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Indian Water Law: The Continuing Jurisdictional Nightmare

Marte Lightstone

INDIAN WATER LAW: THE CONTINUING JURISDICTIONAL NIGHTMARE

INDIAN LAW—REGULATORY JURISDICTION: WATER LAW—QUANTIFICATION AND PRIORITY DATES—The Ninth Circuit set priority dates and quantification limitations on water rights appurtenant to lands reacquired by the Spokane Indian Reservation and returned to tribal trust status. The Ninth Circuit also approved regulatory jurisdiction of the State of Washington over excess water use by non-Indians on the Spokane Indian Reservation. *United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984).

The spring-fed waters of Chamokane Creek originate north of the Spokane Indian Reservation and flow south along its eastern boundary over Chamokane Falls through a gorge.[1] Chamokane Creek flows into the Spokane River which joins the Columbia River and eventually empties into the Pacific Ocean. The lands bordering Chamokane Creek within the Spokane Indian Reservation consist of a patchwork of Indian and non-Indian ownership.[2] In addition, some of the reservation land that had passed into non-Indian ownership has been reacquired by the tribe. This mixture of land ownership, combined with the competition for water within the western Chamokane Basin, provides for the basis of controversy in *United States v. Anderson*.[3]

1. Chamokane Creek is part of a hydrologic system including Chamokane Creek, its tributaries, and groundwater basin. Approximately one-half of the Chamokane groundwater aquifer is located under the reservation in an area ten miles long and two and one-half miles wide. Dellwo, *Recent Development in the Northwest Regarding Indian Water Rights*, 20 NAT. RES. J. 101, 118 (1980).

2. The tribal trust lands created by the formation of the reservation passed out of Indian ownership as a result of two co-existing federal land policies. The first federal policy allotted reservation lands to individual Indians in trust status for twenty-five years followed by deeding the land in fee to the individual Indian. Lands that were allotted to individual Indians often passed into non-Indian ownership. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 613 (1982). General Allotment Act of 1887, 24 Stat. 388 (codified at 25 U.S.C. §§ 331-58 (1982)). The second policy was the opening of surplus reservation land to homesteading by non-Indians. The Act of May 29, 1908, 35 Stat. 458. The Act of May 29, 1908 authorized the Secretary of the Interior to classify lands on the Spokane Indian Reservation remaining after allotment as either agricultural or timber lands. The surplus agricultural lands were to be opened to settlement and entry under homestead laws. The homestead policies were a companion policy to allotment. The federal government designated the homestead lands because these lands were no longer needed by the tribes. F. COHEN, *supra* at 613-14. A portion of the reservation land opened to homesteading on the Spokane Indian Reservation was never claimed and returned to tribal trust status. Act of May 17, 1958, Pub. L. No. 85-240, 72 Stat. 121 (1958). Additionally, some of the allotment lands and non-Indian homestead lands were reacquired by the tribe and returned to trust status. Act of June 10, 1968, Pub. L. No. 90-335, 82 Stat. 174 (codified as amended at 25 U.S.C. § 487 (1982)).

3. United States v. Anderson, 6 INDIAN L. REP. (AM. INDIAN L. TRAINING PROGRAM) 129 (E.D. Wash. July 23, 1979). The trial court noted that Chamokane Creek Basin may be over-appropriated.

INTRODUCTION

In 1972, the United States, acting on its own behalf and as trustee for the Spokane Indian Tribe, filed for adjudication[4] of water rights in the Chamokane Basin. The Spokane Tribe of Indians was permitted to intervene as a plaintiff.[5] The defendants included the State of Washington and all other persons and corporations having an interest in the disputed waters. The defendants' water claims relied on water rights certificates, permits or applications granted by the State of Washington. The district court held that for all lands reacquired by the tribe, the priority date for water rights is the date of reacquisition.[6] The district court also held that the State of Washington had the right to exercise regulatory jurisdiction to issue permits, applications, and certificates for water use within the external boundaries of the reservation in the absence of contrary federal law or infringement by the state on the tribe's right to self-government.[7]

United States v. Anderson[8] was an appeal of an unpublished memorandum opinion and order decided on July 23, 1979, by the United States District Court of the Eastern District of Washington.[9] Two issues were presented on appeal. In the first issue, the United States appealed the district court's decision that water rights appurtenant to reacquired reservation lands which had previously passed out of trust status were entitled to a priority date stemming from the date of reacquisition. The second issue, brought by the Spokane Indian Tribe, appealed the district court's decision that the State of Washington had regulatory jurisdiction over the use of excess water[10] by non-Indians within the Spokane Indian Reservation.

4. Adjudication is "the formal process of settling, describing and recording every water right dating from pioneer times to present." F. TRELEASE, FEDERAL-STATE RELATIONS IN WATER LAW 36-37 (1975). The purpose of adjudicating water rights is to quantify the water rights of all claimants in a given water system.

5. United States v. Anderson, 6 INDIAN L. REP. (AM. INDIAN L. TRAINING PROGRAM) (E.D. Wash. July 23, 1979).

6. *Id.*

7. The district court also found that there was a reservation of water right in sufficient quantity fo fulfill the purposes for which the reservation was created. The court upheld water rights for irrigation and fishing and recognized that preservation of fishing rights would also result in preservation of the aesthetic and recreational quality of Chamokane Creek. Finally, the trial court appointed a water master to carry out and enforce its decision. A water master is appointed by the court under Federal Rules of Civil Procedure to report and perform particular acts upon those issues directed by the court. 5A J. MOORE, MOORE'S FEDERAL PRACTICE 53-1 (1985).

8. 736 F.2d 1358 (9th Cir. 1984).

9. United States v. Anderson, Civil No. 3643, 6 INDIAN L. REP. (AM. INDIAN L. TRAINING PROGRAM) 129 (E.D. Wash. July 23, 1979); Motions to amend the judgment were denied, United States v. Anderson, Civil No. 3643 (Magistrate Dec. 21, 1981); United States v. Anderson, Civil No. 3643, 9 INDIAN L. REP. (AM. INDIAN L. TRAINING PROGRAM) 3137 (E.D. Wash. Aug. 23, 1982).

10. Excess water would be the water available after tribal water rights are adjudicated and quantified. The Ninth Circuit recognized that the state may regulate the use by non-Indian fee owners of excess water. The permits issued by the state would only be for excess water and may represent rights that are empty. 736 F.2d at 1365.

Court's Opinion

The Ninth Circuit reversed the district court on the setting of priority dates for reacquired tribal land. The court decided that non-Indian allotment lands reacquired by the tribe with perfected water rights carry a priority date stemming from the date of the formation of the reservation.[11] The priority status of non-Indian allotment lands with lost or abandoned water rights was not specifically decided by this court. In dictum, the court indicated that the priority of water rights on allotment lands with lost or abandoned water rights would stem from the date of reacquisition.[12] Those formerly Indian lands within the Spokane Indian reservation which were homesteaded and reacquired by the tribe with perfected water rights were held to have priority dates as established by state law. Finally, those homestead lands with lost or abandoned water rights which were reacquired by the tribe were ruled to have priority dates stemming from the date of reacquisition.

The Ninth Circuit further affirmed the district court opinion on the second issue on appeal and found that the State of Washington had regulatory jurisdiction over use of excess Chamokane Basin waters on lands held by non-Indians within the Spokane Indian Reservation. The case was remanded for further proceedings in accordance with the decision.

This case note examines both issues in the Ninth Circuit's decision regarding first, priority dates and quantification of water rights on reacquired lands, and second, state regulatory jurisdiction of water rights on non-Indian land holdings within the reservation. A major problem with the Court's analysis in *United States v. Anderson* is the blurring of these two distinct issues. Therefore, this case note will examine each issue separately and highlight their differences.

PRIORITY DATES AND QUANTIFICATION OF WATER RIGHTS ON REACQUIRED LANDS

Background

Western water law is based on customs and rules developed by the early miners. The miners established "the rule known as prior appropriation—the law of the first taker."[13] The first person to divert water and apply it to beneficial use had first priority.[14] Each of the western states eventually developed laws and regulations controlling water rights. Al-

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

12. *Id.* at 1362.

13. F. TRELEASE, *supra* note 4, at 22. The system of water appropriation in the western United States is very different from the riparian doctrines of the eastern United States. *Id.* The basis for this distinction was that the west was constrained by the scarcity of water. *Id.* at 21.

14. The custom of prior appropriation was recognized by the courts in *Irvin v. Phillips*, 5 Cal. 140 (1855).

though each state has developed its own set of water laws, the basic principles of the doctrine of prior appropriation, including the requirement that the appropriated water be put to a beneficial use, act as a common denominator.[15] Water rights are generally created by state governments as an exercise of their power over the property rights of their citizens.[16]

The federal government entered into water regulation later than the states, and fewer federal laws have been enacted relating to the water rights of individuals.[17] Federal water law has primarily covered federal projects[18] and federal lands. Only in connection with some activities on navigable waters does the federal government consider regulating the water rights and activities of private individuals. Indian water rights are also part of the federal law and are based on the creation of Indian reservations.[19] The federal government is viewed as a trustee of Indian lands and as such has a duty to protect Indian rights.[20]

Indian water rights have been the source of constant conflict between state and federal authority. Water rights for Indian reservation lands are not encompassed within the state-regulated prior appropriation system.[21] Indian water rights are based on the federal reserved rights doctrine set forth in *Winters v. United States*.[22] In *Winters* the Supreme Court held that the recognition of the Fort Belknap Reservation by the federal government included the waters of the Milk River for necessary agricultural use by the Indians. The priority date of *Winters* water rights is based on the date of the creation of the reservation.[23]

15. F. TRELEASE, *supra* note 4, at 29. The basic principles of prior appropriation include: (1) beneficial use of water, not ownership, is the basis of the right to use water and water may be used in the location where it is needed, not merely at stream bank; (2) water right is a defined quantity of water; (3) priority of water use, determined by the time of acquisition of water rights, is the basis for the division of water among appropriators when there is not enough water for all appropriators; and (4) an appropriation of a water right is transferrable and of indefinite duration; however, the water right must be put to beneficial use or it may be terminated by abandonment or forfeiture. *Id.* at 30-34.

16. *Id.* at vii.

17. *Id.* at viii & 9.

18. Federal projects may include dams, hydroelectric projects, and flood control projects.

19. R. CLARK, WATERS AND WATER RIGHTS § 140 (1967).

20. F. COHEN, *supra* note 2, at 596-97. The United States has failed to secure, protect, and develop adequate water supplies for many Indian tribes. *Id.* at 596-99. The federal government has conflicting responsibilities to protect Indian water interests as well as secure its federal water interests. *Id.*

21. Brookshire, Merrill & Watts, *Economics and the Determination of Indian Reserved Water Rights*, 23 NAT. RES. J. 749, 750 (1983) [hereinafter cited as Brookshire]. State water laws do not govern the use of water by Indians and Indian tribes on Indian lands. United States v. McIntire, 101 F.2d 650, 654 (9th Cir. 1939).

22. 207 U.S. 564 (1908).

23. The date of the formation of the reservation is usually earlier than any other appropriator in a basin. Thus, Indian water rights typically predate the rights of other water users. Brookshire, *supra* note 21, at 750.

The alienation of reservation land through the federal policies of allotment[24] and homesteading[25] created questions regarding the status of water rights on those alienated lands. Several recent court decisions have addressed the problems of land passing out of Indian allotment ownership and into non-Indian ownership.[26] *Colville* and *Adair* decided issues involving the priority dates and quantification of water rights on Indian allotment lands acquired by non-Indians. These courts found that on the allotment lands, the full quantity of Indian rights transferred to the non-Indian purchaser along with the priority date as of the creation of the reservation. However, the courts also found important limitations on the non-Indian owner. Once the non-Indian acquires water rights in an allotted property, these rights are limited by the number of irrigable acres the non-Indian owns and the quantity of water utilized at the time of transfer plus any additional water that the non-Indian may appropriate with due diligence. This water right may also be lost by non-use.

Indian lands also passed out of tribal status and into non-Indian ownership through the federal policy of opening lands for homesteading on the reservation.[27] Tribal lands which were opened to homesteading were not available to Indian purchasers because homestead lands were restricted to United States citizens.[28] The homestead lands, acquired by federal patent, separated from tribal trust status, thus became part of the public domain.[29] In *California Oregon Power Co. v. Beaver Portland Cement,*[30] the Supreme Court, relying on the Desert Land Act of 1877, held that land acquired by federal patent from the public domain did not include water rights and that the acquisition and retention of water rights on these lands were subject to state regulatory jurisdiction.[31] Water rights on these homesteaded lands would have to be perfected under state laws.

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24. *See supra* note 2.

25. *Id.*

26. United States v. Adair, 723 F.2d 1394 (1983); Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir. 1980), *cert denied,* 454 U.S. 1092 (1981). For early cases discussing the transfer of water rights on allotment lands to non-Indian owners, see United States v. Hibner, 27 F.2d 909 (D. Idaho 1928) (non-Indian allotment purchaser obtains water right to actual acreage under irrigation and any additional acreage which may be placed under irrigation with reasonable diligence with a priority date equal to the Indian allotee); United States v. Ahtanum Irrigation Dist., 236 F.2d 321 (9th Cir. 1956) (non-Indian successors to original allotees receive the same water rights interests as the original allotees).

27. *See supra* note 2.

28. F. COHEN, *supra* note 2, at 615.

29. Pelcyger, *Indian Water Rights: Some Emerging Frontiers,* 21 ROCKY MTN. MIN. L. INST. 743, 759 (1975).

30. 295 U.S. 142 (1935).

31. *Id.* The Court, however, noted that navigable waters were exempt from state regulatory jurisdiction in favor of federal regulatory jurisdiction. *Id.* at 162. The implied reservation of waters for Indian reservations does not deprive Congress of its power over navigational waters. 2 R. CLARK, *supra* note 19, at § 144.1.

ADDRESSING THE TRANSFER PROBLEM

The Ninth Circuit in *Anderson* initially examined water rights on allotted and homestead lands which had passed from non-Indian ownership back into tribal trust status. In considering the allotment lands, the Ninth Circuit relied upon precedents set forth in *Colville Confederated Tribes v. Walton*[32] and *United States v. Adair*.[33] These courts determined that allotment lands which passed into non-Indian ownership have been given the quantity of water in use at the time of transfer, plus any additional water that may be appropriated with due diligence. These water rights were also found to be limited by the number of practicably irrigable acres owned by the non-Indian.[34] The *Colville* and *Adair* cases also recognized that water rights on allotment lands owned by non-Indians may be lost through failure to perfect the appropriation by the non-Indian successor. Following the reasoning of the *Colville* and *Adair* opinions, the Anderson court found that only those rights that had not been lost through non-use might be reacquired, or conversely, that the Indian tribe acquired only those rights attributable to the previous owner.[35] In regard to the homesteaded property reacquired by the tribe, the Ninth Circuit relied on *California Oregon Power Co. v. Beaver Portland Cement*[36] for the proposition that when reservation property is severed for homesteading the *Winters* rights on those lands are terminated. The court found that water rights on the homestead lands must be perfected through the doctrine of prior appropriation under state law. The Ninth Circuit in *Anderson* followed the logic of prior court decisions to hold that homestead lands reacquired by the tribe contain only those water rights that have been perfected by the prior owner.[37] The transfer of regulatory power over the water right, if any, is not addressed by the court. The Ninth Circuit recognized reacquired homestead lands without water rights as a newly formed federal reservation and found that the implication of *Winters* rights set a priority date of the time of reacquisition.[38] The court failed to define the meaning of an implication of *Winters* rights.

ANALYSIS

The court in *Anderson* carefully addressed the issues of the priority and quantity of water rights on reacquired lands. The court's analysis

32. 647 F.2d 42.

33. 723 F.2d 1394.

34. The practicably irrigable acreage criterion for quantifying Indian water rights was established in Arizona v. California, 373 U.S. 546, 601 (1963). In *Arizona* the Supreme Court defined practicably irrigable acreage as "the various acreages of irrigable land which the Master found . . . to be reasonable." *Id.*

35. 736 F.2d at 1362.

36. 295 U.S. 142.

37. 736 F.2d at 1363.

38. *Id.*

served as a logical extension of prior rulings on similar problems, but the court failed to critically analyze the reasoning of the prior opinions.

In *Anderson,* the Ninth Circuit ruled that, upon reacquisition of non-Indian allotment lands, the tribe received the quantity of water that had been used with due diligence by the previous owner. The Ninth Circuit stated that the full measure of the Indian water right passed from the Indian allottee to the non-Indian purchaser and this water right was reacquired by the tribe.[39] The court, however, explained that if the non-Indian successor did not appropriate the full measure of the predecessor Indian allottee's reserved water right, then the water right would be reduced to the measure used by the non-Indian successor.[40] Therefore, the tribe reacquires only those rights that have not been lost. This holding indicates a confusion on the court's part as to whether the water right is a reserved *Winters* right or an appropriative right.

This decision, in effect, makes the water rights on reacquired allotment lands an appropriative water right dependent on the diligence and efforts of non-Indian transferees. When these rights are reacquired by the tribe the court has limited the water rights attached to these lands.[41] The court has failed to attach any *Winters* rights to the reacquired allotment lands. Furthermore, the court did not analyze the situation when allotment lands are returned from non-Indian ownership without any water rights. Would any water rights attach to the allotment lands? Additionally, the prior court opinions did not indicate which sovereign would supervise the appropriation of the non-Indian water right. However, it may be implied from the court's language that the state would regulate the appropriation. The *Anderson* court further compounded that omission of not determining which sovereign had jurisdiction over the water rights by recognizing and transferring that undefined right back to the tribe.[42]

The courts decision on the homestead lands reacquired by the tribe actually affected only 28.7 acres which the trial court found to be prac-

39. *Id.* at 1362.

40. *Id.*

41. 1,798 acres of allotment lands were restored to tribal trust status on the Spokane Indian Reservation. 562 acres were found to be practicably irrigable by the lower court and the water rights for these lands would carry a priority date of 1877. The district court awarded a reserved right of 1,686 acre-feet of reserved water to the practicably irrigable allotment acreage restored to the tribe. This indicates a reserved water right, but neither the district court nor the court of appeals considered how this conflicted with the reacquirement of appropriation on reacquired allotment lands. The entire Spokane Indian Reservation was found by the lower court to contain 8,460 acres of practicably irrigable land, which consisted of 1,880 acres of bottomland and 6,580 acres of benchland. United States v. Anderson, 6 INDIAN L. REP. (AM. INDIAN L. TRAINING PROGRAM) 129 (E.D. Wash. July 23, 1979).

42. There is a limit to the expansive nature of the water rights held by non-Indian owners of allotment lands because of the requirement that the water right is limited by the number of practicably irrigable acres and that the non-Indian appropriate the water with due diligence. These lands, however, carry a priority date as of the creation of the reservation. This may disrupt other appropriators in the basin and create competition with the tribe.

ticably irrigable.[43] These lands contained no appropriated water right because they were lands opened for homesteading, but never claimed. These lands, according to the court's decision, would carry a priority date of 1958, the date of reacquisition. This late priority date, in an overappropriated water basin, would effectively bar the tribe from obtaining water for use on these lands.[44] Therefore, in this case, the 28.7 acres of reacquired land will have no water.

Apparently very few acres will be affected by the late priority date in this case. However, on other reservations where more land is reacquired from homestead status, the priority date may severely limit the tribe's ability to govern itself and its economic development. The court makes water rights on lands severed from the tribe for homesteading dependent on the diligence of the homesteaders. For lands never homesteaded, or those without perfected water rights, there would be essentially no water for use on the land because of the late priority date.

The *Anderson* decision is in conflict with federal goals of reservation self-sufficiency. Self-determination of the tribes is based on the notion of Indian policy-making centered at the tribal government level.[45] A major goal of self-determination is the economic development of the reservation.[46] Many programs have been instituted to regain alienated tribal land holdings and to overcome the termination policies of the federal government.[47] The reestablishment or enlargement of a reservation without water is meaningless. The court is more concerned about disrupting water rights of other appropriators in the basin. This concern is reflected in the court's holdings limiting water rights in reacquired lands to rights already perfected by transferees. The court is clearly protecting the reliance of the present homesteaders and non-Indian allotment owners.[48] Although the court is returning lands to tribal trust status on paper, it has failed to recognize that lands without water rights are lands with no practical utility. Regarding those lands returned to tribal trust status without water rights, the court should attach full *Winters* rights. Otherwise these lands, originally part of the reservation, would be worthless to the tribe. This decision

43. A total of 5,451 acres of land opened to homesteading were returned to the tribe. United States v. Anderson, 6 INDIAN L. REP. (AM. INDIAN L. TRAINING PROGRAM) 129 (E.D. Wash. July 23, 1979).

44. *Id.* The trial court indicated that the Chamokane Basin may be overappropriated.

45. F. COHEN, *supra* note 2, at 180.

46. *Id.* at 196.

47. *Id.* at 196-200. The statute for reconsolidation of the Spokane Indian Tribe noted that one purpose for land consolidation was to provide an economic land base for the tribe. Act of June 10, 1968, Pub. L. No. 90-335, 82 Stat. 174 (codified as amended at 25 U.S.C. § 487 (1982)).

48. The court must be careful to avoid prior cases that warn courts engaged in determining water rights for Indian reservations not to engage in the balancing of Indian interests and non-Indian interests. F. COHEN, *supra* note 2, at 587.

forces the tribe to accept the loss of water rights on these reacquired reservation lands.

The second issue on appeal addressed by the *Anderson* court was state regulatory jurisdiction over non-Indian water use.

STATE REGULATORY JURISDICTION

Background

In *Worcester v. Georgia,*[49] Chief Justice John Marshall articulated the first analysis of Indian sovereignty in conjunction with state regulatory power. Marshall noted, "The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force . . ."[50]

Since Marshall's landmark decision, state regulatory jurisdiction has been allowed within Indian reservations only in limited situations.[51] Primarily, the interests of the federal, state, and tribal governments must be examined to determine whether state jurisdiction would violate federal law.[52] The courts developed two independent, but related, tests in order to determine jurisdiction over a particular question.[53] First, the exercise of state regulatory jurisdiction may be preempted by federal law.[54] This test is based on the rationale that the states cannot interfere with federal plenary power.[55] Second, without governing acts of Congress, the exercise of state jurisdiction is permitted if it does not infringe "on the right of reservation Indians to make their own laws and be ruled by them."[56] These two tests are "independent because either, standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation."[57]

The *White Mountain Apache* Court emphasized that the preemption and infringement tests are interrelated because, "[t]he right of tribal self-government is ultimately dependent on and subject to the broad power

49. 31 U.S. (6 Pet.) 515 (1832).

50. *Id.* at 561.

51. For a history of this progression, *see* McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973); Organized Village of Kake v. Egan, 369 U.S. 60 (1962); Williams v. Lee, 358 U.S. 217 (1959); Rehner v. Rice, 678 F.2d 1340 (9th Cir. 1982); Mescalero Apache Tribe v. New Mexico, 630 F.2d 724 (10th Cir. 1980).

52. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 145 (1980).

53. *Id.*; Montana v. United States, 450 U.S. 544 (1981).

54. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980); *see, e.g.*, 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 (1965).

55. F. COHEN, *supra* note 2, at 273.

56. Williams v. Lee, 358 U.S. 217, 220 (1959).

57. *White Mountain,* 448 U.S. at 142.

of Congress."[58] In *White Mountain Apache,* the Indian tribe and a non-Indian logging company operating solely within the reservation filed suit for refund of motor carrier license and fuel taxes seeking declaratory relief from regulation by the State of Arizona. The Supreme Court found that extensive regulation of the tribal timber enterprise by the federal government preempted the exercise of state authority.

Tribal sovereignty generally extends "over both their members and their territory."[59] As the Court in *White Mountain Apache* noted, state law is generally inapplicable to Indians on the reservation because at that point, "federal interest in encouraging tribal sovereignty is at its strongest."[60]

Tribal jurisdiction over conduct of non-Indians on the reservation has been a more difficult problem. The issue of sovereign power over non-member activities has been brought to the forefront of Indian jurisprudence because of non-Indian ownership of fee lands within reservation boundaries.[61]

Courts have found that as tribes were incorporated into the United States certain tribal sovereign powers have been implicitly divested.[62] The divested powers included such attributes of external tribal sovereignty as the freedom to alienate land without federal government consent and the ability to enter into relations with foreign governments.[63] In *Montana v. United States*[64] the Supreme Court invalidated that portion of a Crow Tribal regulation prohibiting hunting and fishing within the reservation by non-members of the tribe on land owned by non-Indians within the exterior boundary of the reservation. The court found that federal laws and the tribe's inherent sovereignty did not support regulation of non-Indians on fee lands within the reservation. The *Montana* court followed the rationale in *Oliphant v. Suquamish Indian Tribe* and found that "the inherent sovereign powers of an Indian tribe do not extend to the activities of non-members of the tribe."[65]

The *Montana* court stated that "Indian tribes retain some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands."[66] The *Montana* court noted that the tribe may regulate the

58. *Id.*

59. United States v. Mazurie, 419 U.S. 544, 557 (1975).

60. *White Mountain,* 448 U.S. at 144.

61. *See supra* note 2.

62. Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810), *cited in* Montana v. United States, 450 U.S. 544 (1981).

63. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Johnson v. McIntosh, 21 U.S. (98 Wheat.) 543 (1823).

64. 450 U.S. 544 (1981).

65. Oliphant v. Suquamish Indian Tribe, 491 U.S. 191 (1978), *cited with approval in* Montana v. United States, 450 U.S. 544, 565 (1981). In *Oliphant,* a criminal case, the Supreme Court recognized the rights of the federal government to uphold the liberty of United States citizens.

66. *Montana,* 450 U.S. at 565.

activities of non-members through taxation, licensing, or other means, when the conduct of the non-Indian threatens or has direct effect on the health and welfare, political integrity, or economic security of the tribe.[67] Tribes are able to regulate the activities of non-members who enter contractual relationships with the tribe or its members.[68] Civil regulatory jurisdiction of the tribe over non-members has also been approved in the areas of taxation, zoning, health and safety regulations, and riparian water rights.[69]

Regulation of Water Rights

The Ninth Circuit recently addressed regulatory jurisdiction over non-Indian water use within a reservation. In *Colville Confederated Tribes v. Walton,*[70] the Ninth Circuit examined the issue of whether the state had regulatory jurisdiction over water use in the No Name Creek Basin of eastern Washington. This area was encompassed by the Colville Reservation and included land owned in fee by non-Indians. The Ninth Circuit found that the state had no power to regulate water in the No Name system and that the state permits were of no force and effect.[71] The Ninth Circuit found that state regulatory authority in the No Name Basin was preempted by the federal government in the creation of the Colville Reservation.[72]

The *Colville* court cited *Federal Power Commission v. Oregon* for the proposition that water use on a federal reservation is not subject to state regulation without explicit federal recognition of state authority.[73] In support of preemption the court also cited *United States v. McIntire*[74] for the proposition that state water laws are not controlling on Indian reservations because Congress had not enacted legislation for state control of water.[75]

67. *Id.* at 565-66.

68. *Id.*

69. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) (taxation); Ramah Navajo School Board v. Bureau of Revenue, 454 U.S. 1079 (1982) (taxation); White Mountain Apache v. Bracker, 488 U.S. 136 (1980) (taxation); Knight v. Shoshone & Arapaho Indian Tribes, 670 F.2d 900 (10th Cir. 1982) (zoning); Cardin v. Le La Cruz, 671 F.2d 363 (9th Cir. 1982) (health and safety regulations); Confederated Salish and Kootenai Tribes v. Namen, 665 F.2d 951 (9th Cir. 1982), *cert denied,* 459 U.S. 977 (1982) (riparian rights).

70. 647 F.2d 42 (9th Cir. 1980), *cert. denied,* 454 U.S. 1092 (1981).

71. *Id.* at 51.

72. *Id.* at 52.

73. 349 U.S. 435 (1935). The actual holding of the court was that a license from the United States to build a dam on reservation lands could not be stopped by lack of state permission. *Id.* at 443-45. This case has been construed to hold that former western water law giving the states control of water on the public domain was not applicable to federal reservation lands. However, the Supreme Court in Arizona v. California, 373 U.S. 546 (1963), held that federal non-Indian reservations carried reserved water rights. *See* Trelease, *Federal Reserved Water Rights Since PLLRC,* 54 DENVER L.J. 473 (1977).

74. 101 F.2d 650 (9th Cir. 1934).

75. In *McIntire,* the Court held that Montana statutes specifically provided that Indian lands shall remain under federal regulatory control. 101 F.2d at 654.

The *Colville* court noted that the State of Washington enacted identical enabling language as in the *McIntire* case.[76]

The *Colville* court noted the general deference of the federal government to state plenary control of water use on the public domain. The *Colville* court citing *Federal Power Commission v. Oregon* stated that, "[t]his deference is not applicable to water use on a federal reservation at least where such use has no impact off the reservation."[77] The court noted that "[w]hen land is set aside for an Indian Reservation, Congress has reserved it for federal as opposed to state needs. Because the No Name System is located entirely within the reservation, state regulation of some portion of its waters would create the jurisdictional confusion Congress has sought to avoid."[78] The *Colville* court thus concluded "[i]n creating the Colville Reservation, the federal government preempted state control of the No Name System."[79] The court specifically did not discuss the effect of water rights on the opening of reservation lands for homesteading.[80]

Although the *Colville* court based its decision on preemption, the court discussed whether state regulation of water use infringed on the tribal right to self-government in regulating the tribe's health and welfare. The court noted that the use of water on non-Indian land within the reservation involved the tribe's water rights because "[a] water system is a unitary resource. The actions of one user have an immediate and direct effect on other users."[81]

ADDRESSING THE PROBLEM

In *Anderson* the Ninth Circuit considered whether state jurisdiction over non-Indian water use within the Spokane Indian Reservation was barred either by federal preemption or by infringement on the right of reservation Indians to self-government. The *Anderson* court applied the standard derived from *Montana v. United States* that tribal regulation of non-Indian conduct on fee land within the reservation is withdrawn as a result of tribal dependent status unless one of two exceptions applies.[82] First, the court, in *Montana*, found no consensual agreement between the non-Indian water users and the tribe. The tribe and the non-Indians had

76. Washington Enabling Act, ch. 180, 25 Stat. 676, 677 (1889).

77. *Colville*, 647 F.2d at 52.

78. *Id.* at 53. *See* Bryan v. Itasca County, 426 U.S. 373 (1976).

79. *Colville*, 647 F.2d at 53.

80. *Id.* at 53 n.16. Thus, the *Colville* court did not discuss water rights on homestead lands as was encountered in *Anderson*.

81. *Id.* at 52.

82. 736 F.2d at 1365.

not entered into any consensual agreements or mutual dealing which would subject the non-Indians to tribal jurisdiction. Second, the court, citing *Montana v. United States,* found no conduct which so threatened or had such a "direct effect on the political integrity, the economic security, or the health or welfare of the Tribe," so as to confer tribal jurisdiction.[83] The court concluded that the State of Washington had the authority to regulate excess Chamokane Basin waters use by non-Indians on fee land. The Spokane tribe's water rights would be preserved by the federal water master who would adjudicate all available water rights within the basin. The court noted that the state would regulate only the use of excess water not needed by the tribe.

In addition, the court found no direct federal preemption of state regulation. The court stated, "that no federal statute or regulatory scheme expressly or impliedly governs water use by non-Indians on the Spokane Reservation," and that the balance of interest was in favor of the state.[84] Therefore, there was no preemption by the creation of the reservation.

The court distinguished *Colville Confederated Tribes v. Walton* on several grounds; the first was based on the geography and hydrology of the No Name Basin. The No Name River was non-navigable and entirely within the boundaries of the reservation. Secondly, non-Indian lands within the reservation were allotted rather than opened for entry and settlement. Lastly, the interest of the tribe in regulating waters used from the No Name River was critical to the lifestyle of its residents and the development of its resources.[85]

The *Anderson* court felt that the weight of the state's interest depends "in large part on the extent which waterways or aquifers transcend the exterior boundaries of Indian country."[86] In *Colville,* the stream was distinguished because it was small, non-navigable, and located entirely within the reservation. Additionally, water use by non-Indians would impact tribal fisheries or agriculture. In contrast, Chamokane Creek originated outside the reservation, formed the eastern boundary of the Spokane Indian Reservation, and much of the non-Indian land within the reservation was adjacent to the creek.

The court then weighed the competing federal, state, and tribal interests and found that state interests predominated. The court noted as central to its reasoning, "the fact that the interest of the state in exercising its jurisdiction will not infringe on the tribal right to self-government nor

83. *Montana,* 450 U.S. at 546.

84. 736 F.2d at 1365.

85. The *Anderson* court noted that in *Colville* water use by non-Indians would impact tribal fisheries and agriculture. Chamokane Creek was contrasted only on the basis that it flows outside the boundaries of the reservation. *Id.* at 1366.

86. United States v. Anderson, 736 F.2d at 1358.

impact on the Tribe's economic welfare because those rights have been quantified and will be protected by the federal water master."[87]

ANALYSIS

The Ninth Circuit decision does not fully address the question of whether regulation of non-Indian water use within the Spokane Indian Reservation was preempted by the federal government. The same court in *Colville* found that state regulation of water use on Indian reservations was preempted by the federal government. In the *Colville* case, the court relied on the enabling legislation of the State of Washington and the general rationale that federal reservations are exempt from state water regulations. The *Anderson* court failed to explain why the federal government had not preempted state regulation of water use on this reservation as it had in *Colville*.

The court found no infringement of the right of the Spokane Tribe of Indians to self-government. Using a balancing approach to weigh the competing tribal and state interests, the court compared the geography and hydrology of the Chamokane Creek Basin to the State of Washington's interest in developing a comprehensive water program for the allocation of surplus waters. The *Anderson* court found that the state's interest weighed more heavily and ignored similar tribal interests in water planning.[88] Additionally, the court failed to address the federal interests involved resulting from the federal trust relationship to the tribe and the independent federal interest in the navigable creek which flows into the Columbia River. The factors used by the court did not adequately reflect the tribal interests in self-government. The court stated that the federal water master would preserve tribal water rights and that the state would only be regulating excess water use[89] by non-Indian fee land owners within the external boundaries of the reservation.[90] This reasoning seems to blur the distinction between quantification of water rights and the ultimate use of those water rights.[91] The question of water use regulation within reservation boundaries fundamentally relates to the nature of tribal sover-

87. *Id.* at 1366.

88. Perhaps the tribes should take affirmative action by enacting water codes and planning for future water needs.

89. *See supra* note 9.

90. 736 F.2d at 1366. There may be an argument that the opening of the reservation to allotment and homesteading did not reduce the reservation status of these lands. *See* Dellwo, *supra* note 1, at 103-05 (1980).

91. "Police power authority to regulate and control water use within an Indian Reservation raises different questions from those considered in . . . proprietary rights and adjudication jurisdiction." F. COHEN, *supra* note 2, at 604.

eignty over the lands within its borders.[92] The regulation of water use cannot be easily separated from the overall goals of the tribe to plan for its economic future and its health, safety, and welfare.

The Ninth Circuit in *Colville* previously noted,

> Regulation of water on a reservation is critical to the lifestyle of its residents and the development of its resources. Especially in arid and semi-arid regions of the West, water is the lifeblood of the community. Its regulation is an important sovereign power.[93]

The *Anderson* decision noted that only excess waters on lands owned by non-Indians would be regulated by the state. The Ninth Circuit indicated that excess waters were "surplus, non-reserved Chamokane Basin waters." By the nature of this definition the court is referring to state regulation of water use on non-Indian lands within the reservation. Even though the water to be regulated is the excess of the reservation's *Winters* rights, the water will be utilized within the reservation boundaries. Therefore, the impact of the court's decision will occur within tribal boundaries, not off the reservation. The use of water on a non-Indian fee parcel will impact its neighbors. For instance, the state may approve an industrial use for water while the tribe has planned for the entire area to be agricultural, thereby creating pollution problems and lack of coordination of external effects on adjacent lands. In addition, groundwater management requires unitary management to maintain quality and prevent depletion.[94]

Not only is this fragmentation of regulation nonsensical, but the *Anderson* decision creates the jurisdictional nightmare referred to in *Federal Power Commission v. Oregon*.[95] Within the geographical territory of the reservation there will be intermixed governmental regulation of water use. Even if the opinion refers solely to a few homestead lands, it opens the door for further state intrusion into tribal sovereignty within the reservation. Vast amounts of land within other reservations may be subject to state regulatory control. This opinion erodes the federal policy of tribal self-determination. If a tribe cannot plan for use of water on the reservation in conjunction with its land use powers, then the tribe cannot guide its economic future.

> As a matter of both logic and sound practical administration, jurisdiction must depend on the location of the property, not on the

92. ". . . [t]here is a significant geographical component to tribal sovereignty, though the reservation boundary is not absolute, it remains an important factor to weigh in determining whether state authority has exceeded the permissible limits." White Mountain Apache Tribe v. Bracker, 488 U.S. at 151.

93. *Colville*, 647 F.2d at 52. *See generally* Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 1079. A state's power to regulate water use for times of shortage is a sovereign power.

94. F. COHEN, *supra* note 2, at 604 n.4.

95. 349 U.S. at 448. *See* United States v. Frank Black Spotted Horse, 282 F. 349 (1922).

> owner's race or the title status of the property. If jurisdiction were to depend upon whether the land was in trust or fee patent status or whether it was owned by an Indian or non-Indian, the result would be chaos, confusion, sham transactions, and inherent instability.[96]

CONCLUSION

This opinion compounds the inherent problems of piecemeal ownership patterns within the Spokane Indian Reservation by creating within the reservation a patchwork of state and tribal regulatory jurisdiction. This decision diminishes tribal control over water use within the reservation. The essence of the problem in this case is the existence of a water basin shared between the tribe and the State of Washington. Perhaps the tribe and the state need to recognize that they have equally valid reasons for asserting regulatory jurisdiction over water and water rights. A shared basin requires shared planning. Future planning may be a worthwhile joint endeavor for the tribe and the state. A solution may be the creation of a joint state-tribal management authority for shared basins, with a provision for federal arbitation.

MARTE LIGHTSTONE

96. Pelcyger, *supra* note 29, at 770.