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WATER RIGHTS ON INDIAN ALLOTMENTS

DAVID H. GETCHES*

Development of individually-held reservation lands for agriculture, mining, or commerce almost always depends on a supply of water. Thus, it is essential that owners of land within a reservation have some certainty of their water rights. No statute or other source, however, expressly defines water rights on Indian allotments. This article attempts to define those water rights by examining the allotment policy and legislation in light of the reserved water rights doctrine. The author concludes that no reserved rights may be held by individuals, but that during the period of trust some of those rights may be used by allottees. Upon passing out of trust an Indian or non-Indian owner should have rights recognized within the hierarchy of water rights established by appropriation, based on the dates and quantities of appropriations actually made on the land during the trust period.

INTRODUCTION

Early in the nineteenth century, settlers claimed most of the best lands ceded to the government by Indians who had dominated vast expanses of the American West. Typically, the tribes were confined to vestiges of their former territory, but were given assurances by the United States that their tenure would be secure from the avarice of zealous newcomers. The government and the Indians expected that resulting Indian reservations would be a homeland and an economic base for the tribes.

The ambition and industry of the settlers who populated the area surrounding the reservations created pressure for use of undeveloped lands within the reservations. Politicians and others were dissatisfied with the Indians' failure to mobilize economically and to make their lands productive. These combined forces inspired the allotment program under which many tribal lands were distributed in severalty to individual Indians. The land was to be held by the United States in trust for individual allottees for a period of twenty-five years. During that time, the Indian owner was expected to develop proficiency in agriculture. After the period of trust, it was supposed that Indians, having become experienced in agriculture, moved by the example of their white neighbors, and tantalized by the material and spiritual rewards of individual enterprise, would be emancipated to take their place in the competitive world. Lands could be retained and used by the Indian owners, leased to others, or sold. "Surplus" lands, not needed for allotment to individual Indians, could be opened to homesteading by non-Indians. Tribes, having lost their communal domination of reservation

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lands, would wane in importance and eventually atrophy—a further step toward “civilization” of the Indians.

There is now general agreement that while the allotment scheme succeeded in transferring about 90 million acres out of Indian hands and did weaken the tribes, it failed to engraft the family farm as the nucleus of Indian society. Poor land, adverse weather, limited water availability, inadequate government support, enticements from land-hungry non-Indians to sell or lease, and cultural resistance conspired against the success of Indian allottees as agriculturalists.

Today, many reservations are checkerboards of non-Indian holdings. Titles are traceable largely to homesteads of “surplus” lands and to Indian allotments that have been sold out of trust. Allotments remaining in trust often are leased to non-Indians for farming or other uses. Development of individually-held reservation lands for agriculture, mining, or commerce almost always depends on a supply of water. Thus, it is essential that owners of land within a reservation have some certainty of their water rights. Yet case law has been remarkably sparse until recently, and the few decided cases fail to resolve many important water rights issues with clarity.

The courts have long recognized that Indian tribes have special “reserved water rights” to the extent necessary to satisfy the purposes for which their reservations were set aside. These rights are exempt from state law and thus do not depend on continuous use to keep them alive. They may defeat valid rights of non-Indians based on uses that were begun and have continued for many years and whose priority in time otherwise would make them superior. The only rights of others that might be superior to Indian rights are those that commenced before a reservation was set aside. Whether these extraordinary Indian rights extend to allotments while held in trust, after patenting in fee, and when transferred to non-Indians substantially influences the marketability, value, and development potential of allotted lands.

No statute or other source expressly defines water rights on Indian allotments. But an understanding of the allotment policy and legislation, and of the reserved water rights doctrine, guides the inquiry. Answers depend upon congressional intent and, because the reserved rights doctrine turns on the purposes of an Indian reservation, on the construction of treaties, agreements and statutes establishing particular reservations.

This article concludes that no reserved rights may be held by individuals, but that during the period of trust some of those rights may be used by allottees. Upon an allotment's passing out of trust, an Indian or non-Indian owner should have rights recognized within the hierarchy of state water rights established by appropriation, based on the dates and quantities of appropriations actually made on the land during the trust period. It is argued that this approach best effectuates the policies of the General Allotment Act and neither impedes nor attracts the sale or removal of allotted lands from trust. Every variation in the attributes of water rights on an al-

lotment has some economic impact that will influence conduct, and consequently, that will either facilitate or frustrate the purposes and policies of Congress and the Indian tribes.

RESERVED WATER RIGHTS: ABERRATION IN WESTERN WATER LAW

Early in this century, the Supreme Court announced a creative judicial doctrine to resolve a conflict between Indians in need of irrigation water from the Milk River in Montana and nearby homesteaders who earlier had diverted water from the river. In *Winters v. United States*,¹ the Court said that the government and Indians, in creating the reservation by an 1888 agreement that ceded a large area of what later became Montana, intended to reserve enough water to carry out the purposes of the agreement from a river which formed a boundary of the reservation. The agreement was silent on water rights, but the Court implied an intention to reserve water from the cession.

The consequence of the *Winters* decision was a serious dislocation of the neighboring settlers. They had accepted the government's invitation to move into the rugged territory given up by the Indians. Everyone knew that the lands occupied by the settlers were arid and that without water "they would be valueless, and 'civilized communities could not be established thereon.'"² The settlers had expended considerable effort and thousands of dollars improving their lands and constructing irrigation systems. Later, the Indians began irrigating portions of the reservation as a part of the government's plan "to train, encourage and accustom them to habits of industry and to promote their civilization and improvement."³ This threatened the non-Indians' water supply, so they moved their diversion to a point above the Indians' diversions. The government then brought suit on behalf of the Indians to enjoin the upstream diversions.

Conflict with Western Water Rights

The private parties whose desperate attempts to preserve the lifeblood of their homesteads were found unlawful in *Winters* had established valid water rights under the customs and law of the territory. Lands had been posted, claims had been filed with the county clerk, and, most importantly, water had been diverted and put to a beneficial use. Appropriation, accompanied by a minimum of formalities, early had become the method of establishing water rights throughout most of the West.⁴ Regardless of location, and even without ownership of land, appropriators could establish a priority

1. 207 U.S. 564 (1908).

2. *Id.* at 576.

3. *Id.* at 566-67.

4. See generally on the establishment of the appropriation system in the West and creation of the reserved rights doctrine: 1 W. HUTCHINS, *WATER RIGHTS IN THE NINETEEN WESTERN STATES* 159-80 (1971); Ranquist, *The Winters Doctrine and How It Grew: Federal Reservation of Rights to the Use of Water*, 1975 B.Y.U. L. REV. 639, 642-46.

in the use of water. Under this "first in time, first in right" concept, in times of shortage water was allocated based on seniority. Senior users were entitled to cut off any appropriators whose diversions were subsequent to theirs, to protect the senior's historic use. Principles of sharing the burdens of short supply that had prevailed in the eastern states under the riparian rights system were ill-suited to the agricultural and mining uses in the West. A system of rights appurtenant to land adjacent to water simply would not work where lands of water users often were not near or even in the same watershed as a water source needed by them.

The federal government was to lend its imprimatur to the maverick doctrine that became the foundation of western water law. The establishment of water rights based on prior appropriation grew out of "understandings" among competing claimants in the mining districts. Just as the first to stake a claim to minerals would be able to develop them, the first to use water, a vital ingredient in the mining process, would establish a right to it. An innovative system of property rights was necessary because the miners and other settlers lacked fee title to the lands they used. Virtually all land west of the Mississippi River was owned by the federal government, subject to Indian rights of use and occupancy.⁵ As Indian title was extinguished, some land became available for purchase by cash or by compliance with certain conditions of occupancy and improvement⁶ and the government allowed private exploitation of minerals without formal sanction. During the mid-nineteenth century trespass on the public domain was generally encouraged. Trespassers were eventually rewarded by laws that recognized legal rights in public lands they occupied even before the lands were opened for settlement. Laws designed to validate the miners' property systems also recognized the validity of water rights under the doctrine of prior appropriation.

The 1866 and 1870 Mining Acts⁷ approved past and future private appropriations of water on public lands pursuant to local laws and customs, and made federal patents and grants of private rights in the lands subject to any such water rights that had vested. The Desert Land Act of 1877⁸ eliminated any doubts that the federal government was not conveying water rights when it patented land to private individuals. That statute declared all waters on the public lands "free for appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights."⁹ The Supreme Court construed the statute as recognizing a severance of land

5. See *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823); Cohen, *Original Indian Title*, 32 MINN. L. REV. 28 (1947).

6. See generally G. COGGINS & C. WILKINSON, *FEDERAL PUBLIC LAND AND RESOURCES LAW* 65-82 (1981).

7. Act of July 26, 1866, ch. 262, 14 Stat. 251; Act of July 9, 1870, ch. 235, § 17, 16 Stat. 218. Both acts are codified at 43 U.S.C. § 661 (1976).

8. 43 U.S.C. § 321 (1976).

9. *Id.* See G. COGGINS & C. WILKINSON, *supra* note 6, at 298. See generally Ranquist, *supra* note 4. The effect of the statute was not limited to "desert" lands. *California-Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935).

and water estates in the public domain, and directing that lands be patented independent of any water rights.¹⁰ Waters of the public lands, then, could be appropriated and valid use rights established under state or territorial laws and customs.¹¹

Rationale and Attributes of the Reserved Rights Doctrine

Against a backdrop of federal encouragement to take up lands in the West and to establish rights to the water needed to make those lands productive, the *Winters* decision's rebuff to those very efforts may seem harsh and inconsistent. Congress, however, had only said that private users could establish valid rights in waters of the public lands vis-a-vis others, and that the government would recognize those rights. The *Winters* Court was confronted with a situation in which it was necessary to decide whether water rights, valid as among private users, could be allowed to defeat uses on lands reserved for specific federal purposes.¹² Earlier cases had articulated the principle that the government had sufficient power to reserve water for federal purposes and thereby make it unavailable for appropriation under state law.¹³ In *Winters*, however, there was an apparent conflict between the federal purposes, on one hand, to use the reservation to train the Indians in farming and thereby eventually to establish their self-sufficiency, and, on the other, to settle non-Indian homesteaders in the area.

Congress had not spoken expressly on either issue, but the Court resolved the "conflict of implications" in favor of the Indians' retention of waters necessary to carry out the purpose of their agreement with the United States. The Court cited a rule of construction often applied to Indian treaties and agreements because of the circumstances in which they were negotiated: ambiguities "will be resolved from the standpoint of the Indians."¹⁴

The reserved rights doctrine that was first applied to imply water rights on Indian reservations in *Winters*¹⁵ has been used in a host of cases to protect Indian water rights as against other users, sometimes displacing appropriators with valuable investments that depended on the priority of their rights.¹⁶ The doctrine was consistent with established principles of Indian law; it recognized rights in the tribes that were not defined by state law.¹⁷

10. *California-Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935).

11. *Id.*

12. The Supreme Court has since stated unequivocally that the acts allowing establishment of federal rights on "public lands" do not extend to "reservations"—lands reserved for specific federal purposes or unavailable for private acquisition. *Federal Power Comm'n v. Oregon*, 349 U.S. 435 (1955).

13. *United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 690, 702 (1899). *Cf.* *United States v. Winans*, 198 U.S. 371 (1905) (Indian treaty reserving right to fish prevents application of inconsistent state law).

14. *Winters v. United States*, 207 U.S. 564, 576 (1908).

15. The doctrine had been earlier expressed in the context of Indian fishing rights. *United States v. Winans*, 198 U.S. 371 (1905).

16. *E.g.*, *Arizona v. California*, 373 U.S. 546 (1963); *United States v. Walker River Irrig. Dist.*, 104 F.2d 334 (9th Cir. 1939); *Conrad Inv. Co. v. United States*, 161 F. 829 (9th Cir. 1908).

17. *E.g.*, *Central Mach. Co. v. Arizona State Tax Comm'n*, 100 S. Ct. 2592 (1980); *McClana-*

Treaties and agreements with Indians were considered grants from, rather than to the Indians, and were construed to best effectuate their purposes,¹⁸ using favorable canons of construction.¹⁹ Thus, the Court's implication of "reserved water rights" for Indians should not have been surprising. The Court, however, was eventually to apply the doctrine to other federal reservations as well,²⁰ a startling move to some.²¹

Under the *Winters* reserved water rights doctrine, the "priority date" for reservations is the date the reservation was created,²² or perhaps earlier.²³ This doctrine gives Indians rights senior to all but appropriators who established their rights before the date of the reservation, even though Indian uses may first arise long after others have established rights to the waters. Being free of the conditions of state law, reserved water rights are not subject to loss by "abandonment,"²⁴ which can end rights held by prior appropriation if there is a period of voluntary non-use.²⁵

The amount of water reserved is not fixed, but is whatever is necessary for the purposes of the reservation.²⁶ Thus, it may expand as needs change. This uncertainty is perplexing for other users; it deprives them of predicability as to the future availability of water to satisfy their rights. Quantification of reserved rights has been suggested as a solution. In *Arizona v. California*,²⁷ the Supreme Court approved quantification of reserved rights for several Indian reservations based on the amount of water it would take to irrigate all irrigable acreage within them.²⁸ The Court approved the report of a special master whose quantification was based on a finding that the purpose of the particular reservations was to provide agricultural land for the tribes.²⁹ Where other purposes are found, rights would have to be quan-

han v. Arizona State Tax Comm'n, 411 U.S. 164 (1973); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

18. *E.g.*, *United States v. Winans*, 198 U.S. 371 (1908).

19. See notes 14 *supra* and 87 *infra*.

20. *E.g.*, *Cappaert v. United States*, 426 U.S. 128 (1976); *Arizona v. California*, 373 U.S. 546 (1963).

21. See, *e.g.*, Trelease, *Federal Reserved Water Rights Since PLLRC*, 54 DENVER L.J. 473, 477 (1977).

22. *E.g.*, *Arizona v. California*, 373 U.S. 546, 596 (1963) (date of federal withdrawal); *United States v. Walker River Irrig. Dist.*, 104 F.2d 334, 336 (9th Cir. 1939) (date of treaty).

23. *E.g.*, *United States v. Adair*, 478 F. Supp. 336, 350 (D. Or. 1979), *appeal pending*; *United States v. Gila Valley Irrig. Dist.*, Globe Equity No. 59 (D. Ariz. June 29, 1935). Cf. *New Mexico v. Aamodt*, 537 F.2d 1102 (10th Cir. 1976) (water rights of Pueblos predated federal approval of their land titles).

24. *E.g.*, *Winters v. United States*, 207 U.S. 564, 577 (1908); *United States v. Hibner*, 27 F.2d 909, 911-12 (D. Idaho 1928).

25. See W. HUTCHINS, *SELECTED PROBLEMS IN THE LAW OF WATER RIGHTS IN THE WEST* 389-92 (1942).

26. *E.g.*, *United States v. Ahtanum Irrig. Dist.*, 236 F.2d 321, 327 (9th Cir. 1956), *cert. denied*, 352 U.S. 988 (1957).

27. 373 U.S. 546 (1963).

28. *Id.* at 600-01. See notes 117-20 *infra* and accompanying text.

29. *Id.* See also Report of Simon H. Rifkind, Special Master 254-66, *Arizona v. California*, 373 U.S. 546 (1963): "The reservations of water were made for the purpose of enabling the Indians to develop a viable agricultural economy; other uses, such as those for industry which might consume substantially more water than agricultural uses, were not contemplated at the time the Reservations were created." *Id.* at 265.

tified differently.³⁰

The Supreme Court has said that whether a federal water right can be implied depends on Congress' intent. "Intent is inferred if the previously unappropriated waters are necessary to accomplish the purpose for which the reservation was created."³¹ The Court has emphasized, however, that implicitly reserved water rights are limited to "only that amount of water necessary to fulfill the purpose of the reservation, no more."³² Accordingly, the Court has held that by setting aside a national forest, the government did not reserve water for fish and wildlife needs.³³ It found that the language and history of the Forest Service Organic Act of 1897³⁴ showed that the purposes of national forests were limited to conserving watershed and furnishing a continuous supply of timber.³⁵ Consequently, the Court held that no right had been reserved for water for other purposes. Indian reservations, however, present a different situation; their purposes are stated broadly and a fair synthesis is that virtually every reservation was intended to be a home where Indians could be self-governing and economically self-sustaining.³⁶ By contrast, other federal reservations are dedicated to more specific ends, unrelated to the livelihood of a distinct and dependent group of people.³⁷

The breadth of purpose in the case of Indian reservations suggests an implied reservation of whatever quantity of water is needed to develop reservation resources of any kind and make them productive. The cases speak of encouraging the "habits of industry" and "advancing the civilization of the Indians."³⁸ If these ambitious purposes are to be addressed and Indians permitted to "maintain . . . their way of life,"³⁹ water must be available for a wide range of potential uses. Surely "civilized" and industrious Indians, just as their non-Indian counterparts, will seek to use the resources at their disposal to the greatest advantage. Thus, an implied reservation of rights may be justified to the extent water is needed for any productive activity on an Indian reservation, including agricultural, mining, and recreational en-

30. For example, a reservation may be established to provide a fishery for the Indians, a purpose that then could become the measure of the reserved right. *See, e.g., United States v. Sturgeon*, 27 F. Cas. 1357 (D. Nev. 1879) (No. 16,413). *See also United States v. Nevada & California*, 412 U.S. 534 (1973). *Cf. Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 553 (1832) (reservation of lands as "hunting grounds" did not preclude other uses).

31. *Cappaert v. United States*, 426 U.S. 128, 139 (1976).

32. *Id.* at 141.

33. *United States v. New Mexico*, 438 U.S. 696 (1978).

34. 16 U.S.C. § 473 (1976).

35. *United States v. New Mexico*, 438 U.S. 696, 707 (1978).

36. *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (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, 117-18 (1938); *United States v. McGowan*, 302 U.S. 535, 537 (1938); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 88-89 (1918). The Court in *United States v. New Mexico*, 438 U.S. 696, 700 n.4 (1978), acknowledged that Indian reserved water rights are implied from these broad purposes.

37. *Colville Confederated Tribes v. Walton*, No. 79-4297, slip op. at 2631-32 (9th Cir., June 1, 1981). *See also United States v. Shoshone Tribe*, 304 U.S. 111, 116 (1938).

38. *Winters v. United States*, 207 U.S. 564, 567 (1908).

39. *Menominee Tribe v. United States*, 391 U.S. 404, 406 (1968).

terprises, as well as sustaining fish and wildlife and natural vegetation that support traditional pursuits.⁴⁰

WATER RIGHTS ON ALLOTMENTS

Purposes and Provisions of the General Allotment Act of 1887

In the late nineteenth century, the federal government vigorously pursued a policy of dividing tribal land holdings among individuals. For several years sentiment had been mounting among policymakers that individual ownership of Indian lands was the ultimate solution to the Indian problem.⁴¹ Communal tribal ownership was seen as retarding the "civilization" of Indians. The 1838 report of the Commissioner of Indian Affairs recommended a drastic change in Indian land tenure:

Unless some system is worked out by which there shall be a separate allotment of land to each individual whom the scheme shall entitle to it, you will look in vain for any general casting-off of savagism. Common property and civilization cannot co-exist. . . . At the foundation of the whole social system lies individuality of property. It is, perhaps, nine times in ten, the stimulus that manhood first feels; it has produced the energy, the industry and enterprise that distinguish the civilized world, and contributes more largely to the good morals of men than those are willing to acknowledge who have not looked somewhat closely at their fellow beings.⁴²

Equally fervid pleas were made by other commissioners of the era.⁴³ By the 1870's, allotment of Indian lands in severalty had become official policy. Treaties negotiated during that period and statutes enacted regarding the lands of a number of tribes provided for individual allotments. By 1885, over 11,000 patents had been issued under such laws.⁴⁴

The allotment policy and its philosophical underpinnings reflected the nation's approach to its public lands in general.⁴⁵ Land was used as a tool for exerting the dominion of the United States over the vast territory and for producing needed wealth. The yeoman farmer was the hero of the westward movement. Until the early part of the twentieth century, public land law was chiefly designed to dispose of the public domain for free or at a bargain

40. See note 36 *supra*. But see Boles & Elliott, *United States v. New Mexico and the Course of Federal Reserved Water Rights*, 51 COLO. L. REV. 209 (1980). There is general agreement that water rights quantified (e.g., based on irrigable acreage) need not be confined to the uses (e.g., agriculture) that were the basis of a quantification. *Arizona v. California*, 433 U.S. 419, 422 (1979); Report of Simon H. Rifkind, Special Master 265, *Arizona v. California*, 373 U.S. 546 (1963).

41. A number of individual land holdings already existed pursuant to treaties that reserved them from lands ceded by tribal leaders to the government, usually where there were improvements and homes of tribal members. For comprehensive background on allotments, see generally J. KINNEY, *A CONTINENT LOST—A CIVILIZATION WON* (1937); D. OTIS, *THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS* (F. Prucha ed. 1973).

42. J. KINNEY, *supra* note 41 at 109.

43. *Id.* at 112-31.

44. D. OTIS, *supra* note 41 at 3.

45. See D. GETCHES, D. ROSENFELT & C. WILKINSON, *FEDERAL INDIAN LAW* 76-77 (1979).

price to those who would occupy it and make it productive.⁴⁶

The policy of promoting individual ownership of Indian land was most forcefully manifested in the General Allotment Act.⁴⁷ The Act empowered the President, upon determining that an Indian reservation:

may be advantageously utilized for agricultural or grazing purposes . . . to cause allotment to each Indian located thereon to be made in such areas as may be in their best interest not to exceed eighty acres of agricultural or one hundred and sixty acres of grazing land to any one Indian. . . .⁴⁸

Furthermore, it was anticipated that training Indians in agricultural pursuits would take time, during which the security of an individual's tenure needed assurance. Consequently, Congress required that the land would be held in trust by the United States for a period of twenty-five years.⁴⁹ At the end of that period, or upon a finding by the Secretary of the Interior that the allottee was "competent and capable of managing his or her affairs," the Secretary issued a fee patent to the allottee.⁵⁰ During the period of trust, the land remained tax exempt, after which it was to be conveyed free of "all restrictions as to sale, encumbrance, or taxation."⁵¹ The President was given discretion to extend the trust period of allotments and did so in many instances.⁵² In other cases, Congress extended trust periods on particular reservations by legislation.⁵³ When Congress prohibited all future allotments in 1934,⁵⁴ it indefinitely extended the period of trust on all existing allotments.⁵⁵

Notwithstanding the protection of Indian allotments from alienation or taxation through the trust device, large amounts of former tribal land passed out of Indian hands during the years following institution of the policy. Some lands were conveyed to non-Indians after the trust was removed;⁵⁶

46. PUBLIC LAND LAW REVIEW COMM'N, ONE THIRD OF THE NATION'S LAND 27-28 (1970); G. COGGINS & C. WILKINSON, FEDERAL PUBLIC LAND AND RESOURCES LAW 65-82 (1981). See generally P. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT (1968).

47. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (codified at 25 U.S.C. §§ 331-334, 339, 341, 342, 348, 349 & 381 (1976)).

48. 25 U.S.C. § 331 (1976). Another section of the Act provided for allotments to Indians not residing on reservations or for whom no reservation was provided. 25 U.S.C. § 334 (1976). Subsequent acts provided for allotments to Indians who settled on the public domain (Act of Feb. 28, 1891, ch. 383, § 4, 26 Stat. 795) and who occupied national forest lands (Act of June 25, 1910, ch. 431, § 31, 36 Stat. 863). Homesteading was allowed to Indians who abandoned tribal relations. Act of Mar. 3, 1875, ch. 131, § 15, 18 Stat. 420 (formerly codified at 43 U.S.C. § 189), *repealed*, Act of Oct. 21, 1976, § 702, Pub. L. No. 94-579, 90 Stat. 2787. Only "citizens" were otherwise eligible for homesteads.

49. 25 U.S.C. § 348 (1976).

50. *Id.* §§ 348-349. Allottees were later given veto power over patents issued without their "consent." *Id.* § 352a.

51. *Id.* § 349.

52. *Id.* § 348. Executive Orders issued annually from 1943 to 1950 extended any expiring trust periods by 25 years. See, e.g., Exec. Order No. 9272, 7 Fed. Reg. 9475 (Nov. 17, 1942). Citations to statutes and executive orders extending trust periods are collected at 25 C.F.R. ch. 1, appendix.

53. E.g., 25 U.S.C. § 348a (1976) (Klamath River Reservation).

54. *Id.* § 461.

55. *Id.* § 462.

56. Allotments in trust may be sold out of trust to non-Indians upon approval by the Secretary of the Interior. *Id.* § 349. Once sold, an allotment becomes fully taxable. *Id.* § 379.

others passed by descent on death of the allottees and were either sold for the heirs' benefit or were transferred in fee to non-Indian heirs or to Indian heirs who were found by the Secretary to be "competent to manage their own affairs."⁵⁷ By far the greatest transfer of lands from Indians to non-Indians resulted from the provisions authorizing sale of "surplus" lands—reservation lands that were not allotted to Indians.⁵⁸ The Secretary was to negotiate with the affected tribe for terms on which surplus land would be purchased. The land would then be made available for homesteading by non-Indian settlers.⁵⁹ Making reservation lands available to non-Indians was an important motive of the architects of allotment policy. While some in Congress realistically saw the scheme as a way to diffuse growing pressures from settlers for more land by "opening up" reservations,⁶⁰ others articulated a higher purpose:

Giving the individual Indian title to the land upon which he resides will have a tendency to stimulate him to work and improve his land and accumulate property . . . and by associating him with the white man, which will be the case when the reservations are broken up and the surplus lands opened up to white settlement, he will learn habits of industry and thrift.⁶¹

Additionally, by removing land from tribal control, the tribes themselves would be weakened. This was deemed salutary, as the end of tribal culture was necessary to the civilizing plan.⁶² The allotment system was well-suited to this, and President Theodore Roosevelt called it "a great pulverizing engine to break up the tribal mass."⁶³

The combined effect of sales, probates which took allotments out of

57. *Id.* §§ 372-373, 378.

58. *Id.* § 348.

59. *Id.* Proceeds of sales were held by the government and were then available, with 3% interest per annum, to be appropriated by Congress "for the education and civilization of such tribe. . . ." *Id.*

60. A minority report of the House Indian Affairs Committee on an 1880 predecessor bill to the General Allotment Act stated:

The real aim of this bill is to get at the Indian lands and open them up for settlement. The provisions for the apparent benefit of the Indian are but the pretext to get at his lands and occupy them. . . . If this were done in the name of greed, it would be bad enough; but to do it in the name of humanity, and under the cloak of an ardent desire to promote the Indian's welfare by making him like ourselves whether he will or not, is infinitely worse. . . .

H.R. REP. NO. 1576, 46th Cong., 2d Sess. 10 (1880).

61. 17 CONG. REC. 190 (1886) (remarks of Sen. Skinner). See also SEVENTEENTH ANNUAL REPORT OF INDIAN COMMISSIONERS, H.R. DOC. NO. 109, 49th Cong., 1st Sess. 34 (1886) ("Guard the rights of the Indian, but for his own good break up his reservations. Let in the light of civilization. Plant in alternate sections or townships white farmers, who will teach him by example."); 11 CONG. REC. 875 (1881) (remarks of Sen. Hoar) ("The theory of this bill goes on the ground that it is desirable to put the Indians among the whites, a neighbor among neighbors, to give him the hopes and habits and stimulus that come from the ownership of real estate."); W. BROPHY & S. ABERLE, *THE INDIAN: AMERICA'S UNFINISHED BUSINESS* 19 (1966).

62. D. OTIS, *supra* note 41 at 812. During the same period, other assimilative devices were employed, such as enactment of laws to regulate conduct of Indians (e.g., Major Crimes Act, 18 U.S.C. § 1153 (1976), establishment of boarding schools, abolition of Indian courts and governments, and forceful repression of traditional Indian religious and cultural practices. See D. GETCHES, D. ROSENFELT & C. WILKINSON, *supra* note 45, at 77-79.

63. Message to Congress, 35 CONG. REC., 57th Cong., 1st Sess., pt. 1, 90 (1901).

trust, and the opening of "surplus" lands to settlement was a reduction of the Indian land base by 90 million acres between 1887 and 1934—a loss of about two-thirds of lands held before the General Allotment Act.⁶⁴ Vast land areas were also transferred to non-Indians when Congress enacted legislation that was intended to extinguish all or parts of particular reservations.⁶⁵ Some of these acts also included provisions for allotting lands to Indians;⁶⁶ others left scattered allotments outside reservation boundaries.⁶⁷

Non-Indian populations within the reservations also had been attracted by leaseable lands. At first, allotments were not available for lease, but proposals to amend the Act were pressed soon after its passage.⁶⁸ Opponents of the proposal, including Senator Dawes, who had sponsored the General Allotment Act, insisted that leasing would defeat the purpose of the Act by providing an incentive for Indians to avoid toiling at agriculture, which was the means by which they were to become civilized.⁶⁹ Supporters pointed out that many Indians were too old, too young, or otherwise incapable of farming their lands, that others wanted to leave and pursue other employment or an education, and that some who wanted to cultivate their land needed income from part of it to finance their early efforts.⁷⁰

Finally, in 1891, the Act was amended by a bill sponsored by Senator Dawes himself to allow limited leasing when an allottee could not personally develop his or her allotment because of "age or other disability."⁷¹ Later the limited terms of allotment leases were extended, and the requirement of disability was removed.⁷² Soon leasing was to become "the rule rather than exception on some reservations."⁷³ In many cases, leasing became essential because ownership was fractionated due to inheritance. Moreover, the size of an allotment—usually 80 acres—often was not great enough to farm as an economic unit. Other difficulties included a lack of training, absence of irrigation facilities, and unavailability of credit. The result is that non-Indians now cultivate about 63% of all Indian agricultural lands.⁷⁴

64. *Hearings on H.R. 7902 Before House Comm. on Indian Affairs*, 73d Cong., 2d Sess. 16-18 (1934).

65. *See, e.g.*, *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *DeCoteau v. District County Court*, 420 U.S. 425 (1975). The Supreme Court has held that the "congressional determination to terminate [reservation status] must be expressed on the face of the Act or be clear from the surrounding circumstances." *Mattz v. Arnett*, 412 U.S. 481, 505 (1973).

66. *E.g.*, *Mattz v. Arnett*, 412 U.S. 481 (1973).

67. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *Seymour v. Superintendent*, 368 U.S. 351 (1962).

68. D. OTIS, *supra* note 41 at 98-107.

69. *Id.* at 109. One court held in 1895 that leases of allotments were unlawful in that leases were inconsistent with the Act's purposes of adapting "the Indians in the habits of industry" by teaching "them to cultivate the soil." *Pilgrim v. Beck*, 69 F. 895, 896-97 (D. Neb. 1895).

70. D. OTIS, *supra* note 41 at 107-08.

71. Act of Feb. 28, 1891, ch. 383, 26 Stat. 794.

72. D. OTIS, *supra* note 41 at 118.

73. AMERICAN INDIAN POLICY REVIEW COMM'N, FINAL REPORT, 94th Cong., 2d Sess., 318 (Comm. Print 1977).

74. *Id.* at 315. Non-Indian operators produce 69% of the Indian farm land income and utilize 78% of the irrigated lands. *Id.*

Effect on Water Rights

The few cases dealing with the issue fail to provide any conceptual integrity for the basis of water rights on Indian allotments. Whether rights are transferable, their measure and priority and the degree to which they may be regulated, all depend upon the nature of rights that are established in allotments. In the absence of allotments, reserved water rights, like other tribal property, would be held communally, with each tribal member having an undivided interest in the whole.

Regarding tribal land, the Supreme Court has often reiterated: "Whatever title the Indians have is in the tribe, and not in the individuals, although held by the tribe for the common use and equal benefit of all the members."⁷⁵ A major Indian fishing rights decision contained the following discussion of a tribal member's interest in tribal property: "Individual Indians had no individual title to property, but participated in the communal rights of the tribe. The right of the individual Indian is, in effect, a right of participation similar in some respects to the rights of a stockholder in the property of a corporation."⁷⁶ The court in that case also cited earlier precedent that Indian treaty rights to fish at certain usual and accustomed places were communal property rights.⁷⁷ The same principles would apply to tribal water rights.⁷⁸

There is nothing in the General Allotment Act to suggest that Congress was dividing up and conveying tribal water rights in severalty as it did tribal lands.⁷⁹ Without altering communal ownership of water rights, section 7 of the Act empowered the Secretary of the Interior to promulgate regulations to "secure a just and equal distribution" of irrigation water among Indians on a reservation.⁸⁰ Thus, the ownership of the water rights remained tribal,

75. *United States v. Jim*, 409 U.S. 80, 82 (1972) (quoting *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 307 (1902)). See also *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 665 (1979); *Cherokee Nation v. Journeycake*, 155 U.S. 196 (1894); *The Cherokee Trust Fund Case*, 117 U.S. 288, 308 (1886); *Shulthis v. McDougal*, 170 F. 529, 533-34 (8th Cir. 1909), *aff'd*, 225 U.S. 561 (1912).

76. *United States v. Washington*, 520 F.2d 676, 688 (9th Cir. 1975), *cert. denied*, 423 U.S. 1986 (1976) (citing F. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 183 (U.N.M. ed. 1971)). The essential features of this decision were affirmed in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

77. *United States v. Washington*, 520 F.2d 676, 688 (9th Cir. 1975), *cert. denied*, 423 U.S. 1986 (1976) (citing *Whitefoot v. United States*, 293 F.2d 658, 663 (Ct. Cl. 1961), *cert. denied*, 369 U.S. 818 (1962)).

78. See *United States v. Powers*, 305 U.S. 527, 532 (1939).

79. *But see Colville Confederated Tribes v. Walton*, No. 79-4297, slip op. at 2634-32 (9th Cir., June 1 1981). On rehearing, the court retreated from its holding in an unpublished August 20, 1980, opinion that had found Indian reserved rights were not alienable to non-Indians. The court presumed a congressional intent to convey to allottees an "appurtenant right to share in [the tribe's] reserved waters." *Id.* at 2635. See also *dicta* in *United States v. Preston*, 352 F.2d 352, 358 (9th Cir. 1965), to the effect that an allottee "owns the water the minute the reservation was created, and his rights become appurtenant to his land the minute he acquires his allotment." The Supreme Court has confirmed only an allottee's right "to use some portion of *tribal* water essential to cultivation." *United States v. Powers*, 305 U.S. 527, 532 (1939) (emphasis added).

80. 25 U.S.C. § 381 (1976). The full section reads:

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

but Congress implied that individual Indians with allotments should have access to available tribal irrigation water. Congress' plan was to convert the Indians into farmers by allowing them to develop individually-held lands. If a tribe could withhold water from use on allotted tribal land, the plan would be frustrated because allottees would be forced to compete with non-Indian users for whatever water was available in excess of the tribe's reserved rights. It is reasonable to infer that Congress intended to assure that allottees could use some of the tribe's rights. A tribal member should have a right to share equally in the benefits of communal property, without the mandate of section 7. But for a time, the status of allottees during their ascent from tribalism to civilization was uncertain.⁸¹ Congress may have felt that inclusion of section 7 would provide a means of obtaining water that allottees might need to develop their land during the purgatorial trust period.

Sufficient water rights to meet the irrigation needs of allottees should have been reserved to virtually all tribes, as agriculture was within the purposes for which Indian reservations ordinarily were set aside.⁸² The total rights reserved, however, should encompass more than irrigation needs and, indeed, should accommodate all uses that are within the reservation's purposes. Thus, all demands for agricultural applications on both tribal land and allotments, plus any water needed for other tribal purposes within the reservation, would comprise the tribe's reserved water right.

Nothing indicates that Congress intended section 7 to enable the Secretary to curtail a tribe's reserved rights not attributable to irrigation of allotted lands. Section 7 only addressed how available irrigation water was to be allocated. To the extent that water also must be allocated for irrigation of tribal lands, the Secretary's authority seems well-founded.⁸³ Section 7 em-

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.

The last clause of § 7 has never been judicially interpreted and there is no legislative history that illuminates its meaning. It seems to state, albeit in an inartful manner, that the regulatory authority of the Secretary is limited in that he may not authorize or permit one allottee who borders a water body to take water to the detriment of another except to equalize their use of irrigation water. It seems to express a protective concern as among riparian owners that is not generally significant in the water law of the western states where abutting upon a water source creates no special rights, only a physical advantage in facilitating access. *See* W. HUTCHINS, *supra* note 4, at 14-17, 154-56, 180-85. Yet it also refers to "no other appropriation." The most likely, broader intention of the drafters was that the Secretary's regulations were not to interfere with the normally applicable water rights and allocation principles any more than was necessary to effectuate the "just and equal distribution" of irrigation water among resident Indians.

81. *Cf. In re Heff*, 197 U.S. 488 (1905) (§ 6 of General Allotment Act dissolved tribal relations and terminated national guardianship so that legislation prohibiting liquor traffic did not apply to allottees), *overruled*, *United States v. Nice*, 241 U.S. 591 (1916).

82. *See* notes 31-40 *supra* and accompanying text. A different conclusion might be reached if a reservation were set aside for specific purposes that could not be read to include agriculture.

83. This conclusion might be different where a particular act of Congress specified a grant of water rights with an allotment. *E.g.*, Act of May 29, 1908, § 9, 35 Stat. 448, 449 (Flathead Irrigation Project), which stated that "the land irrigable under the systems herein provided, which has been allotted to Indians in severalty, shall be deemed to have a right to so much water as may be required to irrigate such lands. . . ." In this case, a short supply would be shared pro rata among

powers the Secretary to make a "just and equal distribution thereof among the Indians residing" on the reservation whenever irrigation is necessary for agriculture. This means that available irrigation water must be shared equitably among all Indians on the reservation, whether they have allotments or not. It does not mean, however, that the Secretary can control waters reserved by the tribe for other purposes.

A shortage necessitating secretarial allocation of irrigation water could arise when the supply of available water reserved for irrigation was insufficient for all the tribe's needs. In that case, the Secretary would allocate among all Indian irrigators (including those on unallotted tribal lands) the available waters remaining after other tribal purposes were fully met.⁸⁴ Of course, the tribe could decide to abate other uses for the sake of agriculture, but the irrigation needs of the tribe would have to be satisfied by some equitable allocation of irrigation water that considered both tribal and allotted lands. Presumably tribal regulation insuring an equitable distribution of irrigation water could avert the need for secretarial intervention.

Because Congress did not address the question of how to manage a tribe's reserved rights for uses other than irrigation, it must be assumed that tribal rights for other purposes continue, along with the power of self-government necessary to decide what uses are desirable and who may implement them. Congress might have required dedication of all available water to agricultural purposes, termination of all tribal property interests, and extinguishment of all tribal self-government. It appears that these were among the visions of some framers of the allotment policy. The means chosen to realize those ends, however, were limited, and the policy of the General Allotment Act was to "continue the reservation system and the trust status of Indian lands."⁸⁵ The President's authorization to allot land in severalty was to be a trigger that would activate a reaction leading inexorably to the with-

allottees. See *United States v. Alexander*, 131 F.2d 359 (9th Cir. 1942); *United States v. McIntire*, 101 F.2d 650, 654 (9th Cir. 1939). Only after all such needs were met could the reserved rights of the tribe be met. Congress here has carved a special right to irrigation water for allottees out of the total rights reserved, evidencing some preference for these rights. See also Act of March 1, 1907, 34 Stat. 1015, 1024 (allotments under Fort Hall Cession Act entitled to water rights from reservation irrigation system).

84. One district court has stated: "The individual Indian landowners are entitled to use water essential to their agricultural needs when those needs arise. This right, however, is subject to the superior right of other Indians to use the water for the preservation of hunting and fishing on the Reservation lands." *United States v. Adair*, 478 F. Supp. 336, 346 (D. Or. 1979), *appeal pending*.

85. *Mattz v. Arnett*, 412 U.S. 481, 496 (1973). Otis reports that the allotment policy was expected to render all government involvement with Indians obsolete and, therefore, it was unnecessary to be concerned with the administration of Indian affairs. D. OTIS, *supra* note 41, at 16. Senator Dawes, the General Allotment Act's sponsor, said of the policy:

It seems to me that this is a self-acting machine that we have set going, and if we only run it on the track it will work itself all out, and all these difficulties that have troubled my friend will pass away like snow in the spring time, and we will never know when they go; we will only know they are gone.

Suppose these Indians become citizens of the United States with this 160 acres to their sole use, what becomes of the Indian reservations, what becomes of the Indian Bureau, what becomes of all this machinery, what becomes of the six commissioners appointed for life: Their occupation is gone; they all have vanished, the work for which they have been created . . . is all gone, while you are making them citizens. That is why I don't trouble

ering away of the old order. That, of course, never happened. On most allotted reservations, some land was left in tribal title and it continued to be used for tribal purposes. Finally, the allotment policy was repudiated by Congress with its ultimate goals unsatisfied.

The General Allotment Act must not be construed to extinguish any rights not necessarily extinguished by its language. In the absence of some clear manifestation of intent, it would be improper to read the Act as limiting all tribal water rights to agriculture, thereby ending the tribe's right to apply water to other uses for which land or other property (*e.g.*, fishing rights) was reserved by treaty. This would fly in the face of the principle repeatedly affirmed by the Supreme Court that Indian rights will not be ended by implication.⁸⁶ Furthermore, the consequences of limiting water use to farming would be dire on reservations where much of the land is useless for agriculture. Established rules of construction for Indian legislation insist that ambiguities be resolved in the Indians' favor and legislation be interpreted for their benefit.⁸⁷

At least until an allotment is patented in fee, all rights to water used on it belong to the tribe. Allotment of a reservation only earmarks a portion of the tribe's irrigation water for use on allotments. It has been pointed out

myself at all about how to change it [Indian administration once the allotment process is in place].

NINETEENTH ANNUAL REPORT OF THE BOARD OF INDIAN COMMISSIONERS, 49th Cong., 2d Sess., 54-55 (1887).

86. See *Menominee Tribe v. United States*, 391 U.S. 404 (1968). See generally, Wilkinson & Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth"—How Long a Time is That?*, 63 CALIF. L. REV. 601, 645-66 (1975).

Some inconsistency in purpose is not enough for a later statute to repeal the effect of an earlier enactment or treaty. Repeals by implication are disfavored and wherever possible, courts will strive to give effect to the provisions of both the earlier and later acts. *E.g.*, *Andrus v. Glover Const. Co.*, 446 U.S. 608 (1980); *Morton v. Mancari*, 417 U.S. 535, 551 (1974).

Conversion from tribal to individual Indian ownership may be within Congress' power over Indian affairs and may effect "a mere change in the form of investment of tribal property" such that no taking or right to compensation results. *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). But outright extinguishment of tribal property rights held pursuant to treaty or statute (*e.g.*, extinguishment of reserved water rights, hunting and fishing rights, *etc.*) gives rise to claims for compensation for fifth amendment takings. *E.g.*, *Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968); *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 105 (1949); *Shoshone Tribe v. United States*, 299 U.S. 476 (1937). Close judicial scrutiny is warranted where the result would be to transfer Indian property to third parties. *E.g.*, *United States v. Creek Nation*, 295 U.S. 103 (1935); *Navajo Tribe v. United States*, 364 F.2d 320 (Ct. Cl. 1966). Courts will review the propriety of such congressional actions to determine whether they can be "tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, 85 (1977).

87. Three canons of construction generally apply to Indian treaties and agreements:

1. They are to be interpreted as they would be understood by the Indians. *E.g.*, *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 676 (1979); *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 630 (1970).

2. Ambiguities and doubtful expressions are to be resolved in the Indians' favor. *E.g.*, *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 174 (1973).

3. They should be liberally construed in favor of the Indians. *E.g.*, *Choctaw Nation v. United States*, 318 U.S. 418, 431-32 (1943).

These canons have been applied to construction of statutes enacted for Indians' benefit as well as to treaties and agreements. *E.g.*, *Bryan v. Itasca County*, 426 U.S. 373, 381 (1976); *Squire v. Capoeman*, 351 U.S. 1, 6-7 (1956).

that this causes no practical problems, except when the total of all reserved rights that are needed at a particular time exceeds the supply.⁸⁸

WATER RIGHTS OF SUCCESSORS TO INDIAN ALLOTMENTS

Non-Indian successors to allottees cultivate much of the most productive farmland in Indian country. In many places, competition for scarce water resources is increasing as Indian tribes begin to exercise their reserved water rights more fully. This may bring the tribes into conflict with individual non-Indian users within their reservations. In addition, rights as among non-Indians on and off the reservations must be determined. Thus, it becomes essential to find the measure, priority, and applicable regulatory scheme for non-Indian owners of Indian allotments.

Character of Water Rights Passing With Fee Title to Allotments

So long as reservation land remains in trust, it is appropriate to allow water to be used on it under the reserved rights doctrine. In the case of trust allotments, the purposes intended by Congress—agricultural training and civilization—can best be fulfilled by allowing allottees to use water for agriculture from the total quantity available to the tribe. This is a natural accommodation between the General Allotment Act and tribal rights.

A more difficult question is whether the owner of an allotment obtains a water right upon conveyance of a fee patent. Possibilities include: a continued right to draw as needed from the pool of tribal rights; a pro rata conveyance of reserved rights; a recognition of an appropriative right to the extent tribal reserved rights were used during the trust period; or an absence of any water rights except those that might be established after the fee patent is issued.

The attempt to determine the nature of water rights that an allottee has upon taking a fee patent turns on Congress' intent in the General Allotment Act. As such, the position that would deny an allottee all but those rights acquired after issuance of the fee patent must be rejected. Congress intended to put allottees in a situation similar to homesteaders. At the end of the trust period they were to have marketable lands to use or to sell as they pleased. Homesteaders were able to establish rights by appropriation in waters surplus to reserved rights as soon as they occupied their chosen lands. Similarly, rights equal to their uses established during the trust period should be recognized in allottees when their land is patented to them in fee.

It is clear that Congress intended allotments to be irrigated. This is

88. Tribal reserved rights might also be impacted where they have been quantified and are being fully applied to a use other than that upon which the quantification was based. See note 29 *supra*. For instance, a quantification could be based on irrigable acreage, but the tribe might decide to apply water to mining purposes. An allottee has the right to demand enough water to irrigate the allotment, and it would come from the tribe's quantity. This problem should not arise unless the uses a tribe makes of its water are not within the purposes of the reservation. If they were, a new, expanded quantification based on the full intended use of the waters for all such purposes would be appropriate.

supported generally by the purpose of the Allotment Act and is reflected by the provision in section 7 for a means to allocate irrigation water equitably among allotted reservation Indians.⁸⁹ Fulfillment of the Act's purpose requires that during the trust period, the allottee be able to use a portion of the reservation's available irrigation water, subject to the right of the Secretary to curtail uses in the interest of an equitable distribution. The Act, however, does not address the long-run—the nature of rights that pass with the fee patent.

The General Allotment Act was expected to end tribalism and liberate the Indians from government supervision, thereby allowing them "to qualify themselves for the duties and responsibilities of citizenship."⁹⁰ The view most compatible with these purposes favors an end to preferred treatment under the reserved rights doctrine and to federal administrative control of water when the period of trust expires. The period of trust was intended to protect an allottee's individual estate by making it:

inalienable and non-taxable for a sufficient length of time for the new citizen to become accustomed to his new life, to learn his rights as a citizen, and prepare himself to cope on an equal footing with any white man who might attempt to cheat him out of his newly acquired property. . . .⁹¹

Thus, on the termination of the trust, "all restrictions as to sale, encumbrance, or taxation would be removed" and the allottee shall "be subject to the laws, both civil and criminal, of the State or Territory in which they reside."⁹² It comports with this purpose to eliminate secretarial control over an allottee's water use. Furthermore, it is appropriate to end the advantage an allottee enjoys during the trust period of being able to use the tribe's reserved water rights without being subjected to state law requirements for perfection and maintenance of water rights. There is every indication that Congress presumed that allottees would be capable of being treated just as homesteaders when the trust expired or was removed by discretion of the Secretary. At that point the need for the nurturant spirit of the reserved rights doctrine should cease.

Partition of the allottee's proportionate share of waters reserved to the tribe for irrigation raises conceptual and practical problems and is not supported by congressional intent. Conveyance of a "reserved right" with its exemption from state law doctrines would give the patented allottee a considerable advantage over homesteaders who must appropriate their water. Furthermore, the patented allottee who held land with its own reserved right

89. 25 U.S.C. § 381 (1976). See note 80 *supra*. The relatively greater value of allotted land with irrigation was recognized in an amendment to the General Allotment Act, which provided for allotments of unirrigated agricultural land to be twice as large as irrigated lands and for grazing allotments to be four times as large. 25 U.S.C. § 331 (1976). Cf. 25 U.S.C. § 348 (1976) (providing lands to non-Indian settlers in 160 acre parcels regardless of whether they were irrigated).

90. 18 CONG. REC. 191 (1886) (remarks of Rep. Perkins).

91. *Id.* at 190.

92. 25 U.S.C. § 349 (1976).

and was freed from the section 7 power of the Secretary, would enjoy an advantage over allottees whose land was still in trust and subject to that power. Further, if a pro rata share of the reserved right became individually vested, conflicts with tribal reserved rights for non-irrigation uses may arise when ever supplies were inadequate for all uses. Reserved tribal rights for these other purposes will inevitably compete for water with irrigation uses on patented allotments, but, unlike irrigation uses on trust allotments, which are properly subject to abatement to accomodate other tribal uses because they share the tribal right, an allottee's individually owned reserved right would extend to the full pro rata share that passed with fee title. There would thus be no ready means of resolving conflicts among tribal and individual owners of partitioned water rights.

The only way reserved rights can exist in a coherent system is if they are held by a government. Unless the trust ownership of water rights is to be continued after a fee patent to land is issued on a particular allotment, with the beneficiary changed from the tribe to the allottee, reserved rights will be in the hands of thousands of individual proprietors. Absent some guidance from Congress, it seems improper to extend the extraordinary judicial doctrine so far beyond its original bounds.

The most reasonable approach to filling the gap left in Congress' definition of a patented allottee's water rights is to recognize appropriations based on actual use of irrigation water during the trust period. That is, to the extent the allottee has used the tribe's reserved rights for irrigation, rights should be recognized as included in the conveyance of the land from the federal government. The state would be required to honor the existence of the right, but from the time title was taken in fee, state requirements for maintaining the right would apply. This approach satisfies the inference that Congress intended *some* right to water to attach to allotments, without perverting the reserved rights doctrine and exacerbating the uncertainties that already exist.⁹³ Treating them as if they were homesteaders rewards allottees who have actually made use of their land for agriculture as Congress intended. Yet they have security during the trust period, and could depend on irrigation water from their tribe's reserved rights, with the Secretary regulating supply to prevent any inequities in distribution.

Treatment of allottees as holding rights to the extent they used the tribe's reserved water rights during the trust period cannot be attributed to any specific statutory language. It still, however, effectuates the policy of using federal protections as fully as necessary to turn individual plots into productive farms, and then to release the allottee to participate in the competitive world. The tribal water right would be left intact, except to the extent irrigable acreage, and consequently the basis for quantifying irrigation rights, has been reduced.⁹⁴ Rights for other uses in fulfillment of the reser-

93. See text accompanying notes 26-30 *supra*.

94. See notes 113-121 *infra* and accompanying text.

vation's purposes would remain unaffected.

Transferability of Allottees' Water Rights

The few decided cases in the area agree that a non-Indian purchaser of an allotment succeeds to some water rights, although they disagree on the nature and extent of those rights.⁹⁵ The Supreme Court has not decided the issue, but in considering related issues in *United States v. Powers*, it approved the contention that: "when allotments of land were duly made for exclusive use and thereafter conveyed in fee, the right to use some portion of tribal waters essential for cultivation passed to the owners."⁹⁶

Unless some water right passes with an allotment sold by an Indian to a non-Indian purchaser, the allotment will be essentially worthless. The courts have acknowledged that on many Indian reservations "the lands were arid and, without irrigation, . . . practically valueless."⁹⁷ Accordingly, some courts have found that the goals of the General Allotment Act cannot be met without water rights.⁹⁸ One of the Act's goals was to pass fee title with all its accouterments to an allottee after the land was held in trust for a time.⁹⁹ This meant that the allottee eventually would have alienable property. If the promise of alienability upon termination of an allottee's trust is to have any meaning, some water rights must be transferable along with the land.¹⁰⁰

The extent of water rights that may be transferred to a non-Indian allotment purchaser must be determined by reference to the purposes of the General Allotment Act, in the same manner as the nature of an Indian allottee's water rights upon patenting of the land in fee is determined. There is no statutorily-based rationale that would preclude an allotment purchaser from acceding to all rights held by an Indian predecessor. In the preceding sec-

95. *Colville Confederated Tribes v. Walton*, No. 79-4297, slip op. at 2635 (9th Cir., June 1, 1981); *United States v. Ahtanum Irrig. Dist.*, 236 F.2d 321, 342 (9th Cir. 1956); *United States v. Adair*, 478 F. Supp. 336 (D. Or. 1979), *appeal pending*; *United States v. Hibner*, 27 F.2d 909 (D. Idaho 1928). *Cf.* *United States v. Preston*, 352 F.2d 352, 358 (9th Cir. 1965).

96. *United States v. Powers*, 305 U.S. 527, 532 (1939). The Court held that the United States could not enjoin allottees and their successors whose use of water from a private irrigation project interfered with a government irrigation project serving other parts of the reservation. It stated "we do not consider the extent or precise nature of respondents' [successors'] rights in the waters." *Id.* at 533.

97. *Winters v. United States*, 207 U.S. 564, 576 (1908). *See also Arizona v. California*, 373 U.S. 546, 599 (1963) ("most of the lands were of the desert kind—hot, scorching sands—and . . . water from the river would be essential to the life of the Indian people and to the animals they hunted and the crops they raised").

98. *United States v. Powers*, 305 U.S. 527, 533 (1939) ("the patented lands had no value for agriculture without water"); *United States v. Ahtanum Irrig. Dist.*, 236 F.2d 321, 342 (9th Cir. 1956).

99. *See F. PRUCHA, AMERICANIZING THE AMERICAN INDIANS* 83-86 (1973). Senator Dawes, sponsor of the General Allotment Act, expected that some Indians would sell their allotments to raise capital to go into business.

100. *Colville Confederated Tribes v. Walton*, 460 F. Supp. 1320, 1325 (E.D. Wash. 1978), *rev'd in part, aff'd in part*, No. 79-4297 (9th Cir., June 1, 1981). REPORT OF THE SECRETARY OF THE INTERIOR, PROCEEDINGS OF THE MOHONK CONFERENCE, H.R. DOC. NO. 75, 49th Cong., 2d Sess. 993 (1887). *See also Sondheim & Alexander, Federal Indian Water Rights: A Retrogression to Quasi-Riparianism*, 35 SO. CAL. L. REV. 1, 51 n.239 (1960).

tion it was concluded that no reserved rights should pass to an individual allottee when the trust period ends, but that water rights related to actual water use during the trust should be recognized. Conveyance of the land to a non-Indian purchaser should carry the same rights.¹⁰¹

If allottees possessed and could transfer reserved rights (or access to them) along with conveyance of their allotments, they would have a powerful incentive to sell. This would be contrary to the primary purpose of allotment legislation—providing Indians with the motivation and means to farm their own lands. Yet depriving allottees of any transferable water rights is a disincentive to investment of toil and money in the land. An allotment that has been diligently developed should command a higher price than an undeveloped allotment. Only if a right to continue using irrigation water attaches to allotments in fee will the full value of the property be realized upon its sale. The problems suggested can be avoided by treating owners of allotments in fee as having obtained a right to all water that has been used continuously on the parcel. This solution fits nicely into the prior appropriation system and places allotment successors on a par with homesteaders whose water uses and rights may be established from the time they arrive, even if a fee patent is not granted for many years.

Measure of Rights of Allotment Owners

The measure of water rights that pass to an allottee with the conveyance of a fee title, and that a non-Indian successor may take, should also be comparable to the water rights a homesteader would have established and would have gained a right to convey. Reserved rights measured by all of an allottee's present and future needs or by all irrigable acreage would certainly be inappropriate for the reasons already discussed.¹⁰²

Nevertheless, a number of courts have found conveyance of rights measured by these standards or variations of them. Some cases have suggested the applicability of reserved rights so long as an allotment is Indian-owned but have used a modified reserved rights approach for non-Indian successors.¹⁰³ The right is based on all acreage under irrigation at the time of conveyance, and all that may in the future be placed under irrigation "with reasonable diligence." This approach cuts off the perpetual open-endedness of the reserved rights doctrine by submitting allotment successors to the prior appropriation doctrine, subject to their perfection of any "reserved

101. There is little reason for an Indian to seek a fee patent except to facilitate a conveyance, as the land then becomes taxable. 25 U.S.C. § 349 (1976). Thus, most allotments are transferred directly from the Indian allottees who hold them in trust to a non-Indian purchaser in a transaction approved by the Secretary, rather than by a two-step transaction in which the Secretary first issues a fee patent and then the Indian patentee executes a deed. See 25 C.F.R. § 121 (1980), on procedures for patenting in fee and selling allotments. It must be assumed, however, that any direct sale conveys the same interest the Indian allottee would take by a fee patent.

102. See text accompanying notes 92-93 *supra*.

103. *Colville Confederated Tribes v. Walton*, No. 79-4297, slip op. at 2636 (9th Cir., June 1, 1981); *United States v. Adair*, 478 F. Supp. 336, 349 (D. Or. 1979); *United States v. Hibner*, 27 F.2d 909, 912 (D. Idaho 1928).

rights" during the period of reasonable diligence. Doubtless, this modified reserved rights theory can produce acceptable results in particular fact situations, but it is not founded on principle. In the first case to embrace it, *United States v. Hibner*,¹⁰⁴ the court saw the approach as the only alternative to avoid finding a full conveyance of the allottee's reserved rights, a result that could foster delays in applying water to beneficial uses, contrary to the policy that animates western water law. The alternative recommended here, recognition of appropriative rights to the extent water actually has been used, was not considered. There is no doctrinal basis for allowing post-conveyance perfection of preferred rights outside the appropriation system and furthermore, that approach leads to policy problems. *Hibner* would allow an aggressive non-Indian purchaser on an overappropriated stream, rights to place an entire parcel under irrigation, even if the Indian grantor made no use whatsoever of the land. This creates incentives for prospective purchasers of Indian allotments and an attractive inducement for allottees to sell. The rewards are as great for the idle as they are for sellers who have shown dedication to agricultural development and diligence.

In *Colville Confederated Tribes v. Walton*¹⁰⁵ the Ninth Circuit Court of Appeals reached the same result as the *Hibner* court. It reversed a portion of the district court's decision that had limited non-Indian successors to allotments to rights measured by the extent of use before they purchased the land.¹⁰⁶ The appeals court did not discuss the sound policy behind equating water rights in allotments held in fee to those of homesteaders upon which the lower court had relied.

Priorities of Allotment Owners

The question of what priorities attach to water rights of allottees and their successors is closely related to the measure of those rights. The same principles and policies apply.

Cases holding that the fee owner of an allotment takes a reserved right adhere to a priority as of the date of the reservation¹⁰⁷—the usual priority for reserved rights.¹⁰⁸ Only appropriations that predate a reservation's establishment would be superior to these rights. As is the case with the application of reserved rights principles to measure the quantity of an individual right, the date-of-reservation priority does not serve the purposes of Congress. Sales of allotments are spurred by the attraction of a right that can be originated many years after a reservation is created, but that will relate back

104. 27 F.2d 909, 912 (D. Idaho 1928).

105. *Colville Confederated Tribes v. Walton*, No. 79-4297, slip op. at 2636 (9th Cir., June 1, 1981).

106. *Id.* reversing 460 F. Supp. 1320 (E.D. Wash. 1978), in which the district court said: "In keeping with the purpose of the General Allotment Act, the allottee, like the non-Indian homesteader, must be permitted to convey with his land the water right which he was using at the time of the conveyance. . . ." *Id.* at 1328.

107. See *United States v. Adair*, 428 F. Supp. 336 (D. Or. 1979); *United States v. Hibner*, 27 F.2d 909 (D. Idaho 1928).

108. See text accompanying notes 22-23 *supra*.

to the reservation's establishment date. This is also true under the modified reserved rights approach that allows purchasers to perfect rights after the transfer during a "due diligence" grace period. There is simply no justification for such a windfall to purchasers.¹⁰⁹ It upsets the order in state water allocation systems and creates problems vis-a-vis other reserved rights. It could impede a tribe's assertion of reserved rights for non-irrigation purposes. The most diligent allottees and the successors to the most dilatory would become equal competitors for water.¹¹⁰ Furthermore, if it is correct that the Secretary's section 7 power ends with respect to fee lands, trust allottees would remain under secretarial control while fee owners having the same priority date would be unregulated. These effects are unwarranted by the General Allotment Act. They put successors to allotments in a much more favorable position than their neighbors on homesteads whose right to water depends solely upon their appropriations.¹¹¹

Other possibilities would be to fix the priorities of successors to allotments as of the date an allotment transfers out of trust or the date of its transfer from Indian hands. Both suggestions have the same arbitrary character as fixing all priorities of allottees and their successors as of the date of the reservation. Prospective sellers would be unduly prejudiced by assigning a recent priority date if water had been used on the allotment continuously for many years. It is tantamount to saying that the allotment passes with no water rights at all, because in most situations a purchaser could establish appropriative rights soon after buying the land.

No decision has recognized the wisdom of fixing the priority date of non-Indian successors to allotments at the date of the first continuous appropriation.¹¹² Such an approach is supported by the policy and purpose of the General Allotment Act and meshes well with the appropriation system.

Status of Allotments Returned to Trust After Fee Patenting

Many allotments once patented in fee eventually return to trust status. Some tribes have programs for repurchase of formerly Indian-owned land.¹¹³ The Secretary also has authority under the Indian Reorganization Act to take land in trust that has been acquired by a tribe or individual

109. The General Allotment Act was not to benefit non-Indians. *Baileys v. Paukune*, 344 U.S. 171, 173 (1954).

110. It is curious that the court in *United States v. Adair*, 428 F. Supp. 336 (D. Or. 1979), was persuaded to adopt the date of the reservation rather than the date of appropriation because, it said, the latter approach would allow rights of the successor to be defeated "at any time by an Indian with reserved rights." *Id.* at 349. This is precisely the purpose of reserved rights. See *United States v. Walker River Irrig. Dist.*, 104 F.2d 334 (9th Cir. 1939).

111. No water rights pass on patenting of a public land as a homestead. Subsequent transfers depend entirely upon rights established by prior appropriation pursuant to state law. *California-Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 160-63 (1935).

112. *But see Colville Confederated Tribes v. Walton*, 460 F. Supp. 1320, 1328 (E.D. Wash. 1978), *rev'd in part, aff'd in part*, No. 79-4297 (9th Cir., June 1, 1981).

113. See AMERICAN INDIAN POLICY REVIEW COMM'N, *supra* note 73, at 311. Loan funds for this purpose are available. *Id.*

Indian through purchase or other means.¹¹⁴ Under the theory espoused in this article, an owner in fee could not possess or use reserved water rights. An owner would have rights equivalent to a homesteader, with the quantity and priority date based on the first continuous use of water on the land. This raises the question whether, upon the land's return to trust, the tribe has only the rights that were held by the fee owner or can reacquire a reserved right.

If a new reservation were established by congressional action accompanied by land purchases there would be two possible sources of water rights: reserved rights with a priority date as of the establishment of the reservation, and rights under the doctrine of prior appropriation that may have been established by the government's predecessors. The latter could be better rights in terms of priority (although available quantities of water might be more limited than would be desirable). Certainly on an overappropriated stream the government would choose to rely on the earlier appropriative rights, as the priority of the reserved rights would be worthless.

A tribe's rights on formerly allotted land located outside reservation boundaries that is reacquired in trust should be essentially the same as land that becomes a new reservation. The result, however, should be different when land is reacquired within the boundaries of an Indian reservation. An Indian reservation is a unique enclave, the existence of which does not depend on ownership. Many reservations contain mostly non-Indian-owned land. Fee ownership ends many special rights,¹¹⁵ but the territory remains within the reservation and is "Indian country" for purposes of jurisdiction.¹¹⁶ This is a marked difference from federal reservations set aside for purposes such as parks, forests, or military bases where inholdings may be accessible through a reservation but are not a part of it.

Reserved water rights of an Indian reservation may be quantified by determining the amount of water sufficient to fulfill the purposes of the reservation. If a purpose was to make Indians economically self-sufficient, a huge quantity of water could be demanded for an industrial use on a single parcel of land. Thus, the amount of water to which the tribe was entitled would not depend on how much reservation land Indians owned, but would depend only upon the requirements of reservation Indians. So long as the tribe elects to pursue agriculture as a means of obtaining self-sufficiency, the quantity of water that can be used to that end at any time depends upon the amount of irrigable land that Indians own.¹¹⁷ As land ownership fluctuates, so does the amount of irrigation water Indians can use on their reservation.

114. 25 U.S.C. §§ 464-465 (1976). The Secretary was also authorized by § 465 to purchase lands within reservations to be held in trust for Indians, but little money was appropriated for this purpose. See AMERICAN INDIAN POLICY REVIEW COMM'N, *supra* note 73, at 309-10. See also 25 U.S.C. § 1466 (1976).

115. See notes 90-92 *supra*, and accompanying text.

116. 18 U.S.C. § 1151 (1976). *E.g.*, *Seymour v. Superintendent*, 368 U.S. 351 (1962).

117. *Arizona v. California*, 373 U.S. 546 (1963).

Accordingly, Indians may expect a court to account for this fluctuation in quantifying reserved irrigation rights.

No reported case has addressed the method for treating lands that have gone out of Indian ownership but which are reacquired. The approach the special master in *Arizona v. California*¹¹⁸ used to quantify reserved rights for agriculture is instructive, however. There, the master excluded patented lands within Indian reservations from the calculation of "irrigable acreage" although they were plainly irrigable and within reservation boundaries.¹¹⁹ The Supreme Court upheld the master's findings and retained jurisdiction of the case in order to make later modifications. In 1979 it granted a motion for a supplemental decree that was made necessary by changes in the factors used to calculate the irrigable acreage within the reservations.¹²⁰

Water rights of allotments within reservations that return to trust status should be the same as they were before the land was taken out of trust. If there had been a quantification of the tribe's reserved rights using the irrigable acreage formula, substantial net changes in Indian trust ownership or irrigable acreage would necessitate a revised quantification. The priority date would be the date of the reservation so long as the land remained within the boundaries of an unextinguished reservation.¹²¹

Rights established by appropriation no longer would be needed on an allotment returned to trust ownership. Because the tribe or individual owner of the land in most cases would have superior rights under the reserved rights doctrine, no transfer of the appropriative right would be necessary. Where, however, the reservation had been extinguished, the appropriative right predated the reservation, or the allotment was located outside a reservation, the tribe or individual would most likely attempt to insure that any

118. *Id.*

119. See, e.g., Findings of Fact and Conclusions of Law re Fort Mohave Reservation, Report of Simon H. Rifkind, Special Master 279-87, *approved*, *Arizona v. California*, 373 U.S. 546, 600 (1963). The report refers simply to "all of the practicably irrigable acreage on the Reservation." Report of Simon H. Rifkind, Special Master 265, *Arizona v. California*, 373 U.S. 546 (1963). But the Findings of Fact and Conclusions of Law make it clear that the calculation was to exclude any patented land. The issue was never discussed in the master's report. *Cf. id.* at 287, where the master, in resolving a Fort Mohave boundary dispute (disapproved, *Arizona v. California*, 373 U.S. 546, 601 (1963)) stated that patented land in the disputed area "cannot be considered as part of the irrigable acreage of the Reservation, title having passed from the United States. See *United States v. State Inv. Co.*, 264 U.S. 206, 212 (1924)." *State Investment* holds that the United States may not interfere with private rights in a resurvey of public lands. Thus, the master seems to have recommended exclusion of these lands from the reservation, not just from its irrigable acreage.

120. *Arizona v. California*, 433 U.S. 419 (1979). The principal change has been the determination of reservation boundaries that were uncertain, but the special master will also consider evidence introduced by the government and the tribes as to lands that were omitted from the practicably irrigable lands within the original boundaries. Memorandum and Report of Elbert P. Tuttle, Special Master 41, *Arizona v. California*, 433 U.S. 419 (1979). The lands allegedly "omitted" were primarily those not considered irrigable at the time of the quantification. The parties have not based their claims on any lands within the reservations, title to which was reacquired by tribes.

121. Reserved water rights may continue even on an extinguished reservation if they are necessary for unextinguished Indian rights. In *United States v. Adair*, 478 F. Supp. 336 (D. Or. 1979), the court held that rights to water necessary to sustain wildlife habitat continued even though the reservation had been terminated, because Congress had not terminated the Indians' hunting and fishing rights.

transfer of the land to trust would preserve the validity of the water rights under state law.

As appropriative rights on fee title reservation lands are given up on the land's return to trust, water conceivably would be made available for other appropriators. But if the Indians continued the same agricultural uses there would be no practical difference. Indeed, an appropriator senior to the holder of appropriative rights formerly used on an allotment returned to trust would suffer if the Indians elevated the allotment's priority by assertion of their reserved rights, thereby relegating the non-Indian appropriators to a priority for which the supply of water was inadequate. Further, the lowest priority appropriators potentially could be hurt if more water was used on an allotment after it returned to trust than was used while it was in fee.

Regulation of Water Rights of Allotment Owners

Indian tribes may exercise sovereign powers over their members and their territory. This sovereignty is inherent in the tribes and exists independent of state law.¹²² Federal law also operates to protect tribal governing powers from invasion by a state through the application of its laws within the sphere of sovereignty reserved to the tribes.¹²³ Although there is a presumption against intrusion of state laws into Indian country, it can be overcome by sufficiently weighty state interests in the face of relatively insignificant impacts on tribal self-government.¹²⁴

Following established principles, it can be said with confidence that the tribes retain the power to govern use of their reserved water rights.¹²⁵ Under the analysis offered in this article the power reaches the rights of allottees, as well as all other tribally held rights, because until allotments are removed from trust, allottees make use of tribal reserved rights. The federal government also has authorized secretarial regulatory authority over these matters that may preempt inconsistent state law.¹²⁶ Authority can be delegated to tribes expressly, or delegation may be implied from secretarial approval of an appropriate tribal water code.¹²⁷ Equally clear is the regulatory authority

122. *E.g.*, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978); *United States v. Wheeler*, 435 U.S. 313, 322-26 (1978).

123. *E.g.*, *White Mountain Apache Tribe v. Bracker*, 100 S. Ct. 2578 (1980); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973).

124. *See* *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980).

125. This would include regulation of reserved water rights used by non-Indians on leased trust land. *See* *Montana v. United States*, 101 S. Ct. 1245 (1981) (dictum). The right of Indians to lease their lands, and with them to license use of reserved water rights is not debatable. *See* notes 68-74 *supra*, and accompanying text; *Skeem v. United States*, 273 F. 93, 96 (9th Cir. 1921); 25 U.S.C. § 415.

126. *E.g.*, *White Mountain Apache Tribe v. Bracker*, 100 S. Ct. 2578 (1980).

127. *See* *United States v. Mazurie*, 419 U.S. 544 (1975). Regulations governing secretarial approval of tribal water codes have been proposed. 46 Fed. Reg. 944 (1981) (to be codified at 25 C.F.R. part 260). The regulations are intended to fulfill the Secretary's authority under § 7 of the General Allotment Act and require that tribal codes provide for a "just and equal distribution" of irrigation waters.

of states over former allotments outside reservation boundaries.¹²⁸

More difficult questions are posed in the case of Indians and non-Indians who hold fee lands within reservations. A resolution depends on the degree to which a tribe may regulate the activities of non-Indians on its reservation and the extent to which federal laws and regulatory authority of the Secretary or the tribe preempt state law. The potential for preemption would be increased if the tribe could regulate non-Indians. Although the Supreme Court held in *Montana v. United States*¹²⁹ that an Indian tribe may not regulate fishing by non-Indians on fee land on a reservation bordering a river, the bed of which was owned by the state, it left the door open to tribal control of water use by non-Indians. The *Montana* Court stated that "[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."¹³⁰ The Court noted that tribal reserved rights to waters for their reservations followed as a "corollary" to the stated principles.¹³¹ This raised a strong inference that regulation of all water used on the reservation may be within a tribe's inherent authority. The Crow Tribe in *Montana* was unable to show that non-Indian hunting and fishing so threatened the tribe's political or economic security as to justify tribal regulation.¹³² On most reservations the tribal interest in water rights, which the *Montana* Court acknowledged was related to the factors needed to allow tribal regulation of non-Indians, presumably would dictate a different outcome.

It is assumed that tribes will recognize rights in non-Indians to make use of "surplus" waters—those waters not needed by the tribe. A tribe's interest in regulating non-Indians ordinarily would not extend to refusing to acknowledge rights acquired in surplus waters under state law doctrines. But tribal interests in the methods by which water is determined to be "surplus" and by which water use is controlled on the reservation suggest an arena for tribal regulation of non-Indians.

Whether tribal interests or the application of tribal water laws to non-Indians on the reservation preempt state law depends upon the ability of the two systems of law to co-exist compatibly in light of federal protection of tribal self-government and of congressional intent expressed in relevant legislation. State law cannot apply if it would inhibit effectuating the purposes of the General Allotment Act.¹³³ Even in states that have accepted a congressional grant of jurisdiction over Indian country, federal law expressly prohibits state regulation of Indian water rights if it would be "inconsistent

128. See *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973).

129. 101 S. Ct. 1245 (1981).

130. *Id.* at 1258.

131. *Id.* at 1258 n.15.

132. *Id.* at 1258-59.

133. *United States v. Rickert*, 188 U.S. 432 (1903).

with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto," and no exercise of state jurisdiction may result in "the alienation, encumbrance, or taxation of any real or personal property, including water rights belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States. . . ." ¹³⁴ Aware of important state interests, Congress has provided a means for joining the United States in proceedings to adjudicate water rights in state court, ¹³⁵ and this has been held to apply to reserved water rights of Indian tribes. ¹³⁶ While this does not deprive federal courts of their jurisdiction to adjudicate reserved rights, it does allow states to bring water rights adjudications in state courts. Using these available vehicles for determining the water rights of Indians, a state should be able to fulfill its interest in establishing priorities and quantifying reserved rights. The question of regulating use of surplus waters is not otherwise addressed by federal law.

In order to determine that application of a state's regulatory scheme to non-Indians is preempted, it must be shown that it would directly conflict with the tribe's ability to regulate Indian water rights. If it does, the state regulatory scheme will infringe upon the tribe's authority over reservation affairs—a result barred by the preemptive force of federal protections of tribal sovereignty. ¹³⁷ A finding that state law has been preempted in a particular case depends upon the circumstances, especially the interests of the two governments. The Supreme Court has suggested that while tribal interests in taxing non-Indians simply to raise revenue may not trigger preemption of state law, a tribe's legislation in pursuit of a regulatory or distributive purpose may be sufficient. ¹³⁸

Tribal interests are strong in assuring that water rights on the reservation are consistently determined and administered. In denying the authority of a state to regulate waters within an Indian reservation, the Ninth Circuit Court of Appeals recognized the importance of sovereignty over water regulation:

A water system is a unitary resource. The actions of one user have an immediate and direct effect on other users. The Colvilles' complaint in the district court alleged that the Walton's appropriation [of surplus waters] from No Name Creek imperiled the agricultural use of downstream tribal lands, and the trout fishery, among others. . . .

Regulation of water on a reservation is critical to the life style of its residents and the development of its resources. Especially, in arid and semi-arid regions of the West, water is the life-blood of the community. Its regulation is an important sovereign power. ¹³⁹

134. 25 U.S.C. § 1322(b) (1976); 28 U.S.C. § 1360(b) (1976).

135. 43 U.S.C. § 666 (1976).

136. *Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800 (1976).

137. *E.g.*, *Williams v. Lee*, 358 U.S. 217 (1959) and authorities cited in note 17 *supra*.

138. *Cf. Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 158-59 (1980) (holding that tribal cigarette taxes imposed for revenue and not for distribution or regulatory purposes presented no direct conflict with state cigarette taxes).

139. *See Colville Confederated Tribes v. Walton*, No. 79-4297, slip op. at 2637 (9th Cir., June 1,

In that case the stream in question was entirely within the reservation. Where waterways or aquifers transcend reservation boundaries, tribal interests may be less significant and state interests weightier, making preemption less likely.

At first it might seem that application of state laws regarding permits, definitions of beneficial use, or abandonment to other than reserved rights would not substantially infringe upon tribal interests. A state limit on the maximum amount of water that can be diverted by an appropriator poses no problem. And issuance of a state permit to a non-Indian which is "subject to existing rights," by its terms would appear to have little impact on tribal rights or authority.¹⁴⁰ But if tribal regulatory schemes are frustrated or there are contradictory determinations of the quantity of water available for appropriation, conflicting state law may be preempted.¹⁴¹ The absence of a consistent, unified system of water management itself could interfere with self-government. Because the state would not have authority over reserved rights on the reservation, the only unified management would have to be provided by the tribe or the federal government.¹⁴²

Defining the limits of state regulatory authority over non-Indians with rights to use surplus water on an Indian reservation by reference to comparative interests of a state and a tribe and ascertaining the probable impacts on tribal self-government is fraught with uncertainty. The Supreme Court's prescribed approach to state-tribal jurisdictional determinations invites continual litigation as new fact situations arise, especially in the area of regulating water rights. A unified water regulatory system could best be achieved by negotiation as the issue arises on specific reservations, but this would demand a degree of mutual trust that is unusual, to say the least, in jurisdiction disputes. A possible solution would be federal legislation defining the relative limits of tribal and state authority. Of course the legislative solution

1981). The court did not consider whether a comprehensive tribal water code covering all waters on the reservation had preemptive force, finding that the establishment of the reservation was itself sufficient to preempt state authority. The Secretary's proposed regulations for approval of tribal water codes allow control only of "reserved water rights." *Supra* note 127; 46 Fed. Reg. 945, § 260, 3(a)(3) (1981).

140. *See Colville Confederated Tribes v. Walton*, 460 F. Supp. 1320, 1332 (E.D. Wash. 1978). The Ninth Circuit Court of Appeals reversed on this point. No. 79-4297, slip op. at 2637 (9th Cir., June 1, 1981).

141. *Cf. United States v. Washington (Phase II)*, 506 F. Supp. 187 (W.D. Wash. 1980) holding that Indian off-reservation treaty fishing rights gave rise to an implied right to protection from state actions and projects that may cause environmental degradation of the treaty fishery.

142. One district court has so held. *United States v. Bel Bay Community & Water Ass'n*, No. 303-71 C 2 (W.D. Wash., Mar. 3, 1978) (order granting partial summary judgment). The decision later was vacated following the Supreme Court's decision in *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978) that tribes lack criminal jurisdiction over non-Indians. Subsequent cases indicate that tribal civil regulatory jurisdiction exists over non-Indians for a number of purposes. *See* notes 124-25 *supra*, and accompanying text. *See generally* Collins, *Implied Limitations on the Territorial Jurisdiction of Indian Tribes*, 54 WASH. L. REV. 479 (1979).

In absence of federal legislation, federal regulatory authority over Indian reserved water rights would be limited to assuring just and equal distribution of irrigation water among Indians, as provided in § 7 of the General Allotment Act, 25 U.S.C. § 381 (1976). As a practical matter the Secretary of the Interior exercises considerable regulatory authority over water on reservations used by both Indians and non-Indians because most irrigation systems there are federal projects.

would have to provide a means for considering variables such as regulatory capability of the tribal government, relative concentrations of Indian and non-Indian land, presence of federal irrigation systems, and the extent to which the constituents of the two governments rely on specific waterways.

CONCLUSION

Neither federal statute nor established legal principle dictates answers to the many questions about water rights raised by individual ownership of land within Indian reservations. The "best" solutions are those that accommodate the objectives of the General Allotment Act and Indian treaties and that enable Indians to live upon and develop their reservations while maintaining political autonomy to the degree they find suitable. The *Winters* reserved rights doctrine was a judicial solution calculated to facilitate the apparent intent of Congress. The refinements and extensions of this doctrine needed when reservation land becomes individually owned also are within judicial competence. Choices must be made deliberately, with cognizance of the ramifications of each possible approach. This article has suggested appropriate resolutions for the most important questions likely to arise in the interplay of tribally owned reserved water rights and of private interests in reservation lands.