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Considerations and Conclusions Concerning the Transferability of Indian Water Rights

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CONSIDERATIONS AND CONCLUSIONS CONCERNING THE TRANSFERABILITY OF INDIAN WATER RIGHTS

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As a consequence of the decision of the United States Supreme Court in *Colorado River Water Conservation District v. United States*,[1] the race to the courthouse to adjudicate *Winters* water rights[2] between the states on one hand and the United States and/or their Indian wards on the other has intensified. There appears to be a feeling among state and federal officials alike that, once these adjudications run their course, the uncertainty and acrimony surrounding the assertion of Indian water rights will disappear. However, as tribes attempt to reap the economic gains that they perceive should flow from the use of these water rights, there is a second generation of uncertainty, discord, and litigation looming in the future.

Courts have applied various standards to determine the quantity of water reserved under the *Winters* doctrine.[3] Regardless of what test is utilized to quantify these Indian water rights, the tribes will obtain prior and, in most cases, paramount rights to vast quantities of water.[4] The extent to which the quantification of Indian water rights will lead to harmony or result in discord between states and tribes is very much dependent upon yet undefined legal limits on the extent of Indian water rights. It is the purpose of this article to explore the legal parameters of Indian water rights and to suggest some possible constraints which should be placed upon the transferability of water rights to new uses and users, both on and off the reservation.[5]

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1. 424 U.S. 800 (1976) (commonly referred to and hereinafter cited as *Akin*). This case affirmed the concurrent jurisdiction of state and federal courts to adjudicate reserved water rights, including those rights of Indian tribes.

2. The term "*Winters* rights" is derived from Winters v. United States, 207 U.S. 564 (1908), in which the United States Supreme Court first declared that, when the United States set aside lands as Indian reservations, sufficient unappropriated water was implicitly reserved for Indian use to satisfy the purposes for which the lands were reserved.

3. In Arizona v. California, 373 U.S. 546, 601 (1963), for example, the Supreme Court concluded that "the only feasible and fair way by which reserved water for the reservation can be measured is irrigable acreage." For an extensive treatment of the issue of the quantity of water reserved, *see* Sondheim & Alexander, *Federal Indian Water Rights: A Retrogression to Quasi-Riparianism?*, 34 S. CAL. L. REV. 1 (1960).

4. *See, e.g.*, Arizona v. California, 373 U.S. at 596, 600, in which the Court decreed a reservation of about 1 million acre-feet for use on approximately 135,000 acres of land.

5. This article presumes that quantification of Indian water rights is both desirable and

LIMITS UPON THE TRANSFERABILITY OF INDIAN WATER RIGHTS FOR OFF-RESERVATION USES

In this new era of "tribal nationalism,"[6] the *Winters* doctrine has been fashioned into an economic doctrine, designed to assist the tribes in achieving greater financial, and hence political, autonomy as sovereign nations.[7] Basic to the concept of the *Winters* doctrine as an economic doctrine is the assumption that the tribes can market their water rights to non-Indians for a variety of uses, both on and off the reservation.[8] A careful reading of *Winters v. United States*[9] and its progeny is necessary to determine whether in fact this view is firmly based in the law of Indian water rights.

The question before the United States Supreme Court in the *Winters* case was whether diversions of water from the Milk River by non-Indian appropriators located upstream from the Ft. Belknap Indian Reservation in Montana should be enjoined. The appropriators claimed a priority date of 1898, which they asserted was prior to use of the river by either the tribes or the United States. On the other hand, the United States contended that if the tribes "are deprived of the waters their lands cannot be successfully cultivated, and they will become useless and homes cannot be maintained thereon."[10]

In deciding the case, the Court looked to the intent of the 1898 treaty between the United States and the tribes, noting that:

> The reservation was a part of a very much larger tract which the Indians had the right to occupy and use, and which was adequate for the habits and wants of a nomadic and uncivilized people. It was the policy of the Government, it was the desire of the Indians, to change those habits and to become a pastoral and civilized people. If they should become such, the original tract was too extensive; but a smaller tract would be inadequate without a change in conditions.

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necessary, a presumption which is not shared by all of my colleagues on either the state, federal, or tribal side of this issue; *see* Palma, *Indian Water Rights: A State Perspective After Akin*, 57 NEB. L. REV. 295 (1978).

6. *See, e.g.*, Israel, *The Reemergence of Tribal Nationalism and Its Impact on Reservation Resource Development*, 47 U. COLO. L. REV. 617 (1976).

7. *See, e.g.*, Dellwo, *Indian Water Rights–The Winters Doctrine Updated*, 6 GONZ. L. REV. 215 (1971); Pelcyger, *Winters Doctrine and the Greening of the Reservations*, 4 J. CONTEMP. L. 19 (1977); Veeder, *Water Rights in the Coal Fields of the Yellowstone River Basin*, 40 LAW & CONTEMP. PROB. 77 (1976).

8. The potential wealth available by marketing water rights is evidenced by the fact that industrial water users within the mineral-rich Yellowstone River Basin have expressed a willingness to pay up to $100 per consumptive acre foot of water.

9. 207 U.S. 564 (1908).

10. *Id.* at 569.

> The lands were arid, and, without irrigation, were practically valueless.[11]

The essence of the Court's reasoning, which lies at the very heart of the *Winters* doctrine, was that a reservation of water was necessary in order to ensure that the lands reserved for Indians would support agricultural use and a civilized lifestyle.[12] In other words, the purpose of creating the Ft. Belknap reservation was to provide a permanent homeland for Indians. Therefore, it was necessary to assure that sufficient water was available to meet that purpose. A similar rationale was applied in *United States v. Powers,*[13] in which the Supreme Court found the existence of an implied reservation of water sufficient for the settlement and cultivation of lands within the boundaries of the Crow Indian Reservation.

More recently, in *Arizona v. California,*[14] the Supreme Court again dealt with the question of the purpose of the implied reservation of water under the *Winters* doctrine. In this landmark decision, the claims of five Indian reservations located along the mainstem of the Colorado River were at issue.[15] Arizona attacked the claims for water asserted by the tribes and also challenged a special master's determination of the quantities of water which were reserved for the tribes. In its decision, the Supreme Court reviewed the history surrounding the creation of the five reservations and found evidence indicating a legislative intent to establish irrigated agriculture on the reservations. Consequently, the Court rejected the argument that the United States had created the Indian reservations without intending to reserve waters necessary to make the reservations productive for agriculture.[16]

The lesson from these Supreme Court decisions is that the transferability of *Winters* water rights to off-reservation uses is limited for two reasons. First, *Winters* rights were created as an adjunct to land and have no existence apart from that land. Second, *Winters* rights were intended to have only a limited purpose.[17] Thus, where the

11. *Id.* at 576.

12. *Id.*

13. United States v. Powers, 305 U.S. 527, 533 (1938). A brief synopsis of this case appears below.

14. 373 U.S. 546 (1963).

15. These reservations were Chemehuevi, Cocopah, Yuma, Colorado River and Fort Mohave.

16. 373 U.S. at 600.

17. The view that *Winters* rights may be confined to use on the reservation to which they are appurtenant was shared in an unpublished letter from the Solicitor's Office, Department of Interior, to the Office of the California Attorney General, dated September 16, 1970, which addressed the proposed sale of water by the Chemehuevi Indian Tribe to the Havasu Water Company.

tribes found sustenance from agriculture, irrigation water was reserved;[18] where fishing was important, fishing rights formed the basis of the *Winters* right.[19] It is arguable that an Indian reservation in a water-abundant region could be limited to stock and domestic water.

Indian reserved water rights were never intended to serve any function other than adding to the productivity of the reservation. Crops, wildlife, and the inhabitants of the reservation needed water to survive on the desolate and God-forsaken land upon which the government confined our Native Americans. There is no indication in treaties, executive orders, legislative history, or the holdings of our highest Court that the United States intended to reserve excessive amounts of water so that tribes could market all that was not needed for their own use on the reservation. In fact, surplus water is beyond the scope and extent of the reserved right, which is limited to that *minimum quantity* of water necessary to satisfy the purposes for which the reservation was created;[20] any water in the stream beyond the needs of the tribe should be available for other water users.[21]

Some commentators suggest that there is no logic or equity to such limitations upon the transferability of Indian water rights—that *Winters* rights should be limited only by the "no injury rule" applicable to appropriative rights under western water law.[22] I submit that this broad view is, in fact, illogical. Indian water rights share virtually none of the important attributes of appropriative rights, aside from the fact that both forms of water rights enjoy a priority date which determines the priority of right to the use of water. As a consequence, it appears inconsistent to argue that *Winters* rights must possess a transferability equal to that permitted under the prior appropriation doctrine of water law.

A more appropriate comparison exists between the *Winters* doctrine and the riparian system of water law. Unlike the rights of western appropriators which are based upon actual diversion and use

18. Arizona v. California, 373 U.S. 546 (1963); United States v. Powers, 305 U.S. 527 (1939); Winters v. United States, 307 U.S. 564 (1908).

19. United States v. Winans, 198 U.S. 371 (1905); Alaska Pac. Fisheries v. United States, 248 U.S. 78 (1918).

20. Cappaert v. United States, 426 U.S. 128, 141 (1976).

21. United States v. Hibner, 27 F.2d 909 (D. Idaho 1928).

22. Veeder, *Water Rights in the Coal Fields of the Yellowstone River Basin,* 40 LAW AND CONTEMP. PROB. 77, 89 (1976). Under the appropriation doctrine a water right may be transferred to a new use where it can be shown that there will be no injury to other vested water rights. *See, e.g.,* Green v. Chaffee Ditch Co., 371 P.2d 775, 783 (Colo. 1962). However, the "no injury" rule presupposes that there has been beneficial consumptive use of the water right sought to be transferred. Since most *Winters* rights have not been historically exercised, the tribes would appear unwise to place reliance upon the "no injury" rule.

of water,[23] both riparian and *Winters* water rights exist as a result of ownership of land.[24] As a consequence of the appurtenancy of these rights, neither riparian nor reserved water rights can be lost through non-use.[25] Riparian rights are confined to use upon the lands to which they are appurtenant, thus precluding the use by the riparian owner, or sale to another for use, off the lands to which the water is appurtenant.[26] The logic behind this prohibition is that each riparian owner is entitled only to the reasonable use of water, taking into account the needs of other riparian users.[27] The law refused to allow one riparian owner to monopolize the stream to the exclusion of the needs and uses of others, a rationale which is equally applicable as it relates to the effect of Indian water uses upon other users of the stream.

Indian water rights benefit from a priority date at least equal to the date of the creation of the reservation.[28] That priority exists whether or not the tribes have historically exercised such rights,[29] a principle foreign to the appropriation doctrine and not widely understood by western appropriators who operate under a system which grants priority in the use of water to those who made early application of water to beneficial use.

> The result has been apprehension in the western public land states that the [*Winters*] doctrine will have the effect of disrupting established water right priority systems and destroying, without compensation, water rights considered to have vested under state law. Moreover, the uncertainty generated by the doctrine is an impediment to sound coordinated planning for future water resources development.[30]

The transfer of Indian water rights for off-reservation uses can only heighten the apprehension within western states, since it will greatly increase the prospect that large quantities of water will be consumptively used by Indian water right holders to the exclusion of

23. *See, e.g.*, Coffin v. Left Hand Ditch Co., 6 Colo. 443 (1882); Lux v. Haggin, 10 P. 674 (Cal. 1886).

24. *See, e.g.*, Illinois C.R.R. Co. v. Illinois, 146 U.S. 387 (1892); United States v. Hibner, 27 F.2d 909 (D. Idaho 1928).

25. *Id.*; Hargrave v. Cook, 41 P. 18 (Cal. 1895). Under the common law, and by statute in some states, appropriative rights may be subject to abandonment or forfeiture for non-use. *See, e.g.*, 2 KINNEY, IRRIGATION AND WATER RIGHTS §1118 (2d ed. 1912); WYO. STAT. §41-3-401 (1977).

26. 7 R. CLARK, WATERS AND WATER RIGHTS, §614.1 (1976).

27. *Id.* §516.2.

28. Winters v. United States, 207 U.S. 564 (1908).

29. United States v. Hibner, 27 F.2d 909 (D. Idaho 1928).

30. PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LANDS 144 (1970).

vested appropriators. Such exploitation of these Indian water rights by sale or lease to others for use off the reservation would surely have a devastating effect upon the non-Indian economy. In balancing the equity of limiting Indian water rights to the original intent against the harsh impact of off-reservation use upon non-Indian water users, one finds support for a restrictive view of *Winters* rights.

While the United States Supreme Court has rejected a "balancing of the equities" approach respecting the *creation* of reserved rights,[31] there is support for the proposition that equitable considerations should limit the *scope* of reserved rights.[32] Those considerations necessarily weigh against permitting the disruption of existing agricultural economies throughout the West by allowing the wholesale peddling of *Winters* water rights for use outside the boundaries of the reservation.

TRANSFERABILITY WITHIN THE BOUNDARIES OF THE RESERVATION

A different situation presents itself with respect to the transferability of Indian water rights to new uses within the boundaries of the Indian reservation for two reasons. First, the transfer of water to new uses within the reservation is consistent with the purpose for which the water was reserved in the first instance. Moreover, the transfer of water to new uses within the reservation would not cause nearly the impact which would accompany the sale of water off the reservation to meet the virtually limitless demand for water in the West.

While the *Winters* right may be measured by the practicably irrigable acreage on the reservation,[33] courts have consistently recognized that the scope of the right must be flexible enough to meet future, as well as present, needs of the reservation.[34] Tribal advocates translate the "present and future needs" language to mean that the *Winters* right is open-ended, allowing additional water to be claimed as new uses for the water on the reservation arise.[35]

A more workable approach would be to limit the quantity of

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

32. Myers, *Federal Groundwater Rights: A Note on Cappaert v. United States,* 13 LAND & WATER L. REV. 377, 387-88 (1978).

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

34. *See, e.g.,* Conrad Investment Co. v. United States, 161 F. 829 (9th Cir. 1908); United States v. Ahtanum Irr. Dist., 236 F.2d 321 (9th Cir. 1956), *cert. denied,* 352 U.S. 988 (1957), *second appeal* 330 F.2d 897 (9th Cir. 1964); *see also* S. Rifkind, Report of the Special Master 265, 266 (1960) (Arizona v. California, 373 U.S. 546 (1963)) [hereinafter cited as Report of the Special Master].

35. Dellwo, *Indian Water Rights–The Winters Doctrine Updated,* 6 GONZ. L. REV. 215 (1971); Veeder, *Winters Doctrine Rights–Keystone of National Programs for Western Land and Water Conservation and Utilization,* 26 MONT. L. REV. 149 (1965).

water reserved to that necessary for the purpose of the reservation[36], while allowing the use of the water to shift to meet present-day needs on the reservation. This approach would provide the certainty sought by non-Indians regarding the quantity of water reserved under the *Winters* right and further would provide for the ever-changing requirements for water on the reservation.[37]

Since most of the water claimed under the *Winters* doctrine has not yet been put to beneficial use, there is a question about the quantity of water which could be transferred to a new use. Many scholars suggest the "no injury" rule as a basis for limiting the amount of water right that can be transferred.[38] However, reliance on that principle would be ill placed, since it would severely restrict the flexibility of *Winters* rights.[39]

A similar but more reasonable approach would be to calculate the beneficial consumptive use attributable to the initial purpose of the reservation and then to allow that amount to shift to other uses.[40] This process is no more difficult than the chore faced in quantifying reserved rights in the first instance where little or no actual use of water has occurred on the reservation. The principal advantage of allowing the change in use of Indian water rights is that it eliminates the need for tribes to make repeated claims for additional water as new uses arise. This view, of course, also assumes that there is a limit to the quantity of water reserved for the reservation, a view which is opposed by advocates of open-ended *Winters* rights.[41]

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36. The bulk of the decisions respecting Indian water rights have related the reservation of water to agricultural purposes. *See, e.g.,* Arizona v. California, 373 U.S. 546 (1963); United States v. Powers, 305 U.S. 527 (1939); Winters v. United States, 207 U.S. 564 (1908); United States v. Walker River Irr. Dist., 104 F2d 334 (9th Cir. 1939); Skeem v. United States, 273 F. 93 (9th Cir. 1921); United States v. Hibner, 27 F.2d 909 (D. Idaho 1928); Anderson v. Spear-Morgan Livestock Co., 107 Mont. 18, 79 P.2d 667 (1938); Merrill v. Bishop, 69 Wyo. 45, 237 P.2d 186 (1951).

37. Such an approach also squares with the holding in *United States v. New Mexico,* 438 U.S. 696 (1978), in which the Court refused to recognize reserved right claims of the United States for "secondary uses" beyond the purposes for which the Gila National Forest had been created. By analogy, no water can be claimed for modern-day uses of water which were virtually non-existent at the time of creation of most Indian reservations and, therefore, beyond the scope of the implied reservation of water.

38. *See* note 22 *supra.*

39. Since the *Winters* doctrine is designed to take the tribes out of competition with appropriators in order to secure their right to the use of water on the reservation, a limitation on the transferability of *Winters* rights based upon the amount of water historically put to use would run counter to one of the principal objectives and benefits of the doctrine.

40. This approach has been suggested by the states of Arizona, California, and Nevada in connection with their joint motion to the United States Supreme Court for determination of present perfected rights and the entry of a supplemental decree under the terms of Article VI of the Court's decree in *Arizona v. California,* 373 U.S. 546 (1963).

41. *See* note 35 *supra* and accompanying text.

THE LAW WITH RESPECT TO ALLOTMENTS

An additional issue concerning the transferability of *Winters* rights involves the rights of purchasers of land which was formerly a part of the reservation. The private ownership of lands within the exterior boundaries of Indian reservations is common, brought about by the goal of assimilation which dominated federal Indian policy in the early 1900s. After the cessation of hostilities between white settlers and Indians, the government embarked upon a program designed to bring the Indian into the mainstream of society. A key element of the federal policy was to divide reservation lands into individual tracts for each Indian[42] and to make available the unallotted land within the reservation to non-Indians for homesteading purposes.[43]

As a consequence of this fee ownership of tracts located within a reservation, several lawsuits have originated over claims to *Winters* water rights made by successors in interest to such land.[44] The earliest of these allotment cases, *United States v. Hibner,*[45] determined the rights of non-Indian purchasers of allotted land involving the Fort Hall Indian Reservation in Idaho. In its decision, the court first addressed the rights of the Indian allottees, holding that they were entitled to reserved rights with a priority date equal to the ratification date of the Fort Bridger Treaty which established the reservation, and that these rights could not be abandoned or forfeited for non-use.[46]

The court also recognized the right of allottees to sell their land and water. The purchasers of such water rights were granted the right to the *Winters* priority date but were held to be immediately governed by state law. Further, purchasers were limited to the amount of water which had been actually used by the Indian allottee, along with that which could be put to use with reasonable diligence.

The next case to address the allotment issue was *United States v. Powers,*[47] in which the rights of non-Indian purchasers of allotments which had formerly been a part of the Crow Reservation in Montana were at issue. The United States sought to enjoin the non-Indian holders of the allotments from using waters above a government irrigation project on the reservation.

42. *See, e.g.*, General Allotment Act of 1887, 25 U.S.C. §331 (1976) (commonly referred to as the Dawes Act).

43. *See, e.g.*, § §43 U.S.C. 161-302 (1976).

44. It appears that the lessees of allotted lands may exercise the water rights appurtenant to such lands, Skeem v. United States, 273 F. 93, 96 (9th Cir. 1921), and that issue will not be treated herein. *See also* Report of Special Master 266.

45. 27 F.2d 909 (D. Idaho 1928).

46. *Id.* at 912.

47. 305 U.S. 527 (1939).

In denying the government's request for an injunction, the Supreme Court observed: "[W]hen allotments of land were duly made for exclusive use and thereafter conveyed in fee, the right to use some portion of tribal waters essential for cultivation passed to the owners."[48] Unfortunately, however, the *Powers* case was decided on procedural grounds, and the Court did not have the opportunity to shed any additional light upon the extent of the non-Indians' rights to the use of water upon the former allotment.

Recently, the law with respect to the rights of transferees of allotted land has become unsettled as a result of the decision in *Colville Confederated Tribes v. Walton.*[49] There, the tribes sought to enjoin the use of water by Walton, a non-Indian successor in interest to an allotment within the boundaries of the reservation.

The evidence in the case revealed that the original allottee had not irrigated the land, although he later sold it to another Indian who irrigated 32 acres before selling the land to Walton. Walton claimed a reserved right for the entire allotment or, in the alternative, for the 32 irrigated acres of land, on the theory that the reserved water right is appurtenant to the land and thus passes to non-Indian landowners. The state of Washington intervened in order to protect its authority to issue state water rights permits within the boundaries of the reservation and aligned itself with Walton.

The United States and the tribes took contrary positions on the question of alienability of the reserved water right. The federal government argued that Walton obtained a right to the amount of water being put to use at the time of the transfer, while the tribes contended that the reserved right was a tribal right, which could not be alienated to a non-Indian.

Unpersuaded by the contentions of the parties or by the previous holdings in *United States v. Hibner* and *United States v. Powers,* the court broke new ground. Although the court agreed that reserved rights are appurtenant to allotted land,[50] it found that reserved water rights exist for the sole purpose of providing necessary water to ensure that the reservation can provide a permanent homeland for the tribes. Consequently, "[w]hen title to Indian lands passes into non-Indian hands, the purposes for which the reserved water rights are implied no longer exist. It therefore seems logical to conclude that reserved water rights on Indian reservations are limited to Indians."[51]

48. *Id.* at 532.

49. 460 F. Supp. 1320 (E.D. Wash. 1978).

50. *Id.* at 1326.

51. *Id.* at 1328; *see also* United States v. Anderson, No. 3643 (E. D. Wash. July 23, 1979), in which the court held that the original purposes of the reservation cease to exist when the land passes out of Indian ownership.

Based upon that reasoning, the court denied Walton his reserved right, but granted him a right to irrigate 32 acres, with a priority date equal to the date that the water had first been put to use. Finally, the court held that, when an allotment is transferred to non-Indian ownership, the purpose for the implied reservation of water is defeated, and that portion of the *Winters* water right does not inure to the benefit of the tribe, but is lost completely.

The *Walton* decision cannot be said to represent a clear-cut victory to any of the principals in the case,[52] and its precedential value is limited by its curious reversal of prior decisions which hold that Indian water rights are appurtenant to the land within the Indian reservation.[53] Apparently, the court was heavily influenced by its conclusion that the reserved right is a personal right created solely for the use of the tribes,[54] a conclusion which the court reached after analyzing the rationale behind the *Winters* doctrine.[55] This element of the *Walton* decision transcends the facts of the case, for it isolates the real significance of a *Winters* water right—that it is created for and limited to the purpose of satisfying water needs within the boundaries of the reservation.

CONCLUSION

Only when the *Winters* doctrine is advanced as an economic doctrine does it reach the boundless proportions suggested by its staunchest dogmatists. However, it is clear that the *Winters* doctrine was designed for the limited purpose of meeting the needs of Indian reservations. While the doctrine arose to assure that Indians residing on the reservation would be able to enjoy a quality of life equivalent to that found in the non-Indian agrarian community, there is no foundation in law or equity to support the transferability of *Winters* water rights for use outside the boundaries of Indian reservations.

52. While Washington State took the position that the reserved right passed with the land, it probably is quite content with the decision of the court limiting the scope of reserved rights and thus reducing the likelihood that a previously unasserted paramount claim to water could, without notice, spring up and upset the rights of water users under state law. Additionally, the case established the right of the state to exercise its sovereign authority to regulate the appropriation and administration of non-reserved waters within the exterior boundaries of the reservation.

53. Recently, for example, the court in United States and Kalamath Indian Tribes v. Adair and the State of Oregon, Civil No. 75-914 (D. Ore. Sep. 27, 1979), explicitly rejected the holding in *Walton* in favor of the principles of law set forth in *Hibner* respecting the water rights of non-Indian successors to Indian allotments.

54. 460 F. Supp. at 1328.

55. *Id.*