The original documents are located in Box 6, folder "Water Rights Cases" of the Bradley H. Patterson Files at the Gerald R. Ford Presidential Library.

Cagphard — (Purplish)

THE WHITE HOUSE
WASHINGTON

Re Water doctrine
applies to ground water
as well as surface water

THE WHITE HOUSE
WASHINGTON

Walton

Farmer has fee
patent on a forest
allotment. Does he
have Winters doctrine
rights to water for
his land? Udall
should say they own all
water rights. Udall appointed
as counsel. Bey says he has exclusive
for District Court

THE WHITE HOUSE
WASHINGTON

Water Cuts

Pending decision.
Hang up on
question of Tribal
jurisdiction over non-
Indians

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

SEP 28 1976

MEMORANDUM FOR THE PRESIDENT

Subject: Enrolled Bill H.R. 589 - Relief of the Santa Ynez Water Conservation District
Sponsor - Rep. Lagomarsino (R) California

Last Day for Action

October 8, 1976 - Friday

Purpose

Authorizes the Secretary of the Interior to relieve the Santa Ynez River Water Conservation District of repayment of a reclamation project loan to the extent of $1,120 annually.

Agency Recommendations

Office of Management and Budget	Approval
Department of the Interior	Approval

Discussion

In 1960, the Santa Ynez River Water Conservation District received a Small Reclamation Projects loan from the Department of the Interior in the amount of $3,800,000 to construct a water distribution system. The District repays this loan by means of an ad valorem tax levied against lands within its boundaries.

The Santa Ynez Indian Reservation is located within the boundaries of the 10,000-acre Santa Ynez River Water Conservation District. Although the 88-acre Indian reservation constructed its own water distribution system in 1970, the District water distribution system supplies all of the water used by the Indian reservation distribution system. Under this arrangement, the Santa Ynez Indians make the same payment per unit of water as do other users within the District, including maintenance and operation charges.

However, since the Indian reservation is Federal land, the District's ad valorem tax cannot be levied against these lands, and accordingly, non-Indian landowners are subsidizing part of the cost of the water distribution system that provides water to the Indian reservation. The Indian reservation's pro-rata share of the Small Reclamation Projects loan is about $34,000, or $1,120 annually over the remaining 30-year repayment period.

H.R. 589 would authorize the Secretary of the Interior to amend the repayment contract with the Santa Ynez River Water Conservation District to reduce by $1,120 annually the amount due the United States. The enrolled bill would make the reduction effective on January 1 of the year following enactment, and it would remain in effect so long as the Indian reservation is in Federal ownership.

In reporting to the Congress, Interior opposed enactment of H.R. 589 on the grounds that the issue of payment by the Indians for their share of the District's water distribution system was a matter between the District and the Indians. The Department further noted that the District's original loan agreement with the United States contains no stipulations or reservations concerning prospective water service to the Indians.

However, in its attached enrolled bill letter, Interior takes a different view, and recommends approval based on the following arguments:

> "The Bureau of Reclamation and the Bureau of Indian Affairs have both expressed the view that there are strong equitable reasons for

support of the bill. Because of the need for water by the Indian Band, the District agreed to provide the water to the reservation and to assume the responsibility for operation and maintenance of the lines on Federal land after their construction. Because of the economic status of the Band, the water rate for the Indians did not include a surcharge in lieu of taxes. This necessary conclusion, together with the tax exempt status of the reservation land, created an inequity. The Federal Government utilizes a portion of the District's water distribution system which is being entirely paid for by its non-governmental neighbors by way of tax assessments."

* * * *

"The cost of the bill is minimal. In light of the equities of this case and the lack of other specific authority, we favor approval of H.R. 589 to authorize the Secretary to provide the needed relief."

Although this Office continues to believe that Interior's initial position held considerable merit, on balance, we concur in the Department's recommendation for approval. We take this position in light of the bill's minimal cost to the Federal Government and because the circumstances in this case appear to be unique with little danger of establishing a precedent that could be repeated in the future.

James T. Lynn
Director

Enclosures

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

SEP 27 1976

Dear Mr. Lynn:

This is in response to your request for the views of the Department concerning enrolled bill H.R. 589, "To authorize the Secretary of the Interior to provide relief to the Santa Ynez River Water Conservation District due to delivery of water to the Santa Ynez Indian Reservation lands."

We recommend that the President approve H.R. 589.

H.R. 589 would allow the Secretary to relieve the Santa Ynez River Water Conservation District of repayment of a small reclamation project loan, to the extent of $1120 per year. In 1960 the District entered into a contract with the United States to repay a Small Reclamation Projects loan of about $3,800,000, which was used to construct a distribution system. The distribution system was completed in 1965. The bill would compensate the District for repayment of the portion of the distribution system attributable to the Santa Ynez Indian Reservation. The District usually obtains funds for the loan by the ordinary means of tax assessment, but because the lands involved are Federally owned it cannot assess the Indian reservation. The loan was originally for a term of 40 years, and has 30 years left to run.

The Santa Ynez Indian Reservation is located within the boundaries of the 10,000 acre Santa Ynez River Water Conservation District. There are some 15 Indian families living on the 88-acre reservation. The District is a member unit of the Santa Barbara County Water Agency, the contracting entity on the Cachuma Project. The project is located near Goleta in southern Santa Barbara County, California. The District is also paying the United States for water supplied from the Cachuma project.

The District is providing water for domestic use by the Indians through a part of the water distribution system constructed with the loan funds. The Indian Health Service, a part of the Department of Health, Education, and Welfare, installed a distribution system within the reservation boundaries about five years ago.

The Santa Ynez Indians have made and will continue to make payments to the District for water delivered. This charge is to compensate the District for maintenance and operation costs, and for the District's payments to the United States for water. However, because the annual tax assessment made against other District lands is not possible against the reservation lands, no equitable adjustment can be made to the District for the water distribution system without specific legislation.

The cost of the District's distribution system amounts to approximately $382 per acre over the balance of the repayment period which would be equal to about $34,000 for the 88 acres of Indian land. This is slightly less than one percent of the loan and is the approximate amount the District would be credited under the proposed legislation.

The Bureau of Reclamation and the Bureau of Indian Affairs have both expressed the view that there are strong equitable reasons for support of the bill. Because of the need for water by the Indian Band, the District agreed to provide the water to the reservation and to assume the responsibility for operation and maintenance of the lines on Federal land after their construction. Because of the economic status of the Band, the water rate for the Indians did not include a surcharge in lieu of taxes. This necessary conclusion, together with the tax exempt status of the reservation land, created an inequity. The Federal Government utilizes a portion of the District's water distribution system which is being entirely paid for by its non-governmental neighbors by way of tax assessments.

The Leavitt Act (25 U.S.C. 386a), which authorizes and directs the Secretary of the Interior to adjust or eliminate reimbursable charges of the Government of the United States existing as debts against individual Indians or tribes of Indians for costs in connection with irrigation systems constructed for the benefit of Indians, is not specifically applicable in this case since the debt involved in this legislation was not specifically incurred by either the tribe or the individual Indian. However, the rationale of the Leavitt Act could be reasonably applied to this case.

The cost of the bill is minimal. In light of the equities of this case and the lack of other specific authority, we favor approval of H.R. 589 to authorize the Secretary to provide the needed relief.

Sincerely yours,

Assistant Secretary of the Interior

Honorable James T. Lynn
Director, Office of
Management and Budget
Washington, D. C.

THE WHITE HOUSE
WASHINGTON

October 6

Bill -

Would like your OK before I mail this.

Ford

OK -

CENTRAL FILES

October 6, 1976

Dear Mr. Snyder:

The August - September Newsletter of the Friends Committee on National Legislation carried a special box captioned "American Indians." It stated that the Ford Administration has opposed enactment of the Indian Health Care Improvement Act and "opposed efforts to protect Indian land and water resources."

The President, after personal review, decided to sign the Indian Health Care Improvement Act, and I am forwarding a copy of his Signing Statement, along with our own thanks for the support and interest in this legislation by the Friends.

The reference to opposing efforts to protect Indian land and water resources is, however, troublesome to me because it does not reflect the facts and thus the fairness which otherwise characterizes the activities of the Friends.

I would very much appreciate it if the Newsletter would afford me the opportunity to correct this unfair statement and, for that purpose, I enclose here a brief summary of the actions which the Ford Administration and its predecessors have taken to stand up for the land and water rights of American Indian people.

Sincerely,

Bradley H. Patterson, Jr.

Mr. Edward F. Snyder
Executive Secretary
Friends Committee on National Legislation
245 Second Street, N. E.
Washington, D. C. 20002

BCC: Mr. Wm. J. Barbody, Jr.
Mr. Greg Austin, Interior
Mr. Pet er Taft, Justice
Mr. Morris Thompson, BIA
Mrs. Bobbie Kilberg

Attachment

BHP, Jr. /vhs

PROTECTING INDIAN LAND AND WATER RIGHTS

The President in 1970 proposed, and his staff lobbied hard and successfully, to have Congress restore the sacred Blue Lake lands to the Taos Pueblo. The President signed this bill in December of 1970.

The White House worked for two years to arrange for the return to the Yakima Tribe of 21,000 acres of land improperly taken from them by a Presidential mistake in 1906. The land was returned in 1972.

The White House strongly supported the Menominee Restoration Bill as a leading example of the President's rejection of the terminationist philosophy of the '50s. The bill was signed and is being implemented.

The White House itself designed, proposed and lobbied hard for the version of the Alaska Native Claims Act which passed and which now guarantees Alaskan natives 40,000,000 acres of land and a billion dollars in the 50th State.

The White House intervened to make sure that the government, as trustee, effectively supported Indian treaty rights in the fishing case in the State of Washington. The resulting Boldt decision is a milestone of protection for these rights.

The White House made sure that the Interior and Justice Departments strongly supported the Paiutes in the famed Pyramid Lake case. They did and the brief filed in the Supreme Court is a classic statement for Indian water rights.

The White House intervened with the Justice Department to ensure that whenever there is a court case where Interior wants the Indian trust rights spoken for, this will be done, even if the Federal brief is itself "split." The Ford White House reaffirms this arrangement and reaffirms its six-year-old support for the creation by Congress of an Indian Trust Counsel Authority which will always defend Indian natural resources rights wherever they are challenged.

The Stevens decision protects Indian land from improper taxation; the White House intervened to ensure that the Indian trust rights were reflected in the Federal' brief in court.

Besides signing the Indian Self-Determination Act in 1975 and the Indian Health Care Improvement Act in 1976, President Ford told an assemblage of Indian leaders from all over the nation on July 16, 1976:

> "Many Indian reservations contain valuable natural resources. There must be the proper treatment of these resources with respect for nature, which is a traditional Indian value. My Attorney General has established an Indian resources section whose sole responsibility is litigation on behalf of Indian tribes to protect your natural resources and your jurisdictional rights."

Sometimes there are controversies as to precisely what the Indian treaty and trust rights are; litigation is often necessary to determine them. President Ford will continue to honor and protect Indian treaty and trust rights, and the record backs this up.

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HEALTH

Ford supports a health insurance program for Americans over 65 which would modify Medicare to cover all costs after $500 in hospital bills and $250 in doctors' fees but would require participants to pay 10% of all hospital bills under $500 and doctors' bills under $250. He opposes "federally dictated" national health insurance providing full coverage for all Americans.

During the 94th Congress Ford has vetoed, as too expensive, three bills on health services and nurses' training, school lunches, and the 1976 Labor-HEW Appropriations. Congress overrode all three vetoes.

HANDGUNS

The Ford Administration has supported a ban on the sale and manufacture of cheap handguns. The Republican platform, however, opposes any federal registration of firearms.

Both Carter and the Democratic Platform support banning cheap handguns and establishing stronger controls over the manufacture, distribution, and possession of all handguns.

CRIMINAL JUSTICE

Ford believes that "swift and certain" punishment is the answer for crime control. "To keep a convicted criminal from committing more crimes, we must put him in prison so he cannot harm more law-abiding citizens."

Ford supports Senate Bill One, the controversial criminal code revision. S. 1 would authorize, among other things, the death penalty for certain cases of sabotage, espionage, treason, and murder, and permit wiretapping for 61 separate criminal offenses. He proposed only $10 million for juvenile delinquency prevention in 1977, but Congress voted $75 million. In his 1976 State of the Union address, he called for construction of four new federal prisons.

"A MAN IS KNOWN . . ."

Among the people Ford has appointed are Nelson Rockefeller, vice-president; John Paul Stevens, Supreme Court Justice; Edward Levi, Attorney General; Carla Hills, HUD; F. David Mathews, HEW; William Coleman, Transportation; John T. Dunlop and W.J. Usery, Jr., Labor; Elliot L. Richardson, Commerce; Stanley Hathaway and Thomas Kleppe, Interior; Anne Armstrong, Ambassador to Great Britain. Among the appointees not confirmed by the Senate were Joseph Coors, Corporation for Public Broadcasting; Ben Blackburn, Chairman, Federal Home Loan Bank Board; and Joseph T. Hooper, III, TVA.

Carter named Mondale as his running mate. As Governor he helped defeat Carl Sanders, Atlanta lawyer, to the U.S. Senate to fill a vacancy caused by Richard Russell's death.

Carter is said to have appointed 53 blacks in the Georgia [illegible] as compared to three in Gov. Maddox' administration. He appointed women to posts never before held by [illegible] including a state judgeship.

Send to Brad Patterson
JR

• CARTER

HEALTH

Carter says that "we have built a haphazard, unsound, inefficient non-system which has left us unhealthy and unwealthy at the same time."

FORD LIBRARY

His "first emphasis" as President would be on "prevention of the killers and cripplers of our people." Also he cites the two separate existing programs, Medicare and Medicaid, neither of which relates to health manpower and research programs, and both of which have experienced massive, unanticipated cost increases, as a "perfect example of the need for government reorganization."

Carter has indicated general support for a comprehensive universal national health insurance program financed by payroll taxes and general tax revenues, and accompanied by reforms in the delivery of health services. He ~~would support implementation~~ to the extent that it can be afforded.

As Governor, Carter decentralized and expanded mental health facilities, initiated a storefront drug abuse program, strengthened preventive medicine programs, and doubled the number of alcoholism clinics in Georgia.

CRIMINAL JUSTICE

Carter supports "swift arrest and trial, and fair and uniform punishment" for any lawbreaker, but he has expressed doubts that imprisonment really helps to control crime. "The overall, only solution that I see to the crime problem . . . is the reduction of unemployment."

The Democratic Platform supports "major reform of the criminal justice system," and opposes "any legislative effort to introduce repressive and anti-civil libertarian measures in the guise of reform of the criminal code."

As Governor, Carter signed a bill providing the death penalty for certain cases of murder, kidnapping, armed robbery, rape, treason, and aircraft hijacking. On July 2, the U.S. Supreme Court upheld the Georgia law in a case involving murder.

As Governor, he formed a biracial civil disorder unit to quell potential disturbances without force, strengthened prison education and counseling programs, and supported a bill to extend the use of wiretapping to theft, extortion, and auto theft.

AMERICAN INDIANS

The Ford Administration has opposed enactment of the Indian Health Care Improvement Act, urged termination of the food commodity program for Indians and others, and opposed efforts to protect Indian land and water resources. A significant number of official investigations, intimidating activities, use of informants, and prosecutions regarding Indians have taken place during the Ford Administration.

Carter has not indicated what his policy toward Indians will be as this Newsletter goes to press.

• Major Vice-Presidential Candidates

ROBERT J. DOLE

53. **Home:** Russell, Kansas. **Religion.** Methodist **Education:** Kansas and Arizona, Washburn Municipal U., B.A. and LL.B. **Military Service:** Army Infantry Officer World War II. **Public Offices:** Kansas House of Representatives 1951, Russell County orney 1953-61, U.S. House of Representatives 1961-9; U.S. ate 1969 to present. **Family:** Wife, Elizabeth; one daughter by vious marriage.

Dole was elected to the U.S. House of Representatives in 1960 d served there for eight years. He was elected to the Senate in 68 and narrowly reelected in 1974 in a bitter campaign against William Roy. In the Senate, Dole, like Mondale, serves on the w Budget Committee, the tax writing Finance Committee and the lect Committee on Nutrition and Human Needs. He is also ranking mber of the Agriculture and Forestry Committee and on the Post ffice and Civil Service Committee.

Dole served as Chairman of the Republican National Committee ring the Nixon-Agnew reelection campaign. He defended the Nix- Administration against Watergate charges, but he privately cri- ized the Nixon administration and was fired as G.O.P. national airman in 1973.

In Congress Dole and George McGovern have fought for positive anges in the food stamp laws. Dole opposed open housing provi- ons and sponsored anti-busing amendments. He opposed rengthening the Voting Rights Act in 1975 but supported final ssage in 1965 and 1970.

On foreign policy Dole voted consistently in the House and enate to support the Indochina War. He was a supporter of the lunteer army concept, but voted in 1971 against efforts to termi- te the draft induction authority. He has cast some votes to cut ilitary spending, but he has supported the B-1 Bomber, Trident ubmarine, ABM, ICBMs, F-14 aircraft, military foreign aid, the ego Garcia Navy Base and maintaining U.S. troops overseas.

Dole voted in 1975 against an amendment to require that more .S. food aid go to needy nations. He has both supported and op- osed U.S. funds for international development.

WALTER F. (Fritz) MONDALE

Age: 48. **Home:** Afton, MN **Religion:** Presbyterian **Education:** Macalester College; U. of Minn., B.A. 1951, LL.B. 1956 **Military Service:** Army 1951-53, discharged as corporal. **Public Offices:** Minnesota Atty. General, 1960-64; U.S. Senate 1964 to date **Family:** Wife, Joan, three children.

Mondale, the son of a Methodist minister, was serving as Minn. Atty. General when Hubert Humphrey was elected vice-president in 1964. Mondale was named to the Senate seat, and was elected and re-elected in 1966 and 1972. In 1974 Mondale explored the possibility of a Presidential bid but decided he was not ready to give the time and energy required for that struggle.

In the Senate Mondale serves on the Budget, Finance, and Labor and Public Welfare Committees, the Special Committee on Aging, and Select Committees on Nutrition and Human Needs and Small Business. As a member of the Senate Select Intelligence Committee in 1975 and 1976, Mondale was head of its Subcommittee on Domestic Intelligence.

During his Senate career Mondale has been identified with civil rights and social welfare causes. He has played a leading role in efforts to limit filibusters, provide open housing, speed school desegregation, and to pass bills on child abuse and infant crib death and to publicize the plight of migrant workers and Indians. This year he is again urging a comprehensive child care bill, S. 626, covering health, nutrition, education, and social services for the young.

In 1968 he broke with the Johnson-Humphrey Administration on the Vietnam war and thereafter supported all Senate efforts to limit fighting or military expenditures in Indochina.

He has voted to reduce military spending, to end the President's draft induction authority, and to limit or phase out military aid. He has voted against the B-1 bomber in 1973, 1974, and 1976, and for it in 1975. He voted to reduce troops abroad in 1971 and 1973 and against a reduction in 1974. He has generally voted to support UN and other development assistance.

THIRD PARTIES. At least eight third parties and one independent candidate will be on some ballots in November. They are former Senator Eugene McCarthy from Minnesota; American Independent Party, Lester Maddox; American Party, Thomas J. Anderson; Libertarian Party, Roger MacBride; National Black Political Assembly, Rev. Frederick Douglass Kirkpatrick; People's Party, Margaret Wright and Benjamin Spock; Socialist Party, Frank Zeidler; Communist Party, Gus Hall; Prohibition Party, Benjamin C. Bubar, Jr.; Socialist Workers' Party, Peter Camejo. FCNL can send the addresses for each group to those who want more information.

245 Second Street, N.E., Washington, D.C. 20002

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THE FRIENDS COMMITTEE ON NATIONAL LEGISLATION includes Friends appointed by 22 Friends Yearly Meetings and by 10 other Friends organizations in the United States. Expressions of views in the **FCNL WASHINGTON NEWSLETTER** are guided by the Statement of Policy prepared and approved by the Committee. Seeking to follow the leadings of the Spirit, the FCNL speaks for itself and for like-minded Friends. No organization can speak officially for the Religious Society of Friends

FCNL WASHINGTON NEWSLETTER Contributors: Edward F. Snyder, Tim Atwater, Sylvia Bronner, Steve W. Angell, Larry Newlin, Diana Payne, Nick Block, Chris Moore. 245 Second St., N.E., Washington, D.C. 20002 Subscription price $10.00 per

IN REPLY REFER TO:

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR

September 23, 1976

NOTE TO SOLICITOR

We have surnamed "noted" because, as you know, we continue to believe Powers does not compel the conclusion in Part I of the letter, and that the tribe should be allowed to regulate the "second component" of the Hibner right if you accept Hibner. We do believe this letter is a significant improvement, however, over the one of July 2.

Rick Chaleff

IN REPLY REFER TO:

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR

28 1976 SEP

Honorable Peter R. Taft
Assistant Attorney General
Land and Natural Resources Division
Department of Justice
Washington, D.C. 20530

Dear Mr. Taft:

Re: United States v. Walton, Civil No. 3421, E.D. Wash.; United States v. Bel Bay Community and Water Association, Civil No. 303-71C2. W.D. Wash.

As you know, by letters of September 14, 1971 and February 2, 1973, we asked your Department to file the above actions. In these letters, we asked you to take the position "that the Secretary of the Interior has the exclusive jurisdiction to control and administer the allocation of waters on tribal, allotted and formerly allotted lands" on the Colville and Lummi reservations pursuant to 25 U.S.C. §381. We also asked you to assert that the State of Washington has no authority to issue water permits to non-Indians on these reservations, and that the state should be enjoined from issuing such permits.

These cases have been pending for several years. The United States and the tribes have undertaken numerous studies. From these studies and through discovery, the facts involved in these cases have been clarified. Also, our views of the proper legal theories to be espoused have undergone considerable refinement and some alteration. After much deliberation, and after meetings with you and your staff, we sent you a letter on July 2, 1976, proposing a different legal position in these cases. You responded to that letter with additional proposals on July 19, and we have since that date had a number of further discussions. We now propose that the legal position to be asserted by the United States should be modified as follows.

There are two basic questions:

> (1) Do Indian allottees and non-Indian successors in interest to Indian allottees hold any portion of the Winters Doctrine reserved right to the use of water?
>
> (2) What is the respective extent of the authority of the Secretary, the state and the tribes to regulate the use of waters on Indian reservations.?

Our analysis of the legal questions follows.

I

On the first question, our views are unchanged from our July 2 letter and we understand that you agree with them. We believe that the Indian allottees and their non-Indian successors in interest do hold some reserved rights to the use of water. The only Supreme Court decision which speaks to this question is United States v. Powers, 305 U.S. 527 (1939). In Powers, the United States brought suit to enjoin the non-Indian successors in interest to certain Indian allottees on the Crow Reservation in Montana "from using or diverting any water from two streams on the Reservation." The United States contended that Congress had given it ownership and control of all reserved waters on the Crow Reservation. The Secretary of the Interior had constructed certain irrigation projects prior to making allotments of reservation lands, and the United States argued that this construction plus its ownership and control of the reserved waters "sufficed to dedicate and reserve sufficient water for full utilization of these projects." 305 U.S. at 532.

The Court rejected the government's position, and appeared to accept the arguments of the non-Indian water users. It said:

> "respondents maintain that under the Treaty of 1868 waters within the reservation were reserved for the equal benefit of tribal members (Winters v. United States, 207 U.S.

> 564) and that when allotments of land were duly made for exclusive use and thereafter conveyed in fee, the right to use some portion of tribal waters essential for cultivation passed to the owners.
>
> "The respondents' claim to the extent stated is well founded." (Id at 532).

The Court concluded:

> "The petitioners have shown no right to the injunction asked. We do not consider the extent or precise nature of respondents' rights in the waters. The present proceeding is not properly framed to that end." (Id. at 533) (emphasis added).

The interpretation of Powers as holding that allottees and their successors in interest succeed to some reserved water right finds support in subsequent cases. E.g., Preston v. United States, 352 F.2d 352 (9th Cir. 1965); Segundo v. United States, 123 F. Supp. 554 (S.D. Cal. 1954). This office has been vigorously urged by the Commissioner of Indian Affairs, supported by the Associate Solicitor for Indian Affairs and the Colville and Lummi tribes, to adopt a litigating position that Powers does not compel the conclusion that allottees and their successors in interest succeed to a reserved water right. Their argument is that this question was not directly contested or presented before the Court in Powers or in subsequent cases like Segundo and Preston, and that the holding in Powers was simply that the United States was not entitled to the extraordinary relief of an injunction on the theories it advanced in that case. Under their view, the language quoted above in Powers is mere dictum. Moreover, they assert that under ordinary principles of Indian law, the tribal ownership of Winters Doctrine water rights has never been clearly and expressly transferred by Congress, and must therefore remain in the tribe. We have carefully considered and reflected on this argument, but decided to reject it.

One district court case, United States v. Hibner, 27 F.2d 909 (D. Ida. 1928), considers the question--left open by Powers--of the scope of the allottees' right and that of their successors in interest. In Hibner, the court extended an earlier case */--which held that the leasing of allotteed lands to a non-Indian did constitute the abandonment of the individual water right expressly created by the 1898 agreement with the Shoshone-Bannock Tribe of the Fort Hall Reservation--to hold that sale of an allotment did not extinguish the allottees' reserved water right. The Court first stated:

> "a purchaser of such land and water rights acquires, as under other sales, the title and rights held by the Indians, and there should be awarded to such purchaser the same character of water right with equal priority as those of the Indians. (Id. at 912)."

The court then held, however, that "the status of the water right after it has passed to others by the Indians seems to be somewhat different from while such right is retained by the Indians." (Id.) The court stated that the non-Indian is "entitled to a water right for the actual acreage that was under irrigation at the time title passed from the Indians, and such increased acreage as he might with reasonable diligence place under irrigation, which would give to him, under the doctrine of relation, the same priority as owned by the Indians." Thereafter, the non-Indian can secure a state law right to appropriate additional waters with a priority date as of the time of commencing those later appropriations. The court reasoned, plausibly, that when the water right passed out of trust status, the purpose of the reservation no longer required a reserved water right which expands to satisfy future needs. The court gave as its reason that

*/ Skeem v. United States, 263 Fed. 93 (9th Cir. 1921).

> "the principle invoked by the courts for the protection of the Indian as long as he retains title to his lands does not prevail and apply to the white man, and the reason for so holding is that there was reserved unto the Indians the absolute right to own and use in their own way the water for their lands, while the white man, as soon as he becomes owner of the Indians lands, is subject to those general rules of law governing the appropriation and use of the public waters of the state."

We ask you to take the position that the scope of the reserved right which passes to allottees and successors in interest pursuant to Powers is that set forth in Hibner except that we ask you to argue that the non-Indian's reserved right should be limited to the water actually used by the Indian predecessor. We think that--as the court noted--the federal purpose for an expandable Winters type reserved right ceases when the lands pass out of trust. A non-Indian purchaser, therefore, would get a Winters Doctrine priority to the amount of water used when the land was in trust. The successor in interest can expand his use thereafter, but we believe that principles of state law (and a later priority date) should cover this later use.

II

It remains to discuss the respective authority of the Secretary, the state and the tribe to regulate the use of water on Indian reservations.

Section 7 of the General Allotment Act of 1887, 25 U.S.C. §381, is the only provision conferring jurisdiction on the Secretary to regulate use of reservation water rights. It reads:

> "In cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior is authorized to prescribe rules and regulations as he may deem necessary

> to secure a just and equitable distribution thereof among Indians residing upon any such reservations; and no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor."

We stated on July 2 that in our view Section 381 does not confer jurisdiction on the Secretary--exclusive of tribes--to regulate all uses of water on Indian reservations. First, the statute is limited to "water for irrigation." Secondly, the statute authorizes the distribution of this water "among Indians residing upon [the] . . . reservation." This confers no authority upon the Secretary to deliver any water to non-Indians. Moreover, the Secretary's authority to regulate any water use by non-Indians under this statute is very doubtful; at most, it would seem he could stop uses of water by non-Indians that interfere with Indian uses.

In your July 19 response, you indicated that a somewhat broader view of Section 381 would be supportable. Since it applies to allotments, you suggest that it could extend to "patented lands," and thus to non-Indians. You also indicated that, in your view, Section 381 would not prohibit the tribes from exercising control over the reserved water rights (from our discussions, we have agreed that this means waters used on trust lands and the first component of the rights described in Hibner) so long as the exercise of this tribal authority was consistent with the trust responsibility of the United States with respect to the lands.

Although we recognize that a more expansive interpretation of Section 381 could be argued to a court, we do not choose to adopt that construction of the statute. However, we have jointly formulated a proposal which will make resolution of this issue, and the question of the precise extent of tribal jurisdiction, unnecessary. Under Section 381, the Secretary has authority "to prescribe rules and regulations deemed necessary to secure a just and equal distribution of waters." We propose that this Department

will adopt regulations under Section 381 delegating substantial regulatory authority to the tribes to adopt water codes on particular reservations. These regulations will state that the Department will approve individual tribal water codes regulating the use of water reserved under the Winters Doctrine on the tribe's reservation so long as the following conditions are met:

(1) The tribal code provides acceptable due process procedures to protect the rights of persons subject to them, ultimately permitting judicial review of determinations in the federal courts;

(2) The tribe establishes institutions that are adequate to administer the water code;

(3) The tribal code provides that it does not divest any valid rights under federal law as may be established by courts of competent jurisdiction;

(4) The tribe seeks only to regulate the use of reserved water rights, which includes tribally owned water rights, rights owned by allottees, and the "first component" of the rights described in Hibner;

(5) The tribal water codes would not regulate the use of water within statutory irrigation projects on the reservation with water rights created by federal statutes.

It is our intention to proceed forthwith with the drafting of such Departmental regulations and to publish them as proposed rulemaking in the Federal Register for public comment. As we prepare the precise regulations, the general conditions suggested above will, of course, be honed in greater detail. We will do this in close

consultation with Myles Flint of your office. We are furnishing you, however, with this outline of the regulations at the present time to enable you to meet the court deadline of October 8 in Bel Bay case.

This proposal obviates the necessity of adopting a position as to the precise scope of Section 391 authority and of tribal jurisdiction as far as non-Indians are concerned. By combining the governmental powers of the Secretary and the tribe, federal-tribal authority is exercised. It does not matter, for example, whether the tribe in its adoption of tribal water codes is exercising delegated authority or inherent tribal power. See United States v. Mazurie, 419 U.S. 544 (1975).

It remains to discuss the "second component" of the Hibner test. In our July 2 letter, we asked that you take the position that states have a limited authority to issue permits to non-Indian landowners on an Indian reservation who claim a right to use water pursuant to this "second component;" that is, an appropriative type right to the use of water under state law principles with a priority date after their purchase of their former trust allotment. We have carefully considered the conclusions in your July 19 letter that such questions are ones of federal (not state) law, that administration of such rights should not be subject to state jurisdiction, but that federal law may incorporate state law concepts such as the prior appropriation doctrine for purposes of interrelating the rights of non-Indians under the Hibner case to Winters Doctrine rights. As you reasoned in that letter, state jurisdiction over the use of water derives from the Desert Lands Act of 1877, 19 Stat. 377, 43 U.S.C. §321, and its predecessors. That Act confers plenary control on states over nonnavigable waters on the public domain. See Cappaert v. United States, ___ U.S. ___, 44 L.W. 4756 (June 7, 1976); FPC v. Oregon, 349 U.S. 435 448 (1955); Power Co. v. Cement Co., 295 U.S. 142, 158, 163-164 (1935). Reserved lands held in trust for an Indian tribe or withdrawn from the public domain for other uses are obviously not public lands, and the state has no power to regulate the exercise of reserved water rights. E.g., United States v. McIntire, 101 F.2d 650 (9th Cir. 1939).

When lands within the exterior boundaries of an Indian reservation pass out of trust status and into fee, they do not become public lands nor do they become a portion of the public domain in the sense that they are subject to sale or other disposition under the general land laws. See Union Pacific R.R. Co. v Harris, 215 U.S. 386, 388 (1909); Ash Sheep Co. v. United States, 252 U.S. 159, 166 (1920); Seymour v. Superintendent, 368 U.S. 351, 355 (1961); Mattz v. Arnett, 412 U.S. 481, 497 (1973). Rights to the use of water on these lands, even when in fee ownership, would accordingly, be determined by federal law rather than state law. See United States v. McIntire, 101 F.2d 650, 653-654 (9th Cir., 1939); Tweedy v. Texas Company, 286 F. Supp. 383, 395 (D. Mont. 1968) United States v. Ahtanum Irrigation District, 236 F.2d 321 (9th Cir.) cert. den. 352 U.S. 988 (1957). Since in these cases the State of Washington can only exercise jurisdiction over the use of water as derived from the Desert Lands Act, this does not provide any basis for jurisdiction by the State on either reservation. We have decided to concur in your analysis and conclusions, and therefore ask you to continue to assert that the regulation of the use of water on tribal lands, trust allotments and formerly allotted lands is exclusively a matter of federal and/or tribal jurisdiction.

While, the second component of the Hibner right is derived from federal law, and subject to federal jurisdiction, we do not believe, it has any characteristics of a federally reserved water right. Accordingly, we do not support tribal jurisdiction over this use of water. Federal statutory law is silent on the administrative regulation of this use of water. As you point out in your July 9 letter, federal law would apply, and incorporates state law doctrines. If a landowner were to exceed his rights under this second component, and interfere with reserved rights, we believe the proper remedy would be an injunctive action in federal court against him (or, alternatively, a general quiet title adjudication looking toward a decree administered by a water-master). There would, in our view, be no proper tribal administrative remedies.

At this juncture, an illustrative example may be helpful. If a reservation were established in 1860, and allotted in 1900, and an Indian allottee had applied 5 acre feet of water annually to his allotment before it passed out of trust in 1940, the non-Indian successor of interest would have a Winters type reserved water right to use 5 acre fee with an 1860 priority date (or an immemorial priority in appropriate circumstances). If he then applied a total of 20 acre feet after 1940, he would have an additional 15 acre feet with a 1940 (or later) priority. This second component (with the 1940 or later priority) of the Hibner right would be junior to all reserved rights. These reserved rights (including the 5 acre-foot right which is the "first component" of Hibner) would be regulated by an approved tribal water code. If the landowner exceeded his reserved rights, and the persons entitled to reserved rights (as determined pursuant to the tribal code by, for example, the issuance of permits) were injured, their remedy or that of the United States as trustee would be in federal court.

This letter in its entirety supplants my letter to you of July 2, 1976, which letter is hereby withdrawn. We appreciate the mutually frank and cooperative discussions we have had with your office concerning these cases within the past few months, and hope that this produces a mutually agreeable position for both our Departments.

Sincerely,

H. Gregory Austin
Solicitor

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

DEC 1 1976

Memorandum

To: Acting Deputy Commissioner, Bureau of Indian Affairs

From: Executive Secretary

Subject: U.S. v. Walton and U.S. v. Bel Bay Community and Water Association

On November 12 you requested that the Solicitor retract his September 28 recommendations to the Justice Department on U.S. v. Walton and U.S. v. Bel Bay Community and Water Association. The Solicitor has responded that BIA was involved in many meetings in 1974 and 1975 to develop the position sent to the Department of Justice on September 28, 1976.

The Solicitor has also stated that he would like to receive additional suggestions or recommendations from BIA. He cannot discern from your memorandum the areas of disagreement with the September 28, 1976 Departmental Position. He has suggested that you detail your specific objections to him.

In view of the above offer by the Solicitor, I would suggest that you develop your alternative position and then make a specific proposal directly to Mr. Austin.

Paul L. Reeves

cc: Executive Assistant to the Secretary
Under Secretary
Solicitor

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

Memorandum

NOV 24 1976

To : Executive Secretary

From : Solicitor

Subject: U.S. v. Walton and U.S. v. Bel Bay Community and Water Association.

This is written in response to your memorandum of November 16, 1976 enclosing a November 12 memorandum from Acting Deputy Commissioner, B.I.A., Theodore Krenzke to the Secretary objecting to our position in the above cases, as set forth in my letter to Justice of September 28, 1976, as well as this office's alleged failure to consult with the B.I.A. prior to taking such position in these cases.

First, the B.I.A. memo fails to specify in what respect it disagrees with our position in the above cases. If Acting Deputy Commissioner Krenzke or his staff would detail their objections and suggestions we would be delighted to consider them and if persuaded of their soundness change our position accordingly.

Second, Mr. Krenzke's suggestion that our positions in the above cases were not discussed with officials of the B.I.A. prior to our September 28, 1976 letter to Justice is in error.

In 1974 and 1975 literally dozens of meetings were held on precisely these questions between the Solicitor, the Associate Solicitor, Indian Affairs and his staff and B.I.A. officials, including Martin Seneca, George Crossland, William Veeder, and Phil Corke. In addition a number of written memorandums were exchanged on the subject. The B.I.A.'s position, as set forth in these discussions and memoranda was fully taken into consideration by this office prior to stating our position in the letter to Justice of September 28, 1976.

Nevertheless, as stated above if the B.I.A. has additional suggestions or recommendations I remain eager and willing to receive them.

H. Gregory Austin
Solicitor

OPTIONAL FORM NO. 10
JULY 1973 EDITION
GSA FPMR (41 CFR) 101-11.6

101

UNITED STATES GOVERNMENT

Memorandum

TAILTC
2.J202
FYI

TO : Secretary of the Interior
Acting Deputy

DATE: NOV 12 1976

FROM : Commissioner of Indian Affairs

SUBJECT: Powers-Hibner Issues

United States v. Walton, Civil No. 3421, E.D.Wash.;
United States v. Bel Bay Community and Water Association, Civil No. 303-71C2. W.D. Wash.

On September 28 last, Solicitor Austin made several recommendations to Assistant Attorney General Taft with regard to the litigation referenced above involving the Lummi and Colville tribes in these separate law suits but with similar legal issues. We feel that the Solicitor's recommendations were not only in error but also indicate a compromising of the tribes' reserved water rights which is improper for a trustee to do. It is most disturbing that these important recommendations were not discussed with BIA personnel in order that our views could have been restated and also have been given the opportunity to comment on and/or object to the recommendations. Had we been asked, we would have recommended, as a matter of policy, that the Department develop the most forceful legal argument in support of tribal Winters rights. As we view it, the Solicitor developed a compromise position that can do nothing but harm the tribes' rights.

It is our recommendation that the Solicitor's September 28 recommendations to the Justice Department be retracted in order that a more forceful legal argument may be developed in support of the tribes' Winters rights. It is our further recommendation that important Departmental positions relating to Indian affairs be routed through appropriate Bureau of Indian Affairs' offices for comment and surname before they are communicated to outside agencies.

Theodore C. Krenzke