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Brief of the Spokane Indian Tribe

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> The district courts shall have original jurisdiction of all civil actions, brought by an Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws or treaties of the United States.

According to the House report on section 1362, this statute's purpose is to provide a federal forum for trying issues dealing with Indian lands held in trust by the United States.[273] The Senate report clarifies the House report by noting two reasons for providing a federal forum for such issues: (1) the tribes' fear of the states, and (2) the federal courts' superior expertise in dealing with treaties and applying the relevant body of federal law.[274] The important point is not only that Indians fear having their rights adjudicated in state courts, but also that Congress considers the Indians' apprehensions justified and has, therefore, enacted a law vesting jurisdiction in the federal courts to determine federal questions involving tribal lands and property rights.

In interpreting the applicability of section 1362 in the context of state fish and game laws, the court in *Great Lakes Inter-Tribal Council, Inc. v. Voigt*[275] stated:

> To require exhaustion of state remedies, or to abstain from the exercise of jurisdiction until the state has undertaken to clarify the applicability of its fish and game laws to plaintiffs on Indian lands, would be to dilute the Congressional intention to provide to the Indians a federal forum for just such questions as those presented here.

The legal questions concerning reserved water rights are similar to those concerning reserved fishing rights. Therefore, the reason-

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273. The House report states in part:

> In its report to the Senate Committee, the Department of the Interior specifically pointed out that the issues involved in cases involving tribal lands that either are held in trust or were so held by the tribe subject to restriction against alienation imposed by the United States are federal issues. The Department therefore observed that particularly as to this class of cases it is appropriate that the actions be brought in a U.S. District Court.

H.R. REP. No. 2040, 89th Cong., 2d Sess. 12713-16 (1966).

274. The Senate Report declares;

> There is great hesitancy on the part of tribes to use State courts. This reluctance is founded partially on the traditional fear that tribes have had of the States in which their reservations are situated. Additionally, the Federal courts have more expertise in deciding questions involving treaties with the Federal Government, as well as interpreting the relevant body of Federal law that has developed over the years.

S. REP. No. 1507, 89th Cong., 2d Sess. 2 (1966).

275. 309 F. Supp. 60, 64 (W.D. Wis. 1970).

ing and approach in *Voigt* should apply to cases involving Indian reserved water rights.

The second relevant statute is 28 U.S.C. § 1360, enacted by Congress on August 15, 1953, only 13 months after enactment of the McCarran Amendment. Section 1360 constitutes part of the statutory provision popularly called Public Law 280, which granted certain states authority to assume by appropriate legislation limited civil and criminal jurisdiction over Indians. Subsection (b) of that section reads:

> Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, *including water rights*, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; *or shall confer jurisdiction upon the State to adudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.*[276]

This subsection is, therefore, a saving clause which reiterates the existing law and preserves it against encroachment by the states' assertion of jurisdiction under subsection (a). Subsection (b) specifically speaks of Indian water rights and denies state jurisdiction to adjudicate such rights.

Section 1360(b) should be read *in pari materia* with section 666.[277] In light of the strong reiteration of federal jurisdiction over Indian water rights in section 1360(b) in 1953, Congress could not have intended to subject such rights to state court jurisdiction in 1952 by enacting section 666. The saving language of section 1360(b) would make no sense if Congress had recently subjected Indian water rights to adjudication in state courts. Section 1360(b) must therefore be read as a clear assertion that state courts did not have jurisdiction over Indian water rights prior to its enactment and could not place any encumbrance on nor adjudicate any such rights by assertions of state jurisdiction thereafter.[278]

The McCarran Amendment, when read (as it should be) in tandem with both 28 U.S.C. § 1360(b) and 28 U.S.C. § 1362, does

276. 28 U.S.C. § 1360(b) (1970) (emphasis added).

277. *See* Menominee Tribe v. United States, 391 U.S. 404, 411-13 (1970).

278. Congress reenacted § 1360(b) as a part of the Indian Civil Rights Act, Pub. L. No. 90-284, § 401, 82 Stat. 78 (1968).

not reveal a congressional intent to extend state jurisdiction to Indian reserved water rights.

c. State enabling acts and constitutions. The enabling acts and constitutions of the Western States further demonstrate the distinction between Indian reserved water rights and other reserved water rights, as they relate to the jurisdiction of state courts to effect water adjudications. Those acts and constitutions contain disclaimer clauses applicable to Indian lands and property rights, but not to other federal interests. The disclaimer clauses exist because Congress expressly conditioned the admission of new states with Indian reservations within their boundaries on a disclaimer of jurisdiction over Indian property rights. The enabling acts of Arizona, Washington, Montana, New Mexico, North Dakota, Utah, and South Dakota conditioned admission to the Union in these, or nearly identical, terms:

> That the people inhabiting said proposed State do agree and declare . . . that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States . . . .[279]

This language is duplicated in each of the respective state constitutions.[280] The courts have consistently held that states which have no disclaimer provision are subject to the same limitations on state jurisdiction as the states listed above.[281]

When Congress has acted to extend state jurisdiction over

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279. New Mexico Enabling Act, ch. 310, § 2, cl. 2, 36 Stat. 588 (1910); *see* Arizona Enabling Act, ch. 310, § 20, cl. 2, 36 Stat. 569 (1910); Utah Enabling Act, ch. 138, § 3, cl. 2, 28 Stat. 108 (1894); Enabling Act of North Dakota, South Dakota, Montana, and Washington, ch. 180, § 4, cl. 2, 25 Stat. 677 (1889).

Idaho and Wyoming have similar provisions in the Organic Acts that conditioned their admittance to the Union. *See* Organic Act of Wyoming, ch. 235, § 1, 15 Stat. 178 (1868); Organic Act of Idaho, ch. 17, § 1, 12 Stat. 809 (1863).

If there is ambiguity present in the statute, it must be construed liberally in favor of the Indians. Squire v. Capoeman, 351 U.S. 1, 6-7 (1956); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 174 (1973).

280. *See* ARIZ. CONST. art. 20, § 4; MONT. CONST. art. 12, § 2; N.M. CONST. art. 21, § 2; N.D. CONST. art. 26, § 203; UTAH CONST. art. 3, § 2; S.D. CONST. art. 22, § 2; WASH. CONST. art. 26.

281. Donnelly v. United States, 228 U.S. 243 (1913); United States v. Kagama, 118 U.S. 375 (1886); Whyte v. District Court of Montezuma County, 140 Colo. 334, 346 P.2d 1012 (1959), *cert. denied*, 363 U.S. 829 (1960). In *Whyte*, the Colorado Supreme Court acknowledged this principle when it declared that

> [T]he jurisdiction of the federal government over all Indian affairs is plenary and *subject to no diminution by the states in the absence of specific congressional grant of authority to them to act.*

140 Colo. at 337, 346 P.2d at 1014 (emphasis added).

Indian reservations, it has specifically waived the disclaimer provision in state enabling acts and authorized states with constitutional or statutory impediments to the assumption of such jurisdiction to remove the impediments and assume jurisdiction. An example is section 6 of Public Law 280,[282] which provides:

> Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: *Provided*, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.[283]

Section 666, by contrast, is silent as to the disclaimer provisions in state enabling acts and constitutions. Congress enacted the McCarran Amendment knowing that extension of state jurisdiction to Indians or their property requires (1) waiver or repeal of the disclaimer clauses in the enabling acts, and (2) amendment, with the consent of the United States, of state constitutions or statutes. Nothing is more indicative of the congressional intent to exclude the reserved water rights of Indians from the sweep of section 666 than the absence in the McCarran Amendment of a repeal or waiver of the enabling acts and the absence of consent to the amendment of state constitutions or statutes.

Any argument for extension of state jurisdiction over Indian water rights under the authority of the McCarran Amendment would necessarily posit that the Amendment repeals by implication the disclaimer clauses in the enabling acts applying to the various states. An accepted principle of statutory construction, however, disfavors repeals by implication. In fact, the courts have elevated that disfavor to the level of a presumption: prior law is *not* repealed by implication.[284]

d. The legislative history of the McCarran Amendment. The express intent of Congress necessary to grant to the states jurisdiction over Indian water rights is lacking in section 666.[285]

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282. Act of Aug. 15, 1953, ch. 505, § 6, 67 Stat. 590.

283. *Id.* For an example of the extension of jurisdiction to Indians by the State of Washington under this Act see Quinault Tribe of Indians v. Gallagher, 368 F.2d 648 (9th Cir. 1966).

284. C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 23.10 (4th ed. 1973). *See also* Morton v. Mancari, 417 U.S. 535 (1974).

285. *See* notes 265-269 and accompanying text *supra*.

Where a statute on its face is unambiguous, no resort to its legislative history should be necessary.[286] Nevertheless, support for state jurisdiction over Indian water rights cannot be found in the history of section 666.[287]

3. Removal of Indian water rights cases to federal court

If it were determined for any reason, either by legislation or court decree, that the McCarran Amendment does apply to reserved water rights held in trust for Indian reservations and that state courts do have authority to adjudicate Indian water rights along with all other claims in a given stream, the question arises whether the Indians or the United States can remove the adjudication to federal court pursuant to 28 U.S.C. § 1441, the general federal removal statute.[288] Section 1441(b) provides:

> Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

As discussed earlier, Indian reserved water rights are created pursuant to the Constitution, treaties, and statutes of the United States.[289] While there has never been a determination that an issue involving an Indian water right poses the type of federal question which will permit removal from state to federal court, a number of actions involving other types of Indian trust property rights have been so removed. For example, Indians have removed contested probate proceedings,[290] proceedings concerning allotted

286. United States v. Zion Sav. & Loan Ass'n, 313 F.2d 331, 336 (10th Cir. 1963); Diamond A Cattle Co. v. C.I.R., 233 F.2d 739, 742 (10th Cir. 1956); Nicholas v. Denver & R.G.W.R.R., 195 F.2d 428, 431 (10th Cir. 1952); *cf.* Gay v. Ruff, 292 U.S. 25, 31 (1933).

287. For a discussion of the legislative history of § 666 see Brief on the merits for Southern Ute Indian Tribe *et al.* as Amicus Curiae at 16-19, United States v. Akin, 421 U.S. 946 (1975) (No. 74-949), *granting cert. to* 504 F.2d 115 (10th Cir. 1974).

288. It should be remembered that the federal court's jurisdiction in the event of a removal is *derivative; i.e.*, on removal a federal court can adjudicate only those issues which the state court could have adjudicated in the case if no removal had occurred. Minnesota v. United States, 305 U.S. 382 (1939). If the state court had no jurisdiction over Indian water rights, removal of the action to federal court would apparently not give jurisdiction to the federal court, and another case would have to be filed in the federal court.

289. *See* notes 195-209 and accompanying text *supra*.

290. *E.g.*, Berry v. Brakeshoulder, 162 F.2d 651 (10th Cir. 1947).

Indian lands,[291] and suits to cancel oil and gas leases.[292] An effort to remove cases involving Indian water rights may be anticipated in most cases because the Indians fear that their rights will be prejudiced by rulings on evidence and procedural questions in antagonistic state courts.

Both state and federal interests could be protected if cases involving Indian water rights were initially filed in state courts and later removed to federal courts. 28 U.S.C. § 1441(c) grants a federal court the option in a removed case to determine only those separate or independent claims which present federal questions, and in the meantime to remand all other matters to the state court for determination.[293] Accordingly, a state could initiate a proceeding in its own court to adjudicate all rights in a given stream system. The federal questions and issues concerning reserved water rights held for the benefit of Indian reservations could be removed for determination in federal court with all other issues being remanded to the state court. Proceedings in state court could continue on non-federal rights until the point is reached where the ladder of priorities must be matched against the available water supply. At that point, the federal court's ruling could be returned and incorporated into the state decree.[294] By this means, all the rights in a stream system could be established and incorporated in one decree and enforced by one court.[295]

Whether cases affecting reserved water rights can be removed is another unanswered question. The Supreme Court did not address the question of removal in the *Eagle County* case.[296]

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291. *E.g.*, House v. United States, 144 F.2d 555 (10th Cir. 1944), *cert. denied*, 323 U.S. 781 (1944).

292. *E.g.*, Jackson v. Gates Oil Co., 297 F. 549 (8th Cir. 1924).

293. 28 U.S.C. § 1441(c) provides:

> Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or in its discretion, may remand all matters not otherwise within its original jurisdiction.

294. The federal court, however, may retain jurisdiction to enforce its decree if the reserved right is not adequately protected by the state court.

295. There is a risk involved in using this procedure, however. 28 U.S.C. § 1447(d) provides that if the federal court remands the case back to the state court from which it was removed, that remanding order is not reviewable. Therefore, under the present state of the law, there is the risk that the federal court may remand the entire case to the state court for determination of the measure and extent of both the federal reserved rights and the Indians' reserved water rights. In such a case there would be no remedy to the remand order by appeal.

296. 401 U.S. 520 (1971). For a discussion of the removal question see *In re* Green River Drainage Area, 147 F. Supp. 127 (D. Utah 1956).

Although the legislative history of the McCarran Amendment reveals that a provision concerning removal of federal questions by the United States was eliminated from the Amendment,[297] the implications of that elimination are unknown.

4. The Supreme Court's original jurisdiction over interstate stream apportionments

The determination and enforcement of reserved water rights, including Indian water rights, are suits in the nature of quiet title actions[298] except to the extent interstate stream apportionments under the original and exclusive jurisdiction of the Supreme Court are involved.[299] There the action is to apportion the waters between the several states involved. Such an apportionment action may include establishing the measure and priority of the water rights reserved by the federal government in the various streams and quieting the title thereto against all other users.[300] In such proceedings, each state represents the interests of all water users claiming under its law.[301]

Interstate apportionment suits may be filed by the states against each other[302] or initiated by the United States.[303] An initiating petition is addressed on motion to the discretion of the Supreme Court. The bases upon which the United States may urge the Court to exercise its jurisdiction are fivefold:

(1) The United States is a necessary party in an interstate stream adjudication; therefore, it should be able to initiate the action.

297. *Hearings on S. 18 Before the Subcomm. on the Study of Adjudication of Water Rights of the Senate Comm. on the Judiciary*, 82d Cong., 1st Sess. 5 (1951).

298. *See* 3 KINNEY, *supra* note 238, at 2756-57.

299. *See* 28 U.S.C. § 1251(a) (1970).

300. Arizona v. California, 373 U.S. 546 (1963).

301. Kansas v. Colorado, 206 U.S. 46 (1907); 3 KINNEY, *supra* note 238, § 1224.

302. *See* Arizona v. California, 373 U.S. 546 (1963); Nebraska v. Wyoming, 325 U.S. 589 (1945); Colorado v. Kansas, 322 U.S. 708 (1944); Washington v. Oregon, 297 U.S. 517 (1936); Connecticut v. Massachusetts, 282 U.S. 660 (1931); New Jersey v. New York, 283 U.S. 805 (1931), *modified*, 347 U.S. 995 (1954); Wyoming v. Colorado, 259 U.S. 496 (1922), *vacated and new decree entered*, 353 U.S. 953 (1957); Kansas v. Colorado, 185 U.S. 125 (1902); 28 U.S.C. § 1251(a) (1970).

303. 28 U.S.C. § 1251(b)(2) (1970) permits the Court in the exercise of its discretion to accept suits initiated by the United States against a state. United States v. Nevada, 412 U.S. 534 (1973), brought under the above-cited statute, involved federal claims for the reserved right to the use of water out of the Truckee River, an interstate stream that runs from California into Nevada. It included the claim of reserved rights for the Pyramid Lake Paiute Tribe to sufficient water in the Truckee River to maintain Pyramid Lake, a large desert lake, and its fishery. The lake is within the Indian reservation boundary. The Supreme Court, however, refused to accept jurisdiction.

(2) An interstate stream is involved; therefore, the Supreme Court is the only court in which jurisdiction can be obtained over all the parties and all the water in one action. The multiplicity of suits in separate states that could occur should be avoided.

(3) Extensive efforts at compromise by the means of a federal-interstate compact have been unsuccessful.

(4) Determination of the measure and priority of a federal right is necessary before a solution dividing the waters of the stream can be reached.

(5) An apportionment action would be a less expensive and time-consuming method for determining the reserved right involved.

If the Supreme Court refuses to accept jurisdiction of an adjudication involving an interstate stream, separate actions would be required in each state; in the absence of special legislation, the state and federal courts would not have the requisite jurisdiction to adjudicate all rights in a single action.[304] In effect, water rights in an interstate stream would remain uncertain where there has been no apportionment of the waters of that stream between the various states. This would be so in spite of the desire of the states and their water users for a final adjudication.

C. Administrative Authority and a Proposal for Federal Administrative Action to Determine Reserved Water Rights

Water rights in the Western States are either acquired pursuant to the laws of the states where use occurs or are expressly or impliedly reserved by the federal government to fulfill the purposes underlying withdrawal or reservation of land.[305] Both the federal and state sovereigns have the authority to administer and control the waters within the scope of their respective jurisdictions.[306] The states received their authority over a hundred years

304. *E.g.*, United States v. Alpine Land & Reservoir Co., Equity No. D-183 (D. Nev., filed May 11, 1925) (the court obtained jurisdiction in both California and Nevada pursuant to a special statute). In the absence of such a statute, the jurisdiction of both federal and state courts stop at the state boundary.

305. This assumes that the Indians' aboriginal water rights discussed in section II, *A, 2 supra* are a portion of the water right impliedly reserved by the federal sovereign for the Indians when the reservations were created.

306. Dividing water reserved for a federal reservation or enclave, other than Indian reservations, among various uses to fulfill the purposes of that reservation is strictly a federal prerogative. *See* notes 313-318 and accompanying text *infra*. Where Indian reservations are concerned, the amount, period, place, and nature of water use is a matter for the Secretary of the Interior and the affected Indian tribe, band, or group to decide and

ago when the federal government authorized them to administer and control the use of water among their citizens.[307] During the past century, Congress, with only a few exceptions,[308] has permitted the states to establish, administer, and control water rights within their borders without interference. Nevertheless, without the consent of the federal government, the states cannot adjudicate, administer, or control the use of reserved water rights.[309]

The independent federal and state water systems may at times overlap and conflict when both allocate waters in the same stream. The only machinery that has been used to date to resolve questions of conflicts between water rights protected by state and federal law is the interminable, expensive, and often inconclusive stream adjudication proceeding.[310] The inadequacy of this method is one reason that the scope and measure of the Indians' reserved water right has remained undefined for so many years. Since present adjudicative methods are inadequate or ineffective, the question arises whether a more effective method can be devised to quantify the water rights reserved for federal enclaves and Indian reservations and thereby establish the amount of water remaining in the various watersheds for the states to administer and control among their water users. This question presents the most important unmet challenge in American water law.

At present, there is no federal administrative machinery in existence that can control and administer the use of reserved water rights *within* the various federal enclaves and reservations or set the measure of the total use for each enclave. Nevertheless, this author believes that the authority to establish such adminis-

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administer, subject to court review. *See* notes 334-343 and accompanying text *infra*. Use, control, and administration of water among the citizens of the various states under state law is a matter for the states to decide and administer. California-Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935).

307. *See* notes 6-20 and accompanying text *supra*.

308. One exception, embodied in § 8 of the Reclamation Act, is set forth in note 111 *supra*. That section requires that water rights of reclamation projects be established pursuant to state law, but also provides that such water rights are appurtenant to the land upon which the water is used regardless of state law.

309. United States v. Cappaert, 508 F.2d 313 (9th Cir. 1974), *cert. granted*, 422 U.S. 1041 (1975) (Nos. 74-1107, 74-1304); United States v. McIntire, 101 F.2d 650 (9th Cir. 1939); Nevada *ex rel.* Shamberger v. United States, 165 F. Supp. 600 (D. Nev. 1958), *aff'd on other grounds*, 279 F.2d 699 (9th Cir. 1960).

310. For example, United States v. Alpine Land & Reservoir Co., Equity No. D-183 (D. Nev., filed May 11, 1925) is still pending. Another example is United States v. Orr Water Ditch Co., Equity No. A-3 (D. Nev., Sept. 8, 1944) which was filed on March 3, 1913; the stipulated decree entered in that case is the subject of a current suit, United States v. Truckee Carson Irr. Dist., Civil No. 2987 JBA (D. Nev., filed Dec. 21, 1973), because the court failed to consider a reserved water right in the Truckee River for the preservation of Pyramid Lake and its fishery.

trative machinery currently exists. This subsection discusses that authority and the need to establish the measure of the reserved right on a use-by-use basis in each watershed. It proposes that the various federal administrative agencies, particularly the Department of the Interior, acting jointly with the Indian tribes where Indian reservations are involved, establish administrative machinery to quantify the reserved water rights of all federal reservations and enclaves. Further, it explains how that machinery could relatively rapidly identify the various uses of reserved water required to fulfill the purpose of each reservation or enclave. The amount of water remaining for the use of other water users under state administration will then be apparent. Because of the important differences between non-Indian and Indian reserved water rights, federal action with respect to these rights will be treated separately.

1. Administrative authority for and proposed action to determine non-Indian reserved water rights

An administrative mechanism for determining non-Indian reserved water rights is clearly needed. Consider, for example, the reserved water rights of military enclaves. Presently, there are no Army regulations instructing commanders of posts, camps, and stations concerning the quantification and protection of water rights reserved for their installations.[311] The cost of water is increasing daily and acquisition of congressional appropriations for condemnation or inverse condemnation procedures is difficult and time consuming. Further, if the military fails to act, presently unused reserved waters may be utilized by others pursuant to state law. The inequity of eventually taking those waters from users who were without notice of the reserved right could result in the diminution or loss of the water rights of many military reservations. Similar problems now exist for other federal reservations and enclaves including national parks, monuments, and forests, and fish and wildlife areas. It is therefore imperative that the federal departments involved establish the priority, amount, and location of each of the uses of reserved water rights benefitting their reservations.[312]

311. DEP'T OF THE ARMY, MILITARY RESERVATIONS, PAMPHLET NO. 27-164 (1965) (no section therein discusses establishing or protecting the military's water rights).

312. It is the author's opinion that the United States Supreme Court may interpret the McCarran Amendment (see section III, *B supra*) to grant authority to the states to do this task if the federal government does not quickly make a concerted effort to do the job.

Allocating the water reserved for a non-Indian federal reservation or enclave among the various uses necessary to fulfill the purpose of that reservation is strictly a federal prerogative.[313] The prerogative may be exercised by each federal department or agency with respect to reserved lands subject to its control. This authority is derived from the responsibility of each department to effectuate the purposes for which the lands under its jurisdiction were reserved. For example, the Department of the Interior has sufficient authority under the act establishing the National Park Service[314] to fulfill the "fundamental purpose" of all national parks and monuments which includes the authority to do those things necessary ". . . to conserve the scenery . . . and the wildlife therein . . . by such means as will leave them unimpaired for the enjoyment of future generations."[315] That authority reinforced the Ninth Circuit Court of Appeals' decision in *United States v. Cappaert*[316] that the federal sovereign intended to reserve water for the Devil's Hole addition to Death Valley National Monument. Thus, a statute which supports an implied reservation of water to fulfill the purposes stated therein also impliedly grants the authority to quantify the amount of the reserved water and to provide for the administration and control of its use.[317] Because the various federal departments administer the property of the United States by congressional directive, the secretaries of those departments have the authority to accomplish the purposes of the reservations which they are charged with administering,

313. Cases cited note 309 *supra*; FPC v. Oregon, 349 U.S. 435 (1955). *See generally* Arizona v. California, 373 U.S. 546 (1963).

314. 16 U.S.C. § 1 (1970).

315. *Id.*

316. 508 F.2d 313, 318 (9th Cir. 1974), *cert. granted*, 422 U.S. 1041 (1975) (Nos. 74-1107, 74-1304). For a discussion of the authority of the Department of the Interior, acting jointly with the affected tribe, band, or group, to administer and control the use of water on Indian reservations see section III, *C, 2, b infra*.

317. The extent of such administrative power must be determined by the purpose of the act granting the power and the difficulties that might be encountered in its execution. United States v. Antikamnia Chem. Co., 231 U.S. 654 (1914); Certified Color Indus. Comm. v. Flemming, 283 F.2d 622 (2d Cir. 1960). An early case stated: "It is a general principle of law, in the construction of [grants of administrative power], that where the end is required, the appropriate means are given." United States v. Bailey, 34 U.S. (9 Pet.) 238, 253 (1835). It has also been stated that

> [W]hen a statute imposes a mandatory duty upon a governmental agency to carry out the express and specifically defined purposes and objectives stated in the law, such statute carries with it by necessary implication the authority to do whatever is reasonably necessary to effectuate the legislative mandate and purpose. Corzelius v. Railroad Com. (Tex Civ App) 182 SW2d 412.

73 AM. JUR. 2d *Statutes* § 311 (1974).

without further delegation from Congress.[318] Thus, the Department of Defense has authority over the reserved water rights of military reservations and enclaves; the Department of Agriculture, the reserved water rights of national forests; and the Department of the Interior, the reserved water rights of fish and wildlife areas, national parks, monuments and recreation areas, and the public domain.

It is proposed that each of these departments immediately exercise that authority by completing an inventory of the potential land and water uses necessary to accomplish the purposes for which each reservation and enclave under its jurisdiction was created. These inventories should determine on a use-by-use basis the measure and scope of all water rights reserved for non-Indian reservations and federal enclaves. Acting in conformity with the Administrative Procedure Act,[319] the Departments of Interior, Agriculture, and Defense can, within existing authority, promulgate regulations that establish water use permit systems on a use-by-use basis with appropriate notice, hearing, and appeal procedures. Pursuant to those regulatory systems, the departments can quantify the amount, and determine the priority date, of reserved water rights. The states and their water users can appear, participate in the proceedings, and, if necessary to protect their rights, appeal to the courts. In this context, the states can be encouraged to appear as *parens patriae* on behalf of all water users claiming water rights under state law.[320] All three departments have existing administrative machinery for holding hearings, reaching decisions, and processing appeals.[321] That machinery could be modified to manage the proposed administrative systems. For example, the Department of the Interior, which is responsible for administering most reserved water rights, could authorize its Office of Hearings and Appeals to con-

318. In general, the official duties of the head of an executive department of government, whether imposed by act of Congress or by resolution, require the continual exercise of judgment and discretion. This exercise is especially important in interpreting the laws and resolutions of Congress under which the department head is required to act. Decatur v. Paulding, 39 U.S. (14 Pet.) 497, 518 (1840).

319. 5 U.S.C. §§ 551 *et seq.* (1970).

320. The states have been appearing in this manner in stream apportionment suits. Arizona v. California, 373 U.S. 546 (1963); Kansas v. Colorado, 206 U.S. 46 (1907). Nothing would prevent the states from rendering the same service to their water users in the administrative proceedings to be established under this proposal. The state could be assisted by those water users who feel a need to participate.

321. For example, within the Department of the Interior there are several administrative boards which could be modified, including a Board of Land Appeals and a Board of Indian Appeals.

duct hearings and make decisions on water matters. With an expanded staff and a revised description of its duties in the *Code of Federal Regulations*, that office, with its various appeal boards, could readily handle appeals concerning the measure and scope of reserved water rights. It is imperative that these departments take the necessary steps to establish the priority, amount, and location of each of the uses of the reserved water rights which they are charged with administering for the benefit of those reservations which are used by the public as a whole.

2. Administrative authority for and proposed action to determine Indian reserved water rights

Since non-Indians cannot acquire rights in water reserved for the tribal and allotted lands of Indian reservations, except as prescribed by Congress,[322] efforts to appropriate water under state law for use on or around Indian reservations cannot interfere with the Indians' reserved rights.[323] How then can an Indian and a non-Indian using water from the same source determine their relative rights to water other than by initiating a complete stream adjudication?[324] Except in those few instances involving lands served by Indian irrigation projects,[325] there is no administrative or other legal machinery in existence that provides an adequate alternative to the stream adjudication proceeding. It is contended herein that a need exists for such an administrative alternative for determining the measure and scope of the reserved water rights of Indian reservations. This need, and the reason the water right must be established on a use-by-use basis, are the first matters considered in this subsection. The authority of the Secretary of the Interior, acting jointly with the affected tribe, band, or group,

322. United States v. McIntire, 101 F.2d 650 (9th Cir. 1939).

323. *Id.* at 654. In particular, see the claims of the United States in United States v. Bel Bay Community & Water Ass'n, Civil No. 303-71C2 (W.D. Wash., filed Nov. 23, 1971). The case concerns the rights of non-Indians to use ground waters of the Lummi Indian Reservation. The water rights of non-Indian transferees of Indian allotments are discussed in section II, *A, 5 supra*.

324. The non-Indian who desires to resolve the problem by initiating a stream adjudication cannot find a state forum with jurisdiction over Indian water rights for the reasons discussed in section III, *B, 2 supra*. Even the federal court may lack jurisdiction over the Indians and their water rights for the reasons discussed in section III, *C, 2, a infra*.

325. *E.g.*, Act of April 23, 1904, ch. 1495, 33 Stat. 302, *as amended* Act of May 29, 1908, ch. 216, § 15, 35 Stat. 444 (authorizing the Flathead Irrigation Project). The Secretary of the Interior has adopted regulations and administrative procedures for the management of the various irrigation projects operated under the auspices of the Bureau of Indian Affairs. 25 C.F.R. Subchapters R, S, T & W (1975). These regulations cover only a small portion of the lands of the various reservations.

to establish such a system for each reservation, is then discussed. Finally, the operation and benefits of an integrated Indian-Interior administrative water permit system are examined in light of the current lack of a workable system.

a. The need for administrative machinery. The earlier discussion of reserved water rights establishes that such rights exist, and have certain identifiable characteristics. There are many significant legal questions, however, that remain undecided.[326] Fur-

326. A review of the decisions regarding the *Winters* doctrine reveals that reserved water rights for use upon lands withdrawn from the public domain have the following established characteristics:

(1) The federal government holds the reserved right to use a quantity of water to fulfill the purpose for which a reservation or withdrawal of public lands has been made. In the case of Indian reservations, the United States holds the legal title as a fiduciary, and the Indians hold the equitable title to the right to use water.

(2) The quantity of water reserved may be set at the amount that is reasonably necessary for all present and future needs under current standards of economic feasibility. The same standard applies to Indian reservations except that economic feasibility is determined without requiring repayment of the construction cost of Indian irrigation projects until the land passes out of Indian ownership. If for practical reasons this amount cannot or need not be ascertained, and the amount of reserved water is de minimus with respect to the supply, the reservation will embrace an unquantified amount sufficient for the future requirements of the reservation.

(3) The reservation of water is inferred from the purposes sought to be achieved in the treaties, acts of Congress, executive orders, or executive agreements which reserved the land.

(4) The reserved water right appears to have a proprietary—ownership of land and water—basis under the property clause of the Constitution, although *Arizona v. California* provides the basis for a reservation doctrine independent of ownership of federal lands under the commerce clause powers over navigable waters and Indian tribes.

(5) The water right is not dependent upon the application of water to beneficial use at any specified point in time.

(6) The water right is not lost by nonuse, laches, or prescription under state law.

(7) The reserved water right has priority from the date of the creation of the reservation involved.

(8) The right is subject to private appropriations under state law that vested prior to the date the reservation was created.

(9) The right is senior to all appropriations or other uses under state law thereafter made.

A number of questions concerning the measure and scope of the reserved water right have not been clearly and entirely decided, including:

(1) What showing is required to establish the sovereign's implied intent to reserve the waters when the reservation was created?

(2) What are the nature and scope of those purposes for which the use of water will be deemed to be reserved?

(3) May the original purposes for which water will be impliedly reserved be expanded, and if so, how?

ther, the factual questions involved in determining the measure and scope of the reserved rights of specific reservations will remain unanswered until the *Winters* doctrine is judicially or administratively applied in each situation on a use-by-use basis. The measure to be established should include the amount, period, place, and nature of each use. Until that occurs, no one can determine the amount of return flow. Only when the return flow is known can the amount of water available in a watershed for use by nonfederal water users pursuant to state law be determined.

The only existing method for quantifying the reserved water rights of an Indian reservation, a complete stream adjudication suit, is an inadequate means of quantifying these rights for four reasons. First, stream adjudication suits are interminable, expensive, and often inconclusive. Second, if the Indian water rights are in an interstate watershed, only the Supreme Court has jurisdiction to adjudicate the entire matter in one proceeding, unless the stream has been apportioned by a prior adjudication or by an interstate compact.[327] If the Supreme Court declines to exercise its jurisdiction, all of the water rights in the watershed cannot be adjudicated vis-à-vis other rights—regardless of the desire of all affected water users to have their rights determined—unless one

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(4) May nonstatutory withdrawals by the President *without express congressional authorization* validly reserve a right to water?
(5) May the quantities of water reserved under the *Winters* doctrine for a given use based on current standards of economic feasibility be altered upon changed future feasibility standards?
(6) Can the holder of a reserved water right change the place or nature of his use of reserved waters? If so, what rules or limitations will apply?
(7) Does the federal government in its own right or as trustee of Indian reservation lands have the right to unappropriated water, independent of its ownership of the lands, for domestic and industrial uses?
(8) Will the reserved right be implied to fulfill the needs of both Indian and non-Indian communities established on Indian reservations?
(9) Does the termination of a withdrawal of land as a reservation also terminate the reserved water rights?
(10) Does the reservation doctrine apply to acquired lands or is it confined to original public domain lands?
(11) What is the effect of the construction of an authorized reclamation project conflicting with reserved water rights?
(12) Does the reserved right include aboriginal uses of water by the Indians, such as the farming of the pueblos on the Rio Grande, and the preservation of the environment of the various reservations for fish, wildlife, and related uses, such as the protection of minimum stream flows?

Some of the established characteristics of the reserved water right and the unresolved questions were paraphrased from the itemization in WHEATLEY, *supra* note 29, at 135-36. Those characteristics and questions were further discussed in NATIONAL WATER COMM'N, *supra* note 29, at 459-83.

327. *See* section III, *B, 4 supra*.

state agrees to appear in the federal court sitting in the other state. Third, judicial forums for such suits are limited. As demonstrated by discussion of the McCarran Amendment in section III, *B, 2 supra*, state courts and state administrative bodies have no jurisdiction over Indian reserved water rights. Therefore, if the Indians have rights in a particular stream, only a federal court may entertain an action to adjudicate those rights. Fourth, the sovereignty of Indian tribes, discussed in section III, *B, 2, a supra*, may bar suit against a nonconsenting Indian tribe, band, or group. This could prevent any judicial forum from adjudicating Indian water rights without the tribe's consent. Rights in the watershed would remain uncertain because any suit to establish them would be dismissed for lack of jurisdiction over an indispensable party—the affected Indian tribe. The problem cannot be avoided even if the federal government is deemed, as a matter of law, to have authority to consent on behalf of the Indians. As a matter of policy, the government will not give that consent if the affected tribe objects. While Indian tribes may not be able to successfully argue in court that the United States cannot submit their water rights to adjudication without the approval of the affected tribe, it has been the policy of the Department of the Interior to obtain the agreement of the tribes prior to requesting the Department of Justice to adjudicate Indian property or water rights. This policy is based on the Department's interpretation of the Indian Reorganizations Act[328] and the new Indian Self-Determination and Education Assistance Act.[329]

It should be noted here that the first two reasons obtain in the adjudication of all reserved rights, whether Indian or non-Indian. The third and fourth reasons, on the other hand, are unique problems concerning the use of stream adjudication suits to quantify Indian reserved water rights, and demonstrate the unique difficulty of using such existing procedures to establish the measure and scope of Indian reserved water rights. This discussion of the difficulty of using the present judicial system in Indian water rights cases is not intended as an argument for extension of the McCarran Amendment to Indian water rights. Rather, it is intended to highlight the crucial need for the integrated administrative system proposed below.

The four reasons presented above demonstrate that in many instances it may be impossible to quantify the rights in a stream

328. 43 U.S.C. §§ 315 *et seq.* (1970).
329. 25 U.S.C.A. §§ 450, 450a-n, 455-58, 458a-e (Supp. 1, 1975).

system until the Department of the Interior and the Indian tribes establish a mechanism to identify the amount, place, and nature of each use in order that the amount of water remaining for use by non-federal, private users can be determined. The Secretary and the Indian tribes, however, have never promulgated water regulations or instituted procedures that would determine the amount of water reserved, except for those regulations dealing with constructed irrigation projects.[330] The void left by this inaction has provoked varying responses. Some states have made an administrative determination that waters appropriated by non-Indians under state law are surplus to the needs of the Indians.[331] Also, the federal courts have held on occasion that *they* have a duty to fill the void.[332] Judicial action in the face of administrative inaction, however, is not the rule. In one case, the Ninth Circuit Court of Appeals held, on the facts presented to it, that it was not justified in interfering with the Secretary's duty to administer reserved waters.[333] There is, therefore, a clear need for the Department of the Interior and the affected Indian tribes to create, under existing authority, administrative machinery that will establish the measure and scope of Indian reserved water rights.

b. The authority to establish administrative machinery. The Secretary of the Interior is charged with administering the trust responsibilities of the United States with regard to Indians.[334] Congress, however, holds plenary power over Indians and their property,[335] and may withdraw the duties of guardianship and entrust them to any agency it chooses.[336] By the adoption of the General Allotment Act in 1887,[337] Congress gave the Secretary of the Interior specific responsibilities in the administration of

330. 25 C.F.R. Subchapters R, S, T & W (1975).

331. *See* Tulalip Tribes v. Walker, No. 71421 (Super. Ct. for Snohomish County, Wash., Feb. 7, 1963). Until the Indians' water needs are determined, the amount of water surplus to their needs cannot be known. This requires a determination of the purposes for which each reservation was created, and a determination of the measure of the water right which will be implied to fulfill those purposes. *See* section II, *A, 1, a supra.*

332. *E.g.*, Segundo v. United States, 123 F. Supp. 554, 558 (S.D. Cal. 1954), *appeal dismissed*, 221 F.2d 296 (9th Cir. 1955).

333. United States v. Pierce, 235 F.2d 885, 892 (9th Cir. 1956).

334. 25 U.S.C. § 2 (1970); FEDERAL INDIAN LAW, *supra* note 219, at 220.

335. Choate v. Trapp, 224 U.S. 665 (1912); Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902). *See* notes 217-23 and accompanying text *supra*.

336. United States v. Hellard, 322 U.S. 363, 367 (1944). Note the transfer of responsibility for Indian affairs from the War Department to the Department of the Interior. Act of March 3, 1849, ch. 108, § 5, 9 Stat. 395.

337. Ch. 119, 24 Stat. 388 (1887).

water rights for on-reservation uses.[338] The Act gave the Secretary authority to prescribe rules and regulations to secure just and equal distribution of the water supply among the Indians.[339] Thus, the Secretary may promulgate rules and regulations to provide for the just and equal distribution of reserved waters. The place, nature, and amount of each use could be determined by the system so established, and the amount of water remaining for use by non-Indians will become apparent as the system is implemented.

Since the General Allotment Act must be interpreted and implemented with due consideration for the sovereign power and authority of the Indian tribes,[340] the authority of the Secretary under that statute is not absolute. Although the Act has been interpreted by the courts and the Department of the Interior to provide that the United States has retained jurisdiction and control over waters on Indian reservations,[341] current administrative policy and recent legislation[342] have established the principle that the right of self-determination of organized Indian tribes, bands, and groups will not be interdicted by government officials. Hence, exercise of the Department's jurisdiction over reserved water rights must occur jointly with the exercise of jurisdiction by the Indian tribes, bands, and groups that reside on the various reservations.[343]

c. Proposed administrative action. The first requirement

338. *Id.* § 7 (codified at 25 U.S.C. § 381 (1970)).

339. United States v. Powers, 305 U.S. 527, 533 (1939); United States v. Alexander, 131 F.2d 359, 361 (9th Cir. 1942); United States v. McIntire, 101 F.2d 650, 654 (9th Cir. 1939). The courts have construed the statute to indicate "Congressional recognition of equal rights among resident Indians," and to require the just and equal distribution of water when water is in short supply. United States v. Powers, 305 U.S. 527, 533 (1939). This equal right apparently extends to surface waters, United States v. Alexander, 131 F.2d 359 (9th Cir. 1942) (dictum), and ground waters, Tweedy v. Texas Co., 286 F. Supp. 383 (D. Mont. 1968) (by implication).

340. The sovereignty of the Indian tribes is discussed in section III, *B, 2, a supra*.

341. *See* note 339 *supra*.

342. Indian Self-Determination and Education Assistance Act, 25 U.S.C.A. §§ 450, 450a-n, 455-58, 458a-e (Supp. 1, 1975).

343. Congress has never acted to restrict the authority of Indian tribes in the administration of water except by 25 U.S.C. § 381 (1970). Hence, full power and authority would reside in the joint action of the tribes and the Secretary of the Interior. This authority of the Indian tribes has only recently received attention. *E.g.*, McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973); Lomayaktewa v. Hathaway, 520 F.2d 1324 (9th Cir. 1975). For another example, see the claims of the United States in United States v. Bel Bay Community & Water Ass'n, Civil No. 303-71C2 (W.D. Wash., filed Nov. 23, 1971). For an early expression of this concept see Solicitor's Memorandum to the Department of Justice, May 5, 1938 (concerning petition for certiorari in United States v. Powers, 94 F.2d 783 (1938)).

for action is a complete inventory of the existing and potential land and water uses on each reservation. Such inventories are already being conducted on many reservations.[344] These, when completed, will provide the detailed data from which the amount, period, place, and nature of each use, as well as the return flow, can be established.

The administrative machinery necessary to quantify Indian reserved water rights could be created by federal regulations promulgated by the Secretary of the Interior pursuant to 25 U.S.C. § 2 and 25 U.S.C. § 381. Those regulations should establish standards for departmental approval of tribal water codes, including: (1) guidelines for using the information contained in the inventory of existing and potential land and water uses to establish the amount, period, place, and nature of each use through a permit system on a use-by-use basis; (2) due process requirements for notice and hearings before tribal water boards; and (3) procedures for appeal to the Department of the Interior's Board of Indian Appeals.

Once the Department's regulations are promulgated, the Indian tribes, bands, and groups should take the lead. In accordance with the regulations, a tribal water board on each reservation, created by and acting under a tribal ordinance, could establish a tribal water code that would provide for the issuance of a permit for each existing and potential use. Under this permit system, the various uses of the reserved waters could be established in detail and administered by each tribe, band, or group on its own reservation by its own tribal water board pursuant to its own water code.

Once established and implemented with appropriate administrative procedures, these water codes would solve many important unresolved questions concerning the Indians' claims under the *Winters* doctrine. Each tribe could take the lead and establish the position which the tribe or the individual Indian believed to be correct. Other water users could object to any particular use, or the measure thereof, by appearing before the tribal water board. In each case, the action of the tribal water board would be subject to administrative review in the Office of Hearings and Appeals of the Department of the Interior. Eventually, the deci-

344. The Office of Trust Responsibilities in the Bureau of Indian Affairs is responsible for this program. The Director of that Office stated that as of December 1, 1975, there were land and water resource studies in various stages of completion in a three phase program on 96 Indian reservations. These studies will provide much of the information needed to quantify the Indians' reserved water rights.

sion in contested cases would be subject to court review.[345]

If the authority of the tribe over the non-Indian transferee of an allotment is questioned, or if the water rights exercised by entrymen owning private lands within reservation boundaries are in conflict with the Indians' reserved right, the Secretary of the Interior can delegate his authority over these issues and the non-Indian parties to the Indian tribe for an initial determination which would be subject to administrative review. In this manner, the problem that arises when the non-Indian transferee of former allotted Indian land desires to establish the amount of his water right is solved by providing him with a forum in which to bring his case. Similarly, when a non-Indian entryman or non-Indian neighbor to an Indian reservation wishes to establish his right in relation to the Indians' right in a particular stream or groundwater basin, he can request a determination by the tribal water board and then appeal if dissatisfied.

It is contemplated by the author that each of the uses of water established as feasible in the land and water inventory of a reservation, and each of the existing uses of water, would be subject to a permit issued upon completion of the inventory. When that is done on each reservation, the scope and measure of the Indians' water right will be established on a use-by-use basis in each watershed.

Assuming the proposed water codes, regulations, and administrative machinery are provided, a problem arises in integrating

345. 5 U.S.C. § 702 (1970). Some may claim that it is unjust to make non-Indians appear before Indian water boards. However, this will be no more of an injustice than to make the Indians appear in state proceedings.

Arguably, a conflict of interest problem could arise in this context. The reserved water rights of the various Indian reservations are protected by the Department of the Interior. The Secretary is the trustee who has the duty to assert and protect the Indians' water rights. 25 U.S.C. § 2 (1970); Winters v. United States, 207 U.S. 564 (1908). The performance of that duty will be judged by the most exacting fiduciary standards. Seminole Nation v. United States, 316 U.S. 286, 297 (1942); Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252, 256 (D.D.C. 1972); Navajo Tribe of Indians v. United States, 364 F.2d 320, 322 (Ct. Cl. 1966). It could be claimed, therefore, that it is inconsistent for officers of the Department of the Interior to sit as administrative judges in hearings to decide conflicting Indian and non-Indian claims to water. The states' administrative proceedings, however, cannot be used unless Congress so provides. If Congress provided such jurisdiction, the claimants' appeal from state administrative proceedings would be to state courts. The author believes that state court jurisdiction to adjudicate the Indian rights should be denied. *See* section III, *B, 2 supra*. Conducting the Department of the Interior's proceedings pursuant to the provisions of the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* (1970), and participation by the state should be adequate protection for the interests of the non-Indian. If not, another possible solution to the conflict is to create an independent review board within the federal government, but outside the Department of the Interior.

this federal system with the states' administrative systems.[346] The problem could be resolved by the adoption of two proposals. First, the state should appear in hearings before a tribal water board as *parens patriae* for all persons who claim water rights under state law. Second, copies of all permits issued on a use-by-use basis by a tribe to itself, its members, or to any other holder of a reserved right, should, after approval by the Secretary, or resolution on appeal, be filed with the state.

3. *Summary: proposed administrative action*

If the administrative approach proposed herein is adopted for Indian and non-Indian reservations, administrative law judges could immediately begin establishing precedents on the unresolved legal questions of the *Winters* doctrine. Although the determination of certain issues would require judicial review, many other questions involved in establishing reserved water rights are not subject to controversy. Having these matters disposed of by administrative action would result in a needed economy of judicial effort. Failure to resolve these controversies administratively may create a substantial workload which would overtax the currently overcrowded federal courts and might necessitate the establishment of a special federal water court.

Although non-Indian reserved rights are important, the Indians' reserved right is by far the largest and most controversial of the reserved water rights. The administrative machinery proposed herein would bring an early end to much of the controversy by establishing not only the amount of water available to each reservation and each Indian user at the place of each use, but also the amount remaining to non-Indian users from the same water source. The administrative system would accomplish this result by bringing the United States, the Indian water user, and the non-Indian water user (or the state) into one forum having jurisdiction over the water and all the parties. The system would permit the United States and the Indian tribes, bands, and groups to have the maximum input concerning their claims to water while at the same time permitting judicial review for those who seriously disagree. This mechanism is a feasible method for quantifying reserved water rights in the immediate future. The

346. A single integrated record system of water uses is urgently needed so that the public can look to one source to determine the extent of water available for their use at any given water site. *See* II WHEATLEY, *supra* note 29, at 570-71.

necessity of determining relative rights to the nation's water supply mandates adoption of this or a similar administrative approach.

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

June 3, 1974

MEMORANDUM

TO: Assistant Secretary, Energy and Resources
Assistant Secretary, Fish, Wildlife and Parks
Commissioner, Bureau of Indian Affairs

FROM: Secretary Rogers C.B. Morton

SUBJECT: Solicitor's Opinion on the boundaries of and status of title to certain lands within the Colville and Spokane Indian Reservations

The Solicitor has today signed an opinion concerning the boundaries of and status of title to certain lands within the Colville and Spokane Indian Reservations. This opinion in certain respects reverses an earlier opinion of the Solicitor reported at 59 I.D. 147 (1945).

I hereby direct that all appropriate steps be taken to implement and conform to the legal conclusions reached by the Solicitor, including the nullification of the December 18, 1946, tri-party agreement and the negotiation of a new agreement to which the Tribes are a party.

United States Department of the Interior

OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

IN REPLY REFER TO:

June 3, 1974

Memorandum

To: Secretary of the Interior

From: Solicitor Kent Frizzell

Subject: Opinion on the boundaries of and status of title to certain lands within the Colville and Spokane Indian Reservations

This opinion sets forth my conclusions with respect to the following issues: (1) the present boundaries of the Colville and Spokane Indian Reservations in the reservoir area created on the Columbia River by Grand Coulee Dam; (2) the nature of title to certain portions of the original riverbed within those reservations and to the so-called "Indian zone" established in the reservoir area within lands taken in aid of construction of the dam; and (3) the jurisdiction of the Confederated Colville Tribes and Spokane Tribe to regulate hunting, fishing, and boating in that Indian zone.

The Colville and Spokane Indian Reservations were established in 1872 and 1877 respectively, on lands which were later included within the state of Washington. The Colville Reservation was created by an executive order issued by President Grant. Executive Order of July 2, 1872. Some confusion regarding creation of the Spokane Reservation has existed, but the Supreme Court has specifically held that that reservation was established on August 18, 1877, the date of an agreement between agents of the United States and certain Spokane chiefs. Northern Pac. Ry. v. Wismer, 246 U.S. 283 (1918). A subsequent executive order issued by President Hayes was held by the Court merely to have confirmed the earlier reservation. Executive Order of January 18, 1881. 1/

1/ The 1945 Solicitor's opinion referred to infra (59 I.D. 147), dealing with certain of the subjects considered herein, refers only to the 1881 executive order.

The Columbia River, taking a westerly turn from its initially southward flow, forms first the eastern and then the southern boundary of the Colville Reservation. The Spokane Reservation lies eastward across the Columbia from the Colville Reservation, just before the river turns west and just north of the Spokane River, a tributary of the Columbia; the Spokane River, flowing essentially from east to west at this point, forms the southern boundary of the Spokane Reservation.

In 1940 construction of Grand Coulee Dam, a federal reclamation project, was completed on a portion of the Columbia where it forms the southern boundary of the Colville Reservation. In an Act dated June 29, 1940 (54 Stat. 703), 16 U.S.C. § 835d, Congress required the Secretary of the Interior to designate the Indian lands to be taken in aid of the project, and granted "all right, title, and interest" in such designated lands to the United States, "subject to the provisions of this Act." 2/ The following is the full text of this portion of the Act as originally passed by Congress:

> "In aid of the construction of the Grand Coulee Dam project, authorized by the Act of August 30, 1935, 49 Stat. 1028, there is hereby granted to the United States, subject to the provisions of this Act, (a) all the right, title, and interest of the Indians in and to the tribal and allotted lands within the Spokane and Colville Reservations, including sites of agency

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2/ Grand Coulee Dam was authorized to be constructed by the Rivers and Harbors Act of August 30, 1935 (49 Stat. 1028, 1039), but no provision was included therein authorizing the taking of Indian lands. Some Indian lands were actually inundated prior to the 1940 Act. See 59 I.D. 147, 155 (1945).

> and school buildings and related structures and unsold lands in the Klaxta town site, as may be designated therefor by the Secretary of the Interior from time to time: Provided, That no lands shall be taken for reservoir purposes above the elevation of one thousand three hundred and ten feet above sea level as shown by General Land Office surveys, except in Klaxta town site; and (b) such other interests in or to any such lands and property within these reservations as may be required and as may be designated by the Secretary of the Interior from time to time for the construction of pipe lines, highways, railroads, telegraph, telephone, and electric-transmission lines in connection with the project, or for the relocation or reconstruction of such facilities made necessary by the construction of the project."

The area designated by the Secretary pursuant to this provision and thus taken by the United States in aid of the project extends from the original bed of the river (which was not designated) to the nearest contour line indicating an elevation of 1310 feet above sea level. 3/

3/ The 1940 Act was amended by the Act of December 16, 1944 (58 Stat. 813), to authorize a taking of some of the Indians' interest in the lands above the 1310 contour line to protect against the danger of slides in the areas around the reservoir.

Another provision of the Act requires the Secretary to set aside approximately one-fourth of the reservoir area above the dam for the "paramount" use of the Colville and Spokane Tribes for hunting, fishing, and boating. (The reservoir, Lake Roosevelt, extends approximately 150 miles upstream from the dam into Canada, or about twice as far as the northern boundary of the Colville Reservation.) This provision of the Act reads as follows:

> "The Secretary of the Interior, in lieu of reserving rights of hunting, fishing, and boating to the Indians in the areas granted under this Act, shall set aside approximately one-quarter of the entire reservoir area for the paramount use of the Indians of the Spokane and Colville Reservations for hunting, fishing, and boating purposes, which rights shall be subject only to such reasonable regulations as the Secretary may prescribe for the protection and conservation of fish and wildlife: Provided, That the exercise of the Indians' rights shall not interfere with project operations. The Secretary shall also, where necessary, grant to the Indians reasonable rights of access to such area or areas across any project lands."

Pursuant to this provision, the Secretary in 1946 designated an area--the so-called "Indian zone"--which comprises essentially all of the "freeboard," "drawdown," 4/ and

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4/ "Freeboard" area is that land within the area taken for reservoir purposes which is above the high water mark of the reservoir and must be crossed to gain access to the water area. "Drawdown" area comprises the exposed land between the high-water mark and the actual water level.

water area inside the original boundaries of the reservations (except immediately around the dam). 5/ The zone extends to the center line of Lake Roosevelt from the Colville side except where the Colville and Spokane Reservations are adjacent to one another across the Lake. There, the zone includes the entire reservoir with the exception of a strip in the center of the Lake half a mile wide, which was preserved by the Secretary as a navigation lane. In addition, the zone extends from the Spokane side to the center line of a separate arm of the Lake formed by the backup of the Spokane River. The Colville Reservation does not border this arm of the Lake.

Pursuant to a tri-party agreement among the National Park Service, the Office of Indian Affairs, and the Bureau of Reclamation, dated December 18, 1946, the Bureau of Reclamation has primary responsibility for overseeing administration of the reservoir area. 6/ The general public is presently permitted to have equal use of the Indian zone with the Indians, under the supervision of the National Park Service.

5/ The zone is really two zones--one including lands taken from within the Colville Reservation, and the other including areas taken from within the Spokane Reservation. For convenience, however, these areas are referred to jointly as the "Indian zone."

6/ It was the tri-party agreement (which was approved by the Assistant Secretary) that formally set aside the Indian zone. The agreement speaks of a "Colville Indian Zone" and a "Spokane Indian Zone," and the map annexed as an exhibit to the agreement shows the navigation lane referred to above as being a separate area not included within either zone.

The 1946 tri-party agreement reflects the views expressed a year earlier in an opinion by Solicitor Gardner, dealing with, inter alia, certain of the questions considered herein. 59 I.D. 147 (1945). Solicitor Gardner indicated in that opinion that portions of the original, pre-1940 riverbed in this area had been within the boundaries of the reservations, which had not been altered by the taking pursuant to the 1940 Act; and he appeared to suggest that since the original riverbed was not designated by the Secretary, title to the bed was unaffected by the Secretarial designation made pursuant to the Act. 59 I.D. at 152, 166-67, 175 n.60.

I adopt these conclusions, and hold that the tribes do in fact hold the equitable title to those portions of the original riverbed within the boundaries of their reservations. I differ, however, with the 1945 opinion insofar as it dealt with the extent of the tribes' additional interests in the reservoir area. I hold that the tribes' hunting, fishing and boating rights in the zone set aside by the Secretary for their paramount use are reserved rights, preserved by Congress in the 1940 Act, and that those rights are exclusive of any such rights of non-Indians in that zone, although they do not encompass interference with project purposes and are subject to regulation by the Secretary to conserve fish and wildlife. In addition, I hold that the tribes have the power to regulate hunting, fishing, and boating by non-Indians in the Indian zone (which is almost entirely within the boundaries of the reservations). 7/ To the extent that the 1945 opinion conflicts with any of these conclusions, it is hereby overruled.

7/ The only locations in which the boundaries of the Indian zone might extend beyond those of either reservation would appear to be in places where, because of the meander of the original river or a difference in elevation on the two sides of the river, the center line of the original riverbed differs perceptibly from the center line of Lake Roosevelt. Such differences in fact have relevance only to the Colville Reservation, since the presence of the navigation lane in the middle of the Lake prevents the Spokane portion of the zone from approaching the center line of the original riverbed. (In addition, as set forth in the text infra, the Spokanes claim--not without support--that their reservation includes the entire riverbed.)

I. THE BOUNDARIES OF THE COLVILLE AND SPOKANE RESERVATIONS ALONG THE RIVER

A public land decision dated May 29, 1914, J. H. Seupelt, 43 I.D. 267, held that the Colville Reservation boundary was located at the middle of the channel of the Columbia River where it bordered the reservation. In my view this issue was correctly decided in Seupelt (which was followed in the subsequent 1945 Solicitor's Opinion, see 59 I.D. at 152).

An apparent conflict between the boundaries established for the Spokane and Colville Reservations along the Columbia should be noted, however. The boundary of the Spokane Reservation is described in the executive order ratifying creation of the reservation as being located on the west bank of the Columbia River, thus evidently overlapping with the Colville boundary. While I am cognizant of this conflict and of the consequent possibility that an area of joint rights may have been created in the area of overlap, I do not resolve this question herein, because both tribes, by a joint resolution dated September 17, 1973, have requested that I refrain from doing so. In their resolution, the tribes agree that the Secretary may establish a boundary line between the Colville and Spokane portions of the Indian zone at the center of the reservoir despite the overlap, 8/ and that the question of title to the underlying riverbed should be reserved for future determination. Determination of that narrow question is not necessary for decision of the remaining issues considered herein.

8/ The Secretary is directed by the 1940 Act to set aside "approximately one-quarter of the entire reservoir area" as an Indian zone. Thus the zone must at a minimum be close to that one-quarter standard. If, however, in the exercise of his discretion the Secretary should decide to expand the present zone--which may well encompass less than one-quarter of the entire reservoir area--it would appear that he could do so; and an expansion of the zone in the area where the Colville and Spokane Reservations are adjacent to one another could raise the problem of delineating the Colville and the Spokane portions of the zone.

With respect to the effect of the 1940 Act, it is my conclusion that the boundaries of the reservations along the Columbia (and, in the case of the Spokanes, along the Spokane River), wherever their precise location, were unchanged by the Act. It is clear from the line of authority founded on United States v. Celestine, 215 U.S. 278, 285 (1909), that once the boundaries of an Indian reservation are established, neither those boundaries nor the status of title to the tracts included within them may be changed except upon a clear statement of an intent by Congress to change them. See Mattz v. Arnett, 412 U.S. 481 (1973); City of New Town v. United States, 454 F.2d 121, 125, 126 (8th Cir. 1972); 25 U.S.C. §398d. The Supreme Court concluded in Seymour v. Superintendent, 368 U.S. 351 (1962), that the boundaries of the present Colville Reservation have not been affected by allotments, patents and other dispositions of land within the reservation made subsequent to its establishment. The current boundaries of that reservation thus remain as discussed in J.H. Seupelt, supra, and for similar reasons the boundaries of the Spokane Reservation remain unchanged by the Act. 9/ This holding is in accord with the position taken in the 1945 Solicitor's opinion. See 59 I.D. at 175 n.60.

9/ An argument against the conclusion set out above conceivably could be based on United States v. Oklahoma Gas and Elec. Co., 318 U.S. 206 (1943); Ellis v. Page, 351 F.2d 250 (10th Cir. 1965); and Tooisgah v. United States, 186 F.2d 93 (10th Cir. 1950). Oklahoma Gas and Tooisgah, however, were decided prior to the Supreme Court's decisions in Seymour v. Superintendent, supra, which reaffirmed the analysis of Celestine and applied it to a statute opening the Colville Reservation to white settlement and ownership, and Mattz v. Arnett, supra, in which the Court indicated that a congressional intent to alter reservation boundaries can be found only if such an intent is made express in the language of the statute in question or can be clearly perceived from its legislative history and other surrounding circumstances. (DeMarrias v. South Dakota, 319 F.2d 845 (9th Cir. 1963), a case similar to Tooisgah, was explicitly overruled in United States ex rel. Feather v. Erickson, 489 F.2d 99 (8th Cir. 1973), on the ground that its rationale had become untenable in light of recent decisions such as Seymour and Mattz.) And in any event, all three cases--Oklahoma Gas, Ellis, and Tooisgah--involved statutes which, unlike the 1940 Act, conveyed to the United States all of the lands within the reservations in question. The courts

Footnote 9 continued:

In those cases professed to perceive in such circumstances a clear congressional intent to dissolve tribal governments on those reservations. Plainly, no such intent can be imputed to Congress in connection with the 1940 Act. Indeed, as to that Act, Seymour clearly governs; for if, as Seymour holds, continued tribal jurisdiction is not inconsistent with ownership by non-Indians of certain lands in fee within a reservation, then such jurisdiction is a fortiori not inconsistent with similar ownership, for purposes of a reclamation project such as the one involved here, by the Indians' trustee.

2. THE INDIANS' INTEREST IN THE ORIGINAL RIVERBED AND THE INDIAN ZONE 10/

Congress has recognized the Colville Confederated Tribes' full equitable title to tribal lands within the Colville Reservation, both in the 1940 Act and in prior legislation, see United States v. Pelican, 232 U.S. 442, 445 (1914); and similar recognition has been extended with respect to the Spokane Reservation. 11/ Such title, having vested in the tribes, cannot be taken except as clearly and specifically authorized by Congress. 12/ The following two subsections of this opinion deal, in light of this principle, with the nature of the tribes' interest in (a) the pre-1940 riverbed, and (b) the Indian zone.

10/ The bed of a river is that area covered by water during flood stage up to the normal high water mark. With most rivers, much of this area is dry during the greater portion of the year, during which time it must be travered to obtain access to the stream for fishing, hunting, boating, or other purposes. United States v. Kansas City Life Ins. Co., 339 U.S. 799 (1950). See also United States v. Cress, 243 U.S. 316 (1917).

11/ Congressional enactments concerning the Colville Reservation such as the Act of June 21, 1906 (34 Stat. 325, 378), which provided for the payment of $1.5 million compensation for the lands taken by virtue of the Act of July 1, 1892 (27 Stat. 62), and the Act of March 22, 1906 (34 Stat. 80), which provided compensation for lands taken by settlement and entry, were statutes in which Congress recognized tribal ownership of the equitable title to reservation lands. With respect to the Spokane Reservation, see, in addition to the 1940 Act, the Act of May 29, 1908 (35 Stat. 458), authorizing, inter alia, the allotment of land within that reservation.

12/ Mattz v. Arnett, 412 U.S. 481, 504 (1973); Seymour v. Superintendent, 368 U.S. 351 (1962); United States v. Celestine, 215 U.S. 278 (1909).

a. Title to the pre-1940 Riverbed.

The bed of the river (i.e., of the Columbia and of its tributary the Spokane) was not designated by the Secretary pursuant to the 1940 Act, and the tribes were not compensated for any taking with respect to the riverbed. Accordingly, the action taken by the Secretary pursuant to the 1940 Act has not changed the tribes' title, and I hold that each tribe has full equitable title to that part of the riverbed which is within the exterior boundaries of its reservation. 13/

It could conceivably be argued that the lands in the riverbed are owned by the state of Washington because lands underlying navigable waters in territories of the United States are, as a general rule, held by the United States for the benefit of future states under the

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13/ But see page 7, supra. That title of course confers no rights conflicting with the provisions of the 1940 Act.

The principle articulated at page 8, supra, seems to me clearly to overcome the possible argument to the contrary noted by Solicitor Gardner in his 1945 opinion. See 59 I.D. at 167 n.48. That argument is based on the "ordinary rule" that absent the expression of a contrary intention, "the conveyance of title to the upland carries with it the title to the bed of the stream." As the 1945 opinion acknowledged, however, in the present instance title was taken rather than conveyed. And in any event, the broad principles underlying United States v. Celestine, 215 U.S. 278 (1909), and its progeny would make inappropriate the application of any such rule here, since title to the riverbed was not clearly and specifically taken.

"equal footing" doctrine; and both the Colville and Spokane Reservations were created while what is now the state of Washington was still a territory. Some authority in this regard for a claim of ownership by the state might be found in United States v. Holt State Bank, 270 U.S. 49, 55 (1925), which indicates that "disposals by the United States during the territorial period are not lightly to be inferred." Holt State Bank held that the bed of Mud Lake had not been reserved for the use of the Indians on the Red Lake Reservation, and that title thereto consequently had passed to the state of Minnesota when that state entered the union. The Supreme Court has recently made clear, however, that Holt State Bank turned on its particular facts, and has indicated that the focal question is the intent of the United States with respect to the land in question. In Choctaw Nation v. Oklahoma, 397 U.S. 620 (1969), the Court held that the bed of the Arkansas River in Oklahoma had been conveyed to the Cherokees, Choctaws, and Chickasaws prior to Oklahoma's becoming a state. The opinion emphasized that

> "nothing in the Holt State Bank case or in the policy underlying its rule of construction . . . requires that courts blind themselves to the circumstances of the grant in determining the intent of the grantor." 397 U.S. at 634.

Thus if the intent of the United States in administering lands now comprising a state was clearly to reserve the bed of a river for some particular purpose, then that intent, if embodied in an appropriate legislative or administrative act, would result in an exclusion of the riverbed from the lands passing to the state.

I find that the executive order creating the Colville Reservation and the agreement and executive order establishing the Spokane Reservation sufficiently embody such an intent. Particularly on point in this respect is a recent decision by the Court of Appeals for the Ninth Circuit. In United States v. Alaska, 423 F.2d 764 (9th Cir. 1970), that court held that although Alaska was admitted on an equal footing with other states, the state did not own a lakebed within a wildlife refuge previously created by executive order. The court stated that the equal footing doctrine

> "does not mean that the President had no power to previously promulgate the executive order here under scrutiny. If, as we now hold, the language of the order is sufficiently clear to withdraw the water of the lake and the submerged land the state's rights, if any, are subsequent in time and inferior in right. . . . [T]he United States had all the powers of a sovereign and, if it saw fit, it might even grant rights in and titles to lands which normally would go to a state on its admission . . . ." 423 F.2d at 768.

Similarly, I conclude that the bed of the Columbia and Spokane Rivers in the area presently being considered were reserved for the use and benefit of the Colville and Spokane Tribes and therefore were not acquired by the state of Washington when it entered the union. This Department determined in J.H. Seupelt, supra, that the land out to the middle of the Columbia River had been reserved to protect the fishing interests of the Colville Indians, who relied upon the fish as a source of subsistence. This aspect of the opinion in Seupelt, which was cited with approval in the 1945 Solicitor's opinion, 59 I.D. at 152, is now reaffirmed. Nor is there any basis for distinguishing in this regard

between the Colville and Spokane Tribes, 14/ or between the Columbia and Spokane Rivers. Indeed, by placing the boundary of the Spokane Reservation on the far (west and south) banks of those rivers, the executive order confirming creation of that reservation makes it doubly clear that the lands reserved for the use of the Indians included the river bed. 15/

14/ See 59 I.D. at 153.

15/ The outcome of Holt State Bank was in large part dependent on the fact that the Red Lake Reservation, which was involved in that case, had been created by means which did not constitute an "express" setting aside of the lands in question. See United States v. Pollman, 364 F. Supp. 995, 999 (D. Mont. 1973). As the opinion in Holt pointed out,

> "The reservation came into being through a succession of treaties with the Chippewas whereby they ceded to the United States their aboriginal right of occupancy to the surrounding lands. . . . There was no formal setting apart of what was not ceded, nor any affirmative declaration of the rights of the Indians therein, nor any attempted exclusion of others from the use of navigable waters. The effect of what was done was to reserve in a general way for the continued occupation of the Indians what remained of their aboriginal territory; and thus it came to be known and recognized as a reservation. . . . There was nothing in this which even approaches a grant of rights in lands underlying navigable waters; nor anything evincing a purpose to depart from the established policy . . . of treating such lands as held for the benefit of the future State." 270 U.S. at 58-59 (footnote omitted).

Footnote 15 continued:

The Court in fact noted in Holt that "[o]ther reservations for particular bands were specially set apart, but those reservations and bands are not to be confused with the Red Lake Reservation and the bands occupying it." Id. at 58 n. These aspects of Holt, which distinguish that case from United States v. Alaska, supra, and from the situation now before me, were emphasized in the Pollman decision, supra. That decision held that title to the bed of the south half of Flathead Lake, within the Flathead Reservation, did not pass to Montana when that state joined the union; instead, the court concluded, since the reservation clearly had been set aside for Indian use prior to Montana's becoming a state, the bed continued to be equitably owned by the tribes in question. See also Montana Power Co. v. Rochester, 127 F.2d 189 (9th Cir. 1942).

It should also be noted that in United States v. Big Bend Transit Co., 42 F. Supp. 459 (E.D. Wash. 1941), the court held that the bed of the Spokane River was part of the Spokane Reservation. The opinion observed that "[t]he State of Washington specifically disclaimed all title to all lands held by any Indian or Indian Tribes provided that the Indian lands should remain under the absolute jurisdiction and control of the Congress." 42 F. Supp. at 467 (citing Enabling Act, Rem. Rev. Stats. of Wash. Vol. 1, pp. 332, 333; 25 Stat. 676, 677, sec. 4, par. 2).

b. The Tribes' Interest in the Indian Zone

As outlined above, the Secretary designated all lands between the original riverbed and the nearest 1310-foot contour line to be taken in aid of the Grand Coulee project. Under the Act, accordingly, the United States was granted all of the "right, title, and interest" of the Indians in and to all Indian lands so designated and taken, "subject to the provisions of this Act . . . ." And one of those provisions specified that the Secretary should "set aside" approximately one-quarter of the reservoir area for the "paramount use of the Indians" for hunting, fishing, and boating purposes.

The question to which I now turn concerns the precise nature of the Indians' interest in the so-called Indian zone designated by the Secretary pursuant to that provision. Solicitor Gardner concluded in 1945 that that interest was not necessarily an exclusive one. I am constrained to disagree with this position in view of my conclusion with respect to an issue not specifically considered in the 1945 opinion. In my view the Indians have a reserved and therefore exclusive interest in the Indian zone under the 1940 Act. 16/

Solicitor Gardner viewed the word "paramount" in the Act as reflecting a congressional purpose to create a "flexible scheme" giving the Secretary discretion to determine whether exclusive use of the zone by the Indians is "necessary to ensure the realization of their privilege." 59 I.D. at 170. Standing alone, however, the term

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16/ This opinion concerns only the boundaries of the Colville and Spokane Reservations in the reservoir area, the title to certain portions of the riverbed in that area, the right of tribal members to use the Indian zone designated by the Secretary pursuant to the 1940 statute for hunting, fishing, and boating purposes, and the power of the tribes under that statute to control the use of that zone for those purposes by others. The opinion does not affect or change any of the governmental and institutional arrangements under which Grand Coulee Dam and the Third Powerplant connected therewith are now being operated and maintained.

"paramount" clearly does not determine the issue of whether exclusivity was intended. As Solicitor Gardner himself pointed out, congressional "reliance upon the adjective 'paramount' alone in this context was probably unfortunate," Id. at 169, since the word is ambiguous with respect to connotations of exclusivity. The relevant legislative history, however, while not altogether consistent, serves in my view to resolve the question along lines somewhat different from those articulated the 1945 Solicitor's opinion.

The legislative history of the Act concededly does not point unequivocally in a single direction. In its report to Congress with regard to the proposed legislation, for example, the Department suggested that "the rights of the Indians to use this area for hunting, fishing, and boating will not necessarily be exclusive rights." H.R. Rep. No. 2350, 76th Cong., 3d Sess. 2 (1940). This suggestion represents the strongest support for the position taken in the 1945 opinion. On the other hand, the bill which became the 1940 Act was drafted in its final form by the Office of Indian Affairs jointly with the Bureau of Reclamation shortly after the Assistant Commissioner of Indian Affairs had indicated that he contemplated the "setting aside of a particular part or parts of the reservoir for the exclusive use of the Indians in exercising their rights, subject, of course, to the primary use of the reservoir for reservoir purposes." 59 I.D. at 157 (emphasis added). Indeed, the very memorandum which set forth that contemplation of "exclusive" use expressed the notion in proposed statutory language utilizing the word "paramount." Id.

Early drafts of the Act prepared within the Department provided that the title to be granted to the United States should be "subject to the reservation for the Indians of an easement to use such lands for hunting, fishing, boating, and other purposes." 59 I.D. at 156. The Bureau of Reclamation resisted this approach, not only out of opposition to the open-ended reservation of easements for unspecified "other purposes," but also on the basis of a concern that administration of the project should not be made unduly complicated. The Indian lands to be taken were not contiguous, but rather were arranged in a "checkerboard" pattern--extending, in fact, upriver beyond the boundaries of the reservations. 17/ This situation obviously would have rendered the simple reservation of an easement with respect to the particular lands taken difficult to oversee and administer. Indeed, it was feared that a scheme under which the Indians retained scattered "rights in all parts of the reservoir area . . . would interfere with the proper development of its recreational facilities." Id.

Thus the scheme of the Act was modified, and the present statutory language, authorizing the creation of a contiguous Indian zone, was agreed upon. There is no persuasive evidence of any determination at the time of this modi-

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17/ Congress had opened both the Spokane and Colville Reservations to entry and settlement by non-Indians. See the Acts of June 19, 1902 (32 Stat. 744) (Spokane), March 22, 1906 (34 Stat. 80) (Colville), and May 29, 1908 (35 Stat. 458) (Spokane). See also the title opinion dated May 2, 1973, issued by the Title Plant, Portland Area Director's Office, Bureau of Indian Affairs, which includes 11 color-coded maps depicting the boundaries of the Colville Reservation and the source of title for each parcel of land in the designated area. That title opinion and all related documents are on file in the above office.

As for the area upriver from the reservations, the Colville Reservation originally extended considerably north of its present northern boundary but was diminished by the Act of July 1, 1892 (27 Stat. 62), which provided for allotments to Indians living in the severed portion. See 59 I.D. at 151.

fication that the nature of the Indians' rights was to be different than had originally been contemplated when the reservation of an easement was specified, nor is there any apparent reason or basis for such a determination. In this context, given the background outlined above and the limited purpose that the change in approach evidently was designed to accomplish, the soundest inference is that only the location of the areas to which such rights were applicable was changed. 18/ It is the failure of Solicitor Gardner to draw this inference, or even to deal with the question of whether the Indians' rights were reserved rights, which represents the chief point of departure between his analysis of the Act and mine.

This view of the Act also comports more closely with an agreement dated June 14, 1940, between the Office of Indian Affairs and the Bureau of Reclamation, relating to acquisition of Indian lands for the project. Paragraph 7 of that agreement, which was concluded only fifteen days prior to the date of the Act, reflects an understanding that "existing" rights of hunting and fishing in the areas to be taken were to be "satisfied" by the Act,

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18/ Since the Indian zone is located almost totally within the exterior boundaries of the Colville and Spokane Reservations, there is no geographical anomaly involved in the conclusion that the Indians' rights in the zone are reserved rights.

thus arguably, at least, suggesting a reservation of preexisting rights. 19/

The above analysis is reinforced by the language of the Act. The Secretary is directed to "set aside" an Indian zone from the lands taken for project purposes--terminology that at least is consistent with, and may well be indicative of, a contemplation that already existing

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19/ The 1945 Solicitor's opinion includes the following passage:

> "It is important to realize that the acquisition of Indian allotted lands for the reservoir began long in advance of the passage of the act of June 29, 1940, and that some of these lands were inundated prior to their acquisition. The plan at this time was to reserve easements to the Indian owners which would enable them to make use of the reservoir without any limitation upon these uses, and therefore the riparian factor of severance damage was not taken into consideration in appraising the Indian lands, either at this time or subsequently, the lands of the Indians and non-Indians alike being appraised upon the same basis. The Indian allotted lands were acquired under memoranda of understanding between the Indian Office and the Bureau of Reclamation approved by the Department on April 6, 1939, and June 14, 1940. Paragraph 7 of the latter memorandum of understanding provided: 'Nothing in this agreement shall affect existing hunting and fishing rights of the Indians in the Columbia River Reservoir area intended to be satisfied by the enactment into law of the provisions of the second paragraph of Section 1 of S. 3766 and H.R. 9445 * * * (76th Congress, 3d Session).'" 59 I.D. at 155 (emphasis added; footnotes ommitted).

Indian rights to the lands designated were being preserved. Moreover, the directive is to set aside the zone "in lieu of" reserving to the Indians hunting, fishing, and boating rights "in the areas granted under this Act"--language which would appear to suggest the notion outlined above, to the effect that the Act merely imposed a geographical shift of those preexisting rights. Indeed, the Indians are specifically said to have "rights" in the zone set aside, which rights are "subject only" to (a) the Secretary's authority to promulgate conversation regulations, and (b) the overriding proviso that the rights "shall not interfere with project operations." 20/ The implication thus is that those rights are not "subject" to any concurrent rights of other persons in the Indian zone. 21/

The conclusion that the Act contemplates retention by the Indians of preexisting (and therefore reserved and exclusive) rights is, in addition, strongly supported by the principle that enactments permitting a taking of Indian property are to be construed narrowly, as giving congressional consent only to the most limited extinguishment of Indian proprietary rights necessary for fulfillment of the purpose of the taking. Mattz v. Arnett, supra, 412

20/ The existence of these two limitations on the Indians' rights may well explain why the term "paramount" rather than "exclusive" was used in the Act, and may also perhaps underlie the comment in the Department's report quoted on page 15, supra.

21/ I do not mean to suggest that this analysis of the language of the Act is conclusive of the questions considered herein; indeed, my construction of that language is not the only plausible construction. I do, however, believe that my reading of the language is the soundest of the various possible readings, and that in combination with the analysis of the history and purposes of the Act set out above and the rules of statutory interpretation referred to in the text infra, it provides a sound basis for my ultimate conclusions.

U.S. at 504; Menominee Tribe v. United States, 391 U.S. 404 (1968); United States v. Santa Fe Pac. R. Co., 314 U.S. 339 (1941); Seymour v. Superintendent, supra; United States v. Nice, 241 U.S. 591 (1916); United States v. Celestine, supra. There is no provision in the 1940 Act for any non-Indian use of areas included within the Indian zone.

Similar support for this view of the Act stems from the well established principle that statutes affecting Indian interests are, where ambiguous, to be construed most favorably to the Indians involved. E.g., Squire v. Capoeman, 351 U.S. 1, 6-9 (1956); Carpenter v. Shaw, 280 U.S. 363, 367 (1930); United States v. Santa Fe Pac. R. Co., supra, 314 U.S. at 353-54; Choate v. Trapp, 224 U.S. 665, 675 (1912); Cherokee Inter-marriage cases, 203 U.S. 76, 94 (1906).

Accordingly, although neither the Act nor the legislative history underlying it is crystal clear, I am compelled by the above considerations to hold that the Indians' rights to "paramount use" of the Indian zone are reserved rights held by the United States in trust for them, and that those rights are therefore exclusive (except as limited by the prohibition against interference with project operations and by the Secretary's explicitly conferred power to prescribe conservation regulations). Those rights are a condition to and a burden upon whatever title the United States received pursuant to the 1940 Act. Cf. Seufert Bros. v. United States, 249 U.S. 194 (1919).

3. THE JURISDICTION OF THE TRIBES TO REGULATE FISHING, HUNTING, AND BOATING IN THE INDIAN ZONE

Given my holding in the preceding section, the question arises whether in addition to having exclusive hunting, fishing, and boating rights in the Indian zone, the tribes also have the authority to regulate the use of that area by others for such purposes. It is my conclusion that they do.

With respect to hunting and fishing, such a right is clearly inferable from 18 U.S.C. §1165, which, as was held in Quechan Tribe v. Rowe, 350 F. Supp. 106, 110 (S.D. Cal. 1972), "makes it a crime for any person to enter an Indian Reservation for the purpose of hunting, fishing, or trapping unless such person has tribal permission to do so." 22/ Quechan held that section 1165 "confirmed" the right of tribes to "control, regulate and license hunting and fishing" within their reservations 23/ See also United States v. Pollmann,

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22/ Section 1165 reads as follows:

> "Whoever, without lawful authority or permission, willfully and knowingly goes upon any land that belongsto any Indian or Indian tribe, band, or group and either are held by the United States in trust or are subject to a restriction against alienation imposed by the United States, or upon any lands of the United States that are reserved for Indian use, for the purpose of hunting, trapping, or fishing thereon, or for the removal of game, peltries, or fish therefrom, shall be fined not more than $200 or imprisoned not more than ninety days, or both, and all game, fish and peltries in his possession shall be forfeited."

23/ In theory there may be some question about whether the tribes enjoy regulatory power in those few portions of the Indian zone which are not within the boundaries of the reservations, and whether 18 U.S.C. §1165 would be applicable to those areas in view of the general principle that criminal statutes are to be strictly construed. I am inclined, on the basis of the reasoning set out in the text at note 26, infra, toward the view that the tribes do have jurisdiction in those areas; and I am similarly inclined to conclude that the language of section 1165--which speaks of "lands of the United States that are reserved for Indian use"--is applicable

Footnote 23 continued:

to all portions of the Indian zone, in light of my holding above that the tribes' hunting, fishing, and boating rights in the zone are reserved rights. (With respect to the latter point, I note that section 1165 requires that the substantive terms of the statute be violated "knowingly and willfully," so that my view of the statute would not operate to ensnare the unwary. See United States v. Pollmann, supra.) These questions probably are of no realistic significance, however, in view of the minimal extent of such geographical discrepancies and the practical difficulty of ascertaining their location.

364 F. Supp. 995, 1001-02 (D. Mont. 1973). Thus any tribal ordinances properly enacted to regulate hunting and fishing in the Indian zone must be regarded as valid and may be enforced by the Colville and Spokane tribal courts so long as the requirements of all pertinent federal statutes, such as 25 U.S.C. §§ 1301 et seq., are observed. 24/ See Alaska Pac. Fisheries v. United States, 248 U.S. 78 (1916); Morris v. Hitchcock, 194 U.S. 384 (1904); Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89 (8th Cir. 1956). Such ordinances may also, of course, in effect be enforced in the federal courts through application of section 1165.

The right to regulate boating in the Indian zone is not specifically conferred upon the tribes by section 1165, which speaks only of hunting and fishing. In my view, however, the tribes' regulatory authority in the zone extends to boating as well.

It has long been settled that Indian tribes, bands, and nations originally possessed all aspects of sovereignty, and that those groups today retain such sovereignty, at least in terms of power over their internal affairs, except as limited by act of Congress. Williams v. Lee, 358 U.S. 217, 220, 223 (1959); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Colliflower v. Garland, 342 F.2d 369 (9th Cir. 1965); Iron Crow v. Oglala Sioux Tribe, supra, 231 F.2d at 91-94, 98; Oliphant v. Schlie, ___ F. Supp. ____, No. 511-73C2 (W.D. Wash., filed March 21, 1974); see 55 I.D. 14 (1934). In McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172-73 (1973), the Supreme Court recently emphasized the pertinence of these principles to questions such as the one now before me:

24/ The Colville Constitution, which has been approved by the Secretary, provides in Article V, section 1(a), that the elected tribal council has the responsibility and authority "to protect and preserve the tribal property, wildlife and natural resources . . . ." A similar provision appears in Article VII, Section 1(c) of the Spokane Constitution.

"The Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution of [such] issues . . . ., but because it provides a backdrop against which the applicable treaties and federal statutes must be read. It must always be remembered that the various Indian tribes were once independent and sovereign nations and that their claim to sovereignty long predates that of our own Government. Indians today are American citizens. They have the right to vote, to use state courts, and they receive some state services. But it is nonetheless still true, as it was in the last century, that '[t]he relation of the Indian tribes living within the borders of the United States [is] an anomalous one and of a complex character. . . . They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, nor as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they reside.' United States v. Kagama, 118 U.S. at 381-382." (Footnotes omitted.)25/

25/ While decisions concerning the recognition and preservation of tribal sovereignty have basically dealt with reservations established by treaty, I can perceive no reason for any different conclusion where an executive order reservation is involved, at least so long as the executive order does not clearly and specifically indicate that the reservation was created for an exceptional purpose incompatible with ordinary notions of tribal sovereignty.

On the basis of this approach, the 1940 Act's reservation of exclusive boating rights to the tribes provides in my view a sufficient basis for tribal jurisdiction to regulate that activity in the Indian zone. 26/ The conferral of such exclusive rights would be futile unless there existed some appropriate means of enforcing those rights. It is reasonable, therefore, especially absent any other clearly effective mechanism for the enforcement of such rights, to conclude that a concomitant enforcement authority rests in the tribes themselves.

The Indian zone is, as I have noted, almost entirely within the boundaries of the reservations. A properly drafted tribal ordinance could provide that anyone entering the reservation subjects himself to tribal regulations dealing with activities as to which the Indians have exclusive rights, and to the jurisdiction of the tribal courts in such respects. See, e.g., Buster v. Wright, 135 F. 947 (8th Cir. 1905), app. dismissed, 203 U.S. 599 (1906); cf. Oliphant v. Schlie, supra, ___F. Supp. at ___:

> "[A]n Indian tribe's powers of local self-government originally included the power to enact criminal laws pertaining to non-Indians and to confer upon its tribal court jurisdiction over

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26/ I see no sound basis or reason for distinguishing commercial navigation from pleasure boating in this regard. The Act is not in terms limited to rights of the latter sort; indeed, excessive or unregulated commercial navigation might well interfere with the Indians' hunting and fishing as well as boating rights. In this connection I note that navigation rights exist from one end of the lake to the other in the non-Indian zone (including the "navigation lane" established by the Secretary between the Colville and Spokane portions of the Indian zone).

> the person of a non-Indian to enforce such laws on those lands reserved for such Indians within the established boundaries of their reservation. Such jurisdiction continues to this day, save as it has been expressly limited by the acts of a superior government, i.e., the United States Government." 27/

Nor is the tribal authority outlined above undercut by the regulatory authority of the state of Washington under its criminal law and Public Law 280, 18 U.S.C. §1162. It is immaterial, in fact, whether the state has full jurisdiction over the Colville and Spokane reservations in the respects authorized by that statute; for 18 U.S.C. §1162(b) in any event precludes state regulation of Indian trust property "in a manner inconsistent with any Federal . . . statute," and likewise prevents the state from

> "depriv[ing] . . . any Indian tribe, band or community of any right, privilege, or immunity afforded under any federal . . . statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof."

27/ The court in Oliphant restricted its holding to offenses

> "occuring on land held in trust by the United States Government for the benefit of Indians within the exterior boundaries of the . . . Reservation. Jurisdiction . . . over non-Indians on fee patent lands within the reservation is not presently before the Court, and the Court expresses no views on the question." ____F. Supp. at ____.

Similarly, I deal above only with tribal authority to regulate activities as to which the Colvile and Spokane Tribes have exclusive and reserved rights, in areas to which such rights are applicable.

Such rights are granted both by the 1940 Act and by 18 U.S.C. § 1165, so that state regulatory law of the sort referred to above can in no way undermine the Indians' exclusive right to hunt, fish, or boat in the Indian zone or their right to regulate those activities there. Any state law conflicting with tribal ordinances in these areas, or purporting to undercut such tribal jurisdiction, would be invalid. See United States v. Pollmann, supra, 364 F. Supp. at 1002; Quechan Tribe v. Rowe, supra. 28/

28/ As noted above, there are in reality two Indian zones -- a Colville zone and a Spokane zone -- rather than one. Consistent with this fact and with the 1945 Solicitor's opinion, 59 I.D. at 159-60, each tribe in effect has jurisdiction as described above over its portion of the zone.

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF WASHINGTON

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

BRIEF OF SPOKANE INDIAN TRIBE

APPENDIX ii

(Suggest this Appendix be filed with Exhibits)

Presented by:

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