Notes & Comments

Home Sweet Home: How the 'Purpose of the Reservation' Affects More Than Just the Quantity of Indian Water Rights

Jessica Lowrey*

TABLE OF CONTENTS

* Jessica Lowrey is a 2012 J.D. candidate at the University of Colorado Law School. She also holds an M.S. in Environmental Studies from the University of Colorado, and a B.S. in Natural Resources Management from the University of Maryland. This note is dedicated to Dean David H. Getches, whose scholarship and leadership in the fields of Indian law and water law inspired me to pursue this career path.

I. INTRODUCTION

There are 565 federally recognized Indian Tribes in the United States and many of their members live on federally reserved land totaling about 56 million acres.[1] Modern Indian reservations are among the poorest places in the country due to the lack of jobs and tribal businesses.[2] In fact, on the Pine Ridge Reservation in South Dakota, ninety-seven percent of residents live below the poverty level.[3] In the western United States, however, one commodity that most tribes do have is water.

Under the Federal Reserved Rights doctrine, when the federal government created each Indian reservation, the government impliedly reserved sufficient water resources for each tribe to serve the purposes of that reservation.[4] Although the water was reserved, the amount reserved was not quantified when the reservation was created. Thus, over the years, there has been great confusion over how much water was actually allotted to tribes.[5]

Western states use stream or river adjudications to quantify the water rights in a given watershed,[6] including the federal reserved water rights for Indian tribes.[7] One widely accepted method for quantifying Indian water rights is to determine how much water a tribe would need to irrigate its reservation for agricultural purposes.[8] The rationale is that, beginning in the 1850s, the federal government created Indian reservations with the intention that tribes use them as homelands and form agrarian societies.[9] In cases resolving disputes about quantifying Indian water rights, the Supreme Court has held that the purpose of an Indian reservation was agricultural development.[10] The Court has

---

1. ROBERT T. ANDERSON ET AL., AMERICAN INDIAN LAW, CASES AND COMMENTARY 3–5 (2d ed. 2010).

2. *Id.* at 7–8.

3. *See* Stephanie M. Schwartz, *The Arrogance of Ignorance: Hidden Away, Out of Sight and Out of Mind*, NATIVEVILLAGE.ORG (Oct. 15, 2006), http://www.nativevillage.org/Messages%20from%20the%20People/the%20arrogance%20of%20ignorance.htm.

4. Winters v. United States, 207 U.S. 564, 577 (1908).

5. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 19.03[1] (Neil Jessup Newton ed., 2005) (hereinafter COHEN'S HANDBOOK).

6. 1 WATERS AND WATER RIGHTS § 16.01(Robert L. Beck & Amy L. Kelley, eds., 3d ed. LexisNexis/Matthew Bender 2010).

7. 2 *Id.* § 37.04(a).

8. COHEN'S HANDBOOK, *supra* note 5, § 19.03[5][b]. The PIA standard was first adopted by the Supreme Court in *Arizona v. California* (*Arizona I*), 373 U.S. 546, 600–01 (1963).

9. COHEN'S HANDBOOK, *supra* note 5, § 19.03[5][b].

10. *See, e.g.*, *Winters*, 207 U.S. at 576–77; *Arizona I*, 373 U.S. at 600–01; Wyoming v. United States, 492 U.S. 406 (1989).

therefore found that water rights should be quantified according to the agricultural potential of the reserved land.[11]

Unfortunately, deciding the amount of water reserved to each tribe does not the end the inquiry or resolve the dispute concerning federal reserved water rights for Indian tribes. Many tribes in the arid western United States find it impractical to use their water for agriculture given the high costs of starting a large agricultural enterprise and the low profit margins.[12] On the other hand, selling or leasing water rights to industrial and municipal entities off the reservation has the potential to bring additional income to the tribal communities with little business risk to the tribe.[13] However, court decisions and federal statutes have limited tribes' ability to use their water for purposes other than agriculture on the reservation[14] and off-reservation water leases/transfers.[15] Thus, some tribes who are in dire need of economic development are restricted from using their water rights in ways that could bring significant income to their reservations.

Recently Arizona courts have embraced a new method of quantifying Indian water rights. This method focuses on the federal government's intention to create a "homeland" for the tribes, rather than its intention that the tribes form agrarian societies. Using this method, the Arizona courts quantify water rights based on the purpose of the reservation being a "homeland" for tribes rather than based on the land's agricultural potential.[16] The homeland purpose centers on the idea that reservations were fundamentally created as homelands for Indian people either as explicitly stated in various treaties or based on how the tribes themselves would have interpreted their treaties.[17] However, in the

---

11. *See, e.g.*, *Winters*, 207 U.S. at 576–77; *Arizona I*, 373 U.S. at 600–01; Wyoming v. United States, 492 U.S. 406.

12. Barbara A. Cosens, *The Measure of Indian Water Rights: The Arizona Homeland Standard, Gila River Adjudication*, 42 NAT. RESOURCES J. 835, 846–47 (2002); *see also*, David H. Getches, *Management and Marketing of Indian Water: From Conflict to Pragmatism*, 58 U. COLO. L. REV. 515, 543–44 (1988) (noting that agriculture may be culturally strange for some nomadic tribes).

13. Getches, *supra* note 12, at 543; Lee Herold Storey, *Leasing Indian Water Off the Reservation: A Use Consistent With the Reservation's Purpose*, 76 CAL. L. REV. 179, 217–18 (1988).

14. *In re* Gen. Adjud. of All Rights to Use Water in the Big Horn River Sys. (*Big Horn III*), 835 P.2d 273, 279 (Wyo. 1992); *infra* Part IV.b.

15. Indian Intercourse Act of 1834, 25 U.S.C. § 177 (2011) (alternatively called the Indian Nonintercourse Act); *infra* Part IV.c.

16. *In re* Gen. Adjud. of All Rights to Use Water in Gila River Sys. & Source (*Gila V*), 35 P.3d 68, 76 (Ariz. 2001).

17. United States v. Winans, 198 U.S. 371, 380–81 (1905) ("And we have said we will construe a treaty with the Indians as 'that unlettered people' understood it, and 'as justice and reason demand, in all cases where power is exerted by the strong over those to whom they owe care and protection,' and counterpoise the inequality 'by the superior

context of water rights adjudication, courts have traditionally held that the purpose of Indian reservations was limited to agriculture.[18] Breaking with precedent, in 2001, the Arizona Supreme Court held that Indian water rights should be quantified based on a broader "homeland standard," especially for tribes that do not find it economically profitable or feasible to use their water for agriculture.[19]

This Note examines how expanding the notion of water rights related to "reservation purpose" from exclusively agriculture to multi-faceted homeland purpose may strengthen tribal sovereignty and improve tribal self-sufficiency. After a thorough examination of these concepts, I argue that courts should adopt the "homeland standard" for quantifying Indian water rights. Such a standard will not only improve how water rights are quantified, but will also increase tribes' freedom to decide how best to use water to maintain their reservations as viable homelands.

Part II first explains western water law and the doctrine of prior appropriation and then describes federal Indian law and reserved water rights for tribes. Part III describes how the purpose of the reservation is used to quantify Indian water rights and examines the differences between the agricultural and homeland standard. Finally, Part IV explores how using the homeland purpose to quantify tribes' water rights will give tribes more freedom to use or transfer their water in the future. Like all other water users in the west, tribes desire independence and self-sufficiency. Tribes should be able to decide what is in their best interest and be able to use their water in any manner that is considered a beneficial use by western water law standards. Indian tribes are typically poor and should not be further prevented from making money from the sale or lease of one of their most valuable resources: water.

II. LEGAL BACKGROUND

Indian water rights are created, maintained, and distributed according to two legal doctrines: federal reserved water rights and prior

---

justice which looks only to the substance of the right, without regard to technical rules'") (citations omitted); Winters v. United States, 207 U.S. at 576 ("By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians"); *see also*, Menominee Tribe of Indians v. United States, 391 U.S. 404, 406–07 (1968); Colville Confederated Tribes v. Walton, 647 F.2d 42, 47–49 (9th Cir. 1981).

18. *See, e.g.*, Arizona v. California (*Arizona I*), 373 U.S. 546, 601 (1963); *In re* Gen. Adjud. of All Rights to Use of Water in the Big Horn River Sys. (*Big Horn I*), 753 P.2d 76, 94–97 (Wyo. 1988), *aff'd mem. sub. nom.*, Wyoming v. United States, 492 U.S. 406 (1989).

19. *Gila V*, 35 P.3d at 76.

appropriation.[20] Through decades of legal battles and court decisions, parties—both Indian and non-Indian—and courts have found a way to creatively combine the two doctrines to address the unique issue of Indian water rights. In the western United States water rights are managed according the system of prior appropriation, which gives rights in priority to the entity that first diverts water from each stream.[21] This ensures that entities with the most senior water rights, based on their earliest water use, will be protected from junior water users in the event of a drought. Each western state following the prior appropriation doctrine has both common law and statutes that govern the administration of water rights.[22]

When the federal government reserves public lands, for example to create Indian reservations or national parks, it also reserves the water rights necessary to fulfill the purpose of the reservation.[23] In the western United States, these federal reserved water rights have a priority date so they can be administered in priority along with other water rights in accordance with states' prior appropriation system.[24] As explained below, Indian water rights have a priority date and are managed by state agencies, but are the property of the federal government held in trust for each respective tribe.

A. Western Water Law: The Prior Appropriation Doctrine

In the arid and semi-arid western United States rainfall averages between 9.5–22 inches per year,[25] much less than the average 40 inches per year in the eastern United States.[26] The semi-arid and arid climates in the West also have high evaporation rates. For both these reasons agriculture in the West requires more water per acre than the amount

20. *See infra* Part II. a–b.

21. 1 WATERS AND WATER RIGHTS, *supra* note 6, § 11.01. Eighteen western states apply the prior appropriation doctrine to surface water: Alaska, Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming. 1 *Id.* § 12.2(d), Table 12-1.

22. *See* 1 *id.* § 11.04(b).

23. 2 *Id.* § 37.01; Winters v. United States, 207 U.S. 564, 577 (1908).

24. 2 WATERS AND WATER RIGHTS, *supra* note 6, § 37.01.

25. Based on average annual precipitation between 1971–2000 for Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming. W. Reg'l Climate Ctr , *Average Statewide Precipitation for the Western States*, http://www.wrcc.dri.edu/htmlfiles/avgstate.ppt.html (last visited Nov. 15, 2011).

26. U.S. Dept. of Interior Bureau of Reclamation, *Water Conservation Field Services Program*, http://www.usbr.gov/waterconservation/ (last visited Nov. 15, 2011).

needed to irrigate the same crops in the East.[27] Moreover, annual precipitation in the West can vary more widely from year to year and droughts are not uncommon.[28] Thus, western states developed a system to manage water rights that protects owners of water rights from shortages due to drought or overuse where each water right's protection is relative to its seniority, or how early it was first diverted from the stream and used.

In order to compensate for the relative scarcity of water, water law in western states guarantees those who used water first a higher priority to withdraw water in times of drought or water shortage.[29] A person or entity creates a water right by withdrawing water from a stream and putting it to beneficial use.[30] Each water right is given a priority date based on the year of that first withdrawal.[31] "Senior" water rights are those associated with the earliest priority dates while rights associated with later priority dates are "junior."[32] Owners of junior rights may not have any water left to withdraw in a drought or water shortage.[33]

Water rights adjudicated under this prior appropriation doctrine are controlled and managed by the states, but the right is generally considered a property right owned by the entity that owns the land where the water was first applied or used.[34] While the original water right is not purchased, but rather granted, water rights are generally transferrable and they can be sold either with or without the land.[35] As will be explained below, non-Indian water rights owners are permitted to sell or lease water rights for great profit, while Indian tribes are not.[36]

---

27. *See generally* Edward T. Lincare, *A Simple Formula for Estimating Evaporation Rates in Various Climates, Using Temperature Data Alone*, 18 AGRIC. METEOROLOGY 409 (1977) (demonstrating inputs to evaporation models); *see also*, David Pimentel et al., *Water Resources: Agriculture, the Environment, and Society*, 47 BIOSCIENCE 97, 99 (1997) (discussing how irrigation needs of crops varies based on climate).

28. KATHLEEN A. MILLER, CLIMATE VARIABILITY, CLIMATE CHANGE, AND WESTERN WATER 9 (1997), *available at* http://www.isse.ucar.edu/water_climate/references/climate.pdf.

29. 1 WATERS AND WATER RIGHTS, *supra* note 6, § 12.02(e).

30. 1 *Id.* § 12.02(c)(2). The scope of beneficial use has changed over time, but basically it means that the water was used for a legitimate purpose such as agriculture, municipal, or industrial uses.

31. 1 WATERS AND WATER RIGHTS, *supra* note 6, § 12.02(e).

32. 1 *Id.*

33. Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 805 (1976); 1 WATERS AND WATER RIGHTS, *supra* note 6, § 12.02(e).

34. 1 WATERS AND WATER RIGHTS, *supra* note 6, § 12.02(e).

35. 1 *Id.* § 14.04(a).

36. *See infra* Part IV. b–c.

B. Indian Law: Federal Reserved Water Rights

As opposed to non-Indian water rights, Indian water rights are not owned by tribes or managed by states. Much like reservation land, the federal government owns Indian water rights and holds them in trust for the exclusive use and benefit of specific tribes.[37] These water rights are called "federal reserved rights" because the federal government reserved the water for each tribe at the time land was taken into trust and thereby reserved for the tribe.[38] Tribes may not use their water rights until their rights are quantified through adjudication in state court through litigation or settlement.[39] While Indian water rights are not owned or controlled by the state, they are given a priority date so that they can be administered within the state system of prioritizing withdrawals in time of shortages.[40] Often, the priority date is either time immemorial or the date the reservation was created,[41] but there are some exceptions that will be explained below. Effectively, this means that Indian water rights are often senior to all other non-Indian users on the stream because Indians and Indian reservations were often present long before non-Indian settlers moved out west and began appropriating water.[42]

The senior nature of Indian water rights causes much turmoil and distress among states and non-Indian water users because before Indian water rights are adjudicated, non-Indian water users divert water that may actually belong to tribes.[43] After Indian water rights are quantified and used by tribes, a senior water user that was accustomed to taking its full allotment each year might be curtailed in dry years because Indian water rights have a higher priority date.[44] Thus, when Indian water rights are being adjudicated and quantified, almost all other users on the stream or river have great incentive to raise any argument that the tribe should be granted little or no water.

Unlike state water rights owners, tribes do not own their water rights—the federal government does.[45] Thus, tribes have restrictions on

37. COHEN'S HANDBOOK, *supra* note 5, § 19.06.

38. *See, e.g.*, Winters v. United States, 207 U.S. 564, 577 (1908); Arizona v. California (*Arizona I*), 373 U.S. 546, 600 (1963); *see also* COHEN'S HANDBOOK, *supra* note 5, § 19.03[1].

39. *See generally* COHEN'S HANDBOOK, *supra* note 5, § 19.03[5].

40. Cappaert v. United States, 426 U.S. 128, 138 (1976).

41. *See, e.g.*, *Winters*, 207 U.S. at 577 (priority date is the date the reservation was created); United States v. Adair, 723 F.2d 1394, 1414 (9th Cir. 1983) (priority date is time immemorial).

42. 2 WATERS AND WATER RIGHTS, *supra* note 6, § 37.01(c)(1).

43. Getches, *supra* note 12, at 520.

44. 2 WATERS AND WATER RIGHTS, *supra* note 6, § 37.01(c)(1).

45. COHEN'S HANDBOOK, *supra* note 5, § 19.06.

how they can use and alienate their rights.[46] As described below, the interplay between state water rights systems and federally owned reserved water rights for Indian tribes leads to generally negative results for tribes.

III. USING THE PURPOSE OF THE RESERVATION TO QUANTIFY INDIAN WATER RIGHTS

The federal government's underlying purpose in creating each reservation is used to determine the quantity of water allocated to the tribe in subsequent stream adjudications and settlements. Stream adjudications involving Indian water rights really began in 1908 with *Winters v. United States*.[47] Many are ongoing today,[48] and many more have yet to begin. In these adjudications state courts determine how much water the federal government intended to reserve to the tribes,[49] for example by creating a reservation or signing a treaty.[50] The Supreme Court has approved the use of an agricultural standard to determine the quantity of water rights reserved for each tribe.[51] This is based on the original idea that reservations were created so Indians could adopt an agrarian lifestyle.[52] Because today not all Indian tribes want to become farmers or use their water exclusively for agrarian purposes, the agricultural standard may no longer be an appropriate one.[53]

A. History and Application of the Agricultural Standard

Many years after the federal government created Indian reservations

46. As a trust asset of the federal government, Indian water rights are inalienable without the consent of the federal government. Indian Intercourse Act of 1834, 25 U.S.C. § 177 (2011) (alternatively called the Indian Nonintercourse Act).

47. 207 U.S. 564 (1908).

48. *See, e.g.*, Superior Ct. of Maricopa County, *Arizona's General Stream Adjudications*, http://www.superiorcourt.maricopa.gov/SuperiorCourt/Adjudications/Index.asp (last visited Nov. 15, 2011).

49. Federal reserved water rights may be adjudicated in state courts under the McCarran Amendment, which waived federal sovereign immunity for the joinder of the United States as a defendant in general stream adjudications in state courts. 43 U.S.C. § 666; United States v. Dist. Ct. in and for Eagle County, Colo., 401 U.S. 520, 524 (1971).

50. COHEN'S HANDBOOK, *supra* note 5, § 19.03[5].

51. Arizona v. California (*Arizona I*), 373 U.S. 546, 601 (1963); *In re* Gen. Adjud. of All Rights to Use of Water in the Big Horn River Sys. (*Big Horn I*), 753 P.2d 76, 94–97 (Wyo. 1988), *aff'd mem. sub. nom.*, Wyoming v. United States, 492 U.S. 406 (1989).

52. *See, e.g.*, Winters v. United States, 207 U.S. 564, 576–77 (1908).

53. *In re* Gen. Adjud. of All Rights to Use Water in Gila River Sys. & Source (*Gila V*), 35 P.3d 68, 78 (Ariz. 2001).

in the western United States, settlers arrived and immediately tension over water arose between the tribes and the non-Indians.[54] In *Winters v. United States*, the Supreme Court decided that in reserving a permanent homeland for Indian tribes (specifically, the Indians associated with the Belknap Indian Reservation), the federal government also reserved adequate water for tribes to live on the land.[55] Because the primary purpose of creating the Belknap Indian Reservation was to encourage an agrarian lifestyle, the *Winters* court held that the government reserved sufficient water for the Indians to farm on their reservation.[56]

Later, in a case involving federal reserved water rights for a national monument, the Court held that the federal government reserved only the amount of water sufficient to accomplish the purpose of the reservation.[57] In a case about dividing water rights on the Colorado River between Arizona and California, the Court recognized the practicably irrigable acreage ("PIA") standard that is now used to quantify Indian water rights in most stream adjudications and settlements.[58] The Court in *Arizona I* held that once it was established that the purpose of a reservation was agriculture, the amount of water reserved for Indian tribes would be quantified based on the amount of water necessary to irrigate all the land on the reservation that could be feasibly and economically irrigated.[59] The Court reasoned that if a reservation was created for agrarian purposes, then the water reserved was also for that purpose.[60]

The PIA methodology was further clarified in the Wyoming Supreme Court case *Big Horn I*, which was later affirmed by the U.S. Supreme Court.[61] *Big Horn I* established that the Wind River tribes of northern Wyoming had reserved water rights from their treaty with the United States.[62] The Wyoming Supreme Court found that the reservation was created with an agricultural purpose,[63] so the Tribe's water right should be quantified using the PIA method.[64] The court held that a PIA analysis requires proof of arability and the engineering feasibility of irrigating the land.[65] Thus, PIA is calculated based on the quantity of

54. 2 WATERS AND WATER RIGHTS, *supra* note 6, § 37.01(a).
55. *Winters*, 207 U.S. at 565, 576–77.
56. *Id.*
57. Cappaert v. United States, 426 U.S. 128, 141 (1976).
58. Arizona v. California (*Arizona I*), 373 U.S. 546, 600 (1963).
59. *Id.* at 600–01.
60. *Id.*
61. *In re* Gen. Adjud. of All Rights to Use of Water in the Big Horn River Sys. (*Big Horn I*), 753 P.2d 76, 101 (Wyo. 1988).
62. *Id.* at 91.
63. *Id.* at 96.
64. *Id.* at 100–01.
65. *Id.* at 101 ("The determination of practicably irrigable acreage involves a two-part analysis, i.e., the PIA must be susceptible of sustained irrigation (not only proof of

water necessary to irrigate as much land as it is economically feasible to irrigate.[66]

B. Perceived Problems with the Agricultural Standard

Although PIA is a relatively easy and straightforward calculation, it may not be the most appropriate standard to use in all Indian water rights cases. In an adjudication for the Gila River in southern Arizona, the Arizona Supreme Court rejected the use of the PIA standard as the sole determinant for Indian water rights.[67] The *Gila V* court observed that because such a standard implicitly forced tribes into an agricultural lifestyle it would not fulfill the purpose of the reservation.[68] The *Gila V* court held that Indian reservations were created to serve as a homeland for tribes, whether the document creating the reservation said so explicitly or not.[69] The court then laid out four reasons why the PIA standard does not always ensure that tribes will be granted sufficient water to make their reservations a permanent homeland.

First, the PIA standard is unfairly biased against tribes whose reservations are on land of poor agricultural quality.[70] For example, the Mescalero Apache Tribe, located in a mountainous region of south-central New Mexico, did not receive any reserved water under the PIA standard because it failed to show that agriculture would be economically feasible on its reservation.[71] Thus, tribes in mountainous regions may not be granted enough water to meet their needs under the PIA standard. Denying tribes any water because agriculture is infeasible is inconsistent with the principle established in *Winters* that tribes need water in order to enable their reservations to be a permanent homeland.[72]

---

the arability but also of the engineering feasibility of irrigating the land) and irrigable 'at reasonable cost'").

66. 2 WATERS AND WATER RIGHTS, *supra* note 6, § 37.02(c)(1).

67. *In re* Gen. Adjud. of All Rights to Use Water in Gila River Sys. & Source (*Gila V*), 35 P.3d 68, 76 (Ariz. 2001).

68. *Id.* at 78.

69. *Id.* at 77–78 ("But it seems clear to us that each of the Indian reservations in question was created as a 'permanent home and abiding place' for the Indian people, as explained in *Winters* . . . . Such a construction is necessary for tribes to achieve the twin goals of Indian self-determination and economic self-sufficiency . . . . We therefore hold that the purpose of a federal Indian reservation is to serve as a 'permanent home and abiding place' to the Native American people living there.").

70. *Id.* at 78.

71. State ex rel. Martinez v. Lewis, 861 P.2d 235, 246–51 (N.M. Ct. App. 1993); *see also Gila V*, 35 P.2d at 78.

72. *Gila V*, 35 P.3d at 78 ("This inequity is unacceptable and inconsistent with the idea of a permanent homeland.").

The *Gila V* court's second reason the PIA standard might not give tribes adequate water for permanent homelands was that the PIA standard may force some tribes into an agricultural lifestyle, even when such a lifestyle might be extremely risky and/or only marginally profitable.[73] Third, the court noted that, to maximize a water right the PIA standard gives tribes an incentive to create irrigation plans that include more agriculture activity than they actually expect to engage in.[74] Finally, the court noted that tribes that ultimately have no desire to start farming may be granted more water than is actually necessary for them to have a viable homeland.[75]

C. The Homeland Standard as an Alternative to PIA

In order to ensure greater diversity in the possible uses of water by tribes,[76] the Arizona Supreme Court in 2001 adopted a more flexible "homeland standard" in order to quantify water rights for tribes in the Gila River adjudication.[77] Quantification under the homeland standard is based on actual current and projected future uses of water on the reservation.[78] Under the homeland standard, water quantification is not limited to only the amount of water necessary for economically feasible agriculture.[79] The *Gila V* court suggests using the following factors in a homeland standard analysis to determine the amount of water reserved to a tribe: historical and cultural water uses, land use plans, population projections, geography, and economic base.[80] Thus, under the homeland standard, a reservation would secure a tribe sufficient water rights for current and future needs and would not limit the tribe to only the water necessary for future agriculture.[81]

While the Supreme Court has affirmed the use of the PIA standard to quantify water rights for tribes since *Arizona I*,[82] this expanded "purpose of a reservation" developed in *Gila V* has not been tested before the Supreme Court. However, these two standards are not mutually

73. *Id.*

74. *Id.* ("Limiting the applicable inquiry to a PIA analysis creates a temptation for tribes to concoct inflated, unrealistic irrigation projects.").

75. *Id.* at 79 ("The PIA standard also potentially frustrates the requirement that federally reserved water rights be tailored to minimal need. Rather than focusing on what is necessary to fulfill a reservation's overall design, PIA awards what may be an overabundance of water by including every irrigable acre of land in the equation.").

76. *Id.* at 77–81.

77. *Id.* at 77.

78. *See, e.g.*, Arizona v. California (*Arizona I*), 373 U.S. 546, 601 (1963).

79. *Gila V*, 35 P.3d at 79–80.

80. *Id.*

81. *Id.*

82. Wyoming v. United States, 492 U.S. 406 (1989).

exclusive. The Supreme Court in *Arizona I* affirmed the PIA standard,[83] but later qualified that once Indian water rights are quantified, tribes should not be limited to using the water for agriculture.[84] Thus, the Supreme Court allows for water to be used for homeland purposes, but has, thus far, only used the PIA standard to quantify them.

While the agricultural standard might be beneficial to some tribes, it is not appropriate for all tribes. Many tribes will not get any water under the PIA standard or will get insufficient water for use in areas other than agriculture.[85] However, the adequacy of the PIA standard to quantify Indian water rights is not the end of the issue. As explained below in Part IV, the use of the agricultural standard in quantifying water rights has two negative consequences. It can affect the priority date of the water right, and it can limit a tribe's ability to change its water uses on the reservation or transfer or lease water rights off the reservation. This note argues that quantifying Indian water rights using the homeland, instead of the agricultural standard, will give tribes more freedom to use their water for the uses they deem most valuable in order to make their reservations permanent and sustainable homelands.

IV. QUANTIFYING INDIAN WATER RIGHTS WITH THE HOMELAND STANDARD MAY GIVE TRIBES MORE FREEDOM TO MAINTAIN A VIABLE HOMELAND

Reservations were created as homelands for tribes.[86] Most tribes are poor, and water is one of their most valuable resources.[87] Tribes need flexibility in their use of land and water resources; they should not be tied to an agricultural economy that might not be profitable or practical in the twenty-first century. For instance, a tribe may wish to use its water for nonagricultural purposes, like riparian habitat restoration or energy development. In addition, a tribe may wish to sell or lease a portion of its water because doing so would be more economically efficient than developing agriculture. These are all acceptable water uses, open to other water rights owners in the prior appropriation system, but not necessarily open to all Indian tribes.

Originally, reservations were established with the hope that tribes

83. *Arizona I*, 373 U.S. at 600–01.

84. Arizona v. California (*Arizona II*), 439 U.S. 419, 422 (1979).

85. *See Gila V*, 35 P.3d at 78–79.

86. Winters v. United States, 207 U.S. 564, 565 (1908); *Arizona I*, 373 U.S. at 599; *Gila V*, 35 P.3d at 74.

87. Chris Seldin, *Interstate Marketing of Indian Water Rights: The Impact of the Commerce Clause*, 87 CAL. L. REV. 1545, 1546 (1999).

would farm and create agrarian societies as that is what the government was encouraging all settlers to do in the West.[88] Some tribes developed their agrarian base, but many did not. Today, farms are disappearing in the West because agriculture is no longer profitable compared to other industries and uses of the land.[89] It has taken over a century to get some Indian water rights adjudicated and many are left to be adjudicated. Yet Indian water rights are still largely being quantified based on the PIA standard.

The PIA standard can be a double-edged sword for many tribes. When agriculture requires a lot of water, the water rights granted to tribes under this standard are large. However, quantifying water rights with the PIA standard has its price because it can limit tribes' use of their water rights. For example, tribes in Wyoming are prevented from using their water for nonagricultural purposes, like instream flow.[90] Unlike the PIA standard, quantifying water rights based on a homeland standard does not have the negatives associated with restricting use to agriculture because a homeland standard more accurately focuses the use of water on any purpose a tribe feels is necessary to maintain a viable homeland on the reservation.

It is well established that the way a court defines the purpose of an Indian reservation directly affects the quantity of water that a tribe can expect to get in a stream adjudication or settlement.[91] But the way a court defines the purpose of a reservation has other impacts on Indian water rights, both in the adjudicative process and beyond, as tribes attempt to use their water to foster economic development. If a reservation's purpose is to create a homeland for the tribe, it implies that the tribe should be able to use its water in whatever way it chooses to maintain or create a permanent, viable, and sustainable homeland now and in the future. Thus, while most courts agree that, in general, Indian reservations were created as places for tribes to establish a permanent homeland, the disagreement about the "purpose of the reservation" in the context of quantifying water rights, and the way it might limit future uses of water, also affects the ability of tribes to actually maintain a viable homeland on their reservations.

Quantifying Indian water rights based on the homeland standard may give tribes more freedom to use their water rights in ways that will benefit their people now and in the future. First, tribes may be able to

88. *Winters*, 207 U.S. at 566.

89. Thomas Garry, *Water Markets and Water Rights in the United States: Lessons from Australia*, 4 MACQUARIE J. INT'L & COMP. ENVTL. L. 23, 33–34 (2007).

90. *In re* Gen. Adjud. of All Rights to Use Water in the Big Horn River Sys. (*Big Horn III*), 835 P.2d 273, 279 (Wyo. 1992).

91. COHEN'S HANDBOOK, *supra* note 5, at § 19.03[5][a].

expand the water uses associated with the most senior "time immemorial" priority date under the theory that command of resources since time immemorial entitles them to the ongoing ability to use those resources for any purpose necessary to maintain a viable homeland. Second, establishing a homeland purpose in a water rights adjudication may give tribes more freedom to change their use of water and not be forced to continue farming because the water was quantified for agriculture. Finally, although tribes are not permitted to sell or lease their water rights without consent from the federal government, such permission might be easier to secure under the homeland standard where selling or leasing water rights would increase the economic self-sufficiency of a tribe.

A. Time Immemorial Priority Date

The priority date for Indian water rights is typically the date the reservation was established.[92] However, courts have also recognized an earlier priority date if the reserved land is part of the tribe's aboriginal territory.[93] When it is clear that tribes have been using the water since before white settlers came into the tribe's aboriginal territory, tribes are granted a "time immemorial" priority date, which means there can be no other water rights more senior.[94] In the past, tribes have only been given a time immemorial priority date for aboriginal uses of water.[95] However, some tribes in the Southwest hope to expand this rule and secure a time immemorial priority date for future uses of water, where the tribe was "in command of the streams" since time immemorial.[96] These tribes argue that when their reservations are part of their aboriginal territory, they never gave up the beneficial uses of the waters in their command and thus should be granted a time immemorial priority date for any current or future uses of that water, not just for historic or aboriginal uses.[97] The

92. *See, e.g.*, *Winters*, 207 U.S. at 577; *Arizona I*, 373 U.S. at 600.

93. *See, e.g.*, United States v. Adair, 723 F.2d 1394, 1414 (9th Cir. 1983) (water necessary for Klamath Tribes' treaty rights of hunting and fishing given time immemorial priority date); New Mexico ex rel. Reynolds v. Aamodt, 618 F. Supp. 993, 1009–1010 (D.N.M. 1985) (time immemorial priority date granted for water necessary to irrigate aboriginal lands still owned by Pueblo tribes).

94. COHEN'S HANDBOOK, *supra* note 5, at § 19.03[3].

95. *Id.*

96. *See* United States Brief in Support of its Motion for Summary Judgment at 12–13 *In re* Gen. Adjud. of All Rights to Use Water in the Little Colorado River Sys. & Source, No. 6417-201 (Super. Ct. of Az. in and for the county of Apache Mar. 26, 2010); United States Brief in Response to Motion for Partial Summary Judgment at 36–37, New Mexico ex rel. State Engineer v. Abeyta, (D.N.M. Aug. 19, 1995).

97. United States Brief in Support of its Motion for Summary Judgment, *supra* note 96, at 10–15; United States Brief in Response to Motion for Partial Summary Judgment, *supra* note 96, at 45.

homeland standard furthers this argument because it acknowledges that the purpose of reservations is to create sustainable homelands for tribes, not limit tribes to aboriginal uses of water.

Tribes are typically granted time immemorial priority dates because of the tribe's aboriginal use of the water.[98] In essence, this means that the use of water was reserved by the tribe even though the tribe ceded other lands to the federal government.[99] For example, in *United States v. Adair*, the Ninth Circuit found that one of the primary purposes of creating the Klamath Reservation was to preserve the Tribe's aboriginal hunting and fishing rights.[100] Thus, the Klamath Reservation necessarily included sufficient water for the Tribe to continue hunting and fishing in their aboriginal lands.[101] The court concluded that those water rights necessary for hunting and fishing would necessarily have a time immemorial priority date.[102]

The Pueblo tribes of New Mexico were recently granted a time immemorial priority date for their water rights.[103] The Pueblos have historically been an agrarian people. In *New Mexico ex rel. Reynolds v. Aamodt*, the U.S. District Court of New Mexico held that the Tribes' ownership of their aboriginal land had been recognized by both Spain and Mexico since before the United States secured the land from Mexico.[104] Further, even though Mexico ceded its lands to the United States in the Treaty of Guadalupe Hidalgo, the Pueblos did not cede their lands and thus retained aboriginal title.[105] The *Reynolds* court addressed water rights in its holding that, along with aboriginal title to their lands, the Pueblo Tribes retained the most senior water rights (i.e. time immemorial) to water necessary for domestic and agricultural uses on the part of their lands historically irrigated.[106]

While in the past time immemorial priority dates have only been granted for tribes' aboriginal uses of water, Supreme Court precedent coupled with the use of the homeland standard would allow tribes to get a time immemorial priority date for any current or future uses of water as long as it is applied on their aboriginal territory. *United States v. Winans* stands for the principle that in treaties between the federal government and Indian tribes, the United States did not grant Indian tribes special

98. COHEN'S HANDBOOK, *supra* note 5, at § 19.03[3].

99. *See, e.g.*, United States v. Adair, 723 F.2d 1394, 1414 (9th Cir. 1983); New Mexico ex rel. Reynolds v. Aamodt, 618 F. Supp. 993, 1009–1010 (D.N.M. 1985).

100. 723 F.2d at 1409.

101. *Id.* at 1410.

102. *Id.* at 1414.

103. *Reynolds*, 618 F. Supp. at 1009–10.

104. *Id.* at 998.

105. *Id.* at 1006–09.

106. *Id*.

rights to use or live on their aboriginal territories. Rather the treaties merely stated which rights the tribes were giving up to the federal government, such as parts of their aboriginal territory.[107] In *Winters v. United States*, the Supreme Court had previously reasoned that when reservations are carved from larger tracts of aboriginal territory, tribes do not give up either the command of the lands and the waters or the command of all their beneficial uses.[108] Similarly, in *United States v. Shoshone Tribe*, the Supreme Court recognized a tribe's aboriginal rights to mineral deposits because a treaty did not explicitly grant the mineral rights to the United States.[109] The *Shoshone* court reasoned that, "[s]ubject to the conditions imposed by the treaty, the Shoshone Tribe had the right that has always been understood to belong to Indians, undisturbed possessors of the soil from time immemorial."[110] In sum, when tribes continue to live on a part of their aboriginal territory, they retain all rights to use the land's resources unless those rights were explicitly ceded to the United States in a treaty or other agreement.

If a court establishes that a reservation was created with a homeland purpose and that the tribe was in command of the waters since time immemorial, then it follows that the tribe should be able to use its water for any past, present, or future uses that would enable the tribe to maintain a viable homeland on that reserved land. The time immemorial priority date would not be tied to strictly aboriginal uses of water. Such flexibility with water use is crucial to enabling tribes to develop a wide range of modern activities that might not have existed during the time of treaty negotiations, for example power plants. Likewise, tribes could use their water for instream flows to protect scenic or wildlife habitats that are not tied to aboriginal hunting and fishing, but are now valuable to the tribes on their reservations.

This argument faces challenges. Courts have granted time immemorial priority dates sparingly and only for original aboriginal uses of water.[111] Further, courts have restricted increases in the amount of water allowed under the time immemorial priority date to aboriginal uses.[112] For example, while the *Adair* court allowed for an expansion in

---

107. 198 U.S. 371, 381 (1905) (Treaties and agreements are "not a grant of rights to the Indians, but a grant from them— a reservation of those not granted.").

108. 207 U.S. 564, 576 (1908).

109. 304 U.S. 111,117 (1938).

110. *Id.*

111. *See, e.g.*, United States v. Adair, 723 F.2d 1394, 1414 (9th Cir. 1983) ("Thus, we are compelled to conclude that where, as here, a tribe *shows its aboriginal use* of water to support a hunting and fishing lifestyle, and then enters into a treaty with the United States that *reserves this aboriginal water use*, the water right thereby established retains a priority date of first or immemorial use.") (emphasis added).

112. *Id.* at 1415 (quoting Washington v. Fishing Vessel Ass'n, 443 U.S. 658, 686 (1979)).

the quantity of water under its time immemorial priority date to support the needs of future generations, only the water that was required to support the aboriginal hunting and fishing lifestyle was given a time immemorial priority date.[113] Further, in *Reynolds*, the court focused on the fact that the Pueblo tribes used the land for farming since before the Spanish discovery, and thus found that the tribes should get a time immemorial priority date for any past, present, or future *agricultural uses* of water on land that was historically irrigated.[114] The argument stemming from the combination of principles set forth in *Winans* (that tribes reserve any rights not explicitly granted to the US) and *Winters* (that tribes were in command of the streams since time immemorial) is not widely accepted and may not sway courts to expand the time immemorial priority date to any future use that will help the tribe create and maintain a viable homeland. Thus, establishing a homeland purpose standard to expand the types of uses permitted with a water right may have an insignificant effect on priority dates.

B. Change of Use on the Reservation

A potential problem with the PIA standard is that it may limit a tribe's use of water to agricultural purposes. Change of use is typical for non-Indian western water rights, either by the original owner or by a subsequent owner.[115] Like any water right owner in the West, tribes may want to apply to change the use of their water from the original adjudicated use. While most Indian tribes have not been constrained in their efforts to change the use of water on their reservations,[116] the Wind River Tribes in Wyoming have not been permitted to change from agricultural (consumptive) to instream flows (non-consumptive) uses.[117] Indian tribes should not be constrained in their future water uses based on the "purpose of the reservation" that was used to quantify those rights. Nonetheless, in Wyoming the PIA standard did just that.[118]

---

113. *Id.* at 1414–15.

114. New Mexico ex rel. Reynolds v. Aamodt, 618 F.Supp 993, 1009–10 (D.N.M. 1985).

115. *See* 1 WATERS AND WATER RIGHTS, *supra* note 6, at § 14.04(a).

116. *See, e.g.*, Arizona v. California (*Arizona II*), 439 U.S. 419, 422 (1979); Coleville Confederated Tribes, 647 F.2d 42 (1981); COHEN'S HANDBOOK, *supra* note 5, at §19.03[6].

117. *In re* Gen. Adjud. of All Water Rights in the Big Horn River Sys. (*Big Horn III*), 835 P.2d 273 (Wyo. 1992).

118. *Id.* at 278; *see also*, Peggy Sue Kirk, *Water Law—Indian Law—Cowboys, Indians and Reserved Water Rights: May a State Court Limit How Indian Tribes Use Their Water?*, 28 LAND & WATER L. REV. 467 (1993); Wes Williams, Jr., *Changing Water Use for Federally Reserved Indian Water Rights: Wind River Indian Reservation*, 27 U.C. DAVIS L. REV. 501 (1994).

After the Supreme Court upheld *Big Horn I*, maintaining that the PIA standard should be used to quantify the reserved water rights because the primary purpose of the Wind River Indian Reservation was agriculture,[119] the Wind River Tribes wanted to use a portion of their newly quantified water right to promote instream flows and to maintain fish habitats.[120] In *Big Horn III*, the Wyoming Supreme Court ruled against the Tribes in a plurality opinion, holding that they could not change their water use from agricultural to instream flow; however the justices did not agree on why. Three of the five justices agreed that the tribes should not be able to change their agricultural water rights into instream flow rights.[121] Justice Macy and Justice Thomas reasoned that the original purpose of the reservation was agriculture and not fishing[122] and, further, Wyoming state water law prevents any entity beside the state from holding instream flow water rights.[123] Justice Cardine did not agree that the Tribes' water uses were limited to agricultural uses or that state water laws must apply, but reasoned that the Tribes must first use their water right before being applying to change the water right to an instream flow use.[124] The dissenting justices, Justice Brown and Justice Golden, agreed that under Supreme Court precedent in *Arizona I*, Tribes should be able to change water uses to any lawful purpose on the reservation because federal reserved water rights are not bound by state water laws.[125]

While *Big Horn III* is only persuasive outside of Wyoming, the decision is problematic for practical and legal reasons. As a practical matter, the decision resulted in inefficient use of water resources. By not allowing the Tribes to leave water in the stream, the decision hurt not only their interest, but also the interests of junior users downstream, who would have benefited from the extra water left in the stream. As a legal matter, Indian water rights are federal reserved water rights, and they come from outside the state water law system.[126] Thus, by saying that

---

119. *In re* Gen. Adjud. of All Rights to Use of Water in the Big Horn River Sys. (*Big Horn I*), 753 P.2d 76, 96 (Wyo. 1988), *aff'd mem. sub. nom.*, Wyoming v. United States, 492 U.S. 406 (1989).

120. *Big Horn III*, 835 P.2d at 275–76. Between *Big Horn I* and *Big Horn III*, the Wyoming Supreme Court decided *Big Horn II*, but it only related to the standing of non-Indian claimants who had not participated in *Big Horn I*. *In re* Gen. Adjud. of All Rights to Use Water in the Big Horn River Sys. (*Big Horn II*), 803 P.2d 61 (Wyo. 1990).

121. *Big Horn III*, 835 P.2d at 275–88.

122. *Id.* at 278 (Macy, J., majority opinion).

123. *Id.* at 284 (Thomas, J., concurring specially).

124. *Id.* at 285 (Cardine, J., concurring in part and dissenting in part).

125. *Id.* at 288–89 (Brown, J., dissenting); *id.* at 294 (Golden, J., dissenting).

126. *See* Kirk, *supra* note 118, at 484–85 (arguing that court is misinterpreting the *Winters* doctrine, which provides that federal reserved water rights are exempt from appropriation under state laws).

Indian water rights must fit into the state water law system, Justices Macy and Thomas went against established legal principles by allowing state law to supersede federal law.[127]

Effectively, the *Big Horn III* decision would limit tribes to an agricultural lifestyle; thus, if agriculture is no longer economically feasible, tribes could no longer use their water rights at all.[128] Tribes should be able to decide what is in the best interest of their homeland and how to best use their water rights. A tribe whose water rights were adjudicated for a broader homeland purpose could more easily use their water rights for any purpose on the reservation.[129]

C. Transfer/Lease off the Reservation

If the purpose of Indian reservations is to create a permanent homeland for tribes, and not to force Indians into a permanent agricultural lifestyle, tribes should be able to use their water rights awarded under a homeland standard for any purpose that would create a sustainable economy for tribal members.[130] The ability to lease or transfer water rights off the reservation would help tribes fulfill their homeland purpose. However, tribes are currently prevented from selling or leasing water off reservation by the Indian Intercourse Act of 1834.[131] Under the Indian Intercourse Act, the sale, lease, or grant of tribal property is prohibited without the consent of the federal government.[132] Although most courts have not considered this specific question, it is likely that the Indian Intercourse Act applies to Indian water rights.[133] The inability of tribes to lease water rights off their reservations because of the Indian Intercourse Act is likely denying many tribes the economic benefit they could derive from selling or leasing water that they are not using.[134]

In general, under prior appropriation, owners of water rights may permanently sell or temporarily lease their water right to another

---

127. *Id.* at 483.

128. Kirk, *supra* note 118, at 485–486; *see generally In re* Gen. Adjud. of All Rights to Use Water in Gila River Sys. & Source (*Gila V*), 35 P.3d 68, 76 (Ariz. 2001).

129. *See* Cosens, *supra* note 12, at 857–58.

130. Storey, *supra* note 13, at 213; *see also* Getches, *supra* note 12, at 543.

131. Indian Intercourse Act of 1834, 25 U.S.C. § 177 (2011) (alternatively called the Indian Nonintercourse Act) ("No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.").

132. *Id.*

133. COHEN'S HANDBOOK, *supra* note 5, § 19.03[7][c].

134. Storey, *supra* note 13, at 217–20.

entity.[135] The law and practice associated with water rights transfer and leasing is derived from state laws.[136] Because each water right consists of a quantity and priority date, the original owner sells both and the purchaser can use the water for a different use and in a different location, while retaining the priority date. The only restriction is that the new use cannot "harm" any junior water users on the river. No matter where the new use occurs, junior water users will still get the same amount of water to their diversions that they would have with the original use.[137] Therefore, the purchaser can only use the quantity of water associated with the consumptive use of the original owner.[138] The state engineer is typically responsible for ensuring that no harm befalls junior water users after a water right transfer, but each state has different rules and practices.[139] Laws for water leasing have similar restrictions to selling, but water leasing is not permitted in all states.[140]

Recently, throughout the western United States, water leases and transfers tend to occur from agriculture to municipalities as cities grow and farming becomes less profitable.[141] Selling water rights is big business in the West.[142] Water rights with early priority dates are worth more because there is a much higher degree of certainty that the water user will get to use the water in any given year. As described earlier, Indian water rights typically have very high priority dates because Indians and Indian reservations were present long before white settlers began appropriating water from streams. Thus, tribes could get top dollar for their valuable senior water rights. Similarly, non-Indian water users, such as growing western cities, would benefit from being able to purchase or lease Indian water rights with early priority dates because these rights will contribute to a more reliable water supply.[143]

In addition to the economic benefits of leasing, tribes could lease water to a diversion downstream of the reservation as a way to ensure

135. 1 WATERS AND WATER RIGHTS, *supra* note 6, § 14.01(b)(2).

136. *See generally* 1 *id.* note 6, at §14.

137. 1 *Id*. § 14.04(c).

138. 1 *Id*. § 14.04(c)(1). The consumptive use for agriculture, for example, equals the amount of water diverted from the stream minus the amount that is not used by the crops and goes back into the stream. Water resource engineers have formulas they use to calculate the consumptive use based on the type of crop, the size of the area irrigated, and the climate.

139. 1 *Id.* § 14.04(c).

140. 1 *Id.* § 14.01(b)(2)(B).

141. Garry, *supra* note 89, at 34.

142. Jedidiah Brewer et al., *Water Markets in the West: Prices, Trading, and Contractual Forms* 20–25 (Nat'l Bureau of Econ. Research, Working Paper No. 13002, Mar. 2007), *available at* http://www.nber.org/papers/w13002.

143. Getches, *supra* note 12, at 544.

that water stays instream on the reservation.[144] For example, if a water right is leased to a diversion downstream, then the water will have to continue to flow through the reservation to make it to the diversion off the reservation. Such an arrangement might provide a backdoor to ensure instream flow and avoid a *Big Horn III*-type ruling.

Currently, tribes cannot sell or lease their water off the reservation under the Indian Intercourse Act without express authorization from Congress.[145] This limitation applies to tribes who have already had their water rights adjudicated, and getting Congressional approval for any transfer or lease of water off a reservation would be an onerous process without any precedent. Leasing water rights to non-Indian entities is currently permitted, but only when land is leased and the water is used on that land.[146] However, several recent Indian water rights settlements that have been approved by Congress contain provisions allowing tribes to transfer or lease water rights off reservation in the future.[147] The prevalence of these provisions in settlement agreements indicates non-Indian acceptance of tribal water marketing, albeit under strictly controlled terms. Tribes however want all restrictions to be lifted so that they can freely market their water, even if they do not choose to exercise that option.[148]

Because economic development is necessary to maintain a viable homeland on the reservation, tribes should be able to sell or lease their water rights in order to take advantage the best use of their resources.[149] With the money from the sale or lease of their water rights, tribes would have the opportunity to improve the economic conditions of their people. Under the homeland purpose, water rights should be available for use to support Indian economies on the reservation and profits from the sale or lease of water off reservation.[150]

Of course, transfers of water off the reservation to non-Indian water users may not ultimately be consistent with the purpose of an Indian reservation, which is to provide a homeland for the tribe *on the reservation*.[151] For example, if tribes sell their water rights, they would

144. *Id.*

145. Indian Intercourse Act of 1834, 25 U.S.C. § 177 (2011) (alternatively called the Indian Nonintercourse Act); *see also* Getches, *supra* note 12, at 542.

146. Getches, *supra* note 12, at 542.

147. *Id.* at 546–47; Seldin, *supra* note 87, at 1554–55; Peter W. Sly, *Urban Perspectives of Off-Reservation Tribal Water Leases*, 10 WTR NAT. RESOURCES & ENV'T 43, 45–46 (1996).

148. DALE PONTIUS, COLORADO RIVER BASIN STUDY: COMMISSION FINAL REPORT 77 *(1997), available at* www.colorado.edu/colorado_river/docs/pontius%20colorado.pdf.

149. Getches, *supra* note 12, at 542; Storey, *supra* note 13, at 217–18.

150. Getches, *supra* note 12, at 543; Storey, *supra* note 13, at 217–18.

151. Getches, *supra* note 12, at 542–43.

get a sum of money but not a more permanent source of income that might be derived from other activities such as agriculture. Further, if water is removed from a reservation, the potential for development on the reservation is reduced. As a result, tribal members may leave the reservation to seek work elsewhere, further decreasing the reservation's value as a homeland for the tribe.[152]

There are two additional difficulties that tribes face if they want to transfer or lease their water off the reservation: quantifying consumptive use of unexercised rights and the tension between federal and state laws. A non-Indian water right vests when a quantity of water is diverted from the stream and put to beneficial use;[153] thus state water laws for change-of-use generally do not permit selling a water right that has never been used or put to beneficial use.[154] Because many tribes have not actually put their water rights to beneficial use, it will be difficult for a state to determine the amount of water that can be transferred without harming junior users;[155] especially because junior non-Indian water users are currently developing new water rights with the expectation that tribes will not use their senior rights.[156] Thus, determining the appropriate quantity of water that a tribe could lease or sell/transfer would require either state engineers, state legislatures, courts, or a combination of all three to develop a new method to calculate estimated consumptive use.

The second potential problem with tribes transferring or leasing water off reservation is the tension between federal Indian law and state water laws. Indian water rights, like all federal reserved water rights, are based on federal law.[157] Indian water rights were not developed as part of the state water law system.[158] Thus, there are limits on what tribes can do with their water rights that do not limit other water users managed by the state system. The most glaring example of federal restrictions that apply only to Indian water rights and not state rights is the Indian Intercourse Act mentioned above, which restricts tribes' ability to transfer or lease water off reservations.[159]

---

152. *Id.* at 543.

153. 1 WATERS AND WATER RIGHTS *supra* note 6, at § 12.02(c)(1)–(2).

154. 1 *Id.* § 14.04(b).

155. Recall that one of the consenting opinions in *Big Horn III* said that tribes should be able to change their uses of water, but only after the water is first put to a beneficial use as irrigation for agriculture. *In re* Gen. Adjud. of All Water Rights in the Big Horn River Sys. *(Big Horn III)*, 835 P.2d 273, 285–86 (Wyo. 1992).

156. Getches, *supra* note 12, at 545–46 (arguing that the reliability of southern California's water supply depends on Indian tribes remaining financially unable to develop their water rights on the Colorado River).

157. COHEN'S HANDBOOK, *supra* note 5, at § 19.03[1].

158. *Id.*

159. Indian Intercourse Act of 1834, 25 U.S.C. § 177 (2011) (alternatively called the Indian Nonintercourse Act); Getches, *supra* note 12, at 542.

Even though Indian water rights are not considered to be controlled by state law, state water laws are additional barriers to tribes transferring or leasing water off the reservation. Western states forbid the transfer of water out of state, but markets for Indian water rights may exist in a different state.[160] Given that two Wyoming justices felt that state water laws should substantially limit the use of Indian water rights,[161] even if Congress approves out-of-state water transfers, Wyoming and other states might argue that Indian interstate water transfers are not legal under state law.[162] Thus, even if a homeland purpose of the reservation is established for quantifying water rights, tribes might nonetheless be restricted from making the best economic use of their water resources under state and federal statutes.

In the end, quantifying Indian water rights based on the homeland standard will likely give tribes more freedom to use their water rights in ways that will benefit their people now and in the future. First, tribes may be able to expand the water uses associated with the most senior "time immemorial" priority date, which would entitle them to use those resources to maintain a viable homeland. Second, establishing a homeland purpose in a water rights adjudication may allow tribes to change their use of water and not be forced to continue an agricultural lifestyle. Finally, under the homeland standard, Congress may be more inclined to permit a lease or transfer of water rights off the reservation because doing so would increase the economic self-sufficiency of a tribe. Ultimately, the homeland standard is closer to the original purpose of Indian reservations, which was to create a permanent place for Indian tribes to call home.

V. CONCLUSION

The homeland standard is consistent with Supreme Court jurisprudence and it is the best way to make certain that tribes have the fundamental ability to use their water rights in order to ensure that reservations can remain permanent homelands for Indian tribes. Today, many tribes are relatively poor and need to improve economic development so they can make their reservations homelands for their people. Tribes should have the ability to decide what is in their best

160. Getches, *supra* note 12, at 547.

161. *In re* Gen. Adjud. of All Water Rights in the Big Horn River Sys. *(Big Horn III)*, 835 P.2d 273, 278 (Wyo. 1992) (Macy, J., majority opinion); *id.* at 283 (Thomas, J., concurring specially).

162. *But see* Getches, *supra* note 12, at 547–48; Sly, *supra* note 147, at 46; *and* Seldin, *supra* note 87, at 1553 (all arguing that if states prevent the interstate transfer of water, they may be violating the Dormant Commerce Clause).

interests and what will give them the most economic stability; thus, tribes should not be limited in the use or alienation of their water resources.

While this country has a long history of quantifying Indian water rights based on the amount necessary for all potential agriculture on the reservation, the Arizona Supreme Court found two good reasons to instead use a homeland standard. First, not all reservations are suitable to agriculture, and second, agriculture is not necessary today for tribes to maintain a homeland on their reservations.[163] In some cases, using the agricultural standard to quantify Indian water rights has led to insufficient water for tribes to meet basic needs because the tribes could not prove that agriculture was viable on their reservation.[164] Other states should follow the Arizona Supreme Court in adopting the homeland standard for quantification of Indian water rights because it is a valid, equitable method for ensuring that tribes can make a sustainable homeland on their reservations.

Moreover, the way a court conceptualizes the purpose of an Indian reservation in a water rights adjudication has three additional effects beyond the quantity of water associated with a reserved water right. First, a homeland purpose could help tribes get a time immemorial priority date for any current or future uses of waters that are tied to their aboriginal lands. Second, tribes could use a water right granted for a homeland purpose for any use on the reservation, not just agriculture. And finally, tribes may be able to get Congressional approval of transfers or lease of water off their reservations if they are not limited to maintaining only agricultural uses of water.

All these features have the potential to expand economic opportunities for tribes that are struggling to meet their needs. Water rights in the West are scarce. The western population is rapidly increasing and with it grows its need for water. Tribes should be able to grow as well. They should have the opportunities to both sell their water and to change the use of their water to develop nonagricultural industries on their reservations.

Moving from the agricultural standard to the homeland standard may not make all these changes possible because there are other obstacles and precedents in the way of substantial change to federal Indian law. However, it would be an acknowledgement that Indian tribes can maintain their culture and societies on their reservations but also have the freedom to change with the times like the rest of us.

---

163. *In re* Gen. Adjud. of All Rights to Use Water in Gila River Sys. & Source (*Gila V*), 35 P.3d 68, 78 (Ariz. 2001).

164. *Id.*