July 1982

Colville Confederated Tribes v. Walton: Indian Water Rights and Regulation in the Ninth Circuit

Robert Isham Jr.
University of Montana School of Law

Follow this and additional works at: https://scholarship.law.umt.edu/mlr
Part of the Law Commons

Recommended Citation
Available at: https://scholarship.law.umt.edu/mlr/vol43/iss2/7

This Note is brought to you for free and open access by The Scholarly Forum @ Montana Law. It has been accepted for inclusion in Montana Law Review by an authorized editor of The Scholarly Forum @ Montana Law.
COLVILLE CONFEDERATED TRIBES V.
WALTON: INDIAN WATER RIGHTS AND
REGULATION IN THE NINTH CIRCUIT

Robert Isham, Jr.

I. INTRODUCTION

The Ninth Circuit Court of Appeals seldom asks the Supreme Court to review its work, as it did in Colville Confederated Tribes v. Walton:¹

This case presents an appropriate vehicle for the Supreme Court to give guidance and stability to an area of great unrest and uncertainty in Western water and land law. A definitive resolution is overdue. The magnitude of the problem cannot be overstated.²

One would think that such a request would be granted, particularly when expressed as part of the court's published opinion.³ Nonetheless, the Supreme Court denied certiorari in the case,⁴ which concerned a dispute among an Indian tribe, non-Indian landowners and the State of Washington, over appropriation and regulation of water. The Ninth Circuit, 11 years after the Colville Tribes initiated suit,⁵ made its determination after granting a rehearing, revoking its earlier opinion, and reversing itself on three major issues.⁶ The issues were: (1) whether water may be withheld from an Indian tribe under the Winters doctrine⁷ on the grounds that the proposed use is presently unnecessary; (2) whether a non-Indian purchaser of an Indian allotment acquires a share of an Indian reserved water right; and (3) whether a state has the power to regulate a water system located entirely within a reservation.

2. Id. at 54 n.18.
3. Id.
6. Walton, 647 F.2d at 44.
7. The Winters doctrine, established in Winters v. United States, 207 U.S. 564 (1908), provides that Indian reservations are entitled to a federal reserved water right to meet reservation water needs. Upon adjudication, the right usually has a priority date of the creation of the reservation. Quantification is tied to the purposes for which the reservation was created. For example, a right for irrigation purposes on the reservation is usually based on the irrigable acreage of the reservation. The reserved right is also absolute since the right to water cannot be lost from non-use. In sum, the reserved right is extremely valuable since it guarantees an amount of water with an early priority date, without filing for a state water permit. See generally infra notes 21-68 and accompanying text.

Published by The Scholarly Forum @ Montana Law, 1982
In one sense, Walton is significant because it is the only major ruling on Indian water rights issues since the 1963 Supreme Court decision in Arizona v. California. In this sense, the Ninth Circuit’s application of the Winters doctrine in Walton is noteworthy, since it reveals the modern dimensions of that doctrine as directly applied to an Indian reservation. Walton, however, is also significant because of the impact of its rulings on alienability of Indian reserved water rights, and state regulation of reservation water. Indian reservations, to a large extent, consist of checkerboard holdings of non-Indian owned land. The Ninth Circuit’s decision that non-Indians may acquire Indian reserved water rights creates a new water right for many non-Indian landowners, thereby altering the existing appropriation system on many reservations. The Ninth Circuit’s decision that Washington was preempted from regulating the water involved in Walton puts states and non-Indians alike on notice that state regulation of reservation water is not a certainty, and that tribal regulation may be a reality with which they must contend.

This note examines each portion of the Walton decision: the Tribes’ water rights, the non-Indians’ rights, and the state’s right to regulate water within the Colville Reservation. The note focuses first on the Ninth Circuit’s application of the Winters doctrine to show the present contours of that doctrine in adjudication and quantification proceedings. The note then takes up the court’s holding on alienability of Indian reserved water rights and concludes that the holding is in error. Finally, the note examines the court’s holding on state regulatory power and finds that the strongest basis for that holding lies in the concept of inherent Indian sovereignty.

II. THE FACTS

The Colville Indian Reservation, created by executive order in 1872, is located in the semi-arid and mountainous region of
northcentral Washington. Pursuant to the General Allotment Act of 1887, seven allotments were created in 1917 on the reservation along No Name Creek, a spring-fed stream originating on one of the northernmost allotments and flowing south about three miles where it empties into Omak Lake. The lake is saline and therefore useless for irrigation. The creek, its underlying aquifer, and the lake lie entirely within the reservation boundaries.

Of the seven allotments in the No Name Creek basin, the middle three are owned by the Waltons, non-Indians who rely on the creek water for irrigation and other purposes. The original Indian allotment owners had not irrigated the land, and had sold it in 1942 to an Indian who was not a member of the Colville Tribes. He conveyed it to the Waltons in 1948, after placing about 32 acres under irrigation. The other four allotments are either leased or held in trust by the Tribes.

In 1968, the Tribes, with the aid of the Department of Interior, planted Omak Lake with Lahontan cutthroat in an effort to reestablish a fishery on the reservation. Although the trout thrive in saltwater, they require fresh water for spawning. Since No Name Creek is the only freshwater source for the lake, the Tribes improved the inlet to serve as a spawning ground. Irrigation demands on the creek, however, reduced its flow to a level that precluded spawning. In 1975, the Tribes began an irrigation project in the basin. Wells were drilled on the two northern allotments to supply them with irrigation water, while other well water was pumped into the creek for irrigating the two Indian allotments downstream.

The Colville Tribes initiated suit in federal district court to...
determine their water rights in the basin, and to enjoin the Waltons from using any water there. The State of Washington intervened to assert its authority to issue water permits for that basin. The United States filed a separate suit asserting the Tribes' claims, and the suits were consolidated.

III. THE NINTH CIRCUIT DECISION

When the Ninth Circuit first decided Walton, it affirmed the holdings of the trial court, but provided its own analysis of the Winters doctrine, the General Allotment Act, and state regulatory power on Indian reservations. Upon rehearing, however, the Ninth Circuit reversed itself on three major issues, holding: (1) water for spawning purposes must be awarded once it has been determined that the Tribes have a vested right to that water, regardless of a finding of a lack of present necessity; (2) upon purchase of the Indian allotments, the non-Indians acquired a share of the Colville Tribes' reserved water rights; and (3) the State of Washington was precluded from regulating water in the No Name Creek basin. These holdings are the focus of the following discussion.

A. The Tribes' Water Rights

In its final decision, the Ninth Circuit affirmed the trial court's holding on the existence and extent of the Colville Tribes' water rights under the Winters doctrine, except on the issue of water for spawning. The Ninth Circuit's analysis of the Tribes' claim is divided into three parts: (1) whether water was impliedly reserved for the Colville Reservation at its creation and, if so, with what priority date; (2) how much water was reserved; and (3) whether water for trout spawning may be withheld from the Tribes. A brief analysis of the court's treatment of the Winters doctrine follows the examination of the Ninth Circuit's holding on this issue.

1. Existence of a Reserved Right

The Ninth Circuit held that water was impliedly reserved for the Colville Reservation upon its establishment, and that the right carried a priority date of 1872, the date of the executive order creating the reservation. This holding follows from the court's appli-

20. Walton, 647 F.2d at 48.
21. Walton, 647 F.2d at 47.
cation of the *Winters* doctrine, which provides that water is impliedly reserved for an Indian reservation where water is necessary to effect the purposes of the reservation.\(^\text{22}\) The doctrine originated in the 1908 Supreme Court decision in *Winters v. United States*\(^\text{23}\) and is grounded on the assumption that the United States, when establishing reservations, "intended to deal fairly with Indians by reserving waters without which their lands would be useless."\(^\text{24}\)

While *Winters v. United States* is dispositive on the existence of a reserved right, the Ninth Circuit's opinion recognized that the *Winters* doctrine exists within a more general doctrine of impliedly reserved federal water rights.\(^\text{25}\) The incorporation of the *Winters* doctrine into a federal doctrine derives primarily from two recent Supreme Court decisions, *Cappaert v. United States*\(^\text{26}\) and *United States v. New Mexico*.\(^\text{27}\) Both decisions concerned the adjudication and quantification of federal reserved water rights on federal reservations other than Indian reservations.\(^\text{28}\) Both decisions implied that a reserved Indian water right would be treated no differently from a federal reserved water right.\(^\text{29}\) While the textual basis for incorporating the *Winters* doctrine into a general federal doctrine

---


\(^{23}\) 207 U.S. 564 (1908).

\(^{24}\) Walton, 647 F.2d at 47.

\(^{25}\) In its opinion, the Ninth Circuit states the rule that Congress has the power to reserve unappropriated water for use on appurtenant lands withdrawn from the public domain for federal purposes, and that when water is required to achieve those federal purposes, a reservation is implied with a priority date of the withdrawal of the land. The court cites United States v. New Mexico, 438 U.S. 696 (1978), and Cappaert v. United States, 426 U.S. 128 (1976), as authority. This rule, as it has been applied to Indian reservations, is discussed next by the court, which cites *Winters* and *Arizona v. California* as authority. Walton, 647 F.2d at 47. In short, the Ninth Circuit restates the *Winters* doctrine as it has been enunciated by the Supreme Court in *Cappaert* and *United States v. New Mexico*. In these two cases, the Supreme Court indicated that the *Winters* doctrine is the same as the federal implied reserved water rights doctrine, and that reserved water rights on Indian reservations were to be treated the same as reserved water rights on other federal reservations, such as national forests. Thus, while the *Winters* doctrine arose first in the context of an Indian reservation, it seems that it has been subsumed by a more general federal doctrine. See generally Stone, *A Status Report on Impliedly Reserved Federal Water Rights*, 1 Pub. Land L. Rev. 39 (1980) [hereinafter cited as Stone].

\(^{26}\) 426 U.S. 128 (1976).

\(^{27}\) 438 U.S. 696 (1978).

\(^{28}\) *Cappaert* concerned the question of reserved water for Devil's Hole, a component of Death Valley National Monument, in order to preserve a rare species of fish. *United States v. New Mexico* concerned the question of reserved water for the Gila National Forest in New Mexico.

\(^{29}\) United States v. New Mexico, 438 U.S. at 700 n.4; Cappaert, 426 U.S. at 138. See also supra note 25.
is largely of academic interest, the effect of the incorporation is significant in the context of water right quantification.

2. Quantification of the Reserved Right

The Ninth Circuit affirmed the trial court's holding that the Colville Tribes' reserved water right encompassed quantities of water for two purposes: irrigation and reestablishing a reservation fishery. In both the trial court and Ninth Circuit opinions, quantification of the right is determined by first examining the uses for which the water is claimed, and then comparing them to the purpose for which the reservation was created. According to the test established in *Cappaert* and *United States v. New Mexico*, a reservation purpose is determined from the intent of Congress at the time it withdrew the lands from the public domain; if a particular water use is found to be unnecessary to fulfill the purpose for which the reservation was created, then no water shall be awarded for that use.

As stated in *United States v. New Mexico*, the quantification test is to be applied stringently, since rights by implication are at odds with the history of congressional deference to state water law systems. In the Ninth Circuit opinion, however, the court recognized that *Cappaert* and *United States v. New Mexico* did not concern Indian reservations, whose purposes were often unarticulated. Therefore, another set of considerations had to be applied in quantifying Indian reserved water rights. These considerations included a recognition that the fundamental purpose of the reservation was to provide an Indian homeland, and that such a purpose was subject to a rule of liberal construction. Hence, in determining the purposes for the creation of the reservation, the court was bound to examine not only the executive order creating it, but the circumstances surrounding its creation and the history of the

---

30. See generally Stone, supra note 25, at 42-50 (tracing the textual incorporation).
31. Walton, 647 F.2d at 48.
32. Id. at 47; Walton, 460 F. Supp. at 1328, 1330 (citing United States v. New Mexico, 438 U.S. at 700).
33. United States v. New Mexico, 438 U.S. at 700 (quoting Cappaert, 426 U.S. at 141: "The implied-reservations-of-water-rights-doctrine, however, reserves only that amount of water necessary to fulfill the purpose of the reservation, no more.").
34. United States v. New Mexico, 438 U.S. at 701-02.
35. Walton, 647 F.2d at 47 (executive order creating the reservation was silent on the purpose).
36. Id.
37. Id. (citing United States v. Winans, 198 U.S. 371, 381 (1905), for basic canon of construction for Indian treaties).
Tribes as well. The court was also bound under this rule of liberal construction to consider the Tribes' need to adjust to changing circumstances.

In applying these considerations, the court held that irrigation water was warranted since one of the purposes for the Colville Reservation was to allow the Indians to continue their agrarian lifestyle. The court based its conclusion on historical evidence that the Tribes were engaged in farming before the reservation was established. It is axiomatic, however, that one of the basic motivations of congressional reservation policy was to encourage Indians to adopt an agrarian lifestyle as a first step in acculturation. Therefore, it seems likely that the Colvilles would have been successful with their claim for irrigation water absent the historical fact of pre-reservation farming.

The actual amount of water encompassed by the irrigation purpose was computed by the court on the basis of irrigable acreage in the basin. This standard was adopted in Arizona v. California and appears now to be settled law. By allocating sufficient water to irrigate all practicably irrigable acreage, the future needs of the Indians are satisfied to some extent, instead of leaving the quantification process open-ended.

The second reservation purpose found by the trial court and affirmed by the Ninth Circuit was preservation of access to the Tribes' traditional fishing grounds. Like most tribes in the Northwest, salmon and other fish were principal food sources for the Colvilles. As with those of other tribes, the Colvilles' traditional fishing grounds were destroyed by dams on the Columbia River. The question, therefore, was whether this reservation purpose could be construed to include water to reestablish a fishery on

38. Id. at 47.
39. Id. (citing United States v. Winans, 198 U.S. 371, 381 (1905)).
40. Id. at 47.
41. Id. at 44 (predecessors of Tribes practiced farming before creation of reservation).
42. See Winters, 207 U.S. at 576; Walton, 647 F.2d at 47 n.9.
43. Walton, 647 F.2d at 47-48.
45. Arizona v. California, 373 U.S. at 600-01. This standard replaces the open-ended decree by which a court retained jurisdiction to be able to award more water if a tribe required it. See, e.g., Conrad Inv. Co. v. United States, 161 F. 829, 835 (9th Cir. 1908).
46. Walton, 647 F.2d at 48.
47. Id. (citing Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 665 (1978) (importance of salmon and fishing generally to Stevens treaty tribes)).
48. Id. at 48.
the reservation. Neither court had any difficulty in holding that this water use was permissible, but they cited no express authority. It seems likely the Ninth Circuit relied on the rule in United States v. Winans, which provides that agreements with Indians, including executive orders, are to be construed for the benefit of the Indian.

3. Spawning Water

Although the trial court held that reestablishment of a fishery was included within the reservation purpose, that court refused to award water for spawning because fingerlings were being provided without cost to the Tribes. The Ninth Circuit in its final opinion overturned this holding on the grounds that, once the Tribes were found to have a vested right in the reserved water, they were entitled to use that water for any lawful purpose, regardless of its present necessity.

The trial court relied on the Cappaert-New Mexico test to support its denial of water for spawning. In the Ninth Circuit's initial opinion, the court cited language from Cappaert to affirm the trial court: "The implied-reservation-of-rights-doctrine, however, reserves only that amount of water necessary to fulfill the purpose of the reservation, no more." In essence, the two courts construed Cappaert and United States v. New Mexico to include a determination of present necessity. As recognized by the Ninth Circuit in its final opinion, the refusal to award water for spawning merely gave rise to an open-ended reserved right, which would require quantification once the fingerlings were no longer available. This result, according to the court, was unsatisfactory since open-ended rights create uncertainty in an appropriation system, and

49. The Tribes argued in district court that, since damming on the Columbia River has depleted their traditional food source, it was necessary to introduce a non-indigenous species, which could exist in the saline Omak Lake, in order to replace the lost food source and to preserve one of the purposes of the reservation. Walton, 460 F. Supp. at 1330.
50. Walton, 647 F.2d at 48; Walton, 460 F. Supp. at 1330. The Ninth Circuit held, however, that in finding this replacement fishery purpose valid, the Colvilles lost their right to water at their traditional fishing grounds. Walton, 647 F.2d at 48.
51. 198 U.S. 371, 381 (1905).
52. See Walton, 647 F.2d at 47 n.9.
54. Walton, 647 F.2d at 48.
55. Walton, 460 F. Supp. at 1330 (finding that a denial of water for that purpose would not frustrate the fulfillment of that purpose, since fingerlings provided free of cost).
56. Walton, 7 INDIAN L. REP. (AM. INDIAN LAW. TRAINING PROGRAM) at 2094.
57. Walton, 647 F.2d at 48.
58. Id.
because no restriction may be put on the use of water once it has been awarded.\(^9\) Therefore, since one of the reservation’s purposes had been found to include a reservation fishery, a reserved water right for that purpose had vested in the Tribes, with no limitation on the use of the water encompassed by that right.\(^60\)

4. Indian Reserved Water Rights

The Ninth Circuit’s holding on the Tribes’ water rights is a well-reasoned application of the \textit{Winters} doctrine, given the Supreme Court’s recent, restrictive decisions on quantification. As noted earlier, the Ninth Circuit’s application of the \textit{Winters} doctrine is the first comprehensive treatment of that doctrine, by a major court, applied directly to an Indian reservation since 1963. It is appropriate, therefore, to summarize the \textit{Winters} doctrine as applied in \textit{Walton} and to comment briefly on its significance.

The \textit{Winters} doctrine, as applied in \textit{Walton}, may be summarized as follows: First, reserved water rights will be implied when water is necessary for the purpose of a federal reservation, including an Indian reservation. Second, water is quantified by a determination of the purposes of the reservation at the time of its creation. Executive-order reservations are treated the same as treaty reservations. Third, in order to identify those reservation purposes, the court may look beyond the document creating the reservation to the circumstances surrounding its creation and to the history of the tribe. Fourth, irrigation is a standard reservation purpose, and quantification for that purpose is computed on the basis of irrigable acreage. Quantification for other purposes will be made on a factual determination.\(^61\) Fifth, the priority date of the reserved right is the date of the creation of the reservation. Sixth, once a right is vested, the use of water encompassed by that right is unrestricted.

The reserved right is extremely valuable for two reasons. Since the priority date is fixed to the creation of the reservation, the Indian reserved right is usually the earliest on a water system, where non-Indians acquire a priority date at the time of first continuous appropriation.\(^62\) The right also may be characterized as absolute,
since the water encompassed by it may not be lost by non-use. 63

Two general issues concerning the Winters doctrine remain unresolved by Walton. First, since the Colville Tribes asserted only irrigation and fishery purposes, it is unclear how broadly an implicit homeland purpose of the reservation may be construed by future courts. Conceivably, any reservation activity requiring water falls within the homeland purpose of the reservation, and therefore, merits a reserved water right. The Cappaert-New Mexico test provides limited guidance in this respect; in fact, "without water the purposes of the reservation would be entirely defeated" may be taken to mean that only food-related purposes merit a reserved right. Four factors, however, operate against such a restrictive result: (1) once a reservation purpose is identified, water must be awarded even if that purpose cannot be fulfilled as originally intended; (2) awarded water may be used for any purpose; (3) the water right to that quantity cannot be lost by non-use; and (4) the irrigable acreage standard operates to award a sizeable amount of water, available for other uses, since irrigation is a water-intensive process. In this way, the modern Winters doctrine remains responsive to the needs of the reservation Indian, despite the restrictive quantification analysis expressed in Cappaert and United States v. New Mexico.

The second issue unresolved by Walton is the doctrine of aboriginal water rights. 64 This principle concerns land owned by a tribe since "time immemorial." Since the land was under Indian dominion before the reservation was created, it is argued that a priority date should be fixed at time immemorial, and that the tribe should have the right to use all the water in the water system. 65 Few courts have recognized this doctrine, 66 construing Winters v. United States to hold that reservation lands were reserved for the Indian and not by him. 67 The incorporation of the Winters doctrine in a federal reserved water rights doctrine insulates reserved water rights issues from this line of reasoning.

---

63. Walton, 647 F.2d at 51.
64. See generally Merrill, Aboriginal Water Rights, 20 NAT. RESOURCES J. 45 (1980).
66. See United States v. Adair, 478 F. Supp. 336, 350 (D. Ore. 1979) (priority date of time immemorial for water right to sustain hunting and fishing rights); United States v. Anderson, No. 3643 (E.D. Wa. July 23, 1979), 6 INDIAN L. REP. (AM. INDIAN LAW. TRAINING PROGRAM) F-129, 130 (court recognized the doctrine but refused to rule on question of which priority date—time immemorial or date of creation of reservation—to place with reserved right, since tribe had earliest priority date in either case).
67. See Morrison, supra note 65, at 54-55 (treatment of this question of which party in Winters did the reserving and its relation to the aboriginal rights doctrine).
In sum, the importance of the *Winters* doctrine to reservation Indians cannot be underestimated. The rationale expressed by the Supreme Court in 1908 is no less true today: without water, reservation lands are valueless—incapable of supporting either a viable reservation homeland or economy. While *Walton* provides little guidance on the question of how broadly the homeland purpose may be construed, the application of the rule of liberal construction to identify reservation purposes keeps the *Winters* doctrine, as transformed by *Cappaert* and *United States v. New Mexico*, responsive to the special circumstances of the Indian.

**B. The Waltons’ Water Rights**

Walton and his family, as owners of the middle three allotments in the No Name Creek basin, claimed a share of Colville reserved water rights that, they asserted, attached to their land upon its allotment in 1917.69 The trial court held that the Waltons, as non-Indians, could not share in those rights,70 and the Ninth Circuit affirmed that holding in its first opinion.71 Upon rehearing, however, the Ninth Circuit reversed the trial court on that issue.72 In both analyses, the trial court and the Ninth Circuit concluded that, under the General Allotment Act of 1887, an Indian allottee took an individual share of his tribe’s reserved water rights.73 The two courts then differed on the effect of the Act on the allottee’s power to alienate his share. The error in both decisions, however, lies with their initial conclusion that an Indian allottee took a full share of reserved water rights. This conclusion is inconsistent with the intent of the General Allotment Act and, therefore, taints the Ninth Circuit’s ultimate holding.

1. The Ninth Circuit’s Analysis

The Ninth Circuit’s analysis of this issue—whether the Waltons acquired a share of reserved water rights—involves the resolution of four questions: (1) what was the intent of the General Allotment Act concerning reserved water rights; (2) did the Indian

---

69. *Walton*, 460 F. Supp. at 1324 (Waltons’ title was traced back to the original allottees through mesne conveyances).
70. *Id.* at 1329.
71. *Walton*, 7 INDIAN L. REP. (AM. INDIAN LAW. TRAINING PROGRAM) at 2092. The Waltons, however, were found to have valid state water permits by virtue of the court’s holding that the state could regulate non-reserved water in the basin. *Id.* at 2094.
72. *Walton*, 647 F.2d at 49.
73. *Id.* at 50; *Walton*, 460 F. Supp. at 1326.
allottee acquire a share of such a right with his allotment; (3) could the allottee alienate that right; and (4) what was the nature of the right alienated?

The General Allotment Act of 1887 provided that portions of reservation land were to be allotted to individual Indians in order to supplant the tribal concept of communal property with that of individual property. Allotments were to be held in trust by the federal government for 25 years, and then conveyed to the allottee in fee. As the Ninth Circuit recognized, the Act is silent on the question of transferability of reserved water rights because Winters v. United States was not decided until 20 years after the Act became law. Since the Act was silent on the question, the court was faced with divining "what Congress would have intended had it considered it."

The first step in that determination was to find that the Indian allottee was intended to take an individual share of the reservation water right. The court cited the Supreme Court decision in United States v. Powers for that proposition. On the next question of whether the allottee could alienate his share of reserved rights, the court applied a fundamental rule of Indian law that Indian rights may not be lost or reduced by mere implication. This tenet, according to the Ninth Circuit, overturned the trial court's inference that an Indian allottee was intended to alienate only an appropriative water right to a non-Indian. The trial court's inference was based on the general intent of the Allotment Act and the recent restrictive decisions concerning the Winters doctrine. The Ninth Circuit held, however, that the loss in value caused by the


76. Walton, 647 F.2d at 49.
77. Id.
78. 305 U.S. 527, 532 (1939).
79. Walton, 647 F.2d at 50.
80. Id. (citing Bryan v. Itasca County, 426 U.S. 373, 392-93 (1975); Mattz v. Arnett, 412 U.S. 481, 504-05 (1972)).
81. Walton, 647 F.2d at 50.
82. Walton, 460 F. Supp. at 1328-29 (Allotment Act intended allottee to convey a water right similar to that of a homesteader; recent restrictive decisions by the Supreme Court reveal that reserved water rights not to be found or quantified liberally).
sale of the allottee’s land without the valuable reserved right constituted a reduction of the allottee’s rights by implication. Therefore, such a loss could not be justified. In support, the Ninth Circuit cited its holding in United States v. Ahtanum Irrigation District, that non-Indian successors to allotments were entitled to “participate ratably” with Indian allottees in the use of reserved water. The court also relied on two federal district court decisions.

The court held the right conveyed to the non-Indian to be less in one respect than what the allottee originally acquired. The court characterized the allottee’s right as a full share of the reserved right, including all of that right’s attributes: a priority date of the establishment of the reservation, a quantity of water based on the number of irrigable acres owned, and full retention of the right despite non-use. But since the non-Indian purchaser lacked the “competitive disability” particular to the original Indian allottee, the Ninth Circuit concluded that Congress would not have intended for the non-Indian to take a complete reserved right. Hence, the Ninth Circuit adopted the solution in United States v. Adair, in which a non-Indian successor received a quantity of water based on irrigable acreage with a priority date of the reservation, but limited to the amount actually appropriated at the time of purchase and to whatever amount was put to use with reasonable diligence thereafter. In other words, the non-Indian received a reserved water right without the attribute of full retention despite non-use. The result is that the numerous non-Indian successors to allotments now own a hybrid water right that is at odds with Western appropriative water systems—a result not intended by the General Allotment Act of 1887.

2. The Indian Allottee’s Water Right

The Ninth Circuit’s holding is flawed because it is based on

83. Walton, 647 F.2d at 50.
84. 236 F.2d 321, 342 (9th Cir. 1956), cert. denied, 353 U.S. 988 (1957).
85. Walton, 647 F.2d at 50.
87. Walton, 647 F.2d at 51.
88. Id.
89. Id. (inability to compete initially in state water rights system).
90. Id.
92. Walton, 647 F.2d at 51.
the erroneous conclusion that an Indian allottee takes a full share of a reserved water right, including priority date, quantity and a right to that quantity despite non-use. At the heart of this error is the Ninth Circuit's misapplication of United States v. Powers.\footnote{93} In Powers, the federal government attempted to enjoin a diversion of water by non-Indian successors to allotments, because the diversion interfered with an irrigation project on the Crow Reservation.\footnote{94} The Supreme Court held that the government had not shown a basis for an injunction, and reserved the issue of "the extent and precise nature of . . . [the successors'] rights in the waters."\footnote{95} As the Ninth Circuit recognized, Powers did not control the issue of the nature of the Waltons' water rights, since the Supreme Court merely refuted the government's sole argument that the Indian allottees failed to acquire any rights to reservation waters.\footnote{96} This refutation, however, did not include an examination of the nature of the Indian allottee's rights either.\footnote{97} Despite Powers' meager guidance, the Ninth Circuit cited the case for the proposition that the allottee took a full share of tribal reserved water rights.\footnote{98}

\begin{itemize}
  \item \footnote{93}{305 U.S. 527 (1939).}
  \item \footnote{94}{Id. at 538.}
  \item \footnote{95}{Id. at 533.}
  \item \footnote{96}{Walton, 647 F.2d at 50 n.13.}
  \item \footnote{97}{See Powers, 305 U.S. at 532-33. The treatment of Indian allottee water rights, supplied by the Powers Court, is limited to the following:

Respondents' [successors to Indian allottees] maintain that under the Treaty of 1868 waters within the Reservation were reserved for the equal benefit of tribal members (Winters v. United States, 207 U.S. 564) and that when 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. The respondents' claim to the extent stated is well founded. Powers, 305 U.S. at 532. Without being more specific, "a right to use some portion of tribal waters" could very well mean an appropriative right with a priority date of first continuous use and a quantity based on actual use at the time the allotment was conveyed in fee. Thus, it is not clear what sort of water right the allottee was entitled to take upon receipt of his land in fee. The Powers Court provides no helpful guidance. See also, Walton, 647 F.2d at 50 n.13 (Ninth Circuit attempts to pinpoint the holding in Powers).

98. Walton, 647 F.2d at 51 (comparing non-Indian successor's rights with Indian allottee's rights, apparently on the basis of Powers).

The trial court in Walton reached the same conclusion as the Ninth Circuit about the nature of the Indian allottee's water right. The basis for that conclusion, however, is equally unpersuasive. First, the court cited United States v. Winans, 198 U.S. 371 (1905), for the rule that reserved treaty rights belong to each individual Indian of the tribe. Walton, 460 F. Supp. at 1326. Winans concerned off-reservation fishing rights retained by a tribe and its members. Fishing rights are distinguishable from water rights, since the former are personal and similar to a license. In contrast, water rights are appurtenant to the land. Vesting an individual Indian allottee with a reserved water right strains the nature of that right, which includes a variety of reservation purposes. See supra notes 60-67 and accompanying text. Second, the trial court cited United States v. Preston, 352 F.2d 352 (9th Cir. 1965), a case involving federal water rights and the terms of the Treaty of 1868. See supra notes 60-67 and accompanying text. The trial court in Walton was apparently unaware of the nature of the Indian allottee's water right, as well as the Ninth Circuit's misapplication of Powers. The trial court's conclusion is equally unpersuasive. The statement of law contained in Walton, 647 F.2d at 50 n.13 (Ninth Circuit attempts to pinpoint the holding in Powers), which contains the statement of law that the trial court in Walton relied on, is equally unpersuasive.

Second, the trial court cited United States v. Preston, 352 F.2d 352 (9th Cir. 1965), a case involving federal water rights and the terms of the Treaty of 1868. See supra notes 60-67 and accompanying text. The trial court in Walton was apparently unaware of the nature of the Indian allottee's water right, as well as the Ninth Circuit's misapplication of Powers. The trial court's conclusion is equally unpersuasive. The statement of law contained in Walton, 647 F.2d at 50 n.13 (Ninth Circuit attempts to pinpoint the holding in Powers), which contains the statement of law that the trial court in Walton relied on, is equally unpersuasive.
}

https://scholarship.law.umt.edu/mlr/vol43/iss2/7
As noted, the Ninth Circuit's characterization of the Indian allottee's right as identical to the tribal reserved right is the key step in the court's logic. The court's application of the rule against loss of Indian rights by implication follows conclusively at this point to secure the allottee's right to full value for his land, and therefore, to vest a reserved right in the non-Indian successor. This result, as noted by the Ninth Circuit, is consistent with its prior holding in United States v. Ahtanum Irrigation District, that non-Indian successors were entitled to "participate ratably" with Indian allottees in the use of reserved water. The Ahtanum holding, however, is based on a misreading of the holding in Powers. Moreover, it must be noted that neither Ahtanum nor the other two district court cases cited by the Ninth Circuit contain any discussion of the nature of the right acquired by the Indian allottee.

The nature of the right that the Indian allottee acquired lies in the intent of the General Allotment Act. The purpose of the Act was to encourage Indians to forsake their tribal lifestyle and to become self-supporting through individual landownership. It was expected that, once the Indian recognized the benefits of owning and farming his own land, the necessity for the continued existence

99. Walton, 647 F.2d at 50.
100. 236 F.2d 321, 342 (9th Cir. 1956), cert. denied, 352 U.S. 988 (1957).
101. The Ahtanum court stated that "[Powers] holds that white transferees of such patented Indian allotments were equally with individual allottees beneficially entitled to distribution of the waters diverted for the Indian irrigation system." Id. From a reading of this portion of the Ahtanum opinion, it seems clear that this misreading of Powers is the basis of the holding in Ahtanum. In its first opinion in Walton, the Ninth Circuit also stated that the Ahtanum court's reading of Powers was in error. Walton, 7 Indian L. Rep. (AM INDIAN LAW. TRAINING PROGRAM) at 2092 n.16.
of the reservation would cease. Surplus lands on the reservation were opened to homesteading in the hope that the Indian would learn by example, and allotments were subjected to a 25-year trust period to protect the allottee against the sharp practices of non-Indian purchasers.

Congress certainly intended Indian allottees to have sufficient water to irrigate their parcels of land. But it does not follow that Congress intended allottees to share in the tribal reserved water right to the extent assumed by the Ninth Circuit in Walton. The Act's only reference to water provides that the Secretary of Interior is to insure "a just and equal distribution" of water to Indians on the reservation. In itself, the section reveals little of Congress' intent concerning a reserved water right. Thus, the conclusion that the allottee, upon receipt of fee patent, took no right to use reservation waters is untenable. But the conclusion that he took a full share of subsequently enunciated Winters rights is equally unsupportable, as discussed above. If the primary purpose of the Act is respected, it follows that the allottee, as the homesteader the Act intended he become, took only an appropriative water right, with a priority date of first continuous appropriation and a quantity based on actual use at the time the patent was received. In this way, the allottee who farmed and irrigated the land, as Congress intended, was rewarded with a water right reflecting that effort. Upon sale of the allotment, the purchase price would also reflect that effort and the successor, Indian or non-Indian, would take only what could be conveyed. Had the Ninth Circuit adhered to the purpose of the General Allotment Act, the court would have recognized that the Indian allottee had no preferred right to transfer, much less for the court to protect.

In contrast, the Ninth Circuit's holding creates a type of reserved right in non-Indian successors, who most likely had no ex-

105. See Getches, supra note 98, at 412-16.
106. Id.
108. See supra notes 93-103 and accompanying text.
109. See Getches, supra note 98, at 420-23.
110. This result is also consistent with the general federal policy of deference to state regulation of water. See Walton, 460 F. Supp. at 1328-29. The trial court in Walton declined to rely on any of the prior cases concerning this issue of alienability, since the cases failed to provide any binding precedent. Id. at 1227-28 (Skeem v. United States, 273 F. 93 (9th Cir. 1921); United States v. Hibner, 27 F.2d 909 (D. Idaho 1928); United States v. Powers, 305 U.S. 527 (1939)). Instead, the trial court held that the "homesteading" purpose of the Allotment Act intended that the non-Indian successor take only an appropriative right. Id. at 1228-29. Thus, it seems that the trial court failed to focus the intent of the Act at the correct question—what the Indian allottee was to take.
pectation of such a right. The non-Indian now takes a water right with a priority date of the reservation, and a quantity consisting of the amount in use at the time of purchase and whatever amount the purchaser is able to put to use with reasonable diligence, up to the total amount based on irrigable acreage. As one authority notes, the holding in Walton creates a situation completely at odds with the intent of the General Allotment Act:

[Walton] would allow an aggressive non-Indian purchaser on an overappropriated stream, rights to place an entire parcel under irrigation, even if the Indian grantor made no use whatsoever of the land. This creates incentives for prospective purchasers of Indian allotments and an attractive inducement for allottees to sell. The rewards are as great for the idle as they are for sellers who have shown dedication to agricultural development and diligence.

C. State Regulation of Reservation Water

The final issue decided in Walton was the validity of the Waltons’ claim to water rights based on state water permits. The trial court held that the state had the power to regulate water not reserved for the Tribes, and the permits were valid. The Ninth Circuit initially affirmed the holding to the extent that the state had the power to apportion non-reserved water, but refused to rule on whether the authority extended any further. Upon rehearing, the Ninth Circuit held that the state had no authority whatsoever to regulate water in the No Name Creek basin, and therefore, the permits were void. The resolution of the issue may be said to turn on the geographic fact that the No Name water system lies entirely within the boundaries of the reservation; but the analysis applied provides some guidance on how the Ninth Circuit will approach similar water regulation issues in the future.

1. The Ninth Circuit’s Analysis

The Ninth Circuit applied a two-pronged test, initially developed in Williams v. Lee, to determine whether state regulation was barred on the Colville Reservation. The prongs consist of:

111. Walton, 647 F.2d at 51.
112. Getches, supra note 98, at 425.
114. Walton, 7 INDIAN L. REP. (AM. INDIAN LAW. TRAINING PROGRAM) at 2094.
115. Walton, 647 F.2d at 51.
117. Walton, 647 F.2d at 51 (citing White Mountain Apache Tribe v. Bracker, 448...
whether the regulation is preempted by federal law, and (2) whether the regulation unlawfully infringes on the right of reservation Indians to self-government. Each prong operates independently of the other, but the two are related by the concept of Indian sovereignty. The Ninth Circuit's holding is based on the federal-preemption prong of the test, and on the geographic location of the No Name water system.

The initial portion of the court's analysis comprises a discussion of Indian sovereignty as it relates to the *Williams v. Lee* test. Citing the recent Supreme Court decision in *Montana v. United States*, the Ninth Circuit noted that exceptions do exist to the general rule that a tribe has no power to regulate non-Indian activity on lands no longer owned by the tribe. One such exception is that a tribe still retains inherent power to regulate non-Indian activity that directly affects the health and welfare of the tribe. This exception, according to the Supreme Court, includes water rights. The initial portion of the Ninth Circuit's analysis concludes with strong language characterizing the regulation of reservation water by a tribe as an "important sovereign power."

This discussion of Indian sovereignty provides only a backdrop to the Ninth Circuit's holding, which bars state regulation on the basis of federal preemption, the first prong of the *Williams v. Lee* test. The court cited *Federal Power Commission v. Oregon* for the rule that water use on a federal reservation is not subject to state regulation absent explicit federal approval. Traditional congressional deference to state water systems, according to the court, did not constitute such federal approval because the reasons for that traditional deference were not present in this dispute. Deference to state regulatory power was founded on the policy that Western states should be allowed the freedom to develop water systems suited to their needs, and on the realization that concur-

U.S. 136, 143 (1980)).
118. *Id.*
119. *Id.*
120. *Id.* at 51-52.
123. *Id.*
125. Walton, 647 F.2d at 52.
127. Walton, 647 F.2d at 52.
128. *Id.* at 53.
rent state-federal regulation creates only confusion. The Ninth Circuit held that neither reason for deference applied in this case: the Colville Reservation was created for federal as opposed to state purposes, and since federal reserved rights were within federal control, the finding of state jurisdiction would itself create concurrent jurisdiction. The Ninth Circuit also dismissed claims that Public Law 280 or the McCarran Amendment constituted federal approval of state regulation.

2. Indian Sovereignty

From the Waltons' perspective, the issue of whether the State of Washington, the federal government or the Colville Tribes were to regulate No Name water made little difference, as long as the Waltons were assured sufficient water to operate their ranch. The Williams v. Lee test, however, is blind to the fact that the Waltons risked invalidation of the only water right to which they had a claim; the test is designed solely to reconcile the interests of the three sovereign powers. The Ninth Circuit's holding, barring state regulation over the water system, allows for unitary administration of the resource, an important factor in the balancing of those sovereign interests. The weakness of the Ninth Circuit's federal preemption analysis, however, consists of an inattention to the intent of the General Allotment Act and the McCarran Amendment. The stronger basis for finding a bar to state regulation lies in the second prong of the Williams v. Lee test—inherent Indian sovereignty.

The Ninth Circuit's holding that the creation of the Colville Reservation served to preempt state control is consistent with the doctrine of federal reserved water rights, as enunciated in United

129. Id. (citing California v. United States, 438 U.S. 645, 653-54 (1978)).
130. Id.
133. Walton, 647 F.2d at 53.
134. Supposing that the Ninth Circuit had held that the Waltons had no reserved water right, the Waltons would have been required to file their water rights claim with the Colville Tribes.
To reach that conclusion, however, the court had to overcome a presumption of congressional deference to state water law, which is also included in *United States v. New Mexico*. In *Walton*, the state argued that the purchase of allotted lands by non-Indians "severed . . . any special federal trust status." Therefore, the state argued that it should be permitted to assert control over water appurtenant to that land. As discussed above, the intent of the General Allotment Act supports not only the state's claim concerning non-Indians, but also such a claim concerning Indian allottees who received fee patents for their land. The allotment policy envisioned that Indian allottees would be treated like homesteaders, and therefore, allottees would be subject to state water systems. To refute the state's claim, the Ninth Circuit cited section 7 of the Act for the proposition that continued federal control over all reservation lands was intended. It should be noted, however, that section 7 expressly concerns only Indians on the reservation. Continued federal control over non-Indian owners of land within the reservation does not follow necessarily from a reading of that section. The court's inattention to the purpose of the General Allotment Act is compounded by a failure to address more fully the Supreme Court's repeated cognizance of congressional deference to state water law. As stated by the Court in *United States v. New Mexico*, Congress intended that the federal government acquire water through state procedures, when that water was needed for secondary purposes of the reservation. Non-reserved water in the No Name Creek system, therefore, logically should be subject to state

137. 438 U.S. 696, 700 (1978) (executive power to reserve lands of the public domain carried with it an implied reservation of water necessary to the purposes of the reservation).
138. Id. at 700-02 (limitation of reserved right to primary reservation purpose necessitated by federal deference to state regulation of water).
139. Walton, 647 F.2d at 53 n.17 (state attempted to distinguish holding in United States v. McIntire, 101 F.2d 650 (9th Cir. 1934)).
140. Getches, supra note 98, at 421:
There is every indication that Congress presumed that allottees would be capable of being treated just as homesteaders when the trust expired or was removed by discretion of the Secretary. At that point the need for the nurturant spirit of the reserved rights doctrine should cease.
141. Walton, 647 F.2d at 53 n.17 (citing 25 U.S.C. § 381 (1976)).
142. Section 7 provides in pertinent part: "[T]he Secretary of Interior is authorized to prescribe such rules and regulations . . . to secure a just and equal distribution thereof [water] among the Indians residing upon any such reservation . . . ." 25 U.S.C. § 381 (1976).
143. See Walton, 460 F. Supp. at 1332-33 (restatement of law concerning federal deference to state water control).
regulation under a federal preemption analysis.

From an examination of the Ninth Circuit's analysis, the geographic fact that the No Name system lies entirely within the reservation appears to tip the balance against state regulation.\textsuperscript{145} One authority has recognized, however, that a strong argument exists that, under the McCarran Amendment, Congress intended to grant states the power to regulate all water on federal reservations.\textsuperscript{146} In a series of Supreme Court decisions, the McCarran Amendment has been held to allow adjudication of water rights on federal and Indian reservations in state courts.\textsuperscript{147} Language in the Amendment suggests that the state regulation of water on all federal reservations was also intended by Congress.\textsuperscript{148} The Ninth Circuit, however, dismissed such a claim summarily.\textsuperscript{149} Since Walton, the Ninth Circuit has held that the McCarran Amendment does not grant state jurisdiction to adjudicate Indian water rights in states with constitutional disclaimers of jurisdiction over Indian lands.\textsuperscript{150} This subsequent decision explains the court's reasoning behind its summary dismissal of the regulatory issue in Walton, but it places the Ninth Circuit at odds with the Tenth Circuit, which decided a similar adjudication issue in favor of state power.\textsuperscript{151} Therefore, the Supreme Court's denial of certiorari in Walton preserves the McCarran Amendment issue concerning regulation.

The Ninth Circuit's resolution of the question of state control over reservation waters is based solely on the federal-preemption prong of the Williams v. Lee test. It seems likely that the same lack of state power could have been discovered more logically on the basis of the second prong and on the strength of Montana v. United States.\textsuperscript{152}

In Montana v. United States, the Supreme Court applied the

\textsuperscript{145} The fact that the No Name water system lies entirely within the reservation gave rise to the conclusion that the State of Washington had a minimal interest in managing that resource. Walton, 647 F.2d at 53. The geographic fact is mentioned repeatedly in the opinion. Id. at 52-53.


\textsuperscript{147} Colorado River Water Conservancy Dist. v. United States, 424 U.S. 808 (1976) (Colorado Indian reservation); United States v. District Court for Water Division No. 5, 401 U.S. 527 (1971) (national forest); United States v. District Court of Eagle County, 401 U.S. 520 (1971) (national forest).

\textsuperscript{148} "Consent is given to join the United States . . . in any suit . . . for the administration of such [water] rights . . . ." 43 U.S.C. § 666(a) (1976).

\textsuperscript{149} Walton, 647 F.2d at 53.

\textsuperscript{150} Northern Cheyenne Tribe v. Adsit, 688 F.2d 723, 729 (1982).


\textsuperscript{152} 101 S. Ct. 1245 (1981).
Indian self-government prong of the test to determine whether the State of Montana had the power to regulate hunting and fishing on non-Indian owned land on the Crow Reservation. The rule applied in that determination was that an Indian tribe retains inherent power to exercise civil authority over activity of non-Indians on fee land, when that activity threatens or directly affects the tribe’s political integrity, economic security or health and welfare. In a footnote to the decision, the Supreme Court stated that the rule applied to water rights. While the Supreme Court held that the facts in Montana v. United States failed to show an impermissible infringement, the facts in Walton clearly do show such an infringement.

This infringement primarily concerns the health and welfare of the Colville Tribes, and is recognized implicitly by the Ninth Circuit in its opinion. First, the Ninth Circuit noted that the unitary nature of a water system necessarily entails the finding that the action of one user will directly affect other users. Second, the court recognized that the Tribes’ complaint alleged such a detrimental effect, in contrast to the Crow Tribe’s complaint in Montana v. United States. Third, the court recognized that regulation of water, the “lifeblood” of Western communities, in itself is “an important sovereign power” of the Tribes. Although not mentioned by the court in its final opinion, it must be noted that the Colville Tribes had enacted a water code for the reservation, which demonstrates an active attempt to exercise civil authority. These facts, coupled with the geographic location of the water system, demonstrate that regulation by the State of Washington could have been barred as an unlawful infringement on inherent tribal sovereignty. This analysis provides a stronger basis for the Walton holding, without encountering the theoretical problems in-

153. Id. at 1254-59.
154. Id. at 1258.
155. Id. at 1258 n.15 (citing Arizona v. California, 373 U.S. 546, 599 (1963)).
156. Id. at 1258-59: (1) non-Indian hunters and fishermen did not enter into a consensual agreement with the Crow Tribe when on non-Indian owned land; (2) no facts that suggested a threat to economic or political security; (3) no claim existed in complaint that non-Indian hunting and fishing imperiled subsistence or welfare of the Tribe; (4) State of Montana traditionally exercised exclusive jurisdiction over hunting and fishing on fee lands.
157. Walton, 647 F.2d at 52.
158. Id. (citing the failure of Crow Tribe to allege such peril).
159. Id.
herent in the federal preemption analysis.

IV. CONCLUSION

From a federalism perspective, the Indian reservation and its resources are at the center of the historical conflict between state and federal powers. The situation is further complicated by the unique status of the Indian tribe as both a ward of the federal government and a sovereign in its own right. The Ninth Circuit’s decision in Walton reflects a federal character in a number of ways. First, it seems clear that the Winters doctrine as applied in Walton is primarily a federal doctrine, common to all federal reservations of the public domain. While the Ninth Circuit recognized that the doctrine must be applied differently on Indian reservations, it did so within the framework of the federal reserved water rights doctrine, dispelling any notion that water may be quantified very differently for Indians than it is for national forests or other federal enclaves. Second, Walton operates to create a federal reserved water right in land owned by non-Indians, private citizens who normally look to the state for the source of their water rights. Third, Walton bars state regulation of reservation water on federal preemption grounds in the face of traditional congressional deference to state power. As noted above, the proper basis for that holding appears to lie in the concept of Indian sovereignty, which is recognized by a number of states in their constitutions and enabling acts. In sum, Walton reveals that, in the Ninth Circuit, federal dominion over Indian reservation water is not easily eroded, and that tribal interests are likely to be reconciled within a distinctly federal rather than Indian framework.
