

Water Rights of Public Domain Allotments

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ABSTRACT. Indigenous peoples in the United States have stewarded its land and water for millennia, but now face barriers to accessing sufficient amounts of clean, safe water. Public domain allotments (PDAs) are one solution the United States offers to provide land to Indian people, but PDAs and the rights attaching to them are insufficiently studied or understood by governments and laypersons alike. This Essay shows how PDAs are entitled to a federally reserved water right, with particular attention to the history of Indian land tenure in California.

PDAs are land reserved out of the public domain for use by an Indian person or family, but unlike larger reservations, they are not connected to any Native Tribes or governments and are not subject to Tribal jurisdiction. Nevertheless, PDAs are Indian country.

The United States Supreme Court has found that when Congress created Indian reservations, it impliedly reserved water sufficient to fulfill the purpose of those reservations – a purpose that is individually determined by the language of the treaties or executive orders. This water right, commonly known as a *Winters* right, is not subject to the restrictions of state water systems such as a beneficial-use requirement.

This Essay examines several different statutes to show that, while Congress specifically declined to reserve water rights for allotments granted to non-Indians, Indian allotments – including PDAs – are entitled to a *Winters* right in the same manner as larger reservations.

This conclusion arises from the language of the statutes but is reinforced by applying the Indian Canons of Construction, which dictate that laws applying to Indian Tribes and people should be interpreted to their benefit or as they would be understood by the Indians. By tracing the history of Native land laws in California from the time of Spanish colonization to the mid-twentieth century, this Essay shows that Indian land reservations in California have always included a right to water. The Essay specifically explains the necessity and benefit to Native peoples of including a reserved water right, and why it is the case that Indians would understand land reservation statutes, orders, and other legal instruments to include water rights as well.

Finally, given the practical necessity of integrating federally protected water rights into state water-management systems, this Essay gives a brief overview of water management in the western United States and how *Winters* rights of PDAs can be asserted even in fully appropriated water systems.

INTRODUCTION

Amid the calls for change and social justice that have echoed ever more loudly across the United States for the past several decades, one refrain stands out as a means to address multiple intersecting crises: #LandBack.¹ The term refers to a movement in support of returning land in the United States and Canada to its Indigenous peoples. “Land back” can mean many different things: fee-to-trust conversions through the Department of the Interior, comanagement agreements with federal agencies, fee-simple transfers, and even easements or access permits.² One principle, however, is common to all these mechanisms: land rights must come with water rights, or they are not full grants or restorations.³ Rights to water are critical for Native people, especially in the West where water is increasingly scarce.⁴ This Essay will discuss the water rights of public domain allotments (PDAs), which are a particular type of land grant separate from reservations.⁵

PDAs are tracts of land reserved from federally controlled territory in the United States held as trust or restricted fee parcels by Native American persons who do not live on reservations.⁶ A PDA often has many owners or beneficiaries of the trust, all of whom have a fractionated and undivided interest in an entire

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1. Cheyenne Bearfoot, *Land Back: The Indigenous Fight to Reclaim Stolen Lands*, KQED (Apr. 21, 2022), <https://www.kqed.org/education/535779/land-back-the-indigenous-fight-to-reclaim-stolen-lands> [https://perma.cc/NEQ5-BY3V].
 2. See, e.g., Laura Taylor & Miriam Jorgensen, *Considerations for Federal and State Landback*, HARV. PROJECT AM. INDIAN ECON. DEV. (Oct. 20, 2022), https://ash.harvard.edu/files/ash/files/land_back_policy_brief180.pdf [https://perma.cc/T8NY-LLUH].
 3. Danielle Lucero, *Isleta Pueblo & Aotearoa: Indigenous Nations' Actions to Protect Their River's Personhood*, PUEBLO ACTION ALL. (Dec. 11, 2020), <https://www.puebloactionalliance.org/blog/water-back-op-ed> [https://perma.cc/KQ6W-25UW]. See also #Waterback Manifesto, PUEBLO ACTION ALL., <https://www.puebloactionalliance.org/water-back> [https://perma.cc/F2XQ-63ZF] (“Here in the Southwest, we can’t have #LANDBACK without #WATERBACK”).
 4. See, e.g., *California Is in Drought: Here Are the Conditions*, CAL. WATER WATCH, <https://cww.water.ca.gov> [https://perma.cc/Y3X4-TBT8].
 5. Joe Mitchell, *Forest Service National Resource Guide to American Indian and Alaska Native Relations*, FOREST SERV. 22-23 (Dec. 5, 1997), <https://www.fs.usda.gov/people/tribal/tribint.pdf> [https://perma.cc/A9TB-QLAW].
 6. This Essay mostly uses the terms “Indian” and “Indian Tribe” to refer to the Indigenous peoples of the United States, in keeping with terminology that permeates federal regulations and regulatory bodies such as the Indian Civil Rights Act and the Bureau of Indian Affairs. In this Essay and in various briefing and research materials, they are variously referred to as Indigenous peoples, Native Americans, First Nations, Tribal Nations, and by their own individual nation, band, or Tribe names. The use of Indian terms in this Essay should not be taken to assert their primacy or correctness over any other term or to support any purpose but simplicity and consistency in the writing.

parcel.⁷ The benefit of a PDA, therefore, is largely in its availability as a place to live. In order to realize this benefit, it is critical for any potential owner or user that water rights attach to these allotments, especially as water becomes an increasingly precious resource in the West. Despite their detachment from any reservation or larger Tribal organization, PDAs are Indian country and are entitled to a federal reserved water right, also known as a *Winters* right.⁸ Water rights attach to PDAs as a matter of congressional intent, coupled with the trust responsibility of the United States to Native nations as dependent sovereigns.⁹

This Essay will examine the water rights of PDAs, with a focus on California history and allotments.¹⁰ Part I will explain what PDAs are and why their water rights are critical. Part II reviews *Winters* rights, a type of federal reserved water right that applies specifically to Indian reservations. Part III explains what is meant by “Indian country,” why that definition matters, and why PDAs fit into that definition. Part IV examines the various laws creating different kinds of allotments in the United States and how each law treats water rights. Specifically, the General Allotment Act creating Indian allotments has a distinct purpose and approach that indicates an intent to reserve water that is not apparent in other laws creating allotments. Part V explains the Indian canons of construction and how they apply to the General Allotment Act. Part VI briefly outlines the history of Indian land tenure in California and the various laws that have governed it over the centuries to explain how, in the context of California Indian history, the canons point to a federal reserved water right for PDAs. Finally, Part VII shows how PDAs’ rights would fit within a state’s prior appropriation system.

7. *What Is the American Indian Probate Reform Act?*, CAL. INDIAN LEGAL SERVS. 1-2 (Apr. 2009), <https://www.calindian.org/selfhelppdfs/SelfHelpAIPRA.pdf> [https://perma.cc/JD4J-ZMJY].

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

9. In *Johnson v. M'Intosh*, regarded by many scholars as the foundational case in U.S. Indian law, Chief Justice Marshall described Indian Tribes as dependent sovereigns – that is, independent sovereign entities subject to U.S. federal law and over whom the United States Congress holds plenary power. 21 U.S. (8 Wheat.) 543, 567-68 (1823). In subsequent jurisprudence, the U.S. Supreme Court has explained that because of this dependent relationship, the federal government has a special trust responsibility to act for the benefit of the Indians. *See, e.g.*, *Morton v. Mancari*, 417 U.S. 535 (1974) (upholding a hiring preference for Indians in the Bureau of Indian Affairs because the department nominally existed to carry out the U.S. trust responsibility to provide for and protect the Tribes).

10. Because Indian rights and territory are shaped by the events and laws of the places surrounding them, and because of California’s unique history and interaction with Indigenous peoples, some state-specific focus is useful even though Indian policy is governed by federal law.

I. WHAT IS A PUBLIC DOMAIN ALLOTMENT?

PDA's are a critical but small portion of Indian land in the United States. This Part explains what a PDA is and why it is important to explore the water rights to which they are entitled.

A. Statutory Definitions: Where Allotments Live in U.S. Law

PDA's are land held in trust or in fee simple by Indian persons outside the bounds of a reservation.¹¹ Allotments of this type are governed by the General Allotment Act, also known as the Dawes Act, which split collectively held Indian reservations into individual parcels for the purpose of providing homes for Indians and integrating them within settler farming communities and practices.¹² At the time of the Act's passage, many Indians did not wish to or could not settle on a reservation, so Congress created the option to claim an allotment from land in the public domain.¹³ The General Allotment Act of 1887 authorized the following:

Where any Indian entitled to allotment under existing laws shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her and to his or her children in manner as provided by law for allotments to Indians residing upon reservations, and such allotments to Indians on the public domain as herein provided shall be made in such areas as the President may deem proper.¹⁴

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11. Mitchell, *supra* note 5, at 4. Public domain allotments (PDAs) can be held in fee simple by grantees and their descendants, or they may be held in trust by the federal government for a beneficiary and their descendants. The individual land status of a PDA is determined by the language of the individual order, law, or grant creating the allotment.
 12. General Allotment (Dawes) Act of 1887, ch. 119, 24 Stat. 388, *repealed by* Indian Land Consolidation Act Amendments of 2000, Pub. L. No. 106-462, 114 Stat. 1991 (codified as amended in scattered sections of 25 U.S.C.).
 13. 25 U.S.C. §§ 334, 336 (2018); *see also* Padraic McCoy, *The Land Must Hold the People: Native Modes of Territoriality and Contemporary Tribal Justifications for Placing Land into Trust Through 25 C.F.R. Part 151*, 27 AM. INDIAN L. REV. 421, 491 (2003) ("As massive land losses continued, a number of Southern California Mission Indians began filing for individual lands under the Indian Homestead Act of 1883 and the 1887 Public Domain Allotment Act. Many Indians, though, chose not to seek land recovery under these acts because the acts conditioned recovery upon separation from the tribal group, a condition most Indians were unwilling to accept.").
 14. 25 U.S.C. § 336 (2018).

Unlike reservation allotments, which retained their connection to a Tribe despite being the property or trust benefit of an individual or family, PDAs are not under the jurisdiction of any Tribe or Indian nation.¹⁵

B. Current State of Public Domain Allotments

PDAs comprise about 1.23 million acres in the United States, primarily in the West.¹⁶ California contains about 400 allotments comprising about 20,000 acres; New Mexico has the most territory devoted to PDAs, at over 600,000 acres.¹⁷ Compared to California's roughly 100 million-acre landmass, PDAs are a very small land interest – but on the scale of Indian land in California, they are vital.¹⁸ Indian reservations and rancherias in California comprise only about 525,000 acres, meaning PDAs account for nearly four in every one hundred acres of Indian-held land.¹⁹

The stated purpose behind allotment was to help Indians assimilate into settler, agrarian culture and build capital wealth based in property with the eventual goal of reducing the United States's responsibility for their welfare.²⁰ However, because of probate laws governing Indian trust interests and property, PDA ownership is usually fractionated – that is, it is divided among so many heirs that no one person may effectively benefit from the land as a source of capital.²¹ Most PDAs are held in severalty, meaning that each heir has an undivided interest in the entire parcel rather than an individual claim to a portion of the total; the only real benefit of such an interest in land is as a place to live, since alienation or

15. Mitchell, *supra* note 5, at 22.

16. *Burns Paiute Indian Tribe Allotment: Hearing on S. 1468 Before the Select Comm. on Indian Affs.*, 97th Cong. 7-9 (1981) [hereinafter *Burns Paiute Hearing*] (statement of Kenneth L. Payton, Acting Deputy Assistant Secretary for Indian Affairs, U.S. Dep't of the Interior).

17. *Id.*

18. Edward Thompson, Jr., *Agricultural Land Loss & Conservation*, CAL. DEP'T. OF FOOD & AGRIC. (2009), https://www.cdfa.ca.gov/agvision/docs/Agricultural_Loss_and_Conservation.pdf [<https://perma.cc/WGM8-ECE6>].

19. See Risa Johnson, *Bill Seeks to Recognize California Tribal Land Now Occupied by Schools, Libraries*, DESERT SUN (Mar. 6, 2020), <https://www.desertsun.com/story/news/2020/03/06/bill-seeks-recognize-california-tribal-land-occupied-schools-libraries/4977096002> [<https://perma.cc/5AZ6-DNJG>] (noting that California tribes today own “about 7%” of “more than 7.5 million acres of land” in California once reserved for them, or about 525,000 acres).

20. *History*, INDIAN LAND TENURE FOUND., <https://iltf.org/land-issues/history> [<https://perma.cc/YN7P-VAZG>].

21. CAL. INDIAN LEGAL SERVS., *supra* note 7; see also Indian Land Consolidation Act Amendments of 2000, Pub. L. No. 106-462, § 101, 114 Stat. 1991 (attempting to remediate the problem of fractionated interests).

leasing is next to impossible to coordinate among dozens or hundreds of parties.²²

It is critical that water rights attach to these allotments so that rights to the land may be exercised through settlement or lease. As climate change continues to reduce the available water supply in California and other western states, rights to water are an increasingly fraught issue and a serious human rights concern.²³ Overall, Native people are already at a disadvantage when it comes to water rights, as they have less access to this critical resource than non-Native people.²⁴ One in ten Native Americans lacks access to safe, clean drinking water.²⁵ Since most of California's water is fully appropriated for all or part of the year, allotment owners or tenants likely cannot establish new appropriative rights to water.²⁶ However, PDAs are entitled to federally reserved water rights to fulfill the purpose of supporting Indians and their families.²⁷

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22. Indian Land Consolidation Act Amendments of 2000 § 101.
 23. Michael E. Mann & Peter H. Gleick, *Climate Change and California Drought in the 21st Century*, 112 PROC. NAT'L ACAD. SCI. 3858, 3859 (2015).
 24. See, e.g., Laura D. Taylor, *Predatory Paternalism: The Changing Rights to Water, Enforcement, and Spillover Effects on Environmental Quality in the American West* 17 (2022) (Ph.D. dissertation, University of Arizona) (ProQuest) ("Approximately 58 out of 1,000 Native American households do not have access to indoor plumbing; nearly 30% of homes surveyed by the Indian Health Service (IHS) needed improvements in sanitation for sewer and/or solid waste systems; and 30% - 40% of households on the Navajo Nation do not have piped water . . .").
 25. Nina Lakhani, *Tribes Without Clean Water Demand an End to Decades of US Government Neglect*, GUARDIAN (Apr. 28, 2021, 5:00 PM EDT), <https://www.theguardian.com/us-news/2021/apr/28/indigenous-americans-drinking-water-navajo-nation> [https://perma.cc/3PJF-LWNK]; see also Gabrielle Canon, *'We're Dwindling Like the Salmon': The Indigenous Nations Fighting for Water Rights*, GUARDIAN (Aug. 26, 2022, 6:00 PM EDT), <https://www.theguardian.com/us-news/2022/aug/26/california-indigenous-water-rights-bay-delta> [https://perma.cc/APV3-SVTJ] (discussing the struggle for water rights in California's Bay-Delta).
 26. *Stream Systems Declared Fully Appropriated by the State Water Board*, CAL. WATER BDS., <https://gispublic.waterboards.ca.gov/portal/apps/MapJournal/index.html?appid=b2188e89dfea4e44b156600370f1edf7> [https://perma.cc/7FZV-4VRF].
 27. Supporting Indian families was a stated purpose of both reservations and allotments. See, e.g., *Pallin v. United States*, 496 F.2d 27, 34-35 (9th Cir. 1974) ("[O]ne of the standards to be applied by the Secretary . . . is whether the reservation lands selected for allotment are capable of yielding support for an Indian settler and his family. If the lands are too poor to accomplish this purpose, the Secretary is not to approve the allotment." (quoting *Hopkins v. United States*, 414 F.2d 464, 468 (1969))).

II. WHAT IS A RESERVED WATER RIGHT? AN OVERVIEW OF THE WINTERS DOCTRINE

Federal reserved Indian rights to water were first recognized in *Winters v. United States* in 1908, when the U.S. Supreme Court held that when Congress created Indian reservations, it impliedly reserved sufficient water to “support the purpose” for which the reservation was established.²⁸ Noting that “the lands [which are] arid and, without irrigation, were practically valueless,” the Court held that the federal government had the power to “reserve the waters and exempt them from appropriation under the state laws” to ensure an adequate water supply.²⁹

Various courts have recognized that the *Winters* doctrine provides three unique privileges: “[F]irst, reserved water rights may be asserted at any time; second, those rights are need-based and do not require continued beneficial use; and third, they take priority over all junior water users in water shortages.”³⁰ Because Indian reserved water rights date back to the creation of the reservations, and thus pre-date other settlement of the areas, Tribal water rights are usually senior to other water users’ claims.³¹

Because *Winters* did not dictate a formula to quantify the water reserved, courts apply different standards to quantify Indian reserved water rights by discerning the “purpose” of reservations.³² The reserved federal right was quantified in *Arizona v. California* according to the “practicably irrigable acreage” (PIA) on reservations dedicated to agriculture.³³ However, in *In re General Adjudication of All Rights to Use Water in the Gila River System & Source*, the Supreme Court of Arizona held that the U.S. Supreme Court did not intend the PIA standard to be

28. 207 U.S. 564, 577 (1908); see also E. Brendan Shane, *Water Rights and Gila River III: The Winters Doctrine Goes Underground*, 4 U. DENV. WATER L. REV. 397, 401 (2001) (explaining the *Winters* doctrine and its significance); Robert D. Dellwo, *Indian Water Rights—The Winters Doctrine Updated*, 6 GONZ. L. REV. 215 (1971) (same).

29. *Winters v. United States*, 207 U.S. 564, 576-77 (1908).

30. Amy Choyce Allison, *Extending Winters to Water Quality: Allowing Groundwater for Hatcheries*, 77 WASH. L. REV. 1193, 1203 (2002); *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 51 (9th Cir. 1981). Most western states use a priority-rights system for water allocation, which balances a “first come, first served” principle (creating “senior” and “junior” users on a timeline) with a “use it or lose it” rule requiring that claimants use the water they reserve for a purpose approved by the state or lose the right to use it at all. *Winters* rights sit on the priority timeline but may not be lost through lack of use. See *Walton*, 647 F.2d at 51.

31. CYNTHIA M. BROUGHER, CONG. RSCH. SERV., RL32198, INDIAN RESERVED WATER RIGHTS UNDER THE WINTERS DOCTRINE: AN OVERVIEW 2 (2011).

32. *Id.* at 3.

33. 460 U.S. 605, 617 (1983), supplemented by 466 U.S. 144 (1984).

the sole method for quantification.³⁴ Other courts have used different methods to quantify rights to consumptive and nonconsumptive water use for farming, fishing, and aquaculture.³⁵ On the Klamath reservation, for example, the Ninth Circuit found that Congress intended to support the Tribe's subsistence through fishing and hunting, as opposed to agriculture, and allocated enough water to support this purpose.³⁶

The judicial trend “appears to recognize [that] reservation allocations should not be limited to only an amount of water sufficient to support the pastoral life-style contemplated in the nineteenth century, but rather calculated to provide the tribes with water in quantities sufficient to promote survival and the success of the reservations.”³⁷ Modern jurisprudence tends to recognize that the goal of the federal government in creating Indian reservations was not to produce more farmers or shepherds but instead “to make the reservation livable” and “to further and advance the civilization.”³⁸

Water quality has been recognized by some courts as an element of a reserved water right when a decline in quality would degrade the waters used for reservation purposes.³⁹ For example, a federal district court in Arizona held that “quantity alone is insufficient when granting tribes water for consumptive uses,” so reserved water rights call for “a certain quality of water.”⁴⁰ Because of farming and groundwater pumping in upstream valleys, water used by the San Carlos Apache Indian Reservation was becoming saline, resulting in the loss of some

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34. 35 P.3d 68, 79-81 (Ariz. 2001) (considering a water-rights claim by the San Carlos Apache Indian Reservation and holding that when determining federal reserved rights, courts should evaluate the particular facts and circumstances of the reservation on a case-by-case basis).
35. Dylan Hedden-Nicely, *The Historical Evolution of the Methodology for Quantifying Federal Reserved Instream Water Rights for American Indian Tribes*, 50 ENV'T. L. 205, 209-10 (2020) (“[A]ll of the early cases regarding the development of the *Winters* doctrine were factually limited to reserved irrigation water rights. . . . Later, the Ninth Circuit established that tribes may also be entitled to water rights sufficient to preserve their hunting, fishing, gathering, and other traditional subsistence rights.”).
36. *United States v. Adair*, 723 F.2d 1394, 1409 (9th Cir. 1984). For fishing purposes, the water right is usually related to maintaining a depth, temperature, and flow speed of the rivers sufficient to support fish populations. See Hedden-Nicely, *supra* note 35, at 242-43.
37. *State ex rel. State Eng'r v. United States*, 425 P.3d 723, 734 (N.M. App. 2018).
38. *Id.* (quoting *Arizona*, 460 U.S. at 616); see also *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, 849 F.3d 1262, 1270 (9th Cir. 2017) (“[T]he primary purpose underlying the establishment of the reservation was to create a home for the Tribe, and water was necessarily implicated in that purpose.” (emphasis added)).
39. BROUGHER, *supra* note 31, at 5.
40. Allison, *supra* note 30, at 1209 (citing *United States v. Gila Valley Irrigation Dist.*, 920 F. Supp. 1444, 1448 (D. Ariz. 1996), *aff'd*, 117 F.3d 425 (9th Cir. 1997)).

crops.⁴¹ Although the district court never specifically discussed *Winters* rights, it applied similar reasoning to require users upstream from the reservation to cease using water in order to increase flow and restore the water to a sufficient quality to sustain the salt-sensitive crops grown by the Tribes.⁴²

III. PUBLIC DOMAIN ALLOTMENTS ARE INDIAN COUNTRY

Winters rights are a particular type of federally reserved water right that is specific to Indian country. PDAs' entitlement to water rights is directly tied to their existence as Indian country, despite their not being controlled by or associated with a particular Tribe or nation. This Part explains the statutory meaning of "Indian country," the different kinds of authority attached to that term, and how PDAs fit within that framework.

Indian country is statutorily defined at 18 U.S.C. § 1151. It includes all reservations, all dependent Indian communities, and "all Indian allotments, the Indian titles to which have not been extinguished," as well as allotments no longer owned by Indians but within reservation boundaries.⁴³

Most Indian allotments were created from reservation land by the passage of the Dawes Act and other, similar laws.⁴⁴ On targeted reservations, each Tribal citizen was permitted to choose a plot of land within the reservation's boundaries, usually 80 or 160 acres.⁴⁵ After each member of the Tribe received their allotment, the "surplus" land on the reservation was sold to settlers.⁴⁶ However,

41. *Gila Valley Irrigation Dist.*, 920 F. Supp. at 1448-49.

42. *Id.* at 1454-56.

43. 18 U.S.C. § 1151 (2018).

44. *See, e.g.*, 43 U.S.C. § 321 (2018); *see also* 25 U.S.C. § 334 (2018) (providing for the [a]llotments [of land] to Indians not residing on reservations").

45. 25 U.S.C. § 331 (2018), *repealed by* Indian Land Consolidation Act Amendments of 2000, Pub. L. No. 106-462, tit. I, § 106(a)(1) 114 Stat. 2007; *Native American Ownership and Governance of Natural Resources*, U.S. DEP'T OF THE INTERIOR, <https://revenue.data.doi.gov/how-revenue-works/native-american-ownership-governance/#General-Allotment-Act-of-1887-The-Dawes-Act> [<https://perma.cc/3KJP-ZMD9>].

46. U.S. DEP'T OF THE INTERIOR, *supra* note 45. The land was often sold at prices far below its actual value, but the proceeds of these land sales went into a trust fund held by the United States for the benefit of the Tribe whose land had been sold. The federal government lost billions of dollars in wealth for Tribes by undervaluing the land and mismanaging the funds. In 2010, President Obama signed a \$3.4 billion settlement agreement to resolve a class-action lawsuit on behalf of individual Indian account holders. *Individual Indian Money Accounts* (Cobell v. Salazar), NATIVE AM. RTS. FUND, <https://narf.org/cases/cobell> [<https://perma.cc/RVR3-V8G3>]; *see also* Cobell v. Salazar, 573 F.3d 808 (D.C. Cir. 2009) (upholding the class-action settlement); *Trust Fund Mismanagement* (Nez Perce v. Jewell), NATIVE AM. RTS. FUND, <https://narf.org/cases/nez-perce-v-jewell> [<https://perma.cc/5YT8-DSK2>] (explaining that a parallel suit for Tribal trust funds was also settled).

even when the land was owned by non-Indians, it often remained part of the reservation for purposes of jurisdiction. In 1984, the U.S. Supreme Court held that “only Congress can divest a reservation of its land and diminish its boundaries” and that, therefore, “[o]nce a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise.”⁴⁷ Courts look to the specific language of treaties or agreements to determine a reservation’s post-allotment status.⁴⁸

Although the policy of Indian allotment ended in 1934 with the Indian Reorganization Act,⁴⁹ it continues to (usually) be true that on Indian reservations, some allotments are owned by Tribal members and others are owned by non-Indians, but all of it is Indian country.⁵⁰ Additionally, some allotments have passed out of trust status and are owned in fee simple; the original Indian Reorganization Act intended that all allotments should pass out of trust status after twenty-five years but maintained that “the President of the United States may in any case in his discretion extend the period,” creating a patchwork of trust and fee-simple allotments owned by Indians and settlers, mostly but not entirely

47. *Solem v. Bartlett*, 465 U.S. 463, 470 (1984).

48. *Id.*

49. 25 U.S.C. §§ 461-479 (2018).

50. Land ownership on reservations is not a single rule with exceptions, but rather hundreds of unique histories involving allotment, voluntary and forced sales, shifts in Congressional recognition for Tribes, and interactions with surrounding state governments that create a patchwork of land status within original reservation boundaries. For example, a 2019 U.S. Supreme Court decision confirmed that the Muscogee Creek reservation still existed despite Oklahoma’s encroachment on the land. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2482 (2020). The decision applied to the Five Tribes, who had agreed to the same treaty terms as the Muskogee Creek Nation, but not to any of the other 33 Tribes in Oklahoma, and it did not dispossess non-Indians who had purchased or inherited allotments on the reservation in fee simple, creating a patchwork of ownership and jurisdiction unique to these five reservations. MAINON A. SCHWARTZ, CONG. RSCH. SERV., LSB10527, *THIS LAND IS WHOSE LAND? THE MCGIRT V. OKLAHOMA DECISION AND CONSIDERATIONS FOR CONGRESS* (2020); see also *Map of the Spokane Indian Reservation*, LIBR. CONG. (1910), <https://www.loc.gov/resource/g4282s.ct000268> [<https://perma.cc/6R7W-C9FS>]; *Spokane Tribe of Indians: A Socioeconomic Profile*, SPOKANE TRIBE OF INDIANS 9 (2013), https://spokanetribe.com/wp-content/uploads/2020/03/Spokane-Tribe-of-Indians_A-Socioeconomic-Profile2.pdf [<https://perma.cc/P6QW-7RLZ>] (presenting demographic data about those living on the Spokane Indian Reservation); Jessica A. Shoemaker, *Emulsified Property*, 43 PEPP. L. REV. 945, 947 (2016) (describing the “complicated” nature of land ownership in Indian country); CAROLE GOLDBERG, REBECCA TSOSIE, ROBERT N. CLINTON & ANGELA R. RILEY, *AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM* (Carolina Academic Press, 7th ed. 2015) (providing an at-length and in-depth explanation, with support in federal case excerpts, of Indian land history and how Congress has used its plenary power to create, allot, and disestablish reservations, creating a patchwork of land ownership in Indian country).

within reservation boundaries.⁵¹ PDAs were created from land that the United States had already acquired from Indigenous peoples and are largely still held in trust.⁵² Although PDAs were not created from reservations, courts have held that “a reservation set apart out of the public domain [is] just as truly Indian Country as a reservation created from land which had always been occupied by Indians.”⁵³

IV. THE FLOW OF CONGRESSIONAL INTENT: WATER AND ALLOTMENTS

During the nineteenth century, Congress passed several laws allocating public land in the western territories.⁵⁴ The distinctions between these types of allotments and who owns them informs the status of their water rights, and congressional intent regarding allotments and water rights was repeatedly examined by courts in the decades following allotment. Unlike the Desert Lands Act and other federal statutes distributing public land, the statutes governing Indian allotments do not say anything about water rights.⁵⁵ It has fallen to the courts, therefore, to infer Congress’s intent with regard to water rights for each allotment. This Part will walk through established water rights on non-PDA allotments and explain how that reasoning extends to PDAs.

A. Reservation Allotments and Reserved Water Rights

Reservation allotments are the parcels of land that resulted from general allotment statutes such as the Dawes Act.⁵⁶ Their primary distinction from PDAs is that they were created from reservation land, rather than land in the public domain, and usually remain subject to Tribal jurisdiction. Reservation allotments retain their water rights as a proportion of the original congressional water reservation. In *United States v. Powers*, land companies adjacent to a reservation challenged the water use of Crow citizens who had “succeeded to the interest of the original allottees either by mesne conveyances or by purchase at

51. 25 U.S.C. § 348 (2018).

52. CAL. INDIAN LEGAL SERVS., *supra* note 7, at 4-5.

53. *In re Carmen*, 165 F. Supp. 942, 946 (N.D. Cal. 1958).

54. See, e.g., General Allotment (Dawes) Act of 1887, ch. 119, 24 Stat. 388, *repealed by* Indian Land Consolidation Act Amendments of 2000, Pub. L. No. 106-462, 114 Stat. 1991 (codified as amended in scattered sections of 25 U.S.C.); Homestead Act of 1862, ch. 75, 12 Stat. 392, *repealed by* Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2743 (codified as amended at 43 U.S.C. §§ 1701-1787).

55. 43 U.S.C. § 321 (2018); 25 U.S.C. §§ 334, 336 (2018).

56. 25 U.S.C. § 334 (2018).

government sales of deceased allottees' lands" on the reservation.⁵⁷ The Court relied on Congress's intent that allotments support the Indians' pursuit of settlement and farming to hold that, even where the Secretary of the Interior had not prescribed rules for irrigation on the plots in question, "when allotments of land were duly made for exclusive use and thereafter conveyed in fee, the right to use some portion of tribal waters essential for cultivation passed to the owners."⁵⁸

Courts further developed this system of water allotment in a series of cases on the Colville Indian Reservation that examined the water rights of reservation allotments held by non-Indians.⁵⁹ In *Colville Confederated Tribes v. Walton*, a non-Indian farmer petitioned for the use of the reserved water rights attached to his allotments, which he had purchased from Indian allottees and which remained part of the Colville Reservation.⁶⁰ The court examined prior holdings on reserved rights and the General Allotment Act and concluded that Walton had a water right that was bounded by the Indian allottees' actual use.⁶¹ Specifically, the court said Indian allottees were entitled to a "ratable" share of water (i.e., a share of the reserved water proportionate to their share of the reserved land), and non-Indians had priority use of that right:

[An] Indian allottee does not lose by non-use the right to a share of reserved water. This characteristic is not applicable to the right acquired by a non-Indian purchaser. The non-Indian successor acquires a right to water being appropriated by the Indian allottee at the time title passes. The non-Indian also acquires a right, with a date-of-reservation priority date, to water that he or she appropriates with reasonable diligence after the passage of title. If the full measure of the Indian's reserved water right is not acquired by this means and maintained by continued use, it is lost to the non-Indian successor.⁶²

Throughout the line of cases that became part of the *Walton* adjudication, it was essential to the court's reasoning that Indian allottees were empowered to sell their reserved water rights along with their allotted land because they could

57. 305 U.S. 527, 531 (1939).

58. *Id.* at 532.

59. *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981), *cert. denied*, 454 U.S. 1092 (1981).

60. *Id.* at 52; *see also* INDIAN LAND TENURE FOUND., *supra* note 20 (explaining that many Indians were forced to sell their allotments shortly after they entered fee status due to financial hardship).

61. *Walton*, 647 F.2d at 51.

62. *Id.*

not derive the full benefit of the allotment if they were forced to sell land without accompanying water.⁶³

B. Water Rights of Homestead Act and Other Non-Indian Allotments

As this Section will show, laws allotting Indian land differed significantly from other allotment laws in their treatment of water rights because the federal government explicitly declined to reserve water when creating non-Indian allotments.

In the rush to settle the western territories, several laws were passed in addition to the General Allotment Act to allocate “public” land to settlers.⁶⁴ Two of the largest allotment programs were governed by the Homestead Act of 1862 and the Desert Lands Act of 1877 (DLA).⁶⁵ These laws bore some similarity to the General Allotment Act, in that they allocated plots to settlers who lived on and farmed the land; the Homestead Act allocated 160 acres, while the DLA allocated up to 640 acres.⁶⁶

Critical requirements distinguish these allotments from those made under the General Allotment Act. A settler made a claim under the Homestead Act by moving to a tract of land, building a residence, and farming the land.⁶⁷ If a person lived on a tract for five years, they were issued a patent from the government confirming their ownership of the allotment.⁶⁸ Congress’s intent for these allotments is clear from the Act’s language, which states:

[N]o certificate shall be given or patent issued therefor until the expiration of five years from the date of [entry]; . . . the person making such entry . . . shall prove by two credible witnesses that he, she, or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit . . . [after which they] shall be entitled to a patent.⁶⁹

63. *Id.* at 49-50.

64. *Homestead Act (1862)*, NAT’L ARCHIVES (Feb. 8, 2022), <https://www.archives.gov/milestone-documents/homestead-act> [<https://perma.cc/QA6Y-MTUS>].

65. See Homestead Act of 1862, ch. 75, 12 Stat. 392, *repealed by* Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2743 (codified as amended at 43 U.S.C. §§ 1701-1787); Desert Lands Act of 1877, ch. 107, 19 Stat. 377 (codified as amended at 43 U.S.C. §§ 321-323, 325, 327-329).

66. Homestead Act § 1, 12 Stat. at 392; Desert Lands Act § 1, 19 Stat. at 377.

67. Homestead Act § 2, 12 Stat. at 392.

68. *Id.*

69. *Id.*

The Act made no provision for water rights, nor have courts found they were implied. In *Big Horn IV*, the Supreme Court of Wyoming found:

1. Only land that was once an Indian allotment can be awarded a reserved water right.
2. Claims based on title acquired under such federal programs as the Homestead Act, the Cash Entry Act, the Desert Land Act and the Federal Reclamation Act are not entitled to a reserved water right.⁷⁰

Congress's intent in passing the Homestead Act was not to encourage industrial laborers to take up an agrarian lifestyle, reward decommissioned Union soldiers, or provide material assistance to new immigrants, although it ended up contributing to each of these things; instead, it aimed to encourage people to move west, build farms, and stay there in order to extend control over land in the territories.⁷¹

The DLA was equally explicit about its intent for settlers to cultivate land in the West. It does not require witnesses to settlement to qualify for a patent; instead, the DLA requires a would-be settler to acquire water rights *under state law* and prove their ability and intent to irrigate and farm the land. Specifically, the Act requires a settler to declare under oath

that he intends to reclaim a tract of desert land . . . by conducting water upon the same, within the period of three years thereafter[.] *Provided, however,* [t]hat the right to the use of water by the person so conducting the same, on or to any tract of desert land . . . shall depend upon bona fide prior appropriation.⁷²

Another section of the DLA requires settlers to

file a map of said land, which shall exhibit a plan showing the mode of contemplated irrigation, and which plan shall be sufficient to thoroughly irrigate and reclaim said land, and prepare it to raise ordinary agricultural

70. *In re Gen. Adjudication of All Rts. to Use Water in the Big Horn River Sys. (Big Horn IV)*, 899 P.2d 848, 852 (Wyo. 1995) (holding that settlers who had acquired land by patents issued under federal statutes rather than from Indian allottees were not entitled to the reservation priority date).

71. NAT'L ARCHIVES, *supra* note 64. It should be noted that former Confederates were explicitly prohibited from acquiring land under the Homestead Act, as provisions of the law prohibited anyone who had taken up arms against the Government from applying for a patent. *Id.*

72. 43 U.S.C. § 321 (2018).

crops, and shall also show the source of the water to be used for irrigation and reclamation.⁷³

The DLA makes clear that the settler, not the United States, bore the burden of acquiring water rights.⁷⁴

Courts have found violations of these provisions sufficient to deny claims to allotments under the Homestead Act and the DLA. In *Robert J. Proctor*, for example, the Interior Board of Land Appeals rejected the appellants' application to use their DLA allotment to grow Christmas trees because the trees were not an agricultural crop and timber cultivation was governed by a different statute.⁷⁵ The Board noted that "the ultimate goal of both the Homestead Act and the Desert Land Act were the same, viz., the transformation of heretofore undeveloped land into productive farms."⁷⁶ In *Stewart v. Penny*, although the court ultimately allowed the petitioner to remain on his land, they agreed with the Land Office that "the allowance of this entry . . . without requiring *the entryman to show a water right* sufficient to cultivate at least 1/8th of the land in the entry, or 15 acres, was erroneous."⁷⁷ The court in *Penny* found that the Homestead Act did not allow the Bureau of Land Management to withhold the patent if the petitioner had fulfilled the other requirements of the Act by settling and cultivating the land, but cautioned that it "may or may not" have been improperly classified for settlement because the Act required a showing of water rights.⁷⁸

In sum, the federal government's purpose and responsibility when creating allotments for non-Indians were distinct from the purpose and responsibility of Indian allotment acts. The government required settlers to show active efforts to establish water rights on their claims—a process that differs significantly from the assignment of Indian allotments.⁷⁹

C. Recognizing Water Needs of Public Domain Allotments

Congress's intent for PDAs granted under the General Allotment Act differs from the intent guiding the Homestead Act and the DLA, and its treatment of water rights differs accordingly. Applicants under the Homestead Act and the DLA are responsible for acquiring sufficient water rights to irrigate the land. By

73. *Id.* § 327.

74. *Id.*

75. 124 IBLA 363, 367 (1992).

76. *Id.*

77. *Stewart v. Penny*, 238 F. Supp. 821, 828 (D. Nev. 1965) (emphasis added).

78. *Id.*

79. See, e.g., *id.*

contrast, under the General Allotment Act, the government is responsible for determining that sufficient water exists on land chosen for a PDA before it is granted to the Indian allottee.⁸⁰

The General Allotment Act's congressional purpose was to support the Indians in a transition to settler agricultural practices.⁸¹ It nominally recognized an obligation to compensate and support them by covering all the fees associated with allotments and paying for the "surplus" land that the United States sold to settlers.⁸² To ensure that allotments would fulfill their congressional purpose of supporting Indian families, the Department of the Interior surveyed land to ascertain its highest and best use; each Indian could be granted "forty acres of irrigable land or eighty acres of nonirrigable agricultural land or one hundred sixty acres of nonirrigable grazing land."⁸³ Unlike the grant in *Penny*, if during the application process it was found that land could not support a family through its designated use, the Department of the Interior would revoke the patent despite any reliance.⁸⁴

In *Saulque v. United States*, the petitioner was informed by a Bureau of Indian Affairs (BIA) agent that land had been "temporarily withdrawn [from the public domain] for use of homeless Indians living in Inyo and Mono Counties" in California.⁸⁵ Petitioner Joseph Saulque, a Paiute Indian, settled on the land and applied for an official allotment there, but his petition was denied because the plot he chose "would not support the residents" either through agriculture or grazing.⁸⁶ Saulque appealed the decision, pointing out that he was in fact living there, but the Ninth Circuit held firmly that "land is available for allotment to Indians only if it is suitable for agricultural purposes, is suitable for a home for the Indian and his family, and the return from the use of the land would support the

80. See *Saulque v. United States*, 663 F.2d 968, 975 (9th Cir. 1981).

81. *Dawes Act (1887)*, NAT'L ARCHIVES, <https://www.archives.gov/milestone-documents/dawes-act> [<https://perma.cc/VLL6-992P>].

82. General Allotment (Dawes) Act of 1887, ch. 119, 24 Stat. 388, *repealed by* Indian Land Consolidation Act Amendments of 2000, Pub. L. No. 106-462, 114 Stat. 1991 (codified as amended in scattered sections of 25 U.S.C.). The proceeds of these sales went into a fund held in trust for the benefit of the Tribe.

83. 25 U.S.C. § 336 (2018).

84. *Id.*; see also *Penny*, 238 F. Supp. at 828 (noting that the Bureau of Land Management could not withhold a patent if an entryman had fulfilled the requirements of the Homestead Act); *Saulque*, 663 F.2d at 973-74 (explaining the revocation process).

85. *Saulque*, 663 F.2d at 971.

86. *Id.*

residents”; the plot Saulque had chosen was “rocky” and “sandy” and did not qualify.⁸⁷

In *Saulque* and similar cases involving the General Allotment Act, courts have not read in, nor did Congress include, a responsibility for Indian allottees to obtain or demonstrate state water rights on their land.⁸⁸ Instead, the Department of the Interior has a responsibility to choose plots of land that already have access to sufficient water to support an Indian family.⁸⁹ PDAs are explicitly subject to this requirement and are only granted where sufficient water is available to the allottee. The Claims Court has held that “the government has no duty to develop irrigation facilities for tribes or to deliver irrigation water to allotments,” but the United States recognizes water rights for Tribes even without a duty to help them develop those rights.⁹⁰ As the next Part argues, the difference in statutory construction, in combination with the Indian canons of construction, should be read as implying reserved water rights for public domain allotments.

V. HOW TO READ LAWS: INDIAN CANONS OF CONSTRUCTION AND THE UNITED STATES’S TRUST RESPONSIBILITY

The General Allotment Act does not contain any specific reference to the water rights of PDAs; finding that these rights exist is a matter of interpretation. When interpreting laws, treaties, executive orders, and other documents governing the relationship between Indians and the United States, courts must consider the Indian canons of construction. This Part explains the United States’s trust responsibility to Tribes, the Indian canons of construction, and how both concepts relate to water rights.

A. Trust Responsibility

The trust relationship giving rise to the canons is often attributed to Chief Justice Marshall’s opinions in *Cherokee Nation v. Georgia* and *Worcester v. Georgia*, in which he described the Tribes as “domestic dependent nation[s]” who had

87. *Id.* at 975; see also *Hopkins v. United States*, 414 F.2d 464, 468 (9th Cir. 1969) (“[T]he legislative purpose to authorize allotments only upon lands which the Secretary determined could provide a home and furnish a livelihood by farming, raising livestock, or both, applies to the General Allotment Act as a whole.”).

88. See, e.g., *Saulque*, 663 F.2d at 975; *Hopkins*, 414 F.2d at 466.

89. *Saulque*, 663 F.2d at 975.

90. Judith V. Royster, *Indian Water and the Federal Trust: Some Proposals for Federal Action*, 46 NAT. RES. J. 375, 380 (2006) (internal citations omitted).

granted rights to the United States through treaties and reserved for themselves all rights and property not clearly ceded.⁹¹

Because of this dependent relationship, the United States has a trust responsibility to Indians not unlike the private trust relationship governed by the Restatement of Trusts and common-law principles.⁹² This responsibility often arises in controversies over the management of Tribal resources, in which “the government’s role is most akin to that of a private fiduciary.”⁹³

Allotments, like reservations, are held in trust for Indians by the federal government. The Indian Reorganization Act limits the government’s general land-trust duties to preventing state taxation or alienation.⁹⁴ However, courts have recognized other places where statutes and regulations create a “high fiduciary responsibility” to manage resources for the benefit of a tribe.⁹⁵ The petitioner in *Saulque* attempted to base his claim for allotment on the United States’s trust responsibility to him and his family; Saulque had relied on incorrect information from a BIA agent and built a home on land that was later deemed not suitable for allotment.⁹⁶ The court found that a trust responsibility existed between the United States and the petitioner but did not apply it as Saulque proposed. The court held:

It should be obvious that this trust relationship was the very reason why neither Congress nor the President would allow an allotment of land to be granted to an Indian where the land was not fit for agriculture and would not support the Indian and his family. To do otherwise would result in great hardship and injustice to the Indian and his dependents.⁹⁷

91. See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 552 (1832). This conception of treaties as grants from the Tribes to the United States, when applied to water rights, is known as the *Winans* doctrine. *United States v. Winans*, 198 U.S. 371, 381 (1905). Notably, President Jackson ignored the holdings in both *Georgia* cases, eventually leading to the Trail of Tears; despite this history, Chief Justice Marshall’s analysis of the sovereign-to-sovereign relationship remains good law. See Ronald A Berutti, *The Cherokee Cases: The Fight to Save the Supreme Court and the Cherokee Indians*, 17 AM. INDIAN L. REV. 291-308 (1992).

92. 1 COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 5.05 (2019) [hereinafter COHEN].

93. *Id.*

94. 25 U.S.C. § 5108 (2018).

95. See, e.g., *Fort Mojave Indian Tribe v. United States*, No. 95-5014, 1995 WL 495536, at *2 (Fed. Cir. Aug. 18, 1995) (finding a trust responsibility to manage water-rights litigation prudently).

96. *Saulque v. United States*, 663 F.2d 968, 975-76 (9th Cir. 1981).

97. *Id.* at 975.

In this case, the court extended the trust responsibility beyond preventing alienation and into ensuring that the Indian petitioners settled on land that could reasonably support them in the long term. This interpretation extends from the General Allotment Act's goal of providing settlements for the Indians and their families, which would necessarily include water.⁹⁸

B. Indian Canons of Construction

The Indian canons of construction apply when there is ambiguity in a statute or treaty; when a law is clear on its face, the canons “will not come into play.”⁹⁹ They are intended to ensure that treaty rights are not abrogated without an explicit declaration of congressional intent.¹⁰⁰ The canons are not a product of “judicial solicitude” for a marginalized group but an aspect of the government-to-government relationship between the United States and the Tribes intended to “mediate the problems presented by the nonconsensual inclusion of Indian nations into the United States.”¹⁰¹

Specifically, the canons require that any ambiguous treaty provision or law applying to the Indians be construed: (1) “as the Indians would have understood it”; or (2) “liberally in favor of the Indians”; and (3) “ambiguities in the treaty language must be resolved in favor of the Indians.”¹⁰² For example, in *Herrera v. Wyoming*, the U.S. Supreme Court held that neither Wyoming's admission to the Union nor the establishment of the Bighorn National Forest abrogated the Crow Tribe of Indians' 1868 federal treaty right to hunt on the “unoccupied lands of the United States” outside their reservation.¹⁰³ Congress had made no clear statement abolishing this right, and the Court declared that the test for determining treaty rights “is whether Congress has expressly abrogated an Indian

98. *Id.*; 25 U.S.C. § 336 (2018).

99. 1 COHEN, *supra* note 92, § 2.02. The canons, for example, were applied in the *Winters* case, giving rise to federal reserved water rights. *Winters v. United States*, 207 U.S. 564, 576 (1908) (“By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians.”).

100. 1 COHEN, *supra* note 92, § 2.02; *see, e.g.*, *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985) (“[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.”).

101. 1 COHEN, *supra* note 92, § 2.02.

102. Brief of Indian Law Professors as Amici Curiae in Support of Petitioner at 4-5, *Herrera v. Wyoming*, 139 S. Ct. 1686 (2019) (No. 17-532); *see also* *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 173, 188-89 (1999) (holding that an 1850 Executive Order “was ineffective to terminate Chippewa usufructuary rights” because “the President's power . . . to issue the order must stem either from an Act of Congress or from the Constitution itself”).

103. *Herrera*, 139 S. Ct. at 1699-1703.

treaty right or whether a termination point identified in the treaty itself has been satisfied.”¹⁰⁴

Although the Court in recent years has applied the canons somewhat inconsistently, they remain good law; additionally, “[i]nconsistent use of the canons of construction in interpreting Indian treaties and statutes jeopardizes Indian rights, Indian interests, and the federal-Indian trust.”¹⁰⁵ In the context of water rights, the canons of construction may be applied to interpret land grants as including rights to water unless Congress specifically stated otherwise, since the *Winters* court found that the Indians would have understood land grants to include water rights.¹⁰⁶

VI. CALIFORNIA INDIAN HISTORY: PUBLIC DOMAIN ALLOTMENTS AND THE “LOST TREATIES”

This Part discusses California as a case study for applying the Indian canons of construction to laws governing Indian land, including the statutes establishing PDAs, to reach conclusions about PDA water rights. Accordingly, this Part contains a brief historical overview of California Indian land tenure. Native history in California is unique, due to California’s history as Indigenous, Spanish, Mexican, independent, and United States territory.¹⁰⁷ In part due to this history, California has a large share of PDAs as well as fully appropriated water systems in most of the state, making the water rights of PDAs a crucial human-rights issue for California Indian allottees and their heirs and designees.¹⁰⁸

California’s Indigenous peoples have a long history stretching back through time immemorial. Their interactions with Europeans began not with settlers coming west from the British colonies, but with Spanish explorers coming north from Mexico. California has belonged successively to its Indigenous peoples, to the Spanish Crown, to Mexico, and to the United States as a territory and as a state.¹⁰⁹ A thorough examination of this history, or even of California Indians’ history with the United States federal government, is outside the scope of this

104. *Id.* at 1696.

105. Jill De La Hunt, Note, *The Canons of Indian Treaty and Statutory Construction: A Proposal for Codification*, 17 U. MICH. J.L. REFORM 681, 681 (1984).

106. *Winters v. United States*, 207 U.S. 564, 576 (1908).

107. See KENNETH P. MILLER, *TEXAS VS. CALIFORNIA: A HISTORY OF THEIR STRUGGLE FOR THE FUTURE OF AMERICA* (2020).

108. CAL. WATER BDS., *supra* note 26.

109. See Stephen Aron, *Convergence, California, and the Newest Western History*, 86 CAL. HIST. 4 (2009).

Essay. Instead, this Essay will briefly describe the evolving status of Indian land in California and why PDAs play such a critical role in in that context.¹¹⁰

Spanish and Mexican colonization represented, for Indigenous peoples, a contradiction between words and actions that resulted in death and dispossession lasting over a century. Nominally, Spain's Law of the Indies recognized the Indians' territorial rights and claims; the Spanish crown instructed that when building pueblos and other settlements

the Indians shall be given all the land [and more, if possible] that belongs to them, both as to individuals and communities alike, and, specially those lands where they may have made ditches [acequias], or any other improvement And for no reason can these lands be sold or taken away from them.¹¹¹

That protection extended to the Indians' water rights; the U.S. Court of Appeals for the Tenth Circuit noted in 2020 that the Spanish settlers "never actually ended the Pueblos' exclusive use of water or limited their use in any way."¹¹²

Despite the Crown's strong language, these protections were not to be realized. Spain's establishment of twenty-one California missions between 1769 and 1823 removed tens of thousands of Indians from their traditional homelands and mixed together different bands and Tribes who came from different places with different cultures and languages.¹¹³ When California passed from Spain to Mexico, the missions were maintained in much the same manner. Missions bore some similarity to allotments in that they were an attempt to convert Indians into western-style farmers (albeit specifically Christian ones).¹¹⁴ Like allotment land, mission land was held in trust rather than owned by the Indians who labored upon it, with a view that one day, when the Indians proved themselves sufficiently "capable," the missions would be secularized and the land granted to them.¹¹⁵ Instead, beginning in 1834, the Indians were removed from the

110. William Wood, a historian at the University of California, Los Angeles, has provided a thorough recounting and analysis of Indian country in California as it was legally and practically approached by successive colonizing powers. William Wood, *The Trajectory of Indian Country in California: Rancherias, Villages, Pueblos, Missions, Ranchos, Reservations, Colonies, and Rancherias*, 44 TULSA L. REV. 317 (2013).

111. *Id.* at 320 n.9 (quoting *State ex rel. Reynolds v. Aamodt*, 618 F. Supp. 993, 997 (D.N.M. 1985)).

112. *United States v. Abouselman*, 976 F.3d 1146, 1160 (10th Cir. 2020).

113. Wood, *supra* note 110, at 321. While missions have often occupied a hallowed place in California history lessons, they were in practical terms not dissimilar from southeastern plantations, where people were captured and enslaved for field and domestic work. *See id.*

114. *See id.*

115. *See id.* at 324-25.

missions, and the land was granted to Mexican settlers. William Wood notes that “[t]he Mexican government apparently tried to fix this ‘error,’ but ‘few of the Indians were willing to return to the Mission land because of their experiences there.’”¹¹⁶

The United States took possession of California with the Treaty of Guadalupe-Hidalgo in 1848 and promised to uphold “property [rights] of every kind” for Mexicans, including water rights.¹¹⁷ Nominally, the United States also protected at least some of Indian country, but “[b]ecause the American laws protecting Indian lands were so rarely followed, much of what was Indian country in 1846 lost its status as such during the following decades and passed out of Indian possession, ownership, and control.”¹¹⁸ The Land Claims Act of 1851 declared that any land which was not formally claimed within two years would pass into the public domain; unaware of the law’s requirements, most Indians failed to present their claims and became homeless.¹¹⁹ Due to the violence accompanying the Gold Rush and the doctrine of discovery, the Indigenous population of California declined by as much as ninety percent and many of the remaining peoples lost their ancestral lands.¹²⁰

In 1851, congressional representatives went to California to make treaties with the Indians, whereby they would be settled on reservations like the Native peoples of other United States territories. 139 Tribes and nations signed 18 treaties reserving 8.5 million acres of land in California for Indian reservations and granting the rest to the United States.¹²¹ However, when the representatives returned to Washington, the senators from California felt that too much valuable land had been granted to the Indians and caused the treaty ratifications to fail.¹²²

116. *Id.* at 325 (internal citation omitted). It should be noted that other types of Indian settlements, such as pueblos and rancherías, were also recognized by the Spanish and Mexican governments; however, those terms were used with less specificity and most of the Indian land underwent similar trends in ownership whatever its name. *See id.* at 322-24. For the sake of simplicity, this Essay discusses missions.

117. Anastasia S. Stevens, *Pueblo Water Rights in New Mexico*, 28 NAT. RES. J. 535, 546 (1988) (quoting Treaty of Guadalupe Hidalgo, Mex.-U.S., art. VIII, Feb. 2, 1848, 9 Stat. 922).

118. Wood, *supra* note 110, at 331.

119. *California Tribal Status Act of 1991: Hearing on H.R. 2144 Before the H. Comm. on Interior and Insular Affairs*, 102d Cong. 94 (1992) [hereinafter *California Tribal Status Act Hearing*] (statement of Stephen V. Quesenberry, Director of Litigation, California Indian Legal Services); *see also* INDIAN RTS. ASS’N, *THE PRESSING NEEDS OF THE WARNER RANCH AND OTHER MISSION INDIANS IN SOUTHERN CALIFORNIA: AN APPEAL FOR PROMPT CONGRESSIONAL ACTION* 2-3 (1901) (appealing to Congress to remedy the harm caused by the Land Claims Act of 1851).

120. Wood, *supra* note 110, at 332-33.

121. *Id.* at 338-39; *California Tribal Status Act Hearing*, *supra* note 119, at 94 (statement of Stephen V. Quesenberry).

122. Wood, *supra* note 110, at 339-40.

The eighteen treaties were “sealed in a vault,” becoming known as the “lost treaties,” and the land reverted to the public domain – although Congress neglected to inform the Tribes, many of whom had already moved to the agreed-upon reservation land.¹²³ Congress later attempted to provide settlement for California Indians through the Rancheria Act of 1958, but “the water and sanitation facilities promised the Indians under the terms of the Act were, in virtually every circumstance, either inadequate or not provided at all,” so most of the land passed out of Indian ownership through tax sales or under duress to obtain basic necessities.¹²⁴

This is the context in which California Indians today make claims to PDAs under the General Allotment Act of 1887. Much of the land that had legally been theirs – indeed, land that Congress attempted to reserve for their benefit – passed into the public domain through a combination of vigilantism, well-intentioned but poorly enforced laws, and blatant land grabs.¹²⁵ Over the past century, “five rancherias, an ‘Indian village,’ an ‘Indian community’ and four reservations have been established [in California],” and 400 allotments have been granted from the public domain.¹²⁶ The terminology is varied because of California’s unique history; only in California have “the words ‘ranchería,’ ‘village,’ ‘pueblo,’ ‘mission,’ ‘rancho,’ ‘reservation,’ [and] ‘colony’ . . . been used to describe Indian country.”¹²⁷

Most of these types of Indian country have been understood to include water rights, in part due to their history dating back to Spanish colonization. Applying the Indian canons of construction, therefore, it is reasonable to assume that PDAs – like the rest of California’s Indian country – would include water rights for three reasons.

First, Indian country in California has historically included water rights, in part due to the legacy of Spanish law. Since the first European attempts at colonization, treaties with California Indians have reserved water rights either expressly (as with the Treaty of Guadalupe-Hidalgo) or impliedly (as with the

123. *Id.* at 340. The treaties were sealed away from the public until 1904. *Id.* at 356 n.218.

124. *California Tribal Status Act Hearing*, *supra* note 119, at 96 (statement of Stephen V. Quesenberry).

125. See Wood, *supra* note 110, at 332-40; *California Tribal Status Act Hearing*, *supra* note 119, at 98 (statement of Stephen V. Quesenberry).

126. Wood, *supra* note 110, at 362 (quoting *California Indians and Their Reservations: Rancherias*, SDSU Libr. (Feb 11, 2022, 10:45 AM), <https://libguides.sdsu.edu/c.php?g=494769&p=3389018> [<https://perma.cc/5S46-EXV8>]); see *Burns Paiute Hearing*, *supra* note 16, at 7-9.

127. Wood, *supra* note 110, at 362. Wood notes that colonizing governments have recognized that a reservation of land for Native people in the southwest is incomplete without rights to water – whether through the Spanish crown’s instructions not to interfere with existing Indian use, or through *Winters* rights in the modern context.

unratified reservation treaties).¹²⁸ It is therefore likely that Indians accepting allotments—the latest in a long line of Indian land reservations—would understand them to include rights to water, which falls within the first requirement of the canons to defer to Indians’ own interpretation of laws that apply to them.¹²⁹ Second, the statute’s silence should, according to the canons, be construed to the Indians’ benefit, which would certainly include water rights.¹³⁰ As mentioned earlier, California already experiences water scarcity, meaning that any Indian allottee wishing to make a home on a PDA would need to establish a water right independent of the state appropriation system.¹³¹ Finally, the trusteeship obligations of the United States to Indians means that laws providing land to Indians as a home or settlement should be interpreted as including an obligation to provide an actual benefit, which for a PDA must include a right to water.¹³²

VII. COMPETING SYSTEMS: INDIAN WATER RIGHTS AND STATE APPROPRIATIONS

The complex overlap of state, federal, and Tribal jurisdiction on shared watersheds can make water-rights adjudication complicated.¹³³ This Part explains how states and reservations have historically balanced water rights and how

^{128.} See *id.* at 320.

^{129.} See Brief of Indian Law Professors, *supra* note 102, at 4; 1 COHEN, *supra* note 92, § 2.02.

^{130.} See, e.g., Brief of Indian Law Professors, *supra* note 102, at 5; see also Wash. State Dep’t of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000, 1011, 1015-16 (2019) (holding that an Indian-owned fuel distributor was not subject to state taxes because of a treaty provision barring states from interfering with the Yakama Nation’s “right, in common with citizens of the United States, to travel upon all public highways” (quoting Yakama Nation Treaty of 1855, U.S.-Yakama, art. III, June 9, 1855, 12 Stat. 951)).

^{131.} See Brian Gray, Ellen Hanak, Richard Frank, Richard Howitt, Jay Lund, Leon Szeptycki & Barton Thompson, *Allocating California’s Water: Directions for Reform*, PUB. POL’Y INST. OF CAL. 4 (Nov. 2015), https://www.ppic.org/wp-content/uploads/content/pubs/report/R_1115BGR.pdf [<https://perma.cc/X6JZ-FWLU>].

^{132.} *Saulque v. United States*, 663 F.2d 968, 975 (9th Cir. 1981) (finding that the Secretary of the Interior should only approve allotments to Indians that could actually support them, including having enough water).

^{133.} Since the passage of P.L. 280 and subsequent jurisprudence, most notably *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486 (2022), the exemption of Indian country from state jurisdiction is no longer as complete as it once was, particularly in the area of criminal law. However, for many civil-law concerns, and for the purposes of this Essay, we may consider the boundaries of Indian reservations as the end point of state jurisdiction. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588, 588-90 (codified as amended at 18 U.S.C. §§ 1162, 1360); see, e.g., *Washington v. Confederated Tribes*, 447 U.S. 134, 150-51, 160-61 (1980) (holding that the state of Washington could tax on-reservation cigarette sales to everyone except Tribal members).

PDAs could assert water rights in systems where the water is mostly or entirely appropriated.

A. Defining and Integrating Reserved and Priority Rights

Water regulation in the United States is primarily a matter of state law. The federal government regulates water quality (though much of this is done through state mechanisms) but leaves allocation to state governments.¹³⁴ Eastern states tend to use a riparian system that assigns water rights based on property ownership and “reasonable” use, while the more arid western states use prior appropriation, also known as priority rights or the Colorado doctrine.¹³⁵ Prior appropriation is a “first come, first served” doctrine, in which the earliest claimant has a superior right to later appropriators, so long as they make actual beneficial use of all the water claimed.¹³⁶

Federal reserved rights, such as *Winters* rights, are not subject to prior appropriation or the beneficial-use requirement.¹³⁷ Because Indian country is under federal jurisdiction, state law typically does not apply to Indians on Tribal land. However, when federally reserved rights are adjudicated in a priority system, courts have typically treated them as being part of that system with a priority date of the agreement, order, or statute creating the reservation.¹³⁸ Despite being a sort of patch from one system into another, the end result is usually a cognizable and usable water right for Indians:

[R]eserved rights, like appropriation rights, are assigned priority dates. But the priority of reserved rights is no later than the date on which a reservation was established, which, in the case of most Indian reservations in the West, is earlier than the priority of most non-Indian water rights. Thus, a reservation established in 1865 that starts putting water to use in 1981 under its reserved rights has, in times of shortage, a priority

^{134.} See Frank J. Trelease, *Federal Limitations on State Water Law*, 10 BUFF. L. REV. 399, 399-400 (1961).

^{135.} See *id.* at 407; see also Wells A. Hutchins & John R. Bliss, *The New Mexico Law of Water Rights*, U.S. DEP’T OF AGRIC. 9-11 (1955), <https://www.ose.state.nm.us/Library/TechnicalReports/TechReport-004.pdf> [<https://perma.cc/XAK3-AQQ3>] (discussing the repudiation of the riparian doctrine in favor of the prior-appropriation doctrine in New Mexico).

^{136.} See *State ex rel. Reynolds v. Mendenhall*, 362 P.2d 998, 1001 (N.M. 1961) (quoting JOSEPH R. LONG, *A TREATISE ON THE LAW OF IRRIGATION* 126 (2d ed. 1916)); see also *Boyd Est. ex rel. Boyd v. United States*, 344 P.3d 1013, 1016 (N.M. Ct. App. 2014) (“To establish an existing water right, a claimant must demonstrate his intent to appropriate the water and he must show that he has actually diverted the water and applied it to beneficial use.”).

^{137.} See Allison, *supra* note 30, at 1203.

^{138.} 1 COHEN, *supra* note 92, § 19.01.

that is superior to any non-Indian water right with a state-law priority acquired after 1865. For these reasons, *Indian rights are generally prior and paramount to rights derived under state law*.¹³⁹

Following this logic, PDAs would have reserved water rights with a priority date of the creation of the allotment – that is, when it was patented to the allottee. In *United States v. McIntire*, holders of an allotment argued that their Indian predecessor in interest had acquired water rights on the Kootenay reservation through prior appropriation; however, the Court held that “the Montana statutes regarding water rights are not applicable, because Congress at no time has made such [state] statutes controlling in the reservation,” and the water right was not valid.¹⁴⁰ Conversely, where non-Indians hold allotments on a reservation, courts have found that state law can apply. In *United States v. Anderson*, the Ninth Circuit found that waters in the Chamokane Basin used by non-Indian allottees in excess of the Tribe’s reserved rights were subject to state regulation.¹⁴¹

B. States vs. Tribes: How Water Rights Are Settled

Where Tribal and state water claims conflict, courts typically appoint a water master or third party to examine legal and scientific evidence in order to determine the water rights of disputing parties.¹⁴² The appointment of water masters has become particularly relevant as the U.S. Supreme Court’s interpretation of the McCarran Amendment has given states the opportunity to quantify federal reserved water rights, so long as they are willing to expend the time and money for adjudications.¹⁴³

139. *Id.* (emphasis added) (internal citations omitted).

140. 101 F.2d 650, 654 (9th Cir. 1939).

141. 736 F.2d 1358, 1366 (9th Cir. 1984).

142. See, e.g., CAL. WATER CODE §§ 4150-4151 (West 2022); see also *Anderson*, 736 F.2d at 1365 (explaining that “[t]he district court appointed a federal water master . . . responsible . . . [for] administer[ing] the available waters in accord with the priorities of all the water rights as adjudicated”). Water adjudications are so difficult and fact-intensive that they typically require the appointment of an independent expert, even in situations where multiple attorneys and federal and state government agencies are involved. The *Adair* case discussion is included to give an example of what it might look like to adjudicate the water rights of PDAs in court.

143. 2 WATERS AND WATER RIGHTS § 37.04 (2022); see also *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). The Supreme Court has interpreted the McCarran amendment as waiving the United States’ sovereign immunity from joinder as a defendant in general stream adjudications where the rights of all claimants are determined. In plain terms, the United States can no longer avoid being bound by state water adjudications by refusing to consent to joinder in a state lawsuit, as it had done prior to 1926. See also *The McCarran*

Water masters are particularly necessary when adjudicating the rights of PDAs because those adjudications require fact-intensive inquiries into the individual legislative history and current status of the land parcel:

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.¹⁴⁴

For instance, in *United States v. Adair*, Congress terminated the Klamath reservation, returning it to the public domain, then allotted some land to Klamath Indians.¹⁴⁵ The Court held that Congress had intended that the water rights of the reservation continue on the allotments.¹⁴⁶ Water masters use a variety of techniques to determine how much water Congress intended to reserve to fulfill a particular purpose. In the *Adair* adjudications, the water master determined a “yearly allocation of specific quantities of water to the various parties to the federal suit.”¹⁴⁷ Over the decades since the establishment of *Winters* rights, methods for quantifying those rights against state appropriations have evolved, and their use depends heavily on the established purpose of the reservation.¹⁴⁸

Overall, adjudications have emphasized treaties, executive orders, and other documents establishing Indian land reservations to determine the purpose of land grants or reservations and the amount of water necessary to fulfill that purpose.¹⁴⁹ For PDAs, whose purpose was to provide homes for Indian families, such an investigation might depend upon the geography, history, and other attributes of a particular allotment, as well as the date on which the allotment was given over to the Indian owner or beneficiary.

Amendment, U.S. DEP’T OF JUST. (May 12, 2015), <https://www.justice.gov/enrd/mccarran-amendment> [<https://perma.cc/HQ9G-6HA8>].

144. Margaret Schaff & Cheryl Lohman, *Indian Allottee Water Rights: A Case Study of Allotments on the Former Malheur Indian Reservation*, 31 COLO. NAT. RES. ENERGY & ENV’T L. REV. 147, 154 (2020) (providing an example of the inquiry process and reasoning courts may use to determine water-rights allocations).

145. 478 F. Supp. 336, 346 (D. Or. 1979), *aff’d as modified*, 723 F.2d 1394 (9th Cir. 1983). Some, but not most, PDAs are allotted from land that is in the public domain pursuant to a reservation termination. See *supra* text accompanying notes 121-127.

146. *Id.* at 345-46.

147. *Adair*, 723 F.2d at 1403 n.7.

148. Hedden-Nicely, *supra* note 35, at 210-55.

149. *Id.* at 209.

CONCLUSION

Public domain allotments were created to serve the needs of Native Americans who did not have homes on reservations or other Tribal land. It is clear from legislative and historical context that these lands serve a purpose distinct from other allotted lands: rather than a tool of expansion, they are a nod to the United States's trust responsibility to provide settlement for the Indigenous peoples of this land. PDAs comprise about 1.23 million acres in the United States, primarily in the West, including about 20,000 acres in California.¹⁵⁰ In California and elsewhere, PDAs can provide land to Native peoples who were otherwise completely dispossessed of their ancestral territories. In order to serve their purpose as homes and settlements for Indians, or in order for these grants to have any real value to their present-day Indian owners, it is imperative that reserved water rights attach to the land with a priority date of the federal patent.

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¹⁵⁰. *Burns Paiute Hearing*, *supra* note 16, at 5 (statement of Kenneth L. Payton).