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Letter to the Court from the Office of the Attorney General, Washington

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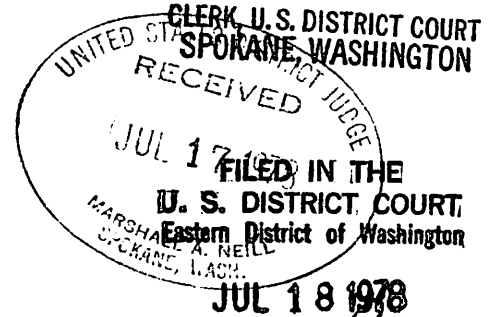
OFFICE OF THE ATTORNEY GENERAL

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JUL 18 1978

July 11, 1978



The Honorable Marshall A. Neill
Chief Judge, United States District Court
United States Courthouse
Spokane, Washington

J. R. FALLOQUIST, Clerk
Deputy

Re: United States v. Anderson, Civil No. 2643

Dear Judge Neill:

Last week the United States Supreme Court decided two cases which appear to be significant and relevant to a number of issues in the subject case. These cases are California v. United States, (1978), hereafter cited as "New Melones," and United States v. New Mexico, (1978), hereafter cited as "Mimbres Valley." Copies of the Supreme Court's slip opinions are attached. This is written to bring your attention to the cases and to highlight those portions of the analysis of the Supreme Court's decisions pertinent to the resolution of the issues now pending in the subject case.

The two basic issues of importance to the State here involve: (1) the State's jurisdiction to apply its water rights laws to certain waters within the original boundaries of an Indian reservation; and (2) the nature and scope of federal reserved rights held for Indians.

As to the first issue, the State's contention is grounded upon the proposition that, as a matter of federal constitutional law, the State's authority to apply its water rights law extends to all waters within the State regardless of location, unless that authority is preempted (or superseded) by federal statute or treaty. In this regard the teachings of the Mimbres Valley and New Melones cases are pertinent in answering the following inquiries arising from the United States v. Anderson litigation.

1. Whether the State of Washington, as a general proposition, has power relating to water rights under our federal constitutional system over all waters within the State's boundaries; that power not being based on any federal statutory grant of powers?

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- See: A. Mimbres Valley, page 2.
- B. New Melones, pages 8-9, 12, 15-17,
 24, 32-33.
2. Whether federal congressional policy has recognized the general dominance of state water rights laws within the State (even as to waters on federal lands, including water on reserved lands of a type not involved in the United States V. Anderson case)?
- See: A. Mimbres Valley, pages 5, 17 (foot-note 21), and page 1 (dissent).
- B. New Melones, pages 7, 10, 11, 23, 32.
3. Whether there is a wall on the original boundaries of all federal Indian reservations through which state water rights laws cannot pierce to reach waters on non-Indian lands?
- See: A. Mimbres Valley, page 6, 21 (foot-note 24, discussion only of Act of March 3, 1891).
- B. New Melones, page 13 through 17 (including footnotes 15 and 16).
- C. Special note is made that the aforementioned 1891 statute is the same statute discussed by the District Court in the case of the Conrad Investment Co. v. United States, 165 Fed. 123 (1907), which upheld the validity of a water right based on state law, applying to "surplus" waters located within an Indian reservation. See affirmation of that holding by the Court of Appeals in Conrad Investment Co. v. United States, 161 Fed. 829 (1908); cited in our previous briefs.
4. Whether state water laws apply to waters on "home-steaded" lands?

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See: New Melones, page 11.

5. Whether application of state water rights law is precluded within federal reservations because it would result in divided jurisdiction over water regulation--"checkerboarding."

See: New Melones, pages 22-23, 32-33.

As to the second issue referred to earlier--the nature and scope of a federal reserved right pertaining to Indian reservations--we note the following questions dealt with in the recent Supreme Court decisions:

6. Whether the reservation of the right to the use of water on an Indian reservation was made by the United States or an Indian tribe, and there whether the priority date of a reserved right is the date of creation of the reservation by the federal government or "time immemorial?"

See: Mimbres Valley, pages 3-5, especially footnote 4.

7. Whether the establishment of a federal reserve, as a matter of law, impliedly reserves the right to the use of all waters within the boundaries of a reserve?

See: Mimbres Valley, page 4.

8. Whether the scope of an impliedly reserved water right extends to all uses to which water could be put within a reservation or only to "necessary" uses (to insure the purposes of the reservations are not "entirely defeated") as compared with "secondary uses?"

See: Mimbres Valley, page 8.

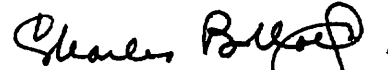
The most important of the above page references have been underscored. For the Court's convenience, those portions of

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the brief especially referred to above are marked in the margins on the slip opinions attached.

Thank you for considering these materials.

Very truly yours,



Charles B. Roe, Jr.
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