

# Indian Allottee Water Rights: A Case Study of Allotments on the Former Malheur Indian Reservation

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## INTRODUCTION

The right to use water is key to making land productive and valuable. This Article will address the little-known topic of the rights of Indian allottees (those Indian individuals who were allotted lands under the General Allotment Act), and their descendants, to use water for agricultural and development purposes on allotment lands. Many allottees

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do not realize they have water rights, and in most cases, the allottees and their local community do not understand what law applies to those rights. This often contributes to allotments remaining unused and undeveloped and Indian descendants losing potential income and enjoyment from the allotments.

The first part of this Article will provide a summary of the law of Indian water rights. The second part of this Article will describe the legal overview of Indian water rights as they relate to allotments. The third part of this Article will narrow in and describe public domain allotments and the allottees' rights to use water.

Lastly, this Article will provide an example case study of the Malheur Public Domain Allotments. This Article will show the importance of doing the historical research to better document the circumstances and purposes of a particular allotment or set of allotments. The historical research will create evidence and documents to show the government's original expectation for the allottees' future use of the land and natural resources. The evidence is necessary in order to prove to the Bureau of Indian Affairs ("BIA"), and other land and water management agencies, that the allottees can exercise water rights as a valuable part of the land right.

## I. INDIAN WATER RIGHTS

In the 1908 case, *Winters v. United States*, the Supreme Court established what is now known as the "*Winters Doctrine*."<sup>1</sup> Under the *Winters Doctrine*, Indian water rights are "reserved"<sup>2</sup> water rights. In other words, when the federal government established Indian "reservations," it implicitly recognized legal rights not only to the land, but also rights to sufficient water to fulfill the purposes of the reservation. Since the government's purpose in creating reservations was to transform tribes into agrarian societies, the *Winters* court found that tribes were entitled to water to support the government's purposes.

Western water rights are ranked according to their priority dates, generally known as the "first-in-time, first-in-right" principle. Earlier

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<sup>1</sup> *Winters v. United States*, 207 U.S. 564 (1908).

<sup>2</sup> It is important to understand the concept of a "reservation." The language has roots in various laws related to homesteading, such as the Sundry Appropriations Act, ch. 1069, 24 Stat. 505, 527 (1888), which "reserved [reservoir sites] from sale as the property of the United States, and [such sites] shall not be subject after the passage of this act, to entry, settlement or occupation until further provided by law." Western "reserved" rights, including what we now call military reservations or Indian reservations, are therefore generally property rights that have not left federal ownership since the time the rights were claimed by the United States.

users of water have priority over later users.<sup>3</sup> Unlike most Western water rights under this prior appropriation system, Indian water rights arise from the rights to land rather than from use of water. Therefore, Indians with land rights may assert their water rights at any time. The water rights are not lost through non-use. Further, Indian water rights are not based on diversion of the water for actual beneficial use.<sup>4</sup>

Indian water rights are federal rights. The establishment of an Indian reservation has the effect of preempting state jurisdiction over Indians, Indian tribes, and Indian property within the reservation.<sup>5</sup> Thus, state water laws generally do not govern the use of water by Indians and tribes on Indian lands.<sup>6</sup> However, in 1952 Congress passed the McCarren Amendment, declaring that the United States would waive sovereign immunity when a state court adjudicates water rights within a river.<sup>7</sup> State jurisdiction is not exclusive, with federal courts also retaining jurisdiction over federal water claims.<sup>8</sup> Therefore, Indian water rights are now included as part of state water adjudications.

Tribes have received mixed results in these state water adjudications, with some tribes satisfied with settlements and others less pleased with the results of the adjudicatory proceedings. Generally, the federal government furnishes tribes with lawyers and expert witnesses. Nonetheless, tribes often turn to negotiated settlements to avoid lengthy and expensive water litigation.<sup>9</sup>

A reserved federal water right depends on congressional intent. Such a right reserves “only the amount of water necessary to fulfill the purpose of the reservation.”<sup>10</sup> Therefore, a review of all applicable statutes, treaties, and sources of congressional purpose found in legislative history for a particular land and related water right is needed for the adjudication or settlement of any particular Indian water right.

The quantity of water reserved must satisfy the present and future needs of the Indian reservation.<sup>11</sup> Many water quantifications settle a

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<sup>3</sup> See *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 804 (1976).

<sup>4</sup> See also *Arizona v. California*, 373 U.S. 546, 600 (1963).

<sup>5</sup> *Bryan v. Itasca Cty.*, 426 U.S. 373, 376 n.2 (1976).

<sup>6</sup> *United States v. McIntire*, 101 F.2d 650, 654 (9th Cir. 1939).

<sup>7</sup> 43 U.S.C. § 666 (2018).

<sup>8</sup> See *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 800 (1976).

<sup>9</sup> David H. Getches & Sarah Van De Wetering, *Protecting Indigenous Rights and Interests in Water*, in *IN SEARCH OF SUSTAINABLE WATER MANAGEMENT* 102, 111–113 (Douglas Kenney ed., 2005).

<sup>10</sup> *Cappaert v. United States*, 426 U.S. 128, 141 (1976).

<sup>11</sup> *Arizona v. California*, 373 U.S. 546, 600 (1963).

particular tribe’s water right by looking to the total irrigable acres on the reservation. However, quantified Indian water rights based on irrigable acreage are not limited to agricultural use.<sup>12</sup> An implied reservation of rights may be justified to the extent water is needed for *any productive activity* on an Indian reservation, including agricultural development, mining, recreation, fish and wildlife, and support of traditional pursuits.<sup>13</sup> Reserved water also includes the right to groundwater.<sup>14</sup>

Although the *Winters Doctrine* recognized Indian water rights, and subsequent case law has addressed quantification of those rights, some legal uncertainty remains about the extent of use of such waters. However, current law and policy<sup>15</sup> allow tribes and allottees to lease their land and water to non-Indians for “public, religious, educational, recreational, residential or business uses” upon the approval of the Secretary of the Interior.<sup>16</sup> Further, the law allows for the “development or utilization of natural resources in connection with...such leases.”<sup>17</sup>

Under the Nonintercourse Act,<sup>18</sup> any conveyance of Indian land (or water rights) requires congressional approval. Although some tribes’ congressionally approved Indian water rights settlements permit tribal water sales,<sup>19</sup> there is no broadly applicable federal law that authorizes marketing of Indian water.<sup>20</sup> Tribes without this congressional authority may attempt to use “deferral agreements,” where tribes receive compensation for agreeing not to utilize or pursue their water rights.<sup>21</sup>

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<sup>12</sup> *Arizona v. California*, 433 U.S. 419, 422 (1979).

<sup>13</sup> David H. Getches, *Water Rights on Indian Allotments*, 26 S.D. L. REV. 405, 411–12 (1981) [hereinafter Getches].

<sup>14</sup> *Agua Caliente Band of Cahuilla Indians v. United States*, 849 F.3d 1262, 1271 (9th Cir. 2017).

<sup>15</sup> 25 U.S.C. § 415 (2018).

<sup>16</sup> As a general proposition, the word “land” in Indian statutes has been construed to include appurtenant waters. *Holmes v. United States*, 53 F.2d 960, 963 (10th Cir. 1931).

<sup>17</sup> 25 U.S.C. § 415(a).

<sup>18</sup> 25 U.S.C. § 177 (2018).

<sup>19</sup> *See, e.g., Arizona Water Settlements Act of 2004*, Pub L. No. 108-451, § 309, 118 Stat. 3478, 3555 (2004).

<sup>20</sup> For a discussion of a number of settlements, *see generally* Dylan M. DesRosier, *Tribal Water Rights Settlements and Instream Flow Protection* (2015) (unpublished M.S. thesis, University of Montana) (on file with ScholarWorks at the University of Montana).

<sup>21</sup> *See* Edward W. Clyde, *Special Considerations Involving Indian Rights*, 8 NAT. RESOURCES L. 237, 250-51 (1975); Robert H. Abrams, *The Big Horn Indian Water Rights Adjudication: A Battle for Legal Imagination*, 43 OKLA. L. REV. 71, 74 (1990).

## II. ALLOTMENT WATER RIGHTS

The law related to allotment water rights is a more specific legal topic within the topic of Indian water rights.

Indian allotments originated as part of federal policies responding to nineteenth-century political pressures, social reforms, and land interests. Politicians advocated for parceling out tribally owned lands to individual Indians to promote assimilation of Indians and Indian agriculture, and to create a pool of “excess” Indian lands that the federal government could transfer to non-Indians. In 1887, Congress passed the General Allotment Act, which authorized the allotment of reservation lands.<sup>22</sup> The policy allowed the federal government to transfer many tribal lands out of Indian control for the general benefit of non-Indians. By the 1920s, the federal government acknowledged that the allotment policy failed to serve any beneficial purpose to Indians.<sup>23</sup> In 1934, Congress passed the Indian Reorganization Act (“IRA”), which repudiated the policy.<sup>24</sup> The IRA prohibited further allotment of tribal land, but declared that allotments already held in trust would continue to be held in trust until Congress provided otherwise.

All allottees, who usually received 160 acres of land, and their descendants, have vested property rights. These rights include valuable appurtenances to the land such as rights to water, timber, minerals, and fossils.<sup>25</sup> Further, because allotments in trust status<sup>26</sup> are titled “in trust for the allottees,” the United States protects the lands against alienation,

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<sup>22</sup> General Allotment (Dawes) Act, ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 331–358 (2019)).

<sup>23</sup> The Meriam Report led to the general suspension of the allotment policy. *See generally* LEWIS MERIAM, INSTITUTE FOR GOV’T RESEARCH, THE PROBLEM OF INDIAN ADMINISTRATION 7-8 (F.W. Powell ed., 1928) (finding that allotment policy did not serve any beneficial purpose).

<sup>24</sup> Indian Reorganization Act, Pub. L. No. 73-383, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 5101–5108 (2018)).

<sup>25</sup> For example, *see* 25 U.S.C. § 179 (2018) (providing remedies for livestock trespass to allotments). *See also* Pawnee v. United States, 830 F.2d 187 (Fed Cir. 1987) (regarding mineral rights).

<sup>26</sup> “Trust status” is a common way to characterize the type of Indian lands and is contrasted with the many other “non-trust” statuses of some Indian lands. An example of non-trust Indian land is fee land owned by individual Indians or tribes that are titled directly to the individual or tribe rather than to the federal government. The obligations of the federal government are different for resources not in trust. The “status” of lands on reservations and lands off reservations that are owned by Indians generally determine many of the rights and obligations related to the lands and affects the jurisdictional oversight of the lands.

encumbrance, and taxation.<sup>27</sup> Additionally, allotments are entitled to water rights, which need not be put to beneficial use and are not subject to abandonment or forfeiture.<sup>28</sup> Moreover, allottees succeed to the water priority of the date the reservation was created.<sup>29</sup> Either the allottees or the United States as trustee may obtain judicial protection of allottee water rights.<sup>30</sup> Further, federal law places the burden of proof on non-Indian claimants when an Indian makes prima facie showing of title.<sup>31</sup>

Federal law defines allotments as “Indian country.”<sup>32</sup> This means that, within allotments on reservations, Indian laws and customs and federal laws pertaining to Indians apply. Primary jurisdiction over Indian country rests with the federal government and not with the states.<sup>33</sup> This rule applies to both criminal<sup>34</sup> and civil jurisdictions.<sup>35</sup> Indian lands retain this status until Congress clearly expresses its intent to diminish or terminate the trust status.<sup>36</sup>

Further, the General Allotment Act of 1887 provided the Secretary of the Interior with the authority to set rules “as he may deem necessary to secure a just and equal distribution” in situations where irrigation water “is necessary to render the lands within any Indian reservation available for agricultural purposes.”<sup>37</sup> This authority allows allotments to retain a

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<sup>27</sup> Tax questions for allottees may be complex, as income derived from trust property is different from income from activities not related to the trust property. *See generally* Rev. Rul. 67-284, 1967-2 C.B. 55. Because there is no provision in the Internal Revenue Code of 1954 that exempts an individual from the payment of federal taxes because of Indian status, tax exemptions must come from treaties, agreements, or other acts of Congress.

<sup>28</sup> *See Colville Confederated Tribes v. Walton*, 752 F.2d 397 (9th Cir. 1985).

<sup>29</sup> *Hackford v. Babbitt*, 14 F.3d 1457, 1469 (10th Cir. 1994).

<sup>30</sup> *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 370 (1968).

<sup>31</sup> 25 U.S.C. § 194 (2018) (but the language of the statute may not apply to states).

<sup>32</sup> 18 U.S.C. § 1151 (2018).

<sup>33</sup> *Alaska v. Native Vill. of Venetie Tribal Gov’t*, 522 U.S. 520, 527 n.1 (1998).

<sup>34</sup> *See* 18 U.S.C. § 1151.

<sup>35</sup> *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 208 (1987).

<sup>36</sup> *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998).

<sup>37</sup> *See* 25 U.S.C. § 381 (2018); *see also* 25 U.S.C. § 382 (2018) (making irrigation projects under the Reclamation Act specifically applicable to “allotments made to Indians”); *see also* 25 C.F.R. § 171.105 (2019) (applying regulations to allotments within an irrigation project where BIA accesses fees and collects money to administer, operate, maintain, and rehabilitate irrigation project facilities); *see also* 25 U.S.C. §§ 386-386(a) (2012) (relating to costs of construction and other costs); *see also* 25 U.S.C. §390 (2018) (relating to specific mandates regarding the San Carlos, Fort Hall, Flathead, and Duck Valley irrigation projects); *see also* 43 U.S.C. § 593 (2018) (relating to the Flathead Irrigation Project); *see also* 25 U.S.C. § 385 (2012) (stating that Federal Indian irrigation projects may charge their costs “reimbursable out of tribal funds...said costs to be apportioned against such individual Indian under such rules, regulations, and conditions as the Secretary of the Interior may prescribe”); *see generally* BUREAU OF RECLAMATION, U.S. DEP’T OF THE INTERIOR, WATER

share of the tribal water right. In 1939, the Supreme Court recognized reserved water rights within allotments.<sup>38</sup> The Court reasoned that since agriculture was the purpose of allotments, and water is necessary for agriculture, reserved water rights are consistent with allotment policy. In later years, lower federal courts interpreted this law to give allotments a “just share” of the tribe’s agricultural water rights<sup>39</sup> based on the total irrigable acres included in the allotment as a percentage of the reservation.<sup>40</sup> Allottees succeed to the tribal priority of the date the reservation was created.<sup>41</sup> Tribes retain the power to govern the use of reserved water rights through tribal law and regulation, including the regulation of allotted water rights on the tribe’s reservation.<sup>42</sup>

The Allotment Act does not authorize the sale of water by allottees. Case law related to the transfer of allotment water only examines instances in which the government leased (pursuant to federal agricultural or other leasing procedures) or otherwise transferred underlying allotted land to third-parties.<sup>43</sup> In such cases, if the allotment land passes out of Indian ownership, the transferred water right may lose its reserved status and related privileges and protections.<sup>44</sup>

### III. PUBLIC DOMAIN ALLOTMENTS

The law related to public domain allotments and associated water rights is a more specific legal topic within the topic of allotments’ water rights.

In some cases, the federal government created allotments from the public domain rather than from within an Indian reservation. In other cases, the federal government created an allotment within an Indian reservation and then extinguished the reservation, returning it to the public

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MARKETING ACTIVITIES WITHIN THE BUREAU OF RECLAMATION (2016) (describing some federal water marketing).

<sup>38</sup> *United States v. Powers*, 305 U.S. 527, 533 (1939).

<sup>39</sup> *See Scholder v. United States*, 428 F.2d 1123, 1126 (9th Cir. 1970); *see Gila River Pima-Maricopa Indian Cmty. v. United States*, 29 I. Cl. Comm. 144, 150 (1972).

<sup>40</sup> *Colville Confederated Tribes v. Walton*, 752 F.2d 397, 401 (9th Cir. 1985).

<sup>41</sup> *Hackford v. Babbitt*, 14 F.3d 1457, 1469 (10th Cir. 1994).

<sup>42</sup> *See Montana v. United States*, 450 U.S. 544, 565 (1981) (stating that a tribe’s right to regulate allotted water rights includes the right to regulate non-Indian leased trust land) (dictum).

<sup>43</sup> *See, e.g., Colville*, 752 F.2d at 397.

<sup>44</sup> *Id.* at 401–04; *see also In re Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys.*, 753 P.2d 76, 113–14 (Wyo. 1988), *aff’d per curiam*, 492 U.S. 406 (1989).

domain. Both of these circumstances create a situation in which allotments are not geographically attached to any particular tribe or reservation. A reserved water right on a public domain allotment should be subject to the same rules as tribal reserved rights.<sup>45</sup> Public domain allotments' reserved water rights will continue even on an extinguished reservation if they are necessary for unextinguished Indian rights.<sup>46</sup>

In 1979, *United States v. Adair* addressed the public domain water rights questions related to lands of the former Klamath Reservation. Congress terminated the Klamath Tribe in the Klamath Termination Act of 1954. Congress then designated some of the tribe's former reservation as the Lower Klamath National Wildlife Refuge. The court held that the federal government, Indian allottees, and non-Indian owners of the former terminated reservation held the water rights previously attached to the Klamath Reservation lands.<sup>47</sup>

A party attempting to prove its rights on a specific public domain allotment or allotments on terminated reservations must review the legal documents and legislative history or context of the actions creating the allotments and the actions leading to the termination of the reservation. This documentation is used as evidence of federal intention. In some cases, the documents may have specific language regarding how to treat water rights on the particular lands. In the *Adair* case, the terminating statute specifically stated that termination did not affect reserved water rights. The *Adair* case makes it clear that allottees do have enforceable property rights in water related to their allotments.<sup>48</sup>

Congress has resolved many individual tribes' claims through legislation, but without legislation, Indians may be required to file suit to enforce their claims. However, to be successful in court litigants must meet many requirements.

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<sup>45</sup> COHEN'S HANDBOOK OF FEDERAL INDIAN LAW §19.03(8)(b) at 1231 n.166 (2012).

<sup>46</sup> *United States v. Adair*, 478 F.Supp. 336, 346 (D. Or. 1979); *aff'd as modified*, 723 F.2d 1394 (9th Cir. 1983).

<sup>47</sup> *Adair*, 478 F. Supp. 336 (D. Or. 1979).

<sup>48</sup> *But c.f.* *Tribe v. U.S. Bureau of Reclamation*, 319 F. Supp. 3d 1168 (N.D. Cal. 2018) (continuing tribal litigation addressing the operation of the Klamath River Hydroelectric Project and Endangered Species Act requirements for salmon and other species in the Klamath Basin. The Project contains seven dams, numerous water canals, and water pumps for the purpose of water management); *but c.f.* *Hoopa Valley Tribe v. Nat'l Marine Fisheries Serv.*, 230 F. Supp. 3d 1106 (N.D. Cal. 2017), *modified sub nom.* *Tribe v. U.S. Bureau of Reclamation*, No. 3:16-CV-04294-WHO, 2017 WL 6055456 (N.D. Cal. Mar. 24, 2017), *order clarified sub nom. Tribe v. Nat'l Marine Fisheries Serv.*, No. 16-CV-04294-WHO, 2018 WL 2010980 (N.D. Cal. Apr. 30, 2018) (continuing tribal litigation addressing the operation of the Klamath River Hydroelectric Project and Endangered Species Act requirements for salmon and other species in the Klamath Basin).



First, there must be subject matter jurisdiction. Tribes easily meet this requirement because it is well established that a federal question is raised when Indian parties claim a breach of the federal trust against the federal government.<sup>49</sup>

Second, federal sovereign immunity must be appropriately waived through a showing of a statutory consent to suit. These waivers hinge on whether a suit is for money damages or for other relief. Non-monetary matters relating to federal agency action administrative procedures can be brought under the Administrative Procedures Act.<sup>50</sup> Other non-monetary claims can be brought under other federal statutes related to the subject matter of the claim, such as the “Tucker Act” (really a number of different laws that waive sovereign immunity for claims such as a breach of the federal trust seeking money damages).<sup>51</sup> Two U.S. Supreme Court cases from 1980 and 1983, each titled *United States v. Mitchell*, established the basis for enforcing the federal trust as it relates to the Tucker Act.<sup>52</sup> These cases examined the extent to which the Secretary of the Interior could be held accountable in money damages for breach of trust for mismanagement of timber resources. In *Mitchell I*, the Court held that although the General Allotment Act declared that the United States held allotted land in trust, the term alone did not create a claim for mismanagement of timber resources. Then, in *Mitchell II*, the court examined other statutes and regulations giving the Secretary of Interior various roles in managing timber resources. The Court decided that these roles established a fiduciary relationship, and private trust law principles afforded money damages and equitable remedies.

Third, Indian parties must show there is a claim upon which relief can be granted. The applicable treaties, statutes, regulations, and orders define whether the government intended to establish a water right or otherwise owes fiduciary responsibilities.<sup>53</sup> Therefore, an Indian party must thoroughly research those historical documents to find evidence that there is a water right or a federal intention that the rights were assumed.

Holders of Indian rights must understand, monitor, and protect their interests, especially since public domain allottees generally do not have an underlying tribe who works to protect, enforce, and adjudicate the allottees’ water rights. Nor is there a tribe to regulate or otherwise

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<sup>49</sup> Cobell v. Babbitt, 30 F. Supp. 2d 24, 31–33 (D.D.C. 1998).

<sup>50</sup> 5 U.S.C. § 702 (2018).

<sup>51</sup> See 28 U.S.C. § 1491(a)(1) (2018); 28 U.S.C. § 1505 (2018); 28 U.S.C. § 1346(a)(2) (2018).

<sup>52</sup> *United States v. Mitchell*, 445 U.S. 535 (1980) [hereinafter *Mitchell I*]; *United States v. Mitchell*, 463 U.S. 206, 224 (1983) [hereinafter *Mitchell II*].

<sup>53</sup> *Mitchell II*, 463 U.S. at 224.

determine water use questions under tribal law. Public domain allottees must document the history of their particular parcels to determine what rights or restrictions exist related to water use on any particular parcel and must work directly with the federal government to utilize and enforce their rights.

#### IV. THE MALHEUR PUBLIC DOMAIN ALLOTMENTS

This Section of this Article provides a case study of a set of public domain allotments. This Article describes how the allotments came to be within the history of the region and the litigation that was required to prove the rights of the allottees.

The Malheur public domain Indian allotments in Harney County in southeastern Oregon<sup>54</sup> are unique cases due to the history of these lands. As is described below in court documents, these particular allotments were once part of the Malheur Indian Reservation, created by various Executive Orders under President Ulysses S. Grant in 1872, 1875, and 1876. The Malheur Indian Reservation was considered to be a home for “all the roving and straggling bands in eastern and southeastern Oregon.”<sup>55</sup> The lands and peoples using the lands are subject to various treaties that preceded the Executive Orders.<sup>56</sup> Following the “Bannock War” in 1878, the seven chiefs and their bands that lived on the Malheur Reservation

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<sup>54</sup> 9 Stat. 323 (1848). Oregon Territory (including what is now Oregon, Washington, Idaho, Western Montana, and Western Wyoming) was established on August 14, 1848. The Act stated, “Nothing in this Act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians.” The Act also secured to the inhabitants of said Territory all the rights and privileges granted by the Northwest Ordinance of July 13, 1787; 1 Stat. 52 (1787). Article 3 states that “the utmost good faith shall always be observed towards the Indians; their land and property shall never be taken from them without their consent; and in their property rights and liberty, they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made for preventing wrongs being done to them, and for preserving peace and friendship with them...” Oregon was made a state in 1859.

<sup>55</sup> OFFICE OF INDIAN AFFAIRS, REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS 65 (1872).

<sup>56</sup> See Treaty with the WallaWalla, Cayuse, Ect., 1855, 12 Stat. 945 (1855); Treaty With the Tribes of Middle Oregon, 1855, 12 Stat. 963 (1859); Treaty with Klamath, Ect., 1864, 16 Stat 707 (1866); Treaty with the Snake, 1865, 14 Stat. 683 (1866); VINE DELORIA & RAYMOND DEMALLIE, DOCUMENT OF AMERICAN INDIAN DIPLOMACY 1240 (1999) (Another treaty with the Snake or Shoshone Indians was signed on December 10, 1868 at Fort Harney, Oregon, however, it was not presented to the Senate for ratification and was not ratified).

were removed to other reservations, including the Yakama Reservation, Washington; Pyramid Lake, Nevada; Ft. McDermitt, Nevada; Ft. Bidwell, California; Ft. Klamath, Oregon; Warm Springs, Oregon; Duck Valley/Owyhee, Nevada; and Ft. Hall, Idaho. President Chester Arthur restored the Malheur Reservation to the public domain in 1882, 1883, and 1889.<sup>57</sup> However, for some Indians who returned to the area, allotments were approved in or around 1898, and President Theodore Roosevelt signed a number of them in 1907.

Many of the people removed to other reservations eventually went to the Warm Springs Reservation. Later generations have since moved to other places. Some of the Paiute people from the Malheur River area eventually returned to the Harney Basin. Some of the Paiute people acquired title to land, which was designated the Burns Paiute Indian Reservation in 1972.<sup>58</sup> The Burns Paiute Indian Reservation is the nearest reservation to the Malheur public domain allotments, but the reservation is not contiguous to most of the allotments.

As the original allottees of the Malheur public domain allotments passed away, their heirs inherited their land interests. These heirs included their family members when there was no will, or their devisees listed in some wills. In some cases, devisees included one or more Indian tribes.<sup>59</sup> Today, the heirs of those original allottees hold interests in the allotments. Some allotments today have only one owner, but most allotments have numerous owners, making management of the interests complicated under federal regulations.

While some of the individuals who currently own interests in the Malheur public domain allotments are members of the Burns Paiute Tribe, many are members of other tribes. In some instances, however, the Burns Paiute Tribe has acquired ownership in allotments through devise or acquisition. That said, no tribe has any regulatory jurisdiction over the allotments. The Burns Paiute Tribe often only has jurisdiction as one of many owners in a particular allotment.

Valuable historical records for the Malheur reservation allotments can be found in records of the Indian Claims Commission.<sup>60</sup> Docket No.

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<sup>57</sup> See OFFICE OF INDIAN AFFAIRS, EXECUTIVE ORDERS RELATING TO INDIAN RESERVATIONS: FROM MAY 14, 1855 TO JULY 1, 1912 at 151 (1912) [hereinafter EXECUTIVE ORDER].

<sup>58</sup> Burns Indian Colony, Oreg., lands in trust, Pub. L. No. 92-488, 86 Stat. 806.

<sup>59</sup> Federal statutes control most aspects of devise, inheritance, and probate of allotments. See 25 U.S.C. §§ 2201–2221 (2018).

<sup>60</sup> Indian Claims Commission Act of 1946, Pub. L. No. 79-726, 60 Stat. 1049. Established Indian Claims Commission to hear longstanding claims of Indian Tribes and Indians against the United States; Act of Oct. 8, 1976, Pub. L. No. 94-465, 90 Stat. 1990.

17 is the claim of *The Snake or Piute Indians of the Former Malheur Reservation in Oregon v. United States*.<sup>61</sup> In that case, the petitioners were descendants of the Snake or Piute Indians who resided on the former Malheur Reservation. The petitioners presented claims on behalf of all members of that group and all such persons were considered to be entitled to participate in any judgment.

For this case, the Commission issued an initial “Findings of Fact” on December 29, 1950. The Findings of Fact detailed the history of the peoples of the area and the various treaties affecting the lands. The Findings concluded that when the Malheur Reservation was restored to the public domain, it “was done without the consent of the Snake or Piute Indians and without payment to them of any compensation therefore.”<sup>62</sup> However, the Commission also found:

[T]here are no facts or circumstances shown by the evidence in this case that will justify this Commission in finding that, on the basis of fair and honorable dealings, the petitioners are entitled to recover on their claims...for the value of the former Malheur Reservation lands, or damages for noncompliance with the unratified treaty of December 10, 1868 by the United States.<sup>63</sup>

The petitioners appealed, resulting in an Opinion of the Court of Claims on June 2, 1953.<sup>64</sup> The Opinion gave instructions for further review. Later, the Commission issued the “Amended Findings of Fact” on December 28, 1956. The Amended Findings of Fact gave additional information about the tribal history and a more detailed history of the treaties. The Amended Findings stated the following as relates to the allottees’ aboriginal title to these lands:

Petitioners are descendants of the bands or “Tribe” of Snake or Piute Indians (also referred to as “Snake or Shoshone Indians”) who were parties to an unratified treaty of December 10, 1868, by their chiefs and headmen, We-You-We-Wa, Gsha-Nee, E-he-gant, Po-Nee, Chow-Wat-Na-Ne, Ow-its, and Tash-E-Go, and by J.W.P. Huntington, Superintendent of Indian Affairs for the Territory of Oregon, representing the United States . . . as distinguished from descendants of other Snake and Piute Bands . . . . The lands to which petitioners claim their ancestors held original Indian title are those lands included within the

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Adjourned the Commission in 1978 and the remaining cases were transferred to the United States Court of Claims.

<sup>61</sup> *Snake or Piute Indians v. United States*, 112 F.Supp. 543 (1953).

<sup>62</sup> *Snake or Piute Indians v. United States*, 1 Ind. Cl. Comm. 422, 433 (1950).

<sup>63</sup> *Id.* at 435.

<sup>64</sup> *Snake or Piute Indians*, 112 F.Supp. at 543.

former Malheur Reservation established for the “Snake or Piute Indians” . . . . In earlier aboriginal times, these Snake or Piute Indians in southeastern Oregon comprised small groups or clusters of families who gathered roots, fished and hunted in areas with which each was most familiar. At times they ranged over wide areas wherever food was available. Since their [sic] was principally a food-gathering economy, those Indians ranging within an area where a particularly important or unusual food was found were designated by other Indians as “Eaters” of such food. The Snake or Piute Indians inhabiting the Harney and Malheur Lake area and on the Malheur River and its tributaries in aboriginal times have been classified as the “Wadatoka” (seed eating) or “Wadatika” band of Northern Piutes by anthropologists who have made special studies of the Northern Piutes in Oregon.<sup>65</sup>

According to the Amended Findings, the unratified 1868 Treaty was negotiated only after “an aggressive military campaign was conducted against (the Indians) by the U.S. Army under General Crook, and as a result over half the Indians were killed and the remainder reduced to a state of starvation . . . .<sup>66</sup> [T]he Snakes . . . agreed to remove to and reside upon such reservation as may be allotted to them by the U.S. Government.”<sup>67</sup> The unratified 1868 Treaty states in Article 5, “[f]uture provisions will be made by the government of the United States for the permanent location of the Snake Indians for their education, government, food, and clothing and for allotment of lands in severalty to them when their advancement warrants it.” In 1869, government officials sought to move the bands to the Klamath Reservation to the west, but “those chiefs who had signed the 1868 unratified treaty would not agree to move, stating they had been promised by Superintendent Huntington at the time the treaty was

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<sup>65</sup> Amended Finding of Facts at 4-571 to 4-574 (1956), *Snake or Piute Indians v. United States*, 1 Ind. Cl. Comm. 422, 433 (1950) [hereinafter *Finding of Facts*].

<sup>66</sup> This matter-of-fact statement could be supplemented with findings related to the psychological, cultural, economic, family, and personal devastation that certainly accompanied the federal government’s choice to address its issues with these titled landowners through violence and warfare. While we recognize federal warfare against Indians was a common solution to the problem of the competing desire for the Indian’s land in the nineteenth century, and the blithe acceptance of this federal approach as a statement of fact was still acceptable in the 1950s, even a legal discussion of these issues today requires an acknowledgement of the moral and legal failure to afford these landowners with even the rights and privileges granted by the Northwest Ordinance of July 13, 1787. No federal law provides for damages related to these breaches of law. However, acknowledgement of the breaches of law and human decency is called for with current mores of human rights, civil rights, and historical reflection. With these facts in the record, the “treaty” was clearly not a negotiation but was a federal military enforced taking of land.

<sup>67</sup> *Finding of Facts*, *supra* note 65, at 4-584 to 4-586.

negotiated and signed that a reservation would be established for them ‘in their own country’ where they desired to remain . . . .”<sup>68</sup> A later finding states that the government selected a tract of land on the headwaters of the Malheur River for which petitioners’ ancestors claimed to hold original Indian title, and that the former Malheur Reservation in Oregon was established by Executive Order of the President on March 14, 1871. The area of land described above was withdrawn from the public domain.<sup>69</sup>

The Amended Findings then describe the decision process through various correspondence and other documents by which President Grant created the Malheur Reservation by Executive Order.<sup>70</sup> This correspondence contains language related to the agricultural nature of the area and the water rights included. For example, an April 15, 1872 letter from Col. Elmer Otis described the bands in the area, their numbers (about 1,400 people in total), and a recommendation that all but one band be established on a reservation at the headwaters of the Malheur river. The letter also stated that the reservation:

[B]e tolerably large, as much of the country is a barren waste and must necessarily be large to obtain sufficient land for tillable purposes. The waters of the Malheur contain at times of the year plenty of fish and there is much land capable of tillage in that vicinity. In the country about Stein’s Mountain and Harney and Warner Lakes are spots capable of tillage. Besides this is a country which these Indians inhabited, that they know, and where the majority desire to stay. . . .

The Amended Findings go on to describe that at the time the Malheur Reservation was established, the majority of the members of the bands who had been parties to the 1868 Treaty were living on or near the reservation. A census of the ‘Piute or Snake’ Indians at the Malheur Reservation taken on June 30, 1877 lists 762 people under Chiefs Egan, Oits, Tanwahta, and Winnemucca. They lived there until their removal by the U.S. government in 1879. Indian Agent Sam Parrish reported that the people were peaceable, quiet, and willing to work and that they made rapid progress learning practical farming. Parrish also noted that the people could raise abundant crops if the government would furnish them the necessary tools and equipment. However, funds were insufficient for buildings and housing.<sup>71</sup>

By 1878, life on the reservation was very difficult due to a lack of food, shelter, and supplies. Indian Agent Rinehart estimated it would

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<sup>68</sup> *Id.* at 4-589.

<sup>69</sup> *Id.* at 4-590 to 4-591.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 4-597.

require \$80,000 per annum to operate the Malheur Reservation, while the appropriation was only \$15,000. As a result, Rinehart was required to “turn most of the Indians away to support themselves in the mountains as soon as subsistence could be found there...requiring them to exchange their prized ponies for cattle, sheep, and hogs.”<sup>72</sup>

Further, stockmen were encroaching on the reservation, bringing 1,400 horses and 10,839 cattle. The government permitted them to lease “the coveted portion of the reserve for a term of five years, at a rental of \$1,500 a year.”<sup>73</sup>

The Amended Findings state that after being denied rations, all Malheur Indians quit work and left the agency by June 5, 1878, joining “Bannocks in hostilities and depredations against the white settlers and the military.”<sup>74</sup> After the Malheur Piutes surrendered, they were held under military guard. In January 1879, the military removed the Malheur Piutes to the Yakima Reservation in Washington.<sup>75</sup> Stockmen and settlers immediately went on the reservation with their herds and trespassed on the most valuable portion of the lands, disregarding all official order of removal.<sup>76</sup> In 1882, 1883, and 1889, the President issued Executive Orders restoring the Malheur Reservation to the public domain.<sup>77</sup> None of the subsequent land sales benefited the Indians who formerly inhabited the area, and they have never been compensated for the lands.<sup>78</sup>

Some of the Piute Indians eventually returned from Yakama and settled near Burns, Oregon. However, they received no assistance from the government until about 1898 when 104 allotments of 160 acres each were made to them within the former Malheur Reservation area. These allotments were made after white settlers had acquired all the productive land in the area. The newly allotted land would not sustain the Indians.<sup>79</sup>

The Commission found that petitioners’ ancestors, who were parties to the unratified treaty of December 10, 1868, had exclusively occupied and used in Indian fashion the area of land included within the boundaries of the Malheur Reservation in Oregon from time immemorial to January 1879. The Indians had never ceded nor relinquished their original Indian title. The petitioner bands were deprived of their original Indian use and occupancy title to the lands when the United States forcibly removed them

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<sup>72</sup> *Id.* at 4-598.

<sup>73</sup> *Id.* at 4-599.

<sup>74</sup> *Id.* at 4-600.

<sup>75</sup> *Id.* at 4-600 to 4-601.

<sup>76</sup> *Id.* 4-601.

<sup>77</sup> EXECUTIVE ORDER, *supra* note 57.

<sup>78</sup> Finding of Facts, *supra* note 65, at 4-605.

<sup>79</sup> *Id.* at 4-606.

to the Yakima Reservation and restored such lands to the public domain without their consent and without payment of compensation.<sup>80</sup>

The Commission issued its opinion on December 28, 1956.<sup>81</sup> The order details many of the amended findings and determined that the petitioners' ancestors held long-standing title to the lands in question prior to 1879. The Commission reasoned,

the Indians who had been removed to Yakima were never granted permission to return to their original home on the Malheur Reservation even though most of them requested permission. Many of the Piutes left Yakima anyway. Over the years a substantial number eventually returned to settle near Burns, Oregon, located on the border of the former Malheur reservation where they continue to live to the present time.<sup>82</sup>

Finally, the Commission concluded,

After a careful study of the entire record now in this case...it is now our conclusion that the preponderance of the evidence establishes that petitioners are descendants of the bands or Tribe of Snake or Piute Indians who were parties to the unratified treaty of December 10, 1868...and that at the time the unratified treaty was made said tribe or bands held original Indian title to and were exclusively occupying, using, and claiming as their homeland the area of land where the Malheur Reservation was established...and that they continued to so occupy and use said land until their removal to Yakima, Washington in January 1879. It is also reasonably certain from the evidence that they were the same Northern Piutes who were living in that area at least as early as 1826. The continuous and permanent exclusion of petitioners' ancestors from their lands necessarily relates back to the date of their removal therefrom...So it is our conclusion that the original Indian title was held and owned by petitioners' ancestors to the lands ... and was terminated and taken by defendant in January 1879 ... [T]he petitioners...are entitled to recover the value of the land ....<sup>83</sup>

Today, the descendants of those allottees who continue to own land rights have begun to work together to assess the potential of their lands and to utilize their allotments and related water rights. These allotments are scattered and subject to numerous and complex ownerships. However,

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<sup>80</sup> *Id.* at 4-606 to 4-607.

<sup>81</sup> Opinion of the Commission at 4-608 (1956), *Snake or Piute Indians v. United States*, 1 Ind. Cl. Comm. 422, 433 (1950).

<sup>82</sup> *Id.* at 4-623.

<sup>83</sup> *Id.* at 4-624 to 4-625.



through organizing into cooperatives and other ventures, the allottees can approach the difficult task of managing these rights for their own benefit in order to produce jobs, economic development, and homes.

Even in this geographical area of expansive lands with low populations, disputes over land uses continue, including the 2016 occupation of the Malheur National Wildlife Refuge by militants insisting that federal public lands should be turned over to states. It is a relatively dry area where water rights often make a difference in the economic use of agricultural lands. The local Burns Paiute Tribe and many individual allottees have become active in regional discussions over water use and long-term water planning.

## CONCLUSION

The right to use water is critical to the ability to use land, especially in the arid western United States. There are no specific federal water rules to address the complexity encountered by allottees' management of their water rights, or to simplify the process of assuring that allottees' trust lands have an adequate quality and quantity of water to allow for use of the lands as the allottees see fit.

Further, the protection and documentation of tribal water is complex, and as shown by this Article, solidifying the water rights of allottees is even more complex and has additional legal precedent.

However, while public domain allottees have additional challenges in proving the tribal history leading to the rights, once the history is documented, experience has shown that the evidence can be shared with BIA and other land and water management agencies to allow the Indian reserved right to use water to be addressed and included in federal leases as part of the numerous federal land leasing regulations.<sup>84</sup>

Since no tribe has jurisdiction on public domain allotments, individual allottees have worked directly with the Bureau of Indian Affairs to manage their own lands using their water, or to lease their own land

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<sup>84</sup> Owners of allotments can use their own water and lands without leases or other BIA approvals, just as any landowners can use their water and lands. Some obligations for agricultural management practices are found in the American Indian Agricultural Resource Management Act, 25 U.S.C. § 3701, et. seq (1993). Owners of allotments can also obtain Bureau of Indian Affairs approval to manage third party agricultural surface leases of land and related water under processes created under the American Indian Probate Reform Act, 25 U.S.C. § 2220 (2004). BIA can also lease allotted lands and related water under regulations for Agricultural leases at 25 CFR §162 (Subpart B), residential leases under 25 CFR §162 (Subpart C) and business lease under 25 CFR §162 (Subpart D).

rights, and to include related water rights and obligations in the leases. Because these lands are held in trust for the allottees, the federal government's trust responsibility includes the protection of allottee rights.

Further, there are no clear and efficient rules related to how groups of allottees, who may have shared interests in an allotment, may manage their jointly owned lands. However, allottees have formed cooperatives to provide for a decision-making process and to simplify how payments are received from the development or leasing of allottees' trust resources.