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Tribes' Reply to the State

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Case #4993

File # 290

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IN THE DISTRICT COURT OF THE

FIFTH JUDICIAL DISTRICT

STATE OF WYOMING

IN RE: THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE BIG HORN RIVER SYSTEM AND ALL OTHER SOURCES, STATE OF WYOMING	)	Civil No. 4993

TRIBES' REPLY TO THE STATE'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND BRIEF

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STATE'S PROPOSED FINDINGS OF FACT,
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The State, as the Master must be painfully aware, has filed 16 loose-leaf volumes designated as the "State's Proposed Findings of Fact, Conclusions of Law, Judgment and Interlocutory Decree" (hereafter "State's Findings" or "Conclusions," as appropriate).1/

Rather than referring to the State's Findings one by one, which would repeat the State's lengthy presentation, we respond to the basic arguments made by the State, with reference to its proposed findings and ours, where appropriate. Where we make no specific response to a finding, the Master should not conclude we do not object to it—but merely that we feel it is already sufficiently answered in our proposed findings and brief.

1/ The State's filing also contains, interspersed in it, the State's brief. The Tribes suggest to the Master that major portions of the 16 volumes are inappropriate and should be rejected. Eight of the 16 volumes (Vols. IX through XVI, labeled appendices) are in fact an attempt to present new evidence after the close of trial, evidence presented without a witness to vouch for it and not subject to cross-examination or voir dire. In a separate motion, we move to strike those volumes.

I.

THE STATE'S PROPOSED FINDINGS AND CONCLUSIONS THAT CONGRESS DID NOT INTEND TO RESERVE WATER FOR THE WIND RIVER RESERVATION ARE CLEARLY WRONG AND MUST BE REJECTED.

The State devotes 160 pages of its proposed findings to an argument that Congress did not intend to reserve water for the Wind River Reservation and asks the Master to make findings of fact and conclusions of law to that effect.[2/]

In these proposed findings and conclusions, the State asks the Master to gloss over the clear intent of the Indians and the United States in the Treaty of July 3, 1868, to reserve the water needed to develop the Wind River Reservation. That Treaty reserved the water. The question after that is not whether Congress reserved water, but whether, by a clear and unequivocal act, it took from the Indians water reserved for them. The State, not the Tribes, has the burden of proof in showing such a taking; and, as we show within, the burden is not lightly satisfied and has not been satisfied here.

These same arguments were made by the State more than a year ago at the conclusion of the boundaries and dates trial. We hope by now the Master has rejected this persistent but unfounded position of the State. Because the State now asks the Court to make findings of fact and conclusions of law on this issue, findings and conclusions which would be clearly erroneous, we make this additional reply.

2/ State's Findings 3-1 to 3-14, pp. 67-184; State's Conclusions 3-1 to 3-12, pp. 1,514-1,558.

A. The Tribes' Water Rights Were Reserved by the Treaty of July 3, 1868.

The Tribes' water rights were reserved in the Treaty of July 3, 1868, 15 Stat. 673. The determination of whether the Tribes have a reserved water right depends upon the intent of the Tribes and Congress in that Treaty. There is not the slightest doubt that both the Shoshone Tribe and Congress intended to reserve for the Shoshone Tribe the water necessary to develop fully the Reservation as a permanent homeland. The State admits (Finding 2-1, Vol. III, p. 22) that:

> In 1863 talks between the Shoshone Indians led by Chief Washakie and the United States Government resulted in agreement between the two parties generally delineating the boundaries within which the Eastern Shoshone roamed, a 44,672,000 acre region comprising parts of Wyoming, Colorado, and Utah.

The State further admits that:

> [O] n July 3, 1868 a final agreement was reached. The Shoshone Indians were granted the land they asked for, approximately 3,054,182 acres, in the Wind River Valley and the government regained a total control over 41,000,000 acres throughout Wyoming, Colorado, Utah and Idaho.

Id., p. 23.

Thus, the consideration to the United States was control over 41,000,000 acres, to the Tribes' retention of a homeland of a little over three million acres.

The negotiations leading to the Treaty of July 3, 1868, as the State admits, were amicable. The Shoshone had been allies of the United States and had lived in peace with the white men. They were not a defeated nation, but

they knew their way of life must change. They agreed the Wind River Reservation would be their permanent home.

The water available in the Reservation, as well as its mineral resources, was well known at the time it was chosen by the Shoshone. Indian Agent Luther Mann described the Wind River Valley as follows:

> The country abounds in game, has a very mild climate, and possesses agricultural advantages which make it a great desideratum to the white man. Numerous oil springs have been discovered and located in the valley of the Pawpawgee, but this Tribe are strongly opposed to any invasion of their territory by the whites.3/

In United States v. Shoshone Tribe, 304 U.S. 111 (1938), the government, in trying to diminish the award against it for giving a half-interest in the Reservation to the Arapahoe Tribe, argued that the Treaty did not grant title to timber and minerals to the Indians but merely a right of occupancy of the land. The Supreme Court strongly rejected this contention. The court stated (id., at 114):

> Upon consummation of the treaty, the tribe went, and has since remained, upon the reservation. It was known to contain valuable mineral deposits—gold, oil, coal and gypsum. It included more than 400,000 acres of timber, extensive well-grassed bench lands, and fertile river valleys conveniently irrigable. It was well protected by mountain ranges and a divide, and was the choicest and best watered portion of Wyoming (emphasis added).

3/ Luther Mann, Sr., Indian Agent, to Duane Doty, Superintendent of Indian Affairs, Fort Bridger, September 20, 1862, Document 73, Part 6, quoted in Morgan, Washakie and the Shoshoni: A Selection of Documents from the Records of the Utah Superintendency, Volume 27, No. 2 (October 1955).

The court rejected the government's narrow construction of the Treaty and held that treaties with the Indians "are not to be interpreted narrowly, as sometimes may be writings expressed in words of art employed by conveyancers, but are to be construed in the sense in which naturally the Indians would understand them." Id. at 116. The court held that the Indians had been granted "peaceable and unqualified possession of the land in perpetuity." Id.

In Winters v. United States, the Supreme Court, of course, almost thirty years earlier, had held under almost identical circumstances that an agreement with the Indians, although not referring to water at all, must be interpreted as including a "reservation of the waters" 207 U.S. 564 at 576.

In light of Winters and Shoshone Tribe, it is established in law beyond any doubt that the Treaty of 1868 reserved for the Shoshone Indian Tribe the waters needed to develop the Reservation. The Arapahoe Tribe later acquired an undivided, one-half interest in the Reservation. Shoshone Tribe v. United States, 299 U.S. 476 (1937). See Tribes' Finding No. 2, boundaries and dates trial. For the Master to endorse findings or conclusions not recognizing those reserved rights would be in error. For further discussion, we refer the court to the Tribes' pretrial brief dated April 4, 1980, pages 2-12 and to the Tribes' reply brief filed in August 1980, pages 1-3.

B. Wyoming's Admission into the Union Did Not Affect the Tribes' Reserved Rights.

The State next asks the Master to conclude that the admission of Wyoming to the Union on July 10, 1890, deprived the Tribes of their reserved water. See State's Finding 3-4, Vol. III, p. 74, and Conclusion 3-6, Vol. VIII,

pp. 1,530-1,533. The short answer to this is that the non-Indian irrigators in Winters made the identical argument, and it was roundly rejected by the Supreme Court. In Winters the Court stated:

> Another contention of appellants is that if it be conceded that there was a reservation of the waters of Milk River by the agreement of 1888, yet the reservation was repealed by the admission of Montana into the Union, February 22, 1889, C.180,25 Stat. 676, "upon an equal footing with the original States." . . . That the government did reserve [the water] we have decided, and for a use which would be necessarily continued through years. This was done May 1, 1888, and it would be extreme to believe that within a year Congress destroyed the reservation and took from the Indians the consideration of their grant, leaving them a barren waste—took from them the means of continuing their old habits, yet did not leave them the power to change to new ones."

Id., 207 U.S. at 377.

The Court then proceeded also to reject the argument that the provisions of the Montana enabling act, granting the State power to dispose of the waters of the State under its laws, in any way interferred with the Tribes' reserved right (id. at 577-578).

We note also that Michael D. White rejected the very arguments he makes here when he served as Master in the Colorado adjudication. In the Matter of the Application for Water Rights of the United States of America, Water Divisions 4, 5 and 6, etc., Aug. 6, 1976, hereafter "Colorado Master's Report." See Tribes' Brief of August 1980, p. 2.

C. The 1905 Act Does Not Affect the Intent of Congress in the Treaty of 1868, Nor Did It Take the Tribes' Reserved Water Rights.

The State next asks the Master to conclude that the Agreement of 1904 and the Act of 1905 opening the northern part of the Reservation to non-Indian

settlement in some way shows that Congress and the Tribes in 1868 did not reserve water. State's Findings 3-7 through 3-9, Vol. III, pp. 90-112; State's Conclusion 3-7, Vol. VIII, pp. 1,534-1,535. Congress and the Tribes clearly had already reserved water for the Tribe by the Treaty of 1868. Nothing Congress might have done in 1905, a generation later, could change the intent of an earlier Congress and an earlier group of Tribal representatives. "[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." United States v. Price, 361 U.S. 304, 313 (1960). This is especially true where more than a generation has passed between the two Congresses. As the Supreme Court stated in such a situation (Rainwater v. United States, 356 U.S. 590, 593 (1958)):

> At most, the 1918 amendment is merely an expression of how the 1918 Congress interpreted a statute passed by another Congress more than a half century before. Under these circumstances such interpretation has very little, if any, significance.

The only relevant question concerning the 1905 Act is whether by that Act, Congress, in the Fifth Amendment sense, took the Tribes' reserved water.

In arguing that Congress deliberately took from the Indians an important part of their property right, the burden of proof shifts to the State, and the burden of proof is a difficult one indeed. It is well established that extinguishment of Indian property rights must be clearly and plainly provided by Congress; it will never be implied. Menominee Tribe of Indians v. United States, 391 U.S. 404, 412-413 (1968); United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339, 353-355 (1941). See Mattz v. Arnett, 412 U.S. 481, 505 (1973). Moreover, in interpreting agreements with the Indians, or acts of Congress affecting Indian rights, ambiguities must be resolved in favor of the Indians.

Washington v. Washington State Commercial Passenger Fishing Vessel Assn., 443 U.S. 658, 675-676 (1979); United States v. Shoshone Tribe, 304 U.S. 111, 116; Winters v. United States, 207 U.S. 564, 576 (1908).

The 1905 Act must not be misunderstood. The State treats it as if it were a sale of the Indians' land to the United States for a cash consideration. But no sale was made to the United States. No money was paid by the United States. What the Act did was to grant a power of attorney by the Tribes to the United States to sell Indian lands, with the proceeds to go to the Tribes. Until lands were actually sold, they remained Indian lands. Article IX specifically stated:

> It is understood that nothing in this agreement contained shall in any manner bind the United States to purchase any portion of the land herein described . . . or to dispose of said lands except as provided herein, or to guarantee to find purchasers of said land or any portion thereof, it being the understanding that the United States shall act as trustee . . . for said Indians and pay over to them the proceeds received from the sale thereof only as received, as herein provided.

33 Stat. 1,018.

Very little land was sold, and the power of attorney was effectively revoked in 1915, only ten years after the Act was passed. See Tribes' Finding No. 4, filed August 29, 1980.

The Act, far from "taking" the Indians' water rights, also specifically provided (Article X):

> It is further understood that nothing in this agreement shall be construed to deprive the said Indians of the Shoshone or Wind River Reservation, Wyoming, of any benefits to which they are entitled under existing treaties or agreements, not inconsistent with the provisions of this agreement.

33 Stat. 1,018.

The only provision on water rights, Article III, did not show an intent to deprive the Indians of their reserved rights, but merely provided that any moneys remaining in a fund created by sales of land, after payment of per-capitas:

> . . . shall be devoted to surveying, platting, making of maps, payment of the fees, and the performance of such acts as are required by the statutes of the State of Wyoming in securing water rights from said State for the irrigation of such lands as shall remain the property of said Indians, whether located within the territory intended to be ceded by this agreement or within the diminished reserve.

33 Stat. 1,017.

? Working

This provision falls far short of a congressional taking of the Tribes' reserved rights--without any consideration for lands not sold. In historical context, the provision is easily understood. The United States had long assumed that its reservations of land reserved the water needed for the land. But around the turn of the century--before the Winters decision in 1908--states were beginning to contest that right. Thus, it might be prudent to hedge one's bets by recording federal water rights with the State. Note, however, that the 1905 Act did not require such registration--it only provided that funds, if any, available after a per-capita payment, were to be used in securing state water rights.

The contemporary thinking on this issue is shown in the Report of the Commissioner of Indian Affairs, Annual Report of the Department of the Interior for 1906, which recognizes these attacks by the States but, in effect, predicts that the courts will rule as they ultimately did in Winters. That report (p. 82) states:

> Prior to [the Reclamation Act of 1902] there seems to be no instance of anyone denying the right and power of the General Government to appropriate sufficient water on an Indian reservation for the needs of the Indians. Recently, however, these have been denied. Even where the Government has appropriated water under a clear implication of law, having specifically covenanted to protect the water rights of Indians and also, as trustee, expended many thousand dollars of their money in constructing irrigation systems, it has been urged before courts, the Congress, and the Department that the Indians had no such rights. But surely if the Congress could appropriate all the unused waters of the public domain for the purposes of the reclamation act, it could appropriate waters in Indian reservations for the use and benefit of the Indian occupants of those reservations. Whenever the subject has been fairly presented to the Congress it has taken this view, and so far the courts also have sustained the rights of the Indians. (Emphasis added.)

The Commissioner's observation that the courts would sustain the Tribes' reserved rights was vindicated two years later in 1908, when the Supreme Court in Winters upheld the earlier understanding that establishment of Indian reservations reserved the water needed for them, as a matter of federal law.

Perhaps the most conclusive answer to Wyoming's argument, based on Article III of the 1905 Act, is that the same argument was made by Wyoming in 1916 in United States v. Hampleman, No. 753, D.Wyo. 1916, Tribes' Ex. 2, boundaries and dates trial, and was rejected by the federal district court at a time when all these issues were fresh. In the Hampleman case, Wyoming, in its brief (in evidence as part of Tribes Ex. No. 2, supra), quoted Article III of the 1905 Act and specifically argued that it showed Congress did not intend Indians, specifically Mrs. Duncan, to have a reserved right to water, but only such rights as they could establish under Wyoming law. Brief on Behalf of Defendant, at 4-9, in Tribes' Ex. No. 2. The court, however, finding for the United States and against Wyoming, held that "the lands, ditches, and water rights of the Indian allottees [such as Mrs. Duncan] ...are within the absolute and exclusive jurisdiction of plaintiff [the United States]." Decree in Tribes' Ex. No. 2,

supra; State's Ex. WRIR I&P 34. Since Hampleman was the state engineer acting in his official capacity, under the doctrines of res judicata and collateral estoppel, that decision is binding here against Wyoming's identical contention that Article III was a surrender by Congress of the Indians' reserved rights and an allocation to them of only such water as they could establish a right to under Wyoming law. Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 328-329 (1971); Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326-333 (1979).

Furthermore, assuming, for the sake of argument, that Hampleman is not strictly res judicata, Wyoming's interpretation of Article III must be rejected on the merits. Article III is no more than a direction that certain funds, if available, be used in a certain way. There is absolutely no indication in it of an express declaration by Congress that the Indians' reserved water rights be extinguished. As explained above, the law is clear that extinguishment of Indian property rights must be clearly and plainly provided by Congress; it will never be implied. Furthermore, Article X of the 1905 Act is an express declaration by Congress that nothing in the Act, such as Article III, should be construed to deprive the Indians of any "benefits" to which they were entitled under the 1868 Treaty, if the continuation of those benefits or rights were not inconsistent with the 1905 Act.[4/] See United States v. Parkins, 18 F.2d at 642 discussed below.

[4/] Since the Indians' reserved water rights were just such a "benefit," and their continued existence is consistent with all the other provisions of the 1905 Act, then Article X, in itself, requires the rejection of Wyoming's argument that Article III now be read to divest the Indians of all their preexisting reserved rights. Further, if Article III admits of any ambiguity as to Congress' and the Indians' intentions as to the significance of Wyoming state law for the Indians' water rights, then, as also established above, the ambiguity must be resolved in favor of the Indians.

D. The State's Arguments that Administrative Interpretation of the 1905 Act, or the Legislative History of a 1914 Appropriation, Transforms the 1905 Act into a Taking of the Tribes' Reserved Rights Should Be Rejected.

The State asks the Master to conclude that the attempts by the United States to register tribal water rights with the state of Wyoming constitute an administrative interpretation that the 1905 Act abolished tribal reserved rights. See State's Finding 3-11, Vol. III, pp. 118-156; State's Conclusions 3-2 through 3-5, Vol. VII, pp. 1,515-1,529. It is true that where there is a consistent administrative interpretation of an Act by the Agency in charge of administering it, that interpretation is entitled to great weight. Udall v. Tallman, 380 U.S. 1, 16-18 (1965). Here, however, there clearly is no consistent administrative interpretation of the 1905 Act to the effect that it abolished tribal reserved rights. In the absence of such an administrative history, the State's reference to various attempts to register Indian rights under Wyoming law is of no significance.

To be sure, in the early days of the Act, the United States made attempts to comply with state registration laws, but as early as 1906 the administration doubted the need to do so; see 1906 Annual Report discussed above. By 1916, the administration had taken an official position in court against the State's claim that tribal members' reserved rights are governed by state law and had won. See discussion of United States v. Hampleman, supra. In 1926, after the administrative acts relied upon by the State and after the 1914 Appropriations Act, the United States district court in Wyoming in United States v. Parkins, 18 F.2d 642, again rejected the contention now made by the State that Article III of the 1905 Act and the United States' registry of water rights with the State in any way deprived Indians of their reserved rights. The court, in

holding that the United States had a reserved right to use the waters of Mill Creek for the Indian Irrigation Project without complying with Wyoming law, held (18 F.2d at 643):

> It is not apparent that the waters in the streams within the Indian reservation were ever specifically granted by the United States to the state of Wyoming, although it is apparently the fact that the Indian service, in promulgating its irrigation project and the officials of the state of Wyoming for the purpose of protecting all landowners who may acquire water rights, have co-operated along the line of taking out water for irrigating purposes with the consent of the state.

The Court further held that the water had been reserved for the Indians:

> [T] he government has reserved whatever rights may be necessary for the beneficial use of the government in carrying out its previous treaty rights; those rights having become fixed and established before the act of admission which made Wyoming a sovereign state. The treaty in this case, like all other treaties with the Indians creating reservations, contemplates the use and benefit of the lands within the reservation to its wards, the Indians, which likewise includes the irrigation of those lands, they being arid in character. Winters v. United States, 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340. So far as the issues here are concerned, it would appear that the government, in the establishment of its irrigation project, had a right to the use of the present waters in Mill creek for its Indian wards.

Id.

The State then argues (Finding 3-12, Vol. III, pp. 157-173) that a 1914 appropriations act supports its view that the 1905 Act deprived the Indians of their reserved rights. It does not. The Appropriations Act of 1914, 38 Stat. 582, states not a word one way or the other on reserved rights for the Wind River Reservation. All it does is appropriate $25,000 to continue construction of the federal Indian project then being built on the Reservation, 38 Stat. at 608. The State seizes on a discussion of a provision, never voted on, that would have added an express reservation of water for land allotted or to be allotted on

the Wind River and several other reservations. The provision—applicable only to allotted lands—was dropped on a point of order—not because Congress substantively wanted the provision, wanted to omit it, or reached any conclusion on whether it was needed. See State's Finding 3-12(j), Vol. III, p. 170.

Since the provision was ruled out of order by the Congress, the debate concerning it does not show an understanding of Congress one way or the other on the merits. The State, however, puts considerable reliance on a report by Mr. Meritt, Assistant Commissioner of Indian Affairs, supporting the allottee provision. See State's Finding 3-12(d), Vol. III, pp. 158-160. Mr. Meritt, when addressing Congress, stated that he supported the language because "otherwise the Indians stand a chance of losing their water rights or else taking their water rights status to the courts for determination." (emphasis added). Indian Appropriations Bill (H.R. 12579) Hearings before a Subcommittee of the Committee on Indian Affairs, 1914, p. 379; see State's Finding 3-12(d), Vol. III, p. 159.

This is far from the administration or Congress concluding that the 1905 Act took the Tribes' water rights. At most, a deputy commissioner thought the allottees might "stand a chance" of losing water rights unless they went to court. What subsequently happened, of course, is that the allottees did take their water rights to court, and the rights were confirmed in 1916 in Hampleman, supra, two years after the 1914 Appropriations Act, and again in 1926 in Parkins, supra, 12 years after the 1914 Act. Whether Mr. Meritt was well advised or not in seeking this amendment to an appropriations bill is thus now moot. Clearly, the 1914 Appropriations Act is not a taking, nor does it

convert the 1905 Act into a taking (without any compensation) of the Tribes' reserved water rights.

E. The State's Reliance on State v. Moss and Merrill v. Bishop is Misplaced.

Wyoming also relies upon the state court decisions in State v. Moss, 471 P.2d 333 (1970) and Merrill v. Bishop, 287 P.2d 620 (1955) in support of its interpretation of the 1905 Act as abolishing tribal reserved water rights. State's Conclusions 3-12, p. 1,557, 4-2, pp. 1,559-1,560; and 4-2e, p. 1,563 (all in Vol. VIII). This reliance is misplaced. First, as carefully explained in the Tribes' 1980 brief in support of its proposed findings and conclusions on boundaries and dates, the Moss case deals with the question of criminal jurisdiction on portions of the Reservation, a question unrelated to the question of water rights priority dates at issue here. Tribes' 1980 Brief at 18-19. See also Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 601, n. 24 (1977). Second, the Merrill case concerned only the claims of non-Indian purchasers of former allotments to an 1868 priority date. The holding of the court was that the requisite proof of facts entitling the non-Indian owners of former Indian allotments to an injunction against interference by the State Engineer had not been made. The injunction was denied, and the court noted additional proceedings would be necessary to determine what rights the non-Indian successors to allottees might have. The court made no ruling on Indian rights. Furthermore, if there were any conflict between these state court decisions and the federal court decisions in Hampleman and Parkins as to the interpretation of the 1905 Act of Congress, the decisions of the federal courts would prevail on that federal question. Armstrong v. Maple Leaf Apartments Ltd., 622 F.2d 466, 473, cert. den. 449 U.S. 901 (1979); United States v. Pricepaul, 540 F.2d 417, 424 (C.A. 9, 1976); United States v. Bedford, 519 F.2d 650, 654

(C.A. 3, 1975); Great American Indemnity Co. v. United States, 120 F.Supp. 415, 449 (D.La. 1954).

II.

THE TRIBES' WATER RIGHTS MUST BE BROADLY DEFINED TO SERVE THE PURPOSE OF THE WIND RIVER RESERVATION, NAMELY, TO PROVIDE A PERMANENT HOME FOR THE TRIBES, NOT ARTIFICIALLY LIMITED, AS SUGGESTED BY THE STATE.

The State asks the Master to enter findings limiting the Tribes' water rights to agricultural uses (Findings 5-1 through 5-12, Vol. IV, pp. 394-525; Conclusions 5-1 through 5-7, Vol. VIII, pp. 1,565-1,582); providing only for the Tribes' minimal needs (id., Finding 7-1, Vol. IV, pp. 526-527; Conclusions 7-1 through 7-4, Vol. VIII, pp. 1,583-1,588); and limiting the Tribes' rights, based on the alleged impact on junior water users (id., Findings 42-1 through 42-8, Vol. VIII, pp. 1,421-1,458; Conclusion 8-1, Vol. VIII, pp. 1,589-1,590). All of these requested findings and conclusions are contrary to well-established law and would amount to a breach of the United States' promises to the Tribes in the Treaty of 1868.

A. The State's Primary-Secondary Purpose Argument Has No Applicability to an Indian Reservation.

In support of its primary-secondary purpose distinction, the State relies heavily on United States v. New Mexico, 438 U.S. 696, 702 (1978). But New Mexico does not support the result urged by the State. The Supreme Court in New Mexico, by a divided court, held that Congress, in establishing the Gila National Forest, reserved water for timber and to preserve the watershed for private appropriators, but not for other purposes--recreational, aesthetic, and wildlife. Reserving water for these "secondary purposes" could decrease

available water for Congress' principal purpose—preservation of the forest, irrigation, and domestic use by private appropriators under state law. In short, the basis for the decision was the presence of two conflicting purposes in the same statute--one dominant, the other secondary—which constrained the court to narrow the scope of the secondary purpose in favor of the dominant purpose.

The balancing required in New Mexico is inappropriate here. The statute interpreted in New Mexico—the National Forest Organic Act of June 4, 1897. 16 U.S.C. 473, et seq. (1976), is not involved here. Furthermore, there were no conflicting purposes in creating the Wind River Reservation as there were in creating the Gila National Forest. There is only one overall purpose of the Wind River Reservation—to provide a permanent home for these Tribes—and water has been reserved for all beneficial uses that serve to carry out that purpose. And, for an Indian tribe, unlike for a national forest, the reservation purpose and the accompanying water rights are to be broadly construed. As the Ninth Circuit recently stated in Colville Confederated Tribes v. Walton, 647 F.2d 42, 47 (C.A. 9, 1981):

> The specific purposes of an Indian reservation, however, were often unarticulated. The general purpose, to provide a home for the Indians, is a broad one and must be liberally construed. We are mindful that the reservation was created for the Indians, not for the benefit of the government.
>
> To identify the purposes for which the Colville Reservation was created, we consider the document and circumstances surrounding its creation, and the history of the Indians for whom it was created. We also consider their need to maintain themselves under changed circumstances. See United States v. Winans, 198 U.S. 371, 381, 25 S.Ct. 662, 664, 49 L.Ed. 1089 (1905). (Footnotes omitted.)

The State further argues that the primary purpose in creating the Wind River Reservation was to promote Indian agriculture, and therefore water is

reserved only for agricultural use. See State's Findings 5-1 through 5-12, Vol. IV, pp. 394-525; Conclusions 5-1 through 5-7, Vol. VIII, pp. 1,565-1,582.

As the Tribes have shown in previous submissions to the Court, the United States, through the Treaty of July 3, 1868, reserved the Wind River Reservation as a "permanent home" (Article IV) for the Shoshone Tribe. The Treaty obligated the United States to "ensure the civilization of the tribes" (Article VII) and to provide skilled craftsmen (Article X) and educational facilities (Article VII) so that the Indians could go to school. The mineral wealth of the Reservation was known. The Treaty terms are progressive in scope, indicating an intention to educate and civilize the Indians to become self-sufficient. The Treaty was a reflection of federal Indian policy in general at that time, which was to prepare Indians for life in white man's society, habituate them to industrial pursuits, and to make them self-sustaining. See Tribes' August 1980 Reply Brief, pp. 13-15; see also Part I, supra.

The United States Supreme Court adopted this broad interpretation of the purposes of the Treaty of 1868 in United States v. Shoshone Tribe, 304 U.S. 111 (1938), discussed in Part I supra. The court recognized the wealth and potential of these lands—"the choicest and best-watered portion of Wyoming," id. at 114--and found that the Treaty guaranteed the Tribes "peaceful and unqualified possession of the land," including its valuable mineral and timber resources "in perpetuity." Id. at 116.

Nothing in the Treaty requires that Indians farm or indicates that farming was the sole purpose of the Reservation. As the Walton court noted, Congress envisioned agricultural activities as only a first step in the civilizing process.

Walton, supra, 647 F.2d at 47, n. 9. Other industrial pursuits would follow as the Indians progressed toward the ultimate goal of self-sufficiency.

None of the other documents relied upon by the State, all post-1868, supports its position that agriculture was the only purpose of the Reservation. The reservation purpose was decreed by the Treaty of 1868, and later pronouncements cannot alter that purpose. Indeed, subsequent documents, if relevant at all, only confirm that Congress envisioned pursuits other than farming--and sufficient water therefor--for the Wind River Reservation.

First, the State asserts that the Treaty of September 26, 1872 (the Brunot Agreement), by which Congress purchased from the Tribes the southern part of the Reservation, including some coal-mining lands, "expressly indicates that the United States viewed mining as extraneous to the purpose of the Reservation." Finding 5-5, Vol. IV, p. 407. That argument assumes, incorrectly, that the remaining reservation lands, the lands at issue here, were devoid of minerals. They were not. It also asks the Court to conclude that in disposing of some mineral lands, the Tribes, by trick, lost their other mineral lands—an unsupportable conclusion.

But Congress, well after the Brunot Cession, continued to recognize the Tribes' ownership of minerals. The Act of August 21, 1916, 39 Stat. 519, empowered the Secretary of the Interior "to lease, for the production of oil and gas therefrom, lands within the . . . Reservation . . . and the proceeds or royalties . . . shall be applied to the use and benefit of said [Shoshone] tribe." Id. Thus, contrary to the State's argument, the fact that minerals and mineral development have an established history on the Wind River Reservation is of

prime importance to the Tribes and is one of the beneficial uses within the permanent-homeland purpose of the Reservation for which water has been reserved.

The State next makes the equally fallacious argument that the Agreement of April 1, 1896, removing the Big Horn Hot Springs from the Reservation to create a national park, makes it "certain" that aesthetics was not a purpose of this Reservation. The State's argument could be correct only if the government had purchased the Hot Springs for the sole purpose of removing any and all aesthetic areas from the Reservation--a totally absurd and unsupported claim. The federal government has always recognized the beauty of this Reservation. In 1868 it was well known that the lands being reserved for the Indians were one of the finest valleys in the State; see p. 5, supra. Today the Wind River Reservation is the only Indian reservation in the country containing a federally designated roadless area, where motorized transportation is banned in order to preserve the pristine beauty of the land. 25 C.F.R. 163.1-.3 (1981). The weight of the evidence, therefore, demonstrates that preservation of aesthetic beauty on this Reservation is an accepted element of preserving the lands as the Tribes' permanent home.

In sum, in Winters, 207 U.S. at 564, the court found that "[t]he Indians had command of the lands and the waters—command of all their beneficial use, whether kept for hunting, and grazing . . . or turned to agriculture and the arts of civilization." Id. at 576 (emphasis added). The court rejected the conclusion that the Indians gave up this dominion over the waters in the lands they reserved. The Tribes' water rights thus extend beyond agriculture to include hunting, fishing, and aesthetic protection, which are traditional uses, and

mineral development and other industrial development which are part of "the arts of civilization."

B. The State's "Minimal Needs" Argument Has No Applicability to Indian Reserved Rights.

The State suggests, citing Cappaert v. United States, 426 U.S. 128 (1976), and United States v. New Mexico, supra (Conclusions 7-1 through 7-4, Vol. VIII, pp. 1,583-1,588), neither of which involves Indian reserved rights, that the Master should limit the amount of water reserved to the Tribes to the minimal amount of water needed to prevent the reservation purpose from being entirely defeated.

There is absolutely no basis for this grudging approach to determining the Tribes' water rights. The Supreme Court, in Winters, did not enunciate any such principle. In Arizona v. California, 373 U.S. 546, 600-601 (1963), the Supreme Court rejected arguments that the Tribes' water should be limited by current needs of the Indians or projections of Indian population and held that the amount of water to be reserved for irrigation on the Indian reservations there should be measured in terms of all the practicably irrigable acreage on the reservation, emphasizing that the reserved water was intended to satisfy future as well as present needs. Since Arizona, other courts have applied the "purposes of the reservation" test broadly. In United States v. Ahtanum Irrigation District, 330 F.2d 897, 915 (C.A. 9, 1964), the court awarded the Indians such water, subject to a natural-flow limitation, "as can be beneficially used" for any purpose. See also United States v. Anderson, No. 3643, slip op. at 9-10 (E.D.Wash. July 23, 1979); United States v. Adair, 478 F.Supp. 336, 345-346 (1979) (both finding that preservation of hunting and fishing rights was

a purpose of the reservation and water was to be reserved sufficient to protect those rights).

No case has ever held, as the State argues, that reserved water is limited to minimal needs. New Mexico and Cappaert simply restate the established standard, expressed in Winters and Arizona, that water is reserved to serve the purposes of the reservation. The words "minimum" and "minimal need" are nowhere to be found.

In this case the United States and the Tribes have presented evidence on the amount of water for agriculture, livestock, mineral development, fisheries, and aesthetics "necessary to accomplish the purposes for which the Reservation was created." The teaching of the Supreme Court is that the Tribes are entitled to reservation of that water for future generations of the Tribes so that the purpose of the Reservation—to provide a permanent, self-sustaining home for these Tribes—is not defeated. This cannot be accomplished under a grudging minimal-needs test, and no law authorizes such a test.

C. The State's Various Attempts to Have the Master Reduce Tribal Reserved Rights Based on Supposed Impacts on Non-Indian Users Must All Be Rejected.

The State, in a number of guises, seeks to have the Master reduce the Tribes' reserved rights, based on an assumed impact on water uses by non-Indians. Various private parties have filed proposed findings and briefs making such claims as well. Before discussing the law, which flatly rejects this approach, a few factual observations are in order. If junior water users will be hurt if the Tribes eventually put all of their water to use, this means the junior users have been using waters reserved for the Tribes. The Tribes should not be

penalized for that. The solution for junior users is for them to band together, to store at their expense or that of the State or federal government, sufficient water so that their uses can be continued even if the Tribes fully develop their Reservation. As it is quite possible that junior users will obtain additional storage before tribal waters are fully developed, arguments based on impact are pure speculation. But, more important, impact on non-Indians is clearly an impermissible ground for reducing the water reserved for the Tribes.

1. Reducing Indian reserved rights based on impact on non-Indian users, or equitable apportionment between users, is improper in determining Indian reserved rights.

In State's Findings 42-1 through 42-8, Vol. VIII, pp. 1,421-1,458, and State's Conclusion 8-1, Vol. VIII, pp. 1,589-1,590, the State asks the Master to conclude that he has considered the impact of the Tribes' reserved rights on other water users in quantifying those rights. Such findings and conclusions would be contrary to law.

Over 70 years ago the Supreme Court in Winters, held that the Fort Belknap Reservation was entitled to water even though it meant that settlers, who had acquired their homesteads pursuant to public land laws and commenced water use after the creation of the reservation but before the Indians began diverting water, had to yield to the Indians' priority. The court so ruled, despite the allegation by the non-Indian water users that the contested waters:

> ...are indispensable to defendants, are of the value of more than $100,000 to them, and that if they are deprived of the waters "their lands will be ruined, it will be necessary to abandon their homes, and they will be greatly and irreparably damaged, the extent and amount of which damage cannot be estimated, but will greatly exceed $100,000," and that

> they will be wholly without remedy if the claim of the United States and the Indians be sustained.

Id., 207 U.S. at 570.

The Supreme Court has not varied from this position.

In Arizona v. California, supra, Indian claims to water from the Colorado River were in issue. The State of Arizona argued that:

> [t] he judicial doctrine of equitable apportionment should be used to divide the water between the Indians and the other people in the State of Arizona.

373 U.S. at 596.

The Court replied:

> The . . . argument is easily answered. The doctrine of equitable apportionment is a method of resolving water disputes between States . . . . An Indian Reservation is not a state . . . . Moreover, even were we to treat an Indian Reservation like a state, equitable apportionment would still not control since, under our view, the Indian claims here are governed by the statutes and Executive Orders creating the reservations. (Emphasis added)

Id. at 596-597.

In Cappaert, supra, the court again specifically rejected a "balancing of interests" approach:

> Nevada argues that the cases establishing the doctrine of federally reserved water rights articulate an equitable doctrine calling for a balancing of competing interests. However, an examination of those cases shows they do not analyze the doctrine in terms of a balancing test. For example, in Winters v. United States, supra, the Court did not mention the use made of the water by the upstream landowners in sustaining an injunction barring their diversion of water. The "Statement of the Case" in Winters notes that the upstream users were homesteaders who had invested heavily in dams to divert the water to irrigate their land, not an unimportant interest. The Court held that when the Federal Government reserves land, by implication it reserves water rights sufficient to accomplish the purposes of the reservation. 4/

[The following is the Court's footnote 4 as indicated in quote.]

> 4/ Nevada is asking in effect, that the Court overrule Arizona v. California 373 U.S. 546 (1963), and United States v. District Court for Eagle County, 401 U.S. 520 (1971), to the extent that they hold that the implied-reservation doctrine applies to all federal enclaves since in so holding those cases did not balance the "competing equities." Brief for Nevada 15. However, since balancing the equities is not the test, those cases need not be disturbed."

Id. at 138-139.

In State of New Mexico v. Aamodt, 537 F.2d 1102 (C.A. 10, 1976), the question of impact was also raised:

> The State makes much of the economic effect on the non-Indians who were awarded lands by the 1933 Act if the Pueblos have a right prior to them. In Cappaert, ____ U.S. at ____, 96 S.Ct. at 2070, 44 LW at 4759, the Supreme Court rejected the argument that equity calls "for a balancing of competing interest." We reach the same conclusion.

Id. at 1113.

2. The doctrine of equitable estoppel does not bar the assertion of the Tribes' water rights.

The State argues that the United States (but, importantly, not the Tribes) is estopped from asserting a claim for reserved water rights in this case (Conclusions 41-1 through 41-9, Vol. VIII, pp. 1,700-1,717). The State's estoppel argument is without foundation and is simply another form of economic impact argument--which is impermissible in any guise. The State alleges that the "injury to residents [caused by the United States asserting reserved water rights for the Tribes] . . . is so serious that estoppel can, and should be, used to prevent the harm. . . ." Id., p. 1,717. Even if this assertion of adverse impact were true—which it is not—it would provide no lawful basis for reducing or

impairing the Tribes' reserved water rights. See discussion in sub-part 1 above. Winters v. United States, 207 U.S. 564, 570 (1908); Cappaert v. United States, 426 U.S. 128, 138-139 (1976). The State's equitable estoppel argument thus seeks to circumvent the clear case law, which holds that the Tribes' reserved rights cannot be eroded by claims of adverse impact.[5/]

Even if economic impact arguments were relevant here, the State has established no basis for estoppel. The State recognizes that, generally, estoppel cannot be invoked against the United States. Conclusion 41-2, Vol. VIII, p. 1,703. While one United States Court of Appeals has held the United States subject to estoppel, "courts are reluctant to invoke its use." Colorado Master's Report at 407 (Aug. 6, 1976, Michael D. White, Master-Referee). No case is cited by the State in which estoppel was invoked against the United States acting as trustee for the Indians. Indeed, in an Indian water rights case, the Ninth Circuit, which has developed virtually all the case law on estoppel of the United States, stated that "No defense of laches or estoppel is available to the defendants here for the Government as trustee for the Indian Tribe, is not subject to those defenses." United States v. Ahtanum Irrigation District, 236 F.2d 321, 334 (C.A. 9, 1956).[6/]

[5/] The City of Lander and Certain Private Parties, in their proposed findings, argue that equitable estoppel should be applied instead of the governing principles of law: "A decision in this case should not be weighed strictly on principles. . . . As Bulwer Lytton said, 'damn your principles.'" City of Lander and Certain Private Parties, Findings of Fact, p. 17. The Tribes respectfully submit that the governing principles of law, including the promise of a homeland for the Indians in the 1868 Treaty, must be honored, not swept aside in a tide of emotionalism.

[6/] The few cases cited by the State as supporting estoppel against the United States are not at all like this case. Each case involved a direct, unequivocal representation by a United States official, or official document, concerning the legal implications of a specific fact situation. In each, the representation was legally incorrect and was specifically relied

The State's first alleged basis for estoppel is that early in the century the United States applied for certain state water rights for Indians on the Reservation and that by doing so, "the United States represented that it claimed no other rights." (Conclusion 41-4, Vol. VIII, p. 1,708.) This contention is unsupported by law or facts. The Tribes' reserved rights—grounded in the 1868 Treaty and never divested by Congress—cannot effectively be lost by administrative action. As Michael D. White stated as Master in Colorado, "[A]n administrative rejection of reserved rights would be improper and of no effect upon the government's reserved rights." Colorado Master's Report, p. 217.

Even where there has been a long-standing, unambiguous administrative practice of filing for state water rights on a federal reservation, the United States is not estopped from later asserting reserved rights. United States v. New Mexico, 438 U.S. at 703, n. 7. On Indian reservations, of course, it is fundamental that Indian property, including reserved water, can only be divested by clear and plain congressional action--never by administrative action. United States v. Santa Fe Pac. R.R. Co., 314 U.S. at 353-355; see 25 U.S.C. 177.

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on, to the detriment of the party asserting estoppel. United States v. Lazy FC Ranch, 481 F.2d 985 (C.A. 9, 1973) (U.S. estopped from obtaining repayments of federal Soil Bank Act benefits erroneously paid to farming partnership, where partnership relied on specific, direct advice of federal official on how to structure their landholdings to be eligible for the benefits); Schuster v. C.I.R., 312 F.2d 311 (C.A. 9, 1962) (United States estopped from collecting tax against Bank where Tax Commissioner initially ruled a certain trust not subject to estate tax, Bank distributed trust corpus, then Commissioner reversed his ruling); Brandt v. Hickel, 427 F.2d 53 (C.A. 9, 1970) (United States estopped from denying oil and gas lease to initial offeror, who was mistakenly advised by federal official that initial offer could be corrected and resubmitted within 30 days); Moser v. United States, 341 U.S. 41 (1951) (Swiss citizen in United States cannot be denied United States citizenship, where he signed a form exempting him from United States military service, and form, contrary to law, said that gaining the exemption did not waive right to apply for United States citizenship. Court stated issue was lack of knowing waiver, not estoppel).

In addition to these legal barriers, the facts simply do not substantiate this estoppel claim. For a short period early in the century there was some ambiguity in federal policy, and the United States filed for state water rights for Indians at Wind River. But following Winters in 1908, the United States plainly and publicly asserted reserved water rights at Wind River. Indeed, by 1916, the federal assertion of reserved water rights at Wind River was not only publicly proclaimed but also upheld by the Court in Hampleman. See discussion in Part I, supra. The short-lived administrative policy of notifying the state as to water use on the Reservation—followed by a complete and lasting repudiation of state law and an assertion and exercise of reserved rights—cannot be grounds for denying the Indians forever the use of their reserved rights.

The State's second alleged ground for claiming estoppel is that by opening up land to non-Indian settlers, the United States represented that no reserved water rights would be asserted. This, too, is without basis.

One need look no further than Winters to find a resounding repudiation of the State's argument here. The defendants in Winters were private appropriators under state law, who had entered their lands under the "homestead and desert land laws of the United States." Winters, 207 U.S. at 568. Of course, the fact that the United States had in some sense encouraged settlement of these lands, and had provided that settlers must look to state law for their water, did not estop the United States from asserting reserved water rights.

While Winters provides the short, definitive answer to this estoppel argument, it should be noted that Michael D. White, as Special Master in Colorado, rejected a virtually identical argument by Colorado—which claimed

that opening lands under the Desert Lands Act, and other federal statutes, estopped the United States from asserting reserved water rights:

> Colorado's argument that these federal laws are firm representations that state rights to divert water from federal lands are exclusive and now immune from reserved right claims is rooted in a fallacious view of the import of these Acts.
>
> The Acts do constitute a federal recognition of water rights acquired pursuant to state principles and procedures even where these differ from the common law. They do open the waters of the public domain to appropriation. Yet the reserved right claims of the United States do not denigrate this character of the Acts involved. State water rights are still recognized as valid and appropriations may still be made of water on public lands. However, these Acts do not constitute representations that state water users will never be limited by federal uses. They do not relinquish the supremacy of federal uses.

Colorado Master's Report, pp. 404-405.[7/]

The mere opening of lands to non-Indian settlement cannot divest the Tribes of effective use of their preexisting rights to water under federal law.

7/ While Mr. White's discussion did not specifically concern all three of the federal statutes the State here claims are a basis of estoppel, his analysis is equally applicable for all. In this case, the State's only point about the Homestead Act, the Desert Lands Act, and the Carey Act is that they encouraged settlement and required settlers to get water under state law. As Mr. White's discussion points out, that simply does not uproot vested federal rights protected by the Supremacy Clause. Indeed, the laws opening western lands to settlement did not even guarantee settlers adequate water as against other settlers claiming under state law. In many instances, there was in fact not enough water to irrigate all lands patented. In Idaho Irrigation Co. v. Gooding, 265 U.S. 518 (1924), for example, the United States patented over 100,000 acres for a Carey Act project. Landowners brought suit to enjoin the irrigation company from issuing additional shares in its water rights - which would diminish each proportionate share. The company claimed that the approval of its irrigation plan by the state and the Secretary and the issuance of patent conclusively determined that sufficient water was available for those lands. The Court rejected this argument, stating:

> We cannot accept the contention of appellants that the application of the State and the issuance thereon of a patent to the lands by the Secretary of the Interior constituted a determination binding on the individual water right owners that an ample supply of water was available.

Id. at 523.

3. The doctrine of election of remedies has no role in this case.

The State asks the Master to find that the United States, by filing early in the century for State water rights for certain reservation lands, elected its remedy and is therefore barred from ever asserting reserved rights with respect to those lands. Conclusions 37-1 through 37-5, Vol. VIII, pp. 1,689-1,692. This election of substantive-rights or election-of-remedies argument is a variation on the State's estoppel argument. It is equally without basis. Indeed, the State cites no cases or other authority in support of its election argument.

Election of remedies is a largely discredited doctrine. As early as 1918 the Supreme Court stated:

> At best this doctrine of election of remedies is a harsh, and now largely obsolete rule, the scope of which should not be expanded.

Friederichsen v. Renard, 247 U.S. 207, 213 (1918).

More recent Supreme Court cases reaffirm the disfavor of the election-of-remedies doctrine. Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974); United States v. 93.970 Acres of Land, 360 U.S. 328 (1959). If it retains any vitality, the doctrine is to the effect that "by asserting a choice of inconsistent claims for relief in a judicial proceeding, a litigant is precluded, in subsequent litigation, from advancing inconsistent claims." 1B Moore's Federal Practice, ¶ 0.405[7] (2d ed. 1982) (emphasis added). There is no inconsistency between earlier litigation and this case—the United States in court has always asserted reserved rights for the Indians at Wind River, beginning in 1916 with the

Hampleman case. Furthermore, there would be nothing inconsistent in asserting state rights as a supplement to reserved water rights. Without some fundamental inconsistency between earlier and current claims, there can be no election. There is simply no support in the record for the State's apparent position that any United States official, in filing for state water rights on behalf of the Indians, intended to preclude forever the assertion of federal water rights. The evidence is, to the contrary, that the United States officials were merely seeking to protect the Indians in a short period of legal uncertainty. Moreover, even if the United States officials did intend to elect state law over federal law for the Indians at Wind River—which they did not—they were completely powerless to do so. See p. 27, supra.

III.

THE TRIBES' 1868 PRIORITY DATE APPLIES TO ALL TRUST AND INDIAN-OWNED FEE LANDS ON THE RESERVATION.

The State sets forth at great length information concerning the status of reservation lands—in particular, whether the lands are within a restoration order or were reacquired (Findings 28-1 through 28-4, Vol. VIII, pp. 1,131-1,392). In our view, all of this is irrelevant to the Master's determination of a priority date for the Tribes' water rights. All trust and Indian-owned fee lands on the Reservation are part and parcel of the Tribes' homeland—guaranteed by Treaty—and thereby entitled to an 1868 priority date. In any event, however, lands subject to restoration orders and lands formerly allotted and reacquired by the Tribes are entitled to an 1868 priority.

The State wholly misconstrues the history of lands falling within restoration orders. These are lands within the portion of the Reservation opened by

the 1905 Act but which were never sold. Having always remained Indian lands, these lands were consistently administered for the benefit of the Indians, the same as reservation lands south of the Wind River.

No court has ever held that lands merely opened for non-Indian settlement, but never disposed of—lands for which the Indians were never paid a dollar—lose their status as Indian lands. The Supreme Court ruled, to the contrary, that such lands remain Indian. In Ash Sheep v. United States, 252 U.S. 159 (1920), the court considered the status of lands of the Crow Reservation, which were opened for non-Indian settlement under a 1904 Act (33 Stat. 352) but never disposed of. Like the 1905 Act concerning Wind River, the 1904 Crow Act provided that the United States was to act as trustee for the Indians in collecting money for land that was sold to entrymen, but the United States was not obligated to purchase any of the lands. Ash Sheep concerned a company indicted for violating a federal statute prohibiting the driving of cattle "to range and feed on any land belonging to any Indian or Indian Tribe." Id., p. 163. The company claimed that the opened, undisposed-of lands under the 1904 Act were public, not Indian, lands. The court rejected this argument, holding that these were indeed Indian lands. Id., pp. 165-166. The court noted that under the 1904 Act the United States was merely authorized to act as trustee in selling the Indians' lands, but that "until sales should be made any benefits which might be derived from the use of the lands would belong to the beneficiaries [the Tribe] and not the trustee * * *." Id. Under Ash Sheep, opened but undisposed-of lands under the 1905 Act remained Indian. The restoration orders were simply a revocation of the United States' authority as trustee to sell the lands for the benefit of the Tribes. Only in this sense were the lands "restored," by being removed from availability for entry.

The continuing status of undisposed-of lands as Indian lands was recognized by both the Department of the Interior and Congress. Even prior to restoration of these lands, the lands were administered as Indian lands, with, for example, proceeds from leasing used for the benefit of the Tribes, not the United States. In 1934, the Secretary of Interior formally concluded that undisposed-of lands remain Indian unless and until sold. 54 I.D. 559. See Tribes' Brief in support of proposed findings and conclusions on boundaries and dates, August 1980, pp. 12-15.

In 1916 Congress also confirmed that these undisposed-of lands were Indian lands. The Act of August 21, 1916, 39 Stat. 519, provided that Indian lands, including opened, undisposed-of lands at Wind River could be leased for oil and gas, with proceeds to the Tribes. If these were no longer Indian lands, as the State argues, proceeds would have gone to the United States. Similarly, in 1953, when the United States wished to acquire undisposed-of lands for the Riverton Reclamation Project, Congress paid the tribes for the lands in question. Act of August 15, 1953, 67 Stat. 592. This, too, reflects Congress's understanding that opened, undisposed-of lands are Indian lands.

In short, the lands opened by the 1905 Act, but never disposed of, have always remained Indian lands. As the court held in United States v. Anderson, No. 3643 (E.D.Wash. 1979), such lands are entitled to a priority date as of the Reservation's creation—here, 1868.

The 1868 priority date is equally applicable to other trust and Indian-owned fee lands, including reacquired lands. See Tribes' 1982 Post-Trial Brief,

pp. 64-66. For formerly allotted lands, reacquired by the Tribes from non-Indians, the Walton case indicates that the 1868 priority date applies. Colville Confederated Tribes v. Walton, 647 F.2d 42 (C.A. 9, 1981). If Walton is correct and non-Indian purchasers of former allotments obtain a right to share in reserved water with an early priority date, certainly when such lands are reacquired by the Tribes, the early date is retained. Even if the Master rules that Walton is not correct, where an Indian or the Tribes reacquire land in trust, the original priority date should pertain to the lands. This is true for lands never allotted which were sold to non-Indians under homestead laws as well as for allotted lands. The lands are reacquired and put into trust to satisfy the purpose of the Reservation, to maintain a homeland for future generations of the Tribes. Since there has been no action by Congress taking the Tribes' water rights, those rights remain intact; and with the lands returned, that part of the Reservation is as if it had never been disturbed. Reacquisition enables the original reservation purpose to be effectuated. The temporary break in Indian ownership cannot remove a vested water right from the Tribes or defeat the purpose of establishing a viable and permanent homeland. Reacquired lands are part of the Tribes' reservation homeland, are subject to the 1868 treaty, and are entitled to an 1868 priority date.

IV.

THE STATE'S PROPOSED FINDINGS AND CONCLUSIONS ON MISCELLANEOUS LEGAL ARGUMENTS SHOULD BE REJECTED.

A. The Proposed Decrees of the United States and Tribes Are Certain and Specific.

Under the rubric it calls "Certainty and Specificity," the State argues that the decree setting forth the Tribes' water rights must be certain and specific

(Findings 9-1 through 9-6, Vol. VIII, pp. 1,591, et seq.). A year of trial set forth the United States and Tribal claims. The Proposed Decrees of the United States and Tribes incorporate those claims with great certainty and specificity.

The State contends, however, that in setting forth a decree for the Tribes' rights—which arise under federal law—State water law standards must be met. As the State puts it, under the McCarran Amendment, the United States "must comply with all State water laws" (Finding 9-4, Vol. VIII, p. 1,605). This is not so. Indeed, this same argument was specifically rejected by the Master in denying the State's motion for a more definite statement. Order of June 23, 1980, reconsideration denied, Sept. 8, 1980. The Master's ruling was proper, because "federal water rights are not dependent upon state law or state procedures...." Cappaert v. United States, 426 U.S. 128, 145-146 (1976). While the McCarran Amendment, 43 U.S.C. 666, waives the United States' immunity from suit in general stream adjudications in state or federal court, it does not make state law applicable to federally reserved water rights. With respect to the McCarran Amendment, the Supreme Court stated:

> The Amendment in no way abridges any substantive claim on behalf of Indians under the doctrine of reserved rights. Moreover, as Eagle County said, "questions [arising from the collision of private rights and reserved rights of the United States], including the volume and scope of particular reserved rights, are federal questions which, if preserved, can be reviewed [by the Supreme Court] after final judgment by the Colorado court."

Colorado River Water Cons. Dist. v. United States, 424 U.S. 800, 813 (1976).

The requirements of state law—including the listings of diversion points—have no application to the Tribes' rights arising under federal law. The decrees in Winters and Arizona v. California were simple and direct—and contained no references to diversion points or any other state law standard. Arizona v.

California, 376 U.S. 340, 344 (1964), Winters v. United States, 207 U.S. 564 (1908) (Supreme Court Printed Record, pp. 20-22); see Tribes' Reply to Wyoming's Motion for a More Definite Statement, pp. 4-5.[8/] The proposed decrees of the United States and Tribes are sufficiently certain and specific.

B. The Decree Must Be Subject to Modification Based on Future Developments.

The State contends that no future modification of the water rights decreed to the Tribes should ever be allowed (Findings 39-1 through 39-5, Vol. VIII, pp. 1,693-1,699). The Tribes strongly disagree. The Winters doctrine provides water for all future as well as present needs of the Reservation. Today's predictions of future needs may prove grossly inadequate to serve the Tribes in the future. We simply cannot be absolutely sure that our best estimations today will stand up to the Tribes' needs a century from now. For this reason, the decree must be subject to modification, if circumstances warrant.

This is consistent with past practice in Indian water rights cases. As the original 1964 decree in Arizona v. California stated:

> Any of the parties may apply at the foot of this decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy.

376 U.S. at 353.

8/ The State also argues that certainty and specificity are required in the decree of the Tribes' rights so the State can properly administer all the water. While the issue of administration is not before the Master, see Section IV.C., infra, we note that the Ninth Circuit has specifically rejected state administration of water on Indian reservations. Colville Confederated Tribes v. Walton, 647 F.2d 51-53 (C.A. 9, 1981).

This provision proved to be of great importance, as Arizona v. California was recently reopened to evaluate lands erroneously omitted from the first trial and to consider lands in areas where Reservation boundaries were newly established. Master Tuttle decreed substantial additional water for the Tribes. Other Indian water rights cases have also left decrees open for future modification. See Tribes' Pretrial Brief, April 1980, pp. 14-16. This practice should be followed here.

C. The Administration of Water Rights on the Wind River Reservation is an Issue beyond the Scope of the Referral to the Special Master.

In the section of its proposed findings entitled "Transferability" (Conclusions 31-1 through 31-6, Vol. VIII, pp. 1,667-1,668), the State argues that the reserved water rights adjudicated in this case must be administered in accordance with state law.

As the Master already has ruled, the issue of administration is not before him on reference from Judge Joffe. At a pretrial conference on October 23, 1980, the State asked the Master to rule that any water rights awarded in this case must be administered by the Wyoming State Engineer. The Master responded in his November 10, 1980 Order on Pretrial Conference and Order on Motions, paragraph 6A, as follows:

> It is the Master's duty to determine the "nature, extent, and relative priority of the water rights of all persons in the river system." . . . The question of who shall administer the water rights goes beyond the reference made by the Court to the Master and will not be determined by the Master. Thus, evidence or arguments relevant only to the question of administration of the water rights will be excluded at trial.

The State's arguments on administration must be disregarded.[9/]

D. The Tribes' Reserved Rights Include Groundwater

The State incorrectly argues (State's Finding 36-1, pp. 1,682-1,688) that the Tribes' reserved rights do not encompass groundwater and that the Tribes must acquire rights to groundwater under Wyoming law.

Under Cappaert v. United States, 426 U.S. 128 (1976), it is settled that reserved water rights include groundwater. In Cappaert the Supreme Court discussed the issue of whether groundwater was reserved for the preservation of a unique fish species living in a pool in Devil's Hole. Recognizing that the "groundwater and surface water are physically interrelated as integral parts of the hydrologic cycle," id. at 142, the court concluded that:

> [s] ince the implied-reservation-of-water doctrine is based on the necessity of water for the purpose of the federal reservation, we hold that the United States can protect its water from subsequent diversion, whether the diversion is of surface or groundwater." Id. at 143.

Thus, in the State's own words, "the Supreme Court had every opportunity to expand the reserved-rights doctrine in Cappaert," and it did so by holding that reserved water rights extend to groundwater.

Lower court decisions, both before and after Cappaert, also have held that reserved water rights encompass groundwater. United States v. Anderson, No. 3643, slip op. at 4 (E.D.Wash. 1979) (post-Cappaert) (holding that the

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9/ The State also seeks conclusions of law on the jurisdiction of the Wyoming state courts to adjudicate the Tribes' water rights (State's Conclusions 1-1, 2-1, 2-2, Vol. VIII, pp. 1,511-1,513). These issues are beyond the reference of the Master here and need not be readdressed.

reservation of water for the Spokane Tribe extends to groundwater); Tweedy v. Texas, 286 F.Supp. 383, 385 (D.Mont. 1968) (pre-Cappaert) ("the same implications which led the Supreme Court [in Winters] to hold that surface waters had been reserved would apply to underground waters as well"); Nevada ex rel. Shamberger v. United States, 165 F.Supp. 600 (D.Nev. 1958), aff'd on other grounds, 279 F.2d 699 (C.A. 9, 1960) (pre-Cappaert). The State fails to cite any cases reaching the opposite result.

The fact that Wyoming law subjects acquisition of groundwater rights to the law of appropriation is completely irrelevant in this case. As the State is well aware, the Tribes' water rights were reserved for the preservation of the Tribes' homeland, and federal, not state, law defines the scope and amount of these rights.

E. The Standard of Proof is Preponderance of the Evidence.

The State seeks to place upon the United States and Tribes an unduly high standard of proof in establishing the Tribes' reserved rights (Findings 10-1 through 10-4, Vol. VIII, pp. 1,614-1,617). Contrary to the State's assertions, the fact that the Tribes' rights have an early priority and cannot be lost by nonuse provides no basis for raising the standard of proof. A similar argument to that made by Wyoming here was made by the States in Arizona v. California—and roundly rejected. As Special Master Tuttle stated:

> I must necessarily reject the State Parties' accompanying suggestions that the seriousness of this litigation and the uncertain nature of the subject matter somehow transforms the burden of persuasion into a greater standard variously phrased by them as "reasonable certainty," "high standard of proof," "very high standard," and "clear and convincing evidence." In fact, the State Parties ultimately argue that the Tribes must "resolve all doubts in their favor or see their claims rejected."

> These standards are clearly inappropriate. All litigation constitutes serious business and any departure from the use of the civil case standard of preponderance of the evidence would inject unnecessary confusion into an already complicated case. The proof which I shall accept for my findings will be the more convincing evidence on any given element, including such elements as may be difficult to prove.

Report of Special Master, p. 88 (Feb. 22, 1982)

In this argument, as in its proposed findings on virtually every factual issue, the State returns to one recurrent--and completely unfounded--theme. Time and again the State suggests that too little work was done, not enough detailed study made for the United States and Tribes to prove their cases. The State's argument is based on its erroneous legal view that some super standard of proof must be met. Moreover, if anything was demonstrated by the trial before the Master, it was that the United States and Tribal witnesses undertook massive studies—unprecedented in scope—in setting forth the claims for water. The State's studies were, by comparison, extremely meager. For example, HKM's soils work in determining arable lands, using both existing data and extensive, independent field work, far surpassed the intensity of the work of Messrs. Sommers and Fowkes—whose fundamental analysis was an office study to determine whether parcels had more holes deeper than six feet or less than six feet. Similarly, the analysis done for the United States under Mr. Billstein's direction of unadjudicated, in-use lands—including several man-months of field verification—was totally unmatched by Mr. Sostrum's aerial photography analysis for the State, which was not even begun until September 1981. Given the far greater level of work done by United States and tribal experts, the State's call for still more work by the United States and Tribes does not ring true. Time and again the most detailed, expertly done, and persuasive evidence was presented by the United States and Tribes.

V.

THE STATE'S ATTEMPT TO REDUCE THE ARABLE BASE OF THE RESERVATION SHOULD BE REJECTED.

The State argues that the soils work performed by HKM for the United States was deficient. Two primary attacks are raised. First, the State contends that HKM used improper land classification standards—suggesting that U.S. Bureau of Reclamation standards must be adopted. State's Finding 18-3, Vol. V, pp. 684-96. Second, the State suggests that the HKM work was not sufficiently detailed to prove that lands are practicably irrigable. State's Finding 18-4, Vol. V, pp. 697-701. Both these arguments are without basis.

The HKM land-classification standards were developed by a well-qualified team of engineering, soils and drainage experts, familiar with the Wind River Reservation and with extensive experience in land-classification techniques and standards. These HKM standards, although criticized at length in the State's Findings, were in fact the only standards used by the State's witness, Mr. Sommers, in his analysis of soils on the Reservation. If the HKM standards were truly deficient, why were they used by the State's witness? Mr. Sommers was free to use the available data and apply different standards, if that were appropriate. He did not do so.

The State's fundamental criticism of the HKM land-classification standards is that they do not precisely reflect Bureau of Reclamation standards. There is no reason, however, why Bureau of Reclamation standards must be adopted as a measure of practicably irrigable acres in an Indian water-rights adjudication. Indeed, Special Master Tuttle, in Arizona v. California, specifically rejected total reliance on Bureau standards. He stated those standards

were "unduly restrictive" in certain respects, finding certain sandy lands which did not meet Bureau standards to be practicably irrigable, based in part on a finding that similar soils were elsewhere being successfully irrigated. Special Master's Report, pp. 127-133.

The State stresses that Bureau land-classification standards include economics, suggesting that lands cannot be classified as arable unless economic factors are taken into account. This is a bogus argument. It makes no difference whether economics is considered as a part of the soils work, like the Bureau, or subsequent to engineering studies, like the United States experts in this case. The relevant point is that all lands classified by HKM--future lands, Type VII (idle) and Type VIII (undeveloped FIP)—were subjected to rigorous, conservative economic testing. Only those lands which survived the soils, engineering and economics tests were claimed as PIA. The State's complaint that economics was not a major component of the HKM soils study is simply irrelevant, since the economic feasibility of all these lands was adequately demonstrated by detailed studies of the United States' and Tribes' economists.

The State completely disregards a compelling problem with the standards the Bureau applied in its study of portions of the Reservation in the early 1960's. That study classified land only for gravity irrigation. Mr. Sommers testified for the State that this makes no difference, since virtually the same lands can be irrigated by either method. This is clearly wrong, as many lands with too great a slope for gravity could be irrigated by sprinkler. The State's suggestion that Bureau standards are the only appropriate standards is not supported by the facts. Certainly, PIA includes lands irrigable by sprinkler.

The Bureau standards would exclude such lands. The State's contention that Bureau standards must be used here should be rejected.

The State's other major attack of HKM's soils work concerns the level of detail. As always, the State claims the amount of work done was insufficient to support HKM's findings. Again, what the State says must be distinguished from what the State does. The State says more detailed work is necessary to support arability determinations. But the State did not do soils work even remotely approaching the level of detail it suggests is necessary. Mr. Fowkes, a State soils witness, who had never before done land classification, stated the unfounded generality that because the Reservation is geographically complex, more soils work by HKM was necessary. Mr. Fowkes lacked expertise to render such a conclusion, even if the record contained evidence to that effect—which it does not. Mr. Sommers, the other State soils witness, also did not do the type of detailed study the State says is required. Indeed, Mr. Sommers' fundamental analysis was an office study comparing HKM and Bureau arability determinations and, where the two conflicted, counting up the number of holes greater than six feet and those less than six feet.

The State's call for more detailed work—especially for more holes—by HKM must be rejected. HKM's soils work was a monumental effort which consumed more than 10,000 man-hours from initiation to the beginning of trial. The State ignores the fact that HKM relied in part on the existing soils information derived from work done by the Bureau. The State rejects the fact that judgment by the experienced HKM personnel in the field must be taken into account in evaluating the intensity of their work. The State's suggestion

that the Master adopt a mechanistic "hole in every parcel" standard must be rejected.

The soils work by HKM was thorough and based on appropriate, although extremely conservative, standards. The work done by the State's experts cannot compare in comprehensiveness or detail with the HKM study. All the State's arguments cannot change the fact that the most complete and persuasive soils evidence was presented by HKM.

VI.

THE MASTER SHOULD ADOPT THE TRIBES' FINDINGS OF FACT ON FUTURE PROJECTS—NOT THOSE PROPOSED BY THE STATE.

The State, in its proposed findings, asks the Master to find that not one single acre of land in the future projects proposed by the United States or the Tribes is practicably irrigable. Findings 18-1 through 18-34, 19-1 through 19-16, Vol. V, pp. 672-860. This result runs clearly contrary to the evidence at the trial and is contrary to common sense.[10/]

The State's proposed findings should be rejected because they are not worthy of belief. The State's own engineers testified that the projects are well designed and practical from an engineering viewpoint. Tribes' Finding 26, pp. 14-15. The lands used in the projects cover only Classes 1 through 3 as classified by HKM. Classes 4 and 6 were excluded, although testimony showed that farmers are successfully irrigating Class 4 and over 9,000 acres of Class 6 lands at Midvale. Tribes' Findings 28, p. 15; testimony of Jack Long, Tr.V. 151,

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10/ The Tribes have anticipated and answered the State's basic arguments in detail in Tribes' Findings 4-20 (future soils), 21-68 (engineering), and 69-97 (economics), pp. 4-42, and in the Tribes' 1982 Post-Trial Brief, pp. 2-28.

pp. 13,130-13,136, 13,729-13,730; see Tribes' 1982 Post-Trial Brief at 33. Dr. Keller, perhaps the most eminent irrigation engineer to testify, saw all the projects as very comfortable from the standpoint of soil, climate, crop mixes, technology, and cost—the kinds of projects commonly found in the West. Tribes' Finding 72, p. 31. For the State's economists to find that land of this quality, this close to water, has not one irrigable acre is their own best refutation. Something is wrong in their figuring. We believe it is (1) exaggerating costs by repeating over and over full complements of equipment for 320-acre farms—as if the farms had to be that size or the Tribes were strangers who could not share equipment; (2) using costs for equipment twice as high as actual quotations; (3) artificially suppressing crop yields beneath those being obtained today, double-counting some costs, and generally having expert testimony slide into pure advocacy to try to kill the projects. See Tribes' Findings 84-97, pp. 37-42; Tribes' Post-Trial Brief, pp. 16-28. With this said, we now turn to some of the arguments made by the State that we believe need additional attention.

A. The State's Criticism of the Work of Dr. Mesghinna Is Unfounded.

1. The State seeks to reduce acreage for nonirrigable fragments, which has already been so reduced.

In Finding 18-16, Vol. V, p. 751-753, the State asks the Master to reduce the arable base of the five projects designed by Dr. Mesghinna. In support of this, the State sets forth a table showing the percentage of fields that contain some Class 6 land. The percentages run as high as 69 percent. This is stated as if it were bad. In fact, Dr. Mesghinna testified that one expects any field to have some Class 6 land in it. The Master may recall the minute quantities of Class 6 land, less than one percent, that the State showed

on its exhibits showing this. Dr. Mesghinna decreased his acreage by five percent to account for this and other expectable problems. See Tribes' Findings 28-30, pp. 15-16. The Master may further recall that Dr. Mesghinna, when confronted with these maps and figures, testified (Tr.V. 49, p. 4,457):

> I am really proud to see we have done this much good really. We have included extremely small amounts of lands. In other works that I've seen . . . it would be probably three or four times more than this.

The State is thus asking the Master to double-deduct.

2. The State's charge that Dr. Mesghinna's climatological data are unreliable is unfounded.

In Finding 18-18, Vol. V, p. 756, the State asks the Master to conclude that the climatological data used by Dr. Mesghinna was inaccurate, and thus his whole design is inaccurate. This is an astonishing complaint. Dr. Mesghinna testified in detail as to careful gathering of data and the use he made of it. Tr.Vol. 45, pp. 4,029-4,047. No expert has presented better data or suggested that it is generally available in planning work projects, or demonstrated that different data would change Dr. Mesghinna's results. The State suggests that Dr. Mesghinna should have conducted tests with a lysimeter or neutron probe to verify his results. No State expert testified that such tests are a standard in the profession, nor did any State expert perform such tests—or, if they did, they did not testify about it. This is another example of the State lawyers simply saying whatever we have done is not enough. If Dr. Mesghinna had used a lysimeter, the State would have wanted a neutron probe.11/

11/ Compare State's Findings 19-9 and 19-10 and supporting discussion. Where Mr. Bliesner did a field experiment on intake rate, the State argues, again, without any expert support, that it is insufficient.

3. The State's attack on Dr. Mesghinna's diversion requirements is unfounded.

The State asks the Master to revise Dr. Mesghinna's water requirements to precisely two acre-feet per acre. Finding 18-21, Vol. V, p. 765. The State also would require lined canals (Finding 18-19, id., p. 759) and a 50 percent overall efficiency for the future projects (Finding 18-20, id., p. 762).

So far as the evidence in this case shows, no farmer in Wyoming survives on two acre-feet per acre. The arguments we heard in Worland were as to the second inch—water in excess of four acre-feet per acre. Midvale does not approach two acre-feet per acre. Significantly, once again, the State has no citation to anyone's testimony that two acre-feet per acre is enough. The reference to Mr. Bishop's testimony (id., p. 766) uses the amounts of water listed in Finding 18-21 for significantly reduced acreage. The State thus offers no alternative water duty based on actual use in the State or expert computations. By contrast, the Tribes' proposed findings are based on Dr. Mesghinna's careful computations and those of Mr. Bliesner, for the two tribal additions. Compare Tribes' Findings 33-36, pp. 17-19; 38, p. 20; 46, p. 22.

The designs and water efficiencies of the seven future projects are more advanced than any project in the area. Wyoming does not require lined canals or 50 percent efficiencies for its other water users. It should not be permitted to impose such requirements for practicably irrigable acres for Indians. We do point out, however, that the weighted averages of the projects do approach a 50 percent efficiency. See Tribes' Findings 34, p. 18; 38, p. 20; and 46, p. 22.

B. The Master Should Reject the State's Proposed Findings on Economics.

1. The State's economic analysis is irrelevant to the facts of this case.

The State's economic analysis is not an analysis of the facts presented in this case, but an analysis of a hypothetical series of independent, 320-acre farms, each with a totally independent complement of equipment. This unrealistic hypothesis is based on the false assumption that the Tribes are bound by the 160-acre limitation of the Reclamation Act and on the second false assumption that there would be no cooperation between individual members of the Tribes. This does not present a fair picture of the legal or factual situation at Wind River. The State's set of assumptions, which puts a heavy thumb on the infeasibility side of the scale, was either made deliberately to weight the scale toward infeasibility or through the inexperience of the State's economists. In either case, these false assumptions make the State's economic analysis irrelevant to the facts of this case.

The State has tried to patch up this problem in testimony on cross-examination and in its Findings (see Vol. V, pp. 810-812). The truth, however, is that both Messrs. Jacobs and Agee for the State reluctantly admitted that if private farmers came to them, they would begin by optimizing farm sizes, not assuming 320-acre farms; that they did not do so here; and that larger farms would be more economical. See Tribes' Post-Trial Brief, pp. 23-25. Successful farms of over 2,000 acres exist today on the Reservation (id.), and there is no reason to believe such farms repeat their total complement of equipment every 320 acres.

2. The State's economic analysis is less reliable than that of the United States and the Tribes.

The State argues that because Dr. Jacobs is an agricultural economist and because some information on crop production generated by Mr. Agee was used by the United States' economist, as well as the State's economist, the testimony of Dr. Jacobs is more reliable on feasibility analysis than that of Mr. Dornbusch or Dr. Cummings. Findings 18-23 and 18-26, Vol.V, pp. 772-778. Any experience Dr. Jacobs had as an agricultural economist was far outweighed by his inexperience in feasibility analysis. Dr. Jacobs used a computer program with which he was barely familiar and which double-costed major operations without his catching it at all. Tr.V. 160, pp. 15,018-15,029 (Agnet model--overhead costs); V. 164, pp. 15,417-15,420 (double-costing alfalfa cutting). He had never read or even heard of Bureau of Reclamation procedures for evaluating projects (Tr.V. 160, pp. 14,992-14,997). As a result he used only average yields over the past as the yield throughout the 100-year life of the project, rather than using the best yields obtained today, even in experimental plots, as suggested by Bureau procedures, because of the steady increase in crop production over the years (id.).

Mr. Dornbusch's work, on the other hand, combined not only thorough familiarity with benefit-cost analysis but an understanding of the necessity of finding out what the farmers are actually producing. Mr. Dornbusch thus conducted extensive interviews with farmers in the area and also made use of the interviews conducted by Mr. Craig Sommers, a State witness. Both sets of interviews, not just those done by Mr. Dornbusch, contradicted the conservative assumptions used by Dr. Jacobs (Tr.V. 160, pp. 14,921-14,937).

The State further argues (Finding 18-26, Vol. V, pp. 786-789) that because Mr. Dornbusch relied on some of Mr. Agee's work on cropping patterns in the Midvale area and Mr. Agee was a witness for the State, Mr. Dornbusch's testimony "stands repudiated." To begin with, this is a non sequitur. It is true that Mr. Agee reported the results of his interviews with farmers in the area several years before the current economic studies began. Mr. Dornbusch was certainly free to use Agee's interviews, to add to those the more recent interviews he did himself and that were done by Mr. Sommers, to do other independent work to determine the price of the equipment, and come up with his own feasibility analysis.

That Mr. Agee does not agree with part of Mr. Dornbusch's work does not mean that the work "stands repudiated." Mr. Agee has no experience in feasibility studies for irrigation projects and, like Dr. Jacobs, had never even reviewed the Bureau of Reclamation manual on the topic. Tr.V. 164, pp. 15,309-15,415. He had no experience with large corporate farms, id., p. 15,335.

Moreover, if Mr. Agee's testimony repudiates anything, it is Dr. Jacobs' testimony. His testimony repudiates Dr. Jacobs' 320-acre farm size as an optimal size, Dr. Jacobs' equipment costs as considerably too high, and Dr. Jacobs' estimate of the number of hours that the machinery could be used as far too low. Mr. Agee pointed out that Dr. Jacobs had double-costed a major cost item, namely, alfalfa cuttings.[12/] Tribes' Finding 89.

12/ The State at Finding 18-32, Vol. V, p. 809, refers to the United States production costs for alfalfa being "an astounding 43 percent lower than the corresponding production costs presented by Wyoming." It should be borne in mind that Wyoming double-costed its cutting costs for alfalfa.

3. The proper discount rate for economic analysis in this case is 2-1/2 percent, not the 4 to 7-1/8 percent range suggested by the State.

The State asks the Master to enter findings of fact on discount rates to the effect that any acreage showing a positive benefit-cost ratio at a 7-1/8 percent discount rate is practicably irrigable, and that acreage showing a positive benefit-cost ratio at a 4 percent discount rate may or may not be practicably irrigable, depending upon what the Master decides. See Findings 15-16 through 15-23, Vol. V, pp. 642-662. The State admits that the 7-1/8 percent upper limit is based on the discount rate formerly provided in the Water Resources Council guidelines (id., p. 642). As the Master knows, those guidelines have been repudiated (Tribes' Ex. 24, pp. A.24-A.25) and abolished (Fed. Reg., Vol. 46, p. 45, 368, Sept. 11, 1981). None of the witnesses testifying on discount rate has supported 7-1/8 percent as the appropriate discount rate. And there is no legitimate argument that it reflects the likely real rate of return on money over the period of the project. The most persuasive evidence on this is clearly that of Dr. Goldfeld, which showed that the real rates of return on money have been and can be predicted to remain in the area of 2-1/2 percent.

The 7-1/8 percent figure formerly used by the WRC and erroneously incorporated by the United States in the recent addition of land in Arizona v. California was simply an incorrect figure, the result of which is to cut off the feasibility of water projects and which is almost three times the discount rates used when the government approved the bulk of the water projects in the West. Tribes' Ex. 24, p. A.25. It thus would be grossly unfair to the Indians to use the 7-1/8 percent discount rate as any part of the test for practicably irrigable acreage. Indeed, the 4 percent discount rate used by the United States'

economist, and admitted to be at least one appropriate rate by the State's economist, is itself practically twice as high as it should be. Thus, in any other considerations of economics, the Master must bear in mind that if a 2-1/2 percent discount rate were used as it should be, all the benefit-cost analysis figures would rise significantly and the feasibility of these projects would be that much clearer. There thus is a considerable margin of error that the Master should apply in favor of the Tribes because a 4 percent rather than a 2-1/2 percent discount rate has been used.

C. The Basic Assumptions from which the Economic Analysis Was Done by Both the State and the United States Are Extremely Conservative.

The Master may wish to note that both the State and the United States used economic analysis requiring the project to pay for itself solely from the direct proceeds of the sale of crops excluding all secondary benefits. Further, both parties used a cropping pattern that was virtually identical (see State's Finding 18-27, Vol. V, pp. 790-792). This cropping pattern, which the Tribes have accepted as well, uses only crops that are currently grown on the Reservation. It is not at all unusual in seeking to justify future projects to show the feasibility of the project by use of high-price crops. Two of the most famous are Christmas trees and berries. Here, by contrast, the assumptions stick closely to current practices, thus making all the economic analysis conservative in that respect. If, for instance, in the future the market for sugar beets should increase or a mill should be brought closer to the Reservation, it is quite possible that sugar beets would again be grown on the Reservation. If that were so, depending upon the market for sugar beets, the income from farm production would go up dramatically. We bring this out simply to point out that the evidence on economics from the United States and

from the Tribes has been solid and conservative—not experimental or fanciful—and should be accepted for what it is: a showing that the proposed future projects are feasible and that the land involved in them is clearly practicably irrigable acreage.

VII.

THE STATE'S PROPOSED FINDINGS AND CONCLUSIONS ON HISTORIC LANDS SHOULD BE REJECTED.

A. The State Would Deny Water to Unadjudicated Lands Which are Currently Irrigated.

Mr. Billstein testified for the United States that 34,427 acres of unadjudicated trust land are currently in use (Tribes' Findings 99-110, pp. 43-49). The State argues that none of this currently irrigated land should be awarded a water right because the United States did not perform arability tests, design irrigation systems, and perform economic cost-benefit analysis for each tract (State's Findings 24-5, 24-7, 24-12, Vol. VI, pp. 960, 968-970, 983-986). This argument is completely fallacious. There can be no better proof that land is entitled to a water right than a showing that it is being successfully irrigated.

For lands not currently in irrigation, the proof of irrigability involves some estimation of how the lands will perform in the future. For lands already in irrigation, no such prediction is needed. As to these in-use lands, there can be no question of whether they can be irrigated. The proof is in the field--Indians are now farming these lands. To cut off water for these lands would eviscerate the Winters doctrine. Winters, itself, involved protection of existing Indian use of water, as well as future needs. Moreover, if these Indian lands are

to be cut off on this basis, all non-Indian lands currently in irrigation must also be cut off unless full soils, engineering and economic studies are completed.

The State argues that the in-use acreage determined by Mr. Billstein must be reduced by some 6,549 acres to account for "obstacles to arability" (Finding 24-16, Vol. VI, p. 993). The record does not support the State's argument. Mr. Billstein testified that his team did eliminate "any significant obstacle"-- such as roads, farmsteads and the like—they observed in the field (Tr.V. 28, p. 2,585). The "obstacles to arability" the State alleges are merely light markings on aerial photographs, or nonred marks on color infrared photographs. As Mr. Billstein stated:

> I would never make a conclusion by looking at a pictorial photograph. That only gives you a first impression of what an area might look like. We got into all the other possible ramifications of why an area might have a lighter texture than another. We were talking about the part that if it could be plowed, the field was plowed, that would show white." (Tr.V. 29, p. 2,630.)

Only Mr. Billstein and his team were in the field to verify actual obstacles to irrigation—the State relied totally on aerial photographs.

The State argues that 3,579.9 acres of unadjudicated, in-use land must be deleted as nonarable or because of "admissions" made by United States experts (Finding 24-18, Vol. VI, p. 1,001). This is based on Mr. Sommers' testimony. No field work was done by Mr. Sommers on these lands. Nor did the State's witnesses even consider whether these lands were in fact being successfully irrigated (Tr.V. 137, p. 12,668). Since many Reservation lands are successfully irrigated, although they do not meet rigorous arability standards, the State's argument must be rejected (Tr.V. 151, pp. 13,130-13,136, 13,729-13,730; Tribes'

Finding 116, pp. 48-49). The proper conclusion to be drawn is that the land classification standards used by HKM were too conservative, since some areas now successfully being irrigated do not meet the standards.

As it must, the State places primary reliance on the work of Mr. Sostrum concerning the unadjudicated, in-use lands. Mr. Sostrum's conclusions were not based on a comprehensive examination of lands to determine whether they were in use. The State portrays Mr. Sostrum's work as a three-step analysis—a color infrared study, a first black-and-white aerial study, and a final black-and-white study. These three studies were not part of a cohesive study, as the first two components were intentionally disregarded by Mr. Sostrum in reaching his final conclusions (Tr.V. 141, pp. 12,960-61). Those two studies—performed personally by Mr. Sostrum—showed more acreage in use than finally was testified to by Mr. Sostrum.

The State suggests that a major reason why Mr. Sostrum's findings are persuasive is that "Mr. Sostrum performed virtually all of the State's analysis personally." (Finding 24-21, Vol. VI, p. 1,015.) This is erroneous. The two disposed-of studies were Mr. Sostrum's work product. But the final study on which Mr. Sostrum's conclusions were based was a review of aerial photographs performed by five other persons—not identified by Mr. Sostrum. Mr. Sostrum reviewed the work and largely disagreed with their findings (Tr.V. 141, p. 12,954.) Yet, despite this, and despite the massive evidence of irrigation found in color infrared photographs, Mr. Sostrum's own earlier work and handheld photographs, based on his reviewers' photo interpretation Mr. Sostrum cut massive acreage of lands found to be in use by HKM.

The State argues that "the United States merely viewed the land and the aerial photographs" (Finding 24-21, Vol. VI, p. 1,014). The State, of course, merely viewed the aerial photographs and did not view the land. The State's witnesses did not even attempt to determine the extent of irrigation in the field, although even Mr. Sostrum admitted that in determining irrigation use, field work is indispensable (Tr.V. 137, p. 12,598). The choice is between Mr. Billstein's team, which comprehensively studied all existing information concerning existing irrigation and visited each tract in the field, and Mr. Sostrum's team, which relied on a single set of aerial photographs, not backed up by field work.

B. The State's Proposed Findings on Adjudicated Lands Should Be Rejected.

The Tribes, in Findings 168-173, pp. 69-70, claim lands with state-adjudicated rights as practicably irrigable. Such lands have had irrigation works constructed and water beneficially applied. Despite the existence of State procedures to cut off the holder of a State water right for nonuse or to limit the right to the extent of actual use, these lands have not been so challenged. The valid State certificate is an admission of these facts. These facts are the basis of the presumption recognized by the Master—that a State certificate is prima-facie evidence of irrigability. The State does not—and cannot—deny the facts on which the ruling and the presumption were properly based.

Mr. Sommers testified for the State that certain adjudicated lands were not arable. He relied on no field work for this conclusion. Although the record is unclear (Tr.V. 122, pp. 11,015-11,020), the State now claims Mr. Sommers eliminated as nonarable thousands of acres based primarily on HKM's typing of whether lands were currently receiving water. State's Finding 26-12, Vol. VI,

pp. 1,072-1,073. Of course, lands can be arable, although not currently receiving water. Mr. Sommers deleted, for example, over 2,000 acres of idle, Type VII lands, (id. pp. 1,072-1,073)—even though Mr. Sommers himself testified that "the majority of the Type VIIs are arable." (Tr.V. 122, p. 11,020.) Other lands were deleted simply because acreage totals of a certain category of lands were small, or because lands were not typed by HKM for existing use. No problem at all was shown with these lands, and there is no basis for deleting them. Only the lands which survived Mr. Sommers' cuts were examined by the State for evidence of irrigation. Mr. Sostrum presented this testimony for the State. His testimony was based on examining aerial photographs—not field visits—and is subject to all the deficiencies described above concerning unadjudicated in-use lands.

The State's testimony on adjudicated lands is not credible and does not rebut the presumption of irrigability.

C. The State's Proposed Findings on Historic Diversion Requirements Should Be Rejected.

The State proposes (e.g., State's Finding 24-10, Vol. VI, p. 975-978), that the water requirements for historic lands should be slashed from the diversion requirements presented by witnesses for the United States. The State's proposed diversion requirements for historic lands would not provide enough water to make Reservation lands productive. Farmer after farmer so testified in Worland (see Tribes' Finding 139, pp. 56-57). Even Mr. Bishop--one of the State's witnesses on diversion requirements—testified that his reduced historic diversion requirements "may reflect an inadequate amount of water" for each individual tract (Tr.V. 149, p. 13,761).

The diminished diversion requirements presented by the State find no substantive support in the record. They were first presented by Mr. Sostrum. The Master properly ruled that Mr. Sostrum was not qualified to render an expert opinion in this field because he completely lacked relevant experience. Then these same diversion requirements were adopted by Mr. Bishop.

The State suggests that certain of their cuts in diversion requirements are supported by testimony of United States or tribal experts (State's Finding 24-10, Vol. VI, pp. 976-977). This is not so. Mr. Bishop testified, for example, that Type IV and VI lands should receive a water right of 30 percent of full net irrigation requirement and Type V lands should receive zero. The State argues that Mr. Toedter's testimony supports these cuts. But Mr. Toedter was performing a depletion study, not determining diversion requirements. Mr. Bishop's reason for diminishing net irrigation requirements for Type IV and Type VI lands was his unverified assumption that only 30 percent of these lands were irrigated in a single year. This assumption made no sense at all, because Mr. Sostrum identified all of these lands as being in use in a single year.

The only rationale suggested by the State for cutting off all water in mid-July in water-short streams is Mr. Bishop's "lengthy experience." But this cut was specifically identified by Mr. Sostrum as being his idea (Tr.V. 140, p. 12,892). Moreover, Mr. Bishop conceded that such an arbitrary cutoff would not apply to a person with a State water right in a water-short area (Tr.V. 149, pp. 13,744-13,745).

The State argues a 50 percent efficiency can be achieved on historic lands. (State's Finding 24-10, Vol. VI, pp. 976-977.) No such examples in the

Basin are cited. The State's attempted reliance on the testimony of Mr. Billstein for the United States and Mr. Bliesner for the Tribes is misplaced. Both Mr. Billstein and Mr. Bliesner testified on water availability. Mr. Billstein stated that where adequate water supply is generally available, irrigation efficiencies can be improved on a short-term basis to cope with temporary shortages. Even on a short-term basis, this could cause reduced productivity:

> That [the reduced water available in drought conditions] causes some people to make some decisions. Sometimes they decide that they're not going to plant their full crop. They may go with a different crop type, like small grains where they feel they can get an early season supply and harvest it out by the time they get a late season shortage. They will get into a situation where they will accept partial service on pasture and apply a vast majority after the water duty to their cash crops.

(Tr.V. 82, p. 7,281)

This testimony, which was paralleled by Mr. Bliesner, does not provide any reason for cutting diversion requirements. The testimony simply points out that when water supply is short, farmers cut back water use. But the measure of the Tribes' right must be intact, and reasonable efficiencies which can be met by existing irrigators over the long run must be provided. Since no one else in the Basin now achieves the 50 percent advocated by the State, the Tribes' water right to serve historic lands must not be subject to such an unrealistic limitation.

VIII.

THE MASTER SHOULD ADOPT THE TRIBES' PROPOSED FINDINGS ON INDIAN-OWNED FEE LANDS.

The State claims the Tribes have "failed to introduce any evidence as to the current ownership of lands they deem to be Indian-owned fee lands"

(Finding 28-12, Vol. VIII, p. 1,644). The State cites the testimony of Mae Eckman as being insufficient in this regard (id.). The State is confused. Ms. Eckman testified for the United States on ownership of trust lands. Elsie Kolstad testified for the Tribes on the ownership of Indian-owned fee lands (Tr.V. 90, p. 8,007-8,030). Mrs. Kolstad relied on certified copies of Fremont and Hot Springs County tax records (Tribes' Ex. 4) and certified deeds and plats, (Tribes' Ex. 5) all introduced in evidence to determine ownership. Mrs. Kolstad, who was qualified as a title expert based on more than 20 years' experience in BIA title work, including work with respect to the Wind River Indian Reservation, testified that these county title records are the kinds of documents properly relied on in determining who owns fee land on the Reservation (Tr.V. 90, pp. 8,015-8,016). The State, while claiming the insufficiency of these official county records, did not object to their admission into evidence (Tr.V. 90, p. 8,028) and did not present any evidence seeking to refute the title information testified to by Mrs. Kolstad. The State's claim is simply another unsupported attempt to impose an unwarranted super burden of proof on the Tribes. The uncontradicted title information testified to by Mrs. Kolstad, reflected in Tribes' Finding 200, pp. 82-83, should be adopted by the Master.

Mr. Keith Higginson testified for the Tribes on the lands found by Mrs. Kolstad to be Indian-owned fee lands—identifying practicably irrigable lands currently in irrigation (6,432 acres) and practicably irrigable lands not currently in irrigation (3,943 acres), and determining diversion requirements for these lands (46,724 acre-feet per year) (see Tribes' Findings 201-212, pp. 81-88; Tribes' Exs. 8 and 9). While Mr. Higginson was by far the best qualified witness to testify on the Indian-owned fee lands, and while his examination of those

lands was far more complete than any other witness, the State criticizes both Mr. Higginson's expertise and his methods.

The State concedes that Mr. Higginson "has many years' experience in water resource engineering and is probably well-qualified to testify in his area of expertise." (State's Finding 25-1, Vol. VI, p. 1018.) The State contends, however, that Mr. Higginson lacks sufficient expertise in soils and aerial photography interpretation to render valid opinions on irrigable and irrigated lands. The State is wrong. Mr. Higginson served as Commissioner of the United States Bureau of Reclamation from 1977 to 1981. He was Director of the Idaho State Water Agency for twelve years and Chief of the Water Rights Branch of the Utah State Engineer's Office for eight years. In these positions he had extensive experience with irrigated lands, soils, aerial photography, diversion requirements, irrigation efficiencies and water availability. Mr. Higginson also served as Master for a water rights adjudication in Idaho concerned largely with determining existing water use. (Tribes' Finding 201; Tr.V. 91, pp. 8,044-8,049.) His 25 years of relevant experience far surpasses that of the State witnesses testifying on fee lands -Mr. Sostrum, who had no relevant experience at all, and Mr. Sommers, whose range of experience was far more limited than Mr. Higginson's. Basically, the State's argument is that Mr. Higginson was too successful in the water resources field—that because he became a high-level official, rather than remaining a field hand, his opinions are invalid. This argument must be rejected. Mr. Higginson is eminently well qualified in the areas of his testimony.

With respect to Indian-owned fee lands currently in irrigation, the State criticized Mr. Higginson for "only" visiting in the field 116 of the 120 Indian-

owned fee land tracts (State's Finding 25-7, Vol. VI, p. 1,032). This is hardly a condemnation of Mr. Higginson's work—he visited in the field each and every tract he identified as being in irrigation (Tribes' Finding 203, p. 84). Mr. Sostrum, the State's primary witness on currently-in-use, Indian-owned fee lands, relied on no field work in making his determination of actual use (Tribes' Finding 204, p. 84).

The State incorrectly suggests that Mr. Higginson's analysis of Indian-owned fee lands currently in irrigation was deficient because he took no soils samples (Findings 25-1, 25-7, Vol. VI, pp. 1,017, 1,032). These were lands seen in the field to be currently receiving water for beneficial use. As discussed above (see p. 49, supra), Indian lands currently in use are entitled to a reserved water right.

The State suggests that 180 acres of this in-use land must be eliminated as Class 6 and another 112 as subirrigated (Finding 25-2, Vol. VI, p. 1,020). This suggestion must be rejected. There was no showing by the State to contradict the fact that these lands were under actual irrigation and that beneficial use was being made. If these Indian lands are to be deleted, then thousands of acres of non-Indian land now irrigated in the Basin, which are also Class 6 or subirrigated, must also be deprived of water and beneficial use (see Tribes' Finding 116, pp. 48-49).

With respect to Indian-owned fee lands not currently under irrigation, the State levels two basic attacks on Mr. Higginson's work. First, the State criticizes Mr. Higginson's reliance on published soils data of official government agencies, suggesting that certain sources lack sufficient data to make arability

determinations (Finding 21-1, Vol. VI, p. 891). However, Mr. Higginson testified that these sources-- the Bureau of Reclamation, Soils Conservation Service and BIA--were indeed the kinds of sources he had previously relied upon throughout his career in evaluating the character of land and its ability to promote irrigation (Tr.V. 91, p. 8,063-8,064). Furthermore, the State's soils witness, Mr. Sommers, "utilized the same information as Mr. Higginson" concerning soils (State's Finding 21-2, Vol. VI, p. 893). Mr. Sommers had no trouble finding enough information in these same published sources to make his conclusion that certain lands were nonarable, yet he felt they could not be used by Mr. Higginson to find arability. Given Mr. Higginson's wealth of experience, his findings of arability were by far the most persuasive evidence presented to the Master on this point.

Second, the State argues that Mr. Higginson's findings of irrigability were deficient because he did not do a specific engineering design or a formal benefit-cost analysis for these tracts. But these were lands which were clearly economically feasible to irrigate. As Mr. Higginson testified:

> [I] n connection with the lands that I looked at in connection with this study, for the most part those lands are adjacent to, within the confines of existing canals and ditches serving already irrigated land. And I felt it unnecessary to make an extensive economic analysis to determine whether water could be brought to that land because it was simply, in most cases, a matter of extending the ditch or a lateral in order to bring water to the land. (Tr.V. 91, pp. 8,057-581.) 13/

The State presented no evidence even suggesting these tracts could not economically be irrigated. Basically, the State is seeking to require the Tribes

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13/ As to those few Indian-owned fee tracts which could not be served by existing facilities, Mr. Higginson requested and received a more formal economic analysis from the Tribes' economists (Tr.V. 92, p. 8,198-8,200).

to perform a formal economic analysis for these lands, which the uncontradicted testimony of Mr. Higginson indicates is totally unnecessary. Such makework was not required in Arizona v. California—where the economic analysis in the initial trial was simply a matter of noneconomist experts locating the "obviously economic" lands. Special Master's Report, Arizona v. California (Tuttle, Special Master, Feb. 22, 1982), pp. 96-97. The record here firmly supports Mr. Higginson's conclusions.

IX.

THE STATE'S PROPOSED FINDINGS AND CONCLUSIONS ON NONAGRICULTURAL CLAIMS SHOULD BE REJECTED.

A. Mineral Development

The State asks the Master to find that there is no factual basis for a reserved right for future mineral development on the Wind River Reservation. Findings 46-1 through 46-6, Vol. VIII, pp. 1,493-1,509. The heart of the State's argument is that (1) evidence is lacking for a recurring annual water requirement in perpetuity, (2) no evidence exists for the connection of mineral development to Indian trust land, and (3) economic feasibility of the proposed mineral development was not adequately shown. Like so many of the State's arguments, this one ignores the extensive evidence presented on mineral development and calls for an unachievable level of detail from the United States to support the mineral claim. See Tribes' Findings 224-265, pp. 92-105.

There are no absolute answers as to precisely which Reservation mineral reserves will be developed in the future, how mineral technology will evolve, or what markets for mineral resources will look like. What is well known is that the vast mineral wealth of the Reservation was recognized by the United States

and Tribe at the time of the 1868 Treaty. Mineral resources have been developed for over half a century into a vital part of the Tribes' Reservation economy. This development will continue to promote Tribal self-sufficiency in the future. As opportunities for mineral development increase and change, sufficient water must be available to serve those tribal needs.

The United States' expert economist, James Merchant, applied his considerable analytical skills to the available information on mineral reserves and general economic conditions to arrive at his quite reasonable, if conservative, projections on this development and associated water requirements. He developed his opinions in a systematic way about all known minerals on the Reservation. If his information turns out to show fewer reserves or more understated demands than the future actually holds, the Tribes' claim for water for mineral development would be too low, whether one is speaking of peak demand or recurring annual requirements. With unknown and unknowable future technology, marketing and demand, it would be impossible to undertake more detailed, long-term, economic feasibility studies of each of the now-known probable developments.

Certainly the State's expert, Gary Watts, could testify with no greater certainty than Mr. Merchant. Mr. Watts had developed no other independent information of substance. Furthermore, he lacked important knowledge. For example, he could not answer basic questions about the occurrence of recent oil and gas discoveries on the Reservation or the practice of mineral leasing there (Tribes' Finding 230, p. 94).

Answering some of the State's specific charges, evidence was indeed presented by the United States and the Tribes that the projected mineral development would occur on Indian trust land. Compare U.S. Exs. C-22 through C-29, C-33 and C-33-B with Tribes' Ex. M-1.

As for the present sulphuric acid plant on the Reservation, the main point is that regardless of the plant's physical location, it can use natural gas produced from tribal leases for its production, a fact which could not be denied by the State's expert (see U.S. Finding 539, p. 184). As long as a tribal mineral resource, such as natural gas, is being developed, reserved water must be available to aid in its development.

B. Livestock

The State, in its proposed findings of fact on livestock operations (Findings 13-1 through 13-10, Vol. IV, pp. 544-568), emphasizes the differences between the testimony of Messrs. Merchant and Harbour, for the United States, and Dr. Carver, for the State, and argues that the Master should adopt the State's conclusions. In reality, however, there is little difference in the approach used and conclusions reached by the opposing witnesses. See Tribes' Findings 213-223, pp. 89-91. In view of the fact that Messrs. Merchant and Harbour based their conclusions on more intimate knowledge of livestock operations on the Reservation itself, the Master should adopt the findings of the federal witnesses.

The witnesses for both the United States and the State agreed that livestock operations on the Reservation could be expanded, and consumptive water needs would increase commensurately with that expansion. The State

argues that the Master should adopt Dr. Carver's conclusions that these operations can be expanded only 25 percent, rather than the 50 percent projected by Mr. Merchant. However, as both the Tribes and the United States have pointed out in their proposed findings of fact, Dr. Carver's economic analysis of expanded livestock operations was extremely conservative and the Master should reject his approach in favor of Mr. Merchant's analysis. Dr. Carver used an unnecessarily high discount rate (7-1/8 percent), and he assumed that current tribal policies with respect to herd size and cross-breeding necessarily will remain in effect for future livestock operations. Even if current tribal policies were to continue, that would not provide justification for limiting the measure of the Tribes' water rights.

The maximal future water consumption needs for livestock operations were projected by Mr. Merchant to be 2,738 acre-feet per year and by Dr. Carver to be 1,000 acre-feet per year. The State criticizes Mr. Merchant's analysis, claiming that, as for present-need requirements, Mr. Merchant has overestimated the size and evaporation rate for each stock pond, as well as the number of additional stock ponds required to meet future needs. Mr. Merchant's testimony, however, was based on reliable information furnished by the Wind River Reservation BIA range operations officer and on official publications of the United States and the State of Wyoming. Dr. Carver, who assumed fewer stock ponds and a lower evaporation rate, based his information on his work on <u>other</u> reservations, written materials unverified by Reservation officials, and on studies limited to specific areas of the Reservation. The Master therefore should adopt Mr. Merchant's conclusions as being more accurate for this Reservation.

C. Fisheries

The State takes no issue with the Tribes' evidence presented through Dr. Omer Stewart that fishing has always been an important element of Shoshone culture and economy both before and after the Treaty of July 3, 1868. Given this uncontradicted evidence, the Master should find the Tribes have a reserved water right to protect fisheries. See Tribes' Findings 272-283, pp. 109-112. The only evidence indicating the instream flows needed to preserve fish habitat was presented by Mr. Vogel for the United States. Mr. Vogel's testimony was based on thorough familiarity with Reservation streams, was well supported, and should be adopted by the Master.

The State's criticism of the government's case for instream flows to maintain fisheries centers on the testimony of Mr. Vogel, for the United States, and Mr. Sinning, for Wyoming.

Mr. Vogel's experience, care and thoroughness in approaching his work and in testifying to his conclusions about the sufficiency of stream flow for fisheries is ample and convincing. The attempt to discredit his work and experience fails by virtue of the misstatements about his testimony that the State makes in its Findings 45-4 and 45-5, Vol. VIII, pp. 1,484-1,490, which are pointed out in the United States' Objections thereto, and by Mr. Sinning's cursory helicopter examination of the streams in question. See Tribes' Findings 281-283, pp. 111-112.

D. Aesthetics and Wildlife

The State misstates the evidence on aesthetics and wildlife water requirements (State's Findings 44-3 through 44-7, Vol. VIII, pp. 1,464-1,477).

Contrary to the State's assertion, the United States did present expert testimony through Richard Harbour, BIA Land Operations Officer at the Wind River Agency, on water needed to maintain wildlife population (Tribes' Finding 286, p. 114). He testified that it would take 100 percent of the water in the aesthetic areas he had designated to maintain the wildlife there (id.). In addition, Steve Martin, one of the State's own experts, testified that 30 to 60 percent of the water in aesthetic areas would be required to maintain wildlife populations in a "good" to "excellent" state (Tribes' Finding 290, p. 115).

It is also evident from the testimony that Mr. Harbour's credentials and experience on the Reservation constitute a more credible foundation than those of Messrs. Keith and Martin. Mr. Harbour has lived and worked on the Wind River Reservation for seven years and was admitted as an expert in natural resources management and planning (Tribes' Finding 284, p. 113). His experience there, which has included land use planning (id.), contrasts sharply with the four limited trips to the Reservation by the State's aesthetics expert, Mr. Tom Keith, and its wildlife expert, Mr. Martin (Tribes' Findings 287-89, pp. 114-115). Mr. Harbour's testimony incorporated his knowledge of what the Tribes consider important aesthetic areas. Mr. Keith, for the State, relied on a model—Bureau of Land Management: Visual Resource Management System—which seeks to classify land by its aesthetic value. Between 70 and 80 percent of Mr. Harbour's aesthetic areas were identified by Mr. Keith as having the highest value under the BLM system. Mr. Keith also testified that if streamflows in those areas were diminished, that could diminish the riparian communities of those streams, thereby reducing their aesthetic quality. See Tribes' Finding 289, p. 115.

The Master should find that the United States' expert presented the most persuasive evidence on the existence and water needs of the aesthetic areas, and that the Tribes have the right to use all the water in those areas to maintain their beauty and wildlife if they so choose.

X.

THE STATE'S PROPOSED FINDINGS AND CONCLUSIONS ON WATER AVAILABILITY SHOULD BE REJECTED.

The State's Findings 27-1 through 27-14 (Vol. VIII, pp. 1,082-1,130) seek to exalt the computer model prepared by Leonard Rice and Gordon Fassett to an "integrated river systems operation study model," while attacking the systems operation study prepared by Mr. Billstein.

As noted in the Tribes' Findings 298-328, pp. 118-31, the evidence amply demonstrates that the Billstein study, along with the testimony presented by Messrs. Bliesner and Higginson for the Tribes' additional claims, may be relied upon with certainty, while the Fassett model is totally unreliable (Tribes' Finding 328-A-K, pp. 129-131; see also United States' Objections to Wyoming's Finding 27-11).

The Billstein study of the availability of water for all United States claims for the Tribes, assuming a tribal priority date of 1868, was based upon the depletion study and the natural flow analysis done by Messrs. Toedter and Keene, the results of which were accepted by the State experts (Tribes' Finding 304, p. 120). To the extent the State, in its findings, now seeks to attack the Billstein systems operation study on various technical grounds, the

Tribes adopt the response of the United States in its Objections to Wyoming's Finding 27-8.

The State attacks Mr. Billstein's conclusions as demonstrating that there are conflicts among the tribal claims. The truth of the matter is that Mr. Billstein demonstrated that if all the tribal water claims were recognized and projects were built, the only conflicts among tribal irrigation claims would be some small shortages in some months of the driest years, shortages which could be cured with minor management techniques (Tribes' Findings 308-315, pp. 121-124). It must be remembered that Mr. Billstein's study related to maximal water demand, which assumed that all United States claims resulted in construction of projects and were exercised at once.

Similarly, the more-than-adequate credentials of Messrs. Bliesner and Higginson fully support their conclusions that the additional tribal claims for Indian-owned fee lands, Big Horn Flats Extension, and Stagner Ridge would also create no unmanageable shortages and in certain instances will actually contribute to additional flow (Tribes' Findings 317-23, pp. 125-28). This testimony also concerned a maximal demand, including the tribal as well as United States claims.

As previously stated in the Tribes' findings, assuming all rights are simultaneously and fully exercised, there could be some shortage that will require a choice between maintaining fisheries' flows at optimal levels and diversion requirements for other uses. If and when such a shortage occurs, it would clearly be a matter of tribal choice to select to exercise one part of its reserved right rather than another.

For the foregoing reasons, the Master should adopt the findings proposed by the United States and the Tribes with respect to water availability.

CONCLUSION

The Master should reject the findings and conclusions proposed by the State and adopt those proposed by the Tribes.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of May, 1982, a true and correct copy of the Tribes' reply to the State's proposed findings of fact, conclusions of law, and brief was sent to each of the following in the manner specified:

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