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Supplemental Brief of the Spokane Indian Tribe in Response to Department of Ecology "Supplemental" Brief and Department of Natural Resources "Reply" Brief

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UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,	)	
	)	NO. 3643
Plaintiff,	)	
	)	
v.	)	
	)	
BARBARA J. ANDERSON ET AL,	)	
	)	
Defendants.	)	

SUPPLEMENTAL BRIEF OF THE SPOKANE INDIAN TRIBE IN RESPONSE TO DEPARTMENT OF ECOLOGY "SUPPLEMENTAL" BRIEF AND DEPARTMENT OF NATURAL RESOURSES "REPLY" BRIEF

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(158)

TABLE OF CONTENTS

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UNITED STATES OF AMERICA, Plaintiff, v. BARBARA J. ANDERSON ET AL, Defendants.	NO. 3643 SUPPLEMENTAL BRIEF OF THE SPOKANE INDIAN TRIBE IN RESPONSE TO DEPARTMENT OF ECOLOGY "SUPPLEMENTAL" BRIEF AND DEPARTMENT OF NATURAL RESOURCES "REPLY" BRIEF

DEPARTMENT OF ECOLOGY "SUPPLEMENTAL" BRIEF

The writer, attorney for the Spokane Tribe, was astonished when he received the Supplemental Briefs of Department of Ecology and Department of Natural Resources. Prior to the submission of reply briefs by either the United States or the Tribe, Department of Natural Resources had written the Court "anticipating" that the reply briefs would include new and inaccurate material and asking for time to make a further answer. Now we are faced with the two Supplemental Briefs, the one by Department of Ecology forty-six pages long. One cannot read this lengthy "supplemental" without asking how far opposing counsel can stretch his presumption that it is to answer alleged new matters contained in the reply briefs.

We agree with Department of Ecology that the field of Indian law and of Indian water rights in particular is indeed a complex field subject to varied interpretations, points of view and nuances. It is certainly possible to discuss and rediscuss any of its various aspects from a multitude of angles and in effect churn the subject matter over and over again. This is true of any complicated legal field. While Department of Ecology may claim that it, in its Supplemental Brief, is merely answering "new matters" which it may allege were unfairly included

in plaintiff's reply briefs, it is difficult to find any paragraph or page of its supplemental which is not in fact a restatement of what it already said at length in its answering brief. The writer feels that while the Court and counsel should be liberal in allowing lengthy and even repetitious briefs so that everything is before the Court, Department of Ecology has gone too far with its "new matters" pretext in order to get in its last lengthy word in its so called "supplemental".

Department of Ecology, having done that, then in its footnote on page two implies that any effort by the Spokane Tribe to answer "new matters" raised in the Supplemental Briefs would be improper. It also objects mightily to the prospect that the Spokane Tribe may file with the Court the updated stream flow and well level records compiled to date by the plaintiff's hydrologist, Ira Woodward.

The writer will deal with each of these matters in more detail below.

LLOYD MEEDS "DISSENTING VIEWS"

While in the give and take of a lawsuit lawyers with a deep mutual respect for each other will nevertheless press the limits in their advocacy, the writer does consider totally improper the filing by the attorney for Department of Ecology of the "Dissenting Views of Congressman Lloyd Meeds."

The so called "Dissenting Views" purport to be Congressman Meeds personal dissent to the voluminous final reports of the American Indian Policy Review Commission of which he was co-chairman with Senator Abourezk. In order to inform the Court as to its purpose and nature I am attaching as Appendix I title pages from its report which list the congressional members, the foreword by its Senator James Abourezk summarizing its purpose, the executive staff, the task force members and staff and the table of contents of the first volume.

Congressman Meeds was a co-chairman because of his chairmanship of the House Committee on Indian Affairs (as Abourezk was in the Senate). He had had a record as a top advocate for Indians and hence became the chairman to the Policy Review Commission. When Congressman Meeds was almost defeated for re-election he attributed the near loss to his espousal of Indian causes - especially the "Boldt Decision" and he performed one of the most remarkable switches in political history. He resigned his position on the Indian Subcommittee and has since engaged in a non-ending vendetta against his former friends. His complete reversal on so many Indian issues has shocked not only his Indian constituents but his non-Indian electorate. The characterizations he is receiving do not bode well for his chances in the next election.

His "Dissenting Views" were ghost written for him by Attorney F. J. Martone[1] of Phoenix and are a rehash of a law review article by Martone published in the Notre Dame Law Review which Meeds had read. [American Indian Tribal Self Government in the Federal System; Inherent Right or Congressional License. F. J. Martone - 51 Notre Dame Law Rev. 600-635, Ap. '76].

Included in Appendix I is Senator Abourezk's response to the "Dissenting Views." The "Views" are a highly opinionated, one-sided polemic against Tribal, Indian, and judicial views and holdings especially in the fields of treaty rights, jurisdiction, taxation and land claims. They do not rise to the level of being a legal brief of probative value in any issue before this Court. They relate in no way to Indian water rights. They should be ignored by the Court. If they are in fact considered by the

1. Frederick J. Martone graduated from North Dakota Law School in 1972 and is a young associate of the law firm Jennings, Surouss and Salmon of Phoenix of which firm there are 36 members and 13 associate members, apparently the largest lawfirm in Phoenix, with a large practice including mining, oil and gas, water rights and Indian Affairs law. Its "Indian practice" is in representation of corporate, municipal and district clients dealing with Tribes. See Martindale, 1977, Arizona, page 364B.

Court then plaintiffs should be allowed to file the entire Final Report of the American Indian Policy Review Commission. We do not plan to do so unless requested by the Court because, while dealing in part with water rights, it deals with the entire spectrum of Indian causes, issues and claims, very little of which is relevant to this case. The Meeds "Views" are totally irrelevant, either as evidence or legal argument, and should be stricken.

Perhaps the most non-political portion of the Report is its section on Indian Water Rights, pages 329-338 [attached as Appendix II.] This section is in fact a well written and reasoned summary or brief of the nature and extent of Tribal water rights. It is quite relevant to our Chamokane case.

As to whether Winters Rights are limited to agriculture or should be adequate to meet future requirements of Indian communities the report on page 332 quotes from the Ahtanum case as follows:

> "The reservation was not merely for present but for future use. Any other construction of the rule in the Winters case would be wholly unreasonable. . ." (United States v. Ahtanum Irrigation District, 236 F.2d 321, 326).

It quotes also from the Conrad case where it stated that there was reserved "whatever water of Birch Creek may be reasonably necessary, not only for present uses, but for future requirements. . ." (Conrad Investment Co. v. United States, 161 Fed. 829, 832). It quotes on page 333 from Arizona the statement of the Court that:

> "We also agree with the Special Master's conclusion as to the quantity of water intended to be reserved. . . the water was intended to satisfy the future as well as the present needs of the Indian Reservations. . ." Page 333. (Arizona v. California, 373 U.S. 546, 600).

On page 333 it summarizes judicial precedent as follows:

> "(a) They underscore the great need for water;
>
> "(b) They underscore the need is for present and future Indian requirements; and

"(c) They underscore the intention that the Indian reservations are to be continuing, viable, economic communities utilizing the necessary quantities of water to achieve those precise and most desirable ends. . ."

It discusses the case of Akin et al v. United States, 424 U.S. 803 (1976), and decries that if each western state were to adjudicate Indian water rights "in effect you have a potential of 15 different interpretations. . ." (Quoting from Assistant Attorney General Taft).

It discusses Indian water rights both for agriculture and fisheries as well as other needs and uses and on page 335 states:

"A central factor in establishing and protecting Indian water rights is the beneficial use of it. Water is so essential to the economic development and social survival to the American Indian that, without it, there can be no development of self-sufficiency for a large percent of the Indian population. . ."

and on page 337:

"The survival of Indian Tribes as economic units in the arid and semi-arid western states requires the protection of Indian rights to water on, under and adjacent to Indian land.

"The development of viable agricultural systems, grazing economies, or industrial ventures depends on adequate, reliable delivery of water from customary sources."

In reading the recommendations of the Review Commission with regard to Indian Water Rights (page 338) it is interesting to note that the Spokane Tribe, in bringing this action, in its inventory of its water and land resources, in its hydrological studies in this suit, in its over all Reservation planning and in its construction of its modern irrigation project on the Spokane River has already accomplished or is attempting to accomplish most of what is recommended.

The writer could excerpt many sections of relevant material supporting the Tribe's views on the subjects of sovereignty, Tribal and federal jurisdictions and especially on the subject of the lack of state jurisdiction within the Reservations and in matters involving Tribal resources.

The Report is in fact a well organized, authoritative, gold mine of information about Indian Tribes and Reservations. For example when we

consider Department of Ecology's statement of the oft repeated bias that the purpose of the Reservation system was to "make farmers out of the Indians" we read on page 315 of the Report the following:

> ". . . 2,440,172, or 4.7 percent of all Indian trust land, were classified as agricultural. Of the almost 2-1/2 million acres, 29 percent was irrigated and 71 percent were dry farm. . ."

It is estimated that of the 150,000 acres of land on the Spokane Reservation not more than 25,000 acres is farmable, and of this 20,000 acres is potentially irrigable through expensive projects such as the current Bureau of Reclamation project. Obviously the purposes of these various reservations with an average of only 4.7 percent agricultural land, and the Spokane Reservation with about 16 percent farmable, were not limited to agricultural.

The Report (page 339) reveals that Indian Reservations have approximately 3 percent of the nation's oil and gas reserves and 7 to 13 percent of its coal reserves. The value of production of oil and gas on Indian lands was 4.4 percent of total United States production. Indian lands have 4.9 percent of the nation's phosphates and "in 1974, 100 percent of the Federal and Indian land uranium production was on Indian lands." (Much of this from the Spokane Reservation). It is clear that water is needed in the development of each of these resources and the concept that Winters Rights for the water is limited to agriculture is patently absurd.

What is revealed is a rapidly developing Indian and Tribal cultural, social, economic, governmental society and hegemony of Indians divided into Tribes and Reservations on a matrix of land with a lifeblood of water catching up fast to the rest of the nation. In this dash to parity the Spokane Tribe is a lead runner.

To say that in this rapid developmental migration from the recent

aboriginal past to the present the Tribe has water rights to the historic Chamokane only for limited domestic and agricultural uses as viewed and specifically foreseen in 1877 and 1881 is to refuse to recognize the plain facts of present day Reservation needs and development and their relation to the nation as a whole.

DEPARTMENT OF ECOLOGY'S UNDERSTANDING OF "SCOPE OF WINTERS DOCTRINE" IS UNREALISTICALLY RESTRICTIVE

The writer is constantly amazed at the postulations of Department of Ecology that it understands the scope of the Winters Doctrine and is supportive of it. On page 14 of Department of Ecology's Supplemental Brief it summarizes that the Tribe has Winters Rights "on a broad base, consisting of five uses: (1) irrigation, (2) stockwater, (3) domestic, (4) firefighting applicable to timber lands, and (5) road building and related construction activities incident to the production of timber." Department of Ecology then acknowledges that the purposes of Reservation included "making a home and making a living thereon by developing agriculture and timber resources of the Reservation" (Supplemental Brief, page 14).

Restrictive as Department of Ecology's definition is, it is broader than that argued for in Department of Ecology's answering brief. There, at page 58, Department of Ecology acknowledged the same classifications of Winters Rights. Then, as to irrigation, the Department took the position that because the Tribe had testified that it had never been its intent to utilize the Chamokane Waters for irrigation but rather to utilize the Spokane River waters (thereby preserving the Creek) "this figure approaches zero." [Winters Rights to Chamokane waters for irrigation].

The self defeating rationale of Department of Ecology is worth repeating: Whereas the Tribe could have had Winters Rights to Chamokane waters for irrigation, it does not have such rights because of its

intent to protect and preserve the creek. It does not have Winters Rights to protect and preserve the creek. Therefore it has Winters Rights for neither irrigation or the instream benefits of protecting and preserving the creek.

As Department of Ecology (pages 14 through 17) pursues its rationale that the Tribe could not and does not have any Winters Rights for the instream benefits of fishing, recreation, esthetics, etc. one has to ask about the various western Reservations such as on the west coast where irrigation could not have been intended and the use of a given creek or water body had to be limited to the instream benefits, fishing, etc. Does Department of Ecology contend that those Tribes have no Winters Rights at all? If they, on the other hand acknowledge that those Tribes would have Winters Rights for those obvious instream benefits, then why not the Spokane Tribe as to the Chamokane where those current and future uses and needs were just as obvious.

Department of Ecology in its Supplemental Brief rediscusses and throws on the table for re-reply all of its attitudes and arguments regarding the scope of the Winters Doctrine. Prudence dictates that the Court would not want either plaintiff to rehash this entire subject. We go back to our discussion in the Tribe's reply brief, page 16 through 31, and really find not much to add.

Let us assume that Department of Ecology is right and that only those "purposes" specifically contemplated at the time of the formation of the Reservation in 1881 are included in the Tribe's Winters Rights. Certainly the purpose of preservation of the stream for its instream values of fishing, recreation and esthetic were more obvious then than was irrigation of the arid land that bordered it. As argued in our earlier briefs it was the existence of the various streams, the Columbia, Spokane and Chamokane that made the Reservation acceptable at all to

either the Tribe or to the United States. The instream benefits were the primary purposes. The prospect of irrigation, more in the mind of the United States than of the Tribe, was something for the future, down the line in consideration and implementation.

A concept that seems to escape Department of Ecology, and most Tribal antagonists in the fields of land and water rights, is that, at the time the Reservation was established the concept of individualized allotments was in the future. The Reservation was reserved for and beneficially owned by the Tribal entity, representing all the Indians inhabiting the Reservation. While individual Indians had had private farms, most of the membership had little understanding of the allotment system. It was a self interested plan on the part of neighboring landowners, prospective purchasers and some federal administrators that down the line such land as would be needed would be allotted to the Indians and any surplus, other than timber land, would be opened for homestead. This plan could not be said to be the official plan of the United States. It certainly was not of the Indians who, with little understanding of the meaning of private property, looked at the Reservation as a reduced aboriginal Tribal land base to be held, utilizied and managed for the benefit of the Tribe as a whole.

Thus it is fallacious for Department of Ecology to keep talking of the "purpose" to make the Indians into farmers. What must be included and emphasized as first priority was that it would be the place for the Tribe, as a body politic, a governmental entity, a quasi proprietary municipality, an ethnic group on a piece of their homeland to headquarter, live and perpetuate itself "forever, as long as the rivers ran and the grass was green" - the collective Spokane Indians.

With this broader purpose of the Reservation we must ask, what then was the purpose of its waters, of the waters of the Chamokane. One

major purpose was for it to continue as a fresh, pure water home base for the enjoyment, the satisfaction, the recreation, the fishing, a beautiful esthetic jewel, close to the hearts of the Tribe.

How can one say that the protection of this beautiful creek, its preservation for its priceless instream values to the Tribe was not a primary "purpose" of the Tribe and its members and of their trustee, the United States?

DEPARTMENT OF ECOLOGY CONCEPT RE "ADJUDICATION" NOT PRACTICAL OR LEGALLY DEFENDABLE

For some reason Department of Ecology stubbornly adheres to its views that this is a general adjudication. It devoted much argument to this in its "State of Proceedings" in its opening brief and again in its "Supplemental" pages 2 et seq.

We rest on our discussion of this point, page one of the Tribe's reply brief. The purpose of this case is to seek a definition and protection of the Tribe's water rights to the Chamokane as against the state and the state issued water licenses and permits. There is no effort to "adjudicate" the relative rights of each individual user as against the others. It is the Tribe's position that it has pre-empted the entire summer time flow of the creek, 30 cfs for the instream benefits, and any excess over that for the irrigation of the Tribe's own lands.

THE McCARRAN ACT 43 USC 666 DOES NOT PURPORT TO GIVE STATE JURISDICTION OVER INDIAN WATER RIGHTS

Page 13 of its Supplemental Brief Department of Ecology implies that somehow 43 USC gives the states jurisdiction "over all waters within its boundaries" including Indian waters.

While that act does purport to allow adjudication in state courts of all waters including those the rights to which are in federal or Indian lands, nothing in the Act would give Department of Ecology for

example any authority or jurisdiction over the federal or Indian water rights.

The courts would "adjudicate" only and, in so doing, would presumably recognize and adjudicate as belonging to Tribes their Winters Rights, ascribing to them the same priority, precedence and dignity that a federal court would. Hopefully the decision of a state court in adjudicating a stream like the Chamokane would be exactly as that of a federal court in adjudicating, defining and protecting the Tribal Winters Rights.

THE 1905 ACT: DEPARTMENT OF ECOLOGY'S MISCONCEPTIONS

From the outset of this litigation it has been the Spokane Tribe's position that jurisdiction over all waters within the boundaries of the Spokane Reservation lies with the Tribe and with the United States as the trustee for the Tribe, and that such jurisdiction is total and exclusive as against the state except insofar as it has been limited or curtailed by Congress. In support of this position, the Tribe has brought to this Court's attention the Act of March 3, 1905, 33 Stat. 1006, which authorized the acquisition of water rights on the Spokane River by appropriation under and pursuant to the laws of the State of Washington subject to departmental approval. Copies of this Act and its legislative history have been attached to both briefs previously filed by the Tribe in this action, and have accompanied a precise textual statement of what the Tribe believes the purposes of this Act to be. This limited discussion then serves only to rebut the rather unique and somewhat illogical interpretation which the Department of Ecology has attached to the 1905 Act in their Supplemental Brief.

In their analysis of this 1905 Act, the Department of Ecology finds two distinct Congressional purposes. The first was to allow for the acquirement of <u>lands</u> on the Reservation for power purposes, etc., by members of the private sector. The Tribe does not dispute this as one

of the purposes for the enactment of this statute.

The second purpose which the Department of Ecology attributed to Congress in enacting this law is a bit more inventive. Reduced to its most simple terms, the Department of Ecology takes the position that in 1905, because the water law in the State of Washington was confusing in that the state recognized both the riparian and prior appropriation doctrines, private industry was hesitant to invest in any large scale power producing facility, not knowing with any degree of certainty what water rights they had. The United States Congress, having knowledge of this through local representatives, and being desirous of encouraging such private investments, decided to eliminate the cause of private industries' hesitancy by enacting this federal statute which would pre-empt the confusing Washington laws on this small segment of the Spokane River, and guarantee these private investor's security in their appropriations. As support for this approach, the Department of Ecology points to a certain few comments found in the legislative history of this 1905 Act wherein a concern was expressed regarding this unique Washington water law. The Department of Ecology notes these few comments then asks:

> "If, as plaintiffs contend, Congress understood that the Tribe or the United States had exclusive jurisdiction over the waters in the Spokane River, then why was Congress concerned with the confusing state law? If state law did not apply to the Spokane River, but only federal or Tribal law, then there would have been no concern expressed and no need to so clarify the situation by legislation." (Supplemental Brief of Department of Ecology, page 39).

The Tribe cannot be absolutely certain why the supposedly confusing Washington water law was briefly mentioned in the legislative history. However, in view of the entire legislative history and the language of the statute itself, these small references are probably irrelevant. However, it is noteworthy that this statute was enacted approximately three years before the landmark decision in the case of Winters v.

United States, 207 U.S. 564, 28 S.Ct. 207, 52 L.E. 340 (1908). Prior to this decision, there had obviously been a degree of uncertainty as to Indian Reservation water rights, what they were and how they were attained, and more than likely this uncertainty was the basis of the comments contained in the legislative history of the 1905 Act. If Washington State citizens could enjoy water rights as both riparians and prior appropriators, then surely the Spokane Tribe of Indians could also. Yet, just as there was previously no way for private investors to acquire lands on the Reservation, there was a similar problem in acquiring these water rights belonging to the Tribe. That Congress recognized this problem is made evident by Representative Jone's comments to the House of Representatives where he said:

> ". . . the question of the acquirement of water rights on the Reservation is a matter of some doubt. This bill simply authorizes the acquirement of water rights on the Reservation side of the river under the laws of the State of Washington. . ." (Cong. Rec., Vol. 39, Part 3, 58th Cong. 3rd Sess., page 2413 (1905))

So Congress passed this 1905 Act to give Washington investors the necessary authority to acquire these water rights on the Reservation thus giving them the security they needed.

The entire legislative history supports this view that the 1905 Act was indeed a grant of authority by the United States as trustee for the Spokane Tribe to the citizens of the State of Washington, and not a restriction on Washington water laws as asserted by the Department of Ecology. This grant enabled the citizens to "acquire" water rights along the Reservation's southern border. In fact, the precise term "acquirement" is used throughout the legislative history as well as in the statute itself:

> "The Committee on Indian Affairs, to whom was referred the Bill (H.R. 15609) providing for the acquirement of water rights in the Spokane River along the southern boundary of the Spokane Indian Reservation, in the State of Washington, for

the acquirement of lands on said Reservation for sites for power purposes and the beneficial use of said water, and for other purposes, . . ." (S. Rep. No. 4378, 58th Cong. 3d Sess. 1 (1905)) (Emphasis Supplied).

And

"This Bill simply authorizes the acquirement of water rights on the Reservation side of the river under the laws of the State of Washington, . . ." (Cong. Rec., Vol. 39, Part 3, 58th Cong., 3rd Sess., page 2413 (1905)) (Emphasis Supplied).

And finally,

"Be it enacted, . . ., that the right to the use of the waters on the Spokane River where the said River forms the southern boundary of the Spokane Indian Reservation may be acquired by any citizen, association, or corporation of the United States by appropriation under and pursuant to the laws of the State of Washington." (Act of March 3, 1905, 33 Stat. 1006.) (Emphasis Supplied).

Without more it would seem that the Tribe's interpretation of the Act of 1905 is the correct one. Yet there is one more important point which should be mentioned and which dictates against the adoption of the Department of Ecology's views: The 1905 Act applied to the acquirement of water rights only along the southern boundary of the Spokane Indian Reservation and no where else. If, as the Department of Ecology contends, the true Congressional intent in enacting the 1905 Act was to encourage private industry by pre-empting the confusing Washington laws, why would Congress have done so only with regard to one small segment of only one river in the State of Washington? Most assuredly there were various potential power sites throughout Washington, and some of those located on other Indian Reservations, none of which would have gained any relief from the so called confusing Washington water laws by this particular Act.

The view advanced by the Department of Ecology is simply a misconception, not only of the purpose behind the enactment of this 1905 Act, but more importantly of the jurisdiction which the Spokane Tribe, through the United States as trustee, exercises over both lands and waters that

comprise the Spokane Reservation.

"NEW MATTERS" NOT ANSWERED BY DEPARTMENT OF ECOLOGY

Because the Supplemental Brief of Department of Ecology purports to answer only "new matters" and to correct inaccuracies, one would expect Department of Ecology to address itself to the items that were in fact "new" in the Tribe's reply brief.

1. The "Supplemental" made no mention of that portion of the Tribe's reply brief entitled ACTION BY WASHINGTON STATE POLLUTION CONTROL HEARINGS BOARD ON WATER RIGHT ON LITTLE SPOKANE RIVER ANALOGOUS TO CHAMOKANE CASE. Pages 40-42 of Reply Brief. This oversight by Department of Ecology of the reported decision of its own department is significant. The fact is Department of Ecology can hardly answer the implications of that decision, relating to the Little Spokane River, which are so applicable to the Chamokane.

The hearing Board held that the recreational, esthetic, instream values of that stream were paramount and "in effect the highest feasible development of the use of the waters belonging to the public." As we argued in our reply brief, such is even more true of the Chamokane.

2. The "Supplemental" Department of Ecology brief makes no answer to that portion of the Tribe's reply brief reporting and discussing the Ninth Circuit April 29, 1977, decision in the case of Confederated Bands and Tribes of the Yakima Indian Nation v. State of Washington which held the State (Public Law 280) jurisdiction assumed by the State of Washington in RCW 37.12 was unconstitutional. As the reply brief reported the reason for the decision was the checkerboard nature of the jurisdiction which violated the Equal Protection clause of the United States Constitution. We argued that the checkerboard that would result in state jurisdiction over claimed non-Indian water rights on the Spokane Reservation, checkerboarded as to territory and fragmented as to subject matter, was clearly covered

by that decision and would likewise be held unconstitutional.

Department of Ecology made no reply to our discussion of this significant recent case.

CONCLUSION TO THIS SECTION

Department of Ecology's "Supplemental" Brief is so repetitious of its earlier brief that it is difficult for the Tribe to answer without repeating the material and arguments in the Tribe's reply brief. Knowing that the Court will see this just as easily as does the writer we will not try its patience by repeating those arguments.

"REPLY BRIEF" OF DEPARTMENT OF NATURAL RESOURCES

Department of Natural Resources in its "supplemental" denominates it a "reply brief" as aforesaid and states that it is "limited to new issues raised in response to our opening brief." It then in a footnote states "The Spokane Tribe's Reply Brief does not raise new legal issues and will, therefore, be dealt with in a peripheral manner. . . where relevant." The writer appreciates this acknowledgment but must wonder that with the Attorney General Slade Gorton making such an acknowledgment in this brief of Department of Natural Resources, why the same Attorney General does not make it in the Department of Ecology brief but speeds off in the opposite direction, feinting and jabbing at alleged new matters and "inaccurate statements of the law" ascribed to the Tribe's Brief. The writer suggests that this acknowledgment in the Department of Natural Resources "supplemental" or reply casts doubt on the good faith of the Department of Ecology in finding its excuse to file its 46 page dissertation and the 40 page "Dissenting Views" of Congressman Meeds.

DEPARTMENT OF NATURAL RESOURCES ARGUMENT THAT CLAIMS AWARD OF TRIBE PRECLUDES ITS WINTERS RIGHTS TO OFF RESERVATION BASED WATER IS WITHOUT MERIT

Department of Natural Resources does not retreat from its earlier argument that somehow the Indian Claims Commission has primary jurisdiction over the matters before the Court in this suit. It continues to press its claim that the Claims Judgment award of the Tribe for the unconscionably low consideration paid for its ceded aboriginal lands foreclosed it from now claiming off reservation waters for use on the Reservation.

In re-reading our response in the Tribe's reply brief we choose to stand on that and not to repeat our arguments. They seem conclusive. There is no relationship at all between the cession of and payment for

aboriginal lands and the Tribe's Winters Rights to waters tributary to the Reservation which originate off the Reservation. Such has been true in every Winters case.

Department of Natural Resources advances a novel argument that somehow fair play does not permit the Tribe to have more than its territorial pro rata share of the total irrigation waters in the water shed. It gives an example of there being say 5 units of land of which the Tribe has one unit. It therefore should not be entitled to more than an equivalent one unit of water. (That is our understanding of this Department of Natural Resource argument). We point out that this is not the case any place in the field of water law. Riparian and appropriative rights (first in time - first in right) almost invariably result in a geographical area (comprising an irrigation district) or an individual (with prior riparian or appropriative rights) pre-empting all or most of the water that is available to the detriment of upstream or adjacent persons or areas who are junior in right. There are innumerable examples of a single state permitte on streams such as the Little Chamokane, or the No Name Creek in the Walton case, being permitted by the State to utilize the whole stream thereby preventing others in the same water shed from having any water at all. The legal essence of the Tribe's Winters Rights is that at the time the Reservation was formed there was reserved from off reservation waters that feed Chamokane Creek sufficient water to achieve the purposes of the Reservation.

The fallacy of the Department of Natural Resources argument is highlighted in the fact that the state has issued pre-emptive permits to several of the individual defendants who claim a similar priority against all the other residents of the drainage area and aquifer.

SCOPE OF WINTERS DOCTRINE

Department of Natural Resources, in its claim that the scope of the

Winters Doctrine is limited to agriculture, makes the same non-sequitur argument as does Department of Ecology, i.e. that "the Winters cases were concerned with agricultural irrigation. The court found in those cases the priority of the Tribal rights for irrigation water. Therefore Winters Rights are restricted to irrigation." The conclusion just does not follow. We will make no further answer, choosing to rely on the portions of plaintiff's opening and reply briefs already addressing this subject.

DEPARTMENT OF NATURAL RESOURCES AND DEPARTMENT OF ECOLOGY DO NOT SUPPORT EACH OTHER'S BRIEFS

There is total harmony in the presentation of this case by the United States and the Tribe. The Assistant Attorney General, the United States Attorney and the writer's firm have worked together as a team with little duplication of effort and total agreement on the issues. One would expect that the Department of Ecology and Department of Natural Resources would be such a team. The fact that they are not should cast doubt on their conviction in some of the arguments they present.

1. Much of the answering brief of Department of Natural Resources was devoted to its novel argument regarding the claimed jurisdiction of the Indian Claims Commission and the effect of the Tribe's claims award. If this argument has the merit claimed for it by Department of Natural Resources one would expect some support of it by Department of Ecology. Department of Ecology totally ignores it.[1]

2. Page 36 - 39 of the Department of Natural Resources answering brief sets out what it argues to be the nature of its claim to Water

1. We have in mind the national reputation of the attorney for Department of Ecology, Charles Roe, who, as explained in the Department of Ecology Brief, [Department of Ecology Supplemental Page 45] has been in every major Indian water rights case in the State of Washington for the last 17 years, teaches and lectures on water law and is considered an eminent authority on the subject. He obviously holds no brief for this Claims Commission argument of Department of Natural Resources.

rights. The Tribe in its reply referred to the Department of Natural Resources claim as a "little Winters Right." (Page 63 of Tribe's Reply Brief). Not only does Department of Ecology not support this Department of Natural Resources argument, it [page 42 of its "Supplemental"] joins the Tribe, utilizing the same term "Little Winters Rights," arguing that the Department of Natural Resources contention is not valid or persuasive and concludes:

> ". . . assuming the correctness of our interpretation of the very sketchy statement of analysis provided in the Brief of Department of Natural Resources in support of its claim, the claim of a 'little Winters Right' should be denied."

While it is most surprising that Department of Ecology does so perfunctorily reject this key argument of Department of Natural Resources, one must question why it breaks ranks in this regard. It does so because it realizes that Department of Natural Resources, in proposing its "Little Winters Rights" argument has really played into the hands of plaintiffs. This result is outlined in the Tribe's Reply Brief (pages 62-66).

CONCLUSION: Except for the foregoing the Spokane Tribe through its undersigned counsel relies on its opening and reply briefs. It asks that Department of Ecology and Department of Natural Resources not be allowed to "re-answer" this "last word" of the Tribal plaintiff. The issues seem clearly drawn and adequately argued and presented. The arguments preponderate almost conclusively to the Tribal position that

it has Winters Rights to preserve and protect the summer time flow of the stream and to utilize any waters in excess of the 30 cfs for the irrigation of its own lands.

Respectfully submitted

September 26, 1977

DELLWO, RUDOLF & SCHROEDER, P.S.

Robert D. Dellwo

Kermit M. Rudolf
Attorneys for the Spokane Tribe of Indians, Plaintiff Intervener

[COMMITTEE PRINT]

AMERICAN INDIAN POLICY REVIEW COMMISSION

FINAL REPORT

SUBMITTED TO CONGRESS
MAY 17, 1977

VOLUME ONE OF TWO VOLUMES

Printed for the Use of the
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APPENDIX I

AMERICAN INDIAN POLICY REVIEW COMMISSION

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Congressman LLOYD MEEDS, Washington, *Vice Chairman*

Senator LEE METCALF, Montana
Senator MARK HATFIELD, Oregon
Congressman SIDNEY R. YATES, Illinois
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MAX L. RICHTMAN, *Professional Staff Member*

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[1] Served in the 94th Congress.
[2] Replaced Congressman Steiger on the Commission.

Vice-President
United States S
Washington, D. C

Congressman Thom
Speaker of the
Washington, D. C

Gentlemen:

I am submitt
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AMERICAN INDIAN POLICY REVIEW COMMISSION
CONGRESS OF THE UNITED STATES
HOUSE OFFICE BUILDING ANNEX NO. 2
2D AND D STREETS, SW.
WASHINGTON, D.C. 20515
PHONE: 202-225-1284

May 17, 1977

Vice-President Walter F. Mondale
United States Senate
Washington, D. C.

Congressman Thomas P. O'Neill
Speakar of the House of Representatives
Washington, D. C.

Gentlemen:

I am submitting herewith the report and recommendations of the American Indian Policy Review Commission.

The report is responsive to the provisions of P. L. 93-580 which established this Commission and charged it with the responsibility to conduct a comprehensive review of the historical and legal developments underlying the Indians' relationship with the Federal Government and to determine the nature and scope of necessary revisions in the formulation of policy and programs for the benefit of Indians.

The Commission's recommendations have been arrived at after a careful review by the Commission and 11 Task Forces of the Federal-Indian relationship.

The Commission's Organic Act requires that any recommendations involving the enactment of legislation shall be referred by the President of the Senate or the Speaker of the House of Representatives to the appropriate standing committee of the Senate and House of Representatives respectfully, and that such committees shall report thereon to the respective house within two years. We urge you to support early implementation of the Commission's recommendations to assure that the Federal Government's responsibility to the Indian people is met.

Sincerely,

James Abourezk

James Abourezk
Chairman

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CONTENTS

SEPARATE VIEWS OF SENATOR JAMES ABOUREZK, CHAIRMAN OF THE AMERICAN INDIAN POLICY REVIEW COMMISSION

SEPARATE VIEWS OF SENATOR JAMES ABOUREZK, CHAIRMAN OF THE AMERICAN INDIAN POLICY REVIEW COMMISSION

The Vice Chairman of the Commission, Congressman Lloyd Meeds, has issued a strong dissent to the Commission's Majority Report and Recommendations. I have no quarrel with his right to do so. Were his dissent merely a statement of disagreement with the report's recommendations, I would perceive no need to make this additional response. The Commission's Final Report stands on its own as a comprehensive and objective statement regarding the status of the United States Government's relationship with Indian tribes and individuals. The arguments advanced in the brief prepared by the Vice Chairman are fully and adequately met by the final report. I firmly believe that any person who compares the objections made in the dissent with the corresponding sections of the final report will come away impressed by the meticulous, thorough, and dispassionate analysis which supports the report, and by the wisdom and fairness of the conclusions it reaches.

I do, however, feel compelled to respond to another and more troubling aspect of the Vice Chairman's remarks. The dissent advocates the extinction or severe limitation of the time-tested doctrines of tribal sovereignity, jurisdiction and trust status. In doing so, it would do away with the basic foundations upon which the structure of federal-Indian relationships have stood, and must continue to stand. These principles are central to the ultimate goal of the American people, that Indian people enjoy fully the rights and benefits of American citizenship while retaining a diverse and identifiable cultural heritage. In addition, the brief for the dissent attempts to undermine the Commission's work by attacking the objectivity and competence of the Commission and its staff, relying on a distorted analysis of the reasons for this Commission's creation. The seriousness of this attack, as well as the partisan fashion in which it is presented, compels me to respond.

The dissent criticizes the report for failing to be "objective." I find this criticism strikingly ironic, given the partisan manner in which the dissent's criticisms are presented. The Vice Chairman has written a legal brief to express his dissenting views. It is an advocate's brief, presenting but one interpretation of fact and law, designed to support a preconceived conclusion. To use such one-sided advocacy as the means of attacking the objectivity of this Commission's work is ill-advised and, I believe, ultimately self-defeating. The dissent's legal analysis of the law regarding sovereignty and jurisdiction is simply wrong; its selective quotation from a handful of the relevant cases misstates the case law and could easily mislead the uncritical reader. In this regard, I merely invite the reader's attention to the corresponding sections of the Majority Report for a more thorough and objective examination of judicial statements on these issues.

A more serious error is presented by the dissent's assertion that the Commission's work was biased from the start because of the composition of Commission and task forces. I consider this charge indefensible. The Vice-Chairman was the prime sponsor, and manager in the House of Representatives of the legislation which established the Commission's method of operation. The resolution he introduced directed that five of the eleven commissioners be American Indians, and that each of the task forces have a majority of Indian membership. It is unseemly for him now to fault this enabling legislation as making it "inevitable" that the Commission's report be "the product of one-sided advocacy in favor of American Indian tribes." (Dissent, p. 571).

I take the Vice Chairman's complaint that the Commission's recommendations benefit the position of American Indians in our society as an affirmation of the Commission's success in meeting its legislative mandate. The legislation which created the American Indian Policy Review Commission did not call for turning back the clock on progress already made toward the eventual economic and social self-sufficiency of Indians. It specifically directed the Congress to formulate "policies and programs for the benefit of Indian people." It does not follow that anything which benefits the Indian works against the interests of the non-Indian. The dissent does a disservice by assuming that the interests of Indian peoples are different from those of "the United States, the States, and non-Indian citizens." In many instances, these interests converge. Most often, the complex issues which the Commission addressed could not accurately be categorized into "interests" that are necessarily Indian or non-Indian. This shortsightedness in the dissent is critical.

Even if a particular recommendation could be fairly described as "pro-Indian," I would never think that such a recommendation automatically becomes "anti-white." Yet, such an attitude is in constant evidence throughout the dissent, which repeatedly presents the interests of Indians and non-Indians as being in opposition. In an effort such as this report, dependent upon coopeartion and mutual respect, arguments which tend to rekindle the flames of racial mistrust strike me as exceedingly irresponsible. To state that the Commission's recommendations return to Indian people a degree of self-sufficiency and control over their own lives and property is to acknowledge that the Commission successfully followed its Congressional directive; to characterize these recommendations as "favoring Indians" raises the spectre of a racial antagonism and majoritarian domination which I had hoped was buried forever in a shameful past.

The legislative proposals which the Vice Chairman plans to recommend amount to a repudiation of his initial concern for the strengthening of Indian self-determination. A primary reason for the disarray of Indian affairs today is the piecemeal, one-or-two-proposals-at-a-time approach taken by Congresses in the past. This Commission was essentially directed to undertake a comprehensive review of Indian policy then, to use that review as a blueprint to make recommendations on a broad range of issues affecting Indian life. The Commission saw as central to its work the fact that proposed legislation must reflect the interdependence of Indian-related issues. Any legislation must integrate considerations of Indian health, tribal government, tribal jurisdiction, Indian education, tribal sovereignty, the development and protection of resources, and the federal trust responsibility. In short, the Congress must look at the whole picture; the Commission's recommedations are made from that perspective.

Taken individually, one or more of the legislative recommendations advanced in the dissent might seem reasonable. To take them in such a fashion, however, would amount to the piecemeal approach which the Commission was directed to avoid. But far worse would be acceptance of the dissent's recommendations in toto. The "big picture" of Indian life which the dissent's proposals paint for us would mark a return to the worst features of the termination and allotment periods. "Termination", of course, is not a goal explicitly articulated by the dissent. But that would be the sure and practical effect of implementing the series of proposals advanced by the Vice Chairman; eliminating tribal determination of membership, removing tribal tax exemptions, drastically limiting the tribal taxing power, and severely curtailing general governmental powers of the tribes. Adoption of the narrow trust policy advocated by the dissent, together with its recommendations to extinguish tribal claims to aboriginal territory and to empower states to tax and control land-use planning on reservation land, would mark as great a threat to the self-sufficiency of Indian people as did any proposal advanced during the unfortunate "allotment" era.

By turning its back on the goal of economic independence, the dissent would entrench the governmental paternalism which Indian people have worked so hard to eradicate. The ultimate consequence would be the virtual assimilation of Native Americans into the dominant culture, destroying the last vestiges of a distinctively proud and independent way of life. Such a result was not intended by the Congress when it wrote this Commission's mandate. I am confident that the Congress, when passing upon the Commission's response to that mandate, will renew its own commitment to a proud, self-sufficient, and culturally distinct Indian heritage.

(1) Sale of timber on trust allotments to provide a first option to the tribes.

(2) Authority to the tribe to acquire existing powers of attorneys now held by the BIA upon a showing that the affected allotted lands have been included in a comprehensive tribal forest management plan.

3. The BIA make a study of its existing forest management practices and regulations.

A special task force be formed comprised of experts in the areas of forest management to evaluate the present BIA forest management program and develop a modernized comprehensive forest management program for the future use of the Bureau and the tribes. The members of this task force should be drawn from the public and private sectors of the forestry industry and should include timber managers of Indian tribes and the BIA.

4. In order to provide for reforestation and regeneration of the millions of acres of Indian forest which have been clearcut by private companies under sales contracts approved by the BIA, the Congress appropriate funds to enable those tribes affected to undertake the necessary regeneration and reforestation programs.

5. Congress enact legislation to permit tribes to contract with private enterprises or the Forest Service for timber management.

Water Resources

The survival of Indian tribes as economic units in the arid and semiarid Western States requires the protection and enforcement of their water rights. The importance of water to the Indians has been well stated by Senator Kennedy:

> (to) American Indians, land and water have always led the list of those matters deemed essential for both present livelihood and future survival. For Indians know that any threats to or diminution of their land and water rights may constitute threats to their very existence.[44]

A formidable body of law favorable to the American Indian people has been developed which, if properly administered and applied, will protect the Indians against divestiture of their water rights. In the past, however, these rights have been neglected and violated, thereby stifling tribal goals of self-sufficiency through economic development.[45]

INDIAN WATER RIGHTS

Indian water rights were recognized by the Supreme Court in the landmark case of *Winters* v. *United States*, from which emanates the body of law commonly referred to as the *Winters* doctrine.[46] That doctrine holds that the Indians have prior and paramount rights to all water resources which arise upon, border, traverse, or underlie a reservation in the amount necessary to satisfy the present as well as future needs of the Indian reservations.

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[44] Vol. 122, Cong. Rec., p. S8339, May 3, 1976. 94th Cong., 2d sess.

[45] For a good discussion of Indian water rights, see Educational Journal, Institute for the Development of Indian Law, vol. 2, Nos. 5, 7, and 8. "The Indian Water Wars" by Steve Nickeson.

[46] *Winters* v. *United States*, 207 U.S. 564 (1908).

Winters rights are owned by the Indian tribes and should, therefore, be distinguished from other federally reserved rights. The only role of the United States is that of a trustee for the tribe. This was precisely the point of the decision in *Winters* v. *U.S.* the lead case on the subject:

> The reservation was a part of a very much larger tract which the Indians had the right to occupy and use and which was adequate for the habits and wants of a nomadic and uncivilized people. It was the policy of the Government, it was the desire of the Indians, to change those habits and to become a pastor and civilized people. If they should become such the original tract was too extensive, but a smaller tract would be inadequate without a change of conditions. The lands were arid and, without irrigation, were practically value-less. And yet, it is contended, the means of irrigation were deliberately given up by the Indians and deliberately accepted by the Government.

The contention that these rights were given up by the Indians was firmly rejected by the Court.

In applying the *Winters* doctrine, it is important to note that rights to the use of water in the Western States are interests in real property, having all the components of a freehold estate.

The doctrine of "prior appropriation" governs water use in most Western States. The extent of the water right is determined by the amount of water actually put to use and the date when that use first commenced. The significance of the *Winters* doctrine is that neither of these criteria are applicable to the determination of Indian water rights. Not only do their rights predate those of the non-Indian users, they are open-ended rights not limited to amounts already put to use, but rather are dependent upon the future needs of the tribes.

The priority date of the Indians' *Winters* doctrine rights to the use of water is of vital importance. For example, on the tributary streams of the Upper Missouri River Basin, such as the Milk River, the Big Horn River, the Tongue River, and others, the demands for water far exceed the available supply, thereby resulting in a gross overappropriation of those streams. Consequently, the priority rights of the Blackfeet, the Fort Peck, the Wind River, the Crow, and the Northern Cheyenne Indian Tribes in the States of Wyoming and Montana are gravely imperiled unless their full priorities are protected.

The priority date of the Indian water rights may depend on whether the reservation was created by treaty or Executive order. Where a reservation was established by treaty, as in the *Winters* case, the tribes impliedly reserved the right to all the water necessary to fully develop their reservations, and arguably these rights date from time immemorial. A different situation may exist with respect to Executive order reservations, where title was returned from the United States to the Indians. For these reservations, the priority dates governing the Indians' *Winters* doctrine water rights are determined as of the date the reservation was created. It should be noted, however, that *Winters* rights for treaty and Executive order reservations have equal dignity and are not subject to appropriation by the State.

In the years following the *Winters* case, many cases arose in which the Circuit Courts of Appeal applied the *Winters* doctrine for the purpose of protecting the Indians' water rights. In *Conrad Investment Co.* v. *United States*, the Ninth Circuit Court of Appeals relied on that doctrine as its basis for holding that the Blackfeet Tribe in Montana possessed water rights in a river bordering its reservation in

amounts sufficient to meet their future needs of irrigation and other useful purposes.[47] That same court reached a similar conclusion in *United States* v. *Walker River Irrigation District*, involving Indian claims to a stream which flowed across its reservation.[48] In that case, the court emphasized the following:

> The power of the Government to reserve * * * water (to Indian tribes) and thus exempt (such waters) from subsequent appropriation by others is beyond debate.[49]

Courts have also established the criteria governing the amount of water which may be reserved by Indian tribes. In *United States* v. *Ahtanum Irrigation District*, the Court of Appeals for the Ninth Circuit addressed the question of the amount of waters reserved and held the amount to be that which is necessary to meet the Indians' "present and future water requirements".[50] The Supreme Court elaborated upon this general rule in the more recent and vitally important case of *Arizona* v. *California*.[51] In addition to reaffirming the *Winters* doctrine, the Court in that case held that the standard of measurement to be used in determining the Indians' water rights should be the amount of water necessary to * * * irrigate all the practicably irrigable acreage on the reservations."[52]

Despite this well-established body of law favorable to the Indian, there is a continual challenge to their *Winters* rights by the Federal Government, the States, corporate and municipal entities, and non-Indian landowners. Great political concern and hostility toward Indians and their rights is frequently engendered as Indians assert their legal claim against State and local water interests.

VIOLATIONS OF INDIAN WATER RIGHTS

A formidable body of law protects the Indians' water rights, and proper enforcement and application of the law should preserve these rights. However, as evidenced by the following cases, the Interior and Justice Departments have often in the past been lax in enforcement of these rights and have not infrequently adopted adverse positions, contributing to the erosion of the Indians' water rights.

For example, in *Colville* v. *Walton, et al*, a case initiated in 1970 by the Colville Confederated Tribes of Washington, the Justice and Interior Departments intervened and adopted a position adverse to that of the Colvilles. In essence, the Department claims the Secretary of the Interior has exclusive jurisdiction over the water resources on the Colville Indian Reservation and therefore has the right to control all allocation of water within the reservation and apparently the duty to allocate the water to non-Indian users on the same basis as it is allocated to Indian users. The authority relied upon for the claimed "exclusive jurisdiction" is 25 U.S.C. sec. 381. That statute states that the Secretary of the Interior may, when water is required for irrigation on an Indian reservation, promulgate rules and regulations "to secure a just and equal distribution" of the available water among the

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[47] *Conrad Investment Co.* v. *United States*, 161 Fed. 829 (9th cir. 1908).
[48] *United States* v. *Walker River Irrigation District*, 104 F. 2d 334 (9th cir. 1939).
[49] Ibid., at 336.
[50] *United States* v. *Ahtanum Irrigation District*, 236 F. 2d 321, 326 (9th cir. 1956).
[51] *Arizona* v. *California*, 373 0.2 546 (1963).
[52] Ibid., p. 600.

"*Indians residing upon such reservation.*" [Emphasis supplied.] This case has now been pending for some 7 years. Recently Justice asked and the Court granted a 1-year extension of time, thus delaying even further the efforts of the tribe to adopt their own water code. The Justice Department has now asserted the same argument in the *Bel Bay* case now pending in the western district of the State of Washington.

The Government is also asserting paramount authority over Indian water rights in the Upper Missouri Basin in matters involving sale of water. This captured the attention of Congress which held comprehensive hearings regarding efforts of the Secretary of the Interior and the Corps of Engineers to invade the Indians' water rights.[53] In all, the Secretary of the Interior has entered into contracts for the sale of approximately 712,000 acre-feet of water of the Big Horn River and its major tributary, the Wind River. Without those water resources, both the Crow and the Wind River Tribes will be denied any possibility of economic growth.

The Rights Are Legally Adequate to Meet the Future Requirements of the Indian Communities

In the above cited *Ahtanum* decision involving the *Winters* rights of the Yakima Indian Nation, the issue arose as to the method to which there should be adherence in measuring the Indian rights. On the subject, the Court said:

> This brings us to a discussion of the question of quantum of waters reserved. It is obvious that the quantum is not measured by the use being made at the time the treaty reservation was made.[54]

These succinct terms used by the Court in this most pertinent declaration:

> The reservation was not merely for present but for future use. Any other construction of the rule in the Winters case would be wholly unreasonable.

It was then that the Court in these terms reiterated and reaffirmed this basic tenet of the *Winters* doctrine, as enunciated in the carrier-*Conrad* decision: "The lands within these reservations are dry and arid, and require the diversion of waters from the streams to make them productive and suitable for agriculture, stock raising, and domestic purposes. What amount of water will be required for these purposes may not be determined with absolute accuracy at this time; but the policy of the Government to reserve whatever water of Birch Creek may be reasonably necessary, not only for present uses, but for future requirements, is clearly within the terms of the treaties as construed by the Supreme Court in the *Winters* case." [55]

There was thus established the important criteria which contemplates a supply of water for the Indian needs to meet their then and future water requirements. In 1960, those criteria, which had been applied to treaty reservations in *Winters*, *Conrad*, and *Ahtanum*, were intensely and extensively reviewed by the Special Master appointed

[53] Hearing on the sale of water from Upper Missouri River Basin by the Federal Government for the development of energy, before the Subcommittee on Energy Resources and Water Resources of the Senate Committee on Interior and Insular Affairs, 94th Cong., 1st sess., pt. 1 at p. 10 (1975, hereafter referred to as Sale of Indian Water).
[54] *United States* v. *Ahtanum Irrigation District*, 236 F. 2d 321, 326 (CA 9—1956).
[55] *Conrad Investment Co.* v. *United States*, 161 Fed. 829, 832 (CA 9—1908).

by the Supreme Court. On the nature, measure, and extent of Indian *Winters* rights to the use of water, the Court had this to say in approving the report of the Special Master in regard to the *Winters* doctrine and its application to future water requirements:

> We also agree with the Special Master's conclusion as to the quantity of water intended to be reserved. * * * the water was intended to satisfy the future as well as the present needs of the Indian Reservations * * *.[56]

There have thus been established by judicial precedent these aspects of great importance in the application of the concepts of the Indians' *Winters* doctrine rights to the use of water:

(*a*) They underscore the great need for water;

(*b*) They underscore that need is for present and future Indian requirements; and

(*c*) They underscore the intention that the Indian reservations are to be continuing, viable, economic communities utilizing the necessary quantities of water to achieve those precise and most desirable ends.

Indian and State Relations Involving Indian Winters Doctrine Rights: The Akin Decision

The *Akin* decision epitomizes the conflicts of interest that pervades Federal protection of Indian resources. In that case the Department of Justice sought a "determination of water rights * * * as trustee for certain Indian tribes and as owner of various non-Indian government claims." [57] The Justice Department is purported to represent claims of the United States which are necessarily in conflict with the *Winters* doctrine rights of the Indians there involved. As has been reviewed, the Indian rights and those of the Federal Government are vastly different. Indian rights are private in character, retained by the tribe, or granted to the tribe for its exclusive use and benefit.[58]

Substance of the issues in *Akin* is that the Congress of the United States subjected the Indian *Winters* rights to the use of water to the jurisdiction of State courts and State tribunals for the determination and adjudication of those rights. By that decision, the Supreme Court made applicable to the Indian *Winters* rights to the use of water the so-called McCarran Act.[59] That ruling placed the Indian water rights within the jurisdiction of State courts.

In hearings before the U.S. Senate after the decision in the *Akin* case, Mr. Peter Taft, Assistant Attorney General of the United States, testified as follows:

> Supreme Court cases, as much as 100 years ago, have noted the fact that there has been a historic hostility between the States and the tribes and that, indeed, it is the Federal interest that has protected the tribes wherever they may be. * * *
>
> I would like to point out also, a difficulty we have in keeping uniformity of interpretation of Indian rights. There are probably 15 or more States in the West. If Indian rights are to be adjudicated in the State courts, in effect you have the potential of 15 different interpretations.

[56] *Arizona* v. *California*, 373 U.S. 546, 600 (1963).
[57] *Colorado River Water Conservation District et al.* v. *United States*, 74-940, 74-949; *Akin et al.* v. *United States*, 424 U.S. 803 (1976).
[58] See 1 Wiel, Water Rights in the Western States, p. 301.
[59] 43 U.S.C. 666.

Thus, the States have now been authorized to adjudicate one of the most heated and controversial issues dividing tribes and States. The one-sidedness of this arrangement is readily apparent to all and Indian water rights are truly now in serious jeopardy.

ECONOMIC DEVELOPMENT AND UTILIZATION OF WATER RESOURCES [60]

The purpose here is to chronicle the importance of water to tribal existence.

Survival for the American Indian ultimately boils down to the relationship he bears to the lands to which he has been confined. White Americans have always moved to new locations once the resources were exhausted. Not so with the Indians—the maintenance of viable tribal structures and cultures is geared directly to the land base and the development and utilization of their resources contained therein.

The demands of national energy and the scarcity of water supply are closing in on the American Indians at a rate which heightens the need for protective legislation that, as applied to Indians and their water rights, will sufficiently embrace Indian intangibles. To the fullest extent possible, development should recognize a role for the special identification Indians have with their land, water, and related natural resources.

History bears testimony to Indian use of water for sustenance as they shaped their lives to the demands of the varying environments. When an indigenous people called the Hohokams occupied lands in the Gila and Salt River Valleys over 2,000 years ago, they diverted water by means of canals which even now are recognized as highly refined engineering accomplishments. They long ago demonstrated that water applied to the land was essential if communities were to be maintained and to have more than a rudimentary culture. They demonstrated the need for economic development which they undertook as a means of survival.

Like the Arizona Indians, the Pueblos of the Rio Grande Valley adjusted to a desert environment by using water to promote agricultural development. Mohaves, Yumas, and Chemehuevi likewise adapted their lives to the surrounding desert by occupying lands on both sides of the Colorado River. In the "Great Colorado Valley," as early explorers referred to it, the soldiers and missionaries first encountered these Indians. Years later, Lieutenant Ives, in his 1858 explorations on the Colorado River, reports the Quechan Indians using water to raise their crops. Of the Mohaves, Ives said:

> It is somewhat remarkable that these Indians should thrive so well upon the diet to which they are compelled to adhere. There is no game in the valley. The fish are scarce and of inferior quality. They subsist almost exclusively upon beans and corn, with occasional watermelons and pumpkins, and are as fine a race, physically, as there is in existence.

Those Mohave crops were raised by the Indians who planted the lush river bottoms as soon as the perennial overflow had receded, thus using the natural irrigation furnished by the Colorado River. It goes without saying, that the importance of the rivers to the indigenous cultures throughout the Western United States was not limited strictly to agricultural purposes. For example, the Northern Paiutes, in the vast desert areas of the present State of Nevada, depended upon fish taken from Pyramid Lake and the Truckee River as a source of sustenance. This was long before the so-called "discovery" of that lake by Fremont in 1844.

Fisheries, to the Indians of the Pacific Northwest, "were not much less necessary to the existence of the Indians than the atmosphere they breathed." Salmon and other fish taken from the Columbia River were always an important item of trade among the Indians, as reported by Lewis and Clark. And, of course, rivers were not only the source of sustenance for the American Indians, but they were also the arteries of crude commerce and travel. Quite significantly, when transition from their traditional way of life was forced upon the western Indians, they relied upon their streams and rivers as a source of sustenance and the means to adopt the new ways of living. The Yakimas, in their transition from a nation given over largely to hunting and fishing, were the first in the State of Washington to undertake to irrigate their meager gardens.

A central factor in establishing and protecting Indian water rights is the beneficial use of it. Water is so essential to the economic development and social survival to the American Indian that, without it, there can be no development of self-sufficiency for a large percent of the Indian population.

Aside from the value of water in the development process, the monetary value of water is tremendous. For example, the fair market value of the 2,000 cubic feet per second that flows out of the Fort Hall Bottoms' lands is about $12 million. This is based on a price of $25 per acre-foot of water from April 1 to October 1, which is only the 6-month irrigation season. Large quantities of water arising on the Fort Hall Reservation are not utilized by members of the tribe, but are used by non-Indians off the reservation. It is illogical for the Shoshone-Bannock Tribes to be short of water because of a junior right in the Idaho canal when 2,000 cfs flow off their reservation 365 days a year. It becomes more illogical when one considers the fact that the major agricultural areas of the reservation are situated over the Snake River Plain Aquifer and are among the most productive lands in the world.[61]

In a report to the Committee on Interior and Insular Affairs of the Senate, the Department of Interior stated that most of the irrigation projects of the BIA were in need of completion accompanied by reservation rehabilitation improvement.[62]

Irrigated farming is the basic industry for many Indian communities, and for many, the only means of income available to the Indian people. There is great danger of loss of the water, if not put to beneficial use, because of the acute competition for water in the arid and semiarid regions in the West. This is particularly true in and adjacent to the Indian communities.

[60] Task Force No. 4, final report, American Indian Policy Review Commission, Washington, D.C., July 1976, p. 153.

[61] Jack Peterson, Futures, A Comprehensive Plan for the Shoshone-Bannock Tribes, 1974, p. 11.

[62] Report to Committee on Interior and Insular Affairs by Secretary of Interior, Thomas Kleppe, Mar. 10, 1976.

A short history of the community of Ak Chin would illustrate how the use of water can help Indian people develop a relatively self-sufficient community. Prior to 1910, their reservation had a river running through their land. That year, however, it was dammed upstream. The Federal Government gave "notice of water appropriation" for their use, which was never implemented. Up until 1946, the land was not used. At that point, the BIA started leasing it to the non-Indians. Just 16 years ago, the Ak Chin people were struggling along surviving on transfer payments in welfare from the Federal Government. Today, as a result of an incredible amount of effort on the part of the Ak Chin people and over the objections of the BIA, they are prospering. Their farming operations have done this for them.

However, even with this success, they are in trouble. Less then one-fourth of their irrigable land is now being farmed because of the short supply of water and the expense of pumping it. The water table is sinking at a rate of approximately 20 feet per year. There is a continuing need for water supply to the Ak Chin people.[63] Without water they will once again become dependent upon the Federal Government for transfer payments in the form of welfare and unemployment.

MANAGEMENT OF WATER DELIVERY SYSTEM [64]

On August 18, 1975, GAO reported to Congress a need for development of Irrigation Management Services (IMS) in the BIA's irrigation projects. The Bureau of Reclamation, the National Water Commission in its report, and various other studies concluded the IMS would allow a reduction in water use by increasing irrigation efficiency by approximately 20 percent annually at a cost of about $8 per acre. In spite of the benefits IMS offers, the BIA has not started such a program. They say that they have not explored the Bureau of Reclamation efforts to develop IMS and also felt that farmers would not cooperate in implementing such a program. Even at that, they felt that IMS was not needed on their irrigation projects.

In contrast to the BIA's position on IMS, such a program could increase the amount of land used for farming on the Yakima Nation. Of the 154,800 acres of cropland, productivity on 10,500 acres has already been adversely affected by a rising water table with approximately 300 additional acres being affected each year. The GAO report stated:

> A 1969 Bureau study estimated that annual rent for 2,282 acres of affected Yakima croplands could increase by $66,520, if the land were reclaimed. Furthermore, rental income could be expected to decrease if the present rate of land deterioration were allowed to continue. According to an agency official, some of this land was formerly used to grow hops and annually rented for over $50 an acre. Now, these same lands are suitable only as pasture and rent for about $2 an acre.
>
> * * * An alternative to IMS on the Yakima reservation would be a drainage project to lower the area's water table. It would cost substantially more than IMS, however. During 1970 and 1971, 934 acres were drained at about $125 per acre. A Bureau official estimated current drainage cost to be nearly $200 per acre.

[63] Letter to Ernie Stevens, staff director, Senate Select Committee on Indian Affairs, from Forrest Gerard and Assoc., re: proposed legislative concept to solve Ak Chin's imminent water needs. Mar. 9, 1977.

[64] U.S. Comp. Gen., report to Senate Committee on Energy and Natural Resources, Indian Natural Resources—Opportunities for Improved Management and Increased Productivity Part I: Forest Land, Rangeland, and Cropland. Aug. 18, 1975, p. 50.

The report also stated that, of the 50,500 acre Gila River Reservation portion of the San Carlos Irrigation Project, only 13,083 acres received water. The agricultural value of these lands to the tribe is very important. These lands that are receiving water produced approximately $4.4 million worth of agricultural products. The BIA's efforts are geared toward finding additional water for the tribe even though they believe that IMS would stretch existing water supplies to irrigate substantially more of the croplands. In spite of the BIA's belief that tribes would be reluctant to accept IMS, GAO found that:

> In 1973, the tribe, Bureau, and BR entered into an agreement to implement IMS on the Colorado River Irrigation Project.
>
> Bureau officials stated that the tribe encouraged IMS because almost all of its available water was being used on 62,000 acres out of 103,000 acres of irrigable lands. IMS has the potential to stretch existing water supplies to an additional 28,000 acres of reservation land by 1978.

The survival of Indian tribes as economic units in the arid and semiarid Western States requires the protection of Indian rights to water on, under, and adjacent to Indian land.

The development of viable agricultural systems, grazing economics, or industrial ventures depends on adequate, reliable delivery of water from customary sources.

> Economic development of the western reservations is inseparable from Indian rights to the use of water, which, in turn, are the most valuable of all the natural resources in the arid and semiarid regions. Those rights are the catalyst for all economic development. Without them, the reservations are virtually uninhabitable, the soil remains untilled, the minerals remain in place, and poverty is pervasive. (Veeder, 1972, p. 175).

Indian water rights are inherent and reserved to tribes through treaties and agreements and are not derived from Federal grant, appropriation, or purchase. The trust responsibility of the Federal Government includes the protection of Indian rights to the use of water.

The States and the Federal Government have ignored established Indian water rights under the *Winters* doctrine, in Federal water projects.

The Government also fails in its trust responsibility by not protecting Indian rights to the use of water from infringement by non-Indian individuals and the States.

At present, there is no program or systematic approach by the Department of the Interior or by the BIA to develop tribal water resources. The responsibility has been put upon the tribes themselves to protect their water rights, but many tribes lack the expertise or the funds to employ experts in this field. In addition, the Department and the BIA do not provide information to the tribes as to the intent and impact of projects of the Bureau of Reclamation, Bureau of Land Management, Corps of Engineers, etc., which have an interest in water resources affecting Indians. This once again is an example of the conflict of interest within the Department of the Interior.

In several suits now pending before the court, the Department of Justice, while claiming to represent the Indian claimants, is arguing a position contrary to the interests of Indian water rights.

The Bureau of Reclamation has presented to Congress data on water recovery in several cases which is factually incorrect. The effect has been the violations of water rights of the tribes involved who have found their access to customary sources of water diminished.

RECOMMENDATIONS

The Commission recommends that:

The Secretary of Interior allow the tribes having legal rights over water to develop their own water codes designed to regulate all forms of water usage.

Congress enact legislation to provide for an Indian trust impact statement (as outlined in trust section of this report) any time Federal or State projects affect Indian water resources.

The Secretary and the Bureau of Indian Affairs take the following actions or provide tribes with the financial capability to:

1. Inventory all tribal water resources.
2. Complete land use surveys particularly to determine lands which are irrigable or which can use water for other beneficial uses.
3. Conduct adequate engineering studies of the Indian water resources necessary for litigation.
4. Make available to the tribes funds to conduct legal and engineering research regarding particular water resources and to proceed with litigation where necessary.

Congress investigate litigation in the San Juan River Basin, the Rio Grande Basin, and the Colorado River Basin, and it likewise investigate the *Walton* cases, the *Bel Bay* case, and the *Big Horn* case to ascertain the scope of Federal conflicts of interest.

Congress amend 42 U.S.C. 666 known as the McCarran amendment to specifically exclude Indian water rights from its provisions.

The Secretary of the Interior direct the BIA to work with Indian tribes and the Bureau of Reclamation to (1) identify those Indian lands served by BIA irrigation projects which would most benefit from IMS; and (2) plan and provide guidance to implement IMS on those lands.

Mineral Resources

There has been a considerable amount of criticism about the leasing practices of Indian mineral resources. A majority of the criticism is aimed at the manner in which the Federal Government manages these resources. Well-documented arguments have been made which point out that the development of the non-Indian community has been, in many cases, paid for by the Indians through their resources. Much has been said about the source of the problem. The effort here is to point out the difficulties and recommend a set of policies to design and correct these unfortunate circumstances. It would be helpful to briefly discuss some important data on the amount of resources we are referring to.

In a report to the Senate Committee on Energy and Natural Resources (then Interior and Insular Affairs). March 31, 1976, the General Accounting Office (GAO) stated that Indian oil and gas reserves

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	No. 3643
v.	)	
BARBARA J. ANDERSON et al.,	)	
Defendants.	)	

CERTIFICATE OF SERVICE

This is to certify that on September 28, 1977, I mailed a copy of Intervener's (Spokane Tribe's) Supplemental Brief in Response to Department of Ecology "Supplemental" Brief and Department of Natural Resources "Reply" Brief to all parties on the attached list.

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