3-12-1978

Reiteration of plaintiff Colville Tribes' motion for partial summary judgement and response to memorandum of points and authorities in support of plaintiff, United States' motion for partial summary judgement

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

COLVILLE CONFEDERATED TRIBES, Plaintiff, vs. BOYD WALTON, JR., et ux, et al., Defendants, STATE OF WASHINGTON, Defendant Intervenor.	Civil No. 3421
UNITED STATES OF AMERICA, Plaintiff, vs. WILLIAM BOYD WALTON, et ux, et al., and THE STATE OF WASHINGTON, Defendants.	Civil No. 3831

REITERATION OF PLAINTIFF COLVILLE TRIBES'
MOTION FOR PARTIAL SUMMARY JUDGMENT AND
RESPONSE TO MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF PLAINTIFF,
UNITED STATES' MOTION FOR PARTIAL SUMMARY JUDGMENT

March 13, 1978

Respectfully submitted,

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REITERATION OF PLAINTIFF COLVILLE TRIBES' MOTION FOR PARTIAL SUMMARY JUDGMENT AND RESPONSE TO MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF, UNITED STATES' MOTION FOR PARTIAL SUMMARY JUDGMENT

SUBJECT INDEX

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PRIMACY OF FEDERAL LAW

It is respectfully submitted that the Colville Confederated Tribes can best respond to the motion for partial summary judgment and memorandum in support of it, filed on or about 1 March 1978 by the Department of Justice, by alluding to the Tribes' motion for partial summary judgment. That tribal motion for partial summary judgment was served 14 April 1976 and fully argued 12 July 1976. Stressed by the Tribes in that motion, in the brief in support and in the argument is the "Primacy of Federal Law" to the exclusion of state law in these consolidated cases.

Predicate for the pre-emption of federal law and the exclusion of state law and jurisdiction is the Constitution of the United States which provides,

among other things, that:

> "The Congress shall have Power... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." 1/

That clause of the fundamental law has, since the adoption of the Constitution, repeatedly been declared to vest in the National Government plenary and, indeed, exclusive powers in regard to Indian affairs insofar as the states are concerned. In the hallmark case of Worcester v. Georgia, the concepts of which, it is respectfully stated, are here controlling, Chief Justice Marshall, referring to the above-quoted Constitution pre-emption of power of the Federal Government, had this to say in regard to state laws which are repugnant to Indian interests and property rights:

> "The Cherokee [Indian] nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force...." 2/

That concept is equally applicable here as to the State of Washington.

From Chief Justice Marshall's powerful statements in Worcester v. Georgia, this excerpt is likewise taken:

> "The whole intercourse between the United States and this nation [Cherokee Nation], is by our Constitution and laws, vested in the government of the United States." 3/

Respecting the laws of Georgia repugnant to the Indian interests involved in Worcester v. Georgia, the highest Court declared them null and void as being contrary "... to the settled principles of our Constitution...." Further, Justice Marshall stated the relations between the United States and the Indian Nations "are committed exclusively to the government of the Union." 4/

In keeping with the constitutional concept of the primacy of federal law, reference is made to the recent Supreme Court decision of the Oneida Indian

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1/ Constitution of the United States, Art. 1, sec. 8, cl. 3.

2/ 32 U.S. 515, 560 (1832)(emphasis supplied)

3/ Id. at 561.

4/ Id. (emphasis supplied)

Nation v. County of Oneida. 5/ There the Supreme Court adhered to the Worcester precepts in these terms:

> "Once the United States was organized and the Constitution adopted, these tribal rights to Indian lands became the exclusive province of the federal law." 6/

Having cited the 1790 Act, which is the predecessor of 25 U.S.C. 177 quoted above, the Court stated:

> "The United States... asserted the primacy of federal law in the first Nonintercourse Act.... This has remained the policy of the United States to this day. See 25 U.S.C. § 177. 7/

So deeply are those concepts ingrained in the jurisprudence of this Nation that further elaboration of them is not essential. What is manifest from those constitutional concepts is this: Where, as here, the United States of America has acted through the Congress of the United States, the State of Washington has no jurisdiction within the Colville Indian Reservation in regard to the water resources of No Name Creek. Moreover, the laws of the State of Washington have no application to the rights claimed by the Waltons in these proceedings.

A. Pursuant To The "Primacy Of Federal Law," The Colville Confederated Tribes Are Entitled To A Partial Summary Judgment Against The Defendants Waltons

As reviewed in detail in the motion for partial summary judgment, 8/ the Waltons interposed the affirmative defenses of adverse possession, statute of limitation, estoppel, laches and acquiescence, all as provided for by the laws of the State of Washington. As set forth in the Tribes' motion for partial summary judgment, it is conceded that the Waltons purchased former Allotments 525, 894 and 2371. 9/ It is likewise admitted that the Waltons have occupied those

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5/ 414 U.S. 661, 667-8 (1974).

6/ Id.

7/ Id. (emphasis supplied)

8/ Plaintiff's Motion for Partial Summary Judgment, served 14 April 1976, heard 12 July 1976.

9/ Id.

lands since 1948 and, by reason of that occupancy, have monopolized all of the waters of No Name Creek during the irrigation season. Irrespective of those facts, it is respectfully submitted that their defenses may not be successfully interposed against either the Colville Confederated Tribes or the United States.

In Rule 56(d) of the Federal Rules of Civil Procedure, it is provided that:

> "If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy...." 10/

It is likewise provided in Federal Rule 56(c) that:

> "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 11/

Most assuredly, the facts are not contravened as to Defendants Waltons' title, occupancy and use of the waters of No Name Creek. Nevertheless, the affirmative defenses relied on by the Waltons have no application as against the claims of the Colville Confederated Tribes to the rights to the use of water in No Name Creek.

In the Ahtanum cases, tried in this Court and reviewed three times by the Court of Appeals for the Ninth Circuit, the matter of the defenses in question was considered in depth. With great specificity, the Court denied that the affirmative defenses could be interposed against the Indians or the United States. 12/ From the Ahtanum decision, this authoritative statement is taken:

10/ Federal Rules of Civil Procedure, Rule 56(d) (emphasis supplied).

11/ Id. Rule 56(c)(emphasis supplied).

12/ United States v. Ahtanum Irrigation District, 236 F.2d 321, 334 (CA 9, 1956), Appellees' Cert. Denied, 352 U.S. 988 (1956); 330 F.2d 897 (1965); 338 F.2d, Cert. Denied, 381 U.S. 924 (1965).

> "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. Utah Power and Light Co. v. United States, 243 U.S. 389, 408-9; Cramer v. United States, 261 U.S. 219, 234; United States v. Walker River Irr. Dist., supra, p. 339." 13/

Relative to Indian Reservations, this most pertinent - and it is believed controlling - statement is made in the Ahtanum decision:

> "And in respect to the rights of Indians in an Indian reservation, there is a special reason why the Indians' property may not be lost through adverse possession, laches or delay. This, as pointed out, in United States v. 7,405.3 Acres of Land, 4 cir., 97 F.2d 417, 422, arises out of the provisions of Title 25 U.S.C.A. § 177, R.S. § 2116, which forbids the acquisition of Indian lands or of any title or claim thereto except by treaty or convention." 14/

Rationale of the reasoning of the Supreme Court regarding the immunity of the National Government itself from the application of the principles of estoppel and laches is well stated in these terms: "A different rule... would place the public domain of the United States completely at the mercy of state legislation." 15/

It is of interest that, in the last-cited Utah Power and Light Company case, the Court made this most pertinent observation, especially applicable here as to the defense of estoppel:

> "... [I]t is said the agents [of the United States]... with knowledge of what the defendants were doing, not only did not object thereto but impliedly acquiesced therein until after the works had been completed and put in operation." 16/

In rejecting the defense of estoppel, the Supreme Court expressed this controlling concept:

> "As a general rule laches or neglect of duty on the part of an officer of the Government is not defense to a suit brought by it to endorse a public right or protect a public interest." 17/

13/ Id. at pg. 334.
14/ Id.
15/ Utah Power and Light Co. v. United States, 243 U.S. 390, 404 (1917); citing Camfield v. United States, 167 U.S. 518, 525 (1897).
16/ Id. at 409.
17/ Id.

It is respectfully submitted in the motion for partial summary judgment that the affirmative defenses as to estoppel, laches, adverse possession, statute of limitation or acquiescence cannot be raised by the Defendants against the Colville Indian Tribes. Accordingly, the Colville Confederated Tribes renew their motion for a partial summary judgment and respectfully petition this Honorable Court to declare that the Waltons may not successfully interpose as against the Colville Confederated Tribes those defenses.

B. The Colville Confederated Tribes And The Justice Department Are Both Entitled To A Partial Summary Judgment Against The Waltons And The State Of Washington

In its motion for partial summary judgment, filed with this Court and argued 12 July 1976, the Colville Confederated Tribes asserted, as a matter of law, that:

> "THE STATE OF WASHINGTON HAS NO JURISDICTION OVER RIGHTS TO THE USE OF WATER ON THE COLVILLE INDIAN RESERVATION AND THE PERMIT AND CERTIFICATE ISSUED TO THE DEFENDANTS WALTONS BY THE STATE OF WASHINGTON ARE NULL AND VOID AND OF NO FORCE AND EFFECT.
>
> "The State of Washington, Intervenor in Civ. No. 3421, and Defendant in Civ. No. 3831, is without jurisdiction over rights to the use of water within the Colville Indian Reservation, including but not limited to the rights to the use of water in No Name Creek. The permit and the Certificate of Water Right, dated August 25, 1950, issued by the State of Washington to the defendants Waltons are null and void and of no force and effect." 18/

The Department of Justice, by its 1 March 1978 motion, makes substantially the same assertion:

> "The State of Washington, as a matter of law, has no jurisdiction or authority to control or regulate the use of water on lands within the exterior boundaries of the Colville Indian Reservation. The judgment to be entered in these proceedings should declare that the Certificate of Water Right issued by the State of Washington to the Waltons on August 25, 1950, is void and of no force and effect." 19/

In support of its motion for partial summary judgment relating to the lack of state jurisdiction over the waters of No Name Creek, the Justice Department

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18/ Colville Confederated Tribes' Motion for Partial Summary Judgment, p. 4, lines 8-16.

19/ Memorandum of Points and Authorities in Support of Plaintiff, United States' Motion for Partial Summary Judgment, p. 2, para. (6).

reviews some of the principles of law which support its motion. 20/ It is, however, the position of the Colville Confederated Tribes that there are additional constitutional precepts of the law pertaining to the "Primacy of Federal Law" over the laws of the State of Washington which require review and analysis.

1. State of Washington Admission Into The Union Conditioned On Plenary And Exclusive Jurisdiction Of The United States Over Indian Affairs

As against the State of Washington - not the Colville Confederated Tribes - the United States has plenary, exclusive and "absolute jurisdiction and control" over the rights to the use of water of No Name Creek. Subject to rights of the Colville Confederated Tribes, which occupied the lands here involved since time immemorial and on which the Tribes now reside, there passed to the United States of America title to and jurisdiction over those lands on 5 June 1846 by its Treaty with Great Britain "In Regard To Limits Westward Of The Rocky Mountains." 21/

By the Act of August 14, 1848, the Congress passed an "Act to Establish the Territorial Government of Oregon." 22/ Embraced within the Oregon Territory is the present State of Washington. Among other things, the Act last cited provided that:

> "[N]othing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory... or to affect the authority of the government of the United States to make any regulation respecting such Indians, their lands, property, or other rights...."

Provision was also made in the Act creating the Oregon Territory that it would be subject to the Ordinance of 1787 which governed the then Northwest Territory. In that 1787 Ordinance, Congress provided that: "The utmost good faith shall always be observed towards the Indians; their land and property shall never be taken from them without their consent...." 23/

20/ Id. pg. 21, para. IV, 1.7 et seq.
21/ Treaty with Great Britain, June 15, 1846, 9 Stat. 869.
22/ Ch. 177, 9 Stat. 323.
23/ Act of August 7, 1789, ch. 8, 1 Stat. 50, n.(a), Art. III.

When on March 2, 1853, the Congress passed "An Act to establish the Territorial Government of Washington," 24/ it used identical provisions as those quoted from the Oregon Territorial provision. Congress thus retained its constitutional power over Indian affairs and Indian property within the Territory of Washington.

The then President, U.S. Grant, on July 2, 1872, issued an Executive Order which provided as follows:

> "It is hereby ordered that the tract of country referred to in the within letter of the Commissioner of Indian Affairs as having been set apart for the Indians therein named by Executive order of April 9, 1872, be restored to the public doman [sic], and that in lieu thereof the country bounded on the east and south by the Columbia River on the west by the Okanogan River, and on the north by the British possessions, be, and the same is hereby, set apart as a reservation for said Indians and for such other Indians as the Department of the Interior may see fit to locate thereon." 25/

By that Executive Order of July 2, 1872, the Colville Indian Reservation was created, pursuant to which there was reserved for the Colville Indian Tribes both the lands and rights to the use of water essential to make those lands inhabitable. 26/

Congress passed the Act of February 22, 1889, pursuant to which the inhabitants of the Territories of Dakota, Montana and Washington "may become the States of North Dakota, South Dakota, Montana, and Washington, respectively...." 27/ Congress then in the exercise of its power to admit states to the Union in fulfillment of its obligation as trustee for Indian Tribes and people, and to establish needful rules and regulations of the Indian lands, prescribed these conditions in the Enabling Act respecting the last-mentioned states, including, of course, the State of Washington:

> "That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title ... to all lands lying within said limits owned or held by any Indian or Indian tribes...." 28/

24/ Act of March 2, 1853, ch. 90, 10 Stat. 172.
25/ See Col. Ex. 2(3), admitted February 7, 1978.
26/ Arizona v. California, 373 U.S. 546, 598 (1963); see 376 U.S. 340 (1964); Final Decree. (Applying Winters Doctrine to Executive Order Reservations.)
27/ Act of February 22, 1889, ch. 180 § 1, 25 Stat. 676.
28/ Id. § 4(2) (emphasis supplied).

Moreover, Congress provided additional conditions to the admittance of these states to the Union by declaring:

> "[until] the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States..." 29/

The proviso contained in the Enabling Act, all as set forth above, is likewise made a part of the Constitution of the State of Washington in its "Compact With The United States." 30/

It is abundantly manifest that the State of Washington, its laws, jurisdiction and administration are totally without force and effect within the Colville Indian Reservation. As above emphasized, Washington's admission into the Union disclaimed all jurisdiction over the Colville Indian Reservation. See Seymour v. Superintendent. 31/

2. Both Court Decisions And Congressional Conduct Establish Lack Of State Jurisdiction Within Indian Reservations, Absent Congressional Consent

Reference has been made to the fact that Montana, in which the Winters case arose, and the State of Washington, in which the Ahtanum Creek case arose, were admitted into the Union and adopted constitutions which specifically disclaimed any right, title or interest in the lands of Indians or Indian Tribes. In the McIntire decision, 32/ of the Court of Appeals for the Ninth Circuit, that Court rules specifically declaring, in regard to the Flathead Indian Reservation in the State of Montana, that a right to the use of water could not be acquired by complying with the laws of the State of Montana. In denying the claim to rights to the use of water based on state law, the Court declared:

> "The waters of Mudd Creek were impliedly reserved by the Treaty of the Indians.... The United States became a trustee, holding the legal title to the land and waters for the benefit of the Indians. . . . Being reserved no title to the waters could be acquired by anyone except as specified by Congress." 33/

29/ Id. (emphasis supplied).
30/ State of Washington Constitution, Art. XXVI.
31/ See Col. Ex. 2(10), 368 U.S. 351 (1962).
32/ United States v. McIntire, 101 F.2d 650, 652 (CA 9, 1939).
33/ Id. at 653.

The Court of Appeals then continued in regard to the inapplicability of state laws respecting the appropriation of rights to the use of water on Indian reservations:

> "... Montana statutes regarding water rights are not applicable, because Congress at no time has made such statutes controlling in the reservation." 34/

Following that conclusion, the Court of Appeals alluded to the Enabling Acts admitting Montana and Washington into the Union:

> "... the Montana enabling acts specifically provided that Indian lands, within the limits of the state, shall remain under the absolute jurisdiction and control of the Congress of the United States." 35/

Hence, said the court, the claimants under state law "... obtained no valid water right."

Reference is made to the Winters decision establishing the reservation by the Indians there involved of their rights to the use of water when they ceded lands to the United States. 36/ That decision is, of course, the primary authority for the immunity of the Colvilles' rights to the use of water from acquisition or invasion by claimants under state law. There it was contended that the Congressional Act of February 22, 1889, reviewed above, admitting Washington and Montana into the Union, repealed the Indian Agreement pursuant to which the Tribe reserved rights to the use of water. Rejecting that claim by Winters, the Highest Court stated:

> "The power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be.... That the Government did reserve them we have decided, and for a use which would be necessarily continued through years." 37/

In the Ahtanum Creek decision, which was tried in this Court, the issue was presented and fully reviewed as to whether claimed rights to the use of

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34/ Id. at 654.

35/ United States v. McIntire, 101 F.2d 650, 654 (CA 9, 1939).

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

37/ Id.

water under the appropriation laws of the State of Washington had validity against the prior and paramount Winters Doctrine rights to the use of water of the Yakimas. Again the Court of Appeals was specific and emphatic in declaring:

> "Rights reserved by treaties such as this are not subject to appropriation under state law, nor has the state power to dispose of them." 38/

It is difficult to perceive of a more definitive ruling against the claim of Defendants Waltons who are claiming rights to the use of water in No Name Creek pursuant to a Certificate of Water Right issued to them by the State of Washington.

Quite recently, the Supreme Court rejected the contention of the State of Arizona which in effect denied the principles of the Winters decision relative to Executive Order reservations comparable to the Colville Indian Reservation:

> "We can give but short shrift at this late date to the argument that the reservations either of land or water are invalid because they were originally set apart by the Executive...." 39/

Continuing, the Court declared that it had

> "... in Winters concluded that the Government when it created that Indian Reservation, intended to deal fairly with the Indians reserving for them the waters.... We follow it now and agree that the United States did reserve the water rights for the Indians effective as of the time the Indian Reservations were created." 40/

Exemption of the Winters Doctrine rights to the use of water in No Name Creek of the Colville Confederated Tribes from acquisition by Defendants Waltons and others similarly situated, it is respectfully submitted, is too clear for successful challenge.

Congress adhered to the concept that rights to the use of water may not be acquired by compliance with the laws of the State of Washington antecedent to the 1908 Winters decision. It did so in regard to the Spokane Indian Reservation. On March 3, 1905, by a special Act of Congress, provision was made:

38/ United States v. Ahtanum Irrigation District, et al., 236 F.2d 321, 328 (CA 9, 1956), Cert. Denied, 352 U.S. 988 (1963).

39/ Arizona v. California, 373 U.S. 546, 598, 600 (1963).

40/ Id.

"That the rights to the use of waters of the Spokane River where the said river forms the southern boundary of the Spokane Indian Reservatin may, with the consent of the Secretary of the Interior, be aquired by any citizen, association, or corporation of the United States by appropriation under and pursuant to the law of the State of Washington." [33 Stat. 1006 (emphasis supplied).]

The legislative history of that Act underscores the recognition in 1905 by the Congress and the then Senator Jones of the States of Washington (39 Cong. Rec., Part 3, page. 2415), of the need for specific legislation for anyone to acquire rights to the use of water under state law on Indian Reservations. That concept of the lack of authority to acquire rights to the use of water within Indian Reservations, absent express authority from Congress, is most relevant, indeed, controlling in light of the authorities that have been reviewed above.

Accordingly, it is respectfully petitioned that this Court grant to the Colville Confederated Tribes and to the Department of Justice a partial summary judgment denying that the State of Washington had authority to issue a valid Certificate of Water Right to the Defendants Walton. The Colville Confederated Tribes likewise petition this Court to declare that the Certificate of Water Right, which was issued to the Waltons, is null and void and is of no force and effect.

On March 3, 1978, the Federal Court for the Western District of Washington in the Bel Bay case granted a motion for partial summary judgment, which is in part as follows:

> "10. The Court finds that the Plaintiff is entitled to partial summary judgment, that the State of Washington has no authority to issue permits for the appropriation of groundwater within the exterior boundaries of the Lummi Indian Reservation nor to manage or otherwise control groundwater or the right to use groundwater within the exterior boundaries of that reservation."

This Honorable Court is requested to enter a comparable judgment against the State of Washington both as to surface and groundwater in the No Name Creek Basin in these consolidated cases.

C. Title To The Rights To The Use Of Water In No Name Creek Resides In The Colville Confederated Tribes - Congress Has Not Expropriated Those Tribal Rights To The Use Of Water

It is conceded by all parties that the United States of America, acting through its President, created the Colville Indian Reservation by an Executive Order proclaimed July 2, 1872. None of the parties challenge the concepts of the Winters Doctrine as enunciated by the Supreme Court and repeatedly applied by that Court, the Courts of Appeals and, indeed, this Court. 41/

It will be observed that although the Winters Doctrine was originally applied to Treaty reservations, it was subsequently made applicable to Executive reservations. It is pertinent that equal status has been accorded to the Executive Order reservations with those of Treaty reservations. The Court of Appeals for the Ninth Circuit specifically ruled on the subject as follows:

> "There can be no doubt that such reservations by proclamation of the Executive stand upon the same plain as a reservation created by a treaty or by act of Congress." 42/

There is also general agreement by all parties that the priority date of the Winters Doctrine rights (to the use of water which adhere to the Colville Indian Reservation) is the date of the establishment of that reservation -- July 2, 1872.

Predicated upon that background, the Colville Confederated Tribes join the Department of Justice in its request for partial summary judgment relative to the first phase of its motion, which is as follows:

> "(1) The creation of the Colville Indian Reservation in 1872 reserved for the Colville Confederated Tribes and its members, as a matter of law, the amount of water necessary to satisfy the future as well as the present needs of the Reservation. The reservation of waters became effective as of the date the Colville Indian Reservation was created." 43/

41/ Please refer to the Colville Confederated Tribes Proposed Conclusions of Law filed with this Court January 9, 1978, pg. 40, Proposed Conclusions of Law, XII, et seq., reviewing the Winters Doctrine and the basic concepts declared by the Winters decision and the precedents which followed that decision.

42/ Gibson v. Anderson, 131 Fed. 39, 42 (1904).

43/ Memorandum of Points and Authorities in Support of Plaintiff, United States' Motion for Partial Summary Judgment, pg. 1, para. (1).

It now becomes important to consider the nature of the title that resides in the Colville Confederated Tribes and the relationship of the United States of America, as trustee, as it pertains to that title.

1. Full Equitable Title To The Winters Rights To The Use Of The Surface And Groundwaters Of No Name Creek Was Vested In The Colville Confederated Tribes By The Executive Order Of July 2, 1872

Predicated upon an abundance of authority, the Solicitor of the Department of Interior has declared, by a recent opinion, that full equitable title to the rights to the use of water, appertaining to the Colville Indian Reservation, resides in the Colville Confederated Tribes. In that opinion, the Solicitor of the Department of Interior states:

> "Congress has recognized the Colville Confederated Tribes' full equitable title to tribal lands within the Colville Reservation, both in the 1940 Act and in prior legislation, see United States v. Pelican, 232 U.S. 442, 445 (1914).... Such title, having vested in the tribes, cannot be taken except as clearly and specifically authorized by Congress ...." 44/

As reviewed above, No Name Creek is now and has always been part of the Colville Indian Reservation and the rights to both the surface and groundwater have likewise always been a part of the Colville Indian Reservation insofar as these consolidated cases are concerned.

It is elemental that the rights to the use of water in No Name Creek are invaluable interests in real property. 45/ Likewise elemental is the fact that

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44/ See Col. Ex. 2(12), "Solicitor's Opinion on the boundaries of and status of title to certain lands within the Colville and Spokane Reservations" Memorandum to Assistant Secretary, Energy & Resources; Assistant Secretary, Fish, Wildlife & Parks; Commissioner, Bureau of Indian Affairs, from Secretary of the Interior Rogers C.B. Morton, June 3, 1974, p. 9.

45/ Wiel, "Water Rights in the Western States," 3d ed., vol. 1, sec. 18, pp. 20, 21; sec. 283, pp. 298-300; sec. 285, p. 301; United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 75 (1913); Ashwander v. TVA, 297 U.S. 288, 330 (1936); United States v. Ahtanum Irr. Dist., 236 F. 2d 321, 339 (CA 9, 1956); Fuller v. Swan River Placer Mining Co., 12 Colo. 12, 17; 19 Pac. 836 (1898); Wright v. Best, 19 Cal. 2d 368; 121 P.2d 702 (1942); Sowards v. Meagher, 37 Utah 212, 108 Pac. 1112 (1910); see also Lindsey v. McClure, 136 F.2d 65, 70 (CA 10, 1943); David v. Randall, 44 Colo. 488; 99 Pac. 322 (1908).

an action of the character of these consolidated cases is a proceeding to quiet title in and to real property. 46/

On the background of the agreement among the parties as to the status of the Colville Indian Reservation and as to the Winters Doctrine rights to the use of water, the Colville Confederated Tribes will further respond to the motion of the Justice Department for partial summary judgment and to its memorandum in support of that motion.

2. Congress, By 25 U.S.C. 381, By The Explicit Language Of The Act, Precludes Construction Of That Act By The Courts

Key to the ultimate resolution of the legal questions presented by the consolidated Walton cases is the application by this Court of the express language of 25 U.S.C. 381:

> "Irrigation lands; regulation of use of water
>
> "In cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior is authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations; and no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor. Feb. 8, 1887, c. 119, § 7, 24 Stat. 390."

It will be observed that 25 U.S.C. 381 is the codification of section 7 of the General Allotment Act of 1887.

In connection with that provision of the General Allotment Act, it is emphasized as follows:

a. 25 U.S.C. 381 is the only provision of the General Allotment Act relating to rights to the use of water.

b. 25 U.S.C. 381 has never been actually applied by any court although it has been alluded to by the courts on several occasions.

46/ United States v. Ahtanum Irr. Dist., 236 F.2d 321, 339 (CA 9, 1956); Crippen v. X Y Irr. Co., 32 Colo. 447, 76 Pac. 794 (1904); Louden v. Handy Ditch Co., 22 Colo. 102, 43 Pac. 535 (1897); Kinney on Irrigation and Water Rights, p. 2844, sec. 1569.

c. 25 U.S.C. 381 conferred upon the Secretary of the Interior certain powers which have never been exercised.

There is no need to construe 25 U.S.C. 381. Its terms are unequivocal. Simply stated, the Act authorized the Secretary of the Interior to adopt regulations "to secure a just and equal distribution" of water "among the Indians residing upon any" reservation where water is necessary "to render the lands" of the Indian reservation "available for agricultural purposes."

Too great stress cannot be placed upon the fact that the "just and equal" clause of 25 U.S.C. 381 pertains to "Indians" residing on the reservations. From the explicit language of the Act, two factors are abundantly clear:

a. 25 U.S.C. 381 has no application to non-Indians; and

b. it relates to "Indians" and not to allottees.

Perhaps the most elemental principle in the law, relative to statutory construction, has been stated by the Supreme Court in these terms:

> "Where the language [of a statute, as in 25 U.S.C. 381] is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meaning need no discussion." 47/

Another precept of statutory construction is contained in this Latin maxim: Expressio unius est exclusio alterius, 48/ as declared in the last-cited authority:

> "... the maxim is applied to statutory interpretation, where a form of conduct, the manner of its performance and operation, and the persons and things to which it refers are designated, there is an inference that all omissions should be understood as exclusions." 49/

Most recently, the courts have reiterated and reaffirmed their adamant refusal to depart from the express language of the law, as enunciated by the

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47/ Caminette v. United States, 242 U.S. 470, 485 (1916). See abundance of authority on the principle quoted, 2A Sutherland Statutory Construction, 4th Edition Text and Commentary, sec. 45.02, pp. 4 et seq.

48/ 2A Sutherland Statutory Construction, 4th Ed., sec. 47.23.

49/ Id.

Congress. A leading case, reviewing the necessity of the courts to abide with the express letter of the law as passed by Congress, contained these controlling statements:

> "The meaning and spirit of the Act are clear on its face. We need not refer to legislative history to rationalize our independent assessment of its impact."

Continuing, that court re-emphasized the limits of the judicial power with these terms:

> "As a court we cannot countenance such patent usurpation of legislative authority. Nor will we expurgate an important federal policy statute...."

The decision in question then alluded to another recent case from which this statement is quoted:

> "We are fully in accord with the 4th Circuit's view, in West Virginia Division of Izaak Walton League of America, Inc. v. Butz, that:
>
> > "Economic exigencies... do not grant courts a license to rewrite a statute no matter how desirable the purpose or result might be.... [T]he appropriate forum to resolve this complex and controversial issue is not the courts but the Congress. 522 F.2d 945, 955 (4th Cir. 1975)." 50/

In another recent decision, these additional, very pertinent principles of statutory construction are taken:

> "'If the words of the statute are clear, the court should not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history."

The Court then continued with this statement:

> "We are not insensitive to the fact that our reading of the Organic Act will have serious and far-reaching consequences, and it may well be that this legislation enacted over seventy-five years ago is an anachronism which no longer serves the public interest. However, the appropriate forum to resolve this complex and controversial issue is not the courts but the Congress."

The decision then proceeded to add this concept:

> "The controlling principle was stated in United States v. City and County of San Francisco...:

50/ Hill v. Tennessee Valley Authority, 549 F.2d 1064, 1072, 1073-4 (CA 6, 1977).

"Article 4, § 3, Cl. 2 of the Constitution provides that 'The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.' The power over the public land thus entrusted to Congress is without limitations. 'And it is not for the courts to say how that trust shall be administered. That is for Congress.'" 51/

It is respectfully submitted that the Supreme Court in the San Francisco decision enunciated what it is believed the law in these consolidated cases should be relative to the meaning of 25 U.S.C. 381. Congress has plenary and exclusive control of Indian affairs within the National Government. 52/ It is not for the courts to usurp the powers of the Congress of the United States in regard to the plenary power of the legislative body. Congress has declared, in 25 U.S.C. 381, that the Secretary of the Interior is authorized to provide a "just and equal distribution" of No Name Creek water among the Indians upon the Colville Indian Reservation. It would be a clear encroachment by this Court upon the powers and will of Congress if it were to rewrite or attempt to rewrite 25 U.S.C. 381, as is proposed by the Department of Justice, all as will now be reviewed.

3. This Court Is Respectfully Requested To Deny That Portion Of The Motion Of The Department Of Justice For Partial Summary Judgment, Which Is As Follows:

"(2) The allotment of lands on the Colville Indian Reservation pursuant to the General Allotment Act of 1877 (24 Stat. 388; 25 U.S.C. 331 et seq.) vests each allottee of land with the right to the use of waters necessary for the allottee's needs with a priority date as of the creation of the Reservation." 53/

In error, it is believed, the Department of Justice declares that the General Allotment Act "vests each allottee of land with the right to the use of waters necessary for the allottee's needs...." Strenuous issue is taken by the

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51/ West Virginia Division of Izaak Walton League of America, Inc., et al., Appellees v. Earl L. Butz, Secretary of Agriculture of the United States, et al., Appellants, 522 F.2d 945, 955 (CA 4, 1975).

52/ See above, p. 2, et seq.

53/ Memorandum of Points and Authorities in Support of Plaintiff United States' Motion for Partial Summary Judgment, p. 1, para. (2), lines 28-32.

Plaintiff Tribes with that interpretation of the General Allotment Act. Basically, the term "allottee's needs" for water has no meaning unless it relates to the water requirements to produce crops on each allotment. There has been admitted in evidence the Colville Exhibits relative to water requirements. 54/ Those exhibits disclose the water requirements, both as to the total irrigable lands for the Colville Irrigation Project and the water requirements for the lands presently irrigated.

It is manifest from the record in the case and it is believed there is general agreement among the parties that the "needs" of the Colville Confederated Tribes far exceed the available supply of water. To have all of the water "needed" to irrigate the 228 acres of the Colville Confederated Tribes actually exceeds the firm water supply of the No Name Creek. That pragmatic approach to the issue of "needs" being the measure of the allottees' rights to the use of water should dispense with any further commentary upon the subject. It is respectfully submitted that this Court could take judicial notice that in the arid and semi-arid west the water requirements or "needs" of the landowners, including the Indian people, far exceed the available supply of water.

Far more important, however, in regard to a motion for partial summary judgment, it must be emphasized that Congress has already made the determination that "needs" will not be the measure of rights to the use of water under the General Allotment Act. The concept that each allottee is entitled to sufficient water to meet his "needs" is entirely at variance with 25 U.S.C. 381, which has been quoted and commented upon extensively above. Congress recognized that, in areas of short water supply, each allottee could not be allocated sufficient water to meet his "needs" to irrigate all of his lands. Rather - and pragmatically - Congress provided that a "just and equal distribution" of water among the "Indians" residing on the reservations would be the criterion for the distribution of water. Hence, this Court is requested to reject the concept of the

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54/ See Col. Ex. 24(1) and (2).

Justice Department that each allottee is entitled to "rights to the use of water necessary for the allottee's needs...."

It is of extreme importance that the Court of Appeals for the Ninth Circuit, in its most recent Ahtanum decision, distinguished with clarity the difference between "needs" for water and rights to the use of water in areas of short water supply. 55/

It is believed that the language of the Court of Appeals calls for a denial of the phase of the Department of Justice's motion here under consideration.

In the Ahtanum case, the Special Master referred to "needs" in much the same manner as the Justice Department uses the term. Predicated upon that error, the Court of Appeals reversed the decision of the Special Master that had been substantially adopted by the trial judge in that case, saying:

> "It appears that the master, disregarding our prior admonition that the water rights of these owners claimed as of 1908 must be set up in the answer and determined by the court, was unduly impressed by the language which we used to the effect that the water rights are necessarily limited by the needs of the owners as of 1908. In no manner did our former opinion state that the rights of the defendants were as great as their needs for water. Our references to needs was a reference to a limitation upon the extent of the water rights." 56/

The grave error of the Department of Justice in seeking to have this Court adopt "needs" as a basis for measuring rights to the use of water in No Name Creek is underscored by this additional quotation from the Ahtanum decision: "The master's erroneous assumption that the 1908 agreement amounted to a conveyance of 75 per cent of the waters of the Ahtanum Creek to the white settlers who were parties thereto led to his adoption of a solution which was wholly beyond the contemplation of our original decision. It produced for the master's report a deceptively simple result."

55/ United States v. Ahtanum Irrigation District, 330 F.2d 897, 901, 903 (CA 9, 1964).

56/ Id. at 901.

> "With his misconstruction of our references to 'needs' of the various water right owners he came to the conclusion that roughly speaking what the Government had done was to turn over, en masse and in gross, this 75 per cent of all these waters, unrelated to any particular parcel of land, and unrelated to proof of water rights under Washington law, with the assumption that if it could be proven that present owners of the lands owned by the signatories to the agreement need all that water and if the owners had need of all that water in 1908, they could have it all." 57/

It is worthy of note that the Justice Department cites no authority to support its contention that each allottee would receive water rights sufficient to meet his "needs." That absence of authority is not surprising since there is no authority to support that contention. By the enactment of 25 U.S.C. 381, Congress has exercised its plenary power in regard to the distribution of water among Indians in a short water supply area. That language is particularly pertinent in regard to No Name Creek.

Accordingly, this Court is respectfully requested to deny that phase of the Justice Department's mortion for partial summary judgment, which is set forth in the subheading to which these comments pertain, and to specifically deny that each allottee is entitled to "rights to the use of water necessary for the allottee's needs."

4. This Court Is Respectfully Requested To Deny That Portion Of The Motion For Partial Summary Judgment Of The Department of Justice, Which Is As Follows:

> "(7) The Secretary of the Interior, pursuant to the authority vested in the Secretary under 25 U.S.C. § 381, may regulate the rights to the use of waters by Indians and non-Indians on the Colville Indian Reservation." 58/

This Court is respectfully requested to deny that portion of the Department of Justice motion for partial summary judgment that is quoted immediately above. Rather, this Court is requested to declared that 25 U.S.C. 381 precludes the Secretary of Interior from allowing the delivery of any water to non-Indians, which necessarily includes the Defendants Waltons who are non-Indians.

57/ Id. at 903.

58/ Memorandum of Points and Authorities in Support of Plaintiff, United States' Motion for Partial Summary Judgemnt, p. 2, para. (7).

In detail, there has been reviewed in this memorandum the unbroken line of authorities which precludes this Court from intruding upon the will of Congress by purporting to rewrite 25 U.S.C. 381, all as urged by the Justice Department. There has been reviewed above the concept that 25 U.S.C. 381 is clear beyond question and precludes any construction of it. 59/

There is reviewed in that portion of this memorandum the specific authorities which preclude the delivery of water to non-Indians. There is likewise reviewed an abundance of authority which effectively declares the reasons why the Judicial Branch of the United States Government may not usurp the powers of the Legislative Branch in regard to 25 U.S.C. 381. There Congress has used clear, definitive and unequivocal language that non-Indians are not to participate in the short supply of water on the reservations where water is essential for successful agriculture.

Magnitude of the error of the Justice Department in attempting to have this Court violate the explicit language of 25 U.S.C. 381 is underscored by the following excerpt taken from the Justice Department memorandum in support of its motion for partial summary judgment. There, among other things, it is stated: 60/

> "Under Section 7 [25 U.S.C. 381], 'the Secretary of the Interior is authorized to prescribe rules and regulations... to secure a just and equitable distribution [of water] among Indians residing [on the reservation].' Such authority, if exercised, could include the regulation of all uses of water by Indians and non-Indians alike within the exterior boundaries of the reservation. It is urged that this authority only applies to 'Indians' on the reservation where water is being utilized for 'agricultural purposes.' The use of water by Indians and non-Indians on an Indian reservation, whether for irrigation, domestic or industrial uses, directly affects the amount of water available for use by 'Indians' for agricultural purposes."

Following that statement, the Justice Department says this: 61/

> "It is inconceivable that Congress would have specifically charged the Secretary with this responsibility without intending that he would also have the authority to regulate all uses of water on the reservation whether such water was being utilized by Indians, non-Indians, or successors to allottees."

59/ See p. 16 supra.
60/ Memorandum of Points and Authorities in Support of Plaintiff, United States' Motion for Partial Summary Judgment, p. 31, lines 2-14.
61/ Ibid., lines 14-19.

Let this fact be specifically emphasized: In this litigation, the only "non-Indians" using water are the Waltons. Moreover, the Waltons are "successors to allottees." There is certainly nothing inconceivable in the Court applying the express language of 25 U.S.C. 381 and denying to the Waltons, who are non-Indians, water from No Name Creek. Indeed, it is respectfully submitted that, by reason of the explicit language of 25 U.S.C. 381, this Court should declare that the Waltons have no rights to the use of water in No Name Creek.

The Department of Justice attempts by the following quote to raise an issue that is not involved in these consolidated cases:

> "For example, if a non-Indian successor to an allottee were using water on the reservation which adversely affected the equal distribution of water among the Indians for irrigation purposes, how else could the Secretary carry out this responsibility to ensure a fair and equal distribution absent authority over the non-Indian water users?" 62/

In answer to that question set forth by the Department of Justice, this simplistic and correct answer is presented: By adhering to the express language of 25 U.S.C. 381, the non-Indian Waltons would be precluded from using any water from No Name Creek. In that manner, the "just and equal" provisions of 25 U.S.C. 381 could be readily applied and would be in conformity with the will of the Congress. A different course would be for the Judicial Department of the United States of America to undertake to legislate on a matter concerning which Congress has plenary power and concerning which Congress has expressly acted. Under the doctrine of separation of powers, the courts are constitutionally prohibited from endeavoring to legislate.

Finally, the Department of Justice, justifying the delivery of water to the non-Indian Waltons, states this:

> "To adhere to the position that the Secretary's authority under Section 7 is strictly limited would serve to create such a patchwork system of regulatory authority as to render Section 7 meaningless." 63/

62/ Ibid., p. 31, lines 19-25.

63/ Ibid., p. 31, lines 31-32; p. 32, lines 1-3.

It is impossible to reconcile that statement with reality. Quite obviously, the delivery of water to the Indians in accordance with 25 U.S.C. 381 and the refusal to deliver water to non-Indians because they have no rights to it does not create a "patchwork," all as has been demonstrated by the Colville Irrigation Project.

It is reiterated and reaffirmed that, in light of the express language in 25 U.S.C. 381 requiring a just and equal distribution of water among the Indians, this Court is precluded from changing the express language of that statute and may not deliver water to the Defendants Waltons.

On that background, reference will be made to certain of the cases relied upon by the Department of Justice to support what it is believed to be its totally unsupportable interpretation of 25 U.S.C. 381.

5. The Colville Confederated Tribes Request This Court To Deny That Portion Of The Motion Of The Department Of Justice For Partial Summary Judgment, Which Is As Follows:

> "(3) At the time of transfer of Indian allotted land to non-Indian ownership, the non-Indian, as a matter of law, is entitled to the right to the use of whatever quantity of water was being utilized by the previous Indian allottee when the land was removed from trust status and this water right shall have a priority date as of the date of the creation of the Reservation." 64/

a. The Powers Decision Has no Application to the Walton Cases

The Department of Justice asks this question: "WHAT IS THE NATURE OF THE DEFENDANT WALTONS' WATER RIGHT?" 65/ In an effort to answer that question favorably to the Waltons, the Department of Justice - in error - makes this statement:

> "In United States v. Powers, 305 U.S. 527 (1939), the Court considered a dispute between the Crow Tribe, allottees and their successors in interest concerning the waters of the Little Big Horn River and Lodge Grass Creek." 66/

64/ Ibid., p.2, lines 1-7.

65/ Ibid., Part III, p. 16, line 16.

66/ Ibid., p. 17, lines 8-12.

That statement is in error. The Department of Justice brought the Powers case for injunctive relief on behalf of the Secretary of the Interior — not the Crow Indian Tribe or its members -- against Powers and other non-Indian owners of formerly allotted lands. Too great stress may not be placed on the fact that in Powers the Secretary of the Interior, through the Department of Justice, was claiming all of the waters there involved for a Secretarial irrigation project.

It is most important to note that:

1. The Powers case was dismissed by the Supreme Court in these terms: "The decree of the Circuit Court of Appeals dismissing the bill must be affirmed." 67/

2. Predicate for the dismissal of the Powers case by the Court of Appeals for the Ninth Circuit was that the lower court lacked jurisdiction for want of indispensable parties. 68/

3. There was nothing adjudicated, nothing decided, and no determinations made in Powers. The obiter dictum in that decision in no way pertains either to the facts or the law in the Walton cases.

4. The Supreme Court summarized the contentions of the Justice Department on behalf of the Secretary of the Interior as follows:

   "That prior to 1885, the United States commenced construction of irrigation works intended to divert waters from the streams in question." 69/

   Approximately 20,000 acres of land were irrigated. Neither Powers nor any of the other defendants owned lands "within the ambit of these projects."

   "That Congress gave the Secretary of the Interior control of Reservation waters. Irrigation projects initiated under his authority prior to allotments of respondents' lands sufficed to dedicate and reserve sufficient water for full utilization of these projects; rights acquired by the allottees were taken subject to this reservation." 70/

67/ 305 U.S. 527, 528 (1939).

68/ United States v. Powers, 94, F.2d 783, 786 (1938).

69/ 305 U.S. 527, 531-2 (1939).

70/ Id.

> "That because of drought during 1932 and 1934, and respondents' diversion of waters upstream from the projects so initiated...." there was insufficient water for the Secretarial project.

Accordingly, the Department of Justice asked for an injunction against Powers. The injunction prayed for by the Department of Justice was rejected out of hand by the Federal District Court; 71/ the United States Court of Appeals, which dismissed; 72/ and the United States Supreme Court, which affirmed the Ninth Circuit dismissal. 73/ That rejection was predicated upon the fact that the Crow Indian Tribe was the owner of the Winters rights to the use of water not the Secretary of the Interior, as erroneously asserted by the Department of Justice. The most crucial differenct between the Walton case and the Powers case is clear. The three courts in the Powers case rejected the erroneous contentions of the Department of Justice because the Secretary of the Interior is not the owner of the rights to the use of water on the Crow Indian Reservation. By the Crow Treaty of 1868, the Crows reserved to themselves Winters Doctrine rights to the use of water. The Secretary of the Interior could not expropriate those rights as the Justice Department contends. Each of the Powers cases recognized that crucial, legal principle. For easy reference, a copy of the Crow Indian Treaty of 1868 is attached and marked Exhibit A. 74/

Respecting the aforementioned Article 6 of the Crow Treaty, the Highest Court had this to say:

> "It provides that whenever an individual Indian desires 'to commence farming' he may select land, under stated conditions, which thereupon shall 'cease to be held in common, but the same may be occupied and held in exclusive possession of the person selecting it, and his family, so long as he or they may continue to cultivate it.'" 75/

71/ United States v. Powers, 16 F.Supp. 155, 159 (U.S.D.C. Mont. 1936).
72/ United States v. Powers, 94 F.2d 783, 785 (1938).
73/ United States v. Powers, 305 U.S. 527 (1939).
74/ Treaty with the Crows, 1868, Art. 6, 15 Stat. 619, ratified July 25, 1868, proclaimed August 12, 1868.
75/ There is no need to analyze that clause of the Treaty. It could well be argued that under no circumstances did there pass rights to the use of water to the individual Indian. It would appear that at most the individual Indian, who selected a farm pursuant to the clause of the treaty, had a right of occupancy as long as he or his family remained upon the land. However, that is not an issue before this Court. See 305 U.S. 527, 528 (1939).

An examination of the Executive Order of July 2, 1872, creating the Colville Indian Reservation contains no comparable provision. 76/ Clearly, the Congress has not enacted a comparable provision in regard to the Colville Indian Reservation.

It is pertinent again to refer to the fact that the often-cited "just and equal" provision of 25 U.S.C. 381 is the only Act pertaining to the Colville Indian Reservation which even alludes to rights to the use of water "among Indians residing" on the reservation. It is abundantly manifest that the factual and the legal differences cause the obiter dictum of the Powers decision -- whatever that obiter dictum may mean -- to be inapplicable to the Walton cases.

If any pertinency can be ascribed to the obiter dictum in Powers -- which is denied -- it is of extreme importance to observe that the Supreme Court made this most important statement: "We do not consider the extent or precise nature of respondents' [Powers] rights in the waters." 77/ That cryptic statement must be pondered very carefully by those who espouse the concept that Powers is controlling in these consolidated cases. When and if that obiter dictum requires consideration, the Colvilles will undertake such an analysis. No analysis now is required because the matter is academic as, indeed, is the Powers decision in the light of its dismissal.

What is clear beyond question is that neither the Powers decision nor the obiter dictum which it contains can in any way benefit the Waltons in these proceedings. It is important, moreover, that the Supreme Court referred to 25 U.S.C. 381 and made this observation:

> "The Secretary of the Interior had authority (Act 1887) to prescribe rules and regulations deemed necessary to secure just and equal distribution of waters. It does not appear that he ever undertook so to do.... The statute itself clearly indicates Congressional recognition of equal rights among resident Indians." 78/

76/ See pg. 8, n. 25, supra.

77/ 305 U.S. 527, 533 (emphasis supplied).

78/ Id.

In light of the contrast between the Walton and Powers cases, this Court is respectfully requested to declare the inapplicability of the Powers decision to these cases.

Quite obviously, the Department of Justice feels insecure in the position that it has taken in regard to Powers for it states:

> "Where federal statutes or treaties do not clearly articulate the law to be applied on a given matter, the courts must then fill the interstices." 79/

To fill those interstices, the Department of Justice turns to the laws and decisions pertaining to rights to the use of water open to acquisition on the "public lands" pursuant to state law 80/ and concludes that:

> "... in determining the federal rule of law to apply to determine the nature of the non-Indian right to the use of water on an Indian reservation, the policy of the United States is clear, and favors the application of the doctrine of prior appropriation. The doctrine of course has been adopted by the State of Washington and is applicable to ground water." 81/

It is respectfully submitted that the Department of Justice, in its effort to bolster the error in which it has engaged relative to the Powers decision, has relied on concepts totally foreign to the laws which govern the rights to the use of water of the Colville Confederated Tribes. The Supreme Court has declared that the laws pertaining to the "public lands" have no application to Indian reservations. 82/

It is also clear that the argument presented by the Department of Justice that the state laws of Washington pertaining to the appropriation of rights to the use of water is truly a nonsequitur. The argument is contradictory on its fact. Both the Colville Confederated Tribes and the Department of Justice have petitioned this Court for partial summary judgments declaring the total inapplicability of the laws of the State of Washington, its jurisdiction and power

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79/ Memorandum of Points and Authorities in Support of Plaintiff, United States' Motion for Partial Summary Judgment, p. 17, lines 26-28.

80/ Ibid., pp. 17-19.

81/ Ibid., p. 19, lines 4-10.

82/ Federal Power Comm'n v. Oregon, 349 U.S. 435 (1955).

within the Colville Indian Reservation. If the Justice Department now accepts the applicability of state law to the Colville Indian Reservation, it should make that declaration. The Colville Tribes steadfastly reject any view that state law or the policies pertaining to state law have application within the Colville Indian Reservation.

b. The Hibner Decision Has No Application to the Walton Cases 83/

A cursory review of the Hibner decision, 84/ strikingly similar to the Powers decision, proceeded to judgment upon a radically different factual statement from that pertaining to the Walton cases. These are some of the differences:

1. The lands in the Hibner decision were and are outside of any Indian reservation. 85/

2. They were originally part of the Fort Hall Indian Reservation which was created by the Fort Bridger Treaty of February 16, 1869. 86/

3. The controlling document in the Hibner case involves the cession by the Shoshone and Bannock Tribes to the United States of the land involved in the Hibner proceedings. Those lands are outside of the Fort Hall Indian Reservation, as stated above. Article VIII of that agreement provides as follows:

"The water from streams on that portion of the reservation now sold which is necessary for irrigating on land actually cultivated and in use shall be reserved for the Indians now using the same, so long as said Indians remain where they now live." 87/

83/ Memorandum of Points and Authorities in Support of Plaintiff, United States' Motion for Partial Summary Judgment, p. 19, lines 12 et seq.

84/ United States v. Hibner, 27 F.2d 909 (U.S.D.C. Ida. 1928).

85/ Ibid., 910.

86/ Ibid., 910. 15 Stat. 673. Exhibit B, Treaty with the Eastern Band Shoshoni and Bannock, 1868. See Article 6, which provides for the selection by an Indian of the lands for farming purposes, all as provided for in the Treaty with the Crows. That Treaty contained virtually the same proviso as the Crow Treaty relative to individual Indians selecting farms and occupying them. See pg. 26, note 74, supra.

87/ See 27 F.2d 909, 911 (U.S.D.C. Ida. 1928). See Exhibit C, An Agreement with Shoshoni and Bannock Indians of the Fort Hall Reservation, Idaho.

It is difficult to perceive a more drastic factual difference than those which exist between the Walton cases and the Hibner case. Those factual and legal differences remove the Hibner case from being in any way applicable to the factual situation in the Walton cases as now consolidated.

A most pertinent factual difference between the Hibner case and the Walton cases is recited by the Department of Justice in its memorandum:

> "Applied to this case [the Hibner decision], the successor in interest, the defendant Waltons, would succeed to a right to the use of whatever quantity of water was being utilized by the previous Indian allottee when the lands were removed from trust status. Such a right would have a priority date as of the date of the creation of the reservation.
>
> "In the present case, the lands acquired by the Waltons were not being irrigated at the time they were removed from trust status. Accordingly, the defendants do not acquire a reserved water right." 88/

Predicated upon the recited facts - with which the Colville Confederated Tribes agree - the concepts of Hibner have no application to these consolidated cases. However, the Colville Confederated Tribes reject out of hand the concept of both Powers and Hibner as relied upon by the Department of Justice. Those cases are not applicable to these cases. Indeed, neither Powers nor Hibner are considered to be sound principles of law irrespective of the Indian cases that are involved. Because the Colville Confederated Tribes assert full equitable title to the rights to the use of water within the Colville Indian Reservation has never passed from the Tribes since the investiture of those rights on July 2, 1872, the Colville Confederated Tribes deny that the concepts of Powers and Hibner have any pertinency to these cases.

c. This Court Will Not Render Advisory Opinions - The Motion for Partial Summary Judgment Numbered 3 Should Be Denied

The Justice Department declares that - as quoted immediately above - the Waltons are not entitled to water from No Name Creek. The Colville

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88/ Memorandum for Points and Authorities in Support of Plaintiff, United States' Motion for Partial Summary Judgment, p. 20, lines 22-30.

Confederated Tribes, as stated above, agree that the Waltons do not have rights to the use of water in No Name Creek but for an entirely different reason. However, issue has not and could not be joined with the Department of Justice under the factual situation that prevails. Hence it is the belief of the Colville Confederated Tribes that the phase of the motion for partial summary judgment -- numbered 3 -- to which these comments have been directed is an effort by the Department of Justice to obtain an advisory opinion. Quite obviously, this Court is without jurisdiction to render advisory opinions as to the acceptibility of the Powers and Hibner cases, which have been reviewed. 89/ The Colville Confederated Tribes reiterate and reaffirm their request for a denial of the motion for a partial summary judgment in regard to the phase of the Department of Justice motion to which these comments have been directed. 90/

6. This Court Is Respectfully Requested To Deny That Portion Of The Motion Of The Department Of Justice For Partial Summary Judgment, Which Is As Follows:

> "(4) Following the transfer of land from Indian to non-Indian ownership, the successor's right to the use of water is, as a matter of law, predicated upon the application of water to a beneficial use upon the lands with a priority as of the date of such use." 91/

An effort has been made to find any supporting authority or concepts upon which the preceding phase of the motion of the Department of Justice for a partial summary judgment could be predicated. Under the heading of "WHAT IS THE NATURE OF DEFENDANT WALTON'S WATER RIGHTS?" 92/ may be a clue as to what the Department of Justice has in mind when it makes such an assertion as that set forth immediately above. Seemingly, the Hibner decision is relied upon by the Department

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89/ U.S. Const., Art. III, sec. 2. See an Indian decision, Muskrat v. United State, 219 U.S. 346, 356 (1911) and another case involving the power of this Court to render declaratory judgments, Aetna Life Ins. Co. v. Hawarth, 300 U.S. 227, 239 (1937).

90/ Memorandum of Points and Authorities in Support of Plaintiff, United States' Motion for Partial Summary Judgment, p. 2, para. (3).

91/ Ibid., p. 2, para. (4).

92/ Ibid., pp. 16 et seq.

of Justice. 93/ Following this citation of the Hibner decision, this statement is made:

> "... With respect to the rights to the use of water on these lands following their removal from trust status, the rights to the use of water would be predicated on the application of a given amount of water to beneficial use, with a priority date as of the date of such use. Such a right is in keeping with the federal policy and the local rules and customs relating to appropriation by non-Indian settlers of waters in the arid West." 94/

Let this fact be respectfully submitted: There is no law upon the subject which supports the contentions quoted above by the Department of Justice. A definitive search has been made in regard to any policy of the nature claimed by the Department of Justice. What has been revealed is that the law and the policies of the National Government are now and have always been antipodal to the concept advanced by the Department of Justice. The United States of America, as trustee in regard to the Indian reservation lands, has proceeded both in law and policy upon a course diametrically opposite from the law and policies adhered to in connection with the public lands. The Pelton decision sets forth very effectively the concepts of the United States, trustee, both in regard to the Indian lands and to the federal lands, which have been withdrawn for public purposes. In the cited case were involved the lands of the Warm Springs Indian Reservation in the State of Oregon. This is the language of the Supreme Court in the Pelton decision:

> "The Desert Land Act covers 'sources of water supply upon the public land....' The lands before us in this case are not 'public lands' but 'reservations.' Even without that express restriction of the Desert Land Act to sources of water supply on public lands, these Acts would not apply to reserved land. 'It is a familiar principle of public land law that statutes providing generally for disposal of the public domain are inapplicable to lands which are not unqualifiedly subject to sale and disposition because

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93/ See C.5.b., pp. 29 et seq., supra.

94/ Memorandum of Points and Authorities in Support of Plaintiff, United States' Motion for Partial Summary Judgment, pp. 20-21; lines 30-6.

> they have been appropriated to some other purpose' United States v. O'Donnell, 303 U.S. 501, 510. See also United States v. Minnesota, 270 U.S. 181, 206. The instant lands certainly 'are not unqulifiedly subject to sale and disposition....'" 95/

A most careful search of the law and policies down through the years has failed to reveal a scintilla of authority that would jettison, as it were, a policy of the National Government of protecting Indian lands, including those of the Colville Confederated Tribes. 96/ In requesting the denial of the phase of the Department of Justice motion for partial summary judgment, here under consideration, reference is made to the fact that the entire concept of the Colville Indian Reservation and the administration of it is contrary to the policy as enunciated by the Department of Justice.

It is to be observed that the Colville Confederated Tribes are proceeding on the basis of a policy of administering rights to the use of water under the Colville Water Code. 97/ Extensive testimony was introduced in regard to the Colville Water Code and the methods of its administration. 98/

The Colville Confederated Tribes request this Honorable Court to deny, as a matter of law, that non-Indians may acquire rights to the use of water by the diversion and use of it, as espoused by the Justice Department. It is the position of the Tribes that, at best, the use of water by the Waltons is at the tolerance of the Tribes.

95/ Federal Power Comm'n v. Oregon, et al., 349 U.S. 435, 448 (1955).

96/ See, e.g., 34 Op. Atty. Gen., 177 et seq., particularly at 178 (1923-25) citing McFadden v. Mountain View Mining & Milling Co., 97 F. 670, 673 (9th Cir., 1899). That case involved the Colville Indian Reservation. See also, Gibson v. Anderson, 131 F. 339, 342 (1904). It will be observed that Gibson v. Anderson was cited on p. 12 supra. It pertains to the Spokane Indian Reservation.

97/ The Colville Water Code was admitted in evidence February 7, 1978, in the trial on the merits of these consolidated cases. See Col. Ex. 2(13).

98/ See Transcript, Vol. 2, Feb. 8, 1978, testimony of Chairman Tonasket, pg. 222, lines 14 et seq., particulary pp. 229 et seq., lines 10 et seq.

7. Colville Confederated Tribes Respectfully Request This Court To Grant The Motion For Partial Summary Judgment Filed By The Department Of Justice As Follows:

"(1) The creation of the Colville Indian Reservation in 1872 reserved for the Colville Confederated Tribes and its members, as a matter of law, the amount of water necessary to satisfy the future as well as the present needs of the Reservation. The reservation of waters became effective as of the date the Colville Indian Reservation was created.

"(5) The rights of the Colville Confederated Tribes and its members to the use of waters on lands within No Name Creek Valley of the Colville Indian Reservation has a priority date of 1872 and is prior and paramount, as a matter of law, to the rights of the defendant Waltons to the use of water upon their lands in No Name Creek Valley." 99/

Provided, However, That This Court Deny Any Phase Of The Foregoing Motion Of The Department Of Justice Which Would Limit The Use Of Water Of The Colville Confederated Tribes For Any Beneficial Purpose And, Further, The Colville Confederated Tribes Request This Court To Deny That The Waltons Have "any Rights *** To The Use Of Water For The Lands In No Name Creek."

One of the gravest difficulties of responding with specificity to the Justice Department motion is this: The motion for partial summary judgment and the several aspects of it are in the broadest possible terms. Nevertheless, as will be observed in regard to paragraph (1) above, the Department of Justice, in the language of the Memorandum of Points and Authorities in Support of the Motion, espouses certain limitations upon the rights of the Colville to use water for any specific purpose other than those "intended" at the time the reservation was created. That limitation and servitude upon the full equitable title of the Colville rights to the use of water is rejected by the Colville Tribes out of hand. Moreover, as will be observed, there are certain inconsistencies set forth in the contentions of the Department of Justice in its memorandum. In its discussion of 25 U.S.C. 381 (Section 7 of the General Allotment Act), the Department of Justice recognizes that "there will be the use of water by Indians... for irrigation, domestic or industrial uses...." 101/ It is

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99/ Memorandum of Points and Authorities in Support of Plaintiff, United States' Motion for Partial Summary Judgment, pp. 1-2; lines 22-27, 13-18.

100/ Ibid., p. 31, lines 10-14.

likewise asserted by the Department of Justice that, where the facts and circumstances indicate that water uses other than irrigation were impliedly reserved at the time of the creation of the reservation, the Colville Confederated Tribes can utilize reserved waters for such uses. 101/ Additionally, the Department of Justice states that it is not "... intimating that waters cannot be reserved for fishery on the Colville Indian Reservation...." 102/ However, the Department of Justice adds what appears to be another of its nonsequiturs:

> "Under the present facts, a reserved rights for a non-indiginous [sic] fish [Lahontan Cutthroat Trout] in No Name Creek, an intermittent stream, is untenable." 103/

As will be observed, the Colville Confederated Tribes, on a sound basis of law, assert that they can utilize water on the Colville Indian Reservation for any beneficial purpose.

Reference is now made to paragraph (5) set forth above in which the statement is made that the Colvilles have prior and paramount rights as a matter of law to the use of the waters of No Name Creek. Apparently, the Department of Justice is willing to state that the Defendants Waltons also have rights to the use of water on their lands in No Name Valley. That statement is, of course, in keeping with paragraph (4), referred to above, 104/ in which it is declared that non-Indians -- the Waltons -- "as a matter of law, predicated upon the application to water for a beneficial use upon the land may acquire rights to the use of water with a priority date as of the date of such use." It is denied by the Colville Confederated Tribes that the Waltons are entitled to any right to the use of water. It is, moreover, the position of the Colville Tribes, as stated, that the use of water by the Waltons has been at the sufferance of the Colville Confederated Tribes since the Waltons acquired the lands in question.

101/ Ibid., p. 16, lines 7-12.

102/ Ibid.

103/ Ibid., lines 12-14.

104/ See page 31, supra.

On that background, reference will be made to the first proposition that the Colville Confederated Tribes have rights to the use of water and that those rights can be used for purposes intended at the time of the creation of the reservation but those rights to the use of water cannot, for some reason, be utilized for the purpose of maintaining the Lahontan Cutthroat Trout Fishery. Reference, at this point, is warranted to the fact that this Court, by its Order of July 14, 1976, as extended, predicated on the agreement of all parties, provided, among other things, that:

> "Such water shall be used for irrigation on Allotments 901 and 903, for the Lahontan Cutthroat Trout Fishery and for use on tribal lands in conjunction with the Omache Resort." 105/

a. The Colville Winters Doctrine Rights to the Use of Water May Be Used for any Beneficial Purposes - Including Water for the Lahontan Cutthroat Fishery

It is worthy of note that the inceptive decision upon which the Winters Doctrine right is predicated relates to the rights to the use of water in the Columbia River for "fishery." 106/ That case is relied upon as a basic precedent by both the Court of Appeals for the Ninth Circuit in the Winters case, 107/ and the Supreme Court 108/ and in the Ahtanum decision, which emanated from this Court. 109/

The Colville Confederated Tribes will introduce evidence by Dr. David L. Koch an expert in the field of fishery, that it was the United States of America which destroyed the immensely valuable salmon fishery of the Colville Confederated Tribes in the Columbia River. That destruction of the Colville Salmon Fishery in the Columbia River came about by reason of the construction

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105/ Order, July 14, 1976, as extended, "For Monitoring, Managing, Measuring and for Hydrological Testing," p. 2, para. 4, lines 18-20.

106/ Winans v. United States, 198 U.S. 371, 381 (1905).

107/ Winters v. United States, 143 F. 740, 746 (CA 9, 1906).

108/ Winters v. United States, 207 U.S. 564 (1908).

109/ United States v. Ahtanum Irr. Dist., 236 F.2d 321, 326 et seq. (CA 9, 1956).

of the dams by the Bureau of Reclamation and the United States Corps of Engineers along the Columbia River. It is believed that this Court will take judicial notice of that fact. Hence it is that the Colville Confederated Tribes respectfully present to this Honorable Court a most pragmatic and basic legal question: By what legal authority can the Department of Justice now object to the Colville Confederated Tribes seeking to mitigate to some degree the gave losses they have sustained through the destruction of the fishery by the United States of America by the initiation and maintenance of the Lahontan Cutthroat Trout Fishery? It is worthy of note that there is no basis in law for the position taken by the Department of Justice. Clearly, they are unable to cite any authorities and there are no authorities on the proposition.

Equally important is this fact: Evidence has already been introduced into the record that the water utilized in the year 1977 for the Lahontan Cutthroat Trout Fishery, pursuant to the aforesaid Order of this Court of July 14, 1976, as extended, was provided by the reduction of the use of water for agricultural purposes within the service area of the Colville Irrigation Project. Once again, a significant question is presented to this Honorable Court: Is it not entirely within the proper administration of the waters of No Name Creek by the Colville Confederated Tribes to make a determination that they would reduce the quantity of water used for agricultural crops for the purpose of maintaining the fishery? Once again, it is reiterated and reaffirmed that there is no basis in law for restraining in any way the utilization of water by the Colville Confederated Tribes predicated upon some arcane concept that, if water was not intended at the time of the creation of the Colville Indian Reservation for a particular use of water, it cannot be used now.

It is most significant that the Ninth Circuit Court of Appeals has recognized that water may be used for power purposes, domestic purposes, irrigation purposes and numerous other purposes. 110/ In the most recent Ahtanum decision,

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110/ United States v. Walker River Irr. Dist., 104 F.2d 334, 340 (CA 9, 1939).

the Court of Appeals for the Ninth Circuit directed the entry of a decree, which is now enforced, that provides that the Yakima Tribe is entitled to use ". . . all the waters of the stream . . . to the extent that said water can be put to a beneficial use." 111/

The Colville Confederated Tribes respectfully request this Court to deny any contention on the part of the Department of Justice in its request for partial summary judgment that the Colville Confederated Tribes will be restricted in the use of the water for any beneficial purpose, including but not limited to the Lahontan Cutthroat Trout Fishery, to which reference has been made.

b. The Waltons Have no Rights to the Use of Water in No Name Creek

The Department of Justice recognized that the Waltons have no rights to the use of water in No Name Creek 112/pursuant to the concepts of the Powers and Hibner decisions. 113/ The Department of Justice, nevertheless, declares that, subject to the prior and paramount rights of the Colville Confederated Tribes, the Waltons do have some rights in No Name Creek. Once again, the Department of Justice cites no authority in support of its assertion that, in some manner, the Waltons have acquired rights to the use of water, albeit, subject to the Colville rights. If the Waltons do have rights, what is the source of their title?

Most assuredly the Waltons did not acquire rights from the State of Washington. The State is entirely without jurisdiction to grant rights pursuant to its laws. 114/ The Waltons are not "Indians" residing on the Colville Indian Reservation; hence, it is denied that they are entitled to water from No Name Creek pursuant to 25 U.S.C. 381. 115/

Predicated upon the foregoing analysis, this Court is request to grant

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111/ United States v. Ahtanum Irr. Dist., 330 F.2d 898, 915 (CA 9, 1964).

112/ Memorandum . . . United States, p. 20, lines 26 et seq.

113/ Id. at p. 17, lines 6 et seq.

114/ See above, p. 6, B.

115/ See above, p. 15, C.

paragraph (5) of the motion of the Department of Justice that the water rights of the Tribes are prior and paramount, but to deny the contention of the Department of Justice that the Waltons could have rights in No Name Creek, as set forth in the aforesaid paragraph (5).

8. The Congress Of The United States Did Not Take From The Colville Confederated Tribes Their Winters Rights To The Use Of Water By 25 U.S.C. 381 Of The General Allotment Act Or Otherwise

There has been reviewed above the fact that Congress by 25 U.S.C. 381 authorized the Secretary of the Interior under the General Allotment Act to make a "just and equal" distribution of water among the Indians residing on the Colville Indian Reservation. 116/ It is abundantly manifest that the Congress has not taken from the Colville Confederated Tribes the equitable title to their rights to the use of water which passed to the Colvilles by the Executive under date of July 2, 1872. As reviewed above, ". . . title having vested in the" Colville Confederated Tribes, those rights ". . . cannot be taken except as clearly and expressly authorized by Congress." 117/

Another basic proposition of law is that Congressional Acts general in character cannot be utilized to deprive the Indians of their vested rights. 118/ Crux of the issue, therefor, turns on the meaning of 25 U.S.C. 381. To resolve that issue, it is essential to determine certain primary aspects of that provision of the General Allotment Act.

It is impossible to authorize the Secretary of the Interior to make a "just and equal" distribution of water "among the Indians" residing on the Colville Indian Reservation and simultaneously to vest in each allottee and their non-Indian successors specific rights to the use of water. Quite obviously, in an area of short water supply, the waters must be equitably divided among the Indians residing on the reservation if they are to survive.

116/ See above

117/ Seymour v. Superintendent, 368 U.S. 351 (1962); United States v. Celestine, 215 U.S. 278 (1909); Mattz v. Arnett 412 U.S. 481, 504 (1973). See also Col. Ex. 2(12), Solicitor's Opinion, p. 9.

118/ 34 Attorney General's Opinion 171, 178 (1923-1925), citing in regard to the Colville Indian Reservation McFadden v. Mountain View Mining & Milling Co., 97 Fed. 670, 671 (CA 9, 1899); Gibson v. Anderson, 121 Fed. 39, 42 (1904.

If the allottees have vested rights to a specified quantity of water, one against the other, a "just and equal" distribution of water "among" them is an impossibility. Rather, the allottee who had monopolized the water supply would deprive all others of any water. If rights had vested and each allottee had title to individual rights to the use of water, a just and equal distribution could only be obtained through the seizure of those individual rights and the distribution of water among the Indians. That would be impossible for, as the Supreme Court has said:

> "Power [of the United States] to control and manage the property and affairs of Indians in good faith for their betterment and welfare may be exerted in many ways and at times even in derogation of the provisions of a treaty. Lone Wolf v. Hitchcock, 187 U.S. 553, 564, 565, 566. The power does not extend so far as to enable the Government 'to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation. . .; for that "would not be an exercise of guardianship, but an act of confiscation."' United States v. Creek Nation, supra, p. 110; citing Lane v. Pueblo of Santa Rosa, 249 U.S. 110, 113; Cherokee Nation v. Hitchcock, 187 U.S. 294, 307-308. . . . Spoliation is not management." 119/

Applying those concepts to No Name Creek, where the supply of water is insufficient fully to meet all of the water requirements for all of the allotments, the upstream Indian Allotments 526 and 892 could divert and use the full supply of water, depriving the downstream Indian Allotments 901 and 903 of water required by them. That is manifestly a violation of 25 U.S.C. 381. To prevent precisely that irreconcilable conflict that would arise on No Name Creek, if each allottee had vested rights to a specified quantity of water, Congress provided that there would be no vested rights to the use of water in any allottee but, rather, each Indian requiring water is to have a "just and equal" share of the limited supply of water which is available.

As the record in this case discloses, the non-Indian Waltons have monopolized all of the waters in No Name Creek. They have deprived Allotments 901 and 903 of the waters from No Name Creek which were historically used on those allotments. A quarter of a century before the Waltons entered No Name Creek Valley, the Timentwa family--Colville Indians--had fully developed Allotment 901

119/ Shoshone Tribe v. United States, 299 U.S. 476, 497-498 (1939).

and were using No Name Creek water to irrigate it. The Timentwas were likewise using No Name Creek water on Allotment 903. Those facts were testified to in detail by Mary Ann Timentwa Sampson. 120/ It is respectfully submitted that Allotments 901 and 903 are entitled to a "just and equal" share of the waters of No Name Creek, all as provided for by 25 U.S.C. 381. Those Allotments may not be stripped of their share of the water by the erroneous interpretation of that statute as the Department of Justice espouses.

Congress, by 25 U.S.C. 381, rather than taking the rights to the use of water of the Colville Confederated Tribes and allocating them to the allottees, decided to protect both the Tribes and the allottees. Future administration of of Tribal rights to the use of water is obviously contemplated by 25 U.S.C. 381.

Repeatedly the Supreme Court has recognized that allottees have not been granted vested rights but rather those rights have continued to reside in the Tribes. Most recently in the Hollowbreast decision 121/ the Supreme Court declared that principle. There it was argued by Hollowbreast that the allottees, not the Tribe, owned the coal reserves. The Supreme Court sustained the coal rights in the Tribe. In making that decision, the Supreme Court said this:

> "The Court has consistently recognized the wide-ranging congressional power to alter allotment plans until those plans are executed. . . . The extensiveness of this congressional authority, as well as 'Congress' unique obligation toward the Indians,' Morton v. Mancari, 417 U.S. 535, 555 (1974), underlies the judicially fashioned canon of construction that these statutes are to be read to reserve Congress' powers in the absence of a clear expression by Congress to the contrary. Chippewa Indians v. United States, 307 U.S. 1, 5 (1939)." 122/

Those concepts are equally applicable to the title claimed and exercised in No Name Creek by the Colville Confederated Tribes. They have administered fairly and equally waters among the Indians by administering the short supply of No Name Creek justly and equally among Indian Allotments 526, 892, 901, and 903. The Colville Confederated Tribes deny that, because title was not taken

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120/ See Transcript, Feb. 7, 1978, pages 315, 318-325.

121/ Northern Cheyenne Tribe v. Hollowbreast 425 U.S. 649 (1976).

122/ Id. at 649-650.

from the Tribes and vested in the allottees, it is a legal impossibility for any title to rights to the use of water to pass to the Waltons when they acquired their titles from non-Indians.

D. The Colville Confederated Tribes Renew Their Motion For Partial Summary Judgment That They Are Empowered To Administer The Waters Of No Name Creek

On their claims to the title to the rights to the use of water in No Name Creek and that they have the inherent power to administer those rights, the Colville Confederated Tribes filed their motion for partial summary judgment, alleging, among other things, that:

> "THE SECRETARY OF THE DEPARTMENT OF THE INTERIOR DOES NOT HAVE 'EXCLUSIVE JURISDICTION' TO CONTROL, ADMINISTER, AND ALLOCATE WATER WITHIN THE COLVILLE INDIAN RESERVATION
>
> 4. When the United States Attorney was directed by the Department of Justice by a letter dated March 6, 1973, to initiate the case of United States v. Walton, Civ. No. 3831, he was likewise directed, among other things, as follows: '. . . . It is the position of the United States that the Secretary of the Interior has the exclusive jurisdiction to control and administer the allocation of waters on tribal, allotted and formerly allotted lands of the Colville Reservation pursuant to the authority vested in the Secretary under 25 U.S.C. Sec. 381." 123/

On the issue thus presented, the Department of Justice, in its March 1, 1978 Memorandum, had this to say:

> "In the absence of the regulations established by the Secretary under Section 7 of the General Allotment Act, tribal jurisdiction exists to regulate water on the Reservation. Indian tribes possess inherent sovereignty within their reservations." 124/

It is manifest that the Justice Department does not, under prevailing circumstances, object to the Tribes' administration of the waters of No Name Creek. That there is an imperative need for regulation is a matter of record.

Chairman Mel Tonasket testified that the Colville Water Code 125/ was

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123/ Motion of Colville Tribes for Partial Summary Judgment served June 14 1972, argued July 12, 1976, p. 45, lines 25-32, 1-3.

124/ Memorandum of Points and Authorities in Support of Plaintiff, United States' Motion for Partial Summary Judgment, p. 32, lines 21-25.

125/ Col. Ex. 2(13), Colville Water Code.

essential to administer water resources on the Colville Indian Reservation because "There has been a void . . . ." in regard to regulations of those resources. 126/ Mrs. Lucy Covington testified as follows to the need for the Colville Water Code which is now in force and effect:

> "At that time I was the chairperson of the Planning Committee and had the Water Rights Committee and there was a vacuum in the control of jurisdiction, or of regulating water on the Colville Reservation, and the land belongs to the Colville Reservation, and, naturally, the water belongs to the Colville Reservation. We needed a code to regulate and control and have jurisdiction over the use of water." 127/

Predicated upon that background, the Colville Confederated Tribes request this Court to grant the Tribes' Motion for Partial Summary Judgment, declaring that (a) the Secretary of the Interior does not have "exclusive jurisdiction" over the water resources of the Colville Indian Reservation; and (b) that the Colville Confederated Tribes have the power and authority to administer the waters of No Name Creek.

Respectfully submitted,

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March 12, 1978

126/ Vol. II. Transcript, Feb. 7, 1978, p. 222, lines 21 et seq.

127/ Vol. II. Transcript, Feb. 7, 1978, p. 304, lines 14-21.

TREATY WITH THE CROWS, 1868.

May 7, 1868.
15 Stats., 649.
Ratified, July 25, 1868.
Proclaimed, Aug. 12, 1868.

Articles of a treaty made and concluded at Fort Laramie, Dakota Territory, on the seventh day of May, in the year of our Lord one thousand eight hundred and sixty-eight, by and between the undersigned commissioners on the part of the United States, and the undersigned chiefs and head-men of and representing the Crow Indians, they being duly authorized to act in the premises.

Peace and friendship.

ARTICLE 1. From this day forward peace between the parties to this treaty shall forever continue. The Government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they hereby pledge their honor to maintain it. If bad men among the whites or among other people, subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also re-imburse the injured person for the loss sustained.

Offenders among the whites to be arrested and punished.

Among the Indians, to be given up to the United States or, etc.

If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States and at peace therewith, the Indians herein named solemnly agree that they will, on proof made to their agent and notice by him, deliver up the wrong-doer to the United States, to be tried and punished according to its laws; and in case they refuse willfully so to do the person injured shall be re-imbursed for his loss from the annuities or other moneys due or to become due to them under this or other treaties made with the United States. And the President, on advising with the Commissioner of Indian Affairs, shall prescribe such rules and regulations for ascertaining damages under the provisions of this article as in his judgment may be proper. But no such damages shall be adjusted and paid until thoroughly examined and passed upon by the Commissioner of Indian Affairs, and no one sustaining loss while violating, or because of his violating, the provisions of this treaty or the laws of the United States shall be re-imbursed therefor.

Rules for ascertaining damages.

Reservation boundaries.

ARTICLE 2. The United States agrees that the following district of country, to wit: commencing where the 107th degree of longitude west of Greenwich crosses the south boundary of Montana Territory; thence north along said 107th meridian to the mid-channel of the Yellowstone River; thence up said mid-channel of the Yellowstone to the point where it crosses the said southern boundary of Montana, being the 45th degree of north latitude; and thence east along said parallel of latitude to the place of beginning, shall be, and the same is, set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from to time they may be willing, with the consent of the United States, to admit amongst them; and the United States now solemnly agrees that no persons, except those herein designated and authorized so to do, and except such officers, agents, and employés of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians, and henceforth they will, and do hereby, relinquish all title, claims, or rights in and to any portion of the territory of the United States, except such as is embraced within the limits aforesaid.

Who not to reside thereon.

Buildings to be erected by the United States.

ARTICLE 3. The United States agrees, at its own proper expense, to construct on the south side of the Yellowstone, near Otter Creek, a

warehouse or store-room for the use of the agent in storing goods belonging to the Indians, to cost not exceeding twenty-five hundred dollars; an agency-building for the residence of the agent, to cost not exceeding three thousand dollars; a residence for the physician, to cost not more than three thousand dollars; and five other buildings, for a carpenter, farmer, blacksmith, miller, and engineer, each to cost not exceeding two thousand dollars; also a school-house or mission-building, so soon as a sufficient number of children can be induced by the agent to attend school, which shall not cost exceeding twenty-five hundred dollars.

The United States agrees further to cause to be erected on said reservation, near the other buildings herein authorized, a good steam circular saw-mill, with a grist-mill and shingle-machine attached, the same to cost not exceeding eight thousand dollars.

Reservation to be the permanent home of the Indians.

ARTICLE 4. The Indians herein named agree, when the agency-house and other buildings shall be constructed on the reservation named, they will make said reservation their permanent home, and they will make no permanent settlement elsewhere, but they shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts.

Agent to make his home and reside where.

ARTICLE 5. The United States agrees that the agent for said Indians shall in the future make his home at the agency-building; that he shall reside among them, and keep an office open at all times for the purpose of prompt and diligent inquiry into such matters of complaint, by and against the Indians, as may be presented for investigation under the provisions of their treaty stipulations, as also for the faithful discharge of other duties enjoined on him by law. In all cases of depredation on person or property, he shall cause the evidence to be taken in writing and forwarded, together with his finding, to the Commissioner of Indian Affairs, whose decision shall be binding on the parties to this treaty.

His duties.

Heads of families desiring to commence farming may select lands, etc.

ARTICLE 6. If any individual belonging to said tribes of Indians, or legally incorporated with them, being the head of a family, shall desire to commence farming, he shall have the privilege to select, in the presence and with the assistance of the agent then in charge, a tract of land within said reservation, not exceeding three hundred and twenty acres in extent, which tract, when so selected, certified, and recorded in the "land book," as herein directed, shall cease to be held in common, but the same may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it.

Effect of such selection.

Persons not heads of families.

Any person over eighteen years of age, not being the head of a family, may in like manner select and cause to be certified to him or her, for purposes of cultivation, a quantity of land not exceeding eighty acres in extent, and thereupon be entitled to the exclusive possession of the same as above directed.

Certificate of selection to be delivered, etc., to be recorded.

For each tract of land so selected a certificate, containing a description thereof and the name of the person selecting it, with a certificate endorsed thereon that the same has been recorded, shall be delivered to the party entitled to it by the agent, after the same shall have been recorded by him in a book to be kept in his office, subject to inspection, which said book shall be known as the "Crow land book."

Survey.

The President may at any time order a survey of the reservation, and, when so surveyed, Congress shall provide for protecting the rights of settlers in their improvements, and may fix the character of the title held by each. The United States may pass such laws on the subject of alienation and descent of property as between Indians, and on all subjects connected with the government of the Indians on said reservations and the internal police thereof, as may be thought proper.

Alienation and descent of property.

Children between 6 and 16 to attend school.

ARTICLE 7. In order to insure the civilization of the tribe entering into this treaty, the necessity of education is admitted, especially by such of them as are, or may be, settled on said agricultural reservation; and they therefore pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that for every thirty children, between said ages, who can be induced or compelled to attend school, a house shall be provided, and a teacher, competent to teach the elementary branches of an English education, shall be furnished, who will reside among said Indians, and faithfully discharge his or her duties as a teacher. The provisions of this article to continue for twenty years.

Duty of agent.

Schoolhouses and teachers.

Seeds and agricultural implements.

ARTICLE 8. When the head of a family or lodge shall have selected lands and received his certificate as above directed, and the agent shall be satisfied that he intends in good faith to commence cultivating the soil for a living, he shall be entitled to receive seed and agricultural implements for the first year in value one hundred dollars, and for each succeeding year he shall continue to farm, for a period of three years more, he shall be entitled to receive seed and implements as aforesaid in value twenty-five dollars per annum.

Instruction in farming.

And it is further stipulated that such persons as commence farming shall receive instructions from the farmer herein provided for, and whenever more than one hundred persons shall enter upon the cultivation of the soil, a second blacksmith shall be provided, with such iron, steel, and other material as may be required.

Delivery of articles in lieu of money and annuities.

ARTICLE 9. In lieu of all sums of money or other annuities provided to be paid to the Indians herein named, under any and all treaties heretofore made with them, the United States agrees to deliver at the agency house, on the reservation herein provided for, on the first day of September of each year for thirty years, the following articles, to wit:

Clothing.

For each male person, over fourteen years of age, a suit of good substantial woolen clothing, consisting of coat, hat, pantaloons, flannel shirt, and a pair of woolen socks.

For each female, over twelve years of age, a flannel skirt, or the goods necessary to make it, a pair of woolen hose, twelve yards of calico, and twelve yards of cotton domestics.

For the boys and girls under the ages named, such flannel and cotton goods as may be needed to make each a suit as aforesaid, together with a pair of woollen hose for each.

Census.

And in order that the Commissioner of Indian Affairs may be able to estimate properly for the articles herein named, it shall be the duty of the agent, each year, to forward to him a full and exact census of the Indians, on which the estimate from year to year can be based.

Annual appropriation in money for ten years.

And, in addition to the clothing herein named, the sum of ten dollars shall be annually appropriated for each Indian roaming, and twenty dollars for each Indian engaged in agriculture, for a period of ten years, to be used by the Secretary of the Interior in the purchase of such articles as, from time to time, the condition and necessities of the Indians may indicate to be proper. And if, at any time within the ten years, it shall appear that the amount of money needed for clothing, under this article, can be appropriated to better uses for the tribe herein named, Congress may, by law, change the appropriation to other purposes; but in no event shall the amount of this appropriation be withdrawn or discontinued for the period named. And the President shall annually detail an officer of the Army to be present and attest the delivery of all the goods herein named to the Indians, and he shall inspect and report on the quantity and quality of the goods and the manner of their delivery; and it is expressly stipulated that

May be changed.

Army officer to attend delivery of goods.

Subsistence.

each Indian over the age of four years, who shall have removed to and settled permanently upon said reservation, and complied with the stipulations of this treaty, shall be entitled to receive from the United States, for the period of four years after he shall have settled upon said reservation, one pound of meat and one pound of flour per day, provided the Indians cannot furnish their own subsistence at an earlier date. And it is further stipulated that the United States will furnish and deliver to each lodge of Indians, or family of persons legally incorporated with them, who shall remove to the reservation herein described, and commence farming, one good American cow and one good, well-broken pair of American oxen, within sixty days after such lodge or family shall have so settled upon said reservation.

Cow and oxen to each family.

ARTICLE 10. The United States hereby agrees to furnish annually to the Indians the physician, teachers, carpenter, miller, engineer, farmer, and blacksmiths as herein contemplated, and that such appropriations shall be made from time to time, on the estimates of the Secretary of the Interior, as will be sufficient to employ such persons.

Physician and teachers, etc.

ARTICLE 11. No treaty for the cession of any portion of the reservation herein described, which may be held in common, shall be of any force or validity as against the said Indians unless executed and signed by, at least, a majority of all the adult male Indians occupying or interested in the same, and no cession by the tribe shall be understood or construed in such a manner as to deprive, without his consent, any individual member of the tribe of his right to any tract of land selected by him as provided in Article 6 of this treaty.

Cession of reservation not to be valid, unless, etc.

ARTICLE 12. It is agreed that the sum of five hundred dollars annually, for three years from the date when they commence to cultivate a farm, shall be expended in presents to the ten persons of said tribe who, in the judgment of the agent, may grow the most valuable crops for the respective year.

Annual presents for most valuable crops

W. T. Sherman,
Lieutenant-General.
Wm. S. Harney,
Brevet Major-General and Peace Commissioner.
Alfred H. Terry,
Brevet Major-General.
C. C. Augur,
Brevet Major-General.
John B. Sanborn.
S. F. Tappan.

Ashton S. H. White, Secretary.

Che-ra-pee-ish-ka-te, Pretty Bull, his x mark. [SEAL.]
Chat-sta-he, Wolf Bow, his x mark. [SEAL.]
Ah-be-che-se, Mountain Tail, his x mark. [SEAL.]
Kam-ne-but-sa, Black Foot, his x mark. [SEAL.]
De-sal-ze-cho-se, White Horse, his x mark. [SEAL.]
Chin-ka-she-arache, Poor Elk, his x mark. [SEAL.]
E-sa-woor, Shot in the Jaw, his x mark. [SEAL.]
E-sha-chose, White Forehead, his x mark. [SEAL.]
—— Roo-ka, Pounded Meat, his x mark. [SEAL.]
De-ka-ke-up-se, Bird in the Neck, his x mark. [SEAL.]
Me-na-che, The Swan, his x mark. [SEAL.]

Attest:
George B. Willis, phonographer.
John D. Howland.
Alex. Gardner.
David Knox.
Chas. Freeman.
Jas. C. O'Connor.

TREATY WITH THE EASTERN BAND SHOSHONI AND BANNOCK, 1868.

July 3, 1868.

15 Stat., 673.
Ratified Feb. 24, 1869.
Proclaimed Feb. 24, 1869.

Articles of a treaty made and concluded at Fort Bridger, Utah Territory, on the third day of July, in the year of our Lord one thousand eight hundred and sixty-eight, by and between the undersigned commissioners on the part of the United States, and the undersigned chiefs and head-men of and representing the Shoshonee (eastern band) and Bannack tribes of Indians, they being duly authorized to act in the premises:

Peace and friendship.

ARTICLE 1. From this day forward peace between the parties to this treaty shall forever continue. The Government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they hereby pledge their honor to maintain it.

Offenders among the whites to be arrested and punished.

If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs, at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also re-imburse the injured person for the loss sustained.

Among the Indians to be given up to the United States, etc.

If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States, and at peace therewith, the Indians herein named solemnly agree that they will, on proof made to their agent and notice by him, deliver up the wrong-doer to the United States, to be tried and punished according to the laws; and in case they wilfully refuse so to do, the person injured shall be re-imbursed for his loss from the annuities or other moneys due or to become due to them under this or other treaties made with the United States. And

Rules for ascertaining damages.

the President, on advising with the Commissioner of Indian Affairs, shall prescribe such rules and regulations for ascertaining damages under the provisions of this article as in his judgment may be proper. But no such damages shall be adjusted and paid until thoroughly examined and passed upon by the Commissioner of Indian Affairs, and no one sustaining loss while violating or because of his violating the provisions of this treaty or the laws of the United States, shall be reimbursed therefor.

Reservation.

ARTICLE 2. It is agreed that whenever the Bannacks desire a reservation to be set apart for their use, or whenever the President of the United States shall deem it advisable for them to be put upon a reservation, he shall cause a suitable one to be selected for them in their present country, which shall embrace reasonable portions of the "Port Neuf" and "Kansas Prairie" countries, and that, when this reservation is declared, the United States will secure to the Bannacks the same rights and privileges therein, and make the same and like expenditures therein for their benefit, except the agency-house and residence of agent, in proportion to their numbers, as herein provided for the Shoshonee reservation. The United States further agrees that the follow-

ing district of country, to wit: Commencing at the mouth of Owl Creek and running due south to the crest of the divide between the Sweetwater and Papo Agie Rivers; thence along the crest of said divide and the summit of Wind River Mountains to the longitude of North Fork of Wind River; thence due north to mouth of said North Fork and up its channel to a point twenty miles above its mouth; thence in a straight line to head-waters of Owl Creek and along middle of channel of Owl Creek to place of beginning, shall be and the same is set apart for the absolute and undisturbed use and occupation of the Shoshonee Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them; and the United States now solemnly agrees that no persons except those herein designated and authorized so to do, and except such officers, agents, and employés of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians, and henceforth they will and do hereby relinquish all title, claims, or rights in and to any portion of the territory of the United States, except such as is embraced within the limits aforesaid.

Boundaries.

Who not to reside thereon.

ARTICLE 3. The United States agrees, at its own proper expense, to construct at a suitable point of the Shoshonee reservation a warehouse or store-room for the use of the agent in storing goods belonging to the Indians, to cost not exceeding two thousand dollars; an agency building for the residence of the agent, to cost not exceeding three thousand; a residence for the physician, to cost not more than two thousand dollars; and five other buildings, for a carpenter, farmer, blacksmith, miller, and engineer, each to cost not exceeding two thousand dollars; also a school-house or mission building so soon as a sufficient number of children can be induced by the agent to attend school, which shall not cost exceeding twenty-five hundred dollars.

Buildings to be erected by the United States.

The United States agrees further to cause to be erected on said Shoshonee reservation, near the other buildings herein authorized, a good steam circular-saw mill, with a grist-mill and shingle-machine attached, the same to cost not more than eight thousand dollars.

Mills.

ARTICLE 4. The Indians herein named agree, when the agency house and other buildings shall be constructed on their reservations named, they will make said reservations their permanent home, and they will make no permanent settlement elsewhere; but they shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts.

Reservation to be permanent home of Indians.

ARTICLE 5. The United States agrees that the agent for said Indians shall in the future make his home at the agency building on the Shoshonee reservation, but shall direct and supervise affairs on the Bannack reservation; and shall keep an office open at all times for the purpose of prompt and diligent inquiry into such matters of complaint by and against the Indians as may be presented for investigation under the provisions of their treaty stipulations, as also for the faithful discharge of other duties enjoined by law. In all cases of depredation on person or property he shall cause the evidence to be taken in writing and forwarded, together with his finding, to the Commissioner of Indian Affairs, whose decision shall be binding on the parties to this treaty.

Agent to make his home and reside where.

ARTICLE 6. If any individual belonging to said tribes of Indians, or legally incorported with them, being the head of a family, shall desire to commence farming, he shall have the privilege to select, in the presence and with the assistance of the agent then in charge, a tract of land within the reservation of his tribe, not exceeding three hundred

Heads of families desiring to commence farming may select lands, etc.

and twenty acres in extent, which tract so selected, certified, and recorded in the "land-book," as herein directed, shall cease to be held in common, but the same may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it.

Effect of such selection.

Persons not heads of families.

Any person over eighteen years of age, not being the head of a family, may in like manner select and cause to be certified to him or her, for purposes of cultivation, a quantity of land not exceeding eighty acres in extent, and thereupon be entitled to the exclusive possession of the same as above described. For each tract of land so selected a certificate, containing a description thereof, and the name of the person selecting it, with a certificate indorsed thereon that the same has been recorded, shall be delivered to the party entitled to it by the agent, after the same shall have been recorded by him in a book to be kept in his office subject to inspection, which said book shall be known as the "Shoshone (eastern band) and Bannack land-book."

Certificates of selection to be delivered, etc., to be recorded.

Survey.

The President may at any time order a survey of these reservations, and when so surveyed Congress shall provide for protecting the rights of the Indian settlers in these improvements, and may fix the character of the title held by each. The United States may pass such laws on the subject of alienation and descent of property as between Indians, and on all subjects connected with the government of the Indians on said reservations, and the internal police thereof, as may be thought proper.

Alienation and descent of property.

Children between 6 and 16 to attend school.

ARTICLE 7. In order to insure the civilization of the tribes entering into this treaty, the necessity of education is admitted, especially of such of them as are or may be settled on said agricultural reservations, and they therefore pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that for every thirty children between said ages who can be induced or compelled to attend school, a house shall be provided and a teacher competent to teach the elementary branches of an English education shall be furnished, who will reside among said Indians and faithfully discharge his or her duties as a teacher. The provisions af this article to continue for twenty years.

Duty of agent.

Schoolhouses and teachers.

Seeds and agricultural implements.

ARTICLE 8. When the head of a family or lodge shall have selected lands and received his certificate as above directed, and the agent shall be satisfied that he intends in good faith to commence cultivating the soil for a living, he shall be entitled to receive seeds and agricultural implements for the first year, in value one hundred dollars, and for each succeeding year he shall continue to farm, for a period of three years more, he shall be entitled to receive seeds and implements as aforesaid in value twenty-five dollars per annum.

Instructions in farming.

Second blacksmith.

And it is further stipulated that such persons as commence farming shall receive instructions from the farmers herein provided for, and whenever more than one hundred persons on either reservation shall enter upon the cultivation of the soil, a second blacksmith shall be provided, with such iron, steel, and other material as may be required.

Delivery of articles in lieu of money and annuities.

ARTICLE 9. In lieu of all sums of money or other annuities provided to be paid to the Indians herein named, under any and all treaties heretofore made with them, the United States agrees to deliver at the agency-house on the reservation herein provided for, on the first day of September of each year, for thirty years, the following articles, to wit:

Clothing, etc.

For each male person over fourteen years of age, a suit of good substantial woollen clothing, consisting of coat, hat, pantaloons, flannel shirt, and a pair of woollen socks; for each female over twelve years of age, a flannel skirt, or the goods necessary to make it, a pair

of woollen hose, twelve yards of calico; and twelve yards of cotton domestics.

For the boys and girls under the ages named, such flannel and cotton goods as may be needed to make each a suit as aforesaid, together with a pair of woollen hose for each.

Census.

And in order that the Commissioner of Indian Affairs may be able to estimate properly for the articles herein named, it shall be the duty of the agent each year to forward to him a full and exact census of the Indians, on which the estimate from year to year can be based; and in addition to the clothing herein named, the sum of ten dollars shall be annually appropriated for each Indian roaming and twenty dollars for each Indian engaged in agriculture, for a period of ten years, to be used by the Secretary of the Interior in the purchase of such articles as from time to time the condition and necessities of the Indians may indicate to be proper. And if at any time within the ten years it shall appear that the amount of money needed for clothing under this article can be appropriated to better uses for the tribes herein named, Congress may by law change the appropriation to other purposes; but in no event shall the amount of this appropriation be withdrawn or discontinued for the period named. And the President shall annually detail an officer of the Army to be present and attest the delivery of all the goods herein named to the Indians, and he shall inspect and report on the quantity and quality of the goods and the manner of their delivery.

May be changed.

Army officer to attest delivery of goods, etc.

Physician, teachers, carpenter, etc.

ARTICLE 10. The United States hereby agrees to furnish annually to the Indians the physician, teachers, carpenter, miller, engineer, farmer, and blacksmith, as herein contemplated, and that such appropriations shall be made from time to time, on the estimates of the Secretary of the Interior, as will be sufficient to employ such persons.

Cession of reservation not to be valid unless, etc.

ARTICLE 11. No treaty for the cession of any portion of the reservations herein described which may be held in common shall be of any force or validity as against the said Indians, unless executed and signed by at least a majority of all the adult male Indians occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive without his consent, any individual member of the tribe of his right to any tract of land selected by him, as provided in Article 6 of this treaty.

Presents for most valuable crops.

ARTICLE 12. It is agreed that the sum of five hundred dollars annually, for three years from the date when they commence to cultivate a farm, shall be expended in presents to the ten persons of said tribe who, in the judgment of the agent, may grow the most valuable crops for the respective year.

ARTICLE 13. It is further agreed that until such time as the agency-buildings are established on the Shoshonee reservation, their agent shall reside at Fort Bridger, U. T., and their annuities shall be delivered to them at the same place in June of each year.

N. G. Taylor, [SEAL.]
W. T. Sherman, [SEAL.]
Lieutenant-General.
Wm. S. Harney, [SEAL.]
John B. Sanborn, [SEAL.]
S. F. Tappan, [SEAL.]
C. C. Augur, [SEAL.]
Brevet Major-General, U. S. Army, Commissioners.
Alfred H. Terry, [SEAL.]
Brigadier-General and Brevet Major-General, U. S. Army.

Attest:
A. S. H. White, Secretary.

June 6, 1900.
31 Stat., 672.

CHAP. 813.—An act to ratify an agreement with the Indians of the Fort Hall Indian Reservation in Idaho, and making appropriations to carry the same into effect.

Agreement with Shoshoni and Bannock Indians of the Fort Hall Reservation, Idaho.
Preamble.
See note to 1889, c. 203, ante, p. 314.
Commissioners.
See note to 1874, ch. 2, ante, p. 153.
Proclamation, post, p. 1016.

Whereas Benjamin F. Barge, James H. McNeely, and Charles G. Hoyt, acting for the United States, did, on the fifth day of February, anno Domini eighteen hundred and ninety-eight, make and conclude the following agreement with the Shoshone and Bannock Indians of the Fort Hall Reservation, in Idaho; and

Whereas Benjamin F. Barge, James H. McNeely, and Charles G. Hoyt, being duly appointed and acting commissioners on behalf of the United States for such purposes, have concluded an agreement with the headmen and a majority of the male adults of the Bannock and Shoshone tribes of Indians upon the Fort Hall Indian Reservation, in the State of Idaho, which said agreement is as follows:

29 Stat., 341.

Whereas the aforesaid commissioners were appointed by the Secretary of the Interior, under and by virtue of an act of Congress, approved June the tenth, eighteen hundred and ninety-six (29 U. S. Stat. L., p. 341), entitled "An act making appropriations for current and contingent expenses of the Indian Bureau of the Interior Department, and fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June the thirtieth, eighteen hundred and ninety-seven, and for other purposes," and by said act were authorized to negotiate with the Bannock and Shoshone Indians, in the State of Idaho, for the cession of part of their surplus lands; and

Vol. 2, p. 1020.

Whereas the Indians of the Fort Hall Reservation are willing to dispose of part of their surplus lands in the State of Idaho, reserved as a home for them by a treaty concluded at Fort Bridger July the third, eighteen hundred and sixty-eight, and ratified by the United States Senate on the sixteenth day of February, eighteen hundred and sixty-nine, and also by Executive order:

Now, therefore, this agreement, made and entered into by and between the aforesaid commissioners on behalf of the United States of America, and by the headmen and a majority of the male adults of the Bannock and Shoshone tribes of Indians, located on the Fort Hall Indian Reservation, in the State of Idaho. Witnesseth:

ARTICLE I.

Cession of lands.

That the said Indians of the Fort Hall Reservation do hereby cede, grant, and relinquish to the United States all right, title, and interest which they have to the following-described land, the same being a part of the land obtained through the treaty of Fort Bridger on the third day of July, eighteen hundred and sixty-eight, and ratified by the United States Senate on the sixteenth day of February, eighteen hundred and sixty-nine:

EXHIBIT C

All that portion of the said reservation embraced within and lying east and south of the following-described lines: Commencing at a point in the south boundary of the Fort Hall Indian Reservation, being the southwest corner of township nine (9) south, range thirty-four (34) east of the Boise meridian, thence running due north on the range line between townships 33 and 34 east to a point two (2) miles north of the township line between townships five (5) and six (6) south, thence due east to the range line between ranges 35 and 36 east, thence south on said range line four (4) miles, thence due east to the east boundary line of the reservation; from this point the east and south boundaries of the said reservation as it now exists to the point of beginning, namely, the southwest corner of township nine (9) south, range thirty-four east, being the remainder of the description and metes and bounds of the said tract of land herein proposed to be ceded.

—boundaries.

[31 Stat., 673.]

ARTICLE II.

That in consideration of the lands ceded, granted, and relinquished, as aforesaid, the United States stipulates and agrees to pay to and expend for the Indians of the said reservation, six hundred thousand dollars ($600,000) in the following manner, to wit:

Consideration.

Seventy-five thousand dollars ($75,000), or as much thereof as may be necessary, shall be expended by the Secretary of the Interior in the erection of a modern school plant for the Indians of the Fort Hall Reservation at a point near the present agency, said point or site to be selected by the Secretary of the Interior, and the surplus remaining, if any, of the above seventy-five thousand dollars ($75,000) may be expended by the Secretary of the Interior for the educational needs of said Indians.

One hundred thousand dollars ($100,000) shall be paid in cash pro rata, share and share alike, to each man, woman, and child belonging to and actually residing on said reservation, within three months after the ratification of this treaty by the Congress of the United States. The remainder of said sum total shall be paid pro rata in like manner, as follows:

Fifty thousand dollars ($50,000) one year after the first payment.
Fifty thousand dollars ($50,000) two years after the first payment.
Fifty thousand dollars ($50,000) three years after the first payment.
Fifty thousand dollars ($50,000) four years after the first payment.
Fifty thousand dollars ($50,000) five years after the first payment.
Fifty thousand dollars ($50,000) six years after the first payment.
Fifty thousand dollars ($50,000) seven years after the first payment.
Fifty thousand dollars ($50,000) eight years after the first payment.
Twenty-five thousand dollars ($25,000) nine years after the first payment.

The deferred payments shall bear interest at the rate of four (4) per centum per annum, said interest to be placed annually to the credit of said Indians, and shall be expended for their benefit by the Secretary of the Interior at such times and in such manner as he may direct.

Provided, That none of the money due to said Indians under this agreement shall be subject to the payment of any claims, judgments, or demands against said Indians for damages or depredations claimed to have been committed prior to the signing of this agreement.

Proviso. Depredation claims not to affect payments.

ARTICLE III.

Where any Indians have taken lands and made homes on the reservation and are now occupying and cultivating the same, under the sixth section of the Fort Bridger treaty hereinbefore referred to, they shall not be removed therefrom without their consent, and they may receive

Heads of families who have settled not to be moved without consent. Vol. 2, p. 1020.

EXHIBIT C

allotments on the land they now occupy; but in case they prefer to remove they may select land elsewhere on that portion of said reservation not hereby ceded, granted, and relinquished and not occupied by any other Indians; and should they decide not to move their improvements, then the same shall be appraised under direction of the Secretary of the Interior and sold for their benefit, at a sum not less than such appraisal, and the cash proceeds of such sale shall be paid to the Indian or Indians whose improvements shall be so sold.

ARTICLE IV.

[31 Stat., 674.] Use of ceded land by Indian continuing to live thereon.

So long as any of the lands ceded, granted, and relinquished under this treaty remain part of the public domain, Indians belonging to the above-mentioned tribes, and living on the reduced reservation, shall have the right, without any charge therefor, to cut timber for their own use, but not for sale, and to pasture their live stock on said public lands, and to hunt thereon and to fish in the streams thereof.

ARTICLE V.

Surveys.

That for the purpose of segregating the ceded lands from the diminished reservation, the new boundary lines described in article one of this agreement shall be properly surveyed and permanently marked in a plain and substantial manner by prominent and durable monuments, the cost of said survey to be paid by the United States.

ARTICLE VI.

Prior treaties continued in force.

The existing provisions of all former treaties with the Indians of the Fort Hall Reservation, not inconsistent with the provisions of this agreement, are hereby continued in force and effect; and all provisions thereof inconsistent herewith are hereby repealed.

ARTICLE VII.

Certain roads declared public highways.

The existing main traveled roads leading from McCammon to Blackfoot and from McCammon to American Falls are declared public highways, and the proper use of such is hereby granted to the general public.

ARTICLE VIII.

Irrigation.

The water from streams on that portion of the reservation now sold which is necessary for irrigating on land actually cultivated and in use shall be reserved for the Indians now using the same, so long as said Indians remain where they now live.

ARTICLE IX.

Signatures.

This agreement shall take effect and be in force when signed by the commissioners and by a majority of the male Indians of the Fort Hall Reservation over eighteen years of age, and ratified by the Congress of the United States.

Signed on the part of the United States Government by the commissioners aforesaid and by the following Indians of the Bannock and Shoshone tribes, residing and having rights on the Fort Hall Indian Reservation.

BENJAMIN F. BARGE, Commissioner.
JAMES H. MCNEELY, Commissioner.
CHARLES G. HOYT, Commissioner.

FORT HALL INDIAN AGENCY,
Ross Fork, Idaho, February 5, 1898.

(1) Jim Ballard (x); witness, Mary W. Fisher. (2) Pocatello Tom (x); witness Chas. M. Robinson. (3) Kunecke Johnson (x); witness, Mary W. Fisher. (And 247 others..)

* * * * * * *

We certify that we interpreted the foregoing agreement with the Bannock and Shoshone Indians and that they thoroughly understood the entire matter; that we truly interpreted for the commissioners and the Indians at all the councils held to discuss the subject, and to individual Indians. [31 Stat., 675.]

J. J. LEWIS,
KENNEKE (his x mark) JOHNSON,
Interpreters.

Witness:
CHAS. M. ROBINSON.
J. H. BEAN.
ALBERT W. FISHER.

ROSS FORK, IDAHO, February 5, 1898.

FORT HALL AGENCY, IDAHO, February 5, 1898.

I hereby certify that two hundred and twenty-seven (227) Indians constitute a majority of male adult Indians on or belonging on the Fort Hall Indian Reservation, Idaho.

F. G. IRWIN, Jr.,
First Lieutenant, Second Cavalry, Acting Indian Agent.

Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the said agreement be, and the same hereby is, accepted, ratified, and confirmed. Ratification.

SEC. 2. That for the purpose of making the first cash payment stipulated for in article two of the foregoing agreement, and for the purpose of a new school plant, as provided in the same article, the sum of one hundred and seventy-five thousand dollars be, and the same hereby is, appropriated, out of any money in the Treasury not otherwise appropriated. Appropriation for first cash payment, etc.

SEC. 3. That for the purpose of surveying, establishing, and properly marking the western and northern boundaries of the tract ceded by the foregoing agreement, as required by article five thereof, and for field examination and necessary office work in connection therewith, the sum of one thousand dollars, or so much thereof as may be necessary, be, and the same hereby is, appropriated, out of any money in the Treasury not otherwise appropriated. —for surveys, etc.

SEC. 4. That before any of the lands by this agreement ceded are opened to settlement or entry, the Commissioner of Indian Affairs shall cause allotments to be made of such of said lands as are occupied and cultivated by any Indians, as set forth in article three of said agreement, who may desire to have the same allotted to them; and in cases where such Indian occupants prefer to remove to lands within the limits of the reduced reservation, he shall cause to be prepared a schedule of the lands to be abandoned, with a description of the improvements thereon, and the name of the Indian occupant, a duplicate of which shall be filed with the Commissioner of the General Land Office. Heads of families settled thereon to have allotments prior to opening of ceded lands to entry, etc. —electing to remove, schedule of lands, etc., abandoned.

Before entry shall be allowed, as hereinafter provided, of any tract of land occupied and cultivated as above and included in the schedule aforesaid, the Secretary of the Interior shall cause the improvements on said tract to be appraised and sold to the highest bidder. No sale —appraisal and sale of improvements.

EXHIBIT C

of such improvements shall be for less than the appraised value. The purchaser of such improvements shall have thirty days after such purchase for preference right of entry, under the provisions of this Act, of the lands upon which the improvements purchased by him are situated, not to exceed one hundred and sixty acres: *Provided*, That the proceeds of the sale of such improvements shall be paid to the Indians owning the same.

Proviso.
—disposition of proceeds of sale.

Removal of improvements.

Any Indian electing to abandon the land occupied by him as aforesaid shall have reasonable time, in the discretion of the Secretary of the Interior, within which to remove the improvements situated upon the land occupied by him.

[31 Stat., 676.]

Lands opened to settlement.

SEC. 5. That on the completion of the allotments and the preparation of the schedule provided for in the preceding section, and the classification of the lands as provided for herein, the residue of said ceded lands shall be opened to settlement by the proclamation of the President, and shall be subject to disposal under the homestead, town-site, stone and timber, and mining laws of the United States only, excepting as to price and excepting the sixteenth and thirty-sixth sections in each Congressional township, which shall be reserved for common-school purposes and be subject to the laws of Idaho: *Provided*, That all purchasers of lands lying under the canal of the Idaho Canal Company, and which are susceptible of irrigation from the water from said canal, shall pay for the same at the rate of ten dollars per acre; all agricultural lands not under said canal shall be paid for at the rate of two dollars and fifty cents per acre, and grazing lands at the rate of one dollar and twenty-five cents per acre, one-fifth of the respective sums to be paid at time of original entry, and four-fifths thereof at the time of making final proof; but no purchaser shall be permitted in any manner to purchase more than one hundred and sixty acres of the land hereinbefore referred to; but the rights of honorably discharged Union soldiers and sailors, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes of the United States, shall not be abridged, except as to the sum to be paid as aforesaid.

Proviso.

Price of Idaho canal lands.

—other lands.

—limit of purchase.

Soldiers' and sailors' homesteads.
R. S., 2304, 2305, p. 422.

Classification of agricultural and grazing lands.

The classification as to agricultural and grazing lands shall be made by an employee of the General Land Office under the direction of the Secretary of the Interior.

Indemnity to State of Idaho for certain school lands.

No lands in sections sixteen and thirty-six now occupied, as set forth in article three of the agreement herein ratified, shall be reserved for school purposes, but the State of Idaho shall be entitled to indemnity for any lands so occupied: *Provided*, That none of said lands shall be disposed of under the town-site laws for less than ten dollars per acre: *And provided further*, That all of said lands within five miles of the boundary line of the town of Pocatello shall be sold at public auction, payable as aforesaid, under the direction of the Secretary of the Interior for not less than ten dollars per acre: *And provided further*, That any mineral lands within said five mile limit shall be disposed of under the mineral land laws of the United States, excepting that the price of such mineral lands shall be fixed at ten dollars per acre instead of the price fixed by the said mineral land laws.

Provisos.
—price under town-site laws.
—lands near Pocatello.

—mineral lands.

Agreement with Comanche, Kiowa, and Apache Indians of Oklahoma.

SEC. 6. Whereas David H. Jerome, Alfred M. Wilson, and Warren G. Sayre, duly appointed Commissioners on the part of the United States, did, on the sixth day of October, eighteen hundred and ninety-two, conclude an agreement with the Comanche, Kiowa, and Apache tribes of Indians in Oklahoma, formerly a part of the Indian Territory, which said agreement is in the words and figures as follows:

Proclamation, post, pp. 1091, 1097.

"Articles of agreement made and entered into at Fort Sill, in the Indian Territory, on the twenty-first day of October, eighteen hundred and ninety-two, by and between David H. Jerome, Alfred M. Wilson, and Warren G. Sayre, Commissioners on the part of the United States, and the Comanche, Kiowa, and Apache tribes of Indians in the Indian Territory.

"ARTICLE I.

"Subject to the allotment of land, in severalty to the individual members of the Comanche, Kiowa, and Apache tribes of Indians in the Indian Territory, as hereinafter provided for, and subject to the setting apart as grazing lands for said Indians, four hundred and eighty thousand acres of land as hereinafter provided for, and subject to the conditions hereinafter imposed, and for the considerations hereinafter mentioned, the said Comanche, Kiowa, and Apache Indians hereby cede, convey, transfer, relinquish, and surrender, forever and absolutely, without any reservation whatever, express or implied, all their claim, title, and interest, of every kind and character, in and to the lands embraced in the following-described tract of country in the Indian Territory to wit: Commencing at a point where the Washita River crosses the ninety-eighth meridian west from Greenwich; thence up the Washita River, in the middle of the main channel thereof, to a point thirty miles, by river, west of Fort Cobb, as now established; thence due west to the north fork of Red River, provided said line strikes said river east of the one-hundredth meridian of west longitude; if not, then only to said meridian line, and thence due south, on said meridian line, to the said north fork of Red River; thence down said north fork, in the middle of the main channel thereof, from the point where it may be first intersected by the lines above described, to the main Red River; thence down said Red River, in the middle of the main channel thereof, to its intersection with the ninety-eighth meridian of longitude west from Greenwich; thence north, on said meridian line, to the place of beginning.

Cession of lands.

[31 Stat., 677.]

—boundaries.

"ARTICLE II.

"Out of the lands ceded, conveyed, transferred, relinquished, and surrendered by Article I hereof, and in part consideration for the cession thereof, it is agreed by the United States that each member of said Comanche, Kiowa, and Apache tribes of Indians over the age of eighteen (18) years shall have the right to select for himself or herself one hundred and sixty (160) acres of land to be held and owned in severalty, to conform to the legal surveys in boundary; and that the father, or, if he be dead, the mother, if members of either of said tribe of Indians, shall have the right to select a like amount of land for each of his or her children under the age of eighteen (18) years; and that the Commissioner of Indian Affairs, or some one by him appointed for the purpose, shall select a like amount of land for each orphan child belonging to either of said tribes under the age of eighteen (18) years.

Allotments in severalty.

"ARTICLE III.

"That in addition to the allotment of lands to said Indians as provided for in this agreement, the Secretary of the Interior shall set aside for the use in common for said Indian tribes four hundred and eighty thousand acres of grazing lands, to be selected by the Secretary of the Interior, either in one or more tracts as will best subserve the interest of said Indians. It is hereby further expressly agreed that no person shall have the right to make his or her selection of land in any part of said reservation that is now used or occupied for military, agency, school, school-farm, religious, or other public uses, or in sections sixteen (16) and thirty-six (36) in each Congressional township, except in cases where any Comanche, Kiowa, or Apache Indian has heretofore made improvements upon and now uses and occupies a part of said sections sixteen (16) and thirty-six (36), such Indian may make his or her

Grazing lands.

Restrictions on selection of land.

selection within the boundaries so prescribed so as to include his or her improvements. It is further agreed that wherever in said reservation any Indian, entitled to take lands in severalty hereunder, has made improvements, and now uses and occupies the land embracing such improvements, such Indian shall have the undisputed right to make his or her selection within the area above provided for allotments, so as to include his or her said improvements.

[31 Stat., 673.] Reservation of land for public schools, etc.

"It is further agreed that said sections sixteen (16) and thirty-six (36) in each Congressional township in said reservation shall not become subject to homestead entry but shall be held by the United States and finally sold for public school purposes. It is hereby further agreed that wherever in said reservation any religious society or other organization is now occupying any portion of said reservation for religious or educational work among the Indians, the land so occupied may be allotted and confirmed to such society or organization, not, however, to exceed one hundred and sixty (160) acres of land to any one society or organization so long as the same shall be so occupied and used; and such land shall not be subject to homestead entry.

"ARTICLE IV.

Limit of time for selecting allotments.

"All allotments hereunder shall be selected within ninety days from the ratification of this agreement by the Congress of the United States: *Provided*, The Secretary of the Interior, in his discretion, may extend the time for making such selection; and should any Indian entitled to allotments hereunder fail or refuse to make his or her selection of land in that time, then the allotting agent in charge of the work of making such allotments shall within the next thirty (30) days after said time make allotments to such Indians, which shall have the same force and effect as if the selection were made by the Indian.

Proviso. —extension of time, etc.

"ARTICLE V.

Allotments to be held in trust for twenty-five years.

"When said allotments of land shall have been selected and taken as aforesaid, and approved by the Secretary of the Interior, the titles thereto shall be held in trust for the allottees, respectively, for the period of twenty-five (25) years, in the time and manner and to the extent provided for in the act of Congress entitled 'An act to provide for the allotment of land in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and Territories over the Indians, and for other purposes,' approved February 8, 1887, and an act amendatory thereof, approved February 28, 1891.

Ante, p. 31.

Ante, p. 56.

—conveyance of title.

"And at the expiration of the said period of twenty-five (25) years the titles thereto shall be conveyed in fee simple to the allottees or their heirs, free from all incumbrances.

"ARTICLE VI.

Consideration.

"As a further and only additional consideration for the cession of territory and relinquishment of title, claim, and interest in and to the lands as aforesaid, the United States agrees to pay to the Comanche, Kiowa, and Apache tribes of Indians, in the Indian Territory, the sum

Payment.

of two million (2,000,000) dollars, as follows: Five hundred thousand ($500,000) dollars to be distributed per capita to the members of said tribes at such times and in such manner as the Secretary of the Interior shall deem to be for the best interests of said Indians, which sum is hereby appropriated out of any funds in the Treasury not otherwise appropriated; and any part of the same remaining unpaid shall draw interest at the rate of five per centum while remaining in the Treasury, which interest shall be paid to the Indians annually per capita; and

the remaining one million five hundred thousand ($1,500,000) dollars to be retained in the Treasury of the United States, placed to the credit of said Indians, and while so retained to draw interest at the rate of five per centum per annum, to be paid to the said Indians per capita annually.

"Nothing herein contained shall be held to affect in any way any annuities due said Indians under existing laws, agreements, or treaties. [31 Stat., 679.] Existing annuities.

"ARTICLE VIII.

"It is further agreed that wherever in said reservation any member of any of the tribes of said Indians has, in pursuance of any laws or under any rules or regulations of the Interior Department taken an allotment, such allotment, at the option of the allottee, shall be confirmed and governed by all the conditions attached to allotments taken under this agreement. Allotments by Interior Department may be governed by this agreement.

"ARTICLE IX.

"It is further agreed that any and all leases made in pursuance of the laws of the United States of any part of said reservation which may be in force at the time of the ratification by Congress of this agreement shall remain in force the same as if this agreement had not been made. Existing leases.

"ARTICLE X.

"It is further agreed that the following named persons, not members by blood of either of said tribes, but who have married into one of the tribes, to wit, Mabel R. Given, Thomas F. Woodward, William Wyatt, Kiowa Dutch, John Nestill, James N. Jones, Christian Ke oh-tah, Edward L. Clark, George Conover, William Deitrick, Ben Roach, Lewis Bentz, Abilene, James Gardloupe, John Sanchez, the wife of Boone Chandler, whose given name is unknown, Emmit Cox, and Horace P. Jones, shall each be entitled to all the benefits of land and money conferred by this agreement, the same as if members by blood of one of said tribes, and that Emsy S. Smith, David Grantham, Zonee Adams, John T. Hill, and J. J. Methvin, friends of said Indians, who have rendered to said Indians valuable services, shall each be entitled to all the benefits, in land only, conferred under this agreement, the same as if members of said tribes. Certain persons married into tribes entitled to allotment.

"ARTICLE XI.

"This agreement shall be effective only when ratified by the Congress of the United States." Ratification.

Said agreement be, and the same hereby is, accepted, ratified, and confirmed as herein amended.

That the Secretary of the Interior is hereby authorized and directed to cause the allotments of said lands, provided for in said treaty among said Indians, to be made by any Indian inspector or special agent. Special allotment agent, etc.

That all allotments of said land shall be made under the direction of the Secretary of the Interior to said Indians within ninety days from the passage of this Act, subject to the exceptions contained in article four of said treaty: *Provided*, That the time for making allotments shall in no event be extended beyond six months from the passage of this Act. Proviso. Limit of time for allotting.

That the lands acquired by this agreement shall be opened to settlement by proclamation of the President within six months after allotments are made and be disposed of under the general provisions of the homestead and town-site laws of the United States: *Provided*, That in Lands opened to settlement. Proviso. Price per acre.

EXHIBIT C

addition to the land-office fees prescribed by statute for such entries the entryman shall pay one dollar and twenty-five cents per acre for the land entered at the time of submitting his final proof: *And provided further*, That in all homestead entries where the entryman has resided upon and improved the land entered in good faith for the period of fourteen months he may commute his entry to cash upon the payment of one dollar and twenty-five cents per acre: *And provided further*, That the rights of honorably discharged Union soldiers and sailors of the late civil war, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes shall not be abridged: *And provided further*, That any person who, having attempted to but for any cause failed to secure a title in fee to a homestead under existing laws, or who made entry under what is known as the commuted provision of the homestead law, shall be qualified to make a homestead entry upon said lands: *And provided further*, That any qualified entryman having lands adjoining the lands herein ceded, whose original entry embraced less than one hundred and sixty acres in all, shall have the right to enter so much of the lands by this agreement ceded lying contiguous to his said entry as shall, with the land already entered, make in the aggregate one hundred and sixty acres, said land to be taken upon the same conditions as are required of other entrymen: *And provided further*, That the settlers who located on that part of said lands called and known as the "neutral strip" shall have preference right for thirty days on the lands upon which they have located and improved.

[31 Stat., 650.] Commutation of homestead entries.

Soldiers and sailors homesteads. R. S., sec. 2304, 2305.

Persons now qualified for homestead entry who have hitherto failed to secure title.

Entry on land adjoining existing entries.

Preference right on "neutral strip."

Reservations for schools, etc.

That sections sixteen and thirty-six, thirteen and thirty-three, of the lands hereby acquired in each township shall not be subject to entry, but shall be reserved, sections sixteen and thirty-six for the use of the common schools, and sections thirteen and thirty-three for university, agricultural colleges, normal schools, and public buildings of the Territory and future State of Oklahoma; and in case either of said sections, or parts thereof, is lost to said Territory by reason of allotment under this Act or otherwise, the governor thereof is hereby authorized to locate other lands not occupied in quantity equal to the loss.

Payments not available for depredation claims. Ante, p. 53.

That none of the money or interest thereon which is, by the terms of the said agreement, to be paid to said Indians shall be applied to the payment of any judgment that has been or may hereafter be rendered under the provisions of the Act of Congress approved March third, eighteen hundred and ninety-one, entitled "An Act to provide for the adjudication and payment of claims arising from Indian depredations."

Mineral deposits open to location.

That should any of said lands allotted to said Indians, or opened to settlement under this Act, contain valuable mineral deposits, such mineral deposits shall be open to location and entry, under the existing mining laws of the United States, upon the passage of this Act, and the mineral laws of the United States are hereby extended over said lands.

Court of Claims to determine claims of Choctaw and Chickasaw. See note to 1893, ch. 517, ante, p. 656.

That as the Choctaw and Chickasaw nations claim to have some right, title, and interest in and to the lands ceded by the foregoing treaty as soon as the same are abandoned by said Comanche, Kiowa, and Apache tribes of Indians, jurisdiction be, and is hereby, conferred upon the United States Court of Claims to hear and determine the said claim of the Chickasaws and the Choctaws, and to render a judgment thereon, it being the intention of this Act to allow said Court of Claims jurisdiction, so that the rights, legal and equitable, of the United States and the Choctaw and Chickasaw nations, and the Comanche, Kiowa, and Apache tribes of Indians in the premises shall be fully considered and determined, and to try and determine all questions that may arise on behalf of either party in the hearing of said claim; and the Attorney-General is hereby directed to appear in behalf of the Government of the United States; and either of the parties to said action shall have

the right to appeal to the Supreme Court of the United States: *Provided*, That such appeal shall be taken within sixty days after the rendition of the judgment objected to, and that the said courts shall give such causes precedence: *And provided further*, That nothing in this Act shall be accepted or construed as a confession that the United States admit that the Choctaw and Chickasaw nations have any claim to or interest in said lands or any part thereof.

—appeal. Proviso. —time for taking. [31 Stat., 681.] Claim not to be construed as admitted, etc.

That said action shall be presented by a single petition making the United States party defendant, and shall set forth all the facts on which the said Choctaw and Chickasaw nations claim title to said land; and said petition may be verified by the authorized delegates, agents, or attorneys of said Indians upon their information and belief as to the existence of such facts, and no other statement or verification shall be necessary: *Provided*, That if said Choctaw and Chickasaw nations do not bring their action within ninety days from the approval of this Act, or should they dismiss said suit, and the same shall not be reinstated, their claim shall be forever barred: *And provided further*, That, in the event it shall be adjudged in the final judgment or decree rendered in said action that said Choctaw and Chickasaw Nations have any right, title, or interest in or to said lands for which they should be compensated by the United States, then said sum of one million five hundred thousand ($1,500,000) dollars, shall be subject to such legislation as Congress may deem proper.

Procedure.

Proviso. Claim barred by failure to bring action.

Disposal of fund on judgment for Choctaw and Chickasaw.

Approved, June 6, 1900.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

COLVILLE CONFEDERATED TRIBES, Plaintiff, vs. BOYD WALTON, JR., et ux, et al., Defendants, STATE OF WASHINGTON, Defendant Intervenor.	Civil No. 3421
UNITED STATES OF AMERICA, Plaintiff, vs. WILLIAM BOYD WALTON, et ux, et a., and THE STATE OF WASHINGTON, Defendants.	Civil No. 3831

CERTIFICATE OF SERVICE

District of Columbia
Washington

I, Carole Ann Roop, being first duly sworn, on oath, depose and say that I am a person of such age and discretion as to be competent to serve papers and that I served the following:

REITERATION OF PLAINTIFF COLVILLE TRIBES' MOTION FOR PARTIAL SUMMARY JUDGMENT AND RESPONSE TO MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF, UNITED STATES' MOTION FOR PARTIAL SUMMARY JUDGMENT

on the attorneys of record listed on the second sheet of this certificate of service by depositing copies thereof in the United States mail, postage prepaid, addressed to each attorney of record on the 13th day of March 1978.

Carole Ann Roop

Subscribed and sworn before me this 13 day of March 1978.

Mario S. Romero
Notary Public

My Commission Expires on Jun/78

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