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Indian Reserved Water Rights Doctrine Expanded

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INDIAN RESERVED WATER RIGHTS DOCTRINE EXPANDED

WATER LAW—INDIAN RESERVED WATER RIGHTS: The Ninth Circuit held that an Indian allotment owner may sell his right to reserved water to a non-Indian, and that the implied reservation of water doctrine includes sufficient creek water for the development and maintenance of replacement fishing grounds. State water permits granted to a non-Indian purchaser of an Indian allotment are of no force and effect, since state regulation of a non-navigable water system located entirely on an Indian reservation is preempted by the creation of the reservation. Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir. 1981), cert. denied, 50 U.S.L.W. 3448 (U.S. Dec. 1, 1981) (No. 81-321).

INTRODUCTION

In 1872 President Grant created the Colville Reservation in the State of Washington. Previously, the Colville Confederated Tribes were a group of small tribes occupying a vast area of land in the Pacific Northwest. As settlement of the area increased after the Civil War, members of the various tribes found themselves in competition with the white settlers from the east. Consequently, the Executive Order confined the reservation to "...the country bounded on the east and south by the Columbia River, on the west by the Okanogan River, and on the north by the British possessions. ..." In 1892, Congressional action reduced the reservation on the north by 1.5 million acres. The Act returned this area to the public domain for entry and settlement by non-Indians.

At the turn of the century, an agreement ratified by Congress in 1906 distributed the lands of the Colville Reservation to individual tribal members. Under the authority of the General Allotment Act of 1887, the agreement created seven contiguous allotments along the No Name Creek watershed on the Reservation. In 1948 William Boyd Walton, a non-Indian, purchased the three middle allotments from an Indian, who was not a member of the Colville tribes. The Indian had irrigated only 32

1. Executive Order of April 9, 1872, reprinted in 1 KAPPLER, INDIAN AFFAIRS, LAWS AND TREATIES, 915-16 (1904).
2. The tribes included the Methow, Okanagon, San Poel, Lake, Colville, Spokane and Coeur d'Alene tribes. Id. at 915.
3. Id. at 916.
6. 24 Stat. 388. The agreement was implemented pursuant to a Presidential proclamation in 1916. 39 Stat. 1778.
7. No Name Creek is a hydrological system consisting of an underground aquifer and a spring-fed creek, located wholly on the Reservation.
8. The allotments were sold to a non-Colville Indian by the Colville tribal member who was originally granted the allotments.
acres of the allotments with water diverted from No Name Creek. Soon after his purchase of the property, Washington state granted Walton a permit to irrigate 65 acres of the allotment. The permit was granted "subject to existing rights." At the time of the commencement of this action a decade ago, Walton had expanded his irrigated farming to 104 acres. Additionally, he utilized water from No Name Creek for domestic and stock watering purposes.

In 1971 the Colvilles sought to enjoin Walton from using water from the No Name Creek watershed. They argued that as a non-Indian, Walton was not entitled to water reserved for Indians on the reservation. The State of Washington intervened to assert its authority to grant water permits for unappropriated water on reservation lands. The district court consolidated the state action with a separate suit brought by the United States against Walton. The district court concluded that Walton was not entitled to share in the Colvilles' reserved water even though the Indians were irrigating from only a portion of the water available.9 The Ninth Circuit, in Colville Confederated Tribes v. Walton, reversed the lower court in holding that Indian allotment owners may sell their property interests in reserved water to non-Indians.10 Additionally, the court denied Walton's claim to water rights based on state water permits because the court concluded that Washington did not have the authority to regulate the No Name Creek system.11

The Colvilles historically and traditionally farmed and fished for a living. They relied heavily on the salmon runs of the Columbia River, until a series of dams destroyed the runs. In an attempt to replace their fishing grounds, the Colvilles, with the assistance of the Department of the Interior, introduced Lahonton cutthroat trout into the saline waters of Omak Lake. This subspecies of trout needs fresh water for spawning, so the Colvilles developed the lower reaches of No Name Creek as a spawning ground. By late spring of each year the water used for irrigation lowered No Name Creek to a level no longer suitable for spawning. To maintain a viable stock of trout, the United States Fish and Wildlife Service annually provided the Colvilles with Lahonton cutthroat fingerlings. The Colvilles argued at trial for sufficient water rights to support their development of No Name Creek as a spawning ground. The Ninth Circuit affirmed the trial court's holding that an implied reservation of water of sufficient quantity from No Name Creek exists to maintain the Omak Lake fishery.12

11. Id. at 51.
12. Id. at 48.
INDIAN RESERVED WATER RIGHTS

Some commentators suggest that the law of Indian water rights is fairly well settled. Others feel that this area of the law is fraught with pitfalls for the unwary user of Indian reserved water. Colville Confederated Tribes v. Walton appears to be a first step in the answer to many legal questions inevitably raised as the race for mineral and energy development in the western United States continues. Fundamental to the problem is the delicate balance the law must weigh between limited Indian sovereignty over Indian resources, including water, and the total assimilation of Indian interests into the mainstream of the American economy.

The Supreme Court unequivocally adopted the doctrine of Indian reserved water rights in Winters v. United States. In an action similar to the creation of the Colville reservation, Congress, in 1874, reserved a vast area of Montana for the Gros Ventre, Peigan, Blood, Blackfeet and River Crow Indians. In 1888, the tribes ceded by agreement all but the area which is the present Fort Belknap Reservation to the United States. The center of the Milk River became the new northern boundary of the reservation. Several individuals and a cattle company who settled upstream from the reservation appropriated, under Montana state law, 5000 inches (120 c.f.s.) of water from the river for irrigation. In 1898 the tribes developed an irrigation project which required 5000 inches from the same source. However, the river’s flow was inadequate to meet the needs of both projects. Since the lands were arid, the Court in Winters concluded that the Government, when it created the Reservation, intended to deal fairly with the Indians by reserving for them the waters necessary for the productive use of their lands. Focusing on the primary purposes for the creation of the reservation, the Winters court held that the Congressional intent was to transform the Indians into a “pastoral and civilized people.” The Court reasoned that this purpose could not be accomplished without water for irrigation.

Historically, non-Indians relied on the Desert Lands Act of 1877 to support their use of appropriated water under state law. Congress, re-

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16. 207 U.S. at 576.

cognizing significant hydrological differences among the states, granted the states plenary control over all non-navigable streams so that each state could adopt its own form of water law. 18 Most western states chose to adopt law based on the doctrine of prior appropriation. 19 Under this doctrine, in times of water shortages, those users with the earliest priority dates of perfected water rights receive the full amount of water allotted to them before users with later dates may take any. A user must apply water continuously to a "beneficial use" from the first date of application in order to perfect a right. The law of each state defines "beneficial use" for purposes of perfecting water rights. 20

Until 1955 western water lawyers believed that the Winters reserved rights doctrine was a special quirk of law applicable only to federal Indian reservations. 21 In that year, the Supreme Court further eroded state jurisdiction over water on federal lands when it held that lack of state permission could not thwart a license from the United States to build a dam (Pelton Dam) on reserved lands. 22

The Supreme Court further expanded the reserved water rights doctrine in 1963 in Arizona v. California. 23 The Court in Arizona applied the doctrine to other types of federal reservations including national forests, wildlife refuges, and various types of national recreation areas. The decision also set the standard by which the quantity of water rights would be measured, at least for primary purposes, on Indian reservations. In this case, the Government asserted rights to the mainstream of the Colorado River on behalf of five Indian reservations in Arizona, California, and Nevada. The parties disputed the rights to 1,000,000 acre-feet of water. The Supreme Court agreed with the Special Master's conclusion that the water was intended to satisfy future as well as present needs of the Indian reservations. The Court determined the measurement standard to be enough water to irrigate all the practicably irrigable acreage on the reservations. 24

In attempting to limit the reserved rights doctrine, the Supreme Court in United States v. New Mexico, 25 held:

18. This proposition was supported in California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 163 (1935).
20. Historically, the most important "beneficial use" of water is for irrigated agriculture. Other "beneficial uses" now include water diverted for industrialization, energy development, and some forms of outdoor recreational uses.
24. 373 U.S. at 601.
Where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water. Where water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator.\(^{26}\)

The purpose for which a reservation is created, therefore, becomes determinative. It is clear that the purpose of Congress, in the creation of the Fort Belknap Reservation, was to transform the Indians into a "pastoral and civilized" people. However, the Act creating the Colville Reservation merely states:

\[
\text{[I]t is hereby ordered that the . . . country . . . be, and the same is hereby, set apart as a reservation for said Indians, and for such other Indians as the Department of the Interior may see fit to locate thereon.}\] \(^{27}\)

The language of the Act is vague as to any specific purpose for the creation of the reservation. Generally, the purpose must be to provide a home for Indians dispossessed of their ancestral lands. However, the New Mexico standard demands that the water be reserved only for primary and fundamental needs. For other secondary purposes, the Government, on behalf of the Indians, must compete with other potential water appropriators under state law.

**COLVILLE CONFEDERATED TRIBES V. WALTON**

The Ninth Circuit in *Colville Confederated Tribes v. Walton* reexamined the reserved water rights doctrine. The Court struggled with complications raised by Walton, a non-Indian, claiming ownership to Indian reserved water rights. The court also considered the Colvilles' needs for water in a changing economy.

The Circuit court concluded that, based on *Winters*, water rights were reserved when the Colville reservation was created. The determination of the amount of water actually reserved for the tribes presented a more difficult issue. The New Mexico test to determine the purposes for which the reservation was created forced the Court to look at the circumstances surrounding the consolidation of the tribes. The court found that the reservation provided a homeland for the tribes' agrarian society. For this specific need, the court held that sufficient appurtenant water was reserved to irrigate all "practically irrigable" acreage.

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26. *Id.* at 702.
27. Executive Order of July 2, 1872, reprinted in 1 KAPPLER, INDIAN AFFAIRS, LAWS AND TREATIES, 916 (1904).
In addition, the court recognized that traditionally fishing had economic and religious importance for the Colville tribes. The Omak Lake project represented a fishing ground which could replace that destroyed by the dams on the Columbia River. However, the system did not have a self-sustaining trout population, because the lower reaches of No Name Creek contained insufficient water for spawning. The District Court found no implied reservation of water for spawning purposes, because the United States Fish and Wildlife Service provided trout fingerlings to sustain the Omak Lake fisheries. The Ninth Circuit reversed the lower court, holding that the Act creating the reservation impliedly reserved water from No Name Creek for the development and replacement of the traditional fishing ground.

Walton argued that the court should extend the implications of the reserved water doctrine to protect his status as a fee owner of allotted Indian land. The General Allotment Act of 1887 (the Act) provided a means by which Indians could become fee land owners. The Act promoted assimilation of the Indians into American society and encouraged them to become totally self-supporting. Walton asserted that, as a fee owner, an Indian has the right to dispose of the land and all appurtenant rights in any manner.

Since Congress passed the Act two decades before the Winters decision, Congress had not considered the possibility of transferring reserved water rights from an Indian to a non-Indian. United States v. Powers held that Indian allottees had rights to reserved water. Relying on Bryan v. Itasca County and Mattz v. Arnett, the court stated the general rule that termination or diminution of Indian rights requires express legislation or a clear inference of Congressional intent gleaned from the surrounding circumstances and legislative history. There is nothing in the Act which limits in any way an Indian allottee's right in fee ownership of the allotment. The court, supported by this principle, concluded that an Indian allottee may sell his reserved water right. Thus Walton acquired a fee absolute ownership in the three allotments he purchased accompanied by the appurtenant reserved water rights. The Ninth Circuit states clearly

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30. The General Allotment Act, id., required that allotted lands be held in trust for a 25-year period because of 

[the desire to protect the Indian against sharp practices leading to Indian landlessness
31. 305 U.S. 527 (1939).
that one must be in the immediate chain of title on land to which the reserved rights doctrine applies to enjoy its benefits.

The court next analyzed the nature of the right acquired by Walton.34 The court considered three points: (1) the extent of an Indian allottee’s right is based ratably on the number of irrigable acres he owns. Since a non-Indian purchaser cannot acquire more extensive rights to reserved water than those held by the Indian seller, the non-Indian similarly is limited by the number of acres he owns; (2) the Indian allottee’s reserved right has a priority date from the date the reservation was created.35 This priority date accrues to the non-Indian purchaser of the right; and, (3) the Indian allottee does not lose his right to reserved water because of non-use. This aspect of Indian water rights is a radical departure from the general principle of the prior appropriation doctrine that water must be applied, once appropriated, continuously to a beneficial use. However, the court, without explanation, concluded that Congress would have intended that the non-Indian purchaser could not retain the right to the Indian allottee’s quantity of water if the non-Indian did not apply it continuously.36

The court dismissed Walton’s claim to water based on permits issued by the State of Washington. State regulatory authority over a tribal reservation may be barred either because it is preempted by federal law, or because it unlawfully infringes on the right of reservation Indians to self-government.37 The court held that creation of the Colville Reservation preempted state regulation of water in the No Name Creek system. Therefore, Walton’s state permits had no force and effect. The Ninth Circuit supported this decision with reasoning from United States v. McIntire,38 a 1939 case. In McIntire, the court held that Montana statutes regarding water rights could not apply to reservation water, because Congress at no time allowed such statutes to be controlling on the reservations.39 The Washington Enabling Act makes it clear that Indian lands within the limits of the state shall remain under the absolute control of the Congress of the United States.40

The No Name Creek water system is located entirely on an Indian

34. The Ninth Circuit in U.S. v. Ahtanum Irrigation District, 236 F.2d 321, 342 (9th Cir. 1956), held that non-Indian purchasers of allotted lands are entitled to “participate ratably” with Indian allottees in the use of reserved water.
35. The United States acquires a water right vesting on the date the reservation was created. Cappaert v. United States, 426 U.S. 128, 138 (1976).
37. 647 F.2d at 51.
38. 101 F.2d 650 (9th Cir. 1939).
39. Id. at 654.
reservation. A court decision upholding Walton's state permits granting him rights to unappropriated water on No Name Creek would have created overlap of authority between the states and the federal government regarding water systems totally on a reservation. The court decided this issue properly, but left undecided the question of who has the authority to regulate a water system located totally on a reservation, where the water rights are owned only by non-Indians. The court did not reach this issue because Walton had not purchased all seven allotments along the No Name Creek.

CONCLUSION

The holdings in Colville Confederated Tribes v. Walton logically expand the reserved water rights doctrine. A non-Indian purchaser needs to be assured that he is purchasing all reserved water rights appurtenant to allotments previously owned by Indians. Any other conclusion by the court would have seriously diminished the value of all Indian owned allotments.

The very nature of the reserved water rights doctrine implies that it be applied in a manner which is beneficial to Indians living on a reservation. Water for replacement of a traditional fishing economy is as important to the Colville tribes as was water for irrigating crops to the Indians on the Fort Belknap Reservation in Winters. A decision limiting use of water to irrigated agriculture would have severely limited the economic options of reservation Indians seeking to keep pace with a rapidly changing, complex economy. The Colvilles' transplanted trout project is an ingenious mix of farsightedness and traditional values. The court, recognizing the importance of reserved water to fishing for the Colvilles, did not preclude the opportunity to make this part of their economy totally self supporting.

Finally, the court carefully worked its way through the jurisdictional maze of federal and state control over the water rights of the No Name Creek system. If No Name Creek had coursed partially off the Colville Reservation onto land under state authority, the Ninth Circuit would have confronted the clash between reserved water rights determined by Congress and the plenary control states have over non-navigable streams. That decision probably will be left to the Supreme Court some time in the future as the fight over limited water escalates in the arid West.

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