MONTANA WATER RIGHTS

HEARINGS

BEFORE THE

SELECT COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

NINETY-SIXTH CONGRESS

FIRST SESSION

ON

OVERSIGHT ON LITIGATION INVOLVING WATER RIGHTS IN MONTANA

JULY 30, 1979, WASHINGTON, D.C.; AUG. 10, 1979, GLASGOW; AUG. 15, 1979, CUT BANK; AUG. 24, 1979, BILLINGS; AND AUG. 31, 1979, RONAN, MONTANA

Printed for the use of the Select Committee on Indian Affairs

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CONTENTS

WASHINGTON, D.C.

WITNESSES

	Page
Flint, Myles, Chief, Indian Resources Section, Land and Natural Resources Division, Department of Justice	3
Fredericks, Thomas, Associate Solicitor, Division of Indian Affairs, Department of the Interior	22
Gerard, Forrest, Assistant Secretary of the Interior, Indian Affairs, Department of the Interior	22
Krulitz, Leo, Solicitor, Department of the Interior	22
Prepared statement	28
Sagalkin, Sanford, Deputy Assistant Attorney General, Land and Natural Resources Division, Department of Justice	3
Prepared statement	4
Sansaver, James, Special Assistant to the Assistant Secretary of the Interior for Indian Affairs	22

MATERIAL SUBMITTED

News release of Gov. Thomas L. Judge of Montana, April 13, 1979	25
Tribal resolutions	37

GLASGOW, MONTANA

WITNESSES

Aasheim, Magnus, farmer, Sheridan County, Mont	105
Cromwell, commissioner of Valley County, Mont	69
Crusch, Fay, chairman, Northeastern Montana Water Rights Association	98
Halverson, James, chairman, Board of Commissioners, Roosevelt County, Mont	71
Hollow, Norman, chairman, Assiniboine and Sioux Tribes, Fort Peck Reservation	75
Maddox, Wesley, representing Chinook and Blaine County, Mont	114
Marlenee, Hon. Ron, U.S. Representative in Congress from Montana	110
O'Connor, Mayor L.J., Nashua, Mont	65
Osby, Mayor Ryley, Wolf Point, Mont	66
Overcast, John, Commissioner, Paradise Valley Irrigation District, Blaine County, Mont	110
Perry, William R., attorney, Assiniboine and Sioux Tribes, Fort Peck Reservation	75
Letter of August 21, 1979	82
Rector, James, city attorney, Glasgow, Mont	61
Romo, Mayor Clarence, Bainville, Mont	60
Ross, William, Montana Land and Mineral Owners Association	116
Schuster, Gerard, city attorney, Wolf Point, Mont	66
Shields, Caleb, vice chairman, Assiniboine and Sioux Tribes, Fort Peck Reservation	75
Prepared statement	88
Smrcka, Mayor James R., Glasgow, Mont	61
Swinden, Ted, Lieutenant Governor, State of Montana	59
Tande, C. William, Commissioner, Daniels County, Mont	73
Warner, John, attorney, Havre, Mont	107

725137

Digitized by Google

PREPARED STATEMENTS

Page
Anderson, Martha, Nashua, Mont 144
Daniels County, Board of County Commissioners 120
Demko, Jack, Poplar, Mont 129
Dodson Irrigation District 124
Glasgow Irrigation District 122
Hamcock, Vern I., Medicine Lope, Mont 140
Jergeson, Greg, Montana State Senator 118
Johnson, Kermit and Frieda, Plentywood, Mont 146
Langer, Bernard, Scobey, Mont 148
Maloney, Rosalene V., Turner, Mont 143
Malta Chamber of Commerce 125
Malta Irrigation District 123
Meisdalen, Noble, Phillips County farmer 128
Roosevelt County, Board of County Commissioners 121
Schuster, Gerard M., attorney 136
Shipstead, Milton, Scobey, Mont 145
Swank, Eugene R., Poplar, Mont 139
Ulrich, R. H., president, First State Bank, Malta, Mont 127
Vies, Lynn 142

CUT BANK, MONTANA

WITNESSES

Barcus, Steve, Mayor, Browning, Mont 170
Brunner, Mrs. Jo, WIFE of Montana 227
Elliott, E. C., Pondera County Commissioner 179
Frisbee, Selden, City Attorney, Cut Bank, Mont 189
Gervais, Bob, Blackfeet Tribal Council 152
Harman, Kenneth, Mayor, Kevin, Mont 169
Hyatt, N. J., Mayor, Havre, Mont 172
Johnson, Fred, Glacier County Commissioner 176
Kalbfleisch, Rae, county attorney, Toole County 188
Keil, Dale, chairman, Marias and Milk River Drainage Association 216
Kennedy, William W., member, Blackfeet Tribe 232
Kronebusch, Donatus A., president, Board of Directors, Pondera County Canal and Reservior Co 205
Lakey, Troy, District 4, Montana Association of County Commissioners 186
Nelson, James C., County Attorney, Glacier County 168
Olson, Bud C., Teton County Commissioner 175
Peterson, Darrell T., Secretary, Cut Bank Chamber of Commerce 224
Ross, Hon. Audrey, Representative, Montana State Legislature 196
Roy, Phil, attorney for the Blackfeet Tribal Council 152
Sheehy, Tom, Montana Land and Mineral Owners Association 220
Sherrard, Tom, Toole County Commissioner 178
Smith, Ronald W., county attorney, Hill County 199
    Prepared statement 202
Underdal, Hon. Melvin, Representative, Montana State Legislature 180

PREPARED STATEMENTS

City of Conrad, Mont 214
DeYong, Deanna, Kalispell, Mont 250
Hamaker, Dorothy, M., Shelby, Mont 241
Montana Land and Mineral Owners Association 238
Robbin, Walter C., and Nita G., Bigfork, Mont 249
Thompson, Robert E. and Sunie L., Whitlash, Mont 244
Watson, Mike, in support of Bob Gervais, Blackfeet Tribal Council 154
Wilcox, Louella J., Shelby, Mont 246

BILLINGS, MONTANA

WITNESSES

Andrews, Dr. Charles, hydrologist, Northern Cheyenne Tribe 412
    Material submitted 414
Bigby, Delmar "Poncho", Tribal Land Use Planner, Fort Belknap Indian Community 389

Digitized by Google

	Page
Etchart, Gene, Glasgow Irrigation District	432
Report submitted	437
Graham, Hon. Carroll, Montana State Senator	286
Material submitted	291
Lamebull, Francis, Tribal Attorney, Fort Belknap Indian Community	389
La Mere, Pete, Chippewa-Cree tribal councilman, Rocky Boy Reservation	399
Material submitted	404
Letter of September 5, 1979	409
Langdorf, Pete, Assistant Commissioner, Yellowstone County	284
Marlenee, Hon. Ron, a U.S. Representative in Congress from Montana	252
Exhibits submitted	255
Miller, Ed, Commissioner, Big Horn County	284
Old Elk, Daniel, chairman, Crow Tribe Water Resources Commission	304
Plumage, Charles "Jack", tribal chairman, Fort Belknap Indian Community	389
Quigley, Dr. Ellen, Northern Cheyenne Tribe	411
Ranstrom, Donald A., Blaine County attorney	442
Real Bird, Edison, delegate, Crow Tribe	305
Schoppert, Thomas, General Counsel, Crow Tribe	309
Material submitted	313

Ronan, Montana

WITNESSES

Bridenstine, K. M., attorney, Polson, Mont	473
Letter of July 31, 1979	475
Curtiss, Hon. Aubyn, representative, District 30, Montana State Legislature	472
Donahue, Norbert F., City Attorney, Kalispell, Mont	459
Eve, Joseph, representing Mayor Norman Stedje, Ronan, Mont	458
Ingraham, Lloyd, attorney	534
Material submitted	536
Jareki, Charles, Western Montana Stockman's Association	532
Kaufman, Leonard, attorney, Flathead Conservation District	463
Loble, Les, attorney	525
Matthies, Wally, president, Montanans Opposing Discrimination	502
Mertz, Paul, reservoir owner	531
Morigeau, E.W., vice chairman, Confederated Salish and Kootenai Tribes	515
Prepared statement	513
Otter, Lucille, Flathead Resource Organization	523
Letter of September 17, 1979	525
Roberts, Joe, Chief Legal Counsel, Office of the Governor of Montana	455
Stevenson, Evelyn K., attorney, Flathead Tribe, Confederated Salish and Kootenai Tribes	505
Van Rinsum, Francis, Chairman, Flathead Conservation District	465
Information supplied	471

PREPARED STATEMENTS

Borgen, Norman and Florence, Columbia Falls, Mont	569
Bruins, Christine, Helena, Mont	568
Duncan, John W., Joplin, Mont	590
Harmon, Dean, Bainville, Mont	574
Lake County Board of Commissioners	519
Meyer, Winifred and Henry, Conrad, Mont	586
Moon, George L., Project Engineer, Flathead Irrigation Project, St. Ignatius, Mont	486
Morsby, Julio K., Missoula, Mont	577
Orcutt, E.H., Augusta, Mont	570
Orem, Belinda K., Columbia Falls, Mont	501
Orem, Everett G., Columbia Falls, Mont	591
Patton, Gail, past president, Western Montana Stockman's Association	532
Peters, Genevieve, Conrad, Mont	575
Taliafero, Frank and Sarah, Dupuyer, Mont	598
Wells, George W., Commissioner, Sanders County, Mont	585
Williamson, Holland, etc	583

Digitized by Google

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Digitized by Google

CONTENTS

WASHINGTON, D.C.

WITNESSES

	Page
Flint, Myles, Chief, Indian Resources Section, Land and Natural Resources Division, Department of Justice	3
Fredericks, Thomas, Associate Solicitor, Division of Indian Affairs, Department of the Interior	22
Gerard, Forrest, Assistant Secretary of the Interior, Indian Affairs, Department of the Interior	22
Krulitz, Leo, Solicitor, Department of the Interior	22
Prepared statement	28
Sagalkin, Sanford, Deputy Assistant Attorney General, Land and Natural Resources Division, Department of Justice	3
Prepared statement	4
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MATERIAL SUBMITTED

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WITNESSES

Aasheim, Magnus, farmer, Sheridan County, Mont	105
Cromwell, commissioner of Valley County, Mont	69
Crusch, Fay, chairman, Northeastern Montana Water Rights Association	98
Halverson, James, chairman, Board of Commissioners, Roosevelt County, Mont	71
Hollow, Norman, chairman, Assiniboine and Sioux Tribes, Fort Peck Reservation	75
Maddox, Wesley, representing Chinook and Blaine County, Mont	114
Marlenee, Hon. Ron, U.S. Representative in Congress from Montana	110
O'Connor, Mayor L.J., Nashua, Mont	65
Osby, Mayor Ryley, Wolf Point, Mont	66
Overcast, John, Commissioner, Paradise Valley Irrigation District, Blaine County, Mont	110
Perry, William R., attorney, Assiniboine and Sioux Tribes, Fort Peck Reservation	75
Letter of August 21, 1979	82
Rector, James, city attorney, Glasgow, Mont	61
Romo, Mayor Clarence, Bainville, Mont	60
Ross, William, Montana Land and Mineral Owners Association	116
Schuster, Gerard, city attorney, Wolf Point, Mont	66
Shields, Caleb, vice chairman, Assiniboine and Sioux Tribes, Fort Peck Reservation	75
Prepared statement	88
Smrcka, Mayor James R., Glasgow, Mont	61
Swinden, Ted, Lieutenant Governor, State of Montana	59
Tande, C. William, Commissioner, Daniels County, Mont	73
Warner, John, attorney, Havre, Mont	107

725737

Digitized by Google

PREPARED STATEMENTS

Page

Anderson, Martha, Nashua, Mont ... 144
Daniels County, Board of County Commissioners ... 120
Demko, Jack, Poplar, Mont ... 129
Dodson Irrigation District ... 124
Glasgow Irrigation District ... 122
Hamcock, Vern I., Medicine Lope, Mont ... 140
Jergeson, Greg, Montana State Senator ... 118
Johnson, Kermit and Frieda, Plentywood, Mont ... 146
Langer, Bernard, Scobey, Mont ... 148
Maloney, Rosalene V., Turner, Mont ... 143
Malta Chamber of Commerce ... 125
Malta Irrigation District ... 123
Meisdalen, Noble, Phillips County farmer ... 128
Roosevelt County, Board of County Commissioners ... 121
Schuster, Gerard M., attorney ... 136
Shipstead, Milton, Scobey, Mont ... 145
Swank, Eugene R., Poplar, Mont ... 139
Ulrich, R. H., president, First State Bank, Malta, Mont ... 127
Vies, Lynn ... 142

CUT BANK, MONTANA

WITNESSES

Barcus, Steve, Mayor, Browning, Mont ... 170
Brunner, Mrs. Jo, WIFE of Montana ... 227
Elliott, E. C., Pondera County Commissioner ... 179
Frisbee, Selden, City Attorney, Cut Bank, Mont ... 189
Gervais, Bob, Blackfeet Tribal Council ... 152
Harman, Kenneth, Mayor, Kevin, Mont ... 169
Hyatt, N. J., Mayor, Havre, Mont ... 172
Johnson, Fred, Glacier County Commissioner ... 176
Kalbfleisch, Rae, county attorney, Toole County ... 188
Keil, Dale, chairman, Marias and Milk River Drainage Association ... 216
Kennedy, William W., member, Blackfeet Tribe ... 232
Kronebusch, Donatus A., president, Board of Directors, Pondera County Canal and Reservior Co ... 205
Lakey, Troy, District 4, Montana Association of County Commissioners ... 186
Nelson, James C., County Attorney, Glacier County ... 168
Olson, Bud C., Teton County Commissioner ... 175
Peterson, Darrell T., Secretary, Cut Bank Chamber of Commerce ... 224
Ross, Hon. Audrey, Representative, Montana State Legislature ... 196
Roy, Phil, attorney for the Blackfeet Tribal Council ... 152
Sheehy, Tom, Montana Land and Mineral Owners Association ... 220
Sherrard, Tom, Toole County Commissioner ... 178
Smith, Ronald W., county attorney, Hill County ... 199
  Prepared statement ... 202
Underdal, Hon. Melvin, Representative, Montana State Legislature ... 180

PREPARED STATEMENTS

City of Conrad, Mont ... 214
DeYong, Deanna, Kalispell, Mont ... 250
Hamaker, Dorothy, M., Shelby, Mont ... 241
Montana Land and Mineral Owners Association ... 238
Robbin, Walter C., and Nita G., Bigfork, Mont ... 249
Thompson, Robert E. and Sunie L., Whitlash, Mont ... 244
Watson, Mike, in support of Bob Gervais, Blackfeet Tribal Council ... 154
Wilcox, Louella J., Shelby, Mont ... 246

BILLINGS, MONTANA

WITNESSES

Andrews, Dr. Charles, hydrologist, Northern Cheyenne Tribe ... 412
  Material submitted ... 414
Bigby, Delmar "Poncho", Tribal Land Use Planner, Fort Belknap Indian Community ... 389

Digitized by Google

Page

Etchart, Gene, Glasgow Irrigation District 432
Report submitted 437
Graham, Hon. Carroll, Montana State Senator 286
Material submitted 291
Lamebull, Francis, Tribal Attorney, Fort Belknap Indian Community 389
La Mere, Pete, Chippewa-Cree tribal councilman, Rocky Boy Reservation 399
Material submitted 404
Letter of September 5, 1979 409
Langdorf, Pete, Assistant Commissioner, Yellowstone County 284
Marlenee, Hon. Ron, a U.S. Representative in Congress from Montana 252
Exhibits submitted 255
Miller, Ed, Commissioner, Big Horn County 284
Old Elk, Daniel, chairman, Crow Tribe Water Resources Commission 304
Plumage, Charles "Jack", tribal chairman, Fort Belknap Indian Community 389
Quigley, Dr. Ellen, Northern Cheyenne Tribe 411
Ranstrom, Donald A., Blaine County attorney 442
Real Bird, Edison, delegate, Crow Tribe 305
Schoppert, Thomas, General Counsel, Crow Tribe 309
Material submitted 313

RONAN, MONTANA

WITNESSES

Bridenstine, K. M., attorney, Polson, Mont 473
Letter of July 31, 1979 475
Curtiss, Hon. Aubyn, representative, District 30, Montana State Legislature 472
Donahue, Norbert F., City Attorney, Kalispell, Mont 459
Eve, Joseph, representing Mayor Norman Stedje, Ronan, Mont 458
Ingraham, Lloyd, attorney 534
Material submitted 536
Jareki, Charles, Western Montana Stockman's Association 532
Kaufman, Leonard, attorney, Flathead Conservation District 463
Loble, Les, attorney 525
Matthies, Wally, president, Montanans Opposing Discrimination 502
Mertz, Paul, reservoir owner 531
Morigeau, E.W., vice chairman, Confederated Salish and Kootenai Tribes 515
Prepared statement 513
Otter, Lucille, Flathead Resource Organization 523
Letter of September 17, 1979 525
Roberts, Joe, Chief Legal Counsel, Office of the Governor of Montana 455
Stevenson, Evelyn K., attorney, Flathead Tribe, Confederated Salish and Kootenai Tribes 505
Van Rinsum, Francis, Chairman, Flathead Conservation District 465
Information supplied 471

PREPARED STATEMENTS

Borgen, Norman and Florence, Columbia Falls, Mont 569
Bruins, Christine, Helena, Mont 568
Duncan, John W., Joplin, Mont 590
Harmon, Dean, Bainville, Mont 574
Lake County Board of Commissioners 519
Meyer, Winifred and Henry, Conrad, Mont 586
Moon, George L., Project Engineer, Flathead Irrigation Project, St. Ignatius, Mont 486
Morsby, Julio K., Missoula, Mont 577
Orcutt, E.H., Augusta, Mont 570
Orem, Belinda K., Columbia Falls, Mont 501
Orem, Everett G., Columbia Falls, Mont 591
Patton, Gail, past president, Western Montana Stockman's Association 532
Peters, Genevieve, Conrad, Mont 575
Taliafero, Frank and Sarah, Dupuyer, Mont 598
Wells, George W., Commissioner, Sanders County, Mont 585
Williamson, Holland, etc 583

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MONTANA WATER RIGHTS

FRIDAY, AUGUST 31, 1979

U.S. SENATE,
SELECT COMMITTEE ON INDIAN AFFAIRS,
Ronan, Mont.

The committee met, pursuant to notice, at 10:15 a.m., in the Ronan High School Auditorium, Senator John Melcher (chairman of the committee) presiding.

Present: Senator John Melcher, chairman.

Staff present: Roy Whitacre, staff director; and Gary Kimble, counsel.

Senator MELCHER. This is an official hearing of the Senate Select Committee on Indian Affairs.

It is being held to provide the people here in Montana an opportunity to comment and testify on these water lawsuits brought by the Justice Department in April of this year.

We will call witnesses who represent cities, towns, counties, groups of defendants, irrigation districts, representatives of the tribes, and other organizations. We will take written testimony from anybody who cares to submit it.

The hearing record will remain open for any such testimony or any additions to testimony for at least 20 days from now.

We have told the school officials that we would welcome any of the students that might want to attend a portion of the hearing. It is all right with us, if, when they come in, it won't disturb the hearing record at all—there may be a little bit of disturbance, but it won't bother us and it won't bother our hearing record—and we welcome them here.

Any of the witnesses that are on the witness list and have a time constraint and wish to testify by a certain time, if they will just let us know, we will try to accommodate their interests.

We will recess at approximately noon and then reconvene at approximately 1:30 this afternoon. We would expect that all of the testimony will be submitted by about 4 o'clock. We will close the hearing then. I will remain afterwards, however, to discuss with any of you any of the points in the water lawsuits or any other matter. So if you have something you wish to discuss with me, feel free to approach me after we recess at noon or after we adjourn later this afternoon.

These public hearings on the Justice Department's lawsuits in Montana should really serve notice on the people here in this State to alert all Montanans that the Justice Department is really reaching much farther than just Indian water claims. The suits are designed, if they go to their ultimate decision, to adjudicate water in these drainages and to identify Federal reservations of water for the future.

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That doesn't just involve Indian water claims or the rights of tribes; it involves the Federal reservation of water for the future, which would be under Federal control.

There is a clear difference you should understand, that unlike the western concept of water that we are familiar with—where we establish priorities for beneficial use of water, and where we recognize that community and agricultural purposes for using water are of the highest priorities; unlike that understanding that we have here in the West—the Justice Department lawsuits are predicated upon an entirely different basis which just does not reflect our western values and western concepts for water uses.

Montana's agricultural use of water, in my judgment, is likely to come close to doubling in the next 15 or 20 years. I say that because we know that sprinkler irrigation is not only here, it is going to be increased very rapidly throughout the State. That would bring thousands upon thousands of acres of Montana land under irrigation and put it to a higher beneficial use in terms of productivity.

Furthermore, the Justice Department has named, at present, 3,400 defendants in Montana, including cities and towns and irrigation districts on these four drainages of the Poplar, the Marias, the Milk, and the Flathead. The Justice Department testified on July 30 that they intend to name as defendants all water users in those water drainages, and so the number of defendants, if you include those that are in cities and towns, will likely reach 100,000 or more of Montanans.

I think it is clear that the scope of these suits, and the long delay in adjudicating all water in these drainages, and the very threat of unknown amounts of—and I use this in quotes—"Federal reservations of water," it ought to be clear to us here in Montana that we have to react very strongly and very forcefully at this time.

The bonding capabilities for cities, towns, and irrigation districts will probably come under somewhat of a cloud, because they are named as defendants in a long drawn-out water suit. Individuals with their land may find that their land title is coming under a cloud because of the water suit.

On Monday of last week, the city of Shelby accepted bids on some water revenue bonds exceeding $1 million for improvements in their water system. They had a contractor in place already working on the improvements prior to the actual sale of the bonds. They had one bidder at the bond sale—Piper, Jaffray and Hopwood—who bid it in at 7.29 percent interest for those water revenue bonds. D. A. Davidson, the brokerage firm that was handling the bond sale, advised the city of Shelby the next morning that they had better disclose that they are named as defendants in one of the lawsuits—so they disclosed. Piper, Jaffray and Hopwood said: "Well, we will have to reconsider whether or not we want our bid at that rate or whether we want to bid at all."

In the middle of this week, Piper, Jaffray and Hopwood advised the city they don't think they want the bonds. D. A. Davidson said: "Maybe we can handle them, and if we can handle them, it will be at 7¾ percent, a half percent up." Of course, these are tax-free bonds and that is the reason for those rates.

The contractor—Felton, from Missoula—already working on the project, is naturally held in limbo. He doesn't know what to do. Should he shut the job down now, so as of yesterday or today, he was going to discuss it with D. A. Davidson and see whether he felt—he

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was confident that the bonds would be picked up and there wouldn't be any more hitches and he could continue on the job. If he shuts down the job, if he withdraws from the job, probably the city of Shelby will have to go through the whole process of readvertising for a bid on the contract, and that will take a while. That means the job probably won't go in this fall. So they are faced with either paying a higher interest rate or telling the contractor to shut down while they palavar over this. They are inclined to think they are better off paying the higher interest rate if D. A. Davidson will pick it up at that extra half percent and keep the contractor working, because if they have to readvertise, it is going to cost them more anyway.

I go through all this scenario because I think we ought to pay some attention on the effects of water lawsuits. If there is some opportunity to think that these water lawsuits would be ended in a few months, that would be another matter, but forget it. The gentleman on my left here come from Nevada, and he tells me there is one suit still pending that is 50 years old, is that right?

Mr. WHITACRE. That is correct.

Senator MELCHER. One water lawsuit pending in Nevada that has been going on for 50 years. Most of us aren't going to live that much longer, and so we have to do the best we can to sort out these facts and see where we are going and see what can be done.

These suits are not well-prepared. The Justice Department and the Interior Department have not prepared well, and we will be relating a portion of the reasons why they are not well-prepared, as I continue my remarks.

This is the fourth of the water hearings here in Montana by the Senate Indian Affairs Committee. It is the fifth of the Senate hearings, though. On July 30, in Washington, we received testimony from the Justice Department and from the Interior Department, and that hearing focused on the facts, as they saw them, in instigating these four massive water suits.

Since then, we have had hearings in Glasgow, Cut Bank, and Billings. At Billings, we took testimony on two additional water suits that were instigated in 1975. One involves the Northern Cheyenne Tribe on the Rosebud Creek drainage and Milk River drainage, and the other involves the Crow Tribe on the Big Horn River drainage.

Because the outcome of these suits could set a precedent affecting all western States, the five-member Senate Select Committee on Indian Affairs has unanimously agreed to this extensive set of hearings on these Montana lawsuits.

On July 30, in Washington, at the hearing there, the position taken by the Justice Department seemed to me to be a type of position where a trial lawyer grasps for every last straw to make a strong case for his client. For example, the Justice Department attorneys, even in contradiction to the Interior Department's attorneys, testified that everyone in the drainage area who used water, whether it was from surface or subsurface, would be named as defendants.

In addition, they have named as defendants cities and towns which are merely leasing water from the Bureau of Reclamation—a Federal agency. They have talked about the need to name as defendants farmers and ranchers who only use subsurface water from their own wells, and cities and towns who only use subsurface water from their own wells. When I asked them: How do you identify

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that as being in connection with all the rest of it? They said: Hydrologic studies would probably indicate that all these users of subsurface water, through their own wells, were probably in the same drainage as one of these river systems. Yet they have absolutely no hydrologic study to present—absolutely none.

I questioned the Justice Department attorneys on July 30 concerning the prior beneficial uses of establishing a valid water claim by non-Indians. They don't view the case that way. They don't believe that even though the water rights for non-Indians are long-established, long-used in a beneficial way—they refuse to concede the point that there ought to be a process for eliminating these defendants from the suit. When I questioned the Federal Government witnesses, if they sought to establish Indian claims for water reservations for the tribes for industrial purposes such as synfuel plants, to be used some time in the future, the Interior Department attorneys said that that was a "speculation." I use the word speculation in quotes. That is their word.

This scenario that they have devised is a very chaotic scenario. I believe Congress, if necessary, will reaffirm the western water law doctrine of first in time, first in place, first in right, to confirm beneficial use. That priority for domestic purposes, for agricultural needs, for livestock watering, for irrigation purposes, for protection of streams for fish habitat, cannot and must not be shunted aside for power grabs by those who are seeking industrial water, whether it is Federal agencies that are seeking these reservations of water in the future for industrial purposes, or whether it is Indian or non-Indian.

In my judgment, if it is necessary, Congress will reaffirm the concept that we understand governing beneficial use, system of priorities for agriculture, domestic use, cities and towns as being of the highest priority.

Now, the overall goal of these hearings is, first of all, to establish a solid record on who is using water in Montana and for what purposes.

Second, we want to, as much as possible, sort out how much water is being used from subsurface as compared to surface; to document as best we can at this time whether there are water shortages on parts of these drainages; and to record—if there is any hydrology available from knowledgable witnesses—how that hydrology is affecting subsurface water.

The committee will seek, on the basis of these public hearings and the material we receive, to drastically limit the scope of the suits, eliminating high priority beneficial water users from the list of defendants. We will seek to get the Justice department to agree to that, and for a very obvious reason. We have heard plenty of testimony that the usual beginning cost for any defendant to get some legal advice is about $250. It is obvious that those are just initial costs and that if the suits drag on, the price for legal defense for defendants will be compounded dramatically. These lawsuits have a habit of going on for decades.

Finally, if the facts presented in these public hearings demonstrate to the satisfaction of the committee that the suits are improper and ill-timed, the committee will so advise the Justice Department and recommend withdrawal of the suits.

We will, first of all, hear from Joe Roberts, chief legal counsel, the Governor's office, representing the State of Montana. Joe?

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STATEMENT OF JOE ROBERTS, CHIEF LEGAL COUNSEL, OFFICE OF THE GOVERNOR OF MONTANA

Mr. Roberts. Thank you, Senator Melcher.

As you indicated, my name is Joe Roberts, and I am chief legal counsel in the office of the Governor, and I am representing him here today.

The weather seems to be quite appropriate for the subject matter of this hearing this morning. In fact, it occurred to me driving through the torrent from Kalispell this morning, that if it kept raining like that, perhaps we would have enough water that there wouldn't be anything to argue about.

The chairman referred to the possible length of these legal proceedings and it called to mind a little story. After these suits were filed, we had many inquiries in the Governor's office. There were several meetings set up around the State, and we tried to go out as much as we could to meet with groups of defendants who had been served. One of the pieces of advice that we rightfully, I think, had to give people was that they needed the advice and counsel of an attorney to make a specific evaluation of their claim. One of the questions at one particular meeting we were at, was: What kind of lawyer do I need? We didn't quite know how to respond to that question. Somebody piped up in the back of the room, "Just make sure he's a young one." While there is some obvious humor in that, I think it really has some unfortunate truth to it, also.

The Governor would like to congratulate you, as chairman of the select committee, and the select committee itself for holding these field hearings in Montana, for taking this extensive testimony of people who have been named as defendants in this suit. He feels that it is very appropriate for you to do so.

I am not going to take a lot of time this morning in developing the legal position of the State. I don't think that is the purpose of your hearings. I think the purpose, as you have adequately stated, is to hear from the people who have been served and named as defendants and who are water users in this State. I want to leave, certainly, the bulk of the hearing for them.

I would like to indicate the basic legal position of the State of Montana. We are named both in our proprietary interest as landowners and water claimants through the State, and also in a protective capacity for its citizens. Our basic legal position is that all waters of this State ought to be adjudicated through the State adjudication process. That includes all the water claimants in Montana, all the Federal claimants, and all the Indian tribes. We feel that that can be done fairly and equitably to all parties. That when you examine the history and development of water law in the West, the State courts have traditionally provided the forum for water adjudication. They have the expertise. They have developed the special procedures necessary to do comprehensive adjudications of water. So, it seems only appropriate that that be done in this instance, also.

I am sure that the chairman is familiar with the McCarran amendment passed by the Congress in 1952. It is a clear statement from Congress that the appropriate forum to adjudicate water is within the States themselves. Further evidence of this goes all the way back to the Desert Claims Act, which indicated that the procedure for

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proving up a water claim was through the local and State water processes. So there is just ample historical and congressional documentation and fact that the appropriate place to deal with these water suits is through the State court forum.

I am sure the chairman is also familiar with the relatively recent *Aiken* decision in 1976, which cleared up one question some people had had as to whether the McCarran amendment also applied to Indian tribes. The very clear statement from the Supreme Court said that that amendment did also apply to the tribes and, consequently, tribes could be brought into a comprehensive statewide adjudication of water such as is going on in Montana right now. So that provides a very clear legal position to bring the tribes and the other Federal entities into the State court process and into the general adjudication, as contemplated in the 1973 Water Use Act, as amended by Senate bill 76 most recently.

Apropos of your comments in introducing it, which I thought were very well-taken, I would just like to mention that there has been a Solicitor's opinion from the Interior Department, issued this summer dealing with the non-Indian and reserved water that they claim. That opinion, we feel, having reviewed it quite carefully, is very accommodating to the State water adjudication process and is indicating that the Federal Government will quantify their reserved rights, will come through the State process, and will file under State law. They will go through the adjudication process on the State level.

Now they are saying that is for all Federal claims except Indian claims. We certainly support that position as put out in the Solicitor's opinion. So it seems to me, then, the only reason we are in Federal court is because of the Justice and Interior Departments' decision that as far as Indian water claims, they will go to Federal court, because they are admitting and agreeing, through this recent Solicitor's opinion, that they will bring the other Federal claims through the State process,

As I said, I don't want to ramble on at length on legal issues. I would be glad to discuss anything further, or develop anything further, but I do want to say one word about negotiations, because that has been mentioned in these discussions.

I want to indicate that the Governor feels very strongly that to the extent that negotiations can be done in a public forum, that that is a logical and hopefully fruitful way to dispatch with these lawsuits. The mechanism for doing that is provided through recent legislation in Senate bill 76, which created a reserved water rights compact commission with authority to negotiate directly with the tribes and with the Federal Government.

I want to indicate that the Governor feels that that process ought to be explored and is committing the resources of State government to that. That any products of negotiation, of course, would have to be ratified by the State legislature and Congress and that, hopefully, that will be fruitful. It certainly is preferable to the time and expense that all parties will be faced with if we get into interminable litigation. What is particularly frustrating is that we are just arguing procedure now. We are arguing whose court to be in. We could be involved in procedural issues for 10 years without ever getting down to adjudicating water, and that would be most unfortunate.

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It is really to the benefit of both the tribes and the water claimants under Montana law to solidify and prove up our water claims in Montana so that we are in a much better position vis-a-vis downstream States, who are really the most covetous of the wonderful resource we have in this State of water. In the long term, that is who we really have to be looking at—the downstream States who can't wait to lay claim on our water. As long as our water system and our water law is up in the air and in litigation, and the more we dally with that, the worse shape we are going to be in in defending our State's interests, and all the citizens, Indian and non-Indian, in that litigation which is certain to come sometime in the future.

Mr. Chairman, I just want to thank you again for the forum you have provided, and your committee has provided, to the people of Montana. I want to tell you that the Governor, I am sure, would subscribe to your opening remarks. I wish you well in your proceedings.

Thank you.

Senator MELCHER. Thank you, Joe. I am interested in the Solicitor's opinion that you mention, but there are so many, I am not even sure that Solicitor's opinion would hold as it affects Federal agencies within the Department of the Interior.

While I don't think the Justice Department has any particular expertise on pressing water lawsuits, they seem to have the idea that they want to run the show.

As it happened, at the July 30 hearing, when we tried to pin down whether the defendants named, the list meant to include those that only used the water for livestock on their farm or ranch and in their domestic use, the Solicitor for the Interior Department said: "No, if they could identify those and that is all the water they used, they were sure they could be removed from the list of defendants." They were immediately corrected by the Justice Department: "That all water users would be named, regardless of the amount, or regardless of whether it was just subsurface water." So the attorneys for the Interior Department pulled in their horns and backed off. It is clear that Justice is going to run the show and is calling the shots. I find it very disconcerting that they are, because there is a feeling in Washington that the Justice Department, while not being directly involved in these suits until they were filed, has been building up a group within the Justice Department that has had a great interest in pushing such suits.

I think it is a little bit menacing to view the scope in which they envision the suits and their lack of any plan for limiting that scope or for minimizing the length of time that it will take.

Of course we have had recommendations that the McCarran Act be reviewed by the committee, as to whether that should be part of our consideration prior to making the recommendations to the Justice Department, and we will certainly do that.

We will continue to consult with Montana people between now and the end of the year, and particularly, prior to the time we make our recommendations to the Justice Department as an outcome of these hearings.

I want to thank you very much, Joe, for being here, and thank the Governor for having you appear representing the State of Montana.

Mr. ROBERTS. Thank you.

Senator MELCHER. Norman Stedje, Mayor of Ronan.

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STATEMENT OF NORMAN STEDJE, MAYOR, RONAN, MONT., PRESENTED BY JOSEPH EVE

Mr. EVE. Mr. Stedje couldn't be here. He and his family had a planned vacation in Oregon, and he asked me to come in his place.

The city of Ronan has two sources of water. Our main source of water comes from Spring Creek up in the mountains, which runs through a chlorination unit to purify it before it gets to the city and we also have a well within the city park that produces some water.

We use probably a little less than 1 million gallons of water a day and supply over 2,000 people in the area outside the city and in the city.

Our big problem right now, our old line is pretty well antiquated and needs to be replaced but with things up in the air, it is kind of hard to tell just which way to move at this time, so we are doing some work on it, putting in a new 12-inch line, with some Indian help, and just how far we will go on that will depend on the outcome of some of these meetings.

I don't know how much more information you want, but we are having quite a bit of trouble with both water and sewer.

Senator MELCHER. Is the city of Ronan named as a defendant?

Mr. EVE. I couldn't tell you.

Senator MELCHER. This water you receive from Spring Creek is gravity flow?

Mr. Eve. Yes.

Senator MELCHER. Is it based on a water right?

Mr. EVE. I don't believe so.

Senator MELCHER. How long has it been used?

Mr. EVE. Oh, probably back in the 20's.

Senator MELCHER. The well that is in the park: How long ago was it drilled?

Mr. EVE. That is not too old, maybe 15 to 20 years.

Senator MELCHER. The total gallonage totals around 1 million a day?

Mr. EVE. A little less than 1 million. We are planning on putting in a 1 million gallon tank on the east side of town to take care of any emergencies for a day.

Senator MELCHER. How far outside of town do you go and how do you determine when you go outside the city limits?

Mr. EVE. Anyone along the line that needs water, gets it.

Senator MELCHER. Is that along the line from Spring Creek?

Mr. EVE. Yes.

Senator MELCHER. Do you extend your water lines outside the city limits otherwise?

Mr. EVE. Yes; just on the east side, just on Spring Creek.

Senator MELCHER. Does the city provide fire protection outside the city limits?

Mr. EVE. There is a rural fire department in connection with the city—all housed in the same unit.

Senator MELCHER. They work together?

Mr. EVE. Yes.

Senator MELCHER. Does it provide fire protection on a nondiscriminating basis?

Mr. EVE. Right.

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Senator MELCHER. Any water that you supply outside of the town is nondiscriminating?

Mr. EVE. Right.

Senator MELCHER. Just location?

Mr. EVE. Right, anyone that wants it.

Senator MELCHER. Have you ever had a water shortage?

Mr. EVE. When the old line breaks, this about throws the city out of water.

Senator MELCHER. The improvement that you are talking about is improving the line on Spring Creek?

Mr. EVE. Right, which would probably run a little less than $1 million if it was completely done right.

Senator MELCHER. And that would require probably a bond sale?

Mr. EVE. Right, and some Government help.

Senator MELCHER. Would those be revenue bonds?

Mr. EVE. Possibly.

Senator MELCHER. Are the water rates high here?

Mr. EVE. No; very low.

Senator MELCHER. But there is no water shortage?

Mr. EVE. Not really; no.

Senator MELCHER. Unless there is just some mechanical breakdown?

Mr. EVE. Right.

Senator MELCHER. Have you ever had a complaint, to your knowledge, of using water out of Spring Creek?

Mr. EVE. Not that I know of.

Senator MELCHER. Have you ever had a complaint about the city of Ronan pumping water through your well in the park?

Mr. EVE. No. We have two wells, and one we don't use because it throws quite a bit of silt into the line. It is kind of a dud, so we just use the one.

Senator MELCHER. I think that is all I have. Thank you very much, Joe.

Norbert F. Donahue, city attorney, and Norma Happ, mayor of Kalispell.

STATEMENT OF NORBERT F. DONAHUE, CITY ATTORNEY, KALISPELL, MONT.

Mr. DONAHUE. Senator, I am Norbert F. Donahue. I am city attorney for the city of Kalispell. Our mayor, Norma Happ, is here in attendance, but she has asked me to speak in behalf of the city, so I am speaking in behalf of our mayor.

Echoing some of the remarks of Mr. Roberts' testimony, when I first heard of this lawsuit being filed, I made a rather facetious remark to one of my friends that if the Congress had done this they would have to entitle it the Lawyers Relief Act, because as I could see it, this would do nothing but keep lawyers busy for years and years and years.

The lawsuit, as I see it, is an effort by somebody, whose motive I have no idea of, to pitch citizen against citizen in the vital field of the use of water.

The Senator has covered some of the points in my prepared testimony here, but I would like to read for the record the letter that I would file with you as our prepared testimony.

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At the outset, I would say that I have not received a copy of any amended complaint, and so if there are any other parties that have been added as defendants, I am not aware of them other than those that were in the copy that was served upon the city of Kalispell.

My letter and prepared statement are as follows:

Dear Senator Melcher and committee members: This statement is submitted on behalf of the city of Kalispell, a municipal corporation of the State of Montana, one of the named defendants in the referenced litigation.

This litigation appears to be a suit by the United States on behalf of the confederated Salish and Kootenai Tribes brought at the request of the Department of the Interior. The purpose is to adjudicate the rights of the Indian tribes and the individual members thereof, as opposed to the defendants named, to the appropriation and use of the "surface and ground waters within the Flathead River Basin."

Rights of the Indians are claimed to flow from the Treaty of Hellgate dated July 16, 1855. Other later laws are cited reflecting specific waters claimed by various agencies of the United States, usually a bureau within the Department of the Interior.

The defendants are largely specific individuals and private corporations. I presume they are persons claiming a right to use the waters either in or expected to flow through the Indian reservation created by the Treaty of Hellgate. The Indians and the U.S. agencies involved claim prior rights to the waters involved.

Only three local public entities are listed as defendants; namely, the city of Columbia Falls, the city of Kalispell, and the State of Montana. As an aside, the city of Ronan is not a named defendant and nothing has been served upon them. Neither the city of Columbia Falls nor the city of Kalispell is within the reservation, and the State of Montana exerts little influence on waters actually within the reservation.

Several other communities, also not on the reservation but who use water for public municipal purposes, are not named defendants, notably the city of Whitefish and the communities of Lakeside, Bigfork, Hungry Horse, Coram, Essex, and West Glacier. These communities, as well as several private water districts and other associations within the Flathead River basin are also not named defendants.

It is also interesting to note that none of the cities or towns within the reservation are named. One wonders why Polson, Ronan, and St. Ignatius are not named; surely they have municipal water systems similar in some degree to Columbia Falls and Kalispell. Could it be that the United States wishes to litigate directly only with non-Indian cities and towns on a theory that less opposition will result? Also, how many of the individually named persons are off-reservation residents who will experience less impact than an on-reservation water user with an unfavorable result?

The city of Kalispell's municipal water supply is almost wholly from deep wells, some of which are deeper than the deepest points of Flathead Lake. It takes a legal fiction to sustain a holding that our water supply is in a source flowing through or under the reservation in the manner that could have been even remotely contemplated by the parties to the Treaty of Hellgate or meant by the Congress in passing any of the later laws dealing almost exclusively with surface waters.

Yet the result of this lawsuit could have a devastating effect on other nonreservation towns or cities not named.

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We don't wish to cause any embarrassment to our sister city of Whitefish, but Whitefish gets its water from a creek and from Whitefish Lake, both of which are part of the Flathead River basin surface water system, yet Whitefish is not a named defendant. Municipalities within the reservation, Ronan, Polson, and St. Ignatius, could be even more directly affected, yet none of these are named defendants, at this time.

Can the U.S. Department of Justice have possibly engaged in picking target defendants? Those of us who are lawyers know the trick of picking a target defendant—who have a minimum of potential impact from an unfavorable result, and then apply the decision to individuals and municipalities more drastically affected? If not, why has the United States not named all potential defendants?

When one reviews the complaint, it becomes obvious that the United States itself has created the problem here, if, in fact, there is a problem. It was the United States that wrote the Treaty of Hellgate in such a fashion as to render doubtful both Indian and non-Indian water claims in the entire Flathead River basin and in the Yellowstone, Milk, Missouri, and Marias Rivers in the other Montana Indian water rights cases.

The entire Flathead River basin is many times larger than the original reservation. Certainly, non-Indian settlement of that area excluded from the reservation and the growth of villages, towns, and cities were contemplated by all parties to the Treaty of Hellgate in 1855. Those non-Indian settlers must have been expected to use the waters flowing past their doors and percolating under their fields and pastures.

Now may be the time to review the Treaty of Hellgate and possibly rewrite it in light of 144 years of intervening history. What did the parties really mean by "waters flowing through or under" the reservation? There are many legislative questions to be answered by the Congress, and even diplomatic questions, since the United States recognizes the Indian tribes as sovereign nations existing within its borders. Since the north fork of the Flathead River arises in Canada, should the Canadian Government also be involved in light of other reciprocal treaties with Canada?

Under the present scheme of this lawsuit, the United States, through the Department of Justice, is suing its own citizens for the negligence and oversight of the United States itself, and financing the cost with the tax dollars of those very citizens. This is not reasonable or equitable, and the crowning insult is when the defendants chosen to shoulder the cost of the defense are those most likely to be the least affected by an unfavorable decision.

The city of Kalispell has very limited budgetable resources. We should not have to spend our time and the available money of our taxpayers to defend this lawsuit.

It is reasonable and equitable for the United States to appropriate sufficient public funds to employ counsel through the office of the attorney general of the State of Montana, or some other recognized agency, to defend all of the people of Montana, individual, corporate, and governmental, in that portion of the lawsuit establishing the broad respective rights of the parties inter sese—and I refer to paragraph 2 of the prayer of the complaint. The State of Montana Legislature has established the water court procedures that can handle

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individual disputes and claims to particular waters. Mr. Roberts addressed that question.

The city of Kalispell respectfully requests your committee to favorably report the matters set out in Senator Melcher's public notice of July 27, 1979. The Departments of Interior and Justice should not be permitted to carry forward this arrogant and devious lawsuit without fully protecting the rights of innocent citizens at public expense.

This we respectfully submit, and I signed it as city attorney for the city of Kalispell.

Senator MELCHER. Mr. Donahue, you said that practically all of the water that Kalispell uses is from deep wells?

Mr. DONAHUE. Yes.

Senator MELCHER. What is the other source?

Mr. DONAHUE. I believe it is five wells. Four of those are deep wells and one is a fairly shallow well which we use to irrigate our golf course.

Senator MELCHER. Other than those five wells?

Mr. DONAHUE. We have no source other than wells.

Senator MELCHER. When you say a deep well, how deep?

Mr. DONAHUE. We have a well up to 700 feet deep.

Senator MELCHER. Up to 700?

Mr. DONAHUE. Yes; and as I understand, the deepest point in Flathead Lake is just under 400 feet.

Senator MELCHER. How much water do you use, roughly?

Mr. DONAHUE. I haven't any idea, Senator. We anticipate approximately 13,000 to 15,000 people use our water.

Senator MELCHER. Do they have to be within the city limits?

Mr. DONAHUE. Just recently, the Public Service Commission of Montana delineated our service area, and that service area includes a few enclaves or islands, you might say, outside the city, but the great majority are within the city.

Senator MELCHER. Have you ever had a water shortage?

Mr. DONAHUE. Not that I know of. We had a few anxious moments a year ago or 2 years ago, when one of our wells showed a little possibility of having some sand in it, but I don't think we have had a shortage. We just drilled a new well that went on the system within the past few months, and that is a deep well.

Senator MELCHER. What about fire protection? Do you just provide it within the city?

Mr. DONAHUE. Just within the city; yes.

Senator MELCHER. You have never experienced any complaints about the use of the water from your own wells until now?

Mr. DONAHUE. We have some of the best water in the world.

Senator MELCHER. Have you had an interrogatory request from the Justice Department?

Mr. DONAHUE. No; none at all. As a matter of fact, I have not answered the complaint at this point.

Senator MELCHER. Has this case been referred to Judge Hatfield?

Mr. DONAHUE. Yes.

Senator MELCHER. And Hatfield has the State?

Mr. DONAHUE. Again, as I said, we have not formally responded to the complaint. They could default us, I suppose.

Senator MELCHER. It is our understanding that——

Mr. DONAHUE. Judge Hatfield has said publicly, in the papers, that all proceedings are being held in abeyance.

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Senator MELCHER. Yes; and the Justice Department says that they are not going to object to that at this time.

Mr. Donahue, you mentioned the Hellgate Treaty. That is the treaty with the Flatheads in 1855?

Mr. DONAHUE. Yes, sir.

Senator MELCHER. Where do you see anything in there about water?

Mr. DONAHUE. In the complaint?

Senator MELCHER. No; in the treaty.

Mr. DONAHUE. I don't know. I haven't referred to the treaty.

Senator MELCHER. Didn't you refer to the Treaty of Hellgate?

Mr. DONAHUE. I referred to the complaint that referred to the Treaty of Hellgate.

Senator MELCHER. All right; but you haven't studied the treaty?

Mr. DONAHUE. I haven't studied the treaty; no, sir.

Senator MELCHER. If you do, let me know. We can't find much talk about water rights in the Treaty of Hellgate. It gets quite specific—I have it in front of me—for instance, it says it is going to furnish one blacksmith shop and a tinshop and gunshop to be attached to that, one carpenter's shop, one wagon and plowmaker shop, and to keep the same in repair and furnish the necessary tools to employ two farmers, one blacksmith, one tinner, one gunsmith, one carpenter, one wagon and plowmaker. It goes on in quite a lot of detail.

Mr. DONAHUE. Yes.

Senator MELCHER. But we haven't found where they talk about water. So based on the Treaty of Hellgate, I don't think we are talking about water rights. You have to look, I think, at the *Winters* doctrine.

Mr. DONAHUE. I hope you are right, Senator.

Senator MELCHER. We continually ask for advice on this, and maybe some members of the tribe will give us some citations, but we have a hard time construing most of these treaties to identify water rights at all. Mostly what we find out is that the claims for water rights for a tribe are based on the *Winters* doctrine, which is quite a few years later than most of the treaties.

I don't have any more questions. I ponder, like you do, why the Justice Department is naming as defendants some communities to the north of you, to the north of the reservation, and it is not understandable. I do not understand it at all, but the cases were filed, it seems to me, in a most haphazard way. I think there was very little preparation and very little understanding about the scope of the defendants that they would name. But they seem to be determined, at least in their testimony of July 30, to name any and all water users in this area as defendants.

All right, thank you very much, Mr. Donahue.

Mr. DONAHUE. Thank you, Senator. I appreciate the opportunity to appear.

Senator MELCHER. Leonard Kaufman?

STATEMENT OF LEONARD KAUFMAN, ATTORNEY, FLATHEAD CONSERVATION DISTRICT

Mr. KAUFMAN. Senator, my name is Leonard Kaufman. I am an attorney in the law firm of Murray, Kaufman, Vidal and Gordon, of Kalispell, and I am one of two attorneys representing the Flathead Conservation District.

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The Flathead Conservation District retained me and Mr. Gene Phillips to represent all of the members of the Flathead Conservation District in the initial proceedings of this matter—to protect the farmers, ranchers, and water users of the Flathead Valley under the Flathead Conservation District—at least up to and through those proceedings where their individual rights were adjudicated.

In addition to representing the Flathead Conservation District, I personally represent several ranchers and farmers that have land and/or water uses established either through filings or through use on the Little Bitterroot River near Hot Springs, Mont.

My concern—representing both these individuals and the ranchers, farmers, and users of the Flathead Conservation District—is that the water adjudication proceedings that are philosophically conceived of by this Federal suit must be done.

For an example, on the Little Bitterroot River, the filed appropriations and the use appropriations far exceed any flow of water in that stream in history. I am certain that a water source to supply the appropriations that are filed in the Little Bitterroot would probably equal the size of a stream of the Missouri. The Little Bitterroot is a stream, Senator, that a good strong jump, except in very high waters, would carry you across.

The other streams that are involved in this, or may be involved, are streams utilized by the irrigation systems of ranchers and farmers in the Flathead Valley in the Kalispell vicinity—the Whitefish River, the Stillwater River, the Flathead River and the various tributary streams, et cetera, that feed these streams and feed into Flathead Lake.

I submit to you, in conjunction with what has been said here, that the procedure as established by the Justice Department is a total botch. There is absolutely no way the Justice Department, in their complaint filed in this action, has even come close to naming the necessary parties that must be named to accomplish the results that they want to accomplish. As a result of this, as has already been pointed out, we are going to be in years and years and years of litigation determining who are proper parties and what court has jurisdiction.

Why they chose this is beyond me. Like Mr. Donahue before me, it appears to be that some person, or some entity, wishes to pit citizen upon citizen. Be that as it may, I suggest that even if the Justice Department reaches their goal of "service on all parties," which appears to be, from your statements and from the reports of the hearings had recently, there will still be serious questions of whether there is jurisdiction under the existing laws that the Federal Government is working under to clearly adjudicate the waters free and clear of subsequent attack.

Senator, there are little users of these waters all over the hills. They are not recorded. They are up there using this water to irrigate their 40, and they have established a use right through years and years of use only. Not through any filing right, but a use right, which has been recognized by State law. As such, if the Justice Department is going after these people who, on the face of it, have a clear right, but they do nothing more than what they have done, they are not going to have correct jurisdiction and any litigation, after all these years, would be subject to attack at any time.

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As an attorney involved in this proceeding, and recognizing that it is very important that we ascertain what these rights are for the development of Montana and for the protection of our resources, I make three suggestions to you at this time.

One: The Federal action has started involving State rights, city rights, individual rights, tribes' rights, et cetera, and should be amended into an action similar to an action of declaratory relief, whereby the State of Montana determines with the Federal Government the rights of the Federal claim. The Federal Government should get out of trying to adjudicate every individual user's rights to waters in this State.

Two: In addition to this, supplemental to this, or as an alternative: I would submit that Federal legislation along the basis of our Montana Senate bill 76 could be instituted, whereby the users of water rights would have the responsibility to come in and make a claim and have that claim adjudicated, rather than the alternative system of the Federal Government bringing this lawsuit against the citizens of this State, taking upon themselves the right and duty to establish that jurisdiction.

Three: A final alternative would be along Mr. Robert's theory, where we have a State that has a history of adjudicating water rights. All of the counties of this State, Senator, don't have the benefits we do in this area. Many of them are arid. Water has been a hot topic since the first goldminer came through with his pan. I would submit that the State of Montana is an awful lot more able to adjudicate the rights of the citizens, both Indian and non-Indian, than any Federal Government monitored by a bunch of people out of Washington, D.C., who, by the very nature of their complaint, have demonstrated a total lack of knowledge of what the water situation is out in this country.

I cannot give you any specifics on the amount of waters utilized. I can only state that as an attorney representing many ranchers—I would suggest that my clients, numbering several hundred in this case, at this time—that there is absolutely no way that the Government can in any sort of an efficient fashion do that which they claim they want to do in the prayer of that complaint under the procedure they have established.

Thank you very much.

Senator MELCHER. Francis Van Rinsum?

STATEMENT OF FRANCIS VAN RINSUM, CHAIRMAN, FLATHEAD CONSERVATION DISTRICT

Mr. VAN RINSUM. Senator, my name is Francis Van Rinsum, and I am chairman of the Flathead Conservation District.

I would like to reiterate just a little bit on what you have already said and what I suppose everyone has been saying and will continue to say at all of these hearings.

The Flathead Conservation District has taken this initial lawsuit upon themselves because we felt that the residents of our district, being taxpayers—we are responsible for their water, protection of their water—and we felt that as taxpayers, we should protect them, because water is our problem and we should protect them a little bit with their tax dollars and hire some attorneys to do the protection.

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We wondered why a few individuals should bear the brunt of this rather than the whole populace because, really, these are the people who are involved in this and not just a few of them.

The trauma of a Federal marshal appearing at your door with a summons was devastating to a lot of people, particularly the older people, who have done nothing more than filing a water right and obeying the law under the laws of the State of Montana. They have done nothing wrong. They were baffled as to why they were being summoned. They just didn't know. They didn't know where to turn or go. Some of them had never even been to an attorney. They didn't know how to contact one or who to contact, and this is one reason that the Flathead Conservation District hired Mr. Kaufman and Mr. Phillips to take on this initial lawsuit and see what could be done.

We would protest the method in which some of the summonses were delivered. In some of our cases here, one of them was given to a hired man who gave it to his wife, who suddenly remembered that it was in her purse the night that we held our meeting. He thought he had gotten away without having to be summoned, when his wife walked in and pulled the summons out of her purse and handed it to him. Some of the people who have been named in the suit have still not been summoned. In one case, a name that is on the list, we can't even find the party. We have some people—one of them happens to be our own supervisor, whose father filed on a spring a long time ago, and although it wasn't a water right, he doesn't know exactly what it is, but he is named in the suit. I have consistently run into people who are completely baffled by what is going on, but are concerned about their domestic wells. All we have been telling them is, wait until you get your summons and take it from there. I have already told some of them—I said, "I don't think anybody is going to live long enough, just go ahead and use the water."

In short, there has to be a better way of adjudicating a system, looking at it from our side. You get the legalistic side—let's look at the people's side. There has to be a better way of adjudicating than the way that has been proposed. The way we are proposing to do it in Montana is the way we feel it should be done.

I would like to add one more little problem. It has been tossed out here before. I have been following the great water problem and the great water spiel of the great Southwest. I don't know exactly what the politics of this suit are, but I think we should be aware of the great water spiel of the Columbia River. We have a 10-year moratorium—another 10-year moratorium on the Columbia—where no one can take it. I would like to ask you, how long is it going to take to straighten this mess out? It is certainly going to take longer than 10 years. Will California, Utah, and the rest of them come in and say, "By this time, everything is fouled up. I'm sorry you don't have a claim on your water, but we want it," and will they get it?

I have this basically written out, but you said something in your initial remarks that scared me, Senator, and this was the fact of your stating that the Federal Government wants to know where their water is.

Will this water be diverted to the great Southwest? I think that we, as citizens of Montana, have to be aware of this, because if we are not, we are going to be left high and dry one of these days.

I would like to thank you and your committee for holding these hearings. I think it is a great service. Thank you.

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Senator MELCHER. Francis, the question you posed: "Will a Federal reservation of water lead to having water go to the Southwest?" is, of course, a question we have thought of often. Is this a possibility? But I wasn't really posing that question in my opening remarks at all. I was posing the question of the Federal reservation of water rights here for Federal uses under one of the Federal agencies. You can review the cases, everybody can, they are real interesting. But what does the Department of Agriculture, for a particular national forest, need a reservation of water for, and how much? The case that was litigated pretty fully said that they don't need that much, unless the Justice Department's claim for water for a particular national forest was shaved clear down to what they actually use, or what they might conceivably use, which is not very much. So I am spreaking about a Federal reservation of water, perhaps, for industrial uses, which could be used right here in our own State, but under Federal control.

Obviously, if the Justice Department is seeking to identify this Federal reservation of water for the future, the great amount that they would probably be indicating that they want to reserve would be for energy purposes, perhaps for syn-fuel plants. I don't think the Justice Department has worked this out at the level they want to testify on—I know they haven't but they are using that as speculation for the future. It is on that basis that I don't even think the risk we are facing here in Montana is not just getting the water diverted to some other part of the country, it is getting it to be reserved for industrial use that might conflict with our desires for agricultural uses and domestic uses. That is what really concerns me. I don't think we have had any answers yet, and I doubt whether we will get any answers for a long time, because the suits are not predicated to get over with very quickly.

I do want to establish a number of things. First of all, you are speaking on behalf of the Flathead Conservation District, both of you, is that correct?

Mr. VAN RINSUM. Yes, sir.

Senator MELCHER. How many people are involved in that conservation district?

Mr. VAN RINSUM. The entire county with the exception of the city of Kalispell.

Senator MELCHER. The entire county?

Mr. VAN RINSUM. Right.

Senator MELCHER. As such, can you identify how many people use water for agricultural purposes?

Mr. VAN RINSUM. For agricultural purposes?

Senator MELCHER. Whether it is livestock water or irrigation.

Mr. VAN RINSUM. That would be a hard figure to come up with right off the top of my head.

Mr. KAUFMAN. Senator, we filed somewhere between 70 and 80 responses to this lawsuit, and they were ranchers who were utilizing the water for agricultural purposes.

Senator MELCHER. Were they named as individuals?

Mr. KAUFMAN. They were named.

Senator MELCHER. Were any irrigation districts named?

Mr. KAUFMAN. We are not representing any irrigation districts at this time.

Senator MELCHER. To your knowledge: Were any irrigation districts named as defendants?

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Mr. VAN RINSUM. None that I know of.
Senator MELCHER. There is no pattern in why some were named and why some were not?
Mr. KAUFMAN. No, sir; and I meant to address that point. I am representing some ranchers on the Little Bitterroot——
Senator MELCHER. I know that, but that is a separate group.
Mr. KAUFMAN. OK, and the same thing is on the Flathead. We will have one person served and another person served, and a neighbor, right between them, whose pump is lying right beside the pumps, served, has never recevied service. We have had husbands and wives named and only the husband has been served; we have had brothers who operate a family operation, and only one has been served.
Senator MELCHER. Can you advise me about how many acres are involved? Not on those that have been named—how many acres in the conservation district?
Mr. VAN RINSUM. Could I turn around and ask a gentleman in the audience?
Senator MELCHER. We will accept his testimony if the wants to come up here. Could he do that?
Mr. VAN RINSUM. Yes; but I could get that information for you.
Senator MELCHER. We would like to have it for the record, and also for the record, some descriptions, some briefing, so we understand the type of irrigation and whether it is surface, flood, or sprinkler irrigation. Ordinarily, a lot of the farming and ranching operations that are a unit are not irrigated and are not even contemplated being irrigated? We would like to have some understanding of the relationship of the irrigated land to the land that is nonirrigated. Do you have a breakdown of totals, for instance? The conservation district covers the entire county other than those communities, right?
Mr. VAN RINSUM. Right.
Senator MELCHER. So it covers a lot of land that is not irrigated?
Mr. VAN RINSUM. Right.
Senator MELCHER. Is there much sprinkler irrigation?
Mr. VAN RINSUM. In Flathead County, it is all sprinkler.
Senator MELCHER. All?
Mr. VAN RINSUM. Yes; I don't think there is any flood irrigation there.
Senator MELCHER. None?
Mr. VAN RINSUM. None.
Senator MELCHER. Is it increasing?
Mr. VAN RINSUM. Yes; definitely.
Senator MELCHER. Do you have any idea of the likely potential?
Mr. VAN RINSUM. I would say, just off the top of my head, I don't think half of Flathead County is irrigated now. With very little work and, of course, a lot of bucks, I would say the whole county could be irrigated; yes. We have just gone through with a Creston Bench Irrigation District and also one in the lower valley, where we were going to set up irrigation districts. This involved channeling the water out of the Flathead River and diverting it into various creeks and so forth, but we, as supervisors, cannot go out and initiate this. This has to come from the people. They have to come to us with a petition that says "We want to irrigate the district," and then we can carry the ball from there, and this hasn't happened.
Senator MELCHER. Is much of this irrigation carried on by using subsurface water?

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Mr. VAN RINSUM. You mean pumps?
Senator MELCHER. Yes; pumps.
Mr. VAN RINSUM. Yes; there is getting to be some of that.
Senator MELCHER. But most of it is out of streams?
Mr. VAN RINSUM. Yes.
Senator MELCHER. Has there been a water shortage in the area or in part of the conservation district?
Mr. VAN RINSUM. Yes; in a normal dry year there are creeks that dry up and run a little short. Mr. Kaufman said some of them are a little overappropriated, and in those years neighbors kind of get a little antsy toward neighbors. Yes, I would say not an outright shortage, but there have been dry years when the streams have lost some water.

I might add, too, that we even have had in 1977—you talk about your Federal agencies—very few people are aware of it, but in the spring of 1977, when things were so dry, we came close to losing 50 feet of water out of Hungry Horse Reservoir to support the fish life, due to a mandate of the people of Oregon and Washington, who wanted to support their steelhead and their salmon. A lot of people aren't aware of this, but Bonneville Power came close to dropping Hungry Horse Reservoir 50 feet just to support the Columbia River for the fish life, and then we talked Federal jurisdiction. These are the kinds of things that scare me, because Hungry Horse Dam was built with a multipurpose aspect, and irrigation is one of those things.

Senator MELCHER. The Bureau of Reclamation runs Hungry Horse, and it would be their responsibility not to agree to the request of Bonneville for water that would jeopardize a fish habitat and the irrigation uses here in Montana; however, it is a fish habitat in Oregon, I take it, and Washington. The Bureau didn't agree to it, did they?

Mr. VAN RINSUM. No; they said they got enough water from the rain and what not. I was in contact with the engineers on it, and they didn't have to do it, being as Montana does not belong to the Pacific Northwest Regional Power Commission, but we are kind of holding things on the short end here, if you know what I mean, with our own water. We, in Montana, are sitting on an edge that is hurting, believe me.

We don't have any laws, and the people of this State had better wake up. We don't have millions of people. When we are talking Federal water when Los Angeles says, "We want a drink," there are millions of people down there that say, "And we are going to get it." There are 600,000 to 700,000 people here, in the whole State, and 500,000 or 600,000 of them on the other side of the Divide. They don't care about the Columbia River, and this is something we have to watch. When those people speak, I think Washington, D.C., is going to stand up and listen, simply because of the votes.

Senator MELCHER. We will see about that.
Mr. VAN RINSUM. I hope so.
Senator MELCHER. Other than these dry years, have you had any problems? For instance, you say you are beginning to pump out of wells for sprinkler irrigation. Has there been any indication that the water tables dropped at all?

Mr. VAN RINSUM. I have heard one complaint, and whether it is valid or not, I don't know. I have a fellow who lives about a mile north of me on the north end of Flathead Lake, by the way, and we

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have several big irrigation pumps going up in the Stillwater area northwest of town. He has a flowing well until they start pumping. This is the only complaint I have heard of. He said the minute they started irrigating he has to start pumping or his well stops flowing. This is the only complaint I have heard.

Senator MELCHER. How big are those pumps?

Mr. VAN RINSUM. Oh, boy!

Senator MELCHER. Pretty big?

Mr. VAN RINSUM. Oh, yes; 100- to 200-horsepower.

Senator MELCHER. I see; bigger than what has been used customarily in the area?

Mr. VAN RINSUM. Yes; the pumps are getting bigger.

Senator MELCHER. All right, I think if you can supply us the information I mentioned, it would be extremely helpful for our hearing record.

Mr. VAN RINSUM. Any help we can be, please drop us a line.

Senator MELCHER. Thank you very much.

[The information follows:]

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Flathead Conservation District

35 W. Reserve Drive
XXXXXXXXXX. KALISPELL, MONTANA 59901 PHONE 257-6242

REC'D SEP 20 1979

September 17, 1979

Senator John Melcher
1121 Dirksen
Senate Office Building
Washington, D.C. 20510

Dear Senator Melcher:

In response to your request for information concerning irrigation in Flathead County, please review the following:

a) Almost all irrigation in Flathead is sprinkler irrigation. There is a very small amount of flood irrigation in the western portion of the county.
b) According to figures compiled from ASCS, SCS, and personal knowledge, 32,000 acres are presently irrigated in Flathead County. There are approximately 118,000 acres of potentially irrigable acres - assuming all dry farmland in the valley floor can be irrigated.
c) We have approximately 30 deep wells in the county which would be in excess of 100 feet deep. There are approximately 90 shallow wells and dugouts used for irrigation only.
d) In regards to your question concerning possible de-watering of streams for irrigation, upper Ashley Creek and the Little Bitterroot Rivers have been subject to this. For further information on de-watering, we recommend you contact Bob Schumacher, Regional Fisheries Mgr., Mt. Dept. of Fish, Wildlife & Parks, 490 N. Meridian Rd., Kalispell, Mt. 59901.

We would be gald to assist you with any further questions that would relate to the federal lawsuit on water rights. Thank you for your active participation in this precedent-setting case.

Sincerely,

Francis Van Rinsum

Francis Van Rinsum
Chairman

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Senator MELCHER. Representative Aubyn Curtiss, District 30. Aubyn also serves on the Select Water Commission.

STATEMENT OF REPRESENTATIVE AUBYN CURTISS, DISTRICT 30, MONTANA STATE LEGISLATURE

Ms. CURTISS. Mr. Chairman, I thank you very much for traveling about the State and giving us this opportunity to present our comments.

It is ironic that the efforts of the Montana Legislature to insure adequate water for Montana uses in the future should initially result in inconvenience and anxiety to those who claim existing rights and are putting water to a beneficial use.

Montana's constitution states that all surface, underground, flood, and atmospheric waters within the boundaries of the State are the property of the State for the use of its people and are subject to appropriation for beneficial uses as provided by law. I think that the greatest concern that many of us here today share is: Are we, through the intervention of Federal agencies, ostensibly on behalf of the tribes, going to see our State rights preempted.

Even as the merits of Montana Senate bill 76 are debated at legislative hearings, representatives of the Department of the Interior and the tribes urge the exclusion of Indian water from the quantification and adjudication process. Obviously, no meaningful adjudication can be effected without including all water users and claimants. Even as the Department of the Interior and the Bureau of Reclamation monitored the committee hearings, briefs were being prepared to initiate action against hundreds of Montanans who possess legitimate water rights.

It is right and just that all Montanans be given equal consideration—red or white. It is right and just that a Government underwriting the expenses of one Montana litigant, underwrite the expenses of the other. If this equal consideration were to be given, that would seem preposterous, but genuine consideration must be given to these legitimate water users who have been drawn into this outlandish travesty through no fault of their own.

Mr. Chairman, I respectfully urge you and your committee to reaffirm our wavering faith in a benign Government which will continue to protect the rights of its citizens guaranteed by our Constitution.

I urge you to do all possible to effect a withdrawal of these suits and permit Montana to quantify and adjudicate her water in order to protect this, our most valuable resource.

I would just like to point out, too, that unless the adjudication process takes place, I am sure that some of the information your committee is seeking is presently nonavailable. There are many water users in the State who have never been forced to make any effort whatever to determine how much water they are using.

If this is not possible, I request that money be appropriated by Congress to furnish counsel and cover court costs for those who have been placed in a position of having to defend themselves from actions of their own Government.

I would just like to thank you. I don't consider my testimony specific, but very general, but it identifies the concerns that most Montanans have right now.

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Senator MELCHER. Thank you. We have taken note of the costs to the individual defendants that have literally been forced upon them by the suits. We will make an effort, if the suits are not withdrawn, to give some sort of assistance to individual defendants to meet the costs of the litigation. Whether we will be successful or not, I don't know, but it seems only equitable that in such suits as these, if they are going to be a long drawn-out procedure and very costly for the defendants, that some monetary relief should be provided. Obviously, a defendant can't forgo proper advice and proper legal representation in the procedures. He has to make those a primary responsibility, and it can become a very serious financial drain. So we will keep that in mind and if the suits are going to be pressed by Justice Department, we will seek some sort of financial relief for individual defendants.

Thank you very much for being here.

Ms. CURTISS. Thank you for the opportunity.

Senator MELCHER. The committee will recess now until 1:15.

[Whereupon, at 12 noon, the committee recessed.]

[The hearing was reconvened at 1:20 p.m.]

Senator MELCHER. We will resume the committee hearing now. Over the noon hour, one of the witnesses indicated a desire to have his testimony come up rather soon this afternoon so he can return to his business.

If there are any other witnesses that are going to be testifying that have some time constraints, please let one of us know right away so we can arrange to accommodate your timeframe.

K. M. Bridenstine, attorney at law, Polson, Mont.

STATEMENT OF K. M. BRIDENSTINE, ATTORNEY, POLSON, MONT.

Mr. BRIDENSTINE. Thank you, Senator. I am K. M. Bridenstine. I am a lawyer from Polson, and I represent two of the defendants in this lawsuit, Mr. David R. Kemp, and his wife.

Perhaps their position would more personify the difficulty that many of the defendants are now in that are brought into this lawsuit. The Kemps operate a cattle ranch east of Hot Springs, here in this county, and they depend a great deal upon irrigated land to produce sufficient forage crops to carry their cattle through the winter. In fact, their entire operation is dependent upon the use of waters which they have developed on their ranch. So over the years, commencing in about 1913, they have drilled wells, filed appropriations under State law, and have filed appropriations for a certain amount of water on the Little Big Horn River, which I think Mr. Kaufman earlier today indicated was insufficient, perhaps, to handle senior, let alone junior water rights.

The difficulty here is that this lawsuit now says literally to my clients: All these years you have developed your water; you have developed your ranch through a great amount of effort on your part, as well as your neighbor's, and expense; you have done a good job, but now we want to reserve the right at any time to remove your life-giving water, or some portion of it, from your ranch.

Senator, back over the years, in western water rights, the basic philosophy as developed was that you either use it or you lose it. For this reason, we saw an early development in our history of water users associations where they combined junior and senior water rights determined from each user's needs and looked at the weather and the

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year to determine how much water was available. Then, through this peaceful process, they distributed the water amongst themselves to everybody's benefit, rather than let somebody with superior and senior water rights to develop their property. I am going to tell you about the expense and efforts put into it to cut off the water.

My client is afraid that is what is going to happen in this case. This fear may or may not be well grounded, but I will read the first paragraph from the complaint:

> This action is brought by the United States in its own right and as trustee for the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation, Montana, the tribal members and allottees, to obtain an adjudication of the rights of the parties to appropriate and use the surface and groundwaters within the Flathead River Basin in Montana.

Paragraph 6, I believe it is, of this complaint—no, that is incorrect, I'm sorry—further on in the complaint, not to take your time on this, it is alleged that the lawsuit is brought on behalf of the Indian allottees, for the purpose of supplying their needs.

I, too, have read the Hellgate Treaty of—I believe it is 1855—and we do not find in there any specific type of reservation of water. I think it says "as long as the wind shall blow and the water shall flow," and this, perhaps, could be interpreted.

The difficulty is that over the years the Federal Government has, through various amendments to the Homestead Act, reserved minerals, and possibly in many cases, water, and some within this area here.

Now, my clients feel that this particular lawsuit puts on them a great burden, financial, as well as the possibility that in the case of an adverse ruling they would be in the position of losing, literally, the total value of their ranch at the whim of some other person or persons not yet identified.

They are concerned that the expense of having to defend the rights which they have exercised since 1913 and before—and to defend the amount of effort and the investment in their property—is unjust and uncalled for. All these years they have done this and they have done it openly, notoriously, they have not tried to hide, and now they are faced with a lawsuit by their own Government, which seeks to tell them, in essence, "We will do as we choose with the water that you use."

Now, we feel that there are a number of possibilities that Congress could address itself to in this particular matter, and I refer to my letter to you of July 31, 1979.

Senator MELCHER. That letter will be made a part of the record.

Mr. BRIDENSTINE. Thank you.

[The letter referred to follows:]

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K. M. BRIDENSTINE
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July 31, 1979

Honorable John Melcher
United States Senate
1016 Federal Building
Billings, Montana 59101

Re: United State -vs- Abell-Kemp et al

Senator Melcher:

The undersigned represents Mr. David R. Kemp one of the Defendants in the water rights lawsuit brought by the United States apparently for and on behalf of the Confederated Salish and Kootenai Tribes of the Flathead Reservation. Mr. Kemp has given me your letter of July 27, 1979, concerning your intent to hold hearings throughout Montana and particularly Ronan, Montana on August 31. I would like to be entered as Counsel for Mr. Kemp to appear at that particular hearing on his behalf and would appreciate your keeping me advised on the place and time. Just a word of caution, school starts late in August so that it may be difficult to find a meeting place in Ronan.

This lawsuit presents a rather difficult and confusing situation in as much a people such as my client, for years have enjoyed water rights both through surface as well as ground water sources and my client has filed on each of these under Montana law and when the law changed he refiled in accordance with the law. At this time he plans to refile again under the new Montana water statutes. The difficulty arises from the fact that people such as my client, over a long period of years have made continuous and beneficial use of water dirived from these sources particularly for agricultural purposes. Our concern lies with the fact that the Federal lawsuit as I see it, seeks to establish a Federal forum before which the rights of the various claimants to water including the Tribe, may be brought for ajudication. In researching the Federal statutes, I find little or no comfort in the fact that there is very little Federal legislation on water rights as relates to use by the Federal Government or by such organizations such as the Tribe. We must recognize the fact that certain treaties with the Tribe have to be recognized in turn, but it does seem rather harsh to expect that the Tribe, while sleeping on its rights for a long number of years, should suddenly come forward under the protection of the Unites States Department of Interior and the Department of Justice and assert their rights against

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page 2
July 31, 1979
Honorable John Melcher

all persons who have, for a similar period of years, asiduously used water, filed appropriations, and have become dependant upon these water sources in their agriculture or in the operation of businesses and municipalities.

We must also recognize that the rights to certain waters within Flathead Lake must be clarified as well as the waters to the Flathead River and its tributaries.

It would seem to me the least burdensome method to resolve this matter would be by act of Congress. Such legislation could recognize all those rights under the State laws which have been established and put to long term use. This would include surface as well as ground water sources. Such legislation could recognize the long established rights of user as well as Tribal rights and could be addressed to making ajustments to avoid serious damage and economic hardship to those persons named as Defendants in the suit. Such legislation could possibly address itself to the establishment of some form of Federal water commission which in turn could address itself to recognizing these various rights and making reasonable ajustments to the use of water considering the current low demand by the Tribe and the possibility that that demand may increase over the years. The rights to the water in Flathead Lake are obviously going to be a matter to be separately addressed in as much as these waters flow to Kerr Dam downstream in the Flathead to many other power and irrigation projects not connected with the Reservation or the Tribe in any way, but which have become sources of hydro-electric energy upon which large communities such as Spokane,Washington, to name one have become dependant. It is obvious that the interstate use of these waters must be separated from the local use of waters other than those of Flathead Lake.

Considering the nature of this lawsuit and the obviously protracted nature of the same which in my opinion, will include moves through the various levels of Federal appealate jurisdiction to the Supreme Court of the United States before final determination is made, the litigation will be expensive and for the period of years over which it will extend, will leave thousands of water rights in limbo. Your letter acurately reflects this situation and I must say, that my client was very pleased to receive such a letter and realize that your assistance is forthcoming.

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page 3
July 31, 1979
Honorable John Melcher

On the Reservation, there has been in operation for a good number of years, the Flathead Irrigation Project which is a government supported unit directed primarily at furnishing waters for agricultural purposes throughout much of the airable land contained within the Reservation. To the best of my knowledge these waters have not been interupted in any way and the project has worked successfully and includes Tribal as well as non-Tribal users. The difficulty with the lawsuit arises from the extension of the sought for jurisdiction outside the Reservation to sources and users and not included within the Flathead Irrigation Project. We do not foresee any great increase in the use of water by the Tribe as it appears that there has been no deprivation of water to any Tribal user to date. The this that concerns my client and many of the other Defendants in the lawsuit, is the apparent attempt to extend forever, the possible Tribal increase in the use of water on a hypothetical rather than an actual basis. It is my opinion that the legal maxim of laches should apply in this particular lawsuit in as much as if the Tribe did have rights they have slept on them for so many years that this would result in a deprivation of rights to those persons who have established water uses and rely upon the same and have for a long period of years. All of us on the Reservation recognize the Tribe is slowly but surely waking up to its responsibilities in handling its property. I find no fault in this at all but as a Lawyer, I must recognize that certain legal maxims develop from the common law in this country and in England must apply or gross injustice will occur.

Considering the matter from a practical standpoint, I have grave doubt in my mind, that the Federal Court has either the facility or the time under their present organizational set up in which to establish a water rights court and be able to adjudicate all of the disputes which are bound to arise if this lawsuit is decided in some reasonably fair manner to all the parties. It is for that reason that I have suggested the possibility of establishing a blue ribbon commission which would address itself to these rights and the adjustments necessary giving due consideration to both local as well as interstate users and demands.

It is for these reasons that we welcome a hearing on the date you have specified and the opportunity for all to present their views. Federal District Judge Paul Hatfeild had by an order dated July 3, 1979, stayed all proceedings in this matter except service of process until further order

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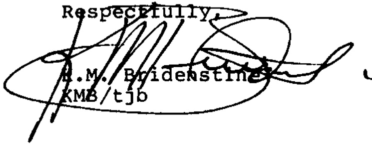
page 4
July 31, 1979
Honorable John Melcher

of the Court. I suggest that Judge Hatfeild fully recognizes the need of the entry of Congress into this matter.

Looking forward to further discussions at the hearing. I remain...

Respectfully,



K.M. Bridenstine
KMB/tjb

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Mr. BRIDENSTINE. I would suggest that the Federal Government does have machinery available by which it may determine, not only the number of water appropriations within the claimed area, but the actual number of irrigated acres and the other beneficial uses and the beneficial users to which this water has been applied. I refer to the Soil Conservation Service, which does this type of work in other areas. This is a Federal agency, already in existence, and it is funded. I think by using that agency, or some similar agency, Congress and the Federal Government would be able to determine exactly what they are doing, what they are effecting, and what is affected. I think that evidence is going to be essential, whether it is to Congress or the Federal court in making a final determination in this matter.

Second, I would suggest that Congress address itself to the proposition that perhaps some form of either temporary or permanent commission be established that in some way could help take the burden from these individual ranchers and landowners, both financially as well as actually, from the emotional standpoint, to help them determine their rights and to help them be represented properly if the United States continues with this lawsuit.

All of the defendants have not been served in this case, and there are a lot more, I guess, could be joined from what I hear. The difficulty is that I understand at this time that the Attorney General of the State is addressing himself to a move by the Federal Government to serve the remainder of these defendants by publication.

That would be all right, perhaps, from a procedural standpoint, but from the standpoint of notifying the individual, I think it would fall far short of due process, but this is just one of the many problems that this case has developed, procedural problems that have little or nothing to do with the actual rights to be adjudicated.

In summary, I would like to suggest to Congress that it will be necessary for Congress, in my opinion, and in the opinion of my clients, to afford to my clients the same opportunity to utilize the Federal services, legal, engineering, technical, or otherwise, as the Department of the Interior has at its disposal for the purpose of prosecuting this lawsuit.

Senator MELCHER. Are the water rights of your clients of long standing?

Mr. BRIDENSTINE. Yes, sir, they are, commencing in 1913 and running clear up and into the mid-1960's. Each time they drilled a well, they filed an appropriation under the relevant provisions of Montana law, to establish that right to a ground-water source. These appropriations were filed with the county clerk and recorder of Lake County and are of long standing. At this particular time, Senator, they are—and I am assisting them—refiling each and every one of these under the new State water statutes which have now become effective. As soon as the forms are supplied, I guess all of these people are going to be literally inundating the clerk of the court with brandnew appropriations.

Senator MELCHER. The suggestions you have mentioned, if they are not followed: What would be your estimate of a time frame for the completion of the suits, or this suit involving the Flathead drainage?

Mr. BRIDENSTINE. Considering the very strict technical nature of the evidence that I anticipate will somehow have to be gathered, and

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considering the procedural difficulties and the large number of attorneys that are going to be involved, and giving due consideration to the schedule and the crowded conditions already faced by the Federal court, my guess is 8 to 10 years before final adjudication. That would include the appellate process, because I would anticipate this case, no matter which way it goes in the Federal court—that is, the district court—will go on to the 9th Circuit Court of Appeals and will go on, I believe, to the U.S. Supreme Court. I can't conceive of any other method by which this could be fully adjudicated or where all parties would be satisfied.

Senator MELCHER. Do you have any knowledge of hydrologic studies in the area?

Mr. BRIDENSTINE. Not that I could identify as such, but I understand that the Soil Conservation Service has a large variety of hydrological information, and I believe Lake County, Sanders County, and in Flathead County, the counties surrounding here. I would think that that would mostly be devoted to those particular farm and ranch lands to which the Soil Conservation Service has applied its expertise in allowing them to get Government grants or loans for the purpose of improving their irrigation systems or their drainage systems and for that particular type of thing. But that information is available, and I would think that those SCS people that put that information together probably have a very intimate knowledge of the total community in which they work, and would certainly be no strangers to continuing it. I think this is a very vital piece of information that all of us should have, and certainly, the court, if this suit is to continue.

Incidentally, that would save a great deal of engineering expense on my clients' behalf, because we are dealing in several thousand acres, irrigable and nonirrigable land, sprinkler irrigation and flood irrigation. We have to deal with underground aquifers, probably two or three different levels. All of this requires a great deal of expertise, and I anticipate the case, as far as we are concerned, would not be complete without our being given the opportunity to present this to the trier of facts.

Senator MELCHER. Won't the burden fall on the Justice Department to present that evidence in court?

Mr. BRIDENSTINE. It could or it couldn't. I am not aware of anything at this time in the way of procedural rules.

Senator MELCHER. Who is the plaintiff in this? Aren't they the plaintiffs?

Mr. BRIDENSTINE. That is correct.

Senator MELCHER. Isn't it their burden to present that evidence before the court?

Mr. BRIDENSTINE. It is also, Senator, the burden of the defendant to present his defense and the burden shifts in a civil case. That is the problem here.

Senator MELCHER. Who is the judge going to ask to present the hydrologic data?

Mr. BRIDENSTINE. If I know Judge Hatfield, he probably would require, at the request of the defendants, that the Federal Government, at its expense, provide hydrological data.

Senator MELCHER. Are we talking about 5 or 6 or maybe 10 years just to gather the hydrological data?

Mr. BRIDENSTINE. It wouldn't surprise me at all.

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Senator MELCHER. That is what surprises me, knowing that that is about the length of time it takes to get just the hydrology. That you feel confident the cases could be wrapped up in 8 or 10 years.

Mr. BRIDENSTINE. Assuming that the hydrology could be obtained before that time, that is. A great deal of it is already done, I am certain. The SCS does a good solid job, I believe, in every area where it operates.

Senator MELCHER. I hope you are correct, but I haven't found that to be the case. When we have asked for hydrologic information concerning strip mining, of the very most rudimentary type of data, I haven't found that to be the case in eastern Montana. If the Soil Conservation Service has the data here, I am glad to hear it, but we have been lacking hydrologic information in eastern Montana that we would like to have knowledge of in terms of strip mining in our particular home area.

Mr. BRIDENSTINE. Perhaps, Senator, that would be a good subject to which Congress could address itself—to establish a program that would, in fact, at least for the purpose of this lawsuit, fund a hydrological study of the whole area that s claimed and utilize whatever available data as has now been developed, and to develop new data where it is needed But it would require a lot of funding.

I estimate that just on the ranch that my clients own, for good engineering, which would be basic because we wouldn't be able to afford to drill or do anything else—we do have a lot of good well logs. Every well has got its own log, and in this respect, these logs are filed with the county and they are a public record—but we estimate that our expense alone, just in producing the minimal engineering, would be $10,000, and that if my client has to pay $10,000 for engineering, they are going to have to sell their ranch. They simply haven't got that kind of money.

Senator MELCHER. I well realize that, but the fact is, it would seem to me that if the court is going to ask the Justice Department to provide the hydrologic evidence—Justice has testified that they have no such evidence at this time, and as far as we could determine on July 30, they didn't have the fuzziest notion about ever acquiring it. I don't know how Judge Hatfield or Judge Battin or whatever Federal judges end up with these suits, is going to react, but I would find it rather frustrating to find that the cases presented dealing with subsurface water, there is no evidence on how you establish what subsurface water is involved.

Mr. BRIDENSTINE. Exactly.

Senator MELCHER. It is for that reason that I felt, prior to July 30, that Justice and Interior wanted to sort out the subsurface water users from the surface water users. Surely, on the basis of a minimal amount of water being used by an individual—and I am now speaking, for instance, for household use and livestock water—that surely they would want to drop those defendants. I found that wasn't the case, that they intended to keep them as defendants and were going to name everybody else they could find like them. I also felt that, surely, the Justice Department and Interior Department did not want to hold cities and towns that were just using subsurface water as defendants, but I also found out that is exactly what they want to do. So, without any basis for evidence on what the hydrology is, I don't understand how these suits can ever get off the ground as it affects those particular defendants who are only using subsurface water.

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Mr. BRIDENSTINE. Maybe the attitude is, Senator, leave it up to the defendant to do it or not do it as he chooses.

Senator MELCHER. That isn't your opinion, though, is it?

Mr. BRIDENSTINE. I do not state an opinion as to the state of mind of John Clear or any of the other attorneys that represent the Government in this case.

Senator MELCHER. But that wouldn't be your opinion, that that would be the ordinary procedure, is it?

Mr. BRIDENSTINE. Normally speaking, the defendant bears the burden of his own defense.

Senator MELCHER. Right.

Mr. BRIDENSTINE. And if he does not prevail in the lawsuit—and this is true in Federal as well as in State procedure—he cannot complain to the court that he has not been paid for his costs.

Senator MELCHER. Now wait a minute, don't get me in too deep here.

Mr. BRIDENSTINE. Sorry.

Senator MELCHER. I just want you to state what the ordinary deal is and not give me all the "ifs." The ordinary deal is: The court is going to ask the plaintiff to provide the evidence of why these defendants have been hauled into court on the basis of water usage when those defendants only use subsurface water. The court is going to ask the plaintiff—the Justice Department—why are they in here. Isn't that true?

Mr. BRIDENSTINE. That is exactly true.

Senator MELCHER. And at that point, they are going to have to say: "because they are involved in the water of our clients," which would be Indian tribes and Federal agencies. Is that not true?

Mr. BRIDENSTINE. I think that that is exactly what the lawsuit says. They claim everything flowing on or under, as well as across. It is the last paragraph of this complaint that frightens us. They are asking us that we assert our rights, and thereafter those rights shall be adjudicated as to their seniority. To assert our rights, we have to first know not only that we have the appropriations, but I believe we are going to have to have a great deal more technical information. I for instance, don't know that the aquifers which my client uses actually penetrate into the reservation or not. That is something we would have to determine. That is a small point, but it is still something that would have to be determined—as to whether or not all other wells that we claim are within the purview of this particular lawsuit. That is a mighty technical problem.

Senator MELCHER. The testimony is, on July 30 by the Justice Department attorney, Mr. Sagalkin:

> Since the case of *United States* v. *Cappaert*, it has generally been understood to be the law that water, whether it is surface water or underground water, where it is hydrologically related, where it is part of the same system, it is part of the water system of the United States, and reserved rights or water uses, whether they are underground or surface, have to be counted. You have to accumulate those total rights and adjudicate them among the various users. There is no difference as far as the law is concerned.

I then asked him: "What is the meaning of this term where the water is 'hydrologically related?' " I asked him to elaborate on it where it is hydrologically related and how they determine when it is not hydrologically related. Remember, that is his term—that is his

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key term—when you count underground water, and Mr. Sagalkin then answered:

That is really a matter of scientific testimony, and it probably will not matter much in these cases because you are dealing with such large systems. But, for example, if I lived on a one-acre plot, and I had a water right, and I pumped water from underneath the ground, and then I have another person next to me who has a water right, and he is taking surface water, he may claim that I am really taking from his water if there is not enough surface water to satisfy his needs. If he can show that my underground water is related to his surface water—it is really part of the same system—then, if he had a priority that was higher than mine, he might be entitled to have me stop pumping my water.

That seems like he is leading us into a very simple example, which is fine. He goes on to tell us that because of this basic question, whether the surface of the underground water user is affecting the surface, that they are going to have to have them tied together.

Finally, we get to the point on whether or not there is any information they have available at this time, where they have established the hydrology. Going back to this original statement, he eventually gets around to, no, they don't have any evidence on it, but it will become necessary to have the hydrologic information—in terms of scientific information—before they could really definitely establish this underground water with the surface water as being hydrologically related. So if the usual procedure in water lawsuits is that the plaintiff provides the evidence, I suppose the court will require that evidence be presented by the Justice Department on behalf of their clients.

Mr. BRIDENSTINE. I would hope that you are right, sir. The difficulty comes with the fact that as you have seen and demonstrated by the, I think, blatant generalization by that attorney, there is a whole body of water law concerning surface and underground rights as related to each other. That is what I mean.

Senator MELCHER. We understood what Justice and Interior were testifying. They were testifying in the broad range. Their testimony to us on July 30 was broad, so that all of the avenues would be available for them to follow in court. I understand that procedure, and I didn't expect them to do anything different. But I think on that specific point, the lack of hydrologic information has been admitted to by Justice. It has been increasingly obvious at each of these hearings that we have held in Montana that the data is not available.

You have said that you think the Soil Conservation Service has some accurate data in the areas where your clients are. I am glad to hear that. We will seek all that information, or refresh the memory of the Justice Department on what we hear about that in our hearings, because we do intend to ask Justice Department specifically as to their intent on how they are going to treat this list of defendants that only use underground water. How long they intend to keep them as defendants unless they are actively engaged in providing the type of evidence that a court would need to make that, or to recognize that, they truly are hydrologically related to the surface water.

Mr. BRIDENSTINE. That is comforting, Senator, because it has been a real problem.

Senator MELCHER. That is one of the goals that we set out to see what we could do about through these hearings. To see whether there isn't a basis of separating out those who only use underground water from the list of defendants that Justice and Interior have

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identified. Also remembering that they still intend to name as defendants anyone else that they haven't named yet. So we are really talking about an awful lot more people than what have been named now.

Mr. BRIDENSTINE. I am afraid you are right about that. Just right on the reservation, there will be a large number of people. I don't speak for the other attorneys involved, but for myself. I had planned, of course, to move the Federal court to order the Department of Justice to provide the necessary evidence as to whether or not all the waters, and if so, what waters do flow on or under the reservation. What waters they are talking about, and try to define this in those terms.

I think the difficulty is, as you well recognize, that Justice itself is not probably financed at this time by a sufficient appropriation by which to accomplish this. Perhaps they would, in turn, have to turn to Congress. If the process took a normal degree of time, it would probably take 6–7 months, at the very earliest, in order to obtain a special appropriation or some other funding by which Justice could devote itself to this very problem of producing engineering data.

Senator MELCHER. I think you are very optimistic. I think, first of all, it would take about 6 or 7 months to get their own act together within the Justice Department to determine what data they are even seeking. Then a review of about another 4 or 5 months after that to discuss it with other Federal agencies—such as the Soil Conservation Service—on where there was data. And finally, I feel it would take them at least a year just to find out what they are looking for.

Mr. BRIDENSTINE. You probably know better than I do about it.

Senator MELCHER. I'm not happy to make that statement, but I am very sure that between July 30 and the next time we talk to Justice Department attorneys about this—which will probably be toward the end of September after we have had time to get this transcript in order and have it reviewed and so on. That will be about 6 or 7 or 8 weeks, and if there is one little old thin parcel of a wheel turned down there on these cases, in Justice Department, between July 30 and then, I will be amazed.

Mr. BRIDENSTINE. That brings me to another point, Senator, related to this. Consider the effect of a prolonged period of litigation on the market value of every piece of real property and its improvements which are contained within the area claimed in this lawsuit.

For instance, my clients' ranch will be literally worthless on the market, in my opinion, until such time as these rights have been adjudicated.

Senator MELCHER. Well, your clients have plenty of water, don't they?

Mr. BRIDENSTINE. They haven't got plenty of water, but they have adequate water.

Senator MELCHER. Is anybody complaining that they are taking their water?

Mr. BRIDENSTINE. Yes; the lawsuit that——

Senator MELCHER. I know the lawsuit, but I mean in actuality of people using water in the area.

Mr. BRIDENSTINE. No, sir; we have never had a complaint.

Senator MELCHER. We have learned, generally speaking, where all of the drainages that have been involved, there has been plenty of water and there haven't been complaints. But we have learned that the Milk River does have a problem. It is not a real pressing problem, but it is a problem where it really should have some attention that is

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quicker than 10, 20, or 30 years. Nevertheless, I think, as long as this suit drags on involving that drainage, that they may not really get proper settlements on whose water is whose quickly enough.

That is one area we found there really should be some questions answered within the next 2 or 3 years, but I am afraid that as long as it is in this Justice Department suit involving the Milk, it will be such a slow process that they won't have the opportunity to do the things they need to do, and have final settlement.

It involves water that has been partially adjudicated by the courts. The tribes at Fort Belknap were involved and are involved in that court adjudication, but nevertheless, with this case in mind, unless it is solved quicker than would ordinarily be the likelihood, I think they may have some trouble on the Milk River quicker than the suit itself. If they didn't have this suit, I think they could arrive at a better settlement much quicker and to the satisfaction of all the users.

We may have a separate recommendation for how that particular suit is handled, and we may find that the tribe itself—the Fort Belknap Community—may request a quicker action than could be accomplished through this particular Justice Department suit. I have no confidence in them doing the things that a court will require them to do in order to make any decisions in court in any timely fashion at all.

Mr. BRIDENSTINE. That is discouraging news. It really is.

Senator MELCHER. We have not found any shortage of water in any other area that is worrying anybody. People have testified that in dry years some of the creeks or areas are short, and of course we would expect that, but otherwise the testimony that we have received is that there are adequate supplies of water. There are no complaints lodged, one user against the other, or one group against another, that they are taking each other's water.

Mr. BRIDENSTINE. I think that within the reservation, that is basically the truth. The Flathead Irrigation District sits here and apparently has done a good job in adjusting use and the delivery of water. I think sometimes, perhaps, there has been a dispute between the project and the tribe as to whether or not the project should obtain more waters, particularly the Jocko Creek drainage, but these are all internal matters that people like my clients are really not concerned with.

What my clients are concerned with is that their land lives from underground water, and until somebody adjudicates their rights if this lawsuit is going to stand, they are literally going to be in limbo. They are not going to know what they have, and of course, if they wish to sell it, what will they do with it? That is the problem. How do you sell a lawsuit? You don't and my clients have a lawsuit that looks like it is going to last for some years.

I think that is the basic concern of many of the attorneys who represent the private landowners. We have a lawsuit, it is going to last and last and last, and we don't know what it is going to do to the value of our clients' property. But we know we can't sell it, because the buyer has the same problems the seller has, and I think it is something we have to address ourselves to.

Senator MELCHER. I am sure we do. Thank you very much, Mr. Bridenstine.

Mr. BRIDENSTINE. Thank you, Senator, for the opportunity.

[Subsequent to the hearing the following letters were received:]

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IN REPLY REFER TO:

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
Flathead Irrigation Project
St. Ignatius, Montana
59865

September 4, 1979

Honorable John Melcher
United States Senate
Washington, DC 20510

Dear Senator Melcher:

May we commend you on the water hearing at Ronan on August 31st. I do regret not scheduling a presentation for your use, however please be assured we will cooperate and furnish any available information.

A presentation would have included the fact that we deliver water to approximately 125,000 acres of irrigated land and our total designation of land susceptible to gravity irrigation is about 135,000 acres. With sprinkler irrigation and pumping possibilities, this could easily be increased to 150,000 acres, but, alas, what only was hinted at in your Ronan hearing, there is not sufficient water to absorb the increase from existing facilities. In addition, there are some 15,000 to 25,000 acres that could be pump irrigated from the Flathead River or Flathead Lake if these areas were economically feasible to bear the development cost.

To obtain more water for the presently irrigable land and to develop more land, the most feasible course is to conserve what we now use and store. The best method would be canal lining since we lose over one half our stored water in diversion and delivery loss.

This subject is much too complex to cover in a short letter and we are enclosing a copy of our crop report as well as a copy of the Morrison-Maierle study of 1975 for your information.

If we can be of additional service, please let us know how we may help.

Sincerely,

George L. Moon
Project Engineer

Enclosures (2)

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REC'D SEP 21 1979

September 14, 1979

Senate Select Committee on Indian Affairs
United States Senate
Washington, D.C. 20510

Re: Oversite Hearings on Water Litigation

Dear Senators:

I wish to thank you for this opportunity to submit comments to the Committee for inclusion in the record, and your consideration. Your interest in reaching an equitable solution for all parties concerned is greatly appreciated.

I have lived on a family farm in the Flathead Valley, Montana with my family since the early 1950's. My father consistently worked two jobs to keep the farm going. In addition, all family members worked out on the farm, plowing, harvesting hay, grain, etc., in a truly, family endeavor. The farm is an important part of my background and my life. Needless to say, it bears an even more important role in my parents lives. They have spent a major portion of their lives purchasing a run-down old farm, working to improve it, and making it a profitable endeavor. After seeing them go through 25 years of agonizing, 17 hour work days, ruined crops, and monetary losses, I marvel that they still love that piece of land. But, they do. It is truly a family partnership, both my mother and father spending hour after hour on a tractor in a field. It is such an integral part of their very being that each set back only drives them on to succeed the next year. Their land is every bit as important to them as the native Montana Indians land base is to their culture.

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Montana farmers truly love their land. Why else would they spend the long, hard, dirty days in the fields. Certainly more profitable and easier occupations exist, but none they love so well as farming.

Attending the public meetings the Committee held in Montana in August 1979, I looked around the room at the defendants. The farmers had left important summer field work to attend the Hearings, hoping for some insight into why they are being forced into court to protect water rights they presumed were long vested under Montana State laws. These people are not wealthy land barons depriving the Tribes of water to subsist, or even to prosper on. They are farmers...hardworking people, caught up in a political controversy. Few even know what the Winters Doctrine is. All they realize is they stand to loose their water rights in a lengthy, expensive, federal litigation, where they can only come out the losers.

The taxpayers of this nation are financing these federal suits. As such, the defendants are financing their opponents, as well as themselves. In the fiscal arena, the defendants are fighting lions with blades of straw. The Justice Department, Department of Interior, and the Bureau of Indian Affairs has extensive funds to prepare these suits against them. In the Pyramid Lake water controversy in Nevada, for example, the Bureau of Indian Affairs expended over 2 million dollars in preparing water and soil studies on the Tribe's behalf. (Hearings Before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, Indian Water Rights, 94th Cong. 2nd Sess. 15 (1976)). What state water user can match that figure to protect his own water rights? Especially, when

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regardless of the state users needs, past beneficial uses, and myriads of studies he may produce, his claims are always subordinate to all prior-dated reserved federal and Indian water rights claims.

Water rights suits continue for decades, over 50 years in some cases. As such, many of these farmers face paying extensive legal fees for decades. Since many of the defendants are currently middle aged or older, they face a lifetime of court and attorney fees, heartaches, and stress, with little prospect of seeing this litigation settled. To the lay person, the prospect of a court suit is terrifying in and of itself. In the instant case, the issue involved is primarily a political one, and not one based on evidence or the traditional adversary system. The defendants are understandably frustrated and confused at having to bear the brunt of financing both sides of the controversy, knowing the ultimate decision will largely be a political one.

Their anger is only flared by the manner in which the suits were prepared and initiated. Many defendants named no longer even own the land. Some defendants were served with interrogatories months before even receiving a summons. They answered it unwittingly believing it to be "just another government survey". At a meeting in Kalispell, Montana, my parents were told by the U.S. Attorney they need not even go to an attorney and formally file an Answer. He suggested they write him a letter and state simply they did not intend to relinquish any of their water rights. That legal advice is unconscionable.

I sincerely hope the Committee will be able to exert some

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influence over the Justice Department to have the scope of the suits narrowed at the very least, if not dropped. Water in Montana is not so scarce as to force "catch basin" and domestic ground water users into court against Winters Doctrine reserved rights. My parents, for example, irrigate out of small potholes and a stream that runs underground on their property. They are located several miles from the Flathead River or any of its tributaries. The streams and potholes are fed by runoff from the Flathead National Forest, bordering their land. The Supreme Court in United States v. New Mexico (Slip. op., No. 77-510, U.S. Sup. Ct., filed July 3, 1978) held that the sole purpose for which water rights were reserved on national forests were solely to conserve water flows for downstream users and to furnish a continuous supply of timber for the people. As such, their irrigating is certainly not infringing upon forest service reserved rights. And, even given the interrelationship of surface and groundwater hydrology, I can hardly accept they are depriving the Tribal members, some 50 - 100 miles away, of their water rights. Even more absurd are water users named as defendants who obtain water from the rainfall, by using "catch basins". Surely our forefathers did not contemplate reserving the rains for the Indians.

I have spent considerable time researching the Winters Doctrine. I believe the claims of the Indians and Justice Department are inflated and have been the subject of, in the words of noted water law authority, Frank Trelease, expanded by conceptualistic

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thinking, causing chaos in the state water laws. The Winters Doctrine is entirely a court created body of law. It was originally established in order to deal fairly with the Indian Tribes, as rightly they should be dealt with. Placing the Tribes on Reservations without providing them with water for domestic and agrarian uses would have been an unconscionable interpretation of the Treaty.

The Winters Doctrine remained unclarified after its creation in 1908, for over fifty years. However, in 1963, the Supreme Court in Arizona v. California (373 U.S. 546 (1963)) reaffirmed that when the government reserved lands, it also impliedly reserved sufficient quantities of water to fulfill the purposes for which the reservation was created. In addition, the Court extended the Doctrine to other federal reservations, holding the government also intended to reserve sufficient quantities for present and future needs, just as it had for Indian reservations. The Doctrine received additional teeth in Cappaert v. United States (426 U.S. 128 (1976)) when the Supreme Court extended the Doctrine to ground water sources.

As a Court created body of law, the implied-reservation-of water rights doctrine is continually evolving on a case by case basis, as the Supreme Court defines only so much of the doctrine as necessary to decide the controversy at hand. As such, the scope of the doctrine remains undetermined and state water users can never be assured of exactly what amounts of water they will have available for their uses. It is the constant evolution of the doctrine that so frightens the state water users. Since their water rights are subject to the whims of judicial interpretation,

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the state water users are constantly under a cloud of uncertainty. Shocked by the Supreme Court's interpretation of the Treaty in Washington v. Washington State Commercial Passenger Fishing Vessel Association, (Slip Op. No. 77-983, U.S. Sup. Ct., filed July 2, 1979), the states are understandably deeply concerned with the possibility of losing a substantial portion of their water rights through judicial interpretation.

The Majority in the Washington case held that the Treaty provision, "the right of taking fish, in common with all other citizens of the Territory" at their "usual and accustomed" off-reservation fishing places, as meaning the Indians have a right to 50% of the catch, rather than the common interpretation of the phrase, as granting a right of unlimited access, free from state regulation. The Washington Court's interpretation is purely a court fiction, fashioned to create a specific result, aimed at increasing Indian commercial fisheries. As such, it places a disporportionate burden on a few non-Indians, in the name of protecting a Treaty right. I can only echo Justice Powell's dissent that there is no historical indication that any of the parties to the Treaties understood Indians would be specifically guaranteed 50%, or any set portion of the fisheries to which they traditionally had access. This interpretation is especially faulty, in that it neglects to consider that the Indians have exclusive fishing rights to all fishing sites on the reservation as well. Since treaties are to be interpreted as the parties themselves would have understood them, the Court's interpretation seems to be unjustly broad.

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Its application results in a windfall to the some 800 Indian commercial fishermen, and economic disaster to the states 6,600 non-Indian commercial fishermen. (Statistics obtained from Slip Opinion at page 4). As Justice Powell states in his dissent, the decision will discriminate quite unfairly against non-Indians.

Noting the reverse, discriminatory effect the Court's interpretation has for non-Indians, Montana farmers and state water users throughout the west can hardly be blamed for conjuring up the spector of a federal - Indian water monopoly.

Further, noted Indian rights advocate, William Veeder, has long advocated Indian water rights are "prior and paramount" to state water rights for any desired purpose, and in unlimited quantities. He even advocates the sale or lease of Indian Winters Doctrine rights off the reservation, as the best use of a scarce Indian natural resource. Should the Court expand the implied-reservation-of-federal Indian water rights to its utmost application, state users could conceivably be required to pay Tribes for water rights vested under state laws.

According to a report by the Public Land Law Review Commission, One Third of the Nations Land (1970), 61 % of the 363 million acre feet of water arising in the 11 western states originate on national forest or national park lands. That figure does not even begin to reflect the Indian needs. States could conceivably loose control of the administration of the majority of state waters, should the Court follow the Washington case rationale in deciding water rights cases.

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Veeder's viewpoint is not widely supported by case law. Most legal scholars characterize the federal reserved water rights as de minimus, and restrict the Indian reserved water rights to the original, primarily agricultural, purposes of the Indian reservations. The Court in Arizona v. California, awarded an amount of water sufficient to irrigate all the "practicably irrigable acreage" on the reservations. The special Master emphasized that although the standard for quantification was defined by irrigable acreage, the uses to which the Indians could apply the water was not limited. He stated, "I hold only that the amount of water reserved and hence the magnatude of the water rights created is determined by the agriculture and related requirements, since when the water was reserved, that was the purpose of the reservation." This interpretation, would seem to meet the needs of the Indians rights advocates for unlimited permissible uses, except that it would provide a definitive quantity of water with which both the Tribes and state users could work. Veeder's interpretation, leaves state water users subject to unquantified, undimensional, and unadministerable federal claims.

To complicate the Winters Doctrine issue, some of the Indian Reservation lands has passed to non-Indian successors in interest pursuant to sale of individual Indian alotee lands, allotted to individual tribal members under the General Allotment Act. For example, I understand about 80 % of the Flathead Indian Reservation is now occupied by non-Indians. As such, the Indians have sold

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rights to much of their Winters Doctrine rights. It hardly seems appropriate to allow them to dispose of the water rights, receiving payment for them, then to allow them to recover those rights without repurchasing them. In all fairness, it must be pointed out that not all non-Indian owned lands on the reservation were purchased from Indian alotees, but rather were originally settled by whites under various land settlement acts. However, the principle remains that once rights are legally disposed of it is inequitable to allow that person to recover those sold rights, plus defeat vested state water rights under beneficial use statutes under the guise of expanded Winters Doctrine Rights.

The Supreme Court recently acknowledged the problem of expanded implied-reservation-of-water rights. In the case United States v. New Mexico (Slip op. No. 77-510, U.S. Sup. Ct., filed July 3, 1978)) the Supreme Court refused to allow a later expanded purpose to relate back to the original date of the reservation. In New Mexico, the United States Department of Agriculture and the United States Forest Service sought to preserve minimum instream flows in the Gila National Forest, citing the Multiple-Use Sustained-Yield Act of 1960. The Supreme Court noted that quantification of reserved water rights for the national forests is of critical importance to the West, where water is scarce and more than 50% of the available water either originates in or flows through national forests.

The Court went on to emphasize that "where a river is fully appropriated, federal reserved water rights would require a reduction in amount of water available to a water-needy state and

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private appropriators. The Court stated, "The reality has not escaped the attention of Congress and must be weighed in determining what, if any, water Congress reserved for use on the national forests." The Court went on to conclude that while the Multiple-Use Sustained-Yield Act of 1960 was intended to broaden the purposes for which national forests had previously been administered, Congress did not intend to thereby expand the reserved right of the United States.

Following the New Mexico rationale, the industrial uses, massive coal strip mining activities, commercial sale and lease of Indian water, and other modern technological uses of water currently employed on the Indian reservations certainly were not contemplated by the original purposes and parties to the Indian treaties, and should not be the measure of an expanded reserved water right under the Winters Doctrine. The Supreme Court in New Mexico re-affirmed its Cappaert decision whereby it held, "Where Congress reserved water rights, it impliedly reserved only that amount of water necessary to fulfill the purposes of the reservation, no more." Since the purposes of the reservations were to provide an agricultural homeland for the Montana Tribes, the reserved right should not encompass unlimited rights to uses such as wholesale distribution of water to off-reservation users.

Following the Supreme Court ruling that the doctrine be limited solely to the original purposes for which a federal reservation was created, the massive federal suits seem inappropriate. Montana has provided a state statutory scheme under which to administer state waters. Adjudication of an unlimited, undimensional implied-

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reservation-of-water right in federal court, while having other state water users continue to appropriate the surplus under the state adjudication system scheme seems inadvisable. Further, the Supreme Court in Akin v. United States (424 U.S. 800 (1976)) held the states have jurisdication over both federal and state water rights adjudications, pursuant to the McCarran Amendment. The Akin Court specifically stated it was necessary to avoid piecemeal adjudications and that "mere subjection of Indian rights to legal challenge in state courts would no more imperil those rights than would a suit brought by the government in district court." The Court felt the government's fiduciary duty to the Indians would adequately be met by representing the Indian rights in state court, and Indian interests would be satisfactorily protected under the regimes of state law.

Since Montana has recently provided for a system for adjudicating the state's waters, the directive seems clear that the Federal suits should be dismissed in favor of federal-Indian water rights quantification along side state water rights in the state courts.

Personally, I feel an even more acceptible solution would be to negotiate an equitable, out of court settlement. Since the Supreme Court has set the Indian water rights standards for reservations such as Flathead at an amount sufficient to irrigate all the "practicable irrigable acreage", the figure should be ascertainable without extensive litigation. Should the Indians need additional

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waters in the future, the doctrine of eminent domain is always available to the government to supply additional waters for Indian uses. Noted water law authority Frank Trelease, has characterized the doctrine of implied-reservation-of-water rights as a fiscal doctrine to avoid the payment for federal and Indian water rights needs. Taking this view, the efficacy of the entire doctrine is questionable. Water rights suits are notoriously expensive and lengthy, often extending over 50 years. The cost of naming thousands of state water users in complex adjudications will undoubtedly exceed the costs of eminent domain proceedings on a case-by-case basis whenever increased quantities of water are needed for future federal and Indian uses.

The need to adjudicate federal-Indian and non-Indian water rights claims is not questioned and indeed, is essential. The need to integrated federal, Indian and state water rights is apparent. The unlimited right to use of water, or any resource, without regard to its effect on the environment and other users is no longer a viable doctrine. As currently applied, the implied-reservation-of-water rights doctrine places senior federal and Indian reserved water rights over any junior state water rights. The effect is to disallow even minimal domestic state uses if there are insufficient quantities of water to fulfill the purposes of the reservation. Since all Indian Treaties were negotiated prior to 1871, when legislation brought treaty making with the Indian tribes to an end, water rights reserved under these treaties as a practical matter pre-date and preempt state water rights, rarely dating before 1900. If water sources are inadequate to meet federal and Indian water needs, state water users would loose 100% of their water rights.

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Although the Supreme Court in Arizona v. California explicitly rejected the doctrine of equitable apportionment as a means of quantifying implied-reservation-of-water rights, a re-evaluation of this position is needed. Unlimited quantites of implied-reservation-of-water rights endangers the vested state rights of private appropriators and water-needy states. Granting unlimited water rights to federal reservations and Indian tribes, who constitute only ½ of 1% of the nation's population, at the expense of state water users, will only lead to discord and antaganism. Conversely, allowing non-Indians to encroach on the Tribe's water right to an adequate source of water to enable them to prosper is equally unconscionable. By equitably apportioning a limited resource among its users, according to reasonable need, the best use of a scarce resource would be promoted.

Sincere negotiations between Federal - Indian and non-Indian water users would eliminate the need for lengthy, expensive, and bitter legal battles. The matter could be concluded in a fraction of the time. In addition, the lives of thousands of Indian and non-Indian litigants would not be as disrupted and inconvenienced. The issue of western water rights should not be reduced to a contest of state versus federal rights, nor Indian versus non-Indian rights. The doctrine is entirely a court created body of law and can be modified by the judiciary or through Congressional enactment at any time. A policy of equitable apportionment, currently used in inter-state water allocations should be used in negotiations. Water is a precious national resource and should not be monopolized by any user at the expense of another class of users. Any other solution

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risks an Indian/non-Indian confrontation, creating hostility between the two groups of users. Any court or legislative solution must not leave the community in disruption and hostility. Hopefully the solution will allow all users to co-exist in peace.

Four decades ago, Justice Holmes described a river as "more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it."

In considering a solution to the western water rights issue and protecting the interests of the Indians under their fiduciary duty, the federal government must also recognize its duty to fairly and adequately represent the PEOPLE OF THE UNITED STATES. A father does not only care for and protect the needs of an adopted son at the harsh expense of his natural son. As such, the United States government should not represent and protect the needs of the Native American nations to the economic ruin of its non-Indian children. The government is a representative of the <u>people</u> of the United States. These are real people; people who are being hurt by the lack of response of that government to their needs and pains.

In his recent energy speech to the country, President Carter spoke of the confidence crisis the American people are experiencing. When their government fails to consider the needs of 99.5% of the American population along side the needs of the federal and Indian reservations, they can expect little more than a lack of trust and confidence in that government.

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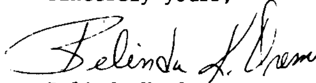
Thank you for your time and attention. I trust the Committee will be effective in reaching an equitable solution to the water rights litigations pending throughout the western states, as well as Montana.

Sincerely yours,



Belinda K. Orem
601 Michels Slough
Columbia Falls, Montana 59912

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Senator MELCHER. Is Harold Magnusson, the mayor of Harlem, here? He asked to testify at this hearing. I guess he missed the one over at Cut Bank and Glasgow.

[No response.]

Is Bill Big Springs here, County Commissioner of Glacier County?

[No response.]

George Wells, County Commissioner of Sanders County? George Wells is not here?

[No response.]

Wally Matthies, Montanans Opposing Discrimination?

STATEMENT OF WALLY MATTHIES, PRESIDENT, MONTANANS OPPOSING DISCRIMINATION

Mr. MATTHIES. Senator Melcher, I am Wally Matthies, president of Montanans Opposing Discrimination. Thank you for the opportunity to speak before you as the chairman of the Senate Indian Affairs Committee.

I would like to present this prepared statement as well as giving you my written comments.

We are becoming increasingly concerned by the continual encroachment of the Federal Government in our citizens' rights. The subject of water rights is before us at the moment. We think it is deplorable when the Federal Government, namely, the Department of the Interior and the Department of Justice, file suits against its citizens for water rights which most of them own right along with the title to the land for which they hold a deed.

We firmly believe that to adjudicate water it first must be quantified, and for the Federal Government to arbitrarily state that tribes have first rights to all the water and further, for the Federal Government to assert that the Government also has first right to any water, for whatever purpose, is ethically, morally, and legally wrong.

We agree with your statement, Senator Melcher, that Western water law doctrine that generally recognizes first in time, first in place, and upholds a priority of water uses where domestic, community, agriculture, and fish habitat needs have priority over industrial uses.

We are finding out that we need protection from the oppression of our Federal Government at the same time that the Government is saying that they are only here to protect us. God forbid that we have come to the point when the bureaucrats can tell us citizens that they know more of what is good for us or what we need than we do ourselves.

Our Constitution was designed so that the Federal Government was, for example, only supposed to defend our shores from invasion from without and in turn, State governments were not intended to rule the lives of the people at the local level.

Today the Federal Government is, or is endeavoring, to control our lives at every level. Over the years there has been a creeping socialism and creeping bureaucracy to the point that some fellow gets himself a career job with the Government, and as attorneys they are privileged to use legal means in suits to wield their powers. Court decisions become law at the whim of judges who, in many cases, do not interpret law, but make laws. Citizens' rights have become historically eroded

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in recent times by the capricious decisions of judges who, by reason of pressure or bias or bleeding heart opinions, favor minorities in many cases.

Treaties or no treaties, we all have to live and survive in this world by some of our own efforts and to continue to depend on someone else to take care of us is inherently wrong.

We had the privilege of attending the 30th Governors Interstate Indian Council Conference in Kalispell this week. It was a very interesting and informative session.

One point brought out several times was that the present water suits were pushed by the tribes—this in spite of considerable publicity recently to the contrary—that the suits were initiated by Justice and Interior against the tribes' wishes.

It would seem that if the tribes are as interested in negotiation as they indicated, that the public should be consulted, especially those citizens who were ultimately named as defendants in these suits. Since it is said these suits were initiated as a result of Senate bill 76 and only the legislators had prior knowledge of these suits, and the State is unwilling to defend the people who are named, it seems only fair that the Federal Government should pay the legal fees for these people as well.

No one in our organization is advocating taking water, land, or resources away from the tribes, especially a fair share of water for their useful purposes and needs. There are many, many tribal members who wish to be and are normal law-abiding, tax-paying and self-supporting citizens like the rest of us. To them, we give our wholehearted support. We applaud their desire to maintain their heritage and customs when they can fit them into the mainstream of life in this world, but we feel that it is wrong to support any group of people to the point of taking away their initiative.

We are grateful to you, Senator Melcher and Congressmen Marlenee and Williams for the stand you are taking in these water suits. It is hoped that your combined efforts can assist us in getting Congress to take some positive action to prevent the Department of Justice and associated Government departments from continued harassment of the majority of its citizens.

We thank you and appreciate the opportunity to present our feelings.

Senator MELCHER. Does your organization represent a lot of water users?

Mr. MATTHIES. I would say yes. A good share of the people who are in our membership are also water users; yes. There is a parallel.

Senator MELCHER. In general, is the membership in these river drainage areas?

Mr. MATTHIES. Yes.

Senator MELCHER. All right, thank you very much.

I have been told, and I am still confused about it, that the witnesses for the tribe whom I have listed here at the request of Richard Anthony Baenen, an attorney for Wilkinson, Cragun & Barker, Thomas Pablo, and Frederick Houle, would be testifying. I have been told that Baenen is not here. Do you know, Bill?

Mr. MORIGEAU. He is not here.

Senator MELCHER. Has he been here?

Mr. MORIGEAU. Not for the hearing.

Senator MELCHER. Did he ever intend to be here?

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Mr. MORIGEAU. Not for the hearing.

Senator MELCHER. I have been told that Pablo and Houle were here to represent the tribe, is that correct?

Mr. MORIGEAU. They were here this morning. Pablo is the chairman of the council, and he had to conduct the meeting, and he asked Evelyn Stevenson, the tribal local attorney, to testify in his behalf and for me, also, to represent the tribe.

Senator MELCHER. That will be fine, but I have been told that Pablo and Houle were here to testify and find they do not feel they were called early enough, despite the fact that they did not inform us that they wanted to be called this morning.

Mr. MORIGEAU. I don't know anything about that. I was just asked to come in this afternoon.

Senator MELCHER. Do you know something about it, Evelyn?

Ms. STEVENSON. Yes.

Senator MELCHER. What do you know about it?

Ms. STEVENSON. There was a council meeting, as he just indicated.

Senator MELCHER. A scheduled council meeting? When?

Ms. STEVENSON. Right. It was scheduled for Friday. This is a regularly scheduled meeting.

Senator MELCHER. But, I mean, what time of day?

Ms. STEVENSON. It started at 9 o'clock but they canceled it until—well, they had a brief session this morning between 9 and about 10 minutes to 10, and came down here for your testimonies and then had to leave at noontime to get back to the afternoon session. I think it was just assumed, Senator Melcher, that you probably would call them.

Senator MELCHER. I was told that they felt they should have been called earlier in the morning, yet we had no idea they had any time constraints. Were you here when I announced at the start that anybody that had time constraints, to let us know, and we would arrange the witness list to suit that?

Ms. STEVENSON. I think, Senator Melcher, it was just somewhat assumed that because this is a reservation and the tribe is involved in this lawsuit, it was just assumed that you would out of courtesy, probably, call on the tribes first.

Senator MELCHER. We are delighted to call anybody first that wants to be called first. We generally follow the procedure of taking the State and county officials first, but we are not locked into anything, and we do attempt to move anybody that has any time constraint at all to the top of the list. We did considerable juggling this morning for that very purpose.——

Ms. STEVENSON. They had to get back.

Senator MELCHER. But we have no feeling of protocol that we have to adapt our hearing schedule to anybody else's schedule. Nevertheless, Houle and Pablo do not intend to testify?

Ms. STEVENSON. I think not. It is budget sessions at the council meeting and they had to get back.

Senator MELCHER. And you and Bill do care to testify?

Ms. STEVENSON. Yes.

Senator MELCHER. We would be delighted to hear from you, and if they had indicated any desire to testify this morning, I would have called them at 11:30 instead of Mrs. Curtiss. I don't think she had any time constraint, but it would have been only 15 minutes, and I know the tribe will take longer than that in their testimony, so please proceed.

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STATEMENT OF EVELYN K. STEVENSON, ATTORNEY, FLATHEAD TRIBE, CONFEDERATED SALISH AND KOOTENAI TRIBES

Ms. STEVENSON. My name is Evelyn K. Stevenson. I am the local attorney for the Flathead Tribe, the Confederated Salish and Kootenai Tribes. As we have just discussed, Tom Pablo, the chairman of the tribe, had intended to present the testimony, but he had to leave, and get back to the council meeting. I have his prepared testimony which I will give first, and then, if I have an opportunity, I would like to speak for myself as a member of the Confederated Salish and Kootenai Tribes.

First, Tom wanted to thank you for the opportunity to be here and an opportunity to give this testimony to the Senate Select Committee on Indian Affairs on behalf of the tribes. This talk of his, by the way, was the one item of business that was handled this morning at the council meeting. The council has all voted and approved that this is the statement they would like made to this committee today.

The Confederated Salish and Kootenai Tribes have been reading in the news media and in the Congressional Record of our congressional delegation's concerns on the pending water rights litigation filed by the United States involving the seven Indian reservations in Montana. I would like this committee to know that the tribes share the same concern as this committee and the rest of the Montana delegation and we know that the efforts to devise a compact that we are pursuing with the State may be the best way to resolve the issue; at least, we think so, based upon developments to date.

One of the major concerns of this committee which does need immediate clarification is the fact that the United States had no other choice under the circumstances but to bring the lawsuit on behalf of the tribes within the State, and the suit encompasses far more than the Indians' reserved water rights. As you know, it includes the Flathead irrigation project, the U.S. Forestry Service, the National Bison Range, and other Federal agencies' reserved water rights, so we feel that the Indians should not shoulder all the blame alone. Under the law which was passed by the Montana Legislature, senate bill 76, the attorney general of the State of Montana was required to file within 20 days from the effective date of that law, a petition with the Montana Supreme Court to compel all but certain domestic users of water in the State, including the Federal Government and Indian tribes, to register their claims to water.

That was the initial step in a general stream adjudication in State court. The attorney general filed the petition and it was followed within a very brief period of time by an order from the State supreme court to all water claimants to register their claims by January 1, 1982. Thus, the Federal lawsuits had to be filed in early April of 1979 by the United States in a Federal forum in order to preserve the extremely important legal position of the Federal court action having been started first.

Even if the United States had not filed the cases when it did, the individual water users within the State, non-Indian as well as Indian, would have found themselves dragged into water rights adjudication by virtue of the State legislature's mandatory filing of the State's suits; therefore, it was the State legislature which instituted statewide adjudications. The United States merely reacted.

This committee should also be aware that there will not be two lawsuits, there will be only one, either in Federal court or State court; there will not be simultaneous proceedings.

The committee's concern that the Federal Government will fund the lawsuits is correct, but there is by no means any assurance that the Federal Government will pay the attorneys' fees and expenses of the tribes. In some instances, the United States has paid the tribal attorney fees where it was necessary for a tribe to intervene on its own behalf if the United States had a conflict of interest. Even then, however, the United States has not always paid the tribal attorney's fee, and we frankly doubt that the funding will be available in all of these water cases in Montana to pay for any of the tribal litigation costs if and when the tribes intervene in the pending cases.

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Therefore, while we can understand why the non-Indian water users are quite upset about these lawsuits filed by the Federal Government, those lawsuits were forced, in fact, by the State's action, and the State's action, in any event, would produce the same results, general stream adjudication throughout the State, forcing all water users into court. None of this, however, would solve the problem, and we think the decision of the tribes to enter into negotiations with the State to see if a compact can be reached and thus precluding the need for legislation, is the best route to follow. Our long-term goals are compatible with the State's and the water users of this State, and we can—in fact must—work together.

Ms. STEVENSON. That was the statement of the tribe. Do you have any questions to ask me in that capacity?

Senator MELCHER. Why don't we let you proceed with any further statement? I understand that is the statement of Tom Pablo's testimony.

Ms. STEVENSON. That is right, that is the statement that Tommy would have made this morning.

Senator MELCHER. Please inform him that had we had any indication at all from the tribe that they had a meeting on and wanted to be heard this morning, it would have been very easy.

Ms. STEVENSON. That is right. We should have probably discussed that this morning.

Senator MELCHER. Please go ahead.

Ms. STEVENSON. On my own behalf, I would just like to point out to this committee that I believe there is a far less problem on the Flathead Reservation concerning the use of water than probably anywhere in the Western United States—the 15 Western States that are probably concerned in Indian water rights issues.

We worked very diligently last winter, all of the seven tribes in Montana, with the State legislature, in attempting to reach some sort of understanding concerning Indian water rights and how they would be dealt with under this proposed Senate bill 76.

It was our intent to come to grips with this whole issue and deal with it, to make some compromises here and there. We asked the State of Montana to amend that bill to leave Indian water rights out of the bill. We were willing to go for a set period of time while we could gather our information, while the State could gather its information, so we could sit at the table and reach a compact or some kind of agreement to resolve this issue. We felt then that that was in the best interest of the Indians; we felt that it was in the best interests of the citizens of Montana.

We felt that the State of Montana had not done all of its homework prior to beginning this Senate bill 76. We felt that Montana didn't really know how much water it had, and the greatest fear that the people of this State faced was exposing the surplus water in this State to downstream users; in fact, there were people from Texas, Oklahoma, and places like that, who have interests in our water, and their interests were made known.

We felt that this was a good opportunity to take these paper rights, if you will, our *Winters* doctrine rights, our Indian water rights, and quantify them.

Now, the word "quantification" is something that Indians have not used in the past. We realized we were at a point in history where we would have to probably use those terms, and so we did.

Unfortunately, because of some of the fears, suspicions, and lack of understanding, ignorance, mistrust, whatever, we were not successful in these meetings. We came very, very close, and I think if the

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rapport, the understanding, had been set up a long time ago, these meetings would have avoided all of this. If we had been successful in our attempts in those eight sessions in Helena, I believe we would not be in these lawsuits today.

If I remember correctly, we met with the water committee on a Wednesday, or a Tuesday, in Helena. They announced that they liked the bill the way it is written. I left at that time and went to Phoenix, and the U.S. Government filed the suits on Thursday.

They are not always well-prepared. They are not, as far as the Flathead is concerned. There are people named in that suit who should not be; there are people not named who should be, and I believe the Government worked in great haste in putting this together. I would have liked an opportunity to talk to the gentleman from Kalispell, because many of his questions were legitimate ones, and they need answering, but the fact remains, as pointed out in Chairman Pablo's statement, this became a race to the courthouse.

Indians object to the State forum to adjudicate our water rights, and I think it is only reasonable that we should question the neutrality of the State courts to adjudicate Indian water rights. It does not seem feasible to us, after having fought for years to deny Indian water rights, that the State could or should now be asked to determine and project these very same rights. I will quote briefly from a speech that Senator Ted Kennedy made in 1976, in which he said:

> No matter how brilliantly water rights are defended by the Government attorneys, they cannot receive full protection in State court forums. The security of Indian water rights rests not only upon a full commitment from the Executive and the complete support of Congress, but also upon the availability of an independent and dispassionate Federal judiciary to adjudicate these rights.

Therefore, it was mandatory for the Government to bring these lawsuits which were filed in early April in Federal court rather than the State court granted by Senate bill No. 76. I would like to again remind all of the people here today that the purpose of Montana Senate bill No. 76, as written, was to bring all water rights into court immediately, and the chosen forum of the State was the State court system. That forum was not acceptable for us to determine Indian water rights, so for that reason, and that reason alone, the cases were brought in Federal court. As I indicated earlier in my statement, this reservation is the one area where we can and should be sitting at the table and working out agreements.

I think it is very unfortunate. People here are frightened, they are nervous. They don't understand water rights, they don't understand Indian water rights, they don't know what they are dealing with. I think the whole act is very important for an atmosphere of understanding and mutual goals, to be looked at, rather than to create any further animosity or feeling of ill-will, or to play on that ignorance, that lack of understanding, that people live with.

I am very glad to have spoken today, and I do hope that the Flathead Tribes and the State of Montana will be able to work out these issues to the benefit of all.

The treaty was mentioned as not containing any reference to Indian water rights, and in fact, that is true. The U.S. Constitution does not at all include any of the rights that we have lived by and understand, and look forward to the courts to withhold. The interpretation of Indian water rights was made fairly clear in the *Winters* case in 1908, as you know, and in most cases since then. It is not specific in the

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treaty, but I think it is fairly clear in most of the cases that have come down, that these reservations in the West were arid and dry and barren. As the *Winters* case said, or the Supreme Court said, it was inconceivable to think that the U.S. Government intended to have the Indians give up these vast areas of land, reserving only these small parcels, and at the same time, to give up the water which make these places habitable or irrigable—I'm not sure of the exact language—so Indian water rights are very important to us here.

Senator MELCHER. I am not even sure what "arid" is. I come from Forsyth, and we don't think the Flathead is arid.

Ms. STEVENSON. You don't think what?

Senator MELCHER. I am nor sure what "arid" is. I come from Forsyth and we don't think of this area as being arid at all.

Ms. STEVENSON. No; that is why I am saying that we are the one area that can discuss in different terms and work with the people who live here, because I think there is enough water for all of us if we work together. That is the point that I am trying to make, I hope that we can keep the spirit of good will and the spirit that we need in order to be able to work with the people here.

Thank you.

Senator MELCHER. Let's get down to some specifics on this. Has the tribe passed a resolution dealing with this lawsuit—requesting it?

Ms. STEVENSON. Here is how the council resolution went sometime back in—what was it?—February?—I'm not sure of the exact date of it—but it was to work as diligently as possible with the water committee in Helena in attempting to get the Indian rights—the Flathead rights, all tribal rights—amended out of that bill so that we could work on the compact motion, and if that did not fail, that we would begin more serious efforts, I believe, to quantify water, to know what our water resources are, and that has been in the process for some time.

Most of the Indian tribes, in fact, are fairly knowledgeable about their water, far more so than anywhere else in Montana. I believe the third alternative on that resolution was that litigation go forward.

Senator MELCHER. Do you have a copy of the resolution?

Ms. STEVENSON. I don't have a copy with me. Do you have a copy?

Senator MELCHER. No; I don't have a copy of it.

Ms. STEVENSON. I don't have a copy of it.

Senator MELCHER. I have something in front of me that says Resolution No. 55–65. Is that the one you are referring to?

Ms. STEVENSON. Yes.

Senator MELCHER. That is dated August 13——

Ms. STEVENSON. Of this year?

Senator MELCHER. 1979.

Ms. STEVENSON. No; I don't have that with me. Go ahead.

Senator MELCHER. Which one were you talking about?

Ms. STEVENSON. I was talking about one earlier in the year—the step process.

Senator MELCHER. I'm not sure this is accurate. It is a letter from the U.S. Department of Interior. They are saying that they have a resolution from the tribe numbered that way and dated August 13 of this year.

Ms. STEVENSON. I'm not familiar with that one. Are you, Bill? Do you know?

Mr. MORIGEAU. No.

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Ms. STEVENSON. The only resolution I know was very, very early this winter, in which those were the steps this tribe wished to take. The first was, of course, the negotiation of process. We were very sure that we were going to be successful in that. We were very optimistic. We sincerely believed those sections were going to prevail.

Senator MELCHER. That is fine, but the reason I am asking about this one is that this is, I suppose, the latest action of the tribe regarding the suits, and it says it was filed from the tribal attorney. It doesn't identify which attorney.

Ms. STEVENSON. That would have been Wilkinson, Cragun & Barker, I suppose, but this is only what?—the 31st—now. I think there is an error there, Senator.

Mr. MORIGEAU. February 13 would be more like it.

Ms. STEVENSON. Yes; I think someone has just typed in the wrong month.

Senator MELCHER. Well, do you know the number?

Ms. STEVENSON. I can go back and pull the number; yes. What do you say it is?

Senator MELCHER. 55–65. Aren't these numbers assigned?

Ms. STEVENSON. It will be in the resolutions file, yes, but I do not know the number of the one that was passed in February. I am not familiar with this resolution.

Senator MELCHER. That is the only one they are making reference to?

Ms. STEVENSON. I think someone typed in the wrong date.

Senator MELCHER. All right. If you think that you want to work out an agreement, through compact or some basis, in these meetings you spoke about: Was there some kind of attempt to reach a compact arrangement?

Ms. STEVENSON. No; that was laying the groundwork. That was working with Senate bill 76. In a prelude, we expressed the willingness from this tribe to enter into negotiations and sitdown sessions immediately. Now I don't know exactly, although it was my understanding up there in Kalispell, that the tribes are still very interested in working with the State—with the whole central goal being the preservation of water in this area.

Senator MELCHER. This is the only tribe that is involved in this water suit dealing with the Flathead?

Ms. STEVENSON. Yes.

Senator MELCHER. So, as far as the tribes themselves are concerned, if the Confederated Salish and Kootenai asked the Justice Department to drop the suit—no other tribe is involved?

Ms. STEVENSON. That is correct.

Senator MELCHER. The tribe, either by earlier resolution or whatever—the one that Interior has advised us about, which may be in error—has not given any indication to the Justice Department they would like the suit dropped as far as they are concerned?

Ms. STEVENSON. No; this came up by Ted Doney, I guess, in Kalispell. The question there was if the State of Montana were willing to amend—it is called an emergency session—Senate bill 76 to recognize Indian water rights and at this late date to go ahead now and amend this bill: Would we consider requesting the Justice Department to drop the suits?

That poses a very interesting question. On that basis, there was quite a bit of talk that that was a possibility. The Justice Department,

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however, indicated that that was not any assurance that they would, in fact, adhere to the tribe's request.

Senator MELCHER. No; I am not sure that you have any influence with the Justice Department at all, but you mentioned this willingness to have negotiations, and I just wondered whether that is really the position of the tribe or not.

Ms. STEVENSON. I believe it is. That was the official action taken by the tribe. We understand that it is President Carter's policy that he favors negotiations—favors congressional actions that would ratify or allow these entering into compact arrangements.

Senator MELCHER. The more hearings we have, and the longer we discuss this about what the Justice Department has done and isn't doing and might do, the more it becomes apparent that these are long, drawn-out suits.

Ms. STEVENSON. There is no doubt about that.

Senator MELCHER. If the tribe is sincere in wanting to negotiate—I just wonder whether they are willing to ask Justice Department to drop the suit.

Ms. STEVENSON. It is not that simplistic, Senator. It really isn't.

Senator MELCHER. I don't think there is anything very simple about water. I am just trying to arrive at the extent of the tribe's feeling, that they want to avoid this confrontation and this friction, whatever the terms were that you used.

Ms. STEVENSON. We are not content to be in the State court forums.

Senator MELCHER. You are not what?

Ms. STEVENSON. The Indians are not content to be in a State court forum. Because of the McCarran amendment, and the uncertainty of what that means at this time, the race to the courthouse—it has happened all over—because of the uncertainty of what the McCarran amendment means. That is why we are in Federal court. What it would take to get us out of Federal court, at this point, I can't give you any answers for sure on that. But if there is any hope for agreements, for working together, I think it is very important not to do anything to refuel or offend the fears people have.

Senator MELCHER. Whether or not the Flathead case gets into State court under the McCarran Act, won't be a decision of the tribe.

Ms. STEVENSON. No.

Senator MELCHER. It probably won't be a decision of the Justice Department, either. It will be a decision of the court itself. But the fact is, that your testimony has been to the effect that you would like to avoid this long-winded confrontation that exists as long as the suits are there. You said that you would like to avoid it.

Ms. STEVENSON. We are in the middle of it now. That is correct, and as we expressed in Helena, and as I think we have expressed since that time——

Senator MELCHER. No; I understand that, and I have heard that you feel pressed in by Senate bill 76, and somehow, I keep hearing that is some reason to keep these suits going. Of course, it is a legislative action. I am not involved with it at all. So I think I can say as sort of an onlooker what happened there—and I have heard everybody's version of it—that if you are really interested in negotiation, which you haven't, have you been named by the State as a defendant in the suit? Has the tribe been named?

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Ms. STEVENSON. It is very obvious, and there is no doubt that all of our water rights are part of and parcel of, as were Federal reserved water rights, that bill.

Senator MELCHER. But the tribe hasn't been named yet?

Ms. STEVENSON. No.

Senator MELCHER. All right, but the defendants, on the other hand, in the Justice Department suit, have been named?

Ms. STEVENSON. Part of them.

Senator MELCHER. So there is a little difference, isn't there? That is really why I am pursuing this line of questioning. There is a little difference.

Ms. STEVENSON. I am not sure what you are getting at.

Senator MELCHER. The tribe hasn't been named as a defendant yet under any State procedure. Am I correct on that?

Ms. STEVENSON. Yes; you are correct on that.

Senator MELCHER. So there is a difference?

Ms. STEVENSON. In that sense, in a semantical sense, yes.

Senator MELCHER. Well, a very real sense in court, isn't it? You are a lawyer, and I am not, but isn't there a very real difference when you are not named as a defendant at a stage of a lawsuit?

Ms. STEVENSON. But it was just an absolute matter of time, and this was necessitated by the Senate bill. The action of the Justice Department was necessitated.

Senator MELCHER. I guess what I am getting at is: Since this, in the State court, has not proceeded very far, it seems there is much more likelihood that there be negotiations started on the basis of that suit rather than on the basis of the Justice Department suit.

Ms. STEVENSON. I think some action from the State of Montana would certainly be welcome, and whatever the State of Montana is willing to come forward and say that is, I am sure we will be more than willing to sit down, because as we stated before and say again now——

Senator MELCHER. Who named the State of Montana as a defendant?

Ms. STEVENSON. The Justice Department. We are not as yet, as you notice, plaintiff in that suit, either.

Senator MELCHER. And I dare say that Interior is trying to tell us that the resolution that they received from the Salish and Kootenai was a request for the lawsuit?

Ms. STEVENSON. The resolution that I saw was three-part, and it stated, "This is the order of priorities that this tribe has," and that is the only one I have. If you have a later one, we can go back.

Senator MELCHER. I don't have either one of them. We have asked for them.

Ms. STEVENSON. I see.

Senator MELCHER. We have asked for them, but I don't have either one of them, if there are two, but I think the point I'm trying to make is, if the Salish and Kootenai really want to negotiate on this, there has to be some procedure to stop the action of the Justice Department. Pablo's testimony, and your testimony have both said that the Justice Department is going much beyond the tribe's water rights, and that is true, but I am not sure how much real sincere negotiation will take place as long as Justice Department is calling the shots on this lawsuit.

I think a request by the Confederated Salish and Kootenai to either drop the suit, forget about it for a few years, would have some effect

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and might lead to some negotiation. I am not sure that while the suit is active and all these people are named as defendants that there will be any real negotiation.

Ms. STEVENSON. I think if there were some assurance and some agreement reached between the tribes and those State people who are involved in this, the water committee, or whoever is now doing this, that a mutual master would be appointed or that there would be some sort of precise procedure set up. I think one of the fears is that if these suits were dropped, and dropped with prejudice or without leave to bring them again, then we are automatically in the State court forum if anything breaks down without something solid having been arrived at beforehand. It is what your order of business is, I guess, how you look at it.

Senator MELCHER. There is no water shortage that you are aware of?

Ms. STEVENSON. Not that I am aware of. That is why I think the Flatheads were very willing to do all that they have done. All that we were mostly concerned with was the possibility of taking our paper rights—our *Winters* doctrine rights—and having this dispute with the State of Montana while our water is in Oklahoma, Texas, Colorado, or somewhere else. Then we all look a little foolish.

Senator MELCHER. How much water is reserved for the reservation?

Ms. STEVENSON. Under——

Senator MELCHER. How much is reserved for the tribe currently?

Ms. STEVENSON. I am not sure what you are——

Senator MELCHER. Is there a quantified reservation for the tribe?

Ms. STEVENSON. No.

Senator MELCHER. In one area?

Mr. MORIGEAU. Mr. Senator, in 1935, Congress passed an act whereby incorporated tribes—IRA tribes like our tribe—have control over hydroelectric sites or any changes in previously licensed sites bearing the approval of the tribal council or if a new license were issued on hydroelectric sites on an Indian reservation the tribe would have to give their approval first before the Federal Power Commission could issue such license. That is one quantification, and I think that is one of the areas in which the Justice Department suit will attempt to reserve the water for the tribes. Of course, this is a nonconsumptive use. You should bear that in mind.

Senator MELCHER. Bill, you have a prepared statement. Would you like to give that now?

Mr. MORIGEAU. I would like to summarize it at this time.

Senator MELCHER. All right.

Your full prepared statement will be made a part of the record.

[The prepared statement of Mr. Morigeau follows:]

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Statement of E.W. "Bill" Morigeau, Vice-chairman of Conf. Salish & Kootenai Tribes Before Senator Melcher on the Department of Justice Water Suits Against Montana and Some Water Users

Mr. Chairman:

It is a pleasure to appear here today. I have three water related areas that I will advance my views on.

Each area is either related to Montana Senate 76 Water Right Bill, or the Justice Department Water Rights Suits.

I have been reading the papers about the thousands of water users that will have to appear and defend their water rights.

This Department of Justice law suit is a complaint that (no. 1) will, protect Indian water rights and (no. 2) will also protect federal reserved water rights.

The way the complaint is written it is mighty confusing, as after examining the complaint filed in April, I find there are only six water users within the entire Flathead Reservation named as defendants, using tribal water without a water right. The other 243 named in the suit are from Columbia Falls area, Kalispell area, Whitefish, bigfork, Swan Lake area, etc., which are using federal reserved water without a federal water right. I would like to set the record straight. The Confederated Salish and Kootenai Tribes Council has never claimed water or water rights outside of the border of the Flathead Reservation.

Federal reserved water rights in the complaint are identified as water for United States Post Offices, Federal Fish Hatcheries, U.S. Wildlife Reserves, Glacier Park, National Bison Range, two national forests and congressional appropriated water in Irrigation Projects to use the surface and ground water of the Flathead River BAsin and recognizing the reserved and appropriated water rights of the United States.

Four of the nine water users within the Reservation named in the complaint were there by error and have been notified of such, leaving six including the state of Montana.

The State of Montana is named as a defendant because of the passage of Senate Bill 76. In my opinion no individual should have been named in this law suit, only the State of Montana should have been named as the defendant.

The Tribes portion of the complaint within the Reservation does not involve over five individuals, including the State of Montana. The Department of Justice acting as trustee, is asking that tribal members and the tribes has the right to use the water flowing through or under the Reservation in an amount sufficient to provide a homeland for the tribal members and to meet the present and future needs of the tribe and their members.

In 1904 Congress passed an act establishing the Flathead Indian Irrigation Project. It became apparent after 1910, when the Reservation was opened for homestead, that this project was not for actual Indian use but the water resources used for the project still remained in Indian ownership. When this error was discovered by the project planners, the Interior Department convinced Congress to appropriate the water for the project.

This appropriation did not include all of the water within the Reservation, only the waters in the project boundary.

The greatest amount of water running through, surface and ground water remained as a tribal resource.

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page 2
E.W. "Bill" Morigeau statement

This department of Justice complaint does not name any of the water users under the project as the project is managed as a federal project using federal reserved water rights.

It is sometimes difficult to dinstinguish between Indian and Federal reserved water rights as the title to Indian resources are held in trust by the United Stated for the benefit of the Tribes.

Congress, in 1946, passed an act setting up a special jurisdictional act for the Confederated Salish & Kootenai Tribes where this tribe can file their claims with the United State Court of Claims.

The taking of some of the Tribes water for the irrigation project was deemed a 5th amendment taking. The tribes may file this case to satisfy the tribes claim, as the congress has already established this tribal right.

I attended four hearings before the special water committee on Senate Bill 76. At each hearing there were representatives of the Montana Tribes and Interior Department personnel.

At each hearing representatives from the seven Montana Reservations asked the special house committee to recognize Indian water in Senate Bill 76.

It was explained to the Indians that Montana had been working on this bill for five or six years, ever since the revised Montana Constitution went into effect.

On Februrary 28, 1979 each tribe put their views into writing requesting again that the bill recognize Indian water rights and to establish a five year moritorium in the bill giving Congress time to approve a compact whereby tribes and the trustee can actually sit down with the state planners, as each Indian Reservation water rights seemed to be under different usage and different laws, sucha s either under treaty, an act of congress or a federal court ruling or just plain water rights established by the Interior Department. The Indians did request the trustee that Indian water be protected if the Montana House Special Water right Committee recommended passage of Senate Bill 76 without recognizing Indian water rights. The lawsuit was therefore necessary.

If I were asked my opinion on whether the lawsuit should be cancelled, my answer would be that as soon as the Montana legislators amend Senate Bill 76 recognizing Indian water rights, I would say cancel the Justice Department lawsuit.

I will close by saying that our tribes doesn't have any water claims against the 243 defendants in the Upper Flathead River Basin. Thank You.

E.W. "Bill" Morigeau
Vice-Chairman, Confederated Salish and
Kootenai Tribes of the Flathead Reservation
East Lake Shore
Polson MT 59860

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STATEMENT OF E. W. MORIGEAU, VICE CHAIRMAN, CONFEDERATED SALISH AND KOOTENAI TRIBES

Mr. MORIGEAU. I am Bill Morigeau, vice chairman of the Confederated Salish and Kootenai Tribes.

You asked if there was any shortage of water presently, and I don't believe there is—only in one area. We have noticed in the last 3 or 4 years that we have a ground water shortage. The water wells on many Indian homes are involved, and I think this is due to the increase in agricultural wells that are being drilled here on the reservation. That is the only area that there is a shortage.

There were some questions earlier on the hydrological studies here on the reservation. There may be some information in the Flathead Indian irrigation project on hydrology. I know presently that there is a contract between the Bureau of Indian Affairs and Woodward Co. from Salt Lake City. They are doing a hydrological study and a water reservation study. I think that will be complete within the year.

This morning, there was some testimony about the cities within the reservation, why they weren't named in the water suit. I think Ronan and St. Ignatius, and I know for sure Polson—I represent the Polson district—that the tribe has a watershed lease with the city of Polson. The reason, I believe, that we have this is that there wouldn't be any way for the city to get the water out of the reservoir were it not for having a lease with the tribe. The pipeline has to cross tribal lands and the city doesn't have a right-of-way across tribal lands. So the watershed leases are necessary.

This is one of the things that we brought out in Helena last February and March—that we have these watershed leases. We didn't know what Senate bill 76 might do to things such as that, especially if the cities were to try to adjudicate a water right on these streams, and end up without a right-of-way. We thought this might create quite a problem.

I spent some time here about 1½ weeks ago. I took a look at the complaint that was filed in April, and I have a copy of it here. There are 244 names listed on this complaint. I picked up the telephone book one evening, and the wife said, "What are you going to do?" and I said, "I am going to go through the telephone book and check how many of these people named here are actually from the reservation." She asked, "Well, what difference would that make?" I said, "Well, the tribes don't have any water claims against people off the reservation and towns like the city of Kalispell or the people in the Flathead Conservation District. We don't have any claims against them and never have."

I researched the records to find out, and we never have passed a resolution claiming any of their water. So that is the situation at the present time. That is how I found that there were 244 names of people living off the reservation listed on this complaint, only 9 people within the reservation borders, and 6 of those were there by error and have been notified. I don't know about the other three. I am sure that two of them are in Arlee and within the Flathead irrigation project and shouldn't have been named.

I think that our attorney here has covered the situation very well, and I just wanted to make those points known, and I thank you very much.

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Senator MELCHER. Thank you, Bill. First of all, they call this the *Abell* case. You say they have named as defendants 243?

Mr. MORIGEAU. 244, I have, and that was in the April complaint. If it has been changed, I don't know anything about that.

Senator MELCHER. I can't tell from the testimony here. They say the *Abell* case, meaning the Flathead drainage, 250. As I said, Sagalkin testified for Justice. In the Flathead River drainage, there may be an additional 1,200, so it would be the sum of those—well, he says—250 and 1,200 would be 1,450.

Mr. MORIGEAU. That is what I was told, but even if there were 2,000 off the reservation, we still don't have any claims against them.

Senator MELCHER. Is there any agreement between the tribe and the city of Ronan on water?

Mr. MORIGEAU. I am really not sure. Evelyn may know.

Ms. STEVENSON. I am not sure what the status is at this particular moment. There was.

Mr. MORIGEAU. There may be, because I know the city of Ronan and the tribal council representative, Joe MacDonald, have discussed it many times.

Senator MELCHER. Where are the areas where the water table is dropping, that you mentioned?

Mr. MORIGEAU. In the Pablo area.

Senator MELCHER. Just in the Pablo area?

Mr. MORIGEAU. Pablo and east of Pablo.

Senator MELCHER. How far?

Mr. MORIGEAU. At least 3 miles.

Senator MELCHER. Can you identify the wells that cause that?

Mr. MORIGEAU. Sid Shortz, for one.

Senator MELCHER. And are these for wells that are used for sprinkler irrigation?

Mr. MORIGEAU. The wells that are affected are used just for home use.

Senator MELCHER. And he uses a lot of water?

Mr. MORIGEAU. Just for his home use.

Senator MELCHER. Let's back up. There are some people in the Pablo area under whose homes the water table is dropping?

Mr. MORIGEAU. Yes.

Senator MELCHER. Do you know why?

Mr. MORIGEAU. We assume——

Senator MELCHER. To your knowledge, do you know what causes it?

Mr. MORIGEAU. We assume that it is the many agricultural wells that have been drilled and put into operation in the last few years.

Senator MELCHER. In that area?

Mr. MORIGEAU. Yes.

Senator MELCHER. All right, and mostly east of Pablo?

Mr. MORIGEAU. I wouldn't want to guess, but around the Pablo area.

Senator MELCHER. How much drop has been noted in the water table?

Mr. MORIGEAU. I couldn't answer that other than the fact that they have reported a shortage of water at times and no water at all, at times.

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Senator MELCHER. This is from their own private wells?
Mr. MORIGEAU. Yes.
Senator MELCHER. Do you think, perhaps, the Flathead irrigation project does have some hydrologic information in this area?
Mr. MORIGEAU. It is very possible, Senator, that they do, because the people who are doing the water study are getting much information from the Flathead project.
Senator MELCHER. Has the tribe developed a long-range plan that would involve use of more water than is currently being used by the tribe or individual members of the tribe?
Mr. MORIGEAU. We are working on establishing a tribal ranch on the river down on our range unit 47—that is the number of our range unit—and we have in the neighborhood of 3,000 acres. We recently purchased another 240 and there is about 600 acres of cultivation land that could be irrigated very well, and we are in the process right now. One of our priorities is to establish a tribal ranch at that point. That would be one area.
Senator MELCHER. That would be one area?
Mr. MORIGEAU. Yes; and also water uses for the possible recreation areas. I think there is plenty of water on the reservation for the fishers' program. That is one of the programs that will be defended in this lawsuit, but again, it is a nonconsumptive use and won't make any difference for the future.
Senator MELCHER. You said recreational, did you not?
Mr. MORIGEAU. Yes; I did.
Senator MELCHER. Why does that depend on this lawsuit?
Mr. MORIGEAU. Well, if you tie in recreation to water——
Senator MELCHER. A beneficial use?
Mr. MORIGEAU. Yes.
Senator MELCHER. What kind of recreation? Maybe we will decide right now if it is beneficial.
Mr. MORIGEAU. It is one of the best fishing areas within the United States.
Senator MELCHER. I think that is beneficial—if you catch any. Even if the tribe were to irrigate an additional 3,000 acres—I am not sure that you meant that amount would be irrigated. That isn't a great amount of water, is it? Wouldn't that water come right out of the river there?
Mr. MORIGEAU. It would be pumped out of the river. I just mentioned that because that is merely one of the areas that we would like developed and put a sprinkler system into it. It won't affect any of the present water users on the reservation at all.
Senator MELCHER. Does the tribe have any other plans that would be using water other than the ones you have mentioned? I don't mean additional home use or anything like that. Has the tribe any plans for industrial use of water?
Mr. MORIGEAU. I think so. As you know, in the past 3 years the tribe has passed two resolutions authorizing the Corps of Engineers to complete studies at the lower Flathead sites—power sites—and one day we hope to have those developed for the benefit of western Montana, and of course, for the region.
Senator MELCHER. All right. That is putting water to use, but I am thinking now of consumptive use for industrial purposes. Does the tribe have any plans for that?

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Mr. MORIGEAU. No; I don't think so, unless you could term agricultural uses as consumptive uses.

Senator MELCHER. No; I mean consumptive uses of an industrial type.

Mr. MORIGEAU. No.

Senator MELCHER. All right, so the sum and substance of it is, there is plenty of water right now except for some lowering of the water tables for some individuals in their home use east of Pablo?

Mr. MORIGEAU. Yes.

Senator MELCHER. And the tribe would be likely to use more water for agricultural purposes, specifically in the areas that you have mentioned?

Mr. MORIGEAU. Yes; that is right.

Senator MELCHER. It really does not indicate any problem for a lack of water at this time or in the foreseeable future as far as the tribe is concerned.

I think I have asked all the questions I want to ask of both of you. I don't believe that there is any use in pursuing a discussion of the *Winters* doctrine in this case, because the tribe simply is not envisioning much more water than they are now using. If I have misunderstood you on that, please correct me, because we like to understand what the tribe's position is.

Ms. STEVENSON. I don't know exactly what the immediate goals are of the tribe for consumptive or agricultural uses of water in the immediate future. There are many kinds of ideas that come up—additional recreational uses, small kinds of industry. So far, the reading I have obtained from the tribal council is that they are very interested in conservation, so this precludes any large factories or pulpmills or anything of that kind that might endanger the recreational or ecological beauty of this area. That is a very big concern around here. Those kinds of commercial ventures that are feasible without interfering with that are what they have been batting around for ideas. Then, of course, there is the question of where does funding come from for any of these beneficial uses that would be projected in the very near future.

Senator MELCHER. Thank you both, very much.

Ms. STEVENSON. Thank you.

Mr. MORIGEAU. Thank you.

[The following material from Lake County was received for inclusion in the record.]

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St. Ignatius
WILSON A. BURLEY
Ronan
TREASURER
MARJORIE D. KNAUS
CLERK AND RECORDER
ETHEL M. HARDING

ASSESSOR
WILL TIDDY
SHERIFF AND CORONER
GLENN FRAME
CLERK OF COURT
ETHEL M. HARRISON
SUPERINTENDENT OF SCHOOLS
GLENNADENE FERRELL
COUNTY ATTORNEY
RICHARD P. HEINZ
COUNTY SURVEYOR

POLSON, MONTANA 59860

August 31, 1979

TESTIMONY ON WATER RIGHTS ADJUDICATION
SUBMITTED TO JOHN MELCHER
CHAIRMAN SELECT COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

PRESENTED BY BOARD OF LAKE COUNTY COMMISSIONERS
AUGUST 31, 1979

Honorable Senator Melcher:

The Department of Justice has seen fit to file suit against thousands of water users in four major river drainages in this State. Their motivating factor was the State of Montana's assertion of authority to adjudicate all water rights within its boundaries. The Federal Government has entered as a stopgap for exclusion of certain citizens and their water rights from the disposition of State District Courts.

Free flowing fresh water is one of the last natural resources remaining to be allocated. Its value is incalculable, its availability is essential to survival. As its use increases and supplies become restricted, efforts toward allocation are imperative. However, distribution of a precious resource should not become a political football between leviathan branches of State and Federal government at the expense of individual citizens. Authority to adjudicate water rights must be established. Perhaps the worst and most confusing method of determining adjudicative process is wholesale filing of individual suits. Evidently, the Federal Government intends to sue everyone, including itself, over the inclusion of Indian Reservations in the States scheme of adjudication. The capacity of Federal intervention in the adjudicative process is suspicious. The availability of water in the west has far-reaching ramnifications particularly in National energy policy. It is probable the Federal Administration would have entered this matter had not the Indian question been a convenient avenue. In this sense all the citizens in Montana are being used as pawns for larger purposes.

The brunt of this "race to the Courthouse" is borne by individual water users. Many more citizens in other areas are likely to suffer from this approach. Government should not function in this manner. Many valid individual water rights

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Page 2
Honorable Senator Melcher
August 31, 1979

have been unnecessarily clouded through actions of governmental entities--governments constitutionally mandated to protect such rights.

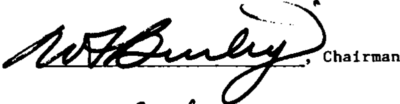
Water rights are too valuable to be squandered through long-term litigation. At stake are the rights of the States in allocating water resources in the face of National policy that likely goes far beyond Indian affairs. Senator, these matters must not become sole territory of Administrative branches of government through initial failure of the legislative. We urge Congress to cooperate in a cohesive effort to allocate water resources.

Digression to a case-by-case process of litigation can only erode the possibility of positive and proper adjudication of water rights in the State of Montana.

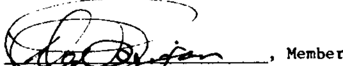
Thank you for this opportunity to comment.

Respectfully,

BOARD OF COUNTY COMMISSIONERS
Lake County, Montana


, Chairman

, Member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GLENNADENE FERRELL
COUNTY ATTORNEY
RICHARD P. HEINZ
COUNTY SURVEYOR

POLSON, MONTANA 59860

September 21, 1979

The Honorable John Melcher
440 Russell Building
Washington, D. C., 20510

REC'D SEP 25 1979

Honorable Senator:

Pursuant to your August 31st hearing on water rights held in Ronan, Montana, I have been asked by the Board of Lake County Commissioners to submit, for the record, information concerning the Pablo Water System.

As evidenced by testimony at that hearing the Pablo area has unique water supply problems that could possibly become a future bone of contention. I will submit facts and statistics as they are now known. It should be specifically noted that this data is inadequate for purposes of litigation. Legal difficulties could not be properly addressed without hydrological study with regard to porosity, aquifer location, static levels etc.

The Pablo Water District comprises 4,600,000 square feet approximately 4 miles north of Ronan, Montana. The system was constructed in 1972 using funds granted by the Economic Development Administration matched by local tax initiative. The system consists of two wells (a third is drilled but not yet in production) and storage of 200,000 gallons. There are approximately 220 hookups to the system including A Tribal Subdivision and Day-Care Center outside the district. Town businesses as well as Confederated Salish & Kootenai Tribal office complex, newspaper and jail are industrial users of this water. Usage ranges from a low of 100,000 gallons a day in the winter to total committment (200,000 gallons of storage plus continued pumping) during the summer. This "shortage" occurs during the summer season during heavy lawn and garden irrigation. It is hoped the new well will provide some relief.

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Honorable John Melcher
September 21, 1979
Page 2

The unique porosity of the aquifer provides water to the Pablo district and other domestic and irrigation wells in the area. The two old wells on the Pablo system are from 385-400 feet in depth. Their average rating is a combined 260/g.p.m. (the new well has not been officially measured but is estimated at 150/g.p.m. at 408 feet). The static level of these wells and others in the vicinity frequently fluctuate horizontally. I am advised that this indicates the aquifer has a good deal of porosity. The fluctuation trends via underground formation transmission causes many area residents to surmise degeneration of their wells. However, according to testimony, average static levels in the area have remained fairly constant. Capacity of the aquifer will be a limiting factor in the future. Some wells that appear to be drying are actually filling with silt. The fine, silty geological characteristics of the area, and the existance of many "open bottom" older-type wells, in need of cleaning, account for many supposed shortages in the area.

I hope this information is of use to you. I again emphasize that future litigation can only be undertaken after the generation of extensive hydrological data.

If I may be of any further information please do not hesitate to contact my office.

Sincerely,

Sam Roberson
Administrative Assistant
BOARD OF LAKE COUNTY COMMISSIONERS

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Senator MELCHER. Mel Tonasket, National Congress of American Indians.

UNIDENTIFIED VOICE. Senator, Mel Tonasket, the last I heard, was going to be driving in from the Colville Reservation, Wash. I would assume that he ran into some weather problems, but I would hope that he would be showing up here, but if he doesn't, I would hope that the record be kept open for submission of his testimony.

Senator MELCHER. It surely will be. If he gets here before we conclude our hearing, we will hear from him directly, but if he doesn't, the hearing record will remain open for it. Thank you very much.

Lucille Otter, Flathead Resource Organization.

STATEMENT OF LUCILLE OTTER, FLATHEAD RESOURCE ORGANIZATION

Ms. OTTER. I am Lucille Otter, from Ronan. The Flathead Resource Organization is a newly formed environmental organization, and we have gone on record supporting the tribes' administration of their resources, timberland, and water. We feel as though the tribe has first rights on water. That is all I am going to say for the Flathead Resource Organization; however, I want to make a few comments on my own. Is that OK, Senator?

Senator MELCHER. Most certainly; yes.

Ms. OTTER. I want to bring to your attention, when you were discussing the Hellgate Treaty of 1855 and commenting on the fact that blacksmiths and wagons were mentioned, that this treaty was written by the non-Indian and signed by Indians who were given the information of the treaty by interpreters. Also, I want to comment on the shortage of water on this reservation.

We do have a lot of water on this reservation, but there are times in the past years, during dry years, that the Flathead Irrigation Service has to allocate water due to shortage in the reservoirs.

Thank you.

Senator MELCHER. What do you mean by that? Who allocates the water?

Ms. OTTER. The Flathead Irrigation Service, the Flathead project. There are times when the reservoirs have a shortage of water due to dry years, and the people who irrigate are allocated water due to the shortage.

Senator MELCHER. The irrigation district allocates the water?

Ms. OTTER. The Flathead irrigation project at St. Ignatius headquarters allocates the water.

Senator MELCHER. We really haven't had any testimony on this project that amounts to very much. I suspect that it is because they are not named as defendants. Is that your thinking?

Ms. OTTER. I hadn't known that they were not named.

Senator MELCHER. I had personally anticipated that we would have witnesses who wanted to testify who use the water—unless Bill Morigeau uses the water, there aren't very many——

Ms. OTTER. I use the water.

Senator MELCHER. You use the water?

Ms. OTTER. I have an inherited interest in an allotment under the Irrigation Service——

Senator MELCHER. I am having difficulty in understanding you.

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Ms. OTTER. I do not want to testify because my voice is bad. I use irrigation water on an allotment.

Senator MELCHER. All right; and how many acres do you irrigate?

Ms. OTTER. About 35, with a ditch.

Senator MELCHER. All under ditch?

Ms. OTTER. Yes.

Senator MELCHER. And you have had some water shortages?

Ms. OTTER. I have not had personally, no, but there have been shortages under the Flathead project over the years.

Senator MELCHER. Sometimes an allotment isn't necessarily too much of a shortage, and that is why I am asking these questions. Has it been rather a severe shortage, causing a decrease in crops?

Ms. OTTER. I cannot answer that. You would have to get that information from the project.

Senator MELCHER. All right. To your knowledge, do you know whether there have been occurrences such as that?

Ms. OTTER. Yes.

Senator MELCHER. Where there have been shortages?

Ms. OTTER. Yes.

Senator MELCHER. Severe enough to decrease the crops?

Ms. OTTER. I imagine it decreased the crops if they couldn't irrigate, but I have no information on how much.

Senator MELCHER. I think we ought to try to clear that up if we can. I would like to know that. It is important. Our impression so far has been that there has not been a shortage of water in this area.

Ms. OTTER. I am sure that by contacting Mr. Axell at the irrigation project that you will find out that over the years the irrigation reservoirs have been drawn down long, long before the irrigating was completed.

Senator MELCHER. If that is the case, if there is no irrigation water available during the periods of the summer, there obviously would be a shortage of water. Our impression from witnesses so far has been to the contrary.

Ms. OTTER. Yes.

Senator MELCHER. That there have not been shortages of water here.

Ms. OTTER. In recent years, with our heavy snowfall, there has been an abundance of water, and they have just let the people use as much water as they want during the irrigating season, but there have been times when there was a shortage of water.

Senator MELCHER. When you testified that you felt the Indian rights were first, were you referring to the Flathead irrigation project?

Ms. OTTER. Yes.

Senator MELCHER. Were you referring to anything else?

Ms. OTTER. No.

Senator MELCHER. Just to the Flathead irrigation project?

Ms. OTTER. To the Flathead Reservation, I believe.

Senator MELCHER. To the water within the Flathead irrigation project?

Ms. OTTER. Yes.

Senator MELCHER. All right; I understand you now. Thank you very much.

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[Subsequent to the hearing the following letter was received from Ms. Otter:]

ROUTE 1, BOX 18,
Ronan, Mont., September 17, 1979.

Re: Justice Department water suit.

Senator JOHN MELCHER,
U.S. Senate, Senate Office Building,
Washington, D.C.

DEAR SENATOR MELCHER: The Flathead Irrigation Project under the Department of Interior supervises irrigation water on this Reservation from the advice of the non-Indian Board of Directors of the 3 irrigation districts; Mission, Jocko and Camas. The Board members are elected by the water users. I have trust farm land under the project in the Mission District and irrigate 35 acres, 72 acres could be irrigated by sprinkler system. When I was farming this trust land I appeared at the polling place and was refused an opportunity to vote for the Mission Irrigation District Board members because I was an Indian using water on trust property. The Indians do not pay Operation and Maintenance on the system. Other Indians under the Irrigation districts have told me that they, too, were refused a voting privilege.

The Justice Department is bringing suit on behalf of the Indians and government agencies. The Flathead Irrigation Project is a government agency controlled by the non-Indian water users on this Reservation. Over the years the resources of the Indians have been shamelessly eroded for the benefit of the non-Indian. Without control of water on their Reservation their land base will be in jeopardy. I urge that you take this matter into consideration during the hearings.

Respectfully,

LUCILLE T. OTTER.

Senator MELCHER. Les Loble, attorney, Loble and Pauly.

STATEMENT OF LES LOBLE, ATTORNEY

Mr. LOBLE. Thank you, Senator Melcher. I am an attorney and I represent several clients in all of these lawsuits—ranging from the Poplar Creek drainage to the Milk River to the Marias—and I have listened to your discourse with the other witnesses during the morning session, so I thought that what I would do is try to address myself to some of the concerns that you expressed at the outset of this hearing.

First, as to who is using, and how much water is being used, I will address myself to that question insofar as I know it, of my clients, and recognize that this complex litigation is just getting started. So I am not as familiar with it as I will be when it is over, but for example, I represent the First Continental Corp. in the Dupuyer-Valier area, which has approximately 8,500 acres all under sprinkler irrigation. Its minimum annual requirements have been 45 cubic feet per second for stock needs and irrigation.

I also represent Glacier Park, Inc., which is a concessionaire at Glacier Park. It needs about a minimum, we feel, of 20 cubic feet per second for the hotel guests, irrigation, and fire protection. I do not have figures for my other clients.

You also asked how much water is being used, subsurface versus surface, and you also asked what hydrology is available to determine the effect on subsurface water. Montaigne says that there are no two opinions that are ever alike, and I have to disagree with Mr. Bridenstine that there is any extensive hydrological information available whatsoever.

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My practice of the law since 1963 has been water-oriented, and if the SCS or the Conservation Service have much hydrologic information, we have never been able to turn it up. I don't think they have it, but to address these questions, the greatest quantum of water presently being used is surface water. The greatest quantity of water available is subsurface water. It is estimated that about 80 percent of all of Montana's water is flowing below the surface.

Dr. L. E. Chalmers, from Choteau, formerly of MSU, did a doctoral study on the Agawam Aquifer in the Choteau area. His daughter, Anne Chalmers Stradley, was doing her doctorate in hydro'ogy in the same area, and it is their opinion that most of the waters lie below the land. So this is a hidden, but very important issue in all of these lawsuits.

There family experience indicates that going from dryland farming to sprinkler irrigation, you go from 15 to 20 bushels an acre of small grains to 60 to 80 bushels. Now, the 15 to 20 bushels per acre occurs on an every other year basis because you have to use a lot of property there. The 60 to 80 bushels per acre is annually, and this is actual experience. Now, I think that their increases are outstanding, but there are large orders of increase of yield when you sprinkler irrigate. Also, flood irrigation is generally 25 to 30 percent efficient on the average, while the sprinkler irrigation is more like 80 percent efficient. Nonetheless, it isn't true that there is subsurface water everywhere. For example, on Birch Creek, in the Dupuyer-Valier area, Birch Creek forms the southern boundary of the Blackfeet Indian Reservation.

Some extensive hydrological studies have been done, and it was found that there were no wells which produced water for irrigation purposes. Even those pits which were dug right in the alluvial gravels of Birch Creek did not yield enough water for irrigation; nonetheless, the development of water is toward the subsurface. If your committee is interested in such hydrological information as is available, I am sure your staff knows Dr. William Groff at the Bureau of Mines, and he would be enthusiastic to pursue this.

The problem is that the undefined claims of the Justice Department on behalf of the Federal Government and the Indian tribes to all subsurface waters represents a very serious problem.

In that connection, Senator, you had a discussion with Mr. Bridenstine about the burden of proof. I have to disagree with Mr. Bridenstine. I think that the defendants are going to have to come up with their own hydrological data. I realize that the Justice Department has the burden in the first instance and must present some sort of evidence, but I think we can be sure that they are going to have some evidence. They are not going to come without any. That being the case, you then go to the other side and see what they can do to rebut it or answer it.

I can tell you from personal experience that there are our hydrologists and their hydrologists, and there will be a lot of expert argument in these cases as to what the hydrological effect is. Any landowner who is involved in these lawsuits, who doesn't take the time and expense to find out about hydrology is probably going to lose.

Addressing the question of water shortages: You stated that the testimony so far has been that there are not a great deal of water

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shortages in these various drainages. I guess I see it from a much narrower perspective than you do, because you are receiving testimony from people who live on reserves and who have never had occasion to get into litigation about their water rights. The people that come into my office do have problems with water and they do have shortages. For example, Cloverdale Ranch on Muddy Creek in northeastern Montana catches the runoff before it even gets to the river. It has early season irrigation only. The creek itself is so high it silts so much that the water is not usable.

Again, in the Dupuyer-Valier area, adjacent to the Blackfeet Reservation, even though my client has half of the very first right after the Blackfeet, they generally run short of water along about August.

In this connection, the actual use of the 40 cubic feet per second by the Blackfeet Tribe is most frustrating. Whenever a call is made for that right, it is turned out in its entirety high on the stream. The tailwater from that 40 cubic feet per second diversion is often in the neighborhood of 17 to 20 cubic feet per second. The trouble is, the tailwater is well downstream above the users on the creek so as a result you have the water going on and then coming off well downstream below the First Continental Corp. diversion point so it cannot be reused.

The point of the story is that it illustrates the importance of administration of this stream. It has been discussed here about how streams are overappropriated in Montana. Well, that is nothing new—it can be overappropriated three or four times—but water can be used and reused as it goes from one neighbor's land and back to the stream and back to the next neighbor's land. That is the function of the administration of the stream that the State courts have been doing and doing well. The Federal courts have not gotten into this at all, and they are not experienced in this area.

You mentioned that the committee is trying to decide whether it would like the Justice Deepartment to seek or to permit the dismissal of the high priority users' established rights. That is a profound question, and it has serious implications.

If the dismissal is with the explicit understanding that such water right owners would not be preempted by an award of massive water rights with earlier priorities to the Federal Government or to the tribes, then such water right owners would be safe and could be comfortable with dismissal. If there is any uncertainty about the outcome, then they have to stay in the lawsuit to protect themselves, or else they may find that what was once a very good right, well-established, is simply way down the list, and under first in time, first in right, they would be fourth or fifth, rather than first.

I have to agree that this points up the necessity of a water rights determination process, and that is why it is important that the water rights of both the Federal reservations, Indians, and other persons, be quantified. I was most happy to hear in the testimony of Ms. Stevenson that the Indians are now in favor of that, because prior to this time they have adamantly opposed any quantification of their rights, and that is good news.

Billions of dollars of investments for improved farms, ranches, irrigation, and so forth, have all been presently based on the existing perceived water rights. I hope some consideration is going to be given

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to that when the earlier priority rights are awarded to Indian tribes and Federal reservations.

Addressing whether or not the suits are ill-conceived or ill-timed: The wind has kind of been taken out of our sails because Ms. Stevenson has admitted that this is simply a race to the courthouse to obtain a procedural advantage.

In 1975, the Justice Department raced to the courthouse and named 75 defendants in the whole Yellowstone River drainage system in order to obtain a procedural advantage. Your remarks about Mr. Whiteacre took me back to 1963, when my first job was with the Department of the Interior's Solicitor's Office, Division of Indian Affairs, and as an enthusiastic youngster, I was trying to get the case going. I spent days and days down there going through the records and the pleadings, but about that time I returned to Montana, and now I find for the first time that it went nowhere and it is where it was when I left it.

I am concerned, Senator, by the rhetoric which is emerging from these lawsuits. I would like to quote to you from a brief that I received in opposition to a brief that I wrote, which is escalating, at least, the verbal battle that is going on.

According to this brief, which was written on behalf of the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, "where water rights are concerned, the States remain our deadliest enemies, and seek in every way to diminish the tribes' rights and authority," and then it quotes from some cases from back about 1886. "In short, the Federal Government has long been the protector, while the States have been the antogonists, of Indian rights."

This is particularly important in litigation that raises high feelings, because while Federal judges have the protection of life tenure and are responsible for vindicating national, as well as local interests, State judges lack both such protection and such orientation.

I think that District Judge Hatfield would be surprised to learn that his orientation and his fairness changed because he has gone through a metamorphosis from a State district judge to a Federal district judge.

I also think that the Federal Government itself has acknowledged the fair treatment that it has received in State courts. The Federal Government has been in the State of Colorado, although it was dragged in kicking and screaming, in the *Aiken* decision. But here is what the Solicitor of the Department of Interior said on June 25, 1979, in his Opinion, M–36914. (This is the same opinion that Mr. Roberts mentioned at the outset of the hearings today.)

The Department's most extensive experience with the recordation and adjudication of its rights has been with the Colorado Water Division, 4, 5, and 6. This is a Colorado State proceeding.

"The result of these proceedings today has been the granting of most, but not all of Interior Agency claims." There is not a complaint in here that the Interior Department was accorded the sort of treatment that one might expect from one's deadliest enemy, but that it succeeded in most, if not all, of its claims. It is a rare litigant who succeeds in all of its claims.

I hope that your committee is able to prevail upon the Justice Department to dismiss these suits, which duplicate the present Montana administrative and judicial procedures. The Justice Department will still be very much in the case when it handles all of these matters in the Montana State district court.

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Thank you, Senator.

Senator MELCHER. Thank you, Les. I think it is obvious, whatever court system it is in, whether it is Federal or State, the Justice Department is not going to be silent. I think that the interesting thing about the Justice Department is that, of course, while they leave themselves all the latitude that is possible to present whatever they want to in court, it will be interesting at some point to smoke them out and see how much they are going to reserve—not Indian water—but on reserved water for other Federal agencies, and for what purposes, and how much they are going to put in that the Federal reserved right is prior to everything else and, therefore, more superior in right to water that has been used beneficially for decades.

Nevertheless, on the evidence on hydrological information, I was interested in your comment. I would feel that if the Justice Department intends to present the court some very preliminary data that is incomplete, that is termed as hydrologic data, that the court will take note of that and either not recognize it or not give it much count.

I did note that Mr. Sagalkin, in describing to us on July 30, his viewpoint on that, did use the term, "scientific data," so I don't know how scientific he wants to get, or how scientific they will get, but there really isn't very much information. I agree with you. I would be surprised if there is very much hydrologic data that could be presented in court at this time, available in Montana, from any source. I just don't think it is here.

Mr. LOBLE. I just am concerned, Senator, that—it's a poll, of course—if there is no evidence presented on the one hand, the Federal Government loses. If they present all the evidence on the other hand, then the defendants lose. Where does it fall in between there? Just because it is called scientific information doesn't mean that it isn't either adequate or neutral from the point of view of the plaintiff United States. I am confident that there is going to be enough information placed in the record that the defendants should be prepared to rebut it. I guess I am just concerned that people will think, "Well, I guess it is going to be up to the United States to do it; therefore, I don't have to worry." They walk into court, and if there are a series of witnesses who discuss hydrology, and there is no rebutting evidence in the record, the court has no choice in that circumstance but to go with the competent evidence on the record.

Senator MELCHER. I think the term Sagalkin used in his testimony on behalf of Justice in being "hydrologically related" strikes me as being quite a key term. If they don't present the evidence to show that Mrs. Grove in Havre's well has some bearing on somebody else's use of water, specifically, in the Milk drainage, I don't know why the court doesn't release Mrs. Grove. That is the first thing, and yet it seems to me to demonstrate that it is hydrologically related and keeps Mrs. Grove in court just because of her well. But lacking that, I would hope that Judge Hatfield or Judge Battin or whatever other Federal judge has these cases if they are pressed, I hope they release Mrs. Grove for lack of evidence that her well has been demonstrated by Justice to be hydrologically related to the rest of the drainage.

Mr. LOBLE. I hope so, too.

Senator MELCHER. This is what I find discouraging in the testimony of the Justice Department. They are not envisioning any process for eliminating any defendants, and God knows, they must be about the sorriest people to get a case going and concluded of any group of

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attorneys that we have here. So I would hope that if our hearing record can convince the rest of the committee that we need to have some procedures either for having the suits dismissed or some procedures to narrow the scope, our hearings will be well worth it.

In a way, it is very encouraging to me that so far they haven't named the other 1,200 or 2,000 or 10,000 defendants in this area that they envision they may name as defendants, but there is a little bit of a disadvantage, I am finding out, too. We are not getting as broad a picture of present water uses in this area as I had hoped we would.

I guess because people aren't named, they are not testifying. We simply do not know for sure, I guess, how many people might feel that their water usage is jeopardized. That, maybe, they are getting to the point to where adjudication is absolutely necessary.

As I stated earlier, we have not found very many examples—they have been very limited—where people felt that adjudication was necessary at this time, including—what was that creek you mentioned?—Birch Creek?

Mr. LOBLE. Birch Creek.

Senator MELCHER. Birch Creek. The testimony we heard, they were not asking for adjudication other than what had been adjudicated previously.

Mr. LOBLE. That was just the Indian water right. That is the only adjudication that has taken place, on Birch Creek.

Senator MELCHER. We have testimony that there was some other. Who was it?

Mr. KIMBLE. I can't remember.

Senator MELCHER. We had testimony that there was other adjudication—well, maybe not adjudication. It was just an old, old water right that had been quantified, but that doesn't necessarily mean that it was adjudicated, does it?

Mr. LOBLE. On Birch Creek, the participants have a fairly decent knowledge of the water rights there. There is some controversy as to who owns the water right, but the Pondera Canal and Reservoir, which goes way back, has kept records for a long time. I think that Birch Creek is probably in a better situation than other creeks in the State, because there has been water recordkeeping, and there are not too many water users on that creek.

Senator MELCHER. That water is allocated by lot, is it not?

Mr. LOBLE. What water, sir?

Senator MELCHER. On Birch Creek.

Mr. LOBLE. No; that creek has not been adjudicated except for the adjudication of the circuit court on the 40 cubic feet per second to the Blackfeet Indian Tribe; otherwise, the creek has not been adjudicated under Montana water law procedures.

Senator MELCHER. Not under Montana law?

Mr. LOBLE. No, sir.

Senator MELCHER. I think it was Federal law they were mentioning, wasn't it? If we understood the testimony we have, it was allocated by Federal law.

Mr. LOBLE. Yes; there was one circuit court opinion, but the only water right it concerned itself with was that of the Blackfeet Indian Tribe, because I have read that case. It did not go on and rank the other water users after the Blackfeet Indian Tribe.

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Senator MELCHER. I believe you testified to having so many inches of water based on creation of the original project?

Mr. LOBLE. They have very definite inches of water, particularly the Pondera Canal and Reservoir Co. I have to tell you, there is somebody who represents people who have been fighting the Pondera Canal and Reservoir Co. for the last 10 or 15 years. There are other people on the stream who have very different ideas.

Senator MELCHER. It might be just the way they think it is.

Thank you very much, Les.

Mr. LOBLE. Thank you, Senator.

Senator MELCHER. Paul Mertz?

STATEMENT OF PAUL MERTZ, RESERVOIR OWNER

Mr. MERTZ. I am Paul Mertz. I was served over there on the Blackfeet Reservoir, and I have two reservoirs in Toole County.

REPORTER. I can't hear you, sir.

Senator MELCHER. Can you pull that microphone closer, Paul?

Mr. MERTZ. I have two reservoirs over in Chouteau County. The water is used for stock and irrigating gardens.

Senator MELCHER. How much irrigation do you do, Paul?

Mr. MERTZ. Just a garden.

Senator MELCHER. Do you know about how much water you use?

Mr. MERTZ. No; I couldn't say how much it is.

Senator MELCHER. A rather small amount?

Mr. MERTZ. It would be a small amount.

Senator MELCHER. How long have you used that water?

Mr. MERTZ. I think we bought the place in 1936.

Senator MELCHER. Were the reservoirs there at that time?

Mr. MERTZ. The reservoir has been there longer than that on the place.

Senator MELCHER. They were on the place before you purchased it?

Mr. MERTZ. Oh, yes.

Senator MELCHER. Have you had any water shortages?

Mr. MERTZ. Some years it goes dry, but the last few years, it has had water in it.

Senator MELCHER. Completely dry?

Mr. MERTZ. Just completely dry, a couple of years.

Senator MELCHER. And it damaged the garden at that time and other people that used it had damage—a decreased crop production?

Mr. MERTZ. It didn't have any water to water the gardens.

Senator MELCHER. All right, thank you very much, Paul.

Gail Patton, past-president of the Western Montana Stockman's Association.

Mr. JAREKI. Senator, Mr. Patton had to leave early. My name is Chuck Jareki, and he asked me to give his testimony. Is that permissible?

Senator MELCHER. Certainly.

Mr. JAREKI. Mr. Patton is a water user in the Sanders, or Hot Springs area, of the Flathead irrigation project. He would be more qualified to speak on water use in this area than I am.

Senator MELCHER. Mr. Patton's complete prepared statement will appear at this point in the record.

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[Mr. Patton's prepared statement follows:]

PREPARED STATEMENT OF GAIL PATTON, PAST PRESIDENT, WESTERN MONTANA STOCKMAN'S ASSOCIATION

My name is Gail Patton. I am past President of the Western Montana Stockman's Association.

Our Association membership primarily consists of individuals who are engaged in the production of beef in the counties of Flathead, Lake, Missoula, and Sanders. Many of our members, both white and tribal members, have land holdings which use water for irrigation. The continued use of this water is essential for them to survive as an economic unit. Water shortages are now occurring on many of these lands during the latter part of the irrigation season. With this in mind, we feel that the Western Montana Stockman's Association is a concerned party in any water right legislation that will affect any of its members.

The Western Montana Stockman's Association takes the position that the grant of title to a parcel of land carries with it a right to a reasonable amount of available water. Since the U.S. Government, in effect, granted title of all lands for private ownership, then the Government should stand behind the rights and privilges of all land owners, not a select few. The severe economic burden of litigation, as well as the general harrassment of litigation, should not be placed upon a particular group of people by any Department of the U.S. Government.

The Western Montana Stockman's Association believes that the Federal Water Rights Suit should be dropped, and Congress should direct that all water rights issues in Montana should be settled under Montana Water Rights Law and Montana judicial procedure.

Montana is now in the process of adjudicating all the water in the State. Any claims for water should be handled under this process.

The Western Montana Stockman's Association wishes to be kept informed of any action your committee may take, and we would like to thank you, Senator Melcher, for holding these hearings.

STATEMENT OF CHARLES JAREKI, WESTERN MONTANA STOCKMAN'S ASSOCIATION

Mr. JAREKI. Thank you, Mr. Chairman.

The Western Montana Stockman's Association consists of approximately 700 members, who are principally in the business of raising beef cattle. Our members consist of both tribal and nontribal individuals. Many of them use water for irrigation either on the Flathead irrigation project or under their own private irrigation systems or water districts. Our members work together for the betterment of the cattle industry, in this area and in Montana.

Some of our members do experience water shortages. I think this is something you are after, Senator, is whether we have enough water or not. In many years, late season irrigation water is short where you have the cheaper delivery systems—where the delivery is simply a diversion in the stream and the gravity flow to the land that is to be watered.

On the Flathead irrigation project, the water quota is set each early summer, usually, based on the snowpack that is in the mountains and the amount of water that is in the existing irrigation reservoirs and around the valley. Also, the assumption is made that you are going to have average rainfall during the irrigation season, but unfortunately, there are powers that are greater than we are that seem to change things around a little bit. Oftentimes the quota will be set quite low to reflect the changes in the seasonal rainfall pattern.

For instance, some years they keep revising the quota down as the summer progresses without any rainfall, such as we had this year.

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There are years in which the farmers or the ranchers simply must decide which land they are going to irrigate during the season and have a supply of water to raise the crops, and which land simply has to go without water. So, consequently, you pick your better land and provide the water to that. But in the case of a cattle rancher that has irrigated land and he is faced with not having enough water to adequately irrigate all of it, then there is hardship. Cattle have to be sold. It is a forced sale, to bring the livestock numbers into balance with production, or the rancher is going to have to go out and buy feed. So there are definitely economics involved on these periodic water shortages that occur.

There is a potential in this area for much more irrigated land, but on that potentially irrigable land, the delivery costs will be higher, so it is a question of economics.

For an example, there is quite an area west of Polson. It is probably 100–200 feet above the level of the lake, that could be irrigated, but you would have to lift the water to it. With farm prices the way they are, I don't think that anybody wants to burden themselves with those types of initial setup costs.

The Western Montana Stockman's Association feels that we, through our membership, are concerned parties in any legislation that may be introduced in Congress, and we would like to be kept informed on any recommendations and legislation that you may consider.

We also take the position that the grant of title to a parcel of land carries with it a right to a reasonable amount of available water. Since the U.S. Government, in effect, granted title of all lands for private ownership, then the Government should stand behind the rights and privileges of all landowners—not a select few. The severe economic burden of litigation, as well as the general harassment of litigation, should not be placed upon a particular group of people by any department of the U.S. Government.

It is not only the money that is involved in defending yourself in litigation, but there is also the time involved. You have to spend time with your attorney, you have to appear in court, and all these other things. When you are doing that, you are not getting the work done at all.

I believe that we are going to have to work this out. Our association doesn't feel that we should be burdened by this litigation, and we would like to be kept informed, Senator, and we thank you for the time that you have taken to hold these hearings trying to get the facts.

Senator MELCHER. Is most of the membership of the Western Montana Stockman's Association in the Flathead drainage area?

Mr. JAREKI. Yes, sir, they are. Some of our membership is in Missoula County and part of that county is within the drainage, but we also have members in Flathead Lake and Sanders Counties.

Senator MELCHER. Flathead Lake, Sanders, and Missoula?

Mr. JAREKI. Yes, sir.

Senator MELCHER. Most of your membership, then, is in the Flathead drainage?

Mr. JAREKI. Probably 95 percent is in the drainage.

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Senator MELCHER. In effect, all these water users in this drainage area—that 95 percent—it is for agricultural purposes, whether they irrigate or not?

Mr. JAREKI. Yes. We have a few members that have retired from the business and they continue their membership just to stay in touch with their former friends and neighbors.

Senator MELCHER. If I understand your testimony correctly, there are times, then, when the water supply is short?

Mr. JAREKI. Yes; it is short for full season irrigation.

Senator MELCHER. For full season irrigation.

Mr. JAREKI. All of the land that has water delivery capability.

Senator MELCHER. Give me some for instances. When you say full season irrigation capability: How many cuttings of alfalfa would you anticipate, for instance, in this area?

Mr. JAREKI. I would suspect that the average on irrigated land here is two cuttings. Some operators do get three cuttings if the season is long enough, but when there is a shortage of water for later irrigation, there may not be enough water to irrigate up a second cutting.

Senator MELCHER. That is surface water that you are speaking of, is it not?

Mr. JAREKI. Most of the water is surface water from the mountains.

Senator MELCHER. Those people who are pumping and using sprinklers would have it for a longer period of time, would they not?

Mr. JAREKI. Yes.

Senator MELCHER. Even in a dry year?

Mr. JAREKI. Yes.

Senator MELCHER. What does a normal irrigation season mean in general, in this area—irrigating in August into September?

Mr. JAREKI. I believe the water is shut off the first part of September. That is on the irrigation project. If you have a pump in a creek, you can pump until it freezes, if you want. There is a lot of land that is sprinkler-irrigated that isn't necessarily getting water from wells.

Senator MELCHER. That are getting it out of the streams? Out of an irrigation canal? Sure; that is true.

That is all of the questions I have, Chuck. Thank you very much for presenting this testimony.

Mr. JAREKI. Thank you.

Senator MELCHER. Lloyd Ingraham?

Mr. INGRAHAM. Thank you, Senator, for this opportunity to appear before the Senate Select Committee on Indian Affairs.

STATEMENT OF LLOYD INGRAHAM, ATTORNEY

Mr. INGRAHAM. This makes my second appearance, having appeared before Senator Abourezk, from South Dakota, about a year ago in Washington.

I would like to add my own comments after I first identify myself. I am Lloyd Ingraham and I represent as counsel some 30 to 40 of the present defendants who do live within the reservation boundaries in this particular litigation.

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I have attended many national Indian water symposiums, including, I might add, one hearing in April in which your very capable assistant, Mr. Kimble, was present. I attended several of the hearings with respect to the administration's national water policy, one in Denver and one in Seattle, on behalf of local groups.

It has been said that there has been a lot of suspicion present in the reservation area. Certainly, there has been. Certainly, I believe that these suspicions are justified. I suppose my first suspicion as an attorney was aroused back in about 1973; when we first intercepted proposed drafts of water regulations for Indian reservations. These were drafted by the Bureau of Indian Affairs attorney-solicitor, Reid Chambers, involving the very issues that we are involved in right here now. This was back in 1973, on the Colville Reservation, where Reid Chambers, being the head attorney of the Bureau of Indian Affairs, proposed that—and this letter was addressed to the tribal attorneys and the tribal chairman—they have published in the Federal Register these particular regulations, so that upon becoming published, and not too much protest then, of course, they would have the force and effect of law, and were very needed, according to Mr. Chambers. I might read the clause in there with respect to Mr. Chambers' reason that they have them. I will read the last paragraph, and I am going to introduce this, because Mr. Chambers' signature is on this letter.

[Material submitted by Mr. Ingraham follows:]

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U. S. Department of the Interior
Office of the Solicitor
Washington, D.C. 20240
March 28, 1974

MEMORANDUM

TO:
All Federally recognized Indian Tribes
Attorneys for the recognized Indian Tribes
All Area Directors
All Regular Solicitors
All Field Solicitors

FROM:
Associate Solicitor, Indian Affairs

SUBJECT:
Review and comment on a set of proposed draft regulations for the Bureau of Indian Affairs involving the administration and control of the use of water on Indian reservations.

Attached are regulations proposed by my office and by the Commissioner of Indian Affairs for administering the use of reserved waters on all Federal Indian reservations in cooperation with the various Indian tribes. This approach is intended to effectuate self-determination for the Tribes to the maximum extent possible.

The purpose of the regulations is the recognition of jurisdiction and authority of the Tribes over their water resources and assist them in drafting and in inforcing Tribal water codes which would be applicable to all persons who use the reserved water within the reservation and persons within the reservation boundaries who use water in conflict with the reserved water rights. The regulations propose three (3) options for promulgating a Tribal Water Code. The Tribal authority will be coordinated with the authority of the Department of the Interior according to the method in which the Tribes select.

A model Indian water code for Indian reservations is being prepared by the Tribal attorneys for some of the North West Tribes. The firm of Ziontz, Pirtle, Morissett and Ernstoff of Seattle, Washington is taking the lead. The code has not yet been finished but will we understand be made available to all when it has been completed.

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I emphasize that the regulations are proposed and have not been finally approved by the Department. These regulations however are immediately necessary in connection with two cases in Federal District Court in the State of Washington that will come to trial soon. Accordingly, it is urgent that we commence the public notice process in the Federal Register. Please review the proposed regulations and submit your comments thereon by April 15, 1974.

Sincerely yours,

Reid Peyton Chambers

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REGULATIONS FOR THE USE OF WATER ON INDIAN RESERVATIONS

DEPARTMENT OF THE INTERIOR

BUREAU OF INDIAN AFFAIRS

The following regulations are enacted pursuant to 25 U.S.C. § 381 and 25 U.S.C. §§ 1a, 2, and 9.

1.1 - Purposes

The purposes of these regulations are:

a. To fulfill the federal trust responsibility to provide a method to preserve and protect in perpetuity the water resources reserved for the use and benefit of the Indians;

b. To recognize, provide for, and assist in the exercise of the sovereign authority of Indian tribes within their reservations to govern the use of all waters therein by Indians and non-Indians; and

c. To provide for the present and future development of Indian reservations including Indian Pueblos through the use of their reserved water resources.

1.2

In order more effectively to establish the means for determining the measure and extent of reserved water rights and to encourage the active participation of the various Indian tribes in the mechanics of establishing and protecting the measure and extent of reserved water rights, the following principles are recognized:

a. Indian tribes having a governing body which has been recognized by the Department of the Interior possess the authority to adopt, with the approval of the Secretary of the Interior, and enforce water codes which will control and regulate the use of reserved water; including use by non-Indian persons and entities;

b. The trust responsibility of the United States requires the Secretary to take such administrative and

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legal steps as are necessary to protect Indian water resources, and;

c. The United States holds legal title to the water resources reserved for the Indians solely as a fiduciary for the exclusive use and benefit of the Indian owners of the equitable interest.

2.1 - Definitions

a. "Secretary" means the Secretary of the Interior or his delegated representative.

b. "Reserved waters" means all ground and surface waters naturally or artifically created excluding sea water, arising on, flowing through, underlying, or bordering Indian reservations and any water rights reserved off the reservation, including but not limited to surface waters, springs, wells, lakes, reservoirs, or ponds.

c. "Beneficial use" means any use of water, consumptive or otherwise, whether for agriculture, domestic, municipal, commercial, industrial, aesthetic, religious, or recreational purposes, for the maintenance of adequate stream flows for fishery, environmental, or other beneficial purposes on an Indian reservation, including any lease thereof for use elsewhere for such periods of time as may now or hereafter be permitted by law.

d. "Just and equitable distribution of reserved waters" means a method of allocating the available reserved waters among those entitled thereto in such a manner that all those similarly situated will be given an equal opportunity to make beneficial use of the water, the allocation being in such a manner as to alleviate hardship where possible.

e. A "water code" shall mean ordinances, rules, and regulations adopted by the governing body of a tribe which provide for regulation and control of the use of reserved waters among those entitled to the beneficial use thereof in accordance with its constitution, bylaws, or other applicable laws.

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f. A "use-by-use basis" shall mean that a separate permit shall be issued for each separate use of water which shall contain all pertinent information with respect to that use. However projects such as irrigation projects may file a single consolidated application describing the exact land to be served and/or each use planned and the amount, period, and nature thereof.

<u>3.1 - Methods by which a tribal water code may be established</u>

There are provided herein three alternative procedures by which tribal water codes may be enacted, provided however, any tribe may at any time revoke its selection as to the type of code it desires to adopt and enact one of the other types, subject to outstanding permits. The three types of codes which the Secretary may approve are as follows:

a. Any tribe with a governing body which has been duly recognized by the Secretary may enact a water code, subject to the approval of the Secretary, and may, pursuant to such code, issue and enforce water use permits without further approval by the Secretary. Guidelines for exercise of this option are more particularly described in Part 3.2, infra.

b. Any tribe having a governing body which has been duly recognized by the Secretary may enact a water code subject to the approval of the Secretary, and may issue permits for the use of water which shall be submitted for approval to the agency superintendent of the reservation involved. If the applicant for a water permit has been accorded procedural due process and if a reasonable basis exists in fact and law for the issuance of the permit, the superintendent of each reservation or agency shall adopt and certify the permit. Said permit, as so adopted and certified, shall have full force and effect as if issued by the Secretary. Guidelines for exercise of this option are more particularly described in Parts 3.3 and 3.4, infra.

c. In those situation where there is no governing body of the tribe, band, or Indian group recognized by the Secretary or where the said governing body does not

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enact a water code which will preserve and protect the reserved waters of the tribe, band, or community, the Secretary may promulgate a water code for that reservation, by regulation, in cooperation with the tribe or, if there is no recognized tribal governing body, in cooperation with a majority of its members. Adoption and enforcement of such a water code shall be in compliance with existing federal regulations under 25 CFR Parts 1 and 2 and the Administrative Procedure Act, 5 U.S.C. § 501, *et seq*. Provided, however, that any tribe with a governing body duly recognized by the Secretary may subsequently amend or modify such code, or substitute its own approved code, for that of the Secretary subject to outstanding permits. Guidelines for exercise of this option are more particularly described in Part 3.5, infra.

d. The tribal governing body may at its discretion call upon the field offices established in Part 111.13. 3H of the Department of the Interior Departmental Manual for an Indian affairs administrative law judge to assist the tribe in the conduct of any administrative hearing with respect to applications for water permits under its water code. The request shall be addressed to the Chief Administrative Law Judge, Office of Hearings and Appeals, U. S. Department of the Interior, 4015 Wilson Boulevard, Arlington, Virginia 22203. Upon receipt of the request, an Indian affairs administrative law judge capable of conducting administrative water hearings shall be assigned to hold hearings and issue findings of fact and conclusions of law to assist the tribe in particular hearings at the time and place selected by the tribe. Such hearings shall be conducted pursuant to Part 111 DM 13.1 *et seq.*, and Part 211 DM 13.7.

3.2 - Tribal Promulgation and Administration of a water code

The governing body of an Indian tribe may adopt a water code providing for the beneficial use of the reserved waters of its reservation. Such water codes shall be submitted to the Secretary for approval and after approved shall be published in the *Federal Register*. Such codes may cover some or all of the following general areas:

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a. A method for establishing the amount, nature, period, and place of use of reserved waters on a use-by-use basis. That method shall be based upon the principle of a just and equitable distribution of reserved waters among those entitled to the use thereof and may include the order of tribal priorities on the use of water within the reservation.

b. Such method shall include a uniform procedure for the issuance of permits to regulate the use of the reserved waters, including a procedure whereby permits can be applied for and received for existing and potential beneficial uses including storage and tribes and others who propose to make beneficial use of reserved waters may apply for and receive permits on a use-by-use basis. The code shall contain procedures for handling the drainage and salvage of waters to provide for the economic use thereof. It shall also provide for enforcement of permits to the use of reserved waters including a procedure for the cancellation of permits in the event of substantial violation of the conditions.

c. A permit may state the amount and period of use in terms of diversion and/or consumptive use, specify by description the tract where the use is to occur, and the nature of the use.

d. Permits <u>may</u> be issued for <u>existing</u> and <u>potential</u> uses including storage. A time period shall be set for exercise of each potential use upon which a permit is issued. A permit may be issued for each potential use established by reservation land and water use inventories. Extensions of time for exercise of the right acquired in such permit shall be given upon good cause shown.

e. All permits shall be subject to such reasonable conditions as the tribal governing body or its designated agency shall determine to be necessary to carry out the purposes of the water code.

f. The diversion and use of water pursuant to the issued permits will be supervised by an official appointed by the tribal governing body and he shall be subject to the supervision of the tribal council or the tribal agency which issues the permit.

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g. Temporary use permits may be granted for limited periods pending action upon application for a regular water permit.

h. Provisions for determining water uses and methods for measuring where practicable.

i. Changes in time, place, and nature of use may be permitted by approval of the tribal governing body or its designated agency. However, such changes shall not be authorized where they will adversely affect the rights of other permit holders or other water users unless such rights are acquired or condemned by tribal or other legal authority or consent obtained from the affected party.

j. Notice of hearings on all applications for a permit shall be given in a manner consistent with due process of law. The states within which any place of use of reserved waters under a permit may be located shall be sent copies of each approved permit for their records.

k. All procedures shall permit any person who claims a right to use reserved waters to present his claim with any pertinent evidence in support thereof. All issues will be heard by an administrative body duly constituted by the tribe, which will render a decision thereon within a reasonable time.

l. The tribal code may, with the approval of the Secretary, be amended from time-to-time as the tribe deems necessary subject to rights under existing permits. It shall be subject to pertinent acts of Congress and tribal ordinances and to binding judicial interpretations of the Indians' reserved water right.

m. A complete record of all applications, actions taken thereon, and permits issued shall be maintained and shall be open for public inspection at the reservation or at the agency responsible for that reservation.

The tribe may seek the assistance of the United States in the enforcement of its water code or permits. If the tribe seeks such assistance, the Secretary or his

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designated representative shall review the actions of the tribe to determine whether due process requirements have been satisfied and that such determinations have a reasonable basis in law and that, if the tribal determinations meet these standards, the Secretary shall take all appropriate measures to secure their enforcement, including requesting the Department of Justice to initiate appropriate legal action.

3.3 - Approval of water permits

At the discretion of the governing body of a tribe that has an approved water code under Part 3.1.a, any permit issued may be submitted to the reservation superintendent together with such other documents or material as are pertinent to the permit or that the superintendent may request to enable him properly to review the permit. The superintendent, after review thereof, shall, within 30 days, approve the permit if the tribal procedures comport with due process and the tribal determination has a reasonable basis in law and fact. Otherwise, the superintendent may approve the permit on condition that modifications be made thereto, or disapprove it. If the permit is approved with modifications or disapproved, the superintendent shall return the permit to the governing body of the tribe or its delegated agent together with a statement of the modifications needed for approval or the reasons for disapproval. When approved by the superintendent, the permit granted by the governing body of the tribe or its delegated agency shall be a federal permit and be enforced as if it had been issued by the Secretary. Failure to act on the permit within 30 days of receipt shall constitute approval.

3.4 - Joint Tribal and Interior Department Administration of Tribal Water Codes

a. If the tribe adopts the option set forth in Part 3.1.b, the superintendent of the affected agency or reservation is designated as the Secretarial representative to cooperate in the administration and enforcement of the ordinance. In those cases, provision shall be made in the code for submission of each of the permits issued by the tribal administrative board in accordance with Part 3.3 hereof. Thereupon the permit when approved shall be a federal permit and shall constitute the decision of the Secretary of the Interior.

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b. Guidelines for the approval and publication in the Federal Register of the tribal water code are set forth in Part 3.2 above.

3.5 - Secretarial water codes

a. If a tribe fails to enact an approved water code for its reservation and the Secretary deems such a code is necessary for the health and welfare of the reservation, the Secretary shall notify the tribe in writing of such need and offer assistance in the preparation of an acceptable water code. If such tribe notifies the Secretary that it elects not to enact a water code or if the tribe does not respond within 60 days from the date of the request, and the Secretary determines that failure to enact a water code would jeopardize the reserved waters of the reservation, the Secretary may prepare and publish a water code for such reservation. The water code so prepared shall cover the areas set forth in Section 3.2 above. In such code the Secretary shall act on behalf of the tribe in the issuance of permits and the regulation of the reserved waters of the reservation, except as otherwise provided in the code so prepared. The regulation of reserved waters shall be based upon the principle of just and equitable distribution of the water among those entitled to the use thereof.

b. When said water code has been completed, it shall be submitted to the governing body of the tribe of the reservation for its review and comment thereon and to make suggested revisions, following which the water code shall be promulgated by publication in the Federal Register and shall be enforced by the Secretary as to the reservation covered by such code. The code may be amended from time-to-time subject to rights under existing permits. However, amendments shall be made only with approval of the governing body of the tribe.

4.1 - Appeals

Where a tribe has utilized the provisions of Parts 3.3, 3.4, and 3.5 as set forth in the preceding section, the code shall provide that appeals from the tribal administrative board's decision and the superintendent's approval of the permit shall be handled as provided in Part 2 of Title 25 of the Code of Federal Regulations,

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JERRY R. GOLDSTEIN
EDWARD M. FOGARTY

* Not admitted in the District of Columbia

April [illegible]

Honorable Norman E. Stedje
Mayor, City of Ronan
Ronan, Montana 59864

Dear Mayor Stedje:

We are enclosing a copy of our letter of this date to the Montana Department of Natural Resources and Conservation concerning the application, No. 73-g76L, of the City of Ronan for a water use permit for municipal purposes.

You may be aware that, as general counsel for the Confederated Salish and Kootenai Tribes of the Flathead Reservation, we previously filed an objection with the Department to the application, on the grounds that the State of Montana has no jurisdiction to issue water use permits for any waters on the Flathead Reservation. United States v. McIntire, 101 F.2d 650 (9th Cir. 1939).

Whether the City of Ronan is granted a permit by the State of Montana or not, it will be necessary for the city to obtain the legal permission of the Confederated Tribes before the water can be used. We suggest you submit to the Tribes a proposal for the use of a specified amount of water over a definite period of time. Before any tribal permission can be obtained, it will also be necessary for the city and the Tribes to agree upon a reasonable price to compensate the Tribes for the use of their water.

We are available to discuss this matter with you at any time.

Yours truly,

WILKINSON, CRAGUN & BARKER

Richard A. Baenen

By: Richard A. Baenen

Enclosure
cc: Montana Dept. of Natural
Resources and Conservation

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THE CONFEDERA[illegible] TRIBES
OF THE [illegible]

[illegible]

Harold W. Mitchell Jr., Chairman
E. W. Morigeau, Vice Chairman
F. J. Houle Jr., Secretary
Ruby M. Christopher, Treasurer
Homer Courville, Sergeant at Arms

[illegible]

TRIBAL COUNCIL MEMBERS
[illegible]

Robert McVey
Rural Route
St. Ignatius, Montana

Dear Mr. McVey,

The Tribes [illegible] currently used by you. I'm [illegible] ditch and its diversion, [illegible] portion of the ditch you use.

Since you are [illegible] that ditch, we require you to [illegible] of the ditch that crosses your property [illegible] to maintaining the ditch, the Tribes [illegible] you to pay the Tribes two dollars [illegible] of water used.

If you have any [illegible] this matter, please contact this [illegible].

[illegible]

Camille E. Matt

[illegible] E. Matt
Tribal Realty Specialist

CEM/jo
08-07-75

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HUNGRY HORSE HOUSE MISERY TO MILLERS

Arlee: They say you should never look a gift horse in the mouth, but Cliff Miller of Arlee is wondering if a little scrutiny six months ago might have prevented a swift kick in his hip pocket.

You see, last October Miller received a Housing Improvement Program (HIP) loan from the BIA to move a government home from Hungry Horse. The Hungry Horse house was free, the HIP loan was merely to move the house and set it up on Miller's land east of Arlee. That's what BIA told him at least.

But later that month when the house arrived, Miller found that the wiring was shot, the plumbing didn't work and there were several minor to major repair tasks. With the HIP loan buried under the foundation and winter setting in, Miller went to Tribal Credit for an $8,000 house improvement loan.

...And as if the $11,500 in debts for their new home were not enough, the Millers have now lost their children. Lake County Welfare placed the six Miller children in foster homes April 4, pending the completion of the house.

According to Mrs. Miller, the children were taken "To insure a safe and healthy home environment". A safe and healthy home is what Miller and his family thought they were getting last October when they agreed to take the government surplus Hungry Horse home. But so far all they have is debts, headaches and heartaches.

Now Miller, who heads a household of eight, only makes $450.00 a month, that comes out to [illegible] $57.00 per person per month...pretty tight under any circumstances, but really tough when you have $11,[illegible] in loans plus interest to pay. [illegible] Miller felt [illegible] Hungry Horse house [illegible] a bargain, [illegible] would [illegible] roof over his [illegible] head.

But [illegible] $8,000 [illegible] loan [illegible] time the [illegible] half [illegible] [illegible] half [illegible] all [illegible] bur [illegible] to wonder [illegible] house [illegible] home.

He [illegible] lem was the [illegible] and Tribal C[illegible] complete [illegible] house. "[illegible] were all [illegible] gotta work", [illegible] "and there was [illegible] home to finish [illegible] guys did the work". He feels that [illegible] have supervised the work to make sure it was done properly. He is also a little miffed at credit because they used $600.00 of his $8,000 loan to make an installment on the HIP loan. "Without that $600.00, we can't finish the work on our house. We are stuck with a half finished house and about $12,000 in debt", he said.

During a review last month, both Chief Tribal Judge, Don Dupuis, and Credit committee [illegible] [illegible] Lou Trosper, felt the Millers had a legitimate gripe. Trosper agreed to help the Millers put the finishing touches to their home.

WATER KEY TO INDIAN LAW

[illegible] The "energy crisis" [illegible] be a disaster for [illegible] tribes unless tribes [illegible] into their [illegible] water and resources. That is what several [illegible] at an Indian [illegible] conference at the University of Montana said [illegible].

[illegible] Veeder, a water [illegible] for the Bureau of Indian Affairs, said that energy corporations, bureaucrats and academic lawyers [illegible] tribes to sell their water, coal and oil now before it is confiscated in the national interest. Veeder said all these threats are [illegible] "Don't let these college professors fool you on this stuff because that's how Indians have been ripped off all these years", he said. He noted that tribal rights to reservation water and resources are backed by [illegible] federal laws and urged tribes not to let state's and federal bureaucrats bluff them into selling rights cheap.

Another Indian water attorney, Al Zionts, of Washington, D.C., agreed with Veeder and pointed out that Indian water is an integral part of energy development plans. He warned that several state governments are attempting to administer water rights on Indian lands and that several private firms have already drawn up plans to take away Indian water for energy development. Zionts noted that current pressure against Indian water rights is not based on prejudice, "No, it is based on hard dollars".

The three day Indian Law Conference, which began March 25, also featured a panel discussion on tribal jurisdiction on reservations. Among the panelists was Flathead Tribal Councilman Bill Morigeau of Polson. Other subjects were taxation of Indian tribes by states, with Flathead Tribal Secretary Fred Houle, and a discussion of Indian preference hiring.

DIXON HOUSING MEETING

Dixon: This is to inform local citizens in the Flathead Sub-Agency, Dixon, area that an application to rehabilitate 22 old houses at the sub-agency, has been filed with the Department of Housing and Urban Development. (HUD)

An environmental assessment is required and will be filed with the formal application. Local citizens are invited to inspect the application and to offer recommendations on any aspect of the proposed project. Two public meetings will be held. The first on April 11, and the second on April 16 at 8:00 P.M., at the Tribal Council Chambers, Flathead sub-agency.

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NEW MOON OF THE [illegible] BITTERROOT (May 1, 1974)

Enough Reservation Roads to Circle the Globe, almost

(Cont. from page 1)

Roads not only reduce the potential for reproduction in the the forest, Dr. Roe said, but they also have "a substantial influence on the esthetic values" of the forest. He said: "In the overview, the greatest influence to esthetic value is the long inharmonious straight tanget placed across the green slope."

The number of roads on the reservation was also blamed for a declining game population by Ralph Warner, a U of M Forestry School faculty member who also studied the forestry impact on game, fish and grazing. Warner reported that there is adequate food on the reservation forests for ten times as many big-game animals as there are now. He said the primary reason for the depletion of deer and elk was lack of protective cover. He explained that big game need proportionate amounts of food and cover to maintain a stable population. But, Werner noted, the maze of roads leading to nearly every shelter in the forest deprives the animals of the needed protection.

Werner pointed out that there are other considerations in managing the reservation's big game.....such as controlling hunting pressure....but insisted that increasing the amount of cover was the most important management factor.

Werner also said roads have some effect on reservation fisheries but emphasized that primary management problems are irrigation and stream-bed manipulation.

Roads, and other areas of forestry slash concentration, also constitute a major fire danger in the reservation forests. Dr. James Lowe, Jr., an expert on fire and insect problems, said the condition of slash along logging roads and in [illegible] logged and thinned areas has created a "critical fire fuel problem." He recommended that the tribe consider some plan for slash disposal to reduce the fire hazard problem.

Dr. Lowe also discussed the health of reservation trees. He said the most pressing disease problem on the reservation is the dwarf mistletoe. He said mistletoe....a plant parasite which makes leafy bushes on trees....is found in [illegible] the reservation forest and infects both young and [illegible] trees.

He said there are also other insect problems, primarily the spruce budworm which has affected some 198,980 [illegible] of reservation trees. He said there are other insects which have appeared on the reservation such as the Mountain [illegible], the Pine Butterfly, the Tussock Moth, the [illegible] and the Larch Casebearer. He said that control of these [illegible] with pesticides was "not feasible" due to the expense.

Roads also contribute significantly to the erosion of surface soils, according to Ronald McConnell, who studied the reservation soils for the Cummins group. By using aerial photographs, McDonnell plotted out the growth capability of reservation soils and its sensitivity to erosion.

The U.S. Forest Service soils expert noted that the [illegible] critical factor in soil erosion was road construction. He said, "The conclusions indicate that the highest degree of [illegible] on soils is created by roads. Their construction and [illegible] reduces the quality of growing space for vegetation and increases the potential for erosion."

Another drawback of excessive logging roads was explained by Dr. Gordon Browder, who investigated the impact of forestry practices on the people of the reservation. Dr. Browder, a sociologist, said that roads...along with other forms of development on the reservation.....tend to alter the way people live. He said that traditional patterns are upset with the mobility created by roads.

Dr. Browder also noted that "roads and cutting practices probably carry the greatest potential for damage to esthetic values, and should be most carefully weighed as to their continuance in this area."

[illegible] Malouf, an anthropologist from the U of M, [illegible] roads not only disrupt tribal culture by exposing [illegible] gathering grounds but also jeopardize tribal his[illegible] Malouf told the Council: "Road building, whe[illegible] interstate highway or a simple logging [illegible] the preservation of prehistoric and historic [illegible] is the construction of the road itself, which [illegible] grounds, or destroy sacred landmarks [illegible] walls on hill tops. Second, the roads [illegible] illegal collectors who would destroy such sites [illegible] for their private collections."

[illegible] member of the Cummins team who did not [illegible] roads was economist Maxine Johnson. She [illegible] the current forestry program is good for [illegible] for reservation Indians and good for the res[illegible]ity.

[illegible] the forestry program brings the tribe about [illegible] annually.....provides 113 full time Indian woods [illegible] $997,080 a year....and 79 forestry workers [illegible] a year.

[illegible] study concludes that "Roads are a primary [illegible] environmental impact upon the forest resources. [illegible] of the unroaded forest lands as natural areas [illegible] the common environmental impact associa[illegible] for the present generation of the Tribes." The [illegible]

[illegible] eight drq
[illegible] the eight drawbacks of roads:
[illegible] water quality
[illegible] air quality
[illegible] siltation
[illegible] in the forest adversely affect small areas.
[illegible] browse is affected with roads are cut [illegible]
[illegible] fishing pressure is increased and cover [illegible] wildlife is reduced
[illegible] recreational pressures are increased
[illegible] on road rights of way and high cut banks impede [illegible] of wildlife

[illegible] of the report points out, however, that [illegible] advantages to roads too.....depending on how you [illegible] them:

—[illegible] the removal of forest fire fuel created by [illegible]
—[illegible] the effectiveness of fire protection
—[illegible] economic benefits
—[illegible] recreational areas to vehicles.

$13-Million in Water Flowing from Missions

"[illegible] valuable resource you have in the reservation [illegible], not timber, and you should start making plans [illegible] water." That was the advice to the Tribal Council by Dr. Richard Konizeski, one of the eight forestry [illegible] presented a one-year environmental assessment of the reservation forests April 30.

WATER (cont. on page 17)

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Mr. Nine Pipe's niece, Frances Vanderburg McClure, remembers that he used to return to the Bitterroot valley as often as possible. He would, she said, return with several other Bitterroot Salish to work the farms and orchards that replaced the berry fields and game trails when the valley was settled....not for the money, but for the opportunity to visit their native homes.

There are many yarns about Mr. Nine Pipe's early life. In the early 19th century, the Indian Bureau began to send young Indians off to boarding schools. Mr. Nine Pipe, along with Leo Barnaby and Sam Vincent, were sent away to Chemawa, Oregon. The three became homesick and decided to run away so they began a 600 mile treck through the mountains. They ate berries and fish most of the time but whenever they would pass near a town, they would send one down to muster some store food. The story goes that they usually ended up with a large package of chewing tobacco and no food.

Later on, during the early 30s, Mr. Nine Pipe was hired by a Missoula radio station to play Tonto in a local Lone Ranger and Tonto series. He didn't like playing second fiddle to the Lone Ranger and didn't like the regular trips to Missoula, so he quit.

Mr. Nine Pipe was preceded in death by his first wife, Catherine Little Deer Red Crow, and three brothers: Adolph "Happy", Andrew and Joseph.

He was buried May 7 in the Jocko Cemetery at Arlee. Religious services and a wake were held the evening before at the St. Ignatius Community Center.

(Continued from Page 3)

Dr. Konizeski was the only team member to recommend a radical departure from the timber-oriented forestry program on reservation lands. He noted that timber sales yield only a maximum of around $5 million a year, water could bring as much as $13 million annually.

Dr. Konizeski said that the power value of water arising from the reservation amounts to about $11,650,000 per year. He said that this does not include the water currently being used to power Kerr Dam at the foot of Flathead Lake. He added that the water is worth an additional $1,445,000 in irrigation value based on a going rate of $3.50 per acre foot. He pointed out that this total in water value far exceeds the foreseeable revenue from timber.

"The energy crunch is here to stay," he predicted, "and those who have the resources will not have any trouble selling their product."

The U of M hydrologist noted that his figures on the value of the reservation waters was based on available rainfall data. Rainfall on the reservation varies from 14 inches on the extreme west boundary to more than 90 inches in the Mission Mountains. He said the available information is not sufficient to establish a management plan and suggested that the tribe "concentrate on an in-depth study of your water resource."

Dr. Konizeski suggested the tribe hire a forestry hydrologist and consider the possibility of contracting forestry Ph.D students to collect data on the various aspects of the reservation water situation. He said the data collected by students would enable the forest hydrologist to devise a management plan which would include power development and irrigation water distribution as well as a logging program. He said that a concentration on water would not preclude a continuation of timber sales but pointed out that logging should conform to water conservation.

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Indian Students Learn Government

MONTANA INDIAN YOUTH

Billings: Learning about how tribal government functions is what the Montana Indian Youth Practicum is all about.

[illegible] Tribal Member students from around the reservation were in Billings last week to participate in the six-day program at Rocky Mountain College. The students formed a simulated Tribal Council and an Inter-Tribal Policy Board and learned how these governmental boards relate to the Bureau of Indian Affairs

Albert Plante Learns Trade

PLANTE

Albert Plant, formerly of the Flathead Reservation was among 5 graduates from United Tribes Employment Training Center at Bismarck, North Dakota.

Mr. Plant obtained his certificate in Welding. His wife, also a graduate, received her certificate in Business-Clerical.

The graduation certificates were presented at ceremonies held at United Tribes Employment Training Center, the only Indian controlled vocational training center in the U.S. Programs are designed to provide Indian people in N.D. and throughout the U.S. with job skills and educational training. Currently there are approximately 160 trainees representing 24 different states enrolled at the Center.

Job Opening For Polson Counselor

Home School Counselor - Polson High School:

Interested persons are requested to write a letter of application to Darryl Dupuis, Polson High School, Polson, Montana, 59860, before May 15, 1974. Qualifications for the position are as follows:

1. Must have successful experience working with elementary or secondary age children as a classroom teacher.
2. Should qualify for a guidance certificate in the State of Montana.
3. Should be from the Salish-Kootenai tribal area.
4. Be acquainted with current juvenile codes and procedures.
5. Must have successful experience in working as a member of an educational team.
6. Must be willing and able to work with all ethnic groups including both white and Indians.
7. To be hired on the existing salary schedule plus mileage

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FULL MOON OF COURTSHIP April 15, 1974

Ronan Councilman Joe McDonald Resigns

Ronan. First term Tribal Councilman Joe McDonald, Ronan, has notified the tribal administration that he intends to resign his council seat.

The [illegible] year old Ronan High School Principal explained in a letter to Tribal Council Chairman Harold Mitchell, Jr., that he felt it would be in the best interest of the Council, the school and his family, if he gave up his Council position. McDonald explained that he would like to spend more time with his administrative duties with the high school and return to school this summer to work on a doctorate in education.

McDonald was the only new councilman elected in the Dec. 15, 1973, Tribal Council Elections. He defeated incumbent Jim Ely 254 votes to 123.

McDonald will meet with the rest of the Council later to discuss the effective date of his resignation.

The Tribal Council has the constitutional authority to appoint a successor to a vacated Council seat. However, in 1972, the Council decided to hold a special election to fill the Arlee Council seat left vacant by the death of Hugh "Jumbo" Grenier.

Inquest to Start Into Pete Pierre Death

Hot Springs: The investigation into the death of Tribal Member Pete Pierre, Jr., will continue next week when a Sanders County Coroner's Jury begins a formal inquest.

The body of the 47 year old Hot Springs man was found March 17 in a room at the City Apartments in Hot Springs. Authorities believe Pierre had been dead two days before he was discovered.

According to Tribal Police Chief Lloyd Jackson, Pierre was apparently beaten to death, suffering severe damage to the head. Jackson said that Tribal Law and Order Police, along with Sanders County Sheriff's Officers and Hot Springs Police are investigating. Jackson said there are two suspects in the apparent slaying.

Results of April 6 School Board Vote

Elections for school boards in reservation-area school districts were held April 6. Also at issue in several reservation communities were bond and mill levy proposals. A district-by-district rundown on the election results follows:

St. Ignatius ... Lake County District 28 voters elected Michael Fisher to a three year term on the board of trustees. Voters also approved a 20 mill elementary school levy of $33,915 but turned down a high school levy of 36 mills for $61,047.

Elmo ... District 22 elected Donna Walker to a three year term.

Dixon ... Charlotte Priddy was elected to a three year term for Sanders County district number 3.

Ronan ... District 30 voters elected Suzie Hanson and James Mook to school board seats. They also approved of a measure to use $104,622 in federal monies for the elementary school and $44,968 for the high school.

Valley View ... Ray Bick was elected to a three year term on the board of trustees and a $2,400 levy for operations of the school was approved.

West Shore School ... Voters in District 33, composed of Dayton, Proctor and Rollins, elected Ona H. [illegible] to the board of trustees. Also decided in Saturday's election was a $6,000 general fund expenditure for the upkeep of the school.

Arlee ... Arlee voters elected Gordon Doney to the school board. Voters okayed $61,350 for operation of the elementary school and $41,761 for the high school. Also approved was a reserve levy for the elementary school amounting to $3,240 and $5,400 for the high school.

Hot Springs ... Voters returned Ed McMaters to a three year term for the elementary school board. Donald [illegible] was elected to a one year term. For outlying high school board members, the Hot Springs voters elected Herb Cross to a three year term and Arthur Argo to a one year term.

Inter-Tribal Policy Board on Water Rights

The Confederated Tribes, along with six other tribes in Montana, have notified the State and other water users that they intend to take strong action to protect their reservation water rights.

In a memorandum from the Inter-Tribal Policy Board, the tribes placed "non-tribal entities" on notice that "interests involved in plans, projects or diversions of said water, do so at their own risk."

The memo noted that Indian tribes have paramount rights to water of all rivers and streams which flow through or [illegible]. The ITPB also pointed out that the federal courts have consistently held that these and other Indian rights apply not only to present but also to future tribal needs and uses.

[illegible] that it would file suit against illegal use of [illegible] waters and went further by saying "the government can be expected to enjoin any efforts to divert any said waters which relate geographically to Indian reservations. The government or the tribes might well seek money damages for any injuries or violations of its rights in the connection."

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FLATHEAD LAKE TRIAL BEGINS

(cont. from page one)

men also said he would not object if attorneys for the Flathead Lakers, a group of lake land owners, entered briefs into the case as long as they stuck with the issues.

Barnett, and attorneys for Namen, the Lakers and the City of Polson, all agreed to file additional arguements on May 13. Another hearing will be held in Missoula following review of the briefs.

The central issue in the Namen case, and the reason it has attracted so much attention, is the question of who owns the bed of Flathead Lake. Non-member property owners on the lake fear that they will either be forced to lease docks and fills that extend out into the bed or they will have to remove them.

The Tribe,on the other hand, wants to establish ownership of the bed as a means to controlling development on the lake. The southern half of the lake was reserved for the Salish Kootenai and Pend 'd Oreille Tribes in the Hellgate Treaty. The waters of the lake are traditional fishing grounds for the tribes and it is felt that some degree of control over shore development is necessary to preserve the fisheries environment in the lake.

Tribal ownership of the bed and the waters of the southern half of the lake have already been established in several court decisions. In 1942, the U.S. Supreme Court found that the United States held in trust for the Tribes the "bed of the southerly half of the lake". The U.S. Federal District Court ruled last year that the Tribe and the Federal Government could control fishing in the lake.

RESERVATION VIOLENT DEATHS

(cont. from page one)

Flathead Reservation. The total number of Indian deaths on the reservation during that period was 53...which means that one quarter of all deaths during 1972 were due to violent causes. He noted that alcohol has been pin-pointed as a predominant cause of these deaths and added that Public Health estimates that some 68 percent of all health money on the reservation is spent on problems connected with alcohol.

For this reason, the alcohol program recieved top priority for the Flathead Reservation. Lefthand said that alcohol programs on the reservation....such as the De-Tox Center, the Halfway House, Field Counselors and the Information Center....will be funded this year with $69,000 out of a special $600,000 Billings Area appropriation. He and that the program will ave a new focus on prevention of alcohol related health problems.

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Council Aims At Res. Water Rights

Dixon: Two Tribal Councilmen attending an Indian water rights meeting in South Dakota in February have returned with a series of proposals to give the tribes more say in the use of reservation waters.

Councilmen E.W. Morigeau, Polson, and Bob McCrea, Dixon, spent February 27-28 and March 1 at a Indian water resources meeting in Mabridge, S.D. In all, some 15 tribes from 8 states were represented at the meeting to hear Bureau of Indian Affairs water experts and tribal attorneys discuss Indian water rights.

Morigeau and McCrea reported to the Tribal Council that although Montana tribes are in somewhat better shape to assert water rights by virtue of the state's enabling act (which disclaims jurisdiction over reservations), little or nothing has been done to implement these rights. They said that the tribe has both a legal and moral basis for asserting its claim to reservation waters, and noted that the federal government is now prepared to help tribes draw up plans to claim their water.

In a written statement, the Councilmen pointed out the following abuses of tribal water rights:

"The monetary value of the Tribe's water resources is comparable to the value of the Tribe's timber resources. For example, the Tribes are receiving payment for water and water shed leases from the towns of Polson, Ronan and Hot Springs. Also, a commercial use is the underground water utilized in the operation of the Hot Springs Tribal [illegible]. The Tribes recieve no income nor recognition of water ownership from private wells drilled on the reservation.

The Flathead Irrigation Project has been recieving renumeration through conveyance of Tribal water for some 64 odd years. The Irrigation Project is supplying water to non-Indian users, irrigating approximately 135,000 acres of land. The Tribes receive no payment for the taking of this water by the project. We recommend that the Tribal Council take immediate steps to gain control of all reservation waters. Subsequent to control, the Council should arrive at a fair value (charge per acre) for the use of this water and collect such charges for water, retroactive to its first usage by the Project, as well as future use."

Morigeau and McCrea also recommended that the Council:

—Should look into Montana Power's claimed rights to the 11,400 cubic feet of water flowing out of Flathead Lake. The utility holds the license for Kerr dam and claims power value for the water.

—That all laws and court decisions involving tribal water rights be reviewed by the tribal attorneys and engineers and a firm water policy be established.

—That federal assistance be sought in realizing claims to tribal waters.

Susan Lefthand Is Tourney Queen

Susan Lefthand, daughter of Mr. and Mrs. Basil Lefthand of Arlee, was elected Queen of the All Indian Basketball Tournament held at Lyola High School March 9.

Other successful contestants from the Flathead were Susan's sister, Mary, who won second prize in the girls dance contest, and Kenny McLure, who won second prize in the Men's War Dance Contest. The Arlee drum group took second prize for their performance.

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Results of Res. Water Survey

Dixon (Char-Koosta): A special Tribal Council meeting will be called sometime in Dec. to discuss the preliminary results of a four-year water survey with the tribe's Washington attorneys.

Attorney Richard Baenan will present the detailed water study by the engineering firm Clyde, Criddle and Woodard. The survey, begun in 1968, was completed earlier this fall but has been under review by the tribal attorneys.

The study reportedly covers all water rising from and flowing through the Flathead Reservation. Preliminary reports indicate this will include aquafirs and groundwater as well as standing and flowing surface water.

The special meeting might be extended another day to permit Baenan to present a report on current court cases involving jurisdiction and other legal matters.

Salish, Kootenai, and 'd Orielles Tribes

CHAR-KOOSTA

VOLUME 2 - NUMBER [illegible] [illegible] of Continuous Snow (Dec. 1, 1972) PRICE 10c

State High Court To Hear Pierre

[illegible] (Char-Koosta): [illegible] Pierre on Dec. [illegible].

District Court Judge [illegible] Gardner Brownlee found last June that the state did have the authority to process a rather complicated repossession case against Pierre. Judge Brownlee's written decision was based on what tribal attorneys feel were numerous errors in the assessment of the case including disregarding the U.S. Supreme Court's judgement in the case of Kennerly vs. the Ninth District Court of Montana.

In the Kennerly case, the nation's highest court found that state courts did not have the authority to process civil debt matters. Kennerly, whose case was very similar to Pierre's, was being sued by a grocery store chain for not paying a food tab.

The Pierre case involves the possession of a 1965 Ford pickup truck by the Security State Bank in lieu of a $250 furniture loan.

Elsewhere in the courtroom, The U.S. Supreme Court will begin hearing testimony on the "Tonasket" untaxed cigarette case and state tax case between McLanahan and the State of Arizona. The decision in both cases will have a bearing on Tribal Members.

$2.4 Million Job Corps Contract

Dixon (Char-Koosta): The tribe will be in the vocational training business for another two years.

Earlier this month, Tribal Council Chairman Harold Mitchell Jr. signed the $2.4 million contract for a two year renewal of the Regional Residential Manpower Training Cen

(cont. on page 2)

Bad Teeth: A Bite On The Problem

Will Fluoridation Help Biggest Toothache?

St. Ignatius (Char-Koosta):

The Indian Public Health Service would like to flouridate the water supplies of all new housing projects on the reservation serving ten households or more.

PHS says flouridation — which is believed to strengthen the teeth of children — is essential because the Flathead Reservation is among the worst areas in the United States for dental problems. But a lot of people are wondering whether there is more to flouride than "[illegible] percent fewer cavities".

The controversy over the salt-like substnace has raged in

(Continued on Page 6)

Tribe Submits Jobs-Education Proposal

Dixon (Char-Koosta): The sometimes volcanic groundwork for tribal contracting of the BIA offices of Education Specialist and Employment Assistance Officer—complete with federal budgets -has finally been laid.

During the November 17 meeting, the Tribal Council decided by a five to two margin to resume negotiations with the Bureau of a contract to take over the two offices.

The controversial contract offer was dropped the previous meeting (Nov.3) by a vote of four to three.

The measure to resume negotiations for the current BIA posts passed November 17 with the votes of Vic Stinger, Pablo, (who voted to break off the talks the previous meeting) — Tom "Bearhead" Swaney (who was absent during the November 3 meeting) — Tom Pablo, Hot Springs, John Malatare, Arlee, and Council Chairman Harold Mitchell Jr. (all voting to continue the negotiations at the November 3 meeting). Opposed to the measure to submit a contract offer were Councilman Jim Ely, Ronan and E W

(cont. on page 2)

Tribe To Lobby For Dentists

Dixon (Char-Koosta): The tribe will take the bit into its own teeth to get more money for Public Health Service dentistry programs on the Reservation.

Dr. Merlyn Johnson, Area Dental Chief for PHS, and Reservation Dentistry Officer Dr. Robert Bartlett told the Council November 17 the reservation needs more dental personnel.

Dr. Johnson explained the administration had not increased the federal fudget for IHS for the coming year and said only only about 14 new dental positions were available.

Dr. Bartlett said reservation PHS dental facilities, which will include a new four chair clinic in St. Ignatius and a two chair facility in Polson, will need need at least one additional dental officer and three dental assistants.

The Council moved to ask Senators Lee Metcalf and Mike Mansfield and Congressman Richard Shoup to assist in getting the necessary appropriations and approved the ap

(cont. on page 2)

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Seven Vie For Seat On Council

Seven Arlee District tribal members will be vying for the council seat left vacant by the death of Hugh "Jumbo" Grenier in an upcoming special election.

Filing with Tribal Secretary Fred Houle, for the June 24 race were: Evelyn Grenier, the widow of the deceased Councilman; Joe Wheeler, a former gamewarden who is currently fighting the state for the right to sell untaxed cigarettes on the reservation; Antoine Charlo, a grandson of Chief Charlo and regarded as the traditional Chief of the Salish tribe; John E. Maltare, an Arlee businessman and a former member of the committee for Optional Withdrawal; Edward A. Fyant, a former Councilman from Arlee; Victor Matt and Isaac Richard Pierre.

Former Councilman E. T. "Budd" Moran had also filed for the spot but was found ineligible by the council Elections Committee this week due to a residency requirement.

The candidates are residents of the Arlee district, which was represented by Grenier. However, all tribal members are eligible to vote for a successor.

(Continued To Page 3)

Published By The Confederated Salish and Kootenai Tribes, Dixon, Montana [illegible]

CHAR-KOOSTA

Moon of The Camas — 17 Volume 2, Number 3 PRICE 10c

Smokeshops Before High Court

County Appeals Smokes to Montana Supreme Court

Missoula—Joe Wheeler's Evero Hill smokeshop is still in the untaxed cigarette business but all his troubles with Missoula County and the State are far from over.

The county filed a writ of Supervisory Control with the State Supreme Court this week seeking to overturn the Missoula County Justice Court decision early last month. County Arrorney Robert Deschamps told Char-Koosta the "highly unusual" plaintiffs appeal was filed because of what he considered errors in the administration of the case by Justice of the Peace J. G. Lamoreaux.

Deschamps said that the nature of this case, where the defendant had more or less admitted that he had committed an infraction of Montana State law under the grounds that he was immune from state jurisdiction, gave the State Supreme Court the authority to decide the guilt or innocence of Wheeler on the merrits of the case. Deschamps said that if Wheeler looses before the Supreme Court, the next legal step for the tribe would be the U. S. Supreme Court

Wheeler's sister, Mrs. Dorothy Clairmont, is operating the Pablo branch of the enterprise, but not without friction with the Lake County Attorney's office.

(Continued To Page 2)

Pierre Downed In District Court

Missoula—The Missoula District Court has upheld a reposession order in the controversial case between the Ronan State Bank and tribal member Richard Isaac Pierre. The Tribe intends to appeal the decision.

Judge E. Gardner Brownlee handed down the decision last Wednesday. In the 23 page document, Judge Brownlee threw out Pierre's argument that the case could not be tried in a state court and found in favor of the bank on the basis that Indians, as citizens of the state, are subject to state laws.

(Continued To Page 3)

Tribe Stakes Claim To Reservation Waters

Dixon—The tribal council, wishing to head off any possibility of outside claims to reservation waters, passed a resolution May 28 firmly staking claim to all tribal waters.

The resolution cites a number of laws and acts which substantiate their calim, among them are:

—The Hellgate treaty.
—The Winters vs. United States (1908), which set aside waters arising from or flowing through the reservation for exclusive Tribal use.
—The Act of April 23, 1904 (allotment) is the only federal authorization for appropriating tribal waters.

The resolution claims ownership to all waters not appropriated by the 1904 act and establishes ownership of water currently being used for sale, rent, distribution, recreation, and fish and wildlife purposes.

The resolution added that waters appropriated by the Federal government by the act of 1904 have not been included in a judgement agreement and the Tribe has yet to be compensated for them.

Tribe Sets Budget At $2.4 Million

Dixon: The Tribal Operating Budget for the upcoming year will be $[illegible].

The figure, approved by the Tribal Council last Friday, represents a small increase over last years budget. The increase, according to Tribal Treasurer, Mrs Ruby Christopher, is due mostly to increase to the cost of living expenses.

The largest cut of the pie will go into Capital Programs, which include per-capita dividends as well as land aquisitions, the revolving credit program, a water survey and industrial development studies. The Capital Programs will cost $[illegible].

Resources Management, which includes the tribe's share of the Bureau of Indian Affairs reservation Forestry Department, realty and general maintenance, has been allocated $121,[illegible]. There is a $[illegible] price tag on Community Services which provides for commodities, sanitation, law and order, education and health.

Tribal Operation, which encompasses the Tribal Council, the Tribal Office and salaries, was set at $[illegible]. The balance will be taken up in Other Programs, which furnishes money for major repairs and forestry development.

Arlee Pow-Wow, Rodeo Slated For July Fourth

Arlee—The annual Arlee Pow Wow has been slated for the Fourth of July weekend and this year, for the first time, an all Indian rodeo has been added to the state.

The festivities, which start June 30 and will continue until July 6, feature the Indian Dance

(Continued To Page 3)

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TRIBAL COUNCIL MINUTES FOR APRIL 15 MEETING

Held April 15, 1975 — Council Chambers
Volume 75 Number 13 — Dixon, Montana

Members Present: Chairman, Harold W. Mitchell, Jr.; Vice Chairman, E.W. Morigeau, Robert McCrea; John F. Malatare, Thomas E. Pablo, Thomas (Bearhead) Swaney, Victor Stinger, Patrick Lefthand and Sergeant at Arms, Homer Courville.

Members Absent: Joseph McDonald and Fred Whitworth.

[illegible]athead Reservation Water Inventory- The Tribal Council [illegible] March 14, took action to have the BIA conduct their four phase water study under the following conditions:
1. The Tribes would have a voice in selection of who would prepare the study. This voice would extend to the Tribes selecting the individual or firm, or to the Area Office making the selection, subject to veto by the Tribes.
2. The Tribes would work out with Bureau officials the specifications for conducting the inventory. The Consultants hired by the Bureau to do the report would be specifically directed to their task, in order to produce a document useful to the Tribes.
3. The Tribes would have complete access to those conducting the study at all reasonable times, and would be permitted to comment critically on the report at all stages.
4. The study would not contain recommendations as to what course of action might be followed, nor would it make any legal assumptions or state any legal conclusions. This would [illegible] "position" of the Bureau.

Motion-by McCrea to accept the above conditions which are in agreement with the BIA, in conducting the Water inventory, seconded by Morigeau, carried, unanimous.

Resolution 4770- Authorizing a Suit to Adjudicate Water Rights-
[W]hereas, the ownership of water rights on the Flathead [R]eservation are confused by the status of the legislative, [ju]dicial and administrative decisions, and
Whereas, it is in the best interest of the Tribes to have any adjudication of their water rights done in Federal court, rather than in state court, now, therefore,
Be It Resolved, by the Confederated Tribes that the United States is authorized to file a lawsuit on behalf of the Confederated Tribes in United States Federal Court to adjudicate rights of the Tribes to all the waters on the Flathead Reservation.
Motion- by McCrea, to approve Resolution 4770, seconded by Malatare, carried, unanimous.

Housing & [illegible] Act of 1974 - Section 8-
Mrs. Grace Beilenburg and Mr. Orvin Fjare met with Council and discussed the Section 8 of the HUD act of 1974. This Section was developed to provide subsidies to person of low income housing developments to pick up the rental payments that the person cannot meet. Further information will be given to the Council at a later date. HUD is just now getting information on the Section

Phillip Clairmont vs Confederated Tribes - Mr. Clairmont is suing the Tribe for damages on his land near Turtle Lake homesites water facilities. Tony Rogers' Tribal Attorney, asked the Council if they wished to have the BIA intervene on the suit.
Motion-by Stinger to authorize the BIA to intervene on the suit of Mr. Clairmont, seconded by Malatare, carried, unanimous.

Resolution 4771 - Modification of Attorney's Contract -
Whereas, the General Services Attorneys' Contract between the Confederated Tribes of the Flathead Reservation, Montana, and the law firm of Wilkinson, Cragun and Barker, No. 14-20-0250-3110, which modified and restated previous contracts between the parties and which was approved on August 28, 1974, provides that the attorneys shall not be reimbursed for fees earned in any one contract year in excess of $75,000 without approval of the Tribes; and
Whereas, the contract also provides that the attorneys shall not be reimbursed for ordinary and necessary expenses incurred in performing legal services in any one year in excess of $10,000 without approval of the Tribes; and
[illegible] during the present contract year beginning July 1, 1974, the attorneys have through February 28, 1975, submitted vouchers to the Tribes for legal fees totaling $74,[illegible] and have indicated that in the remaining four billing months of the contract year legal fees will continue to be substantial and have recommended that the Tribes increase the annual limitation from $75,000 to $110,000 for the current contract year only, and
Whereas, during the present contract year beginning July 1, 1974, the attorneys, through January 31, 1975, submitted vouchers to the Tribes for expenses totaling $6,189.31, and have indicated to the Tribes that such expenses might exceed the annual limitation this year, and have recommended that the tribes increase that limitation from $10,000 to $12,000 for the current contract year only; now therefore,
Be It Resolved, that the Attorney's Contract is hereby [illegible] so that for the contract year beginning July 1, 1974, and ending June 30, 1975, the annual limitation on fees shall be increased from $75,000 to $110,000 and [illegible] the annual limitation on expenses shall be increased from $10,000 to $12,000; and that neither the fees nor the expenses shall exceed those sums unless an additional [illegible] is authorized by the Tribes and approved by the [illegible] of the Interior; and
Be It Further Resolved, that the Chairman of the Confederated Tribes is authorized and directed to execute, on behalf of said Confederated Tribes of the Flathead Reservation, Montana, the attached Agreement modifying the [illegible] Contract, which Agreement is made part of this Resolution.
Motion-by McCrea to approve Resolution 4771, seconded by [illegible], carried, (7 for - 1 opposed, Swaney opposed)

Resolution 4772 - Requesting an Environmental Impact Statement on the Use of Chemicals -
Whereas, the Tribal Council has become concerned about the use by the BIA of Xylene as herbicide in the canals of the Flathead Irrigation Project and the suspected use of other possibly dangerous chemicals by third parties within the project, and
Whereas, the BIA has full responsibility for the administration of the Flathead Irrigation Project; and
Whereas, the National Environmental Policy Act required the responsible federal agency to prepare an environmental impact statement before taking any major action substantially affecting the quality of the environment, and the use of Xylene and other chemicals is such federal action, and
Whereas, the Council needs such a statement well prior to the time Xylene and other chemicals might be used again in the Flathead Irrigation Project, now, therefore,
Be It Resolved, that the Tribal Council calls upon the BIA to complete and present to the Tribal Council an environmental impact statement on the use of Xylene by the BIA and of other chemicals by third parties with the Flathead Irrigation Project well in advance of any such use during the 1975 irrigation season.
Motion-by Swaney to approve Resolution 4772, seconded by Lefthand, carried, unanimous.

Resolution 4773 - Housing Application for Low Rent Housing-
Whereas, the Tribal Council in Resolution 4548, on December 7, 1973, recognized the need for low-rent housing on the Flathead Indian Reservation and approved the application of the Salish and Kootenai Housing Authority to the Government for a preliminary loan in amount not to exeed $20,000, and
Whereas, of the 100 units of housing applied for by the Local Authority in 1973, a program reservation for 36 units was approved by the Goverament in June 1974, together with a planning loan in the amount of $14,400,and
Whereas, it is understood that a program reservation for the remaining 64 units of the 100 is now in prospect, and
Whereas, further planning studies will be required in order to implement the housing program, now, therefore,
Be It Resolved, the application of the Local Authority to the Government for a preliminary loan in amount not to exceed $25,800 for surveys and planning in connection with Public Housing Projects of not to exceed approximately 64 dwelling units is hereby approved.
Motion-by Lefthand to approve Resolution 4773, seconded by McCrea, carried, unanimous.

Meeting Adjourned 6:15 P.M.

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MINUTES OF MEETING OF THE TRIBAL COUNCIL OF THE
CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION

* * * * *

Held February 12, 1975. Council Chambers, Dixon, Montana.
Volume 75. Number 4. Approved March 14, 1975.

MEMBERS PRESENT: Chairman, Harold W. Mitchell, Jr.; Vice-Chairman, E. W. Morigeau; Robert McCrea; John E. Malatare; Thomas (Bearhead) Swaney; Victor Stinger; Fred Whitworth; Thomas E. Pablo; Patrick Lefthand and Sergeant at Arms, Homer Courville.

MEMBERS ABSENT: Joseph McDonald

[illegible]vin Orr - Land Sale - Mr. Orr has 40 acres that he would like to sell to the Tribes. He [illegible]s asking $600.00 per acre.

Motion by Fred Whitworth to have the Economic Development Committee meet with Mr. Orr and look the property over, seconded by Thomas E Pablo, carried, unanimous. (8 present.)

Richard Baenen, Tribal Attorney - met with Council to discuss matters concerning:

1. Colstrip Transmission Lines
2. Kerr Dam
3. Buffalo Rapids
4. Water Code
5. Litigation
   a. Personal Property Tax
   b. Cigarettes
   c. Ragsdale Allotment
   d. Stasso Hunting case
6. Mission Lands
7. Liquor Ordinance
8. Tax on Non-Trust Property
9. God Father's Palace

Kerr Dam - Montana Power - Motion by Thomas (Bearhead) Swaney to instruct the Tribal Attorney to draft a Resolution to secure the Kerr Project for Tribal or US Gov't.(in trust for the Tribe) take over, seconded by John E. Malatare, carried, unanimous. (9 present.)

Flathead Irrigation Project - Motion by John E. Malatare to draft a letter to the Flathead Irrigation Project and inform them that the irrigation season is coming up and that the Tribes are going to lease the watershed to the Irrigation Project, seconded by Robert McCrea, carried, unanimous. (9 present.)

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[illegible] - Cont'd. -
[illegible], by the Tribal Council of the Confederated Salish and Kootenai Tribes, [illegible] Fiscal Year 1975 Tribal Budget is hereby modified to provide for [illegible] Capital Investment into the Tribal Credit Enterprise to be used in [illegible] Loan Program

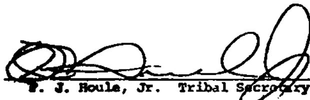
Motion by Victor Stinger to approve the Resolution 4725, seconded by John E. Malatare, carried, unanimous. (9present.)

Affiliated Tribes of Northwest Indians Request - Motion by Thomas (Bearhead) Swaney to direct the Tribes delegates to the Montana Inter-Tribal Policy Board to have the Policy Board support the Affiliated Tribes of the NW Indians, concerning a request from the congressional delegates to support Tribal Water Codes which Tribes seek to administer their own water, seconded by Patrick Lefthand, carried, unanimous. (9 present.)

Arlee Pow Wow - George Washington's Birthday - Motion by Fred Whitworth to grant permission to hold a pow wow from February 15 to 17 at the Arlee grounds, and that they comply to the Tribes pow wow regulations and clean up the ground afterwards, seconded by John E. Malatare, carried, unanimous. (9 present.)

Meeting adjourned.

Confederated Salish & Kootenai Tribes
of the Flathead Reservation



[illegible]. J. Houle, Jr. Tribal Secretary

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Home Purchase Assistance Grants - Cont'd. - The Council has the option of using the money for home purchase or program purposes.

Motion by Thomas (Beachead) Swaney to use the funds for program purposes and direct a letter to the Area Employment Assistance Officer and request that the Bureau of Indian Affairs seek funds to be provided in fiscal year 1975, for the Home Purchase Assistance grants, seconded by Robert McCrea, carried, unanimous. (9 present.)

Proposed Ordinance on Water Use - Motion by E. W. Morigeau to request the Attorneys to draft an Ordinance governing the use of all water on the Flathead Reservation, seconded by Robert McCrea, carried, unanimous. (9 present.)

Joe's Smoke Shops - Marvin Ping, Attorney, and Dorothy Wheeler Clinkenbeard and Shirley Wheeler met with Council to discuss the problem of the Smoke Shops, now that Joseph Wheeler was killed in a mine accident in California.

Motion by Robert McCrea to transfer the leases on the land where the smoke shops are located to Dorothy Wheeler Clinkenbeard and issue her a permit to continue operations seconded by Fred Whitworth, carried, unanimous. (9 present.)

Motion by Robert McCrea to authorize payment of $362.00 for Marvin Ping's attorney fees, seconded by James Ely, carried, unanimous. (9 present)

Television Translator - Big Arm - The Blacktail TV Tax District requests to use Lot 2 Block 3 Big Arm Villa Site as a TV Translator location to serve the Elmo Area, Elmo Bay and up to Dayton and part of Rollins.

Motion by Patrick Lefthand to issue the Blacktail TV Tax District a lease for Lot 2 Block 3, Big Arm Villa Site for $25.00 for a ten year permit, seconded by E. W. Morigea carried, unanimous. (9 present.)

RESOLUTION 4502 - Requesting United States to Join Lawsuit in Protecting Tribal Assets -

WHEREAS, the Confederated Salish and Kootenai Tribes of the Flathead Reservation Montana, own the south half of Flathead Lake pursuant to aboriginal ownership, as confirmed by the Treaty of Hell Gate, July 16, 1855, which Treaty guaranteed to them, their ownership in perpetuity, which ownership has been recognized by the Circuit Court of Appeals of the Ninth Circuit in the case of Montana Power Company v. Rochester, 127 F. 2d 189; and

WHEREAS, one James N. Namen, doing business as Jim's Marina, is in trespass upon the lands underlying Flathead Lake and owned by the Confederated Tribes; and

WHEREAS, said Namen has refused to remove his encroachments and continues in his trespass; and

WHEREAS, the Confederated Tribes, to protect their property rights, have filed a lawsuit in the United States District Court for the District of Montana, Missoula Division, Civil No. 2343, seeking removal of the encroachments and obstructions placed upon Tribal lands by said Namen;

NOW, THEREFORE, BE IT RESOLVED, that the Confederated Salish and Kootenai Tribes request the United States, through the Department of Justice, to exercise its trustee functions, in respect to the Confederated Tribes and join in the lawsuit as a party plaintiff, seeking reaffirmance of Tribal ownership as enunciated in the case of Montana Power Company v. Rochester.

Motion by E. W. Morigeau to approve Resolution 4502, seconded by Thomas E. Pablo, carried, unanimous. (9 present.)

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MINUTES OF [illegible] OF THE TRIBAL COUNCIL OF THE
CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION

* * * *

Held October 19, 1973. Council Chambers, Dixon, Montana.
Volume 73. Number [illegible]. Approved

MEMBERS PRESENT: Chairman, Harold V. [illegible], Jr.; Vice-Chairman, Robert McCrea; Thomas E. Pablo; Thomas (Bearhead) Swaney; E. W. [illegible]; James Ely; Patrick Lefthand; John E. Malater and Sergeant at Arms, Hank Burland.

MEMBERS ABSENT: Fred Whitworth and Victor [illegible].

Quarterly Tribal Council Meeting Minutes, [illegible] 5, 1973 - were read to Council for approval.
Motion by James E[illegible] to approve the Minutes of October 5, with corrections, seconded by Robert McCrea, carried, unanimous. ([illegible] present.)

Tribal Council Meeting Minutes, [illegible] - were read to Council for approval.
Motion by Thomas E Pablo to [illegible] Minutes of October 10, with corrections, seconded by John E Malatare, carried, [illegible]. ([illegible] present.)

State Water Study - Nancy Leifer [illegible] met with Council concerning the Study and the progress thus far They would [illegible] what the Tribes are planning as far as the Reservation waters are concerned, [illegible] for November 2, with the Study Team and a tour will be taken throughout the [illegible]. The State Team mailed out a questionnaire concerning the States water to [illegible] point, this is very important and they request that all should be filled [illegible] to them.
Motion by Patrick Lefthand [illegible] Development Committee contact the Tribal Attorney to set up a proc[illegible] rights with the Tribes, seconded by Robert McCrea, carried, unanimous. ([illegible])

Polson Athletic Boosters Club - [illegible] met with Council and requested in behalf of the Polson Athletic Boosters [illegible] financial assistance to initiate a Junior High Athletic Program.
Motion by James Ely to grant $[illegible] of the Education funds to the Polson Athletic Boosters Club for the Junior High [illegible], seconded by E. W. Morigeau, carried, unanimous. (8 present.)

RESOLUTION 4519 - Programming Judgement Award - Paragraph 7 and 10, Docket 50233, U. S. Court of Claims -

WHEREAS, Public Law 92-253 ([illegible] Stat. 64) authorizes the disposition of judgements entered in favor of the Confederated Salish and Kootenai Tribes in Paragraph 7 and 10, Docket 50233 of the U. S. Court of Claims, and

WHEREAS, said Public Law requires that such disposition shall be as authorized by the Tribal Governing Body and approved by the Secretary of Interior, and

WHEREAS, by previous resolutions all of the funds have been programmed by the Tribal Council and approved by the Secretary of Interior except $40,422 28 plus accrued interest, and

WHEREAS, a need exists from which to make grants to Tribal Members and groups for educational purposes, now, therefore,

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Mr. INGRAHAM. This was under date of March 28, 1974. Those proposed regulations, of course, acknowledged the U.S. Federal recognition of complete and entire ownership of all the waters flowing through, arising on, or existing under the respective Indian reservations.

This, of course, concerned us greatly, because it provided for a permit system whereby the nonmember could get an annual or a 5-year permit if they paid the tribe for it. The permit would never attach to the nonmember's land.

I will present these to you as we go along. I would also like to introduce to you a resolution, No. 47–70, by the tribal council of the Confederated Salish and Kooteani Tribe under datė of April 15, 1975, with a vote of 8 to 4. The resolution requests and authorizes the United States to initiate a lawsuit for the adjudication of the water rights in all of the waters on, under, and flowing through the Flathead Reservation.

Subsequent to that—and I have these documents that I will present to you—we have letters from various departments of the tribe demanding that fees for the use of water be given to the tribe. This includes a motion by the tribal council to notify the irrigation district that they would be expected to lease these waters.

Now, in 1974, and I recognize that I am late, but I think that this is important to you, to have this information to understand some of the feeling that is running here within the reservation boundaries with respect to the 83 percent nonmember population.

In 1974, the city council of the city of Ronan, of which I am the city attorney, received an application from the tribal housing authority for water and sewer hookups under a subsidized program, that we call a cooperation agreement.

At that point in time, it was necessary to enter into this cooperation agreement, which the city council did, recognizing that these low income people need to be subsidized. After granting the use of water to the 10-unit housing project, it was determined that the water pressure in our local water system was extremely low—low to a point that it endangered our rate structure with the insurance underwriters.

The State as a whole is underwritten, and the rates are established with respect to the type of fire protection and the hazards that the insurance companies will have. One of the factors in this is the water pressure.

The water pressure in our municipal water system, frankly, was then and is now extremely low.

Upon determining this, we took our revenue-sharing money—95 percent of it—and authorized the drilling of a well on city-owned fee patent land. Under appropriate and proper State law—what we thought to be proper State law—we made application to the Board of Natural Resources, State of Montana, for a permit to appropriate water sufficient to service this well in order that we could pump it into our municipal system. This was necessary in order to alleviate the pressure loss that was going to be encountered as a result of the tribal housing authority hooking into the city water system.

We no more than made this application than we received letters from the tribal lawyers demanding that under no circumstances were we to drill that well, that if we were to drill it that we had to make arrangements with the tribal government to go into a contract with,

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and pay lease money to, the tribe for the water that was owned by the tribe.

Certainly, this raises suspicions with respect to the motives of the tribe.

At approximately the same time—and I am going to give you written evidence of all this that I have in my files, as a part of my visit with you—at about this same time, we received newspaper articles in the tribal newspaper, relating to a survey that was made by Dr. Konizeski at the university, wherein he told the tribe that the tribal resources and their annual income could be implemented and increased up to $13.5 million per year if they would only go out and charge for the water use that they were entitled to under the *Winters* doctrine.

We have many other resolutions, we have many other items in the tribal newspaper relating to these exclusive claims of exclusive ownership of water by the tribal members under the *Winter* doctrine.

Now, these have raised our suspicions, Senator.

We, of course, by this time are quite well organized in opposition to these claims. I think you are quite familiar with the objections and the protests that have come out of this area and other areas within the State relative to the proposed regulations that were published in the Federal Register of March 17, 1977.

I think you are also familiar, Senator, with the proposed legislation that was introduced by Congressman Meeds back in 1977, relative to an attempt to settle these very problems that we are talking about now. Congressman Meeds' bill, as you recall, provided for a 5-year period within which the tribes could prove up and lay the claims to these implied water rights, and at that time, State law would then take over.

We, here on this reservation, Senator, are awfully sensitive to the State ownership. The latest expression of law, frankly, says that State appropriations of water within the Flathead Indian Reservation are invalid and of no force and effect. This was not held once, but it was held twice, in the case of *Alexander* v. *United States* in 1943 and in the case of *United States* v. *McIntyre*, which was settled just some 3 or 4 months before that. That was the Ninth Circuit Court of Appeals in San Francisco. I don't have the citation, but it is a very familiar citation on this reservation.

Getting to this particular problem, this pits the reservation water user against—and I'm talking of the non-Indian—against those claiming interests upstream off the reservation, who certainly are subject to, or at least are entitled to, make a State appropriation of water. Those appropriations have been held valid upstream, but not within the reservation area.

Certainly, the only claim that we can make if the Ninth Circuit Court is correct, is that we accede to those reserved rights of the Indians that were approved and acquired in the 1855 treaty, unless we can someway have our State appropriations of water declared valid.

I submit to you further, that the present discussion today has gone to areas, "well, is it right for the *Winters* doctrine to be employed in this particular instance?"

I don't think that the case goes to that. I think the case goes to this: The litigation has been filed in Federal court; however, if it is

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to be decided under State court, these Winters right doctrine claims are going to have to be decided in Federal court anyhow before the State court can adjudicate the water interests of the people in this Flathead basin, or any other basin. The point being, that the tribes themselves, frankly, are not in favor, as I can see it, of these suits, because that necessitates the quantifying of their water rights, which they are not prepared to do.

Their claim—according to all the Indian authorities—is that they have a water right, not only to the present water uses, but to all future water uses. So if someone decided to come in and put in an atomic energy generating plant within this reservation area, and it took every damned drop of water that we've got on this reservation in order for the tribe to sell this water to that atomic energy plant, then all the rest of us would go without water.

As a consequence, we would need quantification. We don't object to the quantification suit, at least, as I see it. Our problem is the duplication of adjudication. If we adjudicate it in the Federal court, we are going to be left at the wayside over in the State court. The State court saying that we must make the filing of our claims by January 1, 1982. We aren't even going to get through the first level of the Federal courts in order to know whether we have a claim to file with the State courts by January 1, 1982.

These are some of the problems. I thank you for your attention. I realize the hour is getting late. I would like to answer any questions, and I think I can answer a lot of the questions that are proposed by you.

Senator MELCHER. You mentioned that when the city of Ronan drilled a well, they were challenged by the tribe?

Mr. INGRAHAM. By the tribal attorneys who wrote it, and the council on behalf of the State tribes; yes.

Senator MELCHER. It is general procedure that attorneys represent clients. Was there some reason you say it was challenged by the attorneys or challenged by the tribe?

Mr. INGRAHAM. The documentation that I have is a letter from the tribal attorneys who say that they represent the tribe, who make the demand upon the city.

Senator MELCHER. Is there any reason to think they weren't representing the tribe?

Mr. INGRAHAM. If they weren't, then they subsequently have.

Senator MELCHER. What happened here?

Mr. INGRAHAM. The city of Ronan was building a well and——

Senator MELCHER. Is this the well that was described by Mr. Eve this morning?

Mr. INGRAHAM. Unfortunately, the well we drilled was a silter. We drilled 400 and some odd feet and spent some $45,000–$50,000 of our very dear revenue-sharing money to drill it. The darned thing won't clear up. It has silt and sand in it.

Senator MELCHER. This is another well from what Mr. Eve described this morning?

Mr. INGRAHAM. Yes, sir.

Senator MELCHER. What year are you talking about?

Mr. INGRAHAM. We commenced drilling that well in 1974, and we have been "dinging" with it ever since. We did subsequently decide, as

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I said, after much searching to proceed under State law, hoping that we could get assistance from the State in the appropriation. We finally got an appropriation from the State under the State laws stating that we did have this right subject, however, to all existing reserved rights of the Confederated Salish and Kootenai Tribe.

Senator MELCHER. Was the well completed? The well was completely drilled?

Mr. INGRAHAM. Yes.

Senator MELCHER. But the water was no good?

Mr. INGRAHAM. That is correct. We couldn't feed it into our system, Senator.

Senator MELCHER. So it is not being used?

Mr. INGRAHAM. No; it is not being used at this time.

Senator MELCHER. The challenge that you got from the tribe did not result in a lawsuit or any further proceedings other than the challenge of the letter that you got from the tribal attorneys?

Mr. INGRAHAM. No; we have not had any suit filed at all.

Senator MELCHER. Is there any difference between this well that you are talking about and the well that Councilman Eve testified about this morning—that is being used as part of the water supply for the city of Ronan?

Mr. INGRAHAM. None; except the procedure that we followed in securing our State appropriation.

Senator MELCHER. The well that he testified to: Would it be used as part of the water supply of the city of Ronan, or what standing does it have in terms of recognition?

Mr. INGRAHAM. The same sort of standing. We don't know who owns the water right, whether the city has the other water right or——

Senator MELCHER. Has the city filed with the State of Montana?

Mr. INGRAHAM. Yes.

Senator MELCHER. On that particular well?

Mr. INGRAHAM. Yes, sir; however, we must still go by the mandates of the Federal courts. The last expression was that appropriations of this nature are of no force and effect and invalid on the Flathead Indian Reservation.

Senator MELCHER. The city of Ronan at this time is not named as a defendant?

Mr. INGRAHAM. No; it is not. As a matter of fact, Senator, I represent somewhere between 30 and 40 of the defendants. I think they constitute probably 90 percent of those defendants that have been served that may be within the confines of the reservation area. My defendants do live, with the exception of two within the reservation boundaries—two of them do live off the reservation——

Senator MELCHER. You have cited some cases, which I believe you identified as about 1974–75, that you tied to the *Winters* doctrine, that you think are comparable to the well that the city of Ronan is currently using in their water supply. Is that your testimony?

Mr. INGRAHAM. I'm sorry, I don't quite follow you.

Senator MELCHER. You have cited a couple of cases in Federal court that seem to indicate to you that the subsurface water, similar to the subsurface water that the city of Ronan is now using through their well, would be subject to tribal ownership?

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Mr. INGRAHAM. Yes, sir, the cases I haven't cited, but the *Cappeart* case that you cited earlier, which involved the implied Federal right of the water reserved in the Salton Sea area, certainly, these can be applicable to our position on this subsurface water.

Senator MELCHER. Well, we are not so sure of that, and I just want to tell you that. We are not so sure of that because I think there is a question of how much water is available. I don't believe the *Winters* doctrine is open ended. Maybe some tribes think it is open ended and maybe some individual Indians think it is open ended, and maybe you think it is open ended, but I don't think it is open ended.

Mr. INGRAHAM. I would agree with you, but——

Senator MELCHER. Well, you are indicating that, and I want to straighten that out here in your testimony. You are indicating that the Federal courts have found that the *Winters* doctrine is open ended as regards subsurface water. I don't believe that is true.

Mr. INGRAHAM. I would hope you are correct, however, I think that Judge Smith in the *Texas Co.* case over on the Blackfeet Reservation with which you are probably familiar with——

Senator MELCHER. No, sir; the last thing you are going to get me to do is talk about cases that I have never heard of. At any rate, this case, which I believe is much broader than Indian water rights, and much broader than the *Winters* doctrine, might get into the very point you are talking about. I don't know, but I don't believe there is any reason to say that all subsurface water on an Indian reservation belongs to the tribe. I know I have heard it often enough, but I don't believe that has been established at all.

Mr. INGRAHAM. Senator, I hope you are right, but what I am doing is to cite those instances to show you where that claim is specific. I think what the *Winters* doctrine said is, there is——

Senator MELCHER. I think what the *Winters* doctrine said is: There is enough water available to Indian tribes on the reservation for the purposes for which the reservation was created——

Mr. INGRAHAM. The *Winters* doctrine, without expansion, only limited that water to the allottees, not to a tribal entity.

Senator MELCHER. I don't think that is true. I think maybe it was to the tribal entity first, and there was another act of Congress, about the same time, that identified the Indian allottees. I think it is unfair to leave the impression that the *Winters* doctrine should be interpreted as guaranteeing all of the water on the reservation to an Indian tribe. I think that is absolutely unfair, to leave that impression, and particularly where it involves subsurface water.

Mr. INGRAHAM. Certainly, that was the only impression and the only interpretation we could get out of the Department of the Interior's proposed regulations, had they become law and had you and the other congressional delegates in this State and other States not interceded in that.

Senator MELCHER. I think it is one thing to be talking about the tribes in really arid country where water is very limited. Of course, the intent of Congress was to allow those tribes to have a sufficient amount of water. In some instances, that may have been all the water that was available. But I don't believe it is fair to leave the impression that somehow the *Winters* doctrine just guarantees that

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all water flowing under, or on top, or going through an Indian reservation, it has been decided that that is Indian water. If that were the case, it wouldn't be lodging a case on behalf of the tribe, it would just cite the previous case that said that, and that would be the end of it.

The water questions are tough enough without complicating them. I am not saying that you necessarily do, but as I sat here and listened to your testimony, it could be interpreted that the decisions of those cases that you cited would say to the people of Ronan that their well that supplies part of the water for their city would, if it were litigated, be declared tribal water. I don't think that is the case at all, based on the *Winters* doctrine and the subsequent cases. I don't believe it would turn out that way, either.

Mr. INGRAHAM. That would be the reason we are in court, however, is for that decision.

Senator MELCHER. I think it is fair to say that we are in court because the Justice Department wants adjudication of the water in these drainages for Indian tribes and for Federal agencies to have a reservation, and that is a pretty broad reason to be in court.

Mr. INGRAHAM. I feel you are correct.

Senator MELCHER. It is much beyond the *Winters* doctrine—way beyond the *Winters* doctrine.

Mr. INGRAHAM. I think that the conceptual point has been very relevant in some of the areas.

Senator MELCHER. Were you here this morning?

Mr. INGRAHAM. Yes; I was.

Senator MELCHER. You have given an for instance where you say the Atomic Energy Commission—you used the term, the Atomic Energy Commission—I guess we have already abolished that, but maybe you used some other term—but they want the water and need the water for certain industrial use?

Mr. INGRAHAM. Yes.

Senator MELCHER. And they get it from the tribes. Well, I think it is pretty clear that the Justice Department used this suit as broader than that. They don't believe that the Federal agencies necessarily have to go through any Indian tribe to get water. They think there is a Federal reservation of water, and they want to adjudicate it out. It has nothing to do with Indians. It is just Federal.

Mr. INGRAHAM. In the pleadings—if you will look at your pleadings about paragraph 7 or 8—you will find that they admit that their claims are inferior to the tribal water claims, that is, the claim on the irrigation waters——

Senator MELCHER. That doesn't stop the line of thinking that has been reflected in the *Winters* doctrine that the tribe will need a reasonable amount of water to satisfy their needs, and where there is a lot of water, to claim the rest of it for Federal agencies, based on a very prior right.

Mr. INGRAHAM. I would agree with that.

Senator MELCHER. It is that line of thinking that will be unfolded and developed in court if that theory of the Justice Department is the dominant one in developing their case. I am not saying that that will be their dominant theory, because they have different individuals in there, all jockeying for the position to establish who calls the shots,

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who quarterbacks these cases, but it is certainly identified in their testimony as a distinct possibility. As the Interior Department's attorneys said, that is just "speculation."

Mr. INGRAHAM. My observation of the claims of the Interior Department's attorneys is strictly this—I am talking about the Bureau of Indian Affairs attorneys—they think that the tribes strictly own outright, under immemorial rights, all waters flowing through, arising on, or existing under Indian reservations.

Senator MELCHER. No; they had better not be thinking that. They don't testify that. That is a claim that is made by some individuals, but it is not the testimony of the solicitors of the Interior Department.

Mr. INGRAHAM. But the solicitors of the Bureau of Indian Affairs——

Mr. KIMBLE. Lloyd, we have gone over this many, many times before. The *Winters* doctrine, of course, has been refined to reflect these general principles that that amount of water which has been reserved under the *Winters* doctrine, of course, is reserved for the tribe, for uses—we won't get into the uses——

Mr. INGRAHAM. I think it is important to get into the uses, because it is present or future uses, and then we have problems if you consider the future uses. I don't mean to be argumentative, but we have to define our terms or we can't even discuss it.

Senator MELCHER. One nice thing about being chairman, you can have the first word and the last word and in between, if you want. But the feeling that the committee has, as near as I can determine at this time—and I do not want to infer that this will be the finding, the last word of all the committee members—but the feeling that we have so far developed of the committee that has addressed this question is that the *Winters* doctrine—and I will use the term as refined—provides necessary water for Indian tribes on their reservation, as being the intent of Congress when the reservations were created.

It is sometimes confusing, because sometimes you are talking about reservations of land and then about reservations of water. I don't think there is much question that the original case that was decided here in Montana—the *Winters* case—dealt entirely with the necessary water that the tribe would need on its reservation both in the present and in the future for domestic uses, for agricultural uses, and what has later sometimes been identified as for purposes of civilization.

Justice agrees that perhaps that does mean some industrial water. Some industrial water was always recognized, as has been pointed out by a witness or two in our hearings earlier—because, after all, isn't a blacksmith's shop some type of industry—and of course, that is correct.

The point is that quantification of that reservation—and now I am talking about reservation of water—of water has to be, if we are following the *Winters* doctrine, what would be reasonably needed by an Indian tribe for all of those purposes.

I don't believe it is fair, in my judgment, at least; that neither Justice nor Interior is claiming that all of the water arising on, flowing under or flowing through, or adjacent to an Indian reservation is reserved for Indians. I don't think they are saying that.

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Mr. INGRAHAM. As I stated earlier, I feel that the quantification is tremendous. I question the manner in which it was brought out.

Senator MELCHER. I was interested in the point you made that you felt a case was necessary for quantification.

Mr. INGRAHAM. I might add this, Senator. They don't trust the State courts, and certainly, this is a Federal matter, and the final arbiter is always the Federal U.S. Supreme Court that is entitled to, and will review any State court decision upon appeal.

Senator MELCHER. Certainly.

Mr. INGRAHAM. And it is going to go up on appeal.

Senator MELCHER. The thing that gets me about adjudication, whether it is State or Federal, if there isn't a process for bringing it to a conclusion, it can go on forever. That does place a cloud on the title, not just on the water, but the title to the land, and it is an unnecessary burden.

Mr. INGRAHAM. In our area, it defers all sorts of development. For instance, an example right now—I have clients who want to drill wells and go into irrigation development systems for raising very important food products, but do you think they are going to invest a dime as long as this thing is in litigation? It screws the development of things.

Senator MELCHER. But adjudication in either State or Federal court, unless it is prepared, is a long drawn-out procedure. You seem to be pretty confident that the procedure has worked out pretty well in State court. I am interested in that, but we haven't had adjudication here that has flowed quickly and smoothly through our State courts yet.

Mr. INGRAHAM. This is one of my tremendous problems and I don't think I made quite that point. Let's say that you are successful in influencing and persuading Justice that they should dismiss this case and let it go through State court. It has to go through the State court, because the State law, SB–76 is self-executing. It has to go to court. Ok, when we get into State court, how do we avoid the further adjudication that we are talking about now with respect to the *Winters* doctrine? It is going to be decided there, it is going to be adjudicated under that self-executing provision of Senate bill 76. Wouldn't you agree with that?

Senator MELCHER. I don't know. I know I am not going to try to make that legal judgment at all.

All right, thank you very much, Lloyd.

Mr. INGRAHAM. Thank you for the opportunity, sir.

Senator MELCHER. This concludes our hearing. We have heard all the witnesses. The hearing record will remain open for at least 20 days to accept testimony.

The committee is adjourned.

[Whereupon, at 4:20 p.m., the committee adjourned.]

[The following material was submitted for inclusion in the record.]

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Helena, Montana
July 31, 1979

Senator John Melcher
1016 Federal Building
Billings, Montana

Dear Sir;

This is my statement in regard to the water rights issue.

We have 30 shares of water rights with the Pondera Canal Co. We have had these rights for many years—in fact since we have owned the land.

These rights have been used for irrigation on farm land since the land was homesteaded. It would be a severe hardship on the farming operation if we were to lose these rights.

In addition this action will impose a heavy financial burden to defend these rights in Court.

Sincerely,

[illegible]

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August 9, 1979

John Melcher
1016 Federal Bldg
Billings, Mont. 59101

Dear Sir:

We will be unable to attend the water hearing in Ronan 31 of August as we are school bus drivers and school will be in session then.

However, we are interested in protecting our water rights. We own a very small farm 50 acres and we depend on our well water for irrigating our hay crop for our sheep.

We are not financially able to pay legal fee costs for this lawsuit. Seems to us we are paying for both sides of this case.

Montana better fight to save our water or the people down south will get it all. We think Montana should pay for the expense of this lawsuit.

Sincerely,

Norman & Florence Borgen

Norman & Florence Borgen
2965 LaSalle Road
Columbia Falls, Mt. 59912

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August 10, 1979
Augusta, Montana 59410

John Melcher
U.S. Senate
1016 Federal Bldg.
Billings, Montana 59101

Re: Notice of Public Hearings on Water Suit
July 27, 1979

Dear Senator Melcher:

Enclosed please find copies of Notice of Water Rights in Pondera and Toole Counties owned by Orcutt Ranch Co. and E. H. Orcutt, Augusta, Montana.

These water rights consist of runn-off water only from Yeast Powder Flat Coulee(Pondera Co.) and Wilson Coulee(Toole Co.).

The amount of water we retain in our reservoirs is a very small percentage of the total runn-off which occurs in wet years only.

Sincerely,

E. H. Orcutt
E. H. Orcutt

EHO:mo

Encl.: 2

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PHOTOCOPIED FROM ABSTRACT PREPARED FOR E. H. Orcutt, Augusta, Montana 59410

-1-

E. C. Jones,

-to-

The Public.

Notice of Water Right.
Dated Jan. 2, 1909.
Filed Jan. 5, 1909 at 9:00 A.M.
Recorded in Book "8" of Water Rights, Page 149, Chouteau County Records, transcribed to Book "B" of Water Rights, Page 448, Hill County Records, and transcribed to Book "A" of Water Rights, Page 399, Toole County Records.

That I have appropriated 25 cubic feet per second of time of the waters of Wilson Coulee and its tributaries in the County of Chouteau and State of Montana, for useful and beneficial purposes.
That the purpose for which the water is claimed is for irrigation, stock and domestic purposes, and especially for irrigating land in Section 34, Twp. 29, N. R. 1 E., and Section 2 & 3, T. 28, N. R. 1 E., M. M., which is the place of intended use.
That said waters are diverted from said stream by means of a Reservoir and ditch tapping said stream upon its both banks at a point thereon situate in SE¼, Sec. 33, T. 29, N. R. 1 E. M. M., and running thence in a southerly direction to and upon the above described land.
That said appropriation is made upon the 2nd., day of Jan. 1909.

E. C. Jones.

Verified, subscribed and sworn to by E. C. Jones, before me this 4th., day of Jan. 1909.

John W. Shields,
Notary Public in and for Teton County, Montana.

(Seal).

-2-

United States,

-to-

William Wesley Miller.

Patent.
Document No. 11902.
Dated Aug. 25, 1913.
Filed Dec. 1, 1913 at 9:15 A.M.
Recorded in Book "3" of Deeds, Page 292, Hill County Records, and transcribed to Book "D" of Deeds, Page 490, Toole County Records.

Grants, pursuant to the Act of Congress of May 20, 1862, "To Secure Homesteads to Actual Settlers on the Public Domain", and the acts supplemental thereto, the S½SE¼, Sec. 33, Twp. 29, N., and the Lots 1-2-3-4-, S½NW¼, Sec. 4, Twp. 28, N. Range 1 East, M. M., containing 310.07 acres.

Woodrow Wilson, President.
By M. P. LeRoy, Secretary.
L. Q. C. Lamar, Recorder of the General Land Office.

(Seal).

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PHOTOCOPIED FROM ABSTRACT PREPARED FOR E. H. Orcutt, Augusta, Montana 59410

oOo

3	Beverly R. Fowler To The Public:	NOTICE WATER RIGHT Dated Nov. 23, 1899 Filed Jan. 18, 1900 at 2:10 P. M. Recorded Book 2 W. R. page 574.

Hereby declare and give notice to all persons concerned that I have appropriated 26 cubic feet of waters of Yeast Powder flat coulee in county of Choteau and State of Montana, for useful and beneficial purposes.

And I do further declare as follows:

First: That I do hereby claim 26 cubic feet of waters of said Yeast Powder flat coulee according to standard measurement of water prescribed by House Bill No. 29 Session Laws, Sixth Legislative Assembly, of Montana.

Second: That purpose for which water is claimed is for stock watering purposes on a place described as follows: S½NE¼, N½SE¼ Sec. 4, Twp. 28 N., Rge. 1 E. P. M. M. which is place of intended use.

Third: That said waters are diverted from said stream by means of a dam that size of said dam is ten feet high

Fourth: That said appropriation was made upon 20 day of November, 189-

Fifth: That name of appropriator of said water is Beverly R. Fowler

And I do hereby further claim right to change place of diversion of said water at any time, and to extend ditches, flumes, piles, aqueducts, by which said diversion is made from time to time to any place other than wherefirst used, and to use waters for other useful and beneficial purposes, than that for which it was first appropriated.

And I also claim all rights of way for ditches, flumes, aqueducts and reservoirs, dikes and canals, over and across lands through which same are constructed, and right to enlarge and alter same from time to time; and also all rights, easements, privileges and appurtenances thereunto belonging or granted under and by virtue of all laws, both State and National.

Together with all and singular, hereditaments and appurtenances thereunto belonging or to accrue to the same.

Beverley R. Fowler

Verification by Beverley R. Fowler

Subscribed and sworn to Nov. 23, 1899 before Sterling McDonald, Clerk District Court in and for Teton County, Mont. (Court Seal).

oOo

4	Beveraly R. Fowler, husband of party of second part To Louise C. Fowler	WARRANTY DEED. Doc.No. 1731. Dated March 22, 1913 Filed July 26, 1919 at 4:35 P. M. Recorded Book 1 Deeds, page 221 Consideration $1.00

Grant, bargain, sell, convey, warrant and confirm N½SE¼, S½NE¼ Sec. 4, Twp. 28 N., R. 1 E. First P. M. of Mont containing 160 acres, more or less.

Together with all tenements, hereditaments and appurtenances thereto belonging.

Beveraly R. Fowler

Acknowledged March 22, 1913 by Beveraly R. Fowler, before B. P. McNair, Notary Public for State of Mont. residing at Great Falls. (Notarial seal affixed). Commission expires July 8, 1914.

oOo

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Senator Melcher 5/10/79

My name is Dean Harmon and I farm and ranch approximately 4½ miles south of Bainville on the north side of the Missouri River.

Although I can only speak for myself, there are at least a dozen of my neighbors who are affected in a similar fashion by the reception of summons and subsequent interogatories. I neather own or rent land on the reservation. All drainage from my operation flows into the Missouri River at least 15 miles east of the Fort Peck Reservation.

I pump water from the Missouri River for irrigation purposes as do others south of the River in Richland county. To the best of my knowledge no irrigators and or water user with drainage and use similar to mine along the Missouri in Richland county have been served with a summons. It follows that if some of

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us east of the reservation with no drainage to or through the reservation are served then all parties down stream to New Orleans should be treated similarily.

To adequately answer the interogatories sent me it would be necessary to examine a 2' high stack of abstracts and go to three different court houses to examine their records because Roosevelt, Valley and Sheridan Counties were at one time one.

When I am forced to spend time and energy and money to fight something that apparently does not apply to me, I feel unduly harrassed. It is therefore in order to call for the immediate reexamination of the defendants involved in the suit and the subsequent dismissal of those not affected.

Dean Harmon

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CASPER PETERS
8 SOUTH MAIN
CONRAD MT 59425

Mailgram

4-0124688237 08/25/79 ICS IPMMTZZ CSP WSHB
4062783995 MGM TDMT CONRAD MT 1319 08-25 1109A EST

SENATOR JOHN MELCHER
US SENATE
WASHINGTON DC 20510

AUG 24 1979

DEAR SIR:

IN REGARDS TO THE WATER RIGHTS OF THE AMERICAN PEOPLE VERSUS THE AMERICAN INDIANS AND THE INDIANS CLAIMING ALL THE WATER RIGHTS ON THIS CONTINENT BECAUSE THEY WERE SUPPOSEDLY THE FIRST PEOPLE HERE. THESE CLAIMS ARE AS FAR FETCHED AS IS THE FACT THAT THERE IS A POT OF GOLD AT THE END OF EVERY RAINBOW, IT IS A PROVEN FACT THAT THE MAYAS AND AZTECS OF SOUTH AND CENTRAL AMERICA WERE ON THE NORTH AMERICAN CONTINENT SINCE CENTURIES BEFORE THE RED MAN AND THAT THE RED MAN IS OF AN ASIATIC DESCENT ALTHOUGH SOME OF THE FEATURES HAVE CHANGED. THIS IS DUE TO THE DIFFERENT ENVIRONMENTAL FACTORS AND INTERMARRIAGES BETWEEN THE AZTECS OR ASIATIC NATIONAL GROUPS THEMSELVES, THE MAYAS AND AZTECS CAN BE COMPARED TO THE ROMANS, GREEKS AND EGYPTIANS, THESE PEOPLE POSSESSED A HIGHLY CIVILIZED CULTURE, MANY OF THE ARTIFACTS OF THESE PEOPLE HAVE BEEN FOUND ON UPWARD FROM SOUTH AND CENTRAL AMERICA UP THROUGH NORTH AMERICA. ACCORDING TO THE MAPS THESE PEOPLE WOULD HAVE COME UP ALONG THE ROCKY MOUNTAIN STRAIT THROUGH MONTANA PROCEEDING EASTWARD ALONG THE MARIAS RIVER AND ONWARD TO THE ATLANTIC OCEAN. THE KNOWLEDGE THAT HAS BEEN GAINED FROM THE ARTIFACTS FOUND OF THE MAYAS AND AZTECS SUGGEST THAT THESE PEOPLE HAD A MORE SUPERIOR KNOWLEDGE IN MANY WAYS THEN WE HAVE AT THE PRESENT TIME, THE ARTIFACTS OF THE RED MAN OR AMERICAN INDIAN OF ASIATIC DESCENT HAVE NO SIMILARITIES WHATSOEVER TO THE ARTIFACTS OF THE MAYAS AND AZTECS. IT IS ALSO A SIGNIFICANT FACT THAT THERE WAS HUMAN LIFE ON THE NORTH AMERICAN CONTINENT SOME 30,000 YEARS AGO JUST AS WE KNOW NOW THAT AT ONE TIME ELEPHANTS AND CAMELS ONCE ROAMED THIS CONTINENT, THE MAYA AND AZTECS ARTIFACTS ARE PROVEN TO BE MUCH OLDER THAN ANY OTHER ARTIFACTS OF THE AMERICAN INDIAN OF ASIATIC DESCENT SO IT BECOMES A PROVEN FACT THAT THE RED MAN WAS NOT HERE FIRST, THIS INDIAN AGITATION BEGAN IN WASHINGTON, D.C. BY THE DEPARTMENT OF INTERIOR THEN GOING THROUGH THE BUREAU OF INDIAN AFFAIRS LEAVING THE INDIANS TO THE FALSE IMPRESSION THAT THEY HAD A RIGHT TO ALL THE WATER ON THIS CONTINENT AND THAT THEY COULD GET SOMETHING FOR NOTHING BECAUSE THEY WERE SUPPOSEDLY THE FIRST PEOPLE HERE, BUT WHEN ALL THIS IS OVER THE INDIANS AND EVERY AMERICAN WILL REALIZE THAT THEY HAVE BEEN MADE A BUREAUCRATIC SCAPEGOAT, ONCE THE BUREAUCRATICS GET THE RIGHTS TO THE INDIANS IT WILL THEN BE CONSIDERED GOVERNMENT PROPERTY AND THE BUREAUCRATS CAN USE IT TO ANY ADVANTAGE THEY MAY CHOOSE AND ALL THE PEOPLE WHO USE WATER WILL BE TAXED OR HAVE TO PAY A REVENUE, THE WATER ON ANYONES LAND WILL BE STRICTLY LIMITED AND THE PEOPLE WHO OWN THE LAND WILL BE PAYING THE SAME AMOUNT OF TAXES IF NOT MORE, THIS

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RIDICULOUS STATEMENT THAT ALL THE WATER COMES OFF OF RESERVATION LAND SIMPLY BEARS OUT THE LACK OF INTELLIGENCE OF SOME OF THE APPOINTED AND ELECTED OFFICIALS OF THIS NATION IN WASHINGTON, D.C. IT IS JUST ANOTHER WAY OF STEALING MORE OF THE RIGHTS OF THE AMERICAN PEOPLE AND MAKING WASHINGTON, D.C. A BUREAUCRATIC DICTATORSHIP. THE AMERICAN PEOPLE ARE STILL THE SUPREME SOVEREIGNTY OF THIS NATION. THIS FACT SEEMS TO BE AS BITTER AS GALL TO THE TASTE OF THE BUREAUCRATS WHO ARE NOW LUSTING FOR THE POWER TO DICTATE BY DOING THE THINGS DESCRIBED IN THE FOREGOING PART OF THIS LETTER. THEY CAN NOW GET THE POWER THEY WANT. THEN SOON THEY WILL NO LONGER HAVE TO CONTEND WITH THE STATIC THAT NOW COMES FROM THE AMERICAN PEOPLE. WHAT THE BUREAUCRATS HAVE FORGOTTEN THOUGH IS THE FACT THAT THE AMERICAN PEOPLE HAVE A VERY UNIQUE WAY OF PULLING TOGETHER WHEN THEY FEEL THEY HAVE BEEN PUSHED FAR ENOUGH. THE AMERICAN PEOPLE WILL TAKE ON ODDS OF A THOUSANDFOLD AND WIN. THEY HAVE DONE IT BEFORE AND THEY CAN DO IT AGAIN. MUCH OF THE LAND EAST OF THE MISSISSIPPI RIVER WAS GIVEN IN PAYMENT OF SERVICE TO THE MEN WHO SERVED IN THE AMERICAN REVOLUTIONARY WAR BECAUSE AT THAT TIME THIS COUNTRY WAS SO FAR IN DEBT THAT THERE WAS NO OTHER WAY TO PAY THEM BUT TO GIVE THEM LAND. THERE WERE NO RESERVATIONS IN THOSE AGREEMENTS. ALL MINERAL RIGHTS, WATER, TOPSOIL AND EVERYTHING ON THAT LAND WENT FOR PAYMENT. THESE SAME LAWS STAND TODAY UNLESS OTHERWISE STATED. THESE TOO ARE AGREEMENTS THAT HAVE THE SAME VALIDITY AS A TREATY. SINCE ALL THE RACES OF THIS NATION HAVE FOUGHT TO KEEP THIS NATION FREE AND THE PEOPLE ARE THE GOVERNMENT AND THE SUPREME SOVEREIGNTY OF THIS NATION, LET NOT A SINGLE SUPREME COURT JUDGE DECIDE YOUR FATE OR THE AMERICAN DEPARTMENT OF JUSTICE. THIS IS NOT AN ISSUE FOR THEM TO ACT UPON. THIS IS THE VERY REASON THAT WE HAVE ELECTED REPRESENTATIVES IN WASHINGTON, D.C. FOR THE PEOPLE WHO HAVE LIVED IN THIS NATION FOR ANY NUMBER OF GENERATIONS. LET US NOT FORGET THE PRICE THAT OUR FOREFATHERS PAID. HOW HARD THEY WORKED TO KEEP THIS NATION FREE AND MAKE THIS NATION THE GREATEST OF ALL NATIONS. HER PRICE HAS BEEN HIGH BUT HER FRUITS HAVE BEEN SWEET. AS FOR THE PROBLEM AS IT NOW STANDS YOUR FATE IS IN THE HANDS OF ONE MAN. EACH AREA HAS ONE SUPREME COURT JUDGE. THIS IS NOT THE CASE ONLY IN THE STATE OF MONTANA BUT IN EVERY STATE OF THIS NATION THAT HAS WATER. IF YOU, THE PEOPLE, DON'T PROTECT YOURSELF NOW YOU WILL HAVE NO ONE TO BLAME FOR THE LOSS OF YOUR RIGHTS AND LIBERTIES BUT YOURSELVES. THE GOVERNMENTAL BUREAUCRATS WANT THESE WATER RIGHTS FOR THE DEVELOPMENT OF FUTURE ENERGY SUCH AS COAL, OIL AND SO FORTH. THE THING WRONG WITH THIS IS THE FACT THAT THEY WANT TO STEAL THEM AND YOUR TAX DOLLARS ARE GOING TO PAY FOR THE DEVELOPMENT OF THESE INDUSTRIES. THEN THEY WILL SELL THEM TO SOME COOPERATIVE OR BIG INDUSTRY AND THEY IN TURN WILL TURN AROUND TO RAISE MONEY TO KEEP GOING. THEY WILL SELL STOCKS, BONDS AND SHARES. IF YOU CAN AFFORD THESE STOCKS, BONDS AND SHARES, THEN YOU HAVE A CHANCE OF MAKING MONEY BUT THE ODDS ARE AGAINST YOU BECAUSE BEFORE YOU HEAR OF THEM SOME WEALTHY FOREIGN NATION SUCH AS ARABIA OR JAPAN WILL ALREADY HAVE PURCHASED THEM AND YOU THE LANDOWNER IS STILL GOING TO PAY THE SAME TAXES AS YOU DID BEFORE. IF YOU FEEL THAT THIS WRITER IS PROJECTING A PICTURE OF GLOOM, WAIT A LITTLE LONGER AND DO NOTHING AND SEE WHAT THE FUTURE HAS IN STORE FOR YOU. NOW GENTLEMEN, WHAT KIND OF REPRESENTATION DO WE AMERICAN PEOPLE HAVE IN WASHINGTON, D.C. THIS IS SURELY THE EASIEST WAY TO LOOSE A CAMPAIGN AND ELECTION AND THE ODDS ARE AGAINST YOU, MR SENATOR AND CONGRESSMAN, BECAUSE IT HAS SELDOM BEEN THAT ANYONE COULD STAY IN WASHINGTON, D.C. THAT LONG AND LIVE OUT THEIR LIFE AS A REPRESENTATIVE. DON'T FORGET YOU ARE MAKING THE LAWS SO MAYBE FOR THE TIME BEING YOU ARE NOT OBLIGED TO OBEY THEM FOR IT SEEMS YOU ARE JUST MAKING THEM FOR THE PEOPLE TO OBEY. BUT ALL THOSE YOU LOVE DON'T LIVE THERE AND NEVER WILL AND THE ODDS THAT YOU WILL BE THERE FOREVER ARE AGAINST YOU ALSO SO WHAT ARE YOU GOING TO DO ABOUT THIS PROBLEM? JOHN HOPKINS UNIVERSITY HAS ONE OF THE MOST OUTSTANDING ANCIENT HISTORY DEPARTMENTS IN THE WORLD AND IT IS JUST A FEW MILES FROM WASHINGTON, D.C. THERE IS ALSO A DR BUSCH AT THE UNIVERSITY OF MISSOULA IN MONTANA WHO HAS EXCELLENT KNOWLEDGE ON THIS TYPE OF HISTORY. MOST OF THIS INFORMATION CAN BE OBTAINED IN THE AVERAGE AMERICAN LIBRARY.

REPLY REQUESTED.

RESPECTFULLY YOURS,
GENEVIEVE E PETERS
8 SOUTH MAIN
CONRAD MT 59425

11:11 EST

MGMCOMP MGM

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RONAN HIGH SCHOOL
AUGUST 31, 1979

GARY,

I REQUEST YOU ADVISE SEN. MELCHER ON MY BEHALF THE FOLLOWING, AS MY DECLARATION OR TESTIMONY:

1. MY NAME IS JULIO K. MORALES ATTY-AT-LAW, OF MISSOULA, MT.
2. I REPRESENT PRESENTLY MR. & MRS. KENNETH ROY TUFLY, RANCHERS AT DIXON MONTANA.
3. THE TUFLY WATER RIGHTS ARE ALMOST ENTIRELY "SECRETARIAL" (ACQUIRED BY DEPT. INTERIOR & administered by FLATHEAD IRRIGATION PROJECT)
   - LOTS 7, 10, 18, 19, 20, 21, 22, & 23, IN §18, T. 18 N., R. 21 W., ENJOY 121.45 ACRES AT 2 ACRE-FEET OF SECRETARIAL RIGHTS
4. REGARDING THE COST OF LITIGATION:
   A. NON-LEGAL COSTS:
      (1) EA. PARTY MUST DETERMINE THE EXTENT TO WHICH TO OBTAIN EXPERT EVIDENCE & TESTIMONY AS IS TYPICAL IN WATER RTS. CASES, AT PROFESSIONAL HYDROLOGIST FEES.
      (2) BURDEN OF PROOF: THE INITIAL BURDEN LIES WITH THE U.S.; HOWEVER, ONCE THE INITIAL BURDEN IS MET (IE - ONCE THE PRIMA FACIE CASE IS ESTABLISHED) THE BURDEN SHIFTS TO EA. DEFENDANT TO PROVE OTHERWISE.

IN THIS LAWSUIT WE CAN EXPECT THAT THE US WILL ATTEMPT TO PRESENT EVIDENCE OF HOW MUCH WATER IS USED BY EA. OF:

- THE TRIBES
- THE VARIOUS FEDERAL PROJECTS
- THE TOTAL OF ALL ALLOTTEES

WE SUBMIT THAT THE DEFENDANTS LACK THE RESOURCES TO STUDY THESE AGENCIES & THE EXTENT OF THEIR WATER USE. CONSEQUENTLY THE NATURE OF THE SUIT IS SUCH THAT THE EVIDENCE AS TO THESE USERS WILL BE A FOREGONE CONCLUSION. THE FED. DIST. COURT IS THEREFORE A TOTALLY INADEQUATE FORUM FOR THE PROTECTION OF THE RIGHTS OF THE REMAINING WATER USERS & DEFENDANTS, REGARDING INVESTIGATION OF THE FACTS.

THE BURDEN OF PROOF & ORDER OF PROOF DOES NOT PROTECT THESE USERS & DEFENDANTS, UNLESS THEY EXPEND SUBSTANTIAL SUMS FOR EXPERTS

B. LEGAL COSTS:

I SIMPLY REITERATE THAT NO INDIVIDUAL CAN AFFORD THE LEGAL FEES INVOLVED, SINCE:

- THE SUBJECT MATTER IS NEW & REQUIRES TREMENDOUS RESEARCH
- THE NUMBER OF PARTIES & WATER USERS IS EXTREMELY LARGE, REQUIRING MUCH TIME TO MONITOR ALL EVIDENCE OR PARTIES CLAIMING

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RIGHTS PRIOR TO THOSE OF YOUR CLIENT

- THE SEVERAL DEFENDANTS HAVE CONFLICTING CLAIMS, MAKING IT VERY DIFFICULT FOR A SINGLE ATTY. TO REPRESENT MORE THAN ONE CLIENT OR USER EXCEPT THOSE WHOSE RIGHTS ARE BASED ON THE SAME FILING, OR ELSE ENJOY THEIR RIGHTS JOINTLY THROUGH WATER DISTRICTS, IRRIGATION DISTRICTS, ETC.
- THE MONT. GOVERNOR'S LETTER SPECIFIES THAT THE STATE CANNOT REPRESENT EA. DEFENDANT

C. DUE PROCESS:

- WATER RTS. ARE QUASI-PROPERTY RIGHTS, AT LEAST THE RIGHT TO USE WATER.
- ANY INTERFERENCE WITH EXISTING WATER RIGHTS IS ENTITLED TO THE PROTECTION OF CONSTITUTIONAL DUE PROCESS OF LAW
- WE SUBMIT THAT BASED ON THE NATURE OF THE LAWSUIT, GIVEN THE INEQUALITY OF THE PARTIES & GIVEN OUR PRINCIPLES OF EQUITY & OUR PUBLIC POLICY WHICH ABHORS BARGAINING FROM A POSITION OF ADHESION, THE LAWSUIT WILL CAUSE DAMAGES TO THE INDIVIDUAL DEFENDANTS (CONSISTING OF THE IMPOSITION OF LEGAL & OTHER PROFESSIONAL FEES) WHICH VIOLATE

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DUE PROCESS OF LAW.

5. B. JUST COMPENSATION:

OUR FED. & ST. CONSTITUTIONS PROHIBIT THE TAKING OF PRIVATE PROPERTY (FOR PUBLIC USE) WITHOUT JUST COMPENSATION. (SEE ARGUMENT THAT WATER RTS. ARE SUCH PROPERTY).

GIVEN THE NATURE OF WATER RTS. WHERE EA. USER HAS BEEN FORCED TO FILE & APPROPRIATE THE RIGHT TO USE MORE WATER THAN CAN BE DIVERTED OR USED, EA. INDIVIDUAL DEFENDANT STANDS TO SUFFER A "READJUSTMENT" OF HIS WATER RIGHTS.

WE SUBMIT THAT SUCH "READJUSTMENT" COULD IN SOME INSTANCES AMOUNT TO AN ACTUAL TAKING W/O JUST COMPENSATION.

THIS IS PARTICULARLY TRUE IF THE COURT DECREE DETERMINES THAT INDIVIDUAL ALLOTTED RIGHTS, & TRIBAL RTS., COMBINED WITH THE VARIOUS RIGHTS ALLEGEDLY RESERVED FOR USE BY FED. AGENCIES, AS PREVIOUSLY UNDETERMINED, ARE FINALLY DETERMINED, & THEIR IN TURN CAUSE A REDUCTION OF AVAILABLE WATER FOR OTHER USES BY INDIVIDUALS.

GRANTED, THE QUESTION IS STILL ONE OF PRIORITIES; YET THE PRIORITY & EXTENT OF THE FEDERALLY

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RESERVED WATER RIGHTS HAVE NEVER BEEN MEASURED OR ESTABLISHED.

AS A CONSEQUENCE THE ESTABLISHMENT OF FED. PRIORITIES AT THIS TIME FOR A THE PRESENT TRIBAL ALLOTTEE POPULATION & PRESENT POPULATION NEEDS OF THE VARIOUS FED. AGENCIES INVOLVED WILL DETRIMENTALLY AFFECT WATER RIGHTS THOUGHT TO HAVE BEEN LONG ESTABLISHED.

6. THE DEPT. OF JUSTICE, IN THE CAPACITY OF THE US AS TRUSTEE FOR THE TRIBES, HAS SIDED WITH THE TRIBES TO THE EXTENT THAT THE TRIBES DO NOT NEED TO BECOME A PARTY PLAINTIFF; THE TRIBES IN FACT ALREADY ENJOY THE REPRESENTATION OF THE US DEPT. OF JUSTICE.

WE SUBMIT THAT OUR FED. GOVERNMENT IS THE REPRESENTATIVE OF EVERY PERSON & AGENCY BEFORE THE COURT & HAS THE SAME OBLIGATION AS TO EA. THE STATUS OF TRUSTEE CANNOT BE DEEMED TO MEAN THAT THE THE MONIES OF THE US ~~DEPT. OF JUSTICE~~ SHOULD BE SPENT TO REPRESENT ONLY ONE FACTION & NOT THE OTHERS.

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RESPECTFULLY SUBMITTED.

Julio K. Morales
Attorney-at-law
601 Western Bk. Bldg.
Missoula, MT 59801
1 (406) 543-6673

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August 30, 1979

The Honorable John Melcher,
United States Senate and Chairman
Senate Select Committee on Indian Affairs

We strongly objected to the American Indian Policy Review Commission Report and the Department of Interior proposed departmental regulations restricting water usage from streams originating on Indian Reservations. Now come the water suits filed by the Departments of Justice and Interior to concern us. Is there no end to this federal harassment of citizens of the United States?

It appears by such continued harassment that the Departments of Interior and Justice strongly support Indian sovereignty over any non-tribal member or property! It seems that the non-Indian taxpayer must pay the bills for the water law suits against them, and then dig up the money to get legal representation and court costs to defend themselves against a seeming endless problem and frankly speaking a stacked deck. We believe it is time to strongly rebel against such discrimination. The following are important and seemingly fair considerations:

1. The water rights and water policies should be set by the individual States and the States must continue to control water rights on private land, Indian Reservations and other Federal land.

2. Flathead Lake and river are navigable bodies of water and have handled interstate commerce. The Indians should own no more, no less than any other citizen of the United States. The Federal Government opened up the former Flathead Reservation to homesteading and the non-Indian population is much greater than the Indian population, whereas the latter have tribal membership which includes a great number of so-called Indians with less than 50% Indian blood. The law suits and harassment about shore line ownership, docks, etc., is a ridiculous condition, as well as the Federal Court decisions upholding the right of the Flathead Tribal Government to charge a fee for non-Indians fishing on Flathead Lake.

3. Subsurface water of a landowner, or springs or other water thereon have long been considered to be of first priority to the landowner or person first having need for such water for domestic use or irrigation. Beneficial uses have long been a consistent guide to water rights and this should apply to all U. S. Citizens, Indians and non-Indians alike.

The Interior and Justice Departments should drop their water suits and Flathead lake shore suits against Montana Citizens, or pay the bill of all concerned instead of just a selected race or few citizens. If this harassment continues, no doubt it will increase in scope and into other areas. We beg the Congress to then initiate and pass legislation to correct these matters along the above lines and in addition make Indians and members of Indian Tribes full citizens of the United States equal to other citizens with equal responsibilities as well as benefits. As things now stand the Indians are in a position to lay claim to the entire United States and the Departments of Interior and Justice will continue to aid them.

Respectfully yours,

L. Don Williamson — Annie H Williamson PO Box 434 Big Arm 59910
Lloyd A. Williamson — Elizabeth H. Williamson P.O. Box 44 Big Arm Mt.
Harry Holland — Laura Holland - West Shore, Polson 59860

James H. Knotts - Big Arm, Mont. 59910
Clay H. Ward, Polson Mont. 59860

John E. Boller, Polson, Mt. 59860
Howard Newgard Polson Mt. 59860
John C. Cochrane - Big Arm, Mont 59910
Lucy Cochrane - Big Arm, Mont. 59910
[illegible] Big Arm Mont. 59910
Charles C Moody Ronan Montana 59864
Ruth S. Moody Ronan Mont. 59864
Julia Clunie Big Arm, Mont. 59910
Hugh E. [illegible] . Ronan Mt 59864
Joseph W. [illegible] - Ronan City Council 59864

NORMAN E. RESLER, Commissioner
JOHN MUSTER, Commissioner
GEORGE W. WELLS, Commissioner

DIXIE VAUGHT
Clerk & Recorder

JUNE M. THAYER
Treasurer

AVERAL BRAUER
Assessor

TIMOTHY G. McGOVERN
Supt. of Schools

COUNTY OF SANDERS

STATE OF MONTANA

Thompson Falls, Montana 59873

WINIFRED I. VAN DERHOFF
Clerk District Court

ROBERT L. FLETCHER
Attorney

HARVEY E. SHULTZ
Sheriff

C. E. ROSDAHL
Coroner

August 31, 1979

REC'D SEP [illegible] 1979

The Honorable John Melcher
United States Senate
Washington, D. C. 20510

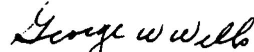
Dear Senator Melcher:

I was sorry to have missed the water rights hearing in Ronan on August 31, 1979. However, I would like to express my views on the subject of that meeting.

I think as in the past we should do away with the reservations, as we have been taking care of the RED Man long enough, and have done him a great injustice by giving them everything and not letting him make his own way. And as far as a nation within a nation, how can that be?

If it was not for the dumb white man paying taxes to take care of them what would they do? I don't think anyone is entitled to their rights and my right, as they are no super citizens as far as I'm concerned. But if so why not pay the white man off and give the reservations back to the Indian and let him make his own way and give him nothing.

Sincerely,



GEORGE W. WELLS
Sanders County Commissioner

NER:pd

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Indian Affairs

REC'D SEP 6 1979

Conrad, Montana
Rte 3-8W

Senator John Melcher
United States Senate Office
Dear Senator Melaker;

I am writing this letter in be-half of Henry Meyer and Winifred Meyer in regard to the Water rights of the American people. Verses the American Indians. And the Indians claiming all the water rights on this Continent because they were the first people here.

These claims are far fetched, as it has been proven the American Indians were not the first ones on this continent, so we do not owe them any thing!

This Indian agitation began in Washington D.C. by the department of Interior. Then going thru the Bureau of Indian Affairs, leading the Indians to believe that they have the right to all the water on this continent, and that they could

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get something for nothing, because they were the first people here! Once the Bureacrates get these rights to the Indians it will then be considered Government property and the Government will use any part of it to any advantage of the Bureacratics Governmental Laws. Charging all the people for the use of any part of it to any advantage they see fit, either by adding a revenue or tax, or some other way. But don't kid yourself, it will be done! Any monies gained will be limited and we will still be paying the same amount of taxes if not more.

This rediculous statement that all water comes off of the reservation land simply bares out the lack of intelligence of some of the appointed and elected Officials of this nation in Washington D.C.

It is just another way of stealing

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more of the rights of American people and making Washington D.C. a Bureacratic Dictatorship.
We, Henry and Winifred Meyer, strongly feel that all the water wells that are on our land belong to us to use in any way we see fit as long as we live on this land, and that they go with the land to the future generations when we are gone. Some of the wells have been here since homestead days and others we paid to have drilled at great expense. We irrigate some hay land from the Birch Creek Dam, which drains into Lake Francis. We pay water rights for irrigating this land to Pondera County Canal and Reservoir company. Our wells have been registered with the state of Montana and we intend to re-register them this fall.
We feel the State of Montana should settle this dispute with the

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Federal Government at the expense of the State instead of the individuals having to hire lawyers costing allot of money and time.

Sincerely,
Winifred Meyer
Henry Meyer

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DUNCAN RANCH CO.
Joplin, Montana

REC'D SEP 1979

Sen. John Melcher
Senate Indian Affairs
Senate Office Bldg.
Washington, D.C.

Testimony for the Hearing on Indian Water Rights

My name is John Duncan, Joplin, Montana. I am a farmer and rancher in north-central Montana. I wish to state my complaint against the policy of the Dept. of Interior concerning the Indian Water Right suit.

I hold in my possession seceral patents for desert entries that were proved up with ditches made by the homesteaders and water given to them by the U.S. Government for the express purpose of irrigating their land. These lands could not be proved up without water and the government stated clearly in the patent that sufficient water was available for each parcel of land. How can the government now claim the water doesn't go with the land?

It is grossly unjust for the Dept. of Justice representative to state that reserved Federal or Indian water rights are not lost by non-use, but then states that white people's rights are lost by non-use. Where is the equality before the law in such a policy?

The inequity of the policy that the defendants be required to pay their lawyers for their own defense as well as being taxed to bring the suit against themselves is so flagrant it borders on ludicrous.

My feeling is that, for these reasons, as well as others given in other testimony, this case should be dismissed.

Yours truly
John H. Duncan

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Everett Gene Orler
601 Nucleus Hungry Horse Road
Columbia Falls Mont.
Sept 12-1979

REC'D SEP 28 1979

To: United States Senate
Select committee on Indian Affairs
Dirksen Senate office Bld Washington DC 20510

Ref: Public Hearings Water Suit 7-27-79 [illegible]

Honorable Senator Melcher,
I attended two of your hearings in montana, and was quite impressed with your attitude & handling of both the Cut Bank & Ronan hearings, and wish to thank you for your efforts.
I would like the following testimony entered in your hearings—
Being title holder of one of the oldest & most clear cut water rights in the State of Montana Filed April 2nd, 1902 & Recorded Book 71 page 10 Flathead County Montana (A copy attached) along with a second appropriation re affirming the 1902, plus an additional (5) cu ft per second of time of legal measurement (copy A attached) with all legal descriptions of said source of water called out—
This instrument was dated & June 12, 1963.
Referenced "Spring creek" in these documents is a small creek originating out of a spring on Forest Service land on about a 45 Degree

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Slope mountain about 300 yards from my property line and my reinforced concrete diversion Dam. This Creek even when I am not irrigating flows across part of my land for a distance of about 3/4 of a mile before sinking into the ground on my property + not reappearing any where again that can be proven. It sinks underground over 4 miles East of the Flathead River. I might add that all of the surface water of this creek has been used beneficially on my ranch consisting of 530 acres, and Mr. + Mrs Stringfellows 27 acres for the last 77 years and we plan to continue using it as long as we are alive, even to the extent of armed resistance to trespassers if required.

This Stupid Law Suit brought about thru the Justice Dept for the Interior Dept is Ill advised Poorly timed, Poorly prepared + is based on Racial discrimination. The suit is misleading + contains outright lies, such as claiming spring creek is a tributary of Flathead River

in article 7 they state:
" By The treaty of Hellgate, 12 Stat 975 executed July 16, 1855 between the United States and the Salish, Kootenai, and Upper Pend Oreille Tribes, there was established and reserved for the use and benefit of those tribes the Flathead Reservation." Section 8 describes the boundries and Section 9 states they reserved the water which is an outright lie as I have a copy of said Treaty, and water is not mentioned or even implied.

This kind of action by our government agencies lends credit to the ever increasing talk by the law abiding citizens of the United States that Public enemy No 1 is our own government and the Beaurcrats that run it. It is the writers opinion that Montana, Wyoming, Idaho Washington + Oregon should Ceced from the Union and go back to the Original Constitution of the United States + the bill of rights and void all other laws - and become a seperate Nation. Even if we become an enemy of the U.S.

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we would be treated more fairly than we are as United States Citizens, as we are now paying the government lawyers wages thru our tax dollars to sue us for our own water.

I reccomend your committee consider the following:

1. Get the Dept of Interior & the Justice Department to withdraw this suit.

2. Furnish means for Defendants to get reimbursed for expense incurred by the suit.

3. Consider legislation to protect existing water rights of citizens of the Western States

Thank you for this opportunity to testify

Everett Gene Orem

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Thomas Lee,
Appropriator,

--TO--

The Public.

NOTICE OF APPROPRIATION OF WATER RIGHT.
Filed April 2nd, 1902,
Recorded Book 71 Page 10.

-o-o-o-o-

That the undersigned did on the 2nd day of April, 1902, appropriate and claim, and does by these presents appropriate, locate and claim Five (5) cubic feet per second of time legal measurement, of the waters of Spring Creek in the County of Flathead, State of Montana, and did, on the above named date, mark at the point of intended diversion by posting thereat a copy of this notice in a conspicious place.

That said water is claimed for milling, electric power and irrigation purposes, and other useful and beneficial purposes and the place of intended use is in Sec. 34 Twp.30 Range 20.

Said water is to be diverted and conveyed to said place by means of a dam, flume and ditch said ditch to be 2 feet wide on bottom, 3½ feet wide on top and 1 foot deep.

That the stream from which said diversion is to be made is more particularly described as follows:

A mountain stream which sinks in Sec. 34 T. 30 R. 20 and measured from said point of diversion as an initial point, the following well know natural objects and pernament monuments are distant as follows:

A rocky ravine is distant about 150 yards in a easterly direction.

And the undersigned hereby claims a right of way over all unappropriated lands of the united States through which said ditch and flume shall pass.

Signed: Thomas Lee.
Appropriator and Claimant.

State of Montana }
} ss
County of Flathead }

Thomas Lee, being first duly sworn, says: That he is the appropriator and claimant named in the foregoing notice of Appropriation, and knows the contents thereof, and that all the matters and statements contained therein are true.

Thomas Lee.

Subscribed and sworn to before me this 2 day of April, 1902.

Michel Therriault,
Notary Public in and for Flathead County, State of Montana.

(SEAL).

(#34)
Flathead County Abstract Company

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NOTICE OF APPROPRIATION

STATE OF MONTANA)
 :
County of Flathead)

WHEREAS, on the 2nd day of April, 1902, Thomas Lee, the predecessor in interest of the undersigned Appropriators and Claimants, did appropriate and claim five (5) cubic feet per second of legal measurement of the waters of Spring Creek in the County of Flathead, State of Montana, and the notice for said appropriation has been duly filed and recorded with the Clerk and Recorder of said County in Book 71 at page 10;

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS:

That the undersigned Appropriators and Claimants did on the 12 day of June, 1963, appropriate and claim, and do by these presents appropriate, locate and claim an additional five (5) cubic feet per second of time of legal measurement of the waters of Spring Creek in theCounty of Flathead, State of Montana, subject to those rights reserved to the Grantors in that certain Warranty Deed between Norman M. Stringfellow and Alvina Stringfellow, his wife, Grantors, and Everett Gene Orem and Anna Charlene Orem, his wife, Grantees, dated 21 April, 1962, and recorded in theoffice of the Flathead County Clerk and Recorder in Book 448 at page 74, and did, on the 12 day of June, 1963, mark the point of intended diversion by posting thereat a copy of this notice in a conspicuous place.

The said water is claimed for electric power, domestic use, irrigation and other useful and beneficial purposes, and the place of intended use is in Sections 34 and 35, Township 30 North, Range 20 West, M.P.M., Flathead County, Montana.

Said water is to be diverted and conveyed to said place by means of a concrete face earthfill dam twelve (12) feet high, thirty-two (32) feet wide and twelve (12) inches thick, a twelve (12) inch steel pipe and a ditch approximately two (2) feet wide and one (1) foot deep.

That the stream from which said diversion is to be made is more particularly described as follows, to-wit: A mountain stream having its beginning on Columbia Mountain, and entering the Southwest Quarter of the Southwest Quarter of Section 35, Township 30 North, Range 20 West, M.P.M., Flathead County, Montana, at a point 320 feet West of the Northeast corner of the Southwest Quarter of the Southwest Quarter of Section 35, Township 30 North, Range 20 West, M.P.M., Flathead County, Montana.

Measured from the point of diversion as an initial starting point, the following well known natural objects and permanent monuments are distant as follows, to-wit: the aforementioned dam in located at the diversion point: the Northeast corner of the Southwest Quarter of the Southwest Quarter of Section 35, Township 20 North, Range 20 West, M.P.M., Flathead County, Montana, is distant about 320 feet in an easterly direction.

And the undersigned hereby claim said pipe and ditch and the right-of-way therefor, and for said water by it conveyed, or to be conveyed from said point of appropriation to said land, or point of final discharge, and also the right of location upon any lands of any dams, flumes, reservoirs, constructed, or to be constructed, by them in appropriating, and in using said water; together with the right to repair and enlarge said dam, ditch and pipe whenever and wherever the same may be necessary to convey the water hereby appropriated.

WITNESS our hands at Kalispell, Montana, this 12 day of June, 1963.

Everett Gene Orem

Anna Charlene Orem

Appropriators and Claimants

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STATE OF MONTANA)
: ss.
County of Flathead)

EVERETT GENE OREM and ANNA CHARLENE OREM, having first been duly sworn, depose and say that they are of lawful age and are the appropriators and claimants of the order and water right mentioned in the foregoing notice of appropriation and claim and the persons whose names are subscribed thereto, as the appropriators and claimants, that they know the contents of said foregoing notice and that the matters and things therein stated are true.

Everett Gene Orem

Anna Charlene Orem

Subscribed and sworn to before me this 12th day of June, 1963.

[illegible] Harrington
Notary Public for the State of Montana
Residing at Kalispell, Mont.
My commission expires [illegible]

(Notarial Seal)

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Dupuyer, Montana 59432
September 27, 1979

Chairman, John Melcher
Select Committee on Indian Affairs
Washington, D.C. 20510

Dear Senator Melcher,

We are writing in regard to the Department of Justice law suit, in behalf of the Indians versus the water users off the Reservations. We are involved in the Marias River suit.

It is a known fact that ranchers must have hay to keep their cattle alive during the winter in this country. Without irrigating water it is very hard to raise an ample hay crop year after year. For an example: the winter of 1976-77 was a mild open winter here. When spring arrived there was very little snow pack in the mountains therefore very little irrigation water, Due to very little water we put up 2100 bales where we put up more then ten thousand bales on normal years.

It appears that Mother Nature, does or does not provide the biggest share of our irrigating water. The Federal Government and Indians didn't have a thing to do with the lack of snow fall that year. Are we going to be sued at some later date over the rain and snow that falls on our lands?

Is the Federal Government going to deny those of us who are industrious, water to provide a livelihood on which the wealth of our state and nation is based?

It is only fair to remember that those who use water off the reservations are producers and taxpayers. While those living on the reservations live off the taxpayers of the United States and very few have the inclination or ambition to use the water rights that they now have.

We urge your committee to get this expensive and discriminatory law suit dismissed. Should it go on, it will cause hard feelings and further divide our nation. Divided a Nation can not stand!

It would seem more appropriate for the Justic Department to spend it's time getting after the criminals that run wild in our nation.

We thank you for letting us express our opinions on this matter.

Sincerely yours,

Frank E. Taliaferro
Sara E Taliaferro

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