May 14, 1969

IMPLEMENTATION OF MEMORANDUM RESPECTING AMERICAN INDIAN RESERVATION ECONOMIC DEVELOPMENT IMPEDED OR THWARTED THROUGH ABRIDGMENT OR LOSS OF INDIAN TITLES TO LAND AND RIGHTS TO THE USE OF WATER BY POLICIES, AGENCIES AND PERSONNEL OF FEDERAL GOVERNMENT

WITH POINTS AND AUTHORITIES IN SUPPORT

SUBJECT INDEX

William H. Veeder
Water Conservation and
Utilization Specialist

March 24, 1969

MEMORANDUM RESPECTING
AMERICAN INDIAN RESERVATION ECONOMIC DEVELOPMENT RETARDED OR THWARTED THROUGH ABRIDGMENT OR LOSS OF INDIAN TITLES TO LAND AND RIGHTS TO THE USE OF WATER BY POLICIES, AGENCIES AND PERSONNEL OF FEDERAL GOVERNMENT

WITH POINTS AND AUTHORITIES IN SUPPORT

This memorandum has been prepared in regard to subject number (2) of the letter dated February 7, 1969, from Senator Proxmire, Chairman, Subcommittee on Economy in Government, to Commissioner Robert L. Bennett, Bureau of Indian Affairs, Department of the Interior.

Subject number (2) is as follows:

"A paper on the relationship between water right problems and economic development."

This memorandum is based upon the facts and the law as they have been found to exist in regard to the above quoted subject. It is reflective of the perplexing paradoxes confronting officials of the National Government charged with the obligations of protecting, preserving, adjudicating and administering Indian lands and rights to the use of water on American Indian Reservations in Western United States.

William H. Veeder
Water Conservation and
Utilization Specialist

March 24, 1969

SUMMARY OF
MEMORANDUM RESPECTING
AMERICAN INDIAN RESERVATION ECONOMIC DEVELOPMENT RETARDED OR THWARTED THROUGH ABRIDGMENT OR LOSS OF INDIAN TITLES TO LAND AND RIGHTS TO THE USE OF WATER BY POLICIES, AGENCIES AND PERSONNEL OF FEDERAL GOVERNMENT
WITH POINTS AND AUTHORITIES IN SUPPORT

1. American Indian Reservations in Western United States contain invaluable natural resources including the land of which they are comprised, minerals, forests, lakes, streams and other sources of water which arise upon, border, traverse or underlie the Reservations.

2. Economic development of the Western Reservations is inseparable from Indian rights to the use of water which are the most valuable of all of the natural resources in the arid and semiarid regions. Those rights are the catalyst for all economic development, for without them the Reservations are virtually uninhabitable, the soil remains untilled, the minerals remain in place, and poverty is all-pervasive.

3. Since time immemorial the Indians' water resources were inextricably a part of their way of life, indeed, a prime feature of their sustenance. Highly sophisticated irrigation systems were developed along the Gila River by the Pimas and Maricopas; Menominees harvested their wild rice, used the streams for travel, fishing and hunting; the Mohaves, Quechans and other Colorado River Indians depended on the stream's annual Nile-like floods to irrigate their crops; the Yakimas lived upon and traded salmon taken from the Columbia; as did the Northern Paiutes - the fish-eaters - who took the famous cutthroat trout from the Truckee River and Pyramid Lake - their species destroyed by the Bureau of Reclamation.

4. Indian Winters Doctrine Rights to the use of water in the streams or lakes which arise upon, border, traverse or underlie their Reservations, have been accorded by the Supreme Court and other courts a prior, paramount and superior status on the streams for the present and future economic development of the Western Reservations.

5. By the Constitution of the United States there was created a relationship between the Nation and the American Indians of transcendent dignity. That relationship of great dignity had its genesis in the policies adhered to by the European sovereigns who colonized this Continent and it was firmly established during the harsh and bitter years of the Revolutionary War and the years which were to ensue prior to and including the adoption of the Constitution.

6. It has been declared that the relationship existing between the American Indians and the Nation, "resembles that of a ward to his guardian" - a trust relationship with all of the express and implied obligations stemming from it. Only the uninformed ascribe to that trust a demeaning connotation in regard to the American Indians.

7. Great stress must be applied to the nature of the Indian trust property, including Indian rights to the use of water.

(a) It is private property, legal title to which is held by the United States in trust for the American Indians as beneficial holders of equitable title.

(b) Indian property is not public property as is the other property of the Nation.

8. Plenary power and responsibility under the Commerce Clause of the Constitution reside with the Congress to effectuate the trust relationship between the United States and the American Indians.

9. Congress is likewise invested by the Constitution with plenary power over the "public lands," all other lands, all rights to the use of water, title to which resides in the Nation. These lands and rights to the use of water are to be administered for the Nation as a whole. It is imperative that the nature of the right, title, interests and obligations of the Nation in regard to these properties held in trust for the Nation as a whole be sharply distinguished from the lands and rights to the use of water of the American Indians.

10. Congress in the exercise of its plenary power over the Nation's lands and rights to the use of water has invested the Department of the Interior with broad authority to administer, develop, sell, dispose of, and otherwise to take all required action respecting those lands and rights to the use of water. Agencies within the Department of the Interior carrying out the will of Congress in regard to those properties held for the public as a whole include but are not limited to: The Bureau of Reclamation, Bureau of Land Management, National Park Service, Bureau of Outdoor Recreation and the agencies generally responsible for the propagation and protection of fish and wildlife.

11. Administrators, engineers, scientists, within the Department of the Interior, all acting within the scope of the authority vested in the Secretary of the Interior, are:

(1) Charged with the responsibility of fulfilling the Nation's trust status in regard to the Indian lands and rights to the use of water, which, as stated, are private in character, to be administered solely for the benefit of the Indians;

(2) Charged with the responsibility of administering lands and rights to the use of water claimed in connection with reclamation projects, administration of grazing districts, and other land uses requiring the exercise of rights to the use of water; fish and wildlife projects, recreational areas and other activities, all of which require rights in the streams.

12. (a) Lawyers in the Department of the Interior directly responsible to the Solicitor, in whom resides the obligation of performing the "legal" work for that Department; all of the agencies of it, including the Bureau of Indian Affairs, Indians and Indian Tribes, are constantly confronted with the sharp conflicts of interests between the Indian land and rights to the use of water, and the numerous other agencies referred to that likewise make claims to those waters and contest the rights and claims of the Indians to them;

(b) Lawyers in the Department of Justice directly responsible to the Attorney General, the Nation's chief law officer, have the responsibility under the same Assistant Attorney General:

(1) To defend, protect, preserve and have adjudicated, title to the lands of the Indians and their rights to the use of water, and otherwise to act as lawyers for the trustee obligated to perform with the fullest degree of loyalty to the Indians;

(2) To proceed as an adversary against the Indian claims for the seizure of their lands and rights to the use of water, seeking to limit or otherwise defeat the claims of the Indians predicated upon the laws which other attorneys of the Justice Department are required effectively to espouse and advocate on behalf of the Indians;

(3) To perform legal services in regard to lands and rights to the use of water in streams and other water sources where the Indian rights are in conflict with claims of other agencies of the United States.

13. Both the administrators of the Department of the Interior and the lawyers of both Interior and Justice ove the highest degree of ethical, moral, loyal and equitable performance of their trust obligations to the American Indians. They are charged, moreover - as professionals - with the highest degree of care, skill and diligence in executing their broad assignments for the protection, preservation, administration and legal duties respecting Indian trust properties including, but not limited to, the invaluable Indian Winters Doctrine Rights to the use of water.

14. Conflicting responsibilities, obligations, interests, claims, legal theories - indeed, philosophies - oftentimes prevent the Interior and Justice Department administrators, planners, engineers and lawyers from fulfilling the trust obligation which the Nation owes to the American Indians in regard to natural resources, particularly in the complex and contentious field of Indian rights to the use of water in the arid and semiarid regions of western United States. Failure by those Departments, agencies and personnel to fulfill the Nation's obligation to protect and preserve Indian rights to the use of water includes, but most assuredly is not limited to: (a) Lack of knowledge of the existence, or the nature, measure and extent of those rights to the use of both surface and ground waters - refusal to recognize Indian rights are private rights to be administered separate, apart and independent of the "public rights" of the Nation as a whole in identically the same manner as other private rights are protected and preserved; (b) Lack of timely action to preserve, protect, conserve and administer those rights; (c) Inability or reluctance at the decisional level to insist upon recognition and preservation of Indian rights to the use of water when to do so would prevent the construction - and/or administration in the manner desired - of a reclamation or other project conflicting with the Indians for water, the supply of which is insufficient; (d) Attempted subordination, relinquishment, or conveyance of Indian rights to the use of water which are in conflict with other claims, Federal, State or local; (e) Failure to assert rights, interests and priorities of the Indians on a stream or project when to do so would limit the interests of non-Indians; (f) Opening Reservations to non-Indian occupancy with the seizure of Indian land and rights to the use of water, with or without the payment of just compensation; (g) The imposition of servitudes, easements, and illegal occupancy or use of Indian lands and rights to the use of water.

15. Economic development of the American Indian Reservations in western United States, due largely to conflicting interests within the Interior and Justice Departments, or vacillating policies - a natural consequence of conflicting interests, responsibilities, and obligations within the Federal Establishment - has been (a) prevented by the abridgment or loss of Indian rights to the use of water; (b) intentionally prevented in whole or in part, or deferred in whole or in part, by the refusal to permit development of Indian lands with rights to the use of water.

16. Irreparable damage to the American Indians in western United States has ensued by reason of the consequences flowing from the conflicts described above. The Indians have suffered from extreme poverty, with the attendant ills of malnutrition, high infant mortality rate, reduced life expectancy, disease, and the shattering loss of human dignity which stems from poverty and deprivation of the necessities of life.

Conclusion:

Economic development of the American Indian Reservations in western United States will continue to be prevented or severely curtailed in the absence of drastic changes in the laws and policies which would eliminate conflicting rights, responsibilities and obligations which presently exist among the several agencies of the National Government, all as reviewed in the accompanying memorandum and the summary set forth above.

Recommendation:

Congress should enact legislation which would place in an agency independent from the Department of the Interior and the Department of Justice the full responsibility for the protection, preservation, administration, development, adjudication, determination, and control, including but not limited to all legal services required in connection with them, of the lands and rights to the use of water of the American Indian Reservations in western United States.

In furtherance of economic development of the American Indian Reservations in western United States it is imperative that there be undertaken an inventory of all of the Indian rights to the use of water in the streams and other sources of water arising upon, bordering upon, traversing or underlying their lands. This inventory should be undertaken with the objective of ascertaining, to the extent possible, the existence, character and measure of the rights as they relate to the present and future development of the Reservations. It is equally important to determine the highest and best use which can be made of these invaluable rights to the use of water and to chronicle those rights as they relate to each water source, indicating the highest and best present use to which they may be applied. They should likewise be evaluated from the standpoint of their maximum potential in the future by reason of the fact that those rights must be exercised in perpetuity and in contemplation of the ever-changing environment of western United States with its increasing population and water demands.

There follows the memorandum on which the preceding summary, conclusion and recommendation are predicated.

William H. Veeder
Water Conservation and
Utilization Specialist

MEMORANDUM RESPECTING
AMERICAN INDIAN RESERVATION ECONOMIC DEVELOPMENT RETARDED OR THWARTED THROUGH ABRIDGMENT OR LOSS OF INDIAN TITLES TO LAND AND RIGHTS TO THE USE OF WATER BY POLICIES, AGENCIES AND PERSONNEL OF FEDERAL GOVERNMENT
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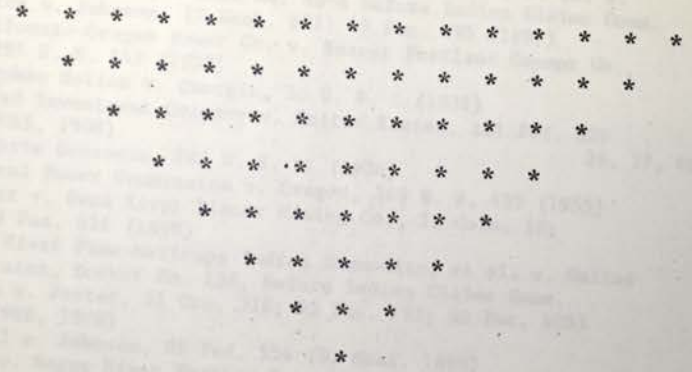

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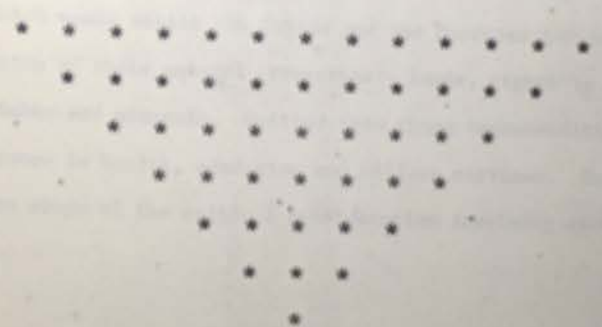

IMPLEMENTATION OF
RECOMMENDATION RESPECTING
AMERICAN INDIAN RESERVATION ECONOMIC DEVELOPMENT RE-
TARDED OR THWARTED THROUGH ABRIDGMENT OR LOSS OF INDIAN
TITLES TO LAND AND RIGHTS TO THE USE OF WATER BY POLICIES,
AGENCIES AND PERSONNEL OF FEDERAL GOVERNMENT

WITH POINTS AND AUTHORITIES IN SUPPORT

In the memorandum dated March 24, 1969, title to which is set forth above and of which these comments are supplementary, there were set forth these conclusions and recommendation among others:

"Conclusion:

"Economic development of the American Indian Reservations in western United States will continue to be prevented or severely curtailed in the absence of drastic changes in the laws and policies which would eliminate conflicting rights, responsibilities and obligations which presently exist among the several agencies of the National Government, all as reviewed in the accompanying memorandum and the summary set forth above.

"Recommendation:

"Congress should enact legislation which would place in an agency independent from the Department of the Interior and the Department of Justice the full responsibility for the protection, preservation, administration, development, adjudication, determination, and control, including but not limited to all legal services required in connection with them, of the lands and rights to the use of water of the American Indian Reservations in western United States."

Inquiries have been received as to the nature of an independent Federal Agency which would assist the Nation and the American Indians in the preservation of their natural resources -- lands, rights to the use of water, timber and minerals. Omitted from these recommendations was any reference to health, education and welfare services. They are beyond the scope of the original consideration involving special skills

and knowledge. Consequently in the paragraphs which succeed reference will not be made to those services, yet the concepts which are set forth and the authorities cited will have application to them.

FEDERAL CORPORATIONS UNDER THE CONSTITUTION

(a) A Federal Corporation - an independent agency - to fulfill the Nation's trust responsibility to the American Indian:

Early in this Nation's history the Congress determined that Federal Corporations were appropriate means of performing the functions of government. It created the Bank of the United States in furtherance of the country's fiscal responsibility. When the constitutionality of the Acts creating the Bank was challenged in the Supreme Court, Justice Marshall declared that the use of a corporation for the "fiscal operations, * * * must be within the discretion of Congress, * * *" - and that Congress could determine "if it be an appropriate mode of executing the powers of government." 1/ Having declared it was for Congress to decide whether a corporation should be created to carry out governmental responsibilities, Justice Marshall added: "* * * where the law is not prohibited [under the Constitution], and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the decree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretentions to such a power."

1/ McCulloch v. Maryland, 17 U.S. 315, 422 (1819). See also Osborn v. Bank of United States, 22 U.S. 738 (1824) in regard to the power of Congress to create Federal corporations and to authorize them to invoke the jurisdiction of the federal judiciary.

More recently the power of Congress to establish a corporation, Federal Land Banks and Joint Stock Land Banks, was reviewed. Likewise important here was the power to exempt those entities from taxation. On the subject the Supreme Court stated:

> "We, therefore, conclude that the creation of these banks, and the grant of authority to them to act for the Government as depositories of the public moneys and purchasers of Government bonds, brings them within the creative power of Congress although they may be intended, in connection with other privileges and duties, to facilitate the making of loans upon farm security at low rates of interest.
>
> "* * * Deciding, as we do, that these institutions have been created by Congress within its legitimate authority, we think the power to make the securities here involved tax exempt necessarily follows. * * *" 2/

Justice Frankfurter, speaking for the Court thirty years ago, stated that,

> "For more than a hundred years corporations have been used as agencies for doing work of the government." 3/

Continuing, he explained that course has been adopted by the Nation:

> "Because of the advantages enjoyed by the corporate device compared with conventional executive agencies, * * *" 4/

2/ Smith v. Kansas City Title Co., 255 U.S. 180, 211-212 (1920).
3/ Keifer & Keifer v. Reconstruction Finance Corp. and Regional Agricultural Credit Corp., 306 U.S. 381, 389 (1938).
4/ Ibid, 306 U.S. 381, 390.

In the decision it is pointed out that 'Congress may, of course, endow a governmental corporation with the government's immunity."

Simply stated, there resides with the Congress the power to decide the nature, character, powers and immunities which it will confer upon a corporate agency which it desires to have perform governmental functions rather than the "* * * conventional executive agencies."

Earlier Justice Brandeis had this to say in discussing the use of Federal Corporations:

> "An important, if not the chief, reason for employing a corporate agency was to enable the Government to employ commercial methods * * *" and to conduct its operations with a freedom not available to bureaus within the framework of the National executive branches. 5/

On the general subject of providing Governmental functions by Congressionally organized corporations, this statement is instructive:

> "Constitutional problems are relatively few in this field of the law.
>
> "* * *The question is sometimes asked: For what purposes can Congress create a government corporation? The answer is, of course, that such a corporation can be created for any constitutional federal purpose. Corporations like the Tennessee Valley Authority must stand, not on any peculiar rule arising from the fact that

5/ Emergency Fleet Corporation v. Western Union, 275 U.S. 415, 423 (1927).

they may be corporations, but on the usual doctrines of constitutional law, such as the power to spend, the power over navigable waters and over commerce between the States, and the powers to make such laws as are necessary and power to execute these and other pertinent powers." 6/

Based upon an abundance of authority this statement adequately summarizes the basic concepts advanced here:

"Although the power of the Federal Government to create corporations is not included among the enumerated powers conferred by the Federal Constitution, still it was settled at an early date that such power may be exercised by it whenever the creation of a corporation becomes an appropriate measure of exercising the powers expressly conferred by the Constitution. Corporations are created by Congress solely for the purpose of effectually executing the powers conferred upon it by the Constitution, and numerous types of federal corporations have been created for such purposes." 7/

Congress acted in the year 1945 to prescribe controls over Federal corporations and specified in these terms its policy respecting them:

"It is declared to be the policy of the Congress to

6/ Government Corporations: A proposal, 48 Harvard Law Review 775, 782.
7/ 36 Am. Jur. 2d, Foreign Corporations, Section 112, pages 120, 121.

bring Government corporations and their transactions and operations under annual scrutiny by the Congress and provide current financial control thereof." 1/

In defining the term "wholly owned Government corporation" it has also set forth the numerous Federal Corporations and the vast variety of Federal functions which are performed by them. 2/

To name a few and to disclose the disparate nature of the services they render to the Nation: "Commodity Credit Corporation * * * Farmers Home Corporation * * * Inland Waterways Corporation * * * Development Loan Fund; Institute of Inter-American Affairs; * * * Saint Lawrence Seaway Development Corporation; Panama Canal Company; Tennessee Valley Authority; and Tennessee Valley Associated Cooperatives, Incorporated."

On the background of Constitutional powers of the Congress to create corporations and the means it has adopted to exercise supervision of them, reference will be made to the type of Federal corporate entity which could serve to protect, preserve, develop and utilize the natural resources of the American Indian Reservations including but not limited to land, rights to the use of water, forests, minerals, oil and gas.

(b) American Indian lands, rights to the use of water and other natural resources could better be administered by an independent Federal Corporation:

There have been reviewed in the memorandum of which these comments are supplementary, the grave problems which have arisen in

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1/ 31 U.S.C. 846.
2/ 31 U.S.C. 846.

regard to the administration of the lands, rights to the use of water and other natural resources. Emphasized there are the numerous conflicts which arise in connection with the properties of the American Indians which are private in character, albeit held in trust by the Nation, and the public properties, title to which resides in, and which are utilized for, the Nation as a whole.

In the broad scope of flood control, navigation, generation of electricity, conservation and related activities, the Congress in the year 1933, created the Tennessee Valley Authority. 10/ Congress in establishing the T.V.A. acted in part pursuant to the Commerce Clause of the Constitution which contains this mandate:

> "To regulate Commerce with Foreign Nations, and among the several States, and with the Indian Tribes." 11/

In exercising that power, it declared:

> "For the purpose of maintaining and operating properties now owned by the United States in the vicinity of Muscle Shoals, Alabama [Wilson Dam] in the interests of national defense and
>
> for agricultural and industrial development and to improve navigation in the Tennessee River and to control the destructive flood waters in the Tennessee River and Mississippi River Basins, there is created
>
> a body corporate by the name of Tennessee Valley Authority * * *." 12/

10/ 16 U.S.C. 831 et seq.
11/ Constitution of the United States, Article I, Section 8, Clause 3.
12/ 16 U.S.C. 831.

Challenge to the constitutionality of the quoted and related Acts was immediate and concerted. Among other things the Supreme Court in upholding the power of Congress to create the T.V.A., had this to say - particularly in regard to rights to the use of water -

> "The Government acquired full title to the dam site [Wilson Dam], with all riparian rights. The power of falling water was an inevitable incident of the construction of the dam. That water power came into the exclusive control of the Federal Government. The mechanical energy was convertible into electric energy, and the electric energy thus produced, constitutes property belonging to the United States." 13/

In sustaining the Nation's power to develop the T.V.A. and to dispose of the electricity generated, the Court recognized the coalescence of the authority stemming from the above quoted Commerce Clause and the Property Clause of the Constitution; 14/

> "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; * * *."

To effectuate the will of Congress provision is made in the Tennessee Valley Authority Act for a board of directors which is the governing body of the entity. 15/ It is empowered to administer the

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13/ Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 330 (1936). See also Tennessee Electric Power Co. et al., v. T.V.A., 306 U.S. 118 (1939).

14/ Constitution of the United States, Article IV Section 3, Clause 2.

15/ 12 U.S.C. 831 e.

Authority, appoint managers, their required assistants and other employees.[16] Among other things the Authority has power to adopt, amend and repeal by-laws, and make contracts.[17] Of great importance is the power conferred on the Authority to sell bonds and to otherwise finance its activities. By an Act adopted in 1966, it is declared that T.V.A. "is authorized to issue and sell bonds, notes, and other evidences of indebtedness * * * in an amount not exceeding $1,750,000,000 outstanding at any one time to assist in financing its power program and to refund such bonds." It has, moreover, the power necessary to carry out the objectives for which it was created, in the name of the United States to exercise the power of eminent domain, to acquire and administer the properties, title to which resides in it.

From the annual reports of the Tennessee Valley Authority the nature and broad scope of its functions in the entire drainage of the Tennessee River Valley and beyond are well demonstrated. Key to its operation is the management of land and rights to the use of water. Electrical energy produced by the numerous dams and steam plants is distributed throughout its service area. Far reaching developments have been undertaken in the fields of agriculture, forestry, use of coal and industry in general. Under the heading of "Managing The Multiple Uses of Water and Land" in the 1968 Report of The Tennessee Valley Authority is set forth the activities in the fields of flood control, recreation, the generation of industry and business, fish and wildlife

16/ 16 U.S.C.A. 831 b.
17/ 16 U.S.C. 831 b.

and related activities. 18/ In great detail the Acts under which the T.V.A. was established have been reviewed and analyzed. 19/ From the reports of the Authority and related documents the grinding poverty that existed in the Tennessee Valley, the failure fully to utilize the land and water resources for the benefit of the inhabitants in the Valley and the Nation as a whole, constitute a striking parallel to the circumstances which exist on many of the American Indian Reservations. From a report entitled "Soil and Sky" this most pertinent excerpt is taken:

> "Contrary to popular belief, TVA's charter empowering it to convert potential resources to active use and to aid in restoring and preserving the agricultural, forestry, and other badly depleted resources of the region, contained no grant of powers new to the federal government. All the things TVA was requested to do - soil conservation and restoration, reforestation, the development of a navigation channel, flood control, development of a public power system - are activities in which the federal government has long been engaged. While no new federal powers were granted TVA, the methods used by TVA to assure the full development of the Valley resources are quite different and involve a distinct break with the practices of the past. These methods are extremely important since methods and means

18/ Annual Report of the Tennessee Valley Authority 1968; see also earlier annual reports.
19/ Hodge, The Tennessee Valley Authority.

affect the broader objective of all government to secure individual independence, human freedom, and satisfactory living." 20/

Conclusion:

1. Congress has the power under the Constitution to establish agencies to fulfill the trust arrangement which exists between the Nation and the American Indians. It has today legislated in regard to virtually every aspect of the American Indian and the natural resources of the Reservations. Those powers under the Constitution could be invested in a Federal Corporation, conferring upon the Corporation whatever powers and immunities it deemed appropriate.

2. A governing board could be created with the American Indians being represented on that Board affording them an opportunity fully to participate in the formulation of policies respecting their lives and properties.

3. The breadth of the Federal Corporation which would perform the functions now carried on by the Secretary of the Interior and his subordinates, would encompass an area far greater than the Tennessee Valley Authority. Hence it would probably entail the establishment of subsidiary administrative units of the Corporation to meet with the special problems which exist on the various Reservations. That Corporation would require great flexibility. However, it is free from

20/ Soil and Sky, The Development And Use Of Tennessee Valley Resources, May 1950, page 6.

doubt that Congress, having established the present means of administration of Indian Reservations, could confer like powers upon a Federal Corporation independent of existing branches of the National Government.

4. The power to finance its activities, to adopt the commercial practices presently precluded, to create and maintain a fully viable economy on the American Indian Reservations, through agricultural, forestry, and marketing practices, the generation of industry and related activities could, if Congress willed it, be within the scope of the Federal Corporate enterprise.

5. If Congress should desire to create an independent agency of the character recommended, it could include functions in addition to those related to natural resources. For example, those pertaining to health, education and welfare might well be included in the purview of the Act.

Recommendation:

It is recommended that an independent agency performing functions similar to the Tennessee Valley authority be created for the purpose of administering, protecting and preserving the natural resources within the American Indian Reservations, including but not limited to land and rights to the use of water.

William H. Veeder
Water Conservation and
Utilization Specialist

AMERICAN INDIAN RESERVATION ECONOMIC DEVELOPMENT RETARDED OR THWARTED THROUGH ABRIDGMENT OR LOSS OF INDIAN TITLES TO LAND AND RIGHTS TO THE USE OF WATER BY POLICIES, AGENCIES AND PERSONNEL OF FEDERAL GOVERNMENT

FOREWORD

Economic development of American Indian Reservations has been gravely retarded or completely thwarted by a vast variety of factors, creating a dilemma within the Federal establishment. In the succeeding review an analysis will be made of one aspect of that dilemma. It relates to a failure correctly to assess the nature of Indian title to lands and rights to the use of water, essential elements upon which economic development must be predicated. That failure to understand - or the refusal to recognize - the character of Indian title as distinguished from title to public properties, gave rise to this study and the recommendations flowing from it.

Better to evaluate the dilemma within the Federal establishment, comments must initially be made on the importance of rights to the use of water in the arid and semiarid western United States where most Indian Reservations are located. There water is the catalyst for all economic development. Without the water soil remains untilled, the minerals continue in place and habitation can only be maintained in a most limited manner. Otherwise stated, if Indian rights to the use of water are not preserved and protected the Reservation lands are without practical value, with the attendant forfeiture now and in the future of any hope for economic development.

By reason of the imperative need for water in every phase of the economic life of an Indian Reservation and the areas which surround it, the rights in question are rapidly proceeding beyond ordinary criteria for establishing their value. They are, indeed, invaluable in the truest sense of that frequently misused term. That circumstance shapes the determination of policies and conduct of agencies or personnel which may not otherwise be successfully explained.

Effectively to appraise the abridgment or loss of Indian rights to the use of water with the attendant withering of economic possibilities on the Reservations, calls for a legal determination of (1) the Nation's relationship with the Indians and Indian Tribes; (2) a review of the legal character of Indian rights to the use of water. Because rights to the use of water to which this consideration is primarily directed are inextricably related to, indeed, are part and parcel of the lands constituting the Reservations, Indian titles to land and rights to the use of water are discussed together.

EXPRESSIONS OF INTENT BY THE CONGRESS AND EXECUTIVE BRANCHES RESPECTING INDIAN PROPERTIES AND NATURAL RESOURCES

On September 12, 1968, Honorable Mike Mansfield, Senate Majority Leader, asked to have printed in the Congressional Record, Concurrent Resolution No. 11 entitled, "National American Indian and Alaska Natives Policy Resolution," 1/ together with excerpts from

1/ Congressional Record, September 12, 1968, pages S 10634 et seq.: "NATIONAL AMERICAN INDIAN AND ALASKA NATIVES POLICY RESOLUTION "The concurrent resolution (S. Con. Res. 11) National American

Report No. 1535, explaining the purpose of the Resolution. From that Report 2/ and the Concurrent Resolution these excerpts, which pertain to the scope of this consideration, are taken. It is declared in the Report that:

"Explanation of Senate Concurrent Resolution 11

"The resolution would assure our Indian citizens that Federal programs * * * will be concentrated where the problems are most acute - on the reservations."

From that explanation of Senate Concurrent Resolution 11 this statement is likewise taken:

"* * * [it is the] sense of Congress that Indian and Alaska native trust property continue to be protected;

* * * that efforts be continued to develop natural resources; * * *."

Footnote 1 continued:
Indian and Alaska natives policy resolution was considered, and agreed to, as follows:

* * * * * * * * * * *

"Resolved by the Senate (the House of Representatives concurring), That it is the sense of the Congress that--

"(1) the deplorable conditions of American Indians and Alaska natives can only be alleviated through a sustained, positive, and dynamic Indian policy with the necessary constructive programs and services directed to the governing bodies of these groups for application in their respective communities, offering self-determination and self-help features for the people involved; and that our Government's concern for its Indian citizens be formalized in a new national Indian policy so that beneficial effects may be continued until the day when the Nation's moral and legal obligations to its first citizens - the American Indians - are fulfilled;

* * * * * * * * * * *

"(d) American Indian and Alaska native property will be protected; that Indian culture and identity will be respected; that the necessary technical guidance and assistance will be given to insure future economic independence; that continued efforts will be directed to maximum development of natural resources; * * *."

2/ Congressional Record, September 12, 1968, S. p. 10634.

Explicitly the Concurrent Resolution has this to say on the subject:

> "(4) American Indian and Alaska native property will be protected; that Indian culture and identity will be respected; * * * that continued efforts will be directed to maximum development of natural resources; * * *."

From that Congressional Concurrent Resolution there is manifested a National intent, made in highest good conscience. It would accord to the American Indians and Alaska natives a recognition and protection, consistently denied to them, of rights to their natural resources.

President Richard M. Nixon in regard to the Indians, stated:

> "Historically, these Native Americans * * * have been deprived of their ancestral lands and reduced by unfair federal policies and demeaning paternalism to the status of powerless wards of a confused 'grest white father.'" 3/

To correct the injustices of the past, President Nixon continued:

> "My administration will promote the economic development of the reservation by offering economic incentives to private industry to provide opportunities for Indian employment and training."

In announcing what he termed "Our goal must be" respecting the American Indian, former President Johnson said in his March 6, 1968, message to the Congress:

3/ Statement by Richard M. Nixon on September 27, 1968.

"Freedom of choice: An opportunity to remain in their homelands, if they choose, without surrendering their dignity * * *." [4/]

Previous similar Congressional and Executive declarations, alluded to in a proceeding directly related to the preservation of rights to the use of water of the Yakima Indian Nation, were described as follows: "The numerous sanctimonious expressions to be found in the acts of Congress, the statement of public officials, and the opinions of courts respecting 'the generous and protective spirit which the United States properly feels toward its Indian wards,' * * * and the 'high standards for fair dealing required of the United States in controlling Indian affairs, * * *'" which, in the words of the Court of Appeals for the Ninth Circuit "* * * are but demonstrations of a gross national hypocrisy." [5/]

Prime objective of this study is to demonstrate how the expression of the highest ideals by the Congress and the Executive have fallen far short of accomplishment by reason of policies, conflicting agencies and personnel of the Federal Government. To accomplish that end it is important to determine the source of those ideals and the reasons for them. The next phase of this review will be devoted to that aspect of the matter.

4/ 114 Cong. Rec. No. 36 (March 6, 1968), pp. S. 2311-2316.
5/ Judge Pope in his first opinion in United States v. Ahtanum Irrigation District, 236 F.2d 321, 338 (CA9, 1956); Appellees' cert. denied 352 U. S. 988 (1956); 330 F.2d 897 (1965); 338 F.2d 307; Cert. denied 381 U. S. 924 (1965).

The high ideals in regard to the Nation's obligation to the American Indians is deeply rooted in its concepts of human dignity. Later there will be discussed the Constitutional basis for those concepts which lends substance to them, affording a means pursuant to which they may be fulfilled at least in part. Comment must first be made, however, to the fact that this Nation with its Old World background has failed to recognize that the people indigenous to this Continent have values which all too often have been frustrated or totally suppressed.

RAPPORT OF AMERICAN INDIANS WITH THEIR HOMELAND MUST NOT BE IGNORED IN ECONOMIC DEVELOPMENT OF RESERVATIONS

A man's heart is where his treasure lies and frequently the American Indians occupying Reservations view their natural resources as a treasure, and wish to avoid exploitation of them if that entails the destruction of the resources. Failure to take cognizance of the Indians' insight into nature and relationship with the lands they and their ancestors occupied, will be to override a crucial aspect of the program with the attendant impairment of the proposal to expedite the economic development of the Reservations.

Efforts to cooperate in the protection of the Reservation resources with the Yakimas, Mohaves, Salish and Kootenais, have revealed an intangible feature difficult to understand much less describe. That intangible is a rapport between the Indians and the land of which they are very much a part. In a permissive secular society the affinity between the Indians and their mountains, lakes and rivers has been all too frequently disregarded. What cognizance may have been accorded to it has in the past been mostly cynical.

Yet the Mission Range, its streams and beauty have a worth to the Flathead Tribes that cannot be measured. Mohave Indians have names for all parts of their valley and segments of the Colorado River which traverses it. A map recently prepared designating those areas in the valley and segments of the River with Mohave names, and interpretations, however insufficient, goes far in explaining the Indian attachment to it. History records the resolute rejection by most Mohaves to move them from their core homeland. Like the White Mountain Apaches who revere sections of their forests, the mountains surrounding Mohave Valley are frequently referred to by the Indians in spiritual terms. The great wilderness on the slopes of Mount Adams has a meaning to the Yakimas understood only in the Long House.

Law is reflective of the mentality which formulates it. Hence the law which is here applied to the Indian lands and rights to the use of water does not embrace intangibles. However, economic development need not connote smoke stacks, filthy air and water. To the fullest extent possible economic development should take cognizance of the special identification of the American Indians with their lands, lakes and streams; if economic development simply submerges them in the so-called main stream of society, the present efforts most assuredly will have failed. It is hoped that if there is a failure there will be at least a footnote in history alluding to the fact that the American Indians and this Nation lost something more than physical resources subject to monetary appraisal and are the more deprived by reason of it.

AMERICAN INDIANS SINCE TIME IMMEMORIAL HAVE USED THE WATERS OF THEIR RIVERS, LAKES AND STREAMS FOR SUSTENANCE AND SHAPED THEIR LIVES TO THE ENVIRONMENT THESE RESOURCES PROVIDED

As reviewed above, the Concurrent Resolution 11 expresses the "sense of Congress that Indian and Alaska native trust property continue to be protected; * * * that efforts be continued to develop [their] natural resources."

The Executive pronouncements, likewise alluded to above, fully recognize and would implement the means for the protection of the "trust property" including the natural resources, thus aiding the economic development of the Indian Reservations. Crucial to this consideration is the meaning of the term "trust property," the legal aspects of it, what gave rise to it, and the activities required in the administration of that "trust property." Antecedent to that phase of the consideration, brief reference will be made to Indian use of the waters of the rivers, lakes and streams; their adjustment to the frequently harsh environment in which they lived by reason of that use.

This Nation's history, particularly that in its formative years, following the War of Independence, the acquisition of huge land areas from France, Great Britain, Spain and Mexico, lends meaning to the "trust" to which Congress makes reference in Concurrent Resolution 11. Virtually all of the lands acquired by the Nation were occupied by Indians and Indian Tribes who in good conscience must be recognized as the original

real owners of the land, albeit the character of that ownership differed widely from that which the stringent Anglo-Saxon law would accord recognition. Most of these lands acquired by the United States west of the Mississippi River are in the arid and semiarid regions. Agriculture, at the time of acquisition and now, could be successfully practiced only through irrigation, artificial and natural. Earliest history describes the use of water by the Indians. No single resource was of more importance to the Indians of the southwest in particular, and western Indians in general. It was, of course, an ingredient without which life could not prevail; it was, moreover, a great deal more.

When an indigenous people called the Hohokams, occupied the lands in the Gila and Salt River Valleys over two thousand years ago, they diverted water by means of canals which are today recognized as highly refined from the engineering standpoint. Whether they are related to the Pima and Maricopa Indians who live in the same valleys today is unimportant. They long ago demonstrated that water applied to the land was essential if communities were to be maintained and have more than a rudimentary culture. They demonstrated the need for economic development which they undertook as a means of survival. 6/

Arizona's Senator Hayden, recently retired, devoted much time to the history of the Pima and Maricopa Indians. 7/ In great detail he chronicles the use of Gila River water by the Pima and Maricopa Indians. First description of the Indian diversion and use of water

6/ National Geographic Magazine, May 1967, Vol. 131, No. 5, pp. 670 et seq.

7/ A History of the Pima Indians and the San Carlos Irrigation Project, 89th Congress, 1st Session; Document No. 11, first printed in 1924 reprinted in 1965.

in modern times, he reports, came from Father Kino, a Jesuit Missionary who visited the Pimas in 1687. The Missionary refers to the "very great aqueduct" constructed by the Indians to conduct Gila River water across great distances to irrigate large acreages of their river bottom lands.

As the nucleus for their culture the Pima and Maricopa Indians had been a community of great magnitude. In detail the Spaniards describe Casa Grande as it existed near the end of the seventeenth century. They "marveled" at the Indian economic development. What they observed was, of course, the adjustment made by the Indians to a desert environment which, without water, produced a most meager subsistence. A half century later another Spanish Missionary was to report the Pima and Maricopa communities still undisturbed by non-Indian intrusion. He described results of their use of Gila River water: 8/ "All these settlements on both banks of the river and on its islands have much green land. The Indians sow corn, beans, pumpkins, watermelons, cotton from which they make garments, * * *"; wheat was likewise raised according to the report.

A hundred years later the industrious Pimas and Maricopas continued to amaze soldiers, travelers, trappers and explorers with their agricultural practices, their use of water and the produce that supplied not only the Indians but many others taking the southern route west and the Mexican conquest. Thereafter but a short half century was to elapse and the seizure of Indian land and water was well under way. Another twenty-five years and the wanton divestiture of the Indian land and water was far advanced - a subject to which comment will be directed.

8/ Ibid. A History of the Pima Indians * * *, p. 9.

Paralleling the Pima and Maricopa use of water for irrigation is the history of the Pueblo Indians in the valley of the Rio Grande. Like the Arizona Indians, the Pueblos adjusted to a desert environment by the use of water for purposes of agriculture.

Mohaves, Yumas and Chemehuevis likewise adapted their lives to the surrounding desert by occupying the lands on both sides of the Colorado River. In the "Great Colorado Valley" as early explorers referred to it, the Spanish soldiers and Missionaries first encountered these Indians. Later Lieutenant Ives in his 1858 explorations on the Colorado River reported the Quechan Indians using water to raise their crops. Of the Mohaves, Ives had this to say: "It is somewhat remarkable that these Indians [Mohaves] should thrive so well upon the diet to which they are compelled to adhere. There is no game in the [Mohave] valley. The fish are scarce and of inferior quality. They subsist almost exclusively upon beans and corn, with occasional water-melons and pumpkins, and are probably as fine a race, physically, as there is in existence." 9/ Those Mohave crops from time immemorial were raised by Indians who planted the lush river bottoms as soon as the perennial overflow had receded, thus using the natural irrigation furnished by the Colorado River.

Importance of the rivers to the indigenous cultures in western United States is not limited to agriculture. In the vast desert areas of the present State of Nevada the Northern Paiutes long

9/ Mohave Tribe of Indians * * * v. United States of America, 7 Ind. Cl. Comm. 219, Finding 12 (a), and sources relied upon.

prior to Fremont's discovery of Pyramid Lake in 1844 relied upon fish taken from the lake and the Truckee River as a primary source of sustenance. 10/ Fisheries to the Indians of the Northwest as described by the Supreme Court "* * * were not much less necessary to the existence of the Indians than the atmosphere they breathed." 11/ Salmon and other fish taken from the Columbia River were, from time immemorial, an important item of trade among the Indians, a fact reported by Lewis and Clark, fully supported by archeological investigations. 12/

It is significant when transition from their immemorial way of life was forced upon the Western Indians, they relied upon their streams and rivers as a source of sustenance. In a poignant description of the transition from a nation given largely to hunting and fishing, the Yakimas were the first in the State of Washington to undertake to irrigate their meager gardens. That change came about under the direction of the Missionaries who attempted to assist in the economic development of the lands to which the Yakimas were restricted. 13/

Rivers were, of course, not only the source of sustenance for the American Indians, they were the arteries of crude commerce and travel.

10/ Popular Science Monthly, Vol. 58, 1900-1901, pp. 505-514.
11/ United States v. Winans, 198 U.S. 371, 381 (1904).
12/ See Journals of Lewis and Clark, Bernard DeVoto, pp. 259 et seq.
13/ "* * * Ahtanum [Creek] was the cradle and proving ground of irrigation in the State of Washington * * *." Yakima Valley Catholic Centennial, the Beginning of Irrigation in the State of Washington.

It is upon that background that the legal characteristics of Indian rights to the use of water will be discussed. From that background it should be clear that water to the American Indians was as inevitably a part of their existence as the land which they occupied.

INDIAN WINTERS DOCTRINE RIGHTS TO THE USE OF WATER - THEIR LEGAL CHARACTERISTICS, MEASURE AND EXTENT

As observed above, the law is largely the product of the mentality which formulated it. American Indians probably did not give thought to the nature of the right to divert and to use water, or the right of fishery. Indeed, the concept of title to land and the bundle of rights which constitute it, was wholly foreign to them. Under those circumstances it is not surprising that the history of the transactions between the Nation and the Indians is infamous. That the Indians were frequently swindled out of properties of immense value is not surprising. In entering into treaties and agreements, whatever means were used, the Indians were totally innocent of the principles of conveyancing or for that matter, the formulation of written conventions. As a consequence they had little knowledge, if any, of the terms under the law which would be required to protect their interests. From an examination of the complex documents which they were required to execute, it is manifest that the Indians did not and could not know the legal implications flowing from those treaties and agreements. It is upon that factual situation that the laws respecting Indian rights to the use of water will be set forth.

(a) Indian Winters Doctrine Rights to the use of water [i] retained by the Indians under their treaties and agreements; [ii] those rights thus retained by the Indians exempt from State law:

The Winters Doctrine as enunciated by the courts is based upon the law, equity, history and good conscience. Factually the Winters Decision giving rise to that doctrine is very simple. The Fort Belknap Indian Reservation in the State of Montana, is the meager residue of a vast area once guaranteed to the Indians by the 1855 Treaty with the Blackfeet.[14/] In 1874 the original area established by the Treaty was sharply constricted.[15/] By an agreement in 1888 the Indians were limited to a small semiarid acreage which could be made habitable only by means of irrigation. North boundary of the Reservation was the center of the Milk River, a tributary of the Missouri.

In the year 1889 water was diverted from the Milk River to irrigate lands within the Fort Belknap Reservation. Upstream from the Indian diversion Winters and other defendants, non-Indians, constructed dams, diversion works and other structures which prevented the waters of the Milk River from flowing down to the Indian Irrigation Project. An action to restrain the Winters diversion was initiated in the Federal District Court and it was enjoined. From that injunction Winters appealed. In sustaining the injunction the Court of Appeals for the Ninth Circuit declared:

14/ 11 Stat. 657.

15/ For a full factual and procedural review refer to Winters v. United States, 143 Fed. 740, 741 (CA9, 1906); Winters v. United States, 148 Fed. 684 (CA9, 1906).

"In conclusion, we are of opinion that the court below did not err in holding that, 'when the Indians made the treaty granting rights to the United States, they reserved the right to use the waters of Milk River' at least to the extent reasonably necessary to irrigate their lands. The right so reserved continues to exist against the United States and its grantees, as well as against the state and its grantees." 16/

Stress is placed upon this phase of the quoted excerpt:

It was the Indians granting to the United States;

It was the Indians reserving to themselves that which was not granted - the rights to the use of water of the Milk River to the extent required for their properties.

The concept there enunciated that the Indians granted to the United States, and not the converse, is important in regard to the nature of the title of the Indians under the circumstances of the Winters Decision. It is reflective of the rationale of the Winans Decision rendered by the Supreme Court. There the Highest Court had before it the fishery provisions of the Treaty of June 9, 1855, between the United States and the Confederated Tribes of Yakima Indians. 17/ By that document the Indians retained the

16/ Winters v. United States, 143 Fed. 740, 749 (CA9, 1906).
17/ United States v. Winans, 198 U.S. 371 (1904).

fishing provisions of the "exclusive right of taking fish in all the streams where running through or bordering" their Reservation; "also the right of taking fish at all usual and accustomed places" on and off the Reservation. Patents were issued by the United States to lands along the Columbia River from which the Yakimas had fished since time immemorial. Those patents did not include any reference to the Indian Treaty fishing rights and the owners of the land denied that the lands thus patented were subject to those rights of fishery. Moreover, the State of Washington had issued to the owners of the land, licenses to operate fishing wheels which, it was asserted, "necessitates the exclusive possession of the space occupied by the wheels." 18/

Rejecting the contentions of the land owners that the Yakima fishing rights in the Columbia River had been abrogated by the issuance of the patents, the Court declared:

> "The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians * * * which were not much less necessary to the existence of the Indians than the atmosphere they breathed. New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away."

Having thus appraised the Yakima Treaty, the Court then pronounced the crux of the decision:

18/ United States v. Winans, 198 U. S. 371, 380 (1904).

"* * * the treaty was not a grant of rights to the Indians, but a grant of rights from them [to the United States] a reservation of those not granted." 19/

A further element of great importance in this review is contained in this succinct sentence relative to the rights of the Indians under the Treaty:

"* * * the right [of fishing] was intended to be continuing against the United States and its grantees as well as against the State and its grantees." 20/

There has thus been cast in the correct light the nature of the title of the Indians under the Treaties between them and the United States. Title of the Indians does not stem from a conveyance to them. Rather, the title which resides in them to their lands, their rights to the use of water, their rights of fishery, their timber, all interests in real property and natural resources as subsequently reviewed - were retained by them when they granted away title to vast areas of which they had been previously possessed.

Those pronouncements by the Supreme Court declared in advance of the Winters Decision, are fundamental precepts of the law recognizing that rights of fishery are interests in real property subject to protection under the Constitution. 21/

19/ United States v. Winans, 198 U. S. 371, 381 (1904).
20/ Ibid., 198 U. S. 371, 381-382.
21/ In considering the legal aspects of the property interests of the American Indians in the rivers, streams and lakes, it is emphasized that of necessity there has been applied principles of law which differ radically from the Indians' aboriginal view in regard to natural resources. (continued next page)

Today, as they have been for generations past, the Yakimas are struggling to maintain their rights of fishery. They are also seeking to revive salmon runs destroyed by power and other developments on the Columbia River.

In affirming the Winters Decision of the Court of Appeals for the Ninth Circuit the Supreme Court reviewed the facts respecting the Indian rights to the use of water in detail. Two basic problems were before it for resolution: (1) Were rights to the use of water in the Milk River reserved for the Fort Belknap Indian land though no mention of those rights is contained in the Treaty of October 17, 1855, the Act of 1874 or in the Agreement of 1888; (2) Assuming those rights were reserved for the Indian lands, was there a divestiture of them upon the admission of Montana into the Union? 22/

Footnote 21 continued:
Apparently title to the right of fishery as this Nation's jurisprudence developed had no place in the Indians' concept of taking fish from the streams where and when they could. At a very early date in the evolution of Anglo-Saxon law the right of fishery - akin to rights to the use of water as that law was much later to evolve - was a right in real property, a part and parcel of the land abutting upon or traversed by a stream or lake.

In Thompson on Real Property, per. ed., vol. 1, sec. 250, this statement appears: "It is held that fishing rights are incorporeal hereditaments, since they issue out of, * * * or are annexed to things corporeal."

It is also stated in 22 Am. Jur., Fish and Fisheries, sec. 7: "The right to fish at a certain place is a property right constitutionally protected from confiscatory legislation, * * *. It is an interest in real estate in the nature of an incorporeal hereditament, * * *."

The nature of the right of fishery is recognized in California Code, Civil, sec. 801, which is in part: "The following land burdens, or servitudes upon land, may be attached to other land as incidents or appurtenances, and are then called easements: * * * (2) The right of fishing; * * *." That principle was likewise recognized by the Supreme Court of the State of Oregon in the case of Hume v. Rogue River Packing Co., 51 Ore. 237, 92 Pac. 1065 (1907), where it is stated that the right of fishery is a right in real property and not a personal right.

22/ Winters v. United States, 207 U.S. 564, 575 et seq. (1907)..

In rendering its keystone opinion the Supreme Court analyzed with care the relationship between the United States and the Indians, together with the objectives of the Agreement of 1888, in which the Indians ceded away a vast tract of land, retaining for themselves only a vestige of that which they formerly occupied. The Court then addressed itself to the untenable position of the non-Indians:

> lands [retained by the Indians] were arid and, without irrigation, were practically valueless. And yet, it is contended, the means of irrigation were deliberately given up by the Indians and deliberately accepted by the Government. * * * The Indians had command of the lands and the waters - command of all their beneficial use, whether kept for hunting, 'and grazing roving herds of stock,' or turned to agriculture and the arts of civilization. Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate?"

Answering the question which it had propounded, the Court declared:

> "If it were possible to believe affirmative answers, we might also believe that the Indians were awed by the power of the Government or deceived by its negotiators. Neither view is possible.
>
> The Government is asserting the rights of the Indians." 23/

23/ Winters v. United States, 207 U.S. 564, 576 (1907).

Following the tenets of Winans the concept of a grant by the Indians to the United States - not the converse - was reiterated. Cogently the Court inquired: Did the Indians grant and the United States accept all of the Indian rights to the use of water without which the lands were uninhabitable? It rejected that concept out of hand as being without merit. Likewise significant is the statement from the excerpt last quoted that as the owners of the land and waters the Indians could use them for hunting, grazing, or in the words of the Court, use them for

"* * * agriculture and the arts of civilization * * *."

No words of limitation there, upon the uses to which the Indians could apply their rights to water.

Turning to the second proposition before it - the part legal, part political question - as to Montana's jurisdiction over the Indian rights to the use of water, the Supreme Court had this to say:

> "The power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be. The United States v. The Rio Grande Ditch & Irrigation Co., 174 U.S. 690, 702; United States v. Winans, 198 U.S. 371. That the Government did reserve them we have decided, and for a use which would be necessarily continued through years. This was done May 1, 1888, and it would be extreme to believe that within a year Congress destroyed the reservation and took from the Indians the consideration of their grant, leaving them a barren waste - took from them the means of continuing

their old habits, yet did not leave them the power to change to new ones." 24/

Crucial aspect of the character of the Indian title is clear: (1) By the Agreement of 1888 the Indians reserved to themselves the rights to the use of water in the Milk River although that Agreement made no mention of rights of that nature; (2) The Indian rights thus reserved were not open to appropriation under the laws of the State of Montana upon its admission into the Union, but rather were exempt from the operation of those laws.

It is imperative that the full import of the Winters and Winans Decisions be kept in the foreground throughout the balance of this consideration. In those cases the Supreme Court declared that the Indians had reserved for themselves the rights to the use of water and the rights of fishery and those rights in the streams which rise upon, border or traverse the Indian Reservations are not subject to the jurisdiction of the States in which the Reservations are found.

(b) Winters Doctrine Rights are part and parcel of the land itself - interests in real property:

Both of the Winters Decisions rendered by the Court of Appeals for the Ninth Circuit, and the Supreme Court decision affirming them, allude to the grant from the Indians to the National Government. Chronicled there were the successive transactions pursuant to which their domain, once embracing large segments of the present State of Montana, was diminished to a small area made habitable only by the

24/ Winters v. United States, 207 U. S. 564, 577 (1907).

use of water. Those rights to the use of water were retained by the Indians by their Agreement of 1888 irrespective of the fact that they were not referred to in the document.

Authorities were reviewed above in regard to the Supreme Court's holding in the Winans Decision relative to the Yakima's rights of fishery under their Treaty of 1855. Those rights are interests in real property; part and parcel of the land itself. In the Ahtanum Decisions,[25/] the Court of Appeals, in regard to that Treaty, applied the same principles to the rights to the use of water in Ahtanum Creek which by that Treaty was declared to be the northern boundary of the Yakima Reservation.

From the first Ahtanum Decision of the Court of Appeals these excerpts relating to the Indian Winters Doctrine Rights - their nature and characteristics - are taken:

> "That the Treaty of 1855 reserved rights in and to the waters of this stream for the Indians, is plain from the decision in Winters * * *. In the Winters case, as here, the reservation was created by treaty; the reserved lands were a part of a much larger tract which the Indians had the right to occupy; and the lands were arid and without irrigation practically valueless. * * * This court, in its decision (143 F. 740, 746), which the Supreme Court was affirming, had said: 'We are of opinion that it was the intention of the treaty to reserve sufficient waters of Milk River, as was said by the court below, 'to insure

Milk River, as was said by the court below, 'to insure

25/ See footnote 5 above.

to the Indians the means wherewith to irrigate their farms', and that it was so understood by the respective parties to the treaty at the time it was signed." 26/

Continuing to define and declare the extent of the Winters Doctrine Rights, the decision states:

"* * * it must be borne in mind, as the Supreme Court said of this very treaty, that 'the treaty was not a grant of rights to the Indians, but a grant of rights from them - a reservation of those not granted.' United States v. Winans, 198 U. S. 371, 381. Before the treaty the Indians had the right to the use not only of Ahtanum Creek but of all other streams in a vast area. The Indians did not surrender any part of their right to the use of Ahtanum Creek regardless of whether the Creek became the boundary or whether it flowed entirely within the reservation. " 27/

Having reviewed in detail the manner in which the Yakimas had reserved their Winters Doctrine Rights, the first Ahtanum Decision applied to them the principles governing interests in realty:

"This is a suit brought by the United States as trustee for the Yakima tribe of Indians to establish and quiet title to the Indians' right to the use of the waters of Ahtanum creek in the State of Washington, * * *." 28/

26/ United States v. Ahtanum Irrigation District, 236 F.2d 321, 325 (CA9, 1956).
27/ Ibid., 236 F.2d 321, 326.
28/ Ibid., 236 F.2d 321, 323.

With further reference to the nature of the rights and the action brought to have them determined, the Court states:

> "The suit [to protect the Yakima rights], like other proceedings designed to procure an adjudication of water rights, was in its purpose and effect one to quiet title to realty." 29/

Those rulings in regard to the characteristics of the Winters Doctrine Rights to the use of water as being interests in real property, comport fully with the Powers Decision rendered by the Supreme Court respecting the Winters Doctrine Rights of the Crow Indians. 30/ There are several aspects of the Powers Decision that are of importance to the Indians in addition to it being a precedent respecting the nature of the Winters Doctrine Rights. The decision arose from an attempt to enjoin the use of water by a non-Indian, who had succeeded to the title to land from an Indian allottee. The Court upheld the lower court's refusal to grant the injunction, specifically declaring - in keeping with sound principles of real estate conveyancing - that the non-Indian succeeded to "some portion of tribal waters," adding this most important caveat when consideration is given to the implications of the Powers Decision:

> "We do not consider the extent or precise nature of respondents' [non-Indian] rights in the water. The

29/ United States v. Ahtanum Irrigation District, 236 F.2d 321, 339.
30/ United States v. Powers, 305 U.S. 527, 533 (1939).

present proceeding [being an action to enjoin not to quiet title as in Ahtanum] is not properly framed to that end." 31/

In effect the courts in regard to Winters Doctrine Rights, have adhered to the basic and long established precepts of the law.

As reviewed, it is elemental that rights to the use of water are interests in real property. 32/ Likewise elemental is the principle that a right to the use of water is usufructuary and does not relate to the corpus of the water itself. 33/ Those principles are, of course, applicable to the Winters Doctrine Rights.

As interests in real property Winters Doctrine Rights are entitled to be protected and the obligation to protect them against abridgment and loss is identical with the obligations respecting the land itself. Keeping in the foreground this concept - Winters Doctrine Rights to the use of water are interests in real property and partake of the land itself - goes far towards the elimination of the confusion which has on occasion arisen respecting the course which must be pursued in the exercise and protection of them.

31/ United States v. Powers, 305 U. S. 527, 533 (1939).

32/ Wiel, Water Rights in the Western States, 3d ed., vol. 1, sec. 18, pp. 20, 21; sec. 283, pp. 298-300; sec. 285, p. 301.
United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 73 (1913).
Ashwander v. TVA, 297 U.S. 288, 330 (1936).

33/ Fuller v. Swan River Placer Mining Co., 12 Colo. 12, 17; 19 Pac. 836 (1898)
Wright v. Best, 19 Cal.2d 368; 121 P.2d 702 (1942).
Sowards v. Meagher, 37 Utah 212; 108 Pac. 1112 (1910);
See also Lindsey v. McClure, 136 F.2d 65, 70 (C.A. 10, 1943).

(c) Like the Reservation lands of which they are a part, the Indians hold title to rights to the use of water for the present and future economic development of their Reservations; the measure of those rights:

Economic development of the Indian Reservations; the success of any program in furtherance of that development in Western United States is, of necessity, predicated not only upon a present firm supply of water but likewise upon a firm supply in the future. In the application of the Winters Doctrine the courts recognized that the Indians would of necessity need additional quantities of water to meet their future needs. On the subject this precise ruling is of paramount importance:

> "What amount of water will be required for these purposes may not be determined with absolute accuracy at this time; but the policy of the Government to reserve whatever water of Birch Creek may be reasonably necessary, not only for present uses, but for future requirements, is clearly within the terms of the treaties as construed by the Supreme Court in the Winters Case." 34/

In keeping with the declaration that the Indians had rights in the stream to meet their present and future needs, the Court of Appeals approved the means provided in the decree entered by the lower court in these terms:

> "It is further objected that the decree of the Circuit Court provides that, whenever the needs and requirements of the complainant for the use of the waters

34/ Conrad Investment Company v. United States, 161 Fed. 829 (CA9, 1908).

of Birch creek for irrigating and other useful purposes upon the reservation exceed the amount of water reserved by the decree for that purpose, the complainant may apply to the court for a modification of the decree. This is entirely in accord with complainant's rights as adjudged by the decree. Having determined that the Indians on the reservation have a paramount right to the waters of Birch Creek, it follows that the permission given to the defendant to have the excess over the amount of water specified in the decree should be subject to modification, should the conditions on the reservation at any time require such modification." 35/

The same principle was declared by the Supreme Court in Arizona v. California, United States, Intervener. 36/ There the Court, relying upon the Winters Decision, stated the quantities of water reserved for the Indians were sufficient "to make those reservations livable." 37/ In sustaining the Report of the Special Master in the case last cited the Court said:

"* * * We also agree with the Master's conclusion as to the quantity of water intended to be reserved. He

35/ Conrad Investment Company v. United States, 161 Fed. 829, 835 (CA9, 1908).
36/ 373 U. S. 546 (1962).
37/ Ibid., 373 U. S. 546, 599.

found that the water was intended to satisfy the future as well as the present needs of the Indian Reservations and ruled that enough water was reserved to irrigate all the practicably irrigable acreage on the reservations." 38/

It is important that the Highest Court not only declared that the Winters Doctrine comprehends water for future needs to make "livable" the Reservations then under consideration which it described as being comprised of "hot, scorching sands", but also accepted those criteria as a means - in no sense the exclusive means - of measuring the rights to the use of water which were in fact reserved:

"We have concluded * * * that the only feasible way by which reserved water for the reservations can be measured is irrigable acreage." 39/

When the United States petitioned to intervene in the last cited case - thus eliminating the objection to jurisdiction for want of indispensable parties - the irrigable acreage criterion was tendered to the Court as the best measure as to rights claimed for the particular Reservations there involved.

Subsequently in Arizona v. California, United States Intervener, the Supreme Court also adopted in connection with other claims of the Federal Government a different criterion from that used in connection with the Indian Reservations. It stated:

38/ Arizona v. California, United States Intervener, 373 U.S. 546, 600 (1962).
39/ Ibid., 373 U. S. 546, 601.

"* * * the United States intended to reserve water sufficient for the future requirements of the Lake Mead National Recreation Area, the Havasu Lake National Wildlife Refuge, the Imperial National Wildlife Refuge and the Gila National Forest." 40/

There are numerous Reservations all of which in the terms of the Supreme Court must be "livable" by the Indians who reside on them. These Reservations vary from those situated on Puget Sound to those in the desert areas of southwestern United States. The quantities of water required in the humid regions differ widely from the "hot, scorching sands" to which the Court made reference. Similarly the water requirements will differ dependent upon the use to which the waters are to be applied in the economic development of each Reservation.

(d) Indian Winters Doctrine Rights, like the lands of which they are a part, may be used for any beneficial purpose:

Potential for economic development of the Indian Reservations, as reiterated throughout this consideration, is inextricably related to the legal title to the right to divert and use water. Those Reservations were established in perpetuity as a "home and abiding place" for the Indians. In the words of the Supreme Court, "It can be said without overstatement that when the Indians were put on these reservations they were not considered to be located in the most desirable area of the Nation." 41/ Most of them were established during times when this Nation was experiencing great changes economically and socially.

40/ Arizona v. California, United States, Intervener, 373 U.S. 546, 601 (1962).
41/ Ibid., 373 U. S. 546, 598.

Changes were anticipated and changes came about; the process of change is continuing. From a predominantly rural culture geared to the cultivation of the soil, this Nation has developed into an urban and industrial country. Galbraith aptly describes it as the "New Industrial State."

Changes have likewise come about concerning the American Indians occupying the Reservations which were established by treaty and agreement between the Indians and the National Government. Reservations were likewise established unilaterally by Executive Orders and Congressional Enactments. At the time of their establishment those Reservations were primarily suitable for farming and livestock raising. In keeping with the balance of the Nation, the Reservations have changed. Some, similar to the Pueblos of New Mexico and the Salt River Indian Reservation in Arizona, are close to and are rapidly becoming a part of urban areas.

Concomitant with the changes in land are changes in water uses. With prescience - it will be recalled - the Supreme Court in Winters stated in regard to the rights to the use of water retained by the Indians:

> "The Indians had command of the lands and the waters - command of all their beneficial use, whether kept for hunting, 'and grazing roving herds of stock,' or turned to agriculture and the arts of civilization." 42/

42/ Winters v. United States, 207 U. S. 564, 576 (1907).

That conclusion is the key to economic development on the Reservations. Having retained the title to lands, they retained all incidents of that title, including but not limited to rights to the use of water. Title to those rights were free of limitations as to the purposes to which they could be applied. In Conrad Investment Company, the court referred to the fact there was invested in the Indians the rights to use the streams to meet future developments "for irrigating and other useful purposes."

In the second Ahtanum Decision the court reviewed the main precepts of the Winters Doctrine in these terms:

> This court held that by reason of the rule laid down in Winters * * * and other decisions of this court applying the rule of the Winters case, including Conrad Inv. Co. * * *
>
> All of the waters of Ahtanum Creek, or so much thereof as could be beneficially used on the Indian Reservation were, by virtue of the treaty, reserved for use by the Indian tribe upon their lands." 43/ (Emphasis supplied)

Adopting a practice seldom pursued, the Court of Appeals formulated the decree and directed its entry, which, based upon the facts, adjudged that "after the tenth day of July in each year, [the date when water becomes in short supply] all the waters of Ahtanum Creek shall be available to, and subject to diversion by, the plaintiff [United States of America] for use on Indian Reservation lands south of Ahtanum Creek,

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43/ United States v. Ahtanum Irrigation District, 330 F.2d 897, 899 (CA9, 1964).

to the extent that the said water can be put to a beneficial use."[44] (Emphasis supplied)

Pertinency must be attributed to the fact that in Arizona v. California, United States, Intervener - as reviewed above - rights were declared to have been reserved for the widely disparate present and "future requirements" of a National (1) recreation area; (2) wild life refuge; and (3) national forest.

Economic development of Indian Reservations, as stated above, must be geared to land and water use. Hence reference to the authority to decide the uses to which those properties will be placed becomes important. It is, of course, an elemental proposition of Constitutional law that there resides with the Congress of the United States, pursuant to the Commerce Clause, the plenary power and authority to conduct Indian affairs.[45] At a relatively early date in the Nation's history the Supreme Court observed that "This [Constitutional] power must be considered as exclusively vested in Congress * * *."[46] A concomitant Constitutional proviso - the Property Clause of the organic document must be read with the Commerce Clause alluded to above. That

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44/ United States v. Ahtanum Irrigation District, 330 F.2d 897, 915 (CA9, 1964).

45/ Constitution of the United States, 1787, Article I, Sec. 8, Cl. 3:
"Section 8: The Congress shall have Power:
"To regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes; * * *."

46/ Worcester v. Georgia, 31 U. S. 515, 559; 580-581 (1832).

clause declares in part that "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; * * *." [47] It is equally applicable to the Indian lands and rights to the use of water [48] as it is to lands the title to which is in the United States held for the benefit of the Nation as a whole. It is pertinent at this juncture to set forth this caveat:

> Although the Constitutional provisions cited above and others are the sources of authority for the administration of Indian lands and rights to the use of water, those property interests are private in nature - they are not public in nature and the precepts of the law which govern the administration of them under the Constitution are vastly different than those which govern lands of the Nation as a whole, that are administered by the Bureau of Land Management, Forest Service and other agencies of the Federal Government.

In the discussion of the Constitutional relationship between the United States and the Indians the caveat set forth above will be considered in greater detail. Suffice presently to say the Indians historically have suffered and are now suffering, irreparable damage by reason of the failure to distinguish their rights to the use of water from those required for the public in general.

47/ Constitution of the United States, 1787, Article IV, Section 3, Cl. 2.
48/ Arizona v. California, United States, Intervener, 373 U.S. 546, 597-598 (1962).

(a) Application of the Winters Doctrine to Treaty, Executive Order and Congressional Act Reservations:

There have been reviewed above the underlying principles of law respecting the Indians' rights to the use of water as enunciated in the Winters Decision.[49] Those rights were "retained" by the Indians, not granted to them by the United States - "the treaty was not a grant of rights to the Indians, but a grant of rights from them - a reservation of those not granted."[50]

In the Walker River Decision[51] the court had before it claimed Indian rights to the use of water. Neither a treaty nor an agreement between the Nation and the Indians was involved. Rather the Walker River Indian Reservation was created in 1859 by departmental action subsequently approved by an Executive Order.

In the opinion the court alluded to the fact that in the Winters Decision the Treaty was emphasized.[52] The fact that the Indians had not retained the rights to the use of water in the Walker River did not alter the court's decision. Rather it declared: "The power of the Government to reserve the waters and thus exempt them from subsequent appropriation by others is beyond debate."[53] In rejecting the alleged difficulties the non-Indian claimants would experience if

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49/ See above, page 14 - Indian Winters Doctrine Rights to the use of water [i] retained by the Indians under their treaties and agreements; [ii] those rights thus retained by the Indians exempt from State law.

50/ United States v. Ahtanum Irrigation District, 236 F.2d 321, 324, 326 (CA9, 1956); Appellees' Cert. Denied 352 U.S. 988 (1956); 330 F.2d 897; 338 F.2d 307; Cert. Denied 381 U.S. 924 (1965).

51/ U.S. v. Walker River Irr. Dist. 104 F.2d 334, 336 (CA9, 1939).

52/ Ibid., 104 F.2d 334, 336.

53/ Ibid., 104 F.2d 334, 336.

the rights of the Indians were recognized, the court states: "The settlers who took up lands in the valleys of the stream were not justified in closing their eyes to the obvious necessities of the Indians already occupying the reservation below." Thus the decree in favor of the Indians by the court below was sustained.

Adhering to the same principles of the powers of the National Government to reserve rights to the use of water for the Indians, as reviewed above, the Supreme Court declared:

> "They [cases relating to the ownership of beds of navigable streams] do not determine the problem before us and cannot be accepted as limiting
>
> > the broad powers of the United States to regulate navigable waters under the Commerce Clause and to regulate government lands under Art. IV, Sec. 3 of the Constitution. We have no doubt about the power of the United States under these clauses to reserve water rights for its reservations and its properties." 34/

From the legal standpoint there is a substantial difference between the rights, title to which resided in the Indians and which they retained, from those, title to which was in the United States, passing to the Indians when their Reservations were created by Congress or Executive Order. That difference does not, it is believed, have bearing upon the economic development of the Reservations, thus being beyond the scope of this consideration.

34/ Arizona v. California, 373 U.S. 546, 598 (1962).

Comment is warranted, however, to the fact that capricious officials have deprived the Indians of the benefits flowing from having their immemorial rights established pursuant to treaties rather than deriving their titles from the United States by Congress or by Executive Orders. An example of that capriciousness has had far-reaching effect upon the rights and interests of the Mohaves and the Colorado River Tribes of the Colorado River Indian Reservation. 55/ Colonel Poston, in 1865 a Member of Congress but formerly a Superintendent of Indian Affairs for the Arizona Territory, presented a graphic description of the course which was adopted in regard to the previously proud and self-sufficient Yumas, Mohaves, and other Colorado River Indians. Quite obviously he gave no thought to the legal implications flowing from his patronizing attitude towards those Indians, however benign his approach to them may have been. Those Indians had been reduced to begging for food by reason of the fact, in the words of Colonel Poston, that they had "been robbed of their lands and their means of subsistence * * *." 56/ He recited that as a representative of the United States "* * * I did not undertake to make a written treaty" with them because "* * * I considered that the Government was able and willing to treat them fairly

55/ See 7 Ind. Cl. Comm. Finding 25 (a) et seq., how the Mohaves, Yumas and others were deprived of the benefits of treaties, is as follows:
"25.(a) No treaty was ever made between the United States and the Mohave Tribe for the purpose of extinguishing the Indian title in said tribe to the lands it exclusively used and occupied. The lands found herein to have been exclusively used and occupied by the Mohave were located in what are now the States of California, Nevada and Arizona."

56/ Cong. Globe, 38th Congress, 2d Sess., March 2, 1865, p. 1320.

and honestly * * *." In their dire distress he pointed out that the Yumas, Mohaves and other Indians "* * * there assembled were willing, for a small amount of beef and flour, to have signed any treaty which it had been my pleasure to write." Because he would attempt to obtain from a "magnanimous Government some relief from their desperate circumstances, he asked those Indians to abandon "* * * all the one hundred and twenty thousand square miles, full of mines and rich enough to pay the public debt of the United States" and to

> "confine themselves to the elbow of the Colorado River, not more than seventy-five thousand acres."

That action resulted in the extinguishment of the Mohave title with the attendant loss of invaluable lands and rights to the use of water and an ensuing history which in many ways partakes of a prolonged nightmare of contradictions, discriminations and travail.

(f) Indian Winters Doctrine Rights distinguished from private appropriative rights to the use of water acquired through compliance with State law; riparian rights:

Economic development on the Indian Reservations has been keyed throughout this consideration to Winters Doctrine rights to the use of water. Geographical location of Indian Reservations and competition to meet present and future requirements necessitates reference to the individual, corporation, municipal and quasi-municipal rights under the doctrine of prior appropriation. Winters Doctrine Rights have been referred to as immemorial in character, prior and paramount or in similar terms, according to them preferential status on streams. Reasons for this status have been reviewed above. Indian rights

having been retained by the Indians or invested in them antecedent to settlement of the lands in Western United States, demonstrate the coalescence of history and the law. Those rights to the use of water as reviewed, were never opened by the Congress to private acquisition.

(i) The doctrine of prior appropriation:

Title to most of Western United States originally resided in the National Government - land, rights to the use of water, minerals, timber and all natural resources. Miners came to the harsh environment of the West exploring for precious minerals. Then, as now, water was the key to economic development. Without it gold remained in the granite and in the gravel. As a consequence water was diverted out of the streams to the mine locations, and frequently conducted long distances at great costs of money, time and effort. These activities - the mining, water diversion - were accomplished with the knowledge of the Government of the United States and with its acquiescence.

Violence is very much a part of the history of the law relating to western rights to the use of water. That circumstance simply demonstrates the imperative necessity for it if economic development of the arid and semiarid regions was to be accomplished. That situation is more acute today than one hundred years ago. In substitution - in part at least - for violence, there grew up in the mining districts the precept that the "First in time [to divert and use water for beneficial purposes] was first in right," on the streams of the public domain. That overworked cliché is demonstrative of the truism that law is the outgrowth of experience, not logic.

In 1866 the Congress, in regard to the Nation's western lands, took cognizance of the laws of the mining districts, the States - which at that time had come into the Union - and declared in part as follows:

> "Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; * * *." 56/

In 1870 there was further Congressional recognition of the rights to the use of water exercised pursuant to State law by enactment of the following legislation:

> "All patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by this section." 57/

Thus the patentee took his title from the Nation subject to privately

56/ Act of July 26, 1866, Ch. 262, Sec. 9, 14 Stat. 253.
57/ Act of July 9, 1870, Ch. 235, Sec. 17, 16 Stat. 218.

acquired rights in the streams on the "public land." [58]

In the 1877 Desert Land Act, Congress, to foster economic development of the arid public land, having provided for diversion and use of water under specified conditions, declared that:

> "* * * all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes subject to existing rights." [59]

In summary of the legal consequences flowing from the Acts of 1866, 1870 and 1877, the Highest Court declared:

> "As the owner of the public domain, the government possessed the power to dispose of land and water thereon together, or to dispose of them separately, Howell v. Johnson, C.C. 89 Fed. 556, 558. The fair construction of [the Desert Land Act of 1877] is that Congress intended to establish the rule that for the future the land should be patented separately; and that all non-navigable waters thereon should be reserved for the use of the public under the laws of the states and territories named." [60]

58/ Act of July 9, 1870, Ch. 235, Sec. 17, 16 Stat. 218. Note: The quotations are from 43 U.S.C. 661 in which the Acts of 1866 and 1870 are in part codified. See in regard to the preceding review: Jennison v. Kirk, 98 U.S. 453 (1878); California-Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935); Federal Power Comm. v. Oregon, 349 U.S. 435 (1955).

59/ Act of March 3, 1877, Ch. 107, Sec. 1, 19 Stat. 377.

60/ California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 163-64 (1935).

When the Supreme Court, as stated above, declared that the National Government as owner of the public lands had the power to dispose of those lands and rights to the use of water separately - as it in fact did by the Acts of 1866, 1870 and 1877 - it relied upon the decision of Howell v. Johnson involving rights to the use of water acquired in a stream in the State of Wyoming which traversed public lands. From that case these most pertinent statements are taken relative to the source of title to rights to the use of water in Western United States:

> "The rights of plaintiff do not, therefore, rest upon the laws of Wyoming, but upon the laws of congress.
>
> "The legislative enactment of Wyoming was only a condition which brought the law of congress into force. The national government is the proprietor and owner of all the land in Wyoming and Montana which it has not sold or granted to some one competent to take and hold the same. Being the owner of these lands, it [the United States] has the power to sell or dispose of any estate therein or any part thereof. The water in an innavigable stream flowing over the public domain is a part thereof, and the national government can sell or grant the same, or the use thereof, separate from the rest of the estate, under such conditions as may seem to it proper." 61/

61/ Howell v. Johnson, 89 Fed. 556, 558 (D. Mont. 1898).

That summation is based upon sound principles of real property law. Substance of it has been variously declared by the Highest Courts of several of the States. 62/

The doctrine of prior appropriation has been well stated in these terms:

"* * *To appropriate water means to take and divert a specified quantity thereof and put it to beneficial use in accordance with the laws of the State where such water

62/ Smith v. Denniff, 24 Mont. 20, 21; 60 Pac. 398 (1900). See also Story v. Woolverton, 31 Mont. 346, 353-54; 78 Pac. 589, 590 (1904).
Benton v. Johncox, 17 Wash. 277, 289; 49 Pac. 495, 499 (1897): "The government, being the sole proprietor, had the right to permit the water to be taken and diverted from its riparian lands; * * *."
LeQuime v. Chambers, 15 Idaho 405; 98 Pac. 415 (1908).
Lux v. Haggin, 69 Cal. 255, 338; 10 Pac. 674, 721 (1886): "It has never been held that the right to appropriate waters on the public lands of the United States was derived directly from the state of California as the owner of innavigable streams and their beds; and, since the act of congress granting or recognizing a property in the waters actually diverted and usefully applied on the public lands of the United States, such rights have always been claimed to be deraigned by private persons under the act of congress, from the recognition accorded by the act, or from the acquiescence of the general government in previous appropriations made with its presumed sanction and approval." (Emphasis supplied)
Morgan v. Shaw, 47 Ore. 333, 337; 83 Pac. 534, 535 (1906).
Hough v. Porter, 51 Ore. 318, 391; 95 Pac. 732; 98 Pac. 1083, 1092 (1908, 1909).
2 Kinney, Irrigation and Water Rights, 1118 (2d ed. 1912), reiterates that proposition. From this latter source, at 692-93, this statement is taken:
"The Government is still the owner of the surplus of the waters flowing upon the public domain. * * * It therefore follows, as the result of the ownership by the United States of the waters flowing upon the public domain, that any dedication by a State of all the waters flowing within its boundaries to the State or to the public amounts to but little, in the face of any claim which may be made by the Government, at least to all the surplus or unused waters within such State."

is found, and, by so doing, to acquire under such laws, a vested right to take and divert from the same source, and to use and consume the same quantity of water annually forever, subject only to the right of prior appropriations. * * * the perfected vested right to appropriate water flowing * * * cannot be acquired without the performance of physical acts through which the water is and will in fact be diverted to beneficial use." 63/ (Emphasis supplied)

Having reviewed the history and prime elements of the doctrine of prior appropriation, brief reference will be made to the common law doctrine of riparian rights to the use of water.

(ii) Indian Winters Doctrine Rights differ drastically from common law riparian rights:

Unsuited to the semiarid regions of the west; incompatible with the monopolistic aspects of the doctrine of prior appropriation, the common law doctrine of riparian rights to the use of water, a product of a more humid, less harsh environment than that of Western United States, was rejected by the States of Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah and Wyoming. Once again the law is the outgrowth of experience, not logic. Where logic purported to override experience, as in California, Oregon and other States, and there has been adherence to even greatly modified concepts of riparian principles, together with the doctrine of prior appropriation, confusion respecting the law has ensued. In a recent California proceeding the principles of the Winters Doctrine were applied to Indian and Federal rights to both surface and

63/ Arizona v. California, 283 U. S. 423 (1931).

ground waters; there were applied the principles of privately owned riparian rights to surface waters; principles respecting correlative privately owned rights were likewise applied to ground waters; and the principles respecting appropriative rights were applied to both surface and ground waters. 64/

This latter case presents the difficult - but imperative immediate need - of ascertaining the Winters Doctrine Rights to the use of water of the American Indians if economic development on their Reservations is not to be totally stifled in areas comparable to Southern California. Thus to protect the Indian rights against invasion, it is essential that brief reference be made to the primary characteristics of riparian rights.

A riparian right is held and exercised correlatively with all other riparian owners as "a tenancy in common and not a separate or severable estate." 65/ Obviously the concept of the "reserved right" in the Indians is wholly at variance with the limitations which are present in a tenancy in common. Further, "a riparian owner has no right to any mathematical or specific amount of the waters of a stream as against other like owners." 66/ That aspect of the riparian right results from the fact that those rights are held correlatively with

64/ United States v. Fallbrook Public Utility District, 101 F. Supp. 298 (S.D.Cal. 1951); 108 F. Supp. 72 (1952); 109 F. Supp. 28 (1952); 110 F. Supp. 767 (1953); 202 F.2d 942 (9th Cir. 1953); 165 F. Supp. 806 (1958); 193 F. Supp. 342 (1961); Reversed in part and affirmed in part, 347 F.2d 48 (9th Cir. 1965). Noteworthy is the fact that on May 8, 1963, a final judgment was entered decreeing, in effect, every right and interest of Fallbrook Public Utility District subject and subordinate to the prior rights of the United States.

65/ Seneca Consolidated Gold Mines Co. v. Great Western Power Co. of California, 209 Cal. 206; 287 Pac. 93, 98 (1930).

66/ Prather v. Hoberg, 24 Cal.2d 549; 150 P.2d 405, 410 (1944).

all other riparians. As a consequence the quantity of water riparian owners may use must be "reasonable" in the light of the claims of all other riparians. Reasonableness is, of course, a variant depending upon the supply of water, the demands which differ from day to day, and a multitude of other factors.[67/]

Equally at odds with the concept of Winters Doctrine Rights of the Indians is the limitation upon the exercise of rights riparian in character that: "'Land which is not within the watershed of the river is not riparian thereto, and is not entitled, as riparian land, to the use or benefit of the water from the river, although it may be part of an entire tract which does extend to the river * * *.'"[68/] There is, of course, no legal basis for any limitation of Winters Doctrine Rights to the watershed in which the Indian land is situated. Moreover, the laws of the States could not thus restrict the power of Congress over the properties of the Nation.[69/]

It is pertinent at this phase of the consideration to turn to the police regulations of the States which govern the rights to the use of water of private persons and briefly to discuss the exemption of Indian rights to the use of water from those police regulations.

(g) Federal-State relationship as it pertains to economic development of Indian lands and Winters Doctrine Rights to the use of water:

Judicial recognition of Indian Winters Doctrine Rights is as broad as the Western United States and it has been applied to a

67/ Hutchins, The California Law of Water Rights 218 (1956).
68/ Ibid., page 202.
69/ United States v. San Francisco, 310 U. S. 16 (1940).

vast variety of circumstances. It is of prime importance to the economic development of American Indian Reservations.[70] Equally important is the fact that the American Indian Reservations are at the headwaters of or border upon or are traversed by the major interstate stream systems in the West. For a variety of reasons, moreover, the Indian rights to the use of water have remained unexercised to a very large extent. Sharp competition exists now - will be accentuated with expanded economic development on the Reservations - between the vested Indian rights to the use of water and those claimed by individuals or corporations, public or private, asserted under State law.

Based upon sound logic, legal precedent, expressed language upon which the States were admitted to the Union, they and those claiming under them may not interfere with the rights of the American Indians. In practice the converse has prevailed.

Immunity of Indian Winters Doctrine Rights from State interference or seizure has been guaranteed in a variety of ways. The State of Washington's Enabling Act and Constitution specifically provide that: "Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States * * *."[71] Respecting identical

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70/ Winters v. United States, 207 U. S. 564 (1907), affirming the Court of Appeals for the Ninth Circuit, 143 Fed. 740; 148 Fed. 684.
United States v. Powers, 305 U.S. 527 (1939), affirming 94 F.2d 783.
Arizona v. California, United States, Intervener, 373 U.S. 546 (1962).
United States v. Walker River Irrigation District, et al., 104 F.2d 334 (CA9, 1939).
Conrad Investment Co. v. United States, 161 Fed. 829 (CA9, 1908).
United States v. McIntire, 101 F.2d 650 (CA9, 1939).
Skeem v. United States, 273 Fed. 93 (CA9, 1921).
United States v. Ahtanum Irrigation District, 236 F.2d 321, (CA9, 1956); Appellees' cert. denied 352 U.S. 988 (1956); 330 F.2d 897 (1965); 338 F.2d 307; Cert. denied 381 U.S. 924 (1965).

71/ Enabling Act, Sec. 4, second subdivision; Constitution of the State of Washington, Article XXIV, second subdivision.

provisions in the Montana Enabling Act and Constitution, the Court of Appeals for the Ninth Circuit has unequivocally declared that the State laws respecting the appropriation of rights to the use of water would have no application to the Flathead Indian Reservation. 72/ That same court later specifically ruled as follows on the subject:

> "Rights reserved by treaties such as this are not subject to appropriation under state law, nor has the state power to dispose of them." 73/

In regard to rights to the use of water for lands withdrawn by the United States, the Supreme Court has declared: "the Acts of July 26, 1866, July 9, 1870, and the Desert Land Act of 1877" opening surplus rights to the use of water to appropriation "* * * are not applicable to the reserved lands and waters here involved." 74/ Having thus ruled, the Supreme Court then proceeded to set forth the legal distinction between Indian lands and withdrawn lands, upon which the Pelton Project was to be located, and "public lands" to which the Desert Land Act of 1877 is applicable, by stating that the former "are not unqualifiedly subject to sale and disposition * * *." 75/

It will be recalled that Winters declared emphatically that the power of the Nation under the Constitution "* * * to reserve the waters and exempt them from appropriation under the state laws is not denied and could not be * * *." 76/

72/ United States v. McIntire, 101 F.2d 650 (CA9, 1939).
73/ United States v. Ahtanum Irrigation District, 236 F.2d 321, 328 (CA9, 1956).
74/ Federal Power Commission v. Oregon, 349 U.S. 435, 445 (1955).
75/ Ibid., 349 U.S. 435, 448.
76/ See supra, p. 14, footnote 15 et seq., particularly pp. 20-21 footnote 24.

Title to rights to the use of water - albeit they stem from the Constitution itself; are fully recognized by the courts - does not in any sense guarantee to the American Indians that those rights will not be, have not been, taken from them. Far from humorous is the description of State permits to appropriate rights to the use of water as "hunting licenses." A permit to appropriate, for example, in California "* * * is * * * no assurance of a water supply * * *." 77/

However, "surplus" waters in a stream frequently are diverted, used and economies built upon those waters quite aside from the fact that the "surplus" is actually water the rights to which reside in the Indians located on the streams. Constitutional law, ethics and good conscience become mere technicalities to be avoided or ignored under those circumstances. To the holder of the permit from the State to appropriate rights to the use of water - although it is subject to vested rights - the existence of a surplus, though it may be momentary, suffices for him to expend money to develop its use with the hope that time will come to his aid as a barrier to the Indians recovering the waters to which they are justly entitled by reason of the ownership of their lands. As a consequence of actual practice, as distinguished from legal niceties, the American Indian rights to the use of water are being rapidly eroded away by those claiming under the guise of compliance with State law. They eloquently prove a Western truism - respecting water - however harsh and cynical it may be - "use it or lose it."

77/ California's "Rules and Regulations" governing appropriation of rights to the use of water.

In the paragraphs which succeed there will be considered the relationship, which has its genesis in the Constitution and is rooted deep in history, between the American Indians and this Nation in regard to the rights to the use of water as they relate to present and future economic development of the Indian Reservations.

ECONOMIC DEVELOPMENT OF AMERICAN INDIAN RESERVATIONS MUST BE EFFECTUATED WITHIN THE PURVIEW OF THE CONSTITUTIONAL RELATIONSHIP BETWEEN THE NATION AND THE INDIANS

(a) American history as it relates to the American Indians and the economic development of their Reservations:

When the European culture encountered that of the indigenous inhabitants of the Americas it is difficult to perceive at this point the disparity which existed between them. It is worthy of note that from the outset the then great Continental powers, though desirous of occupying the lands loosely held by the Indians, did not deny that the Indians had rights to those lands. Rather, Spain acknowledged their ownership of the lands which they occupied and refused to enslave them. The Dutch and early Colonists respected the Indian rights, treating with them as the owners of their lands.[78/] It is, of course, a historical fact that William Penn took cognizance of the rights of the Indians and paid them for their properties.

Great Britain established within its concepts a relationship with the Indians who occupied the lands which it claimed in the New World. That the European and Indian mores did not preclude efforts to resolve amicably the differences inherent between the invaders of the lands and occupants of them is clear. Treaties with the Indians were frequently

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78/ Federal Indian Law, page 164.

entered into purporting to guarantee the integrity of the lands which were retained by the Indians as their homes and abiding places. By reason of Britain being the principal source of the laws ultimately to govern this Nation, its declarations in regard to the Indians greatly influenced the future of this Nation in its confrontation with the Indians. The Crown emphasized through its representatives that the Indians were entitled to justice and that "The boundaries of your hunting-grounds will be accurately fixed, * * *." 79/

Great Britain obviously considered the American Indian tribes that it encountered as nations and dealt with them on that basis. It professed a policy which recognized that the Indians could govern themselves. That policy was, of course, predicated on the Crown's self-interest and that self-interest excluded all other sovereign claims

79/ Worcester v. Georgia, 31 U. S. 515, 546 (1832).
"The general views of Great Britain, with regard to the Indians, were detailed by Mr. Stuart, superintendent of Indian affairs, in a speech delivered at Mobile, in presence of several persons of distinction, soon after the peace of 1763. Towards the conclusion he says, 'Lastly, I inform you that it is the king's order to all his governors and subjects, to treat Indians with justice and humanity, and to forbear all encroachments on the territories allotted to them; accordingly, all individuals are prohibited from purchasing any of your lands; but as you know that, as your white brethren cannot feed you when you visit them, unless you give them ground to plant, it is expected that you will cede lands to the king for that purpose. But whenever you shall be pleased to surrender any of your territories to his majesty, it must be done, for the future, at a public meeting of your nation, when the governors of the provinces, or the superintendent shall be present, and obtain the consent of all your people. The boundaries of your hunting-grounds will be accurately fixed, and no settlement permitted to be made upon them. As you may be assured that all treaties with your people will be faithfully kept, so it is expected that you, also, will be careful strictly to observe them.'"

in the territory which it occupied. In the words of the Supreme Court respecting Britain's historical policy with the Indians:

> "This was the settled state of things when the war of our revolution commenced." 80/

History also records that the Colonies in their rebellion against the then Mother Country, desired most assiduously to avoid conflict with the Indians and conducted negotiations with them with that end in mind. As a consequence the inceptive relationship between the former Colonies in revolt - struggling for their freedom - and the Indians was not that of a superior power enforcing its will upon the Indians, but to placate a war-like people which might very well measure the difference between success and failure; victory or defeat. Significance must be ascribed to the fact that during the Revolutionary War the United States entered into numerous treaties with the Indians, among them being the "Articles of Agreement and Confederation with the Delaware Nation." 81/ Objective of and need for the treaty was declared in this excerpt taken from it:

> "And whereas the United States are engaged in a just and necessary war, in defence and support of life, liberty and independence, against the King of England and his adherents, * * *." 82/

Continuing, the treaty recites that the "said King" was maintaining

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80/ Worcester v. Georgia, 31 I. S. 515, 548 (1832).
81/ 7 Stat. 13 et seq.
82/ Article III.

posts and forts throughout the lands of the Delawares and the United States was in need of access across the lands of the Delaware Nation. Provision was also made in the document pursuant to which the Delawares were to assist the struggling Nation in its war against Great Britain and

> "to join the troops of the United States aforesaid, with such a number of their best and most expeart warriors as they can spare, consistent with their own safety, and act in concert with them, * * *." 83/

In consideration of the very valuable assistance accorded to it, the United States covenanted as follows:

> " [it would] guarantee to the aforesaid nation of Delawares, and their heirs, all their teritoreal rights in the fullest and most ample manner, as it hath been bounded by former treaties, as long as they the said Delaware nation shall abide by, and hold fast the chain of friendship now entered into." 84/

Casting the arrangement in its proper perspective, this Nation and the Indians referred to themselves in the treaty as "the contracting parties." No guardian and ward relationship there; rather a covenant for mutual assistance and recognition.

83/ Article III.

84/ Article VI.

Similar treaties were negotiated and entered into during the period when the Articles of Confederation were in force and effect. 85/ After the adoption of the Constitution of the United States in 1787 numerous other treaties were entered into with the Indians, many of them involving lands in Western United States. A review of those treaties, many of which were contemporaneous with the adoption of the Constitution, is instructive as to the relationship between the Nation and the Indians at the time, and provides the correct perspective of that relationship. Frequently the arrangement between the United States and the Indians was denominated "A Treaty of Peace and Friendship" as with the "Creek Nation." 86/

Violations of the treaties by the United States does not detract from the nature of the covenants when they were effectuated by the parties to them. Those violations caused consternation to

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85/ Schmeckebier, The Office Of Indian Affairs - U. S. Government Service Monograph No. 48; page 14:
Fort Stanwix, with the Six Nations (7 Stat. L., 15)
Fort McIntosh, with the Delawares, Wyandots, Chippewas, and Ottawas (7 Stat. L., 16)
Hopewell, with the Cherokees (7 Stat. L., 18)
Hopewell, with the Choctaws (7 Stat. L., 21)
Hopewell, with the Chickasaws (7 Stat. L., 24)
Mouth of the Great Miami, with the Shawnees (7 Stat. L., 26)
Fort Harmar, with the Wyandots, Delawares, Ottawas, Chippewas, Potawatomi, Sauk, and Six Nations (7 Stat. L., 18,33).

86/ 7 Stat. 35 et seq.

President Washington during his incumbency. 87/ For almost one hundred years the Nation and the Indian Tribes were to negotiate and attempt to resolve their differences by mutual agreements.

From those treaties, some of which are cited above, it is evident that the economic development of the United States and of the Indians were the expressed objectives. It is clear beyond question that the National policy was to create a continuing obligation to the Indians in consideration of the relinquishment by them of vast areas of invaluable land, rights to the use of water, forests, and other natural resources which contributed so abundantly to the affluence of the United States down through the years to the present time.

87/ Schmeckebier, The Office of Indian Affairs - U. S. Government Service Monograph No. 48, pages 20-21:

"Serious and earnest comments on Indian affairs appear in all of Washington's messages; some relate to aggressions of the Indians, but more are devoted to the necessity of legislation to curb the unlawful practices of the whites. In the annual address of November 6, 1792, after referring to the war in the region north of the Ohio and to Cherokee depredations on the Tennessee, the President referred to the frontier situation as follows:

'I cannot dismiss the subject of Indian affairs without again recommending to your consideration the expediency of more adequate provision for giving energy to the laws throughout our interior frontier and for restraining the commission of outrages upon the Indians, without which all pacific plans must prove nugatory. To enable, by competent rewards, the employment of qualified and trusty persons to reside among them as agents would also contribute to the preservation of peace and good neighborhood. If in addition to these expedients an eligible plan could be devised for promoting civilization among the friendly tribes and for carrying on trade with them upon a scale equal to their wants and under regulations calculated to protect them from imposition and extortion, its influence in cementing their interest with ours could not but be considerable.'

"In the annual address of December 3, 1793, another plea was made for the regulation of trade 'conducted without fraud, without extortion, with constant and plentiful supplies, with a ready market for the commodities of the Indians and a stated price for what they give in payment and receive in exchange.'"

It was on that background that the Nation formulated its policy with the American Indians. Altruism undoubtedly was an ingredient giving rise to that policy. However, peace and trade with the Indians - need for domestic tranquillity - far outweighed the benign attitude towards the Indians which is frequently attributed to the Nation's founding fathers - in a word, they were practical in their efforts to survive during the formative period.

(b) It is the Constitution which established the Nation's relationship with the Indians - the courts have interpreted the proviso in the organic law as constituting the Nation a guardian and the Indians the wards under a trust responsibility:

Under the Articles of Confederation the provision was made that

> "The United States in Congress assembled shall also have the sole and exclusive right and power of regulating * * * the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated * * *." 88/

James Madison in the Federalist pointed out the anomaly created by the last quoted vague and uncertain provision, in urging the adoption of the new Constitution. 89/

88/ Articles of Confederation, 1777, Article IX.

89/ Federalist and Other Constitutional Papers, Scott, page 236:
"The regulation of commerce with the Indian tribes, is very properly unfettered from two limitations in the Articles of Confederation, which render the provision obscure and contradictory. The power is there restrained to Indians, not members of any of the States, and is not to violate or infringe the Legislative right of any State within its own limits. What description of Indians are to be deemed members
(Continued next page)

In lieu of the wholly objectionable language of the Articles of Confederation, as commented upon, this provision was adopted as a part of the Constitution of the United States of America:

"Section 8: The Congress shall have Power:

"To regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes; * * *."[90/] Swept away by that clause of the organic law are all doubts as to the plenary power of the Nation in regard to its relationship with the Indians.

Also contemporaneous with that delegation by the States to the new Nation of all power and authority in Indian matters, is this reflection of Federal policy as enunciated in the "Ordinance of 1787: The Northwest Territorial Government":

"* * *The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights, and liberty they never shall be invaded

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Footnote 89 continued:
of a State, is not yet settled; and has been a question of frequent perplexity and contention in the Federal councils. And how the trade with Indians, though not members of a State, yet residing within its Legislative jurisdiction, can be regulated by an external authority without so far intruding on the internal rights of legislation, is absolutely incomprehensible. This is not the only case, in which the Articles of Confederation have inconsiderately endeavored to accomplish impossibilities; to reconcile a partial sovereignty in the Union, with complete sovereignty in the States; to subvert a mathematical axiom, by taking away a part, and letting the whole remain."

90/ Constitution of the United States of America, 1787, Article I, Sec. 8, Cl. 3.

or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall, from time to time, be made, for preventing wrongs being done to them, and for preserving peace and friendship with them." 91/

There have been reviewed the factors which gave rise to the Constitutional provision which was to invest in the Central Government the power:

"To regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes; * * *."

From the shaky first steps of sovereignty the Nation was to progress and to become stronger. It was no longer seeking, as it did with the Delawares, a propitious arrangement which was of mutual assistance to the "contracting" parties. Force rather than diplomacy became the method with which to transact business with the indigenous "savages". It became increasingly clear that the reciprocity between the Nation and the Indians was no longer of paramount importance. Nevertheless, until relatively recent times - a few men are still living who remember - it was propitious for the Nation to come to terms with embattled Indian Tribes and in return for the lands seized from them to guarantee economic development in regard to the vestige of lands left to them.

91/ See Article III.

A half century after the adoption of the Constitution Chief Justice Marshall labored greatly in an effort to analyze what he termed the "anomalous * * * character * * *," of the Nation's relationship with the Indians. He determined that an Indian Tribe was neither a State nor a foreign nation when the Cherokees sought to invoke against Georgia the Highest Court's jurisdiction. 92/ On the subject of that relationship he stated:

> "The condition of the Indians in relation to the United States is, perhaps, unlike that of any other two people in existence. In general, nations not owing a common allegiance, are foreign to each other. The term foreign nation is, with strict propriety, applicable by either to the other. But the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else."

He then summarized as follows:

> "* * * their relation to the United States resembles that of a ward to his guardian." 93/ (Emphasis supplied)

Repeatedly the Highest Court would express the thought:

> "The relation of the Indian tribes living within the borders of the United States, both before and since the Revolution, to the people of the United States has always been an anomalous one and of a complex character." 94/ (Emphasis supplied)

92/ Cherokee Nation v. Georgia, 30 U.S. 1, 15 (1831).
93/ Ibid., 30 U.S. 1, 17 (1831).
94/ United States v. Kagama, 118 U.S. 381 (1886).

More recently Mr. Justice Murphy, speaking for the Supreme Court, said:

> "'* * * this Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.'" 95/

The Constitutional obligation here involved has also been referred to as "the generous and protective spirit which the United States properly feels towards its Indian wards." 96/ In keeping with that platitude the Court has alluded to the "high standards for fair dealing required of the United States in controlling Indian affairs." 97/

Failure of the United States to fulfill its obligation as a trustee is one of the gravest difficulties in regard to the economic development of the American Indian Reservations. Through the dissipation of the remaining assets of the Indians by the failure of the Nation to fulfill that obligation the hope of economic stability becomes increasingly remote. This succinct statement summarizes the difficulty with which the Indians are confronted:

> "'From the very beginnings of this nation, the chief issue around which federal Indian policy has revolved has been, not how to assimilate the Indian nations whose lands we usurped, but how best to transfer Indian lands and resources to non-Indians.'" 98/

95/ Seminole Nation v. United States, 316 U.S. 286 (1942).
96/ Oklahoma Tax Commission v. United States, 319 U.S. 598, 607 (1943).
97/ United States v. Tillamooks, 329 U.S. 40, 47 (1946).
98/ United States v. Ahtanum Irrigation District, 236 F.2d 321, 337 and footnote 23 (CA9, 1956).

(a) Standard of diligence required of the United States in administering Indian rights to the use of water in furtherance of economic development of Indian Reservations:

Constitutional dignity of the Nation's trust responsibility to the Indians has been commented upon in the paragraphs which precede. Performance in the fulfillment of that obligation is, of course, the crux of the matter, not the platitudinous espousals so frequently used in regard to it. In this phase of the matter the criteria in establishing the care, diligence and skill to be required of the Nation, its agencies and personnel in protecting, preserving and administering Indian lands and rights to the use of water will be briefly reviewed.

It is basic that:

> "The trustee [guardian] is under a duty to the beneficiary [ward] in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property; and
>
> if the trustee has greater skill - [here engineers, hydrologists, soil scientists, coptract negotiators, administrators, lawyers] - than that of a man of ordinary prudence, he is under a duty to exercise such skill as he has." 99/

A concomitant proposition - here most important - is that, The guardian is under a duty to the ward affirmatively "to take and keep control of the trust property." 100/ He is, moreover, to the extent of his

99/ American Law Institute, Restatement, Trusts, Section 174.
100/ Ibid., Section 175.

capacities, here professional, "* * * under a duty to the beneficiary to use reasonable care and skill to preserve the trust property."[101] It is instructive to turn to the timber blow-down Menominee Case in Wisconsin. There Congress in its consent that the National Government could be sued, declared, among other things:

> "At the trial of said suit the court shall apply as respects the United States the same principles of law as would be applied to an ordinary fiduciary and shall settle and determine the rights thereon both legal and equitable of said Menominee Tribe against the United States notwithstanding lapse of time or statute of limitations."[102]

From the findings, conclusions and the judgment in the last cited decision it is evident that the broad precepts of the law reviewed above were applied against the United States of America.

In a companion case to that last cited, the court had this to say with respect to the performance of the trust responsibility owing by the United States to the Indians:

> "We further think that the provision of Section 3 of the jurisdictional act concerning the principles applicable to an 'ordinary fiduciary' add little to the settled doctrine that the United States, as regards its dealings with the property of the Indians, is a trustee."[103]

101/ American Law Institute, Restatement, Trusts, Section 176.
102/ The Menominee Tribe of Indians v. The United States, 101 Ct. Cls. 22, 23 (1944).
103/ The Menominee Tribe of Indians v. The United States, 101 Ct. Cls. 10, 19 (1944).

Moreover,

> "Where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court, except to prevent an abuse by the trustee of his discretion." 104/

In regard to this principle there will be further comment upon it in that aspect of this consideration relating to the separation of powers. From that same source, the criteria set forth below are taken, which determine whether the trustee has fulfilled his obligation. 105/ Full consideration of those principles goes far in establishing the nature of the Nation's obligations to the Indians.

Respecting the exercise of administrative discretion, this statement has also been made:

> "To the extent to which the trustee has discretion, the court will not control his exercise of it as long as he does not exceed the limits of the discretion conferred upon him. The court will not substitute its own judgment for his." 106/

104/ American Law Institute, Trusts, Section 187, page 479.

105/ "In determining the question whether the trustee is guilty of an abuse of discretion in exercising or failing to exercise a power, the following circumstances may be relevant: (1) the extent of the discretion intended to be conferred upon the trustee by the terms of the trust; (3) the nature of the power; (4) the existence or non-existence, the definiteness or indefiniteness, of an external standard by which the reasonableness of the trustee's conduct can be judged; (5) the motives of the trustee in exercising or refraining from exercising the power; (6) the existence or non-existence of an interest in the trustee conflicting with that of the beneficiaries." (American Law Institute, Trusts, Section 187, pp. 480-481.)

106/ III Scott on Trusts, 3d ed., Section 187, p. 1501.

It is important to observe that the courts are explicit in the manner in which the trustee must perform:

> "Even where the trustee has discretion, however, the court will not permit him to abuse the discretion. This [exercise of discretion] ordinarily means that so long as he acts not only in good faith and from proper motives, but also within the bounds of a reasonable judgment, the court will not interfere; but the court will interfere when he acts outside the bounds of a reasonable judgment."[107]

Perhaps the most basic concept of the trust obligation owing by the National Government to the American Indians is that it must exercise the highest degree of fidelity to them. It has been declared in regard to the loyalty of the guardian to the ward that, "The trustee is under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary."[108] Recently it has been authoritatively declared that the United States owed "the most exacting fiduciary standards" with respect to the Indians, even if it should prefer to pursue other interests.[109] Under no circumstances can the United States in furtherance of its other obligations, act in competition with the Indians or in derogation of their rights.[110]

107/ III Scott on Trusts, 3d ed., Section 187, p. 1501.
108/ American Law Institute, Trusts, Section 170.
109/ Navajo Tribe of Indians v. United States, 364 F.2d 320, 322 (Ct. Cls. 1966).
110/ American Law Institute, Trusts, Section 170, p. 431 et seq.

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109/ Navajo Tribe of Indians v. United States, 364 F.2d 320, 322 (Ct. Cls. 1966).
110/ American Law Institute, Trusts, Section 170, p. 431 et seq.

Freedom in the exercise of discretion is the key for the care, skill and diligence required for the proper performance by the United States, Trustee, in regard to the administration of lands and rights to the use of water for the economic development of the Indian Reservations. Sharp constriction of that freedom of discretion by reason of laws now in force, gravely impairs the activities of the officials and agencies charged with the obligation of fulfilling the trust responsibilities to the Indians delegated in the Constitution by the States to the Nation. That constraining influence upon the economic development of Indian Reservations will next be considered.

CONFLICTING RESPONSIBILITIES UNDER THE LAW GRAVELY IMPAIR THE CARE, SKILL, AND DILIGENCE REQUIRED OF THE SECRETARY OF THE INTERIOR AND THE ATTORNEY GENERAL IN THE PRESERVATION, PROTECTION, ADJUDICATION AND ADMINISTRATION OF INDIAN LANDS AND RIGHTS TO THE USE OF WATER, THUS IMPEDING ECONOMIC DEVELOPMENT OF THE INDIAN RESERVATIONS

(a) Economic development of Indian lands and rights to the use of water within the purview of the Constitution:

Its genesis being the Constitution itself, the trust responsibility of the Nation to the Indians must be fulfilled within the purview of that document. Earlier there were reviewed the checks and balances which are operative between the Federal and State Governments in the field of water resources and, though in theory the plenary power over Indian Winters Doctrine Rights was delegated to the Nation, in actuality the authority of the States or those claiming rights to the use of water under them have a very real and far-reaching impact upon Indian rights. 111/

111/ See Indian Winters Doctrine Rights distinguished from private appropriative rights to the use of water acquired through compliance with State law * * *, page 37.

Inherent though not explicitly declared in the Constitution, is the doctrine of the separation of powers among the three great branches of the Federal Government, the Executive, the Legislative and the Judicial. 112/ The checks and balances stemming from that separation of powers in the field of water resources are very real.

112/ Three paramount branches of the Federal Government, the Legislative, Executive and Judicial, exercise the powers conferred upon it by the Constitution. Those branches are defined by that document as follows: "All legislative Powers herein granted shall be vested in a Congress of the United States, * * *;" (Article I, Section 1). "The executive Power shall be vested in a President of the United States of America;" (Article II, Section 1). "The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." (Article III, Section 1).

Regarding the division of the powers of government as prescribed by the provisions of the Constitution, Justice Story stated: "The object of the Constitution was to establish three great departments of government; * * *. The first to pass laws, the second, to approve and execute them, and the third to expound and enforce them." (Martin v. Hunter, 14 U.S. 304, 328 (1816)) Admittedly, "The Federal Constitution nowhere declares that the three branches of the Government shall be kept separate and independent." (Ex Parte Grossman, 267 U.S. 87, 119 (1924)) Nevertheless, in speaking of the separation of powers under the Constitution of the United States the Supreme Court emphasized: "In the main, * * * that instrument /the Constisution/ the model on which are constructed the fundamental laws of the States, has blocked out with singular precision, and in bold lines, in its three primary articles, the allotment of power to the executive, the legislative, and the judicial departments of the government. It also remains true, as a general rule, that the powers confided by the Constitution to one of these departments cannot be exercised by another." (Kilbourn v. Thompson, 103 U.S. 168, 191 (1880)) Thus it is recognized that the respective branches of government must exercise the powers with which they have been invested and may not encroach upon the area of authority conferred upon the others.

A concomitant principle is the prohibition against the delegation by those branches of government of the powers conferred upon them by the Constitution. That principle has been repeatedly applied in regard to the powers vested in Congress. This statement respecting the general subject is particularly pertinent: "It is a cardinal principle of our fundamental law, inherent in our constitutional separation of the government into three departments and the assignment of the law making function exclusively to the legislative department, that the legislature cannot abdicate its power to make laws, or delegate this power to any other department or body." (Panama Refining Co. v. Ryan, 293 U.S. 388 (1934), note 79 L.ed. 476) On the subject the Supreme Court of the United States commented as follows: "Congress cannot transfer its legislative power to the State - by nature this is non-delegable." (Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 164 (1919).

(i) Congress has invested the Secretary of the Interior and the Commissioner of Indian Affairs with the power and obligation to exercise the functions of the Executive Branch of the Government in fulfilling the trust relationship of the Nation with the Indians:

There has been reviewed above the investiture in Congress of the plenary power of the Nation "To regulate Commerce with foreign nations, and among the several States, and

with the Indian Tribes;". 113/

The dignity and the nature of the trust relationship between the Nation and the American Indians have similarly been reviewed. Executive power - the power to act, to administer the trusteeship - resides almost exclusively with the Secretary of the Interior. Reference in that regard is made to this Congressional enactment:

> "There shall be at the seat of government an executive department to be known as the Department of the Interior and a Secretary of the Interior, who shall be the head thereof." 114/

As a consequence there resides in the Secretary of the Interior broad powers of administration, including but not limitedto, the authority to issue required regulations, to direct the officers and agents of the Department in fulfillment of legal responsibilities and otherwise to carry out the will of Congress. 115/ Congress has, moreover, "charged" the Secretary of the Interior "with the supervision of public business

113/ Constitution of the United States 1787, Article I, Section 8.
114/ 5 U.S.C. 481.
115/ 5 U.S.C. 22.

relating to the following subjects: * * * 10. Indians * * *." [116]
Congress has likewise provided that: "The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations." [117]

Sweeping nature of the powers of the Secretary of the Interior and the Commissioner of Indian Affairs is evidenced by the rules and regulations which have been promulgated, now are in force and effect. [118]

Economic development of American Indian Reservations in western United States through the exercise of Indian rights to the use of water is provided for in detail in those rules and regulations. [119] Those rights are presently exercised in connection with irrigation, fishing, [120] power development, [121] recreation and numerous other uses.

(ii) Congress has invested the Secretary of the Interior and the Commissioner of Reclamation with the power and authority to construct and administer reclamation projects to provide water to irrigate arid and semi-arid lands in western United States, and other purposes:

In furtherance of making habitable the arid and semiarid "public land" in western United States, the Congress in 1902 adopted

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116/ 5 U.S.C. 485.
117/ 25 U.S.C. 2; See also 25 U.S.C. 1, 1A.
118/ Title 25 Code of Federal Regulations Indians.
119/ 25 C.F.R. 191.1 et seq.
120/ 25 C.F.R. 89.1.
121/ 25 C.F.R. 231.1 et seq.

the Reclamation Act.[122] Pursuant to that Act "The Secretary of the Interior is authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying out the provisions" of the Reclamation Act. Congress likewise, under the Act last mentioned, established the office of the Commissioner of Reclamation.[123] Numerous acts amendatory of the original Reclamation Act and supplementary to it, have been passed by the Congress. For example, in 1939 the Secretary was authorized to build projects "to furnish water for municipal water supply" and other purposes, including but not limited to industrial uses.[124]

Broad authorization for the construction of projects of great magnitude has been granted to the Secretary of the Interior including the Missouri River, Colorado River, Columbia River and Rio Grande Basins. In each of those vast drainage areas are located numerous American Indian Reservations the economic development of which is geared to the availability of water for agriculture, industry, recreation and all other uses.

122/ See 43 U.S.C. 371 et seq.

123/ 43 U.S.C. 373a: "General authority of the Secretary of the Interior * * *
* * * Commissioner of Reclamation; appointment.
"Under the supervision and direction of the Secretary of the Interior, the reclamation of arid lands, under the Act of June 17, 1902 and Acts amendatory thereof and supplementary thereto, shall be administered by a Commissioner of Reclamation who shall be appointed by the President."

124/ See 43 U.S.C. 485 et seq.

(iii) Solicitor's Office: Lawyer for Bureau of Indian Affairs; Bureau of Reclamation; other Bureaus administered by the Secretary of the Interior:

Congress has declared that: "The legal work of the Department of the Interior shall be performed under the supervision and direction of the Solicitor of the Department of the Interior, who shall be appointed by the President with the advice and consent of the Senate."[125/] Associate Solicitors for the Bureau of Indian Affairs, the Bureau of Reclamation, Bureau of Land Management, and others, are under the immediate direction and responsible to the Solicitor of the Department of the Interior.

(b) Congress has constituted the Attorney General as the chief law officer of the United States who represents the Bureau of Indian Affairs, the Bureau of Reclamation; and defends the United States against claims by the Indians for seizure without compensation of their properties:

Congress has provided that: "There shall be at the seat of government an executive department to be known as the Department of Justice, and an Attorney General who shall be the head thereof."[126/] It is the Attorney General and members of his staff who represent the American Indians in actions to preserve, protect and adjudicate their rights to the use of water. Moreover, the Attorney General represents the United States against the Indians in their actions for compensation before the Indian Claims Commission[127/] and before the Court of Claims or in the United States District Courts.

125/ 43 U.S.C. 1455.

126/ 5 U.S.C. 291.

127/ 25 U.S.C. 70; 25 U.S.C. 70 w.

(c) Antipodal positions which Interior must take in administering streams in which Indian rights conflict with Reclamation and other projects:

There are no major interstate stream systems - indeed, there are few tributaries of major streams - where there are not agencies in the Interior Department which are competing with Indians for a supply of water which is inadequate to meet all present and future demands. Because of the magnitude of its projects, the Bureau of Reclamation is the chief competitor with the Indians for that insufficient supply. Politically oriented and powerfully backed, the Bureau of Reclamation has taken and continues to take from the American Indians throughout western United States rights to the use of water for the projects which it builds. Satellite agencies of Reclamation join forces with it in this uneven struggle with the Indians.[128/]

Impact upon the Solicitor's Office - which Congress has directed shall perform the "legal work" for the Department of the Interior - of the confrontation of the agencies competing for the always short supply of water is far-reaching giving rise to results which frequently are disastrous to the Indians. Fully to support the Winters Doctrine Rights of the Indians as enunciated by the courts creates a legal impasse. Reclamation could not countenance it. To force payment to the Indians for the rights which have been seized for Reclamation Projects goes far beyond the power of the Solicitor - indeed, the tenuous basis of project financial feasibility might well collapse. It is in a milieu

128/ Numerous agencies, Fish and Wild Life, Recreation, National Parks, Bureau of Land Management, all participate in the developments undertaken on the stream systems by the Bureau of Reclamation.

of contradictions that the Solicitor and his staff undertake to represent the American Indians. In their struggle to protect the last vestige of their heritage in the streams of western United States, the American Indians are confronted with a coalescence of forces far beyond the control of those who are charged with the legal responsibilities for protecting their interests. It is not an overstatement to declare that the Solicitor's representatives are frequently professional victims of a system ill suited to advocate much less protect the Indian interests.

(d) Conflicts within Justice Department respecting the American Indian rights to the use of water comparable to those within Interior:

In fulfilling the responsibilities and exercising the powers conferred by Congress upon it respecting the American Indian rights to the use of water the conflicts confronting the Department of Justice are similar - sometimes more severe - than those confronting the Department of the Interior. Charged with the obligation of prosecuting suits to protect and have declared Indian rights, that agency is likewise charged with the obligation of representing the United States when Indians seek restitution for seizure of their rights by other agencies of the National Government. Under those circumstances attorneys in the Department of Justice have actually been engaged in preparing to defend against claims asserted by the Indians simultaneously with another group of attorneys in the same division preparing to try suits to protect those Indian rights. As a consequence the attorneys acting on behalf of the fiduciary are confronted in the same office with the attorneys defending against the claims, thus presenting the irreconcilable conflict which could never prevail in a private law office.

When Indian rights to the use of water are being adjudicated on streams upon which the Bureau of Reclamation likewise is asserting claims, the Justice Department attorneys are confronted with perplexing, if not impossible circumstances, in adequately representing the Indians and at the same moment representing the chief opponents of those Indian claims. Loss to the Indians either actually through the form of the decree or subsequently the interpretation of it, starkly outlines the impossible situation in which the American Indians seek to have their rights preserved.

In the light of the preceding review there is a grave question as to whether the trust responsibility owing to the American Indians in regard to the economic development of their Reservations can be fulfilled by the Nation under the existing Federal Establishment.

> QUESTION PRESENTED: UNDER EXISTING LAWS AND POLICIES CAN AND DOES THE NATIONAL GOVERNMENT FULFILL ITS TRUST RESPONSIBILITIES OWING TO THE AMERICAN INDIANS IN REGARD TO THE ECONOMIC DEVELOPMENT OF THEIR LAND AND WATER RESOURCES?

Response to this question and the action taken based on that response is the basic objective of this consideration. Being a complex matter there is no easy resolution of it. Being a legal-political question - for that is the relationship between the Nation and the American Indians - disposition of it entails a careful review of the actual performance by the agencies involved to evaluate the System as it functions under law. Consequently documented cases of that System in operation will be set forth.

Throughout this phase of the consideration an effort has been made to select and review representative areas throughout western United States to demonstrate the problem of protecting and preserving Indian Winters Doctrine Rights. As reiterated, without water in the arid and semiarid regions failure in any program of economic development on the Indian Reservations must ensue. Characteristic examples of the problem will be briefly discussed as they relate to the subject.

I. YAKIMAS' STRUGGLE TO PRESERVE THEIR RIGHTS TO THE USE OF WATER IN AHTANUM CREEK

(a) Yakimas' immemorial rights:

Few cases are better documented than that involving the struggle of the Yakimas and the Bureau of Indian Affairs to protect and preserve the rights of the Indians in Ahtanum Creek. It will be recalled that the Ahtanum Creek has been alluded to as the cradle of irrigation in the State of Washington.[129/] There the Yakimas first irrigated their gardens in the late 1840's.

In 1855 the Yakimas entered into their Treaty with the United States and Ahtanum Creek was constituted the northern boundary of their Reservation. In the early 1860's lands north of the Creek were patented and early settlers occupied them. Without water neither the lands of the Indians south of the stream nor the non-Indian lands north of it could be successfully cultivated.

129/ See above, footnote 13, page 12.

By the turn of the century the Indians had, by their own efforts, constructed several small ditches irrigating approximately 1,300 acres; the non-Indians by innumerable small diversions, irrigated an estimated 4,800 acres. Conflicts among the non-Indians over their respective rights in Ahtanum Creek gave rise to adjudications among themselves - not with the Indians. 130/ Serious conflicts between the Yakimas and the non-Indians developed shortly after 1900.

(b) Justice Department requested in 1906 to take action to protect Yakima's rights in Ahtanum Creek - in excess of a half century was to elapse before relief was obtained - economic development thus thwarted:

The first record of a request to the Justice Department to protect the Yakimas' rights was August 23, 1906. 131/ Almost a half century was to elapse before any action was taken. It is a history replete with evasions of responsibilities stemming from conflicts within the Federal Government, and with politically powerful non-Indian land owners. 132/ During this period invaluable land of the Yakimas was to lie idle or only partially cultivated due to the diversion of water by non-Indians away from the Indian land.

(c) Conflicts within Interior between Bureau of Indian Affairs and Bureau of Reclamation in regard to claims of the Yakimas:

In 1906 the Bureau of Reclamation undertook the construction of the Yakima Reclamation Project. Ahtanum Creek is a tributary of the

130/ Benton v. Johnson, 17 Wash. 277; 49 Pac. 495 (1897)
In re Ahtanum Creek, 139 Wash. 84; 245 Pac. 738 (1926).
131/ Letter from Acting Secretary of the Interior to the Attorney General.
132/ For review of the documentation in regard to the procrastination and the reasons for it, a chronicle of the documents on the subject is set forth in 236 F.2d 321, 328 et seq.

Yakima River from which the Reclamation Project was to receive its water supply. Reclamation officials were gravely concerned over the conflict between the Indians and non-Indians because it might interfere with the project they wished to build.[133] Chief among Reclamation's concerns were the principles of law the Bureau of Indian Affairs desired to rely upon to defend the Indian claims. This statement is reflective of the agonizing impasse between contesting Bureaus administered by the Secretary of the Interior not only as to the rights to the use of water but as to the theory of law which would obtain:

> "The Reclamation Service is endeavoring to build up the theory of appropriative rights as the most safe and most equitable guide for its operations, * * * It is understood that the Indian Bureau proposes to defend its water rights on Atanum Creek on the common law doctrine of riparian rights. For one department of the Government to thus assume a position directly antagonistic to that assumed by another department of the Government, it seems to me must prove embarrassing, particularly in view of the fact that the Reclamation Service is appealing to the various state legislatures to adopt an irrigation code based upon the doctrine of appropriation."[134] (Emphasis supplied)

133/ Letter October 7, 1907 to the Secretary of the Interior from Indian Service Engineer Code.

134/ Letter October 1, 1907 from Reclamation District Engineer to Supervising Engineer.

That statement evidences the grave character of the conflict between two Bureaus functioning within the Department of the Interior. Rationale of that statement sixty (60) years after it was made is repeated and reaffirmed today as the Bureau of Indian Affairs and the Indians themselves seek to protect their interests against the steady encroachment upon the Indians' rights by the Bureau of Reclamation.

(d) Winters Doctrine enunciated and applied by the Judiciary; circumvented by the Executive Departments:

It will be recalled that the Court of Appeals for the Ninth Circuit in 1906 affirmed the Winters Decision in the United States District Court for the District of Montana.[135/] In 1907 the Supreme Court enunciated the Winters Doctrine.[136/] In 1908 the Court of Appeals for the Ninth Circuit in the case of Conrad Investment Company v. United States, in applying the Winters Doctrine, declared that the Indian rights to the use of water could be exercised

"* * * not only for present uses, but for future requirements"

on the Reservations - insuring economic development to meet increased needs.[137/]

Consternation flowed from the pronouncement of the Winters Doctrine and its application in Conrad. That consternation was expressed, oddly enough,[138/] by the Chief Engineer of the then Indian Service in

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135/ See above, pages 14 et seq.
136/ See above, pages 18 et seq.
137/ See above, pages 26 et seq.
138/ It is of interest that Chief Engineer Code in regard to the Salt River Indian Reservation and Camp McDowell Indian Reservation, similarly was a party to seeking to deprive the Indians of the benefits of the Winters Doctrine. The infamous Kent Decree on the Salt River entered in 1910 is a part of Code's failure properly to assert the Indian rights. His activities have also been found in various other areas. His is but an example of employees in the Department of the Interior who totally ignore the fact that the Indians are entitled to protection in their claimed rights.

carrying out an investigation which he was directed to undertake by the Secretary of the Interior. Having referred to the fact that the United States Attorney, as directed by "Washington" had postponed the litigation which was intended to protect the Indian rights in the stream, he recommended a settlement of the dispute, stating among other things:

> "The Reclamation Engineers in charge of the Yakima Project are very anxious that litigation may be avoided on the Ahtanum, fearing that * * * litigation * * * might stop all Reclamation work." 139/

He added that the Winters Doctrine might make a settlement difficult "in view of the recent Montana decisions, especially that of the United States vs Conrad Investment Co. * * *". Continuing, this investigator for the Secretary declared:

> "To a layman, it seems that, as between the early white settler, who has made prior and beneficial use of the waters of a boundary stream, and the Government, which, as guardian of the Indians' water rights, had not done so, the latter would be the party to make restitution to the Indians."

Code's letter to the Secretary of the Interior is reflective of the gravity of the situation facing the American Indians. As an employee of the Department of the Interior he was requested to investigate a conflict between the Indians and non-Indians. Recognizing the failure of the Department of the Interior to fulfill its trust responsibility to the Indians and to protect their rights, he recommended an

139/ Letter dated October 17, 1907, from Chief Engineer Code to the Secretary of the Interior,

abandonment of those rights to the non-Indians. He, moreover, concurred in the postponement of the initiation of proceedings by the Justice Department. Code's course of conduct was but one phase of an unconscionable course of conduct by two major Departments of the Federal Government which failed to protect the Indian interests in clear violation of their obligations.

(e) Interior attempts to give 75% of Indian Ahtanum Creek water to non-Indians - retain 25% for the Yakimas:

Confronted with conflicts between the Indians and the non-Indians; obviously fearful that the Indian interests might prevail; pressured by the Bureau of Reclamation, indeed, guided by the Chief Engineer of the Indian Service, the Secretary of the Interior by an agreement dated May 8, 1908, purported to grant to the non-Indians 75% of the Ahtanum Creek waters; to retain 25% for the Indians. Years were to pass before the Indians were informed of the agreement.

Repeated efforts were made by the Yakimas and the Bureau of Indian Affairs seeking redress for the great wrong thus perpetrated against the Indians. In 1915 the United States constructed the Ahtanum Indian Irrigation Project. Its benefits to the Indians were minimal due to the fact that after approximately July 10 of each year the non-Indians under the 1908 agreement received virtually all of the usable water in the stream.

Stunted crops, poverty and bitterness on the part of the Yakimas whose lands were entitled to water from Ahtanum Creek were, of course, results of the 1908 agreement. Hostility between the

Indians and the non-Indians was all-pervasive, becoming open struggles each irrigation season, accentuated when the yield of Ahtanum Creek was reduced by reason of a light snow pack in the mountains where it had its source.

When the Yakimas brought an action against the United States to protect their rights, Justice successfully moved to have the case dismissed for want of jurisdiction - for want of the legal capacity of the Indians to proceed against it for their own protection - notwithstanding the fact it adamantly refused to act for them. 140/

Politics always prevailed and no action was taken to restore to the Yakimas the invaluable water to which they were entitled under their Treaty. Those conditions continued for two generations with the attendant damage to the Indians.

(f) Forty-one (41) years after first request to Justice it filed action to quiet title to Yakima rights in Ahtanum Creek; fifty-eight (58) years later the Yakimas recovered their rights; Yakimas forced to act to prevent loss of the rights which they had decreed to them:

After repeated delays over a period in excess of forty (40) years the Justice Department initiated an action to quiet the title to the rights of the Yakimas in Ahtanum Creek. In excess of fifty-five (55) years after the matter was referred to that Department for action the Court of Appeals for the Ninth Circuit directed the entry of a decree awarding to the Yakimas each year: (1) all of the water of Ahtanum Creek after July 10, the commencement of the short water period; 141/

140/ See Totus v. United States in the United States District Court for the Eastern District of Washington.
141/ 330 F.2d 897, 913, 915 et seq.

(2) a right of reversion to the quantity of water strictly limited to irrigation the non-Indians are permitted to use during the period of high runoff, as those irrigation uses are reduced.[142] The non-Indians are permitted prior to July 10 of each year to divert up to 47 c.f.s. of the flow of the stream, strictly limited to the purpose mentioned.[143]

After the decree was entered in their favor as directed by the Court of Appeals, an effort was made to force upon the Yakimas a "settlement". When the Yakima Tribal Council was advised that Justice was contemplating a settlement, they came to Washington, informed the officials that they would reject any effort of that nature again to invade their rights. Had the Tribal Council failed to act promptly and vigorously they would undoubtedly have been subjected to another chapter of their history since 1906.

(g) Economic development of Yakima lands curtailed by acts of Justice and Interior; effects of that conduct continues; threat of loss remains:

Flagrant breach by the United States of the trust responsibility to the Yakimas most severely curtailed the economic development of the Indian land entitled to water from Ahtanum Creek for two generations. Yakima Valley is one of the world's great produce areas, especially for apples, cherries, pears and similar fruit. Hops are

142/ 330 F.2d 897, 913; the reversionary clause enunciated by the court is as follows: "when the needs of those parties, [i.e. these particular individuals] were such as to require less * * * then their rights to the use of the water was correspondingly reduced, and those of the Indians, in like measure, greater."

143/ NOTE: In addition the Court of Appeals recognized the Indian right to recover compensation for the severe losses they had experienced by the 1908 agreement. A claim previously filed by the Yakimas for the monetary loss was dismissed based upon the decree entered in their favor at the direction of the appellate court, all as reviewed above.

an important crop. All require late water. Those Indian lands are some of the finest orchard acreage in the entire country. However, because of the agreement purporting to give to the non-Indians 75% of the water, fruit could not be successfully raised. Accordingly, the Indian lands only produced short-water crops, for example, grain and less than two full cuttings of alfalfa.

In the brief time since the decree was entered in their favor, alfalfa production has greatly increased. No longer are the lands limited to the short-water crops. Orchards are now being planted on a large scale, though production from them is, of course, years away. Income from the lands in question has risen by hundreds of thousands of dollars a year. Yet it is too clear for question that the Yakimas were gravely injured from the standpoint of economic development and that damage of necessity is continuing in character because of the retardation imposed by the unconscionable 1908 deal made without their knowledge.

Threats against the Yakimas' rights continue. The Bureau of Reclamation has attempted to secure their agreement to the construction of a reclamation project on Ahtanum Creek. Now well experienced, the Indians peremptorily reject that Bureau's activities. Yet the Bureau continues projects along the Yakima River and it is reasonable to expect that the Indians will be presented with a threat of seizure or invasion of their rights.

Another cause celebre involving the stifling of economic development of Indian lands by the seizure of their water will now be considered.

II. DESTRUCTION OF PYRAMID LAKE - AN ASSET OF IMMENSE VALUE FOR THE ECONOMIC DEVELOPMENT OF THE PYRAMID LAKE INDIAN RESERVATION - IN CLEAR VIOLATION OF THE CONSTITUTIONAL TRUST RESPONSIBILITY

(a) Pyramid Lake not only an Indian, but a National asset of incalculable value:

One hundred and twenty-five years ago General Fremont had this to say of Pyramid Lake which he discovered in 1844:

> "Beyond, a defile between the mountains descended rapidly about 2,000 feet; and filling all the lower space was a sheet of green water some twenty miles broad. It broke upon our eyes like the ocean. The waves were curling in the breeze and their green color showed it to be a body of deep water. For a long time we sat enjoying the view. It was like a gem in the mountains which from our position seemed to enclose it almost entirely." 144/

Interior's Bureau of Outdoor Recreation, in 1969, reiterated Fremont's glowing description of Pyramid Lake in contemporaneous terminology:

> "Pyramid Lake by virtue of its leviathan proportions, year-round water-oriented recreation season, outstanding sport fishery potential, and wealth of aesthetic, geological, ecological, archeological and historical phenomena is presently a recreation resource of national significance.
>
> "Pyramid Lake offers greater undeveloped potential for supporting high-quality water-based recreation opportunities for a large number of users than any other lake in northern Nevada and California." 145/

144/ Harold W. Fairbanks, Ph.D., Berkeley, Cal., U.S. Geological Survey Library March 5, 1901 The Popular Science Monthly, 505, 507.
145/ 1969 Report of Bureau of Outdoor Recreation, page 14.

Not mentioned by the last report is the destruction of Pyramid Lake unless present plans of the Bureau of Reclamation are changed.[146/]

History of Pyramid Lake is a reflection of the callous disregard of Indian property, their rights and interests. Moreover, it is a prime example of the disdain of unchecked political power exercised against a woefully weak minority deprived of any means of preserving the most elemental features of human dignity.[147/]

(b) 1859 - the establishment of the Pyramid Lake Indian Reservation:

The Northern Paiute Indians were the victims of the westward movement of "civilization." In the late 1840's gold and silver brought miners to Nevada. Shortly the ranchers and farmers were to arrive. These lands so attractive to the miners and ranchers had since time immemorial been the home and abiding place of the Northern Paiute Indians who had adjusted to the desert environment and survived the rigors of it. To a marked degree the Paiutes gained their sustenance from fish taken from the Truckee River and Pyramid Lake. The Truckee River rises on the California side of Lake Tahoe, proceeds down the precipitous eastern slopes of the High Sierras, crosses the common boundary separating California and Nevada, terminating in Pyramid Lake which has no outlet.

From a task force report to the Secretary of the Interior this statement is taken:

146/ See House Document No. 181, 84th Congress, 1st Session, Washoe Project, Nevada-California Letter from the Assistant Secretary of the Interior transmitting a report and findings on the Washoe Project, Nevada and California, pursuant to section 9 (a) of the Reclamation Project Act of 1939 (53 Stat. 1187).

147/ See in this regard the articles in The New Yorker, January 1 through January 22, 1955.

"The Paiute Indians of the Pyramid Lake were and are a fish-eating people. Their primary natural resource for many generations has been the Lake and its fish." 148/

From that same report it is possible to determine the historic importance of the fishery. This excerpt is quoted from that source:

"* * * Captain John C. Fremont * * * reported: 'the [Pyramid] lake [in 1844] was found to be teeming with untold millions of brilliantly colored giant cutthroat trout. Indians came from as far away as the Great Salt Lake to obtain them for food.'" 149/

Forty-one years after the succinct, accurate and highly important statement by Fremont, the United States Geological Survey stated in 1885 that,

"The [Pyramid] Lake is abundantly supplied with splendid trout, Salmo purpuratus Henshavi * * *." 150/

Due to conflicts between the settlers and the Northern Paiute Indians the Pyramid Lake Indian Reservation was established in 1859. It is comprised of a limited land area which completely surrounds Pyramid Lake and embraces a segment of the Truckee River. From that date the Indians resided on the Reservation with the fishery constituting a source of subsistence and income.

148/ Action Program For Resource Development Truckee and Carson River Basins California-Nevada, page 20.
149/ Ibid., page 19.
150/ United States Geological Survey, Geological History of Lake Lahontan, Israel Cook Russel, 1885, page 62.

In 1895, the National Geographic reported on the "abundant fish life" in both Pyramid and the then existing Winnemucca Lakes.[151] Immediately after the turn of the century there is reported the fact that Lake Pyramid "* * * is well supplied with large trout, as well as several other kinds of fish."[152]

Yet the task force reported to the Secretary that:

> "The once famous cutthroat-trout fishery of Pyramid Lake and the lower Truckee River ceased to exist about 1938, largely because recession of the lake has made the lower river all but inaccessible to spawning fish. A trout fishery has been partially restored by natural and artificial means since 1950."[153]

(c) The Newlands Federal Reclamation Project:

In 1902 Congress enacted the Reclamation Act,[154] the objective of which, as reviewed above, was to make habitable the arid and semiarid public lands, thus attracting settlers. Nevada's then Senator Newlands was a prime advocate of the Act. As a consequence the Newlands Reclamation Project was one of the first to be constructed.

Geography, history and politics coalesce in regard to the Newlands Project and have spelled disaster to the Northern Paiutes.

151/ National Geographic Society, Physiography of United States, Present and Extinct Lakes of Nevada, V. 1:1896, pp. 101, 114, 115.
152/ Popular Science Monthly, Vol. 58, 1900-01, pp. 509.
153/ Action Program for Resource Development, etc. pages 26-27.
154/ See above, pages 67 et seq.

South of the Truckee River Basin - entirely separate from it - is the Carson River Basin. That river, like the Truckee, rises in California and enters Nevada. Early settlers in Nevada diverted water from the Carson River to irrigate their lands. Like all western snow-fed streams, it is highly erratic, producing an abundance of water in the early spring and declining rapidly in flow as the snow melts away. The need to impound water for late season use was a necessity. Lahontan Reservoir on the Carson River was built to impound water from both that source and the Truckee River.

To the reclamation planners the yield of the Carson River was insufficient. They desired to provide additional water for the Newlands Project by the construction of the Truckee Canal to divert Truckee River water out of the Truckee River Basin away from Pyramid Lake for use in the Carson River Basin. That Canal was completed in 1906.

Grandiose plans for the Newlands Reclamation Project failed. Poor soil, a short growing season, poor drainage, and bad engineering contributed to that failure. Of a huge area originally planned as embracing 287,000 acres of irrigated land, an average annual irrigated area within the project, after sixty years of operation, has been estimated at slightly in excess of 50,000 acres.

Financial failure of the Newlands Project was, of course, the result of physical failure of it. Write-offs of almost half of the interest-free Federal investment was made; massive subsidies in addition to write-offs came from the sale of electricity, collection of grazing

fees, other sources of income having no relationship to agricultural production from the irrigated lands, has kept this grossly submarginal project in existence.

(d) Seizure without payment of compensation, of Indian Truckee River rights to the use of water; destruction of Indian invaluable fishery; unconscionable waste of Truckee River water; disastrous decline of Pyramid Lake due to diversions out of Truckee River Basin for Newlands Project:

From 1859 to 1910 there had been substantial irrigation development using Truckee River water in the Reno-Sparks area. Those diversions all within the Truckee River Basin did not seriously affect Pyramid Lake and Winnemucca Lake situated nearby, which actually fed from overflow from Pyramid Lake. A large part of the diversions after irrigation, returned to the river and flowed into Pyramid Lake.

Drastic reductions in the quantities of water entering Pyramid Lake came about by diversions out of the Truckee River Basin to irrigate Carson Valley lands in the Newlands Reclamation Project, either directly or from impoundment in Lahontan Reservoir.

Under a 1926 contract between the Secretary of the Interior and the Truckee-Carson Irrigation District, a Nevada public corporation, the District assumed the responsibility of administering the Newlands Project, including but not limited to the diversion of Truckee River water away from Pyramid Lake, with the disastrous consequences to that Lake which have been described.

For in excess of forty (40) years the District had practiced uncontrolled diversion of Truckee River water away from Pyramid Lake.

In anticipation of the need to secure sufficient water for the Washoe Reclamation Project now under construction, changes were required in the diversions by the Irrigation District from the Truckee River. These changes will be reviewed in connection with rules and regulations on the subject. Even with those changes Indian water is grossly wasted, all as reviewed in a report to which comment will be subsequently directed.

Seizure of the Indian rights to the use of water - much of it wasted - has been done without payment to the Indians. If Congress authorized the condemnation of the rights of the Pyramid Lake Tribe of Indians - that matter has never been resolved - then there are two prime factors which have been totally ignored: (1) the Indians are entitled to payment for those rights which have actually legally been condemned;[155/] (2) Indian rights, if in fact condemned, could not be taken for wasteful purposes because under the Reclamation Act, the basis, the measure and the limit of any right on Reclamation Projects is beneficial use.[156/]

Compensation for the Indian right of fishery so wantonly destroyed, has not been paid. Yet, as reviewed above, that right of fishery, like the right to the use of water, is an interest in real property having the dignity of a freehold estate.[157/] Injustice of the seizure of Indian rights without just compensation or, indeed, need for much of the water taken, is underscored by this description

155/ United States v. Gerlach Live Stock Company, 339 U.S. 725 (1949).
156/ 43 U.S.C. 372; 383 et seq.
157/ See above, pages 15 et seq.

of the Newlands Reclamation Project by a world recognized hydrologic engineer:

> "Of special interest to this study are the relatively large areas of non-agricultural land that consume river water either directly or indirectly. The survey shows 19,225 acres of permanent water surface and some 44,172 acres of dense and very dense phreatophytes. Thus, there are nearly 64,000 acres of heavy water consuming non-agricultural lands or nearly as much area as was covered by agricultural crops in 1967. Although these lands are used for wildlife purposes, they have relatively little, if any, value for cattle grazing purposes." 158/

This report refers to the "extremely low efficiency of water use" - a kindly way of charging waste - on the Newlands Reclamation Project. It concludes in substance, even with an efficiency of 34% - roughly a waste of 66% - there could be saved for Pyramid Lake 100,000 acre-feet of water annually.

While Pyramid Lake was precipitously declining with an ever-increasing saline content - assuring the ultimate death of this great natural resource - the politically powerful forces in Nevada ignored the plight and poverty of the Northern Paiute Indians. In these graphic terms the effects of diversions to the Newlands Reclamation Project - with its great waste - the Bureau of Outdoor Recreation reports in 1969:

158/ Report on Lower Truckee-Carson River Hydrology Studies, by Clyde-Criddle-Woodward, Inc. Consulting Engineers, Salt Lake City, Utah April 1968.

"Since 1910, however, the lake level has gradually been receding with the exception of a few brief periods when heavy runoff years once again revived the failing lake. Pyramid Lake is currently 82 feet below the lake level recorded 58 years ago and 72 feet below the lake level which Fremont saw in 1844.

"The white man's tampering with related natural resources in the Truckee and neighboring Carson River basins has greatly accelerated the decline of the lake. Between 1888 and 1890, sawdust from upstream mills clogged the Truckee River channel just north of the lake and the river waters were diverted through Mud Lake Slough into the nearby and now dry Winnemucca Lake. The Indians dammed the Slough in 1890 and diverted waters back through their normal channel into Pyramid Lake. Later the Federal government, through the Bureau of Reclamation, began diverting water out of the Truckee River Basin into the Carson River Basin to supply irrigation waters for one of the first irrigation projects in the Southwest--the Newlands Project at Fallon, Nevada. These diversions began when Derby Dam on the Truckee River was completed in 1905 and have greatly accelerated the decline in the level of Pyramid Lake. An average of 250,000 acre feet is diverted annually out of the Truckee River Basin for irrigation uses on the Truckee Bench and the Newlands Project." 159/

159/ 1969 Report of Bureau of Outdoor Recreation, pages 43-44.

(e) Stifling of economic development on Pyramid Lake Indian Reservation by reason of rapidly declining water surface of Pyramid Lake:

In the opening paragraphs of this phase of the consideration reference has been made to Pyramid Lake's great potential for recreation. Yet there has been nothing but the most meager development. Investors could not expend funds of any magnitude because of the imminent destruction of the Lake by Federal Reclamation Projects both existing and abuilding.

Poverty among the Pyramid Lake Tribe of Indians - despair and travail for generations - is the lot of these people by reason of the construction and operation of the Newlands Reclamation Project - a submarginal wasteful project - maintained with Federal funds.

(f) Economic development of immense value to the Northern Paiute Indians and the Nation, if Reclamation Projects are prevented from destroying Pyramid Lake:

Economic development of Pyramid Lake - if it is not intentionally destroyed - is very feasible with high financial returns for the Pyramid Lake Tribe of Indians. On the subject the Bureau of Outdoor Recreation states:

> "A properly developed Pyramid Lake will help meet the water-based recreation needs of a combined day-use and weekend/vacation-use (includes the San Francisco Bay Area) zone population of 13,814,243 in the year 2000. Visitation to Pyramid Lake in that year should total 2,375,000.

"If Pyramid Lake's recreation resources are properly developed, significant tangible and intangible benefits will accrue to the U.S., Nevada, Washoe County, the Reno-Sparks complex, local interests and the Pyramid Lake Indian Tribe. The direct tangible economic benefits from recreation at Pyramid Lake could total $1,425,000 in general admission fees, $15,482,625 in visitor expenditures at the lake and over one-half million dollars in jobs annually by the year 2000. In the 32-year interim between today and the turn of the century, a total gross income from the admission fees and visitor expenditures generated by a developed Pyramid Lake would accumulate to an impressive $202,380,000. A developed Pyramid Lake will also generate additional annual expenditures in the millions of dollars by visitors outside of the recreation area for sporting equipment, car services, food, lodging, and gaming, etc." 160/

(g) Final coup to Pyramid Lake - The Washoe Federal Reclamation Project:

Demise of the "gem in the mountains" as Fremont described Pyramid Lake, is assured if the Washoe Reclamation Project - now abuilding - is completed. Again, the interagency clash between the Bureau of Reclamation and Indian Affairs, with the Indians victimized, has become intensified. In explicit terms the plans to build the Washoe Reclamation Project have been set forth; in explicit terms the Project can be constructed only by the seizure of the last vestige

160/ 1969 Report of Bureau of Outdoor Recreation, pages 15-16.

of the Indian rights in the Truckee River - concomitantly the destruction of Pyramid Lake, for all practical purposes, is planned.

Geography it will be recalled is a salient element in the Newlands Reclamation Project; it is equally important in regard to the Washoe Project.

(i) Stampede Dam on the Truckee River:

This structure is now being built. It is a major component of the Washoe Project. A capacity for it is now planned at 225,000 acre-feet. If used as proposed under the Washoe Project it will take from Pyramid Lake the water required ultimately to stabilize it as a viable body of water, accentuate the decline of the lake, greatly increase the salinity of it, leaving it a dead sea.

(ii) Watasheamu Reservoir on the Upper Carson River:

Another major component of the Washoe Project is Watasheamu Reservoir on the Carson River. Substantial quantities of the waters which otherwise would flow down to the Newlands Reclamation Project, will be impounded in that reservoir for use in the Carson Valley above the Newlands Project Lahontan Reservoir.

(h) Seizure of Indian water to provide a supply of water for Washoe Project:

When Carson River water is impounded at the proposed Watasheamu Reservoir, thereafter to be used above the Newlands Project, an equivalent amount of Indian water will be diverted from the Truckee River away from Pyramid Lake to compensate for it. That seizure of Indian

water will, of course, accelerate the lake's already precipitous decline. Flood waters of the Truckee which historically could not be diverted through the Truckee Canal and away from Pyramid Lake have been the only source of the meager supply reaching Pyramid Lake. When Stampede Dam on the Truckee and Watasheamu Dam on the Carson River, with their planned appurtenant works, are in operation, the destruction of this great natural resource will be consummated; the Northern Paiutes will have suffered the final seizure of their property; the final indignity heaped upon them, because they are without means to withstand the monolithic forces which have conspired against them.

(i) Resolution of conflicts over contesting claims between the Newlands Reclamation Project and the Washoe Reclamation Project:

Prodigal waste of water by the Newlands Reclamation Project could not be tolerated if the Washoe Reclamation Project were to become feasible. With the ingenuity of prime planners, using their immensely capable engineering staff, with judicious use of their vast powers, the Bureau of Reclamation developed a plan. 161/

For example, no longer would the Truckee-Carson Irrigation District divert Truckee River "winter water" - not required for irrigation - for the generation and sale of electricity, with attendant income so profitable to it in the past. That water would have to be stored in Stampede Dam to meet the Washoe Project water requirements. A reduction would have to be made in the quantities of Carson and

161/ House Document No. 181, 84th Congress, 1st Session, Washoe Project, Nevada-California.

Truckee River waters wasted down the Carson River to maintain swamps for ducks. This would impinge to a degree upon Interior's Stillwater Wild Life Refuge - a fringe beneficiary of the excessive diversions of Indian Truckee River water to the Newlands Reclamation Project - a satellite in the Reclamation orbit. Carson River water formerly entering Lahontan Reservoir and there impounded for use on the Newlands Project would be drastically reduced by impoundments in the Watasheamu Reservoir for use in the Upper Carson Valley and above Lahontan Reservoir. To compensate for the reduction of Carson River water previously available, Truckee River water impounded in Stampede Dam - and such water as might not be controlled by it - would be diverted out of the Truckee River Basin, in addition to that previously diverted away from Pyramid Lake.

Simply stated: All increased quantities of water required for the Washoe Reclamation Project would be taken away from Pyramid Lake to the further injury of the Noethern Paiutes - a circumstance giving rise to the next series of comments.

(j) Pyramid Lake Indians object to Washoe Reclamation Project - they were momentarily appeased, then recognized the need to renew their opposition:

Opposition to the Washoe Reclamation Project was interposed by the Pyramid Lake Tribe of Indians. Assurances were given by the Department of the Interior that their interests would be preserved and, indeed, enhanced. They withdrew their opposition momentarily.

There is thus presented a prime obstacle in preserving and protecting Indian assets within a single Department having as disparate and conflicting interests as the Reclamation Bureau and the Northern Paiutes. At all costs - invariably Indian costs - a consensus must be reached. Yet the elemental precepts of trust law reviewed above, necessarily reject all acts of the trustee who bargains against the beneficiary for himself or any third party. Very properly the trustee is required - good conscience dictates - that he have a single loyalty, and that to the beneficiary. Yet the Department of the Interior was forced to weigh conflicting interests, the Indians with no political power against the politically powerful, politically oriented Bureau of Reclamation.

Substance of the assurances to the Indians was that in the administration of the conjunctive use of the waters of the two rivers, efforts would be made to maximize the use of the Carson River waters and to minimize the use of the Truckee River for the benefit of Pyramid Lake. Shadow was given to the Indians, substance achieved by the Bureau of Reclamation - a fact not realized by the Bureau of Indian Affairs and the Indians until almost too late.

In actuality the Indians found that: (1) They would be deprived of the quantity of Truckee River water required to resolve the conflict between the two reclamation projects; (2) They would be stripped of the last vestige of the rights they claimed for Pyramid Lake to make physically feasible the Washoe Project.

When the light of those facts shone through, the Bureau of

Indian Affairs withdrew its approval of the Departmental Task Force Report;[162] the Indians in effect joined the Bureau in its action.

(k) Secretarial rules and regulations on the Truckee-Carson Rivers:

Impossibility of fulfilling splintered and irreconcilable conflicts within the Department of the Interior is often glossed over by the issuance of rules and regulations which are a composite of vagaries enmeshed in contradictions. That course was pursued in regard to conflicting interests on the Truckee-Carson River Systems. Impossible objective was to stretch insufficient supplies to provide water for: (1) the Newlands Reclamation Project; (2) Truckee Storage Project; (3) Washoe Reclamation Project; (4) migratory birds; and (5) Pyramid Lake Indian Reservation.

Those rules and regulations were primarily to obtain sufficient water for the Washoe Reclamation Project, through further diversions of water away from Pyramid Lake, and the limitation upon the grossly wasteful practices of the Newlands Reclamation Project, thus providing Washoe with water previously wasted by Newlands.[163] To placate the Paiute Indians - but never to recognize that the Indians had rights to maintain Pyramid Lake as a permanent viable body of water - the rules and regulations provided for the conjunctive use of the available supplies from those two streams, and that:

162/ Memorandum of July 14, 1966, from the Commissioner of Indian Affairs to the Chairman of the Task Force.

163/ Any doubt that the objective of the rules and regulations is to provide water for the Washoe Reclamation Project is removed when consideration is given to the above cited Washoe Project, Nevada-California, House Document No. 181, 84th Congress, First Session, and the plans now progressing to complete that project.

"* * * coordinated operation and control of the Truckee and Carson Rivers in regard to the exercise of water rights of the United States * * * to (1) comply with all of the terms and provisions of the Truckee River Decree and the Carson River Decree; and (2) maximize the use of the flows of the Carson River in satisfaction of Truckee-Carson Irrigation District's water entitlement and minimize the diversion of flows of the Truckee River for District use in order to make available to Pyramid Lake as much water as possible." (Emphasis supplied)

The "as much water as possible" for Pyramid Lake is, of course, gratuitous and is not intended to be a recognition of the Indian rights to maintain the Lake.

Provision is also made in the rules and regulations that the Newlands Reclamation Project would receive an annual supply of 406,000 acre-feet of water. The rules and regulations provide that the 406,000 acre-feet of water annually " may be reduced." That concession came about only after bitter inter-agency struggles. Both the Indian Bureau and the Indians were well aware that the 406,000 acre-feet annual water allowance was tantamount to a guarantee to the Truckee-Carson Irrigation District that Indian Truckee River water would be wasted as the quantity far exceeded that required for reasonable beneficial use on that project. Hence, the term "may be reduced" held out hope that the dissipation of Truckee River water with the attendant adverse effect on Pyramid Lake might be controlled.

As will be seen, the hope for better times for the Indians under the rules and regulations became a shadow with the substance passing to the Reclamation Bureau and its satellites.

(1) The "nine-point package agreement":

Limitations upon the Newlands Reclamation Project - administered by the politically powerful Truckee-Carson Irrigation District - was neither undertaken lightly nor accomplished with ease. Fail, however, to restrict the historic waste of that ill-starred project and there would be insufficient water for the Washoe Reclamation Project - even with the seizure of all of the Indian water in the Truckee River which could be economically diverted away from Pyramid Lake for Washoe.

There emerged the "nine-point package agreement" - thus named by its sponsors. It is a many-faceted thing but important here primarily because it resuscitated the then expiring Washoe Reclamation Project which, as stated, is the terminal catastrophe to the Northern Paiutes. Principally from the standpoint of the Indians the "package" does this - provides for an increase of acreage above the historic 51,000 acres annually irrigated on the Newlands Project, to 74,500 acres; an assured firm annual supply of 406,000 acre-feet of water - no reduction in the 406,000 acre-feet would be permitted as provided for in the much publicized but largely vacuous rules and regulations, except that "The Department [of the Interior] would reserve the right to commence suit to challenge the correctness of" the 406,000 acre-feet allocation for the Newlands Reclamation Project. Conveniently left open were

the type of action which would be brought, the issues that would be tried, by whom, against whom, when and in what court. Indeed, the Secretary of the Interior might well be one of the prime parties against whom the Indians would proceed.[164/]

In fine, the Northern Paiutes were again left with an illusion and the Washoe Reclamation Project moved nearer to completion when peace was purchased from the Truckee-Carson Irrigation District - purchased, let it be emphasized, with water desperately needed by the Northern Paiutes to maintain Pyramid Lake.

(m) Decrees unenforced - need to "settle" Alpine Case to assure Carson River water for Watasheamu Reservoir - Indian Truckee River water would be seized to compensate Newlands Reclamation Project for loss of Carson River water:

There was entered in March of 1950 a Temporary Restraining Order, which is a preliminary adjudication of rights on the Carson River including those of the United States required for the Newlands Reclamation Project.[165/] That March 1950 decree is based largely upon the evidence introduced by the Justice Department for the United States in support of the direct flow and storage rights asserted by it for the Newlands Project. The decree has never been enforced. Had that decree been strictly enforced with Carson River water being diverted only for

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164/ See exchange of correspondence respecting "nine-point package agreement" dated July 13, 1967, August 10, 1967, related documents, between Department of the Interior and the Truckee-Carson Irrigation District.

165/ United States v. Alpine Land & Reservoir Company, et al., Defendants, in the United States District Court for the District of Nevada, Equity No. D-183.

beneficial purposes in the Upper Basin of the Carson River, based upon priority and limited to the acreage set forth in the decree, and the beneficial use requirements enforced against the Newlands Reclamation Project, the Northern Paiutes and Pyramid Lake would have benefited greatly through the reduction of diversions out of the Truckee River away from Pyramid Lake. Failure to enforce the March 1950 decree, thus benefiting the Indians by reducing the need for Truckee River water in the Carson Valley, is demonstrative of the need for policy changes and the elimination of conflicts between agencies in the Department of the Interior.

Economic development of Pyramid Lake has been retarded not by a single act or omission by the Federal Establishment, but rather by a composite of seemingly disparate events - failure, for example, to enforce the decree in the Alpine Case - yet upon examination of all of the facts, it is evident that this omission to fulfill the trust obligation to the Indians stems directly from the above mentioned conflict among Federal agencies for the waters of the Carson and Truckee Rivers.

(n) Enforcement of the rights and priorities in the Alpine Decree would prevent construction of Reclamation's Watasheamu Dam, a major component of the Washoe Project:

Taking Carson River water from the Newlands Reclamation Project; compensate Newlands with increased diversions of Indian Truckee River water away from Pyramid Lake, is the broad plan for the Washoe Project. That exchange of Newlands Carson River water constitutes the use of the trust property for the benefit of the trustee to the irreparable damage of the beneficiary of the trust.

To use Newlands Carson River water at Watasheamu Reservoir and its appurtenances, requires the abandonment by the United States of its invaluable priorities on Newlands which are set forth with specificity in the Alpine 1950 decree. Enforce those priorities and there would be no Watasheamu Reservoir and Reclamation's plans would be thwarted. On the subject the Criddle Report summarizes the need to abandon the Federal Newlands rights to accomplish Reclamation's plans for Watasheamu:

> "Studies by the Carson River Hydrology Task Force indicate that if prior rights are respected /those of the United States for the Newlands Project, and all others/, little water would be available for Watasheamu and that under the above Secretarial policy, it seems mandatory that rights be respected if such action affects the demand on Truckee River." 166/ (Emphasis added)

That Interior does not demand; that Justice will not - perhaps cannot - protect the "prior rights" referred to in the Criddle Report, on the Carson River thus reducing the diversion of Indian water required for Pyramid Lake, is the fearful dilemma which confronts the Northern Paiutes in their struggle to preserve Pyramid Lake.

(o) Northern Paiutes forced to expend their meager resources to prevent "settlement" by Justice of Alpine Case; Justice opposes Indians:

Repeatedly the Federal Establishment has attempted to secure a settlement of the Alpine Case with the politically powerful landowners

166/ Report on Lower Truckee-Carson River Hydrology Studies * * * by Clyde-Criddle-Woodward, Inc. Consulting Engineers, Salt Lake City, Utah April 1968.

in the Upper Carson River Valley. In a word, those owners will not tolerate interference with their historically wasteful practices of diverting Carson River water without controls of any kind, including headgates, measuring devices, or any other means of administration usually applied in western United States, all in violation of the decree Justice had entered in March of 1950.

A settlement which would please those powerful landowners in the Upper Carson; free enough Carson River water from the Newlands Project to make feasible the Watasheamu Reservoir, was the objective of the innumerable meetings between Interior, Justice and the lawyers representing the Upper Carson landowners. As the negotiations progressed the Northern Paiutes and the Bureau of Indian Affairs were frustrated in every attempt to prevent the arrangement with the attendant increased call for water from the Truckee River.

Confronted with sure disaster if the "settlement " was consummated, the Northern Paiutes, through their attorneys, filed a petition to intervene in the Alpine Case. In their petition to intervene, the Indians allege the failure of the United States properly to perform its functions as their trustee; the irreparable damage they suffer from the waste of water and the failure of the United States to enforce the March 1950 decree. To that and other allegations of the failure of the trustee, Justice responded in part to the Indians as follows:

> "The United States admits a reluctance to insist upon enforcement of the [1950] temporary decree insofar as it differs from the Report of the Special Master.

[The Report which, if approved by the court, would be clearly at variance with the evidence introduced by Justice, particularly in regard to the strict enforcement of priorities, beneficial use and related restrictions upon upstream water users, with the attendant increase in demands for Truckee River water.] If this is construed by this Court as a failure of the fiduciary duty of the United States to the Applicant, then the United States herein immediately requests complete enforcement of the temporary decree whether or not Applicant is allowed to intervene." (Emphasis supplied)

Because Justice has declared that the Indians' effort to intervene and thus assist themselves in the protection of their rights, is an adversary proceeding, it has refused to supply the Indians with the exchange of correspondence and related data between the Department of the Interior and Justice. Justice, moreover, succeeded in having the court deny the Northern Paiutes their day in court. An appeal has been filed by them to the Court of Appeals for the Ninth Circuit and is now pending.

Caught between the monolothic Departments with their conflicting responsibilities, the Northern Paiutes - poverty-stricken, destitute - are expending their meager funds to defend themselves against the Federal agencies, including their lawyers within the agencies.

Intervention by the Northern Paiutes in the Alpine Case has been fruitful. They stopped the settlement so disastrous to them.

However, they had the power of their opponents brought forcefully to their attention. Incredibly the long-disputed California-Nevada Compact was revised to include the main thrust of the "settlement." Nevada's legislature has approved it. California's approval of the compact at the moment of this writing is in balance.

(p) Discriminatory interpretation of Orr Water Ditch Decree against the Northern Paiute Indians - thwarted economic development of Pyramid Lake:

Provisions in the Orr Water Ditch Decree adjudicating the rights to the use of waters of the Truckee River, primarily for purposes of irrigation, have been used to discriminate against the Pyramid Lake Tribe of Indians, sometimes in this consideration referred to as the Northern Paiutes.

An all-important element in the ownership of the rights to the use of water is the ability to change the place of use and purpose of it. Similarly the right to sell, transfer, or exchange rights to the use of water is a primary ingredient, as in the title of any property. Indeed, freedom from restraints against the alienation, use, sale or disposition of property in the absence of injury to others, is a basic precept of the law. However, the decree entered pursuant to the consent of Interior and Justice Departments, adjudicating Indian irrigation rights to the use of water was declared to impose upon those Indian rights the most severe limitations.

On May 5, 1955, the Solicitor ruled as follows:

"This is in response to an inquiry you have received whether water available for the irrigation of Pyramid Lake Indian lands may be allowed to flow into Pyramid Lake in aid of the fish resources of the Reservation.

* * *

"The Truckee River decree is specific as to the use of water under the rights adjudicated to the Indians and other parties under the decree. In these circumstances, it is my opinion that the Indians do not have the right to divert the use of the water adjudicated to them by the said decree to the propagation of fish resources in Pyramid Lake." 167/

Those severe limitations imposed by the Orr Water Ditch Decree upon the Indians' rights is contrasted in regard to the non-Indian rights under that decree:

"Persons whose rights are adjudicated hereby, their successors or assigns, shall be entitled to change, in the manner provided by law the point of diversion and the place, means, manner or purpose of use of the waters to which they are so entitled or of any part thereof, so far as they may do so without injury to the rights of other persons whose rights are fixed by this decree."

167/ No. M-36282, May 5, 1955, from Associate Solicitor, Indian Affairs to Commissioner of Indian Affairs:
"This is in response to an inquiry you have received whether water available for the irrigation of Pyramid Lake Indian lands may

Ridiculous though the Solicitor's opinion may be; inept; unprofessional; failing to mention much less consider, the legal issues involved in the change of place of use or purpose of rights to the use of water; no mention is made that the water for the purposes of the fishery could injure no one, the Indians being the last users on the stream; no mention made of the unconscionable limitations consented to by Interior

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Footnote 167 continued:

be allowed to flow into Pyramid Lake in aid of the fish resources of the Reservation.

"The Pyramid Lake Reservation was created before Nevada statehood by the withdrawal of lands by the Department November 29, 1859, later confirmed and approved by Executive Order of President Grant dated March 23, 1874. The area was a part of the land acquired by the United States in a cession from Mexico in 1848. The Lake is approximately 30 miles in length and 10 miles wide at its broadest point and is entirely within the Reservation.

"The Indians have adjudicated water rights in Truckee River which flows through a portion of the Reservation and empties into the Lake. These water rights were awarded by final decree entered September 8, 1944, by the United States District Court, District of Nevada equity - Docket No. A3, in the case of United States of America v. Orr Water Ditch Company et al. Under the decree the Indians are entitled to a maximum of approximately 30,000 acre-feet of water per year for irrigation and domestic uses.

"It is fundamental in irrigation law that there can be no ownership of the corpus of water flowing in a stream prior to its being diverted from the stream into canals, ditches or reservoirs of the party entitled to use the water (Kinney on Water Rights, Vol. 2, 2nd ed., p. 1340). 'Neither sovereign nor subject can have any greater than a usufructuary right in running water.' (Kinney on Water Rights, Vol. 1, 2nd ed., pp. 548-549 and cases there cited). It is also a familiar rule that water adjudicated for irrigation purposes if not utilized for that purpose must be allowed to flow downstream for the benefit of other water users with later rights in the stream.

"The Truckee River decree is specific as to the use of water under the rights adjudicated to the Indians and other parties under the decree. In these circumstances, it is my opinion that the Indians do not have the right to divert the use of the water adjudicated to them by the said decree to the propagation of fish resources in Pyramid Lake."

and Justice which the decree imposes upon the Indian rights; no mention made of the surplus waters in the Truckee River which the Bureau of Reclamation was to attempt to seize for the Washoe Project and to which the Indians obviously are legally entitled. That opinion, nevertheless, had this very salient, destructive effect upon the Indians: It became the law of the Department of the Interior to the irreparable damage of the Northern Paiute Indians constituting a barrier to the economic development of the vast potential of Pyramid Lake and the Truckee River for the benefit of the Indians. It was, indeed, the party line upon which the Washoe Reclamation Project was to proceed in the attempt - not yet consummated - to seize the last of the Indian Truckee River water.

Nine years after the last mentioned Solicitor's opinion, in October 1964, the Secretary of the Interior approved and adopted a report, referred to above, entitled, "Action Program for Resource Development Truckee and Carson River Basins California-Nevada." No effort was made to preserve Pyramid Lake. Rather the decline and ultimate destruction of the Lake by the Newlands Reclamation Project and the Washoe Reclamation Project was prognosticated in the foreseeable future. Recommendation No. VI of the Report did provide that Justice would be requested to seek an amendment to the Orr Water Ditch Decree permitting the Indians to use the meager quantity of water allowed to them for irrigation - 30,000 acre-feet annual maximum - for purposes of fishery. 168/

168/ Note: The vast proportion of the decreed rights could never be used by the Indians for purposes of irrigation by reason of the Nation's failure to build a project which could use it, and the dilapidated condition of the small project now in existence.

By a letter dated November 2, 1964, the Department of the Interior requested Justice to bring an action because: "The Indians want to use part of their decreed water for reestablishing the fishery at Pyramid Lake." No effort was to be made to preserve the Lake, planned out of existence by the Bureau of Reclamation.

Legalisms, never researched, only vaguely formulated, among the Interior and Justice lawyers, caused the request of November 2, 1964, to amend the Orr Water Ditch Decree, to languish and no action to this date has ever been taken in regard to it.

(q) Successful demands to reconsider Interior's legal and policy decisions made by Bureau of Indian Affairs and by the Indians:

Freeing the Indians from the restrictions imposed upon them entailed months of disengaging action. By 1966 the Bureau of Indian Affairs and the Indians were able to demonstrate the needless disaster being imposed upon them through the planned destruction of Pyramid Lake. 169/ In July of 1966 Commissioner Bennett withdrew the Bureau of Indian Affairs approval of the October 1964 Action Program Report. The press came to recognize the plight of the Indians and the news media brought forcefully to the attention of the public the manner in which the great Indian and National asset was being destroyed. Ultimately the struggle to preserve the Lake with its vast potential was being recognized.

169/ Pyramid Lake in Nevada is not only a Home, Abiding Place and a Source of Livelihood for Northern Paiute Indians - it is a National Asset: of Great Scenic Beauty; with Vast Potential for Recreation; of Historic Import; of Scientific significance - It Must Be Preserved.

(r) California - Nevada Compact - A grave peril to the Indians and to Pyramid Lake:

In keeping with the concept of the Bureau of Reclamation and the Truckee-Carson Irrigation District that the Indian Truckee River rights to the use of water could be seized without compensation, destruction of the famous fishery ignored, indeed, the destruction of Pyramid Lake itself with poverty-in-perpetuity for the Indians, would be countenanced without a struggle, the California-Nevada Compact purporting to divide between the States the waters of the Truckee, Carson and the Walker Rivers, was prepared. The Compact, so clearly violative of the Constitution of the United States; so flagrantly attempted an invasion of the Nation's rights, powers and obligations with the attendant destruction of Pyramid Lake, was rejected out of hand by the Federal Government.[170/]

A revised 1968 Compact was adopted by the California and Nevada Commissioners. It had all the objectionable features of the earlier compact with this addition: It set forth the "settlement" which the Interior-Justice-Upper Carson River water users had failed to consummate by reason of the intervention in the Alpine Case by the Northern Paiutes. Seldom has such power politics been used to strike down Indian claims. Failing to succeed when the Indians intervened in Alpine, the Nevada Compact Commissioners cooperated by writing the substance of the unconscionable "settlement" into a compact and received approval of it by the Nevada legislature. Again strenuous objection was

170/ See letter April 22, 1966, Assistant Secretary Anderson to Bureau of the Budget. Also Analysis of "California-Nevada Interstate Compact concernign waters of Lake Tahoe, Truckee River, Carson River and Walker River Basins" dated January 20, 1966.

interposed to the compact by the Federal Government and the Indians. 171/

Losing in their own State of Nevada in their struggle against the destruction of Pyramid Lake, the Northern Paiutes received gracious treatment by California's legislature. Secretary Hickel's letter of March 18, 1969, strongly opposed the Compact. The Indians and their lawyers were heard by the California representatives. On March 20, 1969, the Indians received a reprieve from destruction by the California-Nevada Compact - at least momentarily - by reason of an amendment California has proposed, exempting the Indian rights from the operation of the Compact.

(s) Ambivalence within the Department of the Interior respecting Indians exemplified by Pyramid Lake struggle:

Ambivalence is the hallmark of Interior in regard to its trust responsibility towards the American Indians. Practical politics - the lifeblood of the Bureau of Reclamation - are daily confronted with good conscience and the need to fulfill the trust responsibility to the Indians. Erosion of Indian title to rights to the use of water through schizoid policies is the consequence. Congressional enactments and reclamation project approval clash with obligations owed by Interior's Secretary to the Indians. Agonizing appraisals and reappraisals are made; reports are written and speeches given. Yet none of them produce sufficient water - indeed, any water - to provide for the Indians and the politically delectable plans of Reclamation for its projects.

Life or death of Pyramid Lake is the perfect example of Interior's agonizing, for:

171/ See letter January 14, 1969, Secretary of the Interior to Bureau of the Budget.

1. Destruction of Pyramid Lake is assured if the Washoe Reclamation Project is constructed - this Nation cannot have Pyramid Lake and the Washoe Project, there is insufficient water in the Carson and Truckee Rivers for the Lake and the Project.

2. Destruction of Pyramid Lake is assured if the contract now approved by Interior is authorized by Congress, increasing the Newlands Reclamation Project from its historic average irrigated acreage of 51,000 acres to 74,500 acres; guaranteeing a firm supply of water to the Newlands Project of 406,000 acre-feet annually.

Interior proceeds with the construction of the Washoe Reclamation Project.

Papers are written in regard to Pyramid Lake and its vast potential for public benefit - witness the 1968 report of the Bureau of Outdoor Recreation alluded to above.

Promises are made of litigation to protect the Indian rights in the Truckee River and Pyramid Lake - currently the Solicitor's Office refers to a letter to Justice requesting that court action.

Contracts are signed to assure 406,000 acre-feet of water annually to Newlands Reclamation Project and increased water right acreage to 74,500 acres.

Harsh fact is this: Reclamation obtains action - results of practical politics-; the Indians receive words - results of good conscience being placated.

Water to be obtained and required for the Washoe Reclamation Project through prohibiting Newlands grossest waste - nevertheless continuing gravely wasteful practices on Newlands. Those meager, momentarily available quantities of water, some of which enter Pyramid Lake, are loudly trumpeted as being evidence of Indian protection.

Nature supplies a huge snow pack in the high Sierras - at widely spaced intervals over the years - and the existing Reclamation facilities cannot manage all of it for its project, and some water enters Pyramid Lake - this is not an Act of God, of course - it is evidence of a great renewal of spiritual rapport between the Red Man and the Great White Father - a rapport that evaporates when another Act of God results in a light snow pack and short water supply; or more practically when Reclamation has completed Stampede Reservoir on the Truckee; Watasheamu on the Carson.

(t) Congress alone can preserve Pyramid Lake:

There is an Indian truism: The Congress and the courts protect the Indians; the Executive Branch destroys them. It is no different today than when President Andrew Jackson nullified the Supreme Court's decision by simply refusing to permit its implementation by Executive action and a grave stain never to be removed, was indelibly written on a Nation's conscience. 172/

What is being done to the Northern Paiutes today differs not at all from what Jackson did to the Cherokees - only the dates and the names are changed, with one exception - the Northern Paiutes have no place to go.

172/ Schmekebier, The Office of Indian Affairs, page 35.

Congress can stop the inhumanity being perpetrated on the Northern Paiutes for the world to see. It can:

1. Refuse to appropriate funds for the Washoe Reclamation project or vitiate Congressional approval of the project;

2. Refuse to appropriate funds to carry out the contracts which would enlarge the Newlands Reclamation Project beyond its historic irrigated acreage and limit the project to beneficial use of all waters diverted to it, thus striking down the firm supply of 406,000 acre-feet of water which the contracts in question would guarantee;

3. Refuse to approve the California-Nevada Compact if it fails to protect, preserve and guarantee the Indian Truckee River rights and their right to maintain Pyramid Lake as a permanent viable body of water.

4. Direct Justice to fulfill its responsibilities in regard to the protection of the rights of the Northern Paiutes in the Truckee River and Pyramid Lake; to desist from opposing the Indian efforts to protect themselves by intervening in the Alpine Case, but rather to assist them in it; to have the principles of beneficial use of water enforced under the Orr Water Ditch Decree on the Truckee River and the March 1950 Decree on the Carson River.

Finally, if Congress were to declare that Pyramid Lake should be preserved for the benefit of the Indians and the Nation; the fisheries that were destroyed by diversions to the Newlands Reclamation Project, be restored, a long step would be taken in correcting one phase of innumerable, sometimes ghastly, wrongs perpetrated on the Northern Paiutes; setting an example in regard to the appropriate course to pursue respecting all of the American Indians.

III. POLICIES PAST, PRESENT AND FUTURE IN REGARD TO THE INDIAN RIGHTS TO THE USE OF WATER IN LOWER COLORADO RIVER VALLEY - A CRUCIBLE

Politics and water readily mix creating an unstable, highly combustible, volatile combination. Only the strong prevail when confronting the combination. That is, of course, the Indian problem in general, and most particularly in the Lower Colorado River Valley. Economic development of Indian lands has long been - is now - retarded by reason of politics in and out of Interior.

(i) Arizona v. California, United States, Intervener:

Arizona had failed in the Supreme Court because in early cases the United States had been declared an indispensable party, it was immune from suit, and had failed to evidence an inclination to become a party to a suit to have adjudicated the rights to the use of water of the Colorado River. That stream drains 244,000 square miles in seven States, with every square mile and drop of water an intemperate political issue. 173/

173/ Arizona v. California, 298 U.S. 558 (1936).

By the end of the 1940's and the early years of 1950, population pressures in the Southwest - particularly the California and Arizona area - forced the National Government to reconsider its historical reluctance to become a party to the gruelling struggle among the sister States of the Colorado River Basin. Conversations within Justice were undertaken and the matter fully reviewed with Interior. At the first meeting after it was agreed the suit would be initiated, this strong caveat was given: Play down the Indian rights! To that caveat the response was made that there probably would not be a justiciable issue in the case if the Indian rights - could - or would be played down.

On November 2, 1953, the "Petition of Intervention on Behalf of the United States of America" was filed in Arizona v. California. Among other things, the petition alleged the United States of America was the trustee for the Indians and Indian Tribes and

> "asserts that the rights to the use of water claimed on behalf of the Indians and Indian Tribes as set forth in this Petition are prior and superior to the rights to the use of water claimed by the parties to this cause in the Colorado River and its tributaries in the Lower Basin of that stream." 174/

Immediately an all-out attack was launched against the then Attorney General. The powerful politicians and their political attorneys from

174/ Petition of Intervention, Arizona v. California, No. 10 Original, filed November 2, 1953, Paragraph XXVII, page 23.

the Lower Basin States would not tolerate the assertion that the Indian claims were "prior and superior" to the claims of the States, yet the petition with the required copies had been filed. No real problem, said the powerful ones - withdraw the petition, strike the offending passage pleaded on behalf of the Indians, and refile it. That was done. The truncated version reads as follows:

"XXVII

"The United States of America, as trustee for the Indians and Indian Tribes, claims in the aggregate on their behalf rights to the use of water from the Colorado River and its tributaries in the Lower Basin of that stream in the States of Arizona and California as set forth in Appendix IIA of this Petition." 175/

For the sake of contrast, demonstrating the resistance to the Indian claims - which foretell of the danger to the Indians in the future, the two provisions are set forth below. 176/ Thus the odd-looking page 23

176/ From first Petition filed November 2, 1953:

"XXVII

"The United States of America, as trustee for the Indians and Indian Tribes, claims in the aggregate on their behalf rights to the use of water from the Colorado River and its tributaries in the Lower Basin of that stream in the States of Arizona and California as set forth in Appendix IIA of this Petition. The United States of America asserts that the rights to the use of water claimed on behalf of the Indians and Indian Tribes as set forth in this Petition are prior and superior to the rights to the use of water claimed by the parties to this cause in the Colorado River and its tributaries in the Lower Basin of that stream."

From Petition filed December 1953:

"XXVII

"The United States of America, as trustee for the Indians and Indian Tribes, claims in the aggregate on their behalf rights to the use of water from the Colorado River and its tributaries in the Lower Basin of that stream in the States of Arizona and California as set forth in Appendix IIA of this Petition."

of the present petition - with its wide spoken between the lines - is explained. It suffered from power failure by those inclined towards the Indians.

The Supreme Court in Arizona v. California, United States, Intervener, applied the principles of Winters, Conrad Investment Company, Walker River, Ahtanum, declaring the basic concepts of those cases to be applicable to reserved lands of the United States.[177] However, there are aspects which require most careful consideration.

are aspects which require [illegible] development of the

(ii) State apportionment threat to economic development of the Indian Reservations under Arizona v. California:

Politics smothered the rights of the Indians to assert their claims against the entire Colorado River System. Those rights are properly against the river - not political subdivisions, but the Upper Basin States - Wyoming, Colorado and Utah - where most of the water rises, had the political power to stay out of the case; a deal it was said, made to avoid other claims which, of course, included Indians. As was pointed out in regard to the Winters Doctrine Rights, they are against the stream system:

> "The suggestion that much of the water of the Ahtanum Creek originates off the reservation is likewise of no significance. The same thing was true of the Milk River in Montana; and it would be a novel rule of water law to limit either the riparian proprietor or the appropriator to waters which originated upon his lands or within the area
>
> [illegible] to this portion of the
>
> [illegible] waters which originate [illegible]
>
> of appropriation. Most streams in this portion of the

177/ See above, Winters Doctrine, pages 14 et seq.

country originate in the mountains and far from the lands to which their waters ultimately become appurtenant." 178/

In sharp contrast to the principles enunciated - invariably applied - the Supreme Court in Arizona v. California, United States, Intervenor, drastically limits the Indian rights:

> "x x x we note our agreement with the Master that all uses of mainstream water within a State are to be charged against that State's apportionment, which of course includes uses by the United States." 179/

As a consequence the Indians are at the mercy of the wheeling and dealing by the States as they attempt to obtain projects and water. A most ominous threat to the Colorado River Valley Indians is the fact that the Colorado River has been outrageously oversold. Where the water for the Central Arizona Project - in the light of guarantees to California - must come from should be clear warning to the Indians. The same powerful people who forced the Attorney General to change the Petition in Arizona v. California, United States, Intervenor, are exercising those powers - powers that can strip from the Indians the rights which originally were to be "played down."

Economic development has been thwarted on all Indian Reservations in the Colorado River Valley. Limitations upon the exercise of their rights to the use of water is advice frequently used thus allowing a seizure of their rights for reclamation and other projects.

178/ United States v. Ahtanum Irrigation District, 236 F.2d 321, 325.
179/ 373 U. S. 546, 601.

(iii) "Giveaway" of 1,500 acres of Mohave Indian land:

Without notice to the Fort Mohave Tribe of Indians or to the Bureau of Indian Affairs, affording them an opportunity to be heard, the Solicitor's Office conducted a proceeding initiated by California in the Bureau of Land Management. 1,500 acres of invaluable Indian land was awarded to California by a decision dated March 15, 1967, allegedly as coming within the Swamp and Overflow Act. Only by chance when the matter was then on appeal did it come to the attention of the Bureau and the Indians.

Efforts by the Bureau of Indian Affairs to intervene were denied - the Solicitor - it was said, perhaps facetiously but none the less officially - was representing the Bureau, although it was not given notice or an opportunity to be heard. Under most severe restrictions the Indians were allowed drastically limited intervention. An astounding fact was forcefully brought to the Indians' attention: The Solicitor's position, in the present state of the 1,500-acre giveaway of their lands, was not the lawyer for the Trustee, the United States; rather he emphasized, he was Judge! - he owed a trust obligation to California. Anomalous? - not at all, that's the law as enunciated by the Solicitor. The matter is now before the Secretary of the Interior for reconsideration. It is but a single example of outrageous conduct by conflicting agencies within the Interior Department, perpetrated against the Mohaves in regard to their lands which are inseparable from their rights to the use of water.

(iv) Conflicts within Interior - Failure to protect and define boundaries, rights to the use of water:

Grave damage to the economic development of the Colorado River Indian Reservation has occurred - is occurring, due to the failure of conflicting Federal agencies to resolve basic differences. Lands have been separated from the Reservation and Indian occupancy lost for periods up to half a century.

A boundary dispute lasting virtually one hundred years, recently brought out an irrational opinion which declared: The boundary was the unknown high-water line in 1876, but for "administrative convenience" another line could be used. This irrational opinion has created administrative and jurisdictional problems which cause economic chaos not development. Moreover, and even more damaging to the Indians is the loss of between 2,000 and 4,000 acres of invaluable lands and rights to the use of water in the Colorado River.

Loss of land and rights to the use of water on the Colorado River Indian Reservation reflect only part of the damage. In an area where recreation, year-round, is rapidly growing, the loss of access to the Colorado River has prejudiced and will continue to gravely prejudice economic development for these Indians.

(v) Fort Yuma Indian Reservation:

This tormented Indian Reservation has suffered more than most. In 1893 the Indians by crushing force had an agreement imposed upon them. All facts point to fraud, diverse and general culpability on the part of officials of the National Government. Those who refused to sign

for the Indians were whipped into submission. Others it is reported, were held in jail for months without charge.

Purportedly the Yumas - Quechans as they are known - were to retain their irrigable lands - or some of it. The other lands were to be sold, and payment made to the Indians. They were not sold. Title remains in the United States. Today the Bureau of Land Management is leasing land taken forceably from the Yumas. Those lands are being irrigated and rental for irrigated lands is collected by the last named Federal agency. Incredibly when the question is raised, How can these lands be declared non-irrigable - as they have been - when they are in fact irrigated -- Simple enough, the Bureau of Reclamation states they are non-irrigable! By that fiat the Indians are deprived of their lands and the economic development of the Reservation delivered a smashing blow.

IV. MISSOURI RIVER BASIN - A VAST AREA WHERE ECONOMIC DEVELOPMENT HAS BEEN DEFEATED BY FEDERAL AGENCIES, LAWS AND POLICIES

(i) Seizure by the Bureau of Reclamation of Fort Peck Indian water supply:

The Fort Peck Indians owned invaluable Winters Doctrine Rights in the Milk River. The Bureau of Reclamation built the Milk River Reclamation Project. It seized the Indian water without compensation and is using it on the Reclamation Project. As a consequence the economic development of the Fort Peck Indian Reservation was gravely retarded. Confronted with the powerful and beyond-control Bureau of Reclamation, water was sought from another source and at great cost the Indian project was reconstructed.

(ii) Seizure without right or compensation of Indian rights to the use of water at Yellowtail Dam on the Crow Indian Reservation and elsewhere in the Missouri River Basin:

One of the most flagrant examples of the Bureau of Reclamation's disregard of Indian rights to the use of water will be found at Yellowtail Dam and Reservoir in Montana's Crow Indian Reservation. There the Bureau of Reclamation not only did not pay the Crows for their Winters Doctrine Rights in the Bighorn River, but is selling the Indian water, depositing the proceeds to a non-Indian account, and seeking to charge coal developers on the Reservation for Indian water, thus driving down the price of coal to which the Indians are entitled.

Detailed reviews of the principles of the Winters Doctrine Rights have been made including the Crow Indian Yellowtail Dam matter. 180/ Time and space do not permit a review of all damage done to Indian rights to the use of water throughout the Missouri River Basin, and its effect upon the economic development of the many Reservations in the Valley. That damage is high and is continuing.

V. CALIFORNIA'S INDIANS ROBBED OF THEIR RIGHTS TO THE USE OF WATER; FAILURE OF THE UNITED STATES TO FULFILL ITS OBLIGATIONS; GRAVE CONFLICTS WITHIN FEDERAL ESTABLISHMENT DEPRIVES CALIFORNIA'S INDIANS OF ADEQUATE REPRESENTATION

Failure of the United States to protect Indian rights to the use of water to which the California Indians are entitled has defeated all hope of economic development of some Reservations. Economic development - Indian or non-Indian - in Southern California is geared to the availability of water to a degree unsurpassed on this Continent.

180/ See memorandum dated October 13, 1965, entitled "Winters Doctrine Rights in the Missouri River Basin."
Also memorandum dated December 5, 1967, entitled "Analysis of Opinion November 16, 1967, to the extent that it relates to the rights of the Crow Indians in the Bighorn River."

It explains the devastation brought to the Mission Indians - the LaJollas, Rincons, Palas. Their rights have been seized without compensation. Their efforts to defend themselves have been defeated. Others, unless the seizure of these rights is prevented, will experience the same grave damage. So widespread; so all-encompassing is this failure of the Nation to fulfill its obligations to the Indians it is impossible to chronicle here the magnitude of the damage done to them, particularly those Indians in Southern California.

Shaken by this failure of the Nation to fulfill its obligations the California Indian Legal Services has become actively engaged and is rendering legal assistance to the Indians. There are conflicts within the Federal Establishment which have caused it to fail these Indians in a most serious way. Recently a brief in opposition to the claims of certain of the Mission Indians and others demonstrates the impossibility of Justice Department adequately to protect Indian rights to the use of water. In that brief there is a failure fully to cite an authority repeatedly relied upon; fully to review the results of the litigation giving rise to the decision relied upon, or correctly to interpret the decision in its present status in view of decisions not cited by Justice. 181/

181/ See brief filed August 1968 before the Indian Claims Commission, Docket No. 80-A, Baron Long (El Capitan), Campo, Inaja, La Jolla, et al., v. United States of America, defendant; Defendant's requested findings of fact, objections to petitioners' proposed findings of fact, and brief, pages 28, 29.

That effort to sustain a proposition which, if successful, would defeat a claim of the Indians for compensation is diametrically opposed to the position taken by Justice in support of Indian claims. 182/ Indeed, the brief referred to above applies principles seeking to defeat the Indian claims, which have not been applied against non-Indians seeking restitution for the alleged taking of rights to the use of water. 183/ This matter and related disparities in regard to conflicts within Justice and Interior is the subject of present intensive investigation. California's Indians are aroused over the loss of their rights due to the conflicts in question and are greatly in need of assitance if they are to avoid further seizure of their rights.

VI. ECONOMIC DEVELOPMENT GRAVELY RETARDED BY PURPORTED SEIZURE OF INDIAN LAND AND RIGHTS TO THE USE OF WATER ON OTHER INDIAN RESERVATIONS

(i) Flathead Indian Reservation:

Magnitude of disasters inflicted upon the Salish and Kootenai Tribes by the opening of the Flathead Indian Reservation to non-Indians and later to other developments, has never been determined. That opening took place in the early 1900's. There has been a continuous disregard of the Indian rights, a claim by the Solicitor that all of those Flathead rights had been preempted by the United States for the largely non-Indian

182/ This is not new - see memorandum dated June 19, 1956, captioned "Water Rights on Indian Reservations (filed under Gila River Pima-Maricopa Indian Community, et al., v. United States, Docket No. 236, before Indian Claims Commission).

183/ In effect the brief before the Indian Claims Commission declares that the Indians are not entitled to compensation without a general adjudication. That position is, of course, wholly incorrect - see United States v. Gerlach Live Stock Co., 339 U.S. 725 (1949).

project, and a failure to take cognizance of priority accorded to Indian rights in the administration of the irrigation project. 184/

Every effort to institute an action to protect or have determined the rights of the Salish and Kootenai Tribes has been denied by the Solicitor's Office. A full investigation of the matter is now under way to the end that those rights will be inventoried and it is hoped in some manner protected against further encroachment by the non-Indians permitted to occupy the Flathead Indian Reservation.

(ii) Gila River Indian Reservation - Pima Maricopa Community; economic development greatly impeded by attempted seizure of immemorial rights of Indians in the Gila River:

Purporting to be for the benefit of the Pima Indians who had from time immemorial irrigated their lands, the San Carlos Indian Irrigation Project was undertaken. 185/ What occurred has been a violation of the Nation's trust responsibility to the Indians - an attempted illegal seizure of most of the immemorial rights of the Indians. Moreover, the broad Winters Doctrine Rights for future development of the Indian Reservation have been systematically denied.

It is infrequent that a court decree - here with the consent of Justice and Interior - sets forth a violation of the Indians' immemorial Winters Doctrine Rights. 186/ In the cited paragraphs of the

184/ See memorandum prepared at request of Solicitor dated April 28, 1967, "Memorandum relative to the titles to rights to the use of water and the authority to control and administer them on the Flathead Indian Reservation."

185/ See "A History of the Pima Indians and the San Carlos Irrigation Project" Senate Document No. 11, 89th Congress, 1st Session.

186/ See Decree entered June 29, 1935, Globe Equity No. 59, The United States of America v. Gila Valley Irrigation District, et al.

decree and elsewhere in it the prior immemorial rights of the Indians are recognized and then are specifically subordinated to the junior rights.

This course of conduct, among others, in connection with the project in question discloses innumerable violations of the surface and ground water rights of the Indians. A full investigation must be undertaken in regard to this outrageous circumstance. It will reveal the extent of the damage to economic development that the Indians have experienced.

AN ATTEMPT TO RECTIFY ANCIENT WRONGS IN REGARD TO INDIAN LANDS AND RIGHTS TO THE USE OF WATER

Commissioner Bennett has authorized and directed a program, strenuously prosecuted to recover for the Indians, lands and rights to the use of water of which they are wrongfully deprived. Progress is being made. Yet the lack of legal assistance or outright opposition has created grave problems in connection with the program. Should that program be stopped or retarded the economic development of the American Indian Reservations may very well be precluded for all time because of the rapidity with which their lands and rights to the use of water are being eroded away by the failure properly to protect them.

CONCLUSION

The Summary of this memorandum, conclusions and recommendations are set forth in the opening pages of it.

William H. Veeder
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