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The Future Course of the Winters Doctrine

Richard B. Collins
University of Colorado Law School

THE FUTURE COURSE OF THE *WINTERS* DOCTRINE

RICHARD B. COLLINS*

In a sense this is an easy prediction, and I don't need Jeane Dixon's help to make it. The *Winters* decision[1] was seventy-seven years old in January, and it announced a rule of real property law. No court would change a rule of this nature without an extraordinary justification, and nothing of that kind has appeared or is likely to. If Congress attempted a major revision of the *Winters* rule, the Supreme Court would honor it short of an unconstitutional taking.[2] But a congressional revision seems even less likely.

We could be more confident of the future if the Indian nations had been able to put more of their water rights to use. It is most unlikely that Congress or the Court would impair Indian investmests in water-using developments. Lack of developed water uses on Indian lands is the principal source of instability for the *Winters* doctrine. Under state or federal water law in the West, junior owners of surface water rights are entitled to use any water that senior owners are not actually using.[3] All over the West, surface water to which Indian nations have a prior right is lawfully being used by others. There are similar groundwater uses. Some of these uses have lasted for many years, raising expectations that Indian water will continue to be available to junior users. As a result, the most effective way to suppress Indian water claims has been to minimize the development of Indian

* Associate Professor, University of Colorado School of Law. B.A., 1960, Yale University; LL.B., 1966, Harvard University. This is the edited text of an address to the Conference on Indian Water in the American West: A Planning Agenda for the Future, sponsored by the American Indian Lawyer Training Program at Scottsdale, Arizona, November 29-30, 1984. Edie T. Cole provided valuable research assistance.

1. Winters v. United States, 207 U.S. 564 (1908). The Court held that the treaties, agreements, and statutes setting aside the Fort Belknap Indian Reservation in Montana implicitly reserved to the tribes of that reservation sufficient unappropriated water from a river forming the reservation's boundary to meet the Indians' reasonable needs. This holding as developed in later decisions of the Court is commonly called the *Winters* doctrine. *See generally* D. GETCHES, WATER LAW IN A NUTSHELL 291-332 (1984); F. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 575-604 (1982). On the background of the *Winters* case, see Hundley, *The "Winters" Decision and Indian Water Rights: A Mystery Reexamined*, 13 W. HIST. Q. 17 (1982).

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

3. *See* United States v. Ahtanum Irrigation Dist., 236 F.2d 321, 335, 340 (9th Cir. 1956), *cert. denied*, 352 U.S. 988 (1957); 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).

lands.[4] This situation has generated powerful political and financial forces that oppose Indian development, of which there has been very little. There have been extravagant claims of the "threat" posed by Indian water claims,[5] but actual conflict has been almost entirely a war of words, paper, and lawyers. Indian calls are not shutting anyone's headgates.

Why then doesn't the unstable situation of undeveloped *Winters* water rights threaten the existence of the *Winters* doctrine? Because the doctrine is so malleable that its moral foundation could be undermined without formally changing the rule.

The *Winters* doctrine is based on a rule of fairness that the Supreme Court has historically followed. Contrary to critics' charges, this was not an ad hoc rule created for the *Winters* case. By the time of *Winters* in 1908, the Court had firmly established its rule that Indian laws and treaties should be construed favorably to the Indians.[6] While the rule has several forms,[7] the underlying principle is the same for all of them. At an early date, the Court decided that the Constitution gave Congress broad power to legislate over the Indian nations.[8] But Congress was often beholden to the Indians' deadliest enemies, and its authority was unchecked by any political power of the Indians.[9] Except when tribes could resist militarily, the Indians were subject to congressional power tempered only by occasional voices of popular opinion in the states far removed from the frontier.[10]

The Court perceived that this unchecked power was the antithesis of the principle of consent of the governed that is a basic ideal of this Nation. Thus while recognizing Congress's power, the Court evolved the rule that the power must be used explicitly and openly. The Court will not sanction dissembling about the technical meaning of agreements with the Indians or of laws imposed on them. Treaties and laws will be construed on the assumption that Congress intended to deal honorably with the Indian nations, even when evidence suggests baser

4. *See* Meyers, *Federal Groundwater Rights: A Note on Cappaert v. United States*, 13 LAND & WATER L. REV. 377, 389 (1978).

5. *E.g.*, National Law Journal, Feb. 18, 1985, at 1 col. 3 ("the West's darkest and most tumultuous legal storm cloud"); Shrago, *Emerging Indian Water Rights: An Analysis of Recent Judicial and Legislative Developments*, 26 ROCKY MTN. MIN. L. INST. 1105, 1116 (1980).

6. *See* Jones v. Meehan, 175 U.S. 1, 11 (1899); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 551-54 (1832).

7. *See* Wilkinson & Volkman, *Judicial Review of Indian Treaty Abrogations: "As Long as Water Flows, or Grass Grows Upon the Earth"—How Long a Time is That?*, 63 CALIF. L. REV. 601, 617 (1975).

8. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 562 (1832).

9. Most Indians were not allowed to vote until the early twentieth century. F. COHEN, *supra* note 1, at 639-45.

10. F. PRUCHA, AMERICANIZING THE AMERICAN INDIANS 4-5 (1973).

motives of some members.[11] Both will be construed to sustain the Indians' reasonable expectations at the time the laws or treaties were made.

The *Winters* facts made out an obvious and compelling occasion for the application of this principle. Justice McKenna's opinion spoke openly of the "conflict of implications" raised by the agreements and laws setting aside the Fort Belknap Reservation along the Milk River, and the Court chose the construction favorable to the tribes.[12] Later the Court established that a water right will be implied for all Indian and other federal reservations when necessary to carry out reservation purposes.[13]

The amount of water reserved is the other great question presented by the *Winters* doctrine. *Winters* was an injunctive action to protect the Indians' water uses at the time of suit, but the Court's theory was that the tribes had a prior right to enough water for the reservation's reasonable needs.[14] This open-ended standard included additional water as the Indians' needs increased.[15] It interfered with water planning by everyone else, including the United States. The federal government solved its problems by filing quiet title lawsuits to quantify the unused part of the *Winters* right,[16] but other claimants faced the barrier of sovereign immunity.[17] Congress responded by consenting to suits brought against the United States to quiet title to federal and Indian water rights.[18]

In quiet title cases, the Supreme Court decided that a fair exchange for the Indians' uncertain future water rights would require a generous present allocation but a permanent one. Under the circumstances of the lower Colorado River adjudication, the Court sustained its special master's award to the tribes of enough water to irrigate all the practicably irrigable land within the reservations.[19] In other words, the tribes were decreed a present right to the maximum water allocation they could have claimed under the future needs theory of

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11. *E.g.*, United States v. Sioux Nation of Indians, 448 U.S. 371, 380-84, 407-24 (1980).

12. *Winters*, 207 U.S. at 576-77.

13. Arizona v. California, 373 U.S. 546, 595-601 (1963).

14. *Winters*, 143 F. 740, 749 (9th Cir. 1906), *aff'd*, 207 U.S. 564, 576-77 (1908).

15. Conrad Inv. Co. v. United States, 161 F. 829, 831 (9th Cir. 1908). *See Winters*, 207 U.S. at 576.

16. *See, e.g.*, United States v. Truckee-Carson Irrigation Dist., 649 F.2d 1286, 1289-95 (9th Cir. 1981) (describing trial court proceedings between 1913-1944), *aff'd in part, rev'd in part sub nom.*, Nevada v. United States, 463 U.S. 110 (1983).

17. Dugan v. Rank, 372 U.S. 609, 617-19 (1963).

18. 43 U.S.C. § 666 (1982). *See* Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983).

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

Winters, according to the best evidence of this allocation available at the time of the lawsuit. But the Court has resisted tribes' attempts to increase their allocations based on newly discovered facts.[20]

Whether the Court will adhere to the quantification standard adopted in the Colorado River case is not as certain as the Court's continued adherence to *Winters*. The Colorado River is an extraordinary water source, and other cases may offer ways to distinguish the Colorado River decision. Last year the Court made a cryptic suggestion that it might reconsider the question in a proper case.[21] Yet it is much more likely that the irrigable acres standard will be retained.

One reason the standard will be retained is that it is quite adaptable. To quantify Indian water rights that are not yet developed, a court must calculate reservation acres that would be practicably irrigable if put to use. Evidence is based on hypothetical development plans drawn up by expert witnesses for the Indians.[22] This calculation can yield dramatically different results based on a court's discretionary choice among several variables. Two that are especially interesting are the cost of capital needed to develop an irrigation system and the efficiency of water use to be required.

Let us compare these variables with the same factors for non-Indian developments. Government capital for non-Indian irrigation developments in the West has been supplied at well below market prices since passage of the Reclamation Act in 1902.[23] Recent federal deficits and high real interest rates have stopped any expansion of these subsidies, and there is no early prospect of their return. Will Indian water rights be calculated based on this new austerity or on the former easy money regime that has capitalized non-Indian developments? Or will the courts simply manipulate this variable to achieve a

20. Arizona v. California, 460 U.S. at 615-28.

21. *Id.* at 625-26. When the Court adopted the practicably irrigable acreage standard, it rejected alternative proposals based on the actual Indian reservation population at the time of adjudication. Arizona v. California, 373 U.S. at 597, 600-01. *See also* 460 U.S. at 617. In recent years, opponents of Indian claims have advanced some sort of equitable apportionment as an alternative standard. The Court expressly rejected this standard in Cappaert v. United States, 426 U.S. 128, 138-39 (1976). Its advocacy continues, however. *See* National Law Journal, Feb. 18, 1985, at 50 col. 1; Shrago, *Emerging Indian Water Rights: An Analysis of Recent Judicial and Legislative Developments*, 26 ROCKY MTN. MIN. L. INST. 1105, 1114-17 (1980).

22. *See* Report of the Special Master 155-205 (Dec. 15, 1982), General Adjudication of All Rights to Use of Water in the Big Horn River System and All Other Sources, No. 4993 (Wyo. Dist. Ct. decree entered May 10, 1983), *modified*, No. 101-234 (Jun. 8, 1984)(hereinafter cited as Big Horn River Adjudication).

23. *See* Sax, *Federal Reclamation Law*, in 2 WATERS AND WATER RIGHTS § 110.2 (R. Clark ed. 1967); Sax, *Selling Reclamation Water Rights: A Case Study in Federal Subsidy Policy*, 64 MICH. L. REV. 13 (1965).

result that seems fair on particular facts?[24]

Efficiency of water use is another pliable standard. Water use efficiency in the West has historically been low.[25] The prior appropriation doctrine of western state water law confines water rights to "beneficial uses," but these are broadly defined.[26] Once water is put to beneficial use, traditional prior appropriation law tends to reward inefficient uses.[27] Theoretically, wasted water is not beneficially used, but in practice this has been a lax standard that condones all but the most egregiously wasteful practices.[28]

Recently some states have sought to combat waste by imposing stricter conservation requirements.[29] The question posed by this change is whether Indian water rights will be calculated based on the newly discovered conservation ethic or on the tradition of unlined ditches and flooded fields. In the Big Horn River Adjudication in Wyoming, the state seeks to require an efficiency standard for Indian uses greater than any actual standard historically achieved in the state.[30] Although the court has so far not agreed with the state, the example shows how the efficiency variable can be manipulated in calculating undeveloped Indian water rights. Moreover, a stiff efficiency standard for Indian rights would require greater capital investment in technology such as laser leveling and sprinklers, so these two variables are related.

When other adjudication variables are considered as well,[31] the flexibility enjoyed by a quantifying court is very great indeed. If this flexibility is used only to take account of particular facts, and the basic standard remains fair to the Indian nations, they will not have cause to complain. But there is an opportunity for manipulation that would formally honor *Winters* but strip it of moral content.

In theory the flexibility can work both ways, and a quantifying court can award Indian nations water to irrigate their mountain tops.

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24. *See* Report of the Special Master, Big Horn River Adjudication, *supra* note 22, at 198-204; Burness, Cummings, Gorman, & Lansford, *Practicably Irrigable Acreage and Economic Feasibility: The Role of Time, Ethics, and Discounting*, 23 NAT. RESOURCES J. 289 (1983).

25. NATIONAL WATER COMMISSION REPORT, WATER POLICIES FOR THE FUTURE 299-306 (1973).

26. Hutchins, *Background and Modern Developments in State Water-Rights Law*, in 1 WATERS AND WATER RIGHTS § 19.3 (R. Clark ed. 1967).

27. Shupe, *Waste in Western Water Law: A Blueprint for Change*, 61 OR. L. REV. 483, 486-91 (1982).

28. *Id.*

29. *Id.* at 488-89 n.23; Higdon & Thompson, *The 1980 Arizona Groundwater Management Code*, 1980 ARIZ. ST. L.J. 628.

30. *See* Report of the Special Master, Big Horn River Adjudication, *supra* note 22, at 134-39, 180-82.

31. Report of the Special Master, *supra* note 22, at 155-205; Burness, et al., *supra* note 24.

In reality this does not occur. The Supreme Court's standard of fairness in Indian cases has never made an Indian rich. Lest anyone think it might, the Court recently warned in a treaty fishing case that Indians are entitled to no more than a "moderate living" from their treaty rights to fish.[32] We always knew that. It was gratuitous and bad form to announce it in print.

The question, then, is whether the *Winters* doctrine will continue to allocate a fair share of water to Indian reservations, or whether its variables will be manipulated so that Indians receive only a minimal allocation. Manipulation might originate in Congress or the Court. But Congress is unlikely to interfere with judicial allocation unless the Court is overly generous to the tribes, and that is not going to happen.

What of the Court? The lesson of history, never conclusive, tells us that the Court will stay the course and not retreat from the substance of the *Winters* doctrine. The Court has been remarkably constant on Indian matters. It did not prevent George Tassell's hanging,[33] the removal policy,[34] Sand Creek,[35] Wounded Knee,[36] the Dawes Act,[37] or Oklahoma,[38] but these were beyond its power. When it has had jurisdiction, the Court has seldom been clearly unfair to Indians. Indeed, the number of justices who lacked a reasonable grasp of the Court's principle of fairness in Indian cases can be counted on one hand, such memorables as Henry Baldwin, dissenter in *Worcester v. Georgia*,[39] David Brewer, dissenter in *Winters*,[40] and Stanley Reed, author of several neo-manifest destiny opinions in the 1940s and '50s.[41] It would be a remarkable change if a future Court were to have

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32. Washington v. Fishing Vessel Ass'n, 443 U.S. 658, 686 (1979). *See also id.* at 685 (Indians entitled to meet their "reasonable livelihood needs").

33. *See* Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500, 512-13 (1969).

34. *See* G. FOREMAN, INDIAN REMOVAL (1932).

35. *See* A. DEBO, A HISTORY OF THE INDIANS OF THE UNITED STATES, 162-64, 166, 184, 191, 195, 286-87 (1970).

36. *See id.* at 244-46, 265.

37. *See id.* at 252-306.

38. *See* F. COHEN, *supra* note 1, at 770-74.

39. 31 U.S. (6 Pet.) 515, 595-96 (1832)(Baldwin, J., dissenting). *See also* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 31-50 (1831) (Baldwin, J., concurring).

40. 207 U.S. at 578 (Brewer, J., dissenting without opinion). Presumably Justice Brewer dissented based on conflicts between *Winters* and dicta in his opinion for the Court in Kansas v. Colorado, 206 U.S. 46 (1907).

41. Justice Reed attempted to recast the Court's rules of construction in Indian cases into a redundant restatement of the search for congressional intent. Northwestern Band of Shoshone Indians v. United States, 324 U.S. 335, 353 (1945). *See also* Squire v. Capoeman, 351 U.S. 1, 11 (1956) (Reed, J., dissenting); Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 281-91 (1955). I would add the first Justice White, author of *Ward v. Race Horse*, 163 U.S. 504 (1896) and dissenter in *United States v. Winans*, 198 U.S. 371, 384 (1905) (White, J., dissenting), but he came around in *Winters*.

a majority of such as these.

If the *Winters* doctrine endures, how will it be affected by the changes in western water law and policy that Charles Wilkinson has described?[42] I have already mentioned the relationship of capital subsidies and water use efficiency to quantification of *Winters* rights. But quantification is based on the original purposes of reservations, so it may be proper to disregard modern policy trends. This does not mean that tribes should ignore environmental and conservation concerns. Provided they share in its gains, Indian nations have every reason to support the move toward greater efficiency and conservation of water resources. This policy can generate the water savings needed to reduce conflict between Indians and their neighbors, and it is a natural ally of tribal water claims to sustain fisheries.[43]

Indian attitudes toward the water conservation movement may be affected by the answer to a legal question about *Winters* water rights. If tribes may initiate conservation measures and benefit by devoting water saved to different uses, we can expect strong tribal support for conservation. However, if water saved passes to junior appropriators, tribes will have little incentive to invest in water conservation.[44]

Pressures to quantify Indian water rights will continue, and quantification will be achieved by all methods known to our legal system, including adjudication, negotiated settlement, and legislation. In some cases the process will be eased by construction of new water projects that supply enough developed water for everyone's needs. *Winters* claims may provide a sufficient impetus to overcome federal reluctance to fund new water projects. Indian nations, states, and private interests have a common interest in pressing this view on Washington. They are already doing so in order to work out aspects of the Central Arizona Project,[45] and common projects are possible in several other states.

Cost is a major obstacle to quantification of Indian water rights. Most water rights quantifications are expensive lawsuits because of

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42. *See* Wilkinson, *Western Water Law in Transition*, 56 U. COLO. L. REV. 317 (1985).

43. Shupe, *supra* note 27, at 517-18.

44. Under traditional state prior appropriation law, water saved may be put to other uses on the land to which it is appurtenant but not on other land. D. GETCHES, WATER LAW IN A NUTSHELL 118-20, 135-38 (1984). If this rule were applied to tribes, it would raise an interesting question about the scope of the appurtenant land limitation.

45. *See* Southern Arizona Water Rights Settlement Act of 1982, Pub. L. No. 97-293, 96 Stat. 1274 (1982). Congress is now aware of *Winters* and may take it into account in laws to reserve new lands for tribes. But no one expects new reservations to be large, and new priority dates are not valuable.

large numbers of necessary parties.[46] The expense is increased significantly when courts must face the technical difficulties of measuring practicably irrigable acreage in the absence of actual development.[47] In recent cases, the federal government has borne the lion's share of technical costs, and states have provided legal representation for many small private owners. A fit of austerity at either level of government could jeopardize this scheme in future cases. When tribes believe the government is not adequately presenting their cases, they face difficult choices because of the prohibitive cost of participation. Nevertheless, the present system is likely to continue, its costs perhaps eased by some negotiated settlements. The key factor is the requirement that suit be brought by or against the United States by name in order to quantify Indian water rights.[48] This sets in motion the traditional adversary machinery of the Justice Department, a process that would be difficult to alter.

Some Indian nations have opposed quantification of their water rights. I believe this view to be mistaken. Undeveloped and unquantified *Winters* rights are abstract, which makes it easy for junior users to dismiss *Winters* rights as the "Indian problem." Quantified water rights seem much more a real commodity, which competing users must reckon with. And quantified rights will more readily attract development capital.

Transfer of *Winters* water rights will become an increasingly prominent issue. Whenever Indian resources have been in great enough demand, Congress has come up with ways to allow or compel tribes to alienate their property. Many of these schemes have been disastrous for Indians.[49] Water rights have been an exception because junior owners can enjoy the resource in the absence of Indian development.[50] The parties interested in maintaining the status quo have not been the Indian nations but those who have used water to which the tribes have a prior right. Lacking the usual political pressures to allow alienation, Congress has not authorized tribes to sell *Winters* water rights.[51]

More recently, pressures to authorize tribes to sell or lease *Winters* rights have arisen, and they will grow. The state and federal gov-

46. Clyde, *Practical Aspects of Water Litigation and General Adjudication Proceedings*, 6 WATERS AND WATER RIGHTS 297, 530 (R. Clark ed. 1972).

47. *See supra* notes 22-31 and accompanying text.

48. *See supra* note 18 and accompanying text.

49. *See* F. COHEN, *supra* note 1, at 136-38.

50. *See supra* note 3 and accompanying text.

51. *But see infra* note 52 and accompanying text, describing a recent, unique exception for one tribe. On leasing and changes of use, *see infra* notes 53-58 and accompanying text.

ernments favor transferability to assure maximum utilization of water. Change is evidenced by the recent Papago water settlement statute, which authorizes alienation by the tribe.[52] Although Indian nations had reason to oppose past schemes to alienate their land, they will want the right to sell or lease water rights, in order to generate capital to finance development projects.

Existing law on transfer of Indian water rights is uncertain. Water rights are real property subject to the general restraint against alienation of tribal land.[53] Although no statute explicitly authorizes lease or sale of tribal water rights, there is a longstanding view, supported by a few legal authorities, that the laws permitting leases of Indian land implicitly allow water rights to be leased for use with the land.[54] At least this is the rule when water rights are leased for the same uses that define the tribal right.

The Supreme Court has held that owners of Indian allotments made out of tribal lands have a right to use some part of the reservation's *Winters* right.[55] This rule is probably based on an implied transfer of a share of the right. The Ninth Circuit has held that allotment water rights survive sale of allotments to non-Indians.[56]

There has also been some judicial treatment of the question whether a tribe may shift use of its *Winters* right measured by one purpose, usually irrigation, to another, such as recreation or mining. The predominant view is that tribes may do so if the water is used within the same reservation.[57] A hypothetical example would be a tribe's use of its irrigation-defined water right for secondary oil recovery purposes. A few judicial opinions have included dicta announcing that tribes may not transfer *Winters* rights outside their reservations.[58] These opinions probably confuse two rather distinct issues. The first is

52. Southern Arizona Water Rights Settlement Act of 1982, Pub. L. No. 97-293, 96 Stat. 1274, § 306(c) (1982). The act specifies that it has no effect on the general question whether *Winters* rights may be sold for off-reservation use. *Id.* § 306(d).

53. 25 U.S.C. § 177 (1982). *See* F. COHEN, *supra* note 1, at 593.

54. Skeem v. United States, 273 F. 93, 94 (9th Cir. 1921). *See also* 25 U.S.C. §§ 390, 394, 402a, 415-415d (1982); 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); Memo. Dep. Sol. Int. (Feb. 1, 1964), reprinted in 2 Opinions of the Solicitor of the Dept. of the Interior Relating to Indian Affairs 1917-1974, at 1930 (Government Printing Office n.d.).

55. United States v. Powers, 305 U.S. 527, 533 (1939).

56. United States v. Anderson, 736 F.2d 1358, 1362 (9th Cir. 1984).

57. 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); Big Horn River Adjudication, *supra* note 22, slip op. at 20, 65 (May 10, 1983). *See also* Coville Confederated Tribes v. Walton, 647 F.2d 42, 48 (9th Cir. 1981), *cert. denied*, 454 U.S, 1092 (1981), and authorities cited therein; Trelease, *Indian Water Rights for Mineral Development*, in NATURAL RESOURCES LAW ON AMERICAN INDIAN LANDS 230-33 (P. Maxfield ed. 1977).

58. *See* United States v. Anderson, No. 3643, slip op. at 17-20; Big Horn River Adjudication, *supra* note 22, slip op. at 20, 65 (May 10, 1983).

whether a tribe may shift water uses between portions of its own land wherever the land is located. The second issue is whether a tribe may transfer its water right to other parties for use on land it does not own, wherever located. The latter form of transfer is precluded by the absence of any applicable waiver of the general restraint on alienation of tribal real property.[59] The best policy would be for Congress explicitly to authorize tribes to lease their water rights for periods long enough for lessees to amortize development investments.

If tribes can shift *Winters* water rights to different purposes or transfer them to different users, several other questions may arise. What uses qualify for transfer—only those defined as beneficial by state law? One federal court has said no,[60] but the issue will probably be contested again. Two uses that may cause controversies are in-stream uses, such as fishery maintenance in states that still do not recognize any in-stream uses as beneficial,[61] and specifically forbidden uses such as Montana's prohibition of the use of water to operate slurry pipelines.[62]

Another question raised by tribal transfers is the quantity of water that tribes are allowed to transfer to new places of use. Western state water laws restrict transfers to protect other water rights holders including junior owners.[63] Indeed, the party wanting to transfer usually has the burden of proving that the transfer will not harm other owners.[64] Some western states limit interbasin transfers,[65] and most of them try to limit or prohibit interstate transfers of any kind.[66] Recent Supreme Court opinions suggest that tribal transfers, if allowed, will have to be limited to assure protection of junior owners who rely on return flow or other water not consumed by the purpose defining the tribal right.[67] In practice, this means that only part of a *Winters* water right may be transferred. However, other limitations found in state law ought not apply to tribes.[68]

The question of who has jurisdiction to administer water rights in

59. *See supra* notes 51, 53.

60. United States v. Anderson, 736 F.2d 1358, 1365 (9th Cir. 1984).

61. *See* Tarlock, *Appropriation for Instream Flow Maintenance: A Progess Report on "New" Public Western Water Rights*, 1978 UTAH L. REV. 211.

62. MONT. CODE ANN. § 85-2-104 (1983) (repealed 1985).

63. D. GETCHES, WATER LAW IN A NUTSHELL 165-79 (1984).

64. *Id.* at 166.

65. *Id.* at 162-65.

66. *Id.* at 399-400.

67. *See* Arizona v. California, 460 U.S. 605, 620-26 (1983); Cappaert v. United States, 426 U.S. 128, 141 (1976).

68. *See* Cappaert v. United States, 426 U.S. 128, 143-46 (1976); Colville Confederated Tribes v. Walton, 647 F.2d 42, 48, 51-53 (9th Cir. 1981), *cert. denied*, 454 U.S. 1092 (1981).

Indian country has been much debated. Tribes claim that reservation sovereignty entitles them to exclusive jurisdiction.[69] States claim jurisdiction based on federal statutory consent and off-reservation effects.[70] The Ninth Circuit has sustained state jurisdiction under the latter theory,[71] but the issue will continue to be litigated. In another case the Ninth Circuit held that a water system entirely within Indian country was under exclusive tribal jurisdiction.[72] Tribes have a legitimate concern that states may employ administrative jurisdiction as a means of imposing substantive state water laws on them.

Several other controversial issues are part of the *Winters* doctrine's future. There has been widespread debate over whether irrigable acreage should be the sole measure of *Winters* water rights, or whether other purposes should be recognized as well. The courts have already recognized some other purposes and will continue to do so. The *Winters* opinion itself referred to water for stock watering, domestic use, and even hunting.[73] However, the courts will probably adhere to the view that *Winters* rights must be measured by purposes contemplated at the time a reservation was set aside.[74] The principal, original purpose of many reservations was to sustain an agricultural economy. Water uses needed to carry out this purpose will be recognized, including water to generate hydroelectric power.[75] Other reservations included fisheries relied on by their residents, and water rights for this purpose will be sustained.[76] But the "homeland" argument that water was reserved for all purposes that contribute to tribal self-sufficiency

69. *See* Colville Confederated Tribes v. Walton, 647 F.2d 42, 51-53 (9th Cir. 1981), *cert. denied*, 454 U.S. 1092 (1981).

70. The statutory argument is based on 43 U.S.C. § 666 (1982), which consents to actions against the United States to determine ownership of water rights. *See supra* note 18. The statute states that the United States "shall be subject to the judgments, orders, and decrees of the court having jurisdiction." The issue is whether a decree could bind the United States to state administration after rights have been adjudicated. In at least one case, the United States has voluntarily agreed to state administration, although no Indian rights were involoved. United States v. City and County of Denver, 656 P.2d 1, 35 (Colo. 1982).

71. United States v. Anderson, 736 F.2d 1358, 1363-66 (9th Cir. 1984).

72. Colville Confederated Tribes v. Walton, 647 F.2d 42, 51-53 (9th Cir. 1981), *cert. denied*, 454 U.S. 1092 (1981).

73. *Winters*, 207 U.S. at 576.

74. *See* Report of the Special Master, Big Horn River Adjudication, *supra* note 22, at 64-71, slip op. at 14-20,42, 60-63, 69 (May 10, 1983); slip op. at 9-11, 17 (Jun. 8, 1984).

75. United States v. Walker River Irrigation Dist., 104 F.2d 334, 340 (9th Cir. 1939); United States v. 5,677.94 Acres of Land, 162 F. Supp. 108 (D. Mont. 1958). *See also* Federal Power Comm'n v. Oregon, 349 U.S. 435, 444 (1955); 34 Op. Att'y Gen. 171, 178 (1924).

76. United States v. Adair, 723 F.2d 1394, 1412-14 (9th Cir. 1983), *cert. denied*, 104 S.Ct. 3536 (1984); Muckleshoot Indian Tribe v. Trans-Canada Enters., 713 F.2d 455 (9th Cir. 1983), *cert. denied*, 104 S.Ct. 1324 (1984); Colville Confederated Tribes v. Walton, 647 F.2d 42, 48 (9th Cir. 1981), *cert. denied*, 454 U.S. 1092 (1981).

will probably fail.[77] Other users of the same water source could not have anticipated many important tribal uses. Hence, tribes may have water rights for oil shale development or water skiing reservoirs only if their irrigation rights may be transferred to these purposes.[78]

An alternative rule that has some indirect support in the case law would measure reservation purposes at the time tribal water rights are quantified, rather than at the time a reservation was set aside.[79] The question of the technology by which to measure practicably irrigable acreage is viewed from the time of litigation.[80]

A novel variant of the reservation purposes issue is the theory that a purpose not contemplated when a reservation was set aside can become a reservation purpose at a later time. For example, one might argue that extracting a mineral that had not been discovered when a reservation was set aside became a reservation purpose when the mineral was discovered, or when mining began, or when water was first used in the mining process. According to this theory, the tribe would then have a federal reservation water right for this purpose with a priority based on the date when the use became known or began.[81] The theory resembles the controversial claim of federal proprietary water rights based on actual use raised by the Carter administration and repudiated by the Reagan administration.[82] The theory avoids the foreseeability problem presented if the new use is claimed as an original purpose. But the fact that this theory has not been asserted creates a similar foreseeability problem because many uses that might be eligible under it were discovered long ago. This problem can be avoided only if actual water use is necessary to invoke the theory, and in that case the water right acquired would be essentially the same as one acquired by appropriation under state law. For these reasons, this theory is unlikely to be of practical importance.

Groundwater raises other unresolved *Winters* questions. Whether there can be a *Winters* right in groundwater technically remains an open question.[83] The answer will likely be yes when the requisite need

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77. *See Colville*, 647 F.2d at 49.

78. *See supra* notes 57-59 and accompanying text.

79. This concept was implicitly applied in Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir. 1981), *cert. denied*, 454 U.S. 1092 (1981). The tribes claimed a *Winters* water right for a new fishery using planted, nonindigenous fish to replace original tribal fisheries in a different watershed. The original fisheries had been destroyed by dams. This purpose, foreseeable at the time of quantification but not at the time the reservation was set aside, was sustained by the court. *Id.* at 48.

80. Report of the Special Master 98 (Feb. 22, 1982), Arizona v. California, 460 U.S. 605 (1983).

81. *See supra* note 79. This theory might have been an alternative basis to uphold the replacement fishery, but under this theory the fishery would have had a new, later priority date.

82. 86 Interior Dec. 553 (1979), *overruled*, 88 Interior Dec. 253 (1981).

83. Cappaert v. United States, 426 U.S. 128, 142 (1976). Some court opinions state that reserva-

can be shown, and the challenge will be to define its extent. When surface and groundwater sources form a connected system, the courts have already recognized that a surface *Winters* right may be protected against depletion by groundwater pumping.[84] There is no apparent reason why a tribe entitled to use such a surface source cannot exploit it by means of a well. Increased efficiency will often result, to everyone's benefit. Another circumstance in which a *Winters* right in groundwater is likely to be recognized is where an underground source is located entirely under Indian land. Many wells on the Navajo Reservation tap such sources, including those used for the slurry line from Black Mesa to Page.

Harder problems are posed when groundwater sources underlie both Indian and non-Indian land. An absolutely prior right in any owner would often allow that owner to preclude pumping from an aquifer by any other party because pumping by junior owners would cause the aquifer's water pressure or the water table to fall. Prior appropriation states have recognized this problem and have either applied a different legal regime to groundwater or have modified the prior appropriation doctrine for groundwater.[85] *Winters* rights in groundwater will require a similar accommodation. In other words, tribes can use groundwater but will have to share it with their neighbors.

Another issue that excites much debate is that of the priority of *Winters* rights—whether the priority date should be the date a reservation was set aside or an earlier date based on original tribal title such as time immemorial. This issue has been said to depend on the answer to the theoretical question of who reserved the water, the United States or the tribe or both.[86] The question of who reserved the water, however, is an irrelevant abstraction. *Winters* rights are implied from a federal treaty, statute or executive order; the relevant issue is what right federal law has recognized. When Indians were already using water for a certain purpose at the time a reservation was set aside, the reasonable interpretation of the federal treaty, statute or executive order is to reserve that water use unimpaired. This requires that the

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tion rights in groundwater exist. *E.g.*, Tweedy v. Texas Co., 286 F. Supp. 383, 385 (D. Mont. 1968). *See also* Nevada v. United States, 165 F. Supp. 600 (D. Nev. 1958), *aff'd on other grounds*, 279 F.2d 699 (9th Cir. 1960); 61 Interior Dec. 209 (1953); Meyers, *Federal Groundwater Rights: A Note on Cappaert v. United States*, 13 LAND & WATER L. REV. 377, 388 (1978).

84. Cappaert v. United States, 426 U.S. 128 (1976); Colville Confederated Tribes v. Walton, 647 F.2d 42, 45 (9th Cir. 1981), *cert. denied*, 454 U.S. 1092 (1981). *See also* United States v. Smith, 625 F.2d 278 (9th Cir. 1980).

85. *See* Grant, *Reasonable Groundwater Pumping Levels Under the Appropriation Doctrine: The Law and Underlying Economic Goals*, 21 NAT. RESOURCES J. 1 (1981).

86. *E.g.*, Note, 15 NAT. RESOURCES J. 375, 375-76 (1975).

tribe's *Winters* right for that purpose be accorded a priority based on the water's first use, such as time immemorial. But when a reservation purpose contemplates a new water use, the reasonable reading is to imply a new reservation of water effective on the reservation date. The great majority of *Winters* rights are in the latter category and should have a reservation date priority. But in proper cases, notably those of fisheries, the earlier priority ought to be recognized; otherwise the establishment of a reservation would impair the preexisting Indian use. This would violate the rule that Indian laws and agreements will not be read technically against the Indians.

This analysis is not new. It was applied in the 1935 Globe Equity decree in Arizona.[87] The decree awarded the Pimas, who had irrigated their farms for centuries, a *Winters* right based on prior use with a priority of time immemorial. It awarded the Apaches a reservation priority date because their right was not in prior use.[88] Although there is controversy about the fairness of the allocations in that decree, the decree seems clearly correct in its concept of priorities.

Finally, the hardest and most important question: Will *Winters* water rights contribute to a reasonably prosperous future in Indian country? With very few exceptions, they have not in the past. *Winters* has mostly functioned to protect subsistence uses, for survival but not comfort. Unfortunately, the obstacles to improvement seem as formidable as ever. Indian nations must find development capital and must find wise ways to use it that are suitable to their societies. The limited development projects that the federal government attempted in the past were often misguided schemes that could not work in the tribal setting, especially projects built around allotments.[89] Increasing demand for shared water supplies will continue to make the task ever more difficult. The risk remains that *Winters* will continue to be mostly a legal scripture for lawyers to debate like theologians.

87. United States v. Gila Valley Irrigation Dist., No. 59 Globe Eq. (D. Ariz., Jun. 29, 1935).

88. *Id.* at 86.

89. *See* F. COHEN, *supra* note 1, at 134-38, 728.