

5-14-1982

Wyoming's Amended Proposed Findings of Fact Volume IIA

Attorney General, State of Wyoming

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BIG HORN ADJUDICATION
WYOMING'S AMENDED PROPOSED MASTER'S REPORT
CONCERNING WATER RIGHTS FOR THE
WIND RIVER INDIAN RESERVATION
1982

VOLUME II
Amended Proposed Findings of Fact
(Series 1 through 5)

PART A

FILED 4993
5/14 1982
Margaret W. Hampton CLERK
DEPUTY

case # 4993

File # 330

4732

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SPECIAL MASTER'S REPORT

Volume 2

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IN THE DISTRICT COURT OF THE
FIFTH JUDICIAL DISTRICT
STATE OF WYOMING

IN RE: THE GENERAL ADJUDICATION)
OF ALL RIGHTS TO USE WATER IN)
THE BIG HORN RIVER SYSTEM AND) CIVIL NO. 4993
ALL OTHER SOURCES, STATE OF)
WYOMING)

FINDINGS OF FACT, CONCLUSIONS OF LAW, JUDGMENT
AND INTERLOCUTORY DECREE CONCERNING THE RESERVED
RIGHTS OF THE WIND RIVER INDIAN RESERVATION, WYOMING

Having reviewed the Master's Report in the captioned matter, which was prepared and filed with the Court on _____, 198_, pursuant to W.R.C.P. 53(e)(1), given notice to the parties and, after hearing, considered any objections of the parties thereto, the Court does hereby ADOPT said Report, and makes the Findings of Fact and Conclusions of Law proposed by the Master and enters his proposed Judgment and Decree, all as set out below.

FINDINGS OF FACT

Based on the various testimony and exhibits admitted at the trial of this matter, as well as the stipulations of the parties hereto, as well as reasonable inferences to be deduced therefrom, the Court makes the following Findings of Fact (hereinafter, sometimes "FF") with respect to the claims by and on behalf of the Wind River Indian Reservation. These findings are organized into discrete sections, solely as an assistance to any reviewing Courts and the parties. The discrete sections must not be considered to be mutually exclusive -- either as they may interrelate or as they relate to the conclusions of law which follow. As stated in the introductory portion of the Conclusions of Law, infra, the distinction between Findings and Conclusions is a difficult one. Consequently, in areas such as Congressional intent and purposes of the reservation, matters may be dealt with as both Findings and Conclusions -- reflecting the Court's determination that they are mixed issues of law and fact -- or as only a finding or only as a conclusion in recognition that the Wyoming Rules of Civil Procedure do not require their separation.

SUPPORT FOR
FINDINGS OF FACT

Following most of the proposed Findings of Fact (hereinafter, sometimes "FF") are yellow pages containing supporting discussions with references to the record, legal citations and/or other Findings of Fact.

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Findings of Fact
Relating to the
Physical Setting

1-1. The Big Horn Basin - Water Division No. 3

Wyoming's Water Division No. 3 is defined by statute as consisting "of all lands within this state drained by the Big Horn River and its tributaries, and by Clark's Fork and its tributaries." It is located in northwestern and west central Wyoming in Park, Washakie, Big Horn, Hot Springs and Fremont Counties and includes parts of Yellowstone National Park. The Wind River Indian Reservation which contains approximately 4000 sq. miles is located in the southeastern portion of the region in parts of Fremont and Hot Springs counties.

1-1. See Wyo. Stat. Sec. 41-3-501. See Dr. Paul Wilson's thesis "Farming and Ranching on the Wind River Indian Reservation, Wyoming" (1972). Wyo. Exh. WRIR PW-2, at 33-36. See U.S. Exh. WRIR C-150, at III-2, "Inventory of Water Resources, Wind River Indian Reservation," presented during the testimony of Al Kersich.

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1-2. Geologic formations, topography and drainage systems

There are many geologic formations within Water Division No. 3 which create a variety of geographical and climatic zones. The area includes numerous mountain ranges and basins. Chief among the ranges are the Absaroka in the northwest, the Wind River in the south, the Owl Creek in the central area, and the Big Horn in the east. The two major Basins are the Wind River in the southeast and the Big Horn in the northeast. The Wind River Indian Reservation occupies the majority of the Wind River Basin and is primarily surrounded by the southeastern portion of the Wind River Range to the west and southwest and the Owl Creek Range to the north.

The topography in the region is quite varied. It includes high mountain peaks and valleys, high plateaus, terraced stream valleys, and low desert badlands. The elevations range from over 13,000 feet in the Wind River Range to 3,870 feet near Basin. On the Reservation the range is between 12,500 feet in the Wind River Range and 4,500 feet at the northeastern corner near the Wind River Canyon.

The primary drainage systems in the region are the Wind River-Bighorn River which originates in northern Fremont County and leaves the Division at the

Wyoming-Montana border in northern Big Horn County; the Clark's Fork River which drains a great deal of the northwestern portion of the region, originating and existing in northwestern Park County; and the Shoshone River, a major tributary of the Big Horn River which originates in northern Park County and joins the Big Horn at the Yellowtail Reservoir.

1-2. See Dr. Wilson's thesis, Wyo. Exh. WRIR PW-2, at 33. See
U.S. Exh. WRIR C-150, Kersich's Report, pp. III-1,
VIII-25, Wyo. Exh. WRIR MV-4, Disposition Map of Water
Division No. 3.

1-3. Landforms

The landforms which currently comprise irrigated portions of Water Division No. 3 are primarily the result of geologic activity during the late Cretaceous and early Cenozoic, approximately 70 million years ago. The major geologic pattern is that of a Basin and Range Province. The mountain ranges were formed during the Cordilleran Orogeny of the late Cretaceous and early Cenozoic thereby producing the Basins in the synclines between the ranges.

Beginning in the Eocene period of the Cenozoic erosion of the mountain ranges entirely filled the Basin regions with sediments. This deposition continued until the late Cenozoic period of the Pliocene. During the Pliocene regional uplift and/or climatic changes reversed this process and erosion of the Basins began, a process which remains the dominant geologic activity of the region.

The majority of the sediments in the region, some of which have a thickness of over 36,000 feet, have been deposited since the early Cenozoic. These sediments are underlain, both in the Mountains and Basins by Precambrian igneous and metamorphic rocks. Outcrops of other formations from the Cambrian to the Eocene exist in the

foothills, or cuervas, which parallel the mountain ranges.

1-3. See Wyo. Exh. WRIR SF-1, 4-6, 8-9, Appendix 3, Wind River Irrigation Project (1968). See Kersich's Report, U.S. Exh. WRIR C-150, at III-8-10, and Dr. Wilson's thesis, Wyo. Exh. WRIR PW-1, at 33-36. See Tr., Vol. 116, at 10560 (9/30/81, C. Fowkes).

1-4. Soils

A study of the soils in Water Division No. 3 is extremely important as soil quality and development are major considerations in determining patterns of land use.

The soils in the region are quite complex due to a wide diversity in climatic, depositional and erosional conditions. In general there are two major soil zones, one located in the basin and plain regions and the second in the foothill and mountain regions. The development of these soils is such that in the bottom areas soils generally have little or no profile development while those on the higher terraces have well-developed profiles which include strong textural horizons and thick lime zones.

An example of soil complexity can be seen in the Wind River Formation located within the Wind River Basin. This formation consists of discontinuous interbedded sandstones and shales which in turn contribute to highly variable, irregular soil patterns overlying these materials. Terrace deposits and alluvium further contribute to the overall complexity of soil, drainage and topographic complexity.

1-4. See Wyo. Exh. WRIR SF-1, at 4-7, 11, Wind River Irrigation Project; U.S. Exh. WRIR C-150, at III-11. See also Finding of Fact 15-5.

1-5. Arid region

Water Division No. 3 is primarily a semi-arid to arid region with the greater humidity zones located in the mountains. These factors significantly limit agricultural productivity as the dryness of the lowlands precludes all but irrigated farming and the temperature ranges and altitudes in the mountains provide too short a growing season for crops and limited grazing because of the late snow pack.

1-5. See Dr. Wilson's thesis, Wyo. Exh. WRIR PW-2, at 46, 55, 59; and Wyo. Exh. WRIR SF-1, at 1, 9, Appendix B, Wind River Irrigation Project (1968).

1-6. Moderate temperature

Water Division No. 3, specifically the Wind River and Big Horn Basins and the surrounding mountain ranges, is located within a relatively moderate temperature zone. However, the temperature ranges between the mountains and basins differ significantly. The mountain's temperature ranges decrease with the increase in altitude, consequently a great deal of the mountain areas average below 32 degrees F. The mountain summers are relatively cool and the winters rarely reach above freezing.

In contrast, the mean temperature in the Basins is around 44.7 degrees F. The Wind River Basin, at 43.9 degrees, averages a few degrees cooler than does the Big Horn Basin at 45.6 degrees. The Big Horn Basin records summer temperatures well into the 70's while the Wind River Basin averages in the high 60's. The winter temperatures in both regions are relatively mild. The Wind River Basin averages a January temperature in the high teens while the Big Horn Basin averages in the mid-teens. The wider temperature range in the Big Horn Basin is attributed to the exposed northern border. The Wind River Basin is surrounded by mountains and regional uplifts and is therefore insulated from the cold arctic air masses that enter the Big Horn Basin.

1-6. See Wyo. Exh. WRIR SF-1, at 8, Appendix B, Wind River Irrigation Project (1968); Wyo. Exh. WRIR PW-2, at 47, 58-62, 63-68. Dr. Wilson's thesis and U.S. Exh. WRIR C-150, at III-7, Kersich's Report.

YELLOW PAPER

1-7. Precipitation

The precipitation in the region varies considerably between the mountains and basins. The mountain regions receive substantially more precipitation, primarily in the form of snow. These precipitation levels increase with the increases in elevation. The lower regions in the mountains, below 9500 feet, receive 20-25 inches annually while the higher elevations receive up to 40 inches.

The average annual precipitation is about 9.6 inches in the Basin. Precipitation in the basins varies as do the temperature levels. The Wind River Basin averages about 10.9 inches annually, with slightly higher levels nearer the mountains. The Big Horn Basin averages about 8.3 inches annually, with significantly drier areas in the interior of the Basin. This is attributed to the inability of warm eastern air currents to pass the Big Horn Mountains and interact with the moist northern air currents.

The majority of the precipitation which falls on the region does so during the spring and summer months. The growing season in the region is divided into two categories. For hardier crops, such as alfalfa and grass, the season averages approximately 207 days, from early April until the end of October in the warmest portions of the

Basin. For crops which must be cultivated within an entirely freeze-free period the season is markedly shorter, approximately 111 days between late May and the middle of September. Warm autumn temperatures generally insure growing seasons well into September in areas at low elevations.

1-7. See Wyo. Exh. WRIR SF-1, at 8, Appendix B, Wind River
Irrigation Project, Wyo. Exh. WRIR PW-2, at 58-62. Dr.
Wilson's thesis and U.S. Exh. WRIR C-150, at III-1, III-7,
Kersich's Report.

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1-8. Vegetation

The natural ground cover or vegetation in the region varies in composition and density from the dry lowlands to the more humid foothill and mountain areas. The types of vegetation which naturally occur are still visible in the undeveloped regions of the Division; however, grazing of these lands has somewhat altered the composition and vigor of the cover.

Basically, the vegetation distribution is such that sagebrush covers most of the drier lower areas, grass covers the intermediate areas, and timber dominates the higher elevations. On the Wind River Indian Reservation, the breakdown by percentage of the dominant vegetation groups on the undeveloped lands supports this distribution. Sagebrush covers approximately 45% of this land, grass 15%, timber 13%, saltsage 3%, weeds 2% and barren wasteland 22%.

The density of the vegetation cover differs significantly throughout the region. In parts of the lower lands the cover nears 0% whereas the density of the cover in the mountain regions often reaches 80%. These differences are primarily attributed to precipitation levels but are also related to other climatic and topographical conditions such as wind, temperature and slope.

1-8. See Wyo. Exh. WRIR SF-1, at 8, Appendix B, Wind River
Irrigation Project and U.S. Exh. WRIR C-150, at III-11,
Kersich's Report.

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Findings of Fact
Relating to
Historical Development
of the Big Horn Basin

2-1 Relations and dealing with the Indians.

- a. In the early 1800's the first non-Indian explorers entered northwestern Wyoming. These adventurous men were met by the Shoshone Indians and a strong friendship developed which continues to this day. In 1863 talks between the Shoshone Indians lead by Chief Washakie and the United States Government resulted in an agreement between the two parties generally delineating the boundaries within which the Eastern Shoshone roamed, a 44,672,000 acre region comprising parts of Wyoming, Colorado and Utah. This rather generous agreement, made at a time when the government was focusing so much of its energy on the promotion of western settlement by private citizens was made in recognition of the friendship that had existed between the Shoshones and white men since the arrival of the first explorers.

2-1

- a. See Wyo. Exh. WRIR PW-2, Dr. Paul Wilson's Thesis "Farming and Ranching on the Wind River Indian Reservation," pp. 162-165. See also the Treaty of July 2, 1863 between the United States and the Eastern Band of the Shoshone Indians 18 Stat. 686.

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2-1 Continued.

- b. As the private settlers began to enter the region designated as Shoshone Country the government realized that the expansive size of the region was unrealistic. Efforts to create a reservation then began and on July 3, 1868 a final agreement was reached. The Shoshone Indians were granted the land they asked for, approximately 3,054,182 acres, in the Wind River Valley and the government regained a total control over 41,000,000 acres throughout Wyoming, Colorado, Utah and Idaho.

2-1 Continued.

- b. See Wyo. Exh. WRIR, PW-2, Dr. Paul Wilson's Thesis "Farming and Ranching on the Wind River Indian Reservation," p. 165.

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2-1 Continued.

- c. During their first years on the Reservation the Shoshone Indians were dependent on the buffalo as the mainstay of their economy. However, the buffalo supply was rapidly decreasing and the Indians, who had earlier expressed an interest in learning the agricultural methods of the white man, renewed their interest and began a changeover to an agricultural economy. In an effort to raise the money needed to begin a cattle herd and continue the farming attempts begun in the spring of 1872, the Shoshone signed the Brunot Agreement on September 26, 1872. This Agreement ceded 910,642 acres of land in the southern part of the Reservation to the government.

2-1 Continued.

- c. See Wyo. Exh. WRIR, PW-2, Dr. Paul Wilson's Thesis "Farming and Ranching on the Wind River Indian Reservation," pp. 168-172.

2-1 Continued.

- d. In the fall of 1878, the Arapahoe Indians were placed on the Shoshone/Bannock Reservation over vehement protests by Chief Washakie and the Shoshone. The Arapahoe and the Shoshone were both promised that the placement would be temporary, but the promise was not kept and the Arapahoe remain on the Reservation today.

2-1 Continued.

- d. See Wyo. Exh. WRIR, PW-2, Dr. Paul Wilson's Thesis "Farming and Ranching on the Wind River Indian Reservation," pp. 179-180.

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2-1 Continued.

- e. At the time of the Arapahoe arrival the Shoshone Indians had been on the Reservation for over 10 years and had pretty well established their settlements in the western portion of the Reservation. The Arapahoe arrived on the Reservation in the southeast and by chance and believing the stay temporary set up camp. Ironically, and this has remained a heated issue between the Tribes, the Arapahoe are settled on the best farm land in the Basin.

During the 1870's the Shoshone Indians increased their efforts in both farming and ranching, so much so that by the early 1880's their future in agriculture looked quite promising. The Arapahoe, on the other hand, continued to hunt the buffalo and showed very little interest in agriculture. Their attempts at cattle ranching completely failed and no time was devoted to farming.

2-1 Continued.

- e. See Wyo. Exh. WRIR, PW-2, Dr. Paul Wilson's Thesis "Farming and Ranching on the Wind River Indian Reservation," pp. 197-202.

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2-1 Continued.

f. By the late 1880's and early 1890's it was evident that the agricultural economy of the Indians was failing. This, added to the fact that there were no more buffalo, reduced the Shoshone's living conditions to that comparable to the Arapahoe's, which had remained virtually unchanged since their arrival on the Reservation in 1878. By 1895 the Indians on the Wind River Reservation were starving, desperate and totally dependent on the government for food, clothing and shelter.

These continued economic misfortunes lead the Shoshone to sell a great deal of their land. In 1896, the First McLaughlin Agreement ceded 55,400 acres in the Big Horn/Hot Springs area on the northern border of the Reservation to the government for \$60,000. This cession relieved some of the harsh conditions on the Reservation but such relief was only temporary.

2-1 Continued.

- f. See Wyo. Exh. WRIR, PW-2, Dr. Paul Wilson's Thesis "Farming and Ranching on the Wind River Indian Reservation," pp. 203-212.

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2-1 Continued.

g. In 1904 the Indians sold an additional 1,480,000 acres of Reservation land to the government. This agreement, known as the Second McLaughlin Agreement, was reached as both the Indians and government recognized that the Indians could not control all of the reservation lands and that the revenue from the sale would help promote the successful development of the lands which remained. The cession of this Act diminished the Reservation to approximately 808,490 acres. By 1904 the majority of the land originally ceded to the Shoshone Indians in the 1868 Treaty again belonged to the United States Government.

2-1 Continued.

- g. See Wyo. Exh. WRIR, PW-2, Dr. Paul Wilson's Thesis "Farming and Ranching on the Wind River Indian Reservation," p. 211.

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Disposition of Non-Indian Land

- a. The development of the lands within Wyoming's Water Division No. 3 by white settlers would not have been possible were it not for the various Disposal Acts passed by Congress between 1820 and 1930. These Acts were the result of Congressional recognition that the settlement and subsequent development of the vast public lands in the western United States would not proceed unless legislation were passed which would favor such settlement.

2-2

- a. See Wyo. Exh. WRIR MV-11. Disposition Analysis of all lands included within Fassett's model, presented during testimony of J. Voeller, September 29, 1981, Vol. 114, p. 10510.

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2-2 Continued.

- b. One of the first Acts set out to promote the settlement of the western lands was the Cash Entry Act of 1820. This Act essentially defined the methods to be relied upon for the disposition and sale of public lands. Under this Act at least 191,139.38 acres, for which State-awarded water rights attach, were disposed of in Water Division No. 3, primarily between 1890 and 1910.

2-2 Continued.

- b. See Wyo. Exh. WRIR, DS-1, The Cash Entry Act of 1820, Tr. October 7, 1981, Vol. 125, p. 11364, also Wyo. Exh. WRIR MV-11, Tr. September 29, 1981, Vol. 114, p. 10510, Wyo. Exh. WRIR, MV-11A, Tr. September 29, 1981, Vol. 114, p. 10510.

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2-2 Continued.

- c. In 1841 Congress passed a State Selection Act which essentially granted the States the right to select 500,000 acres to be used for internal improvement. It also granted 160 acres to qualified settlers. Under this Act at least 20,712.85 acres for which State awarded water rights attach, were selected in Water Division No. 3 by private settlers and the State, primarily in the 1890's and 1970's.

2-2 Continued.

- c. See Wyo. Exh. WRIR DS-3, State Selection Act of 1841, Tr. October 7, 1981, Vol. 125, p. 11364, also Wyo. Exh. WRIR MV-11, Tr. September 29, 1981, Vol. 114, p. 10510, Wyo. Exh. WRIR MV-11A, Tr. September 29, 1981, Vol. 114, p. 10510.

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2-2 Continued.

d. One of the most important Disposal Acts was the Homestead Act of 1862. This Act set out the conditions for the settlement of unappropriated public lands. In 1916 the Act was expanded by the Stock Raising Homestead Act. This Act extended the homestead law to include those lands previously considered unirrigable but suitable for grazing. In Water Division No. 3 alone over 132,898 acres for which State-awarded water rights attach, were settled, primarily between 1890 and 1920.

2-2 Continued.

d. See Wyo. Exh. WRIR DS-6, The Homestead Act of 1862, Tr. October 7, 1981, Vol. 125, p. 11364, Wyo. Exh. WRIR DS-24, Tr. October 7, 1981, Vol. 125, p. 11376, also Wyo. Exh. WRIR MV-11, Tr. September 29, 1981, Vol. 114, p. 10510, Wyo. Exh. WRIR MV-11A, Tr. September 29, 1981, Vol. 114, p. 10510.

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2-2 Continued.

- e. The Mining Acts of 1866, 1870 and 1872 which allowed free and open exploration and settlement of public mineral lands were some of the first disposition statutes to be relied upon in Water Division No. 3. The first major settlements in the region were mining camps established around 1868 in the Wind River Mountains. While very little land was patented under these Acts they are significant in that they provide further support for the prior appropriation system of water management.

2-2 Continued.

- e. See Wyo. Exh. WRIR DS-8, 9, 10, Mining Act of 1866, 1870, 1872, Tr. October 7, 1981, Vol. 125, p. 11366, also Wyo. Exh. WRIR MV-11, Tr. September 29, 1981, Vol. 114, p. 10510, Wyo. Exh. WRIR MV-11A, Tr. September 29, 1981, Vol. 114, p. 10510.

2-2 Continued.

f. In 1872 Congress passed the Desert Lands Act. This Act supported the recognition by Congress that water was necessary for the successful settlement of a great deal of the land in the west and further supported the prior appropriation system. The Desert Lands Act allowed the settlement of at least 23,589.81 acres, for which State-awarded water rights attach, in Water Division No. 3, primarily between 1916 and 1925.

2-2 Continued.

f. See Wyo. Exh. WRIR DS-12, The Desert Lands Act of 1877, Tr. October 7, 1981, Vol. 125, p. 11367, also Wyo. Exh. WRIR MV-11, Tr. September 29, 1981, Vol. 114, p. 10510, Wyo. Exh. WRIR MV-11A, Tr. September 29, 1981, Vol. 114, p. 10510.

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2-2 Continued.

8. In the Carey Act of 1894 Congress again recognized the importance of water and the necessity of irrigation for the successful development of the West and outlined a disposal policy which opened the settlement of at least 75,112.32 acres for which State-awarded water rights attach, in Water Division No. 3, primarily between 1898 and 1917.

2-2 Continued.

g. See Wyo. Exh. WRIR DS-17, The Carey Act of 1894, Tr. October 7, 1981, Vol. 125, pp. 11369-11370, also Wyo. Exh. WRIR MV-11, Tr. September 29, 1981, Vol. 114, p. 10510, Wyo. Exh. WRIR MV-11A, Tr. September 29, 1981, Vol. 114, p. 10510.

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2-2 Continued.

h. The Reclamation Act of 1902 is another example of the disposal policies regarding public land. This Act further recognized the necessity of water for the settlement and the development of the West. It also stated that any project authorized under this Act was to proceed under state law. In Water Division No. 3 over 23,000 acres of land for which State-awarded water rights attach, were disposed of under this Act.

2-2 Continued.

h. See Wyo. Exh. WRIR DS-21, The Reclamation Act of 1902, Tr. October 7, 1981, Vol. 125, p. 11373, 11375, also Wyo. Exh. WRIR MV-11, Tr. September 29, 1981, Vol. 114, p. 10510, Wyo. Exh. WRIR MV-11A, Tr. September 29, 1981, Vol. 114, p. 10510.

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2-3 Non-Indian Irrigation Development

- a. The earliest settlements in northwestern and north central Wyoming began with the exploration of the gold and silver deposits in the South Pass area of the Wind River Range. These temporary mining settlements soon expanded into permanent farming and ranching settlements in the Popo Agie Valley.

By the mid-1880's the success of the government's disposal policies in northern Wyoming was quite evident. Many small communities were established by settlers who had obtained their land under such disposal acts as the Cash Entry Act, the Homestead Act and the Desert Lands Act. These first settlements, located near the foothills and lower mountain valleys, relied primarily on cattle ranching and dryland or easily irrigated farming.

- a. See Wyo. Exh. WRIR SF-1, "Appendix B, Wind River Irrigation Project," p. 8. Defendant's Exhibit Deaver-Willwood-Elk #13, Dams, Ditches and Water, p. 1.

2-3 Continued.

- b. By the early 1900's most of the suitable land in the region was occupied by ranches or irrigated farms. Yet the settlers continued to arrive, necessitating a gradual expansion out onto the dry basin floors. This movement prompted the development of many ambitious irrigation projects, often sponsored jointly by private citizens and the United States Government.

2-3 Continued.

- b. See Wyo. Exh. WRIR PW-2, Dr. Paul Wilson's Thesis "Farming and Ranching on the Wind River Indian Reservation," pp. 224-242, Wyo. Exh. WRIR SF-1, "Appendix B, Wind River Irrigation Project," p. 8.

2-3 Continued.

- c. The first major irrigation endeavor in the Big Horn Basin began on February 10, 1904 when President Theodore Roosevelt authorized the construction of the Shoshone Reclamation Project. This project spanned over 50 years and ultimately resulted in the development of over 90,000 acres of land in the Big Horn Basin.

2-3 Continued.

- c. See Defendant's Exhibit Deaver-Willwood-Elk #13, Dams, Ditches and Water, p. 1.

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2-3 Continued.

- d. In November of 1907 the Garland Division of the Shoshone Reclamation Project was opened for homestead entry. In April of 1908, the Garland Canal supplied the first irrigation waters to the Division. By 1913 over 19,000 acres of what had once been classified as desert lands were under productive cultivation.

In 1915 construction began on the second division of the Shoshone Reclamation Project. The Frannie Division, located north of the Garland Division, was opened to homestead entry in 1917. In 1921 construction of the Frannie Canal, an extension of the Garland Canal, was completed. This canal provided the water necessary for the homesteading of over 23,000 acres in the Division.

In July of 1922 construction began on the Willwood Dam. This dam, located 20 miles downstream from the Shoshone Dam, was to provide the water necessary to irrigate the 11,530 acres of Willwood, the Third Division of the Shoshone Reclamation Project. Basic construction on the system was completed and the area was opened for homestead entry in 1927. The first homesteader received water on April 21, 1928.

2-3 Continued.

Construction of the fourth division of the Shoshone Project, Heart Mountain, began in 1936. In 1941 water was released into the Heart Mountain Canal. Unfortunately, World War II and the placement of a Japanese Relocation Center on the mountain interrupted the construction of the Division. Thus, it wasn't until 1946 that the area was opened for homesteading. The final drawings for the land were made on September 23, 1949. Today Heart Mountain has over 24,681 acres of land under irrigation.

In 1972 Congress approved the development of a fifth division of the Shoshone Reclamation Project. This division, to be located in the Polecat Bench Area west of Frannie and Garland, will provide over 19,000 more acres of irrigable farm land in the Big Horn Basin.

2-3 Continued.

- d. See Defendant's Exhibit Deaver-Willwood-Elk #13, Dams, Ditches and Water, pp. 30-46, 48-53, 54-60, 84-96, 98.

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2-3 Continued.

- e. In 1905 the Governor of Wyoming initiated a survey of the land within the Wind River Basin which had previously been ceded to the government. The survey which was designed to establish the water rights for this area set out approximately 335,905 acres as potentially irrigable. It also secured all of the remaining water rights for the Wind River drainage and essentially determined the boundaries for what would become the Riverton Project.

2-3 Continued.

- e. See Wyo. Exh. WRIR PW-2, Dr. Paul Wilson's Thesis, "Farming and Ranching on the Wind River Indian Reservation," p. 226.

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2-3 Continued.

- f. On August 15, 1906 homestead bidding for the lands on the ceded portions of the Reservation marked the beginning of white settlement in the Wind River Basin. This settlement on the dry lands of the Basin necessitated the development of large-scale irrigation projects and water management systems capable of servicing the rapidly increasing number of farms and communities.

2-3 Continued.

f. See Wyo. Exh. WRIR PW-2, Dr. Paul Wilson's Thesis,
"Farming and Ranching on the Wind River Indian
Reservation," p. 226-228.

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2-3 Continued.

- g. The arrival of the white settlers in the Wind River Basin significantly altered the Indians' economic base. As the numbers of white men and their farms increased the number of Indians working their own farms and ranches decreased. The Indians began to rent and eventually sell their land to the white man and then hired themselves out as laborers. By 1960 barely 10% of the combined income of the Tribes was from self-employment and over 80% of the combined work force were employed as laborers on white farms. The primary income of the Indians was unearned; over 67% came from mineral royalties and land rentals.

2-3 Continued.

- g. See Wyo. Exh. WRIR PW-2, Dr. Paul Wilson's Thesis, "Farming and Ranching on the Wind River Indian Reservation," p. 146-147.

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2-3 Continued

- h. In late 1905 the ambitious plan for the irrigation of over 330,000 acres of land near Riverton was replaced by a smaller, more economical plan. This plan called for the construction of one canal, Wyoming Canal No. 2, which would carry water from the Wind River for the irrigation of approximately 15,000 acres north of Riverton.

2-3 Continued.

- h. See Wyo. Exh. WRIR PW-2, Dr. Paul Wilson's Thesis, "Farming and Ranching on the Wind River Indian Reservation," p. 233-234.

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2-3 Continued.

- i. On June 5, 1920 all of the lands within the Riverton Project which had previously been developed were returned to the Bureau of Indian Affairs. This return, which included the land irrigated by the Wyoming Canal No. 2, renewed Indian interest in the area and resulted in the extension of Wyoming Canal No. 2 and the addition of the LeClair Ditch.

At this time the lands within the Riverton Project Area which had not been developed were placed under the control of the Bureau of Reclamation. After conducting new studies in the area the Bureau estimated that approximately 145,000 of the original 335,905 acres set aside were potentially irrigable. They immediately began the construction of an irrigation system which would supply sufficient water to the region. This design, which consisted primarily of Wyoming Canal #1 and its major extensions and laterals, dominated the Bureau's efforts in the Basin until 1945. The project was completed between 1948 and 1952. By the end of this 32-year span, approximately 61,000 acre of land were placed under irrigation.

2-3 Continued.

- i. See Wyo. Exh. WRIR PW-2, Dr. Paul Wilson's Thesis, "Farming and Ranching on the Wind River Indian Reservation," pp. 235, 237.

2-3 Continued.

- j. On July 27, 1939 the land not purchased or homesteaded which was ceded under the Second McLaughlin Agreement was restored to the Shoshone Tribe. This action was the result of a law suit filed by the Shoshone Indians against the Federal Government concerning the placement of the Arapahoe Indians on the Shoshone Reservation. During the next ten years over 1,000,000 acres of land were returned to the Shoshone.

The undeveloped lands within the Riverton Reclamation Project remained an issue between the Indians and the federal government for many years. In 1940 the gradual return of these lands to the Indians began. By 1953 over 80,000 acres had been returned. In 1953 the Second McLaughlin Agreement was finally resolved as the federal government agreed to purchase the remaining 161,520 acres of undeveloped land.

2-3 Continued

- j. See Wyo. Exh. WRIR PW-2, Dr. Paul Wilson's Thesis, "Farming and Ranching on the Wind River Indian Reservation," p. 242-246.

2-3 Continued.

k. In 1944 Congress authorized the construction of the Boysen Project. This project, which included the building of the Boysen Reservoir at the point where the Wind River enters the Owl Creek Mountains, necessitated the purchase of over 19,000 acres within the Wind River Indian Reservation and 16,000 acres within the Riverton Reclamation Project. The construction of the Boysen Dam began in 1951 and the reservoir was placed into service in 1952. Although the original intention that the reservoir serve as a storage place for water capable of irrigating both basins did not materialize, it has fulfilled its function as a power plant as it generates enough power to supply the entire region. The Boysen Project was the Federal Government's final acquisition of land in the Wind River Indian Reservation.

2-3 Continued.

- k. See Wyo. Exh. WRIR PW-2, Dr. Paul Wilson's Thesis, "Farming and Ranching on the Wind River Indian Reservation," p. 247-251.

Findings of Fact
Relating to the Existence of
Congressional Intent to Reserve Water
for the Wind River Indian Reservation

3-1 Importance of congressional intent to reserve water for the Wind River Indian Reservation.

As dictated by the United States Supreme Court, before the Court can decide the nature and extent of any reserved water rights which may be held by the United States on behalf of the Wind River Indian Reservation, it must first determine whether such rights actually exist. Assuming that Congress had the power to create reserved water rights when it created the Wind River Indian Reservation, this Court must determine whether Congress intended to exercise that power on behalf of the Wind River Indian Reservation or whether Congress elected instead to provide, if at all, for the water needs of the Indians on the Wind River Indian Reservation in another fashion.

3-1 See United States v. New Mexico, 438 U.S. 696, 698-99, 98 S.Ct. 3012, 3013, 57 L.Ed.2d 1052, 1055-56 (1978):

The question posed in this case -- what quantity of water, if any, the United States reserved . . . is a question of implied intent and not power.

Id. at 698, 96 S.Ct. at 3013, 57 L.Ed.2d at 1055. See also Conclusions of Law 3-1, 3-2.

The foundation question before the Court in this case is whether Congress intended to exercise its power to create a reserved water right when it created the Wind River Indian Reservation. The State has comprehensively documented the intent of Congress by its presentation of Wyo. Exh. WRIR I & P ("Intent and Purposes") 1-37, 37(a), 38, 38(a), 39-54, 54(a), 55-58, 60-94, 96-100, 101-101.3220E, 102-109, 109(a), 110-146, 146(a), 147-169, 169(a), 170-186. Based upon this evidence, the Court is able to address and make findings concerning congressional intent to reserve rights to water for the Wind River Indian Reservation.

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3-2 Introductory finding concerning congressional intent to reserve water for the Wind River Indian Reservation.

As set forth with specificity in later Findings of Fact, the Court has made findings with respect to:

1. The establishment of the Wind River Indian Reservation (FF 3-3).
2. Wyoming's constitution and admission into the Union (FF 3-4).
3. Administrative actions and events occurring after Wyoming statehood and before the 1904 negotiations (FF 3-5).
4. Turn of the century congressional express reservations of water associated with other Indian reservations (FF 3-6).
5. The Agreement of 1904 (FF 3-7).
6. Events occurring between the 1904 Agreement and passage of the 1905 Act (FF 3-8).
7. The 1905 Act and its "water proviso" (FF 3-9).
8. Similar congressional treatment of other Indian reservations in the early twentieth century (FF 3-10).
9. Acquisition of water rights under state law for the Wind River Indian Reservation after the 1905 Act (FF 3-11).
10. Congressional rejection of reserved rights in the Indian Appropriations Act of 1914 (FF 3-12).

3-2 Continued.

11. Previous judicial proceedings involving the water rights of the Wind River Indians (FF 3-13).
12. Later administrative attempts to recognize reserved rights for the Wind River Indians (FF 3-14).

3-2 See Findings of Fact 3-3 to 3-14, infra.

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3-3 Establishment of the Wind River Indian Reservation.

The Wind River Indian Reservation was established for the benefit of the Shoshone Tribe pursuant to the Second Treaty of Fort Bridger in 1868 between the Shoshone and Bannock Tribes and the United States. This treaty was silent on the issue of water and the creation of water rights, reserved or otherwise, on behalf of the Shoshone Tribe for use on the Wind River Indian Reservation.

3-3 Wyo. Exh. WRIR I & P 1 (Treaty of 1868, concluded July 3, 1868, ratification proclaimed Feb. 26, 1869), 15 Stat. 673 (1869)); see Conclusion of Law 3-3.

When reviewing a claim for reserved water rights on behalf of an Indian reservation created by a document silent on the issue of water and water rights, some courts have implied the existence of reserved water rights, relying on the facts and circumstances surrounding the creation of a particular reservation, to make that implication. Such an implication is not appropriate in this adjudication, however, for the evidence expressly shows that Congress did not intend to create a reserved right to water in connection with the Wind River Indian Reservation. See Findings of Fact 3-9, 3-12, infra; Conclusion of Law 3-2(b).

3-4 Wyoming's constitution and admission into the Union.

Twenty-two years after the reservation was established, Wyoming was admitted to the Union by an admission act passed by Congress on July 10, 1890. Section 1 of that act confirmed the Wyoming constitution.

- a. Part of the Wyoming Constitution, as adopted by the people of that State and confirmed by the United States Congress, declares all flowing and still bodies of water to be the property of the state and establishes the prior appropriation system as the law of distributing the State's water:

Article 8, Sec. 1. The water of all natural streams, springs, lakes or other collections of still water, within the boundaries of the state, are hereby declared to be the property of the state.

Article 8, Sec. 3. Priority of appropriation for beneficial uses shall give the better right. No appropriation shall be denied except when such denial is demanded by the public interests.

- b. Neither the Wyoming constitution nor the Act of Admission made any express exception for waters reserved by the federal government, either in trust or on its own behalf, when it declared all waters within the State as property of the State.

3-4 Wyo. Exh. WRIR I & P 11 (Admission Act of July 10, 1890, 26 Stat. 222 (1890)):

Be it enacted, * * *, That the State of Wyoming is hereby declared to be a State of the United States of America, and is hereby declared admitted into the Union on an equal footing with the original States in all respects whatever; and that the constitution which the people of Wyoming have formed for themselves be, and the same is hereby, accepted, ratified, and confirmed.

- a. Wyo. Exh. WRIR I & P 12 (Wyo. Const. art. 8, Secs. 1, 3).
- b. See Wyo. Const. (as ratified by Congress on July 10, 1890); Conclusion of Law 3-6.

3-5 Administrative actions and events occurring after Wyoming statehood and before the 1904 negotiations.

Once Wyoming became a state and the doctrine of prior appropriation of water received constitutional sanction, the actions of federal administrative officials directly concerned with the Wind River Indian Reservation conclusively demonstrate that Wyoming state law was considered the appropriate mechanism by which to obtain water rights for the reservation Indians.

a. The annual reports of the Indian agents, the federal officials in closest contact with the Indians on the reservation, insofar as they deal with water at all, show that the securing of water rights for the Wind River Indian Reservation was considered a matter of Wyoming law and that this conclusion was communicated to the Indians.

b. More specifically:

(1) As early as 1894, P. H. Ray, the United States Indian Agent of the Shoshone Agency, who was charged with daily administration of the Wind River Indian Reservation, expressed his concern that water rights be acquired under Wyoming law for the Wind River Indian Reservation:

As these people must depend upon agriculture and stock raising for their future support, and as there was but one ditch (Arapaho) of any

3-5 Continued.

importance on the reservation, I at once commenced preliminary surveys for irrigation, so as to secure to the Indians the first right to water.

- (2) Agent H. E. Wadsworth took action on the problem in 1903 when he informed the Commissioner of Indian Affairs by letter that he had applied to the Wyoming United States Attorney, Timothy F. Burke, for instruction "in securing water rights" for the Wind River Indian Reservation. Wadsworth also told the Commissioner:

It is impossible to overestimate the importance of this matter to this reservation. Immense canals and ditches are being projected in the northern portion of this state, to be taken from the streams flowing through our lands, and unless immediate action is had on the part of this Department, these lands will be rendered worthless for all time to come.

- (3) Wadsworth enclosed his reply from United States Attorney Burke, which letter gave the following instructions:

The Congressional Act of Admission of the State of Wyoming ratified and confirmed the Constitution, therefore to secure water rights for the Indians there must be full compliance with State laws.

United States Attorney Burke explained in detail what the Indians must do to comply with the state water laws:

3-5 Continued.

Section 917 R.S. Wyo. 1899 provides:

Any person, association or corporation, hereafter intending to acquire the beneficial use of the public water of the State of Wyo. shall, before commencing the construction, enlargement or extension of any ditch, canal or other distributing works, or performing any work in connection with said construction, or proposed appropriation, make an application to the State Engineer for a permit to make such appropriation. Such application must set forth the name and P. O. address of the applicant; the source of the water supply; the nature of the proposed use; the location and description of the proposed ditch, canal, or other work; the time within which it is proposed to begin construction; the time required for the completion of the construction; and the time required for the complete application of the water to the proposed use."

Hence, it will be necessary if a number of ditches are to be taken out of the various streams on the Reservation to have accurate maps made of the country through which the proposed ditches are to run with description of the lands to be irrigated, (See Section 924 R. S. Wyo. 1899) and application should be made by you, or by the Interior Department of the United States, for the use of the water required to irrigate such lands as you may determine upon. If the Government contemplates building a number of canals the same procedure is necessary. Upon a sufficient showing the State will undoubtedly grant sufficient time in which to complete the work and apply the water to beneficial uses.

3-5 Continued.

In regard to lands which have been allotted there is no reason why application should not be signed by the Indian to whom the allotment has been made.

If you desire to make applications at once it will be well to have surveys made so that the applications and accompanying maps may be in strict compliance with the State law.

Any further information desired will be furnished immediately upon request from you.

Thus, the legal officer responsible for federal affairs in Wyoming expressly interpreted the applicable law to require compliance with State law in order to acquire water rights for the Wind River Indian Reservation.

- (4) The Commissioner of Indian Affairs shortly thereafter wrote the Secretary of the Interior, reviewing the Wadsworth and Burke letters, and agreeing with the conclusions stated therein:

It appears from Agent Wadsworth's said letter and that of the District Attorney for Wyoming, that some action should be taken looking to the securing of water rights for irrigation purposes for the Indians or the Shoshone Reservation.

This matter is now brought to your attention for consideration in connection with said office report of

3-5 Continued.

August 24, 1903. It is suggested whether it would not be good policy, under existing conditions and circumstances, to instruct Inspector Wm. H. Code (Irrigation Engineer) to proceed at the earliest convenient time to the Shoshone Reservation with the view of investigating the whole matter of irrigation and making report to the Department as to the system of irrigation which should be constructed, the length of the ditches, the amount of irrigable land covered thereby, etc. If a proper irrigation system could be surveyed and laid out on the lands already allotted and those susceptible of irrigation, the complex questions involved in regard to this reservation would be solved, at least, in part. The allotments could then be made to best advantage to the Indians. Application should be made to the State Engineer for a permit to make appropriation of the waters necessary, containing all the requirements of the statutes of Wyoming relating to the matter, if an irrigation system is planned.

- c. In addition to actions by the Bureau of Indian Affairs officials, a private group, the Indian Rights Association, actively sought to influence the federal government to obtain secure water rights on behalf of the Wind River Indian Reservation Indians.

3-5 See Conclusions of Law 3-4, 3-8 (administrative interpretations of federal laws relevant to determining congressional intent).

- a. See, e.g., Wyo. Exh. WRIR I & P 40 (Report of the Commissioner of Indian Affairs, 53d Cong., 3d Sess. 336-38 (1895)); 41 (Annual Reports of the Department of the Interior, H.R. Doc. No. 5, 58th Cong., 2d Sess. 360-64 (1904)).
- b. (1) Wyo. Exh. WRIR I & P 40 (Report of the Secretary of the Interior, 53d Cong., 3d Sess. 337 (1895)).
(2) Wyo. Exh. WRIR I & P 42.
(3) Wyo. Exh. WRIR I & P 43 (Letter from Timothy F. Burke to H. E. Wadsworth (Sept. 1, 1903)).
(4) Wyo. Exh. WRIR I & P 44 (Letter from Commissioner W. A. Jones to Secretary of the Interior (Oct. 14, 1903)).

In that letter, the Commissioner also referred to his previous letter discussing allotments and irrigability of various lands wherein he referred to Representative Mondell's warning that failure to make early applications for water rights would allow prior appropriations by downstream users below the Wind River Indian Reservation. It was urged that early settlement of allotment matters be reached so that water rights filing could be accomplished. Wyo. Exh.

3-5 Continued.

WRIR I & P 45, at 19 (Letter from Commissioner W. A. Jones to the Secretary of the Interior (Aug. 25, 1903)).

- c. When he ordered Superintendent Hill to begin water appropriation work on the Wind River Indian Reservation, see Finding of Fact 3-8(b), infra, the Commissioner of Indian Affairs relied in large part on a letter by S. M. Brosius, Indian Rights Association (IRA) agent, who stated as follows:

It is clear that if the allotments to the Indians can be delayed until the lands are opened to settlement by the whites, all the water not now appropriated will be claimed at once by these settlers and the Indians be left without a water-supply. The refusal of the present allotting agent to locate Indian applicants for the allotments upon lands they have improved and irrigated within the territory proposed to be opened to settlement by the Government only makes more definite the design of persons inspired in opposition to the real interests of the Indians. If these Indian homes must be abandoned to the greed of the land-grabber and politician, the Indian owner will be obliged to locate on the diminished reservation and take his chances in securing available land and water for irrigation, where all the odds are against him.

Wyo. Exh. WRIR I & P 58, at 1-2 (Letter from S. M. Brosius to the Secretary of the Interior (July 28, 1904)). Noting also that the Wyoming Constitution requires all waters to be obtained from the State, Brosius, speaking on behalf of the Indians, demanded

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3-5 Continued.

that action be taken to secure water rights to the Indian under state law. See also Finding of Fact 3-8(c), infra. The position of the IRA was entirely consistent with its support of language which would have expressly created a reserved water right on the Wind River Indian Reservation in the 1905 Act. As noted above, that attempt was rejected. See Finding of Fact 3-9, infra.

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3-6 Turn of the century congressional express reservation of water associated with other Indian reservations.

Immediately before and after the end of the nineteenth century, Congress began to expressly reserve water for selected Indian reservations other than the Wind River Indian Reservation:

a. Yakima Reservation, Washington.

- (1) In 1894, Congress expressly reserved water on the Yakima Reservation from appropriation by the Columbia Irrigation Company, which had been granted a right-of-way over and a reservoir on the reservation.
- (2) Congress later recognized an even broader form of reserved right on the Yakima Reservation in 1906, one year after the 1905 congressional ratification of the Wind River Indian Reservation Agreement of 1904. In legislation enacted that year, Congress granted any Indian who took advantage of the act "a perpetual water right so long as the maintenance charges are paid, whether he uses the water or not"
- (3) The water rights reserved for the Yakima Reservation by Congress were confirmed in United States v. Ahtanum Irrigation District.

3-6 Continued.

b. Fort Hall Reservation, Idaho.

- (1) Congress ceded portions of the Fort Hall Reservation in 1898, providing for payment to the Indians, allotment of lands and protection of Indians' water rights as it later did for the Wind River Indian Reservation cession in 1904. However, Congress expressly created a reserved water right for the Idaho reservation in Article VIII of that treaty:

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

- (2) As in the case of the Yakima reserved right, the Fort Hall reservation of water was judicially confirmed in United States v. Hibner.

c. Crow Reservation, Montana.

- (1) In a cession treaty with the Crow Indians in Montana, ratified at virtually the same time as the agreement for the Wind River Indian Reservation in 1904, Congress again made the same provisions as it did for the Wind River Indian Reservation cession, but expressly reserved water:

ARTICLE V. The water from streams on that portion of the reservation now

3-6 Continued.

sold, which is necessary for irrigating on land actually cultivated, and in use, shall be reserved for the Indians now using the same so long as said Indians remain where they now live.

(2) Once again, this reservation was judicially recognized in Anderson v. Spear-Morgan Livestock Co.

d. Klamath Reservation, Oregon.

(1) The Klamath Reservation in Oregon is yet another example of congressional awareness of the propriety of reserving water rights on certain reservations and applying state water law on others. James McLaughlin, the same United States Indian Inspector who negotiated the 1904 cession of Wind River Indian Reservation lands that expressly applied Wyoming water law on the Wind River Indian Reservation, handled a similar cession negotiation in 1901 with the Klamath Indians. As in the 1904 Wind River Indian Reservation Agreement, Article II of the Klamath agreement provided for a per capita payment to the Klamaths, with the remainder to be applied toward the purchase of cattle and the "drainage and irrigation" of lands. The agreement does

3-6 Continued.

not, however, include an express application of state law to the Klamath Reservation.

- (2) An implied reserved right has been judicially found on behalf of the Klamath Reservation.
- (3) Mr. McLaughlin was experienced in Indian treaty negotiations and had specifically addressed water issues with respect to the Wind River Indian Reservation both before and after his 1901 meetings with the Klamaths. Thus, his omission of any discussion of state water laws in the Klamath agreement and his express reference to the applicability of state law in the Wind River agreement can only be interpreted as intentional.

3-6 a. Other treaties entered into around the same time as the Agreement of 1904 may be used to determine Congress' intent with respect to the Wind River Indian Reservation. See Conclusions of Law 3-4, 3-10.

(1) SEC. 2. That the said irrigation company shall have the right to appropriate and use any and all water necessary for their use from the Yakima River, not otherwise appropriated and in actual use at the time of the passage of this Act, or that may not be necessary for the domestic and irrigating purposes of any Indian to whom an allotment has been made, or shall hereafter be made, upon or along said Yakima River.

Wyo. Exh. WRIR I & P 21 (Act of July 23, 1894, 28 Stat. 118 (1894)) (emphasis added).

(2) This broader form of reserved right was created on March 6, 1906, when Congress enacted H.R. 10067 opening "surplus and unallotted lands" under reservation irrigation projects to homestead entry. Wyo. Exh. WRIR I & P 28 (34 Stat. 534 (1906)).

(3) 236 F.2d 321 (9th Cir. 1956) (Wyo. Exh. WRIR I & P 29).

b. (1) Wyo. Exh. WRIR I & P 22 (Act of June 6, 1900, 31 Stat. 672 (1900) (ratified), entered on Feb. 5, 1898)) (emphasis added).

(2) 27 F.2d 909 (D. Idaho 1928).

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3-6 Continued.

- c. (1) Wyo. Exh. WRIR I & P 24 (Act of April 27, 1904 (H.R. 13300), 33 Stat. 352 (1904)).
- (2) 79 P.2d 667 (Mont. 1938) (Wyo. Exh. WRIR I & P 25).
- d. (1) Wyo. Exh. WRIR I & P 26 (Appropriations Act of June 21, 1906, 34 Stat. 325, 367-68 (1906)).
- (2) Wyo. Exh. WRIR I & P 27 (United States v. Adair, 478 F. Supp. 336 (D. Ore. 1979)).
- (3) See Wyo. Exhs. WRIR I & P 4 (1896 Big Horn Hot Springs cession treaty); 8 (minutes of negotiations prior to signing of Agreement of 1904).

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3-7 Agreement of 1904.

a. Events leading up to Agreement.

Relevant to discovering Congress' intent is the understanding of the Wind River Indians themselves of the 1904 Agreement. The negotiations between the representatives for the United States and the Shoshone and Arapahoe Tribes indicate that the two Tribes understood the need to act under Wyoming law in order to secure their water rights and believed Article III to be an important provision enabling them to achieve secure water rights. A leading spokesman for the Shoshone, George Terry, focused on Article V of the Treaty of 1904 providing for creation of an experimental farm. In his opinion, the farm was unnecessary and he felt "we should take as much of this money as is necessary to secure our water rights and make them good to us."

In response, James McLaughlin, the U.S. Indian Inspector negotiating for the United States said:

The money to be set apart for irrigation, I consider of great importance. Every dollar properly expended to obtain water to irrigate your lands will bring \$20.00 in return. You are all interested in this, and you have a magnificent soil when you get water on it. The irrigation fund is not large enough. I should like to see that increased.

* * * *

3-7 Continued.

The \$85,000 cash per capita payment will be inserted in the agreement, and I will accept your request in that matter that it will be paid sixty days after the land is open for entry or as soon thereafter, as the time required to transact the business of collecting, etc., will permit. That payment will give to each man, woman and child a per capita amount of \$50.00, and leave a surplus of something over \$2,000. It would be well to use this surplus in securing your water rights so that the whiteman cannot deprive you of water with which to irrigate your lands.

Thus, the Indians were concerned that the cession payments be used to secure their water rights. As expressly explained by the Inspector, money would be made available from the cession of ceded lands in order to perform the work required to obtain water rights under Wyoming law under Article III of the 1904 Agreement and this assurance was part of the basis of the bargain struck with the Indians.

b. Description of 1904 Agreement

James McLaughlin concluded the agreement with the Shoshone and Arapahoe Tribes on April 21, 1904. It provided for cession of specified lands from the Tribes to the United States for future sale and retention of allotted parcels by individual Indians or, in the alternative, selection of another allotment. In exchange for the cession agreement, the

3-7 Continued.

Tribes were to be paid a per capita sum, livestock were to be purchased and schools established. Most important, Congress expressed its explicit intention that the Tribes comply with Wyoming law to secure their water rights.

ARTICLE III . . . That upon the completion of the said fifty dollars per capita payment, any balance remaining in the said fund of eighty-five thousand dollars, shall at once become available and shall be devoted to surveying, platting, making of maps, payment of the fees, and the performance of such acts as are required by the statutes of the State of Wyoming in securing water rights from said State for the irrigation of such lands as shall remain the property of said Indians, whether located within the territory intended to be ceded by this agreement or within the diminished reserve.

ARTICLE IV. It is further agreed that of the moneys derived from the sale of said lands the sum of one hundred and fifty thousand dollars, or so much thereof as may be necessary, shall be expended under the direction of the Secretary of the Interior for the construction and extension of an irrigation system within the diminished reservation for the irrigation of the lands of the said Indians: Provided, That in the employment of persons for the construction, enlargement, repair and management of such irrigation system, members of the said Shoshone and Arapahoe tribes shall be employed wherever practicable.

3-7 Continued.

By this provision, all Indian-owned fee lands and trust lands were made subject to Wyoming water law and the means were provided so that the Indians could successfully comply with the statutory requirements in order that the Indians' waters be obtained and made secure.

- 3-7 a. Wyo. Exh. WRIR I & P 8, at 42, 45 (Minutes of council, Shoshone Agency, Wyoming (Apr. 19, 1904)); see Conclusions of Law 3-4, 3-7 (the Indians' understanding of a treaty must be examined when interpreting the treaty).
- b. Wyo. Exh. WRIR I & P 5 (Agreement of 1904, ratified Mar. 3, 1905, 33 Stat. 1016 (1905)).

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3-8 Events occurring between the Agreement of 1904 and passage of the 1905 Act.

- a. Only two weeks after execution of the 1904 Agreement at Fort Washakie, the Acting Commissioner of Indian Affairs ordered Superintendent Wadsworth to begin taking steps to comply with state law in filing for Wind River Indian Reservation water rights. Wadsworth then asked of Wyoming State Engineer Clarence Johnston whether "the United States government, under the Carey Act, (could) appropriate in bulk, sufficient water to reclaim the lands of this Reservation?" Johnston urged the United States to file forthwith for water rights on behalf of the Indians, as simple beneficial use of the water would not preserve their rights.
- b. Acting Commissioner Tonnen then ordered Walter B. Hill, General Superintendent of Irrigation for the Shoshone Agency, "to make surveys of ditches in use and of those necessary to be constructed in order that application for permit to appropriate waters under the laws of Wyoming may be made." Tonnen went on to specify:

You will therefore survey and lay out a proper system of irrigation embracing the lands as above indicated, south of Big Wind River, already allotted, and those susceptible of irrigation, and suitable for allotments. Maps of this system should be made showing the length of the ditches, the amount of irrigable land

3-8 Continued.

covered thereby, the allotments already made, if necessary; also the proposed allotments and any other information, if any, required under the Statutes of Wyoming. When you shall have made the necessary preliminary surveys and prepared the maps covering the proposed system of irrigation, you will make application to the State Engineer, or other proper officer, for a permit to make appropriation of the waters necessary. This application and the accompanying papers should contain all the requirements of the Statutes of Wyoming relative to the matter. In case there is any expense connected with this work and in taking the filings necessary to secure water rights for the Indians, not covered by existing authorities granted you, you will submit an estimate of the same in order that proper authority may be obtained for the expenditure of the amount required. A conference with the proper county or state officers relating to the question of securing irrigation water rights would doubtless materially aid you in your method or procedure and the steps necessary to be taken in the premises.

- c. In so ordering, Acting Commissioner Tonnen was motivated by two main concerns. First, as had been expressed by the Indian Rights Association (IRA), a desperate situation existed for obtaining water rights for the Wind River Indian Reservation Indians. Second, Tonnen was motivated by the opinion United States Attorney Burke discussed previously herein. Referring to a letter from S. M. Brosius, agent for the IRA, Tonnen's letter said:

He appears to be of the opinion that a great and irremediable wrong has already

3-8 Continued.

been done these Indians by reason of the delays that have attended the allotment of lands in severalty so that water rights might attach under the laws of the State of Wyoming.

He states that he finds that influential combinations operating extensive irrigating canals are pushing the construction of these water ways rapidly to completion so that the already acquired rights to the use of the water from the streams draining the Shoshone reservation lands may not be lost to them; that it is clear that if the allotments to the Indians should be delayed until the lands are opened to settlement by the whites, all water not now appropriated will be claimed at once by such settlers, and that the Indians would be left without a water supply.

Tonnen described the United States Attorney's letter as follows:

The U.S. District Attorney in his letter stated that in the matter of securing water rights for Indian lands, the constitution of the State provided that the waters of all natural streams, lakes or other classes of still water within the bounds of the State were declared to be the property of the State; that the Congresssional Act of admission of the State of Wyoming into the Union ratified and confirmed the constitution, and that therefore to secure water rights for the Indians there must be full compliance with the laws.

Tonnen notified Superintendent Hill soon thereafter that filings for water rights should be made in the United States Indian Agent's name.

- d. Tonnen also notified Wadsworth of Hill's orders, since it was he who brought the problem to the attention of the highest levels of the Interior Department.

3-8 Continued.

- e. Finally, Commissioner W. A. Jones notified the Secretary of the Interior of the need to secure water rights for the Wind River Indian Reservation and informed him of steps taken during the previous year to secure those rights under state law. Thus, the Secretary of the Interior was informed of and approved of the program that was established.
- f. The Acting Secretary of the Interior directed Irrigation Inspector W. H. Code to proceed immediately to the Wind River Indian Reservation to assist Superintendent Hill with carrying out the orders of the Commissioner of Indian Affairs.
- g. Wadsworth proceeded immediately to work with State Engineer Johnston to initiate appropriations of water on the Wind River Indian Reservation.
- h. By February 3, 1905, the Commissioner of Indian Affairs, F. E. Leupp, was satisfied that the water rights acquisition program on the Wind River Indian Reservation was proceeding smoothly. On that date, he wrote to the Secretary of the Interior indicating such and noting activities underway to comply with state law.
- i. Thus, the various reports and correspondence are replete with references by government officials to the issue of securing water rights for the Wind River

3-8 Continued.

Indian Reservation. While the federal administrators of the reservation strove to solve the problem once it became apparent that all water soon would be appropriated by non-Indians, they had yet no clear congressional instructions as to the proper approach to take.

3-8 Administrative interpretations of congressional action may be used to determine Congress' intent. See Conclusions of Law 3-4, 3-8.

- a. Wyo. Exh. WRIR I & P 46 (Letter from Acting Commissioner Tonnen to H. E. Wadsworth (May 6, 1904)); 47 (Letter from H. E. Wadsworth to State Board of Control (June 3, 1904)); 48 (Letter from State Engineer Clarence Johnston to U.S. Indian Agent H. E. Wadsworth (June 7, 1904)).
- b. Wyo. Exh. WRIR I & P 49, at 1, 10-11 (Letter from Acting Commissioner Tonnen to Walter B. Hill (Aug. 11, 1904)).
- c. See Findings of Fact 3-5(b), (c); Wyo. Exh. WRIR I & P 52 (Letter from Acting Commissioner Tonnen to Walter B. Hill (Aug. 12, 1904)).
- d. Wyo. Exh. WRIR I & P 50 (Letter from Acting Commissioner Tonnen to H. E. Wadsworth (Aug. 12, 1904)).
- e. Wyo. Exh. WRIR I & P 53 (Letter from Commissioner W. A. Jones to Secretary of the Interior (Aug. 15, 1904)).
- f. Wyo. Exh. WRIR I & P 54 (Telegram from Acting Secretary Thos. Ryan to Inspector William H. Code (Sept. 13, 1904)); 54(a) (Letter from Acting Secretary Thos. Ryan to Commissioner W. A. Jones (Sept. 13, 1904)).

3-8 Continued.

- g. Wyo. Exh. WRIR I & P 55 (Letter from H. E. Wadsworth to Clarence T. Johnston (Sept. 19, 1904)); 56 (Letter from State Engineer Clarence T. Johnston to U.S. Indian Agent H. E. Wadsworth (Sept. 13 (sic), 1904)).
- h. Wyo. Exh. WRIR I & P 57 (Letter from Commissioner of Indian Affairs to Secretary of the Interior (Feb. 3, 1905)).
- i. See Findings of Fact 3-5, 3-8.

YELLOW PAPER

3-9 The 1905 Act and its "water proviso".

- a. In what was known as the "water proviso" in the 1905 Act, Congress specifically dealt with the issue of water rights when it ratified the Agreement of 1904, which ceded to the United States 1,600,000 acres of the Wind River Indian Reservation that were perceived as unnecessary for the needs of the Indians thereon and were therefore opened to settlement by non-Indians.
- b. The legislative history of the 1905 Act (the ratification of the 1904 Agreement) reveals that, as originally proposed by the House Committee On Indian Affairs, Article III included a specific provision to reserve water for the Wind River Indian Reservation.

The article with the proviso would have read:

ARTICLE III. It is further agreed that of the amount to be derived from the sale of said lands, as stipulated in Article II of this agreement, the sum of eighty-five thousand dollars shall be devoted to making a per capita payment to the said Indians of fifty dollars each in case within sixty days after the opening of the ceded lands to settlement, or as soon thereafter as such sum shall be available: And provided further, That upon the completion of the said fifty dollars per capita payment any balance remaining in the said fund of eighty-five thousand dollars shall at once become available and shall be devoted to surveying, platting, making of maps, payment of the fees, and the performance of such acts as are required by the statutes of the State of Wyoming in securing water rights from said State for the irrigation of such lands as shall remain the property of said Indians,

3-9 Continued.

whether located within the territory intended to be ceded by this agreement or within the diminished reserve. Provided, That the constitution and laws of the State of Wyoming shall not operate to secure any rights, having priority to those of members of the Shoshone tribe of Indians, to the use of the waters within the territory hereby opened to sale and settlement, including Big Wind River and its tributaries, for purposes of irrigation of the lands comprised within such territory, until such time as the United States shall have perfected allotments to the members of the Shoshone Indian tribe, either from the lands to be opened for settlement or within the diminished reservation of said Indians, and completed the necessary steps under the law to secure the desired water rights for the said allotments.

This language, recommended by the Indian Rights Association (IRA), would have created an express reservation of water until allotments were made in order to assure that water would be available to all Shoshone and Arapahoe allottees.

- c. Acting Indian Commissioner A. C. Tonnen, in 1904, supported adoption of the reserved right proviso in Article III of the Treaty of 1904 because he believed Wyoming law controlled appropriation of water and that the water rights would be lost by the Indians before their irrigation system was completed. His letter to the Secretary of Interior notes that "a very important question . . . (was) the securing of water rights for

3-9 Continued.

the Indians or water sufficient from the streams of the reservation to irrigate their lands." The subsequent discussion demonstrates that the Acting Commissioner believed that the Indians had no water rights based on the creation of the Wind River Indian Reservation and that these needed to be secured forthwith:

(M)uch of the water of the Big Wind River, the Big Popo-Agie River, and their tributaries, has already been appropriated; that the matter of obtaining sufficient water in that section to irrigate lands is thus of vital importance to the people. This office and the Department have had in view for sometime the subject of obtaining water rights for the Indians and the construction of irrigation ditches and canals. Superintendent W. B. Hill has been upon the reservation for sometime making preliminary irrigation surveys and taking other proper steps for the purpose indicated. Two or three years prior to his going upon the reservation for that purpose, Superintendent George Butler was given instructions as to the same matter, made certain surveys and submitted an elaborate report upon a very extensive system of irrigation on the reservation embracing lands both north and south of the Big Wind River.

In his report of November 17, 1904, above referred to, Inspector Code (U.S. Inspector of Irrigation) states that the surveying of canal lines, filing of plats with the State Engineer of Wyoming, and subsequent construction of canals, will not alone establish the rights of the Indians under the Wyoming laws (emphasis

3-9 Continued.

added) even though the outlay thereby should approximate the vast sum of a million and a half dollars, the maximum amount estimated for irrigation on the reservation that these measures are simply essential preliminaries which hold the appropriation of water (emphasis original) for a period of five years or such reasonable additional time as the State Engineer may allow upon a proper showing that the construction work has been diligently carried on at all seasonable times; "that when diligence is lacking, priority dates from time of use"; that in the filing of applications for water with the State Engineer the applicant must state the time required for the completion of construction which, in the case of the government, on behalf of the Indians, would be given as five years from date of filing; that one year would be allowed the government after the approval of the application in which to begin the work of actual construction; that the would-be appropriator is also requested to state the time required for the application of the water to the beneficial use after the canal work has been completed; that with the Indian farmers the government would certainly need the maximum time limit in both instances; that it is within the power of the State Engineer to fix or extend the dates for completion of canal work and the application of water to the soil; that he and Superintendent Hill were informed by the State Engineer that filings can be made in the name of the United States Indian Agent on behalf of the Indians which he states, will save a great deal of time.

The letter goes on to discuss the reserving language proposed by the IRA and the problem to which it is addressed:

3-9 Continued.

The special attention of the Department is invited to the statements made by Inspector Code with reference to securing water rights for the Indians and the appropriation of water for irrigation purposes; also to the provisions of the clause above quoted.

Can the survey of a system of irrigation within the diminished reservation, the platting of the same, the filing of the plats or maps of definite location with the State Engineer of Wyoming, the making of application for water and the commencement of construction, the exercise of diligence and good faith in the work, be done in time to save to the Indians water rights and a sufficient water supply for irrigation purposes, or will it be necessary to have some such legislation enacted as proposed by the Indian Rights Association to save sufficient water and water rights for them? The office respectfully recommends this matter to the earnest consideration of the Department.

- d. The IRA, the private organization then primarily responsible for promoting Indian issues, also understood that federal reserved water rights did not exist on the Wind River Indian Reservation and made every effort to force the water rights issue upon Congress on behalf of the Indians of the Wind River Indian Reservation. The IRA Agent, S. M. Brosius, wrote to the Secretary of Interior to express his concern that allotting Agent Nickerson was not performing his obligation to allot lands, that white settlers would appropriate all of the available water

3-9 Continued.

before the allotments to the Indians would be completed and that proper applications were not being filed with the State Engineer's office on behalf of the Indians. The basis of Brosius' concern was that

by reason of the delays that have attended the allotment of lands into individual holdings so that water rights might attach under the laws of the State . . . [i]t is clear that if the allotments to the Indians can be delayed until the lands are opened to settlement by the whites, all the water not now appropriated will be claimed at once by the settlers and the Indians left without a water-supply.

Brosius continued:

The question cannot be dismissed by statements that there is no immediate danger that the supply of water for irrigation of the Shoshone lands is imperiled. Article 8th, Section 1, of the Constitution of the State of Wyoming provides that "The water of all natural streams, springs, lakes, or other collections of still water, within the boundaries of the State, are hereby declared to be the property of the State." Section 3, declares: that "Priority of appropriation for beneficial uses shall give the better right. No appropriation shall be denied except when such denial is demanded by the public interests."

And he concluded:

When we consider that the Big Horn River and its tributaries comprises within its drainage territory the Shoshone reservation, the urgent necessity is shown for prompt measures being adopted whereby

3-9 Continued.

the Indians may be protected in their water rights, else all the water will be lost to them. It is imperative that an engineer be directed forthwith to make proper surveys of the numerous ditches or canals already in use within the reservation, and the designation of additional canals, and that proper application be filed with the Engineer's Department of the State of Wyoming at the earliest possible moment. The waters of the streams within the reservation are the chief capital of the Shoshone Indians. Deprived of the use of these waters, the otherwise fertile valleys are practically worthless.

Brosius wrote to the Secretary of the Interior again only two days later and, once again, his concern was the failure to allot lands to the Indians and the effect on water rights. He concluded:

For the protection of the rights of the Shoshone Indians it is necessary that prompt steps be taken to secure their water rights. Honest and competent men should be in control for the Government. An engineer should be directed to proceed to Shoshone at once to make the proper surveys and filings as required by the Statute of Wyoming, and an allotting agent be placed in charge who can be relied upon. The engineer should be given complete control of the allotting and appoint his assistants as required.

It will be an easy matter to defeat the right of these Indians to the use of water from streams within their reservation, but little further delay and all will be lost to them. It will only be necessary to continue the bungling work of allotment that has been in progress there for the past ten years, but a few months longer, for it may be found when too late

3-9 Continued.

that even after so long delay the work has not been honestly and properly executed, and in the interim the valuable water rights have vested in other persons off the reservation.

- e. The Senate Committee on Indian Affairs; however, recommended that the language creating a reserved right be stricken lest it "retard the settlement of the lands thrown open to entry." The concern was for "the homesteader upon the reserve, who might be delayed or defeated in securing his water right, thus delaying his entry and possibly rendering the same valueless."
- f. The proviso quoted above which would have reserved water rights ultimately was not adopted in the version of the 1904 Agreement ratified by Congress. Instead, the language indicating the law that would govern the acquisition of water rights referred only to the "statutes of the State of Wyoming."
- g. The final version of the 1905 Act which became law specified how certain of the Indians' receipts were to be spent, including purchase of livestock, construction and maintenance of schools, and extension of the irrigation system. These specifications included a \$50 per capita payment to be made to all Indians on the reservation from an \$85,000 cash sum.

3-9 Continued.

The balance of this sum was specifically directed to be applied toward performing the acts necessary for the acquisition of water rights for Indians under Wyoming law.

PROVIDED FURTHER, That upon the completion of the said fifty dollars per capita payment, any balance remaining in the said fund of eighty-five thousand dollars, shall at once become available and shall be devoted to surveying, platting, making of maps, payment of the fees, and the performance of such acts as are required by the statutes of the State of Wyoming in securing water rights from said State for the irrigation of such lands as shall remain the property of said Indians, whether located within the territory intended to be ceded by this agreement or within the diminished territory.

- h. Prior to the ratification on March 3, 1905, of the Agreement of 1904, Congress left undisturbed administrative policy to comply with Wyoming law in order to secure water rights for the Wind River Indian Reservation. On this date, however, Congress actually confirmed this policy by expressly stating that state law was applicable and by rejecting an attempt to insert express reserved rights language into the ratification.

- 3-9 a. Wyo. Exh. WRIR I & P 5 (Agreement of 1904, concluded on Apr. 21, 1904, ratified on March 3, 1905; H.R. No. 3700, 58th Cong., 3d Sess. (1905)).
- b. Wyo. Exh. WRIR I & P 6 (House Committee on Indian Affairs, Agreement with Indians Residing on the Shoshone Indian Reservation, Etc., H.R. No. 3700, 58th Cong., 3d Sess. (1905)) (emphasis added). In a letter prepared by Interior Secretary E. A. Hitchcock and dated December 10, 1904, the purpose of the language proposed for addition to Article III was "to ensure sufficient time for the surveying of canal lines, filing of plats with the State Engineer, and to make a proper showing in construction work on the diminished reservation." Id. at 9. See Conclusions of Law 3-4, 3-5(c)(1) (legislative history of the ratification of the 1904 Agreement may be examined to determine congressional intent).
- c. Wyo. Exh. WRIR I & P 9, at 11-12, 15 (Letter from A. C. Tonnen, Acting Indian Commissioner, to the Secretary of Interior (Dec. 8, 1904)).
- d. Wyo. Exh. WRIR I & P 58 (Letter from S. M. Brosius to Secretary of Interior (July 28, 1904)) (emphasis added in part); 182 (Letter from S. M. Brosius to Secretary of the Interior 4 (July 30, 1904)) (emphasis added in part).

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3-9 Continued.

- e. Wyo. Exh. WRIR I & P 7 (Senate Committee on Indian Affairs, Indians on Shoshone or Wind River Indian Reservation, Wyo., S. Rep. No. 4263, 58th Cong., 3d Sess. 2 (1905)).
- f. Wyo. Exh. WRIR I & P 5 (Art. III, Treaty of 1904).
- g. See Finding of Fact 3-9(f), supra.
- h. See Wyo. Exh. WRIR I & P 5; Findings of Fact 3-9(f), (g), supra.

YELLOW PAPER

3-10

Similar congressional treatment of other Indian reservations in the early twentieth century.

- a. In contrast to express congressional reservations of water described in Finding of Fact 3-6, supra, Congress specifically applied state law to other reservations at the same time it made the Wind River Indian Reservation subject to state law. Court cases have never held that reserved rights exist on these particular reservations.
- b. Uintah Reservation, Utah. The Uintah Reservation in Utah was subjected to state water law by the following language:

For constructing irrigation systems to irrigate the allotted lands of the Uncompahgre, Uintah, and White River Utes in Utah, the limit of cost of which is hereby fixed at six hundred thousand dollars, one hundred and twenty-five thousand dollars which shall be immediately available, the cost of said entire work to be reimbursed from the proceeds of the sale of the lands within the former Uintah Reservation: Provided, That such irrigation systems shall be constructed and completed and held and operated, and water therefor appropriated under the laws of the State of Utah

No Court has ever ruled that reserved rights exist on this reservation (though there has been a settlement of a dispute between the State of Utah, the United States and certain tribes recognizing reserved rights).

3-10 Continued.

- c. Fort Peck Reservation, Montana. Another example is the Fort Peck Reservation in Montana. In 1908, Congress instructed the Secretary of Interior to survey all the lands of the Fort Peck Reservation and to bring "practicably" irrigable lands under irrigation. The act went on to provide a mechanism to allow lands to Indians and stated that all allotted irrigable lands were deemed to have a water right without charge to the Indian allottee for construction costs. The act was abundantly clear, however, on the source of the right, stating in the last sentence of Section Two:

All appropriations of the water of the reservation shall be made under the laws of the State of Montana.

No court adjudication has held that reserved rights exist on this reservation.

- d. Blackfeet Reservation, Montana.

(1) An example of a "hybrid" situation is the Blackfeet Reservation in Montana where the Appropriations Act of 1907 directed the Indian lands to be surveyed and allotted to tribal members. It then made the following provision giving the Indians essentially a reserved right

3-10 Continued.

for one year only and then subjecting all waters appropriated during that year to state laws:

Provided, That the Indians, and the settlers on the surplus land, in the order named, shall have a preference right for one year from the date of the President's proclamation opening the reservation to settlement, to appropriate the waters of the reservation which shall be filed on and appropriated under the laws of the State of Montana, by the Commissioner of Indian Affairs on behalf of the Indians taking irrigable allotments and by the settlers under the same law. At the expiration of the one year aforesaid the irrigation system constructed and to be constructed shall be operated under the laws of the State of Montana, and the title to such systems as may be constructed under this Act, until otherwise provided by law, shall be in the Secretary of the Interior in trust for the said Indians, and he may sue and be sued in matters relating thereto:

The Act also specified: "(B)eneficial use shall be the basis, the measure and the limit of the right (to the use of water acquired)."

3-10 Continued.

- (2) A judicial decision interpreting this situation did not explore the congressional intent issue on the effect of the express application of state law, but found that a reserved right existed on the Blackfeet Reservation for the use of water, but not the ownership thereof, citing the 1907 appropriations legislation.

3-10 Other treaties and agreements entered into around the same time as the 1904 Agreement may be used to determine congressional intent. See Conclusions of Law 3-4, 3-10.

a. See Finding of Fact 3-10.

b. Wyo. Exh. WRIR I & P 30 (Appropriations Act of June 21, 1906, 34 Stat. 325, 375 (1906)) (emphasis added).

c. Wyo. Exh. WRIR I & P 31 (Act of March 30, 1908 (S. 208), 35 Stat. 558 (1908)).

d. (1) Wyo. Exh. WRIR I & P 32 (Appropriations Act of March 1, 1907, 34 Stat. 1015, 1036 (1907)) (emphasis added).

(2) Wyo. Exh. WRIR I & P 33 (Tweedy v. Texas Co., 286 F. Supp. 383 (D. Mont. 1968)).

YELLOW PAPER

3-11 Acquisition of water rights under state law for the
Wind River Indian Reservation after the 1905 Act.

a. As described above, in Findings of Fact 3-5, well before enactment of the 1905 Act, the United States began the process required to obtain water rights under Wyoming state law for the Wind River Indian Reservation.

b. Eventually, as set forth below, the United States did actually obtain state water rights for the reservation, in spite of some misgivings and concerns occasioned by the January, 1908 Winters decision:

(1) 1905-1908.

(a) At the same time that Congress was ratifying the Agreement of 1904 and thereby subjecting Wind River Indian Reservation water to Wyoming law, Agent H. E. Wadsworth expressed some concern over ambiguous state-federal jurisdiction over the Wind River Indian Reservation as a result of new state legislation and a court case concluding that the State had no jurisdiction to establish a school district on the Wind River Indian Reservation.

3-11 Continued.

If the state has no jurisdiction on this reservation and cannot establish water districts thereon, there is apparently no way in which the water of the streams on the reservation may be appropriated to the Indians, nor granted by the state.

- (b) The Commissioner did not share Wadsworth's concerns and felt that state jurisdiction over water rights on the Wind River Indian Reservation would be unaffected:

The Office does not feel justified in urging the recommendation made by the Agent. It is not exactly seen how the decision in this case will affect the water rights of the Indians of the reservation. Applications for such rights have been and will be made not by the Indians themselves, but by the United States Indian Agent for and on their behalf.

- (c) The Indian Commissioner, Francis E. Leupp, also understood the Agreement of 1904 and congressional ratification thereof to require the Indians' compliance with Wyoming law in order to secure their water rights. In the Indian Commissioner's annual report for the fiscal year ending June 30, 1905, he made the following report, after describing the 1905 Act:

3-11 Continued.

W. B. Hill, superintendent of irrigation, has been instructed to make surveys of ditches in use and of those necessary to be constructed on the Shoshone Reservation so as to give water to each allottee is possible and in order to apply for permit to appropriate waters under the laws of Wyoming. He was advised that in the beginning only such construction should be made as might be necessary to maintain priority of water rights and that any system of irrigation planned should be within the diminished reservation. In revising and completing allotments to the Indians on that reservation it is the policy of the Office to make new allotments within the diminished reservation, and to encourage Indians who have received allotments north of Big Wind River to relinquish them and agree to take other lands in lieu thereof within their diminished reservation. Superintendent Hill was directed to make maps of the lands irrigated and of those susceptible of irrigation, showing the length of the ditches, the amount of irrigable land covered thereby, the allotments already made and the proposed allotments, and any other information required under the statutes of Wyoming, and, on making the necessary preliminary surveys and the preparation of the maps covering the proposed system of irrigation, to apply to the State officials for a permit to make appropriation of the waters necessary.

On March 4, 1905, he telegraphed this Office as follows:

3-11 Continued.

Water filing mailed today for 80,000 acres under Big Wind and Little Wind rivers. Probably 20,000 acres more can be secured upper Big Wind River. Two weeks required to complete further.

April 26, 1905, he reported that it was his intention to complete filings or applications for the appropriation of water for the remainder of the lands in the diminished Shoshone or Wind River Reservation, and that on so doing a report of the Shoshone survey, together with maps and estimates, would be forwarded to the Office for approval. They were forwarded on August 30.

As application has been made to secure water rights for the Indian allottees of this reservation and the work of construction of the irrigation ditches is in progress, good results may soon be expected.

(d) Not surprisingly, federal officials continued to interpret the law as requiring the application of Wyoming water law on the Wind River Indian Reservation after ratification of the Treaty of 1904. Soon after the 1905 legislation, Indian Service Chief Engineer W. H. Code urged the Secretary of the Interior to remit further funds to carry on the work required in order to comply with Wyoming law. Code's concern was to fit the Indians safely within priority system of the State.

3-11 Continued.

An initial remittance of \$10,000.00 to the agent would be sufficient to carry on the work until July the 1st, it being our plan to begin the construction on the easier and less costly projects.

The Wyoming law states that work must begin on all proposed canals within one year from date of the filing of application, hence while it is our plan to chiefly concentrate work on some one canal, it will be necessary during the coming year to do a little work on each of the proposed systems. We will be allowed five years within which to complete work on all of the proposed canals and an apportionment of not less than \$45,000.00 should be made the Shoshone Reservation for the fiscal years of 1905-6 in order that we may make the proper beginning.

It is a relief to know that we have the water rights of the Shoshone and Arapahoe Indians fully protected since at this time there are no complications, or prior appropriations on either the Little or Big Wind Rivers, which can interfere with the appropriations of the Indians and I assume of course that we will complete the systems within the time specified by the Wyoming law. This will be no small task however, and the necessary total expenditure will be heavy as I pointed out in my first report, due to the large area of the contemplated allotments.

- (e) Code's request was supported by the Commissioner of Indian Affairs and approved by the Secretary of the Interior. In his

3-11 Continued.

letter notifying Agent Wadsworth of the Secretary's approval of Code's request for \$10,000, the Commissioner of Indian Affairs stated:

On April 22, 1905, this Office made a report to the Secretary of the Interior upon a letter from Chief Engineer Code, dated April 14, 1905, relative to irrigation work already done and in contemplation of the Shoshone Reservation in Wyoming.

Mr. Code stated that the main canal surveys had been completed, and the necessary applications for water filed with the State Engineer; that it would be necessary in order to comply with the Wyoming law to do some work during the coming year on each of the proposed canal systems; that an additional remittance of \$10,000.00 to you would be sufficient to start and carry on the work until July 1, 1905, and that you should be designated to disburse the money needed to prosecute the work which would be carried on by an assistant engineer with a capable foreman until such time as Superintendent Hill could return to the reservation to supervise the same in person.

In view of the facts stated, the Office recommended that authority be granted for the expenditure of \$10,000.00 in carrying on construction work and extension of the irrigation system on the diminished reserve as

3-11 Continued.

surveyed and planned by Superintendent Hill, which sum to be disbursed by you, Superintendent in charge of the Shoshone Agency; payable from the appropriation of \$25,000.00 made by the Act approved March 3, 1905, for the purpose.

The Office is now in receipt of a communication dated April 27, 1905, from the Secretary of the Interior, stating that upon consideration of said Office report, in view of the facts stated, and in accordance with the recommendation made, authority is granted for the purposes indicated.

- (f) From this point on, the correspondence between federal and State officials indicates that Wyoming water law was considered without question to be applicable to the Wind River Indian Reservation. The United States filed many applications for water rights, without any form of qualifying language regarding reserved rights.
- (g) Once the decision was made to go forward with construction of the Wind River Indian Reservation irrigation system, the primary concern was to assure that compliance was duly completed under the incipient program. The undisputed understanding was that Wyoming law governed. The annual reports of

3-11 Continued.

the Wind River Indian Reservation agent discussed the necessity of securing water rights every year from 1905 through 1907. Wyoming law was considered the only basis for the acquisition of water rights for the Reservation.

The foremost topic in Agent Wadsworth's 1905 report to Congress was the issue of Wind River Indian Reservation water rights. Describing the construction of the first ditch on the reservation, he commented:

Five miles of this canal have now been completed, and work will soon be suspended on this one project in order that a portion of the work on each of the different projects may be completed within the year, in order to comply with the State irrigation law

His 1906 report contained the following:

I consider it of the first importance that these Indians perform practically all the work in connection with the construction of their new irrigation system. As the time for the completion of these canals is limited by statute or the State, it is imperative that work on the same be pushed as rapidly as possible. The water-right laws of the State of Wyoming provide that title to water for irrigation is contingent upon the actual appropriation of water for

3-11 Continued.

that purpose within a certain time after the applications are made to the State engineer. If the Indians of this reservation are to build these canals, and I think for their own benefit they should be allowed to do so, it will mean that agriculture and, in fact, nearly every other line of industry among them, will receive but little attention until these projects are completed and out of the way. The first of these canals, costing about \$50,000, and irrigating about 20,000 acres, will be completed this summer or fall, part of which will be cleared in time for cultivation next spring. The sum of \$100,000 is now available for this work during the coming fiscal year, which will insure to every able-bodied Indian of the reservation work at fair wages during the great portion of that time.

Finally, his 1907 report contained the same concern, that in order to secure water rights for the Indians under state law, the construction and use of the Wind River Indian Reservation irrigation system was of paramount importance.

All farming among these Indians is now practically suspended, pending the completion of the immense and comprehensive irrigation system laid out and being constructed by the Indian Office for the Indian lands of the diminished reservation. In order to secure an incontestible title to the water necessary to reclaim these lands the laws of the State

3-11 Continued.

of Wyoming require that the irrigation canals shall be completed and the water actually put on the lands within a certain time after formal application for the water has been made with the State Engineer. This being the case it has been deemed advisable to practically drop all farm work and put all the Indian labor available on this project until completed.

- (h) The Ratification Act of 1905 set the stage for opening the Wind River Indian Reservation to settlement and it was actually opened by presidential proclamation beginning August 15, 1906.
- (i) Prior to the opening of the Wind River Indian Reservation to settlement, some private parties and the State sought to undertake surveys on a portion of the reservation in order to be prepared to construct water systems then envisioned as essential to the region. While the Secretary of the Interior ultimately denied the granting of survey permits to private parties, the State of Wyoming was permitted to survey, since the subject of water rights acquisition was considered to be one solely of Wyoming law.

3-11 Continued.

An example of an inquiry by a private party into the possibility of surveying the Wind River Indian Reservation for a proposed irrigation system is contained in Wyo. Exh. WRIR I & P 96 (Letter from Fenimore Chatterton to Secretary of the Interior (July 17, 1905)). The Reclamation Service recommended that such surveys be permitted by the Commissioner of Indian Affairs, but the Department of the Interior denied the granting of permits to private parties.

The State, however, applied to survey the Wind River Indian Reservation and was granted permission. The reason the State was permitted to survey in preparation for the entry of new settlers, but private parties were not, apparently was in deference to State sovereignty over appropriation of its waters and to ensure the Indians' rights had been secured under Wyoming law.

The question of water rights for irrigation purposes in the State of Wyoming is an important one. It is now and has been the purpose of this office to secure for the Indians water rights sufficient to irrigate their lands susceptible of irrigation within the diminished reserve, before the

3-11 Continued.

opening of the ceded portion to settlement and entry, by proclamation of the President on June 15, 1906, and to endeavor to protect them in such rights by the construction of the necessary preliminary work.

In view of the law in the case, and all the facts and circumstances bearing thereon, the Office respectfully recommends that no permits be granted to private parties or corporations to enter upon the ceded portion of the Reservation for the purpose of making irrigation surveys and beginning irrigation construction work, prior to the opening of the lands as provided by law. Such action will be consistent with the policy of this Office with respect to the Reservation under consideration.

(2) The effect of Winters, 1908 and after. After the United States Supreme Court announced its January, 1908, opinion in Winters, dealing with the Fort Belknap Reservation in Montana, the administrative position to acquire water rights under State law was no longer uniformly held:

(a) The United States began to disclaim the applicability of Wyoming law to the Wind River Indian Reservation only after the Winter and Conrad Investment cases were decided in 1908. Certain early documents

3-11 Continued.

indicate an administrative interpretation that Winters created a reserved right on the Wind River Indian Reservation.

- (b) In correspondence following the Winters decision, reservation agent H. E. Wadsworth asserted that the Wind River Indian Reservation was not within the jurisdiction of the State for purposes of water administration. In a letter to the Wyoming State Engineer, Wadsworth asserted that the State had no jurisdiction over Indian ditches, although he had not yet departed from his long-held view that the waters of the reservation were still within Wyoming's jurisdiction:

(T)he Indian lands over which these Indian ditches run are not within the jurisdiction of the State, and I doubt whether on that account, the State can exercise any control over them, except as to the water and its use (emphasis added).

Soon thereafter, in a letter to the Commissioner of Indian Affairs, Wadsworth began to argue that the waters of the Wind River Indian Reservation were not included

3-11 Continued.

within the Wyoming constitutional provision
proclaiming State jurisdiction over waters
"of" the State:

The question of water for the reservation has been in consideration for years by all parties interested, and good arguments are presented to show that the title is still in the Indians, although the State of Wyoming has held and still holds that the title is solely in the State. The Constitution of the State of Wyoming (Article VIII), confirmed by the Act of Congress approved July 10, 1890, provides that the waters within the state shall belong to the State. Whether the waters of this reservation could properly be considered as being "within the State" or not, is the question. The reservation did lie and does lie within the boundaries of the State, but the lands are not "of" the State, and never have been. The State therefore has never had jurisdiction over the lands of the reservation, and having no territorial jurisdiction, it would seem impossible that jurisdiction could be exercised over the waters on the reservation. In many instances the waters of the streams originate upon the reservation. In view of all these facts, it is difficult to understand how and why the State can claim the jurisdiction mentioned.

3-11 Continued.

Wadsworth repeated his argument and urged that a test case be brought to test his theory in a second letter to the Commissioner:

(T)he Shoshone Indian Reservation is not and never has been a part of the State of Wyoming, . . . it would necessarily follow that the waters on the reservation would not be in any sense "waters of the State." This being the case, the exclusive title and control . . . lie with the (federal) Government.

(c) Other later documents and correspondence also began to claim that reserved water rights existed on the Wind River Indian Reservation. For example, in a letter from Assistant Secretary of the Interior S. G. Hopkins to State Engineer James B. True, the Assistant Secretary opined:

Under the above provisions of the (1868) treaty a sufficient amount of water from streams adjacent to or within the reservation were reserved by necessary implication for the use of the Indians (citing Winters and Conrad Investment).

3-11 Continued.

- (d) These documents failed, however, to address the issue of whether Congress intended to create a reserved water right on this specific reservation.
- (e) Later documents also asserted the existence of reserved rights, though in doing so they dismissed the import of the Agreement of 1904 and the 1905 ratification, failing to analyze critically the legislative history and negotiations that led to these enactments.

One later view was that the 1905 Act simply provided a means of record-keeping with regard to the Indians' reserved water rights. The negotiations by Indian Inspector James McLaughlin, comments made by the Indians themselves, the rejection by Congress of an attempt to create an express reserved right on the Wind River Indian Reservation and the concurrent administrative acts indicating a genuine fear that water rights would be lost by the Indians if they failed to comply with state

3-11 Continued.

law all indicate that the impact of the 1905 legislation was to deal expressly with the issue of Wind River Indian Reservation water rights for the first time. The understanding was not that the legislation simply required the federal government to give notice to the State of the extent of the Indians' reserved water rights. The Hopkins letter cited above in Finding of Fact 3-11(b)(2)(c) attempts to explain away the language of the 1905 legislation:

The principal difficulty in the matter arises under the following provision (quoting article 3 that makes water rights and use subject to State law)

The purpose of this provision, in the view of this Department, was to provide for a place of recording such Indian water rights, making them definite, for the benefit not only of the Indians but of the white settlers or the future possible white purchasers of the Indian lands. It can not be presumed that the Indians by such a provision intended to subject their already existing water rights to subsequent appropriations under the laws of the State of Wyoming, article 10 of the agreement specifically stating that nothing in it was intended to deprive the Indians "of any benefits to which they are entitled under existing treaties or agreements, not inconsistent with the provisions of this agreement."

3-11 Continued.

This interpretation of the legislation appears patently erroneous in light of the legislative history and surrounding circumstances. The understanding of the U.S. Indian Inspector who negotiated the Agreement of 1904 and of the Indians themselves is described above in Finding of Fact 3-7(a), supra. The vigorous attempt to add an express reserved rights provision to this legislation, which was rejected by Congress, was detailed above in Finding of Fact 3-9. The intent of Congress appeared so clear to the federal administrative officials that they energetically applied themselves to construction of an irrigation system and filing for State water rights on behalf of the Indians. See Findings of Fact 3-8, 3-11.

A position similar to Hopkins' was held by E. B. Merritt, Assistant Commissioner of Indian Affairs, in 1918 correspondence where he argued that the significance of the Winters doctrine was that all reservations enjoyed the benefit of implied reservations of water.

3-11 Continued.

(3) Subsequent administrative positions prior to the 1914 Act.

(a) Many other administrative interpretations and actions also cut against the interpretation that reserved rights existed on behalf of the Wind River Indian Reservation and the alleged lack of jurisdiction by the State. Agent Wadsworth's claim that the Wind River Indian Reservation was not subject to the jurisdiction of the State Engineer caused a great deal of concern among the ranks of officials charged with completing the irrigation system and filing for water rights on the reservation. A flurry of correspondence during the years 1909 and 1910 pointed out the fear that Wadsworth's assertions would endanger the Indians' ability to obtain water as required by the 1905 legislation. For example, a 1911 annual report covering the Wind River Indian Reservation stated as follows:

3-11 Continued.

In order to perfect and retain titles to water in this state, it is necessary that all the lands under the various canals of this irrigation system be cultivated regularly. For this reason every effort should be made to get all such lands under cultivation at the earliest possible date. My plan is to require the head of each family to farm as much land of his own or other family allotment as possible, and to lease the balance. In an irrigated country the maximum amount of land of his own or other family allotment as possible, and to lease the balance. In an irrigated country the maximum amount of land that can with profit be handled by one man, unassisted, averages forty acres. In the case of an Indian the acreage would of necessity be less, for the present. By setting aside for the use of each head of a family say, forty acres, quite a large tract belonging to each family can and should be leased as soon as possible, and this is the plan now being followed by me.

(i) A very lengthy report submitted to the Secretary of the Interior also made it clear that work was necessary to secure rights under state law and more work was needed.

(ii) Assistant Reservation Engineer Gonin wrote to Code expressing concern that the State Engineer would strictly enforce State law on the reservation, causing loss of water rights unless action was taken as necessary to protect those rights.

3-11 Continued.

(iii) A letter from H. C. Means to Code indicated state law applied on the reservation and that the necessary extensions should be obtained. Code responded to this concern not by invoking a reserved right, but by assuming that extensions could be had if necessary.

(iv) Assistant Commissioner of Indian Affairs Hauke wrote to Code instructing him to obtain extensions.

(v) Telegrams from Code to Wadsworth and Hill contained instructions to proceed at once to obtain necessary extensions.

(vi) All of these actions apparently were necessary because of Wadsworth's jurisdictional assertions and refusal to obtain extensions.

The five year period, which is the term specified within which final proof must be made, expired in the spring, and Superintendent Wadsworth failed to make the application for extension in a manner satisfactory to the State Officers.

Upon receipt of this order I took the matter up with the State Engineer of Wyoming, and subsequently received a reply from

3-11 Continued.

him which indicated that there was a "soreness" felt, due to the fact that it had come to his ears that Supt. Wadsworth was claiming that his reservation was above the State laws, and that the Department of Justice would look after his water rights, etc. I presume Supt. Wadsworth had in mind that the Milk River decision would be a criterion as to what might be expected should the government find it necessary to have the question of the Wind River water rights finally determined by the Federal Courts.

I think that Superintendent Wadsworth should not have brought up this question as long as the State authorities were disposed to grant extensions of time, if the applications were presented in the regular manner.

Upon hearing from the State Engineer I wired Supt. Wadsworth to submit his applications for extension, and also wired Asst. Engineer W. B. Hill to proceed to Cheyenne and give his personal attention to securing favorable action by the State Officers. The following satisfactory telegram has just been received from Mr. Hill:

"Memorandum requested mailed yesterday. Have secured extensions for all permits Diminished Reservation, also all Big Wind River permits ceded strip. Standing of other permits ceded strip cannot be settled until September. Mail report tomorrow."

3-11 Continued.

(b) There was, therefore, a conflict of interpretation even within the Indian Service. Other federal agencies, however, did not suffer this confusion. For example, the Reclamation Service considered the Wind River Indian Reservation water rights to have originated in Wyoming law and, while it recognized the fact that the Indian Service might claim that the Indians' right to water arose out of implied reserved rights, the attitude of the Reclamation Service was that:

It is understood that the government should make full compliance with the State law in the matter of water right permits except where in direct contravention of the Reclamation Act and the following (report) is based on that assumption.

(4) Acquisition of water rights under Wyoming law.

In spite of the administrative uncertainties created by Winters, water rights for the Wind River Indian Reservation were indeed obtained under state law following the enactment of the 1905 Act.

3-11 Continued.

- (a) Prior to Congress' express directive in 1905 that Indian water rights be appropriated under Wyoming law, no permits had been applied for by the United States on behalf of the Indians.
- (b) Between the 1905 ratification of the Agreement of 1904 and the 1908 Winters decision, however, the United States applied for seventy permits on behalf of the Indians, for the irrigation of lands totalling 130,534 acres.
 - (i) Of those, 125,598 acres were the subject of applications submitted to the State of Wyoming before June 26, 1905, the date the complaint was filed in Winters.
 - (ii) After the Winters complaint was filed and prior to the United States Supreme Court decision in 1908, an additional 4,936 acres were the subject of applications made to the State.
- (c) After January 6, 1908, the date the Winters decision was announced, an additional 14,200 acres were the subject of applications to the State on behalf of the Indians.

3-11 Continued.

- (d) In all, from 1905 through 1914, 144,734 acres of land to be irrigated were the subject of applications for water rights on behalf of the Indians from the State of Wyoming.
- (e) Parenthetically, the applications filed by the United States on behalf of the Indians comprised approximately:
 - (i) 100% of all applications for State water rights to irrigate lands on the reservation between the 1905 Act and the filing of the Winters complaint,
 - (ii) 16% of all such applications between the Winters complaint and the United States Supreme Court decision, and
 - (iii) 8% of such applications filed thereafter.
- (f) In spite of the inconsistent positions taken by various administrators for the few years following Winters, the United States continued to assert and claim water rights pursuant to Wyoming law up until at least 1960. Extensions were granted for those rights until December 31, 1963.

3-11 Continued.

- (g) Interestingly enough, with respect to the lands for which reserved rights are now claimed for irrigation in this reservation, 65% were already covered by state-awarded water rights.

3-11 For authority that administrative actions may be used to interpret congressional enactments and intent, see Conclusions of Law 3-4, 3-8.

(1)(a) Wyo. Exh. WRIR I & P 60 (Letter from H. E. Wadsworth to Commissioner of Indian Affairs (Mar. 10, 1905)); see also Wyo. Exh. WRIR I & P 51 (Letters from H. E. Wadsworth to Commissioner of Indian Affairs (Mar. 3, 1904); from Acting Commissioner A. C. Tonnen to Secretary of the Interior (Mar. 15, 1904)).

(b) Wyo. Exh. WRIR I & P 61 (Letter from Acting Commissioner of Indian Affairs to Secretary of the Interior (Apr. 10, 1905)).

(c) Wyo. Exh. WRIR I & P 10 (Annual Reports of the Department of the Interior, Indian Affairs (Pt. 1), H.R. Doc. No. 5, 59th Cong., 1st Sess. 155 (1906)).

(d) Wyo. Exh. WRIR I & P 62 (Letter from Chief Engineer W. H. Code to the Secretary of the Interior (Apr. 14, 1905)).

(e) Wyo. Exh. WRIR I & P 65 (Letter from Acting Commissioner C. F. Larrabee to H. E. Wadsworth (May 3, 1905)). See also Wyo. Exhs. WRIR I & P 63 (Letter from Acting Commissioner of Indian Affairs to Secretary of the Interior (Apr. 22, 1905); 64 (Letter from Secretary of the Interior to Commissioner of Indian Affairs (Apr. 27, 1905)).

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3-11 Continued.

- (f) See, e.g., Wyo. Exhs. WRIR I & P 66-91.
- (g) Wyo. Exh. WRIR I & P 92 (Annual Reports of the Department of the Interior, H.R. Doc. No. 5, 59th Cong., 1st Sess. 381 (1906)); Wyo. Exh. WRIR I & P 93 (Annual Reports of the Department of the Interior, H.R. Doc. No. 5, 59th Cong., 2d Sess. 403 (1907)); Wyo. Exh. WRIR I & P 94 (Report prepared by Superintendent and Special Disbursing Agent H. E. Wadsworth 2-3 (Aug. 15, 1907)).
- (h) Proclamation by President Theodore Roosevelt, 34 Stat. 3208 (June 2, 1906) (Pt. III).
- (i) Wyo. Exhs. WRIR I & P 97 (Letter from Acting Director of Reclamation Service to Commissioner of Indian Affairs (Aug. 4, 1905)); 98 (Ninth Biennial Report of the State Engineer 32, 38-42 (1908)); Wyo. Exh. WRIR I & P 99 (Letter from Commissioner F. E. Leupp to Secretary of the Interior (Aug. 24, 1905)). See also Wyo. Exh. WRIR I & P 100 (Letter from Acting Commissioner C. F. Larrabee to State Engineer Clarence T. Johnston (Feb. 8, 1906)).
- (2)(a) See Findings of Fact 3-11(b)(2); Winters v. United States, 207 U.S. 564, 28 S. Ct. 207, 52 L. Ed. 2d 340 (1908); Conrad Investment Co. v. United States, 161 F. 829 (9th Cir. 1908)(Wyo. Exh. WRIR I & P 102).

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- (b) Wyo. Exhs. WRIR I & P 103 (Letter from Superintendent H. E. Wadsworth to State Engineer C. T. Johnston (Mar. 10, 1910)); 104 (Letter from Superintendent H. E. Wadsworth to Commissioner of Indian Affairs (June 13, 1910)); 105 (Letter from Superintendent H. E. Wadsworth to Commissioner of Indian Affairs (Mar. 7, 1911)).
- (c) See, e.g., Wyo. Exh. WRIR I & P 106, at 3 (Letter from Assistant Secretary of the Interior S. G. Hopkins to State Engineer James B. True; (Jan. 2, 1919)).
- (d) The Hopkins letter cited above (Wyo. Exh. WRIR I & P 106) makes a bootstrap argument that the Agreement of 1904 and the 1905 ratification did not strip the Wind River Indian Reservation of "pre-existing" reserved rights. Hopkins' argument fails, however, to address the threshold question of whether reserved rights were indeed preexisting on the Wind River Indian Reservation. No authority was cited specific to the Wind River Indian Reservation.
- (e) Wyo. Exh. WRIR I & P 107 (Letter from E. B. Meritt to Federal Farm Loan Board Secretary Chas. E. Lobdell (Sept. 11, 1918)). See also Wyo. Exh. WRIR I & P 108 (Letter from Federal Farm Loan Bank to E. B. Meritt

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(Jan. 16, 1919)) (opining that the Bank was not bound by water rights decisions by State tribunals).

(3)(a) Wyo. Exh. WRIR I & P 112 (Annual Report, Shoshone Indian School, Sec. IV(9), at 10 (1911)).

- (i) Wyo. Exh. WRIR I & P 113, at 14-17, 19-22 (Inspector Joe H. Norris, Report on Investigation Relative to Sale and Leasing of Irrigable Lands on the Shoshone Indian Reservation, Wind River Reservation, Wind River, Wyoming (July 6, 1912)).
- (ii) See Wyo. Exh. WRIR I & P 114 (Letter from Wind River Indian Reservation Assistant Engineer John Gonin to W. H. Code (Mar. 22, 1909)).
- (iii) Wyo. Exh. WRIR I & P 115 (Letter from H. C. Means to W. H. Code (Apr. 16, 1909)); 116 (Letter from W. H. Code to Secretary of the Interior) (Apr. 26, 1909)).
- (iv) Wyo. Exh. WRIR I & P 117 (Letter from Second Assistant Commissioner of Indian Affairs C. F. Hauke to Chief Engineer W. H. Code (July 6, 1910)).
- (v) Wyo. Exh. WRIR I & P 118 (Telegrams from W. H. Code to H. E. Wadsworth and W. B. Hill (July 11, 14, 18, 1910)); see also Wyo. Exh. WRIR I & P 120 (Letter from Assistant Inspector of Irrigation

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3-11 Continued.

W. B. Hill to Chief Engineer W. H. Code (Aug. 6, 1910)) (actions taken in response to telegram); 121 (Letter from Chief Engineer W. H. Code to the Secretary of the Interior (Aug. 18, 1910)) (regarding W. B. Hill's compliance with instructions).

- (vi) Wyo. Exh. WRIR I & P 119 (Letter from Chief Engineer C. H. Code to Secretary of the Interior (Aug 13, 1910)) (emphasis added).
- (b) Wyo. Exh. WRIR I & P 122 (Project Engineer I. B. Hosig, Preliminary Report on Shoshone Project Water Rights 2, 5 (Nov. 13, 1920)).

Similarly, three memoranda of the Reclamation Service bear out the assertions of the previous report that the Reclamation Service concurred in the need to apply state law. Wyo. Exh. WRIR I & P 123 (Memorandum from Project Manager T. S. Longwell to U.S. Reclamation Service Director (Nov. 6, 1920)) (forwarding a copy of Hosig's report and indicating the need to secure water rights according to the report); (Memorandum from Project Manager T. S. Longwell to U.S. Reclamation Service District Counsel (Nov. 6, 1920)) (recommending action according to subparts 1, 2, and 3 of paragraph 2 of the report.

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Subpart 3 indicates that full compliance with state law be had); (Memorandum from U. S. Reclamation Service Assistant Director Morris Bien to Chief Engineer of U.S. Reclamation Service, Denver (Nov. 15, 1920)) (agreeing with Longwell recommendation and urging action in accordance with paragraph 16 of Hosig report (pps. 48-52) to project water rights).

(4)(a)

-(e) See Wyo. Exh. WRIR SR-7.

(f) See Wyo. Exhs. WRIR I & P 124 (Nov. 28, 1909) (Superintendent H. E. Wadsworth to State Engineer C. T. Johnston asking about necessity of permit for Agency and School rights); 125 (Jan. 5, 1910) (Superintendent H. E. Wadsworth to State Engineer C. T. Johnston, asking what procedure should be followed to protect Fort Washakie rights); 126 (July 21, 1910) (Superintendent H. E. Wadsworth to State Engineer C. T. Johnston, application to enlarge Stagner Ditch with \$2.00 filing fee); 127 (Sept. 15, 1910) (Superintendent H. E. Wadsworth to State Engineer C. T. Johnston, agreeing that title to all rights of way for canals and reservoir sites should be in the State); 128 (July 12, 1912) (Letter from Special Indian Agent W. W.

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McConihe to State Engineer, applying for permit for Indian School with \$2.00 fee); 129 (Oct. 16, 1913) (Letter from U. S. Indian Service Assistant Engineer E. E. Jones to Wind River Indian Reservation Project Chief Engineer W. M. Reed asking why State had taken no action on specified permits); 130 (May 27, 1914) (Letter from Assistant Engineer E. E. Jones to State Engineer A. J. Parshall enclosing permit application); 131 (May 29, 1914) (Letter from State Engineer A. J. Parshall to Assistant Engineer E. E. Jones rejecting permit because improperly signed); 132 (June 1, 1914) (Assistant Engineer E. E. Jones returns properly signed permit for filing); . 133 (June 30, 1914) (Assistant Engineer E. E. Jones to State Engineer A. J. Parshall, application to enlarge and extend LeClair Ditch, with voucher check); 134 (Apr. 26, 1915) (Assistant Engineer W. B. Hill, Jones' successor, to State Engineer James B. True agreeing to drop certain lands from permit application to obtain approval of same); 135 (Aug. 7, 1915) (Assistant Engineer W. B. Hill to State Engineer James B. True including information needed for permit for Riverton Ditch No. 2); 136 (Aug. 27, 1915) (Assistant Engineer W. B. Hill to State Engineer James B. True enclosing \$17.35 check

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for permit fees); 137 (Apr. 11, 1916) (Engineer W. B. Hill to M. B. Meredith, of Indian Service, application for permit with \$2.00 fee); 138 (Apr. 17, 1916) (State Engineer to M. B. Meredith returning permit application for failure to have licensed engineer prepared maps); 139 (May 11, 1916) (Engineer W. B. Hill to State Engineer James B. True complaining that his engineers should be allowed to prepare applications); 140 (May 18, 1916) (State Engineer to Engineer W. B. Hill returning application, saying licensed engineer necessary); 141 (Nov. 20, 1916) (Letter from Agency Superintendent E. A. Hutchinson to True requesting extension for completion of ditches to Dec. 31, 1922 and for 57 ditches for which not certain if completed. Letter stamped with extension); 142 (Nov. 27, 1916) (Superintendent E. A. Hutchinson to Governor John B. Kendrick, with copy of extension letter asking Governor's help in obtaining extension); 143 (Dec. 5, 1916) (State Engineer James B. True to Superintendent E. A. Hutchinson informing him of extension); 144 (Dec. 5, 1916) (second letter from State Engineer James B. True to Superintendent E. A. Hutchinson, regarding granting of extension); 145 (Oct. 10, 1913) (Supervising Engineer W. S. Hanna to State Engineer

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James B. True requesting extension for 31 ditches); 146 (Oct. 26, 1918) (Indian Service Assistant Engineer Ward Webber to State Engineer James B. True arguing that certain extensions expire later than State Engineer had stated in prior letter); 147 (Nov. 3, 1920) (State Engineer to Supervising Engineer W. S. Hanna regarding extension); 148 (Nov. 29, 1920) (State Engineer to Supervising Engineer W. S. Hanna regarding LeClair Diversion right); 149 (Feb. 19, 1921) (Supervising Engineer W. S. Hanna to State Engineer Frank Emerson asking what action taken on Aug. 28, 1920 extension request); 150 (Feb. 21, 1921) (State Engineer to Supervising Engineer W. S. Hanna informing that extension authorized to Feb. 8, 1923); 151 (Sept. 28, 1921) (Superintendent E. A. Hutchinson to Shoshone Project Assistant Engineer E. F. Winston, notifying him of grant of permits for Enlarged LeClair Ditch, Dry Creek Bench Ditch and Wind River Ditch); 152 (Oct. 6, 1921) (State Engineer Frank C. Emerson to Indian Service Superintendent asking, with reference to permit application by non-Indian, whether certain lands had been reclaimed by Indians in order to determine whether application should be granted); 153 (Oct. 12, 1921) (Assistant Engineer E. F. Winston to

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State Engineer Frank C. Emerson in response, did not think water was available for permit); 154 (Jan. 27, 1922) (Assistant Engineer E. F. Winston to State Engineer Frank C. Emerson asking of Ray Ditch permit cancellation and reason therefor); 155 (Nov. 13, 1922) (Supervising Engineer W. S. Hanna to State Engineer Frank C. Emerson requesting extension of 73 ditches. Stamped extended to Dec. 31, 1926); 156 (Jan. 17, 1923) (Supervising Engineer W. S. Hanna to State Engineer Frank C. Emerson asking why four permits not extended); 157 (Sept. 10, 1923) (Supervising Engineer W. S. Hanna to State Engineer C. D. Shawver with notices of completion of 23 ditches); 158 (Sept. 24, 1926) (Supervising Engineer W. S. Hanna to State Engineer Frank C. Emerson asking extension for 99 ditches until Dec. 31, 1932. Stamped as granted until Dec. 31, 1930); 159 (Oct. 1, 1926) (State Engineer Frank C. Emerson to Supervising Engineer W. S. Hanna, assuring Hanna that Emerson will attend to extensions as soon as possible and relating information on certain other ditches in which Hanna interested); 160 (Aug. 29, 1927) (U. S. Indian Irrigation Service Supervising Engineer Herbert V. Clotts to State

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Engineer asking for copy of Wyoming laws on irrigation); 161 (Sept. 3, 1927) (State Engineer John A. Whiting to Supervising Engineer Herbert V. Clotts, sending copies of irrigation laws per Clotts' request); 169(a) (Aug. 26, 1928) (Project Engineer E. L. Decker to State Engineer John A. Whiting requesting blueprints of permits); 162 (Nov. 13, 1928) (Supervising Engineer W. S. Hanna to State Engineer John A. Whiting with notices of completion for Enlargement O'Neal Ditch); 163 (Apr. 16, 1929) (Supervising Engineer W. S. Hanna to State Engineer requesting right to adjust acreage under existing permit. Needed in order to secure farm loan for purchase from Indian); 164 (July 5, 1929) (Supervising Engineer W. S. Hanna to State Engineer John A. Whiting, regarding adjustment so that non-Indian owner may obtain farm loan); 165 (July 23, 1929) (Supervising Engineer W. S. Hanna to State Engineer John A. Whiting, asking Whiting to notify Federal Land Bank of adjustment in permit so that loan would be approved); 166 (July 27, 1929) (Wind River Irrigation Project Engineer E. L. Decker to State Engineer John A. Whiting requesting information on earlier permit extension and on complete date for Bull Lake Ditch permit No. 6752); 167 (Aug. 5, 1929) (Indian Field

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Service Clerk W. S. Schmehl to State Engineer J. A. Whiting asking for copy of application blueprint for O'Neal Ditch Enlargement in order to assure that beneficial use); 168 (Aug. 8, 1929) (Project Engineer E. L. Decker to State Engineer John A. Whiting forwarding certain applications to Whiting); 169 (Aug. 24, 1929) (Project Engineer E. L. Decker to State Engineer John A. Whiting requesting copies of permits); 170 (Aug. 27, 1929) (State Engineer John A. Whiting to Project Engineer E. L. Decker with response); 171 (Oct. 4, 1930) (Supervising Engineer W. S. Hanna to State Engineer John A. Whiting, requesting extension of time for certain permits from Dec. 31, 1930 to Dec. 31, 1936. Stamped as granted to Dec. 31, 1936); 172 (Oct. 25, 1934) (Indian Irrigation Service Assistant Engineer A. H. Farmer to State Engineer seeking extension, granted to Dec. 31, 1936); 173 (Oct. 1, 1936) (Supervising Engineer W. S. Hanna to State Engineer John D. Quinn asking for extension for permits until Dec. 31, 1941. Allowed to Dec. 31, 1939); 174 (Sept. 15, 1942) (Wind River Irrigation Project Engineer Henry Gerharz to State Engineer L. C. Bishop seeking extension); 175 (Oct. 16, 1945) (Engineer Henry Gerharz to State Engineer L. C.

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3-11 Continued.

Bishop, application seeking extension. Granted for three years); 176 (Oct. 13, 1948) (Project Engineer Henry Gerharz to State Engineer L. C. Bishop seeking extension, granted to 1951); 177 (Dec. 19, 1951) (Project Engineer Leon P. Poitras to State Engineer L. C. Bishop seeking extensions); 178 (Dec. 27, 1954) (Project Engineer Leon P. Poitras to State Engineer L. C. Bishop seeking extension); 179 (Sept. 27, 1957) (Acting Superintendent C. E. Faulkner to State Engineer Earl Lloyd seeking extension. Granted to Dec. 31, 1960); 180 (Oct. 26, 1960) (Superintendent Arthur N. Arntson to State Engineer Earl Lloyd requesting extension. Granted to Dec. 31, 1963).

See also Wyo. Exhs. WRIR I & P 101.9080, .11240, .12327, .12050, .13406-.13428, .13430, .13484, .3288 E, .3198 E, .3055 E, .2965 E, .3220 E (permit applications from 1909 through 1915).

(g) See Wyo. Exh. WRIR SR-3 (Rev.).

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3-12 Congressional rejection of reserved rights in the
Indian Appropriations Act of 1914.

- a. The Indian Appropriations Act of 1914, which was one in an annual series of appropriations on behalf of Indian tribes, appropriated funds for the further construction and maintenance of irrigation facilities on the Wind River Indian Reservation according to Congress' obligation under its 1905 ratification of the Agreement of 1904:

For continuing the work of constructing an irrigation system within the diminished Shoshone or Wind River Reservation, in Wyoming, including the maintenance and operation of completed canals, \$25,000, reimbursable in accordance with the provisions of the Act of March third, nineteen hundred and five, and to remain available until expended.

- b. The legislative history of the Indian Appropriation Act of 1914 reveals an attempt, based on a suggestion by the Assistant Commissioner of Indian Affairs to the House Subcommittee of the Committee on Indian Affairs and the Senate Committee on Indian Affairs, to add a proviso to the language adopted by Congress in the Appropriation Act, which would have created a reserved water right on behalf of the Wind River Indian Reservation. The language read:

3-12 Continued.

Provided, That the use of so much water as may be necessary to supply for domestic, stockwatering, and irrigation purposes, land allotted or to be allotted to Indians on the (Wind River) Reservation or set aside for administrative purposes within said reservation, is hereby reserved, and the failure of any individual Indian or Indians to make beneficial use of such water shall not operate in any manner to defeat his or her right thereto while said land is held in trust by the United States. All laws or parts or laws in conflict herewith are hereby repealed.

- c. The proviso was proposed to be appended to the appropriations for the Wind River Indian Reservation and five other western Indian reservations, including the Fort Hall, Flathead, Blackfeet, Fort Peck and Uintah Reservations.
- d. The purpose of the proviso, as described by Mr. Meritt, the Assistant Commissioner who suggested the proviso, was discussed at several points during the hearings on the appropriation bill. The Assistant Commissioner was concerned that Congress had appropriated large sums of money for projects on certain reservations where water rights were subject only to state law and that the proposed legislation was required in order to protect the Indians' water rights and, hence, Congress' investment.

In the words of Mr. Meritt, when addressing the Wind River Indian Reservation:

3-12 Continued.

We have offered a proviso clause which, if enacted into law, will help to equalize the burdens of irrigation on the various reservations. That is, we are asking that it be enacted in connection with the general item which was offered this morning. We have called attention to the injustice which is now being done the Indians of the Flathead, Fort Peck, and Blackfeet Reservations in connection with the method of financing their projects. We are also asking that this proviso clause in connection with these various items for irrigation work be included in the bill, because we realize that if laws of that character are not enacted the Indians will lose their water rights, and the large appropriations that have been made by Congress out of reimbursable funds will go very largely to the benefit of the white farmers rather than the Indians.

This reasoning was repeated by Meritt with respect to an identical proviso proposed for addition to the Fort Hall Reservation appropriation:

The CHAIRMAN. Why do you add this provision which materially modifies the law which has existed heretofore?

Mr. MERITT. We are asking that this proviso clause be incorporated in the bill in connection with a number of irrigation projects for the reasons that we find it necessary if the water rights of the Indians are to be protected. Congress has appropriated in a number of cases a large amount of money for irrigation projects on various reservations and has required that those appropriations be made reimbursable out of the funds of Indians. States have passed certain laws which make it desirable, in certain cases, that the water be made beneficial use of by the Indians; otherwise the Indians stand a chance of losing their water rights or else taking their water rights status to the courts for determination. This item, we believe, will

3-12 Continued.

protect the water rights of Indians on a number of reservations where large appropriations have been made, and where, if they lose their water rights, they will receive no benefit from the irrigation projects heretofore constructed.

- e. The Commissioner of Indian Affairs, through the Assistant Commissioner, expressed his concern that certain reservations, including the Wind River Indian Reservation, were subject to state water appropriation laws pursuant to the express action of Congress. The Commissioner stated his understanding that, although Congress originally had the power to reserve water to satisfy the purposes intended by the creation of these Indian reservations under the Winters case, the potential reserved water rights of Indians on those reservations had been "nullified" by various acts of Congress, so that such water rights were entirely dependent on the Indians' satisfactory compliance with applicable state water law.

Assistant Commissioner Meritt submitted a report to the House Subcommittee stating that the proviso needed to be adopted by Congress because the water rights on the Wind River Indian Reservation had been expressly submitted to state law in the Act of March 3, 1905, ratifying the 1904 Agreement:

Referring to the proviso clause regarding water rights, I wish to say:

3-12 Continued.

The purpose of this and other similar legislation in this bill is to protect the rights of Indians to water on Indian reservations and on allotted Indian lands held under trust or by other patents containing restrictions on alienation.

To establish more certainly and securely water rights of Indians is a matter of the greatest importance in administering satisfactorily their affairs. On a number of reservations where Indians have been allotted, the land is practically of no value for agricultural purposes without irrigation. Water on these reservations is a vital factor in developing the Indians living thereon so that they may become self-supporting and be raised to a higher standard of civilization.

The Supreme Court, in the case of Winters v. United States (207 U.S., 564), said that "The power of the Government to reserve waters and exempt them from appropriation under the State laws is not denied, and could not be."

The Supreme Court further said in this case that there was an implied reservation for the benefit of the Indians of a sufficient amount of water from the Milk River for irrigation purposes which was not affected by the subsequent act of February 22, 1889 (25 Stat. L., 676), admitting Montana to the Union, and that the water of the Milk River can not be diverted so as to prejudice the rights of the Indians by settlers on the public lands and those claiming riparian rights on that river.

It is believed that the general principles laid down in the Winters case are applicable to all Indian reservations where there are no specific acts of Congress to the contrary. However, I find that the very favorable decision of the Supreme Court in the Winters case regarding the water rights of Indians has been practically nullified by various acts of Congress, and as a result of such legislation the water rights of Indians are now dependent on beneficial use in a number

3-12 Continued.

of reservations where the Government has been, and is now, spending large amounts of reimbursable funds, and by acts of Congress these water rights are subject to the laws of the several States wherein these irrigation projects are located. In substantiation of this statement your attention is invited to acts of Congress regarding the water rights in connection with the Blackfeet, Fort Peck, Wind River, and Uintah Reservations.

The act of March 1, 1907 (34 Stat. L., 1015, 1035), regarding water rights on the Blackfeet Reservation provides:

"That the Indians and the settlers on the surplus land, in the order named, shall have a preference right for one year from the date of the President's proclamation opening the reservation to settlement to appropriate the waters of the reservation, which shall be filed on and appropriated under the laws of the State of Montana by the Commissioner of Indian Affairs on behalf of the Indians taking irrigable allotments and by the settlers under the same laws.

The act of May 30, 1908 (35 Stat. L., 558, 560), referring to the same subject on the Fort Peck Reservation, reads:

"All appropriations of the waters of the reservation shall be made under the provisions of the laws of the State of Montana.

The law applicable to the Wind River Reservation, act of March 3, 1905 (33 Stat. L., 1016, 1020), is as follows:

"That upon the completion of the said fifty dollars per capita payment any balance remaining in the said fund of eighty-five thousand dollars shall at once become available and shall be devoted to surveying, platting, making of maps, payment of the fees, and the performance of such acts as are required by the statutes of the State of Wyoming in securing water rights from said

3-12 Continued.

State for the irrigation of such lands as shall remain the property of said Indians, whether located within the territory intended to be ceded by this agreement or within the diminished reserve.

The law of Congress regarding the water rights on the Uintah Reservation is found in the act of June 21, 1906 (34 Stat. L., 335, 375), and reads:

"For constructing irrigation systems to irrigate the allotted lands of the Uncompahgre, Uintah, and White River Utes in Utah, the limit of cost of which is hereby fixed at six hundred thousand dollars, one hundred and twenty-five thousand dollars which shall be immediately available, the cost of said entire work to be reimbursed from the proceeds of the sale of the lands within the former Uintah Reservation: Provided, That such irrigation systems shall be constructed and completed and held and operated, and water therefor appropriated under the laws of the State of Utah.

The same justification was presented to the Senate Committee where the report quoted above was read into the record during a discussion in support of adding the proviso to the Wind River Indian Reservation appropriation.

- f. The proviso was put before the House of Representatives and debated on the theory proposed by Assistant Commissioner Meritt in the committee hearings, that the proviso was required to protect Congress' major investment on Indian reservations and to protect Indians against the application of state law on the Uintah, Blackfeet, Fort Peck and Wind River Reservations.

3-12 Continued.

Debate before the House centered upon the proviso generally and not as applied to any particular reservation. The purpose of the proviso was made clear by Congressman Stephens of Texas, who cited Meritt's argument and added his own comments.

Mr. STEPHENS of Texas. Mr. Chairman, I would like to give the reasons for this language. It is found on page 379 of the hearings, and is as follows:

The CHAIRMAN. Why do you add this provision which materially modifies the law which has existed heretofore?

Mr. Meritt. We are asking that this proviso clause be incorporated in the bill in connection with a number of irrigation projects for the reason that we find it necessary in the water rights of the Indians are to be protected. Congress has appropriated in a number of cases a large amount of money for irrigation projects on various reservations and has required that those appropriations be made reimbursable out of the funds of Indians. States have passed certain laws which make it desirable, in certain cases, that the water be made beneficial use of by the Indians; otherwise the Indians stand a chance of losing their water rights or else taking their water rights status to the courts for determination. This item, we believe, will protect the water rights of Indians on a number of reservations where large appropriations have been made, and where, if those lose their water rights, they will receive no benefit from the irrigation projects heretofore constructed.

I will state in addition to that that these irrigation projects are being constructed out of Indian funds, and if on account of the State laws interfering with the rights of the Indians to obtain the rights to the water, after it has been furnished by their own funds, those rights are extinguished and given to the white people, it will be doing the Indians a great amount of damage. For that reason the department insists and I insist that this language should remain in these bills. I admit that the language is subject to a point of order. It is certainly legislation, but I hope the gentleman will not make it, for the benefit of the Indians and for the benefit of the States that are interested. It will require legislation outside of an appropriation bill, and I think there is no question but that if a bill were presented to this House, outside of an appropriation bill, containing this language, this House would pass it.

Representative Stephens then commented:

(T)he Indians . . . are not provident enough to take advantage of putting water upon their land for their own use, that then their rights lapse under the State laws

- g. The opposition to the proviso within the House of Representatives insisted that the proviso was unnecessary because the Indians' water rights would be protected under state law. Preservation of the Indians' rights was argued to be simply a matter for the Indian Service under Wyoming law. The theory that a reserved right actually existed on the Wind River Indian Reservation, therefore making the proviso unnecessary, was never raised.

3-12 Continued.

Representative Mondell of Wyoming argued that the United States had applied for water rights on behalf of the Indians, that it was the duty of the Indian Service to insure that these were not lost through non-use, and that this proviso would "simply encourag(e) the department in its failure to provide for the irrigation of the Indian land."

Both Messrs. Stephens and Mondell felt that the proviso would change the current law, Mr. Stephens where he quotes the House Subcommittee Chairman:

Why do you add this provision which materially modifies the law which has existed heretofore?

and Mr. Mondell where he initially objects to the proviso:

I make the point of order against the proviso just read, that it is new legislation and changes existing law.

Thus, although the Winters case had been decided several years earlier, confirming the congressional power to create reserved rights to water when an Indian reservation was created, and had been raised in both the House and Senate hearings, at no time was the argument made that its doctrine applied to the Wind River Indian Reservation, but rather Congress and the

3-12 Continued.

Indian Service repeatedly affirmed that the Wind River Indian Reservation water rights were to be acquired only through compliance with Wyoming law.

- h. Debate in the Senate similarly centered upon the proviso generally, with reference to specific appropriations. The purpose of the proviso was communicated to the full Senate by senators who supported the amendment as being necessary to preserve and protect for the benefit of the Indians all waters that had not been previously appropriated under state law.

In discussing the proviso as it would apply generally to the Wind River Indian Reservation and five other reservations, Senator Ashurst of Arizona stated:

Mr. ASHURST. He would have a better right to it if he went out upon the public domain and located, appropriated, and turned to a beneficial use water that was theretofore previously unappropriated. The point in this legislation is this: It was the intention of the committee -- and I might say this legislation was drafted and prepared by the Indian Bureau -- to preserve and protect, for the benefit of the particular Indians, all the waters which are upon or rise in that particular reservation and have not been previously appropriated.

* * * *

3-12 Continued.

Mr. ASHURST. Assuming that my premise is correct, that an individual may not appropriate water upon an Indian reservation, for the obvious reason that it has previously been appropriated for another purpose, it was the intention of the committee, however impotent our work may appear, to preserve that status, so that after the reservation was opened and the lands were sold and the general public acquired them, under no guise or disguise could anything thereafter happen whereby a lapse on the part of the Indian -- who obviously can not take care of himself in many instances -- could cause him to lose the water that he possessed while he was living upon the reservation in tribal relations with other Indians.

Senator Lane of Oregon added immediately thereafter:

Mr. LANE. Mr. President, I should like to say that it went further than that, for the reason that the law under which the reclamation scheme was established gave the Indians a certain and definitely limited time in which to make use of the water, that time in some cases not being over two years. The Senator knows as well as I do, for we both come from sections of the country where land is irrigated, that that is not sufficient time for an Indian, a white man, or anyone else, and it was to cure that defect in the previous law which circumscribed the time in which he could apply it that this provision has been adopted.

Senator Page of Vermont also supported the proviso: "I simply say that I am guided by the opinions of the Indian Department." Later the same day, Senator Page read the Meritt statement into the record as was done in the hearings and also in the House of Representatives by Mr. Stephens:

3-12 Continued.

The CHAIRMAN. Why do you add this provision which materially modifies the law which has existed heretofore?

* * * *

Mr. MERITT. We are asking that this proviso clause be incorporated in the bill in connection with a number of irrigation projects for the reason that we find it necessary if the water rights of the Indians are to be protected. Congress has appropriated in a number of cases a large amount of money for irrigation projects on various reservations and has required that those appropriations be made reimbursable out of the funds of Indians. States have passed certain laws which make it desirable, in certain cases, that the water be made beneficial use of by the Indians; otherwise the Indians stand a chance of losing their water rights or else taking their water-rights status to the courts for determination. This item, we believe, will protect the water rights of the Indians on a number of reservations where large appropriations have been made, and where, if they lose their water rights, they will receive no benefit from the irrigation projects heretofore constructed.

- i. The senators opposing the reserved right proviso argued that the vested interests of the Indians would be served by requiring beneficial use and that Congress had no power to enact such an amendment. As stated by Senator Brady of Idaho:

I am as much in favor of protecting the Indians as the Senator from Vermont (Page) can possibly be; I want to help them in every way I can; but the way to help them is to have this money expended in putting water on these Indian reservations to a beneficial use, for if you do not put it to a beneficial use they cannot hold it, and there is no law

3-12 Continued.

that can be passed by the Congress that could enable the State to permit them to hold it.

- j. The result of the debate was that the proviso was stricken on a point of order, expressly rejected by the Senate as it had been in the House of Representatives.
- k. As an epilogue, Congress, in the same session, considered two additional provisos to assure tribes' rights over and above the protection offered by state law and to protect the U. S. investment in tribal irrigation systems.

Provided, That not to exceed \$100,000 shall be expended under this appropriation unless the Attorney General of the United States shall, after submission to him by the Secretary of the Interior of a request for an opinion, hold affirmatively that in his opinion the Indians, under existing law, are protected and confirmed in their water rights.

Provided further, That, in addition to what is herein required, there shall be submitted to Congress on the first Monday in December, 1914, as to the Uintah, Shoshone, Flathead, Blackfeet, and Fort Peck reclamation projects, a report showing the status of the water rights of the Indians and the method of financing said projects, together with such other information as the Secretary of the Interior may deem necessary for a full and complete understanding of all the facts and conditions in connection therewith.

Both of the offered amendments were extensively debated and subject to great disagreement in the Senate. Neither was enacted.

3-12 Continued.

- l. In summary, the Department of Indian Affairs did not believe that the Wind River Indian Reservation had a reserved right to water nor did Congress have this understanding of the legislation relating to the Wind River Indian Reservation. At the behest of the Department of Indian Affairs, a faction in Congress attempted to create reserved rights, but the attempt failed.
- m. The language of the Act as actually adopted shows the proviso was rejected by both the House of Representatives and the Senate.
- n. Thus, Congress recognized the fact that it did not reserve water rights when it created the Uintah and Fort Peck Reservations and, along with the Wind River Indian Reservation, reaffirmed this in the 1914 appropriation legislation and its history.

3-12 a. Wyo. Exh. WRIR I & P 14, at 608 (Indian Appropriation Act of 1914, Pub. L. No. 63-160, 38 Stat. 582, 608 (1914)). As explained in Conclusions of Law 3-4, 3-9, appropriations by Congress are a proper source of information to determine its intent in enacting legislation to which the appropriation relates.

b. Wyo. Exh. WRIR I & P 15 (Hearings before a Subcommittee of the Committee on Indian Affairs, Indian Appropriations Bill (H. R. 12579) (1914)) (emphasis added). Legislative history is a proper source on which the Court may rely for information pertaining to congressional intent. See Conclusions of Law 3-4, 3-5(c)(1).

Mr. E. B. Meritt, Assistant Commissioner of Indian Affairs, testified before the House Subcommittee of the Committee on Indian Affairs with regard to the appropriations to be made for irrigation-related purposes on many reservations, recommending the addition of the proviso to the House version of the appropriation bill, H. R. 12579. Mr. Meritt recommended the same proviso to the Senate Committee, as well, with regard to the Wind River Indian Reservation. Wyo. Exh. WRIR I & P 16 (Hearings before the Committee on Indian Affairs, Indian Appropriation Bill (H. R. 12579) at 279 (1914)).

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3-12 Continued.

- c. See Wyo. Exh. WRIR I & P 15, at 374 (Fort Hall Reservation), 445 (Flathead Reservation), 456 (Blackfeet Reservation), 460 (Fort Peck Reservation), 658 (Uintah Reservation), 703 (Wind River Reservation).
- d. See Wyo. Exh. WRIR I & P 15, at 707, 379 (Mr. Meritt testifying with regard to the Wind River Indian Reservation appropriation) (emphasis added).
- e. Wyo. Exh. WRIR I & P 15 at 378 (emphasis added); Wyo. Exh. WRIR I & P 16, at 280-81.
- f. Wyo. Exh. WRIR I & P 17 (51 Cong. Rec. 3661 (Feb. 19, 1914)) (emphasis added).
- g. Wyo. Exh. WRIR I & P 17, at 3661-62 (emphasis added).
- h. Wyo. Exh. WRIR I & P 18 (51 Cong. Rec. 10,596 (June 17, 1914)) (emphasis added); Wyo. Exh. WRIR I & P 19 (51 Cong. Rec. 10,771, 10,787) (June 20, 1914)).
- i. Wyo. Exh. WRIR I & P 19, at 10,772.
- j. Wyo. Exh. WRIR I & P 19, at 10,789.
- k. Wyo. Exh. WRIR I & P 20 (51 Cong. Rec. 11,109 (June 24, 1914)); (51 Cong. Rec. 12,611-17 (July 24, 1914)) (emphasis added).
- l. See Finding of Fact 3-12, supra.
- m. See Wyo. Exh. WRIR I & P 14.
- n. See Finding of Fact 3-12, supra.

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Judicial proceedings involving the water rights of the Wind River Indians.

Two decisions of the United States District Court for the District of Wyoming, Hampleman (1916) and Parkins (1926), have dealt with water on the Wind River Indian Reservation. These cases dealt with factual situations that have no relevance to this adjudication and, therefore, are not res judicata of any facts in this case nor do the cases create a collateral estoppel.

- a. Hampleman did not address the issue of whether Congress intended to create reserved rights on the Wind River Indian Reservation or whether such rights actually existed on the reservation. The sole issue decided by the court was whether
- the lands, ditches and water rights of the Indian allottees named in plaintiff's bill of complaint are within the absolute and exclusive jurisdiction of [The United States].

No factual issues were decided that would affect this adjudication.

- b. The pleadings in Parkins joined no issue regarding reserved rights, the intent to create the same or any other related issue. Rather, the United States relied upon its rights as an

3-13 Continued.

appropriator to bring suit and argued that it had a superior right to the defendant Parkins on the ground that he held no lawful water right. This was simply a case of one water user under Wyoming law interfering with rights of another and no reserved right claim was made.

3-13

See Conclusion of Law 3-11.

- a. United States v. Hampleman, No. 753 (D. Wyo. 1916) (Wyo. Exh. WRIR I & P 34).
- b. The dispute in United States v. Parkins, 18 F.2d 642 (D. Wyo. 1926), was between the United States, on behalf of certain Indians, and a Wyoming citizen, George W. Parkins. In its complaint, the United States alleged that it had "appropriated," by construction of a dam and ditch and diversion of water by beneficial use, sufficient water to irrigate the irrigable land of the reservation under the Wind River Project. Wyo. Exh. WRIR I & P 38, paras. 5, 7, 8 (Bill of Complaint). As part of the project, it was alleged, the United States ran water through Mill Creek to convey water to users along the Creek. Id. para. 5. In addition, it was alleged that Parkins owned land on the diminished reservation conveyed by the Indian allottees to him. Id. para. 6. The United States alleged that Parkins, without any state authorization, built a dam and ditch on and from Mill Creek to irrigate his lands by use of the waters of the Creek. Id. para. 7. In so doing, the United States alleged Parkins was unlawfully using water "appropriated"

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3-13 Continued

by the United States for the use of the Indians and sought to enjoin him from doing so.

Parkins responded by admitting most of the foregoing, but asserted that the United States had no right to use the waters of Mill Creek itself, but only those placed in the Creek and that he had a right to use the water under state law. Wyo. Exh. WRIR I & P 38A (Answer).

On the facts, the court ruled for the United States based on four grounds. One ground discussed reserved rights on the reservation, the others did not. The three nonreserved right grounds were:

Second. The evidence in the case shows by a strong preponderance that the flow of Mill Creek consists primarily of water conveyed as a part of the irrigation project through the bed of the stream to satisfy appropriators farther down and as a result of seepage from the main irrigation canal, and in either event the waters belong to the irrigation project, which in this case makes them the property of the Government. Ide v. United States, 263 U.S. 497.

Third. The evidence discloses that the defendant has no right to divert water from Mill Creek, by permit granted either by the United States or the State of Wyoming.

Fourth. The evidence further discloses that the defendant has an

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3-13 Continued

adequate water right through the Wind River Irrigation Project for the irrigation of his lands, which he has neglected and refused to take advantage of, by his failure to pay maintenance charges established under that project and affecting all owners of lands using waters similarly. If he has a grievance in this respect, he should seek appropriate relief through the proper forum. This condition establishes clearly a want of equity in the case, so far as the defendant is concerned.

Wyo. Exh. WRIR I & P 39, at 4 (Judge's Memorandum). Each of these depends on facts alleged and found in the case, and to issues raised by the pleadings.

In contrast, the reference to reserved rights is only dictum and not based upon issues raised. Indeed, no express statement that reserved rights exist was made, but rather the Parkins court assumed their existence:

First. It is not apparant that the waters in the streams within the Indian reservation were even specifically granted by the United States to the State of Wyoming, although it is apparently the fact that the Indian service in promulgating its irrigation project and the officials of the State of Wyoming for the purpose of protecting all land owners who may acquire water rights, have co-operated along the line of taking out water for irrigating purposes with the consent of the State. It must be assumed, however, that in the absence of any

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specific grant, that the Government has reserved whatever rights may be necessary for the beneficial use of the Government in carrying out its previous treaty rights, those rights have become fixed and established before the Act of Admission which made Wyoming a sovereign state. 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 its wards, the Indians, which likewise includes the irrigation of those lands, they being arid in character. Winters v. United States, 207 U.S. 564. So far as the issues here are concerned, it would appear that the Government in the establishment of its irrigation project, had a right to the use of the present waters in Mill Creek for its Indian wards.

Id. at 3-4. Thus, in this dispute, which was really over a failure to pay operation and maintenance expenses, the court's own language indicates that it did not find reserved rights.

3-14

Later administrative attempts to recognize reserved rights for the Wind River Indians.

- a. The administrative interpretation of the 1905 legislation, that the language requiring compliance with state law was discretionary only, did not die easily. Secretary of the Interior Franklin Lane wrote the President of the Senate and the Speaker of the House of Representatives to point out the problems that were arising on the Wind River Indian Reservation, such as the dispute in United States v. Hampleman. In his letters, Lane explicitly stated that the 1905 legislation required compliance with state law in order to obtain and preserve water rights. He then discussed the results of the Winters and Conrad Investment cases, and noted that the court in Hampleman did not follow those cases, and recommended that legislation be enacted to ensure that the same result would apply to the Wind River Indian Reservation.

Lane's letters stated the following:

If this (reserved rights) contention can be maintained, the water rights for irrigating the Indian lands will be secure until the expiration of the trust period on the allotments, and thereafter it is believed that the State requirement of beneficial use would control. Inasmuch as the contention has been raised that the Act of March 3,

3-14 Continued.

1905, supra, should be construed as placing the acquisition of water rights for the Indian lands wholly within the State control, it is believed that legislation should be enacted by Congress to provide for confirmation and protection of the prior reserved rights to water for such lands.

In mentioning the Hampleman case, Lane stated that it prevented achievement of the purpose of the 1905 legislation to assure compliance with State law because the State Engineer was not issuing permits to the Indians.

Upon complaint of the allottees that their lands were without water and their rights were disregarded, among other things done for relief, suit was brought in the Federal Court to enjoin the adverse appropriation of water to the detriment of the Indians entitled to receive same. The action of the Department in this matter apparently has caused a situation which prevents the attainment of the object of said act as it appears that the intent thereof was that water rights for Indian allotments should be substantiated by evidence of the same character as that required of settlers on public land, inasmuch as the State Engineer has declined to act on applications for permits to appropriate water for Indian land filed in accordance with said act and has failed to reply to the correspondence of officials in charge of irrigation matters.

- b. Congress had specifically rejected language creating a reserved right for the Wind River Indian Reservation in the 1914 Indian appropriation legislation only a few months prior to this similar proposal by the Secretary of the Interior and did not subsequently

3-14 Continued.

adopt the Secretary's suggestion that such rights be created by legislation.

- c. In addition, as late as 1919, Assistant Commissioner of Indian Affairs E. B. Meritt, who earlier took the position that the State had no jurisdiction over water rights on the Wind River Indian Reservation, still represented that it was necessary to comply with state law in order to protect the water rights of the Indians on the Wind River Indian Reservation.

E. B. Meritt's letter was in response to a January 9, 1919 letter from State Engineer James B. True to S. G. Hopkins. In that letter, True suggested the federal government waive its jurisdictional claims and allow processing of State applications. Meritt responded:

Referring to your letter of January 9, 1919, regarding water rights on the Wind River Reservation, permit me to suggest that this Office is ready and willing at all times to cooperate with the State Officials in carrying out the provisions of the Act of March 3, 1905 (33 Stats., 1016), which requires the filing of maps and the performance of such other acts as may be required by the Statutes of the State in securing water rights for irrigable lands.

* * * *

As to the question of jurisdiction over the Indian water rights, it is suggested that this matter be allowed to rest until the

3-14 Continued.

pending controversy over the water rights of George Lajeunesse, an Indian, is settled, the Office understanding that the Department of Justice now has the matter under active consideration with a view of taking such steps as may be necessary to protect the rights of the Indians.

This letter points out that Meritt interpreted the 1905 legislation as requiring compliance with Wyoming law and that the issues of jurisdiction and reserved rights raised in the 1914 Hampleman case were not regarded as settled.

3-14 a. Wyo. Exhs. WRIR I & P 109, at 4-6 (Letter from Franklin K. Lane to President of the Senate (Dec. 7, 1914)); 109A, at 2-3 (Letter from the Secretary of the Interior, H. R. Doc. No. 1274, 63d Cong., 3d Sess. (1914)) (emphasis added).

b. As was discussed above, Finding of Fact 3-12, supra, Congress had rejected a similar legislative proposal in the hearings prior to enactment of the Indian Appropriations Act of 1914 just six months before Lane's recommendation. Thus, the opportunity to reserve water rights on the Wind River Indian Reservation was placed once again before Congress and rejected.

c. Wyo. Exh. WRIR I & P 110 (Letter from Assistant Commissioner E. B. Meritt to State Engineer James B. True (Mar. 18, 1919)) (emphasis added); see Conclusion of Law 3-11.

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