NATURAL RESOURCES JOURNAL

Volume 15
Issue 2 *Spring 1975*

Spring 1975

The Irrigable Acres Doctrine

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THE IRRIGABLE ACRES DOCTRINE

The irrigable acres doctrine enunciated in *Arizona v. California*[1] holds that the quantity of an Indian tribe's reserved water is measured by the reservation's practicably irrigable acres. However, that decision left some doubt whether the Court intended the doctrine to be a measure for all Indian reserved rights or whether the doctrine is limited to the facts of *Arizona v. California* where five Indian tribes lived on irrigable but very arid lands. This comment intends to discuss the irrigable acres doctrine, its applicability to various situations, and alternative standards for determining reserved rights in water. Should all tribes receive an irrigable acres quantity regardless of its appropriateness? Should the determination of the quantity of the implied reservation of water be based on each tribe's peculiar situation? Should they receive, at the very least, all the waters arising on the reservation? Should the measure be experience of past use or some estimate of future needs? If the reserved right does not encompass future, nonagricultural development on the reservation, does the Government's fiduciary duty to the Indians include the duty to purchase additional water rights for them? None of these questions were answered in *Arizona v. California,* so the lower courts will have to fashion solutions for them as they arise.

ORIGIN

A. The Winters Doctrine

The irrigable acres doctrine is the latest elaboration of the "Winters doctrine" originally declared in the landmark case of *Winters v. United States.*[2] By holding that the purpose of the reservation was to convert the Indians from a nomadic to a pastoral way of life, the Court in *Winters* inferred from the treaty a reservation of the water necessary for the new way of life. Statements in the *Winters* case have given rise to two water reservation theories: (1) that of reservation by the Indians and (2) that of reservation by the Federal Government. Justice McKenna spoke both of what the Indians "gave," knowingly or unknowingly, and of the Federal Government's recog-

1. Arizona v. California, 373 U.S. 546 (1962).
2. Winters v. United States, 207 U.S. 564 (1908).

nized right to reserve waters and exempt them from state appropriation.[3]

The first theory, that of reservation by the Indians, is that the Indians retained all they did not expressly grant away of their once vast aboriginal lands.[4] Those espousing this theory rely on the rule of construction that Indian treaties and other dealings with Indians are to be given a liberal construction in the Indians' favor: "as that unlettered people would have understood it,"[5] avoiding the traditional constructions of such writings. The Indian treaties did not mention the water rights and so it was implied the water was reserved by the Indians.

The second theory, that of reservation by the Federal Government, is found in *Arizona v. California* and several other cases. Those cases[6] extended the power of the Government to reserve waters for non-Indian federal reservations such as national forests. Paul Bloom has explained the *Winters* result as the Court's desire to avoid a genocidal construction of a treaty. He perceives a contractual or quasi-contractual interpretation of the 1888 treaty establishing the Fort Belknap reservation, citing other authors who refer to the lack of "consideration" and the "unconscionability" of any other result.[7] Those who support this second theory apparently do not materially distinguish the situation of an Indian reservation from that of other federal reservations.[8]

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3. *Id.* at 576, 577.

4. The following cases support reservation by the Indians: United States v. Winans, 198 U.S. 371 (1905); United States v. Ahtanum Irr. Dist., 236 F.2d 321 (9th Cir. 1956), 330 F.2d 897 (9th Cir. 1964); United States v. Powers, 94 F.2d 783 (9th Cir. 1938); Skeem v. United States, 273 F. 93 (9th Cir. 1921).

5. McClanahan v. Arizona State Tax Comm'n., 411 U.S. 164 (1973); Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918); Winters v. United States, 207 U.S. 564 (1908); United States v. Winans, 198 U.S. 371 (1905); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Moore v. United States, 157 F.2d 760 (9th Cir. 1946); Skeem v. United States, 273 F. 93 (9th Cir. 1921); Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F.Supp. 252 (D.D.C. 1973); United States v. Hibner, 27 F.2d 909 (D. Idaho 1928); Mason v. Sams, 5 F.2d 255 (W.D. Wash. 1925); Byers v. Wa-Wa-Ne, 86 Ore. 617, 169 P. 121 (1917).

6. Federal Power Commission v. Oregon, 349 U.S. 435 (1955) (Pelton Dam case); United States v. Rio Grande Dam & Irr. Co., 174 U.S. 690 (1899); United States v. McIntire, 101 F.2d 650 (9th Cir. 1939).

7. Bloom, *Indian "Paramount" Rights to Water Use,* 16 Rocky Mt. Mineral L. Institute 669 (1971), *citing* Bradshaw, *Water in the Woods: The Reserved-Rights Doctrine and the National Forest Lands,* 20 Stan. L. Rev. 1187, 1188 (1968); Hillhouse, *The Federal Reserved Water Doctrine–Application to the Problem of Water for Oil Shale Development,* 3 Land & Water L. Rev. 75, 81 (1968); Miller, *Indians, Water and the Arid Western States–a Prelude to the Pelton Decision,* 5 Utah L. Rev. 495, 501 (1957).

8. William Veeder, a proponent of the first theory, would make such a distinction, however. He notes the Indians' tribal sovereignty and emphasizes the language in *Winters* that the Indians "gave" their lands rather than the language on the power of the Federal Government to reserve lands and water. Veeder distinguishes *Winters* rights from those in

B. Applications of the Winters Doctrine

In the *Winters* family of cases,[9] the various courts have held the circumstances and purposes of a reservation determine whether an implied reservation of water exists. In *Byers v. Wa-Wa-Ne,*[10] for example, the land was not arid and did not need irrigation; consequently, the court found no implied reservation of water. In *United States v. Wightman,*[11] it was held that the waters were not reserved even though the land was arid, for only a few acres on the reservation could be irrigated by the springs in controversy and these springs were vital to the use of the adjoining military reservation which had recently been opened to settlement.

C. The Winters Doctrine and Prior Appropriation

Some courts have used the prior appropriation doctrine to infer a reservation of water. For example, in *Arizona v. California,* the Court found the priority dates to be the dates of the establishment of the reservations, and so the Indians' water rights were "present perfected rights" and had priority over the Boulder Canyon Project.[12] The Court in *Wightman* distinguished *Winters* by finding that in *Winters* the Indians had previously used some water from the Milk River for irrigation.[13] In *Wightman,* however, only the military personnel had used Goodwin Springs; thus, the Indians themselves had made no prior appropriations of the water.[14]

Other courts have held that any prior appropriation is irrelevant, that even the use or occupancy of the reservation is not necessary to preserve the Indian water right.[15] In *United States v. McIntire*[16] and

Arizona v. California, labeling *Winters* rights "immemorial" and those of *Arizona v. California* "investive." He believes that even though *Arizona v. California* purports to follow *Winters,* it is actually following *Federal Power Commission v. Oregon,* 349 U.S. 435, 442 (1955) (the "Pelton case") which relied on the property clause of the Constitution in construing the Desert Land Act of 1877, 19 Stat. 377, *as amended,* 43 U.S.C. § 321 (1970). *See* Veeder, *Indian Prior and Paramount Rights to the Use of Water,* 16 Rocky Mt. Mineral L. Institute 631 (1971).

9. Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918); United States v. Winans, 198 U.S. 371 (1905); United States v. Ahtanum Irr. Dist., 236 F.2d 321 (9th Cir. 1956), 330 F.2d 897 (9th Cir. 1964); Moore v. United States, 157 F.2d 760 (9th Cir. 1946); United States v. Walker River Irr. Dist., 104 F.2d 334 (9th Cir. 1939); Conrad Investment Co. v. United States, 161 F. 829 (9th Cir. 1908); United States v. Conrad Inv. Co., 156 F. 123 (D. Mont. 1907).

10. 86 Ore. 617, 169 P. 121 (1917).

11. 230 F. 277 (D. Ariz. 1916).

12. 373 U.S. at 600.

13. 230 F. at 282, *citing* 207 U.S. 564.

14. *Id.* at 279.

15. United States v. McIntire, 101 F.2d 650 (9th Cir. 1939); United States v. Walker River Irr. Dist., 104 F.2d 334 (9th Cir. 1939); McIntire v. United States, 22 F.Supp. 316 (D. Mont. 1937); United States v. Hibner, 27 F.2d 909 (D. Idaho 1928).

16. 101 F.2d 650 (9th Cir. 1939).

in *Federal Power Commission v. Oregon*,[17] the courts held that only "public lands," a category which does not include Indian reservations, are subject to private appropriations under state prior appropriation law.

THE NEED FOR QUANTIFICATION OF INDIAN RESERVED RIGHTS

Although the exact origin of the Indians' implied reservation of water and all the elements of the *Winters* doctrine are not clear, assuming that there is an implied reservation, the quantity of water reserved to the Indians must be decided. For without some resolution, sometime in the future Indian tribes may claim a right in water being used by non-Indians. In such a situation, the Indians, at least, could demand compensation for the loss of their water. However, the people who are subject to the potential claims are entitled to some notice the claims exist.[18]

To these various problems, John C. Guadnola has suggested a solution which is based on the Colorado water system which permits a present adjudication of future rights and provides notice to those involved. That system utilizes conditional decrees; the final degree is for the amount actually put to beneficial use. However, when a water appropriation is for municipal uses, the final decree is for the full amount authorized by the conditional degree. The municipality may sell or lease the excess until its needs match the amount of the decree. Guadnola would put federal reservations in the municipal category.[19] This solution would still present a problem for those who have been buying or leasing the reserved water. Even though they would have received notice, they would be in difficulty when the water is taken for the owner's own use.

Veeder would answer that western water law is harsh: "first in time is first in right."[20] Those with senior rights are protected against those whose rights are junior in areas of short supply. He notes, however, that in theory Indian reserved rights are not subject to the beneficial use and other requirements of the prior appropriation system. The Indians would not lose their rights by non-use or even by failure to occupy the land to which the right is appurtenant.[21]

On the other hand, Robert Dellwo has pointed out that the use-it-

17. 349 U.S. 435 (1955).
18. Bloom, *supra* note 7.
19. Guadnola, *Adjudication of Federal Reserved Water Rights*, 42 U. Colo. L. Rev. 161 (1970).
20. Veeder, *Winters Doctrine Rights*, 26 Mont. L. Rev. 149 (1965).
21. *Id.*

or-lose-it principle has been applied to Indian rights, irrespective of the theoretical privileges of *Winters* rights.[22] Even when a court is acting favorably to Indians, they often receive a quantum less than even the amount needed at the time. For instance, in *United States v. Ahtanum Irrigation District,*[23] an agreement apparently intended to be only a temporary working agreement during the pending adjudication was held binding, limiting the Indians to considerably less than the full amount of the stream to which the court admitted they otherwise would have been entitled.

ADMINISTRATION OF INDIAN RESERVED RIGHTS

Aside from the difficulty in presently adjudicating a future right, it is not clear which government is to administer Indian reserved rights. Although the McCarran Amendment,[24] which permits state adjudications of federal water rights, has been held to apply to federal reservations,[25] the cases which so held were not deciding the Amendment's applicability to Indian reservations. It has been held that federal laws do not apply to Indians unless they expressly state that they do,[26] and if some doubt exists, the applicability cannot be said to be express.

STANDARDS FOR THE QUANTIFICATION OF INDIAN RESERVED RIGHTS

Once the questions of origin, method of notice, and administration of reserved rights are resolved and adjudication has begun, the question of what standard is to be used to measure the quantity of the Indians' reserved rights arises. Court decisions of the past, as well as the more recent *Arizona v. California* decision, have used various criteria.

A. "Reasonably Necessary" Standard

In *United States v. Conrad Investment Co.*[27] involving a fact situation similar to that of *Winters,* the court found that, although a stream on public lands bordering an Indian reservation did not lose

22. Dellwo, *Indian Water Rights–the Winters Doctrine Updated,* 6 Gonzaga L. Rev. 215 (1971).

23. 236 F.2d 321 (9th Cir. 1956).

24. 43 U.S.C. § 666 (1970).

25. United States v. District Court for Water Div. No. 5, 401 U.S. 527 (1971); United States v. District Court for Eagle County, 401 U.S. 520 (1971).

26. Minnesota v. Hitchcock, 185 U.S. 373 (1902); Elk v. Wilkins, 112 U.S. 94 (1884); *Ex parte* Crow Dog, 109 U.S. 556 (1883).

27. 161 F. 829 (9th Cir. 1908).

its public character, the Indians were entitled to the water "reasonably necessary for the purposes of irrigation and stock raising, domestic *and other useful purposes.*"[28] The quantity was to apply to future, as well as present, needs. The defendant was permitted to use only the surplus water, and the decree was to be modified when the Indians' needs changed. *United States v. Powers*[29] also held the implied reservation was for both irrigation and other purposes.

B. "Past Experience" Standard

Winters itself gives no measure of the water reserved. Apparently the whole river could have been held reserved had the Indians needed it. *United States v. Walker River Irrigation District*[30] held that irrigable acres was not necessarily the criterion to be used in measuring the reserved right. Instead, the court based its decision on "experience." Relying on the master's report comparing past and present population and acres under cultivation, the court decided the Indians would not need to irrigate any additional acres. Apparently, the only use of the reservation land contemplated was some form of subsistence farming by the Indians themselves.

C. "Variable Needs" Standard

In contrast, *United States v. Ahtanum Irrigation District*[31] held the Indians' right to water was not limited to their use at any given time but extended to their ultimate needs as those needs and requirements should grow with the development of Indian agriculture on the reservation. The court did not seem to follow *Walker* but cited that opinion with approval, mentioning its use of seventy years of experience to estimate the future needs.

D. "Highest and Best Use" Standard

Ronald Young has emphasized the Government's fiduciary duty to the Indians. According to him, the purpose of the reservations was not merely to transform the Indians into an agricultural people but to better their lives while integrating them into the mainstream of American life.[32] Using this theory, if agriculture was not appropriate or if a better use could be made of the reservation, agriculture should

28. *Id.* at 831 (emphasis added).
29. 94 F.2d 783 (9th Cir. 1938).
30. 104 F.2d 334 (9th Cir. 1939).
31. 236 F.2d 321 (9th Cir. 1956).
32. Young, *Interagency Conflicts of Interest: the Peril to Indian Water Rights,* 1972 Law & Social Order 313 (1972); *see also* Warner, *Federal Reserved Water Rights and their Relationship to Appropriative Rights in the Western States,* 15 Rocky Mt. Mineral L. Institute 399 (1969).

not be considered the purpose for which the reservation was established, and the amount of water impliedly reserved was not simply the amount needed for irrigation. Consequently, an irrigable acres measure would not always result in a feasible or fair quantity of water. However, such an analysis is open to the criticism that a government that restricted the Indians to limited and often inferior land would hardly have intended to give those Indians the best water or an unlimited amount of water. Also, while a request by the government attorneys for an application of the irrigable acres doctrine to a reservation unsuited for agriculture might be found to be a breach of the Government's fiduciary duty to the Indians, it is not clear that the court's application of the existing doctrine, without such a request by government attorneys, would be a breach.

E. "All Water on the Reservation" Standard

The court in *United States v. Alexander*[33] went so far as to say that "[t]he treaty impliedly reserved all waters on the reservation to the Indians."[34] This statement suggests the possibility that all waters arising on the reservation belong to the Indians and the quantity is not limited to any particular use to which the waters might have originally been intended. Such a finding is consistent with the theory that the Indians reserved the waters. To suggest that the Indians are not entitled to all the waters arising on the reservation because all the water is not needed for an agricultural use of the reservation is analogous to arguing that if the purpose of the reservation is agriculture, the Indians are entitled to only the quantity of timber, minerals, and other resources needed for agriculture and domestic consumption. However, ownership of timber and minerals on the reservations has already been determined to be in the Indian tribes.[35]

F. "Irrigable Acres" Standard

In *Arizona v. California,* the Court affirmed the master's finding that the water was intended to satisfy future as well as present needs of the Indian reservations and that enough water was reserved to irrigate all the practicably irrigable acres on the reservations. The Court agreed with the master that irrigable acres was "the only feasi-

33. 131 F.2d 359 (9th Cir. 1942).

34. 131 F.2d at 360. The treaty referred to was signed on October 17, 1855 (11 Stat. 657).

35. *See* United States v. Shoshone Tribe of Indians, 304 U.S. 111, 115-116 (1938); United States v. Klamath and Moadoc Tribes of Indians, 304 U.S. 119, 122-123 (1938), where the Court held that although the fee of the minerals and timber was in the United States, the Government could not appropriate these items for its own use without paying the Indians just compensation.

ble and fair way," and that "reasonably forseeable needs," the standard advocated by the State of Arizona, was only a guess.[36]

Since the *Arizona v. California* decision, the irrigable acres doctrine would appear to be the chosen standard and the Supreme Court's last word on measurement of reserved rights. It is certainly more objective than guesses. Many would insist the irrigable acres standard was intended as, or at least should be used as, the standard for measuring all reserved rights. Others would claim the standard is limited to the facts of the *Arizona v. California* situation and that a contrary result would be a breach of the Government's fiduciary duty to the Indians.[37]

CRITICISM

The use of the irrigable acres standard in *Arizona v. California* was actually quite generous to the Indians. By the use of this standard, a small reservation population received a large quantity of water, larger than that which they would have received under a *Walker River* measure of "experience," and the use was not limited to irrigation. However, the irrigable acres standard will not produce this favorable result if a tribe has no irrigable acres. Veeder would limit the irrigable acres doctrine to the facts of *Arizona v. California.*[38] He notes that *Winters* rights have been used for purposes other than agriculture, particularly for fishing and recreation.

Many Indian tribes which may be well situated for a recreation industry, tribes located in mountainous regions may have little or no irrigable acres on which to base a reserved water right. Yet, they would have a need for water for fishing and other recreation projects if they were to utilize the scenic attractions of the reservation which may well be their primary resource. To these tribes, the irrigable acres standard is neither feasible nor fair.[39] This seems to be the thrust of the statement by the Supreme Court in *Arizona v. California* that it is impossible to believe that when Congress and the Executive established these reservations they were unaware of the conditions there or of the fact that water would be essential to the life of the Indian people.[40]

36. 373 U.S. at 600-01.

37. Bloom, *supra* note 7; Veeder, *supra* note 8.

38. Veeder, *supra* note 8.

39. These tribes suggest that an attempt is being made "to limit and restrict the Indian people to their present meager uses of water without any further allowances for uses to which they are rightfully entitled under the historic 'Winters Doctrine.'" Testimony of Wendell Chino, President of the Mescalero Apache Tribe, in *Hearings on Indian Water Rights Before the Subcomm. on Indian Affairs of the Senate Comm. on Interior & Insular Affairs,* 93d Cong., 2d Sess. 44-53 (1974).

40. 373 U.S. at 598-99.

CONCLUSION

Today, many Indian tribes are federally chartered corporations as well as government entities with diverse business interests and investments. They have a need and a duty to provide employment for tribal members, whether or not farming is practical on the reservation. In answer to this need, the tribes raise cattle, attract industry, and build resorts just as municipalities do.

The variable needs standard would handle the growing needs of the tribes; they claim, that they unlike municipalities, have a right to water which has always been theirs and which, because of their peculiar status, has not been lost through non-use. However, the variable needs standard would make chaotic any attempt to administer water rights in any area that contained Indian lands. Even if government compensation was provided to those who lost their water to Indian claims, there would be no notice that such claims existed or might arise.

Considering past and present treatment of Indians, particularly in the area of land and resources, it is absurd to expect they would receive water sufficient for the highest and best use of the reservation. Indians simply would never be given this amount; public policy is against it.

Even if most Indian reservations were established primarily with the idea of turning these nomadic peoples into farmers, this purpose could not be accomplished unless the Indians were placed on lands conducive to agriculture. Of course, in many situations the addition of irrigation water permits otherwise arid lands to be farmed. In those cases an irrigable acres standard might be appropriate. Even if the Indians did not choose to farm, with a moderately large reservation they would receive a large quantity of water which they could then use for other purposes. However, some reservations have few if any irrigable acres; the irrigable acres standard might provide them with only enough water for the most primitive subsistence. The Government could probably not succeed in a claim that it had fulfilled its fiduciary duty by merely bringing the Indians into a 19th century rural economy while the rest of the country is living in the 20th century; in fact, the Government long ago abandoned the idea of turning the Indians into a class of yeoman farmers. The irrigable acres standard then is not appropriate for all reservations. The experience standard presents the same problem; it would provide only a subsistence (or lower) level of water on many reservations.

A compromise solution should use all the standards as appropriate. The Indians should be guaranteed a minimum quantity of water

consisting of all the water arising on the reservation, if any, and a quantity based on irrigable acres, if any. In awarding Indians water the courts should look to the amount "reasonably necessary" for utilization of the reservation resources, considering experience, irrigable acres, and the other standards, but without being bound by any.

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