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Reply Brief of Spokane Indian Tribe

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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.	)	

REPLY BRIEF OF SPOKANE INDIAN TRIBE

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, Plaintiff, v. BARBARA J. ANDERSON et al, Defendants.	NO. 3643 REPLY BRIEF OF SPOKANE INDIAN TRIBE

INTRODUCTION

This Brief is in reply to the Briefs filed by the State of Washington through the Department of Ecology and the Department of Natural Resources. It also replies to the only Brief filed by any of the individually named defendants, that of Defendant Boise-Cascade Co.

We will address ourselves first and primarily to the Brief of the Department of Ecology and then to that of the Department of Natural Resources. We consider the Brief of the Department of Ecology to be a standard Brief of a State in litigation with a Tribe about a Tribe's Winters Rights. The bizarre arguments advanced by the Department of Natural Resources are not of this standard variety and, therefore, will be discussed separately.

ANSWER TO BRIEF OF DEPARTMENT OF ECOLOGY

STATEMENT OF PROCEEDINGS

We disagree with the State's effort to broaden the issues into those of a general adjudication. This is not a general adjudication. It is an action to determine the Winters or Reserved Rights of the Tribe and of the United States as against the State permittees as a class. In this regard <u>there is but one issue</u> . . . that is - whether the Tribe and the United States have reserved rights to the natural summertime flow of the Chamokane that are prior and superior to the permits to the same

water which have been issued or which might be issued by the State.

The Department of Ecology, in its Statement of Proceedings, would involve the Court in nonexistent issues and controversies and in arguments about facts and evidence where the evidence is overwhelming. Some examples are as follows:

1. The Department of Ecology speaks of the plaintiffs asking for the placement of a "wall" on the boundaries of the Reservation, through which State jurisdiction over non-Indians could not pierce.

Plaintiffs postulate no "wall." Rather they postulate the fact, obvious to them at least, that there is insufficient irrigation flow of the creek to fill the beneficial needs (the Winters Rights) of the Tribe and its members. If the Court agrees that this is so there then would be no "surplus water" to which the State could claim jurisdiction for non-Indian Reservation lands. There is no need for the Court to become involved in a legal controversy, solely of Department of Ecology's making about alleged State jurisdiction over a non-existent "surplus?"

2. The Department of Ecology describes as "mutually exclusive and incompatible" the plaintiffs' contention that the Tribe and the United States have a right to declare the normal summer flow (or 30 cfs) to be protected for the instream benefits of recreation, esthetics, fishery, etc. and the right of the Tribe to irrigate.

The right of the Tribe to irrigate is where any so called "surplus" would go. There should be no doubt of the right of the Tribe and the United States to exercise their Winters Rights to protect the natural flow of the stream and to utilize any water beyond the 30 cfs needed for that for the irrigation of bordering or nearby Indian lands.

3. The Department of Ecology contends that the Court is asked to "plow new ground" in declaring the Chamokane a free flowing, protected creek which "if applied throughout the rest of Washington State . . .

would have severe detrimental impacts through the displacement of major cultural and economic communities."

That argument is irrelevant because in the case of the Chamokane, except for the several active individual defendants, there is no such community in the Chamokane drainage or acquifer area that would be displaced.

This argument of Department of Ecology is glaringly inconsistent with the National laws and policies providing for wild and scenic rivers (16 USC 1271, see also 16 USC 577(a) and (b)) and ignores Department of Ecology's own legislative mandate provided for in RCW 90.03.290 requiring that Department of Ecology establish minimum flows of various streams needed to protect ecological and recreational values before issuing consumptive irrigation permits. This is covered in other portions of this Brief and in our opening Brief, but especially infra where we discuss the analogous case involving the Little Spokane River. There the Hearing Officer held that Department of Ecology must establish the minimum flow of the Little Spokane before it could issue irrigation permits that might impair the nature and use of the Little Spokane as a recreational, neighborhood stream.

4. In Department of Ecology's description of the drainage area, evidence is slanted to give inaccurate impressions.

They, for example, refer to the fact that the creek constitutes the Eastern boundary of the Reservation as a "controversy."

Department of Ecology speaks of "small acreages" being irrigated outside the Reservation. There are only two major users and it would hardly be accurate to call defendants Newhouse and Seagle "small acreages. . ."

5. Department of Ecology states that the "Tribe has no present plans to irrigate new lands in the Chamokane drainage area. . ."

This inaccurate and fallacious interpretation of the Tribe's position with regards to the irrigation of the Chamokane drainage area repeats itself time after time in the Department of Ecology Brief. The only reason the Tribe does not irrigate now (preferring to begin in a different and more expensive, less feasible part of the Reservation) is that it has determined that the normal irrigation season flow of the creek should be protected as prayed for. Should the Court not recognize the Tribe's right to so protect the flow of the creek for its instream values, the Tribe would then begin to irrigate several thousand acres of land from the Chamokane. These can be as feasibly irrigated as the lands now irrigated by defendants Newhouse, Seagle and Smithpeter.

6. Department of Ecology seeks to highlight the testimony of their hydrologist (Mr. Maddox) to cast doubt on what was obvious to Engineer Walter Woodward, namely that all the "net" waters flowing out of the acquifer appear at the springs.

Comparing the testimony of Woodward and Maddox, the latter not having conducted any studies at all in the basin but restricting himself to a partial analysis of the records filed by Woodward, the evidence would seem overwhelming that all the "net waters" left after pumping, flows over Chamokane Falls and down the creek to the Spokane River.

SUMMARY: In summary the issues are not as complicated as argued by the State. All the issues can be framed in a single question: "Does the Spokane Tribe and the United States have prior and paramount 'Winters Rights' to the normal, natural flow of Chamokane Creek both for its instream values (30 cfs) and for irrigation of nearby irrigable Tribal land?"

We submit that the answer is YES.

FEDERAL STATE RELATIONSHIPS

Department of Ecology labors with outstanding expertise in its dissertation regarding the evolution of State jurisdiction over waters and water rights. (Pages 7 et. seq.). This discussion, while interesting, has little, if any, relevancy to the issues at bar. Clearly the Winters Rights of the United States and the Spokane Tribe in no way fall within the jurisdictional umbrella of the State of Washington.

As argued by the Spokane Tribe in its opening Brief, State law is only relevant as showing that, even if the Tribe did not have special Winters Rights it would still have the same rights as any other citizen group to establish under State Law a reasonable "minimum flow" of the Chamokane and to appropriate any waters not needed for that minimum flow, for the irrigation of Tribal lands. This the Tribe could have done but to do so it would be subjecting itself illegally to State jurisdiction. Further it would find its state derived rights junior to already existing state issued water permits (Newhouse, et al). Additionally, it might find itself "stuck" with the arbitrary, (established minimum flow of the creek established without a meaningful study) State finding (unenforced to this date) that 20 cfs minimum flow of the creek is sufficient to protect the fishery and other in stream values.

Department of Ecology does however (page 8) speak relevantly of riparian rights. The Winters case to a certain extent analogizes the Winters Rights of a Tribe to riparian rights and we might assume that that would be the minimum or starting point of the Tribe's rights. It retained riparian rights to all sources of water within or bounding the Reservation for the general benefit and needs of the entire Reservation and Tribe.

On its page 10 Department of Ecology seems to "discover" the Winters

Doctrine and voices that "it is this doctrine which the Court is asked to rely upon to support the very, very substantial claim of the United States for the benefit of the Spokane Tribe." Nothing could be closer to the truth. It should be no surprise that it is this reserved rights doctrine that places the Tribe and the United States in such a superior position in their joint rights to the flow of the Chamokane.

Department of Ecology then goes on (page 11) telling this Court that it has "the difficult task of fitting special and unique forms of federal reserved Indian water rights into the federally encouraged and sanctioned comprehensive water use allocation programs embodied in State water rights law. . ." We submit that this is not a "difficult task." It is a simple problem of recognizing the clear Winters Reserved Rights of the Tribe which pre-empt the entire summer flow of the creek.

DEPARTMENT OF ECOLOGY DISCUSSION OF WINTERS RIGHTS

Department of Ecology, beginning page 12, discusses its version of the history and evolution of the Winters Doctrine. By this time this must be "old hat" with the Court but, like off shoot religious sects, citing scattered Bible texts, the State tries to find small nuances and strict interpretations which it gathers in its fruitless attempt to pare down the clear amplitude and applicability of this Doctrine.

As in the case of Powers (supra and infra) we must keep going back to the Winters Case and read and study its entire sequence. The decision is in three parts or appeals. The first appeal from District Court is reported in 143 Fed.Rep. 749, Feb. 5, 1906. The second appeal to the Ninth Circuit is 148 Fed. 684, Oct. 1, 1906. The famous United States Supreme Court opinion is 207 U.S. 564, Jan. 6, 1908.

The first citation is the foundation stone. It summarizes the case history and enunciates the basic Reservation Doctrine that it invokes. It is replete with quotable sections dramatizing the breadth of the Doctrine. We will quote only the following:

> "We will construe a Treaty with the Indians as 'that unlettered people,' understood it . . . and counterpoise the inequality 'by the superior justice' which looks only to the substance of the right without regard to technical rules. . . The law is well settled that the Doctrine of Appropriation under said statutes (The Desert Land Act, etc.) applies only to public lands and waters of the United States. . . when lands of the government have been legally appropriated or reserved for any purpose, they become severed from the public lands, and . . . no subsequent law or sale should be construed to embrace or operate upon them. . ." (Page 747).

The second appeal to the Ninth Circuit (148 Fed., supra) was a "re-appeal" on the final decree. The court merely held to all of its findings and judgments in the first appeal but dealt specifically with the allegation that, while the rule of liberal construction as "that unlettered people understood it" is the applicable rule there is "no room for judicial interpretation" that would disregard the "palpable meaning of the words of the Indian Treaty."

The court then stated that

> "Our former decision does not disregard 'the obvious palpable meaning of the words of an Indian treaty,' nor does it incorporate therein something which is inconsistent with the clear import of its words. It construes and gives effect to what we understand to be the obvious meaning and intent of the treaty, and holds that by the expressed terms of that treaty there was reserved to the Indians the waters of Milk River as a part and parcel of the reservation set apart to them. We find no ground to question the correctness of our former decision."

We can now review the United States Supreme Court decision (207 U.S., supra) with better insight. In view of the vast literature construing the Winters Doctrine it is interesting to note the briefness of this landmark decision. It does not say, as is often contended, that "sufficient

water was reserved to achieve the purposes of the Reservation." We look in vain in the Winters cases for these words of the oft quoted Winters Doctrine (quoted erroneously again by Department of Ecology, Page 12 of its Brief). We find them not in the Winters cases but in the case of Conrad Investment Co. v. U.S., 161 Fed. 831, Ninth Circuit 1908, wherein that court says that the Winters Case was applicable and "determines the paramount right of the Indians of the Blackfeet Indian Reservation to the use of the waters of Birch Creek to the extent reasonably necessary for the purposes of irrigation and stock raising, and domestic and OTHER USEFUL PURPOSES." (Emphasis Ours).

The Winters Doctrine as outlined in the Winters and Conrad cases has never been changed or limited. Rather it has been updated and emphasized as the rule of interpretation and law which establish the paramount and superior Winters Rights of Tribes to waters available to the various Reservations of the United States.

THE POWERS CASE

Scattered through its Brief, Department of Ecology seeks solace in the Powers, Skeem and Hibner cases which it tries to interpret as giving non-Indian successors the former Indian rights. From this unjustified premise the State leaps to the conclusion that the exercise of these dereigned rights would be under State jurisdiction, giving the non-Indian successor the privilege (as in the case of defendant Smithpeter) to file for and receive a massive permit that unduly pre-empts and depletes the stream.

The earliest case in point is the case of Skeem v. U.S., 293 Fed. 93, CA 9, 1921. It involved lands outside the Fort Hall Indian Reservation in Idaho -- an allotment that remained in the ceded area. To protect

allottees in that ceded area outside the diminished Fort Hall Reservation Congress specifically provided that water from streams required for those allotments would be available to irrigate those lands. The Ninth Circuit reviewed the various Winters cases and found the doctrine applicable to the individual allottees on these off reservation lands. The specific Congressional legislation which controlled Skeem is non-existent in the Chamokane case.

Several years after Skeem the Federal District Court of Idaho again considered the Indian rights in such lands (U.S. v. Hibner, 27 F.2d 909, USDC, Ida. E.D. 1928). That case involved a non-Indian purchaser of a former off Reservation allotment. The District Court made this ruling respecting the resulting non-Indian right:

> ". . . the White man (said the court) would be entitled to a water right for the actual acreage that was under irrigation at the time title passed from the Indians. . . The White man, as soon as he becomes the owner of the Indian lands, is subject to those general rules of law governing the appropriation and use of public waters of the State. . ."

Hence, said the District Court, the white man, with regards to the unirrigated Indian lands he had acquired, would be governed by the laws of Idaho and would be required to apply water to those non-irrigated lands with reasonable diligence.

The distinctions between Hibner and Skeem and the case at bar are quite obvious. No Reservation or Tribe was involved in Hibner and Skeem because the lands were outside the Fort Hall Reservation. No countervailing Federal or Tribal jurisdiction was involved. 25 USC 381 directing the Secretary to "prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof (of needed water) among the Indians residing upon any such reservations. . ." was inapplicable.

Congress had specifically provided for disposal of the surrounding lands to non-Indians and for the sale of allotments. There was no prohibition against other appropriations or grants from available supplies of water as provided by 25 USC 381.

Thus neither Hibner nor Skeem support Department of Ecology in its contention either that the successors of Reservation allottees succeeded to the allottees' inchoate water rights or that the State would have jurisdiction over their appropriation and use of the Reservation waters in question.

Powers (supra) would seem to give us greater "pause." It is often cited for the principle that successors of allottees succeed to the allottee's existing or inchoate water rights.

One must read the entire sequence of Court decisions in that case (19 F.Supp. 155, USDC D. Mont. 1936; 94 F.2d 783, CA 9, 1938 and 305 U.S. 527, 1939). The distinctions from the case at bar are almost too numerous to list. We discuss the Powers case in our Trial Brief dated January 15, 1974, on page 46. We point out that the Crow Treaty of 1868, as emphasized by the Supreme Court, contained special and specific provisions that the members of the Crow Tribe were entitled, indeed, encouraged to select farms and to commence farming. The court held that the rights to the use of water were reserved "for the equal benefit of Tribal members." The court concluded that it could not determine the rights of the Crow Indians or their successors.

If Powers is authority for the proposition that successors in interest to allottees succeed to the allottees' water rights, the maximum right received was the amount and extent of that right as it existed at the time of the change in title. Further exercise of the right would

remain under the exclusive jurisdiction of the Secretary and of the Tribe. By no flight of the imagination would it make the quantitative leap to come under State jurisdiction and become expanded into a right to file with and receive from the State a large appropriative permit by which the non-Indian successor would receive more than his equitable share of a limited stream. Nothing in Powers would deprive the Crow Tribe and the United States from dedicating a specific esthetically beautiful Reservation stream as a free flowing, natural resource. The "derived Powers right" would be for a non-Indian to enjoy the beauty of that stream along with his Indian neighbors.

CONTRADICTORY RATIONALES OF DEPARTMENT OF ECOLOGY AND DEPARTMENT OF NATURAL RESOURCES REGARDING ALLEGED DERIVED RIGHTS OF NON-INDIAN SUCCESSORS

In the above-cited portion of their Briefs Department of Ecology and Department of Natural Resources both take the position that successors to allottees and homesteaders somehow succeeded to the allocable water rights of the Tribe and the allottees. They contend that these "little Winters Rights" passed on to the present owners and fell under State jurisdiction.

In total contradiction to the above, Department of Ecology and Department of Natural Resources also express a rationale that, as former Indian land went through a transition of homesteading or purchase from allottees to non-Indian owners and finally back to the Tribe, the lands involved lost their prorata Winters Rights to water. They argue then that the priority date of any water rights that might be allocated to particular re-acquired lands would be the date of re-acquisition rather than 1881.

This argument regarding the interpretation of Powers, etc., is considered above and in our opening Briefs. What we want to point out

here is the inconsistency of defendants' arguments. If in fact the Indian successors of allottees "succeeded to the allottees allocable Winters water rights," then those rights must inhere in the land and the Tribe on repurchase would at least "succeed" to the right succeeded to by the intervening non-Indian purchasers completing a full circle of entitlement.

More logical is the Tribe's position that Winters Rights inhere in the Reservation and the Tribe as a whole, not segmented or allocated to individual parcels of land until the Tribe and/or the Secretary makes that allocation. Thus they would be available for the benefit of re-acquired land just as on any other land. These lands would comprise part of the "future needs and uses" of the Tribe as provided for in the various Winters cases and especially in Conrad, supra.

EFFECT OF "OPENING RESERVATION" TO TRIBE'S WINTERS RIGHTS

In an earlier Motion to Dismiss and throughout defendants' Briefs and especially that of Department of Natural Resources a point is repeatedly made that somehow in the opening of the Reservation to Homestead in 1908 the Tribe lost its Winters rights to waters to the opened lands even though not homesteaded.

Rather than re-answer this argument in detail the writer calls the Court's attention to the Answering Memorandum of Spokane Tribe to Motion to Dismiss, filed with the Court on June 7, 1974.

As that Memorandum adequately argued, the Homestead Act of 1908 authorizing the sale and disposition of surplus lands did not affect Tribal title in undisposed lands. While technically "restored" in 1958, 25 USCA 463, (an act affecting several Tribes) title was not "restored." The 1958 Act merely made clear that the affected lands were no longer open to

homestead. The title to the undisposed lands never left the Tribe and hence those lands enjoy the same Winters rights and the same priority date as to other Indian lands on the Reservation.

The Tribe's Answering Memorandum of June 7, 1974, covers other legal points and arguments that will not be repeated here.

STATE JURISDICTION IS LIMITED BY ACT OF 1905

On page 14 Department of Ecology argues that a Tribe does not have a right of use or jurisdiction "over all the waters flowing through or located within the boundaries of an Indian Reservation." They cite the "mighty Columbia." Again Department of Ecology seeks to amplify this case far beyond its natural limits. We need not discuss the "mighty Columbia" and its implications. We are talking only of one small stream to which we believe the Tribal Winters rights are clear. This case does not lay claim to the Columbia or total jurisdiction over it.

Although discussed in our initial Brief, we are attaching as Appendix No. I a copy of the 1905 Act and the various reports and legislative comment accompanying its enactment. Why did Congress feel that it was necessary to enact this legislation which authorized the acquisition of water rights on the Spokane River "bordering the Spokane Reservation?" The 1905 Act while authorizing water power projects is general in nature and encompasses all types of water permits. It provides that they may be acquired by complying with applicable State law and securing the approval of the Department of the Interior.

Whereas there are in excess of 25 State issued irrigation permits along the South bank of the Spokane arm of Roosevelt Lake, the State issuance of those permits was merely pro forma and none of the permits would have any validity at all without the requisite approval of the Department of the

Interior, as provided in the 1905 Act.

Additionally, this gigantic Federal Reservation (Grand Coulee and Roosevelt Lake) highlights the length and breadth of the Reserved Rights Doctrine. Bordering the Colville and Spokane Reservations, we have the co-existence of the Tribe's Winters rights and the Federal Reserved Rights whereby the Federal Government reserved the jurisdiction and right to the waters for the purposes of the Grand Coulee project. In this duality, despite Department of Ecology's protestations to the contrary, there is exclusive Tribal and Federal jurisdiction to the "mighty Columbia" behind Grand Coulee. The only State jurisdiction that exists is by virtue of the above cited 1905 Act which covers the Spokane River. Where is there legislative authority of a similar import covering the waters of Chamokane Creek?

In the Grand Coulee Project, the United States has to pass on each application for irrigation diversion to make sure it does not conflict with the general purposes of the project. It has to retain total jurisdiction because it retains total responsibility for the administration of the hydroelectric, multipurpose system. The Chamokane is a microcosm of that. It is a sparkling, jewel of a stream where total Tribal and Federal jurisdiction is required to preserve it in its pristine beauty and to make "judgment calls" as to whether there might be a surplus of water for the irrigation of Tribal lands.

THE CAPPAERT CASE

Cappaert, cited repetitiously in our opening Brief and by Department of Ecology (page 15 of its Brief) affirms once and for all that ground waters are also pre-empted by the Reservation Doctrine where necessary to achieve the purposes of the Reservation.

Department of Ecology quotes only that portion of the Court's opinion stating "The implied reservation of water doctrine, however, reserves only that amount of water necessary to fulfill the purpose of the reservation, no more." (Emphasis Added).

This would of course be true in the case of a single purpose reservation so as "to preserve the pup fish," but, in the case of the Chamokane we have (and for Grand Coulee) the reservation of waters for manifold purposes, not just to preserve one species of fish.

THE WINTERS DOCTRINE NEVER WAS LIMITED TO AGRICULTURAL USES AND MANIFESTLY INCLUDES ALL THE NEEDS AND PURPOSES OF THE TRIBE AND THE RESERVATION

A major line of argument of defendants is that, though the Tribe does have Winters Rights, they are limited to domestic, stock watering and agricultural uses. No case is cited or can be found that says this. It is deduced from the fact that, until now, the various Winters cases have had to do with those uses. There is no word, hint or dicta in any cases that would even indicate an intention of the various Courts that the Winters Rights would be limited to the agricultural uses evident in each case. Rather all of the Court statements refer to or imply changing and expanding uses to cover "future needs" as those needs and uses "change in the future."

SCOPE OF THE WINTERS DOCTRINE

Except for general treaty recitals regarding agriculture in the Powers, Hibner and Skeem cases, there has been no single "Winters Case" in the history of Winters litigation in which the Winters or Reserved Rights are said to be based on the specific language of Treaty, Agreement, Executive Order or Statute. The Reserved Rights Doctrine or Winters Doctrine is by its very nature based on implication. The implication is drawn, as in the Winters case itself, from a liberal reconstruction of what the intent of the parties (the United States and the Tribe) was at the time the reservation was established. The Doctrine of liberal construction "as 'that unlettered people' understood it" has invariably resulted in liberal rulings as to the extent and nature of the rights reserved.

The Department of Ecology seems to recognize these broad principles (beginning on page twelve of its Brief.) It discusses the "scope" of

those rights and immediately retreats to a strict interpretation of the extent of the rights reserved. Gratuitiously and without an iota of legal precedent it concludes that the rights reserved are limited to domestic, stock watering and agricultural purposes because the classic Winters cases involved such purposes.

While every important Indian water rights case has involved irrigation or fishing that does not mean that the implied rights drawn from the court decisions are restricted to irrigation and fishing. A phrase that seems to have been most used by the courts is "beneficial use." (See Winters v. U.S., 207 U.S. 564), Conrad Investment Company v. U.S., 161 F. 829, U.S. v. Parkins, 18 F.2d 624). A water right can be maintained if the water is applied to some "beneficial use." It was in the Winters case itself that the implication was presented most forcefully. There the court posed this rhetorical question at page 576:

> "The Indians had command of the lands and waters -- command of all their beneficial use, whether kept for hunting and grazing roving herds of stock, or turned to agriculture and the arts of civilization. Did they give up all this?" (Emphasis Added).

The court's answer was emphatically "no," holding that the Indians still have that command of "all their beneficial use." Thus, it could easily, and indeed quite logically be said that what the Tribes "appropriated" was this total "command." The entire spectrum of "beneficial use" was appropriated, or more accurately, "reserved" by the Tribes. (U.S. v. Winans, 198 U.S. 371). The Winters court in using the above language distinguishes "agriculture" and "the arts of civilization." They are not presented as synonyms. Rather they are entirely distinct, or the first is a subset of the second. The Winters doctrine clearly refers to more than agriculture.

The State of Washington has gone through a similar evolution in expanding the idea of "beneficial uses." Whereas the original 1917 Code established "beneficial use" as the sole criterion for appropriating

water, this beneficial use was construed to mean "beneficial to agriculture." 9 Gonzaga Law Review, 761 (1974). As the state progressed, a need was recognized for a more general definition of beneficial use. This need has been met fairly recently, in two separate RCW sections:

> "RCW 90.54.020 - General Declaration of Fundamentals for Utilization and Management of Waters of the State:
>
> "Utilization and management of the waters of the state shall be guided by the following general declaration of fundamentals: (1) Uses of water for domestic, stock watering, industrial, commercial, agricultural, irrigation, hydroelectric power production, mining, fish and wildlife maintenance and enhancement, recreation, and thermal power production purposes, and preservation of environmental and esthetic values, and all other uses compatible with the enjoyment of the public waters of the state are declared to be beneficial."

As the Anti-Drinking Commercial says, "We will drink to that."

This progression of laws in Washington (and in other states) illustrates that what is considered a "beneficial use" is a dynamic concept and subject to change as the needs of the Tribe (or the public) change.

There is presently being circulated to all interested agencies a proposed modification and amendment to 25 CFR Part 260 (attached as Appendix II) which should be officially published by the time the Court reads this brief. The proposed new regulations are authored by the Department of the Interior and are proposed to affect the administration and protection of the water rights of the various tribes.

The proposed definition of "beneficial use" is as follows:

> "(b) 'Beneficial use' means any use of water, consumptive or otherwise, for agricultural, domestic, municipal, commercial, industrial, aesthetic, religious, or recreational purposes, or for the maintenance of adequate stream flows for fishery, environmental, or other beneficial purposes on an Indian Reservation."

This proposed definition is of course remarkably like Washington's statutory definition above and like others being adopted by the various western states.

While not relevant to this portion of the Brief "Reserved Water Rights" are defined as being "those rights to the use of waters recognized as reserved in accordance with the principles enunciated in Winters v. U.S., 207 U.S. 564, and subsequent cases, which rights have either an immemorial priority or a priority date as of the establishment of the Reservation."

The language of the various Winters cases focuses on the absurdity of a policy which would at the outset contain the Indians on arid land and then make the land useless by denying to Indians the necessary rights to the use of water to make the Reservation livable and to advance the Indians in the "Arts of Civilization." Such rights are found in the intent to create the reservation. The circumstances and conditions surrounding the creation of the reservation must be looked at to determine their scope.

> "It would be irrational to assume that the intent was merely to set aside the arid soil without reserving the means of rendering it productive. . . the good faith of the attempt to induce the Indians to make their homes on the reservation, and to remain there, seems inconsistent with a purpose of reserving the lands only, leaving the waters of the stream to be diverted without limit by the settlers above." U.S. v. Walker River Irr. Dist., 104 F.2d at 339.

In focusing upon the intent of the parties at the time of the reservations' creation, the courts have in fact made a subtle shift from the aboriginal reserved rights rational of the original Winans - Winters rule to the present governmental reserved water rights doctrine.

> "When considering the nature of the grant under consideration we must not forget that it was not a grant to the Indians, but was one from them to the United States, and all rights not specifically granted were reserved to them." U.S. v. Hibner, 27 F.2d 909, 911 (Ninth Circuit 1928).

EXTENSIONS OF THE WINTERS DOCTRINE

The cases since Winters and Conrad have clarified and expanded the

nature and extent of Tribes' Winters Rights and the related Federal Reserved Rights Doctrine.

The first step was the verification that they existed equally on Executive Order Reservations so that the means of creation of the reservation become immaterial.

> "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 (in Executive Order Reservations, without treaties or agreements). Arizona v. California, 373 U.S. at 546."

and

> "The doctrine of liberal construction in determining those rights should extend equally to Executive Order Reservations (U.S. v. Walker River Irr. Dist., supra)."

Navigability was held not to be a factor and the states got no greater jurisdiction or right on navigable streams than on non-navigable ones. (See Arizona, supra).

Non use never operates to work a forfeiture of Winters Rights.

> "The failure of the Indians to use their water will not cause either an abandonment or a forfeiture of their rights thereto. (See Hibner, supra.)"

Even the fact that the Indians received the land in fee title rather than trust did not preclude or limit a resulting Winters Reservation of the water necessary for the Indians' land (State of New Mexico v. Aamodt, 537 F.2d 1102 (1976). This recent case is an interesting recapitulation and summary of the various cases involving Winters and Reserved Rights including that occurring in Cappaert, supra.

The Tribal rights are not quantified or limited to a certain amount but can expand in future years. "not only for present uses, but for future requirements. . ." (Conrad, supra). "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." (Ahtanum . . . 48 years later).

Since courts have recognized the Indians have a future interest in water supplies, the rights of all others must necessarily be subject to change. A present utilization of Winters Rights can thereby cut off non-Indian users. See U.S. v. Wightman, 230 F. 277 and U.S. v. Walker River Irrigation Dist., supra.

As so clearly expressed in both Winters and Ahtanum the apparent conflicting interests and implications between Indians and settlers have always been balanced in favor of the Indians.

In U.S. v. Walker River Irr. Dist., supra, the court recognized that its decree finding an implied reservation of waters "to the extent reasonably necessary to supply the needs of the Indians" would greatly "depreciate the value of the water rights of the upstream owners, and make impossible any intelligent program of farming" (104 F.2d at 340). This effect of diminishing the non-Indian use has not deterred the courts. It should not here.

It is clear that the Indians' rights to the use of water as conferred by the Winters Doctrine are not limited by prior or subsequent use by white settlers who also need the water, even if those settlers were granted land by the state or issued United States patents. The settlers' right to use of the water exists only to the extent the Indians do not presently exercise their Winters Rights. In the case at bar the Indians have exercised their rights in their Resolution (Exhibit 7) to preserve the natural flow of the Chamokane.

USES INCLUDED IN WINTERS RIGHTS

Every dicta and implication of the case law is that Winters Rights

are for any reasonable beneficial use. We have already discussed relevant quotes from the older cases, the "Arts of Civilization" in Winters where the Court also held that the placing of the Reservation's boundary in the middle of the Milk River was "For the purpose of reserving the right of the Indians to the use of said water for irrigation, as well as for other purposes." (143 F. 740, 748, Emphasis Added).

We have mentioned Conrad which in explaining Winters said:

> "The controversy involved the right . . . of the Indians . . . (in Winters) to the use of . . . the waters of Milk River for useful and beneficial purposes." (id. at 830, Emphasis Added).

The Court in Conrad described the Indians' rights as "The paramount right . . . to use of the waters . . . to the extent reasonably necessary for the purposes of irrigation and stock raising, and domestic and other useful purposes." (id. at 831)

What did the Ninth Circuit have in mind in its repeated use of the "other purposes" phrase? Certainly it was leaving the door open to other uses which might arise in the future. Irrigation was in the forefront of the Court's mind. The 1908 West of the Ninth Circuit was an agrarian society. Nevertheless the Court thought of the future of the Indians as well as their present.

> "The government has undertaken, by agreement with the Indians on these reservations, to promote their improvement, comfort, and welfare, by aiding them to become self supporting as a peaceable and agricultural people." (id. at 831).

The intention generally was to turn the Indians into farmers, but the role of the government didn't end there. Changing nomads to farmers was only a means to an end in 1877 or 1881. The objective sought was really the metamorphosis of each Tribe of Indians into an economic, social and political unit. Turning them into farmers was just one step to that purpose.

In U.S. v. Parkins, 18 F2d 642 (D. Wyoming 1926) where the right to divert water running through a Reservation was at issue, the Court determined:

> "The treaty in this case, like all other treaties with the Indians creating reservations contemplates the use and benefit of the lands within the reservation to . . . the Indians, which likewise includes the irrigation of those lands." (Emphasis Added).

What we really are concerned with is the uses of water not specifically contemplated at the time the reservation was established. In the case involving the water rights of the Walker River Reservation (cited above), the court said:

> "It was pointed out in the illuminating opinion of Attorney General (now Justice) Stone of May 12, 1924, (Opinions of Attorney Generals, Vol. 34, page 171) that doubts whether reservation of lands for the Indians included rights to hidden or latent resources, such as minerals, petroleum or water power, have, as a practical matter, uniformly been resolved in favor of the Indians."

(Note: That opinion is attached as Appendix III.)

The Attorney General was trying to define just what property interests were held by Indian Allottees and Tribes. He postulated that they must own beneficially during the trust period what they would receive at the end of the trust period. Since an owner in fee would have these various rights to the accompanying resources, latent or otherwise, the Indian trust lands included these rights before the fee title passed. Naturally the Indian allottee or Tribe would receive fee title to everything that went with the land. The timber, minerals, all surface rights, and the water rights, in their expanded definition (including esthetics, recreation and instream values), would of course be included. Therefore, the Attorney General reasoned, those property rights existed during the trust period.

(See U.S. v. 5,677.94 Acres of Land, 162 F.Supp. 108 (D. Mont. 1958) and Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana v. U.S., 181 Ct.C. 739 (1967)).

THE PURPOSE OF THE WINTERS DOCTRINE

Towards the end of the Nineteenth Century the United Stated through such commissions as the John Wright Commission (which negotiated the 1887 Agreements with the Tribes in this area) had a twofold policy. It was the removal of Indians as a threat to the white man in the pursuit of America's Manifest Destiny, and to assimilate the remaining Indians into white civilization. The removal to reservations seemed to achieve both purposes. The Indians were to become "settlers" in their own right and change their culture and life to achieve the "arts of civilization."

In utilizing the reservation approach, it is inconceivable that Congress would have taken

> "from them (the Indians) the means of continuing their old habits, (and not) leave them the power to change to new ones." (Winters, supra) (Emphasis Added).

The new life of the Indians would necessarily be that life dictated by the environment where they were to live. In Eastern Montana it would necessarily go in the direction it actually has - farming, grazing, cattle, mining, oil, coal. Under the Winters Doctrine there was reserved from available waters, sufficient water to achieve these long range goals.

But in this area, especially with regards to the Spokanes and Colvilles who were to live on portions of that wonderful fishery composed of the Spokane and Columbia Rivers, with small farmable acreages intermixed with timber and grazing lands, farming and ranching could not by themselves make the Indians self sufficient. The Tribal land base, both allotted

and Tribal, lacked sufficient agricultural land for more than a few Indians. Living on stump ranches and hill sides was feasible only if the Tribes and their members could utilize the various Reservation resources, including especially the Chamokane, Spokane and Columbia which together constituted a "fishery beyond compare."

To paraphrase Winters: Is it conceivable that the Department of the Interior and Congress in forming and approving the Colville and Spokane Reservations took from the Indians their most important resource of all, the bountiful fishery and the waters with their multiple uses and benefits?

If the intent was to contain the Indians and yet change their habits so that they could some day become a viable social and economic force, then Winters must be asserted to give them the means to that end. If the means was in the water (as it manifestly was) then the Tribe must retain and the United States government must reserve for them the necessary use of it. Indeed, it would be an embarrassing policy if the United States government promoted the establishment of thousands of poor farmers, eternally dependent upon the government's mercy for handouts -- with the Indian as a serf and the federal government as Lord.

Carrying the intent doctrine to its logical conclusion brings us to this recent law review quotation:

> "If the contemplated purposes standard is adopted, the purposes underlying the creation of each Indian reservation must be carefully considered. The various treaties and statutes creating reservations speak in terms of providing a permanent home for the Indian or of setting aside a place for him to live free from encroachment by non-Indians. It appears that this language reveals an intention to permit the Indian to do the same thing with the reserved lands of his home as the white man does with his lands, such as irrigate the irrigable acres, develop the minerals, create communities, preserve the environment for fish and game, preserve minimum stream flows,

> provide for recreation, and establish industries to the extent that the lands lend themselves to this type of development. Assuming all of these purposes were intended, not all may require water for their fulfillment. If water is required, however, for the fulfillment of a contemplated purpose, the sovereign may be deemed to have reserved the water." (Ranquist, The Winters Doctrine and How it Grows: Federal Reservation of Rights to the Use of Water, 1975 B.Y.U.L.Rev. 639, 659). (Emphasis Added).

Apply those principles to the Spokane Reservation and it is inconceivable that the "sovereigns", the Tribe and the United States, did not reserve the Chamokane for the use for which it was admirably suited, an ecological, esthetic fishery and recreational community resource.

A review of the various treaties and agreements reflects that hardly any referred to water. They all referred to land. The parleys, however, were so replete with assumptions and reassurances that the Indians and government agents did not think it necessary to mention the water with any more particularity than timber, coal, minerals, and other special resources. While none of these "general" resources were mentioned in the agreements, such as the Agreement of 1887 with the Coeur d'Alenes, John Wright repetitiously referred to the general resources of the reservation, including good soil, timber and water, as making it a good place for the Indians to live and retain their identities as Indian Tribes.

The courts stepped in to fill the wording gap of the treaties, invariably interpreting them as including all of the resources reasonably contemplated to be part of each reservation. No case can be cited wherein the Court held that a Tribe did not receive each of these resources (timber, etc.) including the Winters line of cases involving water.

The water cases, Winters, and the rest, were all in the Ninth Circuit. That court was forced to act, and acquired expertise in the

area just as the Second Circuit has acquired expertise in Securities Regulation. The Ninth Circuit and the Supreme Court, in recognizing the plight of the Indians should they have ruled differently, uniformly concluded that Congress must have intended to deal fairly with the Indians by reserving for them the water without which their land would have been next to worthless.

On the Spokane Reservation, although some farming and ranching was contemplated, its rocky, mountainous terrain precluded agriculture either on a large scale or on small family subsistence units. The possibilities for agriculture were further limited when the reservation was opened for settlement, and settlers homesteaded the best farm lands.

The primary interest of the Colvilles and Spokanes in entering their reservations was to continue their existing fish-based culture. As long as they had access to the great salmon runs, the native fish and the fruits of the frontage lands, they could survive. It was this environmental unity that made each reservation feasible.

In considering the Archival Record and known facts it is clear that the Spokane Reservation was established to end conflict and release lands for white settlement. The Indians were reassured that they could continue to live as they had previously, although restricted to a diminished area. When that area was formally set aside in 1881, it should be noted that the United States government's motivation was not just for the Indians' benefit, it was for the government's "convenience." As was stated in Senate Report No. 664, 52nd Congress, First Session (1892).

> "In the spring of 1872, it being called to the attention of the Commissioner of Indian Affairs that certain roving bands of Indians in the eastern part of the territory of Washington, with whom the United States had no treaty relations, should, for the convenience of the government in dealing with them, be placed upon a reservation. . ." (id. at 1).

All of these Tribes and especially the Spokanes were a fishing, hunting and berry people. The rivers and streams (and especially the Chamokane) running through and around their lands were the basis of their culture and economy. In a Solicitor's Opinion, J. H. Seupelt, May 29, 1914, in a determination of ownership by the Colvilles to the middle of the Columbia River, we find the following:

> "It would seem reasonable that the intention in the establishment of the reservation was to include the land to the center of the river to protect the fishing interest of the Indians, as it is well known that the Indians secure a great deal of their subsistence from the fish obtained from the Columbia River." 43 I.D. 267, 268.

The Spokanes title was clear (to the far banks of both the Rivers and Chamokane) hence the lack of a Solicitor's Opinion regarding its title to the river and creek beds "to protect the fishing interest."

We refer again to Senate Report No. 664, supra, wherein it is said:

> "The portion of said reservation not ceded contains ample territory for the comfort, security, support, and maintenance of all the Indians upon said reservation in their avocations of life." id. at 4. (Emphasis Added).

What was said of the Colvilles can be "doubly" said of the Spokanes. In the case of the Spokanes the proclamation of the Reservation was the result of the parley and Agreement of 1877. The cession of the aboriginal lands was the result of the Parley of 1887. The reservation was of a key portion of their aboriginal lands in the heart of their river creek system. Their "avocation" involving the streams in their amplitude of uses (as a fishery and much more) was clearly evident. The only thing that made this relatively small (much smaller per capita and much less arable land per capita than the Colville) reservation feasible at all was the combination of arid, mountainous, timbered land and the bountiful river system.

It seems absurd that anyone would contend for the principle that, while there was a reservation of water rights on the Chamokane, it was only for irrigation and then only of lands designated during the homestead era as agricultural (excluding the sparse timbered land). Yet that is what both Department of Ecology and Department of Natural Resources are trying to tell the Court here.

EVOLUTIONARY CHANGE OF WINTERS RIGHTS

We will not repeat our quotations from the Conrad and Ahtanum cases that are in point on this subject. We advert to the language of Winters about Congress not taking from the Indians the means of continuing their old habits without leaving them "the power to change to new ones." Winters, supra, at 577. The Indians' "future needs" imply, as in the case of Washington's own law, changing beneficial needs and uses.

With the Spokanes we have a classic and extreme case of changed circumstances with most of the changes forced upon them by their trustee, the United States Government. Aside from the technical, scientific, and cultural revolution that has seized all of America and to which the Indians were equally subject, we had the construction of Grand Coulee effectively terminating their fishing culture. Roosevelt Lake flooded out much of their farmland. Most of the remaining good farm land was in the hands of settlors, the homesteaders, etc., either through patents from the government or federally approved transfers from Indian allottees. We are left with the paradox of United States governmental action almost destroying the basis for which the reservation was created, leaving but one primal, unpolluted, undammed stream, the Chamokane.

Here we advert to a contention made in the Brief of the Department of Natural Resources. It seeks to turn around our argument as outlined

above and contend that, since the river system included in the reservation was so bountiful, the Tribes and the government could not have had in mind the Reservation of Winters Rights to the extent claimed on the Chamokane. The Chamokane was such a tiny part of this vast system, it probably, according to the Department, was not even considered. Therefore, the Department unbelievably argues, there was no reservation of the waters of Chamokane.

It is probably true that, in view of the entire naturally integrated river system that was in existence until the Grand Coulee Project, little thought was given to each small part of it. Each segment was merged in the totality. We liken the argument of the Department to a banker saying "Since you originally had $10,000.00 in your savings account and wanted to save that $10,000.00, you could not have seriously intended to save the last $10.00." The Chamokane is the last $10.00 of this wonderful savings account of resources the Tribe thought it had "forever."

The Department of the Interior Executive Summary of Critical Water Problems Facing the Eleven Western States, Westwide Study 6-7 (1975) states in part:

> "There are significant opportunities for development of agricultural, industrial, energy, recreational and other economic activities on Indian Reservations throughout the West that, if realized, could improve the economic status of the Indian Tribes tremendously."

We ask, DOES <u>WINTERS</u> AFFORD THE BASIS FOR ACHIEVING THESE OPPORTUNITIES? The Tribe has its mining industry. A short distance downstream on the Spokane it has its multimillion dollar reclamation project. It has its timber and farming industries. On its eastern boundary it has the Chamokane, its only remaining pure flowing stream and fishery. How logical to protect and preserve it while engaging in the industrial and economic reclamation and development of the rest of the reservation.

What more within the Tribe's entitlement.

CONCLUSION TO THIS SECTION

Every logical, economic, cultural, anthropological and legal analysis adds weight to the conclusion that the waters of Chamokane Creek were reserved and preserved for the Spokane Indians as an esthetic, ecological, fishery recreational resource with the surplus of waters not needed for those purposes reserved for the irrigation of the Tribe's adjacent lands.

A modern treatment of Indian water rights and their relation to general water rights law is contained in the Encyclopedic publication, "Waters and Water Rights," Editor in Chief Emmet Clark, Vol. Two, Chapter 10, pages 373-399, entitled "Indian Water Rights." (Available in Spokane County Law Library.)

It is interesting that the writers of this lengthy work, dealing with the whole field of waters and water rights comes up on the side of the plaintiffs in this case on every point they discuss. (Note: They do not, however, discuss the issue of the various uses for which Winters rights exist.)

STATE JURISDICTION - "SURPLUS WATERS"

It is difficult to follow the rationale of Department of Ecology, beginning page 32, wherein it attempts to get around the various cases, including Winters itself and argue for State jurisdiction over hypothetical "surplus waters."

Most of the cases cited by Department of Ecology are tax, civil and criminal cases. The Winters cases including the case at bar deal with a single natural resource which was by implication reserved along with the reservation of lands at the time the Reservation was established. They deal with the prior and paramount rights of the Tribe to that resource and, finally, with the jurisdiction to administer and protect it.

With all respect to the Department of Ecology, it did not cite (because it could find none) a single appellate water rights decision that finds that the state has any jurisdiction at all in the administration of waters on an Indian Reservation even if there are "Surplus Waters" surplus to the needs of the Tribe. The Department of Ecology's position is stated again on page 44 wherein it proclaims that it asserts no jurisdiction "over the rights of Indians" over the Tribe's "real property" and no jurisdiction over Indian lands or water. And then

> "The State asserts jurisdiction only over 'excess waters,' i.e., waters of a water body on non-Indian lands not necessary to satisfy rights of Tribes as reserved by treaty. . ."

There is no need for the Court to attempt to follow such semantics. The Court, from the evidence, can easily find that there are no "excess waters" theoretical or actual. As in the Bell Bay (Lummi Tribe) and the Walton (Colville Tribe) cases, the available water is obviously insufficient to fill the minimum Winters needs of the Tribe and its members, especially with a minimum flow of 30 cfs. That being true, why litigate the issue

of jurisdiction over non-existent "Surplus Waters."

Department of Ecology in its search for precedent cites the usual cases which affirm that a state has jurisdiction over non-Indians on a Reservation. It agrees that the state would have no jurisdiction over Indians, Indian lands or Indian rights except where confirmed by Public Law 83 - 280 (28 USC 1360 and Washington's companion statute RCW 37.12).

RCW 37.12 is a partial jurisdiction law which extends state jurisdiction onto Indian Reservations over eight listed items (traffic on public highways, juvenile delinquency, etc.) and extends total state jurisdiction over Indians on non-Indian lands on a Reservation. Not yet reported, but in a slip opinion dated April 29, 1977, the Ninth Circuit struck down all of RCW 37.12 on the grounds that the "checkerboard total jurisdiction," where jurisdiction was "based on the status of title to the land upon which an alleged criminal offense occurs" violated the United States Constitution. The court said

> "We hold that Washington's partial assumption of jurisdiction based upon this land title classification cannot withstand the Yakimas' equal protection attack, and we strike down Section 37.12.010." (Confederated Bands and Tribes of the Yakima Indian Nation v. State of Washington, No. 74-1225, Ninth Circuit, April 29, 1977).

This court is aware of its own 1976 decision in Confederated Tribes v. Washington holding that the United States and the Colville Tribes had preempted hunting and fishing jurisdiction and that the State of Washington could not require non-Indians to have state hunting and fishing licenses to hunt and fish on the Colville Reservation, the Tribe having enacted its own hunting and fishing code which included the licensing of non-Indians.

It should be born in mind that the Washington Statute providing for checkerboard jurisdiction involved both criminal and civil jurisdiction

and both were struck down. The Ninth Circuit held that all of RCW 37.12 must be held invalid because it was inconceivable that Washington would assume total jurisdiction in the eight listed items except in conjunction with its total jurisdiction on fee land.

One cannot read that Ninth Circuit opinion without being convinced that it would also strike down the split or checkerboard jurisdiction over water rights argued for by the State of Washington. In this case Department of Ecology would have the Court rule a divided jurisdiction on a checkerboard basis (fee land and Indian land) over a single integrated resource that underlies and permeates all the land (the Chamokane and its aquifer). It would seem that such split jurisdiction would be more clearly unconstitutional than RCW 37.12.

Counsel for Department of Ecology on page 45 cites 25 USC 381 which directs the Secretary of the Interior "to prescribe rules and regulations as he may deem necessary to secure a just and equitable distribution thereof (of needed irrigation water) among 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."

This statute is discussed in detail in plaintiff's other Briefs and especially in that of the United States. Let us assume that it is susceptible to the interpretation of Department of Ecology with regards to the Chamokane. What Department of Ecology is contending is that the Secretary's authority and obligation under the statute is limited to "waters necessary for Indian lands" and that he would have no jurisdiction over any theoretical "surplus." Let us also assume that there is some "surplus" waters and it becomes obvious that the Secretary and his

Tribal designee (as provided in Appendix II in the proposed Federal rules) would be administering a single, Tribal resource for the benefit of the Tribe and its members. This resource is not like the "mighty" Columbia. It is a limited resource in which any alleged surplus would have to await for its determination the vagaries of weather and run-off in any particular year. It would be totally impractical, if not illegal (under the Yakima case, supra) to so fractionate and segment the administration of this resource so that the State of Washington would be administering the theoretical, fluctuating, changing "surplus" coincident with the Secretary and the Tribe administering the same resource (the Chamokane waters) as a whole.

Such a course would give the State its choice of three approaches. The State could proceed as it has in the past issuing permits without regards to the water availability, leaving it to the United States or the Tribe to litigate ad nauseum to keep the permittees in control. The State could "stand by" ready to step in in any given year when some theoretical administrator might determine that there is a surplus, and administer that small surplus among several non-Indian permittees. Finally the State could refer its potential clients to the Tribe and the Secretary, for conditional water permits to be administered in good water years by the United States or the Tribe.

The presence of these state "surplus waters" permittees would require constant on going policing and monitoring, either by the State or the United States.

We submit, however, that this Court need not enter this arena. If it finds as we believe the evidence indicates that there is no likelihood of a "surplus" available for non-Indian permittees, the issue becomes

moot. The Tribe and the Secretary, assured of the minimum stream flow, will then be responsible for administering any surplus above that minimum stream flow, presumably making it available for the irrigation of nearby Indian lands.

Department of Ecology on page 37 seeks to simplify this issue by the question:

> "Does the State of Washington have authority to issue water rights authorizing withdrawal and use of waters located on non-Indian lands within the original boundaries of an Indian Reservation?"

Stated in this manner, and assuming a single, isolated water source on non-Indian lands, we could possibly accept a concept that the state could exercise jurisdiction. The hypothesis, however, does not exist in the real world. Except for minimal quantities of water that fall only on the non-Indian land and perhaps reach the farmer's cistern, well or small storage pond, we can think of no possible instance of a source of water on a non-Indian farm that is not a portion of a general water resource. There invariably is, as on the Little Chamokane, a single creek, passing through miles of Indian land, or as in the case of the Chamokane a combination of a large aquifer and creek involving thousands of acres.

It is not accurate, therefore, to speak of waters "located on non-Indian lands" or on any land in particular. The waters constitute a complex hydrological system where individual uses involve the entire system and the surrounding community. How can it be legally practical for either the state or federal (federal-Tribe) to operate with a split jurisdiction within this unified system without as has already happened on the Chamokane, impairing or ignoring the legal rights of those governed by the other jurisdiction.

Chamokane is the classic example of what happens. Here we have a hydrological system (aquifer and creek) to which the United States and the Tribe has obvious paramount, superior Winter rights. Yet the State of Washington went right ahead issuing irrigation permits with little thought given to those superior rights. On the Little Chamokane going through the former Anderson property (the first named defendant in this case) now owned by the Tribe, the State of Washington issued a single permit to Anderson for three times the summertime flow. In its esthetic and scenic travels, that beautiful little creek bubbled and sparkled past and lent beauty to thousands of acres of Indian lands. These lands had obvious first rights to its waters including the right for it to flow past each property unimpaired and undiminished as a sparkling jewel, to the Spokane River. The destruction of this creek is a typical example of the exercise of state jurisdiction over waters on an Indian Reservation.

An example of the jurisdiction of the United States in practice is the fact that, whereas the State of Washington has issued about twenty-six irrigation permits to farmers on the south side of the Spokane arm of Roosevelt Lake, every single one of those permits required the approval of the Department of the Interior . Those approvals were primary and not secondary and recognized that the purpose of Roosevelt Lake was to be an esthetic, recreational, power producing resource of the people of the United States not subject to diminution by diversions for irrigation except with federal approval. Department of Ecology says on page 42 of its Brief:

> "The State of Washington has stated many times herein, as the Court did in Tweedy, that federal reserved rights are governed by federal law, not state law. And of course we would not have any quarrel with the contention that such reserved water rights would apply to all waters within a specific water body

whether located under trust severed non-Indian or Indian lands, or for that matter, located in part under non-Indian lands outside the original boundaries of a reservation." (Emphasis Added).

One reads that and wonders what we are litigating about.

On page 44 Department of Ecology states;

"The State asserts jurisdiction only over 'excess waters,' i.e., waters of a water body on non-Indian lands not necessary to satisfy rights of Tribes as reserved by treaty. Further, water rights issued by the State, applicable to water on non-Indian lands within a reservation, are clearly subject to all prior (senior) reserved Indian rights. . ." (Emphasis Added).

Non-Indian lands within the Reservation (all formerly Indian lands and derived either through homestead entry or supervised sale or transfer to a non-Indian) have no water rights at all if in fact the stream or aquifer is totally preempted by the Tribe's Winters Rights. This is obviously the case on the Chamokane, there being insufficient water to fulfill both the instream rights of the Tribe (minimum flow) and to irrigate its lands bordering the creek or basin.

Department of Ecology states on page 46:

". . . the state's assertion of authority in this case extends only to: (1) non-Indians. (2) non-Indian lands, and (3) waters beyond the amount required to satisfy Indian reserved rights. . ."

We ask again, why cross into this question of jurisdiction where obviously there are no "waters beyond the amount required to satisfy Indian reserved rights?"

Department of Ecology, beginning at page 46, cites the only case that supports its theory, that of the State Superior Court in Tulalip Tribe v. Walker, Snohomish County No. 71421 (1963).

We totally disagree with that opinion and regret the fact that no one saw fit to appeal it in behalf of the Tribe. Nevertheless the entire decision is based on assumptions that are not existent in our

case. It found that the state could issue permits only to "surplus waters" and the Court says in its Opinion:

> "I can find no case which denies to a state the power to assert its legitimate interest in the waters of a non-navigable stream flowing across lands owned in fee by non-Indians where only the right to the use of such waters by non-Indians is involved and the right to use by Indians is not affected thereby. . ." (Emphasis Added).

In Chamokane we are not talking about waters flowing only across non-Indian lands. Further the right to the use of Chamokane waters by the Tribe is directly affected by any use of the same waters by non-Indians either from the Chamokane aquifer or the stream itself. The affect is direct and positive. The whole issue in this case is the Tribe's right to continue to use or enjoy the benefits of the creek versus its depletion and impairment by non-Indian use.

ACTION BY WASHINGTON STATE POLLUTION CONTROL HEARINGS BOARD ON WATER RIGHT ON LITTLE SPOKANE RIVER ANALOGOUS TO CHAMOKANE CASE

Department of Ecology (page 46) saw fit to append to its Brief a copy of the Superior Court's decision in the case of Tulalip Tribe v. Walker, alluded to above.

Department of Ecology should therefore not object to the writer appending a water rights decision of the Pollution Control Hearings Board regarding the Little Spokane River and it is attached marked Appendix IV.

The Court is certainly familiar with the Little Spokane River which while about five to ten times as large as Chamokane Creek, constitutes a beautiful, recreational, esthetic resource of the Little Spokane Valley, winding down past Wandermere Golf Course where it is spanned by the 17th and 18th holes.

The attached decision is in an appeal to the Pollution Control Hearings Board by the Little Spokane Community Club from the granting by Department of Ecology of Surface Water Permit No. 16229 to a Howard H. Gatlin for a diversionary irrigation use of 2.0 cfs of the Little Spokane's summer flow of water. Thus, except for the larger size of the Little Spokane River and its more dense residential population, it is a situation remarkably like the permits issued by the State of Washington and especially that of Defendant Smithpeter to the Chamokane waters.

The writer quotes from the Board's conclusions, beginning on page 5, as follows:

> "Before considering the specifics of this matter, the Pollution Control Hearings Board first takes note of a gradual change over the years relative to the accepted uses of public waters, riparian rights, once paramount, gave way in the arid West to the doctrine

of non-riparian appropriation for beneficial use. More recently there has been a recognition that esthetic and recreational uses of public water are as important as earlier, historical rights of irrigation. Riparian rights for recreational purposes on non-navigable lakes have been recognized in decisions of the State Supreme Court and it may be reasonable to assume that the court some day may also apply this doctrine to non-navigable streams. In any event the Water Resources Act of 1971, stating that public waters of the state are to be "protected and fully utilized for the greatest benefit to the people,' includes use of water for 'recreational' purposes and 'preservation of environmental and esthetic values' among its 'general declarations of fundamentals."

and

"In the instant matter there appears to be a classic example of this gradual change in acceptable uses of public water bodies. Once a farming region dependent to a great extent on irrigated water removed from the Little Spokane River, the area between Chattaroy and Dartford today -- intervenor's non-riparian acreage being an exception . . . is almost entirely devoted to the development of river bank and upland 'country living' homesites. The Little Spokane River has changed from an agricultural stream to a residential brook but respondent, (Department of Ecology) in its field examinations and consideration of intervenor's application, took no more notice of this basic change in the use of the Little Spokane River than to make a cursory acknowledgment in its finding that 'irrigation and esthetic benefits should not be . . . undermined.' It well could be asked therefore, what agency of the State government is to prevent such undermining if not respondent? Respondent cannot shirk its responsibility for establishing minimum flows by saying that a 'specific flow necessary for recreational and esthetic purposes has not been made.' Is the Little Spokane River, now primarily a residential brook, to be drained dry by irrigation withdrawals simply because respondent has not gotten around to making a minimum flow study? We think not."

The Hearing Officer then quoted RCW 90.03.290 (page 9 of Opinion) that the Department shall reject an application if

". . . the proposed use . . . threatens to prove detrimental to the public interest, having due regard to the highest feasible development of the use of the waters belonging to the public. . ."

and finds

"The evidence before us establishes that the diversion would be, and was, detrimental to the public interest, having due regard to the highest feasible use of the water belonging to the public. . ."

Everything that was found and said by the Hearing Officer about the Little Spokane can be doubly said about the Chamokane. If we totally ignored the Tribal rights and interest, it would still exist as a fragile but marvelous esthetic, ecological, recreational resource of the community. Undoubtedly that Hearing Officer would have brought to a screeching halt the issuing of irrigation permits to any of the defendants or applicants. Adding the Winters rights of the Tribe, the Federal jurisdiction, the fact that the Tribal rights pre-date those of any of the defendants, that Hearing Officer would have wiped out the irrigation uses and protected the whole acquifer and stream for the Tribe and the public.

WATER RIGHTS OF LAND TRANSFERRED TO NON-INDIANS

It is difficult to follow the reasoning of the state in this section beginning on page 53 of its Brief. Apparently what it argues for is that successors in interest of allottees somehow succeed to the prior interest of the original allottee to the use of water. The state then leaps to this conclusion:

> "However, once the federal trust relationship to the allotment is severed, the rights of the new non-Indian become subject to state water laws."

The Powers, Hibner and Skeem cases at most hold that a successor in interest of an allottee succeeds only to the actual "inchoate" water right of the allottee. In Hibner that was measured as follows:

> ". . . for the actual acreage that was under irrigation at the time title passed from the Indians, and such acreage as he might from reasonable diligence place under irrigation. . ."

One asks rhetorically: How does this language in any way subject the derived right of the non-Indian to state jurisdiction? Further: How can the state then make the quantitive leap that it has jurisdiction, as in the case of defendant Smithpeter, to issue a single permit to 10%

of the total flow of the creek to irrigate 320 acres of land. The records will show that the land involved never was owned by an allottee. It was Tribal land opened for homestead. Further, the original owner utilized very little water for a few acres of gardens and hay.

Assuming that there are successors in interest of Indian lands in the case at bar, we have at most derived rights to use small amounts of water for garden, household and stock watering purposes. None of the lands were irrigated. At most the original allottee had the right to look forward to the possibility that the Tribe and the federal government, in preserving Chamokane's esthetics and other instream benefits, would allow some irrigation usage of waters surplus to the instream benefits. This small amount of water could be allocated to the various lands on the Chamokane. Following the mandate of 25 USC 381, the Secretary (and the Tribe) would most obviously seek "to secure a just and equitable distribution thereof among Indians residing upon such reservation. . ." (Emphasis Added).

CONCLUSION TO THIS SECTION

If the Court concludes that the Tribe and the United States has Winters rights to a minimum flow of 30 cfs and to any seasonal surplus over that for the irrigation of Indian lands, it need not deal with the alleged State jurisdiction over "surplus waters." If the Court finds some theoretical "surplus waters" it should conclude that these waters, at least on the Spokane Reservation, are under the jurisdiction of the Secretary of the Interior and of the Tribe and not of the State of Washington.

30 CFS NEEDED TO PROTECT FISHERY AND ESTHETICS

The Chamokane as a fishery becomes borderline at best if its summertime flow, during hot weather is allowed to drop much more. We will not

repeat the discussions of our earlier briefs regarding the Narvarre report and testimony in which Mr. Navarre established that the creek's value as a fishery rapidly diminished with summertime drops in flow. While these drops hindered and limited the fish in their feeding and spawning habits, the principal thing harming the fishery was the increase in water temperature to points exceeding 68 degrees above which trout could not survive for long.

Department of Ecology, page 24, seeks to rationalize around this 68 degree limit and questions whether "these affects are so adverse as to violate the reserved rights of the Tribe in this limited trout fishery."

All over the country and especially in the State of Washington minimum flows are being established and maintained to protect fisheries that do not compare to that of the Chamokane. It is not the intrinsic value of the fishery by itself, it is the fishery as a part of an esthetic, ecological, recreational resource. There may be but one pair of blue birds per 40 acres in a forest preserve but those few blue birds are without price, cannot be valued and are in fact a priceless part of the total ecology and esthetics. They are the final flicks of the brush of Mother Nature, the master artist.

According to Navarre the stream is nearing the limits of favorability in the fish habitat. Do we then pass two degrees and ten second feet further beyond those limits on the rationale that these last two steps really kill very few more fish? One would think that the Departments of Ecology and of Natural Resources, being pledged to the protection of our deteriorating environment, would be fighting to save this creek instead of aiding in its destruction.

GENERAL CONCLUSION REGARDING DEPARTMENT OF ECOLOGY BRIEF

On page 30 of its Brief, Department of Ecology lists six "factual determinations" that it claims must be made before the Tribe's reserved water rights can be established and quantified. Was a trout fishery a "purpose?" Could it have been preserved by 20 cfs? Was agriculture and timber a "purpose?" Was there an intent to eventually irrigate timber lands? And other questions.

One wonders why these questions are asked. The obvious purpose of the Reservation and especially of the Chamokane Valley was to provide a place for the Spokane Indians to live and support themselves on at least a parity with the White community. Everything that could be included in their basic quality of life and in their making a living ("assuming the Arts of Civilization") was intended.

Why must we fragment this general intent and purpose into small parts like "Did they really intend to preserve this particular creek?"

Department of Ecology says to the Tribe "Because you have protected and preserved this creek and want to continue to do so and because you have shrunk from irrigating you own lands to accomplish this end we now find that Number 1, you did not have a Winters Right to preserve and protect it, and Number 2, because you preserved and protected it you did not intend to use it for irrigation and therefore you have no Winters Rights at all in its waters?"

The Department of Ecology in its conclusion, sheds tears for the State's water permittees and says that "the loss of water rights would play havoc with our entire economic structure not to mention potentials for social disruption." (Page 61). Department of Ecology then proposes that the State be authorized to continue to issue water permits except that its own minimum flow requirement of 20 cfs be maintained.

On page 62 Department of Ecology makes this offer: ". . . We urge

the scheme for quantification of reserved rights contained in our 'recapitulation' be accepted by the courts. . ."

This "scheme" urged by Department of Ecology totally ignores the prior and paramount Tribal rights and in fact gives the Tribe and its members nothing. It proposes the allowance of Winters Rights only for domestic and stock watering uses. It would restrict the use of waters for timber lands to "purposes of firefighting and road and related construction incident to the production of timber. . ."

It would deny any use for esthetics, recreation or fishery purposes except to the extent of the 20 cfs minimum provided by Department of Ecology in the Smithpeter permit.

It would effectually deny any use of the Chamokane waters by the Tribe for irrigation "because the Tribe's own witnesses expressed an intention to irrigate only from the Spokane and Columbia Rivers, this figure approaches zero. . ." (Explanation: Zero waters for irrigation of Tribal lands.)

In the light of this regressive, non-responsive and most unrealistic "offer" by Department of Ecology, is there any wonder any more why the Tribe, after a period of protests to the State, has had to resort to this court seeking an order defining its actual Winters Rights and seeking an injunction against the State of Washington not to violate the Tribal rights.

ANSWER TO BRIEF OF DEPARTMENT OF NATURAL RESOURCES

It is interesting that in this case plaintiffs are pitted against the Department of Ecology and the Department of Natural Resources, each of which should, along with the Tribe and the United States, be equally interested in preserving the beautiful Chamokane against further diminution or impairment caused by irrigation diversions. In the Summary of the Case outlined by the Department of Natural Resources, hereinafter called "DNR," DNR takes a misplaced ambit wherein it (top of page 2) speaks of the plaintiffs as seeking "to displace state law." On the next page it speaks of the arguments of the United States and the Tribe as being "broad, generalized and, indeed, in startling relief." We submit that plaintiff's arguments are Hornbook Law as it applies to Indian water rights. Plaintiffs are not seeking to displace state law because state law has no place at all in the administration and management of a resource such as the Chamokane on the Spokane Reservation. What is being sought is not to "displace" state law because the state law referred to never was legally in force or "in place" in its issuance of water rights to Chamokane waters.

DNR, after speaking of the plaintiff's arguments as being so "broad, generalized, etc." then advances two principal arguments that are so novel and without legal foundation that time and space probably should not be spent in answering them.

The first argument begins on page 3 (DNR Brief) wherein DNR takes the position that somehow the Spokane Tribe lost its Winters Rights to the Chamokane when it ceded its aboriginal lands (outside the Reservation) in 1887 and received an increased payment for those lands in the settlement of its claims case in 1968.

The second argument, equally novel, (beginning page 15 of the DNR Brief) is that the Winters Rights of the Tribe are limited to "use for irrigation purposes" and then only to specific agricultural lands that have remained in the ownership of the Tribe since 1881. DNR, like Department of Ecology, would exclude all timber lands and all lands reacquired by the Tribe. It would also exclude all lands opened for homestead in 1908 but "restored" to the Tribe in the Land Restoration Act of 1957. It can cite no statutory or case law to support either of its arguments. There is none.

DNR'S ARGUMENT THAT EXTINGUISHMENT OF TRIBAL TITLE TO CEDED ABORIGINAL LANDS ALSO EXTINGUISHED ITS IMPLIED WATER RIGHTS IS WITHOUT MERIT

We give DNR an A plus for originality because, as mentioned above, beginning on page 3 of its Brief, it advances an argument never before advanced in a Winters Doctrine case. It argues that in the Cession of the Tribes' non-Reservation aboriginal lands of 1887, as confirmed and additionally compensated in 1968, the Tribe also ceded its Winters Rights of its Reservation lands.

DNR states on page 10 that

> "The acceptance of the settlement in the amount of $6,700,000 by the Spokane Tribe (in its claims case) from the United States extinguishes any claim of an implied paramount right to water arising outside reservation boundaries."

On page 12 DNR says "The Spokane Tribe's aboriginal title to the lands and waters in question has been extinguished."

DNR has its argument completely reversed. In reading the Winters case, and its successors, the legal conclusion always was that, in the Tribe ceding its vast aboriginal lands and agreeing to placement on a very small reservation, there was reserved sufficient rights to water

to achieve the purpose of the Reservation. In every instance, Winters, Conrad, Walker River, Arizona and Ahtanum, the court was dealing, as this court is on the Chamokane, with a stream originating off the Reservation in the ceded area.

There is no contention by the Tribe and the United States that the Spokane Tribe, in the cession of its aboriginal lands, did not also cede the mountains, the forests, the minerals and the waters that inhered in those lands. That isn't the question. The question in this case and in any other Winters case is whether the United States and the Tribe reserved from waters originating off but traversing the Reservation sufficient waters for the beneficial needs and purposes of the Reservation itself.

What was the situation in the major Winters Cases? Each involved Tribe had its claim (similar to that of the Spokanes) for the unconscionably low consideration paid for ceded lands. Those claims have by now been litigated or settled. In no instance was there any consideration given to the fact that the Tribe had Winters Rights for Reservation use to waters originating in the ceded area.

The writer has before him the Findings of Fact and Judgment in the joint claims case involving the Blackfeet (the Conrad case), the Fort Peck and the Fort Belknap (the Winters case situs) Reservations. These voluminous findings will not be filed with the court or circulated but are available upon request. (Docket No. 279-A Ind. Claims Commission).

The joint claims case was decided March 31, 1967, one year earlier than that of the Spokane Tribe. In fact the same claims attorneys (Wilkinson, Cragun and Barker) that represented the Spokane Tribe also represented the Blackfeet and the Assiniboine Tribes of Indians (Fort Belknap). The findings are quite similar to those in the Spokane claim.

They describe the vast area, the aboriginal lands, originally ceded by the Tribes and the Reservations that were reserved. They describe the use by the Tribes of those lands for hunting, fishing, berry gathering, buffalo hunting, etc. They discuss the methods followed in appraising their value as of the time of taking and contain a formula for the establishment of the value, the resulting award and the division of it between the involved Tribes.

The valuation describes the area and the process and especially the resources. For example on page 258 the findings state:

> "Nearly all of the subject area lies within the drainage basins of the Marias and Milk Rivers, tributaries to the Missouri River . . . the drainage basin of the Milk River consists principally of a flat glacial plain formed by the last Pleistocene ice sheet . . . (page 259). The valley of the Milk River is a flat, alluvial valley which is mostly unbroken with low generally smooth escarpments. . ."

The findings then describe the soils involved, their fertility and then at page 260:

> "Those soils of the Milk River plains . . . may be heavy textured and not as good for tillage as the Joplin, Williams and Scobey loams. The heavier soils are, however, good grassland soils. . ."

(Note: This is the precise area where the non-Indian water users settled on the Milk River to later become unsuccessful parties in the famous Winters case.)

The findings (page 275) proceed to describe the areas involved in the Blackfeet cession. Included is a description of the evolution of the area from Buffalo pasture to sheep and cattle and finally to more intensive agriculture and on page 272:

> "It had long been recognized that the homestead policy of 1862 was not suited to the Great Plains area. . ."

Then:

"By 1884, after seeing homesteaders file on bottom lands and hay lands which they had been using; after seeing the more prudent cattlemen acquiring title to such lands, and seeing water holes fenced, many of these same cattlemen were in favor of a leasing program."

Finally on page 287 of the findings the following:

"(1) The Blackfeet Nation shall have and recover from defendant the sum of $11,125,606.40 . . . and

"(2) The Assiniboine Tribe of the Fort Peck and Fort Belknap Reservation in Montana shall have and recover from defendant the sum of $3,108,506.40. . .

"(3) The Sioux Tribe of the Fort Peck Reservation in Montana shall have and recover from defendant the sum of $2,364,216.80."

These Findings and Judgment, far more voluminous than those in the Spokane claim, go into detail on all questions of valuation of various lands, apportionment between Tribes who shared the original lands (an issue non-existent in the Spokane claim) and finally the best judgment both as to valuation and allocation.

On page 323 of the Judgment the Claims Commission zeroes in on valuation and in a section entitled "Valuation" begins by saying that "at various stages of the proceedings there are five valuation reports in this record." It sets about choosing the best one and reaching its judgment as to valuation. It then speaks astonishingly of the cattle era prior to the 1887 cession agreement. The figures are incredible. ". . . By 1885 more than 5 million cattle had been driven northwestward from Texas." Then ". . . the winter of 1886-87 saw the end of the boom in the cattle business. The hazards of open range grazing were well known but the severity of the winter of 1886-87 caused the death of thousands of cattle in the overgrazed range. . . This experience forced adjustments in the open range system. Herds were reduced, shelter provided and hay cut for emergency feeding. . . and (page 327) this

catastrophy caused a reassessment of the open range policy. . . then . . ."

> "The problems of the cattlemen were compounded by the continuing advance of homesteaders into cattle country. The homesteader would file on a piece of land containing water or bottomlands where the cattleman had been accustomed to water his stock and cut hay. Once this homestead was fenced it could reduce the grazing range of the cattleman by a considerable amount . . . this spelled the end of the open range era. . ."

The Judgment speaks of this rapid change from open range to fenced farms with the fencing off and use of available water by the settlers. The relevance is that at the very Time of Taking (1887) the land status and use was changing from open range to fenced farms and the question was whether this caused an increase in reasonable market price to be considered by the Commission in its award. It becomes apparent that the Commission did not take this step and held to the value of the lands as grazing lands.

Page 340:

> "In this case, however, once the conclusion has been reached that the subject lands were among the best grazing lands in the United States. . . any consideration of alternative use, or lack thereof, such as for farming, becomes immaterial. . ."

They held that much of the appraisal reports recognizing this change in value and use was therefore immaterial. Based on this decision the Claims Commission then proceeded to its own valuation reflected in the judgments set out above.

THE WINTERS - CLAIMS CASE SITUATION IS THE SAME ON THE FORT BELKNAP, ETC., RESERVATIONS AS IN THE CASE OF THE SPOKANES

We thus see that the claims cases for the Fort Belknap and Blackfeet Reservations, the cradle of the Winters Doctrine, are exact parallels of that of the Spokanes. The difference is that long prior to the filing of their claims and their settlement as outlined above, each had

already had its Chamokane case (Winters for Fort Belknap and Conrad for the Blackfeet). Obviously the fact that each Tribe had its adjudicated Winters Rights to waters originating in the ceded lands was of no relevance to the valuation that became a basis for the claims judgments. The Winters Rights for the Reservation lands to off-Reservation waters were not even mentioned.

What is said above is true of most, if not all, of the other Tribes who have had Winters cases and most certainly of the Walker River Reservation, that of the Yakima and of most of the Tribes involved in the Arizona v. California case.

DNR cannot cite any case supporting its position because there are none. It is for that reason we cannot cite any case in our answer that deals with the question DNR raises. It has never been raised in a previous case. It is understandable that it was never raised because it is without merit.

THE DNR ARGUMENT THAT ANY TRIBAL CLAIM FOR WATER IS WITHIN THE EXCLUSIVE JURISDICTION OF THE INDIAN CLAIMS COMMISSION IS WITHOUT MERIT

Equally surprising is the contention by DNR that this action should have been filed with the Indian Claims Commission. All of the relevant statutes (25 USC 70a, et. seq.) immediately establish that that Commission could not possibly have jurisdiction of such a matter.

In the first place the only purpose of the Commission (which will expire soon) is to process claims against the United States. Further the types of claims are limited to the five categories set out in 25 USC 70a. None of them could relate to the matters in this case.

This case is not a claim against the United States. The United

States is a principal plaintiff in what amounts to a "claim" against the State of Washington and the other defendants.

Perhaps it is the theory of DNR that the claim should have been against the United States because the United States wrongfully disposed of the Tribe's water. This position is untenable because the whole theory of this lawsuit is that the United States did not dispose of the Tribe's water but rather, along with the Tribe, reserved it for the beneficial needs of the Reservation.

THE DNR ARGUMENT THAT THE WINTERS RIGHTS OF THE TRIBE IS LIMITED TO IRRIGATION IS WITHOUT FOUNDATION

We have already answered the Department of Ecology contention that the Winters Rights of the Tribe is limited to irrigation, domestic and stock watering purposes. The same argument advanced by DNR beginning page 15 of its Brief, takes such an unexpected tack that we will deal with it separately. DNR states in a heading, page 17.

> "NO FACTUAL BASIS EXISTS TO CONCLUDE THAT THE SPOKANE INDIANS DEPENDED UPON FISH FROM CHAMOKANE CREEK FOR THEIR SUBSISTENCE."

DNR quotes the position of plaintiffs from United States Brief wherein the United States states "It is undisputed that the Spokane Tribe was historically a fishing people, etc." and makes the surprising accusation "These statements are false." It cites from Findings in the Spokane Tribal Claims Case in support of the DNR contention that the Spokanes were not in fact "a fishing people." The very Findings they cite contradict their argument. The quoted portion of the Claims Commission Findings describing the food gathering and hunting activities of the Tribe included "From June to October the Spokanes fished the Columbia and Spokane Rivers."

DNR then argues that the Spokanes were not dependent on fish (especially from the Chamokane) and advance the concept that the Spokanes were moved to their Reservation "to integrate the Indians into the agrarian level of our economy" namely to be farmers. This argument of DNR is so specious that, as with its argument regarding the Claims case, it is difficult to answer. The evidence before the Court clearly establishes the fact that the Spokanes were a "fishing people" and that it was the fish of the river system including the Chamokane that surrounded their Reservation that made it feasible for them to live there.

The Findings of the Claims Commission are replete with references to this fact and that it was a combination of hunting, root gathering, berry picking, gardening and especially fishing that supported the Spokane Indians. They lived in a fish-river culture of which the Chamokane was a vital, though schematically small, part.

Any quick review of the Claims Commission findings to verify the assertions we have made should include a look at page 239, describing the first, the 1872 Reservation, formed for all of the Indians including the Spokanes of this area, and also page 240, wherein is reported the 1877 Agreement establishing the first Spokane Reservation and finally the Field Order of 1880 and the Executive Order of 1881 enlarging the 1877 Reservation to its present boundaries.

The Findings state on page 242 "After the 1877 Council white settlers gradually crowded the Spokane Indians away from their fisheries. . ." Other cites stand out.

Page 246:

> ". . . They are identified as a Tribe of Flathead (i.e. Salish) Indians in 1811 by another trapper, Alexander Henry, who described them as river dwellers. . . Agents of the Pacific

Fur Company applied the name 'Spokane' to the river along which they dwelt in 1813. . ."

Page 248:

". . . In December most of the Spokane Indians retired to their winter villages and camps, where they subsisted on dried fish, roots and game. . ." (Note: Attention is called to other evidence particularly the testimony of Alex Sherwood that the principal wintering villages were along the Chamokane where they could get fresh fish and reliable "warm in winter and unfrozen" pure water.)

Page 249:

". . . By 1880 many Spokane Indians were attempting to live by fishing and farming, having abandoned the hunter life. . ."

The case Judgment appended by DNR (The Spokane Tribe of Indians et al in the Court of Claims) contradicts DNR. Available quotes are numerous. For example page 61:

". . . The Spokane Indians were a land using and fishing group . . . during the last half of the Nineteenth Century."

The writer was active as general counsel of the Tribe in all phases of the Claims Case and knows that most of the Findings, actually prepared by the Tribe's Claims attorneys with some assistance from the writer, were based on the anthropological findings of Dr. Verne F. Ray, who acted as an expert witness in most of the Claims Cases in this area. In a recent work entitled "Ethnic Impact of the Events Incident to Federal Power Development on the Colville and Spokane Indian Reservations" dated March 19, 1977, Dr. Ray goes on for ninety pages outlining and establishing the fishing - river culture orientation of the Spokanes and the Colvilles prior to Grand Coulee. This scholarly work will not be filed with the Court but is available to the Court or any party upon request. The whole report substantiates the Tribal position in this case - that the Spokanes were in fact a river - fishing people and that manifestly there was reserved the manifold bounties and uses of the River-Chamokane Creek system to make the Reservation a decent, ample place on which to live.

There follows some typical quotes:

Page 17:

> "The name of the Lower Spokanes was 'Sinalt' occupying the lowermost part of the Spokane River Valley. . ."
>
> "The name of the Middle Spokanes was 'Skaseelnee' meaning 'fisherman.' They were peoples of the Middle Spokane River Country. . ."
>
> "The name of the Upper Spokanes was 'Sinwamenee' meaning 'people of the Steelhead trout place.' Their Tribal territory included the Upper Spokane River Valley, to its headwaters, and the Valleys of the Little Spokane River and Latah Creek."

On page 17 he describes the effect of building Grand Coulee Dam "A way of life that had been thousands of years in the making was damaged or destroyed, a way of life represented nowhere else in the world."

(Note: Think of it . . . and the fact that this little sliver of a creek, the Chamokane, is really all that is left of that way of life.)

Page 41:

> "The economic pursuits of the Colville and Spokane Tribes, in aboriginal times, consisted of fishing, hunting and gathering."

He described the combined fishery as "beyond compare worldwide. . ." Page 45: "One of the most productive rivers in the world of salmon. . ." And "Salmon was the staple food for both the Colvilles and the Spokanes. . ." Page 59: "The salmon and other fish taken from the rivers provided around half the native subsistence and the lands immediately adjacent to the rivers supplied a significant part of the game which was taken. . ." "The village life was almost wholly confined to the river banks. . ."

Page 62 - with the building of Grand Coulee Dam: "How is one to evaluate the aesthetic loss, the transformation of a beautiful and loved environment. . ." And page 63 "The Tribes suffered not only loss of many environmental assets of aesthetic and emotional worth; they sustained

incredible despoilment of their physical milieu. . ."

On page 79 he quotes from a Department of Interior Solicitor's Decision, dated May 29, 1914 as follows:

> "It would seem reasonable that the intention in the establishment of the Reservation was to include the land to the center of the river to protect the fishing interests of the Indians, as it is well known that the Indians secure a great deal of their subsistence from the fish obtained from the Columbia River."

We agree with DNR that we are not litigating the irreparable loss to the Tribe resulting from Grand Coulee. That nearly wiped the Tribe out as a fish - river people except for Chamokane Creek which still, somewhat diminished as a result of the water diversions by the State Permittees, flows as a prime, recreational, aesthetic fishing resource as it did in 1887, in 1881, in 1877 and in fact from time immemorial. Chief Louis could come today and find his accustomed place to relax on its banks, little changed from 1887 when, in the Parley, he spoke so emotionally and beautifully of the bounties of this wonderful fishery.

What was reserved? Obviously the river fishery in all its parts as much as the land. Are we to say that because the major river fishery was destroyed by Grand Coulee Dam, the Tribe cannot now retain the Chamokane?

OFFICIAL CONGRESSIONAL DOCUMENTS VERIFY FISHING-RIVER-WATER CULTURE OF SPOKANES

We have cited and included but small portions of this vast storehouse of official archives and government documents which support the Tribe's legal position.

Because it is immediately relevant and summary in nature we now include as Appendix V the Reports of House and Senate Committees on Indian Affairs, dated March 16, 1928, and April 13, 1928 regarding H.R.

5574 and S. 1480.

These bills authorized the Spokane and Kalispel Tribes to file claims in the United States Court of Claims for the unconscionably low consideration paid for their lands. The Bill was passed and an interesting included document is the Message from President Coolidge dated May 18, 1928, in which he returned the Bill without approval.

These documents are interesting in that they document the ongoing efforts of the various Tribes to bring to issue or litigation their various claims. Most of these efforts suffered the same demise as did those of 1928 in behalf of the Spokanes and Kalispels. This sorry history of vetoing or legislatively refusing to approve the filing of claims lead to the formation of the Indian Claims Commission as discussed above and through which the Spokane Tribe was finally able to file and settle its claim regarding its ceded lands.

Relevant in Appendix V are the Committee and Departmental Reports which highlight and summarize all the arguments of the writer in the preceding pages . . . the fishing-hunting-water oriented nature of the Spokanes. The House Committee Report constitutes an excellent historical summary regarding many points in this lawsuit. The writer will assume that the Court will peruse it and will quote only briefly from it as follows:

Page 4:

> "The Lower Spokanes were not crowded off their lands or deprived of their use thereof until the early eighties; the big bunch of them were driven off in the eighties following the creation by Executive Order of January 18, 1881, of the so-called Spokane Reservation for the benefit of the Spokane Indians out of a more or less worthless and barren portion of the habitat of the Lower, Middle and Upper Spokane Indian Tribes, lying north of the Spokane River, and which no White person then considered of any particular value, or desireable for present

White settlement.

> "With respect to the Indian use of this land. . . needing but a small amount of cultivated land, they selected, enclosed and cultivated small patches of the best ground; availed themselves of the best hay lands, and for the rest, used the land in its natural state, gleaning therefrom in season its roots, its berries, its game, and furbearing animals, gathering duck eggs in the Spring, catching immense quantities of carp, salmon and other fish during their running season for food and barter; hunting the deer and buffalo, and in small family parties roamed over the whole of their large holdings for their livelihood and pleasure during the year, only gathering together as a Tribe at the fisheries, the camas fields, and on special occasions. . ."

Page 8:

> "The loss of their salmon and other fisheries (outside the Reservation) was a most severe economic blow to those Indians and they still feel it. It was not the loss of a sporting game privilege to go out with a line in season and catch a fish or two. It was the loss of half their food supply for the family for the whole year. The average person has no conception of what these fisheries were . . . Fish were caught and cured by the tons."

Page 8:

> "The fisheries have dwindled until they produce far less than one percent of the fish they used to carry, and the Indians who now endeavor to catch a single fish or two are arrested and prosecuted. . ."

Appendix V (the foregoing reports) constitute one of the best summaries the writer has read regarding the extent and nature of the fishing and river operations of the Spokanes, their depletion and diminution and step by step eradication until 1928 (and thereafter until the present). It is difficult to comprehend that out of this wondrous fishery there remains a single part, the Chamokane, surviving to this day with a "single fish or two" for all the Spokane Indians.

THE EFFECTIVE DATE OF THE RESERVATION WAS EITHER 1877 OR TIME IMMEMORIAL

Why is the DNR so vehement in its contention that the effective date of the Reservation was 1881? It is quite clear that it was 1877

when the Tribes first ceded all their aboriginal lands outside the Reservation. Certainly if we ever had a case where the effective date of the Reservation of the waters was time immemorial we have it here. But let us assume it is 1881 - what difference?

There is no defendant that can claim a priority date earlier than 1881 especially since statehood occurred in 1889. We see no reason to deal in detailed arithmetic in this case. Once we establish the right of the Tribe to preserve and protect the 30 cfs minimum flow of Chamokane, once we establish that the Tribe had at the time of the Reservation and still has sufficient irrigable lands in the area to utilize beneficially any surplus, the creek is totally pre-empted. Why must we equivocate the fine line of dates of acquisition, etc? Clearly, as set out elsewhere in this Brief, the Tribe still has thousands of acres of land, just as irrigable as the Smithpeter lands, which could be as feasibly irrigated with Chamokane water. Practically all of this land has been owned by the Tribe since the establishment of the Reservation. Only a small amount has been recently acquired in its repurchase program.

THE TIMBER LANDS

Much of the fertile, cultivable farm lands went out of Indian ownership during homestead days. It is timber and grazing lands that are now being reclaimed and irrigated. Does DNR contend that because these lands were classified as timber lands in 1908 the Tribe is stuck with that classification forever? Of course it was the plan that as the timber was cut and cleared, the more fertile acreages would become agricultural. We are talking about the whole northwest. Think of the hundreds of thousands of Palouse, Half Moon Prairie, Peone Prairie and Spokane Valley lands that were timber lands in 1881. Today they are

fertile farms, some of the best in the world. Do not the Tribes have the same opportunity for agricultural development from timber to agriculture of similar lands?

Both Department of Ecology and DNR vacillate from premise to incongrous premise:

(a) Timber lands are not entitled to Winters water because "being timber lands" there was no intent to develop them agriculturally."

(b) Tribal irrigable lands in the Chamokane Basin have no Winters Rights to Chamokane for irrigation because the Tribe, wanting to protect and preserve the stream, did not intend to use it to irrigate the land.

(c) The Chamokane, intended to be preserved by the Tribe as a fishery and aesthetic, recreational resource, so as to preclude its use for irrigation, was not actually intended to be preserved as such because, being such a miniscule part of the vast Columbia-Spokane River fishery, it was so merged that it was overlooked and not even thought of as now contended.

(d) The Tribe did not intend to use any of the Chamokane waters to irrigate because it intended to use the "fertilized Spokane River waters" instead., hence no Winters rights for irrigation.

From these premises come their erroneous conclusion that the Tribe really has no Winters Rights at all to the Chamokane.

ANY WATER RIGHTS OF DNR LANDS ARE INFERIOR TO WINTERS RIGHTS OF TRIBE

DNR beginning on page 36 of its Brief, attempts to outline what it denominates its "Claim to Water Rights." Whereas DNR pours cold water on the certainty with which the Tribe has identified its lands suitable for irrigation from the Chamokane, it is impossible either from the

record of the case or the DNR Brief to identify any DNR lands as being dependent upon Chamokane waters. DNR merely takes the position that it owns Sections 16 and 36 in each Township except where it might own "in lieu lands" because for some reason or other it could not receive those sections. Where are the lands? We don't know.

DNR cites the State Enabling Act (page 38 of DNR Brief):

> ". . . now shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants or to the endemnity provisions of this act. . ."

DNR then leaps to the conclusion that it received these lands upon statehood on November 11, 1889 and therefore "Natural Resources submits that its water rights for all the granted trust lands in question have a priority date of November 11, 1889. . ." (Page 39).

In making its claim that it received the school lands on the date of statehood, DNR must be referring to lands outside the Spokane Reservation. The transfer of school lands (Sections 16 and 36) on the Spokane Reservation, if it occurred at all, was by virtue of Senate Bill 6163 (35 Stat. L. 458), enacted by the United States Congress on May 25, 1908. It is therefore clear that any title received by DNR to school lands on the Spokane Reservation was subsequent to the date that act was enacted.

There is attached as Appendix VI a copy of that bill and the related Congressional comment which would indicate that for but $1.25 per acre (as compared to the $5.00 per acre received by the Tribe for the homesteaded lands) the state could hardly believe that it received anything but arid grazing lands with no water rights at all.

The water right contended for by DNR would in effect be a "little Winters Right," implied from the fact of the Reservation of the involved "school" or DNR lands. It seems quite out of place for DNR suddenly to

invent this Winters Right of its own after its attack on the Tribe's Winters Rights. DNR also, without identifying its lands, lays claim to some kind of riparian rights. Its little Winters Rights and riparian rights somehow take on a reality and priority above that of the Tribe's Reservation lands.

It is interesting that a very similar argument was raised by the water users in the Winters Case and we find the United States Supreme Court dealing with it (207 US 564 at 576). We will quote with some skips as follows:

> ". . . the lands ceded were, it is true, also arid; and some argument may be urged, and is urged, that with their cession there was the cession of the waters, without which they would be valueless, and 'civilized communities could not be established thereon.' . . . We realize that there is a conflict of implications, but that which makes for the retention of the waters is of greater force than that which makes for their cession. . . The government is asserting the rights of the Indians. . . By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians. And the rule should certainly be applied to determine between two inferences, one which would support the purpose of the agreement and the other impair or defeat it. . . Another contention of appellants is that if it be conceded that there was a reservation of the waters of Milk River by the Agreement of 1888, yet the reservation was repealed by the admission of Montana into the Union, February 22, 1889, 'upon an equal footing with the original states.' . . . 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 . . . (citing cases) . . . That the government did reserve them we have decided, and for a use which would be necessarily continued through years. This was done May 1, 1888, and it would be extreme to believe that within a year Congress destroyed the reservation and took from the Indians the consideration of their grant, leaving them a barren waste. . . but our construction of the Agreement makes it unnecessary to answer the argument (that of the water users) in detail. For the same reason we have not discussed the doctrine of riparian rights urged by the government. . ."

How applicable the above comments of the United States Supreme Court in the Winters case to the arguments of DNR in the case at bar. Without any Treaty, Agreement or specific statute or any right whatever

except some implication drawn from the State Enabling Act, it seeks to place its own "implied rights" on a level higher than those of the Tribe.

DNR seems to contend that upon statehood the United States "gave" water rights to the state for the school lands which now in retrospect conflict with the Winters Rights of the Tribe. Many cases can be cited showing the high level of trust existing between the Tribes and the United States and the almost conclusive, overwhelming implication that, absent clear Congressional enactment, no grant or conveyance of Indian land or rights will ever be implied.

The case of Shoshone Tribe v. U.S., 57 S.Ct. 244, 299 U.S. 476 (1937) highlights this. There the question was not whether the United States had "given" Tribal lands to a state but whether it had transferred Tribal land or rights thereto to another resident Tribe. On page 252 the court says:

> ". . . The power (to manage) 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 . . . for that . . . would not be an exercise of guardianship, but an act of confiscation. (Citing Cases) . . . The right of the Indians to occupancy of the lands pledged to them may be one of occupancy only, but it is 'as sacred as that of the United States to the fee. . .'" (Citing Cases).

In Minnesota v. Hitchcock, 185 U.S. 373, the question was whether a Reservation resulted, where, lacking Congressional or executive formalization, a treaty ceded aboriginal lands outside a reserved area (almost identical to the Spokane's 1887 Agreement and its relationship to the 1877 Agreement and the 1881 Executive Order). Finding that there was a reservation "clearly inferable," the Court was faced with the conflict of two policies, the protection of Indian lands as against the designation of certain Sections for public school purposes. (The identical situation as contended

for by DNR).

The Court said, on page 661:

> "Contrasting the two policies . . . that in respect to public schools and that in respect to the care of the Indians. . . it would seem we are called upon to uphold the rights of the Indians, which otherwise would be totally lost without compensation . . ."

How far the Courts will go in protecting Tribes' "implied rights" and how reluctant the Courts are to find implied rights in states or other entitities that might conflict with the Tribes' implied rights is dramatized in many cases.

In Menominee Tribe v. U.S. 404, 88 S. Ct. 1705, the Tribe itself sued the United States for the claimed loss of its fishing and hunting rights by reason of the Congressional termination of its Reservation. The court held that since the Termination Act did not specifically mention or cover hunting and fishing the Tribe still retained its hunting and fishing rights and hence had no claim for their loss.

CONCLUSION REGARDING DNR BRIEF

It is difficult to find any relevancy or merit to the various arguments advanced by DNR. DNR in its novel, original approach would deny even the rudiments of the Winters Doctrine and would foreclose the Tribe totally from its Winters rights.

ANSWER TO BRIEF OF BOISE CASCADE

The writer will not dwell at length on the Brief of Boise Cascade. Most of the arguments raised by it were also raised by Department of Ecology and Department of Natural Resources and are answered above and in the Reply Brief of the United States.

Boise Cascade tries to raise doubts regarding the hydrological connection between the intermittent surface and ground waters on its lands and the Chamokane aquifer and waters. We will not re-discuss all of the evidence, principally that presented by Walter Woodward, indicating rather conclusively the close hydrological unity and connection between all of the waters, ground or surface, within the Chamokane Basin. The Woodward testimony recognizes a "breaking off point" several miles north of the Reservation where presumably the waters divide and head north rather than south. If in fact Boise Cascade has lands too far north to drain into the Chamokane aquifer those lands would not be affected by this lawsuit. The various maps do indicate rather conclusively that all of its lands are within and tributary to the Chamokane Basin and the aquifer that feeds Chamokane Creek.

WATER NEEDS OF BOISE CASCADE MINIMAL

Boise Cascade states on page 2 "although the total amount covered by the applications (its applications to Department of Ecology) equals approximately 450 acre feet, Boise Cascade anticipates it would not use over 100 acre feet per year."

Boise Cascade then indicates, beginning on page 8, that it uses and will use water only for road maintenance or fire protection and that "it does not now nor does it contemplate using the water for irrigation, mining or other purposes."

The Spokane Tribe would agree that Boise Cascade be allowed to utilize all the water it needs for "road maintenance and fire protection." It wants fires to be prevented and controlled and roads maintained on this neighboring property. The Tribe, however, points out the minimal amount of water needed for these purposes. It suggests that Boise Cascade has grossly overestimated this amount. An average tank truck, hauling 10,000 gallons of water, would have to make thirty-six trips to haul an equivalent of one acre foot (about 350,000 gallons). It is inconceivable that Boise Cascade could ever use 100 acre feet for "road maintenance and fire protection."

GENERAL CONCLUSION

The Tribal plaintiff joins in the conclusion expressed by the attorney for the United States (page 61, United States Reply Brief). The Winters rights of the Spokane Tribe to preserve a minimum flow of the Chamokane of 30 cfs as an ecological, esthetic and recreational resource and to utilize any extra waters over that amount for irrigation of Reservation lands are firmly grounded and established "in the law and the record of this case."

This Chamokane Creek case should be so adjudicated and decided that it will take its place as a step forward in the journey of the Winters doctrine from the Winters case, through the Conrad, Walker River, Ahtanum and Cappeart cases and now through "Chamokane." In granting the

prayer of the Tribe and the United States we will be assured that the Chamokane will flow as a jewel in the necklace of nature for generations to come. The alternative is irrigated non-Indian farms and a dry creek bed.

Respectfully submitted,

July 15, 1977

DELLWO, RUDOLF & SCHROEDER, P.S.

ROBERT D. DELLWO

KERMIT M. RUDOLF
Attorneys for the Spokane Tribe of Indians, Plaintiff Intervener

Selections of lands in Montana confirmed. Description.

half of northeast quarter of section eight, township thirty-two north, range eleven east; lot six of section five, township thirty-two north, range sixteen east; the southeast quarter of northeast quarter of section five, township thirty-two north, range seventeen east; the northwest quarter of northwest quarter of section thirty-five, township thirty-three north, range nineteen east; the southwest quarter of the southeast quarter and southeast quarter of southwest quarter of section thirty-two, township thirty-two north, range thirty-three east, Montana principal meridian, in the State of Montana, containing in all three hundred and fifty-six and eleven one-hundredths acres, made by the Saint Paul, Minneapolis and Manitoba Railway Company in the United States land office at Helena, Montana, between the years eighteen hundred and ninety-three and eighteen hundred and ninety-nine, under the provisions of an act of Congress entitled "An act for the relief of settlers on certain lands in the States of North Dakota and South Dakota," approved August fifth, eighteen hundred and ninety-two, and the patents of the United States thereafter issued under said act conveying said lands to said railway company be, and the same are hereby, ratified and confirmed, and the said lands granted to said railway company.

27 Stat., 390.

Selections on former Indian lands confirmed.

SEC. 2. That the Secretary of the Interior be, and he is hereby, authorized and empowered to approve the selection of one hundred and twenty acres of unsurveyed land situated in township thirty-two north, range fourteen east, Montana principal meridian, made by the said The Saint Paul, Minneapolis and Manitoba Railway Company, under the act of Congress aforesaid, on the twenty-sixth day of March, eighteen hundred and ninety-seven, in the United States land office at Helena, Montana, whenever said land shall have been duly surveyed, and to thereafter patent and convey said land to said railway company, notwithstanding the limitations contained in section three of an act of Congress entitled "An act to ratify and confirm an agreement with the Gros Ventre, Piegan, Blood, Blackfeet, and River Crow Indians in Montana, and for other purposes," approved May first, eighteen hundred and eighty-eight: *Provided*, That said land was in all other respects subject to selection by said railway company under said act of eighteen hundred and ninety-two, and the said railway company has complied and shall hereafter comply with the requirements of said act of eighteen hundred and ninety-two.

Patents.

1888, ch. 213, sec. 3, 25 Stat., 133, vol. 1, p. 286.

Proviso. Restriction.

Approved, February 27, 1905.

1905 ACT

Mar. 3, 1905. [H. R. 13609.]

[Public, No. 173.] 33 Stat., 1096.

CHAP. 1440.—An act 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.

Spokane River, Wash. Use of waters.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the right to the use of the waters of the Spokane River where the said river forms the southern boundary of the Spokane Indian Reservation may, with the consent of the Secretary of the Interior, 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.

Spokane Indian Reservation. Grant of lands of, for dams, etc.

SEC. 2. That the Secretary of the Interior be, and he hereby is, authorized and empowered to grant such appropriator or appropriators land on said reservation, whether the same has been allotted in severalty to any individual Indians, but which has not been conveyed to the allottee with full power of alienation, or whether the same remains unallotted, on the north bank of the said Spokane River, such as shall be necessary and requisite for overflow rights and for the

APPENDIX I

1905 Act and the Reports and Congressional Comment Accompanying Its Enactment.

erection of suitable water, electrical, or power plants, dams, wing walls, flumes, or other needful structures required for the developmet of power or for the beneficial use of said water: *Provided*, That no lands shall be granted under this act until after the Secretary of the Interior is satisfied that the person, association, or company applying has made said application in good faith and with intent and ability to use said lands for the purposes above specified and that it requires the quantity of land applied for in such use, and in case objection to the grant of said land shall be made the said Secretary shall afford the parties so objecting a full opportunity to be heard.

Proviso. Decision of Secretary of the Interior.

SEC. 3. That the compensation to be paid for said land by said applicants shall be determined in the manner prescribed in section three of the act of March second, eighteen hundred and ninety-nine, entitled "An act to provide for the acquiring of rights of way by railroad companies through Indian reservations, Indian lands, and Indian allotments, and for other purposes."

Compensation.

1899, ch. 374, sec. 3, 30 Stat., 991, vol. 1, p. 103.

SEC. 4. That if the land allotted in severalty to any individual Indian which has not been conveyed to the allottee with full power of alienation be granted to any such appropriator, the Secretary of the Interior is empowered to use the moneys received for such land so allotted in the purchase of other suitable lands for such allottee.

Indian lands.

SEC. 5. That the Secretary of the Interior shall make all needful rules and regulations not inconsistent herewith for the proper execution and carrying into effect of this act.

Rules, etc.

Approved, March 3, 1905.

CHAP. 1452.—An act to ratify and amend an agreement with the Indians residing on the Shoshone or Wind River Indian Reservation in the State of Wyoming and to make appropriations for carrying the same into effect.

Mar. 3, 1905. [H. R. 17044.]

[Public, No. 183.]

33 Stat., 1015.

Preamble.

Whereas James McLaughlin, United States Indian inspector, did on the twenty-first day of April, nineteen hundred and four, make and conclude an agreement with the Shoshone and Arapahoe Tribes of Indians belonging on the Shoshone or Wind River Reservation in the State of Wyoming, which said agreement is in words and figures as follows:

Agreement with Indians of the Shoshone or Wind River Reservation, Wyo.

This agreement made and entered into on the twenty-first day of April, nineteen hundred and four, by and between James McLaughlin, United States Indian inspector, on the part of the United States, and the Shoshone and Arapahoe Tribes of Indians belonging on the Shoshone or Wind River Indian Reservation, in the State of Wyoming, witnesseth:[1]

Lands ceded.

ARTICLE I. The said Indians belonging on the Shoshone or Wind River Reservation, Wyoming, for the consideration hereinafter named, do hereby cede, grant, and relinquish to the United States, all right, title, and interest which they may have to all the lands embraced within the said reservation, except the lands within and bounded by the following described lines: Beginning in the midchannel of the Big Wind River at a point where said stream crosses the western boundary of the said reservation; thence in a southeasterly direction following the midchannel of the Big Wind River to its conjunction with the Little Wind or Big Popo-Agie River, near the northeast corner of township one south, range four east; thence up the midchannel of the said Big Popo-Agie River in a southwesterly direction to the mouth of the North Fork of the said Big Popo-Agie River; thence up the midchannel of said North Fork of the Big Popo-Agie River to its intersection with the southern boundary of the said reservation, near the southwest corner of section twenty-one township two south,

[1] Wadsworth *v.* Boysen, 143 Fed., 771.

58TH CONGRESS, 3d Session. } SENATE. { REPORT No. 4378.

WATER RIGHTS IN THE SPOKANE RIVER, ETC.

MARCH 1, 1905.—Ordered to be printed.

Mr. GAMBLE, from the Committee on Indian Affairs, submitted the following

REPORT.

[To accompany H. R. 15609.]

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 and for the acquirement of lands on said reservation for power-site purposes, beg to report the same with the recommendation that it do pass.

The House report is as follows:

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, having considered the same, beg to report said bill with the recommendation that it pass with the amendments hereafter suggested.

The provisions of the bill and the reasons for its passage are set out fully in a letter from the Commissioner of Indian Affairs, which is herewith printed and made a part of this report. The views of the Indian Office are concurred in by the Secretary of the Interior, as shown by his letter, which also is herewith printed.

We recommend that said bill be amended as follows:

After the word "may," in line 5, insert "with the consent of the Secretary of the Interior."

Insert the following as section 4 of the bill:

"SEC. 4. That if the land allotted in severalty to any individual Indian, which has not been conveyed to the allottee with full power of alienation, be granted to any such appropriation, the Secretary of the Interior is empowered to use the moneys received for such land so allotted in the purchase of other suitable lands for such allottee."

DEPARTMENT OF THE INTERIOR,
Washington, December 22, 1904.

SIR: I have the honor to acknowledge the receipt, by your reference of the 7th instant, of bill H. R. 15609, entitled "A bill 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."

In response to your request for report on the said bill I transmit herewith a copy of a communication from the Acting Commissioner of Indian Affairs, dated the 17th instant, in which the opinion is expressed that favorable consideration should be given the bill.

The Department concurs in the views expressed by the Indian Office.

Very respectfully,

E. A. HITCHCOCK, *Secretary.*

THE CHAIRMAN COMMITTEE ON INDIAN AFFAIRS,
House of Representatives.

DEPARTMENT OF THE INTERIOR, OFFICE OF INDIAN AFFAIRS,
Washington, D. C., December 17, 1904.

SIR: I have the honor to acknowledge receipt, by departmental reference of December 9, 1904, for report of H. R. 15609, entitled "A bill 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."

Under the terms of the bill the right to the use of the waters of 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.

Section 2 provides that the Secretary of the Interior is authorized and empowered to grant to such appropriator or appropriators land on said reservation, whether the same has been allotted in severalty to any individual Indian without power of alienation, or whether the same remains unallotted, on the north bank of the said Spokane River, to the extent necessary and requisite for overflow rights and for the erection of suitable water, electrical, or power plants, dams, wing walls, flumes, or other needful structures required for the development of power or for the beneficial use of said water. It is further provided in this section that no lands shall be granted under the act until after the Secretary of the Interior is satisfied that the person, association, or company applying has made its application in good faith and with the intent and ability to use the lands for the purposes specified and that it requires the quantity of land applied for in such use. The bill provides in case objection to the grant of land shall be made the Secretary of the Interior shall afford the parties so objecting full opportunity to be heard.

Section 3 provides that the compensation to be paid for the land by applicants shall be determined in the manner prescribed in section 3 of the act of March 2, 1899. (30 Stat. L., 990.)

Section 4 provides that the Secretary of the Interior shall make all needful rules nd regulations not inconsistent therewith for the proper execution and carrying into effect of the act.

Reporting thereon, you are advised the bill appears to be in substance a modification of and an enlargement of the rights granted by the act of Congress approved February 15, 1901 (31 Stat. L., 790), in so far as the Spokane Indian Reservation, in the State of Washington, is concerned.

The act of February 15, 1901, authorizes and empowers the Secretary of the Interior to permit the use of rights of way through public lands, forest and other reservations of the United States, including Indian reservations, for electrical plants, poles, and lines for the generation and distribution of electrical power, and for canals, ditches, pipes, and pipe lines, and for water plants, dams, etc., used to promote irrigation, mining, or quarrying, or the supplying of water for domestic purposes, public, or any other beneficial uses, etc., to the extent of the grounds occupied by such canals, flumes, etc., and not to exceed 50 feet on each side of the marginal limits thereof. It is provided in this act that any permission given by the Secretary of the Interior thereunder may be revoked by him or his successor in his discretion, and shall not be held to confer any right or easement, or interest in, to, or over any public land, reservation, or park.

The act of February 15 does not in terms grant the use of any waters flowing through public lands, parks, and other reservations.

In the bill under consideration provision is made for the acquisition of the right to the use of the waters of the Spokane River by any citizen or corporation of the United States by appropriation under and pursuant to the laws of the State of Washington.

This office is advised that the laws of the State of Washington with respect to the appropriation of waters therein differ materially from the laws of some of the other States, in that it has been decided by the supreme court of the State of Washington that the law of riparian rights obtains in that State.

The act of February 15, 1901, carries with it no grant of land, and is in effect merely a license for the use of land for the purposes specified in the act, subject, however, to revocation in the discretion of the Secretary of the Interior. It is seen that some difficulty might be experienced in securing capital for investment in an enterprise involving the making of extensive improvements of great value where title to the land upon which such improvements might be located is vested in the Government and not in the individual or corporation promoting the enterprise.

Section 2 of the bill under consideration authorizes and empowers the Secretary of the Interior "to grant such appropriator or appropriators land on said reservation (Spokane reservation) * * * such as shall be necessary and requisite for overflow rights and for the erection of suitable water, electrical, or power plants, dams, wing walls, flumes, or other needful structures required for the development of power or for the beneficial use of said water."

Further provisions of the bill place it within the power of the Secretary of the Interior to restrict the grants of land authorized by the bill to applicants acting in good faith and with intent and ability to use the lands for the purposes specified in the act, and to restrict the taking of land to the extent absolutely necessary for such uses.

The provision made for the payment of compensation for the lands taken will, it is thought, amply protect the owners of any such lands, be it an Indian tribe or an individual Indian allottee.

Further reporting relative to the bill, you are advised that there are at the present time before the office and the Department two applications for rights of way through the Spokane Indian and Military reservations, submitted under the act of February 15, 1901, for the use of land for power-plant purposes at a point designated "The Narrows" and on both sides of the Spokane River, a portion being in the Spokane Indian Reservation and a portion in the Spokane Military Reservation. Both of these applications cover almost identically the same grounds, and this office, after thorough investigation, concluded that one of the applicants had prior rights, and the Department November 11, 1904, advised the office that the application of the applicant company having such prior rights would be further considered upon the filing of the additional proofs and showings required by departmental regulations prescribed under the act of February 15, 1901. Should the provisions of this bill be enacted into law, these applications would be materially affected.

It is thought a law embodying provisions similar to those in this bill is necessary to grant to an individual or corporation in the State of Washington the right to the use of the waters in that State. It further appears that an individual or corporation proposing the expenditure of large sums of money for purposes specified in this bill should be granted the perpetual use of the land upon which such expenditures are to be made. In view of the premises, it is thought the bill herewith should be favorably considered, unless objections thereto should be found upon a further consideration of the proposed measure at the Department, which is urgently requested.

There is returned the communication of Hon. J. S. Sherman, dated December 7, 1904, transmitting to the Department copies of H. R. 15598 and 15609. A separate and a further report will be made with respect to bill H. R. 15598.

Very respectfully,

A. C. TONNER, *Acting Commissioner.*

THE SECRETARY OF THE INTERIOR.

O

APPENDIX I

Mr. DOLLIVER. I desire to call up the joint resolution I introduced yesterday in relation to the appointment of a joint commission in respect to amendments to the interstate-commerce laws.

The PRESIDENT pro tempore. The Chair lays before the Senate the joint resolution, which will be read.

The joint resolution (S. R. 113) providing for a joint commission to investigate the question of additional legislation to regulate interstate commerce was read the first time by its title and the second time at length, as follows:

Resolved, etc., That a joint commission, consisting of seven Senators members of the Fifty-ninth Congress, to be appointed by the present President pro tempore of the Senate, and seven Members-elect of the House of Representatives of the Fifty-ninth Congress, to be appointed by the Speaker of the House of Representatives of the Fifty-eighth Congress, shall, at such times and places as it may determine, investigate the question of additional legislation to regulate interstate commerce and to authorize the Interstate Commerce Commission to fix rates of freight and fares, and to inquire into violations or evasions of the act of Congress approved February 19, 1903, including the methods by which such evasions and violations are accomplished, including refrigerator and other private car line systems, industrial railway tracks, switching charges, and all other devices.

Said commission is authorized to employ experts, who shall render such assistance as the commission may require, and shall receive such compensation as the commission shall determine to be just and reasonable. The Department of Justice, the Department of Commerce and Labor, and the Interstate Commerce Commission shall detail from time to time such officers and employees as may be requested by said commission in the furtherance of their investigations under this resolution.

Said commission or any subcommittee thereof shall have power to employ a stenographer to report its hearings, to have such hearings printed, and as rapidly as printed a copy shall be sent to each member of the Senate and House of Representatives. It shall also have powers to send for persons and papers, to administer oaths, and such process shall be issued and such oaths administered by the chairman of the commission, or subcommittee thereof.

Said commission shall report, by bill or otherwise, to their respective Houses of the Fifty-ninth Congress on or before the 10th day of the first session of said Congress.

All necessary expenses of said commission shall be paid upon vouchers approved by the chairman of the commission, and such sum as may be necessary for such purpose is hereby appropriated out of any money in the Treasury not otherwise appropriated.

Mr. KEAN. I move to refer the joint resolution to the Committee on Interstate Commerce.

Mr. DOLLIVER. Mr. President——

Mr. KEAN. I withhold the motion.

Mr. DOLLIVER. I desire to say a few words.

Mr. HEYBURN. This will not involve any debate?

Mr. DOLLIVER. I think not.

Mr. HEYBURN. If it does——

Mr. FORAKER. It will involve a great deal of debate if it is insisted upon.

Mr. HEYBURN. If it leads to debate, I will ask the Senator from Iowa to postpone it until I have made a statement in connection with the unfinished business. I will say to the Senator from Illinois [Mr. CULLOM] that I have no desire to antagonize any matter, but I wish to have measures considered subject to the unfinished business.

Mr. CULLOM. I supposed the Senator had the floor for the purpose of holding it on his bill, and I did not desire to interfere with him, but wanted to pass a little private bill which would not lead to any debate or take any time.

Mr. HEYBURN. I yield now to the Senator from Illinois, if it will lead to no debate.

Mr. DOLLIVER. I do not desire to interfere with the Senator from Idaho, and I will very gladly withhold what I have to say until he has finished.

JAMES HOUSELMAN.

Mr. CULLOM. I ask unanimous consent for the present consideration of the bill (H. R. 815) to correct the military record of James Houselman.

There being no objection, the Senate, as in Committee of the Whole, proceeded to consider the bill.

The bill was reported from the Committee on Military Affairs with an amendment, to strike out all after the enacting clause and insert:

That James Houselman, late second lieutenant of Company H, Sixty-third Regiment Illinois Volunteer Infantry, shall hereafter be held and considered to have been honorably discharged the service on the 7th day of December, 1862, and a certificate of such discharge shall be issued to him: *Provided*, That no pay, bounty, or other allowances shall accrue or become due or payable by virtue of this act.

The amendment was agreed to.

The bill was reported to the Senate as amended, and the amendment was concurred in.

The amendment was ordered to be engrossed and the bill to be read a third time.

The bill was read the third time, and passed.

REPORTS OF BUREAU OF IMMIGRATION.

Mr. PLATT of New York. Mr. President——

Mr. HEYBURN. I yield to the Senator from New York.

Mr. PLATT of New York. I am directed by the Committee on Printing, to whom was referred the joint resolution (H. J. Res. 225) providing for the printing annually of the reports of the Bureau of Immigration, to report it favorably without amendment, and I ask unanimous consent for its present consideration.

There being no objection, the Senate, as in Committee of the Whole, proceeded to consider the joint resolution.

The joint resolution was reported to the Senate without amendment, ordered to a third reading, read the third time, and passed.

WATER RIGHTS IN SPOKANE RIVER.

Mr. FOSTER of Washington. Mr. President——

The PRESIDENT pro tempore. Does the Senator from Idaho yield to the Senator from Washington?

Mr. HEYBURN. I yield to the Senator from Washington, provided the measure he calls up does not lead to debate.

Mr. FOSTER of Washington. I desire to call up 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.

The Secretary read the bill.

The PRESIDENT pro tempore. Is there objection to the present consideration of the bill?

Mr. LODGE. I should like to examine the act. I object to its consideration now.

Mr. FOSTER of Washington. It is a House bill just passed.

Mr. LODGE. I dare say, but I wish to look at it.

Mr. FOSTER of Washington. It is very important that the bill should pass.

The PRESIDENT pro tempore. Objection is made to the present consideration of the bill.

Mr. FOSTER of Washington subsequently said: I call up House bill 15609, which was under consideration a few moments ago. The bill has been read.

The PRESIDENT pro tempore. The bill was read. Is there objection to its consideration?

There being no objection, the bill was considered as in Committee of the Whole.

The bill was reported to the Senate without amendment, ordered to a third reading, read the third time, and passed.

PURE-FOOD BILL.

The Senate, as in Committee of the Whole, resumed the consideration of the bill (H. R. 6295) for preventing the adulteration or misbranding of foods or drugs, and for regulating traffic therein, and for other purposes.

Mr. HEYBURN. Mr. President, I should like now to proceed for a while, and if Senators have matters that require no discussion and desire after a little bit to interrupt me, I shall be very pleased to yield to them.

Mr. President, I wish to premise what I shall say by calling the attention of the Senate to what the United States Supreme Court has said in regard to the question involved in this bill. In the case of Plumley *v.* The Commonwealth of Massachusetts, 115 United States, at page 13, the Supreme Court says:

It is within the power of the State to exclude from its markets any compound manufactured in another State which has been artificially colored or adulterated so as to cause it to look like an article of food in general use, and the sale of which may, by reason of such coloration or adulteration, cheat the general public into purchasing that which they may not intend to buy. The Constitution of the United States does not secure to anyone the privilege of defrauding the public. The deception against which the statute of Massachusetts is aimed is an offense against society, and the States are competent to protect their people against crime or wrongs of more serious character. And this protection may be given without violating any law secured by the National Constitution and without interference of the authority of the General Government. A State enactment forbidding a sale of deceitful imitations of articles of food in general use among the people does not abridge any privilege to secure citizens of the United States, nor in any just sense interfere with the freedom of commerce among the several States.

Now, that is the rule as stated by the Supreme Court with regard to the right of the State. That the United States may, and should, in dealing with its Territories and districts under its direct control, do the same thing can not be open to question. The bill under consideration provides only for the regulation of interstate commerce. It does not profess to invade the province of a State to enact laws and enforce them upon this subject. In addition to the interstate-commerce feature, this act provides that within the territorial jurisdiction immediately under the direction and control of the General Government the Government shall do that which, if the Territory or district were a State, would be done by the State.

Mr. LATIMER rose.

tion of jurisdiction and at the same time involving the appointment of a receiver or the granting of an injunction would go to the circuit court of appeals, as would other cases not involving this question?

Mr. BRANTLEY. That is what this bill does.

Mr. BARTLETT. It does not change the law which permits an appeal where the circuit court or the district court appoints a receiver? It does not change the act of 1899?

Mr. BRANTLEY. Not in the slightest.

Mr. BARTLETT. I am very anxious about that, because I introduced that bill and am responsible for that act.

Mr. BRANTLEY. It has the unanimous report of the Committee on the Judiciary.

Mr. BARTLETT. I am quite satisfied about it.

The SPEAKER. The question is on the engrossment and third reading of the bill.

The bill was ordered to be engrossed and read a third time, read the third time, and passed.

On motion of Mr. BRANTLEY, a motion to reconsider the last vote was laid on the table.

SUBPORTS OF ENTRY AT ROUSES POINT AND MALONE, N. Y.

Mr. SHERMAN. Mr. Speaker, I call up a privileged bill (H. R. 15318) for the establishment of subports of entry at Rouses Point and Malone, N. Y., and in that connection I desire to say that an identical Senate bill has already passed. I ask unanimous consent to substitute the Senate bill in place of the House bill.

The SPEAKER. The Clerk will report the title of the bill.

The Clerk reported the title of the bill.

The SPEAKER. The gentleman asks unanimous consent to substitute a similar Senate bill for the House bill. Is there objection?

There was no objection.

The SPEAKER. The Clerk will report the Senate bill.

The Clerk read as follows:

Be it enacted, etc., That Rouses Point, N. Y., and Malone, N. Y., be, and are hereby, established as subports of entry in the customs collection district of Champlain, State of New York, and that the privileges of the first section of the act approved June 10, 1880, relating to the transportation of dutiable merchandise without appraisement be, and the same are hereby, extended to said subports.

The SPEAKER. The question is on the third reading of the Senate bill.

The bill was ordered to be read a third time, read the third time, and passed.

On motion of Mr. SHERMAN, a motion to reconsider the last vote was laid on the table.

MAJORITY REPORT ON DIVISION OF OREGON INTO JUDICIAL DISTRICTS.

Mr. GILLETT of California. Mr. Speaker, I ask unanimous consent to withdraw the report made by myself on behalf of the Committee on the Judiciary to accompany the bill (S. 285) to divide the State of Oregon into two judicial districts, and to substitute therefor in lieu thereof a new report, in order to correct certain errors or mistakes made in the first report now on file.

The SPEAKER. The gentleman from California asks unanimous consent to withdraw the majority report and substitute in lieu thereof another. Is there objection?

There was no objection, and it was so ordered.

WATER RIGHTS IN SPOKANE RIVER.

Mr. JONES of Washington. Mr. Speaker, I ask unanimous consent for the present consideration of the bill (H. R. 15669) 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, which I send to the desk and ask to have read.

The Clerk read as follows:

Be it enacted, etc., That the right to the use of the waters of 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.

SEC. 2. That the Secretary of the Interior be, and he hereby is, authorized and empowered to grant such appropriator or appropriators land on said reservation, whether the same has been allotted in severalty to any individual Indians, but which has not been conveyed to the allottee with full power of alienation, or whether the same remains unallotted, on the north bank of the said Spokane River, such as shall be necessary and requisite for overflow rights and for the erection of suitable water, electrical, or power plants, dams, wing walls, flumes, or other needful structures required for the development of power or for the beneficial use of said water: *Provided*, That no land shall be granted under this act until after the Secretary of the Interior is satisfied that the person, association, or company applying has made said application in good faith and with intent and ability to use said lands for the purposes above specified and that it requires the quantity of land applied for in such use, and in case objection to the grant of said land shall be made the said Secretary shall afford the parties so objecting a full opportunity to be heard.

SEC. 3. That the compensation to be paid for said land by said applicants shall be determined in the manner prescribed in section 3 of the act of March 2, 1899, entitled "An act to provide for the acquiring of rights of way by railroad companies through Indian reservations, Indian lands, and Indian allotments, and for other purposes."

SEC. 4. That the Secretary of the Interior shall make all needful rules and regulations not inconsistent herewith for the proper execution and carrying into effect of this act.

The SPEAKER. Is there objection?

Mr. DALZELL. Mr. Speaker, reserving the right to object, I would like to have some explanation of this bill.

Mr. JONES of Washington. Mr. Speaker, the Spokane River forms the southern boundary of the Spokane Indian Reservation for a considerable extent. There is quite a fall in the river. There are considerable rapids there which would furnish splendid water-power facilities to the land on the north side. Being an Indian reservation there is no way by which sites for power purposes could be acquired. Our supreme court also has held that the riparian doctrine with reference to water holds in our State, and 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, and the committee has put in a further restriction that it must be with the consent of the Secretary of the Interior. In order to secure sites for water-power purposes there is no law now under which the title to these sites can be secured. There is a law enabling companies to secure permits or licenses; but of course they would not want to expend large sums of money on a mere license or permit, so this bill authorizes the acquirement of title to this land under the procedure of law by which railroads can acquire rights of way through reservations. The money is to be paid into the Treasury for the benefit of the Indians, and the amendment suggested by the committee is that if any allotment is taken the sum received can be used by the Secretary of the Interior in the purchase of other suitable land for such allottee.

Mr. DALZELL. How is the water power to be used, by dams in the river?

Mr. JONES of Washington. They will probably dam the river. This is a matter they are willing to take care of at some future time. I will say, however, that the War Department had the matter investigated, and I know from personal observation that that part of the river is not navigable. This is simply a matter in reference to Indian lands, however, and the acquirement of water rights.

Mr. DALZELL. From what committee is this bill reported?

Mr. JONES of Washington. From the Committee on Indian Affairs. It simply affects Indian lands and provides means by which persons can acquire the permanent rights.

Mr. LOVERING. Does it carry the right to dam the river?

Mr. JONES of Washington. Oh, no; not at all. That matter, if it came up, would have to go to the Committee on Interstate and Foreign Commerce. They have to take their chances on that.

The SPEAKER. Is there objection? [After a pause.] The Chair hears none.

Mr. JONES of Washington. Now, Mr. Speaker, in the amendment as section 4 the word "appropriation" should be "appropriator," and I will move the amendment.

The SPEAKER. The Clerk will report the amendment.

The Clerk read as follows:

Amend the amendment as section 4 by striking out the word "appropriation" and insert the word "appropriator."

Mr. STEPHENS of Texas. Do you accept the committee amendment?

Mr. JONES of Washington. Yes.

The question was taken on the amendment to the amendment, and it was agreed to.

The SPEAKER. The question now is on agreeing to the committee amendment.

The question was taken, and the amendment was agreed to.

The bill as amended was ordered to be engrossed and read a third time; and was read the third time, and passed.

On motion of Mr. JONES of Washington, a motion to reconsider the last vote was laid on the table.

SITTINGS OF CERTAIN COURTS IN FERNANDINA, FLA.

Mr. DAVIS of Florida. Mr. Speaker, I ask unanimous consent for the present consideration of the bill which I send to the Clerk's desk.

The SPEAKER. The gentleman from Florida asks unanimous consent for the present consideration of the bill which the Clerk will report.

Lat. 41°26'43" N., Long. 97°20'36" W.; to Lat. 41°27'00.3" N., Long. 97°20'28" W. Consequently, Airways V-71 and V-220 will automatically move slightly without redesignation. However, to facilitate air traffic control service in the vicinity of the VOR, it is necessary to realign V-172 via the Columbus VOR.

This amendment is proposed under the authority of Sec. 307(a) of the Federal Aviation Act of 1958 (49 U.S.C. 1348(a)) and Sec. 6(c) of the Department of Transportation Act (49 U.S.C. 1655(c)).

Issued in Washington, D.C., on March 10, 1977.

WILLIAM E. BROADWATER,
Chief, Airspace and Air Traffic Rules Division.

[FR Doc.77-7865 Filed 3-16-77;8:45 am]

[14 CFR Part 71]

[Airspace Docket No. 76-PC-71]

TRANSITION AREA

Proposed Alteration; Extension of Comment Period

On January 21, 1977, a Notice of Proposed Rulemaking (NPRM) was published in the FEDERAL REGISTER (42 FR 3361) stating that the Federal Aviation Administration (FAA) was considering an amendment to Part 71 of the Federal Aviation Regulations that would alter the 700 feet transition area at Honolulu, Hawaii.

Due to technical difficulties, the FAA was unable to follow its usual procedures for advance distribution of NPRMs; thus, airspace users in the Honolulu area were not given ample opportunity to comment on the proposal prior to the comment period closing date. For this reason the comment period is hereby extended to March 22, 1977. All comments received before this date will be considered before final rulemaking is taken on the proposal.

This amendment is proposed under the authority of Sec. 307(a) and 1110 of the Federal Aviation Act of 1958 (49 U.S.C. 1348(a) and 1510), Executive Order 10854 (24 FR 9565) and Sec. 6 (c) of the Department of Transportation Act (49 U.S.C. 1655(c)).

Issued in Washington, D.C., on March 10, 1977.

WILLIAM E. BROADWATER,
Chief, Airspace and Air Traffic Rules Division.

[FR Doc.77-7864 Filed 3-16-77;8:45 am]

[14 CFR Part 71]

[Airspace Docket No. 77-SW-10]

TRANSITION AREA

Proposed Designation

The Federal Aviation Administration is considering amending Part 71 of the Federal Aviation Regulations to designate the Welch, Okla, transition area.

Interested persons may submit such written data, views or arguments as they may desire. Communications should be submitted in triplicate to Chief, Airspace and Procedures Branch, Air Traffic Division, Southwest Region, Federal Aviation Administration, P.O. Box 1689, Fort Worth, Texas 76101. All communications received on or before April 18, 1977 will be considered before action is taken on the proposed amendment. No public hearing is contemplated at this time, but arrangements for informal conferences with Federal Aviation Administration officials may be made by contacting the Chief, Airspace and Procedures Branch. Any data, views or arguments presented during such conferences must also be submitted in writing in accordance with this notice in order to become part of the record for consideration. The proposal contained in this notice may be changed in the light of comments received.

The official docket will be available for examination by interested persons at the Office of the Regional Counsel, Southwest Region, Federal Aviation Administration, Fort Worth, Texas. An informal docket will also be available for examination at the Office of the Chief, Airspace and Procedures Branch, Air Traffic Division.

It is proposed to amend Part 71 of the Federal Aviation Regulations as hereinafter set forth.

§ 71.181 [Amended]

In § 71.181 (42 FR 440), the following transition area is added:

WELCH, OKLA.

That airspace extending upward from 700 feet above the surface within a 5-mile radius of the Patch Airport (latitude 36°52'39" N., longitude 95°08'58" W.)

The proposed transition area will provide controlled airspace for an instrument approach procedure established for the Patch Airport, Welch, Okla. Coincident with this action, the airport will be changed from VFR to IFR.

The FAA has determined that this document does not contain a major proposal requiring preparation of an Inflationary Impact Statement under Executive Order 11821 and OMB Circular A-107.

This amendment is proposed under the authority of Sec. 307(a) of the Federal Aviation Act of 1958 (49 U.S.C. 1348) and of Sec. 6(c) of the Department of Transportation Act (49 U.S.C. 1655(c)).

Issued in Fort Worth, Texas, on March 8, 1977.

PAUL J. BAKER,
Acting Director, Southwest Region.

[FR Doc.77-7862 Filed 3-16-77;8:45 am]

[14 CFR Part 71]

[Airspace Docket No. 77-SO-2]

ALTERATION OF FEDERAL AIRWAY

Proposed Alteration

Correction

In FR Doc 77-6325 appearing at page 12190 in the issue of Thursday, March 3, 1977, in the third column, last paragraph, fourth line down, the figure now reading, "(33°M)" should be corrected to read, "(331°M)".

[14 CFR Part 91]

[Docket No. 16431; Notice 77-2]

REGULATORY REVIEW PROGRAM

Extension of Submission Period

This notice extends the period for submission of proposals under Notice 77-2, published January 21, 1977 (42 FR 3863), which closes March 15, 1977.

The notice invited interested persons to submit proposals to amend Subpart B of Part 91 of the Federal Aviation Regulations, which prescribes flight rules governing the operation of aircraft within the United States. Due to a delay in printing and distributing copies of the notice and several requests for an extension of the time for submitting proposals by organizations which desire extra time to consult with their members, the FAA has decided that an extension of the closing date for submission would be appropriate. Therefore, the period for submission of proposals is hereby extended to April 8, 1977.

(Secs. 305, 307, 312, 313(a), and 601, Federal Aviation Act of 1958 (49 U.S.C. 1346, 1348, 1353, 1354(a), 1421), and section 6(c), Department of Transportation Act (49 U.S.C. 1655(c).)

Issued in Washington, D.C., on March 11, 1977.

RAYMOND G. BELANGER,
Director, Air Traffic Service.

[FR Doc.77-7848 Filed 2-16-77;8:45 am]

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

[25 CFR Part 260]

INDIAN RESERVATIONS

Use of Water

Notice is hereby given that it is proposed to issue Part 260 of Title 25 of the Code of Federal Regulations. These regulations are proposed pursuant to the authority contained in Section 7 of the Act of February 8, 1887 (24 Stat. 390, 25 U.S.C. 1a), Revised Statute 463 (25 U.S.C. 2) and Revised Statute 465 (25 U.S.C. 9).

The purposes of these regulations are: (a) To fulfill the Department's trust responsibility to provide a method to preserve and protect in perpetuity all rights to the use of water reserved for the benefit of the Indians; (b) to recognize, provide for, and assist in the exercise of the sovereign authority of Indian tribes within their reservations to govern the use of all reserved water rights therein; (c) to provide for the delegation to Indian tribes of the Secretary's authority to prescribe rules and regulations distributing water on Indian reservations to persons and entities entitled to use reserved water rights; and (d) to provide for the present and future development of Indian reservations, including Indian Pueblos, through the use of their reserved water rights.

APPENDIX II

Proposed Regulations by Department of the Interior
re Use of Water on Indian Reservations.

It is the policy of the Department of the Interior, whenever practicable, to afford the public an opportunity to participate in the rulemaking process. Accordingly interested persons may submit written comments, suggestions, or objections regarding the proposed regulations to the Commissioner of Indian Affairs, Department of the Interior, Washington, D.C. 20240, by April 18, 1977.

It is proposed that Part 260 of Title 25 of the Code of Federal regulations will read as follows:

PART 260—THE USE OF WATER ON INDIAN RESERVATIONS

Sec.
260.1 Definitions.
260.2 Purposes.
260.3 Approval of tribal water codes.
260.4 Codes with individual water permits.
260.5 Secretarial water codes.
260.6 Appeals.

AUTHORITY: Sec. 7, Act of February 8, 1887 (24 Stat. 390, 25 U.S.C. 381), Act of August 8, 1946 (60 Stat. 939, 25 U.S.C. 1a) Revised Statute 463 (25 U.S.C. 2) and Revised Statute 465 (25 U.S.C. 9).

§ 260.1 Definitions.

(a) "Secretary" means the Secretary of the Interior or his delegated representative.

(b) "Reserved water rights" means those rights to the use of waters recognized as reserved in accordance with the principles enunciated in *Winters v. United States*, 207 U.S. 564 (1908), and subsequent cases, which rights have either an immemorial priority or a priority date as of the establishment of the reservation.

(c) "Beneficial use" means any use of water, consumptive or otherwise, for agricultural, domestic, municipal, commercial, industrial, aesthetic, religious, or recreational purposes, or for the maintenance of adequate stream flows for fishery, environmental, or other beneficial purposes on an Indian reservation.

(d) "Just and equitable distribution of reserved water rights" means a method of allocating the available water among those entitled thereto in such a manner that all those similarly situated will be given an equal opportunity to make beneficial use of the water, the allocation being in such a manner as to alleviate hardship where possible.

(e) A "water code" or "code" shall mean ordinances, rules, and regulations adopted by the governing body of an Indian tribe which provide for regulation and control of the use of reserved water rights among those entitled thereto in accordance with the tribe's constitution, bylaws, or other applicable laws.

(f) "Indian tribe" or "tribe" means a tribe, band or identifiable group of Indians owning water rights for which the United States has a trust responsibility.

(g) A "use-by-use basis" means that a separate permit shall be issued for each separate use of water which shall contain all pertinent information with respect to that use. However projects such as irrigation projects may file a single consolidated application describing the exact land to be served, each use planned and the amount, period, and nature thereof.

§ 260.2 Purposes.

The purposes of these regulations are:

(a) To fulfill the Department's trust responsibility to provide a method to preserve and protect in perpetuity all rights to the use of water reserved for the benefit of the Indians;

(b) To recognize, provide for, and assist in the exercise of the sovereign authority of Indian tribes within their reservations to govern the use of all reserved water rights therein;

(c) To provide for the delegation to Indian tribes of the Secretary's authority to prescribe rules and regulations distributing water on Indian reservations to persons and entities entitled to use reserved water rights; and

(d) To provide for the present and future development of Indian reservations, including Indian Pueblos, through the use of their reserved water rights.

§ 260.3 Approval of tribal water codes.

(a) Any Indian tribe may adopt, with approval of the Secretary, and enforce a water code to control, distribute, allocate and regulate the use of reserved water rights on its reservation for a beneficial use by any person or entity, including non-Indian persons and entities, that may be entitled to exercise such reserved water rights. Upon adoption, this water code shall be submitted to the Commissioner of Indian Affairs who shall review the code and submit it, with his recommendation, to the Secretary for formal approval or disapproval.

(b) The Secretary shall approve the code if it satisfies the following requirements:

(1) The code affords procedural due process of law to all persons claiming the right to exercise reserved water rights, by providing the following:

(i) A method for establishing the amount, nature, period, and place of use of reserved waters. That method shall be based upon the principle of a just and equitable distribution of water among those entitled to the beneficial use thereof and may include the order of tribal priorities on the use of water within the reservation.

(ii) All procedures shall permit any person who claims a right to the beneficial use of reserved waters to present his claim by application to the tribe with any pertinent evidence in support thereof. All issues will be heard by an impartial administrative official or body duly constituted by the tribe. A written decision on such application will be rendered within a reasonabl time and reasons shall be given for each decision.

(iii) Notice of hearings on all applications shall be given in a reasonable manner such as to afford interested persons the opportunity to support or contest any claimed rights.

(iv) A complete record of all applications, actions taken thereon, and any permits issued shall be maintained by the tribe and shall be open for public inspection on the reservation.

(2) The code affords aggrieved persons the opportunity to seek judicial review of administrative determinations.

(3) The tribe possesses the capacity to administer the code.

(4) The code is limited to administration and enforcement of reserved water rights as defined in this Part.

(5) The code does not seek to regulate rights to the use of water granted or created by federal statute to purchasers of land within an irrigation project located within any Indian reservation and administered by the Bureau of Indian Affairs pursuant to 25 CFR 191–203. The code recognizes the continued existence of such rights with the same priorities (relative to the reserved water rights regulated by the code) that those rights would have had absent enactment of the code.

(6) The code is subject to pertinent acts of Congress and to binding judicial decisions concerning reserved water rights.

(7) Amendments to the code require approval by the Secretary.

§ 260.4 Codes with individual water permits.

(a) At the option of the tribe, the code may adopt an individual permit system authorizing the diversion and use of water on a use-by-use basis. Where a permit system is utilized:

(1) Permits may state the amount and periods of use in terms of diversion and/or consumptive use, specify by description the tract where the use is to occur, and the nature of the use.

(2) Permits may be issued for existing and potential uses including storage.

(3) A time period may be set for exercise of each potential use upon which a permit is issued, and changes in time, place and nature of use may be permitted.

(4) A permit may be issued for each potential use established by reservation land and water use inventories.

(5) Extensions of time for exercise of the right acquired in such permit may be given upon good cause shown.

(6) All permits may be subject to such reasonable conditions as the tribal governing body or its designated administrative officials or body shall determine to be necessary to carry out the purpose of the code.

(7) Procedures may be employed for enforcement or permits and cancellation of a permit in the event of substantial violation of its conditions.

(8) Temporary use permits may be granted for limited periods pending action upon application for a regular water permit.

(b) The code may also provide that permits shall be submitted to the superintendent of the Bureau of Indian Affairs agency having jurisdiction over the reservation for his approval. Such other documents or material as are pertinent to the permit or necessary to enable him properly to review the permit shall also be submitted to the superintendent. The superintendent, after review thereof, shall, within 30 days, approve the per-

...approve the permit on condition ...modifications be made thereto, or ...approve the permit. If the permit is ...approved with modifications or disap... ...the superintendent shall return ...permit to the governing body of the ...or its designated administrative ...or body together with a statement ...modifications needed for ap... ...or the reasons for disapproval. ...approved by the superintendent, ...permit granted by the governing ...of the tribe or its designated ad...official or body shall be a ...permit and be enforced as if it ...been issued by the Secretary. Fail... ...to act on the permit within 30 days ...receipt by the superintendent shall ...approval.

(c) The tribal governing body may at its discretion call upon the field offices established in 111 DM 13.5 of the Department of the Interior Manual for an Indian Affairs Administrative Law Judge to assist the tribe in the conduct of any administrative hearing it may conduct with respect to applications for water permits under its water code. The request shall be addressed to the Chief Administrative Law Judge, Office of Hearings and Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, Virginia 22203. Upon receipt of the request, an Indian Affairs Administrative Law Judge capable of conducting administrative water hearings shall be assigned to hold hearings and issue findings of fact and conclusions of law to assist the tribe in particular hearings at the time and place selected by the tribe. Such hearings shall be conducted pursuant to 111 DM 13 and 211 DM 13.7 of the Department of the Interior Manual.

(d) The code may, in addition to the requirements in Part 260.3(b), contain any other lawful provision.

§ 260.5 Secretarial water codes.

(a) If a tribe fails to enact an approved water code for its reservation and the Secretary finds that such a code is necessary to preserve and protect the reserved water rights of the Indians, the Secretary shall notify the tribe in writing of such need and offer assistance in the preparation of an acceptable water code. If such tribe notifies the Secretary that it elects not to enact a water code or if the tribe does not respond within 60 days from the date of the request, the Secretary may prepare and publish a water code for such reservation. The water code shall cover at least the areas set forth in Part 260.3(b) above, and shall otherwise comply fully with these regulations.

(b) In this code, the Secretary may act on behalf of the tribe in the issuance of permits and the regulation of the reserved water rights of the reservation.

(c) When said water code has been completed, it shall be submitted to the governing body of the tribe of the reservation for its review and comment thereon and to make revisions thereto, following which the water code shall be enforced by the Secretary as to the reservation covered by such code.

(d) The code may be amended by the Secretary from time-to-time subject to rights under existing permits after submitting such amendments to the governing body of the tribe for its approval. *Provided, however,* That any amendment shall become effective if the tribe neither approves nor disapproves the amendment within 60 days.

(e) The tribe may replace such a code with one adopted by it at any time, or it may amend the code, with approval of the Secretary.

§ 260.6 Appeals.

Where the provisions of §§ 260.4 and 260.5 have been utilized, appeals from the superintendent's approval of the permit or other determinations of the superintendant or other Department officials concerning any person's right to the use of water shall be within the jurisdiction of the Board of Indian Appeals in the Office of Hearings and Appeals, Office of the Secretary, Department of the Interior. A hearing shall be held on the appeal by the Board at which the tribe and the appealing party may appear and present evidence and argument. When practicable, this hearing shall be held on or near the reservation. A determination by the Board of Indian Appeals shall be final and there shall be no further administrative remedy available.

Dated: March 7, 1977.

CECIL D. ANDRUS,
Secretary of Interior.

[FR Doc.77-7886 Filed 3-16-77;8:45 am]

DEPARTMENT OF TRANSPORTATION

Coast Guard

[33 CFR Parts 160 and 165]

[CGD 75-205]

SAFETY ZONES

Proposed Authorization

The Coast Guard proposes to amend the ports and waterways safety regulations by adding a new part authorizing the establishment of safety zones. The Coast Guard would protect vessels, structures, waters, and shore areas by establishing water or waterfront safety zones, by limiting access to the zones, and by controlling movement in the zones.

Interested persons may participate in this proposed rulemaking by submitting written data, views, or arguments concerning the proposal to Commandant (G-CMC/81), U.S. Coast Guard, Washington, D.C. 20590. Each person submitting comments should include his name, address and organization, if any, identify the notice number (CGD 75-205), and give reasons for any recommended change in the proposal. Copies of all written comments received will be available for examination in Room 8117, Department of Transportation, Nassif Building, 400 Seventh Street SW., Washington, D.C.

All comments received on or before April 29, 1977, will be fully considered before final action is taken on this proposal.

This proposed amendment would create a method under the Ports and Waterways Safety Act of 1972 (33 U.S.C. 1221 et seq.) to protect designated areas for safety and environmental protection purposes. The Coast Guard currently uses Security Zones (33 CFR Part 127) under the Magnuson Act (50 U.S.C. 191) to protect designated areas. The Magnuson Act is intended to protect national security, and regulations issued under it are dependent on a Presidential finding that the security of the United States is endangered. Security zones would continue to be used for port security purposes. The proposed safety zones would be used in lieu of security zones for safety and environmental protection purposes.

Under the proposed regulations the Coast Guard could establish a safety zone around a damaged or burning vessel to facilitate access for fire or rescue units and to protect uninvolved persons or vessels. A safety zone could be used to ensure safe transit of a vessel carrying dangerous cargo. It might be established for a long period of time to safeguard a vessel grounded or sunk in or near a navigable channel or to keep vessels off an uncharted shoal before marking or dredging. Safety zones could be established to protect shoreside dangerous cargo or to limit access to shoreside areas with fires or explosions. These regulations are intended to be invoked on a temporary and usually emergency basis to deal with a situation beyond the scope of normal safety or security procedures.

When a safety zone is established, the Captain of the Port (COTP) would authorize who and what may be in the zone. Whoever is in a safety zone, whether authorized by the COTP or not, would be required to obey any lawful order of the COTP, District Commander, or their authorized representative.

Failure to obey these regulations could result in the penalties in 33 CFR 160.15. To promote safety and protect the environment, the Coast Guard would be able to not only limit access to the zone but also to control activities within the zone.

In consideration of the foregoing it is proposed to amend Title 33, Code of Federal Regulations as follows:

§ 160.11 [Amended]

1. By amending § 160.11 by striking the word "part" and inserting the word "subchapter" in place thereof.

2. By adding a new Part 165 to read as follows:

PART 165—SAFETY ZONES

Subpart A—General

APPENDIX II

that respect your action is final and to the extent of your modification of the sentence restores the subject to the same status he occupied prior to the finding and sentence of the court.

The sole duty of the Comptroller General in regard to such action is to be governed by it in adjusting the amount of pay to which the enlisted man is entitled.

As to the pay actually due in the respective cases, that must be left to the determination of the Comptroller General, subject to the effect of your action, and I have the honor, therefore, to advise you that I do not deem it proper to express my opinion upon that subject.

Respectfully,

HARLAN F. STONE.

To the SECRETARY OF THE NAVY.

EXECUTIVE ORDER INDIAN RESERVATIONS—LEASING ACT.

The Act of February 25, 1920 (41 Stat. 437), entitled "An Act to promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain," does not apply to executive order Indian reservations.

DEPARTMENT OF JUSTICE,
May 12, 1924.

SIR: I now have the honor to respond to the request transmitted February 11, 1924, through your Secretary, for an opinion on the question "whether or not the general oil and gas leasing act is applicable to executive order Indian reservations." It appears that Secretary Fall of the Interior Department ruled that the Leasing Act does so apply (49 L. D. 139); and that some leases or prospecting permits have already been issued affecting Indian reservations of that kind.

The General Leasing Act (41 Stat. 437) is entitled "An Act to promote the mining of coal, phosphate, oil, oil shale, gas, and sodium *on the public domain.*" Its first section reads in part:

"That deposits of coal, phosphate, sodium, oil, oil shale, or gas, and lands containing such deposits owned by the United States, including those in national forests, but ex-

APPENDIX III

Opinion of Attorney General Harlan Stone, May 12, 1924, re Application of General Leasing Act to Indian Reservations.

cluding lands acquired under the Act known as the Appalachian Forest Act, approved March 1, 1911 (Thirty-sixth Statutes, page 961), and those in national parks, and in lands withdrawn or reserved for military or naval uses or purposes, except as hereinafter provided, shall be subject to disposition in the form and manner provided by this Act * * *."

The title refers solely to the "public domain," and nowhere in the whole Act is there any mention of Indians, Indian lands or Indian reservations of any kind.

The long settled rule of construction is that general laws providing for the disposition of public lands or the public domain do not apply to lands which have been set aside or reserved for particular public uses, unless the contrary clearly appears from the context or the circumstances attending the legislation. *Newhall* v. *Sanger*, 92 U. S. 761; *Bardon* v. *Northern Pac. R. R. Co.*, 145 U. S. 535, 538; *Mann* v. *Tacoma Land Co.*, 153 U. S. 273, 284; *Union Pac. R. R. Co.* v. *Harris*, 215 U. S. 386. Concerning Indian reservations, Indian lands, and Indian affairs generally, Congress habitually acts only by legislation expressly and specifically applicable thereto. *Missouri, Kansas & Texas Ry. Co.* v. *Roberts*, 152 U. S. 114, 119. This is true historically, and the fact is one of necessity, because Indians, and especially tribal Indians, remain a people apart for whom it is impracticable to legislate in terms common to them and the whites. *Ex parte Crow Dog*, 109 U. S. 556, 571.

Now, however, the Secretary of the Interior, explicitly reversing the attitude of his predecessors (47 L. D. 424, 437, 489), has decided that an Act of Congress purporting to deal with lands of the *public domain* and a certain class of reservations *owned exclusively* by the United States is applicable to executive order Indian reservations, although it contains no express or specific reference to Indians, Indian reservations, or Indian lands.

The first section of the Act describes the deposits and lands to which it applies. They are deposits and lands "owned by the United States." Then follow words of inclusion which make it clear that the Act applies to the national forests of the West. This language in turn is followed by expressions of exclusion, and the reserves expressly

excluded are Appalachian Forest lands, national parks, and lands reserved for military or naval uses.

It is obvious that the words of inclusion and the words of exclusion, taken together, do not by any means embrace all the lands "owned by the United States." Neither Indian reservations, national monuments, bird reservations, nor lighthouse reservations are either expressly included or excluded; and of course the United States is the sole owner of other bodies of land such as the Capitol grounds at Washington, parks and squares in the District of Columbia, national cemeteries, etc., which are neither expressly included nor excluded. Yet no one would contend that any of these latter lands are subject to the Leasing Act, whatever mineral deposits they may be found to contain. It is thus apparent that there are many classes of lands owned by the United States to which the Leasing Act does not apply although they are not expressly excepted from it. Nevertheless, the Secretary of the Interior, and others who take the same view, base their conclusions mainly upon the broad language "owned by the United States." But this language is not new in the legislation of Congress. The mineral law of May 10, 1872, now embodied in Revised Statutes, Sec. 2319, provides for the disposition of "all valuable mineral deposits in lands *belonging to the United States*, both surveyed and unsurveyed" * * *. The Supreme Court had occasion to consider this language in *Oklahoma* v. *Texas*, 258 U. S. 574. After quoting it, the court said (pp. 599, 600):

"This section is not as comprehensive as its words separately considered suggest. It is part of a chapter relating to mineral lands which in turn is part of a title dealing with the survey and disposal of "The Public Lands." To be rightly understood it must be read with due regard for the entire statute of which it is but a part, and when this is done it is apparent that, while embracing only lands owned by the United States, it does not embrace all that are so owned. Of course, it has no application to the grounds about the Capitol in Washington or to the lands in the National Cemetery at Arlington, no matter what their mineral value; and yet both belong to the United States. And so of the lands in the Yosemite National Park, the Yellowstone Na-

itonal Park, and the military reservations throughout the western States. Only where the United States has indicated that the lands are held for disposal under the land laws does the section apply; and it never applies where the United States directs that the disposal be only under other laws."

The court accordingly held that the mining laws did not apply to certain lands "belonging to the United States" and lying in the south half of the bed of Red River.

The general mining laws never applied to Indian reservations, whether created by treaty, Act of Congress, or executive order. *Noonan* v. *Caledonia Min. Co.*, 121 U. S. 393; *Kendall* v. *San Juan Silver Min. Co.*, 144 U. S. 658; *M'Fadden* v. *Mountain View M. & M. Co.*, 97 Fed. 670; *Gibson* v. *Anderson*, 131 Fed. 39. Yet, "owned by the United States" and "belonging to the United States" are equivalent expressions, and there seems to be no ground whatever for giving one a broader meaning than the other.

The foregoing considerations, I think, are conclusive. However, the Leasing Act contains a number of other provisions leading to the same result, two only of which will be mentioned. Section 28 declares that "rights of way *through the public lands, including the forest reserves*, of the United States are hereby granted for pipe-line purposes for the transportation of oil or natural gas." (41 Stat. 449.) If the Act were intended to provide for the leasing of Indian reservations, there would be the same need of rights of way for pipe lines through those reserves, but none are granted.

Again, the Act, in section 35, provides in mandatory language for the disposition of all the royalty moneys realized. They are to be divided in certain proportions between the Treasury, the Reclamation fund, and the States within which the leased lands lie. Yet, as hereafter shown, it would violate practically all legislative precedents for Congress to dispose of lands and mineral deposits in Indian reservations of any kind without directing the payment of some portion of the proceeds to the Indians. It is notable that Secretary Fall, in making his decision, realized this so strongly that, ignoring the mandatory directions of the Act, he ordered the royalties from executive order Indian reservations to be deposited in the Treasury in a special fund to await disposition by Congress.

In view of the foregoing, any reference to legislative history seems hardly necessary. Yet, in fact, none of the numerous committee reports made during the long pendency of the measure before Congress shows any indication whatever of an intent to embrace Indian reservations of any kind; but they do show affirmatively an understanding that the only lands to be affected were public lands, western forest reserves, and lands withdrawn by various executive orders to protect the minerals therein pending congressional action for their final disposal. Thus, in the report of the Conference Committee dated February 11, 1919, occur the following significant statements (65th Cong. 3d Sess., House Reports, vol. 2, H. R. 1059, p. 20):

"This bill makes possible the leasing, in whole or in part, of approximately 700,000,000 acres of public land, approximately 365,000,000 acres of forest reserve, 35,000,000 acres of coal land, 6,000,000 acres of oil land, and 3,500,000 acres of phosphate land. Under present law all of this land may be passed to patent, without Government regulation, without Government royalties, and without the receipt of any remuneration by the Government, excepting such purchase price as may be provided for the patenting of the same.

* * * * *

"This legislation is made necessary by certain withdrawals made by President Taft during his administration and later by President Wilson during his administration. Both Presidents Taft and Wilson and the Secretaries of the Interior under them have felt the necessity of passing this legislation."

I might stop here; but the reasons advanced by the Secretary, reinforced as they have been by arguments and briefs submitted to me in behalf of lessees or permittees now exploring executive order reservations under this legislation, seem to require some comment. The gist of the argument is that the President could not reserve the minerals for the Indians; that they remained the property of the United States and were therefore "deposits" "owned by the United States" in the meaning of the Leasing Act.

That the President had authority at the date of the orders to withdraw public lands and set them apart for the benefit of the Indians, or for other public purposes, is now settled beyond the possibility of controversy. *United States* v. *Midwest Oil Co.*, 236 U. S. 459; *Mason* v. *United States*, 260 U. S. 545. And aside from this, the General Indian Allotment Act of February 8, 1887 (24 Stat. 388, Sec. 1), clearly recognizes and by necessary implication confirms Indian reservations "heretofore" or "hereafter" established by executive orders.

Whether the President might legally abolish, in whole or in part, Indian reservations once created by him, has been seriously questioned (12 L. D. 205; 13 L. D. 628) and not without strong reasons; for the Indian rights attach when the lands are thus set aside; and moreover, the lands then at once become subject to allotment under the General Allotment Act. Nevertheless, the President has in fact, and in a number of instances, changed the boundaries of executive order Indian reservations by excluding lands therefrom, and the question of his authority to do so has not apparently come before the courts.

When, by an executive order, public lands are set aside, either as a new Indian reservation or an addition to an old one without further language indicating that the action is a mere temporary expedient, such lands are thereafter properly known and designated as an "Indian reservation"; and so long, at least, as the order continues in force, the Indians have the right of occupancy and use and the United States has the title in fee. *Spalding* v. *Chandler*, 160 U. S. 394; *In re Wilson*, 140 U. S. 575.

But a right of "occupancy" or "occupancy and use" in the Indians with the fee title in the sovereign (the Crown, the original States, the United States) is the same condition of title which has prevailed in this country from the beginning, except in a few instances like those of the Cherokees and Choctaws, who received patents for their new tribal lands on removing to the West. And the Indian right of occupancy is as sacred as the fee title of the sovereign.

The courts have applied this legal theory indiscriminately to lands subject to the original Indian occupancy, to reservations resulting from the cession by Indians of part of their original lands and the retention of the remainder, to reservations established in the West in exchange for lands in the East, and to reservations created by treaty, Act of Congress, or executive order, out of "public lands." The rights of the Indians were always those of occupancy and use and the fee was in the United States. *Johnson* v. *McIntosh*, 8 Wheat. 543; *Mitchell* v. *United States*, 9 Pet. 711, 745; *United States* v. *Cook*, 19 Wall. 591; *Leavenworth etc. R. R. Co.* v. *United States*, 92 U. S. 733, 742; *Seneca Nation* v. *Christy*, 162 U. S. 283, 288–9; *Beecher* v. *Wetherby*, 95 U. S. 517, 525; *Minnesota* v. *Hitchcock*, 185 U. S. 373, 388 et seq.; *Lone Wolf* v. *Hitchcock*, 187 U. S. 553; *Jones* v. *Meehan*, 175 U. S. 1; *Spalding* v. *Chandler*, 160 U. S. 394; *M'Fadden* v. *Mountain View Min. & Mill Co.*, 97 Fed. 670, 673; *Gibson* v. *Anderson*, 131 Fed. 39.

In *Spalding* v. *Chandler*, *supra*, which involved an executive order Indian reservation, the Supreme Court said (pp. 402, 403):

"It has been settled by repeated adjudications of this court that the fee of the lands in this country in the original occupation of the Indian tribes was from the time of the formation of this government vested in the United States. The Indian title as against the United States was merely a title and right to the perpetual occupancy of the land with the privilege of using it in such mode as they saw fit until such right of occupation had been surrendered to the Government. When Indian reservations were created, either by treaty or executive order, the Indians held the land by the same character of title, to wit, the right to possess and occupy the lands for the uses and purposes designated."

In *M'Fadden* v. *Mountain View Min. & Mill Co.*, *supra*, the Circuit Court of Appeals for the Ninth Circuit said (p. 673):

"On the 9th day of April, 1872, an executive order was issued by President Grant, by which was set apart as a reservation for certain specified Indians, and for such other Indians as the department of the interior should see fit to locate thereon, a certain scope of country 'bounded on the east and south by the Columbia river, on the west by the

Okanagon river, and on the north by the British possessions,' thereafter known as the 'Colville Indian Reservation.' There can be no doubt of the power of the president to reserve those lands of the United States for the use of the Indians. The effect of that executive order was the same as would have been a treaty with the Indians for the same purpose, and was to exclude all intrusion upon the territory thus reserved by any and every person, other than the Indians for whose benefit the reservation was made, for mining as well as other purposes."

The latter decision was reversed by the Supreme Court and on an entirely different ground (180 U. S. 533). The views expressed in the *M'Fadden* case were reaffirmed by the same court in *Gibson* v. *Anderson*, *supra*, involving a reservation created by executive order for the Spokane Indians.

The General Indian Allotment Act of February 8, 1887 (24 Stat. 388, Sec. 1), is based upon the same legal theory as the decisions of the courts; for it is expressly made applicable to "any reservation created for their use, either by treaty stipulation or by virtue of an Act of Congress or *executive order setting apart the same for their use*," etc.

If the extent of the Indian rights depended merely on definitions, or on deductions to be drawn from descriptive terms, there might be some question whether the right of "occupancy and use" included any right to the hidden or latent resources of the land, such as minerals or potential water power, of which the Indians in their original state had no knowledge. As a practical matter, however, that question has been resolved in favor of the Indians by a uniform series of legislative and treaty provisions beginning many years ago and extending to the present time. Thus the treaty provisions for the allotment of reservation lands all contemplate the final passing of a perfect fee title to the individuals of the tribe. And that meant, of course, that minerals and all other hidden or latent resources would go with the fee. The same is true of the General Allotment Act of 1887, which applies expressly to executive order reservations as well as to others. Then, beginning years ago,

many special acts were passed (with or without previous agreements with the Indian concerned) whereby surplus lands remaining to the tribe after completion of the allotments were to be sold for their benefit. In all these instances Congress has recognized the right of the Indians to receive the full sales value of the land, including the value of the timber, the minerals, and all other elements of value, less only the expenses of the government in surveying and selling the land. Legislation and treaties of this character were dealt with in *Frost* v. *Wenie*, 157 U. S. 46, 50; *Minnesota* v. *Hitchcock*, 185 U. S. 373; *Lone Wolf* v. *Hitchcock*, 187 U. S. 553; *United States* v. *Blendaur*, 128 Fed. 910, 913; *Ash Sheep Co.* v. *United States*, 252 U. S. 159.

Similar provisions have been made in many other cases for the sale of surplus tribal lands, all the proceeds of all elements of value to go to the tribe. In a recent Act for further allotment of Crow Indian lands (41 Stat. 751), the minerals are reserved to the tribe instead of passing to the allottees (Sec. 6); and moreover, unallotted lands chiefly valuable for the development of water power are reserved from allotment "for the benefit of the Crow Tribe of Indians" (Sec. 10). The Federal Water Power Act of June 10, 1920 (41 Stat. 1063), applies to tribal lands in Indian reservations of all kinds, but it provides (Sec. 17) that "all proceeds from any Indian reservation shall be placed to the credit of the Indians" etc.

Again, by a provision in the Indian Appropriation Act of June 30, 1919, the Secretary of the Interior was authorized to lease, for the purpose "of mining for deposits of gold, silver, copper, and other valuable metalliferous minerals," any part of the unallotted lands within "any Indian reservation" within the States of Arizona, California, Idaho, Montana, Nevada, New Mexico, Oregon, Washington, or Wyoming" heretofore withdrawn from entry under the mining laws. These States contain numerous executive order reservations, and yet the Act declares that all the royalties accruing from such leases shall be paid to the United States "for the benefit of the Indians." (41 Stat. 3, 31–33.)

The opening to entry by Congress of a part of the Colville Reservation established in Washington by executive

order has been cited as an exception to this line of precedents. (Act July 1, 1892, 27 Stat. 62.) But the exception is more apparent than real; for Congress, though it expressly declined to recognize affirmatively any right in the Indians "to any part" of that reservation (Sec. 8), yet, in fact, preserved the right of allotment, required the entrymen to pay for the lands, and set aside the proceeds for the benefit of the Indians for an indefinite period. Later, the proceeds of timber sales from the former reservation lands were secured to the Indians, but the mineral lands were subjected to the mineral laws without any express direction for the disposal of the proceeds, if any. (Act July 1, 1898, 30 Stat. 571, 593.) The Committee reports show that the reservation was considered as improvidently made, excessive in area, and that the action taken was really for the best interests of the Indians. (Senate Report No. 664, 52d Cong., 1st Sess., vol. 3; House Report No. 1035, 52d Cong., 1st Sess., vol. 4.)

In respect to legislation and treaties of this character two views are possible. First, that the right of occupancy and use extends merely to the surface and the United States, in providing that the Indians shall ultimately receive the value of the hidden and latent resources, merely gives them its own property as an act of grace. Second, that the Indian possession extended to all elements of value in or connected with their lands, and the government, in securing those values to the Indians, recognizes and confirms their preexisting right. If it were necessary here to decide as between these opposing views, I should incline strongly to the latter; mainly because the Indian possession has always been recognized as complete and exclusive until terminated by conquest or treaty, or by the exercise of that plenary power of guardianship to dispose of tribal property of the Nation's wards without their consent. *Lone Wolf* v. *Hitchcock*, 187 U. S. 553. Moreover, support for this view is found in many expressions of the courts. Thus, in the case just cited, the court quotes from *Beecher* v. *Wetherby*, 95 U. S. 517, 525, as follows:

"But the right which the Indians held was only that of occupancy. The fee was in the United States, subject to that

right, and could be transferred by them whenever they chose. The grantee, it is true, would take *only the naked fee*, and could not disturb the occupancy of the Indians; that occupancy could only be interfered with or determined by the United States."

If a transfer by the United States would convey only the naked fee, it goes without saying that the complete equitable property was in the Indians. The earlier and fundamental decisions make this plain. In *Worcester* v. *Georgia*, 6 Pet. 515, 544, 545, Chief Justice Marshall clearly states that the right asserted in behalf of the discovering European nations was merely a right, *as against each other*, which he defines as "the exclusive right of purchasing such lands as the natives were willing to sell." As late as 1872 the Supreme Court said.

"Unmistakably their title was absolute, subject only to the preemption right of purchase acquired by the United States as the successors of Great Britain, and the right * * * to prohibit the sale of the land *to* any other governments or their subjects." (*Holden* v. *Joy*, 17 Wall. 211, 244.)

The important matter here, however, is that neither the courts nor Congress have made any distinction as to the character or extent of the Indian rights, as between executive order reservations and reservations established by treaty or Act of Congress. So that if the General Leasing Act applies to one class, there seems to be no ground for holding that it does not apply to the others.

You are therefore advised that the Leasing Act of 1920 does not apply to executive order Indian reservations.

Respectfully,

HARLAN F. STONE.

To the PRESIDENT.

EXECUTIVE ORDER INDIAN RESERVATIONS—LEASING ACT.

The Act of February 25, 1920 (41 Stat. 437), entitled "An Act to promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain," does not apply to executive order Indian reservations.

STATE OF WASHINGTON
POLLUTION CONTROL HEARINGS BOARD
312 INSURANCE BUILDING
TELEPHONE 753-3029
OLYMPIA, WASHINGTON 98504

WALT WOODWARD, CHAIRMAN
JUDGE MATTHEW W. HILL, MEMBER
JAMES T. SHEEHY, MEMBER
MRS. DOLORIES OSLAND, CLERK

DANIEL J. EVANS
GOVERNOR

January 19, 1973

Mr. Kermit M. Rudolf
Dellwo, Rudolf & Grant

Mr. Charles W. Lean
Assistant Attorney General

Mr. Joseph P. Delay
Delay, Curran & Boling

Gentlemen:

Re: PCHB No. 70-7
Little Spokane Community Club v. Department of Ecology

Herewith is the Board's final Findings of Fact, Conclusions and Order in this matter, approved by the Board on January 2, 1973 after having considered Exceptions filed to the Board's Proposed Order of November 10, 1972.

Major changes from the Proposed Order are (1) a shortening of Conclusion IV and (2) making more definite and certain the terms of the Order permitting intervenor a limited amount of water withdrawal.

These changes, however, do not materially affect the essence of the Board's original opinion, which was that the recreational and esthetic factors of riparian residents and users of the Little Spokane River downstream from intervenor's irrigation withdrawal must be considered in determining the amount of that withdrawal.

The Board, and particularly the hearing officer, thanks all counsel for their courtesies and patience in the lengthy adjudication of this important matter.

Sincerely,

Walt Woodward

Walt Woodward
Chairman

WW:do

Enclosure

cc: Little Spokane Community Club

Mr. Glen Fiedler, Department of Ecology

Mr. Howard H. Gatlin

APPENDIX IV

Washington State Department of Ecology Case Involving Little Spokane River - Findings of Fact, Conclusions and Order.

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF LITTLE SPOKANE COMMUNITY CLUB, Appellant, vs. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent, HOWARD H. GATLIN, Intervenor.	PCHB No. 70-7 FINDINGS OF FACT, CONCLUSIONS AND ORDER

This matter is the appeal by the Little Spokane Community Club of Surface Water Permit No. 16229 (issued under Application No. 21149) granted to Howard H. Gatlin, intervenor, by the State of Washington, Department of Ecology, respondent. It came before the Pollution Control Hearings Board (Walt Woodward, hearing officer) at a formal hearing held in the Spokane County Courthouse, Spokane, Washington at 1:00 p.m., April 19, 1972, and continuing on April 20, 21 and 25, 1972.

S. F. No. 9928—OS—3-67.

Appellant appeared through Kermit Rudolf, intervenor through Joseph P. Delay and respondent through Charles W. Lean, assistant attorney general. Nora Fay Gasman, court reporter, recorded the proceedings.

Witnesses were sworn and testified. Exhibits were offered and admitted. Counsel submitted briefs.

After reviewing the transcript, studying exhibits, considering the argument of counsel and after having considered Exceptions to its Proposed Order, the Pollution Control Hearings Board makes these

FINDINGS OF FACT

I.

The subject body of water, the Little Spokane River, is a non-navigable stream which flows in a southerly direction in Spokane County to a point some ten miles north of the City of Spokane, then swings west where it joins the Spokane River. The portion of the Little Spokane River under consideration in this matter lies between the communities of Chattaroy on the north and Dartford on the south. Human use of this section of the river has undergone a gradual metamorphosis from an earlier and almost exclusive condition of farming, dairying and cattle raising to the present and predominant establishment of suburban homes.

II.

Howard H. Gatlin, intervenor in this matter, is the owner of a 200-acre tract near the western side of the Little Spokane River at Buckeye, a point much closer to Chattaroy than to Dartford. In 1968, he began to pump water from the Little Spokane River to his non-riparian acreage for sprinkler irrigation of alfalfa as feed for cattle. On August 9, 1968, he filed application for a water appropriation permit of 2.8 cubic feet

V.

There is no proof in the record that intervenor's irrigation under Permit No. 16229 is a profitable enterprise.

VI.

Intervenor's withdrawal of water under Permit No. 16229 reduces the amount of water flowing downstream from the point of withdrawal from two to four percent during dry spell, low-water periods.

VII.

During 1968, the lowest flow year of record in the 1960 decade, the Little Spokane River was flowing at 92 cfs during the lowest period of that year at the gaging station at Dartford, several miles downstream from the point of intervenor's withdrawal. Between the point of withdrawal and Dartford, at least two tributary streams enter the Little Spokane River. The Little Spokane River, at the point of intervenor's withdrawal, contains about 80 percent of the volume of water registered at the Dartford gaging station.

VIII.

Starting in the summer of 1968 and continuing from that time, riparian residents of the Little Spokane River downstream from intervenor's point of withdrawal noticed several critical changes in the river flow past their properties. These included insufficient water for their accustomed pursuits of swimming, diving, boating, canoeing and river floating, and a necessity to move water pumps further out into the stream.

IX.

Any lowering of the volume of water in the Little Spokane River

per second (cfs) with the then State of Washington, Department of Water Resources, a predecessor agency to respondent. After receiving a complaint from appellant, the Department of Water Resources conducted a field examination on August 28, 1968. Intervenor complied with an order of the Department to cease pumping until he had obtained a permit. On July 29, 1970, respondent approved a finding that "water is available for appropriation for a beneficial use" to the amount of 2.0 cfs, and that this appropriation "will not impair existing rights or be detrimental to the public welfare."

III.

Respondent, noting in its finding of July 29, 1970, that 48 protests were on file opposing the Gatlin withdrawal, notified appellant, whose membership included most of the protesters, of the finding on July 30, 1970. On August 27, 1970, appellant protested the withdrawal in a letter to respondent. On September 11, 1970, respondent granted intervenor Surface Water Permit No. 16229 in accordance with the terms specified in respondent's finding of July 29, 1970. On September 14, 1970, intervenor began construction of his water system and subsequently withdrew water from the Little Spokane River under terms of Permit No. 16229. On September 15, 1970, the members of the Pollution Control Hearings Board, a newly created state agency, were sworn into office. On November 4, 1970, the Pollution Control Hearings Board advised respondent that appellant's letter of August 27, 1970 constituted a "timely protest" for purposes of this appeal.

IV.

At least 68 acres of intervenor's non-riparian acres are irrigable.

flowing past Pine View Park, a major facility of the Spokane County Park Department located downstream from intervenor's point of water withdrawal, has a deleterious effect on the public's use and enjoyment of that park.

X.

Respondent, while conceding in its finding of July 29, 1970 that the river's "value to the public for its recreational and esthetic benefits should not be underestimated nor undermined," made no detailed field investigation of appellant's protests.

From these Findings, the Pollution Control Hearings Board comes to these

CONCLUSIONS

I.

Before considering the specifics of this matter, the Pollution Control Hearings Board first takes note of a gradual change over the years relative to the accepted uses of public waters. Riparian rights, once paramount, gave way in the arid West to the doctrine of non-riparian appropriation for beneficial use. More recently there has been a recognition that esthetic and recreational uses of public water are as important as earlier, historical rights of irrigation. Riparian rights for recreational purposes on non-navigable lakes have been recognized in decisions of the State Supreme Court and it may be reasonable to assume that the court some day may also apply this doctrine to non-navigable streams. In any event, the Water Resources Act of 1971, stating that public waters of the state are to be "protected and fully utilized for the greatest benefit to the people," includes use of water

for "recreational" purposes and "preservation of environmental and esthetic values" among its "general declarations of fundamentals."

II.

In the instant matter there appears to be a classic example of this gradual change in acceptable uses of public water bodies. Once a farming region dependent to a great extent on irrigated water removed from the Little Spokane River, the area between Chattaroy and Dartford today--intervenor's non-riparian acreage being an exception--is almost entirely devoted to the development of river bank and upland "country living" homesites. The Little Spokane River has changed from an agricultural stream to a residential brook but respondent, in its field examinations and consideration of intervenor's application, took no more notice of this basic change in the use of the Little Spokane River than to make a cursory acknowledgment in its finding that "irrigation and esthetic benefits should not be . . . undermined." It well could be asked, therefore, what agency of the state government is to prevent such undermining if not respondent? Respondent cannot shirk its responsibility for establishing minimum flows by saying that a "specific flow necessary for recreational and esthetic purposes has not been made." Is the Little Spokane River, now primarily a residential brook, to be drained dry by irrigation withdrawals simply because respondent has not gotten around to making a minimum flow study? We think not.

III.

We attach no great significance to the apparent discrepancies between the Dartford gaging station records and the testimony of appellant's witnesses as to the level of the river flowing past their

properties. The important consideration is not the measured volume of water still flowing in certain deep channels; the critical consideration is the fact that, since 1968, riparian residents have found that the river, which once lapped their shores, has receded so much that they are prevented from accustomed aquatic pursuits. There is no proof that intervenor's withdrawal caused this change in the river flow. In our view, none is needed. The fault lies in respondent's failure to recognize that the general condition of the river, from whatever cause, had deteriorated to the detriment of riparian residents and to general citizens' use and enjoyment of a large public park. We conclude, therefore, that respondent erred in finding (1) that there was water available for appropriation, and (2) that intervenor's appropriation is not detrimental to the public interest.

IV.

The third criterion by which respondent must test every surface water application is whether there is a beneficial use. Certainly, intervenor's stated objective of growing alfalfa for cattle raising is a beneficial one. Intervenor, although invited to do so, did not furnish proof that his enterprise is a profitable one. He failed to produce evidence at the hearing to sustain his claim that it is profitable. He was given a post-hearing opportunity to show by his financial records that his project is profitable and therefore, a beneficial use which does not waste his appropriated water. He has failed to make such post-hearing proof. We must conclude, therefore, that there is doubt as to the beneficial use to which intervenor is putting his appropriated water.

V.

We come now to the curious set of circumstances surrounding this appeal. The Pollution Control Hearings Board always has recognized that appellant's letter to respondent of August 27, 1970 was a timely appeal to this Board. This has been tested twice in court and the Pollution Control Hearings Board's position has been twice sustained. This, however, cannot be taken as an implied criticism of respondent for granting a permit which later became the subject of appeal. There were mitigating circumstances surrounding the establishment of the Pollution Control Hearings Board. Accepted procedures and lines of communication had not been well established during the period when the permit was granted and the appeal was recognized. By the same token, intervenor cannot be condemned for constructing a water withdrawal system after being granted the permit and while this appeal was moving to the stage of formal hearing. We are inclined to grant the appeal in toto, but we feel our judgment must be tempered with a recognition of the obvious good faith of respondent during the confused period of organization during which the appeal was accepted. Our judgment also must recognize the legal right of intervenor to test the validity of the acceptance of the appeal by the Pollution Control Hearings Board.

VI.

The applicable law at the time of this application was RCW 90.03.290 which directs that the Department shall reject an application if

". . . the proposed use . . . threatens to prove detrimental to the public interest, having due regard to the highest feasible development of the use of the waters belonging to the public, . . ."

We do not know what evidence the Department considered in reaching its conclusion in approving the proposed use of 2.0 cfs for a marginal irrigation project, but the evidence before this Board on this appeal established conclusively that the proposed use would be detrimental to an already imperiled public interest in the lower reaches of the Little Spokane River, which the Legislature by its 1971 enactment (somewhat belatedly) moved to protect.

We do not impugn the motives of the Department of Ecology in granting this permit to the intervenor, Howard A. Gatlin. On this appeal we have had the advantage of considerable evidence not before the Department, as to the character and the extent of the public interest in the Little Spokane River below the point of the intervenor's diversion.

The evidence before us establishes that the diversion would be, and was, detrimental to the public interest, having due regard to the highest feasible use of the water belonging to the public.

In view of these Conclusions, the Pollution Control Hearings Board makes this

ORDER

Permit No. 16229 is remanded to respondent for modification as

follows:

1. Flow meters shall be installed at both the river pumping station and the spring diversion; such meters shall be capable of measuring the instantaneous rate of diversion as well as the total volume of water pumped over any irrigation season.

2. Intervenor is to be permitted to withdraw water from the Little Spokane River for the irrigation of 68 acres, not to exceed 570 g.p.m. and 235 acre-feet per year, less the amount of water which respondent finds is available from intervenor's spring, said modified permit to remain in force until such time as the results of a minimum flow study by respondent has been made, at which time said permit will be subject to that minimum flow as is established.

3. At such time as certificate of water right might issue under Permit No. 16229, respondent shall reduce the quantities of water appropriated if the flow measurement readings find a lesser quantity of water is needed than as are identified in (2) above.

DONE at Olympia, Washington this 2nd day of January, 1973.

POLLUTION CONTROL HEARINGS BOARD

Walt Woodward
WALT WOODWARD, Chairman

Matthew W. Hill
MATTHEW W. HILL, Member

James T. Sheehy
JAMES T. SHEEHY, Member

70TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
1st Session } { No. 958

AUTHORIZING THE LOWER SPOKANE AND LOWER PEND D'OREILLE TRIBES OF INDIANS TO PRESENT THEIR CLAIMS TO COURT OF CLAIMS

MARCH 16, 1928.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed

Mr. WILLIAMSON, from the Committee on Indian Affairs, submitted the following

REPORT

[To accompany H. R. 5574]

The Committee on Indian Affairs, to whom was referred the bill (H. R. 5574) authorizing the Lower Spokane and the Lower Pend d'Oreille or Lower Calispell Tribes or Bands of Indians of the State of Washington, or any of them, to present their claims to the Court of Claims, having considered the same, report thereon with a recommendation that it do pass without amendment.

This is a jurisdictional bill and if enacted into law will enable the Lower Spokane and the Lower Pend d'Oreille or Lower Calispell Tribes or Bands of Indians of the State of Washington, to bring suit in the Court of Claims for the purpose of establishing certain claims which have arisen out of alleged failures of the United States to extinguish the original possessory rights of these Indians to lands in the northeastern part of the State of Washington, the northern part of Idaho, and the northwestern part of Montana, or to compensate said Indians for the right and property of which they have been deprived.

The Lower Spokane and the Lower Pend d'Oreille or Lower Calispell Indian Tribes or Bands of the State of Washington from time immemorial inhabited and had recognized, undisputed, and exclusive possessory rights over the lands and the fishing and hunting rights and privileges within the limits described in H. R. 5574.

The United States Government has never extinguished possessory Indian titles of this character except by the express consent of the tribal bands evidenced by formal treaty or agreement of relinquishment.

Through oversight and neglect of the Government, the original possessory rights of the Indians named in this bill have never been

APPENDIX V

Reports of House and Senate Committees
on Indian Affairs, 1928, regarding H.R. 5574.

extinguished. In 1853, after the organization of Washington Territory, and under the administration of Governor Isaac I. Stevens, who was also superintendent of Indian Affairs for said territory, the original Indian possessory title to all lands within the new Territory was recognized, and Governor Stevens recommended, and himself negotiated, treaties with most of the Indian tribes within the Territory.

It was Governor Stevens's announced plan and intention to negotiate treaties with the tribes named in this bill, and in 1855 a council was called for that purpose, but the outbreak of the Yakima Indian war required the governor's attention and the council adjourned without accomplishment. Governor Stevens recognized this Indian possessory title in his records, in his maps and his speeches, and in the treaties actually negotiated with other tribes. Various intervening causes, such as the Indian wars, the gold-mining excitements, and later the outbreak of the Civil War, thereafter diverted the attention of the Government from such negotiations and prevented the consummation of a formal treaty agreement promised these Indians.

In December, 1855, Governor Stevens as Indian commissioner to these Indians said:

> I, your friend, say that your lands will not be taken away from you. * * * It is my business as your friend to protect you in your lands and rights and I shall do so as well as I can. * * * Your rights are your rights and you shall not be deprived of them.

Subsequent Indian commissioners, agents, and representatives of the Government for the next 30 years repeatedly called the attention of the Government to the unextinguished and outstanding rights, and to the injustice being done to these Indians, and they, in turn, proposed, recommended, discussed, and negotiated tentative agreements with the Indians, but nothing was ever done toward extinguishing this recognized outstanding Indian title and right.

The following statement appearing in the hearings on this bill sets forth the origin, character, and history of the claims of these Indians:

> Generally speaking, these claims are based on the fact that the original, admitted, undisputed, and recognized Indian possessory rights of these tribes to a large expanse of country occupied and used by them have never been extinguished by treaty, agreement, or voluntary cession of these Indians, nor have these Indians ever received any compensation therefor. The United States simply took possession of their country (except more or less worthless portions thereof set aside for their occupancy, hereafter referred to). The Indians were pushed, crowded, and forced off from and deprived of the best of the lands they occupied and were deprived of the hunting rights, fishing rights, root and berry fields, appurtenances, and privileges enjoyed therewith and wherefrom they obtained their livelihood—all wholly without any compensation to them for the property taken from them. That this Indian right of occupancy was and is a property right within the meaning of the fifth amendment to the Constitution, which forbids the taking of private property without just compensation, has long been settled by judicial announcement. (See Binns *v.* United States, 194 U. S. 486.)
>
> Historically considered, these claims arise as follows: The right and title of the United States to the "Oregon country," wherein these Indians have resided from time immemorial, was founded on discovery, exploration, and settlement as against foreign nations, and as such was confirmed in the United States by the only foreign nation making adverse claims thereto by the treaty of June, 1846. When the United States thus acquired the undisputed fee, as against foreign nations, to the Oregon country, that fee was as to the actual use and possession of the soil subject to and charged with the existing and

continued possession by, and the exclusive possessory right to the soil embraced within that fee, vested in and held by the various Indian tribes then, and for ages before, inhabiting that region.

This transfer to the United States conveyed only the naked fee, and the complete equitable property was in the Indians. I am here using the language of the Attorney General in a recent opinion. To continue from the same source:

"The earlier and fundamental decisions make this plain. In Worchester *v.* Georgia (16 Pet. 515, 543, 544) Chief Justice Marshall clearly states that the right asserted in behalf of the discovering European nations was merely a right as against each other, which he defines as "the exclusive right of purchasing such lands as the natives were willing to sell. As late as 1872 the Supreme Court said: 'Unmistakably their title was absolute, subject only to the preemption right of purchase acquired by the United States as the successors of Great Britain, and the sign * * * to prohibit the sale of the land to any other governments or their subjects." (Holden *v.* Joy, 17 Wall. 211, 244.)

The treaty of 1846 found the Indian claimants named in H. R. 5574 in peaceful, undisturbed, and long-standing possession of a considerable body of land on the south side of the international boundary line in the northeastern part of what, by subsequent act of Congress, became the Territory and later the States of Washington, Idaho, and Montana. The claim of the Lower Spokanes embraces a tract of land, rectangular in shape, lying in Douglas, Lincoln, Grant, and Adams Counties, in the State of Washington, aggregating approximately somewhere in the neighborhood of 1,750,000 acres. The general location and extent of this original habitat is not disputed and the exact acreage extent can be computed by engineers. The land claims of the Lower Kalispell embrace lands lying in the watershed of the Lower Pend Oreille River, from the international boundary line between the State of Washington, and the Province of British Columbia, southeasterly through the panhandle of Idaho into the State of Montana; it embraces a strip of land running through Pend Oreille County, Wash.; Bonner, Shoshone, and Kootenai Counties, Idaho; and Lincoln, Fergus, and Mineral Counties, Mont.; and roughly aggregating in its greatest extent nearly 3,755,000 acres. The location and extent of the original habitat of these Indians for which this claim is made is undisputed, and the exact acreage can be determined by surveyors, and land claims may be determined of less, but there is little likelihood of their being computed over the acreage I have stated. Their location is indicated on the maps I here exhibit.

With both these claims are a claim for loss of appurtenances in the way of fishing and hunting rights in a substantial amount, both in connection with the lands heretofore described and in, to, and upon the so-called "common hunting grounds," east of the Rocky Mountains at the head of the Missouri River. On these claims it is difficult to place any definite value in the absence of accepted or agreed data as to their full extent, exact character, and the extent of beneficial use thereof, together with an accepted and agreed measure of damages for their loss.

Sifted down, these claims made by these two Indian tribes or bands amount to a demand for compensation for the loss of their original habitat and range, with the appurtenances and rights enjoyed therewith, and of which they were deprived by the Government and the settlers whom the Government invited upon and gave these lands to, without any treaty, agreement with, relinquishment by, or compensation to these Indian owners. The original rights of these Indians are still outstanding, unimpaired by agreement, treaty, cession, sale, relinquishment, or compensation. Any offset of the Government in the way of gratuities or expenditures for their benefit is of a comparative nominal amount, and will leave a very substantial claim owing and unpaid to these tribes or bands.

The record shows that these tribes or bands, with their neighbors, for years persistently refused to accept gratuities or presents from the Government, believing that some one would afterwards claim that they had accepted such payments from the Government in settlement for their lands when they had refused to sell their lands or to relinquish any of their rights.

These were the only Indians occupying these lands when the first explorers arrived among them, when the first Indian agents took cognizance of them, and when the first settlers came into and upon their lands. These lands have never been claimed by or in the possession of any other Indians; their claim dates back beyond our knowledge and history, and there is no adverse claim or adverse possession in derrogation of these Indian rights. Their title and right to the claim, whatever it may amount to, is clear and distinct.

The Lower Spokanes were not crowded off their lands or deprived of their use thereof until the early eighties; the big bunch of them were driven off in the eighties following the creation by Executive order of January 18, 1881, of the so-called Spokane Reservation for the benefit of the Spokane Indians, out of a more or less worthless and barren portion of the habitat of the Lower, Middle, and Upper Spokane Indian Tribes, lying north of the Spokane River, and which no white person then considered of any particular value, or desirable for present white settlement.

With respect to the Indian use of this land, it may be said that the Indians in season occupied and used all of these lands; obviously they had no occasion to and did not make the intense beneficial use of it that the white man has who succeeded them. Needing but a small amount of cultivated land, they selected, inclosed, and cultivated small patches of the best ground; availed themselves of the best hay lands, and for the rest, used the land in its natural state, gleaning therefrom in season its roots, its berries, its game, and fur-bearing animals, gathering duck eggs in the spring, catching immense quantities of carp, salmon, and other fish during their running season for food and barter; hunting the deer and buffalo, and in small family parties roaming over the whole of their large holdings for their livelihood and pleasure during the year, only gathering together as a tribe at the fisheries, the camas fields, and on special occasions.

The existence of this outstanding Indian occupancy of and possessory right to the whole country from the limits of the Louisiana purchase, near the headwaters of the Mississippi, to the Pacific Ocean, was at all times recognized, as was also the necessity of extinguishing it in major part by friendly treaties with and by voluntary sale and cession by the inhabiting Indians. Oregon Territory was created by the act of August 14, 1848, and Washington Territory was created through a division of that Territory by the act of March 2, 1853. The extinguishing of the Indian title became a matter of immediate concern with the Indian Office and the records for the next few years.

The existence of this Indian possessory claim to the land, and the fact that it has never been extinguished by treaty or purchase or relinquishments will not be disputed, but as illustrative of Government admission thereof we give the following:

"1853. Serial No. 698, Thirty-third Congress, first session. SE. 34, page 13. The Indian title to lands east of the Cascade Mountains should be at once extinguished * * * the reservations which they will require in any treaty must necessarily be large. The amount that will be required to negotiate treaties with these Indians will not be less than $15,000. George W. Mannypenny, Commissioner of Indian Affairs, recommended appropriation of the necessary money by Congress.

"1854. Serial No. 721, February 6, 1854. Thirty-third Congress, first session. H. Ex. 55, part 1: Commissioner Mannypenny again recommended to the Secretary of the Interior the necessity for treaties. On page 1 he stated that, with many of the tribes in Oregon and Washington, it appears absolutely necessary to speedily conclude treaties for the extinguishment of their claims to lands now or recently occupied by them. And on page 3 he renewed his request for a total appropriation of $10,000 for expenses of negotiating these treaties. Congress (10 Stat. 350) in 1854 appropriated for 'expenses for negotiating with and making presents of goods and provisions to the Indian tribes in the Territory of Washington, $45,000,' but it was available too late for any action before 1855.

"1854. Serial No. 777, Volume I, part 1, Document No. 1, page 223, annual report: The governors of Washington and Oregon, 'called on for information as to the extent and nature of the various Indian claims, with maps indicating the boundaries of each tribe, with such information as would enable the department to issue the necessary instructions, etc. The superintendents in those Territories were instructed to proceed as early as practical with the negotiations.' In Stevens report, page 455, the governor, who as yet had had little opportunity to perform this work, said: 'The duty will devolve upon myself to negotiate treaties with the Indians of the Territory.' Page 456: The subject of the ancient fisheries is one on which legislation is demanded. It never could have been the intention of Congress that the precedent exists for recognition of the right of Indians to urge claim for compensation for loss of fishing and hunting privileges in H. R. 3344 passed by the Sixty-eighth Congress under which, I believe, the Piegan, Blackfoot, and Nez Perce claims are being prosecuted in the Court of Claims; also in S. 3185, Sixty-ninth Congress, under which the Okanogan and other Indians have instituted action, H-121, in the Court of Claims."

In the year 1855 (congressional documents, serial No. 810, p. 332) the instructions of the Commissioner of Indian Affairs, given in August, 1854, to Joel Palmer, superintendent in Oregon, and Isaac Stevens, Governor of Washington, to enter at once upon negotiations having for a principal aim the extinguishment of the Indian title to the land.

In the year 1853 Gov. Isaac I. Stevens had, in connection with the Pacific Railroad survey and reports, in a general way, established a record of the outer boundaries of the lands of these Indians and all other Indians in Washington Territory, and in 1855, at what was known as the Walla Walla council and treaty of May and June, 1855, the general question of tribal boundaries was considered, both of the "nontreaty" tribes and of those different tribes and bands of Indians for whom reservations were then established and with whom treaties were then and there made.

And I have here a copy of the original Stevens map of 1857, being map No. 187—1033 of the map records of the Indian Office. This [indicating on map] is the territory that is referred to.

He signed this, and it is addressed to the Hon. George W. Mannypenny, Commissioner of Indian Affairs, with letter of this date. It says: "Office of Commissioner of Indian Affairs, Washington, Olympia, April 30, 1857. Isaac Stevens, Government superintendent of Indians."

Although individual members of the Lower Spokane and Lower Kalispell Tribes, as now known and designated, were present at this Walla Walla treaty council, no treaty was made with these tribes, but they were advised by Governor Stevens that they would be separately treated with later with a view to entering into formal treaties and establishing permanent reservation boundaries out of their lands.

All arrangements were made for a treaty council with these other nontreaty Indians. The Indians were assembled, supplies and gifts brought up from Walla Walla, but the outbreak of the Yakima Indian war while the governor was negotiating the Blackfoot treaty at Fort Benton prevented these plans being consummated. A short conference only was held, wherein the governor expressed his position as the friend and protector of these Indians, as respect their possessory rights to their lands.

On December 4, 1855, at this council, which was held at Antoine Plantes's place on the Spokane River, Governor Stevens, as commissioner and superintendent of Indian Affairs for said Territory, amongst other things, assured these Indians, as a representative of the Government, that:

"Your rights are your rights and you shall not be deprived of them * * * I, your friend, say that your lands will not be taken from you. * * * It is my business as your friend to protect you in your lands and rights."

Various causes, the Indian War of 1855–1858 and the disturbances therefrom, the gold-mining excitement, 1855–1865; the outbreak of the Civil War, etc., defeated Governor Stevens's intentions to negotiate and execute formal treaties with the Lower Spokane and Lower Kalispell tribes, and their neighbors in the northeastern part of what is now the State of Washington for the extinction of part of their original Indian possessory title and rights in and to and upon these and adjoining lands and waters, and no treaty, agreement, cession, sale, or relinquishment was ever made by the Government with these Indians with respect to said lands and rights.

The boundary lines between these tribes and certain of their neighbors were recognized, fixed, and alluded to in the treaties and papers connected with the treaties made between the Government and the allied Yakima Indian Tribes at the Walla Walla council of 1855, and at the Flathead council of that same year, and the rights of these Indians to lands lying between those fixed and described in said treaties was generally recognized in the reports of Indian agents and commissioners and in the records and reports of the Indian Office and the Department of the Interior for the next 30 years or more.

As a part of the report of his proceedings as Superintendent of Indian Affairs, Governor Stevens had prepared, under his direction in March, 1855, a map of the Indian nations and tribes of the Territory of Washington, etc. (map No. 187, tube 1033, and indorsed Wash., Sup. W. 36S, 1857), this map, which I previously referred to, approximately correctly sets out the ownership and possession by these Indians of the land above referred to, and the buffalo hunting grounds held in common with other tribes.

In the year 1857, in the report of the Indian Department, serial No. 919, Thirty-fifth Congress, first session, S. E. II, page 299, it says:

"I invite attention to the report of the superintendents for Oregon and Washington, from which it appears that our relations with the Indians in this

Territory are in a very critical condition * * * the continued extension of our settlements into their territory, without any compensation being made to them is a constant source of dissatisfaction and hostile feeling. They are represented as being willing to dispose of their land to the Government, and I know of no alternative to the present unsatisfactory and dangerous state of things but the adoption of early measure for the extinguishment of that title."

Further at pages 609, 610, 611:

"My observation in relation to the treaties which have been made in Oregon leads me to the conclusion that in most instances the Indians have not received a fair compensation for the rights which they have relinquished to the ground (609). The Indians surrendered all their means of obtaining a living and where annuities are divided among a tribe they are pitifully small (p. 610). No other treaties have yet been ratified with the Spokane and other tribes bordering on the northern boundary east of the Cascade Mountains. The discovery of gold mines will bring our people in direct contact with these Indians (611) (p. 639). The approach of the white man was the only notice he received that he must leave the graves of his family and fields and surrender his very home and cultivated fields to the whites, who were continually throwing him back into a wilderness beyond the outer circle of civilization, as settlement approached him, and the white man deprived him of everything he possessed of any value."

It was useless to negotiate any further treaties with Indian tribes until such as had been negotiated had been ratified. It was not until Stevens himself took a seat in Congress that the treaties of 1855—the failure to ratify which was largely responsible for the Indian wars and several millions of dollars loss and expense—were ratified in 1859.

In the year 1867, serial No. 1308, special session, Senate Executive Document 4, pages 4 and 5, the report shows the necessity for treaty or other arrangement with these tribes by securing them a reservation as their lands and settlements are being interfered with by the advancing tide of emigration and travel to Idaho. By securing certain fisheries their welfare would be greatly advanced. Table C, page 31, shows these Indians as never having been treated with.

Quoting from serial No. 1326, Fortieth Congress, second session, House Executive Document No. 1, part 2 (1867):

"Of the tribes having no treaty relations with the Government there are the Spokanes, Colvilles, and others in the northeastern part of the Territory, who are liable to be dispossessed of their country by the advance of the whites. (The Colville district) * * *. Its boundaries are on the north of the forty-ninth parallel of latitude, on the south of Snake River, and the forty-seventh parallel; the one hundred and seventeenth meridian of longitude, by which it is separated from Idaho, in the east, and the boundary of the Yakima treaty on the west."

Quoting from serial No. 1414, Forty-first Congress, second session, House Executive Document No. 1 (1869):

"The Indians under the jurisdiction of the agent in charge here live over a section of country embracing about 2,500 square miles, including much fine grazing land. It extends from the forty-ninth parallel north latitude to the Snake River and from thence to the one hundred and seventeenth meridian (pp. 593, 594)."

Quoting from serial No. 1505, Forty-second Congress, second session, House Ex. Document No. 1 (1871):

"I have the honor to submit the following as my annual report of the Indians under my supervision: They have never been treated with or placed on reservations, and reside within the following boundaries, viz: Commencing at a point where the forty-ninth parallel of latitude crosses the Cascade Mountains (continuing along the boundary fixed in the Stevens map) (p. 710)."

Quoting from the report of Special Commissioner John P. Shank, dated Colville, August 14, 1873, serial No. 1584, Forty-third Congress, first session, Sen. Mis. Doc. No. 31:

"They ask for nothing but their homes, and for these they plead as children.

"There has been no treaty with these tribes, for whom this reservation is proposed, and their title to all the country from Steptoe's Butte to the Flathead country and British line and to the Sierra Nevada, to the Snake and Pelluce Rivers, is yet theirs."

That is the commissioner who at the time was a Member of the House.

The map of W. P. Winans, Indian agent, accompanying the annual report of 1871, and the annual report of 1871, serial No. 1505, Forty-second Congress,

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second session, H. Ex. Doc. No. 1, page 710, sets out the lands in question as still in the possession of these Indians without treaty.

Contemporary with the creation of Washington Territory went the establishment of land offices, the survey of this Indian land as "public domain," and the grant by the Government of its "fee" in these lands to settlers under the "donation act" to the Northern Pacific under its land grant and to the Territory for school and other purposes. As early as the Antoine Council of 1855, some 20 or more white men had prepared for forwarding to the Surveyor General's office written notifications of intention of taking up claims under the donation act on the lands of the Colville Indians. Chief Garry, in that council, told these men "listen to the governor, listen to the chiefs, and when a treaty is made then talk about your lands." Journal Secretary Doty, December 4, 1855. From that time on these Indians met a constantly increasing onrush of land-hungry settlers, intent on securing for themselves the best of the Indian lands, having no regard for the Indian or his rights, and actually seizing and dispossessing the Indians from inclosed fields, cultivated lands, and improvements. The Indians were constantly and gradually forced off their best lands on to poorer lands the whites did not then want.

The situation once or twice attracted the distant attention and casual notice of Congress. In 1873 a Member of the House, Gen. J. P. C. Shanks, with T. W. Bennett and H. W. Reed, as special commissioners, investigated and reported on the Indian affairs in the Territory of Idaho and Territories adjoining thereto. A subsequent act of Congress of March 3, 1885, authorizing the negotiating of treaties with Indians occupying lands outside of Indian reservations in Washington and Idaho Territories. The original Indian possessory right and title in and to the lands, for which claim is here made, has, however, admittedly never been ceded by these Indians or relinquished to the United States. The matter was neglected and overlooked. Had these peaceful, long-suffering Indians gone on the warpath the matter would doubtless have been settled.

It is the contention of the claimants that they enjoyed a joint occupancy, possession, and use of the "common hunting ground" particularly described in and reserved by article 3 of the Blackfeet treaty of October 17, 1855 (11 Stat. 657, et seq.), and that the rights of these claimants are recognized and respected in the following language of said section:

"*And provided further*, That the rights of western Indians to a whole or a part of the common hunting ground, derived from occupancy and possession, shall not be affected by this article, except so far as said rights may be determined by the treaty of Laramie."

Contemporary records and maps disclose the joint occupancy and use of these "common hunting grounds" by these other western Indians, not party to the treaty. That right has never been ceded or relinquished by claimants.

And in this map [indicating] it names those Indians; and the Indians who are parties to the treaty were not only named, but others not parties to the treaty were named as participating in those hunting grounds.

All that the Lower Kalispell Indians were permitted to keep and retain of their lands is a strip about 5 miles long and of an average width of a mile along the Pend d'Oreille River on which they now live on allotments of an average size, I believe, of 40 acres. All the Lower Spokanes were permitted to keep and enjoy was a common use, with the Middle and Upper Spokane Tribes and other bands of Indians, the Spokane Reservation created without their knowledge out of the most worthless and barren part of their lands. They never agreed to or accepted their remnant of their lands in settlement or accord for what was taken away from them. The poor reservation lands were already theirs by stronger and better title than the Government could vest by Executive order prior to the extinguishment of their original possessory Indian title.

Quoting from the report of the Colville Indian agent, August 15, 1897, Serial No. 3641, Fifty-fifth Congress, second session, House Document 5, page 288:

"The country comprising the Colville and Spokane Reservation is rough and mountainous in character, and very little part of it can be utilized for agricultural purposes. I am forced to the conclusion that the Indians of the Colville and Spokane Reservations have received less aid and assistance from the Government than any other tribes in the country. When I look around and note the rough mountainous character of the country, and see the gradual encroachments of whites on all sides, the scarcity of game, the almost utter lack of employment, the majority of them with only a few acres of ground to cultivate, and dependent almost entirely on the few bushels of grain they raise, I am astonished at the progress they have made, while at the same time I wonder how they have managed to live."

Of their original holdings of thousands of acres of fine land involved in these claims, these Indian claimants have received nothing; for their fishing and hunting rights and their root fields that they were deprived of and which furnished them their subsistence and livelihood, they have received nothing.

They have never had or received anything of value to compensate these Indians for the loss of greater and more valuable tracts of land taken from them without their consent or for the abundant means of livelihood—fishing, hunting, root grounds, etc.—of which they had been wrongfully deprived. There is practically no hunting left; the great salmon and other fisheries have been ruined; the lands where these Indians are allotted and now live are at best suited for grazing purposes; and these Indians after six years of drought are in a situation where probably one-quarter of them have passed through the winter on half rations, where horses have been killed to leave feed for cattle, and cattle sold to provide food for existence, and where many Indians have no money or means to purchase food, to say nothing of seed wheat and other agricultural necessities.

Fishing

The loss of their salmon and other fisheries was a most severe economic blow to these Indians; they still feel it. It was not the loss of a sporting-game privilege to go out with a line in season and catch a fish or two. It was the loss of half their food supply for the family for the whole year. The average person has no conception of what these fisheries were. In the seasons when the carp or suckers, and the salmon came up the streams the water literally "boiled" alive with them and from their frantic efforts to get upstream to the spawning grounds. Fish were caught and cured by the tons. There were hundreds of tepees at the fisheries, the curing grounds covered acres, and supplies for the whole year laid in, and the surplus used in barter with other tribes. Hunting parties for the "buffalo grounds" loaded their pack horses with smoked salmon to trade with the plains Indians for buffalo robes, pemmican, and other commodities. Fish were sold and traded to settlers, miners, and to the Hudson Bay Co. that maintained a trading post at Colville until 1872.

"Their main resource is salmon. These actually filled the stream. The fishery at Kettle Falls is one of the largest on the river. (Serial No. 746, 33d Cong., 2d sess., S. Ex. Doc. 1, p. 446 (1854).)

"They resort to the salmon fisheries on the Columbia, where they are employed in catching and curing for winter consumption until September. (Serial No. 1248, 39th Cong., 1st sess., H. Ex. Doc. 1, pp. 266, 267.)

"The greater number of the tribes depend for their subsistence upon the products of their fisheries, upon camas, bitter roots, berries, etc., Okanogans subsisting almost by fishing and hunting. (Serial No. 1326, 40th Cong., 2d sess., H. Ex. Doc. 1, pt. 2, pp. 56 and 57.)

"At Kettle Falls they catch their annual supply of salmon, which they dry in the shade. (Serial No. 1449, 41st Cong., 3d sess., H. Ex. Doc. 1, pt. 4, p. 491.)

"Two-thirds of their subsistence is derived from hunting, fishing, and root digging, and the great fishery at Kettle Falls is where the surrounding tribes get their annual supply of salmon. (Serial No. 1505, 42d Cong., 2d sess., H. Ex. Doc. No. 1, pp. 708–709.)

"They catch a great number of salmon on the San Poil River near where it flows into the Columbia, which is a great means of support to them. (Serial No. 2841, 51st Cong., 2d sess., H. Ex. 1, pt. 5, p. 218.)"

As early as 1877 the diminution of the fisheries was noted.

"From the diminished number of salmon taken by the Indians at the different fisheries this season, in consequence, it is believed, of the large quantities near the mouth of the Columbia for canning and other purposes, it is feared there will be much suffering from an insufficiency of food." (Serial No. 1800, 45th Cong., 2d sess., H. Ex. Doc. 1, pt. 5, pp. 582–583.)

The fisheries have dwindled until they produce far less than 1 per cent of the fish they used to carry, and the Indians who now endeavor to catch a single fish or two are arrested and prosecuted. As a substantial food supply and an article of commerce their great value have been wholly taken from these Indians.

They consistently refuse to accept gifts from the Government until there had been a settlement of their land question. Quoting from Indian Agent Paige's report in 1868 (Serial No. 1366, 558–559):

"I have the honor to state that I have just completed the distribution of presents to Indians, contemplated in your instructions of September 10 to November 17, 1867. * * * A great deal of difficulty was experienced in persuading many of them to receive their presents, as an impression had for some

APPENDIX V

time prevailed among the more distant bands that the distribution was to be made in payment for their lands, and that by accepting the articles they would forfeit all right to the soil and be removed to some reservation. Every effort in my power has been made to disabuse them of this impression. * * * Quite a number of Spokanes, among whom was Garey, were present, and drew rations, but declined to receive presents in goods. * * * They appeared to have a suspicion that there was something behind so large a distribution affecting their right to the soil, and up to the present time the majority of them have refused to receive anything. * * * The fact that a portion of the Indians refused all gratuitous presents shows a determination to hold possession of the country until the Government makes satisfactory overtures to open the way of actual purchase."

The reports of the various Indian agents for subsequent years show that this was the consistent attitude of most of these tribes toward supplies, presents, and gratuities offered to them.

They have a very substantial claim over any and all offsets, payments, and gratuities, and other offsets that may be properly chargeable to them by the Government.

The report of the Secretary of the Interior on this bill is set forth in his letter to the chairman of the committee. The letter is as follows:

DEPARTMENT OF THE INTERIOR,
Washington, January 20, 1928.

Hon. SCOTT LEAVITT,
Chairman Committee on Indian Affairs,
House of Representatives.

MY DEAR MR. LEAVITT: Further reference is made to your letter of December 21, 1927, inclosing for a report a copy of H. R. 5574, being a bill "Authorizing the Lower Spokane and the Lower Pend O'Reille or Lower Kalispel Tribes or Bands of Indians of the State of Washington, or any of them, to present their claims to the Court of Claims."

The purpose of this bill is to have the Court of Claims adjudicate the claims against the Government of the tribes or bands of Indians named therein.

These claims arose partly under the treaty between the United States and the Yakima Nation of Indians of June 9, 1855 (12 Stat. 951), and under certain Executive orders as shown by the records here. The combined claims are for approximately 6,500,000 acres of land lying in Idaho, Montana, and Washington, and for hunting and fishing rights claimed by the Indians, of which they claim to have been deprived without their knowledge or consent and without adequate compensation having been made for the lands and rights so taken and denied.

The bill provides that the lands taken from the Indians shall be valued at $1.25 per acre, and the approximate amount which will be awarded, should the Indians be authorized to enter suit and their claims be favorably adjudicated, is about $8,125,000 for the lands. In addition to the amount claimed for the lands the Indians are asserting a combined claim for hunting and fishing rights of which they have been deprived. These rights will not amount to more than $1,000,000. The total amount claimed by these Indians is $9,125,000 approximately.

The claims for lands originated under certain treaties, acts of Congress and Executive orders reducing the area of the lands occupied by these tribes. There are certain setoffs which the Government can present to the court should a jurisdictional act be passed which would materially reduce the amount which the attorney believes can be obtained in a judgment against the United States. The principal claim for hunting rights alleged to have been lost by these Indians originated under the Blackfoot treaty of October 17, 1855 (11 Stat. 657), which provided that certain country described, in the southwestern corner of what is now the State of Montana, "shall be a common hunting ground for 99 years where all the nations, tribes, and bands of Indians, parties to the treaty, may enjoy" certain uninterrupted privileges.

It also provided that the western Indians, parties to the treaty, may hunt on certain parts of the Territory. The preamble of the treaty recites the names of the tribes and the nations of Indians parties thereto, but the Lower Spokane and Lower Pend d'Oreille tribes were not mentioned in the treaty.

From a careful reading of the Blackfoot treaty of 1855, it is not believed that the Indians mentioned in this bill were included within the provisions thereof.

The fishing rights extend to certain salmon fisheries along the Columbia River, also Spokane River, and are alleged to have been materially injured by the establishment of canneries along the lower Columbia River.

In view of the prima facie showing made by these Indians, they have been authorized to enter into contract with an attorney to present their claims to the proper department of the Government and to the courts. Approval of this bill seems not to be indicated.

The Director of the Bureau of the Budget has advised that the proposed legislation is in conflict with the financial program.

Very truly yours,

HUBERT WORK.

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APPENDIX V

Calendar No. 824

70TH CONGRESS, 1st Session } SENATE { REPORT No. 796

AUTHORIZING INDIANS IN THE STATE OF WASHINGTON TO PRESENT CLAIMS TO THE COURT OF CLAIMS

APRIL 13, 1928.—Ordered to be printed

Mr. JONES, from the Committee on Indian Affairs, submitted the following

REPORT

[To accompany S. 1480]

The Committee on Indian Affairs, to whom was referred the bill (S. 1480) authorizing certain Indian tribes and bands, or any of them, residing in the State of Washington, to present their claims to the Court of Claims, having considered the same, report favorably thereon with the recommendation that the bill do pass without amendment.

The report of the Secretary of the Interior is appended hereto and made a part of this report, as follows:

DEPARTMENT OF THE INTERIOR,
Washington, January 20, 1928.

Hon. LYNN J. FRAZIER,
Chairman Committee on Indian Affairs,
United States Senate.

MY DEAR SENATOR FRAZIER: Further reference is made to your letter of December 19, 1927, inclosing for a report a copy of S. 1480, being a bill authorizing certain Indian tribes and bands, or any of them, residing in the State of Washington, to present their claims to the Court of Claims.

This bill is practically identical with H. R. 5574, upon which a report is being made. The principal differences lie in the title and the spelling of the word Kalispel. The purpose of this bill is to have the Court of Claims adjudicate the claims against the Government of the tribes or bands of Indians named therein.

These claims arose partly under the treaty between the United States and the Yakima Nation of Indians of June 9, 1855 (12 Stat. L. 951), and under certain Executive orders, as shown by the records here. The combined claims are for approximately 6,500,000 acres of land lying in Idaho, Montana, and Washington, and for hunting and fishing rights claimed by the Indians, of which they claim to have been deprived without their knowledge or consent and without adequate compensation having been made for the lands and rights so taken and denied. The bill provides that the lands taken from the Indians shall be valued at $1.25 per acre, and the approximate amount which will be awarded, should the Indians be authorized to enter suit and their claims be favorably adjudicated, is about $8,125,000 for the lands. In addition to the amount claimed for the lands the

Indians are asserting a combined claim for hunting and fishing rights of which they have been deprived. These rights will not amount to more than $1,000,000. The total amount claimed by these Indians is $9,125,000 approximately.

The claims for lands originated under certain treaties, acts of Congress, and Executive orders reducing the area of lands occupied by these tribes. There are certain set-offs which the Government can present to the court should a jurisdictional act be passed which would materially reduce the amount which the attorney believes can be obtained in a judgment against the United States. The principal claim for hunting rights alleged to have been lost by these Indians originated under the Blackfoot treaty of October 17, 1855 (11 Stat. L. 657), which provided that certain country described, in the southwestern corner of what is now the State of Montana, "shall be a common hunting ground for 99 years, where all the nations, tribes, and bands of Indians, parties to the treaty, may enjoy" certain uninterrupted privileges. It also provided that the western Indians, parties to the treaty, may hunt on certain parts of the territory. The preamble of the treaty recites the names of the tribes and the nations of Indians, parties thereto, but the Lower Spokane and Lower Pend d'Oreille tribes were not mentioned in the treaty.

From a careful reading of the Blackfoot treaty of 1855, it is not believed that the Indians mentioned in this bill were included within the provisions thereof.

The fishing rights extend to certain salmon fisheries along the Columbia and Spokane Rivers and are alleged to have been materially injured by the establishment of canneries along the lower Columbia River.

In view of the prima facie showing made by these Indians, they have been authorized to enter into contract with an attorney to present their claims to the proper department of the Government and to the courts. Approval of this bill seems not to be indicated.

This bill is identical with H. R. 5574, upon which the Director of the Bureau of the Budget has advised that the proposed legislation is in conflict with the financial program.

Very truly yours,

HUBERT W[illegible]

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70TH CONGRESS, 1st Session } SENATE { DOCUMENT No. 110

VETO MESSAGE AUTHORIZING INDIANS IN THE STATE OF WASHINGTON TO PRESENT CLAIMS TO THE COURT OF CLAIMS

MESSAGE

FROM

THE PRESIDENT OF THE UNITED STATES

RETURNING WITHOUT APPROVAL THE BILL (S. 1480) ENTITLED "AN ACT AUTHORIZING CERTAIN INDIAN TRIBES AND BANDS, OR ANY OF THEM RESIDING IN THE STATE OF WASHINGTON, TO PRESENT THEIR CLAIMS TO THE COURT OF CLAIMS"

MAY 3 (calendar day, May 18), 1928.—Read; ordered to lie on the table and to be printed

THE WHITE HOUSE, *May 18, 1928.*

To the Senate:

I am returning herewith Senate bill 1480, "An act authorizing certain Indian tribes and bands, or any of them, residing in the State of Washington, to present their claims to the Court of Claims," without my approval.

These claims amount to approximately $9,125,000, which represents the value of 6,500,000 acres of land, in the aboriginal possession of the Indians, at $1.25 per acre, and includes hunting and fishing rights to the value of $1,000,000. These claims are not based upon any treaty or agreement between the United States and these Indians, nor does it appear to me that they are predicated upon such other grounds as should obligate the Government at this late day to defend a suit of this character. The Government should not be required to adjudicate these claims of ancient origin unless there be such evidence of unmistakable merit in the claims as would create an obligation on the part of the Government to admit them to adjudication. It seems to me that such evidence is lacking.

I am constrained, therefore, to withhold my approval of this bill.

CALVIN COOLIDGE.

S. 1480. Seventieth Congress of the United States of America; at the first session, begun and held at the city of Washington on Monday, the fifth day of December, one thousand nine hundred and twenty-seven.]

An act authorizing certain Indian tribes and bands, or any of them, residing in the State of Washington, to present their claims to the Court of Claims.

Be it enacted by the Senate and House of Representatives of the United States of American in Congress assembled, That jurisdiction is hereby conferred on the Court of Claims, with the right to appeal to the Supreme Court of the United States by either party, as in other cases, notwithstanding the lapse of time or statutes of limitation, to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims of the Lower Spokane and the Lower Pend O'Reille or Lower Calispell Tribes or Bands of the State or Washington, or any of said tribes or bands, against the United States arising under or growing out of the original Indian title, claim, or rights of the said Indian tribes and bands, or any of said tribes or bands (with whom no treaty has been made), in, to, or upon the whole or any part of the lands and their appurtenances claimed by said Lower Spokane Tribe or Band of Indians, in the State of Washington, and embraced within the following general descriptions, to wit:

Commencing in the State of Washington on the east and west Government survey township line between townships 24 and 25 north at a point whose longitude is one hundred and nineteen degrees ten minutes west; thence east along said township line to the first draw leading and draining into Hawk Creek in Lincoln County, Washington; thence down the center of said draw to said Hawk Creek and down the center of said Hawk Creek to its conflux with the Columbia River; thence up and along the south and east bank of the Columbia River to the north bank of the Spokane River at its conflux with the Columbia River, which said boundary lines separate the lands of said Lower Spokane Tribe or Band of Indians from those, the several so-called Colville and Okanogan Tribes or Bands of Indians; thence easterly up and along the north bank of the said Spokane River to a north and south line whose longitude is one hundred and eighteen degrees west; thence south along said line to its intersection with the forty-seventh parallel of latitude; thence west along said forty-seventh parallel to a line whose longitude is one hundred and nineteen degrees and ten minutes west; thence north on said line to the point of beginning, which two latter lines of boundary separate the lands of the said Lower Spokane Tribe or Band of Indians from the lands of the confederated Yakima Indians as defined by the treaty between the United States and said Yakima Indians concluded at Camp Stevens, Walla Walla Valley, Washington Territory, June 9, 1855 (Twelfth United States Statutes at Large, pages 951, 956); lands in the States of Idaho, Montana, and Washington, claimed by said Lower Calispell or Lower Pend O'Reille Indian Tribe or Band of Indians and embraced within the following description to wit:

Commencing at a point in the State of Idaho at the forty-ninth parallel latitude on the divide between the waters of the Flat Bow or Kootenai River and those of the Clark Fork River and its tributaries; thence southerly and southeasterly along said summit of the divide, known as the Cabinet Mountain, to the headwaters of Thompsons River in Sanders County, Montana; thence southerly along the divide between Thompsons River and the tributaries of the Flathead River to the town of Plains, Montana, and continuing southwesterly on a line drawn through Saint Regis, Montana, to the summit of the Calispell or Coeur d'Alene Range of the Bitter Root Mountain (which said boundaries separate the original habitat and lands of said Lower Calispell or Lower Pend O'Reille Indians from those of the Cootenay, Upper Pend O'Reille, and Flathead Tribes or Bands of Indians as defined by the treaty between the United States and said last-named tribes or bands of Indians, executed July 16, 1855) (Twelfth Statutes at Large, pages 975–979); thence northwesterly along the summit of said Calispell or Coeur d'Alene Range and the divide between the waters of the said Clark Fork and those of the Coeur d'Alene River, and along said course extend to and across the Spokane Plains and continuing in a general northwesterly direction to the divide separating the waters of said Clark Fork River from the Spokane River and its tributaries to the main ridge of the Calispell Mountains in the State of Washington; and thence in a northerly direction, along the summit of main ridge of said Calispell Mountains, and said course extending to the International boundary line between the Province of British Columbia and the State of Washington; then east along said international boundary line to the point of beginning, which last-named boundaries separate the original habitat and land of said Lower

Calispell or Lower Pend O'Reille Indians from those of the Coeur d'Alene, Spokane, Colville, and Lake Tribes or Bands of Indians; which said lands or rights therein or thereto are claimed to have been taken away from said Indian tribes and bands, or some of them, by the United States, recovery therefor in no event to exceed $1.25 per acre; together with all other claims of said tribes or bands of Indians, or any of said tribes or bands, arising under or growing out of fishing rights and privileges held and enjoyed by said tribes and bands, or any of them, in the waters of the Columbia River and its tributaries; or arising or growing out of hunting rights and privileges held and enjoyed by said tribes and bands, or any of them, in common with other Indians in the "common hunting grounds" east of the Rocky Mountains as reserved by and described in the treaty with Blackfoot Indians, October 17, 1855 (Eleventh Statutes at Large, pages 657 to 662), and which are claimed to have been taken away from said tribes and bands, or any of them, by the United States without any treaty or agreement with such Indian claimants therefor and without compensation to them.

SEC. 2. Any and all claims against the United States within the purview of this Act shall be forever barred unless suit or suits be instituted or petition, subject to amendment, be filed as herein provided in the Court of Claims within five years from the date of the approval of this Act, and such suit or suits shall make the said Lower Spokane and Lower Calispell or Lower Pend O'Reille Indian Tribes or Bands of Washington, or any of said tribes or bands, party or parties plaintiff and the United States party defendant. The petition shall be verified by the attorney or attorneys employed to prosecute such claim or claims under contract with the Indians approved in accordance with existing law; and said contract shall be executed in their behalf by a committee or committees selected by said Indians as provided by existing law. Official letters, papers, documents and records, maps, or certified copies thereof may be used in evidence, and the departments of the Government shall give access to the attorney or attorneys of said Indians to such treaties, papers, maps, correspondence, or reports as they may require in the prosecution of any suit or suits instituted under this Act.

SEC. 3. In said suit or suits the court shall also hear, examine, consider, and adjudicate any claims which the United States may have against the said Indian tribes and bands, or any of them. Any payment or payments which have been made by the United States upon any such claim or claims shall not operate as an estoppel, but may be pleaded as an offset in such suit or suits, as may gratuities, if any, paid to or expended for said Indian tribes and bands or any of them.

SEC. 4. Any other tribes or bands of Indians the court may deem necessary to a final determination of any suit or suits brought hereunder may be joined therein as the court may order: *Provided*, That upon final determination of such suit or suits the Court of Claims shall have jurisdiction to fix and determine a reasonable fee, not to exceed 10 per centum of the recovery, by any one of said tribes or bands, and in no event to exceed the sum of $25,000 for all of said tribes or bands of Indians, together with all necessary and proper expenses incurred in the preparation and prosecution of such suit or suits to be paid to the attorney or attorneys employed as herein provided by the said tribes or bands of Indians, or any of said tribes or bands, and the same shall be included in the degree, and shall be paid out of any sum or sums adjudged to be due said tribes or bands, or any of them, and the balance of such sum or sums shall be placed in the Treasury of the United States, where it shall draw interest at the rate of 4 per centum per annum, subject to appropriation by Congress for the health, education, and Industrial advancement of said Indians, including the building of homes.

NICHOLAS LONGWORTH,
Speaker of the House of Representatives.

CHARLES G. DAWES,
Vice President of the United States and President of the Senate.

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APPENDIX V

AGRICULTURAL STATISTICS.

Mr. HEFLIN. Mr. Speaker, I ask unanimous consent for the passage of the bill (H. R. 21847) to prevent falsifications in the collection and compilation of agricultural statistics and the unauthorized issuance and publication of the same.

The SPEAKER. The gentleman from Alabama asks unanimous consent for the present consideration of a bill, which the Clerk will report.

The Clerk read as follows:

Be it enacted, etc., That it shall be unlawful for any person in the employment of the Government of the United States to divulge, or cause to be divulged, or in any way to give out, or cause to be given out, publish, or make known to anyone not authorized by law to have or receive the same, any information, statistical or otherwise, acquired by virtue of his employment by or official position with any Department of the Government of the United States regarding the reports on crop conditions prior to the hour that the crop estimate is published as is now required by law.

SEC. 2. That it shall be unlawful for any person in the employment of the Government of the United States to divulge, or cause to be divulged, or in any way to give out, or cause to be given out, publish, or make known to anyone not authorized by law to have or receive the same, any information, statistical or otherwise, obtained by virtue of his employment by or official position with the Government of the United States regarding the amount of cotton ginned prior to the day fixed by law for the publication of the ginners' report obtained by the Census Department.

SEC. 3. That it shall be unlawful for any officer or employee of the United States of America, whose duties require the collection, compilation, or report of statistics or information relative to the products of the soil, knowingly to collect, compile, or report for issuance or issue any false statistics or information relative to such products.

SEC. 4. That any person who shall violate any of the provisions of this act shall upon conviction be punished by a fine of not more than $10,000 or by imprisonment for a period of not more than five years, or both fine and imprisonment, in the discretion of the court.

The SPEAKER. Is there objection?

Mr. PAYNE. I object, Mr. Speaker.

Mr. HEFLIN. Will the gentleman withhold his objection a moment?

Mr. PAYNE. No; this matter is thoroughly understood by the House. I object to the passage of the legislation and want the opportunity to vote against it.

The SPEAKER. The gentleman from New York objects.

SPOKANE INDIAN RESERVATION, WASH.

Mr. JONES of Washington. Mr. Speaker, I move to suspend the rules and discharge the Committee of the Whole House on the state of the Union from further consideration of the bill (S. 6163) to authorize the Secretary of the Interior to sell and dispose of the surplus unallotted agricultural lands of the Spokane Indian Reservation, Wash., and to place the timber lands of said reservation in a national forest, and that the bill as amended by the House Committee on Indian Affairs do pass.

The SPEAKER. The gentleman from Washington moves to suspend the rules and pass, with amendments, a bill which the Clerk will report.

The Clerk read as follows:

Be it enacted, etc., That the Secretary of the Interior be, and he is hereby, authorized and directed to cause allotments to be made under the provisions of the allotment laws of the United States to all persons having tribal rights or holding tribal relations and who may rightfully belong on the Spokane Indian Reservation and who have not heretofore received allotments.

SEC. 2. That upon the completion of said allotments to said Indians the Secretary of the Interior shall classify the surplus lands as agricultural and timber lands, the agricultural lands to be opened to settlement and entry under the provisions of the homestead laws by proclamation of the President, which shall prescribe the time when and the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof; and no person shall be permitted to settle upon, occupy, or enter any of said lands except as prescribed in such proclamation.

SEC. 3. That the price of the lands classified as agricultural shall be $5 per acre, and said price shall be paid in accordance with rules and regulations to be prescribed by the Secretary of the Interior upon the following terms: One-fifth of the purchase price to be paid in cash at the time of entry and the balance in five equal annual installments to be paid in one, two, three, four, and five years, respectively, from and after the date of entry. In case any entryman fails to make the annual payments, or any of them, promptly when due, all rights in and to the land covered by the entry shall cease and any payments theretofore made shall be forfeited and the entry canceled, and the land shall be reoffered for sale and entry under the provisions of the homestead laws at the same price at which it was first entered: *Provided*, That nothing in this act shall prevent homestead settlers from commuting their entries under section 2301 of the Revised Statutes of the United States by paying for the land entered the price fixed herein, receiving credit for payments previously made. In addition to the price to be paid for the land the entryman shall pay the same fees and commissions at the time of commutation or final entry as now provided by law where the price of the land is $1.25 per acre, and when an entryman shall have complied with all the requirements and terms of the homestead laws as to settlement and residence and shall have made the required payments as aforesaid he shall be entitled to a patent for the lands entered: *And provided further*, That all lands classified as agricultural remaining undisposed of at the expiration of four years from the opening of said lands to entry shall be appraised by the Secretary of the Interior from time to time and sold at public auction or under sealed bids to the highest bidder for cash at not less than the said appraised value, under such regulations as of honorably discharged Union soldiers and sailors of the late civil and Spanish wars or the Philippine insurrection as defined and described in sections 2304 and 2305 of the Revised Statutes, as amended by the act of March 1, 1901, shall not be abridged: *Provided further*, That sections 16 and 36 of the agricultural lands in each township shall not be disposed of, but shall be reserved for the use of the common schools and paid for by the United States at $1.25 per acre, and the same are hereby granted to the State of Washington for such purpose.

SEC. 4. That the Secretary of the Interior may reserve such lands as he may deem necessary for agency, school, and religious purposes, to remain reserved so long as needed and so long as agency, school, or religious institutions are maintained thereon for the benefit of the Indians; and he is further authorized and directed to reserve and set aside such tracts as he may deem necessary or convenient for town-site purposes, and he may cause any such reservations to be surveyed into lots and blocks of suitable size and to be appraised and disposed of under such regulations as he may prescribe, and the net proceeds derived from the sale of such lands shall be deposited in the Treasury of the United States to the credit of the Indians of the Spokane Reservation.

SEC. 5. That the lands so classified as timber lands shall remain Indian lands subject to the supervision of the Secretary of the Interior until further action by Congress, and no provision authorizing the sale of timber upon Indian lands shall apply to said lands unless they be specially designated: *Provided*, That until further legislation the Indians and the officials and employees in the Indian Service on said reservation shall, without cost to them, have the right, under such regulations as the Secretary of the Interior may prescribe, to go upon said timber lands and cut and take therefrom all timber necessary for fuel, or for lumber for the erection of buildings, fences, or other domestic purposes upon their allotments; and for said period the said Indians shall have the privilege of pasturing their cattle, horses, and sheep on said timber lands, subject to such rules and regulations as the Secretary of the Interior may prescribe: *Provided further*, That the Secretary of the Interior is hereby authorized to sell and dispose of for the benefit of the Indians such timber upon such timber lands as in his judgment has reached maturity and is deteriorating and which, in his judgment, would be for the best interests of the Indians to sell, the purpose being to as far as possible protect, conserve, and promote the growth of timber upon said timber lands. The Secretary of the Interior shall deduct from the money received from the sale of such timber the actual expense of making such sale and place the balance to the credit of said Indians, and he is authorized to prescribe such rules and regulations for the sale and removal of such timber so sold as he may deem advisable.

SEC. 6. That the Secretary of the Interior is hereby vested with full power and authority to make all needful rules and regulations for the purpose of carrying out the provisions of this act, and there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $5,000, or so much thereof as may be necessary, to pay the Indians for the lands granted to the State of Washington, as provided in section 3 of this act, and there is hereby appropriated the further sum of $7,000, or so much thereof as may be necessary, for the purpose of carrying out the other provisions of this act: *Provided*, That the appropriation other than that to pay for the lands granted to the State of Washington shall be reimbursed to the United States from the proceeds of the sale of the lands described herein, or from any money in the Treasury of the United States belonging to the said Spokane Indians.

SEC. 7. That nothing in this act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections 16 and 36 of the agricultural lands or the equivalent in each township, or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this act that the United States shall act as trustee for said Indians to dispose of the said lands and to expend and pay over the proceeds received from the sale thereof only as received as herein provided: *Provided*, That nothing in this act shall be construed to deprive said Indians of the Spokane Indian Reservation, in the State of Washington, of any benefits to which they are entitled under existing treaties or agreements not inconsistent with the provisions of this act.

Amend the title so as to read: "An act to authorize the Secretary of the Interior to sell and dispose of the surplus unallotted agricultural lands of the Spokane Indian Reservation, Wash., and for other purposes."

Mr. FINLEY. Mr. Speaker, I demand a second.

The SPEAKER. The gentleman demands a second, and is entitled to twenty minutes, and the gentleman from Washington [Mr. JONES] is entitled to twenty minutes.

Mr. JONES of Washington. Mr. Speaker, this bill relates to the surplus lands remaining after the allotment to the Indians on the Spokane Reservation, which allotment will be completed some time during the present year. The remaining lands are divided into agricultural and timber lands. The bill provides that the agricultural lands shall be disposed of to homesteaders who, in addition to complying with the homestead law, pay $5 an acre, which money goes to the Indians. Now, this price was fixed upon by the special agent of the Department who was sent out to confer with these Indians last fall, this being the price agreed upon. These lands are arid and semiarid and are not valuable except with irrigation, so that the $5 an acre, without irrigation, is a very fair value for the lands.

This money goes to the Indians. There will be about 5,000 acres of this agricultural land.

The surplus of timber lands will be about 80,000 acres, but these lands are not disposed of under this bill. They are left for future legislation by Congress and are placed under the control of the Secretary of the Interior, who may allow the Indians and the Indian agents to cut such timber as may be necessary for fuel, building purposes, and matters of that kind of interest to the Indians. The Secretary of the Interior is also authorized

APPENDIX VI

1908 Homestead Act (Note: As passed, included on first page Congressional Record), including Related Congressional Comment.

pose of the bill with reference to the timber lands being to conserve the timber and promote its growth and development. Then there are the usual provisions we have in all these bills for opening Indian reservations, providing that the United States is simply acting as a trustee for the Indians, but does not bind itself to find purchasers or anything of that sort, and simply providing for the payment for sections 16 and 36. Unless some one has some questions to ask, I will reserve the balance of my time.

Mr. STEPHENS of Texas. Mr. Speaker, I would like to ask the gentleman a question. Does this carry the provision in the bill usually carried in these bills opening up Indian reservations, providing that there shall be no charge upon the United States Treasury, but that the money received for the sale of the lands only shall be paid to the Indians?

Mr. JONES of Washington. It does.

Mr. STEPHENS of Texas. It is guarded in that respect?

Mr. JONES of Washington. Yes.

Mr. STEPHENS of Texas. As I understood the gentleman, there are only about 5,000 acres of agricultural lands that will be disposed of.

Mr. JONES of Washington. That is the estimate by the Department.

Mr. STEPHENS of Texas. This land is semiarid land and is not agricultural except where it can be irrigated.

Mr. JONES of Washington. Practically so.

Mr. STEPHENS of Texas. Does the gentleman consider that a fair price?

Mr. JONES of Washington. I consider that a high price for these lands.

Mr. STEPHENS of Texas. Does the Northern Pacific Railroad run over these lands?

Mr. JONES of Washington. Not at all. I think it is 50 miles away. There is no railroad, in fact, to these lands at the present time.

Mr. STEPHENS of Texas. I believe the bill has been unanimously reported from our Committee on Indian Affairs, and it corresponds with the other bills we have passed for the same country.

Mr. JONES of Washington. That is correct.

Mr. STEPHENS of Texas. There being no substantial difference between them?

Mr. JONES of Washington. That is correct.

Mr. STEPHENS of Texas. I think it has the unanimous report, as well as I remember.

Mr. FINLEY. To what extent is the land here designated as agricultural land watered?

Mr. JONES of Washington. There is no irrigation now.

Mr. FINLEY. Never mind the irrigation, but to what extent is there water on these lands that can be used for irrigation purposes?

Mr. JONES of Washington. As I understand, there are some small streams coming down from the mountains that can possibly be used for irrigation purposes, although these streams, most of them, are very small and probably all go dry in the summer time.

Mr. FINLEY. How much land is reserved for the Spokane Indians?

Mr. JONES of Washington. Every Indian—man, woman, and child—gets 80 acres of land under the allotment law, and that leaves about 5,000 acres of agricultural lands as surplus, and then about 80,000 acres of the timber land, which will be held for the Indians and looked after by the Secretary of the Interior; but each man, woman, and child is allotted 80 acres under the general allotment law, and that allotment will be completed, I understand, this summer.

Mr. FINLEY. And the price here fixed is $5 per acre?

Mr. JONES of Washington. Yes; that is the price, as I say, agreed upon by the Indians and the special agents of the Department last winter.

Mr. FINLEY. I understood the gentleman to say a moment ago that the Government did not bind itself to do more than act as trustee for the Indians and did not bind itself to find a purchaser.

Mr. JONES of Washington. That is true; that is the usual provision in these bills. That is put in here.

I reserve the balance of my time.

Mr. FINLEY. Mr. Speaker, for a great many years I have paid some attention to bills opening up Indian reservations for settlement. I have observed that while the position, as stated by the gentleman, as to the attitude of the Government is correct—that is, the Government assumes to act as trustee for the Indians, and that it does not bind itself to find a purchaser for the lands of the Indians, which it [illegible] it not be better in the interests of fair dealing, to the end that the Indian receives what belongs to him, as a matter of right, that the Government open these lands, if they are to be opened, and receive bids for them? It may or it may not be that $5 per acre is a sufficient price. I do not know nor do I believe that there is a man in this House who can answer that question accurately.

But I, for one, am tired of the proposition that the Government fix a maximum price on the land of the Indians. I believe that when lands belonging to the Indians are to be opened for settlement there should be a proposition made to sell the lands in the open market at not less than a minimum price. Anything that can be obtained more than that would inure to the benefit of the Indian and would result in fair dealing to him. I think this bill is objectionable.

It is true, no doubt, that these lands are unimproved. It is true, no doubt, they are semiarid, but it is also true there is water there not utilized at present, but water that can be utilized, and who will stand up here and say that he knows for a certainty that none of these lands are worth more than $5 per acre; 5,000 acres to be opened for settlement at $5 per acre? Why would it not be better to receive bids for the land and fix the minimum price at $5 per acre? When Congress is to act as trustees for the Indians, as the gentleman from Washington states, let us be fair, let us give the Indian what belongs to him.

Mr. WILLIAMS. The question I would like to ask the gentleman before he sits down is, I notice here that sections 16 and 36 are to be carved out and are to be given by the United States to the State of Washington for school purposes.

Mr. FINLEY. Yes.

Mr. WILLIAMS. And I notice the Government is to pay over to the Indians the sum of $1.25 an acre for that much.

Mr. FINLEY. Yes.

Mr. WILLIAMS. And that it furthermore provides that it shall be sections 16 and 36 of the agricultural land. So the bill fixes $5 as the fair value of the land, but when it comes to that part which the United States Government is to pay for it fixes $1.25 as the fair value for it. Now, if $5 be a fair value, then the Government of the United States in sections 16 and 36 is cheating the Indians out of $3.75 an acre.

Mr. FINLEY. And give it to the State of Washington. That is another objectionable provision in the bill. Why should the Government of the United States take over sections 16 and 36 for school purposes at $1.25 an acre? Why should it do that and pay the Indians that amount and then give these sections to the State of Washington? Now, with lands belonging to the Government, where Territories have been created into States, I understand this practice has been followed in the past as to Government lands, but we are asked to indorse a proposition for taking lands from the Indians for school purposes and then give those lands to a State. Why should this be done? Mr. Speaker, this bill is objectionable in many respects.

Mr. STEPHENS of Texas. Mr. Speaker, will the gentleman permit me, in his time, to suggest that land sections 16 and 36, under the enabling act of this State will permit it to select these sections in each township, and they really belonged to the State when these Indian reservations were made by Executive order, consequently the Indians could not claim this land without a settlement between the State and the Indians, and hence the bill had to be drawn in this way.

Mr. FINLEY. Do I understand the gentleman from Texas to state that sections 16 and 36 of the Indian lands throughout this country belong to the States in which the reservations are?

Mr. STEPHENS of Texas. Under the enabling acts of several Western States they were permitted to select these sections 16 and 36 for school purposes.

Mr. FINLEY. That applies to Government lands.

Mr. STEPHENS of Texas. Those were Government lands before they were turned over to the Indians by treaty or Executive order. I do not know whether this was a treaty reservation or an Executive order reservation; probably the gentleman from Washington can tell you.

The gentleman is speaking about something he does not understand and which is not applicable to this bill. Does the gentleman know that these lands were turned over to the State of Washington under the agreement set forth in the enabling act? Hence they did not, in my judgment, become Indian lands, because they had been reserved to the State of Washington for school purposes.

Mr. FINLEY. But were they reserved?

Mr. STEPHENS of Texas. I understand that they were re-

Mr. FINLEY. If that is true, why should the Government pay $1.25 an acre?

Mr. STEPHENS of Texas. Because that is the valuation set upon the lands at the time the enabling act was passed when such lands were sold to actual settlers as homesteads.

Mr. FINLEY. If that is true, why should the Government pay anything to the Indians for the land?

Mr. STEPHENS of Texas. That is the value at which the settler was entitled to take the land, and in addition they were required to live upon it five years——

Mr. FINLEY. That is not the question involved here, as I understand it; this is a case of opening up to settlers a part of an Indian reservation.

Mr. STEPHENS of Texas. But it was originally public land, the gentleman must remember, that had prior thereto been granted to the State for school purposes.

Mr. FINLEY. I understand that. Originally all the land in this country belonged to the Indians, too. There is no doubt about that. So that, according to the gentleman's own contention, if what he states is true, then the Government should pay nothing to the Indians for sections 16 and 36. I do not see that the gentleman's point is applicable at all. Why, the States the gentleman speaks of as a rule obtain lieu land, or lands in place of the lands that were allotted to the Indians for school purposes. Is not that true?

Mr. STEPHENS of Texas. Sometimes.

Mr. FINLEY. Generally it is true. In the States where the lands were allotted the States obtained lieu lands in place of the reservation set apart to the Indians. Now, as to sections 16 and 36, as in this case, you would give additional sections for school purposes, would you not? I yield to the gentleman from Mississippi [Mr. WILLIAMS] such time as he desires.

Mr. WILLIAMS. Mr. Speaker, sections 16 and 36, within this reservation, are or are not a part of the public domain of the United States. If they are a part of the public domain of the United States, then there is no reason why the Federal Government should pay the Indians $1.25 an acre for them.

Mr. JONES of Washington. Will the gentleman allow me a suggestion?

Mr. WILLIAMS. The minute I finish putting the logical horns of the dilemma. If they are not a part of the public domain, but are the property of the Indians, then the Federal Government should not fix the price of $5 per acre upon the agricultural lands for others while it itself pays the Indians only $1.25 per acre for what it so generously takes in order to give the State of Washington, thereby cheating the Indians out of $3.75 upon each acre of the land which the Federal Government gives to the State of Washington. Now, I have no objection giving it to the State of Washington. I am very much in favor of setting aside sections 16 and 36. If I had my way, I would set aside more to each State, to be held for public-school purposes. But it strikes me that one of two things must be true—either this land belongs to the Government already or it belongs to the Indians. If it belongs to the Government, then I have no objection to the Government giving it to the State of Washington without any payment to the Indian at all, because the Indian has not right to any payment for the land which belongs to the Government, whereas if it does belong to the Indian and has been reserved to him, I presume that some time in the past lieu lands were given to the State of Washington for sections 16 and 36; but even if not, it was a lax piece of carelessness, for which the Indian was not responsible, at any rate, and therefore the Government of the United States ought not to fix the price of $1.25 for payment by it to the Indian upon land which it admits by a public act to be worth $5. And that is the point upon which I would like to hear the gentleman from Washington [Mr. JONES].

Mr. JONES of Washington. Mr. Speaker, I simply desire to say that in the enabling act admitting the State of Washington sections 16 and 36 were granted to the State, and in case of Indian reservations the grant simply held in abeyance until the reservation was opened. So, in my judgment, the Federal Government is not under any obligation whatever to pay the Indian a dollar for these sections. But as it has been the policy of Congress for a great many years—I know since I have been here—in opening reservations, and States were admitted on similar enabling acts, we have put in this provision giving the Indians $1.25 an acre for these lands. So it was done in this case.

Mr. WILLIAMS. Does the gentleman know whether or not, when this particular land was put in reservation for these particular Indians, lieu lands were granted to the State of Washington elsewhere for so much of the land as constituted sections 16 and 36 in the reservations?

Mr. JONES of Washington. They have not.

Mr. WILLIAMS. It has not been done?

Mr. JONES of Washington. It has not been done.

Mr. WILLIAMS. Now, then, the gentleman's contention is, that the original enabling act gave to the State of Washington this land?

Mr. JONES of Washington. It held it in abeyance.

Mr. WILLIAMS. Held it in abeyance; but the gentleman must remember that an enabling act could not give to the State of Washington land which belonged to the Indians without any sort of an agreement by the Indians or any sort of treaty with them agreeing to that.

Mr. SMITH of Arizona. It would depend on the nature of the reservation, I would say to my friend.

Mr. JONES of Washington. This was an Executive-order reservation, as I understand it.

Mr. WILLIAMS. Was this land part of the public domain and subject to homestead entry before it was set aside for the Indian reservation?

Mr. JONES of Washington. It was, so I understand.

Mr. WILLIAMS. Or was land never thus far acquired from the Indians?

Mr. JONES of Washington. It was public land before and set aside as a reservation.

Mr. WILLIAMS. Or acquired from the Indians once?

Mr. JONES of Washington. I suppose you would consider it that way. It had been taken and considered as public land. But afterwards the Indians were roving all over that country and the Government put them on these lands and established them on this as a reservation.

Mr. FINLEY. What objection would the gentleman have to a minimum price fixed of $5 an acre?

Mr. JONES of Washington. I will revert to that point of the gentleman. I want to say, as I said before, that this price was agreed upon between the Indians and the special agents. Now, I would oppose an open sale of these lands in the first instance that the gentleman seems to advocate. We want settlers in this territory if we can get them there. It is better for the Indian and better for the State, and even if the lands should be worth a little bit more than $5 an acre it is better to get $5 an acre and the settler than to get $7 and no settler. As a matter of fact, these lands, in my judgment, are not worth $5 an acre, and that the homesteader who takes these lands will pay really more than he ought to be required to pay, but this was put in there because it was agreed upon between the representative of the Indian Department, who was looking after the welfare of the Indians, and the Indians themselves, and this is a higher price than almost any other reservation.

Mr. STEPHENS of Texas. Is it not a fact that the Indians had a council and agreed to the terms proposed by the Indian Department?

Mr. JONES of Washington. Yes; they had a regular meeting.

Mr. STEPHENS of Texas. And $5 was the amount mentioned as the highest price for these agricultural lands?

Mr. JONES of Washington. That is true.

Mr. STEPHENS of Texas. And there are only 5,000 acres?

Mr. JONES of Washington. This land is not in a compact body. It is at different points in this reservation. There may be 40 acres here and 80 acres yonder and 100 acres somewhere else.

There is one other point in the bill, and that is that if after five years there is any of this agricultural land that is not disposed of by homestead under the $5 price, then the Secretary is authorized to appraise the land and sell it from time to time—after four years, of course.

Mr. FINLEY. Will not that result in the best land being sold at $5 per acre and the less desirable land be retained for future appraisement?

Mr. JONES of Washington. Where is there any objection to that? The desirable land of course will be taken, and if homesteaders consider it all worth $5 an acre it will all be taken by homesteaders.

Mr. FINLEY. Does the gentleman think that none of this land is worth more than $5 an acre?

Mr. JONES of Washington. I do not believe it is unless irrigation works were put in—that is, none of this agricultural land. I do not know how much the timber land is worth, but we do not dispose of it anyway. It is not involved in this bill. I reserve the balance of my time, Mr. Speaker.

The SPEAKER pro tempore (Mr. GREENE in the chair). The question is on suspending the rules, agreeing to the amendment, and passing the bill.

Mr. WILLIAMS. Mr. Speaker, I demand the yeas and nays.

The yeas and nays were ordered.

Mr. PAYNE. Mr. Speaker, I make the point that no quorum is present.

The SPEAKER pro tempore. The point is sustained. The Doorkeeper will close the doors, the Sergeant-at-Arms will notify absentees; as many as are in favor of the motion will, as their names are called, answer "yea," those opposed will answer "nay," those present and not voting will answer "present," and the Clerk will call the roll.

The question was taken, and there were—yeas 171, nays 61, answered "present" 14, not voting 141, as follows:

YEAS—171.

Acheson	Ellis, Mo.	Holliday	Nye
Adair	Ellis, Oreg.	Houston	Olmsted
Andrus	Esch	Howell, Utah	Overstreet
Barchfeld	Fairchild	Howland	Padgett
Barclay	Fassett	Huff	Parker, S. Dak.
Bartholdt	Ferris	Humphrey, Wash.	Parsons
Bates	Focht	James, Ollie M.	Payne
Beale, Pa.	Fordney	Jones, Wash.	Pearre
Beall, Tex.	Foss	Kahn	Perkins
Bede	Foster, Ind.	Keifer	Porter
Bonynge	Foster, Vt.	Kennedy, Iowa	Pray
Boyd	Foulkrod	Kinkaid	Prince
Bradley	French	Knapp	Reeder
Burgess	Gaines, W. Va.	Kustermann	Reynolds
Burleigh	Gardner, Mich.	Lafean	Richardson
Burleson	Garner	Lamb	Robinson
Burnett	Gillhams	Landis	Rodenberg
Burton, Del.	Gill	Langley	Russell, Tex.
Calderhead	Gillespie	Laning	Scott
Campbell	Gillett	Law	Sherman
Capron	Goulden	Lindbergh	Slayden
Carter	Graff	Lindsay	Smith, Iowa
Cary	Graham	Longworth	Southwick
Caulfield	Greene	Loudenslager	Sperry
Chaney	Gregg	Lowden	Steenerson
Chapman	Hackett	McCall	Stephens, Tex.
Clark, Mo.	Hackney	McCreary	Sterling
Cocks, N. Y.	Hale	McGavin	Stevens, Minn.
Cook, Colo.	Hall	McKinley, Ill.	Tawney
Cooper, Tex.	Hamilton, Iowa	McKinney	Taylor, Ohio
Coudrey	Hamilton, Mich.	McLachlan, Cal.	Thistlewood
Crumpacker	Hamlin	McMillan	Volstead
Currier	Hardy	Madison	Waldo
Cushman	Haskins	Malby	Wanger
Dalzell	Haugen	Maynard	Washburn
Davenport	Hawley	Mondell	Weeks
Davis, Minn.	Hay	Moore, Pa.	Weems
Dawson	Hayes	Moore, Tex.	Wheeler
Denby	Henry, Conn.	Morse	Wilson, Ill.
Draper	Henry, Tex.	Mouser	Wilson, Pa.
Driscoll	Higgins	Murdock	Wood
Durey	Hill, Conn.	Needham	Young
Edwards, Ky.	Hinshaw	Norris	

NAYS—61.

Adamson	Dixon	Lloyd	Rucker
Aiken	Ellerbe	McLain	Russell, Mo.
Alexander, Mo.	Finley	Macon	Sabath
Ashbrook	Floyd	Moon, Tenn.	Sherley
Bell, Ga.	Foster, Ill.	Murphy	Sherwood
Booher	Garrett	Nicholls	Small
Bowers	Glass	O'Connell	Spight
Brodhead	Granger	Page	Thomas, N. C.
Broussard	Heflin	Patterson	Tou Velle
Candler	Helm	Pou	Underwood
Clark, Fla.	Hughes, N. J.	Pujo	Watkins
Clayton	Hull, Tenn.	Rainey	Webb
Cox, Ind.	Johnson, Ky.	Rauch	Williams
Craig	Jones, Va.	Riordan	
De Armond	Keliher	Roberts	
Denver	Kimball	Rothermel	

ANSWERED "PRESENT"—14.

Ansberry	Cooper, Wis.	Humphreys, Miss.	Stanley
Bennet, N. Y.	Cousins	Jenkins	Talbott
Boutell	Haggott	Madden	
Brundidge	Harrison	Sheppard	

NOT VOTING—141.

Alexander, N. Y.	Davidson	Hill, Miss.	Littlefield
Allen	Dawes	Hitchcock	Livingston
Ames	Dickema	Hobson	Lorimer
Anthony	Douglas	Howard	Loud
Bannon	Dunwell	Howell, N. J.	Lovering
Bartlett, Ga.	Dwight	Hubbard, Iowa	McDermott
Bartlett, Nev.	Edwards, Ga.	Hubbard, W. Va.	McGuire
Bennett, Ky.	Englebright	Hughes, W. Va.	McHenry
Bingham	Favrot	Hull, Iowa	McKinley, Cal.
Birdsall	Fitzgerald	Jackson	McLaughlin, Mich.
Brantley	Flood	James, Addison D.	McMorran
Brownlow	Fornes	Johnson, S. C.	Mann
Brumm	Fowler	Kennedy, Ohio	Marshall
Burke	Fuller	Kipp	Miller
Burton, Ohio	Fulton	Kitchin, Claude	Moon, Pa.
Butler	Gaines, Tenn.	Kitchin, Wm. W.	Mudd
Byrd	Gardner, Mass.	Knopf	Nelson
Calder	Gardner, N. J.	Knowland	Olcott
Caldwell	Godwin	Lamar, Fla.	Parker, N. J.
Carlin	Goebel	Lamar, Mo.	Peters
Cockran	Goldfogle	Lassiter	Pollard
Cole	Gordon	Lawrence	Powers
Conner	Griggs	Leake	Pratt
Cook, Pa.	Gronna	Lee	Randell, Tex.
Cooper, Pa.	Hamill	Legare	Ransdell, La.
Cravens	Hammond	Lenahan	Reid
Crawford	Harding	Lever	Rhinock
Darragh	Hardwick	Lewis	Ryan
Davey, La.	Hepburn	Lilley	Saunders
Shackleford	Snapp	Thomas, Ohio	Wiley
Sims	Sparkman	Tirrell	Willett
Slemp	Stafford	Townsend	Wolf
Smith, Cal.	Sturgiss	Vreeland	Woodyard
Smith, Mich.	Sulloway	Wallace	
Smith, Mo.	Sulzer	Watson	
Smith, Tex.	Taylor, Ala.	Weisse	

The following additional pairs were announced:

Until further notice:

Mr. COLE with Mr. SULZER.

Mr. LOVERING with Mr. SPARKMAN.

Mr. DIEKEMA with Mr. SMITH of Missouri.

Mr. DAVIDSON with Mr. RYAN.

Mr. DARRAGH with Mr. MCHENRY.

Mr. COOPER of Pennsylvania with Mr. HOWARD.

Mr. DOUGLAS with Mr. FULTON.

Until Wednesday morning:

Mr. LOUD with Mr. GOLDFOGLE.

The SPEAKER. On this question the yeas are 171; the nays, 61; present, 14; a quorum; the Doorkeeper will open the doors; the motion prevails.

CUSTOMS ADMINISTRATIVE LAW.

Mr. PAYNE. Mr. Speaker, I move to suspend the rules, take from the Speaker's table the conference report on the Senate amendments to the bill H. R. 17506, and agree to the conference report.

The conference report was read, as follows:

The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H. R. 17506) to amend an act entitled "An act to simplify the laws in relation to the collection of the revenues," approved June 10, 1890, as amended by the act entitled "An act to provide revenues for the Government and to encourage the industries of the United States," approved July 24, 1897, having met, after full and free conference have agreed to recommend and do recommend to their respective Houses as follows:

That the House recede from its disagreement to the amendment of the Senate, and agree to the same with amendments as follows:

On page 5, lines 17, 18, 19, 20, 21, and 22 of said Senate amendment, strike out the following words: "When a case has been remanded to the Board of General Appraisers as above provided, the United States attorney for the district in which the appeal is pending may appear in the proceedings had before the Board under the order remanding the case."

On page 8, in line 5 of said Senate amendment, strike out the word "ten" and insert in lieu thereof the word "nine."

And the Senate agree to the same.

SERENO E. PAYNE,
JOHN DALZELL,
Managers on the part of the House.

NELSON W. ALDRICH,
W. B. ALLISON,
JNO. W. DANIEL,
Managers on the part of the Senate.

The statement is as follows:

STATEMENT.

The managers on the part of the House on the conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H. R. 17506) to amend an act entitled "An act to simplify the laws in relation to the collection of the revenues," approved June 10, 1890, as amended by the act entitled "An act to provide revenues for the Government and to encourage the industries of the United States," approved July 24, 1897, submit the following written statement in explanation of the effect of the action agreed upon in the conference report:

The Senate amendment strikes out all after the enacting clause and inserts an amendment which follows, substantially, the House bill, the only material changes being that the Senate amendment authorizes an appeal from the decision of the Board of General Appraisers to the circuit court, instead of directly to the circuit court of appeals. It also provides that a rehearing may be ordered before the Board of General Appraisers, and provides, on such rehearing, as follows: "When a case has been remanded to the Board of General Appraisers, as above provided, the United States attorney for the district in which the appeal is pending may appear in the proceedings had before the Board under the order remanding the case." This latter provision is stricken out by the report of the conference.

The House fixed the salary of the general appraisers at the rate of $8,000 per annum. The Senate amendment fixes this salary at $10,000. The conference agree upon a salary of $9,000;

Herman Lehman. Patent in fee to.

SEC. 28. That the Secretary of the Interior be, and he is hereby, authorized to make an allotment to Herman Lehman (Montechema), an enrolled member of the Comanche tribe of Indians, who did not get an allotment, of one hundred and sixty acres of unappropriated and unallotted land from the lands to be disposed of under the Act of Congress approved June fifth, nineteen hundred and six (Thirty-fourth Statutes at Large, page two hundred and thirteen), and patent shall issue therefor in fee simple.

Vol. 34, p. 213.

Kiowa, etc., lands, Okla. Repayment of forfeited deposits. Vol. 34, p. 213.

SEC. 29. That all moneys forfeited under the regulations issued October nineteenth, nineteen hundred and six, by the Secretary of the Interior under the Act entitled "An Act to open for settlement five hundred and five thousand acres of land in the Kiowa-Comanche and Apache Indian Reservation in Oklahoma Territory," approved June fifth, nineteen hundred and six, be repaid to the persons by whom such moneys were deposited in every case where it shall be made to appear to the satisfaction of the Commissioner of the General Land Office that the bid upon which the award was made was the result of a clerical error, or was due to an honest mistake on the part of the bidder as to the numbers, the description, or the character of the land upon which his bid was made.

Regulations.

That the Commissioner of the General Land Office shall make all necessary rules and issue all necessary instructions to carry the provisions of this Act into effect, and the payment of the deposits herein provided for shall be paid out of any moneys deposited in the Treasury of the United States as the proceeds arising from the sale of lands under said Act of June fifth, nineteen hundred and six, and an appropriation, sufficient in amount to cover such case, is hereby made.

Payment of deposits.

Vol. 34, p. 213. Appropriation.

Lawton, Okla. Court-house, etc., in. Use of part proceeds of certain land sale for, authorized. *Post*, p. 545.

SEC. 30. That twenty per centum of the proceeds arising from the sale of the south half of section thirty, townsite two north, range eleven west of the Indian meridian in Oklahoma, is hereby appropriated, to be available immediately after such sale, to begin construction of a court-house and post-office building at Lawton, in said State, to cost not more than one hundred thousand dollars; and all Acts in conflict herewith are hereby repealed. That the Secretary of the Interior is authorized and directed to turn over to the treasurers of the cities of Lawton, Hobart and Anadarko, the unexpended balance of the proceeds arising from the sale of town lots in said cities heretofore appropriated and set apart for public improvements in such cities by the Act of March third, nineteen hundred and one, and the Acts of June thirtieth, nineteen hundred and two and March fourteenth, nineteen hundred and six.

Lawton, Hobart, and Anadarko. Sale of town lots. Unexpended balance paid to.

Vol. 31, p. 1094. Vol. 32, p. 506. Vol. 34, p. 62.

Approved, May 29, 1908.

May 29, 1908. [S. 6183.]

[Public, No. 157.]

CHAP. 217.—An Act To authorize the Secretary of the Interior to sell and dispose of the surplus unallotted agricultural lands of the Spokane Indian Reservation, Washington, and for other purposes.

Spokane Indian Reservation, Wash. Allotments, etc., of lands in.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, authorized and directed to cause allotments to be made under the provisions of the allotment laws of the United States to all persons having tribal rights or holding tribal relations and who may rightfully belong on the Spokane Indian Reservation and who have not heretofore received allotments.

Classification of surplus lands.

SEC. 2. That upon the completion of said allotments to said Indians the Secretary of the Interior shall classify the surplus lands as agricultural and timber lands, the agricultural lands to be opened to settlement and entry under the provisions of the homestead laws by proclamation of the President, which shall prescribe the time when

Agricultural lands to be opened to settlement.

and the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof; and no person shall be permitted to settle upon, occupy, or enter any of said lands except as prescribed in such proclamation.

Price per acre.

SEC. 3. That the price of the lands classified as agricultural shall be five dollars per acre, and said price shall be paid in accordance with rules and regulations to be prescribed by the Secretary of the Interior upon the following terms: One-fifth of the purchase price to be paid in cash at the time of entry and the balance in five equal annual installments to be paid in one, two, three, four, and five years, respectively, from and after the date of entry. In case any entryman fails to make the annual payments, or any of them, promptly when due, all rights in and to the land covered by his entry shall cease and any payments theretofore made shall be forfeited and the entry canceled, and the land shall be reoffered for sale and entry under the provisions of the homestead laws at the same price at which it was first entered: *Provided*, That nothing in this Act shall prevent homestead settlers from commuting their entries under section twenty-three hundred and one of the Revised Statutes of the United States by paying for the land entered the price fixed herein, receiving credit for payments previously made. In addition to the price to be paid for the land the entryman shall pay the same fees and commissions at the time of commutation or final entry as now provided by law where the price of the land is one dollar and twenty-five cents per acre, and when an entryman shall have complied with all the requirements and terms of the homestead laws as to settlement and residence and shall have made the required payments as aforesaid he shall be entitled to a patent for the lands entered: *And provided further*, That all lands classified as agricultural remaining undisposed of at the expiration of four years from the opening of said lands to entry shall be appraised by the Secretary of the Interior from time to time and sold at public auction or under sealed bids to the highest bidder for cash at not less than the said appraised value, under such regulations as the Secretary of the Interior may prescribe: *Provided*, That the rights of honorably discharged Union soldiers and sailors of the late civil and Spanish wars or the Philippine insurrection as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the Act of March first, nineteen hundred and one, shall not be abridged: *Provided further*, That sections sixteen and thirty-six of the agricultural lands in each township shall not be disposed of, but shall be reserved for the use of the common schools and paid for by the United States at one dollar and twenty-five cents per acre, and the same are hereby granted to the State of Washington for such purpose.

Payments.

Forfeiture.

Provisos.
Commutation.
R. S., sec. 2301, p. 421.

Fees, etc.

Lands remaining to be sold at auction.

Sealed bids.

Soldiers' and sailors' rights not affected.

R. S., secs. 2304, 2305, p. 422.
Vol. 31, p. 847.

School lands.

Lands reserved for agency, schools, etc.

SEC. 4. That the Secretary of the Interior may reserve such lands as he may deem necessary for agency, school, and religious purposes, to remain reserved so long as needed and so long as agency, school, or religious institutions are maintained thereon for the benefit of the Indians; and he is further authorized and directed to reserve and set aside such tracts as he may deem necessary or convenient for town-site purposes, and he may cause any such reservations to be surveyed into lots and blocks of suitable size and to be appraised and disposed of under such regulations as he may prescribe, and the net proceeds derived from the sale of such lands shall be deposited in the Treasury of the United States to the credit of the Indians of the Spokane Reservation.

Townsites.

Deposit of proceeds.

Timber-land restrictions.

SEC. 5. That the lands so classified as timber lands shall remain Indian lands subject to the supervision of the Secretary of the Interior until further action by Congress, and no provision authorizing the sale of timber upon Indian lands shall apply to said lands unless they be

Provisos. Cutting timber allowed.

specially designated: *Provided*, That until further legislation the Indians and the officials and employees in the Indian Service on said reservation shall, without cost to them, have the right, under such regulations as the Secretary of the Interior may prescribe, to go upon said timber lands and cut and take therefrom all timber necessary for

Pasturage.

fuel, or for lumber for the erection of buildings, fences, or other domestic purposes upon their allotments; and for said period the said Indians shall have the privilege of pasturing their cattle, horses, and sheep on said timber lands, subject to such rules and regulations as the

Sale of timber.

Secretary of the Interior may prescribe: *Provided further*, That the Secretary of the Interior is hereby authorized to sell and dispose of for the benefit of the Indians such timber upon said timber lands as in his judgment has reached maturity and is deteriorating and which, in his judgment, would be for the best interests of the Indians to sell, the purpose being to as far as possible protect, conserve, and promote

Use of proceeds.

the growth of timber upon said timber lands. The Secretary of the Interior shall deduct from the money received from the sale of such timber the actual expense of making such sale and place the balance to the credit of said Indians, and he is authorized to prescribe such rules and regulations for the sale and removal of such timber so sold as he may deem advisable.

Appropriation to pay for lands granted to Washington.

SEC. 6. That the Secretary of the Interior is hereby vested with full power and authority to make all needful rules and regulations for the purpose of carrying out the provisions of this Act, and there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of five thousand dollars, or so much thereof as may be necessary, to pay the Indians for the lands granted to the

Further appropriation.

State of Washington, as provided in section three of this Act, and there is hereby appropriated the further sum of seven thousand dollars, or so much thereof as may be necessary, for the purpose of carrying out the other provisions of this Act: *Provided*, That the appropriation other than that to pay for the lands granted to the State of Washington shall be reimbursed to the United States from the proceeds of the sale of the lands described herein, or from any money in the Treasury of the United States belonging to the said Spokane Indians.

Proviso. Reimbursement.

Nonresponsibility of United States.

SEC. 7. That nothing in this Act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six of the agricultural lands or the equivalent in each township, or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this Act that the United States shall act as trustee for said Indians to dispose of the said lands and to expend and pay over the proceeds received from the sale thereof only as received as herein provided: *Provided*, That nothing in this Act shall be construed to deprive said Indians of the Spokane Indian Reservation, in the State of Washington, of any benefits to which they are entitled under existing treaties or agreements not inconsistent with the provisions of this Act.

Proviso. Treaty rights not affected.

Approved, May 29, 1908.

May 29, 1908. [S. 1885.]

[Public, No. 158.]

CHAP. 218.—An Act To authorize the sale and disposition of a portion of the surplus and unallotted lands in the Cheyenne River and Standing Rock Indian reservations in the States of South Dakota and North Dakota, and making appropriation and provision to carry the same into effect.

Sioux Indians. Sale of lands in Cheyenne River and Standing Rock reservations, S. Dak. and N. Dak.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, authorized and directed, as hereinafter provided, to sell and dispose of all that portion of the Cheyenne River and Standing Rock Indian reservations in the States of South Dakota

Copy received 7/13, 1977
Robert S Linnell
Acting United States Attorney

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 July 13, 1977, I mailed a copy of Intervener's (Spokane Tribe's) Reply Brief to all parties on the attached list.

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