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Letter to the Court from Department of Justice

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UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

Address Reply to the
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July 11, 1978

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3643-ED, Wash.

Hon. Marshall A. Neill
United States District Court
Eastern District of Washington
938 United States Courthouse
Spokane, Washington 99210

Re: United States et al v. Anderson et al
Civil No. 3643, USDC, E.D. WASH.

Dear Judge Neill:

On July 3, 1978, the United States Supreme Court decided two cases which no doubt have already been brought to the Court's attention. The cases are: California v. United States, No. 77-285 and United States v. New Mexico, No. 77-510. Copies of those decisions are enclosed for the convenience of the Court and the parties.

While neither of the decisions deal directly with the two major issues before the Court in this case (the nature and extent of reserved water rights for the Spokane Indian Reservation and jurisdiction over the allocation of water on that reservation) they do touch upon some of the legal concepts involved. Therefore, while we do not wish to start another round of briefs and reply briefs, we would offer the Court the following thoughts on these two cases.

California v. United States, No. 77-285. In a 6-3 decision, the Supreme Court held that under Section 8 of the Reclamation Act of 1902, a State may impose any condition on "control, appropriation, use or distribution of water" in a federal reclamation project that is not

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inconsistent with clear congressional directives respecting that project. In reaching its decision, the Court relied largely upon the language and legislative history of the Reclamation Act of 1902 as well as the history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the western States. The Court concluded that with regard to reclamation, Congress has pursued a policy of deference to State water law.

The instant case does not, of course, deal with whether State law shall control the appropriation or distribution of water on a federal reclamation project. The issue is whether State law controls within the exterior boundaries of the Spokane Indian Reservation. The distinction is crucial. The Supreme Court has recognized that "[t]he policy of leaving Indians free from State jurisdiction and control is deeply rooted in the Nation's history." Rice v. Olson, 324 U.S. 786, 789 (1945). Congress has traditionally permitted State criminal and civil jurisdiction in Indian country only after the most comprehensive and detailed scrutiny and only by a clearly defined grant of jurisdiction. See, e.g., Kennerly v. District Court of Montana, 400 U.S. 423, 424, n. 1, 427 (1971); Williams v. Lee, 358 U.S. 217, 218-221 (1959); McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 168, 172 (1973); United States v. Mazurie, 419 U.S. 544, 556-559 (1975). Thus, California v. United States does not change the general rule that absent an explicit grant by Congress of jurisdiction to the State to determine or control the use of water on an Indian Reservation, the State is without such jurisdiction.

United States v. New Mexico, No. 77-510. In this 5-4 decision, the Supreme Court held the Organic Administration Act of June 5, 1897 evidences that Congress intended national forests to be reserved for only two purposes -- to conserve the water flows and to furnish a continuous supply of timber and that, therefore, when the Gila National Forest was set aside the only water reserved was that amount necessary to preserve the timber in the

forest or to secure favorable water flows. The Court rejected the claims of the United States for water for aesthetic, recreational, wildlife-preservation and stock watering purposes. The Court relied on two grounds for its decision. First, the Court felt that an examination of the limited purposes for which Congress authorized the creation of national forests (chiefly evidenced by legislative history) provided no support for the government's claims. Second, the Court felt that the claims for water for recreation and wildlife-preservation would defeat the very purpose for which Congress did create the national forest system, i.e., "to conserve water flows."

Nothing in United States v. New Mexico serves to defeat the claims made by the Federal Government and the Tribe in this case. First of all, this case involves the reserved water rights of an Indian Reservation, not a national forest. In the words of the Final Report of the National Water Commission (1973) at 477:

> Indian water rights are different from Federal reserved rights for such lands as national parks and national forests, in that the United States is not the owner of the Indian rights but is a trustee for the benefit of the Indians. While the United States may sell, lease, quit claim, release, or otherwise convey its own Federal reserved water rights, its power and duties regarding Indian water rights are constrained by its fiduciary duty to the Indian tribes who are beneficiaries of the trust.

Secondly, the Court in United States v. New Mexico did not rule that the United States could never reserve water for the purposes claimed but only that in the general acts creating national forests Congress had not chosen to do so. The Court indicated that the act creating National Parks (slip opinion, p. 13) and certain acts creating specific national forests (slip opinion, p. 14) may have

reserved minimum flows. Finally, in Section I of its opinion, the Court reaffirmed the reserved right doctrine and the cases plaintiffs have relied upon from the outset in this case (slip opinion, pp. 2-8 especially n. 4). Nothing in the opinion erodes the reserved right doctrine, especially as that doctrine applies to the facts of this case.

The purposes for the creation of the Spokane Reservation are clearly set forth in the Agreement of August 18, 1877: to provide the Indians with "permanent homes" and to allow the Indians to engage in "agricultural pursuits." Plaintiffs' claims to reserved water rights are based exclusively on these two purposes. The notion of "permanent homes" includes "the right to sustain themselves from any source of food which might be available on their reservation." United States v. Finch, 548 F.2d 822, 832 (9th Cir. 1976) vacated and remanded with directions to dismiss the appeal, 97 S.Ct.Rptr 2909 (June 29, 1977). It also includes ". . . values . . . (which) are spiritual as well as physical, aesthetic as well as monetary. . . . beautiful as well as healthy. . . ." Berman v. Parker, 348 U.S. 26, 33 (1954). Thus, since the reserved water rights claimed by plaintiffs here are in fulfillment of the primary purposes for which the Spokane Reservation was created, they are entirely consistent with United States v. New Mexico, Winters, Arizona v. California, Cappaert and the other reserved right cases.

Respectfully,

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Enclosures

cc w/ enclosures:
All parties