IN REPLY REFER TO:

341.1

UNITED STATES
DEPARTMENT OF THE INTERIOR

BUREAU OF INDIAN AFFAIRS

Flathead Irrigation Project
St. Ignatius, Montana
59865

October 21, 1969

Ray Jensen, Secretary
Mission Irrigation District
St. Ignatius, Montana 59865

Dear Ray:

Enclosed is a copy of the brief prepared by your attorneys in the matter of Taking of Power Values. It is extremely interesting and I suggest that you make arrangements to route it to all your commissioners for their study.

By phone call the attorneys informed me that the court denied the motion to file the brief as it should have been filed over a year ago with the original hearings. The judges did keep copies of the brief and may use it in their deliberations, however, this precludes the oral arguments by your attorneys. Preparation of the brief was not entirely wasted since the same ground will have to be covered before the Federal Power Commission. The context was extremely interesting since it deals with water rights and any information we can get leading to a settlement of that important question will benefit all of us.

Sincerely yours,

George L. Moon
Project Engineer

Enclosure

License No. 5 of the provision for a block of power for the Flathead Irrigation Project--namely, to compensate the landowners served by the Project for the licensee's use of their reserved or appropriated water rights, which were referred to and expressly confirmed by Congress in the enabling Act of March 7, 1928, ch. 137, 45 Stat. 200, 212-213, the statute principally relied on by the Tribes herein. The Districts believe that considerable pertinent and highly significant information regarding the issues in this case has not yet been brought to the Court's attention. For example, so far as we can tell, the filings thus far in this case have not brought to the Court's attention the fact that the Act of March 7, 1928, specifically confirmed the existence of water rights specifically reserved or appropriated for the benefit of the landowners served by the Irrigation Project. Moreover, the Districts believe that they can shed considerable light upon the legislative history of the Act of March 7, 1928.

WHEREFORE, it is respectfully requested that this motion be granted.

Edward J. Grenier, Jr.
1200 Farragut Building
900 - 17th Street, N. W.
Washington, D. C. 20006
Attorney for the Amici Curiae

Frank J. Martin, Jr.
Sutherland, Asbill & Brennan
1200 Farragut Building
900 - 17th Street, N. W.
Washington, D. C. 20006
Of Counsel

IN THE UNITED STATES COURT OF CLAIMS

No. 50233

Paragraph 13

Taking of Power Values

CONFEDERATED SALISH AND KOOTENAI

TRIBES OF THE FLATHEAD RESERVATION,

MONTANA, Plaintiffs

v.

THE UNITED STATES OF AMERICA, Defendant

Brief of the Flathead, Mission and
Jocko Valley Irrigation Districts, Amici Curiae

Edward J. Grenier, Jr.
1200 Farragut Building
900 - 17th Street, N. W.
Washington, D. C. 20006
Attorney of Record
for Amici Curiae

Of Counsel:

Frank J. Martin, Jr.
Sutherland, Asbill & Brennan
1200 Farragut Building
900 - 17th Street, N. W.
Washington, D. C. 20006

TABLE OF CONTENTS

Table of Authorities

Cases:

Statutes:

Statutes--Continued

Miscellaneous:

IN THE

UNITED STATES COURT OF CLAIMS

No. 50233

Paragraph 13

Taking of Power Values

CONFEDERATED SALISH AND KOOTENAI

TRIBES OF THE FLATHEAD RESERVATION,

MONTANA, Plaintiffs

v.

THE UNITED STATES OF AMERICA, Defendant

Brief of the Flathead, Mission and
Jocko Valley Irrigation Districts, Amici Curiae

Question Presented

Did the Federal Power Commission and the Secretary of the Interior correctly recognize the reserved or appropriated water rights of the Indian and non-Indian landowners within the Flathead Irrigation

Project which are referred to and confirmed by the Act of March 7, 1928, by incorporating into License No. 5 a provision for a block of electrical power from the licensee at cost or less than cost?

Statement of the Case

This case is founded upon Paragraph 13 of the Tribes' petition of July 31, 1951 pursuant to the special jurisdictional Act of July 30, 1946, ch. 701, §1, 60 Stat. 715. It arises out of a 1930 license granted to the Rocky Mountain Power Company, a wholly-owned subsidiary and predecessor in interest of the present licensee, the Montana Power Co., for the development of what is known as the Kerr dam site on the Flathead River which flows through the Flathead Indian Reservation in Montana. The license includes by way of compensation for the use of certain reserved or appropriated water rights of the landowners served by the Flathead Irrigation Project, a provision for a block of power for the Irrigation Project at or near cost. The license also provides for an annual rental to be paid to the Tribes based on the Tribes' contribution of the power site and certain water rights. The license was granted by the Federal Power Commission with the approval of the Secretary of the Interior pursuant to an enabling Act of March 7, 1928, ch. 137, 45 Stat. 200, 212-213, which expressly recog-

nized and confirmed the "water rights reserved or appropriated for the irrigation projects."

The Government's motion for summary judgment herein was denied by the Court on the ground that there was a disputed factual issue whether the Tribes suffered any loss as a result of the power block furnished to the United States for the benefit of the Irrigation Project. Confederated Salish and Kootenai Tribes v. United States, 181 Ct. Cl. 739 (1967). On December 3, 1968, the Commissioner filed a Memorandum Opinion recommending the dismissal of Paragraph 13 of the Petition on the ground that the plaintiff Tribes had failed to establish that the furnishing of the power block in question in any way reduced the rental that the Tribes received and deprived them of the power value of their land.

The Flathead, Mission and Jocko Valley Irrigation Districts, as amici curiae, believe that the conclusion of the Commissioner in the Memorandum Opinion of December 3, 1968, that Paragraph 13 of the plaintiff's petition should be dismissed, is correct and should be upheld. In addition, the Districts agree with the positions taken by the defendant United States in its Brief in Opposition to Plaintiff's Exceptions to Report of Commissioner. However, the Districts believe that the interests of the individual Indian and non-Indian land-owners served by the Flathead Irrigation Project, who are the owners of the reserved or appropriated

water rights mentioned in the Act of March 7, 1928, supra, and who are the direct beneficiaries of the block of power in question, should be directly brought to the Court's attention in order to assist it in resolving the issues in this case.

The Districts were created pursuant to Congressional direction in the Act of May 10, 1926, ch. 277, 44 Stat. 453, 464-466, requiring that all the landowners of irrigable lands within the Project, other than the holders of Indian trust patent land, be organized under state law for the purpose of assuring and discharging the obligation of such landowners to repay the construction costs of the Flathead Irrigation Project, including the power development of the Kerr site, advanced by the United States on behalf of the Irrigation Project. Thus, the Districts directly represent the interests of some but not all of the individual Indian landowners of irrigable lands within the Irrigation Project,*/ as well as practically all non-Indian landowners of irrigable land within the Project. Since the power block in question benefits all owners of irrigable land within the Project whether or not included in the Districts, the Districts here speak,

---

*/ The only Indian lands now included in the Districts are lands which were originally homesteaded but which have been purchased by individual Indians. Certain Indian-owned allotted lands as to which fee patents have been issued are now being petitioned into the Districts in local court proceedings. Until recently, Indian fee patent lands were not considered subject to construction charges, and thus, were not included in the Districts.

The provisions governing the Districts' contracts and obligations are set out in the Act of May 25, 1948, ch. 340, 62 Stat. 269, as amended.

directly or indirectly, for the interests of the owners of all the irrigable lands within the Project.

Statement of Facts

The Districts accept as sufficient for purposes of this Brief the findings of fact in the Memorandum Opinion of the Commissioner of December 3, 1968, with the following additions:

In regard to finding 3(a) dealing with original plans for the Flathead Irrigation Project prior to the opening of the Reservation, it is noted that because of the necessity for pumping of irrigation water referred to by the Commissioner, original plans for the Irrigation Project included a plan for a hydroelectric development at the present Kerr site on the Flathead River. 69 Cong. Rec. 2482-2484 (1928), (Memorandum of Walter L. Pope, incorporated into the record by Senator Walsh of Montana, hereinafter referred to as "Pope Memorandum").

In furtherance of these original plans, Congress appropriated $50,000 by the Act of April 30, 1908, ch. 153, 35 Stat. 70, 83-84,

> "[f]or preliminary surveys, plans and estimates of irrigating systems to irrigate the allotted lands of the Indians of the Flathead Reservation in Montana and the unallotted irrigable lands to be disposed of under [the 1904 Act opening the Reservation], and to begin construction of the same ...."

In addition, by the Act of May 29, 1908, ch. 216, §15, 35 Stat. 444, 448-450, Congress incorporated the then fully developed plans for an irrigation project into the basic fabric of the 1904 Act opening the Reservation, by amendments thereto requiring each homestead entryman to pay a share of the construction costs of the project in addition to the appraised value of the land.

In regard to finding 3(b), relating to the provision in the Act of March 3, 1909, ch. 263, 35 Stat. 781, 795, authorizing the Secretary of the Interior to reserve power and reservoir sites, it is pointed out that this provision was attached as a rider to an appropriation measure appropriating $250,000,

> "[f]or construction of irrigation systems to irrigate the allotted lands of the Indians of the Flathead Reservation of Montana and the unallotted lands to be disposed of under [the 1904 Act opening the Reservation], including necessary surveys, plans and estimates .... "

In regard to finding 3(d), relating in part to the beginning of actual construction of the Irrigation Project, including the power project at the present Kerr site, the construction began in December of 1909 and continued until December of 1912. The tunnel was to be approximately 1,700 feet in length and construction of a dam to develop a head of 69 feet was contemplated. The cost of the tunnel work was in excess of $100,000 and was paid by the Department of the Interior from funds appropriated by the Act of April 4,

1910, ch. 140, §11, 36 Stat. 269, 277 and the Act of March 3, 1911, ch. 210, §9, 36 Stat. 1058, 1066, which appropriated $250,000 and $400,000, respectively, for the identical purposes stated by the Act of March 3, 1909, quoted above. Pope Memorandum, at 2483. The appropriation measure contained in the Act of March 3, 1911 referred to above, as amended by the Act of August 24, 1912, ch. 388, §10, 37 Stat. 518, 526-527, provided for reservation of a water fluctuation easement on lands adjacent to Flathead Lake "for uses and purposes connected with storage for irrigation or development of water power."

In regard to finding 3(d) insofar as it relates to the acquisition of water rights under the Montana Statutes, the following supplemental facts are noted. Beginning in 1908 or 1909, when construction on the irrigation ditches and the power plant was begun, the Reclamation Service of the Department of the Interior made water filings on all Reservation streams under Montana Statutes authorizing such filings by the United States. These filings were made under a special statute authorizing the United States to reserve water rights by filing notices of intended use and by commencing work within three years after the filing was made. Hearings Before a Subcommittee of the Senate Committee on Indian Affairs conducting a Survey of Conditions of the Indians of the United States, 71st Cong., 2d Sess., pt. 10, at 4143, 4191 (FPC Hearings on License No. 5), (hereinafter referred to as "F.P.C. Hearings"). The filings made were, in substance, as follows:

> "Be it known that the United States of America under and by virtue of an act of the Legislative Assembly of the State of Montana entitled, 'An act authorizing the Government of the United States to appropriate the water of the streams in the State of Montana subject to certain restrictions, approved February 27, 1905, enacted by and through H. N. Savage, supervising engineer, thereto duly authorized by the Secretary of the Interior of the said United States in that behalf,' does hereby publish and declare as a legal notice to all the world as follows: First, that the said United States has a legal right to the use, possession, and control of, and claims 100,000 cubic feet per second of the waters of the Flathead River in said county and State for irrigating and other purposes; second, that the purpose for which said order is claimed at the place of intended use is for the purpose of irrigating 50,000 acres of land on the Flathead Indian Reservation for domestic uses and for developing power for pumping and other purposes." F.P.C. Hearings, at 4182.

The first filing on the Kerr site was made on January 28, 1910. Successive timely filings on the Kerr site were made down to and including a filing on December 14, 1927. Sen. Doc. No. 153, 71st Cong., 2d Sess. (Scattergood Report), at 41; F.P.C. Hearings, at 4191; Pope Memorandum, at 2484; 69 Cong. Rec., 2487.

In further amplification of finding 3(d), on May 22, 1909, President Taft proclaimed the opening of the unreserved lands classified as "agricultural lands of the first class, agricultural lands of the second class and grazing lands" on the Flathead, Spokane and Coeur d'Alene Indian Reservations, to settlement and cultivation under the homestead

laws. Various publications in towns near the Reservation made much of the promised irrigation system. These publications generally characterized the lands as ideal farm lands--the best in the West--in hopes of attracting large numbers of settlers to the Reservation. (Par. 10, Def. Ex. V-11, Vol. 1, p. 103). On April 10, 1910, the Department of the Interior printed a "Schedule of Lands in the Flathead Reservation to be Opened on May 2, 1910," which announced that "[t]he Government is now constructing irrigation works from which the farm units will be irrigated as far as possible, but it cannot at this time be told what part or how much of any particular unit can be furnished with water." (Par. 10, Pl. Ex. 35, p. 1).

By way of supplementing finding 3(d), it is noted that appraised land values which were paid by homestead settlers on the Reservation ranged from $7 to $2.50 an acre for the "agricultural land" to $1.25 an acre for "grazing lands." These prices were higher than prices ordinarily paid to the Government for homestead lands. Pope Memorandum, at 2483. A commission appointed by the Secretary of the Interior in 1914 to investigate water rights on the Reservation made the following report:

> "The understanding of the homesteader that water would eventually be delivered to his land enabled the United States as agent for the Flathead Tribe to dispose of practically all their surplus lands at the appraised value." (H. Doc. No. 1215, 63rd Cong., 3d Sess., 36.)

According to Mr. Hitchings, the Indians' land value expert who testified in the proceeding pursuant to Paragraph 10 of the Tribes' Petition, market prices for land on the Reservation fell off sharply in 1913 and 1914 when it became known that there would be more delay than previously anticipated in providing irrigation water for the irrigable lands. (Par. 10, 1968 Tr 216-217).

In regard to finding 3(e), the Act of May 10, 1926, ch. 277, 44 Stat. 453, 464-466, referred to by the Commissioner provided that the funds appropriated thereby were not to be expended until "repayment contracts ... shall have been properly executed by a district or districts organized under State law embracing the lands irrigable under the project, except trust patent Indian lands .... " Pursuant to the Act of 1926, the Flathead, Mission and Jocko Valley Irrigation Districts (the amici curiae herein) were organized, and contracts between the said Districts and the United States were concluded on January 14, 1928, April 21, 1931, and November 13, 1934, respectively. Paragraph 9 of the original Flathead, Mission and Jocko Valley Irrigation Districts Contracts provided as follows:

> "The Secretary of the Interior is hereby authorized and empowered, in so far as the Districts executing this contract may authorize the same, to construct, operate, maintain, improve and extend the power plant authorized by the Act of May 10, 1926, aforesaid, together with such accessory works, including a proper transmission line and pumping plants, as he shall deem proper and concerning which he may

> be authorized by law to act; or to consent to the licensing by the Federal Power Commission of a corporation or corporations to build, operate and maintain said plant, transmission line or other works or any part thereof, instead of or in connection with his building the same or any part thereof himself; and, in connection with the licensing aforesaid, to permit the use of water and other rights and privileges appropriated or reserved for said project (for power purposes), all upon such terms, designed to secure ample and cheap electrical power for pumping water for irrigation and other project purposes, and for sale, and to aid in paying project construction and other charges as contemplated by said quoted statutes, as the said Secretary may deem proper."

In regard to finding 6(a), it is noted that the plaintiff Tribes had been organized as a Tribe pursuant to the Indian Reorganization Act of June 18, 1934, ch. 576, 48 Stat. 984, at the time that they consented to the amendment of July 17, 1936, to License No. 5, referred to by the Commissioner.

In regard to finding 6(h), the Commissioner refers to the decision of the Federal Power Commission in Montana Power Co., Project No. 5, 38 F.P.C. 766 (October 4, 1967). This decision was reversed on the ground that the Federal Power Commission lacked jurisdiction to adjust the rental since the terms of License No. 5 required arbitration in the event the parties could not agree. Montana Power Co. v. Federal Power Commission, ___ U.S. App. D.C. ___, ___ F.2d ___ (Nos. 21,904, 21,767 decided June 26, 1969).

ARGUMENT

I. THE LANDOWNERS SERVED BY THE FLATHEAD IRRIGATION PROJECT OWN RESERVED OR APPROPRIATED WATER RIGHTS WHICH WERE CONTRIBUTED TO THE DEVELOPMENT OF THE KERR POWER PROJECT.

A. Water Rights Acquired Pursuant to the Winters Doctrine.

In Winters v. United States, 207 U.S. 564 (1908), the Supreme Court held that, when Indian lands are ceded to the United States by a treaty which provides that a portion of the ceded lands shall be reserved for the use and benefit of the Indians, even though such treaty is silent as to water rights, it will be presumed that the reservation of the lands operates to reserve the waters of the natural streams to the extent necessary to render the reserved lands suitable for settlement and cultivation. The Treaty of Hell Gate, which created the Flathead Indian Reservation, falls squarely within the doctrine enunciated in Winters.

The Winters doctrine was recently reaffirmed and refined in Arizona v. California, 373 U.S. 546 (1962), which dealt with rival claims among certain states, and the United States on behalf of certain Indian reservations, to the waters of the Columbia River and its tributaries. The Court made clear that waters rights reserved pursuant to the Winters doctrine were broad enough to assure the irrigation of all of the practicably irrigable reserved lands for the indefinite future:

> "We also agree with the Master's conclusion as to the quantity of water intended to be reserved. He 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. Arizona, on the other hand, contends that the quantity of water reserved should be measured by the Indians' 'reasonably foreseeable needs,' which, in fact, means by the number of Indians. How many Indians there will be and what their future needs will be can only be guessed. We have concluded, as did the Master, that the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage. The various acreages of irrigable land which the Master found to be on the different reservations we find to be reasonable." Id. at 600-01.

It is well established that reserved water rights under the Winters doctrine are appurtenant to the irrigable reserved lands, as described above, and run with such land upon conveyance to individual Indians or non-Indians. E.g., United States v. Powers, 305 U.S. 527 (1939); United States v. Ahtanum Irrigation Dist., 236 F.2d 321 (9th Cir. 1956); Skeem v. United States, 273 Fed. 93 (9th Cir. 1921); Segundo v. United States, 123 F. Supp. 554 (S.D. Col. 1954); United States v. Hibner, 27 F.2d 909 (D. Iowa 1928). In United States v. Powers, supra, the United States brought suit on behalf of an irrigation project against certain successors in title to Indian reservation lands, who were diverting water upstream from the irrigation project. The defendants included (1) Indian allottees,

(2) non-Indian grantees of Indian allottees, and (3) non-Indian purchasers from the United States of land which had reverted to the United States upon the death of Indian allottees.*/ The Court held that, with respect to all the classes of defendants, under the Winters doctrine the right to a portion of tribal waters essential for cultivation of the allotted or conveyed land passed to the allottees or non-Indian purchasers along with the lands.

Neither Winters nor Powers defined the scope of the water rights reserved. However, Arizona v. California, supra, as noted above, held that water rights under the Winters doctrine are coextensive with the irrigation needs of all of the practicably irrigable reserved lands for the indefinite future. Consequently, since a substantial portion of the practicably irrigable lands (i.e., those lands which can be cultivated if supplied with irrigation water) of the Flathead Reservation cannot be irrigated without pumping, the Winters doctrine extends in our particular situation to water rights necessary for the development of electrical power for pumping. This follows logically from the Winters case itself, since it cannot be doubted that,

---

*/ Under the Act of May 8, 1906, ch. 2348, 34 Stat. 182, 183, upon the death of an Indian allottee prior to the issuance to him of a fee patent, the allotment was canceled and the land reverted to the United States. The United States was authorized to sell such land to anyone and to pay the net proceeds to the heirs or legal representative of the deceased Indian.

In the district court opinion, 16 F. Supp. 155, 163-164 (D. Mont. 1936), some of the defendants are identified as non-Indian purchasers from Indian grantors, and non-Indian purchasers at sales of deceased Indians' allotments.

in ceding lands to the United States, the Tribes could have expressly retained, in conjunction with the reserved lands, the right to develop power for pumping necessary for irrigation.

The landowners served by the Flathead Irrigation Project stand in the Tribes' shoes as to Winters doctrine water rights for power and irrigation purposes. A substantial portion of individually owned irrigable land within the Flathead Irrigation Project is owned by Indian allottees or Indian and non-Indian successors in title of the original Indian allottees. Other individual landowners within the project trace their title to patents issued by the United States as trustee of Indian lands disposed of pursuant to the Act of April 23, 1904, as amended. In issuing these patents, the United States disposed of the unallotted and unreserved lands on the Reservation pursuant to its power as a trustee for the Indians and held the proceeds of such disposition in trust for the benefit of the Tribes. Compare United States v. Powers, supra.

This application of the Winters doctrine plainly accords with common sense. If land held in trust for Indians were deemed to lose its appurtenant water rights upon allotment to an individual Indian or conveyance to an Indian or non-Indian, then (1) the individual Indian allottee might be deprived of his means of livelihood on the land and (2) in the case of conveyance, the Tribes

would be deprived of the full value of their land since land without water rights would sell for less and indeed might be worthless.*/

B. Water Rights Secured by Governmental Reservation or Appropriation.

It is clear that landowners served by the Flathead Irrigation Project, as successors in title of reserved lands benefited by the Winters doctrine, had in 1930, and have today, certain water rights which were appropriately taken into account in License No. 5. Quite apart from the landowners' water rights as successors in title to the Indians, the same water rights were secured to the project landowners by acts of Congress and actions of members of the executive branch of the Government, which effected a legal reservation or appropriation of such water rights for their benefit.**/

---

*/ The Tribes are not in a position to attempt to answer this point on the ground that, historically, they did not receive the full value of their land sold upon the opening of the Reservation for settlement pursuant to the 1904 Act. Under paragraph 10 of their petition in this litigation, the Tribes are claiming damages arising out of such sales of tribal lands. The matter has been tried and submitted to a Commissioner of this Court for recommended decision.

It should be noted that the Tribes themselves acknowledge the pertinence of the Winters doctrine in the case at bar. (See Plaintiff's Exceptions to Report of Commissioner, pp. 203, hereinafter cited "Pl. Excep.")

**/ Of course the landowners' water rights have been leased to the licensee, Montana Power Co., for the fifty-year term of License No. 5.

Since without water for irrigation the lands within the Reservation are practically valueless for agricultural purposes, the 1904 Act, authorizing the allotment of lands to the Indians and the opening of unallotted lands for settlement and cultivation under the homestead laws, necessarily precipitated plans for a vast irrigation project which was actually begun and publicized by the United States prior to and during the making of allotments and the offering of the lands for homestead settlement. Because a substantial portion of the irrigable land on the Reservation could be irrigated only by pumping water from the Flathead River, original plans necessarily included the development of a hydroelectric power facility to supply power for pumping.

Through a series of enactments, including riders on Irrigation Project appropriation measures, the Congress made clear its intent to benefit the Irrigation Project by providing needed power for pumping.

Thus by the Act of May 29, 1908, ch. 216, §15, 35 Stat. 448-450, the Congress amended the 1904 Act to provide for the manner in which the planned irrigation project would be paid for. Then by the Act of March 3, 1909, ch. 263, 35 Stat. 781, 796, the Congress again amended the 1904 Act by adding a new section authorizing the Secretary of the Interior to set aside land chiefly valuable for power and reservoir sites. Almost immediately thereafter the Secretary reserved the Kerr site and other power and reservoir sites for use by the Irrigation Project. Subsequently, in December of 1909,

he began the construction of the Newell Tunnel at the present Kerr site, as the first step in building the needed power facility, and the work continued for two years. The over $100,000 expended on the Newell Tunnel was taken by the Secretary from monies appropriated by Congress in 1910 and 1911,

> "for the construction of irrigation systems to irrigate the allotted lands of the Indians of the Flathead Indian Reservation, in Montana, and the unallotted irrigable lands to be disposed of under authority of law ...."*/

Beginning in 1909 or earlier, the Reclamation Service made water filings on all Reservation streams pursuant to Montana Statutes authorizing the United States to make such filings. The first filing on the Kerr development site was made on January 28, 1910; it and subsequent timely filings through 1927 served notice on all concerned of the Government's intention to make use of the waters of the river for irrigation water and power for the Irrigation Project. These filings were made pursuant to a special act of the Montana legislature entitled,

> "An act authorizing the Government of the United States to appropriate the water of the streams in the State of Montana, sub-

---

*/ Act of April 4, 1910, ch. 140, §11, 36 Stat. 276, 277; Act of March 3, 1911, ch. 210, §9, 36 Stat. 1066. The Act of March 3, 1911 added a provision to the 1904 Act for a reservation of water fluctuation easements on lands bordering on Flathead Lake "for purposes connected with the development of water power." This provision was later amended to secure such an easement "for uses and purposes connected with storage for irrigation or development of water power." Act of August 24, 1912, ch. 388, §10, 37 Stat. 518, 526.

> ject to certain restrictions, approved February 27, 1905, enacted by and through H. N. Savage, supervising engineer, thereto duly authorized by the Secretary of the Interior of the said United States in that behalf,'

now appearing as Section 89-808 of the Revised Code of Montana of 1947. The filings operated to establish a priority for the irrigation and power use of the river waters under Montana's prior appropriation law. See Bailey v. Tintinger, 45 Mont. 154, 177; 122 P. 575 (1912); Mettler v. Ames Realty Co., 61 Mont. 152, 168, 201 P. 702 (1921). Moreover, these filings evidence unequivocally an intention on the part of the United States officers who made the filings to reserve the water rights in question for the benefit of the Irrigation Project.*/

---

*/ Contrary to the apparent implication of the reference to Winters v. United States, supra, in Pl. Excep., pp. 2-3, the discussion of the Winters doctrine water rights in this brief shows that such rights attach only to water necessary to achieve the irrigation of all the practicably irrigable reserved lands. Arizona v. California, supra. If contrary to our position, Winters doctrine water rights are lost upon allotment, homestead or other disposition under the 1904 Act opening the Reservation, and thus did not pass to the landowners served by the Irrigation Project, the water thus freed of the Winters doctrine priority would revert to the status of unappropriated or unreserved water available for state law appropriation, or for federal reservation to the extent federal law applies. Of course, it takes only a fraction of the water of the Flathead River to supply water for irrigation or related power purposes to the lands of the Reservation which have remained tribal lands following the disposition of land under the 1904 Act, pursuant to the Winters doctrine priority enjoyed by such lands.

Thus the Congress and the Executive Branch took the necessary actions to appropriate or reserve waters required for the Flathead Irrigation Project, including power development.*/ Even if their actions had not been so definitive, the facts that the Congress authorized the Flathead Irrigation Project and that the Executive Branch commenced its construction were sufficient to invoke the general principle that the Congress and the Government in general cannot be considered to have done a useless and indeed misleading act by holding out land as suitable for agricultural use without providing the wherewithal for such use. See Arizona v. California, supra; Winters v. United States, supra.

II. THE CONGRESS EXPRESSLY RECOGNIZED AND CONFIRMED THE EXISTENCE OF WATER RIGHTS ACQUIRED BY THE LANDOWNERS SERVED BY THE FLATHEAD IRRIGATION PROJECT IN THE ACT OF MARCH 7, 1928, AND IMPLIEDLY AUTHORIZED THE FURNISHING OF A BLOCK OF POWER BY THE LICENSEE OF LICENSE NO. 5 AT OR NEAR COST FOR THE USE OF SAID RIGHTS BY THE LICENSEE.

A. The Act Itself.

The Act of March 7, 1928, ch. 137, 45 Stat. 200, 212-213, provided as follows:

> "[T]he Federal Power Commission is authorized in accordance with the Federal Water Power Act and upon terms satisfactory to the Secretary of the Interior, to issue a permit or

---

*/ The Congress even confirmed the water right appropriations or reservations by specific statutory language. See Part II, infra.

> permits, or a license or licenses for the use, for the development of power, [1] of power sites on the Flathead Reservation and [2] of water rights reserved or appropriated for the irrigation projects; Provided further, that rentals from such licenses for the use of Indian lands shall be paid to the Indians of said reservation as a tribe, which money shall be deposited in the Treasury of the United States to the credit of said Indians, and shall draw interest at the rate of 4 per centum .... " (Numbers and emphasis supplied.)

The 1928 Act thus expressly recognized and confirmed the reserved or appropriated water rights of the landowners served by the Irrigation Project.

In the 1928 Act, the Congress authorized the licensing of both the Indian power site and the landowners' water rights and then described the manner in which the rentals to be paid to the Indians for the use of their lands were to be paid and deposited. The Congress thus accomplished two things in the 1928 Act: (1) it recognized that the Indians as a tribe were to receive "rentals" for the use of their land, to be handled in the manner specified in the Act; and (2) it recognized that the landowners would also be compensated for the use of their water rights in a manner left to the discretion of the Federal Power Commission with the approval of the Secretary of the Interior. The plain language of the Act, therefore, refutes the Tribes' contention, enunciated chiefly in their Reply Brief (pp. 6-7), that they were entitled to receive 100% of the "consideration" flowing from the Kerr license.*/

---

*/ The Tribes' strained reading of the 1928 Act is revealed by their statement of the issue in the case (Reply Br., p. 2) in which they, in effect, substitute for the simple statutory term "rentals" the term "100% of the rentals (consideration)."

B. The Legislative History and Subsequent Interpretations of the Act by the Tribes.

The assertion that plaintiff Tribes should receive all of the consideration paid by the licensee is premised, as logic requires, upon an assertion that no land or water rights other than those of the Tribes were made available to the licensee of License No. 5, that is, that "[o]nly the Tribes and the Montana Power Co. have interests in and make contributions to the Kerr hydroelectric development." (Pl. Reply Br., pp.6-7). The Tribes invoke the legislative history of the Act of March 7, 1928, to support both assertions. However, a careful reading of the legislative history of the Act of March 7, 1928, only parts of which are quoted by the Tribes in their Exceptions to Report of Commissioner, pp. 8-56, establishes beyond any doubt that the Congress rejected the efforts of those who took positions favorable to the assertions now made by the Tribes to exclude recognition of the interests of the landowners served by the Irrigation Project from the Act of March 27, 1928.

Some representatives of the Tribes and some members of the Subcommittee of the Senate Committee on Appropriations favored the elimination of certain language of the House bill (H.R. 9136, 70th Cong., 1st Sess.) (which was passed in all respects pertinent to this case). They would have eliminated the language confirming the existence of the project landowners' reserved or appropriated water rights and authorizing the licensing of the power project and distribution system, because they believed this

language was included by the House in order to authorize the giving of a block of power to the project landowners as compensation for the use of their reserved or appropriated rights.*/ Congress, however, flatly rejected their efforts to eliminate this language and instead enacted the statute with the language in question unchanged.**/

During the debates leading up to the acceptance by the Senate of the Conference report incorporating the bill as enacted, Senator La Follette stated in no uncertain terms that the measure which became law would authorize, if not require, the sale of the power block in question to the Irrigation Project. Senator Wheeler, on the other hand, indicated that the bill would permit, but would not require, the provision for a block of power for the Irrigation Project. See, e.g., 69 Cong. Rec. 3332, 3334 (1928). Just before enactment of the House text by the Senate, even Senator La Follette, the strongest advocate for the

---

*/ Hearings before the Subcommittee of the Senate Committee on Appropriations, Interior Department Appropriation Bill, fiscal 1929, 70th Cong., 1st Sess., pp. 19-102, 114-119.

**/ The Senate Committee recommended an amendment to H.R. 9136 eliminating the language believed to authorize the giving of the power block, so that the merits of the matter could be explored in conference. The Senate accepted this amendment. 69th Cong. Rec. 2477-2478, 2491 (1928). The Conferees reported the bill as originally adopted by the House, rejecting the Senate amendment, and the Senate, after further discussion, acceded to the House and enacted the language objected to by those advocating the position taken by the Tribes here. Id. at 3329-3340.

position taken by the Tribes herein, agreed that the Act of March 7, 1928, contemplated the furnishing of a block of power to the Irrigation Project by the Kerr license:

> "I merely want to say that I am convinced that if the House text is enacted, a provision will be contained in the lease given to the successful bidder providing for the furnishing of this amount of horsepower at a low or nominal sum, and in my judgment the successful bidder will no doubt be the Montana Power Co." Id. at 3334.

The legislative history thus conclusively refutes the Tribes' contention that the Act of March 7, 1928, requires that all consideration from the licensee be paid to the Tribes because only they and the Montana Power Co. have interests in and make contributions to the Kerr development. Indeed, the debates preceding enactment of the 1928 Act show that the Congress was specifically aware of the fact that the landowners served by the Irrigation Project were entitled to recognition of, and compensation for, their reserved or appropriated water rights.

> "Mr. KING. The statement is accurate, is it not, that the Indians are only distributees of their pro rata share of the profits derived from the sale of the power.
>
> "Mr. WHEELER. That is correct.
>
> * * *
>
> "Mr. KING. Mr. President, will the Senator permit an inquiry?
>
> "The PRESIDING OFFICER. Does the Senator from Montana yield to the Senator from Utah?
>
> "Mr. WHEELER. Yes.
>
> "Mr. KING. I am interested in the statement made by the Senator that under treaty the power rights--that is, the power that might be developed--would become the property of the Indians. I was not clear, from

the statements made by the senior Senator from Montana and from what I read from the hearings before the committees of Congress, who was the owner of the water, or entitled to its use, whether it was claimed that the Indians owned the water because it flowed through an Indian reservation, or whether the waters were subject to capture and use by any person, or whether the usufruct was claimed by the United States. I did not understand from the Senator whether the United States made a filing upon the river and claimed ownership as a proprietor and pursuant to the State law governing appropriation of water for useful purposes. Does the United States claim the water is the power rights, claim it in its sovereign capacity for itself, or that it holds as trustee for the Indians, or for white settlers, or for reclamation projects?

"Mr. WHEELER. It claimed it for reclamation projects, according to my understanding of the matter.

"Mr. WALSH of Montana. Mr. President, if my colleague will yield----

"The PRESIDING OFFICER. Does the junior Senator from Montana yield to his colleague?

"Mr. WHEELER. I do.

"Mr. WALSH of Montana. The Reclamation Service, pursuant to a statute of the State of Montana, made appropriations of water for all irrigation projects in the State of Montana, as I understand has been done in the case of every irrigation project. Pursuant to the statute authorizing the United States to make the appropriation, the United States as the representative of the settlers on the project, made the appropriation of this water. The appropriation by the United States is in trust for the settlers on the project, and for the district when it shall be organized.

"Mr. KING. Then there is no claim that the Indians own the water.

"Mr. WALSH of Montana. I do not know that anybody claims that at all. They claim they own the site.

"Mr. KING. As riparian proprietors?

"Mr. WALSH of Montana. As riparian proprietors; and I fully agree with that." Id. at 2479, 2487.

The Tribes have elsewhere indicated agreement with the proposition that they are entitled only to a proportionate share of the value of the development. As recently as 1967, after having petitioned to the Federal Power Commission for a scheduled adjustment of the Indian rental for the Kerr site pursuant to License No. 5, the Tribes successfully contended, through their expert witnesses, for a two-phase computation whereby the Tribes were held entitled to an annual rental equal to 42.13% of the annual commercial value of the Kerr development. The 42.14% was deemed to represent the Tribes' proportionate contribution of valuable land and water rights used in the development. The Tribes' expert witness, Sporseen, arrived at the 42.13% as follows:

" ... Sporseen attributed water rights to the [Montana Power] Company on the basis of its proprietary interest, and the land rights to the Tribes and Montana Power on the basis of their respective interests thereto .... [T]he basis of his computations is Kerr generation under critical water conditions. He segregated Flathead Lake from Kerr generation. The value of Kerr without Flathead is ... 68.5 percent of the total. The Tribe's share, based on 50-50 division between land and water is 34.25 percent. To this must be added one-half the value of Flathead; 50-50 split between land and water with a further 50-50 split to reflect the ownership of one-half of the lands. One-fourth of Flathead's power value [which is] 31.3 percent of total Kerr, is nearly 8% which, when added to the

> above mentioned 34.23 percent produces his result of 42.13 percent." The Montana Power Company, Project No. 5, 38 F.P.C. 766, 783 (Opinion No. 529, October 4, 1967).

Of course, all rights not attributed to the Tribes were treated as belonging to Montana Power Co. by Sporseen, because the Power Company had acquired them pursuant to the license, and it was unnecessary in that proceeding for the Federal Power Commission to consider the source or nature of other land and water rights not belonging to the Tribes.*/

---

*/ The Federal Power Commission's decision in the Montana Power Co. case was reversed on grounds not here pertinent by the U. S. Court of Appeals for the District of Columbia in Montana Power Co. v. Federal Power Commission, ___ U.S. App. D.C. ___, ___ F.2d ___ (Nos. 21,904, 21,767 decided June 26, 1969). It is particularly noteworthy that the Tribes' expert witness Sporseen and the Federal Power Commission apparently did not credit the Tribes with any water rights involved in the Kerr development. This contrasts with the position taken by the Department of the Interior at the time of the negotiations which led up to License No. 5, whereby the Tribes were credited with a claim to some of the water involved under the Winters doctrine. Sen. Doc. No. 153, 71st Cong., 2d Sess. (Scattergood Report), at 41-42.

The fact that the Tribes were not the sole contributors of valuable land and water rights to the Kerr development was recognized by the Commissioner in his Memorandum Opinion of December 3, 1968, at page 3, where he stated, "There was, moreover, other land and water, in addition to tribal land and water, involved in the production of the power."

III. LICENSE NO. 5, AS ADOPTED BY THE FEDERAL POWER COMMISSION AND THEREAFTER EXPRESSLY APPROVED BY THE TRIBES, IS FULLY CONSISTENT WITH THE ACT OF MARCH 7, 1928, AND THE TRIBES HAVE NO BASIS FOR RECOVERY IN THIS ACTION.

A. The Provision for the Power Block for the Project of Districts in License No. 5 Is Fully Consistent with the Act of March 7, 1928.

It has been shown that the Act of March 7, 1928 authorized the Federal Power Commission and the Secretary of the Interior to arrange for compensation of the landowners served by the Irrigation Project for their water rights in precisely the manner incorporated into License No. 5; i.e., by an undertaking on the part of the licensee to furnish a block of power at a rate approximating cost.*/ Such a method of compensation appears natural and reasonable in view of the necessity that the Irrigation Project abandon its own plans to develop needed power at the Kerr site. Plaintiffs concede that the record shows that the entire

---

*/ Since the Act of March 7, 1928, confirmed the existence of the water rights of the landowners, it would seem incumbent upon the Federal Power Commission and the Secretary of the Interior to have arranged for just compensation for the disposition thereof to the licensee Power Company. In United States v. Ahtanum Irrigation District, 236 F.2d 321 (9th Cir. 1956), the court held that the Secretary of the Interior made an improvident but effective disposition by contract of Winters doctrine water rights of certain Indian and non-Indian successors in interest of allotted reservation lands, and indicated that the Secretary's action constituted a Fifth Amendment taking of the landowners' property rights for which the United States should pay just compensation. Id. at 338-339, 342.

License No. 5 contains language expressly recognizing that the development requires use of the "water rights for power purposes reserved or appropriated for Indian irrigation projects." Memorandum Opinion, at 11.

15,000 horsepower block of power involved is sometimes required in one month solely for pumping irrigation water. (Pl. Br., p. 32, citing Tr. pp. 83, 98). The power furnished appears, therefore, to be quite reasonable. In any event, the Tribes cannot recover herein unless they establish that their rentals do not represent the fair "power value" of their site, and, as the Commissioner pointed out on page 3 of his Memorandum Opinion, the Tribes' proof was directed solely to the value of the power made available to the Government for the Irrigation Project.

Moreover, the record shows beyond any doubt that the amount of the Indian rental was based on a two-phase computation, somewhat comparable to that advocated by the Tribes in the recent Federal Power Commission proceeding referred to above, which was designed to assure that the furnishing of a block of power to the Irrigation Project would in no way affect the Indian rental. First, the total value of the power development was computed by subtracting the average annual generating cost at the Kerr development, including a return on the Power Company's investment and excluding the Indian rental (and without taking into consideration any incremental costs which might be attributable to the furnishing of a power block), from the Montana Power Co.'s average annual generating cost similarly computed for an equivalent amount of power at its other sites. Then, the Tribes' proportionate contribution of valuable land and water rights was determined to be about 50%; i.e., 7.87% higher

than the 42.13% successfully claimed by the Tribes in the Federal Power Commission proceeding referred to above. The Tribes' proportionate share of 50% was then applied to the annual power value of the development as computed above, and the resulting figure was taken as an appropriate Indian rental. By the very nature of this computation, it is clear that the result would have been the same whether or not the power block was furnished to the Irrigation Project at or even below costs. Any resulting increment in cost would, under the method employed, be passed on to the general public in the form of slightly higher, but still quite reasonable rates charged by Montana Power Co., to the extent it was not absorbed by the Power Company.*/

By computing the Indian rental in a manner which did not take into account in any way the furnishing of a power block to the Irrigation Project, the Federal Power Commission and the Secretary of the Interior successfully negotiated a license whereby the Tribes received substantially more than any applicant had previously offered. Moreover, this approach assured a license contract which avoided entirely the criticisms of the power block method of compensating the project landowners for their water rights advanced by Senator La Follette and others, namely that the furnishing of a power block might in some way reduce the amount of the

---

*/ Sen. Doc. No. 153, 71st Cong., 2d Sess. (Scattergood Report), pp. 9-37.

Indian rental. */ Thus, it is apparent that all concerned were satisfied with the license as finally approved; indeed as subpart B, infra, will show, the Tribes subsequently indicated their approval by formal action.

B. The Tribes Themselves Expressly Approved License No. 5, including the Provisions for their Rental and for the Block of Electrical Power for the Irrigation Project.

License No. 5 was in default by May of 1935 because of failure of the licensee to complete the development within the time allowed by the original agreement and an amendment thereto. The Power Company applied to the Federal Power Commission for a further extension of time but the Secretary of the Interior declined to approve such extension until the Tribes, which had assumed powers of self determination under the Wheeler-Howard Act, or Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984; 25 U.S.C. §§461-474, had first given

---

*/ During the Senate debates Senator Walsh of Montana summed up the objections of some to the plan to compensate the landowners for their water rights, as follows:

> "I am very glad the discussion has been precipitated because I think it has developed the fact that the contemplated legislation, so far as the Indians are concerned, makes it possible for the Federal Power Commission to accept the proposal of the Montana Power Co., with respect to which no criticism is made so far as the Indians are concerned, except the difference in the price the Montana Power Co. would be willing to pay over and above $1 per horsepower if it were not obliged under its proposal to furnish 15,000 horsepower to the irrigation district at the diminished figures given here. If there is any other objection to it on the part of the Indians I should like very much indeed to have any Senator present who has any other suggestion to make to offer it now." 69th Cong. Rec., p. 2490 (1928).

Since no one offered any other objection, Mr. Walsh's summation of the views of the critics of the Act was apparently accepted.

their consent. Montana Power Co. v. Federal Power Commission, ___ U.S. App. D.C. ___, ___ F.2d ___ (Nos. 21,904, 21,767 decided June 26, 1969) (Slip Op., pp. 12-13). Thereupon the Power Company took the matter up with the Tribes and obtained their consent after agreeing, among other things, to pay liquidated damages and a higher annual rental. Subsequently an amendment incorporating the agreement obtained by the Tribes, and supplementary matters proposed by the Secretary of the Interior, was approved by the Tribes, the Secretary of the Interior, and the Federal Power Commission on July 17, 1936. This amendment (No. 2) recites the Tribes' express consent and agreement to the annual rentals they were to receive. (Appendix to Def. Br., pp. 260-271). The license as amended, of course, incorporated the provision for a block of power for the Irrigation Project. Thus the Tribes have expressly consented to the rentals they now claim to be inadequate, and the provision for the block of power for the Irrigation Project which they now claim should have been made available to them, either directly or in the form of increased money rentals.

The Tribes do not contend that they lacked the capacity to enter into or give their approval to the agreement which became Amendment No. 2; nor do they deny that the Amendment No. 2 expressly approved the rental and confirmed the furnishing of the power block to the Irrigation Project. (Pl. Reply Br., pp. 8-19).

Conclusion

For the reasons set forth herein it is respectfully submitted that the Court should adopt the Memorandum Opinion of the Commissioner and enter a judgment dismissing Paragraph 13 of the Petition.

Respectfully submitted,

Edward J. Grenier, Jr.
1200 Farragut Building
900 - 17th Street, N. W.
Washington, D. C. 20006
Attorney of Record for
Amici Curiae

Of Counsel:

Frank J. Martin, Jr.
Sutherland, Asbill & Brennan
1200 Farragut Building
900 - 17th Street, N. W.
Washington, D. C. 20006

SUMMARY OF THE FACTS

The Defendant United States acquired sovereign powers of government over Plaintiffs' aborigial domain by treaties with France and Spain entered into in the first half of the nineteenth century. These powers included the power to appropriate and dispose of the navigable waters flowing on the lands pursuant to the Commerce and Property clauses of the Federal Constitution. Requested Finding No. 1. By the Treaty of Hell Gate of 1885, Defendant acquired from Plaintiffs full proprietary title to Plaintiffs' lands, reserving therefrom Plaintiffs' Reservation for Plaintiffs' use and occupancy. In so doing, Defendant reserved for the irrigable reservation lands Winters doctrine rights to so much water and water power as was needed to irrigate such lands. Water and water power rights not so reserved remained available for future disposition by Defendant. Defendant's Requested Finding No. 2.

In 1904 Congress provided that Reservation land should be alloted to the individual members of the Tribes pursuant to the general allotment laws, and that the excess lands should be appraised and opened to entry under the homestead, mineral and town site laws. Defendant's Requested Finding No. 3. While allotments were being made and before the unallotted lands were opened to settlement, a vast irrigation project was conceived. It was contemplated that irrigation water would have to be pumped from the Flathead River in order to achieve irrigation of all lands to be irrigated, and the plans for the project included plans for hydroelectric power development at the falls of the Flathead River to provide power needed for such pumping. Congress incorporated the irrigation project into the basic 1904 legislation by Act of Congress in 1908. Defendant's Requested Findings No. 4 and 5. In order to assure availability of the power site and water power rights, as well as availability of reservoir sites to store irrigation water, the federal government withdrew available dam and reservoir sites from entry or other disposition, and made water rights filings on the waters of the Flathead River to reserve the same for use for the development of power for the irrigation project. Defendant's Requested Findings No. 6 and 7. Actual construction of the proposed power development began in 1909. Defendant's Requested Finding No. 8. The costs of construction were paid with funds appropriated for the

irrigation project and were made reimbursible by the Indian and non-Indian landowners benefitted by the irrigation project. Defendant's Requested Findings No. 8 and 11.

Homestead settlement on the Reservation began in 1910 under a promise by the Government to supply irrigation water to the extent possible to agricultural lnads. Settlement of the Reservation continued to 1935. The settlers on the unallotted irrigable lands and their successors in interest, like the allottees of irrigable lands and their successors in interest, acquired Winters doctrine water and water power rights appurtenant to their lands. The Plaintiffs have recently been awarded the value of the unallotted lands disposed of pursuant to the opening of the Reservation, with values fixed as of January 1, 1912. The value received by Plaintiffs for the unallotted lands disposed of the settlers will therefore include value attributed to the promise of the United States to furnish irrigation water to the irrigable lands. Defendant's Requested Findings No. 9 and 10.

In 1920 Congress enacted the Federal Water Power Act which, in general, authorized the licensing of power projects upon condition that ~~the~~ licensees pay certain annual charges based on the cost of administering the act and for use of government lands and other property. All proceeds of charges paid for the use of any lands embraced within Indian reservations were to be paid to the Indians of the reservation, but proceeds of charges

for use of other government or public property were to be divided as specified in the act. One-half of such proceeds from non-Indian property was to be paid into the reclamation fund created by the Reclamation Act of 1902. Defendant's Requested Finding No. 12. Shortly after enactment of this general licensing enabling act, the Rocky Mountain Power Company, a subsidiary of the Montana Power Company, filed an application for preliminary permits to explore the development of the five Tribal dam sites on the Flathead River, previously withdrawn by Congress for the benefit of the irrigation project. No action was taken on this application however, pending completion of a Department of Interior study of the Columbia River Basin. Defendant's Requested Finding No. 12 and 13.

Meanwhile Congress determined that the power project needed to complete the Flathead irrigation project should be finally completed in order to fulfill the long delayed promise to supply irrigation water to the Indians and non-Indians settlers on the Reservation. Congress also determined to permit the irrigation project to dispose of excess power not needed for irrigation pumping in such way as to yeild revenues to be applied against the construction charges already accrued against irrigable lands on the project. In 1926 a law was passed authorizing funds for continuation of construction of a small power plant at site No. 1 to be operated by the irrigation project. It was contemplated that the Tribes

would be compensated for this proposed use of one of their dam sites by payment of an appropriate rental. Funds appropriated for the proposed government power development were not to become available until the landowners on the irrigation project formed Irrigation Districts wnder state law with power to assess irrigation project construction and operation maintenance charges. Pursuant to this requirement, which was continued in subsequent legislation holding out the prospect of realization of compensation for the water rights reserved or appropriated for the irrigation projects, Irrigation Districts were formed and repayment contracts were entered guarranteeing repayment of irrigation project construction and other costs.

In 1926, after completion of the Columbia River Basin study confirmed that the Flathead project would be available for full scale developmenr, the Rocky Mountain Power Company renewed its efforts to obtain a preliminary permit under the Federal Water Power Act. It was recognized that the 1926 law authorizing government development preempted licensing to a private developer pursuant to the Federal Water Power Act. Also, the Rocky Mountain Power Company recognized that Congress had, by the 1926 law and by prior actions, conferred an interest in the development of the power project on the Flathead Irrigation Project. In a negotiated proposal dated February 17, 1927, the company therefore proposed to supply to the Irrigation Project

the amount of power for pumping and other uses which could have been produced at the government project authorized by the 1926 Act for payments which would not exceed the costs of developing the small government project. The company also recognized the need for paying rental to the Tribes for use of their Tribal dam site and a rental of $1 per developed horsepower then paid for use of national forest sites was proposed; however, the original proposal, dated February 17, 1927, called for a division of this $1 per horsepower rental between the Tribes and the Irrigation Project. Defendant's Requested Finding No. 15.

An effort was made to enact legislation which would authorize the full development sought by the Rocky Mountain Power Company upon the terms of the February 17, 1927 proposal, including power at special rates for the irrigation project. This effort failed because of the belief that the rental to be paid for use of the Tribal site should all be paid to the Tribes. Defendant's Requested Finding No. 16.

Walter H. Wheeler filed an application for preliminary permits to develop the five Tribal sites in January 1928. Mr. Wheeler's application was accompanied by an agreement with Plaintiffs' Tribal council to pay to Plaintiffs only $1.12 1/2 per developed horsepower. Defendant's Requested Finding No. 17.

In 1927-1928 Congress enacted a law authorizing implementation of the proposal of the Rocky Mountain Power Company dated February 17, 1927, including the provision for

power at cost to the irrigation project, in exchange for the project's reserved or appropriated water rights, but with an express requirement that all of the rental to be paid for the Tribal site be paid to the Plaintiffs as a Tribe. In other words the proposal that the rental for the dam site be divided between the Tribes and the Irrigation Project was rejected, but otherwise the legislation formerly proposed to implement the proposal of February 17, 1927, became law in 1928. Defendant's requested Finding No. 18. Congress later enacted a provision waiving the usual administrative charge normally deducted by the Federal Power Commission, in order to insure that the Tribes would receive the full rental paid for their dam site. Defendant's Requested Finding No. 21.

In 1928 the Rocky Mountain Powe Company applied for a license to begin construction at Site No. 1. The Chief of Engineers of the War Department studied both the Rocky Mountain Power Company and Mr. Wheeler's application for preliminary permits on the five sites, and Rocky Mountain Power Company's application for a license to construct at Site No. 1, and recommended a grant of the application of Rocky Mountain Power Company and rejection of the application of Mr. Wheeler. Defendant's Requested Finding No. 19. The Secretary of the Federal Power Commission thereupon recommended a grant of the Rocky Mountain Power Company's applications and rejection of Mr. Wheeler's applications; however,

Mr. Wheeler's request for a hearing was granted. Defendant's Requested Finding No. 20.

As a result of lengthy hearings, the Rocky Mountain Power Company was found to be the only qualified applicant, and a license for development of Site No. 1 (License No. 5) was awarded to the Rocky Mountain Power Company in accordance with its February 17, 1927 proposal, as amended, after it had agreed to pay an Indian rental based upon the Tribes' proportionate contribution to the commercial value of the project without regard to the power to be furnished at cost to the irrigation project. The Indian rental thus obtained was substantially in excess of the amounts initially offered by the applicants, and was the result of the almost single handed efforts of Mr. J. Henry Scattergood who represented the Secretary of the Interior in the licensing proceedings. Defendant's Requested Findings No. 22 and 23.

Subsequent to issuance of License No. 5, the Tribes consented to its terms, including the amount of the Indian rental and the furnishing of power at special rents to the irrigation project. In 1948, Congress, with the Tribes' express consent, ratified the provision in the License for low rate power and expressly recognized and condoned the furnishing thereof in exchange for the water rights of the irrigation project licensed to the developer of Site No. 1, pursuant to License No. 5. Defendant's Requested findings No. 24 and 25.

Recent actions of the Federal Power Commission, and the position of the Tribes and other parties in the proceedings leading up to said action, expressly confirm that the Tribes furnished only a portion (less than one-half) of the resources contributing to the commercial value of the Flathead hydroelectric project. Defendant's Requested Finding No. 26 and 27.

Evidence developed at the recent rehearing of this case in July of 1970 demonstrates conclusively that a hypothetical license of the Flathead project in 1929-30 would not have anticipated any loss as a result of furnishing the irrigation project power at the special rates provided for in License No. 5. Further, such evidence shows that the Tribes failed to establish that any loss which might have been anticipated would exceed in value the value of the water rights reserved or appropriated for the irrigation project which were to be obtained by the licensee in exchange for the power at special rates. Finally, whether or not the water rights of the irrigation project are taken into account, the magnitude of any loss which could conceivably have been anticipated would be such that no hypothetical licensee would have been prevented from passing the loss out to customers through its rate structures which, quite legitimately, are set to assure recovery of the licensee's cost of service. Hence, the fact of an anticipated loss, if any loss was anticipated,

could in no way have affected the amount of Indian rental that a hypothetical licensee would have been willing to pay. Defendant's Requested Finding No. 28 and 29.

Even if, contrary to the weight of the evidence, it were determined that an out-of-pocket loss would have been anticipated by a hypothetical licensee in 1929-30, and further that such anticipated loss would have affected adversely the amount of Indian rental which the hypothetical licensee would have been willing to pay, the Tribes have not shown that such loss would exceed in value the value of the water rights of the irrigation project received by the licensee in exchange therefore. Hence the Tribes are not entitled to recover because they are not entitled to receive what the irrigation project received in exchange for value contributed, and they have not shown that the irrigation project received more than a fair quid pro quo for its water power rights. Defendant's Requested Finding No. 30.

ARGUMENT

I

A HYPOTHETICAL APPLICANT FOR LICENSE NO. 5 WOULD NOT HAVE ANTICIPATED THAT THE COSTS OF FURNISHING THE IRRIGATION PROJECT POWER AT SPECIAL RATES WOULD EXCEED THE REVENUES PRODUCED BY SUCH RATES.

A. The Commissioner must determine whether a well informed hypothetical licensee would have anticipated any loss.

The Court's opinion remanding this case for rehearing called for in depth analysis of information available in 1929 to determine, not what the representatives of the parties said and did, nor even what they truly believed, but instead to determine whether a reasonable hypothetical licensee would have concluded, after analyzing the known physical and economic facts, that furnishing power to the irrigation project at the special rates which were incorporated into Article 30 of License No. 5 would result in an out-of-pocket loss. See Formulation of Issues Presented, supra, pp. ___.

B. The Tribes' Expert Witness did not address himself to the issue posed.

Mr. Van Scoyoc who testified as an expert for the Tribes, limited his remarks to a [illegible]tical explanation of what the parties advocated or, for the sake of conservatism, assumed in 1929. He did not discuss or endorse the validity

of what was advocated in view of the raw data, except to state an abstract preference for the demand-energy approach used by the RMPC at the hearing, as against the straight-energy method of pricing used by the RMPC in its original offer of power to the irrigation project. Mr. Van Scoyoc then applied variations of the demand-energy method using figures lifted here and there from the 1929-30 record, without explanation of the origin or originally intended use thereof. As a result his supposed test calculations were predicated on faulty and unexamined premises, including an understated demand capacity of plant, and an overstatement of irrigation project demand. In addition Mr. Van Scoyoc ignored the universally conceded fact that a large portion of the irrigation project power could be supplied by the licensee from secondary energy at no cost, despite the fact that the RMPC freely admitted this, and actually took account of it in the so-called loss figure advocated in 1929. Finally Mr. Van Scoyoc Scattergood used a grossly exagerated figure for the cost of the Indian rental because he failed to take into account the obvious fact that the rental proposed by Mr. Scattergood would never reach the theoretical amount it would reach if the plant were operated at 100% load factor, and because he failed to make allowance for the fact that it would take several years to construct and work the new power into the existing area

load. See Defendant's Requested Finding No. 28.

Because of the superficial nature of Mr. Van Scoyoc's examination of the underlying facts, his testimony is of no real bearing on the issue posed. His testimony did not, therefore, in any way advance the Tribes toward meething their burden of proving that a hypothetical licensee would have anticipated an out-of-pocket loss.

C. R.W. Bech Assocaites carefully examined underlying data and determined that no matter what method of costing is used, a hypothetical licensee would not have anticipated any loss.

The approach taken by Mssrs. Spencer and Gallup, expert witnesses for Defendant, was in accordance with the Court's mandate because they first identified and quantified the known physical and economic factors exactly as a hypothetical licensee would have done in 1929 for purposes of determining his real costs. They then applied the methods of costing then in use and determined that no matter which method the hypothetical licensee is presumed to have used (and the chances are he might use them all) he would not have anticipated any loss.

This conclusion is reach without necessity of considering the special circumstance greatly benefiting the RMPC, a subsidy of the MPC, regardless of who might be licensed to develop the project, namely, the very substantial gain in

primary energy which would accrue to the MPC's downstream run-of-the-river power development at Thompson Falls. Since theRMPC did in fact exist, and was in fact a licensee, it would seem appropriate to take this very real economic consideration into account since it might preclude other hypothetical licenses from the bidding. If the gain at Thompson Falls is taken into account, it is quite clear that the licensee would make a somewhat higher profit. But, as stated above, the Thompson Falls benefit is not necessary to the determination that the irrigation project power at special rates would not cause an out-of-pocket loss. See Defendat's Requested Finding, No. 27.

D. Plaintiffs must be held to have failed to carry their burden of proof:

The Defendant's Expert Testimony is in any case more persuasive than that offered by the Plaintiffs, and since Plaintiffs bear the burden of proof, Plaintiffs must be held to have failed to prove that a hypothetical licensee would have anticipated an out-of-pocket loss.

ARGUMENT

II

EVEN IF A HYPOTHETICAL APPLICANT WOULD HAVE ANTICIPATED THAT THE COSTS OF FURNISHING THE IRRIGATION PROJECT POWER WOULD EXCEED THE REVENUES THEREFROM, PLAINTIFFS MADE NO EFFORT TO ESTABLISH THAT SUCH EXCESS WOULD BE GREATER THAN THE VALUE OF THE WATER RIGHTS RESERVED OR APPROPRIATED FOR THE IRRIGATION PROJECT WHICH WERE TO BE GRANTED TO THE LICENSEE IN EXCHANGE FOR THE POWER AT SPECIAL RATES.

A. The Defendant's irrigation project owns, for the benefit of the Indian and non-Indian landowners served by the project, reserved or appropriated water power rights which were necessarily involved in the hydroelectric development of Tribal dam site No. 1.

1. Winter's doctrine water rights appurtenant to Tribal lands conveyed by allotment and pursuant to the homestead laws to individual allottees and settlers, and their successors in interest.

In Winters v. United States, 207 U.S. 564 (1908), the Supreme Court held that when Indian lands are ceded to the United States by a treaty which provides that a portion of the ceded lands shall be reserved for the use and benefit of the Indians, even though such a treaty is silent as to water rights, it will be presumed that the reservation of the lands operates to reserve the waters of the natural streams to the extent necessary to render the reserved lands suitable for settlement and cultivation. The Treaty of Hell Gate, which created the Flathead Indian Reservation, falls

squarely within the doctrine enunciated in Winters.

The Winters doctrine was recently reaffirmed and refined in Arizona v. California, 373 U.S. 546 (1962), which dealt with rival claims among certain states, and the United States on behalf of certain Indian reservations, to the waters of the Colorado River and its tributaries. The Court made clear that water rights reserved pursuant to the Winters doctrine were broad enough to assure the irrigation of all of the practicably irrigable reserved lands for the indefinite future:

> "We also agree with the Master's conclusion as to the quantity of water intended to be reserved. He 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. Arizona, on the other hand, contends that the quantity of water reserved should be meausred by the Indians' 'reasonably foreseeable needs,' which, in fact, means by the number of Indians. How many Indians there will be and what their future needs will be can only be guessed. We have concluded, as did the Master, that the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage. The various acreages of irrigable land which the Master found to be on the different reservations we find to be reasonable." Id. at 600-01.

It is well established that reserved water rights under the Winters doctrine are appurtenant to the irrigable

reserved lands, as described above, and run with such land upon conveyance to individual Indians or non-Indians. E.g., United States v. Powers, 305 U.S. 527 (1939); United States v. Ahtanum Irrigation Dist., 236 F.2d 321 (9th Cir. 1956); Skeem v. United States, 237 Fed. 93 (9th Cir. 1921); Segundo v. United States, 123 F. Supp. 554 (S.D. Col. 1954); United States v. Hibner, 27 F.2d 909 (D. Iowa 1928). In United States v. Powers, supra, the United States brought suit on behalf of an irrigation project against certain successors in title to Indian reservation lands, who were diverting water upstream from the irrigation project. The defendants included (1) Indian allottees, (2) non-Indian grantees of Indian allottees, and (3) non-Indian purchasers from the United States of land which had reverted to the United States upon the death of Indian allottees.*/

Neither Winters nor Powers defined the scope of the water rights reserved. However, Arizona v. California, supra, as noted above, held that water rights under the Winters doctrine are coextensive with the irrigation needs

---

*/ Under the Act of May 8, 1906, ch. 2348, 34 Stat. 182, 183, upon the death of an Indian allottee prior to the issuance to him of a fee patent, the allotment was canceled and the land reverted to the United States. The United States was authorized to sell such land to anyone and to pay the net proceeds to the heirs or legal representative of the deceased Indian.

In the district court opinion, 16 F. Supp. 155, 163-164 (D. Mont. 1936), some of the defendants are identified as non-Indian purchasers from Indian grantors, and non-Indian purchasers of deceased Indians' allotments.

of all ofethe practicably irrigable reserved lands for the indefinite future. Consequently, since a substantial portion of the practicably irrigable lands (i.e., those lands which can be cultivated if supplied with irrigation water) of the Flathead Reservation cannot be irrigated without pumping, the Winters doctrine extends in our particular situation to water rights necessary for the development of electrical power for pumping. This follows logically from the Winters case itself, since it cannot be doubted that, in ceding lands to the United States, the Tribes could have expressly retained, in conjunction with the reserved lands, the right to develop power for pumping necessary for irrigation.

The landowners served by the Flathead Irrigation Project stand in the Tribes' shoes as to Winters doctrine water rights for power and irrigation purposes. A substantial portion of individually owned irrigable land within the Flathead Irrigation Project is owned by Indian allottees or Indian and non-Indian successors in title of the original Indian allottees. Other individual landowners within the project trace their title to patents issued by the United States as trustee of Indian lands disposed of pursuant to the Act of April 23, 1904, as amended. In issuing these patents, the United States disposed of the unallotted and unreserved lands of the Rservation pursuant to its power

for the irrigation project. These filings were made pursuant to a special act of the Montana legislature authorizing the federal government thus to give notice of exercise of its power of appropriation or reservation. See Defendant's Requested Finding No. 7. The provision in question now appears as Section 89-808 of the Revised Code of Montana of 1947. The filings operated to clarify the government's prior reservation of water power rights and, to the extent deemed necessary or desirable to establish a priority for the irrigation and power use of the river waters under Montana's prior appropriation law. See Bailey v. Tintinger, 45 Mont. 154, 177; 122 P. 575 (1912); Mettler v. Ames Realty Co., 61 Mont. 152, 168, 201 P. 702 (1921). It cannot be doubted that Congress, pursuant to the Commerce and Property clauses of the United States Constitution, had full authority to appropriate and dispose of the unreserved and unappropriated navigable waters of the Flathead River and Lake. Arizona v. California, 373 U.S. 546, 599 (1963); United States v. Grand River Dam Authority, 363 U.S. 229, 233 (1960).*/ Thus all of the water power rights over and above those reserved to the Reservation Lands by the 1855 Treaty pursuant to the Winters doctrine (i.e. water power necessary and sufficient to irrigate the irrigable Reservation lands), were available in 1909-1910 for appropriation and disposition by Congress for any public purpose.

*/ It has been held that aboriginal Indian title was subject to the Constitution and laws of the United States. Cherokee Nation or Tribe of Indians v. State of Oklahoma, 402 F 2(d) 739, 746 (10th Cir. 1968)

Finding No. 1

Acquisition by Defendant of Power to Control the Use and Disposition of the Navigable Waters of Flathead Lake and River

Defendant acquired sovereign powers with respect to a vast territory including all of what is now included in the states of Montana and Idaho as a result of the Louisiana Purchase from France in 1803, and the Oregon Compromise with Great Britain in 1846.[1/] Through the exercise of its sovereign powers Defendant thus acquired title to the lands occupied and used by the Plaintiffs subject to Plaintiffs' rights of occupancy and use.[2/] Defendant also acquired all powers of government over the ceded lands, including the broad powers of Congress to appropriate and dispose of unappropriated lands and the navigable and non-navigable waters on the ceded lands pursuant to the Commerce and Property Clauses of the Federal Constitution.[3/]

Footnotes to Finding No. 1

1/ Treaty of April 30, 1803, 8 Stat. 200; Treaty of June 15, 1846, 9 Stat. 869.

2/ Clark, Water and Water Rights, Chapter 10, §140.1, p. 373 (196).

3/ It has been held that aboriginal Indian title was subject to the Constitution and laws of the United States. Cherokee Nation or Tribe of Indians v. State of Oklahoma, 402 F. 2d 739, 746 (10th Cir. 1968). The Constitution's Commerce and Property clauses secured to the United States the power to regulate, reserve or appropriate and dispose of navigable (Arizona v. California, 373 U.S. 546, 599 (1963)), and non-navigable waters, United States v. Grande River Authority, 363, U.S. 229, 233 (1960).