United States Department of the Interior

OFFICE OF THE SOLICITOR
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M-36982
Memorandum

To: Secretary

From: Solicitor

Subject: Entitlements to Water Under the Southern Arizona Water Rights Settlement Act (SAWRSA)

This memorandum is in response to questions that have arisen regarding the interpretation of the Southern Arizona Water Rights Settlement Act (SAWRSA), Pub. L. No. 96-293, Title III, 96 Stat. 1274 (1982). In order to proceed with the implementation of SAWRSA, the Department requires legal guidance on the nature of the rights in, and authority over, settlement water enjoyed by certain allottees of San Xavier District[1] (allottees) and the Tohono O'odham Nation (Nation).[2]

In considering this matter, I examined the legislative history of SAWRSA, available information on the history of the Tohono O'odham Nation, and relevant case law pertaining to allottee water rights. In addition, I solicited and reviewed comments from both the allottees and the Nation on these issues of significant importance to them. I also received and considered several other helpful comments on an earlier letter to members of Congress addressing these issues. Letter from Solicitor to Senators McCain and DeConcini, Senator-elect Kyl, and Congressmen Kolbe and Pastor, all of Arizona (Dec. 22, 1994).

I conclude that, with the limited exception of the right to convey settlement water, neither the text of SAWRSA nor its legislative history resolves the fundamental issue of relative entitlements of the Nation and the allotees to settlement water.

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[1] The "San Xavier District," a political subdivision of the Tohono O'odham Nation, is coterminous with the "San Xavier Reservation" and the terms are used interchangeably. Of all the lands within the Tohono O'odham Nation, only the San Xavier Reservation was significantly allotted.

[2] The basic question presented here involves the relationship between the Tohono O'odham Nation and the allottees. Nothing in this Opinion addresses or is intended to provide guidance on the respective water rights or jurisdictional authority of Indian tribes vis-a-vis states or non-Indians.

Accordingly, the legal interests of the Nation and the allottees under SAWRSA must be what each has under legal principles generally applicable to federal Indian reserved water rights. The basic attributes of tribal and allottee interests in such water rights are as follows:

1. An Indian allottee has a right to a "just and equal distribution" of water for irrigation purposes.

2. Indian tribes possess broad regulatory power over reservation water resources, including those to which allottees have rights.

3. The quantity of water to which an allottee may be entitled is not subject to precise formulae.

I. BACKGROUND

A. SAWRSA

The Southern Arizona Water Rights Settlement was enacted to resolve Indian water rights claims arising within the San Xavier and Shuk Toak Districts of the Tohono O'odham Nation (formerly the Papago Tribe). The rights granted under SAWRSA were intended "to fully satisfy any and all claims of water rights or injuries to water rights (including water rights in both ground water and surface water)" within these two Districts.[3]

Briefly, SAWRSA provides that in exchange for waiver and release of existing and future Indian water rights claims: (1) the United States will deliver Central Arizona Project (CAP) or other replacement water to the San Xavier and Shuk Toak Districts; (2) the United States will bear the cost of rehabilitating or constructing irrigation systems to put the water to use; and (3) a limited measure of groundwater within the Districts may be withdrawn for use each year.

B. The Positions of the Nation and the Allottees

Since SAWRSA is, for the most part, silent on the manner in which these benefits are to be allocated, certain allottees of the San Xavier District and the Tohono O'odham Nation have advanced substantially different interpretations of their respective settlement entitlements. This disagreement has been a principal cause of an unfortunate delay in the implementation of SAWRSA. The result has been that many of the benefits of the settlement have not been realized within the time frames originally contemplated by Congress.

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[3] SAWRSA, section 307(e). The legislation did not settle all water rights claims within the Tohono O'odham Nation. Claims in the Sif Oidak, Gu Achi, and Hickwan Districts remain at issue in the ongoing Gila River general stream adjudication.

The key issue requiring resolution is the nature of the rights in, and authority over, settlement water enjoyed by the allottees and the Nation. While the allottees and the Nation agree that their respective interests in groundwater were unaffected by SAWRSA, they disagree on other matters. The respective positions of the allottees and the Nation may be summarized as follows:

> The allottees contend that because the CAP or other replacement water provided by the settlement is a substitute for federal Indian reserved water rights appurtenant to allotted land, their property interests in that water must be equivalent to the rights they held in reserved water. They believe they are entitled to a ratable share of all settlement water (both confirmed groundwater rights and replacement water) based upon their ownership of practicably irrigable acreage within the San Xavier District. In their view, they have the right to use, lease, and otherwise exercise control over this water.
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> The Nation contends that the right to use all surface water and groundwater within the boundaries of the Nation, including the replacement water provided by SAWRSA, is held by the Nation for the benefit of its members. The Nation further contends that section 306 of SAWRSA[4] expressly gives the Nation the right to lease and otherwise control all settlement water regardless of whether it is pumped from the ground or delivered by the United States as replacement water.

C. Reservation History

By Executive Order dated July 1, 1874, President Grant set aside approximately 71,000 acres in Arizona for the Papago Indian Reserve (commonly referred to as the San Xavier Reservation or the San Xavier District) "for the use of the Papago and such other Indians as it may be desirable to place thereon." 1 Charles J. Kappler, Laws and Treaties 805-06 (2nd ed. 1904). While the San Xavier Reservation itself has never been expanded, additional non-contiguous lands totaling approximately 2,774,370 acres were set aside for Papago Indians by several executive orders and acts of Congress between 1916 and 1939. These lands are commonly referred to as the "Papago Reservation" or the "Sells Papago Reservation." Both

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[4] 96 Stat. at 1279-80. The most pertinent passage is found in section 306(c)(l), which reads, in part:

> The Papago Tribe shall have the right to devote all water supplies under this title, whether delivered by the Secretary or pumped by the tribe, to any use ... whether within or outside the Papago Reservation so long as such use is within the Tucson Active Management Area and that part of the Upper Santa Cruz Basin not within such area.

the San Xavier and Sells Papago Reservations are included within the territory of the Tohono O'odham Nation, a federally recognized Indian tribe operating under a constitution adopted on January 18, 1986, and approved by the Secretary on March 6, 1986, pursuant to 25 U.S.C. § 476. The Tohono O'odham Nation currently has approximately 18,538 members.

In 1890, when the San Xavier Reservation had approximately 363 residents, allotment commenced pursuant to the General Allotment Act, ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 331-334, 339, 341, 342, 348, 349 & 381 (1982)). Between 1890 and 1917, the United States issued 292 trust allotments on the Reservation.[5] Approximately 85 consisted of "arable" lands; the remainder were timber or mesa lands. The mesa lands were viewed as suitable only for grazing purposes. Annual Report of the Commissioner of Indian Affairs. 1893, 117-19. Approximately 41,566 acres were allotted, of which "arable" allotted lands comprised approximately 2289 acres. The "arable" allotments were grouped together around the Santa Cruz River in the northeast comer of the Reservation.

Even prior to non-Indian contact, the Tohono O'odham were an agricultural people. Historic records of farming in the San Xavier area date to at least the early 1700s. When allotment commenced in 1890, 400 acres were irrigated on the Reservation. By the turn of the century, irrigation had expanded to 1000 acres. Originally, the allotments were irrigated with water from the Santa Cruz River, but non-Indian development adjacent to the Reservation soon began to deplete the flow of the river. By the early 1900s, the allottees began to withdraw and use groundwater. For a time, combined use of groundwater and surface water allowed farming to continue. According to Bureau of Indian Affairs records, irrigated lands on the Reservation reached a maximum of 1781 acres in 1926. (If fallowing practices are taken into consideration, the maximum acreage may have been as high as 2100 acres.) In the 1940s Reservation farming went into a decline when, again due to non-Indian off-reservation development, groundwater supplies beneath the Reservation were depleted. The combined depletion of both surface water and groundwater supplies made Indian farming virtually impossible by the late 1970s.

In 1975, the United States filed suit in federal district court on behalf of the Tribe and the heirs of the original allottees of the San Xavier Reservation. The case, United States v. City of Tucson, Civ. 75-39 TUC-JAW (D. Ark), named the City of Tucson and over a thousand other non-Indian water users as defendants and sought to establish and protect the water rights of the Tribe and allottees.

Congress' enactment of SAWRSA seven years later was intended to resolve the claims made by the United States on behalf of Indians in City of Tucson so that the case could be dismissed. The case is still pending because the San Xavier allottees have opposed dismissal on account of their continuing concern about the adequacy of the benefits provided them

[5] At present approximately 1275 Indians, most of whom are members of the Nation, hold interests in allotments on the Reservation.

under SAWRSA.

II. ANALYSIS OF THE PROVISIONS OF SAWRSA

SAWRSA's legislative history shows that the purpose of the settlement was to "provide a fair and reasonable settlement of the water rights claims of the San Xavier Papago Indian Reservation and the Schuk Toak District of Sells Papago Reservation with a minimum of social and economic disruption to the Indian and non-Indian communities in Tucson and eastern Pima County, Arizona." H.R. Rep. 855, 97th Cong., 2d Sess. 37 (1982).

Unfortunately, in fashioning SAWRSA little attention was paid to questions that have now become critical to its implementation--the nature of the rights in, and authority over, settlement water enjoyed by the allottees and the Nation. The answers are, of course, integral to determining how settlement benefits are to be allocated between the Nation and the allottees.

Several provisions of SAWRSA address the rights of the "Papago '[sic] Tribe;" e.g., §§ 303(c); 306(a),(c); 309. Numerous statements in the legislative history refer to the "Tribe's claims" and the "Tribe's water rights;" e.g., H.R. Rep. 855, 97th Cong., 2d Sess. 37, 39-41, 43,47 (1982). With the exception of section 306(c), which speaks of the Nation's right to convey settlement water rights,[6] however, none of these provisions or statements directly addresses the question of relative entitlements of the Nation and the allottees to settlement water.

Indeed, the weight that might be given to SAWRSA's references to "tribal" rights is counterbalanced by the qualification in section 307(e) that the benefits of the settlement are to flow not only to the Tribe, but also to "all individual members of the Papago Tribe that have a legal interest in lands of the San Xavier Reservation...."[7] Although section 307(e) does not utilize the term "allottees," allottees are the only individuals having "legal interest[s] in lands of the San Xavier Reservation."[8] I must conclude, therefore, that neither the text of

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[6] See footnote 4, supra, and accompanying text. Section 306(c)(l) is discussed in more detail further below.

[7] Section 307(e) also says that the settlement "shall be deemed to fully satisfy" all water right related claims of such tribal members, and that "[a]ny entitlement to water of any individual member of the Papago Tribe shall be satisfied out of the water resources provided in this title."

[8] A literal reading of section 307(e) would limit settlement benefits to only those allottees who are members of the Tohono O'odham Nation. In fact, a small number of Indians holding trust interests in allotted lands on the Reservation are not members of the Nation. (Congress ought to consider deleting the requirement of Tohono O'odham

SAWRSA nor its legislative history resolves the fundamental issue.

The replacement water and other benefits provided by SAWRSA were intended to be a substitute for federal Indian reserved water rights. Accordingly, in the absence of Congress expressly settling the question in SAWRSA, the legal interests of the Nation and the allottees under SAWRSA must be generally what each enjoyed under legal principles generally applicable to federal Indian reserved water rights.[9] Put another way, I interpret SAWRSA to leave intact the basic nature of the interests in water held by the Nation and the allottees prior to enactment of SAWRSA.

III. GENERAL PRINCIPLES OF INDIAN LAW

The basic attributes of tribal and allot-tee interests in water are as follows:

> A. An Indian allottee has a right to a "just and equal distribution" of water for irrigation purposes.

The allottees and the Nation claim competing rights to use and control settlement water received in satisfaction of federal Indian reserved water rights. The General Allotment Act secured water to allottees where necessary for farming. Section 7, 25 U.S.C. § 381,[10] the

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membership as a condition to receiving settlement benefits, for there does not seem to be any reason to deny the benefits of settlement water to other Indians holding trust interests in lands on the Reservation.) There is minimal non-Indian ownership of formerly allotted lands on the Reservation. It is my understanding that two parcels of allotted land passed into fee status when they were sold to non-Indians in 1909. In addition, some undivided fractional interests in allotments have passed into non-Indian ownership by virtue of inheritance. It is not necessary to address here the nature of the rights held by non-Indians in formerly allotted lands, see Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir. 1981), because SAWRSA does not purport to settle or otherwise affect such rights. In this respect, SAWRSA is consistent with the general approach followed by the United States in water rights litigation and settlement. Because the United States has no trust responsibility for, and holds no legal title to, non-Indian water rights, we do not assert claims for such rights and have 'no authority to compromise them in settlement.

[9] The general rule is that the United States may, as trustee, substitute one form of trust asset for another as long as the value of the assets is approximate. See. e.g., Three Tribes of the Fort Berthold Reservation v. United States, 390 F.2d 686 (D.C. Cir. 1968).

[10] This section provides:

> In cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for

only part of the Act expressly to address water, directs the Secretary to ensure a "just and equal distribution" of water among the resident Indians for irrigation purposes. In the context of the General Allotment Act, this clearly means or at least includes allottees. In United States v. Powers, 305 U.S. 527, 532 (1939), the Supreme Court interpreted section 7 to entitle allottees to water: "[ti]hen allotments of land were duly made for exclusive use and thereafter conveyed in fee, the right to use some portion of tribal waters essential for cultivation passed to the owners." Therefore, the allottees' claim to a share of reserved water rights and, accordingly, settlement water rights, is accurate, at least as far as agricultural irrigation is concerned.

A basic standard for quantifying federal Indian reserved water rights is the amount of water necessary to irrigate the "practicably irrigable acreage" on the reservation. See Arizona v. California, 373 U.S. 546 (1963). Particularly where, as here, Indian water rights claims are settled by negotiation and congressional legislation rather than by final court decree, the amount of water available to Indians under the settlement may not reflect the amount of practicably irrigable acreage on the reservation. Accordingly, an allottee's share may not be sufficient to irrigate all practicably irrigable allotted acres.

It is also beyond dispute that allottees have the right to lease the water to which they are entitled, at least for use on the allotted land as part of an otherwise authorized lease of that land. See Skeem v. United States, 273 F. 93 (9th Cir. 1921).[11] Tribal consent is not necessary for such leases.

On the other hand, as discussed in the next section, a tribe may, among other things, regulate and perhaps proscribe uses of natural resources, including water, over which it has regulatory jurisdiction. See generally Brendale v. Confederated Tribes and Bands of the Yakima Nation, 492 U.S. 408 (1989). This includes water uses by allottees or their lessees.

> agricultural purposes, the Secretary of the Interior is authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservation; and no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor.

[11] Skeem addressed 25 U.S.C. § 403, which authorizes short term leases of allotted land. Since Skeem was decided in 1921, Congress has enacted a more comprehensive statute authorizing longer term leases, 25 U.S.C. § 415, which applies to most reservations. Leasing on the San Xavier Reservation is covered by 25 U.S.C. § 416, which is virtually identical to section 415 except for some special provisions owing to the proximity of the land to a major urban center. These are not relevant to the issue being addressed here, and the holding of Skeem applies to section 416 as well as 415.

Tribal sovereign power over water may be particularly important, and given particular deference, in the desert environment of the Tohono O'odham Nation.

It might be argued that 25 U.S.C. § 415 or § 416 authorizes allottees to lease water apart from allotted land, perhaps even off-reservation. This is by no means clear, however, and I have not yet had to resolve this issue because no lease raising it has been presented to the Department for approval. In acting on such a proposed lease I believe it appropriate to consider not only these statutes, but other federal law and any relevant tribal law. [12] A tribal prohibition of off-reservation water marketing by individuals, for example, would be entitled to great weight.

In the context of SAWRSA, however, I believe Congress has foreclosed the possibility of allottees marketing their right to use water off-reservation, for I read section 306(c)(l) as providing the Nation with exclusive marketing authority over "all water supplies under this title, whether delivered by the Secretary or pumped by the tribe ...." 96 Stat. at 1280. See footnote 4, supra. While this subsection speaks of the Nation's right to control the use of water on or off-reservation, I believe its right to control on-reservation water use by agricultural allottees is constrained in ways discussed in the next section.

B. Indian tribes possess broad regulatory power over reservation water resources, including those to which allottees have rights.

The Nation maintains sovereign control over Reservation resources, including water, within the limits of federal law. The Nation's sovereign power to regulate the water use of those within its jurisdiction may be described as a form of "ownership" in much the same way that the individual states claim ownership of natural resources. That is, as the Supreme Court has noted, "ownership" of water can be described as a "fiction expressive in legal shorthand of the importance to its people that a State have the power to preserve and regulate the exploitation of an important resource." Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941, 951 (1982).[13]

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[12] The recently enacted American Indian Agricultural Resource Management Act (AIARMA), 25 U.S.C. §§ 3701-3715, 3741-3745 (1993), recognizes extensive tribal rights to control reservation agricultural resources, expressly including water resources. Section 102(a) of the AIARMA requires that the Secretary conduct all land management activities in accordance with tribal agricultural resource management plans and tribal law unless such compliance would be contrary to the Secretary's trust responsibility or is prohibited by federal law. 25 U.S.C. § 3712(a).

[13] The analogy between the rights of a tribe and those of a state is admittedly not perfect. For instance, Congress has imposed specific limits on a tribe's authority to deal with allottees' water rights, see, e.g., 25 U.S.C. § 381, discussed further below, but it has not so constrained the ability of a state to affect individual water users within its jurisdiction.

A tribe's sovereign power to regulate reservation resources continues to exist unless divested by Congress. United States v. Wheeler, 435 U.S. 313, 322-23 (1978); see Felix S. Cohen's Handbook of Federal Indian Law 230-32 (1982 ed.). While many in and out of Congress at the time of enactment of the General Allotment Act expected that tribes would eventually wither and disappear, nothing in the Act affirmatively divests Indian tribes of regulatory control over reservation water. Indeed, the cases interpreting section 7 of the Act recognize that both the tribes and the Secretary have regulatory control over allottee water use. See Colville Confederated Tribes v. Walton (Walton II), 647 F.2d 42, 52 (9th Cir. 1981); Colville Confederated Tribes v. Walton Walton I), 460 F. Supp. 1320, 1332 (E.D. Wash. 1978). The tribes' regulatory power is similar to that possessed by states over appropriations of state "owned" water resources.

A tribe's sovereign power includes some authority to allocate water to allotments and to determine the parameters of its use (such as type, amount, required conservation measures, etc.)[14] But a tribe's regulatory authority is circumscribed by the command of section 7 of the General Allotment Act, that an allottee not be denied a "Just and equal distribution" of irrigation water. 25 U.S.C. § 381, quoted in footnote 10, supra. While section 7 does not directly address tribal authority, it plainly makes the Secretary responsible for protecting the allottees' interest in agricultural water use. Therefore, the Secretary may, by promulgating federal regulations, preempt tribal regulation that would thwart allottee interests protected by this statute. In this respect, I agree with the view of the Claims Court in Grey v. United States, 21 Cl. Ct. 285, 299-300 (1990), aff'd, 935 F.2d 281 (Fed. Cir. 1991), cert. denied, 112 S. Ct. 934 (1992), to the extent it suggests that section 381 gives allottees a right to some available water.

The question has been raised whether an allottee's right to use water is derivative of the

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In other respects, however, a tribe's sovereign authority over water on the reservation may be greater than that enjoyed by a state over water within its jurisdiction. Tribes may not, for example, be as constrained by the commerce clause as a state. Compare the Court's view of the dormant interstate United States Constitution's commerce clause limitation on states applied in Sporhase, supra, with its view of the Indian commerce clause in Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1980).

[14] Of course, if allotted land is transferred to non-Indian ownership, determining the extent of tribal regulatory powers becomes more complicated. Compare Walton II, 647 F.2d. 42 (tribe has jurisdiction to regulate non-Indian water use in hydrologic system situated entirely within the boundaries of the reservation) with United States v. Anderson, 736 F.2d 1358 (9th Cir. 1984) (state has jurisdiction to regulate on-reservation non-Indian use of water in excess of tribal needs in hydrologic system originating and substantially flowing off-reservation). This complex issue is beyond the scope of our current discussion.

tribe's federal reserved water right, not only historically,[15] but also currently. If it is, then a congressional repeal of 25 U.S.C. § 381 might give rise to a tribal claim that it could freely divest allottees of any right to use available water (even apart from the Indian Civil Rights Act, discussed in the next paragraph). There is room to doubt this result. Section 381's command of a "just and equal distribution" of water was part of the General Allotment Act that gave rise to individual property interests in reservation land, and thus it might be viewed as vesting a right to a "just and equal distribution" of agricultural water in the allottee. So long as section 381 exists, however, there is no need to resolve this question.

Congress has also constrained tribal authority to regulate reservation resources, including water rights, by the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1301-1303. Section 1302(5) prohibits an Indian tribe exercising powers of self-government from "tak[ing] any private property for a public use without just compensation." I believe that, at least so long as section 381 is in force, an agricultural allottee's interest in irrigation water may properly be considered "private property" for purposes of this section. This is not necessarily to say that such interests would constitute private property under the Fifth Amendment. See United States v. Jim, 409 U.S. 80 (1972). Whether allocations for uses other than irrigation may be characterized as private property under the ICRA is not so clear. See the discussion in the next section.

Questions concerning the extent to which a tribal government may regulate private property without crossing the line to a regulatory taking are not easily answered. It would seem that a tribal decision to deny an allottee the use of available water for agricultural use on lands allotted for farming purposes would be impermissible. Other situations may not be so clear, as analogous examples of state regulation of private property show. See. e.g., Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992). In one situation, however, Congress has acted to give (or confirm) sweeping authority in the Tohono O'odham Nation, i.e., controlling the export of water from the reservation. See the earlier discussion of section 306(c)(l) of SAWRSA.

C. The quantity of water to which an allottee may be entitled is not subject to precise formulae.

In Walton II, the Ninth Circuit expanded upon the Supreme Court's holding in Powers that allottees are entitled to share in reservation water resources by discussing several aspects of allottee water rights, including the amount of water to which an allottee is entitled. The measure of the right was determined to be based upon and limited by the number of

[16] Federal Indian reserved water rights arise no later than the date of establishment of a reservation. Winters v. United States, 207 U.S. 564 (1908). A right to use water associated with an allotment created after the establishment and out of a reservation--the kind of allotment being addressed in this Opinion, as opposed to allotments created out of the public domain--is therefore appropriately described as "derivative" of the reservation water right.

practicably irrigable acres held by an allottee. 647 F.2d at 51. But Walton II also recognized that ownership of irrigable acreage does not guarantee the delivery of that full measure of water: "In the event there is insufficient water to satisfy all valid claims to reserved water, the amount available to each claimant should be reduced proportionately." Id.

Section 381's command of a "just and equal distribution" of agricultural water is necessarily dependent on the supply of water available upon any particular reservation. If sufficient water sources are available to satisfy all the purposes for which a reservation was established, each allottee should receive water sufficient to irrigate all practicably irrigable land allotted for agricultural purposes.

It is important to note, however, that only water necessary for irrigation is subject to "just and equal distribution" under section 381. See Joint Board of Control of the Flathead, Mission and Jocko Irrigation District v. United States, 832 F.2d 1l27, 1131 (9th Cir. 1987) (criticizing lower court finding that all reservation waters are subject to equal distribution). Water reserved for fisheries or other purposes may not bear the burden of "equal" reduction. Although the Ninth Circuit first held in Walton II that all reservation uses (irrigation, fisheries, domestic, etc.) should in times of shortage be proportionately reduced, Walton II, 647 F.2d at 51; see also Colville Confederated Tribes v. Walton (Walton III), 752 F.2d 397, 405 (9th Cir. 1985), cert. denied, 475 US. 1010 (1986), subsequent Ninth Circuit decisions have retreated from that approach. See Joint Board of Control of the Flathead, Mission and Jocko Irrigation District v. United States, 832 F.2d 1127, 1131 (9th Cir. 1987); United States v. Adair, 723 F.2d 1395, 1416 n.25, (9th Cir. 1983), cert. denied sub nom. Oregon v. United States, 460 U.S. 1015 (1983). In these latter cases, pro rata reductions were avoided by the court's determination that the time immemorial priority date recognized for fisheries water was superior to the reservation establishment priority date recognized for agricultural water use.

Given the provisions of the General Allotment Act, the circumstances surrounding allotments on the San Xavier Reservation, and the history of water use on the Reservation, those allotments originally identified as arable and intended for farming have a stronger legal interest in settlement water than other allottees. Allotments created primarily for grazing, timber or otber purposes may not receive the same measure of water vis-a-vis other reservation uses as those created for agricultural purposes.

I do not mean to suggest, however, that the principles applicable to the distribution of water secured by federal reserved Indian water rights among tribes and allottees in any way affects the standard for quantification of such rights in the first instance. When a reservation is established, water rights in an amount sufficient to accomplish the purposes of the reservation are impliedly reserved. Winters v. United States, 207 U.S. 564 (1908). Whether measured by the practicably irrigable acreage standard or otherwise, the aggregate reservation water right is neither reduced nor enlarged by subsequent federal actions distributing it among reservation Indians for particular purposes.

In sum, the history of allotments, the history of allottee water use, and the nature and type of other reservation interests in water all should inform the allocation and priority of allottee entitlements when there are insufficient supplies to meet all demands. This is, however, a complex matter and definitive determinations must be left for the future.

IV. CONCLUSION

The relative rights and authority held by allottees and tribes with respect to federal Indian reserved water is a complex area of law. Many questions must necessarily be addressed in the context of the facts unique to a particular reservation. The above discussion shows, however, that it is inaccurate to speak of either tribal governments or agricultural allottees as having plenary rights in water vis-a-vis each other. Agricultural allottees have rights tribes cannot wholly defeat; at the same time, tribes have regulatory authority over reservation water use from which allottees are not immune.

This Opinion was prepared with the substantial assistance of Pamela S. Williams and Daniel L. Jackson in the Office of the Solicitor, and was reviewed by more than a dozen attorneys in the Office with responsibility for Indian water rights issues.