212.
158. *Id.*
159. Getches, *supra* note 142, at 516.
160. *Id.* at 544.
161. R. Collins, Speech at Symposium on Indian Water Policy in a Changing Environment, *reprinted in* AMERICAN INDIAN LAWYER TRAINING PROGRAM, INDIAN WATER POLICY 84 (1982).
162. Getches, *supra* note 142, at 542.
163. NAT'L WATER COMM'N, *supra* note 1, at 481.
164. DePalma, *supra* note 101, at 95-96 (suggesting that export of Indian water will greatly increase the amount of water consumptively used by Indian water holders); GETCHES, *supra* note 145, at 163 (Explaining the reasons for state restriction on transbasin diversions of state water rights, he notes that the "economy, ecology, lifestyle, and potential for future growth of an area can change greatly with massive exports of water").
165. *See* Shupe, *supra* note 4, at 5-8 (Negotiations and settlements have been undertaken in Arizona, California, Colorado and Washington).

gained immediate help in water development in return for certain restrictions on use of their water rights.[166] In another negotiation, the state has offered to pay the Indians for a ninety-nine year lease of their water rights.[167] Specific limits on export could likewise be worked out in return for some compensation or benefit.[168] Further, through Congressional approval of the settlement, potential problems regarding contracts between Indians and non-Indians can be averted.[169]

Through negotiation, fair and realistic resolutions can be attained. Treaty rights would be recognized. They might subsequently be limited, but only in return for other benefits. Above-board exchanges between the state and the tribe could occur resulting in a fair and mutually beneficial resolution.

BIG HORN REVISITED

In Re the General Adjudication of All Rights to Use Water in the Big Horn River System[170] is the recent Wyoming Supreme Court decision determining the Indian reserved water rights in the Big Horn river system.

After affirming its jurisdiction,[171] the court found that there was a reserved water right for the Wind River Reservation.[172] This required the Wyoming Supreme Court to investigate the purpose of the Indian reservation in order to quantify the Indian water rights.[173] The court noted the law from the pertinent cases and accepted the proposition that the amount of water impliedly reserved is determined by the purposes for which the reservation was created.[174]

Turning to the treaty which created the Shoshone reservation, the court had no difficulty affirming the district court's finding that the Shoshone reservation had a solely agricultural purpose when it was created.[175] The court dismissed the reference in the treaty to creating a "permanent homeland" as not determinative and instead focused on scattered references to an "agricultural reservation."[176] Consequently, the court refused to grant water rights for mineral, industrial, fishery, wildlife or aesthetic purposes.[177]

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166. H.R. 2642, 100th Cong., 1st Sess. (1987).
167. Shupe, *supra* note 4, at 6 (the Tucson City Council offered to purchase 8,000 acre-feet per year water rights from the Tohono O'odham on a 99 year lease basis).
168. *See* MONT. CODE ANN. § 85-20-201 (1987) (the Fort Peck-Montana Compact provided for state approval of Indian water sale).
169. *See* Shupe, *supra* note 4, at 4-5 (the Indian Non-Intercourse Acts, 25 U.S.C. § 177, invalidate transfer of land by Indian nations and tribes unless Congress has authorized the transaction. It is unclear whether water is covered by these acts, but general consensus holds that it is. Thus Congressional approval is probably necessary for a valid sale.). *See also* Getches, *supra* note 142, at 542.
170. 753 P.2d 76.
171. *Id.* at 88.
172. *Id.* at 94.
173. *Id.*
174. *Id.*
175. *Id.* at 97.
176. *Id.*
177. *Id.* at 98-99.

The court then briefly discussed the scope of the reserved water right.[178] On the issue of exportation the court let stand the district court's holding which prohibited sale and exportation from the reservation.[179]

The correct handling of the issue of Indian export and sale of their reserved water rights would be as follows. The first step in the analysis is to determine the intent of the treaty creating the Wind River Reservation. As the Supreme Court interpreted it in *United States v. Shoshone Tribe of Indians,*[180] the treaty created a reservation for the Shoshone which was to be their "permanent home."[181] The Court supported this finding by holding that the minerals and timber on the reservation belonged to the Indians and could not be taken without compensation.[182] Certainly, if the reservation's only purpose was to establish a place where the Indians could be agricultural rather than a permanent homeland, it would not have been important that the minerals were taken since the Indians were to be solely agricultural, not industrial.

A common sense understanding of what a permanent homeland entails supports the holding that the treaty did not create a permanently agricultural community but a permanent homeland with all the diversity which that designation denotes. Justice Thomas' dissent in *Big Horn* stated it well:

> [I]t assumes that the Indian peoples will not enjoy the same style of evolution as other people, nor are they to have the benefits of modern civilization. I would understand that the homeland concept assumes that the homeland will not be a static place frozen in an instant of time but that the homeland will evolve and will be used in different ways as the Indian society develops.[183]

Unfortunately, the Wyoming Supreme Court decided that the Indian reservation had a narrow agricultural purpose and no other.[184] The correct approach would recognize that the treaty's purposes should be broadly construed and then accept the legally supported,[185] as well as logically and historically sound conclusion that the Shoshone reservation was to be a permanent homeland, not a permanent agricultural community.

Neither the Wyoming Supreme Court nor the State Engineer has jurisdiction to limit the sale and export of Shoshone and Arapahoe[186] water.

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178. *Id.* at 99-100.
179. *Id.* at 100. The court also noted that the Tribes did not affirmatively seek permission to export reserved water and that the United States conceded no federal law permits sale of reserved water to non-Indians off the reservation.
180. 304 U.S. 111 (1938).
181. *Id.* at 113.
182. *Id.* at 118.
183. 753 P.2d at 119 (Thomas, J., dissenting).
184. *Id.* at 99.
185. *See supra* notes 104-21 and accompanying text.
186. The Wind River Reservation was created for the Shoshone, but the federal government later moved the Arapahoe to the Shoshone reservation. Today both tribes share the reservation. *See Shoshone Tribe*, 304 U.S. at 112.

Arizona v. San Carlos Apache Tribe[187] clearly states that "[s]tate courts . . . have a solemn obligation to follow federal law" while adjudicating Indian water rights.[188] Therefore, Wyoming may not impose or create its own law to prevent Indian export of water, notwithstanding that it has jurisdiction under the McCarran Amendment to quantify the water rights. The federal cases of *Conrad,*[189] *Ahtanum,*[190] *Arizona*[191] and *Walton*[192] hold that present uses do not restrict future uses. Thus, Wyoming is prohibited from limiting Indian use by relying on past or present on-reservation, agricultural uses.

Tribal sovereignty and federal preemption likewise indicate that Wyoming does not have the authority to limit exercise of Indian water rights to the reservation. As discussed above, tribal and federal interests in the freedom to export water are significant.[193] In respect to the state interest, the Big Horn flows for a significant stretch within Wyoming after leaving the Wind River Reservation.[194] Exporting the water from the reservation does not necessarily require export from the state. Thus Wyoming's valid interest of keeping the water within the state may still be satisfied even if the Indians export the water from the reservation. Further, to prevent export from the state, Wyoming could pay for the water just as non-Wyoming water users could. It is not beyond Wyoming's power to keep the water in-state without infringing on the Tribes.

In balance then, the Indian interests of autonomy, as supported by the tribal sovereignty and federal preemption doctrines, outweigh the state interests of keeping the water in Wyoming without paying for it, thereby rendering invalid state restrictions on Indian export and sale of their water. Thus, the Wyoming Supreme Court should have reversed the district court's restrictions.

Finally, practical and economic considerations suggest that such restrictions would not be beneficial to Wyoming. Common sense indicates that if water has greater monetary value for the Indians, which an expanded export market would undoubtedly cause, they will use their water carefully. The result could well be more useable water for Wyoming. Furthermore, it behooves Wyoming, a state with a depressed economy hoping to attract industry, to heed the suggestion that allowing sale of Indian water rights outside of the reservation would encourage development.

In conclusion, *Big Horn* would have been a fine case to clearly set forth applicable law and sound thinking on the treaty's purpose, tribal sovereignty and the practical effects of sale and export of Indian reserved

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187. 463 U.S. 545 (1983).
188. *Id.* at 571.
189. 161 F. at 832.
190. 236 F.2d at 337.
191. 373 U.S. at 600.
192. *Walton I,* 647 F.2d at 48.
193. *See supra* notes 131-51 and accompanying text.
194. About 125 miles. Telephone conversation with Wyoming State Engineer's Office (October 21, 1988).

water rights. These factors indicate that the Wyoming Supreme Court should have reversed the district court in its brief opinion that the Indians could not sell or export their water off-reservation. It should have held that any per se restriction on sale and export does not comport with treaty intent, existent case law, state jurisdiction, or even necessarily the best interests of the Indians or the non-Indians in Wyoming.[195]

CONCLUSION

Law, logic, and integrity support the Indians' right to sell and export their water. The Shoshone treaty, and others, sought to create a permanent home for the Indians. The established law gives the Indians the right to use the water for that purpose. A well-rounded and common-sense interpretation of the purpose of the treaties demands that the type of allowable use of Indian water not be restricted. A permanent homeland necessarily evolves as the people and the surrounding environment evolve. Allowing sale and export of Indian water in fact fulfills the intention of the treaties since, along with providing a permanent homeland, the federal government sought to civilize the Indians. Consequently, the water reserved for Indian use may be used for that myriad of useful activities, be it irrigation, commercial sale or other beneficial use, in which our "civilized" society participates.

The principles of tribal sovereignty and federal preemption likewise support Indian use of their quantified water rights in economically beneficial ways, free from state interference. Recent federal law seeks to promote Indian enterprise. Sale of water is such enterprise. In balancing the state and tribal interests, the outcome weighs heavily in favor of the tribes, precluding state assertions of power to limit Indian sale and export.

Economic considerations also support opening this resource to the free market. Indians and non-Indians alike could benefit from the action of the free market on this valuable resource.

As to integrity, some Indians believe that "[n]othing less than the future of the tribes' permanent homelands is at stake" in the exercise of their reserved water rights.[196] If the United States is to avoid perpetuating one of the "sorrier chapters" of history[197] or the "gross national hypocrisy,"[198] the government and its citizens should do so now, in an area so vital to Indian survival. It is time to deal fairly, not arbitrarily, with the Indians; their right to full use, including sale and export, of the rights that are "legally as well as morally"[199] theirs must be acknowledged. After

195. The United States Supreme Court has the opportunity to rule in this manner. The State of Wyoming as well as the Shoshone and Arapahoe have applied for a writ of certiorari, raising the issue of exportation among others. 753 P.2d 76, *petition for cert. filed*, 57 U.S.L.W. 3161 (U.S. Aug. 18, 1988) (No. 88-309).

196. AMERICAN INDIAN LAWYER TRAINING PROGRAM, INDIAN WATER POLICY 10 (1982).

197. NAT'L WATER COMM'N, *supra* note 1, at 475.

198. *Ahtanum*, 236 F.2d at 338.

199. NAT'L WATER COMM'N, *supra* note 1, at 480.

recognition of the broad scope of Indian water rights, which caselaw, logic and integrity mandate, negotiation between states and tribes can offer a fair, mutually agreeable resolution to the conflicts inherent in this scramble for a vital, limited resource. Because the parties have different needs, settlements minimizing hardships and maximizing benefits are possible and should be the goal.

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