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COMMENTS ON INDIAN WATER RIGHTS

Sharon M. Morrison*

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The 1973 Montana Water Use Act¹ declared the waters within Montana to be the property of the state. During the next five years, state officials and interim legislative committees mulled over the "Indian problem."² Ultimately, the 1979 House Select Committee

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2. The Montana Legislative Interim Subcommittee on Water Rights heard testimony from Indians and non-Indians on April 14-15, 1978. The transcript of the meeting is a color-
voted to include Indian water rights in the state adjudication program. Within hours the federal government had filed law suits in three Montana federal courts seeking to have the federal rights determined in a federal forum. The following week, the legislature adopted a plan which included federal rights in the state adjudication procedure. However, the bill declared a three-year moratorium on adjudicating Indian rights.

The flurry of legislative and litigious activity neither raised new nor solved old problems. Since it first surfaced in a 1908 Montana case, the question of the extent and priority of Indian water rights has been part of the story of the West. This paper will examine the nature of Indian title and rights, the present legality of state adjudication of Indian claims, and plans for prioritizing and quantifying those claims.

I. BACKGROUND

In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were ful, though poignant, summary of the Montana Indian position on adjudication. Particularly notable was the presentation of Vicky S. Santana, attorney for the Blackfeet Tribal Water Study, in which she recalled:

[O]ne of the ways that we lost this land was that they told us “you don’t have any people and you can never use all this land, so you might as well give it to us,” and we’re very sorry we got took that way. At the time when they were saying these kinds of things to us, we had passed through at least four smallpox epidemics, and we were down to about fifteen hundred to two thousand people. Now we are twelve thousand; we are sorry we lost all that land . . . . How can the Blackfeet Tribe of today say how much water the Blackfeet Tribe is going to need forever? We just feel that morally we are not able to make that kind of decision on behalf of future generations of Blackfeet. Because, morally, we feel our ancestors who made that decision on land for us were wrong, we don’t want people one hundred years from now saying, “Aha, first the Blackfeet sold out on land and now they are selling out on water.”

3. The bill, S.B. 76, included a number of changes in the system set out in the 1973 Act.

4. The suits, filed by the Justice and Interior Departments in the United States District Court at Billings, Great Falls, and Missoula, sought federal adjudication of Indian water rights for tribes on the Flathead, Blackfeet, Fort Peck, Rocky Boy, and Fort Belknap reservations in Montana. Nos. CV-75-6-BLG, CV-75-20-BLG, CV-75-34-BLG, CV-79-40-BLG, CV-79-21-GF, CV-79-22-GF, CV-79-33-M (D. Mont. 1979). The cases were subsequently dismissed in favor of state court proceedings. The dismissal is on appeal to the Ninth Circuit Court of Appeals.

5. MCA §§ 85-2-701, -217 (1979). MCA § 85-2-212 (1979) directs the Montana court to “issue an order to file a statement of claim of an existing water right.” Under MCA § 85-2-226 (1979), failure to do so results in a “conclusive presumption” that the water right or claimed water right has been abandoned.

6. Winters v. United States, 207 U.S. 564 (1908). The Court in this case established the basic doctrine of federal reserved rights, called the Winters doctrine.
Indian land tenure and rights are not readily linked to any established concept of modern American law. As such, awareness of the history of this unique political phenomenon is essential to an understanding of the legal status of Indian claims.

A. The Discovery Doctrine

The development of a concept of Indian property rights is not an inspiring chapter in American history. It is, nevertheless, understandable within the context of the emerging American nation. Chief Justice John Marshall, in 1823, summarized this period of American history and European philosophy:

On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; . . . But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the rights of acquisition which they all asserted, should be regulated as between themselves. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments which title might be consummated by possession.

Marshall, further explaining what became known as the “discovery doctrine,” wrote that “[t]he exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements on it.” As to those who had inhabited the land, he conceded that “[t]hey were admitted to be the rightful occupants of the soil, with a legal as well as a just claim to obtain possession of it.”

According to the Marshall analysis, the Europeans asserted ultimate dominion in themselves, and, as a consequence, “the power to grant the soil, while yet in the possession of the natives.” The grants, he said, conveyed a title to the grantees subject only to the

8. Id.
9. Id. at 572-73 (emphasis added).
10. Id. at 573.
11. Id. at 574.
12. Id. at 583. Without a hint of humor, Marshall attempted to demonstrate this doctrine by explaining that, when France effectuated a cession of North American lands to England, “[i]t was never supposed that she surrendered nothing, although she was not in actual possession of a foot of the land.” Id.
Indian right of occupancy. The Chief Justice then articulated what instantly became the basic Indian policy of the United States:

The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise. . . . The title to a vast portion of the lands we now hold, originates in them [the English and French claims]. It is not for the Courts of this country to question the validity of this title, or to sustain one which is incompatible with it.

It seems incongruous that the political thinking which conceived the nation and founded its documents upon protection of "inalienable" and God-given rights, could so callously disregard the rights of the native American. The American willingness to accept the "discovery doctrine" is perhaps explainable by the "cultivation ethic"—that the soil was to be used productively. The Indians' use of vast lands for hunting, fishing, and only occasional agriculture was antithetical to the production-oriented Americans. In his first annual address to Congress in 1817, President James Monroe declared that "[t]he earth was given to mankind to support the greatest numbers of which it is capable, and no tribe of people have a right to withhold from the wants of others more than is necessary for their own support and comfort."

If this philosophy was understandable, it was not readily excusable even then. Unable to satisfactorily rationalize the American position, Chief Justice Marshall wrote the following apology:

However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned. So, too, with respect to the concomitant principle, that the Indian inhabitants are to be considered merely as occupants, to be protected, indeed,
while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others.  

Indians' rights to possession could thus be displaced by European colonists, who fabricated new ownership rules to justify their claims.

Ironically, the discoverers' assertions of claims subject only to Indian use and occupancy were not inconsistent with the native Indian philosophy of land ownership. Alvin M. Josephy, describing the Indian concept of land tenure, wrote:

Many Indians held in common certain fundamental ideas. A concept concerning the right of land ownership, basically different from that of the white man, was shared by most Indians. To them, land and its produce, like the air and water, were free to the use of the group. No man might own land as personal property [sic] and bar others from it.  

So while the alien "title holders" were asserting claims to all rights except the use and occupancy of the land, the Indians claimed nothing for themselves but that same use and occupancy. Because they were not provoked by notions of property rights to defend a certain plot of ground, the Indians obligingly moved on as the nation expanded. When it became clear that the white man intended to inhabit all the land, it was too late to make an effective stand. While they might have been powerful enough to have repelled the conquest at the outset, the bewildered Indians were reduced to shrinking land areas and finally to no more than cestui que trusts by the fictional "discovery doctrine."

B. Indian-Federal Government Relationship

The most appropriate legal description of the present relationship between the Indians and the federal government may be a type of trust, with the legal title in the United States and the equitable title in the Indians. In fact, Indian land legal title is in the United States, and Indians are powerless to convey the land without action by the federal government. Furthermore, the United States has power to terminate the Indian right of occupancy and fully dispose of the lands, although currently, by statute, they must in most cases compensate the tribes under the Fifth Amend-

ment for such actions.\textsuperscript{21}

While the discovery doctrine is the philosophical basis for the Indian-federal government relationship to the land, the interrelationship involves more than land and is founded on other sources of power. As with much of Indian law, the foundations are not precise. The power is most often traced to the property clause of the Constitution,\textsuperscript{22} to the commerce power,\textsuperscript{23} and to the presidential power to enter into treaties.\textsuperscript{24}

The presidential treaty power was perhaps the most important source of power over Indians during the explosive westward movement period. During the time from 1789 to 1868, 370 treaties were negotiated, 260 of those being signed in the expansion period from 1815 to 1860.\textsuperscript{25} In 1871, the treaty period was brought to a close by the Congressional Act of March 3, 1871.\textsuperscript{26} After that date, agreements between Indians and the federal government were accomplished by legislation. The treaties are critical to a discussion of Indian property rights, including water rights. The language must be scrutinized to ascertain the nature of the interest retained by the tribes.

The clearest constitutional connection permitting present federal power over Indian lands is founded on the property clause.\textsuperscript{27} As explained above, under the "discovery doctrine" the United States owned all lands to which it succeeded by virtue of agreements with European nations, property interests recognized by the ceding nation being recognized by the United States. The property interest assigned to the Indians by the ceding countries was one of "use and occupancy" with the fee in the "discoverer." Accordingly, that was the interest recognized by the United States, and, from the beginning, the government claimed the fee in Indian lands.\textsuperscript{28} It is the

\textsuperscript{21} Indian Claims Commission Act of 1946, 60 Stat. 1049, 25 U.S.C. § 70 (1976). Missouri, Kansas & Texas Ry. Co. v. Roberts, 152 U.S. 114, 116-18 (1894) ("Though the lands of the Indians were reserved by Treaty for their occupation, the fee was always under the control of the government."); Choate v. Trapp, 224 U.S. 665, 671 (1912) ("[T]reaties are no different from any other public laws and are subject to contrary legislation by the Congress when it is felt to be in the interest of the country . . .").

\textsuperscript{22} "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. CONST. art. IV, § 3, cl. 2.

\textsuperscript{23} "To regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes;" U.S. CONST. art. I, § 8, cl. 3.

\textsuperscript{24} "He shall have power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur;" U.S. CONST., art. II, § 2, cl. 2.

\textsuperscript{25} UNITED STATES INDIAN CLAIMS COMMISSION, FINAL REPORT (1978).


\textsuperscript{27} See note 38 infra.

\textsuperscript{28} Nadeau v. Union Pac. Ry. Co., 253 U.S. 442, 445-46 (1920) ("It seems plain that, at least until allotted in severalty, the lands were but part of the domain held by the tribe

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federal right, combined with the federal government-Indian trust relationship described below, which allows the United States to control disposition of Indian land through the property clause.

Federal control of Indian affairs rests upon the federal common law trust relationship between Indians and the United States. The Northwest Ordinance, passed in 1787, mandated good faith dealings with the Indians. At that time, the resolution was in the primary interest of the United States. Facing inevitable conflict with Great Britain and uneasy about the control of the Mississippi River by France, the colonists hoped to encourage alliances with the Indians. After the Revolution, the Louisiana Purchase, and the War of 1812, however, the United States government was in a position to deal from strength. In Cherokee Nation v. Georgia, Chief Justice Marshall discussed the "anomalous" character of the United States-Indian relationship. He then decided that "[their] Indian relation to the United States resembles that of a ward to his guardian." Implicit in that trust relationship is the federal government's obligation to represent to his best interests, the Indian.

C. The Reservations

Reservations, that is, the land on which tribes of Indians reside under the protection of the federal government, were created in three ways: by treaty under the executive power and ratified by the Senate; by executive order; and by Congressional enactment.

under the ordinary Indian claim—the right of possession and occupancy—with fee in the United States.

29. The declaration says:
The utmost good faith shall always be observed towards the Indians; their land and property shall never be taken from them without their consent; and in their property rights and liberty, they shall never be invaded or disturbed, unless in just and lawful uses authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.


31. Id. at 17.

32. U.S. CONST. art. II, § 2, cl. 2.

33. U.S. DEP'T OF INTERIOR, FEDERAL INDIAN LAW 613, 614 (1958) notes, "[A]lthough the practice of establishing Indian Reservations by executive order goes back at least to May 18, 1855, the practice rested on an uncertain legislative foundation prior to the General Allotment Act [of Feb. 8, 1887, 24 Stat. 388]."

34. Id. at 314-16. An opinion of then Attorney General Stone concluded that "any reservation created for their use, either by treaty stipulation or by virtue of an Act of Congress or Executive Order," was valid.
1. Public Land

In addition, reservations were designated on two types of land: land owned by the particular tribe or tribes from "time immemorial" and land then in the national domain, which encompassed all land held by the United States for the people of the United States. Public land, however, is land within the national domain "unqualifiedly subject to sale and disposition." The distinction is important. The Homestead Act of 1862 invited settlers to enter and claim "one-quarter section or less of unappropriated public land." Indian lands, not being "public land," were not part of the territory thus opened.

More importantly, Indian lands were not included in the Desert Land Act. That act permitted applicants to acquire desert land and reclaim it "by conducting water to the same, within the period of three years [after entry]." The act directed that the water was to be "appropriated" and was to be used for irrigation and reclamation. The meaning of the act was debated for a half-century. In 1934, the Supreme Court settled the dispute, saying that all water on public lands "should be reserved" for public use subject to state law. Had Indian reservation lands not been distinct from public lands, presumably the water on the reservations would have been subject to state laws dealing with prior appropriation and beneficial use. As it is, reservation water rights are immune from such laws. Accurate analysis of Indian water rights requires a clear understanding that reservation water rights are in no way akin to the prior appropriation rights of the western states. Arguably, the only reason a reservation might be given a priority

35. Ownership of lands from "time immemorial" is part of the rubric of aboriginal ownership discussed infra.


40. Id. at § 321.

41. Id.


43. "Public lands" are lands subject to private appropriation and disposal under public land laws. "Reservations" are not so subject. 49 Stat. 838, 16 U.S.C. § 796(1) & (2) (1976). "It is a familiar principle of public land law that statutes providing generally for disposal of the public domain are inapplicable to lands which are not unqualifiedly subject to sale and disposition because they have been appropriated to some other purpose." Hynes v. Grimes Packing Co., 337 U.S. 86, 103-04 (1948).
date is where the land was carved out of public land at the outset. Nevertheless, case law has proceeded to name priority dates for Indian reservation water rights, usually corresponding with the date of the establishment of the reservation. While in theory this distinction is important, in practice it has little application, since the reservation dates are ordinarily early and would precede most appropriated water priorities anyway.

2. Aboriginal Land

Land owned by an Indian tribe from "time immemorial" is called aboriginal ownership, or "Indian title." The terms are deceptive. Although sounding like secure and indefeasible interests, the words legally describe the Indian land tenure under the discovery doctrine—use and occupancy only.

Some tribes can show aboriginal possession and some cannot. Typically, an Indian tribe hunted and traveled on a large land area, claiming it as tribal territory. As the westward expansion touched the borders of these areas, however, the claim would shrink away—usually as a result of a treaty with the government. At first these agreements attempted to barter only for peace among the tribes and settlers and safe passage across Indian lands. Later treaties set out boundaries roughly approximating the land claimed by the tribes as their own. Finally, as the Indians became increasingly dependent on the protection of the United States, the government adopted a policy of re-locating tribes.

44. The author is aware that this theory runs askew of the Supreme Court holding in Winters v. United States, 207 U.S. 564, 577 (1908), where the Court assigned as the date of the reservation of water the date of establishment of the reservation, in spite of the fact that the reservation was created on land aboriginally owned by the Indians. It is here suggested that these distinctions, though critical today, were not considered important then.


47. An example of such a claim was that of the Blackfeet articulated in the Treaty of Fort Laramie of 1851, 11 Stat. 749 (1851). The territory of the Blackfeet Nation (already diminished by the encroachment of the white men) commenced at the mouth of the Musselshell River; thence up the Missouri River to its source; then along the main ridge of the Rocky Mountains in a southerly direction, at the headwaters of the northern source of the Yellowstone River; thence down the Yellowstone River to the mouth of the Twenty-Yard Creek; thence across to the headwaters of the Musselshell River, and thence down the Musselshell River to the place of beginning.

Id.


49. The first such act was passed to deal with the Indians east of the Mississippi River.
The policy had a profound effect on Indian land tenure. Those tribes remaining on their ancestral lands retained aboriginal ownership; those who were moved to other parts of the national domain were located on land reserved by the federal government for that purpose. The fact that a tribe is located on its ancestral land may be relevant to an inquiry about water rights. This subject will be further discussed in part IV below.

D. Allotment

The allotment program was initiated in 1887 by the General Allotment Act, better known as the Dawes Act. It provided for a “grant of 160 acres to each family head, of 80 acres to each single person over 18 years of age and to each orphan under 18, and of 40 acres to each other single person under 18.”50 The final bill directed that a patent in fee be issued to each allottee to be held in trust by the federal government for twenty-five years, during which time the land could not be alienated or encumbered.51 The purpose of the allotment program “was to enable the Indian to acquire the benefits of civilization”52 and to “enjoy a deeper sense of security”53 by issuing to individual Indians patents in fee to be carved out of reservation lands.54 It was contemplated that the acquired land would be cultivated55 and irrigated by the allottees.

The act further provided that after lands had been allotted to all Indians of any tribe “or sooner if in the opinion of the President

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51. Id.
52. Id.
   The believers in allotment had another philanthropic aim, which was to protect the Indian in his present land holding. They were confident that if every Indian had his own strip of land, guaranteed by a patent from the Government, he would enjoy a security which no tribal possession could afford him. If the Indians’ possession was further safeguarded by a restriction upon his right to sell it they believed that the system would be foolproof.
54. F. Cohen, Federal Indian Law 208-10 (1940).
55. Id. Section 7 of the act provides:
   That in cases where the use of water for irrigation is necessary to render the land within any Indian reservation available for agricultural purposes, the Secretary of the Interior be, and he is hereby, authorized to prescribe such rules and regulations as he may deem necessary to Indians residing upon such reservations, and no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor.
it shall be for the best interests of said tribe," the Secretary of the Interior could negotiate with the tribes for the purchase of unallotted reservation land by the government. The land so purchased was to be opened for settlement by homesteaders. As the Supreme Court recently noted, the settlement program was intended to promote "interaction between the races" and to encourage "Indians to adopt white ways." Most of the allotment and settlement under the act was accomplished prior to 1900. The program did not, however, create a new agrarian Indian society.

In an attempt to make the allotments more productive, the government leased to non-Indians some of the parcels, paying the rent to the Indian allottees. Many Indians who held their allotments until expiration of the trust period sold their parcels—some to other Indians—most to non-Indians. The Wheeler-Howard Act ended the allotment program in 1934, extending indefinitely the existing trust status of Indian land and prescribing "that title to all lands acquired for Indians" should remain in the United States.

The act drew the curtain on a two-century long drama of Indian land "adjustment" which resulted in a variety of types of landholding by Indians and non-Indians on reservations. Within most reservations today there are tribal ownerships, Indian allottees holding trust patents, Indian allottees holding fee simple patents, lessees of the tribe, non-Indian grantees of allotted land, and purchasers of settlement lands under the General Allotment Act.

II. THE WINTERS DOCTRINE

A. Federal Reserved Rights

As a review of Indian land tenure is necessary to an understanding of Indian ownership, a study of the development of the federal reserved water doctrine is vital to a discussion of the nature of the Indian water right. In 1899, the Supreme Court stated in dictum that the "plenary power" of the states with respect to water did not extend to non-public federal land. While states were free to adopt

56. Id. § 5.
57. Id.
62. Tribal property may be formally defined as property in which an Indian tribe has a legally enforceable interest. Subsequent to passage of the Indian Reorganization Act of 1934, the United States holds the legal title and the tribes hold the equitable title.
the prior appropriation doctrine, the opinion suggested, non-public lands would retain a water right more like the common law riparian right:

[In the absence of specific authority from Congress a State cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its water, so far, at least as may be necessary for the beneficial uses of the government property.]

The case generally is considered the origin of the federal reserved water right. It was prominently cited in *Winters v. United States*, the case on which Indian water rights are based.

**B. The Winters Case**

*Winters* involved a water rights dispute between the Fort Belknap reservation and a group of Montana non-Indians. The reservation was established in 1888 on a "part of a very much larger tract which the Indians had the right to occupy and use. . . ." Later, the Indians ceded to the United States a part of this holding which was then opened for settlement. The defendants took land upstream from the reservation and, prior to 1898, appropriated, under Montana law, 5000 inches of water from the Milk River which formed the northern boundary of the reservation. In 1898, an Indian project, also requiring 5000 inches, was constructed on the Milk. Defendants' use left insufficient water for the Indian projects, and the Indians asked the federal court to enjoin the non-Indian use. The lower court granted the injunction, the circuit court upheld the judgment, and the United States Supreme Court affirmed the decree. Justice McKenna, author of the opinion, said the case turned on "the agreement of May, 1888." Deciding that it was the policy of the government and the desire of the Indians to become a "pastoral and civilized" people, the Court found a reservation of water to accomplish those purposes implicit in the agreement.

The decision announced that "[t]he power of the Government to reserve the waters and exempt them from appropriation under

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64. *Id.* at 703 (emphasis added).
66. 207 U.S. 564, 577 (1908).
67. *Id.* at 576.
68. *Id.* at 575.
69. *Id.* at 576.
Indian Water Rights

state law is not denied and could not be."70 In 1963, in Arizona v. California,71 the doctrine was unequivocally expanded to cover all federal reservations,72 and, in Cappaert v. United States,73 the Court included within the implied reservation doctrine ground water—at least to the extent that "groundwater and surface water are physically interrelated as integral parts of the hydrological cycle."74

C. The Nature of Federal Reserved Rights

The field of federal reserved water rights represents one of the few exceptions to the famous declaration of Justice Brandeis, "There is no federal general common law."75 The doctrine was announced, defined, and expanded solely by the federal courts, and it is thought that the doctrine is firmly grounded in the Constitution.76 Insofar as the reserved rights serve Indian reservations, the power to claim the water appears to arise from the property clause and the treaty power.77

It is perhaps helpful in describing federal reserved rights to contrast the concept with the one more familiar to western law—the prior appropriation doctrine. In order to acquire a water right in most western states, including Montana, one must divert or impound or withdraw the water78 (in some states only from an established watercourse79), and apply it to some beneficial use.80 He

70. Id.
72. The Court said:
The Master ruled that the principle underlying the reservation of water rights for the Indian Reservation was equally applicable to other federal establishments such as National Recreation Areas and National Forests. We agree with the conclusions of the Master that the United States intended to reserve water sufficient for the future requirements of the Lake Mead National Recreation Area, the Havasu Lake National Wildlife Refuge, the Imperial National Wildlife Refuge, and the Gila National Forest.
Id. at 601.
74. Id. at 143, 144.
76. See Moses, The Federal Reserved Rights Doctrine—From 1866 through Eagle County, 8 NAT. RESOURCES LAW 221, 222-30 (1975), where the author says the power to reserve water derives from the "Welfare, War, and Treaty powers and the Commerce and Property Clauses." Professor Trelease declares, "Reserved water rights stem from the Supremacy Clause and the need for water to carry out federal functions." F. TRELEASE, WATER LAW 817 (1974).
78. MCA § 85-2-302 (1979). Most states currently require compliance with a statutory procedure such as a permit system for acquisition of a water right.
may use no more than he needs for the purpose for which the water was claimed. He acquires a "priority date" coinciding with the first use or application for a permit. The right is then subordinate to all earlier claims and superior to all later claims of water from the same source. He may lose the right by non-use over a long period or by intent to abandon. In most states, he cannot change the purpose or place of use except as permitted by statute.

By contrast, the federal reserved right is more like the common law riparian right. For example, most courts have assigned to a reserved right an "acquisition" date as of the date of creation of the reservation. Riparian water right title accrues "when title to the land passes from public . . . to private ownership." The priority of a federal reserved right "endures whether or not the water is put to use; and the reserved right is not lost by any period of non-use, it always being superior to rights on the same stream system which came into effect after the date of creation of the reservation." Similarly, whether a riparian right owner "contemplates use of the water is immaterial . . . . Use does not create and disuse cannot destroy or suspend a riparian right." The federal reserved water right extends to all rights in all waters on all lands within the federal domain. The amount of water reserved, while not specifically quantified, is limited to that amount of water necessary to fulfill the purposes of the reservation. It is this aspect which has been

suggests that the 1973 Montana Water Use Act eliminates the water course, non-water course distinction by defining "water" as "all water of the State, surface and subsurface, regardless of its character or manner of occurrence . . . ." Lecture by Albert W. Stone, Professor of Law, University of Montana (March 21, 1979).

81. Quigley v. McIntosh, 110 Mont. 495, 505, 103 P.2d 1067, 1072 (1940).
83. Montana courts historically have resisted finding abandonment of a water right. See A. Stone, SELECTED ASPECTS OF MONTANA WATER LAW 46-48 (1978). The 1973 Act ties abandonment to intent to abandon, or to ten successive years of non-use, when there was water available for use, in which case a prima facie presumption of abandonment arises. MCA § 85-2-404 (1979). But note the statute does not operate except on those rights determined under the 1973 Act.
87. Kiechel, Inventory and Quantification of Federal Water Rights—A Common Denominator of Proposals for Change, 8 NAT. RES. LAW. 255, 257 (1975). Mr. Kiechel is Deputy Assistant Attorney General, Land and Natural Resources Division, Department of Justice, Washington, D.C.
89. See Cappaert v. United States, 426 U.S. 139, 143 (1976), where the Supreme Court said flatly, "The implied-reservation-of-water-rights-doctrine reserves only the amount of water necessary to fulfill the purposes of the reservation, no more."
focused on by resource commissions, Congress and the western states in recent years.90

Indian water rights are considered by some as but one type of federal reserved water right.91 They are, however, distinctly different and deserve separate treatment. In the first place, the Indian water is held in trust for the Indians,92 and the United States is held to a fiduciary duty in dealings with the Indians. Therefore, even if the government, in administering water rights of other federal enclaves, could consider a balancing of federal and non-federal interests, at least some arm of government must effectuate as to Indian rights an uncompromising loyalty commensurate with that duty to maintain a trust.93 The failure by the government to distin-


91. See note 106 supra. See also Colorado River Water Conservation Dist. v. United States, 424 U.S. 808, 811 (1976) [hereinafter referred to as Akin]. Mary Akin, the originally first-listed plaintiff, lost her position in the case name when she did not join in the appeal.


Indian water rights are different from federal reserved rights for such lands as national parks and national forests, in that the United States is not the owner of the Indian rights but is a trustee for the benefit of the Indians. While the United States may sell, lease, quit claim, release, or otherwise convey its own federal reserved water rights, its powers and duties regarding Indian water rights are constrained by its fiduciary duty to the Indian tribes who are beneficiaries of the trust.

93. See Seminole Nation v. United States, 316 U.S. 286, 297 (1941), where the Court said:

[U]nder a humane and self-imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, [the United States] has charged itself with moral obligations of the highest responsibility and trust. Its conduct . . . should therefore be judged by the most exacting fiduciary standards. See also Taylor & Birdbear, Indian Water Rights, 18 Nat. Resources J. 221 (1978) quoting II Federal Protection of Indian Resources; Hearings Before Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, 92d Cong., 1st Sess. 2 (1971) [hereinafter cited as Hearings] (paper presented by Reid Peyton Chambers):

Just as a private trustee, the United States has a duty of undivided loyalty, which has been called the most fundamental duty owed to the beneficiary by his trustee or a ward by his guardian. Another important duty is the obligation to preserve and protect the trust property, which includes taking all reasonable steps to enforce the beneficiary's legal claims relating to the property. And just as a conflict between the private trustee's fiduciary duty of loyalty and his own personal interest would be intolerable if it interfered with performance of his trust responsibility, a conflict between the rights of Indian beneficiaries and the public purposes embodied in federal programs with adverse interests must not impede the effective discharge of the United States' fiduciary obligation to protect private Indian property rights.

. . . . But private rights, which the United States is obligated as a fiduciary to

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guish Indian water rights from other water rights was bitterly de-
nounced in hearings before a Senate subcommittee in 1976. How-
ever, the Supreme Court on two occasions has failed to recognize a
difference, and the distinction now may be only academic.

Secondly, the "discovery doctrine," which bifurcates Indian ti-
tle into government-owned "fee interest" and Indian-held "use and
occupancy," may further distinguish a non-Indian federal reserved
right from an Indian right. Arguably, where a tribe has never
moved from its aboriginal claim, and where its Indian title has
never been extinguished, it holds an unbroken and unfettered prop-
erty right to use and occupancy of the land and the water. Accord-
ingly, there are two types of Indian water rights: those reserved
by the Indians from their aboriginal holdings, and those reserved from
the public domain by the federal government for the Indians. The
distinction as it relates to quantification will be discussed in part
IV of this article.

For all the controversy which has surrounded Indian water
rights from the beginning, there are only two United States Su-
preme Court cases on the subject—Winters and Arizona v. Califor-
nia. Neither case conclusively resolves the critical question: Did
the Indians on aboriginal lands, pursuant to treaties, grant the
land to the United States retaining the right to use the water, or
did they grant land and water, thus giving the government the
power to reserve water for the Indians?

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94. Hearing, supra note 93, at 44. Mel Tonaket, President of the National Congress of
Americans, testified:

Throughout the Akin brief, the Department of Justice failed to make that distinc-
tion. Rather than making the all-important differentiation, the Justice Depart-
ment reiterated its errors in Eagle River and on page 56 of its Akin Brief, said this:

"As recognized in Arizona v. California, supra, 373 U.S. at 601, the principles of
reserved rights doctrine are the same whether Indian or non-Indian Federal claims
are involved."


95. Arizona v. California, 373 U.S. 546, 601 (1963); Colorado River Water Conservation

96. The initial Indian water rights opinion, United States v. Winans, 198 U.S. 371
(1905), was written by Justice McKenna, author of the Winters decision. He said of the
treaty in Winans, "The grant was not a grant to the Indians, but was a grant from the
Indians to the United States, and such being the case all rights not specifically granted were
reserved to the Indians." Id. at 395.

Lower court cases decided before Arizona v. California similarly have found that treaties
with the various tribes grant only certain property rights to the United States, reserving
water rights to the Indians. United States v. Ahtanum Irrigation Dist., 236 F.2d 321, 326
(9th Cir. 1956); Skeem v. United States, 273 F. 93, 95 (9th Cir. 1921); Winters v. United
States, 143 F. 740, 748 (9th Cir. 1906).

At the same time, other decisions view water rights as reserved by the United States for
In *Arizona v. California*, the Supreme Court ignored the question, apportioning the water of the Colorado River among Arizona, California, and Nevada according to the terms of the Boulder Canyon Act. That area through which the Colorado River runs is arid, requiring irrigation for any production of crops. The special master who tried the case “refer[red] to archaeological evidence that as long as 2000 years ago the ancient Hohokam tribe built and maintained irrigation canals near what is now Phoenix, Arizona, and that American Indians were practicing irrigation in that region at the time white men first explored it.”

Justice Black, writing for six members of the Court, quoted from *Winters* as follows: “And this, it is further contended, the Indians knew and yet made no reservation of waters.” In spite of the seemingly clear indication that if water reservations were made, they were made by the Indians, Justice Black concluded “that the Government when it created that Indian Reservation, intended to deal fairly with the Indians by reserving for them waters without which their lands would have been useless.”

The opinion does not mention aboriginal ownership. There is no indication whether or not the question was considered by the Court at all. The lack of mention in *Arizona v. California* is not necessarily the death knell of the aboriginal rights doctrine. However, since the Justice Department has been reluctant to vigorously assert the theory, it may never be properly heard. Having explored the history of Indian land tenure and the development of federal reserved water rights, we come to the important local question.

### III. Can Montana Adjudicate Indian Water Rights?

In 1976, in *Colorado River Water Conservation District v. United States (Akin)*, the United States Supreme Court said that

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98. *Id.* at 600, citing *Winters*.
99. *Id.*
100. *Even if it is heard, there is a possibility that a court would invoke the *Johnson v. McIntosh* approach to a different problem:*

However extravagant the pretension . . . may appear; that the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it . . . it becomes the law of the land and cannot be questioned.

21 U.S. 543, 591 (1823).
a Colorado court had concurrent power with federal courts to adju-
dicate the priority and quantity of all federal water rights, includ-
ing Indian water rights. The opinion reinstated a district court dis-
missal of a pending federal court water rights proceeding after a
state adjudication was undertaken with respect to the same water
system. The seven cases filed in Montana federal courts\textsuperscript{102} were
similarly dismissed in favor of a statewide adjudication plan.\textsuperscript{103} The
cases have been appealed to the Ninth Circuit Court of Appeals. In
order to ascertain whether the \textit{Akin} result should obtain in Mon-
tana, it is necessary to review what the Supreme Court considered
in that decision.

\section*{A. The Akin Case}

Colorado has a judicial system for determining water rights in
its seven water divisions.\textsuperscript{104} In 1972, there were pending in three
water divisions state court adjudications in which the United
States was asserting non-Indian federal claims. In November,
shortly before a state water rights adjudication action was filed in
Division 7, the federal government brought a suit in federal court
seeking to adjudicate Indian and non-Indian federal claims against
some one thousand other users in the division. Shortly thereafter,
one of the defendants sought in state court for Division 7 to make
the government a party to state proceedings pursuant to the Mc-
Carran Amendment.\textsuperscript{105}

The amendment waives sovereign immunity in adjudications
of "a river system or other source," and subjects the government to
state adjudications "where it appears that the United States is the
owner of or is in the process of acquiring water rights by appropri-
ation under State Law, by purchase, by exchange, or otherwise."
\textsuperscript{106}

\begin{itemize}
  \item \textsuperscript{102} Nos. CV-75-6-BLG, CV-75-20-BLG, CV-75-39-BLG, CV-79-40-BLG, CV-79-21-
  \item \textsuperscript{103} The courts seemed to be reaching for their result in finding that the supreme
court order, 36 St. Rptr. 1228 (1979), initiating the claims registration program pursuant to
MCA § 85-2-212 (1979) constituted "initiation of the general adjudication." As such, the
opinion surmised that "the greater wisdom lies in following Colorado River, and, on the
basis of wise judicial administration, deferring to comprehensive state proceedings." Nos.
CV-75-6-BLG, CV-75-20-BLG, CV-75-34-BLG, CV-79-40-BLG, CV-79-21-GF, CV-79-22-GF,
  \item \textsuperscript{105} 424 U.S. at 806.
  \item \textsuperscript{106} The McCarran Amendment, 43 U.S.C. § 666 (1976), provides:
      Consent is given to join the United States as a defendant in any suit (1) for the
      adjudication of rights to the use of water of a river system or other source, or (2)
      for the administration of such rights, where it appears that the United States is
      the owner of or is in the process of acquiring water rights by appropriation under
      State law, by purchase, by exchange, or otherwise, and the United States is a
\end{itemize}
The federal district court granted a motion to dismiss its proceedings in favor of the state court action. The Court of Appeals for the Tenth Circuit reversed, and the United States Supreme Court granted certiorari.

In its decision, the Court noted that, in an earlier case, they held that reserved rights were included in the “otherwise” language of the amendment. Indian rights were not different from other federal rights, they indicated, saying, “Though Eagle County and Water Division 5 did not involve reserved rights on Indian reservations, viewing the Government’s trusteeship of Indian rights as ownership, the logic of those cases clearly extends to such rights.”

The Court concluded the state had concurrent jurisdiction and directed that the case be tried in state courts. In dismissing the federal proceeding in favor of a state action, the Court did not rely on the abstention doctrine as had the lower court. Rather, they founded approval of the dismissal on the admittedly narrow ground of “wise judicial administration.” The Court specifically withheld decision of whether dismissal “would be warranted if more exten-
sive proceedings had occurred in the federal district court prior to dismissal, if the involvement of state water rights were less extensive than it is here, or if the state proceedings were in some respect inadequate to resolve federal claims." 114

B. Akin and Montana

Does Akin determine conclusively that Indian water rights can always be adjudicated in state court proceedings? The answer, if indeed there is a definite answer, is intertwined among the facts of Akin. It might be said that if the proceeding is an adjudication of a river system, if the state has an established system for such procedure, and if the state court proceeding is filed first, state jurisdiction is proper. 115 However, an examination into the issues in Akin demonstrates the answer is not that simple.

1. The McCarran Amendment

Prior to enactment of the 1952 McCarran Amendment, states were without power to legislate or in any way affect Indian rights. 116 However, the amendment did waive sovereign immunity as to river system adjudications where there was federal ownership on the water source. 117 Although the language of the amendment is broad enough to include all federal rights, it was asserted in an earlier Colorado case 118 that the provision was intended to apply only to federal rights acquired or being acquired by the federal government pursuant to state law 119 although Indian water rights were not an issue in that case.

It has been argued that Indian claims should not be treated in the same way as other federal rights. 120 It is also maintained by some that the McCarran Amendment did not contemplate submis-

114. Id.
115. See generally Hearings, supra note 93. In his testimony, Reid Chambers, Associate Solicitor, Department of the Interior, noted that the case will result in a "race to the courthouse" to file such actions. He said:
We have won the race in two cases in Montana. Scott and I worked nights to get those cases filed in Montana. We won those and we are now faced with motions to dismiss where we won the race. The States are citing Akin as support for dismissing those cases.

Id. at 13.
116. United States v. Wheeler, 435 U.S. 313 (1978) ("Congress has plenary authority to legislate for Indian tribes in all matters including their form of government."). By implication, Congressional power would include power to grant jurisdiction to the states.


119. Id. at 525.
120. See notes 91-92 and accompanying text supra.
sion of Indian claims to state court adjudication. Advocates of this position call attention to the total absence from the McCarran Amendment of any language typically found in statutes applying to Indians.

The legislative history of the bill, however, suggests that the congressional intent was to allow all federal claims to be considered in an appropriate state water proceeding. A Senate report said:

It is apparent that if any water user claiming to hold such right by reason of the ownership thereof by the United States or any of its departments is permitted to claim immunity from suit in, or orders of, a State Court, such claims would materially interfere with the lawful and equitable use of water for beneficial use by the other water users who are amenable to and bound by the decrees and orders of the State Court . . . . The bill [S18] was introduced for the very purpose of correcting this situation and the evils growing out of such immunity.

In a letter opposing the measure, the Department of Interior set out types of interests which might not be best served by the McCarran Amendment, including "those which exist by virtue of the creation of Indian Reservations under the doctrine of United States v. Winters." The letter noted that "the United States can be said, with varying degrees of accuracy, to be the 'owner' of rights of any and all these types . . . ." In view of the legislative history of the McCarran Amendment, the Akin Court's conclusion that Congress intended that Indian water rights be subject to state court adjudication seems to have been proper.

2. Public Law 280

Public Law 280 provides for expanded state jurisdiction over Indians where both the state and the tribes consent. The act cautions that, even if a state does assert jurisdiction, nothing in the legislation "shall confer jurisdiction upon the state to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of any real or personal property, including water rights, belonging to any Indian or Indian tribe . . . that is held in trust by the United States." On its face, the statute clearly would seem to preclude the result in Akin. Even though this point was raised by

123. Id. at 7.
124. Id. at 7-8 (emphasis added).
the government in briefs, the Court dealt with it only in one less-than-convincing footnote:

Footnote 20. To be sure, 25 U.S.C. § 1322(b) and 28 U.S.C. § 1360(b) provide that nothing in those sections “shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of [any real or personal property, including water rights, belonging to any Indian or any Indian tribe . . . that is held in trust by the United States].” This provision in both sections, however, only qualifies the import of the general consent to state jurisdiction given by those sections. It does not purport to limit the special consent to jurisdiction given by the McCarran Amendment . . . 127

The Court could have suggested that the intent of Public Law 280 was that any waiver of sovereign immunity be pursuant to the McCarran Amendment rather than to Public Law 280. Or the opinion could have pointed out that, although Public Law 280 was passed just one year after the vigorously debated McCarran Amendment, there was no mention of the earlier legislation, thus indicating no intent to limit the special consent given in McCarran. Or, Justice Brennan, who authored the opinion could have said, as some authorities suggest, that the purpose of Public Law 280 was merely to deal with growing lawlessness on the reservations. 128 But the opinion, discussing none of these theories, dismissed Public Law 280 with a mere footnote.

The cursory treatment of the provision in Akin may well cause others to raise it later. It should be of special interest in Montana that the state code has a provision identical to Public Law 280. 129 Furthermore, the Montana Supreme Court has held that a Montana water right is personal property. 130 According to the Montana court, a proceeding to determine the extent of such personal property must necessarily be an “adjudication of the ownership or right to possession” of the property—the very activity proscribed by Public Law 280. Therefore, the question may well deserve more than a footnote in Montana.

3. Montana Considerations

An additional question which must be discussed in Montana is

129. MCA § 2-1-304 (1979).
whether the courts of this state have power to adjudicate Indian claims. In a recent case, the United States Supreme Court said, "State and Federal Governments 'deriv[e] power from different sources,' each from the organic law that established it." The Federal Enabling Act for the State of Montana provides:

That the people inhabiting said proposed states do agree and declare that they forever disclaim all rights and title . . . to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until title thereto shall have been extinguished by the United States, the same shall be and remain under the absolute jurisdiction and control of the United States.

This same doctrine is incorporated into the Montana Constitution, which declares:

All provisions of the enabling act of Congress (approved Feb. 22, 1889, 25 Stat. 676), as amended and of Ordinance No. 1, appended to the Constitution of the State of Montana and approved February 22, 1889, including the agreement and declaration that all lands owned or held by any Indian or Indian tribes shall remain under this absolute jurisdiction and control of the Congress of the United States continue in full force and effect until revoked by the consent of the United States and the people of Montana.

Several interpretations of the provisions are possible. First, a strict reading of the language demonstrates that disclaimer applies only to land. Since Montana law views water rights as personal property, arguably they do not fall within the provisions at all. Second, if the water right is considered with the land and therefore under the exclusive control of Congress, Indian water rights may still be subject to state adjudication through the McCarran Amendment. Finally, even if the McCarran Amendment does not unilaterally nullify the effect of the disclaimer, the combination of that act and the Montana Water Use Act may provide the necessary state and federal consent. However, it has been argued that the consent requirement is constitutional and that only a referendum vote by the people can satisfy it. Given the socio-political realities in Montana, the position, if correct, probably would preserve the disclaimer only until a referendum could be called. Akin sheds no light on this question because Colorado does not have a

133. Mont. Const. art. I.
disclaimer provision similar to that of Montana. New Mexico does have an identical clause in its constitution. The supreme court in that state found the provision did not prohibit state adjudication of Indian water rights.

4. A Final Word on Forums

If the question of who has the power to adjudicate Indian claims in a given situation is difficult, the query "Who should make the determination?" is even more so. Indians are reluctant to submit this vital determination to state courts. On the other hand, it is an extravagant waste of judicial resources and litigants' time and money to adjudicate claims in both federal and state courts. This is an almost inevitable result in Montana where the federal court would not have the administrative personnel to seek out and serve the unfiled use rights. Any judgment, therefore, would not be binding on non-party water right holders, and the entire question would have to be relitigated in state court.

Perhaps Indian claims should not be determined totally in state courts. Two alternatives are possible. First, Indians, the federal government, and the state could negotiate a compact, as set out in MCA § 85-2-702 (1979). A second plan is a class action in federal court to ascertain Indian rights against all users. As a third alternative, the United States could sue the State of Montana as administrator of the waters of the state. Such a suit could be in the nature of an injunction to prevent use in excess of the amount claimed by Indians. The threatened injury requisite for such a suit can be found in the state's declared intent to adjudicate all the water in the state.

136. N.M. Const., art. XXI, § 2.
137. Reynolds v. Lewis, 88 N.M. 636, 637, 545 P.2d 1014, 1015 (1976). The New Mexico court said the disclaimer was inapplicable because "[t]he state is not asserting a proprietary interest in Indian lands" and "the state can exercise power over the Indians if the federal government has specifically granted it."
138. The DNR has estimated that of the approximately 500,000 water rights in Montana, 350,000 are unfiled "use" rights. Montana Department of Natural Resources, Report to Montana Legislative Interim Subcommittee on Water Rights (April 14, 1978).
139. Hearings, supra note 93, at 6: The point we would make is there are means whereby the Indian right alone can be adjudicated in the Federal court effectively by making the State a class action defendant, or by having free right of intervention from those that wish to appear.
IV. QUANTIFICATION

A. To Quantify or Not to Quantify

Federally reserved rights, whatever their special nature, must be quantified. For western states, engaged in the process of ascertaining all rights, such adjudications cannot be conclusive so long as there are indeterminate federal rights in the same system. Accordingly, states have urged the federal government to inventory its water rights.

It was thought that the McCarran Amendment would allow federal claims to be determined in state courts. However, Akin is an example of the ineffectiveness of this method. After the Supreme Court ordered that all federal and Indian water rights within Colorado Division 7 be determined by the state court, the state court directed the federal government to submit claimed figures and priority dates for its water rights. Three years later, no figure has yet been submitted. Clearly, that method of clarifying federal rights is inadequate.

The Public Land Law Review Commission, established in 1964, recommended limitation and quantification of federal reserved water. In 1968, the National Water Commission was created by Congress "to study and make recommendations concerning broad national water policy programs." The commission report was completed in 1973. On the subject of Indian water rights, the commission recommended the following: (14-1) Upon request by any Indian tribe, the Secretary of the Interior could direct a study of resources of the reservation. An object of the study would be "to define and quantify Indian water rights in order to develop a general plan for the use of these rights in conjunction with other tribal resources." The recommendation also includes a provision for litigation to adjudicate these rights, this litigation to be financed by Congress. Under Recommendation (14-3), "Existing water uses on Indian reservations whether or not they have yet been adjudicated, should be quantified and recorded in State water right records for the purpose of providing notice of such use." In Rec-
ommendation (14-4) the Commission recommended that "[j]urisdiction of all actions affecting Indian water rights should be in the U.S. District Court . . . ."¹⁴⁹

Assuming for the sake of this inquiry that federal and Indian rights should be quantified and prioritized, the question arises as to the criteria to be used in deciding how much water was reserved and when it was reserved. It is suggested here that there must be three separate tests: one for federal enclaves, one for non-aboriginally owned Indian reservations, and one for Indian reservations established on ancient tribal lands.

B. Federal Enclaves

Quantification for purely federal enclaves is beyond the scope of this paper; however, a brief review of the major cases is helpful in establishing a framework for other proposals. Arizona v. California established that there are federally reserved water rights implicit in all federal reservations and that the quantity reserved is that "sufficient for future requirements" of such establishments.¹⁵⁰ In Cappaert v. United States, a non-Indian case, the Court trimmed the quantity to "the amount of water necessary to fulfill the purposes of the reservation, no more."¹⁵¹

The most recent Supreme Court case involving federally reserved rights is United States v. New Mexico.¹⁵² At issue in the case was the "quantity of water, if any, the United States reserved out of the Mimbres River when it set aside the Gila National Forest in 1899."¹⁵³ The supreme court of New Mexico had said that the quantity did not include water for the purposes of recreation, aesthetics, wildlife preservation, or cattle grazing. The United States Supreme Court affirmed the New Mexico Supreme Court’s conclusion. Justice Rehnquist, writing for a bare majority, said:

    Each time this Court has applied the "implied-reservation-of-water doctrine," it has carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be entirely defeated.¹⁵⁴

The Court decided that the purpose for establishing national for-

¹⁴⁹. Id.
¹⁵³. Id. at 697.
¹⁵⁴. Id. at 700. He noted that an intent to reserve water was implied where it was necessary to fulfill the very purposes for which the reservation was created. Id. at 702.
ests in 1899 was "to improve and protect the forest within the boundaries . . . [to secure] favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States . . . ."  

The opinion concluded:

Congress intended that water would be reserved only where necessary to preserve the timber or to secure favorable water flows for private and public uses under state law. This intent is revealed in the purposes for which the national forest system was created and Congress’ principled deference to state water law in the Organic Administration Act of 1897 and other legislation.  

Thus, with respect to national forests, and arguably in all federal reservations, the quantity of water impliedly reserved is limited to that necessary to accomplish the purposes of the reservations at the time it was set aside.

C. Indian Reservations

Following United States v. New Mexico, the Regional Solicitor of the Department of the Interior sent the following communique to field committee members:

The message from New Mexico is clear: Reserved rights will be strictly construed. To be successful, such assertions must be solidly tied to express purposes of the Act, treaty, withdrawal, etc. of creation and the quantum claims must find clear support within a reasonable construction of the intent of the purposes of the reservation.  

It is apparent that the Solicitor anticipated that the New Mexico case rationale would be extended to all federal reservations, including Indian reservations. That conclusion is not unreasonable, given the existing case law. In Arizona v. California, the Court moved easily from Indian rights under Winters to water rights for other federal enclaves. While the case is considered to have extended the Winters doctrine to all federal reservations, the Court did not

156. Id. at 718.
158. Arizona v. California, 373 U.S. 546, 601 (1963): The Master ruled that the principle underlying the reservation of water rights for Indian Reservations was equally applicable to other federal establishments such as National Recreation Areas and National Forests.
expressly declare that all such reservations were the same. United States v. District Court for Eagle County, Colo.,160 however, did equate all federal reservations, the Court stating, "The federally reserved lands include any federal enclave."161 Akin particularized the concept even further, declaring, "Eagle County spoke of non-Indian rights and Indian rights without any suggestion that there was a distinction between them for purposes of the [McCarran] Amendment."162 In Cappaert, the Court noted that the federal reservation of water rights "applies to Indian reservations and other federal enclaves, encompassing water rights in navigable and nonnavigable streams."163 The case did not involve Indian water rights, but the opinion cited Indian and non-Indian cases throughout without drawing any distinctions.

In New Mexico, the Court consolidated all types of federal enclaves "set apart from the public domain," saying:

[S]ubstantial portions of the public domain have been withdrawn and reserved by the United States for use as Indian reservations, forest reserves, national parks, and national monuments.164

In light of the language in the federal reservation cases, it would not be unexpected if the Supreme Court did extend the New Mexico doctrine to an Indian water rights case. Presumably the result would allocate to any reservation a quantity of water "necessary to fulfill the very purposes for which the . . . reservation was created."165

Under New Mexico, the Court would have to look to the act which first created the reservation, disregarding later modifications. Accordingly, most Montana reservations would be allowed that quantity necessary "to enable [the Indians] to become self-supporting, as a pastoral and agricultural people and to educate their children in the paths of civilization."166 Yet for all its logical appeal, there are reasons to question such an analysis. Both the cases and the theory support a distinction between New Mexico and cases involving Indian water rights167—a distinction which the Court may still recognize at some future date.

The language in the cases strongly suggests a difference be-

161. Id. at 524.
162. Akin, 424 U.S. at 811.
165. Id. at 702. See note 155 supra.
tween federal and Indian rights. Both *Cappaert* and *New Mexico* formulate the quantity permitted a federal reservation in the most niggardly terms: "The amount of water necessary to fulfill the purposes of the reservation, no more." 168

No Indian cases have been so restrictive. In *Winters*, the Court upheld the lower court injunction which prohibited defendants from interfering with the 5000 inches of water needed for the Indian project. The opinion, however, is framed in terms of making the area "valuable or adequate," 169 and there is no reason to believe that the Court would not have implied reservation of any amount of water necessary to make the reservation livable. 170

In *Conrad Investment Co. v. United States*, 171 the Ninth Circuit expanded on *Winters*. Judge Morrow said that *Winters* "determines the paramount right of the Indians ... to the use of waters ... reasonably necessary for the purposes of irrigation and stockraising, and domestic and other useful purposes." 172 The court said, "What amount of water will be required for these purposes may not be determined with absolute accuracy at this time; but the policy of the government to reserve whatever of Birch Creek may be reasonably necessary, not only for present uses, but for future requirements, is clearly within the terms of the treaties as construed by the Supreme Court in the *Winters* case." 173 Judge Morrow then upheld the 1,666 2/3 inches decreed by the lower court, but warned that the award was "subject to modification, should the conditions on the reservation at any time require such modification." 174

The most thorough discussion regarding quantity of water reserved for an Indian reservation was in *United States v. Ahtanum Irrigation District*. 175 The opinion began:

It is obvious that the quantum is not measured by the use being made at the time the treaty reservation was made. The reservation was not merely for present but for future use. Any other construction of the rule in the *Winters* case would be wholly

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170. Judge Pope said in *United States v. Ahtanum Irrigation Dist.*, 236 F.2d 321, 327 (9th Cir. 1956): "It is plain that if the amount awarded ... equaled the entire flow of the Milk River, the decree would have been no different."
171. *Conrad Inv. Co. v. United States*, 161 F. 829 (9th Cir. 1908).
172. Id. at 831.
173. Id. at 832.
174. Id. at 834.
After discussing Winters and Conrad Investment Co., Judge Pope said:

It is plain from our decision in the Conrad Investment Co. case that the paramount right of the Indians to the waters of Ahtanum Creek was not limited to the use of the Indians at any given date but this right extended to the ultimate needs of the Indians as those needs and requirements should grow to keep pace with the development of Indian agriculture upon the reservation. 177

A few years later, the United States Supreme Court did decide another case involving Winters rights, Arizona v. California, discussed above. The Indian water rights question was a small part of a "battle of the giants," 178 but it did present a contemporary perspective of the Court's stance on Indian water rights. Arizona had argued that Indian rights should be measured by "reasonably foreseeable needs." 179 The Court rejected that approach for that of the special master—"enough water to satisfy future as well as present needs of the Indian reservation." 180 The case is often cited as equating federal non-Indian and Indian claims, but such analysis appears erroneous. Rather, the Court said "the principle underlying the reservation of water rights for Indian reservations was equally applicable to other federal establishments." 181 By this, Justice Black may have meant only that the government impliedly reserved waters for all federal reservations—not that such reservations had the same character or requirements.

D. The Measure of the Water

1. Priority

It is appropriate on non-aboriginally owned land to establish a priority for reserved water rights as of the establishment of the reservation. Prior to the creation of the reservation, the land was either national domain or public land. If the land was national domain, the federal government owned the land and, at the time of setting it aside for a particular purpose, reserved sufficient water to accomplish the purpose. This could only be effective from the date

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176. Id. at 326 (emphasis added).
177. Id. at 327.
179. Id. at 600.
180. Id.
181. Id. at 601. See note 71 and accompanying text, supra.
of the creation of the reservation. Where a reservation is withdrawn from public land previously open for settlement and reclamation, the priority date must necessarily be the date of withdrawal. There are two such reservations in Montana: the Northern Cheyenne Reservation with a priority date of 1884182 and Rocky Boy Reservation with a date of 1916.183

Priority on aboriginally owned land should be from time immemorial, since the Indians have held the land and water, uninterrupted from pre-civilization. As explained above, the law has never recognized that principle, however, and it must be accepted that, regardless of the Indian interest, the priority dates of all Winters doctrine rights are the dates of establishment of the reservations.184

2. Quantity

The quantity of water reserved to an Indian reservation is a more complicated problem. While different standards have been used on a case-by-case basis, there is no settled formula for quantification of Winters rights. Case law seems to indicate that the measure of water reserved will be in some way connected to the purpose for which the reservation was established,185 although it is clear that the quantity should reflect future as well as present needs. It is frequently suggested that the quantity of water to be assigned to a reservation should be measured by the amount necessary to irrigate the irrigable acreage on the reservation.186 This premise is perhaps based on the frequency with which irrigation needs are a part of Indian water litigation.

Where aboriginal possession can be shown, the measure should be different. Since such interest is “as sacred as the fee simple of the whites,”187 it is inappropriate to encumber incidents of ownership other than according to general law. Accordingly, the Indian owning land and water rights can be lawfully prohibited from wasting or making unreasonable uses of the water. But it may be inap-

183. Id. at 285.
184. See note 100 supra on the Johnson v. McIntosh rationale. Also as pointed out earlier, the distinction may have no practical significance, since most reservations predate non-Indian rights.
185. Because agriculture was the predominant economy in the West during the treaty period, most reservations had as a purpose changing Indians to a “pastoral and civilized people.” Winters, 207 U.S. at 576. See also Skeem v. United States, 273 F. 93, 95 (9th Cir. 1921), where the court said that “the purpose of the government was to induce the Indians to relinquish their nomadic habits and to till the soil . . . .”
propriate to limit the quantity of the water right by the interests and purposes of the federal government at the time the Indian tribe reserved the land.

If the federal reservation doctrine does not apply in quantifying such rights, the prior appropriation doctrine should. However, as was shown in the analysis of Indian land tenure, where the ownership is aboriginal, the land never left Indian ownership. Such land would not be subject to appropriation laws.

Although the Indians contend that, where aboriginal rights can be shown, they own all the water arising on or flowing through the reservation, such a contention cannot be supported. The maximum claim to water recognized can only be the right to use it. As was demonstrated earlier, such a usufructory right in the water also is consistent with the ancient claim of the Indians.

The measure of an aboriginal right to the use of the water should be that which is reasonably necessary to support and sustain the inhabitants of the reservation. In order to arrive at a quantity, studies should be undertaken to discover the highest and best use of the reservation consistent with the values and beliefs of the tribes.

E. Non-Indians within the Reservation

On the fringe of an inquiry into quantification of Indian water rights is the quantity to be assigned interests acquired as a result of the Dawes Act—either by settlement of unallotted land or by non-Indian acquisition from Indian allottees. The land once part of the reservation remains "Indian country" until terminated by Congress, irrespective of the nature of the land ownership. Accordingly, land once within a reservation remains there, in spite of purchase by non-Indians.

In 1939, in the United States v. Powers, the Supreme Court ruled on the nature of water rights accompanying the lands. The case involved the use of water by non-Indian purchasers of an Indian allotment on the Crow Reservation in Montana. The non-Indian in the case argued that "when the 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

188. In 1948 Congress defined "Indian country" as (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent... 62 Stat. 758, 18 U.S.C. § 1154(c) (1976).
to the owners.” The Court agreed, but did not “consider the extent or precise nature of respondent’s rights in the waters.”

Several cases have suggested that the acquired right is not the same as a “Winters right” held by Indians. A pre-Powers case met the question with respect to the quantity of water to which a non-Indian purchaser of an Indian allotment outside the reservation was entitled. The opinion reasoned that the non-Indian received a water right for the “actual acreage that was under irrigation at the time title was passed from the Indians, and such increased acreage as he might with reasonable diligence place under irrigation, which would give him, under the doctrine of relation, the same priority as owned by the Indian.”

In Colville Confederated Tribes v. Walton, a Washington federal district court faced the question of whether Indian rights were superior to those of a non-Indian purchaser of allotted land. In the case, the tribe sought to enjoin Walton’s use of water from No Name Creek. Walton claimed a water right in part based on the prior status of his property as Indian allotment. The opinion traced development of the reserved rights doctrine and concluded that an allottee could “convey with his land the water right he was using at the time of the conveyance, with a priority date of the first appropriation of the water . . . rather than the founding of the reservation, for no part of the Indian allottee’s implied water right may be conveyed to a non-Indian.”

In dictum, the court discussed acquisition of water rights by homesteaders on lands returned to public land status under the Dawes Act and on lands remaining within the reservation boundaries. In the former situation, the opinion said, “[H]omesteaders were required to perfect water rights under state law, and could convey only those water rights which they had so perfected.” The court said it was unclear whether homesteaders on reservation lands acquired part of the “reserved right,” but that “strong policy arguments militate against implying reserved water rights for homesteaded surplus lands.” Such a result may be contrary to the intent of the Dawes Act.

A recent Supreme Court opinion explored the Congressional
intent in passing the Allotment Act and concluded, "Unallotted lands were made available to non-Indians with the purpose, in part, of promoting interaction between the races and of encouraging Indians to adopt white ways." If this is the case, persons acquiring such lands within reservation boundaries arguably should be assured water under the reservation doctrine. The question apparently has not been raised. In the planned state-wide adjudications, it may become important.

V. CONCLUSION

The question of Indian property and water rights are extremely complicated. As one writer has said:

The term tribal property . . . does not designate a single and definite legal institution, but rather a broad range within which important variations exist. In view of these diversities, generalizations about "tribal property" should be scrutinized as critically as assertions about "property" in general. The same indefiniteness has attached to water. It has been the purpose of this paper to expose the considerations which may become important to the necessary task of adjudication and quantification of Indian water rights in Montana. Those considerations counsel that determination of Indian water rights should involve federal courts, at least in part. They lend doubt as to the applicability of Akin in Montana. They urge distinctions between Indian and non-Indian federal rights and between aboriginal and non-aboriginal Indian holdings. Finally, they demonstrate the need for careful analysis in the selection of a measure for reservation rights.

200. Id. at 496.