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RESERVED WATER RIGHTS OF INDIAN ALLOTMENTS

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THE FEDERAL IMPACT
ON STATE WATER RIGHTS

Natural Resources Law Center
University of Colorado School of Law
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RESERVED WATER RIGHTS OF INDIAN ALLOTMENTS

I. Federal Water Rights of Indian Tribal Lands

This subject has been covered by earlier speakers. Its principal aspects -- reservation by implication, priority, measurement, purposes, immunity from state law, and relation of surface to ground water -- bear importantly on allotment water rights.

Tribal rights in real property, including water rights, are generally inalienable to outsiders except with explicit authority in a statute or treaty. Cohen 510-22.

II. Allotment of Tribal Common Land to Members

A. A major federal policy, 1854-1934. Cohen 98-102, 127-43, 612-18. Purposes: making Indians into self-sufficient family farmers; freeing "surplus" lands.

B. The General Allotment Act

1. Applies to almost all tribes outside eastern Oklahoma.
2. 25 year trust; extensions. Cohen 614-20.
3. §6 specifies federal jurisdiction during the allotment trust period.

III. Allottee's Rights in Tribal Waters

A. The Supreme Court has held that allottees have rights to use the Winters rights of their reservation. U.S. v. Powers. The Ninth Circuit has held that allottees beneficially own a proportionate share of their reservation's agricultural Winters rights, that is, that the allotment title includes an implied grant of appurtenant water rights. Walton, Adair. See General Allotment Act §7. It has been argued that allottees only have the right to use a share of a water right that continues to be beneficially owned by the tribe. Getches 419. This view may be inconsistent with the Supreme Court's decision in Powers. Another alternative would recognize an allottee's ownership of water actually put to use with a proportionate share as the maximum. Getches at 424-25; Wash. L. Rev. Note.

B. The Ninth Circuit has held that allottees' rights have the same priority date as the tribal right, usually the date the reservation was established. Walton, Adair.

This view can generate many owners with identical priority dates. Presumably they share ratably in times of shortage. Cf. General Allotment Act §7.

It has been argued that the priority date for allotment rights ought to be the date of actual use by the allottee. Getches at 423-26. This rule might cause some proof problems, but may better serve the ostensible purpose of the General Allotment Act.

- C. The cases have recognized allottees' agricultural and domestic Winters rights. To the extent that a reservation has rights reserved for other purposes, other issues are presented. Do allottees have an implied share of these rights too? If not, how are the tribal and allottee rights accommodated? In Walton and Adair, the courts recognized tribal rights for fishing purposes.
- D. General Allotment Act §7 gives the Secretary of the Interior authority to regulate allotment water rights for irrigation purposes.
- E. Trust allotments are routinely inherited or devised to Indians with no change in trust status. Cohen 618-38. To some extent they may be transferred inter vivos by gift or sale to other Indians, again with no change. Id. at 622-24. Cf. Stevens v. C.I.R.

IV. Water Rights on Non-Indian Successors

- A. Allotments have gone out of trust but continued in the same Indian ownership, now in unrestricted fee. More commonly, allotments have been removed from trust for sale or devise to non-Indians or inheritance by them. This has occurred under a number of somewhat different statutes. Cohen at 619-22. Some authorize the Interior Department to sell without consent of the allotment owners.
- B. Non-Indians and their property on Indian reservations are normally subject to state law, including state property law. Cohen at 352. But the Supreme Court has held that non-Indian successors to allotments acquire a right to use some part of the tribal Winters right. U.S. v. Powers. The Ninth Circuit has held that successors acquire ownership of the proportionate right owned by the allottee with the reservation priority date. The successor must perfect this right by putting the full amount of water to beneficial use under state law with reasonable diligence after acquisition. Walton, Adair. See Ahtanum. This result was first adopted by analogy to the relation back doctrine of

state prior appropriation law. Hibner. The Supreme Court of Wyoming rejected this result in Merrill.

It has been argued that successors should acquire a right only to that amount of water actually put to use by the allottee during the trust period with a priority date of such use. Getches at 423-26. This view might present some proof problems. Another view is that the successor should acquire only the amount actually put to use but with the reservation's priority date. Wash. L. Rev. Note.

The Ninth Circuit's handling of Walton shows the uncertainty and confusion on this question.

- C. It is curious to compare non-Indian allotment buyers with non-Indians who bought "surplus" lands directly from tribes. See Cohen 44. The latter have never been recognized to succeed to any Winters rights.

V. Leases of Allotments; Irrigation Projects

- A. Under federal law, allottees can lease their allotments for varying periods and purposes. Cohen at 624-26. Some allotments can be leased for 99 years, and mineral leases may last until the deposits are commercially exhausted. In one case the Ninth Circuit explicitly held that reserved water rights may be used by non-Indian lessees of allotments. Skeem. In many other cases lessees in fact have used reserved water rights.
- B. An untested issue is the degree to which Indian reserved water rights may be leased apart from the land. Cohen 593.
- C. Congress has at times funded Indian reservation irrigation projects and at other times included reservation lands in reclamation projects. Allotments and former allotments are served by these projects. In these cases the Reclamation Act or particular authorizing act may govern a particular legal question. Cohen 596. See Alpine Land & Reservoir Co.; 25 C.F.R. pts. 172-177 (1983); 25 U.S.C. §§381-390.

VI. Reacquisition in Trust

Various laws allow tribes or individual Indians to purchase land within reservations and place it in trust again. See 25 C.F.R. pt. 151 (1983). If an allotment with a Winters water right perfected by a non-Indian successor is reacquired, presumably the right is restored to trust status like the land. Getches at 426-29. If the right has not been

continuously perfected, tribes nevertheless have claimed a restored Winters right with a reservation priority.

VII. Regulatory Jurisdiction

Indian trust allotments under a tribal government are immune from state regulatory jurisdiction except to the extent that Congress provides otherwise, and no statute allows states to regulate allotment water rights. Cohen at 349-52. Allotments taken out of trust under §6 of the General Allotment Act originally subjected the allottee to state jurisdiction. But the Supreme Court has held that subsequent statutes implicitly limited that effect to allotments outside reservations. Moe.

When the allotment is sold to a non-Indian but remains within an Indian reservation, the tribe and state become competitors for regulatory authority. In Walton, the Ninth Circuit held a successor subject to tribal, not state, jurisdiction. But the court withheld judgment on application of the ruling to differing situations. See also Getches, 429-33; Cohen 604.

VIII. Public Domain Allotments

- A. Under several statutes, the United States set aside allotments for individual Indians out of federal holdings not part of an Indian reservation. See Cohen 615. (These should not be confused with allotments that are now off-reservation but were within a reservation when made. DeCoteau.) Some of these allotments are subject to a tribal government. Many are not. Whether they have a Winters water right has not been authoritatively determined.

AUTHORITIES

Cases

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cert denied, 454 U.S. 1092.

DeCoteau v. District County Court, 420 U.S. 425 (1975).

Merrill v. Bishop, 74 Wyo. 298, 287 P.2d 620 (1955).

Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976).

Skeem v. United States, 273 F. 93 (9th Cir. 1921).

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pending.

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1956), cert denied, 352 U.S. 988 and 330 F.2d 897 (9th Cir.
1964), cert. denied, 381 U.S. 924.

United States v. Alpine Land & Reservoir Co., 697 F.2d 851 (9th
Cir. 1983), cert denied, 104 S.Ct. 193.

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

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

Statutes (all 25 U.S.C.)

§ 331. Allotments on reservations; irrigable and nonirrigable
lands (General Allotment Act §1):

. . . [U]pon any reservation . . . the President shall be
authorized . . . to cause allotment to each Indian located
thereon . . . And whenever lands on any Indian reservation
subject to allotment by authority of law have been or may be
brought within any irrigation project, he may cause allot-
ments of such irrigable lands to be made to the Indians. . . .

§ 334. Allotments to Indians not residing on reservations
(GAA §4):

Where any Indian not residing upon a reservation, or for
whose tribe no reservation has been provided by treaty, Act
of Congress, or executive order, shall make settlement upon
any surveyed or unsurveyed lands of the United States not

otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her, and to his or her children, in quantities and manner as provided in this Act for Indians residing upon reservations; . . .

§ 348. Patents to be held in trust; descent and partition
(GAA §5)

. . . [T]he United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State . . . where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: Provided, That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void. . . .

§ 349. Patents in fee to allottees (GAA §6 as amended in 1906)

At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section 348 of this title, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State . . . in which they may reside; . . . Provided, That the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: Provided further, That until the issuance of fee-simple patents all allottees to whom trust patents shall be issued shall be subject to the exclusive jurisdiction of the United States: . . .

§ 381. Irrigation lands; regulation of use of water (GAA §7)

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 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.

§ 462. Existing periods of trust and restrictions on alienation extended

The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are hereby extended and continued until otherwise directed by Congress.

Text

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Isham, Colville Conf. Tribes v. Walton: Indian Water Rights and Regulation in the Ninth Circuit, 43 Mont. L. Rev. 247 (1982).

Note, 59 Or. L. Rev. 299 (1980).

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Note, 17 Land & Water L. Rev. 155 (1982).

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