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UNIVERSITY OF OKLAHOMA

GRADUATE COLLEGE

DAMMING THE BIGHORN:
INDIAN RESERVED WATER RIGHTS
ON THE
CROW RESERVATION,
1900-2000

A dissertation

SUBMITTED TO THE GRADUATE FACULTY

In partial fulfillment of the requirements for the

degree of

Doctor of Philosophy

By

MEGAN KATHLEEN BENSON
Norman, Oklahoma
2003

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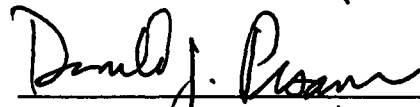
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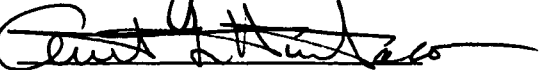
A Dissertation APPROVED FOR THE
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Abstract

This dissertation explores a century of interpretation of the Winters Doctrine, reserved water rights, on the Crow Reservation. Beginning with the 1880s construction of the Crow Indian Irrigation Project, the federal government attempted to fulfill the directive of the 1887 General Allotment Act—to turn a nomadic people to agrarian pursuits. Under the same act, Congress charged the Department of Interior with the duty and the power to divide the waters of the reservations. In 1908, the Supreme Court handed down their seminal *Winters* decision, reserving to Indian tribes all necessary water to ensure the success of the agrarian enterprise. Using the double-pronged authorization, the Department of Interior, as trustee to the ward Crow, oversaw construction of a number of water projects through the bureaucratic arm of the Indian Irrigation Service.

The Service, along with the Bureau of Reclamation, oversaw development that ostensibly helped the Crow Indians achieve a settled existence. Instead the projects made Crow land more attractive to non-Indian interests and eventually came to serve larger development interests—non-Indian corporate farmers and eventually extractive industry giants. Rather than serve the interests of Indians, both the Indian Irrigation Service and the Bureau of Reclamation merged Indian reserved water rights under their purview, claiming them as “Secretarial waters.” As such the Indian reserved right eventually came to serve the interests of the developers—industrial users dependent on the resource. For the purposes of this study, the story unfolds in four distinct federal policy periods: the allotment era, 1900-1932; reorganization, 1932-1952; termination, 1950s; and self-determination, 1970s to the present. Regardless of executive policy,

the powerful bureaucracies that controlled water development determined Indian water policy

The Indian Irrigation Service and the Bureau of Reclamation have ensured their own federal water development policies using the Winters doctrine, while the Crow have fought, often in court, to prevent their fiduciary from raiding their tribal trust fund, their natural resources, and most notably their tribal water rights. Throughout the 20th century, no tribe has fought more consistently than the Crow to separate their tribally owned water resources—their Winters rights—from the development interests of their federal trustee. Several court cases reveal the extent of the ongoing battle: *U.S. v Thomas Powers* (1939); *U.S. v 5,677.94 acres of land* (1956); and *Montana v. U.S.* (1981).

According to one experienced lawyer, the Winters doctrine “hangs by a thread.” Quantification of the Indian reserved water right serves the interests of local and state entities; does it also serve the interests of Indians? The dissertation examines Crow negotiations to quantify their reserved right with the State of Montana's Reserved Water Rights Compact Commission and concludes that circumstances will always dictate whether or not quantification is advisable. The Crow had compelling reasons to quantify and many obstacles including in fee owners within the tribe, non-Indian ranchers, and the United States.

Introduction

“Love this river, stay by it, learn from it....whoever understands this river and its secrets would understand much more.”--Siddhartha

In the year 1900, if you had been able to ride the Bighorn River through the Crow Reservation, you would have traveled both downhill and north out of Wyoming, between the perpendicular cliffs of the Bighorn Canyon, and you would have had the ride of your life. Like most other tributaries that eventually flow into the Missouri, the Bighorn was “too thin to plow and too thick to drink.” It was hardly navigable, but occasionally explorers, adventurers, thrill seekers tried and lived to tell about it. The French explorer and fur trader Antoine Laroque traded in this valley and captains William Clark and Pryor split off from others on the voyage of discovery and came upstream from the Yellowstone. The ethnographer Lowie came here in the 1930s and determined that the Crow arrived in this valley in the 1700s—splitting from the Hidatsu to the east. But the Crow claim aboriginal rights to this country, from the Bighorn west to the Yellowstone and east to the Powder. And the Crow named the river after the sure-footed spiral-horned sheep. But by 1900, you would not have seen any sheep. They were already hunted to extinction in the red sandstone cliffs of the Bighorn Canyon.

Crow country became the Crow Reservation by the terms of the 1868 Treaty of Ft. Laramie, and as you travel down the Bighorn River, you bisect its metes and bounds almost perfectly. Sixty miles to the west is Pryor Creek, a tributary of the Yellowstone, and the Pryor Mountains. Pryor Creek was home to the Crow and in 1884 when Superintendent Armstrong moved the tribe east to the Bighorn valley to turn the warriors to the plow, the last warrior chief Plenty Coups remained there in the west.

Between the Bighorn River and the Yellowstone rolls high range land—cattle country deeply broken by eroded streambeds: Beauvais, Woody, Buster, Shorty-- where

a calf that failed to “mother up” might still be lost “up the middle draw of east Buster.” Limestone and shale remnants of the ancient sea floor erode out in the red washed gulches and draws. Thousands of “devil’s claws,” ancient marine fossils, surface as thirty-foot drifts of snow melt in the warm spring. The rampaging water allows one stream to “pirate” the flow from the next in the ever-evolving tale of erosion.

Where Woody Creek flows into the Bighorn, after Armstrong’s march east, Pretty Eagle settled and perpetuated the leadership of his father Iron Bull. Further down the Bighorn, Two Leggins, Two Belly, and Young Onion settled with bands. They were called River Crow. Some had been Custer scouts and settled near Ft. Custer at the confluence of the Big and Little Horns. Due east from the Bighorn River, ambling ridge lines bosom in their valleys the tributaries of the mythic Little Horn: Lodge Grass Creek, Willow, Owl Creek, and high on the border with Wyoming, Pass Creek. Here where Lodge Grass flows into the Little Horn, the bands of Medicine Crow, Old Dog, Spotted Horse, and Crazy Head settled. On the Little Horn at Crow Agency, Bull Goes Hunting and Takes A Wrinkle settled with their bands.¹

Just west of the Bighorn sits the bench land that overlooks the river—now called the Hardin Bench, home to the largest dryland wheat ranch in the world. It took a World War and J.P. Morgan and Thomas Campbell to create demand for the grain and supply it. For over a century, men and women have imagined ways to irrigate the bench and bring prosperity to non-Indians in Crow Country, but they never have.

To the east of the Bighorn River lies rich bottom land and in the 1880s and 1890s, it was already irrigated by the long Indian Irrigation Service canal, the Bighorn, one of the largest irrigation project then in Indian country. On the Little Horn too, the Indian Service had used tribal funds to build irrigation ditches. Some had names as rich as the history itself—Agency, Reno, Bozeman, Forty Mile. Some names simply replicated the creeks and rivers: Lodge Grass, Little Horn. Increasingly ditches carried the names of

half blood Crow: Yellowtail. Increasingly the names of the ditches in the Little Bighorn Valley reveal the pressure of non-Indians on the water resource: Miller and Yates ran off the Lodge Grass; Campbell, Tschirgi and Powers ran off the Little Horn Ditch. Non-Indians came to own the valuable irrigated land through marriage to Crow women, or through purchase of irrigated lands at the notoriously corrupt Indian Service “Dead Indian auctions.” Among these non-Indians were cattlemen who had created grazing empires on Crow land, men who used the irrigation works-private and public- to raise alfalfa for fattening cattle and profits. Corporations, like Holly Sugar, also leased land from living Indians whose allotments remained in trust status. Non-Indians used government money to build the Bozeman Trail diversion and the Two Leggings ditch. Complicating further the checkerboard, many Indians diverted water from non-Indian constructed ditches—approximately a third of the diversions from non-Indian constructed ditches were Indian. The 1880s policy of assimilation by Indian land allotment worked rapidly where water was at stake. Within thirty years, half the Crow tribe was landless. But the remaining allottees and heirs held land and valuable water rights along the rivers, streams and diversions in Crow Country. Indian water rights were already hopelessly entangled with those of non-Indians, and their interests intersected.

In the watered fields grew crops of alfalfa to sustain the livestock through the long winters. But in the 1890s the Burlington Northern built a line through the Little Bighorn valley, and with ideological fervor that accompanied the Spanish-American War, sugar beets became the lucrative cash crop. Holly Sugar based in Sheridan leased the irrigated lands of the Crow. Conflict between the cattlemen and the sugar beet men for the precious water resource was inevitable.

In 1908, upstream on another tributary of the Missouri, the Milk River, conflicting water rights on the Ft. Belknap Reservation led to litigation that changed the

future of water allocation in the west and on the Crow reservation. The conflict between upstream and downstream non-Indian water users ended in the Supreme Court in the case *Winters v. United States*. Justice McKenna, for the majority, queried, "The Indians had command of the lands and water--command of all their beneficial use...Did they give up all this?" No, he wrote. The tribe reserved by implication, with their land, sufficient water to turn a "nomadic" people to a "pastoral and civilized people." That reservation might be used in traditional ways or, "turned to agriculture and the arts of civilization."²

Water rights in the west, though never as consistent as many wished them to be, nevertheless depended on the doctrine of prior appropriation--first in time; first in right. Simply stated the person who first appropriated the resource, filed on it, put it to beneficial use, and continued that use maintained a water right under state law. The Indian reserved right, on the other hand did not need to be quantified. It was riparian in nature, based on much older common law concepts. Beneficial use was not inherent to a reserved right; lack of use did not limit the right and that need might expand over time. Further, though lawyers argued that the water reservation was timeless, the reserved right's appropriation date came to be considered the day the reservation was created; for the Crow the 1868 date predated any state appropriation. For the non-Indian water user the risk of the sudden usurpation of their water right was a perpetual threat to their livelihood.

The legal implications of *Winters* left many questions. Resolution of those questions did not begin in earnest until the triple imperatives of drought, demand, and development in the 1930s. During Roosevelt's New Deal the issue of Indian reserved water rights pushed itself again onto the high Court's docket. With confused interests on the Crow Reservation, it is not surprising that the issue was pressed here, where land had become territory and then property with all its "appurtenances." The conflict arose

on the Little Bighorn between Pass Creek and Hardin on familiar and long contested ground.

The Crow tribe's first legal relationship with the United States was a friendship treaty penned in 1825.³ In 1851, in September the Crow signed a second treaty, one that has entered the annals of history and law with more controversy. Though the United States claimed never to have ratified it, this first Treaty of Ft. Laramie designated territory for tribes south of the Missouri River, east of the Rockies, and north of Texas. Tribes included were the Sioux, Cheyenne, Arapaho, Assinaboine, GrosVentre, Mandan, Arikara, and the Crow. Crow country, according to the treaty, was bounded roughly by the continental divide on the west, to the Musselshell River to the north, to the Powder River on the east, and south to the middle of what is now Wyoming—38 million acres.⁴

According to the terms of the 1851 Treaty of Ft. Laramie:

...the aforesaid Indian nations do not hereby abandon or prejudice any rights or claims they may have to other lands; and further, that they do not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described.

By the terms of the treaty the Crow would receive annuities to compensate them for the loss of their territorial integrity. Fifty thousand dollars in annuities only rarely reached any of the tribes involved and in 1856, the United States announced it would no longer deliver any treaty goods.

In 1868, a second Treaty of Ft. Laramie more formally designated the territory of the Crow, restricting their range significantly to 8 million acres, land bounded on the east by the 107th meridian, to the north by the Yellowstone River, "thence up [south] the mid-channel of the Yellowstone to the southern boundary of Montana Territory and then along that boundary east to the point of beginning—the 107th meridian. By the terms of the Treaty of Ft. Laramie, the United States, "Now solemnly agrees that no

persons, except such officers, agents, and employees of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described.”⁵

Further, the Treaty stipulated:

If any individual belonging to said tribes of Indian, or legally incorporated with them, being the head of a family, shall desire to commence farming, he shall have the privileges to select, in the presence and with the assistance of the agent then in charge, a tract of land within said reservation, not exceeding three hundred and twenty acres in extent, which tract when so selected, certified, and recorded in the “land book”, as herein directed, shall cease to be held in common, but the same may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it....The President may at any time order a survey of the reservation, and , when so surveyed, Congress shall provide for protecting the rights of settlers in their improvements, and may fix the character of the title held by each. The United States may pass such laws on the subject of alienation and descent of property as between Indians, and on all subjects connected with the government of the Indians on said reservations and the internal police thereof, as may be thought proper.

In 1884, the bands of Crow lived west in the Pryor Mountains and along Pryor Creek.

The Agency was in Stillwater. In that year Superintendent Captain Henry Armstrong encouraged the tribe to move east to inhabit the land around the Little Bighorn. His vision of a settled agrarian culture for the Crow coincided with the ideological fervor of the age of irrigation. The General Allotment Act of 1887, the “Dawes Act,” consolidated thought in legislation:

...the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot the lands in said reservation in severalty to any Indian located thereon in quantities as follows.....

That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor

in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made...and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs...free of all charge or encumbrance...

....at any time after lands have been allotted to all the Indians of any tribe as here in provided...it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by said tribe, in conformity with the treaty or statute under which such reservation is held, of such portions of its reservation not allotted as such tribe shall from time to time consent to sell....And the sums agreed to be paid by the United States as purchase money for any portion of any such reservation shall be held in the Treasury of the United States for the sole use of the tribe or tribes of Indians...and the same with interest of three per cent per annum shall be all time subject to appropriations by Congress for the educational and civilization of such tribe.

...That in cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agriculture purposes the Secretary of the Interior be, and he is hereby authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservation, and no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor.⁶

For the Crow “just and equal” distribution of the land and waters of their reservation had already begun by the time of the Allotment Act. The Crow began to “cede” portions of their reservation by the Act of April 11, 1882. This first allotment stipulated for each family one-quarter section of land with an additional one quarter section of grazing land and one eighth section to single persons, orphans and to persons under 18. In exchange the Crow would receive annual payments of \$30,000 a year for twenty-five years.

The second cession was by the Act of December 8, 1890 and March 3, 1891.⁷ This cession stipulated a further land sale with proceeds to be used for the construction of irrigation works in the valleys of the Big and Little Horn Rivers.

The Agreement of August 14, 1899 ceded lands to the north of the present reservation. In 1904 this Ceded Strip came under the aegis of the Reclamation Service and the Hundley Irrigation Project.⁸

The long forestalled Crow Act of 1920 was the last allotment act and signaled the official opening of the Crow reservation. Section 2 of the Act restricted land sales to non-Indians to 640 agricultural and 1280 grazing land, but the restriction was widely ignored. Dryland farmer Thomas Campbell leased and purchased thousands of acres of the non-irrigated Hardin Bench, and for a while he had the largest dryland farm in the world. Section 6 reserved to the tribe:

All minerals including oil and gas, on any of the lands to be allotted hereunder are reserved for the benefit of the members of the tribe in common and may be leased for mining purposes upon the request of the tribal council under such rules, regulation, and conditions as the Secretary of the Interior may prescribe...

No additional irrigation system shall be established or constructed by the Government for the irrigation of Indian lands on the Crow reservation until the consent of the tribal council thereto has been duly obtained. Section 8

That any unallotted lands on the Crow Reservation chiefly valuable for the development of water power shall be reserved from allotment or other disposition hereunder for the benefit of the Crow Tribe.⁹

Irrigation activities began on the Crow reservation in 1885 with construction of the Reno Ditch. The seven mile ditch irrigated Indian lands on the Little Bighorn south of Crow Agency. In 1890 Irrigation engineer W.H. Graves designed a much more extensive system. On the Big Horn River, in 1896 construction began on a major canal that followed along the river and eventually watered 28,000 acres.

In 1893 the Indian Irrigation Service began work on the Forty Mile Ditch on the Little Horn, followed in 1896 by the Agency Ditch, one that served over 1000 acres. Beginning in 1898, Lodge Grass Creek saw the first construction with Lodge Grass No. 1. Upper Little Horn No. 2 was constructed in 1910, and Lodge Grass No. 2 was constructed in 1925.

Along with the Indian Irrigation Service canals, blended private/government ditches watered land to the north of the Bighorn River, the Two Leggings Unit and on the Little Horn, the Bozeman Trial Ditch similarly blended public and private enterprise. Total cost of the irrigation works on Crow exceeded \$2 million. The Crow contributed \$1,500,000, money from the sale of their lands, kept in trust.

By the Act of June 25, 1910 the government began to officially divide the irrigated waters of the reservation by providing a new allotment scheme.¹⁰ All living Crow would receive 1000 "units" of land of which 4 units were equivalent to one acre irrigated by the Indian Service. By the 1930s 65% of the irrigated lands of the reservation were still owned by Indians who leased the acreage. On the Little Horn and Lodge Grass ditches 8391 acres received water. Of the total, 3000 acres were owned by non-Indians; 5000 leased by non-Indians; and 380 owned and farmed by Indians.

Crops grown on the irrigated land of the Crow and non-Indian farms changed over time. Increasingly the land grew sugar beets. Holly Sugar in Sheridan, Wyoming, "the sugar beet men," leased land irrigated by the Indian Service Project. On the Little Horn and Lodge Grass projects, by the 1930s, 2173 acres of sugar beets grew. Their crops required extensive water—1.61 acre feet a season. The sugar beet crop competed with alfalfa, still the dominant crop, one that served the interest of the cattlemen. Over 4452 acres of alfalfa grew

along the IIS ditches. Also 2375 acres of wheat grew in the watered land of the Crow.

The 1908 *Winters* decision came to bear on the water rights of all Indian reservations and specifically on the Crow reservation with its many irrigation works. The court concluded that Indians of the Ft. Belknap Indian Reservation, by their Agreement of 1899 had reserved by implication enough water to change a nomadic people to an agrarian culture; that is, Indians reserved water sufficient for irrigation purposes “which would be necessarily continued through the years.” Conflating the concept of federal reserve water rights *U.S. v Rio Grande Dam and Irrigation Company (1899)* *U.S. v. Winans (1905)*, *Winters* provided the important precedent reserving water for Indian reservations. Indians had reserved by implication the water necessary to exchange their nomadic culture and pursue “agriculture and the arts of civilization.”¹¹

It was the policy of the Government, it was the desire of the Indians, to change those habits and to become a pastoral and civilized people. The lands were arid and, without irrigation, were practically valueless. And yet, it is contended, the means of irrigation were deliberately given up by the Indian and deliberately accepted by the Government....And this, it is further contended the Indians knew, and yet made no reservation of the waters. ...The Indians had command of the lands and the waters—command of all their beneficial use, whether kept for hunting, and grazing roving herds of stock or turned to agriculture and the arts of civilization. Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate? If it were possible to believe affirmative answers we might also believe that Indians were awed by the power of the Government or deceived by its negotiators. Neither view is possible. The Government is asserting rights of the Indians...By rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians...That the government did reserve them we have decided, and for a use which would be necessarily continued through years...it would be extreme to believe that within a year Congress destroyed the reservation and took from the Indians the consideration of their grant, leaving them a barren waste—took from them the means of continuing their old habits, yet did not leave them the power to change to new ones.¹²

Reserved rights were counter to state water laws that dictate “prior appropriation”—the first in time; first in right water laws of the west. Unlike the specific date and amount required in state appropriation, Federal and Indian reserved rights were by their nature unquantified. *Winters* set a collision course between state and federal water rights.

Conrad Investment Co. v. United States (1908), another Montana case, immediately applied *Winters*: “The law of that (Winters) case is applicable to the present case, and determines the paramount right of the Indians...to the extent reasonably necessary for the purposes of irrigation and stock raising, and domestic and other purposes.”¹³

In a later 9th Circuit case, *Skeem v. United States* (1921), the appeals court found that Indian water rights could be transferred to a lessee, a use the court deemed consistent with the intent of the Ft. Hall agreement; that is, it benefited the Indians. The Court also determined that the amount of water reserved to the Indians was not limited to the water put to use on the date of the agreement reserving the land. The court rejected the lower court’s attempt to limit water use: “...such meaning should be given as will enable the Indians to cultivate eventually the whole of their lands so reserved to their use.”¹⁴

In *United States v. Hibner* (1928) the United States District Court for Eastern District of Idaho was asked to determine the nature of water rights of the assignees of the original allottees. By that time almost half of all allotted land had passed into the hands of non-Indians. The Court found that the United States intended to “recognize and fix permanently the rights that the Indians had at the time the treaties were made...” That included water rights. Were water rights lost by lack of use as they would have been under state law? No, the Court

determined citing *Skeem*. Indians held a water right sufficient to cultivate “the whole of their lands” and crucially assignees were entitled to water right for the acreage that was under irrigation at time the title passed and with the same priority as owned by the Indians.¹⁵

In the 1930s on the Crow Irrigation Projects, water shortages threatened the tentative relationships between Indian and non-Indian. Battle lines formed between downstream lessees, including many of the sugar beet men, and upstream non-Indian owners, mostly the cattle barons. Further, the downstream interests were primarily Democrats while the upstream cattle barons were Republican. The conflict grew to pit the interests of the government project, water rights claimed as “tribal,” with those of the successors to the original allottees, who were non-Indian. At stake was the very nature of the reserved right: was it inherently tribal or might an individual, under the auspices of the Allotment Act, claim Indian reserved water rights, the most valuable of all water rights in the west.

In 1933, little snowfall, followed by summer totals of only two inches of rain in June and then none until October. On the reservation, it was a crisis in the making. In 1934, again no snowfall—followed by average rain. In 1935, again scant rainfall; and in 1936, little rainfall from June through October. The drought combined with increasing demand for the water intensive crops of alfalfa and sugar beets led to confrontation, one that set the course for reserved water rights in the west.

This dissertation is the story of water use on the Crow Reservation in the 20th century, as water development choices have been defined by the *Winters* decision and subsequent decisions at all levels of government. The decisions left many questions that are yet to be addressed. Some of those questions form themes that run through this work. Did the United States, by implication, reserve water on behalf of the ward tribe or

did the tribe reserve the water with their land in the Treaty of Ft. Laramie? Did Congress in the 1887 General Allotment Act intend that the water right, like the land allotment, become individual property? Non-Indian property? Did the individual water right remain part of the water reserved by/to the tribe or did it become subject to state law? Does the reserve Indian right preempt the federal government's right to store water behind dams? To use water for industry rather than agriculture or for marketing off reservation? Is the tribe entitled to power revenues from electricity generated by the flow of the water? And what of the aquifers underlying the reserve? Is the tribal reserve right subject to state adjudication? To interstate negotiations? And perhaps the most significant question I address: Is it in the tribal interest to quantify their reserved water right?

Throughout the 20th century, the Indian reserved water right has remained only marginally defined. Over the course of the century the United States, originally hostile to the concept of the Indian reserved right, began to blend it seamlessly with federally stored water. Indeed the Department of the Interior came to think of them as one. The tribes became increasingly aware of their loss as their water disappeared behind dams; their water was pumped out of aquifers and used to slurry coal to population centers; their water was pumped into the ground in tertiary attempts to recover oil; their water was spilled over giant turbines to light up an energy hungry non-Indian population. Though divided by their treaty interests, the tribes were united by *Winters* and began a concerted attempt to retrieve their legal heritage.

In this work I will nod historiographically to interpretations known as "conquest discourse," the idea that Indian law has been written, interpreted and enforced in ways that support the dominant white culture.¹⁶ As one Montana federal district judge opined, "The blunt fact is that an Indian tribe is sovereign to the extent that the United States permits it to be sovereign—neither more or less."¹⁷ *Winters* rights and the

reserved rights doctrine can well be placed in this legal line. The reserved right is what the United States, at any given time, says it is. It has remained undefined because it is that aspect of its nature that renders the Indian reserved water right most useful.

Inchoate, it has been useful in the Department of Justice and in the many halls of the Department of the Interior—the Bureau of Indian Affairs and the Bureau of Reclamation and to the Environmental Protection Agency. The doctrine has been useful also to Congress as it justified the process of appropriation. Therefore one theme of this account is how Indian reserved water rights have been used by the United States on the Crow Reservation. But reiterating Oliver Wendell Holmes, Jr., legal scholar Kermit Hall has written the law is “not a rock but a river.” Conquest discourse leaves a void where in fact history provides so many examples of creative response to oppressive and hegemonic force. Indian reserved water rights in theory and in practice on the Crow reservation have been a doctrinal river.¹⁸

Countering the federal government has been the state of Montana as it too reacted to the Indian reserved right on the Crow Reservation— in the Bighorn, the Yellowstone, and finally the Missouri Basin. The power of the state in the federation, the influence of local interests on both the Congress and the courts, have all mitigated the imperial impulse of the central government. The state’s interaction along with those that share its “equal footing,” Wyoming, North and South Dakota, all share different interests in the Indian reserved water right as it impacts water storage, development, transportation, and inter basin marketing. The Yellowstone Compact, an interstate water agreement allocating water between Wyoming and Montana, directly affects and is affected by the Indian reserved right. Montana has been and remains a significant part of the story of the Indian reserve.

As Frederick Hoxie has eloquently asserted, the Crow are a persistent and innovative people.¹⁹ Above all, this tribe has used the inchoate nature of the reserved

water right to impose their own tribal vision. The theme of tribal interaction and interpretation with the water right is the most significant part of the story. The Crow too have used the inchoate nature of the right to leverage their own demands on the precious commodity. Notoriously pragmatic, the Crow people have also used the reserved right to define the very nature of their sovereignty; it has forced the tribe and continues to force the tribe to define what this “nation” is. The policies of assimilation originating with allotment in the 1880s gave voice to individual Crow who thrived in the climate created by economic opportunities available in the ensuing 40 years. New Deal policies ended allotment and fostered renewed communal concepts. The 1930s thus brought another definition to the reserved water right even as it created a new power structure within the Crow community. The two policies conflict in history and today in Crow society. The reserved water right exacerbates the division. By its very nature is the Indian reserved water right one that belongs to the tribe or to its members? Today the question remains unanswered though increasing exigency demands response.

In 1960 the Crow won the right in federal court to be compensated for the “flow” of the river.²⁰ The flow, with its ability to generate power, legally became a part of the reserved right in the controversial construction of Yellowtail Dam. The case is significant for a number of legal reasons but language also is important. It is in the “flow” that the Crow people individually and as a people have maintained their agency, their power. In his later years Robert Yellowtail sat in tribal council and, pounding his cane, over and over and louder and louder his old voice rang out, “Autonomy...Autonomy...Autonomy....”²¹ Just as the United States has used the inchoate nature of the Indian reserved water right to its own purposes so too has the tribe. Crow autonomy has come from the tribal ability to navigate U.S. law and policy however imperial they may be, to navigate the current of sovereignty that runs between federal and state, waters as complex as the Bighorn itself.

This study incorporates the early narrative of water development on the Crow reservation within the shift in Indian policy changes in the 1930s. Two chapters cover the New Deal period on the reservation. The first examines the case *U.S. v Thomas Powers* (1939). *Powers* was the only Supreme Court case to consider the Indian reserved water rights doctrine between the 1908 *Winters* decision and the 1963 decision in *Arizona v. California*. The case involved a conflict between non-Indian upstream water users, primarily the old cattle barons, and the Indian Irrigation Service project of the Little Horn, one that came to serve the interests of the sugar beet men. Both the government and the upstream successors to allottees claimed they held intact *Winters* rights from original Indian allottees. The chapter considers the inherent contradiction between federal reserved water rights and Indian reserved rights; between tribal ownership and individual ownership; between an administration favorable to Indian issues and an Indian Irrigation Service willing to sacrifice Indian water rights to insure IIS project survival.

Rehearsal at Willow Creek, the second chapter, examines the politics within the New Deal as it interacts with politics at Crow. White factions work the alphabet soup of the administration in order to achieve both a small storage reservoir on the Indian Irrigation Service Little Bighorn Project and a big dam on the Bighorn River. Supporting small storage was tribal chairman and Indian Service Superintendent Robert Yellowtail. The tribe received many benefits from the relief projects intended for Indians, and under the leadership of Yellowtail, they forestalled the big dam. The chapter ends by exploring the interstate rivalry between Montana and Wyoming and its impact on the Crow as all three claim the water in the Bighorn. Eventually the Yellowstone Compact Commission determined distribution but in the pre-McCarren allocation, it did so without considering the reserved rights of the federal government or the tribe.

The chapter, the “Grand Desideradum,” conjures up the language of Hiram Chittington as it explores the white policy history of the Bighorn Canyon Dam, including the Bureau of Reclamation’s early irrigation decisions for the reservation. The Missouri Basin Flood Control Act of 1944 and the failed Missouri Valley Authority is part of this story. The chapter tracks the federal legal battle to build the dam against the specific vote of the Crow Tribe under the waning leadership of Robert Yellowtail, four separate opinions of Interior’s solicitor, and the veto of President Eisenhower. Two federal court actions eventually condemn the Bighorn Canyon and determine compensation. However, unique to the Crow among all the tribes dispossessed by the Flood Control Act, compensation was calculated based on loss the of the flow of the river; that is, the value of the loss of the power to be generated at Yellowtail Dam.

Interpreting the “arts of civilization,” the fourth chapter recaptures the language of the 1908 *Winters* decision as it envisioned water use for agriculture and other domestic use specifically using the expression, “...the arts of civilization.” In the late 1960s, the Bureau of Reclamation quantified the Crow Tribe’s reserved water right, its *Winters* allocation, at 150,000 acre feet from the impounded waters of the newly created Bighorn Reservoir water. Then the bureaucracy decided how the Crow would use it. Just as the Bureau of Indian Affairs had leased land to corporate farmers, now Reclamation leased Crow water to major petrochemical concerns for strip mining Crow coal and for potential oil shale exploration. The Crow were not unique among tribes as the federal policy of “self-determination,” revealed itself to be a policy that served the interests of extractive industry giants. Intra and intertribal friction developed over coal development and the enforcement of the newly passed National Environmental Policy Act on sovereign land. Both the Northern Cheyenne and the Shoshone used the act in an attempt to reign in an overmighty Reclamation and its agenda for the Crow. The chapter also explores the environmental impact of the dam: silt, salinity, and disease in fish.

The fifth chapter recaptures the language “political integrity, economic security, health, or welfare...” from the *U.S. v Montana* (1981) decision in a case that pitted the state against the tribe.²² The chapter explores federalism and theories of water “ownership.” Environmental concerns and an entitled Indian rights movement encouraged the Crow to limit access to their blue ribbon stretch of the Bighorn River. The State of Montana retaliated in a confrontation that eventually involved the tribe, the state, and the federal government. Both Montana and the United States, along with the powerful fish and wildlife lobby shared an interest in seeing the Crow lose the right to their river. In this standoff over sovereignty--*Montana v US* (1981), the Crow lost the ownership of the Bighorn riverbed. The standoff became literal on the Crow Reservation as Indian activists occupied a state bridge that accessed the fishery. The decision of the Supreme Court in favor of the state of Montana signals a pivot point in recent Indian legal history. The Rehnquist Court rediscovered the *Johnson v. M'Intosh* “discovery doctrine,” using it to limit the implied reservation doctrine. The Court instead advanced the new more limited treaty interpretation using of the theory of expressed rather than implied reservation. The implication, according to the court, was in the divestiture of tribal sovereignty. The precedent in the *Montana* case remains a crucial cornerstone of the Court’s more conservative view of Indian sovereignty.

The final chapter involves the Crow Compact Commission and explores recent trends in water quantification through negotiations. With decisions of the Rehnquist Court and its “new subjectivity” and with the Winters Doctrine “hanging by a thread,” the Crow reached the decision to quantify their water rights through compact in 1998.²³ Drought and demands by Wyoming water users also contributed to the controversial decision. Negotiations proceeded between the state of Montana’s unique Reserve Water Rights Compact Commission, the federal government represented by both the Bureau of Reclamation and the BIA, and Crow tribal representatives. Negotiating tactics

included a noteworthy Crow/Montana alliance that forced the federal agencies to sacrifice significant negotiating points. Both the history and controversy of Indian Winters quantification reveal themselves in the internal dissent within the tribe. Indian allottees battle with the tribe over who owns the Indian reserve water right. As the political situation boiled over, the Barrett Corporation entered the reservation with a multi-million dollar contract to drill for coalbed methane. Drilling methane requires virtually all the water in the aquifer. Ironically the methane underlies Last Stand Hill.

A final theme forms a meander line through these chapters. How does the Indian reserve right affect the environment itself? Warfare between the tribe, the state and the nation brings to mind far older battles. It is here that Coyote danced on the flood waters and finally grew bored and asked the deep diving ducks to dive and dive again to bring forth a little root and a little land and when the ducks at last succeeded, coyote created more land and then man and woman: the People. For this place, the Crow fought Sioux and Cheyenne and Blackfeet and for this place the Crow joined with non-Indian soldiers and fought and fought again. It is in this valley that the Crow looked on as enemy met enemy in a battle that captured the world's attention, and entered the nation's mythic memory, and continues to captivate western imagination for generation after generation. The place belongs to the memory of many people as well as to present day Crow.

In many ways it is an artificially recreated place, a place that struggles to sustain its people in the present environment, but a place also charged with instilling the power of meaning. The environment no longer naturally sustains the Bighorn sheep. State Fish, and Wildlife Management teams replenish them, annually if necessary. The trout in the blue ribbon Bighorn are not the native wild trout and would not survive without the cooler water from the turbines of Yellowtail Dam. Crow Fair celebrates for all Indian country, and for quite a few non-Indians as well, a sovereignty now defined within

more rigid confines. Crow Fair tipis are within site of the Custer memorial and every year reenactors, both Indian and non-Indian recreate the Battle of the Little Bighorn, each actor vying for the most glorious death. This confluence of water is sacred ground to many and conflicts here are writ large.

Underlying all water resolution is respect for environmental memory. The term “duty of water” is a legal term—how much water it takes to grow a crop on a given acre is the duty of water. The term implies so much that western law imposes, for if water has a duty it is to sustain life in all its forms. As the boundaries of Indian sovereignty intersected with metes and bounds and ranges and townships, imposed measurements in the last century, so now those boundaries will be in acre feet and miner’s inches. As water is parceled between Indians and non-Indians, between Indian nation and Indian nation, between state and state and the United States, between agricultural and urban and industrial, and between the United States and other nations, the “duty” rests with the people who divide it. The battle for the water has already begun. The Crow are a people caught in opening skirmishes and those battles are here on the Bighorn. But in a larger sense what happens here will enter the public memory—the law and the policy of this most crucial of life’s allocations. Decisions will enter the environmental memory as well—as the Bighorn has cut through mountains made over deep time, so may the power of rampaging interest influence the shape of this contested and mythic ground and the water that runs here too.

¹ Frederick Hoxie, *Parading Through History: The Making of the Crow Nation, 1805- 1935* (Cambridge 1995).

² *Winters v. United States*, 207 U.S. 564 (1908).

³ Treaty with the Crow Indians, 7 Stat. 266.

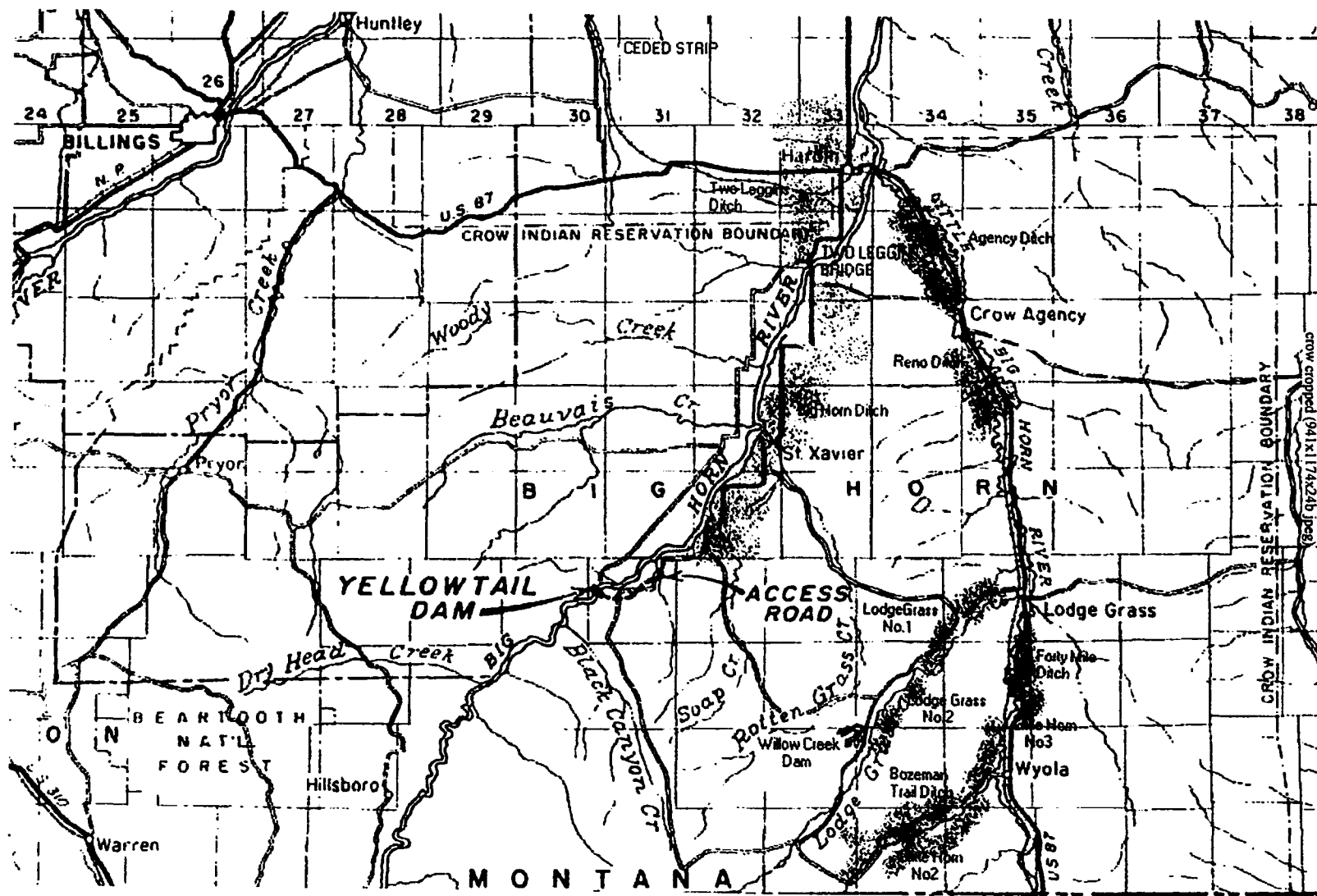
⁴ Treaty of Fort Laramie of 1851, 11 Stat. 749.

⁵ Treaty of Fort Laramie of 1868, 15 Stat. 649.

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- ⁶ Act of April 11, 1882, 22 Stat. 42.
- ⁷ Act of December 8, 1890 ratified by the Act of March 3, 1891, 26 Stat. 1039
- ⁸ Agreement of August 14, 1899 ratified by the Act of April 27, 1904, 33 Stat. 352.
- ⁹ The Crow Act, P.L. 239.
- ¹⁰ Act of July 25, 1910, 36 Stat. 859.
- ¹¹ *Winters v. United States*, 207 U.S. 564 (1908); *U.S. v Rio Grande Dam and Irrigation Company*, 164 U.S. 690; *United States v. Winans*, 198 U.S. 371.
- ¹² *Winters v. United States*, 207 U.S. 564 (1908).
- ¹³ *Conrad Investment Company v. United States*, 161 F. 829.
- ¹⁴ *Skeem v. United States*, 273 F. 93.
- ¹⁵ *United States v. Hibner*, 27 F. 2d 909.
- ¹⁶ Robert Williams, *The American Indian in Western Legal Thought* (Oxford, 1990).
- ¹⁷ *United States v Blackfeet*, Civil No. 3197 (U.S. District Great Falls).
- ¹⁸ Kermit T. Hall. *The Magic Mirror: Law in American History* (Oxford, 1989).
- ¹⁹ Hoxie, *Parading Through History*.
- ²⁰ *United States v. 5,677.94 acres of land more or less of the Crow Reservation of Montana*, 162 Supp. 108, May 15, 1956.
- ²¹ Clarence T. Belue, "White Oppression and Enduring Red Tears: Indian Law and the Real Rules for White Control of Crow Lands (Master of Law thesis, University of Wisconsin, 1991).
- ²² *Montana v. United States*, 450 U.S. 544, 1981.
- ²³ David H. Getches, "Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law," *California Law Review* (December, 1996)1573-1654.



Yellowtail Dam 1965
after completion but before the reservoir was filled
Hardin Bench is on the horizon.



Chapter One

Indian Reserved Water Rights and the New Deal

United States v. Powers

In July 1932, United States Indian Irrigation Service Supervising Engineer W. S. Hanna ordered all private headgates on Lodge Grass Creek and the Little Bighorn River closed. Following Hanna's orders, ditchrider Otto Waldschmidt delivered the warning of the United States:

NOTICE: To all water users from private ditches on the Crow Indian Reservation, Montana. The supply of water in the Little Big Horn River and tributary streams has reached a stage where it is inadequate to supply the prior rights of lands under the Crow Irrigation Project irrigation systems, and it is necessary that each and every private ditch be closed at once and all water in the stream be allowed to flow to the Government headgates. Failure to comply with this request immediately will make it necessary for this Service to place this matter in the hands of the United States Attorney.¹

Critically timed, the shutdown of the private ditches threatened to deprive late season irrigation to sugar beets, the lucrative cash crop grown primarily by non-Indian successors to original Indian allottees and non-Indian lessees on the Crow Reservation. As the headgates shut, Hanna set in motion a water war, both in the courts and at the headgates. The litigation determined the control of Indian reserved water rights throughout the West for decades to come. Were water rights, as a result of the seminal doctrine laid down in the 1908 Supreme Court decision, *Winters v. U.S.*, reserved by the Crow Tribe?² Or did the United States, specifically the Secretary of the Interior acting as guardian of the Indian trust, determine how the precious commodity was to be allocated? Had water rights on the reservation passed with the fee in the land to individual Indian under the 1887 General Allotment Act? And, most crucially, did those

individual water rights pass to the many white successors in interest on reservation fee land?

From the time of the *Winters* decision, the Supreme Court had not heard a case involving Indian water rights and would not again until 1963. Serving as a legal pivot point, the 1939 decision in *U. S. v. Thomas R. Powers* has a complex legacy.³ In later decisions as inconsistent as *Arizona v. California* (1963) and *U.S. v. Walton* (1984), the Powers decision left a confused legacy for the courts, and for the Department of the Interior.⁴ On the Crow Indian Reservation, however the legacy was consistent with all previous federal Indian policy. Powers allowed white ranchers to consolidate the proceeds of a half -century of Indian dispossession and helped perpetuate the heavy toll taken by the allotment policy. Even as federal policy, more than court interpretations, would continue to define water use on the reservation, the case would deprive the Crow Nation of their treaty rights, “the exclusive use and benefit” of their land.

Responding to several years of serious drought on the reservation, Hanna attempted to shut the private headgates in order to protect the government irrigation project begun in 1884 by H.J. Armstrong. Armstrong, superintendent of the Crow Reservation, believed in irrigation with a fervor that matched many from his time. Irrigating the west had ideological implications to those in the late 19th century, prescient Progressives, who believed in the scientific and efficient use of water on arid western land. Conflating manifest destiny, Jeffersonian agrarianism, and the Protestant work ethic, irrigation proponents like William Ellsworth Smythe painted a picture of the west where no water was wasted to the sea. With modern management, all rain and snowfall would be stored and used to irrigate unproductive land, turning desert into garden. By popularizing his beliefs in his journal, *Irrigation Age*, and his book, *The Conquest of Arid American*, Smythe’s vision dovetailed nicely with the 1862 Homestead Act and

with the 1887 General Allotment Act. Congress, eager for solutions to problems as diverse as urban overpopulation and the Indian question, embraced Smythe's vision and eventually pressed for the Reclamation Act of 1902. The Act created the Reclamation Service, a bureau charged with building irrigation projects on public lands for homesteaders. Irrigation made it seem possible to earn a livelihood in the arid west, even on the impossibly small acreage allotted to Indian and white settler alike.⁵

When Armstrong became superintendent of the Crow, the tribe still held millions of acres under the 1868 Treaty of Fort Laramie. Before allotment, Armstrong convinced the tribe to move east onto the arid plain and farm—with the help of irrigation canals diverting water from the tributaries of the Bighorn River. He wrote in 1885: "...with Indians it [farming] is of the first importance for the sole reason that it teaches them to have a settled existence, which is the starting point in the work of civilizing them."⁶

Chief Plenty Coups, the last warrior chief of the Crow, became reconciled to a settled way of life for his people, but his vision was of ranching; spotted buffalo came to him in his dreams. However, according to the theory of the day, Indians needed to progress to ranching by first learning to be farmers. Plenty Coups' more appropriate use of the eastern Montana plain never gained the financial support of his government trustee. Instead Armstrong impressed upon his superiors in Washington that an irrigation project would allow the farming of 4500 acres on the plains surrounding the Bighorn River. Conveniently, Indians could then produce all the hay for the cavalry horses at nearby Ft. Custer. As a bonus, he added, Indians would provide the labor to dig the ditches, educating them to the value of wage labor. The size of the Reservation, with its enhanced productivity, could be reduced, the "excess land" sold to the always land-hungry white settlers. Proceeds from land sales would easily finance the irrigation

project. Eventually the new yeoman farmers would support their project with annual operation and maintenance fees. Everyone would benefit.

The amazingly efficient irrigation scheme worked exactly as Armstrong had predicted. By 1932, Crow Reservation projects diverted water through 100 miles of major canals whose laterals watered 63,328 acres of cropland. On Armstrong's original project on the Little Bighorn and Lodge Grass Creek, the cost had been \$1,977,879.00. Most of the money--\$1,565,235.00—came from the sale of excess land on the Crow Reservation, funds held in trust by the Secretary of the Interior.⁷

Quite intentionally, the irrigation projects made the Crow land more attractive to white settlers. The United States counted on white land sales to finance the purchase of its 1899 purchase of the "Ceded Strip." Crow funds eventually paid for irrigation projects whose sole intent was to water the farms of the white farmers on allotted reservation land. The tribe voiced its discontent as early as the 1890s. The 1920 Crow Act and its 1926 Amendment documented it. The tribe demanded in legislation that no more irrigation projects be funded without express tribal permission. In testimony, tribal Chairman James Carpenter detailed complaints concerning the Irrigation Service. They included "idiotic" expenditures of money for year round ditchriders and the many construction projects. He also spoke for the tribe demanding the removal of the Crow superintendent C.W. Asbury.⁸

While Crow agitation threatened the vision fostered by the Indian Irrigation Service, by 1932 a more immediate threat came from private canals and storage dams that had been built by white successors to Indian allottees upstream from the government ditches on both the Little Bighorn and Lodgegrass Creek. In times of water shortage, their diversions deprived the Indian Service ditches of meaningful amounts of water. For the most part white men constructed the private ditches, men who had

purchased their land, and, as they would later claim, all its appurtenances-water rights—from the original Indian allottees or their heirs. Upstream diverters included many of the old cattle barons who had fattened their cattle on Crow grass from 1860s. Men like Frank Heinrich and Matt Tschirgi originally leased large tracks from the Crow. In 1903 Heinrich leased land from the Crow, subleased the same land to other ranchers and expanded his herd from 80 head to 23,000. Under the name of Antler Land Company, Tschirgi had a similar story. After the Crow Act of 1920 opened reservation land, these men, along with operations like the Miller Ranch, gained land by violating the terms of Section Two of the Crow Act, the section that stipulated limiting acres that non-Indians might purchase. Section Two limited whites to 600 acres of agricultural land or 1,280 acres of grazing land on the reservation. The Millers alone held close to 7,000 acres of Crow land in violation of Section Two.⁹

Section Two limitations were part of a controversial compromise insisted on by Democratic Senator Thomas J. Walsh, one that promoted smaller holdings. By encouraging homesteaders rather than ranchers, Walsh hoped to expand his Democratic constituency. However, the statute was wantonly ignored by the Indian Service.

One of the private diverters was H.G. Campbell part of the Campbell Farming empire begun in 1919 by Thomas Campbell. Encouraged by World War I grain prices, Campbell left New York for Crow Country financed by J. P. Morgan in agreement with Secretary of the Interior Lane. Lane announced the opening of farming operations on “an extended scale on several Indian reservations.” With 5 million dollars of capital investment, Campbell was able to acquire by lease and purchase thousands of acres of Crow land. Section Two of the Crow Act of 1920 Along with the purchase of “excess lands,” Campbell, along with others, aggressively took advantage of the popular “dead Indian sales.” When an Indian allottee died, the land very often fell to the auctioneer’s

gavel in order to absolve the deceased's debt. While Indians could not borrow against their allotments, the Indian Service billed them for operation and maintenance, money the Indian allottee owed to the United States. While the Department of the Interior required an open auction for the property, superintendent Asbury simply offered good land—land that was or could easily be irrigated—to Campbell with no competitive bids. And so it was with the allotments of Wrinkle Face and Medicine Coyote; “dead Indian” allotments on upper Lodge Grass Creek that became part of the Campbell Farming empire. Campbell Farms eventually grew to become the largest wheat farm in America.

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White upstream diverters all told similar stories as the policy of allotment systematically failed Indians: the 80 acre Belken-Walsh ranch acquired from the allotment of Crazy Head and his wife Pretty Face; Billie Miller's 111 acres from Does Anything; Robert Miller's 143 acres from Pounded Meat, Strikes A Feather, Holds A Feather, Eagle, and Plain To See; Nickels and Mary Dethlefsen's from Rosa Martinez, Arthur Peters, Alice Peters, and George Peters; Jay and Ruth Henman's acres from Goes Ahead, Pretty Shield, and Crazy Sisterinlaw; Edith Belken and Judy Walsh' land from Crazy Head and Paintpretty; the Ladows from Buffalo that Sings, The Meat and Ella Meat, and the Back; and to the Antler Land Company under the management of Tschirgi—the allotments of Wolf, Little Fact, Deaf, Medicine Horse, Young Duck, Heifer Woman, Yellow Coyote, and Gives Away. Each of the white ranchers diverted with impunity from Lodge Grass and the Little Bighorn Rivers. They grew alfalfa to fatten their cattle and their profits and all claimed they had in tact right to the water on dead allottee land.¹¹

In 1932, as the shutdown directive from Hanna caused battle lines to be drawn, they were not so clearly established as to be upstream/white against downstream

government/Indian. Other upstream private diverters included the Yellowtail family who ran a lateral off a private diversion on Percheron Creek. In 1916 and 1923 Robert Yellowtail filed under Montana state law, as did Lizzie Yellowtail, William Yellowtail, Josiah Yellowtail, and Marjorie Yellowtail.¹² Yellowtail also served as an officer in the Bozeman Trial Ditch, a privately held ditch funded with federal dollars. In 1934, Robert Yellowtail was elected chairman of the tribe and in a revolutionary move by the New Deal's director of Indian Service, John Collier, Yellowtail was also named Superintendent.¹³ Neither he, nor any of the Indian users, would be enjoined by the United States. Indeed on the Reservation, Yellowtail represented the United States. In a remarkable twist of history, Yellowtail's conflict of interest involved all three sides of the controversy: government, tribe, and private water user. Yellowtail shared with non-Indian F.L Yates a ditch diverting water from Percheron Creek, a tributary of Lodgegrass Creek. He also shared upstream interest in ranching and grazing, and he shared their politics. He was a Republican politician with aspirations of his own.

Downstream, on the Indian Irrigation Service project, the story was also complicated by white successors to the original Indian allottees. While Indians owned close to 50,000 acres along the Crow government canals, they farmed only 1,000. They leased 17,500 acres to non-Indians, and the income supported many Crow. Holly Sugar, from Sheridan leased much of the land for the cash crop, water intensive sugar beets. Downstream Hardin city boosters eagerly sought a Holly Sugar Factory for their town. They had a vested interest in reservation success for the sugar beet men. Whites owned another 15,000 acres on the government projects and irrigated 8,000.¹⁴ One thing seems clear from even the most cursory statistical glance: the U.S. Indian Irrigation Service, at a high cost to the Crow trust fund, ensured success to many white cash crop farmers on the Crow Reservation. The controversy that led to the Powers case involved Indian

water rights but not the water rights of Indians. The courts were to determine which non-Indians held the best legal claim to the reserved water rights—the *Winters* rights.

The urgency of the drought in the early thirties led to the legal confrontation between the Indian Irrigation Service and the upstream non-Indian diverters. With scant snowfall followed by the hot dry summer of 1932, project farmers, both white and Indian, were frustrated and angry as the upstream diversions took a heavy toll. No water came down the canals, and growers watched the beets, along with their livelihood, wither before their eyes. They had paid the annual operation and maintenance fees required on the government project, but the government was not supplying the water. No longer willing to trust their interests to the Irrigation Service, non-Indian growers organized the Lodge Grass Owner's and Tenants Association and hired their own lawyer, H.W. Bunston from Hardin. The group presented Hanna with an ultimatum: "We the members of the landowner's and tenant's organization resolve that immediate steps be taken to provide water for the lands in crop in order that the loss to the landowners and tenants be minimized...[and] that adjustment be made with the landowners and tenants for the failure of the Government to furnish water last year and this year." The challenge prompted Hanna's shutdown order.¹⁵

When the ditchrider delivered Hanna's order to each upstream user, the response was immediate. Farmer Nick Dethlefsen fired off a letter defending his prior right to water from Lodge Grass Creek. The original allottee, Oliver Peters, husband of Rosa Martinez, a Crow Indian, filed in Montana on Lodge Grass in 1907 and the water had been in continuous use since that time. Dethlefsen did not desire to violate any order from any "Governmental Department," but surely they were wrong about his particular diversion. "I am therefore intending to continue to use the water for three days more and complete my irrigating."¹⁶

The other upstream diverters did not bother to put their objections in writing. After the shut down notice, Hanna along with Clyde Lewis, the project engineer, both rode the private ditches daily. The private diverters simply ignored the notice: Hanna's notes read: "August 1, 1932, Monday: Tschirgi still running a full head....Campbell-Belken ditch running a full head, other private ditches dry;" "August 2, 1932, Tuesday: Billy Miller using a head of water;" "August 3, 1932, Wednesday: Tschirgi still running a full head of water. Yates running a small head."¹⁷

Hanna responded to Dethfelsen's letter. The Indian Irrigation man clearly understood the source of government's legal right to control all reservation water. For Dethfelsen he accurately rehearsed what soon would become the government's legal argument—their *Winters* right: "I will say that it is the quite definite understanding of this office that the Crow Irrigation Project systems have a legal prior right to the use of all water required for irrigation use on these Project systems. It is also our understanding that any State law regarding prior use of irrigation water does not apply on the Reservation."

The same day Hanna sought written assurance from the Commissioner of Indian Affairs: "It seems to me under the principle of the Winter's Decision the waters of the Reservation insofar as they are needed for beneficial irrigation use are reserved for the tribe.... My understanding [is] that priority of use means nothing as applied to the Crow Irrigation Project ditches whose rights under the Winter's Decision would date at least as far as the Treaty of May 7, 1868 and possibly to an even earlier Treaty."¹⁸

Hanna clearly understood that the seldom-used *Winters* decision was the legal precedent for water rights on the Indian reservation. In the 1908 decision the Supreme Court had determined that Indian treaties had reserved sufficient water with the reserved land to fulfill the intent of Congress in the Allotment Act of 1887. That stated

intent was to turn the nomadic people into farmers. As he wrote, Hanna unwittingly also stated the precise question on which the case would turn when he declared that the water was “reserved for the tribe and that the Secretary, under authority of law, has allocated prior use....” In the *Winters* decision, the Court was vague as to who had reserved the water, the government or the tribe. If the reservation was to the government, did control of the water come as a result of the status as sovereign or the status as guardian to the ward tribe? If reserved to the tribe did the Secretary of Interior control at his discretion all water used on reservations in the west? Certainly in 1934, as the *Powers* case began, the Secretary of the Interior believed that he held exclusive right to the so-called “secretarial waters”—all water held in federal reserves including Indian reserves.

Hanna’s appeal on behalf of the Indian Irrigation Service project found little sympathy in Washington, and in September, 1932, responding to the verbal threats from the upstream diverters he reopened the gates. The Hoover administration’s Department of Justice maintained a policy of placating white settlers on the reservations in the west with a non-confrontational policy of “making land and water meet.” The administration pointed to the Preston-Engle report to justify their lack of action. As the 1928 Meriam Report had detailed Indian land dispossession, the government’s Preston-Engle Report addressed the question of water rights. Their findings confirmed the obvious: whites had not only taken possession of the reservations in the west, they held the water rights as well, rights acquired from the Indian allottees. The government, the report alleged, had failed to protect the Indian’s right to the precious resource. The report did not recommend any compensation to the tribes. The water experts urged that local non-Indians not be penalized for the failure of government trust responsibilities, that peaceful relations should supersede the dire need for water on western reservations.

Another season of drought would go by before the national election would bring a new administration and a New Deal to Indians. Hanna's urgent request for a legal remedy met a more sympathetic ear. The Roosevelt administration jumped in with litigious alacrity.¹⁹

With the new administration, Franklin Roosevelt appointed Harold Ickes as Secretary of the Interior. The headstrong secretary in turn appointed John Collier to head Indian Affairs. Collier was the first 20th century Commissioner whose policy was not shaped by assimilationist policies of late 19th century. Instead he was influenced by the Indian autonomy and an ethos of the cooperative commonwealth. He strongly believed in communal land base as a panacea for anarchic individualism that had led the United States into its economic depression, and had also left the Indian tribes of the west with such devastating dispossession.²⁰

Collier was strongly influenced by the 1928 Meriam Report detailing, in all areas of life, the failure of the allotment program. In his first report to Secretary of Interior Harold Ickes, Collier wrote:

The allotment system and its various corollaries have fragmented the Indian estate, insuring the divestment of title, and in the meantime virtually prohibiting group-effort by the Indians with respect to the use of their own properties. This whole policy is the result of unwise—in many ways disastrous—efforts to apply the old “homesteading” idea to types of land that it did not fit and to a primitive race that should live and develop its property on a tribal or communal basis.²¹

Six months into his tenure, in 1933, Collier suspended sale of trust land and effectively ended the allotment program. Eventually Collier would consolidate his broad program under the umbrella of the 1934 Indian Reorganization Act.²²

With regard to natural resources, Collier wrote: “It is our fundamental program, in Indian Service reorganization, to reverse the policy toward Indian natural resources.”²³

Indian tribes would own and manage their own natural resources, but while the Indian Reorganization Act addressed natural resources, Collier never included Indian water rights.

Collier's policy inadvertently caused fractures within the tribe. For those individuals who had managed to keep allotments, the return to the tribal ethos stirred anxiety. Those who lost land found the New Deal for Indians more palatable.

In the summer of 1934 drought forced more urgent appeals by the Crow Irrigation Service to their superiors in Washington, as the project farmers again lost their crops. Complaints also poured into the superintendent's office. Robert Yellowtail responded. In one August 1934 note to Project Engineer Clyde Lewis, he relayed, "Complaint is again lodged against the use of water at Wyola—especially against Campbell Farms." Lewis asked Tschirgi to turn water back into the river. To his ditchrider he wrote, "You might notify Campbell, also, although I don't suppose he will pay any attention to our notice." ²⁴

The calamitous situation forced the new Interior Department Regional solicitor, Kenneth R. L. Simmons, along with W. S. Hanna to wire Nathan R. Margold, the new Solicitor General of the Interior Department, apprising him of the emergency:

Situation extremely tense. Landowners who are paying the United States for water service demand private ditch diverters be immediately shut down. We believe Government ditches carry prior rights over all private ditches under Winters decision...situation becoming intolerable and some immediate definite action necessary. Urge immediate authority be transmitted to this office and United States Attorney for Montana to file suits. ²⁵

The telegram sent by the district counsel moved rapidly through the bureaucracy. Assistant Secretary Oscar Chapman relayed it to the Attorney General urging action. The Justice Department responded; the Irrigation Service received final authorization from the Department of Justice that the case *U.S. v Thomas Powers* would go to trial. ²⁶

However much the Irrigation Service urged action, asserting a *Winters* claim for the Crow irrigation project was in no way a certain route to legal victory. The *Winters* decision in 1908 had not lain dormant, but in the 22 years that had intervened, drought had seldom lent exigency to the issue. In the *Winters* decision, the Court had concluded that Indians of the Fort Belknap Indian Reservation, by their Agreement of 1899 had reserved enough water to change a nomadic people to an agrarian culture; that is, Indians reserved water sufficient for irrigation purposes “which would be necessarily continued through the years.” The date of the treaty or the agreement was the priority date of the water right.

Two legal lines led to the *Winters* decision. *U.S. v Rio Grande Dam and Irrigation Company (1899)* determined that the federal government had implied the reservation of water with federal land. Federal land might include national parks, forests, and military posts. The water use on such federal holdings was exempt from state law. The cryptic decision did not address the Indian reserve as a separate issue. *U.S. v. Winans (1905)* provided the important precedent for Indian reservations.²⁷ According to *Winans* when Indians signed treaties, they reserved everything not specifically deeded away. In *Winters* the high Court fused the two concepts. Indians had, by implication, reserved the water necessary to exchange their nomadic culture and pursue agriculture and the arts of civilization.

The wedding left some crucial gaps in interpretation: had water on Indian reservations been reserved for federal lands or Indian lands. As guardian to the ward tribe, did the government have legitimate “command of the waters”? And most importantly, how did the policy of allotment, the acquisition of the fee in the land by individual Indians, affect the tribal and/or federal reservation water right?

The vagueness of the high Court left much legal room for lower federal courts to extrapolate over the next 20 years. By 1933, three cases had refined the Winters decision; none had been argued to the Supreme Court. *Conrad Investment Co. v. United States* (1908), another Montana case, immediately applied Winters: “The law of that [Winters] case is applicable to the present case, and determines the paramount right of the Indians...to the extent reasonably necessary for the purposes of irrigation and stock raising, and domestic and other purposes.”²⁸

In a later 9th Circuit case, *Skeem v. United States* (1921), the appeals court found that Indian water rights could be transferred to a lessee, a use the court deemed consistent with the intent of the Fort Hall agreement; that is, such a transfer benefited the Indians. The Court also determined that the amount of water reserved to the Indians was not limited to the water put to use on the date of the agreement reserving the land. The court rejected the lower court’s attempt to limit water use: “such meaning should be given as will enable the Indians to cultivate eventually the whole of their lands so reserved to their use.”²⁹

Most directly relevant to the *Powers* decision was *United States v. Hibner* (1928). The United States District Court for the Eastern District of Idaho was asked to determine the nature of water rights of the assignees of the original allottees. By that time almost half of all allotted land had passed into the hands of non-Indians. The Court found that the United States intended to “recognize and fix permanently the rights that the Indians had at the time the treaties were made...” That included water rights. Were water rights lost by lack of use as they would have been under state law? No, the Court determined citing *Skeem*. Indians held a water right sufficient to cultivate “the whole of their lands.” Most importantly, did assignees of allottees acquire “the same character of water right with equal priority as those of the Indians.” The Court determined that

assignees would “be entitled to a water right for the acreage that was under irrigation at time the title passed...and such increased acreage as he might with reasonable diligence place under irrigation, which would give to him, under the doctrine of relation, the same priority as owned by the Indians.”³⁰ The case was never appealed.

While these few cases had refined the extent of Indian water rights—*Winters* rights—by 1933, other disputes replicated the issues of the Crow reservation *Powers* controversy. What rights to *Winters* water did non-Indian successors to Indian allotments acquire? Cases similar to *Powers* had already been filed: *U.S. v. Walker River*, *U.S. v. Orr Ditch*, *U.S. v. Alpine Land and Water Co.*, *Alexander v. U.S.*, *Burch v. U.S.*, *Smith v. U.S.* and *McIntyre v. U.S.* As ditches ran dry, all sought to clarify, even quantify water rights on Indian reservations.³¹

The future of the Indian Irrigation Service projects hung in the balance, projects that had cost the Indian trust millions of dollars. However, the greater threat to Interior was losing control of western water. The Bureau of Reclamation had expanded its function with major construction projects including Boulder Dam. The Bureau, already skilled at usurping Indian funds for their own “revolving fund,” now began to cast an eye on the *Winters* decision in their legal claims to federal water rights. During the early 30s, *Winters* came to be used as legal rationale in defense of their water development projects in *U.S. v. Arizona*.³² In this 1934 legal confrontation over the construction of Parker Dam, the state of Arizona argued that the Bureau had never received congressional approval for the project. The Bureau, among its many arguments, used *Winters* to assert its right, irrespective of Congress, to build projects that benefited Indians. The Supreme Court, at first eager to strike at the heart of the New Deal, never bought the defense, but with an ever expanding role for the federal government and

specifically the Bureau of Reclamation anticipated, the Justice Department looked increasingly to *Winters*.

When the Justice Department contacted Interior's Regional Solicitor Simmons with authorization for the lawsuit, Oscar Chapman also wrote: "The matter of the institution of a suit or suits looking to a final settlement of the existing controversy has been under consideration for some time past although complete information thereon apparently has not yet been assembled."³³ Intriguingly, the information had been assembled by Simmons' predecessor Solicitor Benjamin P. Harwood. Harwood had written Crow Project Engineer Clyde Lewis in March, 1933, after the election but before he left his position. He requested that Lewis compile and provide all relevant material to the case. Harwood wanted a daunting quantity of information from what soon would become the B.I.A—a bureau that never achieved mastery over its paperwork. Included in his request were the records of all allotments—trust land and fee patent, state water filings, sales- private and government, ownership of all ditches and headgates. How was the land allotted? Was the land designated as "Irrigable" by the allotting superintendent? "While awaiting your reply, I shall work up a statement re Montana law which would apply if we see fit to present that theory as well as the *Winters* doctrine. It will help a good deal if we can show a clear case both ways."³⁴

Though clearly taxed by the request, Clyde Lewis did spend the summer of 1933 collecting and relaying the information. As the new administration worked its way through the appointment process however, Kenneth Simmons replaced Harwood. Upstream defendants Matt Tschirgi, Antler Land Company, the Belkens, the Henmans, the Millers, and H. G. Campbell immediately hired Harwood. The information gathered by Lewis would now be put to use against the government. Ironically the government's *Winters* argument would also prove invaluable.

Despite the rigorous schedule of the early New Deal Department of Justice attorneys, the case moved into Montana District Court in 1935 under Judge Charles N. Pray. Kenneth Simmons, District Counsel for the Irrigation Service was joined by U.S Attorney James R. Baldwin, and Assistant Attorneys R. Lewis Brown and Roy F. Allen. The upstream defendants retained several of Montana's finest attorneys including Ben Harwood. Heard in equity, the plaintiffs, the United States, sought an injunction against the upstream white diverters. They asserted that in diverting and using the waters of the Little Big Horn and Lodge Grass Creek and their tributaries, the defendants unlawfully obstructed the free uninterrupted flow of the waters by building dams above the points of diversion in each of said streams. "great and irreparable loss and damage is being caused plaintiff and it's Indian wards by the interference...and by the taking therefrom of waters lawfully belonging to this plaintiff and its said Indian ward...." ³⁵

The United States seemed to have all the arguments on its side. Superintendent Armstrong had filed on the project water in Montana as early as 1885 giving them prior appropriation under state law. They held their *Winters* claim on behalf of the Crow to all water in the original reservation with a priority dating to the Fort Laramie Treaty in 1868. Neither state law nor federal law carried water as an implied appurtenance to land. The most potent argument in the government's arsenal however was the General Allotment Act of 1887. There as well as in the Crow allotment act in 1882, Congress stipulated that, as concerned the water, the Secretary of the Interior was, "authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations." Further proof of congressional sanction for secretarial control could also be interpolated from appropriations in 1891 and subsequently. Congress had authorized the irrigation

project, and the Secretary had authorized that the tribal trust fund be tapped. The law of Montana was behind them; the law of the United States was behind them.³⁶

Significantly, U.S. attorneys cast their lot with the *Winters* precedent. The United States did not want to assert prior appropriation based on Montana state law. The argument, however, was as vague as the *Winters* decision had been. U.S. attorneys consistently confused the Court as to who they claimed held the water right. Was it the United States or the Crow Tribe? The Department of the Interior never saw the two reserves as separate. Though the government certainly planned to use the *Winters* right—the Indian right—as the rationale, the primary motive in the litigation was to maintain secretarial control of the water. Needing to retain the government right to the project, they began a convoluted argument as to who had reserved the right to the water. Their confusion is obvious as they state their theory of ownership to the court:

Our theory is that the Indians were given a right to locate on the land for the purpose of cultivating it and as the Government expresses in the Treaty, for the purposes of civilizing the Indians. They had the right to the use of the water necessary to that cultivation, implied in the Act. The *Winters* case so held....Now our position is simply this, that the Government, having given to the Indians the right to the land, or right to use water on the land, having used the Indians' money for the construction...a white settler has no right to go upon the Indian land at the upper stretches of the water and take from us the water that we should be carrying in our ditch.³⁷

Did the government give the water right to the Indians? Or had the Indians, according to both the *Winans* and *Winters* decisions *reserved* that right? The government argument was inconsistent with its own precedents. Nevertheless, they took yet another stab at it:

Now our theory is simply this: that the land and water both belonged to the Government in the beginning by treaty with the Indian tribe, the Crows, and the land was given to the Indian with certain rights. He was given the right to go upon it and cultivate it, and he was given as a part of that right the right to use certain water to irrigate it. Our contention is that so far as the water in these creeks is concerned the Indians have the right to the use of all of it to the extent of their needs, and *so far as*

*this project can be extended. ...Under the Winters decision.” (emphasis mine).*³⁸

Again the government conflated the interests of the project, one that served mostly white farmers, with the interests of the Crow tribe. The irony could hardly have been lost on the Chairman and Superintendent Robert Yellowtail whose family diverted next to one of the defendants, upstream from the limited area covered by the project.

Crucial to the government case was the communal nature of the water right; the reserved right remained with the tribe despite allotment of the land in severalty. Continuing, the government articulated this aspect of the water right:

Then we find in the treaty that the right is not a right in perpetuity. It is not a right in fee simple absolute. It is a right to a life estate of a limited kind...How long? As long as he shall continue to cultivate it....Then the life estate is given to what? To his heirs. And how long? So long as they shall cultivate it....Certainly if I have been given a life estate I can't give somebody else a perpetuity....And we claim further, that when the Indian ceases to use this water on the land that he held by right of possession that the thing ran back where—to where it belonged, the tribe of which he was a member. In other words it flows into the common fund; the tribal right of the Crow Indian and cannot be transferred out of that right, because that is where it was in the beginning...and when the conditions to the use are not made, the right then goes back to the source; it goes back to the Government; And in this case it goes back to whatever interest the Crow tribe had.³⁹

After close to fifty years, the federal policy of allotment had resulted in nothing but alienation of tribal land and water through federally instituted individual Indian ownership. The government now insisted that the ownership of the water was and always had been communal. They denied that at the time of the land allotments, that “any reserve waters became vested in the said Indians.”⁴⁰ Unlike the parcels of land, the water, they maintained, remained in communal ownership. But at the heart of the communal ownership argument was the inconsistent claim that the government itself held all rights to the water at the time of the treaty and continued to hold rights to the

exclusive use and control of the water on the reservation. Denying the *Winans* line, the government had reserved the water for the benefit of the Crow tribe. It asserted this despite the wording of its own *Winters* precedent: “The right so reserved continues to exist against the United States....”⁴¹

Referring to the land, the Fort Laramie Treaty reads: “...and the same is set apart for the absolute and undisturbed use and occupation of the Indians herein named....and the United States now solemnly agrees that no persons....shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians.”⁴² In all ways the government allotment policy had violated the Fort Laramie Treaty, and now the government hoped to revive it in order to prove ownership of a water right for their own project.

The government argument was not made in an attempt to recover a communal right for the tribe. It was made in the interests of a project that now served the very people who had “passed over” and “settled upon” the Crow reservation. The claim to *Winters* rights was not made on behalf of Indian water rights but to secure Interior’s command of the waters. With Collier’s repudiation of allotment and his endorsement of communal ownership, the *Winters* argument appealed to the government lawyers, and they hoped to the courts, but the intent was to protect the federal presence in water development projects in the west. To the courts, replete with Republican appointed judges, communal ownership made no more sense than the New Deal. The scheme seemed like a feudal vestige, a fee tail ownership that restricted individual property rights. A more convincing articulation would await the better-trained lawyers in the Justice Department as the case was appealed. As it was, the defense made short work of it.

The defense could not argue a state sanctioned priority water right and, as non-Indians, the upstream diverters had little legal right to claim water for the use of the government project. In a daring move, attorneys for upstream private diverters, including former District Counsel Harwood, now articulated their own *Winters* claim to the reservation water. Dismissing both rationales for secretarial control, the defense argued:

We hold these truths to be self evident—that the land and the water both belonged to the Indians in the beginning and if the United States acquired any property rights it must have received such property rights from the Indians...Under the Treaty of May, 7 1868, the lands on the Crow reservation were recognized as the common property of the Indians of the Crow Tribe....By virtue of the same treaty, as interpreted by the *Winters* case, the use of the waters of said reservation were reserved by the Indians for the use on said lands. When the lands were allotted to the individual Indian he ceased to have an interest in the common property so divided but took the lands allotted to him in severalty... When he took a parcel of ground which was capable of irrigation he had need for individual water for that land. To say otherwise is to entirely defeat the policy of the Government and the intention of the Indian as expressed in all treaties and acts of Congress and as clearly set forth in the *Winters* case.⁴³

As to the conveyance of the land from Indian to white, the defendants asserted that the Indian allottees, “have died and the United States, as guardian of the Indian heirs, sold the land, at public sale, and at these sales the defendants, or their predecessors in interest became the purchasers... The United States issued a fee patent to the purchaser which patent conveyed the land ‘together with all rights, privileges, immunities and appurtenances of whatsoever nature thereto belonging.’ And without any reservation of water or water rights.”⁴⁴

As evidence, the defense described the Crow allotment process itself and in so doing, they provided the Judge with a compelling equal protection rationale for his decision. At allotment on the Crow reservation, each Indian was to receive 40 acres of irrigable land, his equal share. Attorneys for the defense argued, “each Indian would be

entitled to his pro rata share of the available water...neither the Government, the Secretary of the Interior nor the Commissioner of Indian Affairs could deprive any one Indian of the available water to the advantage of any other Indian.”

Clinching its case the defense finally asserted:

The manner in which he transported his water to his land was the individual concern of each Indian. He could build his own ditch; join with others in constructing a common ditch; or if fortunate, talk the Government into using treasury and tribal moneys to build a ditch for him. His right to the water must not be confused with the means of transporting it to his land. The United States saw fit to construct irrigation systems which delivered one Indian's water to that Indians land and neglected to construct irrigation systems to take the water belonging to another Indian to that Indian's land, but the latter fact did not increase or diminish the rights of the Indian owners of irrigable land to the use of their waters. The building of irrigating systems was not an exercise of the delegated powers to the Secretary “to secure a just and equal distribution thereof (water) among the Indians residing upon any such reservation.”⁴⁵

Finally, in the weakest link of their argument, the white diverters claimed their own *Winters* right by adding, “Defendants further contend that the purchaser of the Indian title stepped into the shoes of the Indian allottee and thereby became entitled to the same pro rata share of the available water as his Indian predecessor.”⁴⁶

The case had been filed in October, 1935. In August, 1936, Judge Charles Pray handed down his decision. Using much of the language of the defense and reiterating the *Hibner* decision, he wrote:

The Secretary of the Interior had no power or authority to grant water or water rights to one Indian's land and take such rights away from another Indian's land....That when the United States used Tribal funds and constructed the U. S. Indian Irrigation Service ditches, it did so for the sole purpose of conveying water to lands lying under said ditches, and such construction was not an adjudication that the owners of such were legally entitled to the use of water or that the owners of other reservation lands, not under the ditches were not entitled to the use of the waters on the reservation... the Indian predecessors...were entitled to their pro rata share of such available water divided among the total area of irrigable lands in the reservation.⁴⁷

Confirming the *Winters* doctrine, Judge Pray adopted the *Winters* right interpretation of the defense rather than the government:

Under the interpretation of a like treaty in the Winter's case the use of the streams on the reservation were reserved to the Indians...the right of said Indians to the lands and to the use of the waters of said reservation was a common right until the lands were allotted to individual Indians, whereupon the right ...became vested in the individual Indian allottee with a priority of May 7, 1868, *subject to the equal distribution of the available water to the total irrigable lands of the reservation.*⁴⁸

Judge Pray replied to the final argument of the defendants by stating that white successors did indeed stand in the shoes of their Indian predecessors. The water right became appurtenant to the land though the owner would have to put the water to use with "due diligence" in conformity with Montana law. He pointed out that any white successor had no greater right to water than the Indian had, no more water would be put to use than if the original allottee had used his pro rata share. "How can it wreck the system on the reservation if the white man is permitted to stand in the shoes of his Indian grantor, or acquire the right at sales of deceased Indian allotments."⁴⁹ Finally, Pray ordered his own idea of a fair distribution of the water. He declared the duty of water on the reservation land to be one half a miner's inch rather than one inch as it had been.

The judgment handed down by the District Court met with mixed interests. If white successors now held a significant water interest on the reservation, the Crow tribe had lost a significant water right. Downstream farmers on the project, both Indian and non-Indian, would lose another crop. At stake too were sugar interests and the city of Hardin's desire to attract the Holly factory. Full scale water war erupted on the Crow Reservation. But the tribal interest was not that simple. Robert Yellowtail had not aligned himself with the downstream interests. His interests instead lay with the

upstream diverters with whom he shared his political ideology—he was a Republican, his interest in the status quo, and the Bozeman Trail Ditch.⁵⁰

Robert Yellowtail began to promote a policy of early season flooding of the fields, sound policy for the time but one that required prior payment of operation and maintenance fees, money owed to the government annually for the right to use the water from the government project. It was money that nobody had and even white project farmers could not borrow without more certainty as to available water.⁵¹ Senate colleague of Senator Burton Wheeler(D-MT), Elmer Thomas (D-OK) introduced a bill that would allow the Secretary of the Interior to exempt from payment “non-Indian landowners of lands situated within any Indian irrigation project.” The tribes had paid for the project originally by relinquishing their land and committing tribal trust money to build the project. The government had failed to protect tribal right to the water in the irrigation projects. Now, according to Thomas’s vision, the Crow were to bear the cost of operating and maintaining the government project while white successors waited out the drought taking what profits they could. The bill received an adverse report from the Secretary of the Interior.⁵²

The defendants in the Powers case, rejoicing in their legal victory, began to abandon the gravity flow irrigation they had always used in favor of pump irrigation. Even as the drought continued, upstream whites expanded their acreage under the ditch.⁵³ Downstream project farmers prevailed upon Senator Burton Wheeler to intervene. Wheeler paid attention.

In 1936 ironically, Wheeler introduced an amendment to the 1928 Act for the control of floods on the Mississippi River and its tributaries. The 1936 Flood Control Act was an umbrella for Corps of Engineer projects and was amended in every budget. The amendment proposed by Wheeler placed the Bighorn River into the omnibus of

projects undertaken by the Corps. The Corps, under the auspices of the well-funded War Department, traditionally built dams for the purpose of flood control, while the bureaucratically weaker Bureau of Reclamation in the Interior Department undertook dam construction for irrigation purposes. Though the project clearly would benefit irrigation, the Corps had far more resources. Wheeler, casting his lot with the Corps, argued convincingly that damming the Bighorn would prevent silt from traveling downstream to flood the Mississippi.

Incidentally, a few Indians will obtain some benefit from it, if we wish to have that done. We do not have to but we can irrigate Indian land. We are constantly appropriating money to help these Indians become self-supporting. If this dam should be built the whole Crow Reservation could be irrigated at practically no expense. I mention this only as an incidental matter.⁵⁴

The proposed dam would irrigate the Hardin Bench, home to the main holdings of Campbell Farms. In 1936, the amendment failed, but it was the beginning of decade long appropriation battle for the water development project that would become the Missouri Basin or the Pick-Sloan Project. A marriage of the Corps and the Bureau, Pick-Sloan resulted in several decades of dam building along the many tributaries of mighty Mo. The wedding also displaced thousands of Indians whose allotments lay in the path of progress

Senator Wheeler also actively sought funds for smaller storage reservoirs. As early as 1933, supervising Engineer Hanna had appealed for a small dam project on the Little Bighorn or Lodgegrass Creek. By 1936, with continued drought and with the decision in *Powers* allocating each Indian or successor a pro rata share of reservation water, the need became urgent. Wheeler sought and received a line item in the Interior Department budget for \$100,000 for a dam on a tributary of Lodgegrass, Willow Creek. Funding had been secured for a preliminary investigation, but in 1936 Wheeler was no more

successful with the final appropriation than he had been with the dam on the Bighorn. Nor was the WPA interested in funding the Indian project. The agitation would continue and eventually bear fruit, as the *Powers* case continued through the appeals process.⁵⁵

One week after Pray's decision, United States Attorney General Homer Cummings reported the adverse decision to Secretary of the Interior, Harold Ickes and requested his recommendation. Cummings urged appeal based on the threat to all Indian irrigation projects. He also found fault with the "broad pronouncement that all have an equal right to the water and [the judgment] permits all who own land to take the water and construct their private irrigation ditches without regard to the effect that it has upon the irrigation system constructed by the Government."⁵⁶ In reply the First Assistant J. A. Walters replied urging appeal to the Circuit Court. He wrote, "the Court's decision constitutes a rather complete reversal of the fundamental procedure followed in the construction and operation by the Government of Indian irrigation projects." Walters implored action, "Due to the importance of the principles involved..."⁵⁷

Of pressing concern to those on the ground in Montana was Judge Pray's specific language that every acre of irrigable land on the Crow Reservation was entitled to its per acre pro rata share of the available water supply. District Counsel Kenneth Simmons advised the acting director of the Indian Irrigation Service E. C. Fortier that if the decision stood, "not over two gallon buckets of water will be available for each acre of irrigable land. It will mean constant water war."⁵⁸ The government never anticipated nor planned for water use other than their own on the Crow Reservation. They had encouraged through law and policy non-Indian settlement on the reserve, but when their policy came to its logical conclusion, the United States was unwilling to assume responsibility for its carefully crafted answer to the "Indian problem."

The United States attorneys began to formulate two lines of argument for the appeal to the 9th Circuit. First, the attorneys reiterated that, in fact, they had made a “just and equal” distribution of the water according to the terms of the General Allotment Act. Judge Pray had referred to the division as a “usurpation of power” by the Secretary, but the attorneys described the process in detail. The division of irrigable land, while not equal was equitable. The Crow allotment process had designated land as “units.” Each living member of the tribe had received 1030 units of land. One unit of irrigable land equaled two units of agricultural land and four units of grazing land. All tribal members had received an equitable division from the three classifications. By irrigable land, the allotting agent meant only land that was under the government ditch. The upstream white diverters in the Powers case had purchased land that had been designated “agricultural,” and nevertheless had irrigated it. According to the argument, neither they nor their Indian predecessors on “agricultural” land had been entitled to take water from the Little Bighorn or Lodgegrass Creek. For that reason the court “erred in finding that each irrigable acre is entitled to the same amount of water as any other acre on the Crow Reservation.”⁵⁹

The United States also proceeded with its failed line of argument concerning the nature of *Winters* rights. In so doing they again confused the Court as to who indeed held the water right—the United States or the Tribe. To maintain their own authority, they continued to undermine, even sacrifice the Indian water right in favor of a *Winters* interpretation that reserved water to the United States. “The Court erred in finding and holding that the Crow Indians, in their treaty with the United States in 1868, reserved the right to the use of the waters in the Little Big Horn River, Lodge Grass Creek and their tributaries...”; and it “erred in holding that the purpose of the allotment act...was to provide for the distribution of water to individual Indians and that a just and equal

distribution must be made and the duty devolved on the Secretary of Interior...”; and it “erred in finding that the waters upon the Reservation were reserved for the individual Indians and not for the Crow Tribe of Indians.”⁶⁰ Finally the United States objected to the successors of the allottees receiving the same vested right to the use of the waters.

The Circuit Court, comprised of Judges Garrecht, Mathews and Haney, offered little support for the government’s argument. On Feb.1, 1938 the 9th Circuit upheld the lower court. Garrecht wrote:

Appellant [the United States] contends that...all rights in and to the waters... were the property of appellant; that all such rights were by said treaty reserved to appellant and have never been extinguished; that no one else—Indian or white—has ever had the right to divert or use any of said waters without appellant’s consent; that no such right was conveyed to or acquired by any patentee of allotted lands in the Crow Reservation; Appellees contention is unsupported by authority and is contrary to holdings of this court in... *Winters v. United States*.⁶¹

While not calling the IIS project a “usurpation of power” as had Judge Pray, the Circuit Court did reiterate the language limiting the powers of the Secretary of the Interior. It too determined that the Allotment Act gave the Secretary no authority to prescribe rules and regulations governing the distribution of the waters of streams that would, “deprive any allottee or patentee of lands in the Crow Reservation, or the successor in title of any allottee or patentee, of his just and equal right to the use of said waters.”⁶²

Boxing in the courts with its limited theory of *Winters* rights, the government gave judges little latitude. In order to find on behalf of the United States and the Indian Irrigation Service project, both District and Circuit courts had to deny that any individual Indian had acquired water rights as an appurtenance to their allotment. Neither Court was prepared to do that. But significantly, the Circuit Court did reverse the lower court water adjudication. It held that the allocation without all concerned

parties would violate the property holders' rights. Effectively, however, the Circuit refused to rule on whether or not white successors in interest stepped into the shoes of the Indian. The principle of an equal share of water per acre in a pro rata division continued but the practical application, the Circuit determined, was itself a usurpation of the power of the court. Though unhappy with the decision, the government understood that, while the scope of the division was now determined by the court, the control of the allocation would remain at the discretion of the Secretary.

The 9th Circuit decision now stood as the law of the United States for pending cases in Washington, Idaho, and Montana. Of most concern to Interior were the narrowed rights of the Secretary to determine water use on the reservation. The limitation of secretarial power was far and away the primary reason an appeal to the Supreme Court was contemplated. Urging an application for certiorari, Regional Solicitor Simmons wrote to the Solicitor General of Interior, Nathan Margold. "The Circuit Court has definitely placed a limitation upon the discretionary power granted the Secretary." Furthermore, Simmons argued that the Circuit Court had enlarged on the trial court:

...the inevitable conclusion must be that each irrigable acre of land on the Crow Indian Reservation held by an allottee and patentee or their successors in title is entitled to its pro rata share of the waters and streams of the reservation... This interpretation of ...the 1887 Act is highly dangerous and inimical to the interests of the United States on every Indian Reservation in the western part of the United States where the government has expended millions of dollars for the construction of irrigation projects...

He added for emphasis: "Should this decision stand the Secretary of the Interior would have no control on any treaty reservation..."⁶³

In defending the legal craftsmanship of his trial court and Circuit appeal, Simmons wrote: " Every effort has been made by all of us to support the Government's theory of

Indian water rights and to obtain certain principles of law from the courts which would protect the United States, the Secretary of the Interior and his agents in the administration and operation of Government irrigation projects on Indian reservations.”

⁶⁴ U.S Attorney for the Department of Justice, Montana District, Lewis Brown joined Simmons in his concerns. As it stood, the decision “limits the power of the Secretary of the Interior...to that of a mere ditchrider.”⁶⁵ Certainly, as they contemplated appeal, the Department of the Interior was not as concerned with maintaining the principle of Indian water rights as with maintaining the discretionary power of the Secretary. Indeed they were willing to sacrifice Indian water rights for the principle of secretarial command.

The Department of the Interior, under the headstrong leadership of Harold Ickes and Solicitor Nathan Margold, was unanimous in its recommendation to Justice to petition the Supreme Court for a review of the decision. The Justice Department, always less aggressive and now under the temporary leadership of Solicitor General Robert Henry Jackson, was not so certain. In one long meeting on April 28, 1938 and in a later brief prepared for the new Attorney General, Carl McFarland, Assistant Attorney General in the lands division urged against an appeal. He wrote: “The Winters case...seems to foreclose the claim advanced by the United States. The Supreme Court decided there that the right to the use of waters was incident to the Indians’ right to occupancy thereto and that this right was reserved to the Indians by implication.” ⁶⁶ The only governmental claim to the water, according to McFarland, was the congressional authority granted in the General Allotment Act and subsequent appropriations. He urged that no claim be made by the United States to the exclusive use of the water.

Reluctance to appeal also stemmed from the concurrent loss in the high court on a similar question. In *United States v. Shoshone Tribe of Indians* (1938), the government

had claimed that, at the time of the Shoshone treaty, all mineral and timber rights had been reserved by the United States and that the Shoshone Tribe had retained only a right of occupancy. In this case, one that had pitted tribal interests against the government in the U.S. Court of Claims, the Supreme Court came down on the side of tribal interests over that of the government. Justice Butler for the Court wrote:

“...although the United States always had legal title to the land and power to control and manage the affairs of the Indians, it did not have power to give to others or to appropriate to its own use any part of the land without rendering, or assuming the obligation to pay just compensation to the tribe for that would be not the exercise of guardianship or management, but confiscation.”⁶⁷ Disregarding both McFarland’s warning and the recent loss, the Attorney General decided to appeal on behalf of the Interior’s right to secretarial waters. Both the McFarland brief and the *Shoshone* case would influence the Government’s appeal.

Writing for the Justice Department, Charles W. Leaphart, lands division and Harvard educated attorney, wrote the “masterly” petition which McFarland passed to Jackson. Jackson authorized it May 23, 1938.⁶⁸ The petition followed the McFarland line of reasoning regarding the nature of *Winters* rights. The questions submitted to the high Court on appeal included whether the waters were reserved to individual Indians, as had been held in the lower courts or, as the United States now argued, reserved and expressly held in tribal ownership. The guardian relationship, with the sanction of Congress in the General Allotment Act, had authorized the Secretary to control water distribution for the benefit of the Tribe. Congress, with plenary power over all Indian relations, had never granted individual interests in the use of waters of the reservation; instead it had placed control of them under the Secretary of the Interior. Moreover, Leaphart argued, should the lower court prevail and each acre entitled to its pro rata

share of the available water, the thousands of acres so affected could never be economically irrigated.

In the government's brief, the argument became more persuasive. With the revised theory of Winters right, now excluding exclusive government ownership, Leaphart reiterated: "The Government is not stressing any claim made below of ownership of these waters by the United States, except as guardian of the Indians and their tribal property, since whether the fee is in the Indians or the United States is immaterial."⁶⁹

Leaphart also reiterated with emphasis that the water right would not have become appurtenant to the land under any government conveyance unless expressed, nor would the right have been passed under Montana state law unless the right had been expressly affixed. The Crow Indians would be the only entity whose water right could be passed as an appurtenance without expressly stating so.

The upstream diverters had known only victory in the courts and did not substantially change their defense. They continued to claim that the water right had passed to individual Indians at allotment. Using their equal protection argument, they asserted that each individual Indian acquired, in the fee, water rights to their individually allotted land with only trust restrictions as to its alienation, and no reservation by the United States. One significant addition to their argument involved their response to the government's refined interpretation of Winters rights as being tribally owned. Respondents argued:

The Winters case holds that the waters were reserved for use on the arid lands of the reservation so that the Indians could make their living as an agricultural and pastoral people; and that without irrigation these lands were valueless. It is not contemplated that the agriculture and pastoral pursuits should be carried on as a tribe. OR THAT THERE SHOULD BE ANY COMMUNISTIC FARMING; On the contrary, the treaties provide that the lands should be allotted in SEVERALTY.⁷⁰

The defense attorneys incorporated into their argument the belief held by many, that Collier's Indian Reorganization Act was communistically inspired. Though conservative forces frequently attacked the New Deal generally for such sympathies, Collier came under special scrutiny because of his unwavering belief in the ethos of communalism. Senator Burton Wheeler, a loyal New Dealer until the 1936 court packing plan, had also been criticized for his communistic sympathies. Even those within the Indian community organized opposition to the IRA based on the association with communism. Legally, a number of precedents for tribal ownership predated the Indian New Deal, but the defense played heavily on the emotional argument pitting tribal/communal ownership against their own view, that of individual ownership and the unrestricted right of contract.⁷¹

The case came before the high court in November, 1938. Well beyond the "constitutional revolution" of 1937, the Court included Chief Justice Charles Evans Hughes, Louis Brandeis, Harlan Fiske Stone, the pivotal Owen Joseph Roberts, controversial new Roosevelt appointee Hugo Black, and two of the remaining "Four Horsemen," Pierce Butler and James McReynolds. The Court had ruled consistently to support the legislation of the second New Deal and both the Justice Department and Interior had every reason to believe that it would be similarly disposed with *U.S. v. Powers*.⁷² However, Justice McReynolds, appointed to the Court in 1914, fiercest of the Four, responsible for felling the National Industrial Recovery Act, the AAA, and the minimum wage, reared back, ignored what many perceive to be a so-called switch in time, and wrote his last majority opinion. The opinion, one that denied to the United States an injunction against the diverters, was entirely consistent with his beliefs: equal protection, private contract over public interest, and federalism over a strong central

government. Exercising his last chance to slap down the overmighty Secretary of the Interior, Harold Ickes, McReynolds wrote:

Manifestly the Treaty of 1868 contemplated ultimate settlement by individual Indians upon designated tracts where they could make homes with exclusive right of cultivation for their support and with expectation of ultimate ownership. Without water productive cultivation has always been impossible. We can find nothing in the statutes after 1868 adequate to show Congressional intent to permit allottees to be denied participation in the use of waters essential to farming and home making.... The Secretary of the Interior has authority (Act 1887) to prescribe rules and regulations deemed necessary to secure just and equal distribution of waters. It does not appear that he ever undertook so to do. Certainly he could not affirmatively authorize unjust and unequal distribution. The statute itself clearly indicates Congressional recognition of equal rights among resident Indians. Adoption by the Secretary of plans for irrigation projects to serve certain lands was not enough to indicate a purpose to exclude other land from participation in essential water and thereby destroy the equal interest guaranteed by the Treaty.⁷³

The Supreme Court denied the injunction sought by the United States. There was no written dissent. McReynolds' decision affirmed the Circuit in its opinion that individual Indians received an equal division of reservation water at allotment; it also upheld the Circuit in their decree overturning Judge Pray's adjudication of water rights on the Crow reservation. "We do not consider the extent or precise nature of respondents' rights in the waters. The present proceeding is not properly framed to that end."⁷⁴ The Court had left open the prospect that the Secretary of the Interior might still make a just and equal distribution. The project, paid for with the tribal trust fund, did not have priority; tribal rights did not have priority. The water right had passed to the individual with the fee in the land. But even as the high court denied total secretarial discretion, it also left the "precise nature" of white successor rights inchoate. That alone was cause for celebration at Interior.

The *Powers* decision in both lower courts and in the Supreme Court introduced language that extended the *Winters* right to all the land on the reservation that could be irrigated. Throughout the briefs, the decisions, and correspondence the terminology of ultimate irrigable acres is used. When, in the adjudication of the Colorado River, the watermaster examined the history of Indian water rights, he easily found the water right quantified not by individual allotments, not by present need, but by acre. When the master's report reached the courts, "practicably irrigable acres" became the determinate in tribal quantification. The Supreme Court upheld the basis for quantification in *Arizona v. California* (1963). As remarkable as it seemed in 1963, the phrase found its origins in *Powers*. The Court also looked to *Powers* in reaffirming the *Winters* decision: "Winters has been followed by this Court as recently as 1939 in *United States v. Powers*."⁷⁵ With the approach of the era of self-determination in all its policy and political ramifications, the *Winters* Doctrine remained relatively intact.

The legal legacy of *Powers* is complex. While the case seems in hindsight to be a loss to the cause of tribally held reserved rights, it is important to note that for the cause of reserved right and its quantification, in the late 30s, the legal pendulum had begun to swing in a more restrictive direction. In 1939, concurrently with the *Powers* high court decision, the Ninth Circuit heard the case *United States v. Walker River Irrigation District*⁷⁶ In that case the court found: "The area of irrigable land included in the reservation is not necessarily the criterion for measuring the amount of water reserved..." The Circuit Court, finding that the numbers of Indians on the reservation had not increased, limited the water right to the beneficial use at the time of the reservation. The

Powers decision, by reinforcing a liberal line of interpretation, one that tied the water right to the total reservation, preempted the *Walker River* line. All the decisions in *Powers* actually laid legal groundwork for the most significant water rights decision of the 20th century, *Arizona v. California*.

The rights of the white successor in interest were not legally addressed for another half century. Throughout the early 1980s the several *Colville Confederated Tribes v. Walton* decisions formalized to some extent what the various judges had written in dicta in *Powers*. In *Walton*, the full quantity of the Indian right may be conveyed to non-Indian purchasers, though those rights will be limited to the number of acres he owns and what he can put to beneficial use. Limiting the nature of the water right of the individual Indian when he sold his land, the court insisted, was a diminution of his rights.⁷⁷ Despite *Walton*, the precariousness of non-Indian held *Winters* rights remains a source of anxiety to many who have purchased Indian land. Moreover, individual Indian landowners express concern as to the precise nature of their water rights, a confusion that interferes with present day quantification.⁷⁸

On the Crow Reservation in 1939, the *Powers* decision had far more immediate ramifications. There, remarkably, rather than interpret the high Court decision as a loss, the government attorneys began regrouping, recalculating, and reconfiguring the federal government's case. The bureaucrats retained, after all, the responsibility to make a just and equal distribution of the water on the reservation. With the help of a court appointed Watermaster, the Interior Regional Solicitor Simmons reported to A.L. Wathan, Interior's Director of Irrigation, that, "little difficulty will be encountered in securing just and equal distribution."⁷⁹ After calculating the pro rata share of reservation water, the government again issued restrictions to the upstream diverters,

this based on the high court decision. When the white diverters again refused to comply, the United States once again took them to court and this time succeeded. Both the U.S. and the upstream irrigators were enjoined from taking more than their per acre pro rata share of the reservation water. For the downstream government, it was a victory.⁸⁰

Interior's recovery was rapid. With Supreme Court sanction it would now provide an equal per acre pro rata share of water to all reservation land, Indian and non Indian. What had seemed impossible in 1936 now moved rapidly forward in the form of storage reservoirs. The directive fit nicely with the larger vision of the Bureau of Reclamation and the Department of the Interior in the New Deal. The Indian water right established in the *Winters* decision remained inchoate enough to lend itself to the new task. The Bighorn Canyon Dam Association became more vocal in its demands to both Reclamation and the Army Corps of Engineers. The Crow Tribe became far more vocal in opposition. Individual rather than tribal control of the water restricted the ability of the Crow to stop the government bureaucracy in its march toward water development.

On the reservation the government continued in its guardian role, conflating the interests of its projects with its responsibility to the Crow Tribe. White successors in interest reaped the benefits. As they waited for appropriation to dam the Bighorn, the small storage reservoir on Willow Creek, a tributary of Lodgegrass Creek, received bureaucratic approval. The site was carefully selected out of a number of potential sites along the two Bighorn tributaries. The Project engineer rejected non-Indian owned lands in favor of Indian held fee and trust land. Ray Bear Don't Walk appealed to Commissioner Collier:

We Crows do not have enough lands as it is today. This water storage that the white farmers and lessees of Indian Lands would like to have...would not be fair to us heirs. This land is irrigable and tillable. In the long run this

land would be more valuable to us my brother Oliver Bear
Don't Walk and myself in a long run and especially for our
childrens.⁸¹

Despite Crow disapproval for the small dam, in a letter dated June 1, 1938 from W.S.Hanna and Kenneth Simmons to Commissioner Collier, the Indian Irrigation Service and Bureau of Reclamation men described the acquisitions necessary for the small storage reservoir on Willow Creek. The two assured the Commissioner that appropriate guardians had been procured for the minor Crow children involved in the land deals. The young Crow could now legally relinquish their allotments. In their letter the two continued by describing the trust property necessary to fulfill their obligation toward the tribe: "Pretty Tail, 144 acres; Ella Moccasin, 154 acres; Mary Rock, 30 acres; John Grey Bull, 115 acres, Benjamin Spotted Horse, 17 acres; John Fights Well Known, 25 acres; Joseph Fights Well Known 210 acres; Polly Grey Bull 160 acres; and Walks Pretty 47 acres...The United States paid \$6 an acre to dam Willow Creek."⁸²

The dispossession of Indians in the United States would continue despite New Deal policies ending allotment. The loss of land would no longer be accomplished piecemeal with white settlement chipping away at Indian country. Federal policies, still intent on watering the arid west, devoted to the philosophy of efficient use--now multiple use--would justify wholesale condemnation of Indian land. The Bureau of Reclamation, well aware of the "obligation" to provide water to every irrigable acre on every Indian reservation would use the justification to extend its command of the water and dam virtually every river in the west. Reservations proved to be prime locations for reservoirs. As Senator Wheeler had written in 1936, "Incidentally, a few Indians will obtain some benefit...." Many more would not. But the justification of Indian reserved water rights--Winters rights--as interpreted by the courts and the bureaucracy of the

New Deal would lend itself to developing water resources in the west in the 20th century.

¹ W.S. Hanna, Supervising Engineer, U.S. Indian Irrigation Service to water users, July 25, 1932, file "1934-40 *U.S. v Thomas Powers*—Supply Water Litigation," Box 256, Records of the Bureau of Indian Affairs—Crow, RG 75, National Archives and Records Administration—Rocky Mountain Region (Denver).

² *Winters v United States*, 207 U.S. 564 (1908). The outstanding summary of the Winters case is John Lytle Shurts, *Indian Reserved Water Rights: The Winters Doctrine in its Social and Legal Context, 1880s—1930s* (Norman, Oklahoma, 2000. See also Norris Hundley, Jr., "The Dark and Bloody Ground of Indian Water Rights: Confusion Elevated to Principle," *Western Historical Quarterly*, 9 (Oct. 1978) 455-482 and Hundley: "The Winters Decision and Indian Water Rights: A Mystery Reexamined," *Western Historical Quarterly*, 13 (Jan. 1982); Harold A. Ranquist, "The Winter Doctrine and How it Grew: Federal Reservation of Rights to the Use of Water," reprinted in: *Constitutionalism and Native Americans, 1903-1968*, ed. John R. Wunder (New York, 1996).

³ *United States v. Powers*, 305 U.S. 527 (1939).

⁴ *Arizona v. California*, 373 U.S. 546 (1963); *Colville Confederated Tribes v. Walton* (Walton II), 454 U.S. 92 (1981).

⁵ Donald J. Pisani, *To Reclaim a Divided West: Water, Law, and Public Policy, 1848-1902* (Albuquerque, 1992).

⁶ Exhibit Three at 327, *U.S. v Powers*, Transcripts of Record and File Copies of Briefs, Vol. 58, No.102, Archive of the Supreme Court, Washington, D.C. The irrigation program is detailed in *Report on the Crow Reservation Project, Montana* by Robert S. Stockton, Engineer, April 15-1905, Department of the Interior, United States Geological Survey, Reclamation Service, Folder 130 "Crow Reservation Project," Box 466, Entry 3, The Bureau of Reclamation, RG115, National Archives and Records Administration—Rocky Mountain Region (Denver); Also for the history of the Crow Tribe I rely on and am grateful for the work of Frederick E. Hoxie, *Parading Through History: The Making of the Crow Nation in America, 1805-1935* (Cambridge, 1995). A very nice history of this period on the Crow Reservation can also be found in the work of art historian, Peggy Albright, *Crow Indian Photographer: The Work of Richard Throssel* (Albuquerque, 1997).

⁷ Transcript of *U. S. v Powers*.

⁸ C.F. Larrabee, Acting Commissioner to Secretary of Interior, May 25, 1907, Folder 130A, Box 466, Entry 3, The Bureau of Reclamation, RG115, National Archives and Record Administration—Rocky Mountain Region (Denver); The Crow Act of 1920, 41 Stat.751. Testimony taken from James Carpenter in "Montana-Crow Reservation," From Folder 47, Box 2, Legislative Series, The Collection of the Honorable Elmer Thomas, The Carl Albert Center Congressional Archive, University of Oklahoma; Frederick E. Hoxie, *A Final Promise: The Campaign to Assimilate the Indians, 1880-1920* (Lincoln, 1984); Leonard A. Carlson, *Indians Bureaucrats and land: The Dawes Act and the Decline of Indian Farming* (Norman, 1981); Janet A. McDonnell, *The Dispossession of the American Indian, 1887-1934* (Bloomington, 1991); Donald J. Pisani, "Irrigation, Water Rights, and the Betrayal of Indian Allotment," *Water, Land, and Law in the West: The limits of Public Policy, 1850-1920* (Lawrence, 1996).

⁹ Clarence T. Belue, "White Oppression and Enduring Red Tears: Indian Law and the Real Rules for White Control of Crow Lands" (Master of Law Thesis, University of Wisconsin Law School, 1991).

¹⁰ "J.P. MORGAN IS MONTANA FARMER," Folder "Surveys and Investigations," Box 310, Entry 3, The Bureau of Reclamation, RG 115, National Archives and Record Administration—Rocky Mountain Region (Denver). The details of the dead Indian sales reveal themselves in the letters of C.W. Asbury, Superintendent, Crow Reservation, see especially to Maddox, Secretary, Campbell Farming Corporation, January 14, 1931; also many completed forms, "Amendment to Form 5-110," the signed and thumb printed forms relinquishing allotments by Indian heirs, "Land Sales, Correspondence, and Case Files," Box 195, Crow, Bureau of Indian Affairs, RG 75, National Archives and Record Administration, Rocky Mountain Region (Denver).

¹¹ Transcript of *U.S. v Powers*, testimony of defendants, 406-533.

¹² Details of the filings can be found in "Maps, Schedules and Reports," Box 256, Bureau of Indian Affairs- Crow, RG 75, National Archives and Records Administration—(Rocky Mountain Region (Denver)).

¹³ The controversial appointment is detailed in several memos: Collier to Ickes, Memorandum for the Secretary, June 11, 1934, Reel 27, John Collier Papers, The Western History Collection, University of Oklahoma.

¹⁴ Clyde E. Lewis, Project Engineer, Crow Irrigation Project, Crow Agency, Montana to John F. Truesdell, Chief Counsel, Denver Colorado, August 11, 1933, Folder "Maps, Schedules, and Reports," Box 256, Bureau of Indian Affairs-Crow RG 75, National Archives and Record Administration—Rocky Mountain Region (Denver).

¹⁵ Bunston to Hanna, August 18, 1932, "Water Complaints," Box 256, Bureau of Indian Affairs-Crow, RG 75, , National Archives and Records Administration—Rocky Mountain Region (Denver).

¹⁶ Dethlefsen, Big Horn County Bank to Hanna, July 28, 1932, "Supply Water Litigation—*U.S. v Thomas Powers*, 1934-40, Box 256, Bureau of Indian Affairs-Crow, RG 75, National Archives and Records Administration—Rocky Mountain Region (Denver).

¹⁷ "Memorandum of events in connection with water shortage season of 1932," Folder "Water Shortage Season 1932," Box 256, Bureau of Indian Affairs-Crow, RG 75, National Archives and Records Administration—Rocky Mountain Region (Denver).

¹⁸ W.S. Hanna, Supervising Engineer to Commissioner of Indian Affairs, July 30, 1932 "Supply Water Litigation—*U.S. v Thomas Powers*, 1934-40, Box 256, Bureau of Indian Affairs-Crow, RG 75, National Archives and Records Administration—Rocky Mountain Region (Denver).

¹⁹ The term "making and water meet" comes from a letter quoting Chief Counsel John F. Truesdell quoted in Benjamin P. Harwood, District Counsel, Indian Irrigation Service, to C.E. Lewis, Project Engineer, Crow Irrigation Service, March 15, 1933, Billings, Montana, Folder "Maps, Schedules, and Reports," Box 256, Crow-Bureau of Indian Affairs, RG 75, National Archives and Record Administration—Rocky Mountain Region (Denver). Porter J. Preston and Charles A. Engle, "Report of Advisors on Irrigation on Indian Reservation," in Hearings Before a Subcommittee of the Committee on Indian Affairs, Senate, July 8, 10, 11, 12, and 17, 1929 (Washington, D.C., 1930). Meriam Report

²⁰ Kenneth R. Philip, *John Collier's Crusade for Indian Reform: 1920-1954* (Tempe, 1977). See too Graham Taylor, *The New Deal and American Indian Tribalism The Administration of the Indian Reorganization Act, 1934-1945* (Lincoln, 1980).

²¹ Collier to Ickes, Memorandum for Secretary Ickes, June 25, 1933. Reel 27, John Collier Papers, Western History Collection, University of Oklahoma.

²² Indian Reorganization Act

²³ "Memorandum," June 25, 1933, Collier Papers.

²⁴ Robert Yellowtail, Superintendent Crow Agency to C.S. Lewis, Project Engineer, Crow Irrigation Project, no date, but C.S. Lewis to Yellowtail, August 9, 1934 replies, "I have your note of several days ago..."; C.S. Lewis to Otto Waldschmidt, ditchrider, Crow Irrigation project, July 13, 1934. Several letters in this correspondence detail the violations, Folder "Correspondence Water Litigation, 1934," Box 256, Bureau of Indian Affairs-Crow, RG 75, National Archives and Records Administration—Rocky Mountain Region (Denver).

²⁵ Telegram, Kenneth R.L. Simmons, District Counsel, Indian Irrigation Service and Bureau of Reclamation and W.S. Hanna to Nathan R. Margold, Solicitor, Interior Department, June 4, 1934, File Thomas R. Powers, 90-2-2-37, Entry 114, Department of Justice, RG 60, , National Archives at College Park, College Park, MD.

²⁶ Oscar L. Chapman, Assistant Secretary, Dept. of Interior, to Homer Cummings, Attorney General, Department of Justice, June 12, 1934, 90-2-2-37, Entry 114, Department of Justice, RG 60, National Archives at College Park, College Park, MD.

²⁷ *U.S. v. Rio Grande Dam and Irrigation Company*, 174 U.S. 690 (1899); *U.S. v. Winans*, 198 U.S. 371 (1905).

²⁸ *Conrad Investment Co. v. U.S.*, 161 F. 829 9th Cir. (1908) 14.

²⁹ *Skeem v. U.S.*, 273 F. 93 (9th Cir. 1921) 21.

³⁰ *U.S. v. Hibner*, 27 F. 2d 909 (E.D. Idaho, 1928) 29.

³¹ *U.S. v. Walker River Irrigation District*, 11 F. Supp. 158 (D. Nevada 1935), 14 F. Supp 11 (D. Nev 1936), reversed 104 F. 2d 335 (9th Cir.1939); *U.S. v. Orr Ditch*; *U.S. v Alpine Land and Water Co.*; *Alexander v. U.S.*; *Burch v. U.S.*; *Smith v. U.S.*; and *U.S. v. McIntyre* 101 F.2d 650 (9th Cir.). The *McIntyre* case can be found at 90-2-2-29, Department of Justice, Entry 114, RG 60, , National Archives at College Park, College Park, MD.

³² *U.S. v Arizona*, 295 U.S. 174; 55 S.Ct 666; (1935).

³³ Oscar L. Chapman, Assistant Secretary, Dept. of Interior, to Homer Cummings, Attorney General, Department of Justice, June 12,1934, 90-2-2-37, Entry 114, Department of Justice, RG 60, National Archives at College Park, College Park, MD.

³⁴ Benjamin P. Harwood, District Counsel, Indian Irrigation Service, to C.E.Lewis, Project Engineer, Crow Irrigation Service, March 15,1933, Billings, Montana, Folder "Maps, Schedules, and Reports," Box 256, Bureau of Indian Affairs-Crow, RG 75, National Archives and Record Administration—Rocky Mountain Region (Denver).

³⁵ *U.S. v Powers*, Transcripts of Record and File Copies of Briefs, Vol. 58, No.102, Archive of the Supreme Court, Washington, D.C.,26.

³⁶ General Allotment Act of February 8, 1887, 24 Stat. 388; Act of April 11, 1882, 22 Stat. 42; Act of March 3, 1891 26 Stat. 1040.

³⁷ In the District Court of the United States, District of Montana, Transcript of Trial, United States of America, Plaintiff, vs. Thomas R. Powers et al, Defendants, Vol. 1 (Carbon for Indian Department) p.81-87, Box 256, Bureau of Indian Affairs-Crow, RG 75, National Archives and Records Administration—Rocky Mountain Region (Denver).

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ *U.S. v Powers*, Transcripts of Record and File Copies of Briefs, Vol. 58, No.102, Archive of the Supreme Court, Washington, D.C. 212.

⁴¹ *Winters v United States*, 207 U.S. 564 (1908).

⁴² Treaty of May 7, 1868 ,15 Stat. 649.

⁴³ In the District Court of the United States for the District of Montana Billings Division, United States v. Thomas R. Powers, Brief of Antler Land Company, a Montana Corporation, B.B. Belken, Edith Belken, Judy Walsh, H.G. Campbell, Jay H. Henman, Ruth Henman, Billie Miller and Robert J. Miller, at 6, File Thomans R. Powers, 90-2-2-37, Entry 114, Department of Justice, RG 60, National Archives at College Park, College Park, MD.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*, p. 8.

⁴⁶ *Ibid.*

⁴⁷ *U.S. v Powers*, Transcripts of Record and File Copies of Briefs, Vol. 58, No.102, Archive of the Supreme Court, Washington, D.C.,250-52

⁴⁸ *Ibid.*, 262-63.

⁴⁹ *Ibid.*, 276.

⁵⁰ In other action the Crow moved to assert an old claim in *The Crow Nation or Tribe of Indians of Montana v. The United States*, 81 Ct. Cl.238 1935.

⁵¹ Robert Yellowtail, "Flood Waters to Raise Grass," *Indians at Work*, V. II, 16: 45. Yellowtail urges all having water rights to come into the agency to clear their back irrigation charges. "Petition" and letter from Lodgegrass, Little Bighorn, and Reno Ditch owners and tenants to Hanna, March 26, 1935 details the difficulty of paying the operation and maintenance charges, Folder "Land Areas and Crops, Water Litigation, Box 256, RG 75 Crow, Bureau of Indian Affairs, National Archives and Records Administration—Rocky Mountain Region (Denver).

⁵² Elmer Thomas. Legislative Series, Box 21, Folder 72, The Carl Albert Center Congressional Archives, University of Oklahoma.

⁵³ Details of the pumping operation and water war are contained in a letter Kenneth Simmons, District Counsel, Indian Irrigation Service and Bureau of Reclamation, Billings, Montana to E. C. Fortier, Acting Dirctor, Indian Irrigation Service, Washington, D.C., August 21, 1936, Folder "Thomas R. Powers", 90-2-2-33-37, Entry 114, RG 60, Department of Justice, National Archives at College Park,

College Park, MD; "Acreages under private diversions from Little Bighorn and Lodgegrass Streams, 1939" gives figures of 3053 owned by Antler Land Co.-Tschirgi. In 1934 Antler owned 1500 according to court testimony at 502. Folder "Land Areas and Crops Water Litigation," Box 256, RG 75 Crow, Bureau of Indian Affairs, National Archives and Records Administration—Rocky Mountain Region (Denver). Tschirgi testimony in Transcripts of Record and File Copies of Briefs, Vol. 58, No.102, Archive of the Supreme Court, Washington, D.C.

⁵⁴ Senator Burton Wheeler received many letters in support of storage beginning in 1933. A number can be found in Folder "Maps, Schedules, and Reports," Box 256, Bureau of Indian Affairs-Crow, RG 75, National Archives and Record Administration—Rocky Mountain Region (Denver). H.R. 8455 was introduced January 16, 1936 and referred to the Commerce Committee. Wheeler's speech before the Senate is in the Congressional Record—Senate, May 20, 1936, pp.7796-7805. The best work on water development throughout the 20th century as it pertains to Indians is Daniel McCool, *Command of the Waters: Iron Triangles, Federal Water Development and Indian Water* (Berkeley, 1987); also see Michael Lawson, *Dammed Indians*; Marian E. Ridgeway, *The Pick-Sloan Plan* (Urbana. 1955).

⁵⁵ Many letters regarding storage sites can be found in Folder "Storage Dams," Box 248, Bureau of Indian Affairs- Crow, RG 75, National Archives and Records Administration—Rocky Mountain Region (Denver); WPA references see especially William Zimmerman, Assistant Commissioner of Indian Affairs to James E. Murray, Senator, Montana, November 7, 1936.

⁵⁶ Homer Cummings, United States Attorney General to Harold Ickes, Secretary of Interior, August 11, 1936, Folder "Thomas R. Powers", 90-2-2-33-37, Entry 114, Department of Justice, RG 60, National Archives at College Park, College Park, MD.

⁵⁷ J.A. Walters, Assistant Secretary of Interior to Homer Cummings, Attorney General, September 15, 1936, Folder "Thomas R. Powers", 90-2-2-33-37, Entry 114, Department of Justice, RG 60, National Archives at College Park, College Park, MD.

⁵⁸ Kenneth Simmons, District Counsel, Indian Irrigation Service and Bureau of Reclamation, Billings, Montana to E. C. Fortier, Acting Director, Indian Irrigation Service, Washington, D.C., August 21, 1936, Folder "Thomas R. Powers", 90-2-2-33-37, Entry 114, Department of Justice, RG 60, National Archives at College Park, College Park, MD;

⁵⁹ "Memorandum for the Solicitor General—Recommendation that an appeal be taken to the United States Circuit Court of Appeals for the Ninth Circuit: Statement of the case, October 30, 1936, Folder "Thomas R. Powers", 90-2-2-33-37, Entry 114, Department of Justice, RG 60, National Archives at College Park, College Park, MD; and Transcripts of Record and File Copies of Briefs, Vol. 58, No.102, Archive of the Supreme Court, Washington, D.C. at 569-579.

⁶⁰ *Ibid.*, 579.

⁶¹ *Ibid.*, 590.

⁶² *Ibid.*

⁶³ Kenneth Simmons, District Counsel, Indian Irrigation Service and Bureau of Reclamation, Billings, MT to Nathan Margold, Solicitor, Interior Department, Washington, D.C. March 9, 1938, Folder "Thomas R. Powers", 90-2-2-33-37, Entry 114, Department of Justice RG 60, National Archives at College Park, College Park, MD.

⁶⁴ *Ibid.*

⁶⁵ John B. Tansil, United States Attorney for Montana by Lewis Brown, Assistant U.S. Attorney, Montana to the Attorney General of the United States, Feb 14, 1938, Folder "Thomas R. Powers", 90-2-2-33-37, Entry 114, Department of Justice, RG 60, Department of Justice, National Archives at College Park, College Park, MD.

⁶⁶ "Memorandum for the Files," April 28, 1938 by O.A. Provost, Assistant Chief, Appellate Section, Department of Justice; Carl McFarland, Assistant Attorney General, "Memorandum for the Solicitor General, May 9, 1938, Recommending Against Petition to the Supreme Court of the United States to Issue Certiorari to the Circuit Court of Appeals for the Ninth Circuit." Folder "Thomas R. Powers", 90-2-2-33-37, Entry 114, Department of Justice, RG 60, National Archives at College Park, College Park, MD.

⁶⁷ *U.S. v Shoshone Tribe of Indians*, 304 U.S. 58 S.Ct.

⁶⁸ "Memorandum for the Solicitor General, May 23, 1938, Recommending Petition for Certiorari" Authorized by Robert H. Jackson, May 27, 1938," Folder "Thomas R. Powers", 90-2-2-33-37, Entry 114, Department of Justice, RG 60, National Archives at College Park, College Park, MD; Petition for a Writ of Certiorari," Transcripts of Record and File Copies of Briefs, Vol. 58, No.102, Archive of the Supreme Court, Washington, D.C.

⁶⁹ "Brief for the United States", *United States of America v. Thomas R. Powers et al.*, No 102, The Supreme Court of the United States, October Term 1938, *Transcripts of Record and File Copies of Briefs*, Vol. 58, p.16, Archive of the Supreme Court, Washington, D.C.

⁷⁰ "Brief for the Respondents," *United States of America v. Thomas R. Powers et al.*, No 102, The Supreme Court of the United States, October Term 1938, *Transcripts of Record and File Copies of Briefs*, Vol. 58, p.31, Archive of the Supreme Court, Washington, D.C.

⁷¹ Alice Jemison was a particularly virulent opponent to the New Deal. A Creek Indian, Jemison testified before the Dies Commission attacking Harold Ickes and John Collier for their communistic sympathies. Jemison seems to have had Nazi sympathies and believed Indians to be part of the Aryan race. She was part of the American Indian Federation led by Joseph Bruner, an organization that opposed the New Deal for Indians. See Harold Ickes, *The Secret Diary of Harold Ickes: Inside Struggle*, v. 2 (New York, 1954) 520; Liz Sonneborn, *A to Z of Native American Women* (New York, 1998).

⁷² The "switch in time" has been thoroughly debated in New Deal Court historiography. For a recent perspective see Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* (Oxford, 1998). Cushman's interpretation challenges William E. Leuchtenburg view, best articulated in the long anticipated, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* (Oxford, 1995). A nice historiographical article can be found in Michael E. Parrish, "The Hughes Court, the Great Depression, and the Historians," *Historian* 40 (February 1978), 286-308.

⁷³ Transcripts of Record and File Copies of Briefs, Vol. 58, No.102, Archive of the Supreme Court, Washington, D.C.

⁷⁴ Ibid.

⁷⁵ *Arizona v. California*, 373 U.S. 546 (1963); *Colville Confederated Tribes v. Walton (Walton II)*, 454 U.S. 92 (1981).

⁷⁶ *United States v. Walker River Irrigation*, 104 F. 2d 334 (C.C.A.9 1939).

⁷⁷ *Colville Confederated Tribes v. Walton (Walton II)*, 454 U.S. 92 (1981).

⁷⁸ Chronic anxiety among both Indian and non-Indian allottee landowners as to the extent of their water right received reinforcement by a Court of Claims decision in 1990: "Title [to water] resides in the tribe itself and is not held by individual Indians...The Supreme Court has only confirmed that an Indian allottee has the 'right to use some portion of tribal waters essential to cultivation.'" 21 Cl Ct. 285 (1990).

⁷⁹ Simmons reported to the Interior's Director of Irrigation, A.L. Wathan, Jan 31, 1940, Folder "Correspondence, and Case documents," Box 256, Bureau of Indian Affairs-Crow, RG 75 National Archives and Record Administration, Rocky Mountain Region (Denver).

⁸⁰ Preliminary injunction, *United States v. Thomas R. Powers* in the District Court of the United States, Billings Division, September 1939. Folder "Correspondence, and Case documents," Box 256, Bureau of Indian Affairs-Crow, RG 75, National Archives and Record Administration, Rocky Mountain Region (Denver).

⁸¹ Bear Don't Walk to Collier, Folder "Emergency," Box 283, RG 75 Crow, Bureau of Indian Affairs, National Archives and Record Administration, Rocky Mountain Region (Denver).

⁸² Simmons and Hanna to Collier, Folder "Correspondence-Willow Creek Dam-1936-41" Box 248, Bureau of Indian Affairs-Crow, RG 75, National Archives and Record Administration, Rocky Mountain Region (Denver).

Chapter Two

Rehearsal at Willow Creek

The Little Bighorn River, with its tributary Pass Creek, rises in Wyoming, just south of the Crow Reservation boundary. Large only in our mythic memory, the creek flows north across the Wyoming- Montana border onto the Crow Reservation. Lodgegrass Creek joins the Little Horn from the west and Owl Creek from the east, en route to its confluence with the Bighorn at Hardin. In 1932, as the river crossed the Reservation, it supplied water first to private irrigation ditches, the Tschirgi or Farmer's Alliance ditch, then to the Bozeman Trail Ditch, an irrigation ditch that blended private and public money. The river then flowed onto the Indian Irrigation Project diversions, Upper Little Horn No. 2 and 3, then Forty Mile Ditch. Joined by Lodge Grass Creek with its own Indian Service projects, Lodge Grass 1 and 2, the Little Horn then supplied the Reno Ditch and Agency Ditch as it passed the site of the Custer "massacre." Twelve miles north of the infamous battle, if there was any "through cruising," the Little Horn joined the Bighorn. Below the Agency Ditch, in the searing late summers of the 1930s, the Little Bighorn River frequently ran dry.

Adding to local misery, as it crossed from Wyoming onto the Crow Reservation, little water ran in the Bighorn. Hardin locals liked to joke that the river flowed into Montana "only on holidays." Long under the affectionate eye of the Bureau of Reclamation, Wyoming's Bighorn was among the most overappropriated rivers in the west, and Wyoming interests had been assiduous in establishing beneficial use of its water resources. In Montana, white interests, both on the Reservation ditches and local Hardin boosters, agreed on three solutions to the problem: on-reservation adjudication of water rights; an interstate compact negotiating water allocation between Montana and Wyoming; and storage—government and/or privately built dams across the Bighorn and Little Horn Rivers.

Nationwide, even as the New Deal's Indian Reorganization Act formally ended the dispossession of the allotment policy, federal water projects would eventually capture another 1.8 million acres of Indian land. The federal government, trustees of the Crow Tribe, feared the first two solutions, compacting and adjudication. Both affirmed state authority over water rights, and they inherently challenged "Secretarial Waters," the inchoate concept granting to the Secretary of the Interior the right to administer water that fell under his domain.

Secretarial waters included both water held in trust under the Winters Doctrine for Indian reservations and stored water. Placed under the authority of the Secretary of the Interior for "fair and equal distribution" by Congress in the General Allotment Act of 1887, the Indian reserved right was considered real property held in trust. Stored water was considered surplus, unclaimed runoff, and on projects built by the Department of Interior, stored water also fell under the command of Secretary of the Interior. However, stored water was considered personal property of the United States. These two classifications of secretarial waters had been thoroughly blended in the legal vocabulary and in the budgets of the Department of Interior as it freely interpreted what the Indian reserved right was.

For the Department of the Interior, storage reservoirs provided an answer to the dilemma of state control and supplied a solution to their trust responsibility to divide "equally" Indian reserved water. But in creating storage, Interior needed to be mindful not to create increased demand, one that might outstrip the available water and force a state initiated general stream adjudication. On the Crow Reservation, the government began in a small way with the dam on Willow Creek.¹

The Indian Irrigation Service first requested appropriations for a small reservoir to serve the Little Bighorn and Lodge Grass Project as early as 1932. Drought in the early 1930s along with increasing demands by both the upstream diverters and the government project's "sugar beet men"—Holly Sugar corporate farmers— emphasized the importance of storage to the IIS.

When Franklin Roosevelt's solution to the depression involved enormous expenditures for public works projects, hopes ran high that the small dam would be funded quickly. But the Indian project proved to be a complex proposition for the "alphabet soup" of new agencies within New Deal bureaucracy.²

The Water Users of the Lodge Grass District No.1 were the first to officially voice their demands for a storage dam. In August, 1932, W.S. Hanna, Supervisor of the area Indian projects received a complaint from the white farmers on the government project, along with a letter from their spokesman, Hardin lawyer H. W. Bunston. The farmers had suffered severe crop losses, and they demanded two things. First they wanted an end to the policy of using Indian labor for the upkeep of the ditches. This policy dated back to the very beginning of both the Indian Irrigation Service and the Bureau of Reclamation. But white owners and leasees deemed the policy "expensive and unsatisfactory." What water there was, they claimed, could not flow efficiently down ditches operated by men who did not know how to farm the land themselves. In addition, Bunston and the Lodge Grass men urged that "if water is to be furnished for beet and bean production that storage must be provided" and "preliminary surveys be made at once." In the meantime, the white farmers strongly suggested that the late season cash crop, sugar beets, be given priority for the depleted water supply.³

After rejecting the sugar beet priority rotation plan, Hanna wrote Commissioner of Indian Affairs Rhoads urging that funds be provided for a Lodge Grass Valley survey. Pointing out the desirability of the location, he wrote, "Some of the best land on the Crow Reservation is located under the Lodge Grass Units and a considerable portion of this land is adjacent to the Burlington Railroad. That land is adapted to raising beets and beans, crops that require considerable amounts of late season irrigation....Should a feasible storage site be found, the

construction of a storage reservoir would be fully justified.” The request, made in the last days of the Hoover administration, never received attention.⁴

Hanna continued his budgetary requests, even as he also urged that legal action be initiated against the white diverters upstream from the project. In October, 1933, he addressed the new Commissioner of Indian Affairs, John Collier, urging \$2500 in the Public Works Administration budget for preliminary surveys of the Lodge Grass watershed. The President and Congress had approved over 6 million dollars for Public Works funds for use on Indian reservations, the greater portion for irrigation work. No specific appropriations had been made, and Hanna hoped to have the storage reservoir on Lodge Grass Creek funded with the PWA money.⁵ Hanna appealed to the commissioner with what he considered to be impressive statistics. Of the 22,750 acres under the ditch, three quarters were Indian owned and would benefit from the storage reservoir. Hanna also knew but did not relay that Indian-owned did not mean Indian-farmed. Most Indians leased their land to white farmers. The Indians owned and farmed less than 400 acres of the 8500 acres under cultivation.⁶

The New Deal Commissioner of Indian Affairs, John Collier, was besieged with funding requests for a small storage reservoir on the Crow Reservation. Along with Hanna’s request, Collier also received a petition from Lodge Grass tenants and owners, urging “immediate” funding for the project. Specifically they reiterated Hanna’s request— \$2,500 for surveying. Montana Senator J.E. Erickson delivered the petition personally. Collier declined to enter a line item for the project in his first budget, though he “appreciated” the need. He held out hope that “requisite funds will be made available in due course.”⁷

Early in 1934, Hanna sent another request for the storage dam on Lodge Grass along with his basin wide project budget. The budget included an additional dam in Wyoming to create the Washakie Reservoir, part of Wyoming’s Wind River Irrigation Project. The dam had been funded in the prior fiscal year and now needed supplemental funding. That project totaled

\$185,000 but only \$150,000 had been appropriated. The PWA had partially funded many projects to get them started quickly, and men like Hanna had adapted their budget requests to include initial start up funding. Final amounts, they hoped would follow. When constructing a dam however, the piecemeal approach was not only inefficient, it was dangerous, as Hanna pointed out with some frustration: “to be forced to discontinue work with the principal dam only partially completed would result in the complete destruction of that portion of the job with resultant loss of property and danger to life and property below the dam site.”⁸ The budget maneuver worked so well that it would again be incorporated in the request of Willow Creek Dam.

Hanna decided not to ask for a survey appropriation for Willow Creek, and instead he submitted a request for the total cost of the dam: “a reservoir of sufficient capacity to offer great relief...can be completed for the sum of \$175,000.” For emphasis he added, “This is a most urgently needed addition to the existing Crow Irrigation Project constructed works and it is respectfully requested that any further estimates for Public Works money include this item.”⁹

Hanna sent a far more detailed budget to the Project Engineer at Crow, Clyde Lewis. Explaining to Lewis that the report should be “considered confidential,” Hanna detailed the total cost of construction alone at \$325,000. While the more powerful dam builders, the Bureau of Reclamation and the Army Corps of Engineers, had more discretion over year to year operations, the Indian Irrigation Service still relied on annual appropriations, even for projects that would span several years. Budgetary manipulation was a necessary skill.¹⁰

Congress was no more inclined to approve the project in 1935, striking the storage dam from the PWA appropriation. Increased interest in a major dam on the Bighorn itself captured the congressional loyalty of both Montana and Wyoming representatives. On Crow, no rain fell in June, July, August, or September. Fortunately, other federal relief projects, meant only

for Indians, had received funding. In 1934, John Collier appointed with the support of the Crow tribe, tribal chairman Robert Yellowtail to the position of Superintendent of the Crow Agency.

Robert Yellowtail had risen to prominence in the tribe when Senator T.J. Walsh attempted pass legislation in 1917 to open the remaining reservation to white settlement. Born in 1889 near Lodge Grass, he was educated in boarding school, the Sherman Institute in Riverside, California. Moving back to Crow, he studied law by correspondence course, and ranched in the Lodge Grass area. Yellowtail unabashedly shared an economic interest in both water development and ranching with his non-Indian neighbors. In 1914 he filed a claim on the Bighorn Canyon power site and he served as an officer in the private/public Bozeman Trail Ditch on the Little Bighorn.¹¹

Collier knew Yellowtail prior to the Commissioners appointment to head Indian Affairs. Yellowtail had approached the then executive secretary of the American Indian Defense Association with a proposed plank to be included in the Democratic platform. The plank was not put in the Democratic platform, but at Yellowtail's instigation, it was included in the Republican. Yellowtail himself ran for Congress in 1924 and for State Senate in 1932 as a Republican. His platform included federal release to state jurisdiction for all Indian property. His opponent in the Senate race, C.H. Asbury, resigned as Crow Superintendent to run for the seat. Yellowtail lost. Collier remembered the tribal chairman and in a revolutionary move, he transferred Asbury's replacement, James Hyde to Crow Creek, ordered a tribal referendum, and despite some dissent in the tribe and the close scrutiny of Harold Ickes, Collier appointed Yellowtail to the position of Crow Superintendent.¹²

Respect between the two wavered over Yellowtail's battle against Crow participation in Collier's Reorganization Act, but generally, the Crow tribe benefited from the relationship. In 1935 alone, between the Indian Emergency Conservation Work, funded initially under the

Unemployment Relief Act of 1933, and the National Industrial Recovery Administration, New Deal programs employed Indian labor on 56 public works projects on the Reservation with total funding of \$190,000.¹³ That year Crow labor constructed 21 small stock ponds benefiting Indian allottees like Rena Takes a Wrinkle. Each pond required a dam and each dam generated a set of highly professional blueprints. These small earthen dams cost anywhere from \$400 to \$700 and while not as sophisticated as the Irrigation Service projects, they helped promote stock raising—a far more efficient use of land. Yellowtail shared with his Crow predecessor Chief Plenty Coups, the vision of stock raising for the Crow Reservation. He also shared economic interests with non-Indians stockmen who leased the range land from the Crow tribe. Both were Republicans.¹⁴

Yellowtail and the Crow were not the only ones who understood the advantages of the small dams. Even as the Corps of Engineers contemplated a major earthen dam downstream on the Missouri at Ft. Peck, a dam begun in 1936, one local farmer contrasted the huge project with ones he thought more efficient in scope. Custer farmer C.S. Horton wrote Assistant Secretary of State Raymond Moley, who had written an article, “Back to the Country,” that glorified the farming life. To what he hoped would be a receptive audience, the farmer suggested that instead of constructing the big dam, the government should use the money exactly as the Crow were, for thousands of small dams for individual farmers. Horton had tried before to interest the government but, “I found them not deeply interested as it did not make a big soft spot whereby our influential City brethren could shove his arm into up to his shoulder at least...very few of these dams would cost as much as one thousand dollars and the water trapped could be used....to irrigate a few acres.” Horton’s vision for water development in the arid west had merit. In 1936, the Department of Agriculture, after losing the Public Works Administration to Interior, implemented its own small dam project on thousands of midwestern farms. On the Crow Indian reservation, a knowledgeable and

visionary superintendent, who had a long term stake in the land, had already seen to it that just such a program received funding.¹⁵

Other New Deal funding benefited the Indian stockmen. The tribe received \$10,000 for fencing and re-vegetation of range land. Traditionally the Indian stockmen used communal range land, gathering each small herd together in the spring and separated them in the fall. The communal herd, a symptom of resurrected tribalism, even communism, in the eyes of the government, had long been under assault by prior superintendents including C.H. Asbury. Superintendent Yellowtail accused Asbury of selling off the herd for personal gain, leaving it in its depleted state. In 1935, the Crow raised only 250 head of cattle.¹⁶

While prior superintendents may have had a serious impact, dryland farming also took a toll on Crow cattle raising. The passion of Thomas Campbell who founded the Campbell Farming Empire on the Reservation, dry land farming had put the plow to thousands of acres of pasture, stripping the land of its valley and upland bluestem cover. After the soil played out, 50,000 acres of reservation land grew “cheat grass” and Russian thistle—tumbleweeds. Yellowtail was intent on increasing stock raising; good cattle began with good range. In one year alone, the New Deal’s Indian Emergency Conservation Work funded the replanting of 2000 acres of grazing land.¹⁷

The range improvement program also supported another of Yellowtail’s pet projects—the reintroduction of the buffalo. When the Superintendent received word of the thinning of a buffalo herd in Canada, he asked for and received permission to import the endangered beasts. By 1935, 300 buffalo roamed the Crow Reservation, “on account of the reverence and love expressed by the Indian for this animal.” Remarkably there were 50 more buffalo than steers.¹⁸

Along with the buffalo, horses too were reintroduced. Traditional Crow ponies were small, averaging just 800 pounds, but for the federal trustees, they had been powerful

symbols of the untamed native. By the terms of the 1868 Treaty of Ft. Laramie, the United States had promised oxen to the Crow tribe for their new sedentary life. When the government reneged, the Crow attempted to plow with their own little horses. The tribe had received oxen collars, but they slipped off the horses' shoulders, leaving the Crow yeomen frustrated. Later, according to Yellowtail, Superintendent Asbury allowed horse dealers to come on the reservation and round up the Crow horses, their great pride, and ship them off for meager profit. "Civilizing" took many forms. The Crow persevered with their horses and in 1935 owned 2000. When the War Department decommissioned a nearby remount station, Yellowtail acquired a purebred stallion named Bet Mosie for breeding stock. A Morgan stallion and two Belgians also came to live at Crow with everyone's hope of reinvigorating the Indian pony stock. Yellowtail's vision of the Reservation fit well with Collier's Indian program, one that emphasized a nostalgic view of tribal life, but on the Crow Reservation, cattle, horses and buffalo made outstanding economic and ecological sense.¹⁹

The largest expenditure from the Indian Emergency Conservation Work program was earmarked for another range conservation measure--the control of Mormon crickets. Whether a result of poor management, the drought, or purely sidereal reasons, in 1931 the voracious pests emerged out of the Pryor valley in the western part of the Reservation and began an unrelenting march east. They crossed the Bighorn and swept over the eastern range eventually infesting 350,000 acres. The sheep-hating Crow likened the damage to sheep overgrazing. The pests destroyed range and crops alike; the reliable cash crop alfalfa was a favorite. In the worst year, 1935, the battle against this devastation involved over 5,000 man days of labor at \$4.62 a day. Tactics involved dusting with four parts hydrated lime and one part sodium arsenic. Because the mix was so toxic, Yellowtail refused to employ young Indian boys to man the dust guns and instead hired "crews of white boys wherever we could secure them-from Hardin and other Reservation towns."²⁰

By 1936, the sub-foreman in charge of Cricket Control adopted the charge “Rid the Reservation of Mormon Crickets in 1936.” The base for the application changed from lime to diatomaceous earth. “...it is not as harmful to the men who handle it, because it does not burn so badly...the kills are equally as large.” Success with the kills was not exactly sweet; the dead cricket carcasses stunk, bringing the white men to their knees, retching. Eventually the foreman used barrier control. In a maneuver not unlike the buffalo kills of old, workers constructed, in Lost Creek Canyon, tin fences, each ten inches high and six hundred feet long. Inside the fence they dug two pits, six feet wide, eight feet long, and three feet deep. In the spring, as the invading crickets came down the canyon, they came to the fence, traveled along the fence to the pit, and there fell to their arsenic-induced doom. The pits had to be shoveled out often, and the odor was horrendous. The Indians eventually won out over the crickets, at least in the short term.²¹

By 1936, Hardin locals became frustrated with the lack of progress for a storage dam and had moved to secure funding for a project outside the scope of the Indian Irrigation Service. The Holly Sugar Company had promised to locate a factory in Hardin if the water supply became more reliable. Holly Sugar already leased Indian land on the downstream Indian Irrigation Project. The sugar beet crop was perpetually jeopardized. Led by H.W. Bunston, the group proposed funding first from the Works Progress Administration in Montana. Always more sensitive to local political pressure the New Deal’s WPA consisted of homegrown officials who controlled how the federally allocated funds intended for local relief were to be spent. In the case of a storage dam on the Crow Reservation, the WPA might well have helped. Local promoters however began an internecine conflict over the location of the dam.

The Indian Irrigation Service had long favored the site on Willow Creek. Ideally located for the Lodge Grass Units and the lower ditches, the dam might well impound 10,000 acre

feet of water. White factions had other ideas. Represented by Bunston, white diverters Linthacum, Miller, and Therney proposed the Spotted Horse Coulee. The dam—already proposed as the Bob Miller Dam-- would impound only 3,000 acre-feet, but had the advantage of not appropriating any of Linthacum's land. The WPA was interested, but not as interested as Bunston made it out to be. To generate the support of the Indian Irrigation Service, Bunston promised that the WPA was on board, but the relief agency warned early that it could not participate in projects on Indian Reservations—other relief agencies were charged with Indian welfare. In their preliminary funding discussions, WPA officials inquired as to the number of Indians who actually owned the land and would be benefited by the storage reservoir. They might be willing to fund the project if it were of benefit primarily to white landowners. The dam site, of course, had been selected by the white men precisely because it was almost entirely Indian owned and any dislocation would involve only allottees. When informed, the WPA backed out of the deal writing, “at the present at least, we cannot operate on Indian Agencies for this class of work.”²²

Local interest shifted to a site on Sunday Creek, but even as it did, several events concerning water development on the Bighorn itself rapidly superseded the power plays on the small storage project. First, Judge Pray handed down his decision in Federal District Court in the *Powers* case.²³ He found on behalf of the white interests upstream from the Indian Irrigation Project, first by stating that Indian allottees held individual not tribal water rights. According to Pray, individual Indian owners then conveyed the water right to white successors in interest. Whites “stood in the shoes” of their Indian predecessors with an intact Winters right dating to the 1868 Treaty of Ft. Laramie. Pray then entered an equitable division—an adjudication of all water rights-- white and Indian-- on the reservation: 1½ acre feet, the duty of water for most crops. Prior to the *Powers* decision, the reserved rights doctrine of the federal government and the *Winters* doctrine had not been aggressively

pursued by the government. Reservation whites had only recently discovered that the *Winters* rights superseded appropriative rights under state law. Pray's decision came as a relief coming as it did at the end of the 1936 season of devastating crop loss. Though 18 months later the Circuit Court overturned, in part, Pray's decision—the adjudication, white water users continued to feel entitled to a pro rata per acre share of reservation water.²⁴

The second factor influencing the water situation on the Bighorn was the renewal by congressional approval of the interstate compact commission allocating water between Montana and Wyoming in the Yellowstone Basin. The Yellowstone Basin settlement included the Powder and Tongue Rivers along with the Bighorn River as they flowed north from Wyoming into Montana. It was clearly in Montana's interest to negotiate. Wyoming had appropriated sufficient water for 45,000 irrigated acres before Montana appropriated their first acre in 1889. By 1932, Montana had become deeply concerned that they could not maintain adequate flow in the four principle rivers.²⁵

Along with the other rivers, Wyoming's upstream Bighorn Valley had long been the focus of water development projects. First under the entrepreneurial eye of Buffalo Bill Cody in the 1870s, large irrigation projects encouraged white settlement of the area. Wyoming's state engineer Elwood Mead was just as interested in providing state support to the projects under the 1894 Carey Act. Indeed, the Bighorn valley proved to be the first public land transferred from federal to state control under the Act. In the 1920s Mead moved his enthusiasm for the fertile valley with him to the Bureau of Reclamation, where he continued to encourage development, joined by fellow Wyoming booster, Senator Francis E. Warren (R-WY), head of the Senate Appropriations Committee. The first reservoir project was undertaken in 1908 by the Bureau on the Shoshone River, a Wyoming tributary of the Bighorn. The federal government's interest in the watershed continued with three additional divisions built on the Shoshone, and by the mid-thirties, the PWA had approved funding for

the Greybull Division with the construction of the Oregon Basin Reservoir. In the mid-thirties the Bureau of Reclamation also looked to the feasibility of the Boysen Dam near Thermopolis. Wyoming's private water users also developed projects in Wyoming's Bighorn by mixing private funding and PWA money for two dams on the Greybull River—the upper and lower Sunshine Reservoirs. No fewer than 15 projects in Wyoming's Bighorn valley held the attention of the Bureau in the mid-thirties. The potential diversions alarmed Bighorn Basin interests in Montana and focused their attention on legal recourse. Litigation was long and costly, and Wyoming interests predated those of Montana. Bighorn interests joined with other Montanans and turned instead to negotiations as an alternative by urging a Yellowstone Compact Commission.²⁶

Negotiating an interstate compact was a relatively new approach to settling water allocation disputes between two or more sovereign states. It was first tried to resolve an allocation dispute on the Colorado River in 1922. Interstate compacts settled, with the principle “equitable apportionment,” the conflicting demands of interstate water distribution. Intended to end settlement by federal court decree, compacting reinforced the authority of the states over their own water laws. The principle of equitable apportionment originated in *Kansas v. Colorado* (1907), a case that championed state law over federal on interstate non-navigable streams. More akin to treaties than statute, Congress maintains ultimate discretion over interstate commerce, and as such, must approve the formation of a compact commission and any agreement it might negotiate. The approval of Congress for the creation of the Yellowstone Compact Commission, granted first in 1932 and again in 1936, was crucial to the long settlement.²⁷

The Yellowstone Compact Commission reached critical importance in 1936 because most understood it to be a necessary step to attracting larger federally funded storage in the Basin. While Compact negotiations were still years from achieving an agreement, 1936, the

driest on record, saw negotiations begin in earnest. Representing the Bighorn Basin in the negotiations was Hardin lawyer, H.W. Bunston. Longtime champion of Bighorn water development and arch foe to Wyoming's prior appropriation, Bunston had long been active in protecting non-Indian water interests on the Crow Reservation. Born in 1884 in Ontario, Canada, Bunston moved to Hardin in 1912, after graduating from the University of Michigan Law School. He was the first attorney in Bighorn County and had long been a booster for the region. It was his initiative that brought the Holly plant to Hardin. Bunston also served as president of the Two Leggins Irrigation District, a private irrigation concern that successfully blended federal and private money in the construction of ditches around Hardin, north of the reservation on the Ceded Strip. The name "Ceded Strip," according to the Crow, made the land involved seem deceptively small. In fact, the 1899 cession involved over a million acres and occurred as a result of white irrigation interests well after initial reservation cessions and after the allotment process had begun. The Indian Irrigation Service paid the district annually over \$4,000.00 for Indians to use the "private" ditches. Bunston was one of the Hardin locals who clearly saw the Crow reservation as holding economic opportunity. The federal dollars that filtered through the Indian projects clearly served the local economy. Use of the land had attracted corporate farming. Bunston was also in a position to see the clear advantage to Indian reserved water rights regardless of whether they were Indian or federal in nature. Either meant a superior posture for Montana as the state negotiated for a share of the Bighorn River.²⁸

Finally, interest in a dam on the Bighorn itself received a boost when the Corps of Engineers usurped the Bureau of Reclamation and expressed interest in constructing a big dam at the mouth of the Bighorn canyon, creating a reservoir on the Crow Reservation. The Bureau of Reclamation decided very early not to focus attention on the Bighorn in Montana with the same ambition they pursued the Wyoming Shoshone project. Instead early

recommendations included only the modest Huntley Irrigation Project, diverting water from the Yellowstone across land on the Ceded Strip.

In the original Act of August 14, 1899, by which the Crow ceded the million acres to the United States, the government was to pay \$1,150,000 in immediate revenue and per capita payments to the tribe for the land. That was before the Bureau of Reclamation became involved. In 1904, the Bureau claimed the money for its own “revolving fund,” and pledged to the Indian Service that it would use the Crow funds to build the Huntley Project, enhancing the Crow investment. Enacted April 27, 1904 a bill introduced by Reclamation retroactively canceled the payment plan of the earlier law and replaced it with a plan based on the 1902 Reclamation Act—all without tribal approval. The new act placed the Crow payment for the ceded land at the disposal of the Bureau. Remarkable for its ingenuity, the Bureau would use the 1899 congressionally appropriated Crow payment to construct the off- reservation Huntley Project. With the construction of the project, white settlers would pay a fixed price per acre that included construction costs; \$4 an acre was discussed—more than four times the original price negotiated with the Crow. The Bureau would then repay the tribe the originally agreed upon price--\$1 an acre, holding back the considerable profit for their future use. Under the plan the Crow would only be paid if whites settled in the strip. Whites would only buy if the Bureau built the canals. The tribe assumed all the risk, at best reaping only what they had agreed to for the purchase price in 1899. Crow payment for the million plus acres was completely contingent on Bureau success.²⁹

Even as Congress considered applying the Reclamation Act to the Ceded Strip, the Director of Indian Affairs, W.A. Jones expressed apprehension over the anticipated wait for the Crow: “it is felt that the least possible delay consistent with thoroughness should be incurred in preparing the irrigable land for sale...in justice to the Indians.”³⁰ A year later the Crow had yet to receive any payment. Acting Commissioner of Indian Affairs Larrabee again

addressed the Secretary concerning the Crow: "Their progress and welfare is greatly dependent upon the sale of the lands....the Indians have parted with their title to the land, it is only fair and just that they should receive compensation therefore at the earliest practicable date." ³¹

Another year with no payment went by before Commissioner of Indian Affairs F.E. Leupp wrote the Secretary of Interior with a scathing indictment of the Reclamation's foot dragging. Among many complaints the Commissioner specifically accused Reclamation of attempts to remove the few Indians with already patented allotments from the strip. That, he pointed out, was in direct violation of the original act. Further the Commissioner objected to Reclamation's attempts to charge the Indian tribal fund for the construction of the project. Leupp then urged that either Indian Irrigation or private concerns build the projects. ³² Though the Director of Reclamation denied vehemently Leupp's accusations and considered the Commissioner's ideas "dangerous," Reclamation's interest in the Crow Reservation waned with only incomplete projects and any number of excuses as to why the revolving fund never revolved back to the Indians. Low crop values and the short growing season combined with little non-Indian interest in the irrigated land. ³³ For the next twenty years, the Bureau cast only a nervous eye on the lower Bighorn.

Ironically, the 1904 Act which placed the Ceded Strip under the Reclamation Bureau's Huntley Project, formed the legal nucleus for renewed interest, in the early thirties, for a major multi purpose dam on the Bighorn River. Local interest including boosters Bunston and John J. Harris formed the Bighorn Canyon Project in an attempt to interest the New Deal administration in the project. President Roosevelt became aware of the potential of Montana's Bighorn in early 1934 and conveyed his interest to Secretary Ickes, who also headed the PWA. PWA engineers investigated the site and found that Wyoming's Bureau projects increased the river's silt load. The silt load, they determined would fill any reservoir in a

relatively short period of time—50 years. The PWA declined to pay for the project, but the Bighorn Project boosters continued to look for funding.³⁴

At the urging of Hardin boosters, in 1936, Senator Burton Wheeler (D-MT) proposed an amendment to the 1936 Flood Control Act, the omnibus legislation for the Army Corps of Engineers. The amendment, one that funded a feasibility study of the Bighorn Dam, failed to pass, but after both the Secretaries in the Departments of the Interior and War. While the War Department's Corps cast a longing look at the project, irascible Harold Ickes wrote a scathing note to the Secretary of War. Lecturing the Secretary on Indian policy, Ickes informed him that, "Superintendent Yellowtail stated that the Crow Indians were definitely opposed to the construction of a dam in the Big Horn Canyon." Ickes continued, "under the provisions of the Indian Reorganization Act recognized tribes of Indians are given certain rights and powers not previously enjoyed by them. I believe that consideration must be given to the wishes of the Indians with regard to future developments on...the Big Horn River or on any other river which may affect their property or economic interest. I urge, therefore, that the wishes of the Indians and the interest of this Department in their behalf be borne in mind by your Department..." Of course, the Crow had voted not to participate under Reorganization, but the bluff worked. The Corps dropped the project for two additional years before proposing another study³⁵

Throughout the mid-thirties, locals sought funding for both the dam on the Bighorn and the small storage dam for the Little Bighorn and Lodge Grass Creek. The key difference between the two projects turned out to be Robert Yellowtail. The Superintendent favored the small site and objected strenuously and continuously to the large reservoir, at least as a federal project. Yellowtail himself hoped to develop the large site and the small site served his interests as well. With his objections and the political sway of two powerful protectors, Collier and Ickes, Yellowtail effectively stalled the big dam in its tracks. In 1937, Collier

again requested funding for the small storage dam on Willow Creek through a PWA appropriation. This time Congress approved.³⁶

Supervising engineer, W.S. Hanna jumped into the long anticipated project on Willow Creek. Prior to the '37 appropriation, no preliminary study of the area had been funded. Hanna embarked on just such a study and included a Little Bighorn Basin-wide assessment. The *Powers* case indicated that white demand on reserved water would increase, and Hanna wanted to be ready. The initial funding for Willow Creek Dam included feasibility studies for a dam on the Little Bighorn and one on its tributary, Owl Creek.³⁷ The project engineers made a final site selection for the Willow Creek Dam and survey teams descended on the Lodge Grass tributary. Land acquisitions began for the 1000 acre site. Heirs to the Walks Pretty allotment, the Wood Ticks, Stops, Grey Bulls, and White Hips received \$6 an acre for their agricultural land. The Pretty Tail allotment brought the same to heirs including the Hogans, the Grey Bulls, Stops, Pretty Shield, and White Hip. The one white owner affected by the construction was Linthacum, who had a second mortgage on the acreage. He failed to profit from the forced acquisition.³⁸

Originally, the Willow Creek Dam was to be a "simple cut off," a diversion dam of the Creek using material from a borrow pit immediately adjacent to the dam site. After 10 months of soil testing however, Hanna and construction engineer Decker determined that both the soil from the pit and the subsurface of the dam location would need to be replaced with soil mixed with gravel. In addition the composition of the dam itself would need a mixture of clay and gravel in order to "Insure stability and safety." The material was available at a stone quarry located some distance from the dam site. Hanna informed his superior that more land would be necessary for the haul road. And he got it. The allotments of Half White and heirs Tenbear, Bright Wings, Comes Up Red, the Stevens and Westbrooks, Crooked Face and heirs Bulls Shows and Red Star, the Chathams, another Grey Bull, Spotted

Horse, and Horse Guard all contributed parts of their land for transporting the gravel for Willow Creek Dam.³⁹

The government was slow to pay for the acquisitions. Pretty Shield was reduced to calling at the Agency daily in order to receive money that had been promised months before. Pretty Shield was not the only one to complain; none of the Indians received payments on schedule, and many had borrowed from banks with the anticipated payment in mind. Yellowtail intervened on their behalf, and eventually the wheels of bureaucracy issued the payment.⁴⁰

Hanna also allocated the first Willow Creek Dam appropriation on the construction camp next to the dam site and he hired a small crew for the preliminary work. As the Collier policy required, he gave preference to Indian workers. The policy was not new. It replicated a long history of Indian hiring preference dating back to the beginning of the Indian Irrigation Service. The PWA directive to the Indian Service was to provide water conservation and employment through the public works projects, and PWA projects on Indian reservations also required hiring preference for Indians. From the earliest congressional appropriations, the Bureau of Reclamation also gave hiring preference to Indian workers. Dovetailing with the assimilationist allotment policy, Indians laboring on their own irrigation projects, it was thought, would help ease them into responsible citizenship. Steady wages would teach them the value of their labor, thrift, and independence. The cost of labor to build the irrigation projects could also be justified as part of the expense of maintaining the tribe and thus costs for construction were justified as tribal expenses and deducted from tribal funds. The 1904 Crow Indian Irrigation Act, the law that brought the 1898 “ceded strip” under Reclamation’s Huntley Project, stated: “preference shall be given to the employment of Crow Indians, or whites intermarried with them, so far as may be practicable.” The Huntley project was only one example of preferential hiring in federal Indian policy.⁴¹

On the Crow reservation, Indians had helped build all the Indian Irrigation Service projects, and as the projects began to serve the Indian community, Indians also helped maintain the ditches—maintenance that was then charged to individual Indian allottees. As the allotments passed into the hands of white successors, Indians continued to receive hiring preference for maintaining the ditches. That preference was a source of constant irritation for the white owners whose petitions appeared frequently at both local Indian Irrigation Service Offices and in the offices of Montana’s senators. Hardin attorney H.W. Bunston wrote Hanna in 1932 deploring the condition of the ditches and fixing blame on the hiring policy: “It is a notorious fact that regulation of the Department requiring exclusive Indian labor in the upkeep and control of the irrigation ditches is a most expensive and unsatisfactory method of handling the same....if the Indian Department expects to keep the white people farming these lands the ditches must be kept in proper condition. The tenants are not satisfied with results obtained through Indian labor.”⁴² The complaint, relayed to the Commissioner of Indian Affairs, prompted a concerned inquiry to which Hanna replied, “It cannot be denied that this class of labor is far less efficient than could be obtained if we were permitted to employ whites on much of the maintenance work...we have been unable to secure full value for the funds expended for maintenance on the Project.”⁴³

Several tactics had been used to increase the efficiency of the Indian laborers as they cleaned the ditches for the white owners. One method that purported to be in the Indians’ interest included holding back wages and applying that money to any outstanding operation and maintenance charges that had accrued to the laborers’ own land or to any land to which he was an heir. This approach had the added advantage of additional income to the Irrigation Service Project, holding down the O&M for white owners. Problems arose when white laborers received their wages in full. Indians, already bitter over O&M charges, felt additional resentment when their wages were withheld. As Hanna later commented, “In this

case, every Indian who applied for work was made to clearly understand the conditions of employment. However, after the work closed down, there was such a flood of protests that instructions were issued to pay the Indians in full.”⁴⁴

Another concern for reservation superintendents was the speed with which Indian laborers spent their wages. Most work involving the Indian Irrigation Service projects was accomplished in the summer, and thus wages were concentrated in a particular season. In 1932 Crow Superintendent James Hyde, Yellowtail’s predecessor, embarked on a program intended to help Indian laborers to plan ahead. Hyde instructed the Indian Irrigation Service to withhold 40% of the wages until December. However, the program was unpopular with the Indian laborers and strained the IIS accounting system. When Hyde canceled the policy after the first year, the government accountants rejoiced.⁴⁵

Despite local concerns expressed by both the white owners and the Indian Irrigation Service, the preferential treatment in hiring Indians continued after John Collier became the new Commissioner of Indian Affairs. Collier did attempt to address the complaints of the local farmers. In 1934, almost \$50,000 was allocated through PWA for work on the IIS projects on the Crow Reservation. Indians were already employed by the Indian Irrigation Service, but PWA wages were higher. As a cost-cutting measure, Collier sent a directive to all reservation superintendents instructing them to have Indian laborers “donate” 25% of their higher PWA wages to the IIS projects. On the Crow Reservation, the donated money would be used to reduce the indebtedness of the Project and pay down the “reimbursable” account—money owed by the IIS to the federal treasury. The IIS would have a “revolving fund” of its own, writ small.

A model of restraint, lifelong bureaucrat, W.S. Hanna wrote Commissioner Collier: “It seems permissible that I submit my views in this connection. I have serious doubts as to whether the Indians on any of the reservations in this District...would willingly agree to

donate 25% of their labor. For those Indians who work on these jobs to donate 25% of their labor, it would mean the benefits would apply to what is now considered individually owned allotments, and also, on most of the reservations in this District there are numerous tracts of non-Indian owned land checkerboarded over the irrigable area of the projects, all of which would be benefited by the donated labor.” The Indians, charged Hanna, would pay the reimbursables of the white successors.⁴⁶

The policy of donated labor was dropped but the contractor for the Willow Creek dam project, R.P. England, continued the policy in his own more informal way. The South Dakota contractor hired Indian laborers at the newly enacted minimum wage for unskilled labor, but then used them to perform skilled labor jobs. Almost immediately Washington began hearing Indian complaints that the pay scale was too low. Complaining Crow included some highly respected tribal members including Paul Red Horse, John Yellowtail, Roger Rossette, Lawrence Red Wing, George Peters, John Holds the Enemy, Ed Bad Bear, Anson Pease, Grady Darough, Harold Pease, John Sing Jr., and Perry Paint Pretty. The complaints extended over the life of the construction project and well beyond. Indian laborers appealed finally to the Department of Labor accusing England of violating the 1939 Davis-Bacon Bill, which set a minimum wage, by misclassification of labor. They accused England of a variety of offenses: men who worked as truck drivers paid as rock pickers; riprap placers—men who laid stones immediately adjacent to the dam—who received rock pick wages; Euclid Trac-truck drivers--the large 6 tire semi-trailer type truck--who received the same pay as common drivers, and so on.

At first, the Department found no violations, but at the urging of Assistant Indian Service Commissioner William Zimmerman, the Secretary of Labor reviewed the case and found on behalf of the Indian claimants: “The men...should have been compensated at no less than the

minimum rate specified for the skill work which they performed.”⁴⁷ A year later, the Indian claimants were still attempting to collect from England.

The Willow Creek Dam project did employ Indians. In one year, June 1938- June 1939, the Indian Irrigation Service employed between 13 and 45 laborers, depending on the season. Over the year, along with the operation and maintenance crews, Indian workers on Willow Creek earned a total of \$35,649.11.⁴⁸

The Crow hiring policy served as part of Collier’s propaganda crusade, touting his visionary agenda. Early in the Roosevelt administration, Collier began the publication of a bi-monthly journal called *Indians at Work*. To refute the notion that Indians could not support themselves in a market economy, *Indians at Work* included articles that documented the programs, expenses, and ultimately Collier’s vision of the progress of a “race.” The politically astute Robert Yellowtail contributed often to the publication, but Collier also wanted the Irrigation Service to participate. He sent a directive to A.L. Wathen, director of Indian Irrigation with instructions to have all the local supervisors of the irrigated reservations send short articles to be included in the journal. Wathen forwarded the directive on: “The irrigation Division has been asked to contribute both articles and pictures for publication...your submission should be a short concise narrative of the proceeding two weeks activities...Please see that your submission is mailed in time...”⁴⁹ The directive was passed down the chain of command to the lowest man capable of writing such an article. On the Crow reservation that was Project Engineer Clyde Lewis.

An overwhelmed Lewis confessed to Hanna, “I haven’t done anything toward supplying this information. I neglected getting any pictures.” Despite the tense situation at Crow and between trips up the Little Bighorn, Lewis did submit a nice article about the irrigation projects. Addressing the issue of Indians at work, Lewis described their employment: “The Indians have been encouraged to work in every way possible and have received about 60% of

the allotment expended to date.” Warming to his subject, Lewis continued, “Undoubtedly the percentage would have been higher had it not been for the fact that there was more desirable work under other projects supervised by the Reservation Superintendent. Removing muck from ditches is not quite so desirable as working on roads.” Perhaps Lewis’s negative attitude permeated the writing; the article never appeared in *Indians at Work*.⁵⁰

Construction of the small dam project on Willow Creek proceeded. After purchasing the right of way for the dam and the haul road, the construction engineer, Decker, built the construction camp and began preliminary hiring. Crews proceeded with clearing of the reservoir basin by cutting and removing the large timbers and clearing the trees, excavating the canals, and constructing a trash rack and stilling basin. They completed the gate tower, air vent, ladder ways and gate house. In 1938, Congress appropriated an additional \$150,000. The Willow Creek Dam was at last under construction.

The Indian Irrigation Service also responded to the Circuit Court decision in the *Powers* case by planning more storage projects in the Little Bighorn Basin to distribute the water in a “fair and equal” way. In the *Powers* case, the district and the circuit court had each determined that Indian allottees and their assigns were entitled to a pro rata share of reservation water. Responding to the decision, the Indian Irrigation Service initially determined that it was their responsibility to provide for the all reservation interests in the same way they had provided for those few on the original government ditches. To that end beginning in 1938, two additional storage projects proposals joined the Willow Creek project. The additional proposed storage reservoirs would dam Owl Creek and the Little Bighorn River.⁵¹

The proposed reservoirs would increase storage substantially. While Willow Creek Dam would store 23,000 acre feet, the Little Bighorn Dam would provide 50,000, and at Owl Creek another 61,500. The total irrigable acres added by the Little Bighorn Dam alone was to

be 77,278 acres. On the Little Bighorn, the Service proposed a dam 165 feet high and 2,700 feet long at a cost of \$2,632,878.00. The construction would be designated reimbursable and would add \$169.86 dollars per acre to those farmers benefiting and, in addition, they would pay an annual operation and maintenance charge. The Service acknowledged that no explorations had been made as to the foundation for the dam, and they “assumed” that suitable fill would be available though “no tests were made as to its suitability.” The proposal for Owl Creek was even larger. The two dams were designed to intercept the waters of the Little Bighorn watershed as they flowed into Montana.⁵² Significantly the dams were upstream from the private diverters in the *Powers* case. The private diverters would get their pro rata share of the reserved water, but they would have to pay construction charges on the dam.⁵³

One “private” diverter was tribal chairman and Crow superintendent Robert Yellowtail. With land on Percheron Creek, a tributary of Lodgegrass Creek, Robert Yellowtail was one of the first tribal members to move his original allotment from the twenty-five-year trust status dictated by the General Allotment Act to fee status, individual ownership subject to state law. He filed on his water right in state court. He had purchased other allotments in the area, had inherited some land. He was closely allied with the white owner of the Antler Land Company. Matt Tschirgi diverted more water from the Little Bighorn than any other defendant in the *Powers* case. Yellowtail also served as an officer in the private irrigation operation, the Bozeman Trail Ditch Company. Begun in 1922 the Company watered 2,800 acres, over half was trust patent land owned by Crow Indians. The government paid the Bozeman Ditch Company out of tribal trust funds using the rationale that it was providing water to the trust land, thus blending federal dollars with private ownership. It was not in Yellowtail’s private interest to see competing water development on the Little Horn. Few

were surprised when the Superintendent began to question the development plan for the Little Bighorn Basin.

In 1938, Yellowtail requested the Little Bighorn Basin Study—one that summarized the three storage projects—Willow Creek, Owl Creek, and the Little Bighorn. Hanna complied with the request and encouraged Yellowtail to continue with the Willow Creek storage, and also to move forward with the other two storage projects. On February 11, 1939, the Crow Tribal Council met and Yellowtail presented the question of the dams. According to the 1926 Amendment to the Crow Act, tribal permission was absolutely necessary for the projects, and the tribe had granted authority to build the Willow Creek Dam. But in the February meeting, Yellowtail came down sharply in opposition to the Owl Creek and Bighorn Dams. He cited cost overruns on Willow Creek—costs that he claimed would be carried by the tribe.

Yellowtail accused the government of intentionally understating costs, insisting that the Willow Creek project would exceed \$2 million dollars. Pointing out the large and accruing costs carried by tribal members, Yellowtail threatened that those would increase and the tribe could not afford them. He pointed to the *Powers* decision and asserted to the tribal council that the Crow had lost their water rights in the Supreme Court. The Council, influenced by what were at best half truths, tabled indefinitely the additional storage projects.⁵⁴

Word of the tribal sentiment reached Director of Indian Irrigation Wathen, who immediately ordered all work on the Crow Reservation suspended including the Willow Creek Dam. Already unhappy with what had been substantial overruns—the project estimates were now \$500,000 Wathen was also concerned about the implications of the *Powers* decision in the Supreme Court. As the Irrigation Service contemplated further litigation, the director requested a full report of the various Crow projects both from Hanna and District Council for the IIS and the Bureau of Reclamation, Kenneth Simmons. They complied,

heartily endorsing the Willow Creek Dam, but now they equivocated about the other projects.

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Throughout the west, the Indian Irrigation Service had operated for several years under a new policy regarding “reimbursable accounts” to Indians. Contrary to what Yellowtail told the Council, the Leavitt Act of 1932 directed that individual Indians were not to be charged for capital outlay on irrigation projects previously charged to tribal trust funds.⁵⁶ Prior to the Leavitt Act tribal trust accounts were tapped for the Indian Irrigation Service projects, and then individual Indian owners, like the non-Indians on the projects, were also charged prorated construction costs along with their annual operation and maintenance charges. After the 1932 Leavitt Act, individual Indians remained liable for operation and maintenance charges, but all prior debt for prorated construction was erased. Future projects could not count on “reimbursables” from Indians. After 1932, all projects deemed reimbursable by the government would be charged to white participants. While the Leavitt Act intended to reform an unacceptable liability for individual Indians, in actual practice it meant that fewer projects were undertaken for the benefit of Indians. On reservations across the west, Leavitt reinforced the checkerboard nature of land tenure encouraging non-Indian water development—projects that would reimburse the government. On Crow it meant that the white farmers footed the bill for the Willow Creek Dam. Kenneth Simmons made that very plain to the director.

“We have in contemplation spreading the costs of the storage reservoir on an equal basis, including the ultimate irrigable area now under constructed works owned by the defendants in the *Powers Case*....”⁵⁷ Simmons explained pointing to his legal plan to pay for the project. At the same time, he responded to Supreme Court’s criticism in the *Powers* decision. The Court had declared that the Secretary of Interior had never made “a fair and equal distribution” of the reservation water as had been directed in the 1887 General Allotment Act. Simmons now claimed the authority to make that distribution. Not surprisingly he also

exacted his retribution on his upstream adversaries. In his zeal, he determined that the *Powers* defendants, the upstream private diverters, would pay the pro rata share for the Willow Creek storage construction. Though the upstream farmers had constructed their own canals and headgates, had filed in state court for their water right, and had never experienced a water shortage, they would help fund a project designed mainly to serve downstream interests, the sugar beet men. And the upstream growers' neighbor was Robert Yellowtail, a man who, in many ways, had more in common with them than not. Indeed it was the upstream interest, thinly veiled, that Yellowtail had put to the Council when determining the location of the Willow Creek dam.

The payment scheme drawn by Simmons and Hanna was a bold one. They would charge all reservation non-Indians in the Little Bighorn watershed for all Indian Irrigation Service reimbursable construction costs, regardless of whether they were on a government project or not. To make the proposal more palatable, Simmons offered some conciliation to his distribution order, and so compromised the intended role of the Indian Irrigation Service. Simmons knew that the defendants would not pay an indefinite amount. Future "reimbursables" would need to be limited. To that end he revoked his endorsement of the Little Horn and Owl Creek storage, siding with Robert Yellowtail. He wrote, "these defendants will undoubtedly refuse to participate in a repayment contract unless new development is curtailed and controlled." Simmons and Hanna strongly urged a plan that "will absolutely limit future new development on lands in Indian ownership."⁵⁸ Remarkably, the Indian Irrigation Service men suggested a policy that was entirely counter to their mission. Because of reforms, including the Leavitt Act, the Crow were not to pay construction costs, but they were also never again to benefit, even nominally, from water development projects built by the Indian Irrigation Service.

Simmons and Hanna were not motivated entirely by the need for construction reimbursement. They also recognized and feared that additional water use along with further development on the Reservation would force an adjudication of water rights. Judge Pray's reservation-wide quantification was overturned by the Ninth Circuit, but the implications of the court order remained fixed in the IIS memory. In response the IIS had initially moved to provide as much storage as possible on the reservation, to irrigate the "ultimate irrigable acres," but as the drought wore on, the ecological implications of the decision became evident. There simply was not enough water to supply all the lands of the Reservation—even the more limited acreage that had long been designated "Irrigable."

More threatening than water shortage however was the threat to the inchoate right of the Secretary of the Interior to the "command of the waters." As water supplies dwindled, non-Indian demands increased, demands that might well lead to a general stream adjudication. Simmons wrote: "Should adjudication be attempted, a serious interstate controversy would result between water users on Pass Creek in the state of Wyoming, the Government's interests on the Crow Reservation and white land owners in Montana in this watershed. Further the principle established in the Winter's case, so valuable to this Service would be at stake in any attempt to have an inter-state adjudication in this instance." ⁵⁹ To pursue the Indian water right risked its loss.

Of course the Yellowstone Compact Commission lurked in the background of any decision made by the Crow Indian Irrigation Service. The federal reserved water right was all that stood between enjoining the Crow along with their federal trustee in a general interstate reallocation of water, one that almost certainly would favor the beneficial use put to the waters on the Wyoming side of the Bighorn watershed. While Wyoming water users constituted a significant membership on the Commission, to the north of the Reservation lay Hardin, whose economic interests, Bighorn development and a Holly Sugar factory, were

represented by H.W. Bunston. Those interests had encroached on the Reservation before along the Ceded Strip and had usurped Indian water rights.

Even as Interior made major adjustments to its water policy on the Crow Reservation, it continued to exact hefty operation and maintenance charges on both Indian and white irrigators. While the Leavitt Act of 1932 reformed construction charges for individual Indian irrigators, no such reform had ended the dread operation and maintenance charges—O&M. Long a source of Indian dispossession, O&M dated to a time when the government irrigation projects were expected to pay their way. From the earliest days on the Crow Reservation, Indians had been responsible for an annual payment that would sustain not only maintenance of the dams and ditches, but also the salaries of Indian Irrigation Service engineers, supervisors, and year round salaries for the ditchriders.

The Crow had long been unhappy with the assessments. Their complaints went on record in the twenties when the Chairman, James Carpenter, testified to Congress about the many questionable charges. His objections included repair work executed in the winter. Apparently the IIS used concrete for patching the small dams and headgates. The repair work was left for the winter months when no water flowed in the ditches. The extreme cold however did not allow the concrete to set properly, compromising the integrity of the repair. Carpenter patiently explained what all the Crow knew, that in Montana you could not pour concrete in the winter. The testimony would come back to haunt the Indian Irrigation Service. Despite the Crow complaints O&M charges continued their relentless toll.⁶⁰

The Bureau of Reclamation had ended the Indians' obligation to pay construction and O&M in 1908 on all Bureau projects, as money from sale of Indian land became a reliable source of income. But the Indian Irrigation Service continued to charge both.⁶¹ Unpaid O&M charges created liens on the allotments of the Indian irrigators. At the death of the Indian lienee, if heirs could not pay the back assessments, the lienholder, the federal trustee,

auctioned the valuable irrigated land. As death took its toll on Indian allottees, the policy devastated Indian land tenure throughout the west.⁶² During the Indian New Deal, John Collier came under fire for failing to end the dispossession exacted by the Indian Irrigation Service. In 1937, the Pima organized an O&M strike under the leadership of Reverend Birk Lay, who himself owed an outstanding charge of \$400. Lay urged the strike as a vindication for 40 years of suffering the costs. Despite his policy of ending the dispossession caused by allotment, Collier refused to acknowledge the inequity of O&M, and he had no tolerance for the Pima position. "This office has indicated a willingness to accept payment in labor performed throughout the present season," he wrote Secretary Ickes, but the Pima refused. The tribe also refused to authorize the payment out of their tribal trust. Collier traveled to the reservation himself with no result. Eventually Congress authorized the expenditure from the trust fund, ending the strike.⁶³

On the Crow Reservation, Robert Yellowtail wrestled with collecting outstanding O&M and initiated the policy of charging the fee prior to the growing season. No water would be provided until the annual O&M was paid. Both Indian and non-Indian alike objected; the water shortage and low crop prices during the depression had left both groups with little money for payment. With the drought and lack of any certainty as to the water supply, area banks were unwilling to loan money with crops as collateral. The charges were very high. On all the Crow projects, annual O&M totaled \$930,000. In 1940 only half the assessments were paid. Farmers on the largest ditch in the original Crow Project, Agency Ditch, paid \$48,000, but still owed the same amount. The government placed liens on the land.⁶⁴

The years 1938 and 39 were particularly bad. Attrition for the foreclosed liens included Horse that Sings who died and "title passes subject to unpaid irrigation liens;" Eagle Turns: "title passes subject to unpaid O&M liens;" Simon Bulltail: "title passes subject to \$547 in

O&M”: Mary Red Star: “title passes subject to \$439.40 O&M;” White Dog: “title vests subject to irrigation liens of record—O&M \$421.63.”⁶⁵

The specific form used by the federal bureaucratic trustee to dispossess the heirs was Amendment to Form 5-110. The Crow Agency records contain hundreds of the card stock forms, each indicating an allotment and the willingness of the heirs to relinquish the land. Each heir signed the form and applied a thumbprint; each thumbprint in a different color. On one form is the signature and thumbprint of Ray Bear Don’t Walk who had urged so poignantly that the government not build the storage reservoir, “in the long run this land would be more valuable to us...and especially for our childrens.”⁶⁶ His brother’s signature is there also, Oliver Bear Don’t Walk, and the Medicine Tails, the Old Crows, Among the Sheep, Beaver that Passes, Plenty Hawk, Hestor Knows Gun, Among the Sheep, Not Afraid, and Joseph and George Not Afraid—all fractional heirs to an allotment whose liens had been foreclosed.⁶⁷ Investigations into relieving O&M debt began in the late thirties; relief was years away.

Construction on the Willow Creek Dam began once again in the summer of 1939 after Congress designated an appropriation of \$500,000 for the project. Hopes had been high for storage by the 1940 growing season but now optimistic guesses were for 1941. R.P. England received the government contract for the earth fill and the concrete conduit for the overflow. He began in August of 1939 and completed construction December 1, 1940. Later, in the investigation, the onsite engineers assured Washington that no concrete had been poured in the winter months.

Workmen first noticed cracks in the dam structure in May of 1940. The cracks ran along the construction joints and ranged from hairline to quarter inch. In September 1940, onsite engineer Decker wrote to Sika, Inc. inquiring as to a suitable cement for “plugging cracks and

holes under water pressure.” In August more cracks appeared with “appreciable movement.” In October, Supervisor Hanna informed Washington.⁶⁸

The Indian Irrigation Service urgently called in engineers from the Bureau of Reclamation in Denver and between the two teams, they isolated the reason for the failure: “The consolidation of the shale foundation from the weight of the embankment caused pore pressure of sufficient magnitude to reduce the factor of safety to 1.00, the point where sliding may take place.” The engineers added, “A very serious failure of the entire foundation is eminent.”⁶⁹

The engineers agreed to a temporary solution and ordered additional fill material to hold down the toes of the dam while more permanent solutions could be found. Hanna sent urgent requests for an emergency appropriation of \$50,000, while Decker sent out equally urgent pleas for some material that would stand up to the pressure of the repair. He needed cement and a pump that would feed the grout a distance a 300 feet. In June, 1941, he found a pump on the Flathead Reservation, but it proved “impracticable.” He rented a grout pump from Keywit & Sons and following a test run of 40 sacks of cement, Decker declared the pump “satisfactory,” though the grout mixture needed to be “somewhat thinner than was hoped.”⁷⁰

Decker also needed steel pipe to line the cracking concrete conduit. The Bureau specified 5 foot diameter pipe; Decker found 42 inch pipe at the Thompson Pipe and Steel Company in Denver. The company could fill the order only partially however; the United States, attacked at Pearl Harbor by the Japanese, had entered World WarII, and the Pacific fleet needed the steel more than the Crow Reservation.

Thompson shipped the partial order for the Willow Creek repair in January, 1942. Decker received the order on January 20th—fourteen twenty-one foot joints of enamel-lined pipe, brittle in the cold. With draglines and dollies the five-man crew, including Decker, carefully hoisted the pipe to the dam site. They devised a double roller bearing and jack that allowed

the men to thread the pipe, with great care, through the damaged concrete conduit. But as they began the operation, the weather turned unseasonably mild and melting snow filled the concrete conduit with icy runoff. As temperatures dipped, the men began again the laborious process only now through conduit filled with ice. As they fed the pipe, the men welded the seams. Pushing the final length into place, they welded it, only to discover that the concrete in the transition section to the control gate had not been poured to specification. The pipe did not fit.

As Decker later related, “Additional clearance was provided by cutting several eight inch parallel slots in the end of the steel plate pipe with the acetylene torch and then bending the sections slightly inward.”⁷¹ After re-welding, a new coat of enamel had to be applied, necessitating temperatures of 500 degrees. The fumes from the hot enamel required frequent breaks but the five men completed the unorthodox operation in 5 days, then tested the enamel coating with a device constructed from “a Ford coil and a hot shot battery.” “Believe this must be some kind of a record,” Decker later wrote, “There has been and continues to be, times when I feel that the elements, as well as providence, has combined to make this job as difficult as possible.”⁷²

That was the last steel pipe the engineer could procure, leaving one final section incomplete. The War Production Board did not deem Willow Creek’s A-10 designation sufficient to supply the Indian Irrigation Service with the remaining pipe. “Possibly the applicant can use wood pipe, or some other non-metallic substitute.” And no doubt they did. The reservoir was partially filled in the summer of 1942. The total cost was close to a million dollars. The total acres served— Indian owned and farmed—was 380.⁷³

The decade-long drought on the Crow Reservation had broken. The need for Willow Creek storage was far less pressing. In light of the additional moisture, Supervising Engineer Hanna made one last suggestion for the compromised structure on the Willow Creek Dam:

“It seems advisable to stock pile a few thousand cubic yards of rock of sufficient size and weight along the 3 to 1 slope near the crest in order that rock repairs will be immediately available in case of emergency.”⁷⁴

The Willow Creek Dam serves as a tempting metaphor for the larger role of the Indian Irrigation Service. Throughout the thirties, good men, talented men, even valiant men heeded the warnings of the Meriam Report and the Preston-Engle Report and tried to repair a structure whose foundation was inherently weak. Rather than rebuild in a way that would help the Crow nation benefit from and retain their reserved water rights, the Service applied solutions like the engineers they were. To compensate for decreasing water supplies and increased water demands, they adapted the existing structures; they built on, subtracted from, and rewelded—all to reform a system that was archaic at its inception. The result was as gerryrigged as the dam on Willow Creek. In the end the Service was content unabashedly to hand over Indian reserved water—though not water rights—to white farmers.

Throughout the 1930s, as drought called into question the nature of the Indian reserved water rights on the Crow Reservation, the Indian Irrigation Service defended the inchoate concept of *Winter's* rights. Under assault were both the *Winters* right and its practical application—“wet water.” The assault came from outside the Reservation, both upstream Wyoming beneficial use and downstream boosters bent on economic development. Also the Bureau of Reclamation's Huntley Project on the old Ceded Strip required its share of the downstream water. On the Reservation, upstream Little Bighorn non-Indian private ditches diverted the waters away from downstream Crow use. Downstream, non-Indians individuals and corporations checkerboarded through the Indian Irrigation Project, grew crops like sugar beets that required more water than the drought-compromised watershed could provide. As complicated as the obvious demands were, more subtle forces robbed the tribe of water use: a tribal chairman and superintendent whose private interests blurred the line of civic

responsibility; a federal trustee, hamstrung by the reform of the Leavitt Act, yet still obliged to reimburse the expense of irrigating Indian land; and finally the unrelenting dispossession of operation and maintenance liens displacing Crow heirs from the original allotments of their ancestors. All the factors influenced the interpretation of reserved rights on the Crow Reservation and limited its application.

Despite the assault, the concept of Indian reserved water rights survived. It survived precisely because it was poorly defined. Useful to the Department of the Interior when blended with federal reserved rights, "Secretarial Waters" allowed the federal government to maintain command of the waters in a time of pressing state usurpation. The Indian Irrigation and the Department of Justice tiptoed through a minefield, and they very nearly lost. As it was, it adjusted to being under the umbrella of the Secretary.

The sacrifice was wet water projects that would benefit Crow Indians. To avert the potential loss of Indian reserved rights, the Irrigation Service with willful understanding, ceased to assert the claim legally. Intent on keeping the Service solvent after the Leavitt Act, the government failed to use what resources they did have for the benefit of the Crow. Instead non-Indians continued to make inroads into the Crow Winters right by de facto water use.

Ironically with 40 years of experience providing water to the Reservation, the Indian Irrigation Service could not match the record of the Indian Emergency Conservation Work. The agency funds, in short order and with far less money, built wells and stock ponds that actually served the Crow in ways consistent with their history, their culture, and with the ecology of the rolling savanna, the escarpment, and coulees of the Crow Reservation. But no doubt the Custer farmer was correct when he alleged such a program would not "make a big enough soft spot whereby our influential City brethren could shove his arm into up to his shoulder at least."⁷⁵

The federal trustee, through the sacrifice of the tribe, did preserve the *Winters* right. As witness to the doctrine's remaining strength over time was the Yellowstone Compact. In 1950, the final negotiated plan went to Congress and received federal sanction. The twenty-year negotiation at last divided the four rivers of the Yellowstone Basin: the Powder, the Tongue, the Yellowstone, and the Bighorn. The waters of the Bighorn had been apportioned without tribal input—80% to Wyoming and 20% to Montana. But the compact contained the following language: "Nothing contained in this compact shall be so construed or interpreted as to affect adversely any rights to the use of the waters of the Yellowstone River and its tributaries owned by or for Indians, Indian tribes, and their reservations."⁷⁶ A similar provision, as expected, was included to guarantee the integrity of what, by that time, was the entirely separate federal reserved right. The language of the Yellowstone Compact was in Montana's interest. From this early time Montana understood that its late start in appropriations put it at a disadvantage in a system where prior appropriation and even equitable apportionment meant a superior posture for Wyoming. Montana's economic interest lay in quantifying the federal and Indian reserve that had been exempted from the allocation. Clearly its interest was that the reserve water rights be quantified generously.⁷⁷

The language is assumed today, but in this early compact, with rampant state inroads into Crow water use, the language is crucial. The 1922 Colorado River Compact, while nodding to the principle of Indian reserved rights, carved the Indian share from the participating state's allocation, denying its potency and leaving the Indian reserved right vulnerable to state encroachment.⁷⁸ Twenty years later as far as the states of Montana and Wyoming were concerned the Indian reserved right was intact and so clearly understood that, despite the fears of Interior regional attorney Simmons, negotiators excluded from their deliberations altogether the highly contested waters of the Little Bighorn River.

De facto water use might well have compromised the Indian reserved right—the *Winters* right. But the Crow were soon to receive more water than they ever imagined or wanted. In an almost Biblical turn, it was flood not drought that dictated the next federal scheme. As federal policy revolved again from reorganization to termination, the Bureau of Reclamation would at last cast its eye on the Bighorn River with every intention of damming it.

¹ 1.8 million acres is a statistic used by Daniel McCool in his outstanding work on Indian water policy as it relates to United States water development in the 20th century: Command of the Waters: Iron Triangles, Federal Water Development, and Indian Water (Berkley, 1987), 3. The fears over adjudication are detailed in a number of letters. See particularly the correspondence between assistant Secretary of Interior Oscar Chapman and District Counsel Simmons and to the Attorney General in Chapman to Cummings, July 31, 1939, Folder “Litigation 1939,” Box 256, RG 75 Crow, Bureau of Indian Affairs, National Archives and Records Administration, Rocky Mountain Region (Denver). Hanna and Simmons to Walten, January 17, 1939, “Storage Reservoirs Willow Creek Dam 1939,” Box 248, RG 75 Crow, Bureau of Indian Affairs, National Archives and Records Administration, Rocky Mountain Region (Denver). For Wyoming’s Bighorn water development I rely on Donald J. Pisani, To Reclaim a Divided West: Water, Law and Public Policy, 1848- 1902 (Albuquerque, 1992), 251-85. Wyoming development as it affected Montana can be found in 2 folders “General Survey and Investigations, Bighorn River, Montana and Wyoming- Jan 1938-1940 and 1941-1942, Box 513, RG 115 Bureau of Reclamation, National Archives and Records Administration, Rocky Mountain Region (Denver). Compacting is also discussed in several of the letters. For a thorough overview see Jerome C. Muys, Interstate Water Compacts—The Interstate Compact and Federal-Interstate Compact, Report NWC-L-71-011, National Water Commission, Final Report, National Technical Information Service (Springfield, VA, July 1971). See too Montana Water Compacts (State of Montana Department of Natural Resource and Conservation, 1999); and the heavily biased work by Wendy Frueauf, Yellowstone River Compact (Wyoming Heritage Society, 1982).

² Petitions can be found in Folder “Storage Dams,” Box 248 and in Folder “Water Shortage,” Box 256, RG 75 Crow Agency, Bureau of Indian Affairs, National Archives and Records Administration, Rocky Mountain Region (Denver).

³ Folder “Water Shortage,” Box 256, RG 75 Crow Agency, Bureau of Indian Affairs, National Archives and Records Administration, Rocky Mountain Region (Denver).

⁴ Ibid.

⁵ Zimmerman to Supervising Engineers, Sept 7, 1933, Folder 250 Public works correspondence 1933-35, RG75 Crow Agency, Bureau of Indian Affairs, National Archives and Records Administration, Rocky Mountain Region (Denver).

⁶ Hanna to Collier, October 16, 1933, Folder “Storage Dams,” Box 248, RG 75 Crow Agency, Bureau of Indian Affairs, National Archives and Records Administration, Rocky Mountain Region (Denver). Statistics about the numbers of acres Indian owned and farmed were not meticulously kept, but numbers of Indian—owned and irrigated land were. See “Crow Irrigation Project” in the same location.

⁷ Collier to Erickson, Dec. 7, 1933, Folder “Storage Dams,” Box 248, RG 75 Crow Agency, Bureau of Indian Affairs, National Archives and Records Administration, Rocky Mountain Region (Denver).

⁸ Hanna to Collier, March 30, 1934, “Storage Dams,” Box 248, RG 75 Crow Agency, Bureau of Indian Affairs, National Archives and Records Administration, Rocky Mountain Region (Denver).

⁹ Ibid.

¹⁰ Hanna to Lewis, June 19, 1935, “Storage Dams,” Box 248, RG 75 Crow Agency, Bureau of Indian Affairs, National Archives and Records Administration, Rocky Mountain Region (Denver).

¹¹ Clarence T. Belue, “White Oppression and Enduring Red Tears: Indian Law and the Real Rules for White Control of Crow Lands,” Master of Law thesis, University of Wisconsin Law School, 1991.

¹² Platforms of the two great political parties 1856-1932, Compiled by George D. Ellis under the direction of South Trimble, Clerk, United States House of Representatives July 1932. Robert Yellowtail to Collier, June 7, 1932. Yellowtail refers to his opponent Asbury and writes, "I am out to rub mud on him." Reel 4, John Collier Papers, The Western History Collection, University of Oklahoma. The political leanings of Yellowtail can be found in campaign material, private archive of Robert Kelly, Billings, Montana. The appointment of Yellowtail is debated in internal Interior Department memos, see especially Memorandum for Secretary Ickes from John Collier, June 11, 1934, Reel 27, John Collier Papers, The Western History Collection, The University of Oklahoma. The Commissioner received a petition from 35 Crow tribal members objecting to the nomination of Yellowtail based on his marital infidelities and his peyote trafficking. See: To Whom It May Concern, May 10, 1934, Reel 27, John Collier Papers.

¹³ Superintendent's Reports-Crow Agency, Narrative Section, Annual Statistics, 1935, RG 75, Bureau of Indian Affairs, National Archives and Records Administration, Southwest Region (Ft. Worth).

¹⁴ Folder "Emergency Conservation Work Project Case Files, 1933-41", Box 280, RG 75, Crow Agency, Bureau of Indian Affairs, National Archives and Records Administration, Rocky Mountain Region (Denver). Belue, "White Oppression and Enduring Red Tears."

¹⁵ Horton to Moley, Montana Surveys and Investigations, Folder 302, Box 567, Entry 7, RG 115, The Bureau of Reclamation National Archives and Records Administration, Rocky Mountain Region (Denver).

¹⁶ Superintendent's Reports-Crow Agency, Narrative Section, 1935, RG 75, Bureau of Indian Affairs, National Archives and Records Administration, Southwest Region (Ft. Worth).

¹⁷ Ibid.

¹⁸ The buffalo repatriation program is detailed in: Robert Yellowtail, "Buffalo on the Crow Reservation," Indians at Work, III (May 15, 1936) 28-9; and Robert Yellowtail, "Wildlife on the Crow Reservation," Indians at Work, III (Jan 1, 1936) 25-6. Details can also be found in the Superintendent's Report—Crow, Narrative Section, 1935, RG 75, Bureau of Indian Affairs, National Archives and Records Administration, Southwest Region (Ft. Worth).

¹⁹ Superintendent's Report—Crow, Narrative Section, 1935, RG 75, Bureau of Indian Affairs, National Archives and Records Administration, Southwest Region (Ft. Worth).

²⁰ Ibid.

²¹ Harlan Halliburton, "Mormon Cricket Control on the Crow Reservation," Indians at Work, III (1936) 24-5.

²² Details of WPA funding can be found in Cory, Chief Engineer, Works Progress Administration to Clyde Lewis, August 18, 1936; Hanna to Walthen-September 28, 1936; Assistant Commissioner of Indian Affairs Zimmerman to Bunston, October 10, 1936; Bunston to Senator James E. Murray, September 4, 1936, "Storage Dams," Box 248, RG 75 Crow Agency, Bureau of Indian Affairs, National Archives and Records Administration, Rocky Mountain Region (Denver). For letters regarding storage location in the same folder, see especially: Hanna to Bunston, August 11, 1936; Lewis to Bunston, August 11, 1936; Lewis to Therney, August 12, 1936; Ray Bear Don't Walk to Collier and Zimmerman, Nov. 7, 1936;

²³ *U.S. v. Thomas Powers*, 305 U.S. 527 (1939).

²⁴ For the impact of the Winters decision and the failure of Interior to use the decision to protect Indian water rights see John Lytle Shurtz, *Indian Reserved Water Rights: The Winters Doctrine in its Social and Legal Context, 1880s-1930s* (Norman, 2000); and McCool, *Command of the Waters*.

²⁵ Rich Moy, "Analysis of the Yellowstone River Compact," Report prepared for Water Management Bureau, Water Resource Division DNRC, Nov. 29, 1989.

²⁶ Pisani, *To Reclaim a Divided West*, 251-85. The extensive nature of development—both private and public on the Wyoming side are detailed in a memorandum dated May 22, 1939, Giles to Sanford, "General Survey and Investigations, Bighorn River, Montana and Wyoming- Jan 1938-1940 and 1941-1942, Box 513, RG 115 Bureau of Reclamation, National Archives and Records Administration, Rocky Mountain Region (Denver). Many letters in the same folder express the concerns of the Montana Bighorn users. See especially the response of S.O. Harper, Acting Chief Engineer, Bureau of Reclamation to E.B. Winter, Secretary, Southeastern Montana Counties Association, June 25, 1940,

Folder 302, Box 513, RG 115, National Archives and Records Administration, Rocky Mountain Region (Denver).

²⁷ Muys, Interstate Water Compacts. See too Department of the Interior, Federal Reclamation Laws Annotated, (1943) p. 74-5. The Montana /Wyoming Compact Commission was authorized by Congress in Act of Jan.1, 1936.

²⁸ Bunston was Secretary of the Two Leggins Water Users Association. Dollar amounts are from receipts found in Folder "Two Leggins Users," Box 240, RG 75 Crow Agency, Bureau of Indian Affairs, National Archives and Records Administration, Rocky Mountain Region (Denver).

²⁹ See Act of April 27, 1904 (33 Stat. 352). See too C.F. Larrabee, Acting Commissioner, Office of Indian Affairs to the Honorable Secretary of the Interior, April 6, 1905, Folder 130, Box 466, Entry 3, RG 115-Bureau of Reclamation, National Archives and Records Administration, Rocky Mountain Region (Denver). In the same location see also Director to Honorable Secretary, June 8, 1905.

³⁰ Jones to Secretary, April 19, 1904, Folder 130B, Box 466 Entry 3, RG 115 Bureau of Reclamation, National Archives and Records Administration, Rocky Mountain Region (Denver).

³¹ Larrabee to Secretary, April 26, 1905 Folder 130, Box 466 Entry 3, RG 115 Bureau of Reclamation, National Archives and Records Administration, Rocky Mountain Region (Denver).

³² Leupp to Secretary, Feb 9, 1906, Folder 130, Box 466 Entry 3, RG 115 Bureau of Reclamation, National Archives and Records Administration, Rocky Mountain Region (Denver).

³³ Director to Secretary, Feb 15, 1906, Folder 130, Box 466 Entry 3, RG 115 Bureau of Reclamation, National Archives and Records Administration, Rocky Mountain Region (Denver).

³⁴ The President's interest is relayed in Ickes to Mead, February 3, 1934, Folder 302, Box 513, Entry 3, RG 115 Bureau of Reclamation, National Archives and Records Administration, Rocky Mountain Region (Denver). The same folder contains many letters from the Bighorn Dam Association including a leaflet "The Big Horn Dam." See also "Victory or What of the Future," in Folder 302, Box 567, Entry 7 RG 115 Bureau of Reclamation, National Archives and Records Administration, Rocky Mountain Region (Denver).

³⁵ Ickes to Secretary Dec 19, 1936, Folder "Storage Dams", Box 248, RG 75 Crow Agency, Bureau of Indian Affairs, National Archives and Records Administration, Rocky Mountain Region (Denver).

Wheeler's amendment is argued in the Congressional Record—Senate, May 20, 1936.

³⁶ Willow Creek was funded in four installments: Act of August 9, 1937 (50 Stat. 570, 580); Act of May 9, 1938 (52 Stat. 297,307); Act of May 10, 1939 (53 Stat. 693, 702-703); Act of June 18, 1940 (Public No. 640, 76th Congress, Ch. 395). All funding was designated reimbursable.

³⁷ Folder "Report on Little Horn Watershed," Box 248, RG 75 Crow Agency, Bureau of Indian Affairs, National Archives and Records Administration, Rocky Mountain Region (Denver).

³⁸ Simmons and Hanna to Commissioner of Indian Affairs, June 1, 1938, Folder "Correspondence Willow Creek Dam, Box 248, RG 75 Crow Agency, Bureau of Indian Affairs, National Archives and Records Administration, Rocky Mountain Region (Denver).

³⁹ See "Haul road acquisitions," Box 248, RG 75 Crow Agency, Bureau of Indian Affairs, National Archives and Records Administration, Rocky Mountain Region (Denver).

⁴⁰ Lewis to Hanna, August 31, 1938, Folder "Willow Creek Reservoir," Box 248, RG 75 Crow Agency, Bureau of Indian Affairs, National Archives and Records Administration, Rocky Mountain Region (Denver).

⁴¹ The Crow Indian Irrigation Act, 33 Stat. 352(1904). For a description of early wage labor on Crow, see Frederick Hoxie, Parading Through History, The Making of the Crow Nation, 1805-1935 (Cambridge: 1995) 276-80.

⁴² Bunston to Hanna Aug 1932, Folder "Water Shortage 1932," Box 257, RG 75 Crow Agency, Bureau of Indian Affairs, National Archives and Records Administration, Rocky Mountain Region (Denver).

⁴³ Hanna to Commissioner, Sept 12 1932, Folder "Water Shortage 1932," Box 257, RG 75 Crow Agency, Bureau of Indian Affairs, National Archives and Records Administration, Rocky Mountain Region (Denver).

⁴⁴ Hanna to Collier April 23, 1935, Folder "Public Works Correspondence 1933-35," Box 250, RG 75 Crow Agency, Bureau of Indian Affairs, National Archives and Records Administration, Rocky Mountain Region (Denver).

⁴⁵ Corry to Lewis, November 22, 1933, Folder "Public Works Correspondence 1933-35," Box 250, RG 75 Crow Agency, Bureau of Indian Affairs, National Archives and Records Administration, Rocky Mountain Region (Denver).

⁴⁶ Hanna to Collier, April 23, 1935, Folder "Public Works Correspondence 1933-35," Box 250, RG 75 Crow Agency, Bureau of Indian Affairs, National Archives and Records Administration, Rocky Mountain Region (Denver).

⁴⁷ Decision of the Secretary December 18, 1941, Folder "1942-War," Box 249, RG 75 Crow Agency, Bureau of Indian Affairs, National Archives and Records Administration, Rocky Mountain Region (Denver).

⁴⁸ Hanna to Commissioner, June 28, 1939, Folder "Storage reservoirs—Willow Creek Dam," Box 249, RG 75 Crow Agency, Bureau of Indian Affairs, National Archives and Records Administration, Rocky Mountain Region (Denver).

⁴⁹ Walten to All Supervising Engineers and Project Engineers, December 7, 1933, Folder "Public Works Correspondence 1933-35," Box 250, RG 75 Crow Agency, Bureau of Indian Affairs, National Archives and Records Administration, Rocky Mountain Region (Denver).

⁵⁰ For this wonderful look at a beleaguered bureaucrat see note xlvii and Lewis to Hanna Dec. 12, 1933 and "news item for Indians at Work" Dec. 13, 1933, Folder "Public Works Correspondence 1933-35," Box 250, RG 75 Crow Agency, Bureau of Indian Affairs, National Archives and Records Administration, Rocky Mountain Region (Denver).

⁵¹ Folder "Report on Little Horn Watershed," Box 248, RG 75 Crow Agency, Bureau of Indian Affairs, National Archives and Records Administration, Rocky Mountain Region (Denver).

⁵² Ibid.

⁵³ Hanna and Simmons to Walten, January 17, 1939 Folder "Storage reservoirs—Willow Creek Dam," Box 249, RG 75 Crow Agency, Bureau of Indian Affairs, National Archives and Records Administration, Rocky Mountain Region (Denver).

⁵⁴ Walten to Hanna, April 17, 1939, Folder "Storage reservoirs—Willow Creek Dam," Box 249, RG 75 Crow Agency, Bureau of Indian Affairs, National Archives and Records Administration, Rocky Mountain Region (Denver).

⁵⁵ Hanna to Walten, February 9, 1939, Folder "Storage reservoirs—Willow Creek Dam," Box 249, RG 75 Crow Agency, Bureau of Indian Affairs, National Archives and Records Administration, Rocky Mountain Region (Denver).

⁵⁶ Act of July 1, 1932, 47 Stat. 564.

⁵⁷ Hanna and Simmons to Walten, September 13, 1940, Folder "Storage reservoirs—Willow Creek Dam," Box 249, RG 75 Crow Agency, Bureau of Indian Affairs, National Archives and Records Administration, Rocky Mountain Region (Denver).

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ Testimony taken from James Carpenter in "Montana—Crow Reservation," From the collection of the Honorable Elmer Thomas, Legislative Series, Box 2, Folder 47, The Carl Albert Center Congressional Archive, University of Oklahoma.

⁶¹ Act of April 30, 1908, 35 Stat. 70.

⁶² In the Crow collection see "Land Sales, correspondence and case files," Box 195, RG 75 Crow Agency, Bureau of Indian Affairs, National Archives and Records Administration, Rocky Mountain Region (Denver).

⁶³ Details of the Pima strike can be found in Memorandum for Secretary Ickes from Collier, February 11, 25, March 10, May 19, June 3, 1937, Reel 27, John Collier Papers, Western History Collection, University of Oklahoma.

⁶⁴ Statement of Operation and Maintenance assessments, United States Indian Irrigation Service, Crow Irrigation Project, Department of Interior, April 29, 1940, Folder "Report to Superintendent," Box 240, RG 75 Crow Agency, Bureau of Indian Affairs, National Archives and Records Administration, Rocky Mountain Region (Denver).

⁶⁵ Folder "Wills," Box 187, RG 75 Crow Agency, Bureau of Indian Affairs, National Archives and Records Administration, Rocky Mountain Region (Denver).

⁶⁶ Bears Don't Walk to White, December 6, 1936, Folder Emergency Conservation Work Project and Case Files, Box 283, RG 75 Crow Agency, Bureau of Indian Affairs, National Archives and Records Administration, Rocky Mountain Region (Denver).

⁶⁷ See the many Amendment to Form 5-110, "Land Sales, correspondence and case files," Box 195, RG 75 Crow Agency, Bureau of Indian Affairs, National Archives and Records Administration, Rocky Mountain Region (Denver). Public Law 468 responding to the Crow Tribal Resolution of June 15, 1945 and the District Engineers Report of November 29, 1945 directed the refund to all heirs of O&M subtracted from the sale of allotments. In 1947 \$39,000.00 was refunded. See Frickinger to Lippert March 27, 1947 "Accounts 1940-1955," Box 8, RG 75 Crow Agency, Bureau of Indian Affairs, National Archives and Records Administration, Rocky Mountain Region (Denver).

⁶⁸ The chronology of the dam failure can be found in "Justification for Additional Funds—Willow Creek Dam—Crow Irrigation Project," Folder "Correspondence Willow Creek Dam," Box 249, RG 75 Crow Agency, Bureau of Indian Affairs, National Archives and Records Administration, Rocky Mountain Region (Denver). Also see in the same location, "Report on Foundation Failure Willow Creek Dam by the Board of Engineers, U.S. Bureau of Reclamation, December 31 1940." For Decker's letters see the same location.

⁶⁹ "Report on Foundation Failure," Folder "Correspondence Willow Creek Dam," Box 249, RG 75, NARA-Denver

⁷⁰ Decker, Construction Engineer to Clotts, Assistant Director, Indian Irrigation Service, March 7, 1942, Folder "Correspondence Willow Creek Dam," Box 249, RG 75, National Archives and Records Administration, Rocky Mountain Region (Denver).

⁷¹ Ibid.

⁷² Ibid.

⁷³ "Crow Indian Project Jan 16, 1939, Folder "Storage Reservoirs," Box 248, RG 75 Crow Agency, Bureau of Indian Affairs, National Archives and Records Administration, Rocky Mountain Region (Denver).

⁷⁴ "Justification for Additional Funds—Willow Creek Dam—Crow Irrigation Project," Folder "Correspondence Willow Creek Dam," Box 249, RG 75 Crow Agency, Bureau of Indian Affairs, National Archives and Records Administration, Rocky Mountain Region (Denver).

⁷⁵ Horton to Moley, May 14, 1933, Folder 302, Box 567, Entry 7, RG 115 Bureau of Reclamation, National Archives and Records Administration, Rocky Mountain Region (Denver).

⁷⁶ Article VI, Yellowstone River Compact, P.L. 83, 81st Congress.

⁷⁷ Rich Moy, "Analysis of the Yellowstone River Compact," Report prepared for Water Management Bureau, Water Resource Division DNRC, Nov. 29, 1989. See too "An evaluation of the Yellowstone River Compact: A Solution to Interstate Water Conflict," University of Washington, Master's Thesis, 1984.

⁷⁸ Muys, *Interstate Water Compacts*.

Chapter Three

The “Grand Desideratum:” Damming the Bighorn

**“There be land rats and water rats; land thieves and water thieves”
—Shakespeare, *The Merchant of Venice***

In Crow history, the Bighorn River received its name when White Horn, Big Horn Ram, One-With-White-Face, Big Horn Sheep, Sure-Footed-One, and Never Slips—all Bighorn sheep—joined together to save the life of a young Crow boy. The boy’s evil stepfather had pushed the boy over the canyon wall, leaving him for dead. The boy, clinging to a cedar branch on a narrow ledge, looked up to see the wild sheep, and, encouraged by them, the boy leapt from the security of his perch onto Big Horn Ram and then to each of his saviors in turn until at last he was safely on the rim of the canyon. There Big Metal met him and bestowed upon the boy all the wisdom of the natural world and a lifetime of four generations. He would be Chief of all Chiefs. In exchange for saving his life, the boy promised always to call the river after the sheep. From this earliest time, for the Crow, the river had always been the Bighorn.¹

Beginning in the 1940s, the Bureau of Reclamation tried to change that, along with the landscape of the canyon itself. In the hope of gaining the support of the Crow tribe to dam the Bighorn, the Bureau named the project Yellowtail—the dam and the reservoir-- after the tribal chairman and by then elder Robert Yellowtail. Rumors, substantiated by Yellowtail himself, claimed that representatives of the Bureau tried to bribe the chairman and his successor, seeking to gain the necessary permission to build a large multi-purpose dam and to take eleven miles of the Bighorn Canyon from the diminished lands of the Crow reservation.²

In 1944, Congress passed the Missouri Basin Flood Control Act. As World War II ended, there was general anxiety that the United States might return to economic

depression. There was also pent up demand for federal water projects because most had been put on hold during the war. Therefore, the Missouri Basin Plan promised to provide an enormous public works project to infuse federal capital into the economy in a declared war on the floods that ravaged the lower reaches of the Missouri. Called the Pick-Sloan Plan, the act served to consolidate plans put forth by both the Corps of Engineers and Bureau of Reclamation. This “shot gun wedding,” as journalist Marc Reisner has termed it, coordinated the construction of six main stem dams on the Missouri and 90 lesser dams on tributaries, including the Bighorn. The projects originally intended to replicate the Tennessee Valley Authority, and were intended to provide inexpensive and publicly owned and funded power to rural consumers. One of seven river basin authorities imagined by President Franklin Roosevelt, the Missouri Valley Authority, along with the others, failed to win congressional approval, though public rather than private ownership would prevail for awhile as policy on the power generated by the large multipurpose dams designated in the Act.³

In the Missouri Basin plan, Indian reserved water rights and federal reserve rights diverged. The Department of the Interior had blended three concepts: federal reserved water rights-the water reserved by the creation of federal enclaves such as national parks; Indian reserved rights; and water stored behind Reclamation project dams. Secretarial control created one unquantified amalgam referred to as “Secretarial waters.” Almost from the *Winters* decision itself, Interior had usurped the Indian right and had used the right in theory to justify Reclamation projects, conceptually conflating stored water and Indian reserved rights. By the 1920s, the Reclamation Service, along with those members of Congress who wanted to take home its attractive projects, wrapped self-interest in the proverbial “Indian blanket.” Indian reserved water rights, intended to serve the interests of Indians on their road to

civilization, conveniently migrated to the projects of their trustee, and then most often, *de facto*, to white successors. Drought and dislocation of the 1930s along with the conflicting pressure of New Deal public works projects and New Deal Indian rights activism forced the issue of the nature of Indian reserved water rights. Court action in *U.S. v Thomas Powers* (1939) prompted the Department of the Interior to consider the legal principles behind the Indian reserve and to see it as separate from the federal reserve and from the water stored in its projects.

The Crow saw the practical aspects of the dilemma unfold. They witnessed the Indian Irrigation Service projects, intended to “uplift” the tribe, promote white settlement on the reservation. The tribe witnessed Interior’s struggle again in the 1939 Supreme Court decision in *U.S. v. Thomas Powers*, the decision that jeopardized the very nature of the Indian reserved right by individualizing reservation water rights. The same forces were at work with the small rehearsal of the Willow Creek Dam. Robert Yellowtail expressed his suspicion in tribal council meetings throughout the late 30s. In the Missouri Basin plan however, all became clear. In the name of multipurpose progress, the United States engaged in wholesale removal of Sioux from the Standing Rock, Cheyenne River, Lower Brule, Crow Creek, and Yankton Reservations, and the Mandan, Arikara, and Hidatsa from the Fort Berthold Reservation. The Crow came to understand the nature of the fight they would need to wage in order to maintain their autonomy and their land base. As the battle for the Bighorn River approached, despite the federal trust relationship over Indian reserved water rights, the United States attempted a legal usurpation of the *Winters* right. The Crow would establish that the federal reserve water right and the Indian reserve water right were not one; they were as distinct from one another as were the two sovereign entities.⁴

A dam on the Bighorn River had been a gleam in the eye of government and private speculators for decades. As early as Hiram Chittenden, Captain of the Army Corps of Engineers, set the course for the Missouri Basin including the Bighorn in

History of Early Steamboat Navigation on the Missouri River:

What of the Future? Unlock its imprisoned power. Utility will take the place of romance. The buffalo, the Indian, the steamboat, the goldseeker, the soldier, will be seen in its valley no more, but in their stead the culture and comfort, and the thousand blessings that come with civilization... The grand desideratum would be that everywhere, whether upon the main stream or its tributaries, the water could be saved and used in irrigation.⁵

Both irrigation and power development continued to generate enthusiasm, and, in 1902, the Reclamation Act promised action. A 1905 report written by Reclamation Service engineer Robert Stockton, surveyed the Bighorn Basin projects that would be cost effective for irrigation. Stockton was the first to provide details for a large dam on the Bighorn. By that time, ditches already crossed most of the easily irrigated land along the river on the Crow Reservation, but Stockton envisioned a “high masonry dam,” that would provide irrigation for the proposed Bighorn High Line—a ditch that would carry water to 47,000 acres of the bench land west of the river.

Stockton was also interested in a much grander scheme: hydroelectricity. He knew that the future of irrigation was inherently tied to power generation. Power was necessary to provide pump stations for the bench land. As Stockton detailed the potential irrigation projects and their cost, he added that power production would “eventually reduce the cost of the system, since its economic use is only a matter of time.” The Bighorn Dam, he estimated, would generate 6534 H.P. in a low water year. A drop tunnel to the Two Leggins irrigation project would provide another 4000 H.P. Stockton concluded that for “the Big Horn project there are many difficulties in the

way, but eventually it will probably be built, especially if the power can be used to advantage for pumping or commercially.” Eventually, the Reclamation Service, ever mindful of “reimbursables,” considered power sales to be one means by which that could be accomplished.⁶

The most serious impediment to the big dam was in its funding. Already overburdened by many partially constructed projects, Reclamation’s revolving fund was exhausted. For Stockton, the answer to the funding dilemma lay in the Crow Indian trust fund. With meager resources the Indian Irrigation Service had just completed a small diversion dam on the Bighorn that provided water to 30,000 acres of Crow land. The canal tracked alongside the river and, with the contested resources of the Little Bighorn ditches, provided water for 50,000 acres on the reservation. Stockton’s proposed high dam was upstream from the Bighorn Canal and would interfere with the diversion. With seemingly few qualms, Stockton proposed that money for the high dam come from the Crow trust with the rationale that, after the high dam’s construction, the downstream Crow project would most seriously suffer from the lack of water.⁷

In discussing the feasibility of the funding problem, Supervising Engineer Savage wrote: “While at present there is a considerable discharge of water due to the unregulated flow of the Big Horn River during the irrigation season-the completion of works already under construction will deplete the supply to such an extent as to require...the construction of a diversion dam across the Big Horn River.” Savage continued, “The best result for all interests can be brought about under the present law if the Indian Department will cooperate by providing for payments assessed against live Indians...such payments being made from tribal funds, the same as had been done for the ditches already constructed for the Indians, and also by arranging for selling the allotments of dead Indians.” From its very inception, the Reclamation

Service, later the Bureau of Reclamation funded its projects unashamedly from the tribal trusts with little regard for how much the Indians would benefit from the project. By the 1940s, the Bureau of Reclamation continued and expanded its vision by proposing additional dams on the tributaries of the Missouri Basin using as sites Indian reservations.⁸

The big dam was not built. In 1914, as white settlement continued into the Ceded Strip and the bench lands to the west of the Bighorn River, the Geological Survey, with the approval of the commissioner of Indian Affairs, reserved from location and entry, allotment, or appropriation 3,760 acres of the Crow Indian Reservation along the Bighorn River. The prohibition included any issuing of trust and fee patents to the Crow. The site was designated Power Site Reserve 420, Bighorn River.⁹

Federal power policy was confused prior to the 1920 Federal Power Act.¹⁰ While the government reserved the Bighorn, it also granted a permit to private developers. Early speculators on the Bighorn, including John J. Harris, later father of the “Bull Grip,” formed a Montana corporation, the Bighorn Canyon Irrigation and Power Company. The speculators sought a permit as early as 1912 for a dam across the Bighorn, one that would serve the dual purpose of irrigation and power generation. They had invested in the bench land west of the river, and in the Ceded Strip. On June 20, 1912, the federal government granted a permit to the corporation for a preliminary survey, but the corporation never got the financial backing to build the dam, nor was it able to strike a deal with the Crow. Again in 1922, under the Federal Power Commission’s Act of 1920, the corporation filed and again it failed to attract investors. In 1925, under the terms of the Act, the permit expired. Harris maintained an interest in the project, however, and promoted it throughout the 1930s, because of the benefit to his bench land investment.¹¹

The Crow themselves had a very clear idea of the value of the Bighorn Canyon as a dam site. In 1917, the assaultive senator, T.J. Walsh, introduced one of many bills for the final allotment and “opening” of the Crow Reservation. Long forestalled, the act was designed to allot the diminished reservation lands to all living Crow Indians and would then allow white farm settlement on the remaining land. The Crow had been more successful than many western tribes in delaying this final process, but in 1917, the plenary power of Congress seemed certain to extract the last vestige of tribally owned Crow land. Walsh’s motives included his own political survival. He counted on the new settlers, small farmer Democrats, to win reelection. Appearing before the Indian Affairs Committee in April was a contingent reminiscent of another era, an era where battle lines were more easily discerned: Chiefs Plenty Coups, Two Leggings, Spotted Rabbit, Medicine Crow, and Bird Hat. Representing them was the young Robert Yellowtail. According to Yellowtail’s memory of the events, the Chiefs met prior to their committee appearance, burned buffalo chips and sweet grass in a purifying incense, and made war medicine on Congress. Plenty Coups prayed, “Help us overcome Senator Walsh tomorrow. The entire Crow people are calling upon you to do this—don’t neglect us, Great Spirit. Be by our side tomorrow. We have nowhere else to go but to thee. Hold us by the hand and save our lands and homes for us.”¹²

Walsh’s arguments before the committee included evidence that the Crow Reservation served the interest of the large cattle barons, men who had extracted loyalty from the Crow with hefty grazing fees. The lowly settlers— and future voters—had been blocked from land by the conspiracy between Indians and cattlemen.

Yellowtail responded with a detailed account of the real value of the Reservation, far beyond the price offered by the government. “ The value of the land can only be estimated into the billions of dollars from the billions of tons of the largest coal

deposits in the world, water power sites whose values are unpredictable at this moment—but safe to guess as into the hundreds of millions....The water rights in the Bighorn River which are reserved unto us by the Crow Treaty of 1868, and later upheld under the Winters Supreme Court decision, which as the years roll on will be one of the most valuable assets and natural resources that we possess.”¹³

The prescient Yellowtail, along with the chiefs’ ancient war medicine, and the lobbying efforts of the Indian Rights Association, convinced the Senate Committee to vote the bill down, a remarkable achievement in light of the demand for agricultural production during World War I. In 1920, Congress did pass the Crow Act, opening the reservation to white settlement, but with far more consideration for the tribe. Yellowtail again addressed the Senate Committee on Indian Affairs “It (power generation) represents quite a tribal asset to us...and we do not want to lose that right..” The Crow Act of 1920 granted to the tribe refusal on all future irrigation projects; reserved to the tribe all mineral rights; and, remarkably, in Section 10 of the Act, “That any unallotted lands on the Crow Reservation chiefly valuable for the development of water power shall be reserved from allotment or other disposition hereunder, for the benefit of the Crow Tribe of Indians.” Section 10 proved to be a valuable weapon as non-Indians became more covetous of the Bighorn Canyon damsite.¹⁴

The push to dam the Bighorn began in earnest when the Bureau of Reclamation and the Hoover Administration began to enlarge their vision in the late 1920s, at a time when Boulder Dam demonstrated the feasibility of large multi-purpose structures. Local stockholders in the Bighorn Irrigation and Power Company pushed to ensure that the Bighorn Canyon dam was on a national agenda. Presenting one plan to officials, Mrs. Sam Emmons characterized the project as one that would best serve “the people at large.” Emmons, urging that “the people get the benefits of the

dam,” opposed two other factions active in the development project. The first was the big landholders, specifically Thomas Campbell of the Campbell Farming Corporation. She wrote: “and it should be fixed that one farmer can’t buy more than what he can take care of so just a few will own it all. Thomas Campbell has so much of that land that should be sold to men that want to make a home for their family.” Emmons also objected to Montana Power Company “getting everything.” Montana Power Company had leased a site on the Flathead Reservation for which it paid the tribe an annual rent. Referring to the Bighorn Irrigation and Power Company, Emmons explained that, “the little Co. [company] that has something to say about this dam don’t want that Montana Power Co. to get it...” She continued, “The people need help...these big companies don’t care how the poor class get along.”¹⁵

“The people,” led by the speculator J. Harris continued their campaign into the next administration. In 1934, Harris garnered the support of U.S. Senator from Montana Erickson whose interest lay in the growth of white settlement—mostly Democratic in political leanings—on the Ceded Strip. Harris, who lived in Chicago, spent eight months in Washington lobbying the President Roosevelt and the Public Works Administration for the necessary funds to begin the dam. President Roosevelt, always mindful of the support of Western senators, responded with a memo to Secretary of Interior Harold Ickes. Roosevelt inquired about the project: “What to do with it? National Park? Power? Dam to stop silting?” Ickes passed the inquiry along to Elwood Mead, Commissioner of the Bureau of Reclamation and to Roger Toll Superintendent of the National Park Service. Mead urged both a National Park and a reservoir to enhance the natural scenic beauty of the Bighorn canyon. “The Bighorn Canyon is destined to be one of the noted scenic attractions of this country. The river has worn its way through a spur of the Big Horn Mountains until in its depth, its precipitous cliffs and sculptured forms, it has a beauty which justifies its being

reserved as a national park. There is an opportunity to impound the wasted water of the Bighorn River by means of a high dam built in the lower end of the canyon...the building of this dam would make possible the generation of a considerable amount of power.” The sale of the power would make the dam “self liquidating,” that is, the dam would pay for itself, still a major concern for the Bureau.¹⁶

By 1936, with the urging of Senator Burton Wheeler, the Secretary of War authorized surveys and reports on a number of projects including the Bighorn in the Flood Control Act of 1936.¹⁷ With continued agitation from Hardin promoters like the Big Horn County Commercial Club and the Chamber of Commerce, the project was included in the Reclamation Act of 1939. Between 1939 and 1944, the Bureau endorsed the Bighorn dam along with a second dam at Kane in Wyoming. The two dams would be low and together would generate 105,000 kilowatts. The Flood Control Act of 1944 commonly referred to as the Pick-Sloan Plan for the Missouri Basin included the project. In 1946 the project was specifically authorized.¹⁸

A separate 1946 bill reiterated the 1920 and 1926 Crow Act’s prohibition of irrigation projects without express tribal permission: “No further construction work on the Crow Indian Reservation shall be undertaken by the United States without the prior consent of (1) the Crow Tribe, (2) the irrigation districts affected, and (3) the Congress of the United States.”¹⁹

By 1950, the legal battle for the Bighorn began in earnest when the Bureau of Reclamation projected one big dam in Montana, called Yellowtail, replacing conceptually two small dams. In 1953 Congress approved funding. There was only one problem: along the legislative path no one had entirely reckoned on the political savvy, personal aspirations, and legal memory of Chairman Yellowtail.

Robert Yellowtail did not object to a dam on the Bighorn. Rather, he wanted to maintain tribal ownership of the structure, the canyon, and the river, and its power

production. The Bureau of Reclamation initially contacted the tribe in 1946, and the tribe agreed to exploratory work. In 1948 Regional Counsel W.J. Burke, one of the *Powers* prosecutors, offered the tribe \$1000 a month to study the damsite. The Crow refused the offer and also turned down a second of \$2000 a month. Four more abortive meetings between the tribe and the Bureau occurred in 1948. In 1949 Robert Yellowtail offered Reclamation an option: the government could lease the site for 50 years with a \$1 million annual rent. Yellowtail's offer was not exorbitant. He based his figures on a lease by Montana Power Company to the government. The private utility made an offer to build the dam and transmission lines in exchange for the power generated, agreeing to pay the \$1 million for annual rent. The 1944 Missouri Basin Project however discouraged private power development. According to New Deal philosophy, power belonged to the people and the government's role was to supply electricity to the public as cheaply as possible. The 1944 Missouri River Act authorized the Bureau of Reclamation to market the power generated by Yellowtail dam, but it was unwilling to entertain the Montana Power offer. They also found the Yellowtail offer untenable.²⁰

In 1948, discouraged by the lack of tribal cooperation, the Bureau of Reclamation approached the Solicitor of the Department of the Interior to seek his opinion on a condemnation action—a taking. The Bureau based the authority to take the land on the Secretary's 1914 authorization to withhold from entry the lands along the Bighorn River for the dam site. Mastin White, Solicitor, decided that the legislation did, "not vest in the Secretary any power to acquire for the United States the title to any such site...the mere reservation of a site does not, of course, deprive its owners of their title to the land. It is still necessary to acquire the title from the Indian owners before the land can be used for the contemplated project." The Bureau also suggested it might have the right to the taking under the Crow agreement of 1899, the Ceded

Strip legislation, along with the 1904 authorization for Reclamation to use the land for the Huntley Project. The Bureau's reasoning seemed to be that they had once had an agreement to use the Ceded Strip, might they not now have the right to even more? White again said no. The legislation applied only to land and water for private individuals and private water districts. Again the Bureau suggested that the Act of 1948 authorizing the Secretary rights-of-way for all purposed across Indian lands might be justification. "It would certainly be stretching the statute beyond reason to hold that a reservoir site covering thousands of acres is a right-of -way."²¹

In October, 1949 the Bureau brought another legal possibility to the Solicitor. Did it have the authority to take the land under the 1944 Flood Control Act? Quoting from the Act: "The proposed reservoirs will inundate Indian lands at several points. The estimates submitted of the over-all cost of the projects include funds to cover the cost of taking such lands and buildings including relocation of burial grounds. It is to be understood therefore that approval of this plan includes authority for the Indians through their tribal councils, with the approval of the Secretary of the Interior to convey and relinquish such property to the United States." According to acting solicitor W.H. Flanery, the problem for the Bureau's taking came with the hasty combination of the two plans for the Missouri Basin—the Pick Corps of Engineers and the Sloan Bureau of Reclamation. In a legal sense the authority for the taking was conveyed only to the Secretary of War for the Corps of Engineer projects, not to the Department of the Interior for the Bureau projects. While the Secretary of the Interior had the right to approve any conveyance, authority to acquire the land rested in the Secretary of War. For the Secretary of War to acquire land for the Bureau of Reclamation would be "a highly anomalous governmental procedure.... Acquisition is not authorized by the Flood Control Act of December 22, 1944."²²

Within the Interior Department, the Acting Commissioner of Indian Affairs offered little consolation to the Bureau. "The powersite is entirely within the Crow Reservation and most of the reservoir will be on Crow Indian lands. Your study should, therefore, take into consideration strategic values for power development so that this phase of the matter may be adequately considered when dealing with the matter of compensation for the rights of the Crow Indians. You should also give consideration to the allocation of a block of power to the tribe as part compensation for the rights of the tribe being acquired."²³

During the next year, 1950, four appraisals were conducted on the site: by the Crow Tribe, the Federal Power Commission, the Bureau of Reclamation, and the Bureau of Indian Affairs. Not surprisingly the appraisals were quite different. The Crow appraisal established a value of \$5 million to the land and the dam site, while the Bureau of Indian Affairs set a value at \$1.5 million. The Federal Power Commission valued the Crow's interest at \$10,000 and the Bureau of Reclamation's Robert Herdman appraised the site at \$940,000. The Secretary of the Interior offered the Crow tribe \$1,150,000 to purchase the canyon. The Crow Tribal Council, all the tribe serving as voting members, turned down the offer.

The disparate figures revealed the difficulty that would ensue: the government was reluctant to compensate the Crow for the value of the flow of the river. To do so would establish a precedent for all the dislocated tribes involved in the Missouri Basin Project, and for that matter, any Indian tribe in the vast western reach of Reclamation projects. Should the tribes come to understand their *Winters* rights as including, in addition to water for irrigation, falling water—hydroelectricity—Reclamation's condemnation costs would skyrocket. At jeopardy too would be the secretarial control over Indian reserved water rights. The battle for the Bighorn was so lengthy, not because the government was reluctant to pay the Crow. Interior was

highly averse to establishing a dangerously expensive precedent setting interpretation for *Winters* rights.

If Interior had hoped to shortcut the condemnation, they picked the wrong the tribe of Indians. Robert Yellowtail knew exactly what the value of the flow of the river was and what it meant to the Bureau, and he also knew the legislative history intending to reserve Crow tribal rights to the potential power generation of the Bighorn River. With the support of the Tribal Council, as required by the Crow constitution, Yellowtail continued to demand full ownership of the river and rental on the dam site.

The Interior Department again approached its solicitor, this time with the rationale of the Reclamation Act of 1902: "...the Secretary of the Interior is authorized to acquire same for the United States by purchase or by condemnation under judicial process, and to pay from the reclamation fund the sums which may be needed for the purpose." ²⁴

Mastin White issued his opinion at the end of the Truman administration and just before Eisenhower's election, October 27, 1952. Again he cited Congress's intent in 1920, 1926, and 1946 to prohibit any irrigation project without tribal permission. All required approval of the tribal council—the council consisting of all tribal members. White cited Felix Cohen on the subject. Cohen, whose accomplishments included the remarkable *Handbook of Indian Law*, asserted in 1945 that any condemnation by the United States of tribal land was illegal. White backed away from any pronouncement with those far reaching implications, but in the case of the Yellowtail dam, he concluded, "It is my opinion that the tribal lands needed for the Yellowtail dam and reservoir site cannot be acquired by means of condemnation proceedings." ²⁵

With the 1952 election of Eisenhower and a Republican majority in Congress, Indian policy changed dramatically. "Termination," was an appropriate

name for a policy designed to end the government's trust relationship with the Indian and purportedly, the Indian's dependence on the government. It also changed the party affiliation of the solicitor of the Interior department, and with that change came a more development-oriented opinion on the Bighorn Canyon condemnation. In the fourth and final opinion from the solicitor's office, the United States Bureau of Reclamation received the permission to supersede the 1920, 1926, and 1946 legislation and to condemn the land of the Crow Indians. Solicitor Clarence Davis wrote: "There can be no question that the United States possesses the inherent right of eminent domain in the lands required for the construction of this project, even though they be tribal lands of the Crow. To hold otherwise is to say that the Crow nation holds in a more sacred title than do any other landowners in the United States...." Though consistent with the earlier philosophy of assimilation, the decision surely reflected a shift from the New Deal in all questions concerning Indian sovereignty. For the Crow it represented the turning point in their battle for the Bighorn.²⁶

Yet another blow to the sovereignty issues involved in Indian reserved water rights came when, in 1952, the McCarran Amendment passed Congress. The McCarran Amendment allowed the states to include the federal government in adjudications of water rights. The federal government had avoided any quantification by allowing their reserved right to remain inchoate. In post-McCarran state-initiated court actions, the federal government would "be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual...." The McCarran Amendment marked a distinct turning point in the concept of federal reserved water rights; states now had jurisdiction over allocating federal water. Did the McCarran Amendment also allow the states to enjoin the tribes in any general watershed adjudication, or

were the two reserved rights—federal and Indian—separate? The position of the tribal reserved rights was precarious as the era of termination began.²⁷

The Crow themselves were torn apart by the very real federal and the potential state threat. They clearly held the legislative upper hand, but all the tribes along the Missouri were mindful of the fate of the Ft. Berthold Confederated Tribe, the first of the Pick-Sloan takings. The Corps of Engineers, without warning, began the mainstem Garrison Dam, leaving the tribe at the mercy of the War Department soldiers. Only the conscience of Congress granted the Tribe any compensation.²⁸

Under these pressures, in the May, 1954 tribal elections, William Wall, Jr defeated Robert Yellowtail for tribal chairman. Yellowtail, then 65 years old, had always garnered his share of tribal criticism. The Commissioner's office received many complaints about his philandering, his controversial endorsement of peyote, and most significantly, his haphazard approach to tribal accounting procedures. One tribal member requested a full investigation of Yellowtail's "bad bookkeeping," claiming that Yellowtail dropped an Indian Claims Commission action in exchange for the Commissioner's wink on his financial records.²⁹

As Superintendent, Yellowtail did receive annual requests for substantiation from General Accounting Office audits. Irregularities included cash transfers from one Indian's account to another, payments to "incompetent or extravagant Indians," missing vouchers in values as high as \$4,000, and failure to itemize individual Indian's securities. L.C Lippert replaced Yellowtail as superintendent in 1945. Lippert spent years trying to reconcile the Yellowtail books.³⁰

Yellowtail's defeat revealed serious fissures in the Crow tribe. The tribe, divided in locale from the time of Superintendent Armstrong's irrigation project, now turned on each other. In the 1880s, Plenty Coups had given his permission for those in the tribe who wanted to take the path to modern farming to follow Armstrong and settle

along the Little Bighorn valley. There they began the construction of the infamous irrigation ditches. Plenty Coups admitted that he could not make the change, and, along with his own close supporters he stayed in the Pryor Mountains. This regional division deepened as representatives of the Indian Office restricted travel between the areas of the reservation. Familial associations turned into heated enemies during the damsite controversy. Yellowtail's supporters lived primarily in the Pryor region and endorsed the rental plan, while those who endorsed the \$5 million sale to the Bureau lived nearer Crow Agency on the Little Bighorn. Though the factions had more in common than not, they divided in ways that became permanent. The heated debate came to a boil in the January, 1956 meeting of the Crow tribal council.³¹

The defeat of Yellowtail reflected a significant shift in tribal sentiment. The meeting held that January night opened with Robert Yellowtail proposing two companion motions. The first would end the Bureau of Reclamation's negotiations with a committee named by the new chairman: "HEREAFTER ALL NEGOTIATIONS WITH THE BUREAU OF RECLAMATION FOR THE TRIBAL LANDS DESIRED FOR THE YELLOWTAIL DAM, WILL AND SHALL BE CONDUCTED BEFORE THE CROW TRIBAL COUNCIL AND NO WHERE ELSE, AND BEFORE NO MORE COMMITTEES APPOINTED BY THE CHAIRMAN." The motion was seconded but no vote was taken.³²

Yellowtail put forth a second resolution: "THAT THE BUREAU OF RECLAMATION IS HEREBY REQUESTED AND INVITED TO SUBMIT IN WRITING THEIR FINAL AND DEFINITE OFFER OF PRICE AND TERMS FOR ACQUIRING THE TRIBAL LANDS OF THE CROW TRIBE FOR THEIR PROPOSED YELLOWTAIL DAM. IF THE MILLION AND FIVE HUNDRED DOLLARS IS THEIR FINAL OFFER SUCH INFORMATION SHOULD ALSO BE

CONVEYED TO THE CROW TRIBE.” The motion was seconded but again no vote taken.

George Hogan, Jr. moved to substitute Resolution 63 for the Yellowtail resolutions. Resolution 63 would force a vote between two plans. Plan 1 included the Crow tribe’s agreement to sell the damsite for \$5 million, while Plan 2 would require the Yellowtail lease. Hogan’s motion was the first challenge of the evening to the strength of Robert Yellowtail among those 285 members of the Council present. The Chairman asked tribal attorney Kronmiller to explain Resolution 63 and he did. Heated debate ensued. Yellowtail battled Hogan with arguments erupting from all quarters: Edward Whiteman, John Glenn, Owen Williams, Dick Little Light, Oliver Lion Shows, Jasper Long Tail, Alfonso Childs, and Plain Feather—all weighed in. At one point Council member John Glenn moved to change the name of the dam from Yellowtail to Absarokee. The motion was ruled out of order. Of the many questions on the table before the Council, they finally agreed to vote on whether to consider the substitute to the Yellowtail resolutions, Resolution 63. The Council was unanimous in support of the up or down vote of Resolution 63.

Edward Whiteman moved that the tribe vote on Resolution 63 by secret ballot. The Council again responded unanimously. Ballots went to each member present. After the ballots were counted, 185 supported the Resolution to decide between the two plans—the sale or the lease. Under the watchful eyes of the Chairman-appointed election judges, Donald Deer Nose, Eloise Pease, Corinne Buechler, William Russell, George Hogan, and Philip Beaumont, the Council lined up, 285 strong, to decide the fate of the Bighorn Canyon. They cast 148 votes in favor of the \$5 million sale and 137 for the Yellowtail lease plan. Robert Yellowtail had lost every vote and his failure would be enshrined forever in the name of the Bureau of Reclamation dam.

Yellowtail began to hurl accusations of bribery against Bureau of Reclamation employee Carl Sloan. On February 8, 1957, Yellowtail filed a complaint with the F.B.I. accusing Sloan, through his intermediary, Matt Tschirgi, of offering Yellowtail a substantial amount to support the dam. Yellowtail also alleged that the new tribal chairman Wall had, indeed, accepted such an offer. The Chambers of Commerce of both Billings and Hardin had also attempted to influence the tribe's decision according to Yellowtail. They had offered \$35,000 to the tribal leaders, money, Yellowtail alleged, the leaders accepted and had used for the purchase of new cars. Further, for their votes, each tribal member had received \$5, groceries, and coal for the winter. Tribal members had long complained about the political affiliations and strong-arm tactics of Mr. Sloan. While all documentation disappeared by the time the Bureau of Reclamation investigated the allegation, the position of the Crow tribe remained unaltered.³³

A better documented conflict of interest existed in the firm representing Crow interests, Wheeler and Kronmiller. Hired by the new chairman, former Senator Burton Wheeler had long been a proponent of the dam and a friend to the Hardin non-Indian interests. Kronmiller's explanation of Resolution 63 at the tribal council meeting in 1956 no doubt reflected those leanings.

As a result of the changed sentiment of the tribe, Congress made an offer. Under the watchful eyes of then Senators Mansfield and Murray, Resolution 135, offering \$5 million to the tribe passed both the Senate and the House. Eisenhower vetoed the bill. His frugality on all water projects resulted in a "no new starts" policy, and he objected to the high price for the taking. But the President had more pressing reasons to veto the bill. He insisted the \$5 million was too high to be "just compensation" for the condemned land. Congress, he insisted, had made an award based on the Crow loss of the value of the flow of the stream, not just the damsite.³⁴

Jurisdiction over the flow in a river had been claimed by the federal government as part of the commerce clause in the constitution, with legal precedents dating to John Marshall's decision in *Gibbons v. Ogden* (1824). Eisenhower, along with the Department of the Interior, did not support the precedent of compensation to the tribe for the loss of the flow of the stream. To do so would blur the "bright line" of federal sovereignty over interstate waters. With that rationale, there could be no just compensation for the tribe's loss of water power potential on the Bighorn.³⁵

The Department of the Interior responded to the presidential veto by rescinding its \$1.5 million offer, leaving on the table the \$35,000 offer for the naked value of the land. It then filed, in federal court, Civil No. 1825, *United States v. 5.677.94 of land, more or less of the Crow Reservation of Montana*.³⁶

Congress, however continued to believe the taking was unconscionable and again offered to compensate the Tribe for the full \$5 million. New legislation expressly stipulating that the United States was under no legal obligation to compensate the tribe for more than the valuation of the land. Interior balked. It had a great deal to lose if the Confederated Ft. Berthoud, the Standing Rock, Cheyenne River, Lower Brule, Crow Creek, and Yankton Sioux all claimed compensation for the flow of the Mighty Missouri.

The compromise between Congress and the Secretary of the Interior involved a \$2.5 million payment to the tribe, but, significantly, the Crow also received congressional permission to sue in federal court for additional damages. The Department of the Interior felt safe with such an offer. Montana District Court Judge, Charles Pray, had already denied a Crow petition to dismiss *United States v. 5.677.94 of land, more or less of the Crow Reservation of Montana*. The condemnation case, despite Congress's intervention, continued in the courts. Pray had weighed in strongly in 1936 in *U.S. v Thomas Powers*, finding on behalf of non-Indians in their

fight transferring Indian held *Winters* rights to non-Indians. Now, as the federal trustee turned on its ward, Interior felt confident they could count on Pray. But Interior underestimated the Tribe's case and its willingness to pursue it.³⁷

The Crow Tribe maintained its relationship with law firm Wheeler and Kronmiller. The former Montana senator, Burton Wheeler attacked Judge Pray's decision in the preliminary hearing, the decision granting the right of the United States to condemn Indian land. The attorneys pointed to the long held precedent requiring specific congressional intent to declare eminent domain. Fifth amendment protections were specific: the will of the executive was not enough. Arguing the application of 1 Nichols on "Eminent Domain," Wheeler and Kronmiller quoted, "One of the most firmly established principles of the law of eminent domain is that the burden is on a party seeking to exercise the power of eminent domain to show a warrant from the legislature either in express terms or by necessary implication...whatever is not plainly given is to be construed as withheld."³⁸

The lawyers further claimed that the various legislative authorizations for the Missouri Basin Project, as asserted by the United States attorneys, did not clearly express the will of Congress to condemn Crow lands: "When the mind of Congress was focused on the particular affairs of the Crow Tribe, it prohibited a taking of their lands for reclamation purposes." In fact, on three occasions Congress specifically protected the Crow from unwanted encroachment from the Bureau of Reclamation. They cited the Crow Act of 1920, the 1926 Amendment to the Crow Act, and the Act of June 28, 1946. The latter legislation addressed many complaints over Crow water rights, and again stated that, "no further construction work on the Crow Indian Reservation shall be undertaken by the United States without prior consent of the 1) Crow Tribe, 2) the irrigation district... affected, *and* 3) the Congress of the United States." [emphasis added] The 1946 Act actually expressed congressional intent after

the 1944 Missouri Basin funding; therefore, the attorneys reasoned, this general legislation funding the Missouri Basin projects could not be interpreted as superseding the legislation expressing the clear will of Congress specifically involving the Crow.³⁹

In fact the 1944 Missouri Basin Project, endorsing 90 dams sites in nine states seemed to be worded specifically to protect Indian lands: “...the reclamation and power development to be undertaken by the Secretary of Interior under said plan shall be governed by the Federal Reclamation laws...except that irrigation of Indian trust and tribal lands...shall be made in accordance with the law relating to Indian lands.” The attorneys argued that, “It is well established that general Acts of Congress do not apply to Indians unless so worded as clearly to manifest an intention to include Indians. The Indian has always been the object of special legislation.”⁴⁰

Wheeler and Kronmiller did not stop with the specific exemption of the Crow to the particular condemnation, but forcefully asserted the exemption of all tribes to federal reclamation condemnation based on the conflict of interest within the Interior Department. The lawyers cited the three New Deal solicitor opinions, but went further. Citing *U.S. v Kagama* (1886) the attorneys appealed to Court’s emotion, “From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them and the treaties in which it has been promised, there arises the duty of protection...The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers is necessary to their protection....”⁴¹

Citing *U.S. v Shoshone* (1938) and reiterating other established precedent, the attorneys continued their assault: “In treaties made with them (Indian tribes) the United States seeks no advantage for itself; friendly and dependent Indians are likely to accept without discriminating scrutiny the terms proposed. They are not to be

interpreted narrowly, as sometimes may be writings expressed in words of art employed by conveyancers, but are to be construed in the sense in which naturally the Indians understand them.”⁴²

Finally, to assert the rights of the dependent ward, the attorneys used *Lane v. Pueblo of Santa Rosa*. To reiterate the obligation of the guardian in the dependent relationship of the taking, that case provided that: “It is not the usual situation for the guardian to assert power to condemn his ward’s property. When the Secretary of the Interior, carrying out his reclamation functions, decides to dispossess his ward, “ ‘that would not be an exercise of guardianship, but an act of confiscation.’ ”⁴³

Regarding the right of the United States to condemn treaty-guaranteed Crow land, Judge Jameson would have none of the Crow argument. Looking to the 1903 *Lone Wolf v. Hitchcock* decision, one that asserted the power of Congress to abrogate treaties, Jameson declared that clearly Congress did hold the power to condemn where it clearly intended to do so. “While general acts of Congress do not apply to Indians unless so expressed as to clearly manifest an intention to include them, general legislation is sufficient to override the provisions of an Indian treaty where the intentions of Congress to do so is clear. Jameson noted that, where reclamation was concerned, Congress had on a number of occasions granted the Bureau the right to condemn Indian land. It had done so in the original Reclamation law of 1902 and the courts had reinforced the rule in *Henkel v. United States*. Where the ruling determined that reclamation projects under the Reclamation act, “must necessarily include much territory which is included in Indian reservation.” Clearly Congress had given the Secretary of Interior, “the right to acquire such lands, when necessary for the reclamation, either through purchase or condemnation.” Finally Jameson looked to the five separate authorizations for Yellowtail Dam beginning with the Flood Control Act of 1944 as sufficient instruction to the Secretary of Interior. Jameson’s

decision regarding the eminent domain of the federal government was soon to be reiterated in the Supreme Court case, *Federal Power Commission v. Tuscarora Indian Nation* (1960), along with the famous dissent of Justice Black, “Great nations, like great men, should keep their word.”⁴⁴

While Judge Jameson clearly underscored the superior posture of the sovereign United States, he would not entertain the government’s view of adequate compensation. The government had held consistently that they had no need to compensate beyond the naked value—\$37,000. They had no obligation to reimburse for the “flow of the stream”—power development. Their case was based on the principle of federal control, “dominant servitude,” over all navigable streams. Dominant or navigation servitude gave the United States enhanced jurisdiction over a river. As such it diminished any riparian claim. While the Bureau had never been concerned with navigation, it now took a page from the Corps of Engineers and asserted federal supremacy on multipurpose projects based on the 1956 Supreme Court decision *United States v. Twin City Power* and *United States v. Appalachian Power Co.* “If the interests of navigation are served, it is constitutionally irrelevant that other purposes may also be advanced... ‘flood protection, watershed development, recovery of the cost of improvements through utilization of power are likewise parts of commerce control.’”⁴⁵

The high court had given Jameson further legal precedent: “the interest of the United States in the flow of a navigable stream originates in the Commerce Clause...the power is a dominant one which can be asserted to the exclusion of any competing or conflicting one...the landowner seeks a value in the flow of the stream a value that inheres in the Government’s servitude and one that under our decisions the Government can grant or withhold as it chooses.”⁴⁶ While the *Twin City Power* case would have reimbursed a private power company, attorneys for the United

States attempted in the Crow case to equate treaty guaranteed “undisturbed use” of the Bighorn Canyon with the rights of a private company to produce power on the Savannah River.

Underlying the argument of the United States was the premise that the Bighorn River was navigable. Only navigable streams invoked the Commerce Clause. Arguing for the defense, the Crow attorneys insisted that the Bighorn was not one of the “highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.”⁴⁷ Defendants argued heatedly that the Bighorn was not, in fact, a navigable stream in any sense of the word. But, they also contended, even if it were navigable, the United States had no dominant servitude over the river as it flowed through the Crow Reservation. To claim servitude was to deny the principle of the *Winters* decision.⁴⁸

The Crow defense used the *Winters* decision to establish the Crow right to the flow of the Bighorn. In *Winters*, non-Indians, upstream and off reservation, had diverted waters of the Milk River. At the time of the suit, Indians on the Ft. Belknap Reservation used 30,000 miner’s inches of water from the Milk, or what amounted to the entire flow of the stream. Therefore Indians demanded for an “uninterrupted flow” of the waters in the non-navigable stream. The Supreme Court in the seminal decision upheld the Ft. Belknap contention that the flow was reserved to the tribe. The Crow demanded the same consideration, the flow of the river, but with the significant addition of compensation for the lost power generated by the flow: “Here...the Government would strip from the Crow Indians substantially all the value of their great dam-site on the theory that the Crows have no interest in the stream flow.”⁴⁹

The United States asserted that compensation, according to precedent, should be based on the present value to the owner, not on the future value to the taker. The

defense pointed to Section 10 of the 1920 Crow Act—the Section reserving the Bighorn power site to the Crow. The Crow had always intended to develop the site in some manner, and that argument swayed the court. After upholding the right of the United States to condemn the Bighorn Canyon, Judge Jameson found on behalf of the Crow as to compensation. Regardless of navigability, the Crow must receive adequate compensation for the loss of the power site; that is, the Crow were entitled to the value of the flow of the Bighorn River:

No case has been cited holding that a ‘dominant servitude’ exists in the United States over tribal interests in streams on an Indian reservation. On the contrary, the treaties, legislation and course of dealing with Indians generally and with the Crow Tribe in particular, lend to the opposite conclusion. ...The United States by these treaties and others, and through a course of dealing with the Crow Tribe, has recognized in the land now sought to be condemned an aboriginal Indians title in the Crow Tribe and its right of occupancy, possession, and the use of the territory including the development of water power.⁵⁰

Jameson referred the final compensation to a commission. The United States as plaintiff demanded that a jury decide compensation; the Crow requested the court-appointed Commission. Jameson’s opinion cited the complex nature of the settlement and the unusual nature of the land in deciding in favor of the court appointees. At that point in the proceedings the United States dropped its case. They had the condemnation, and Eisenhower had signed the \$2.5 million congressional offer. Should the Crow desire more compensation, the government trustee would not pay the court costs to support the settlement. The Crow would need to initiate their own suit.

The issue of navigability of the Bighorn remained unsettled. Jameson had refused to render an opinion on navigability in the condemnation case. The United States had used the issue of navigability to assert dominant servitude. Jameson had found that

the issue of navigability did not influence the question—no servitude existed. But the navigability might well influence the valuation for the dam site. He referred the issue to a separate trial. Already having what it needed, the United States was unwilling to risk its position on navigability and declined to pursue the question further. The issue was only temporarily unresolved. Already the state of Montana was making noise; they had much to gain.

Compensation for the loss of the dam site and its power potential, the flow of the river, and the lands acquisition all were determined in a subsequent case, *Crow Tribe v. United States* (1963). Permission for this legal action had been granted by Congress to compensate the Crow beyond the congressional \$2.5 million. The federal district court awarded the Crow another \$2 million dollars and \$500,000.00 in interest. Traditionally, the court awards interest only in wrongful takings.⁵¹

The money from the settlement never reached the Crow. The money entered a B.I.A. account designated “Debt Retirement.” For years, Robert Yellowtail introduced resolutions in tribal council demanding an explanation, and though the resolutions passed, the B.I.A. never provided one.⁵²

The case *Crow v. US* (1963) compensated the tribe for their holdings, in the Bighorn Canyon along with various rights of way to the site, and a campground for what would become a National Recreation Area. Despite the sale the tribe retained all mineral rights including oil, gas, hydrocarbons, uranium, thorium and the rights to extract them. They also retained rights of egress, hunting and fishing, boating, and other recreational use. The land, originally withheld by the Secretary in response to a request by the Geological Survey had also been withheld in the final 1920 allotments. In a much quieter way another taking occurred. Prior to the 1914 decision to withhold entry on the power site, as a part of Act of February 8, 1887, the general allotment act, ten Crow allottees received land on either side of the Bighorn River just below

the mouth of the canyon. In 1949, the government quietly compensated seventy remaining heirs of the original allotments. Among them were the heirs of Rides a Horse, whose allotment included 160 acres. The government also took the allotments of Theodore Rides a Horse, 160 acres; Katie Leider, 40 acres; Mary Knows 80 acres; Otto Rides a Horse, 120 acres; Puts on a Hat, 163.24 acres; Grace Wolf, 49.53 acres; Hairy, 120 acres; Knows His Horse, 80 acres; and Bull Horse, 60 acres. This stretch of the Bighorn below the Yellowtail dam soon welcomed fly fisherman from all over the world, and the river, whose undisturbed use was reserved to the Crow in the 1868 Treaty of Ft. Laramie, was designated a blue ribbon trout stream.⁵³

The compensation to the Crow tribe for the value of the power site was calculated on the Yellowtail power plant producing 200,000 kw. The Bureau of Reclamation had already determined that they would build an even bigger plant. The Bureau let contracts on the construction of Yellowtail Dam in April, 1961 to a joint venture consisting of Morrison-Knudsen Company, Inc, the Kaizer Company, the Perini Corporation, Walsh Construction Company, and F&S Contracting Company. Construction on the 525 foot high, thin concrete arch began in 1964 in a ceremonial first bucket of concrete. The final bucket pour was put in place on October 18, 1965. The four generating units in the power plant roared to life in July, August, October, and November, 1966.⁵⁴

Dedication ceremonies had been planned for 1967, but President Johnson was unable to attend. Finally in October, 1968, with Crow Fair rescheduled to coincide with the event, officials settled for Interior Secretary Morris Udall for the dedication. The Billings High School band performed along with the Yellowstone Square Dance Council. The square dancers added a note of wholesome sobriety, "Square dancers do not drink alcoholic beverages," they assured organizers. Tribal Chairman Edison Realbird, in stirring oratory, recounted the story of the Bighorn sheep and the Crow

name for the canyon. For all the visiting dignitaries, Regional Bureau of Reclamation Director H.E. Aldrich had planned a flotilla on the reservoir, but it was a dry year and the reservoir contained too little water.⁵⁵

Though the reservoir was not full, already water from the Bighorn River covered significant Crow history. Among the uncompensated losses in the value of the Bighorn Canyon were archaeological remains discovered by representatives from the Smithsonian twenty years earlier. In August, 1946, as a result of the Missouri Basin Flood Control Act, Wesley Bliss and Jack Hughes made a reconnaissance sweep of all the Missouri Basin projects sites. They spent several hours at the Yellowtail site, though heavy rains halted the ground investigations. The men settled for local inquiry as their investigative tool. Though limited they reported tipi ring clusters, rock shelters, a bison fall, a pottery site, flint, quartzite, chalcedony, and jasper flakes, projectile points, and scrapers. The men reported that, “abundant and varied remains discovered at Yellowtail during a brief reconnaissance suggest that many archeological sites exist both within and around the reservoir area...it is recommended that an intensive survey be made of the valley above the canyon, in the rock shelters along the canyon borders, at creek mouths in the canyon bottom, and around the dam site.” The men expressed their concern not only from the eventual flooding; they worried about damage to the remains from the onslaught of tourists in the recreation area.⁵⁶

The men also speculated about the origin of the remains: “it is possible that some of the remains were left by the Crow, who now occupy a reservation on the east side of the Bighorn Canyon and who were encountered in the area by trappers and explorers of the early nineteenth century...identity of the prehistoric inhabitants can be revealed only by archeological investigation.” Extensive archeological studies

never received adequate funding. Inundated in 1967, the Bighorn Canyon would keep many of the secrets of early Crow inhabitation. That proved to be a costly loss.

The Crow had suspected from the earliest Indian Irrigation Service projects that their tribal interests were subservient to government interests. The Indian Irrigation Service was dependent on Congress, and Congress was in turn dependent for reelection on the non-Indian electorate. By the early 1900s, Crow suspicion as to the conflicted interest became certain knowledge. The 1920 Crow Act protected tribal rights to water, minerals, and the power site.. Though largely ignored by the Indian Service and its successor bureaucracies, the Office of Indian Affairs, and the Bureau of Indian Affairs, that legislation expressed the Crow intent to put their resources to “beneficial use.” In *United States v. 5.677.94 of land, more or less of the Crow Reservation of Montana*, the concept of beneficial use mixed with and reinforced the reserved rights concept, appealing to the court’s sense of equity. Though the final settlement was not equitable in a legal sense—that is, it did not restore land, water, or power to the tribe—it did establish the right of the tribe to the value not only of the land, but also to the flow of the river. That was a significant victory and precedent.

The condemnation case was significant for another reason. *United States v. 5.677.94 of land, more or less of the Crow Reservation of Montana* marked the point where the interests of the federal guardian departed in obvious ways from the interest of the ward. The court found compelling evidence that the taking of the Bighorn “would not be an exercise of guardianship, but an act of confiscation.” With the approval of the Secretary of Interior, in a collective personality not unlike Custer’s Seventh Cavalry humming Gary Owen, the Bureau of Reclamation advanced on its own ward along the rivers of Crow country.

One might think that the 1950s era termination ethos that arose in Congress during the Eisenhower administration lent its philosophy to the Bureau of

Reclamation action. However, the Bureau of Indian Affairs only moved to terminate the trust relationship in cases where they deemed the tribe ready. They studied each tribe extensively, producing voluminous sociological documentation. Were the Crow ready for the federal government to cease in its oversight responsibilities? Clearly Reclamation's legal swordsmanship indicated that it thought the Crow were completely competent opponents. In fact, the Bureau of Indian Affairs recommended against Crow termination. In its "Withdrawal Programming" study of the Crow, the B.I.A. advised, "The members of the Crow Tribe of Montana have not yet progressed in economic and social development to the stage where they are ready for complete withdrawal of Bureau responsibility for services and termination of trusteeship responsibilities. The Tribe itself is not yet organized to handle its Tribal affairs in an efficient and business like manner." If the Bureau of Reclamation had its way, Crow tribal dependence on its United States guardian would indeed be perpetual.⁵⁷

¹ This story is often repeated but the immediate source is in the testimony of *Montana v U.S.* (1981). Archive of the Supreme Court of the United States, Washington, D.C.

² The story of Bureau representative Sloan's attempt to bribe Robert Yellowtail is documented in W. Kip Viscusi and Richard L. Berkman, *Damming the West* (New York, 1973), ch. 7. The highly polemic work was produced as a Ralph Nader Study Group Report on the Bureau of Reclamation.

³ Montana Senator Murray proposed S.2089 on August 18, 1944, "A Bill to establish a Missouri Valley Authority to provide for unified water control and resource development on the Missouri River..." The bill was not adopted. The Flood Control Act of 1944 replaced it and authorized the Army Corps of Engineers and the Bureau of Reclamation to carry out flood control, navigation, hydroelectric, and water supply activities on the Missouri and related waters. For a chronology of legislative activity see: *Congress and the Nation, 1945-1964: A Review of Government and Politics in the Postwar Years* (Congressional Quarterly Service, 1965). Secondary sources include Marc Reisner *Cadillac Desert: The American West and its Disappearing Water* (Viking Press, 1986); Donald Worster, *Rivers of Empire: Water, Aridity, and the Growth of the American West* (New York, 1985); Marian E. Ridgeway, *The Missouri Basin's Pick-Sloan Plan: A Case Study in Congressional Policy Determination* (Urbana, 1955); John E. Thorson, *River of Promise, River of Peril: The Politics of Managing the Missouri River* (Lawrence, 1994); Mark D. O'Keefe, Nancy E. Slocum, Donald R. Snow, John E. Thorson, and Paul Vandenberg, *Boundaries Carved in Water: An Analysis of River and Water Management in the Upper Missouri Basin* (Northern Lights Research and Educational Institute).

⁴ For the account of the Sioux battle against the Pick-Sloan taking see Michael L. Lawson, *Dammed Indians: The Pick-Sloan Plan and Missouri River Sioux, 1944-1980* (Norman Press, 1982).

⁵ Quoted in "Victory or What of the Future," a publication of the Big Horn Dam Association, 1938. Folder 312, Box 514, RG 115, Bureau of Reclamation, National Archives and Records Administration Rocky Mountain Region (Denver).

⁶ *Report on the Crow Reservation Project, Montana* by Robert S. Stockton, Engineer, April 15, 1905, Folder 130A "Crow Reservation Project," Box 466, Entry 3, Record Group 115, Bureau of Reclamation, National Archives and Records Administration Rocky Mountain Region (Denver).

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Missouri River Basin Investigations: Yellowtail Dam and Reservoir, Montana*, The Department of Interior and the Bureau of Indian Affairs, Report No. 80 June 15, 1949. This report contains the findings of fact as to description and ownership of tribal and allotted lands for dam site, reservoir, campsite, and recreational areas.

¹⁰ Federal Power Commission's Act of 1920, 41 Stat. 1063.

¹¹ Harris's involvement is documented throughout Folder 302 "General Correspondence: Surveys and Investigations Bighorn River," Box 513, RG 115 Bureau of Reclamation, National Archives and Records Administration Rocky Mountain Region (Denver). See particularly *The Big Horn Dam*, by the Big Horn Dam Association, Hardin and Billings Commercial Club, Billings, February 1, 1934.

¹² "Robert Summers Yellowtail at Crow Fair 1972," (Albuquerque: Wowapi Press).

¹³ *Ibid.*

¹⁴ Congressional Record, 66Cong, 1st session, pp 17-18. PL 239, June 4, 1920.

¹⁵ Emmons to Hoover, July 11, 1930. Folder 302- "General Correspondence: Surveys and Investigations Bighorn River," Box 513, RG 115 Bureau of Reclamation, National Archives and Records Administration Rocky Mountain Region (Denver).

¹⁶ Harris to McIntyre, Secretary to the President, May 6, 1935; Ickes to Mead February 3, 1934; Mead to Ickes, Feb 7, 1934 Folder 302- "General Correspondence: Surveys and Investigations Bighorn River," Box 513, RG 115 Bureau of Reclamation, National Archives and Records Administration Rocky Mountain Region (Denver).

¹⁷ See Wheeler's testimony in the Congressional Record, Senate, May 20, 1936.

¹⁸ The Flood Control Act of December 22, 1944, 58 Stat. 887; Act of July 24, 1946, 60 Stat. 653.

¹⁹ Act of June 28, 1946, 60 Stat. 333.

²⁰ The narrative of the attempts to negotiate a settlement between the Crow and the Bureau of Reclamation has been pieced together from several sources. These include testimony in *United States v. 5677.94 acres of land*, Civ. No. 1825, 162 F. Supp. 108, May 15, 1958; "Memorandum to the Secretary of the Interior, Re: Rights of the Crow Tribe of Indians to the Waters of the Big Horn River and of the Yellowtail Reservoir," by Wilkinson, Cragun, and Barker; Opinion M-35093, March 28, 1948, Mastin G. White, Solicitor, Department of Interior; "Annual Project History Yellowtail Unit Lower Bighorn Division, Missouri River Basin Project" Volume I, United States Department of the Interior Bureau of Reclamation Region 6, in Entry 10 Box 346. RG 115 The Bureau of Reclamation, National Archives and Records Administration Rocky Mountain Region (Denver); and "Missouri River Basin Investigations: Yellowtail Dam and Reservoir, Montana," The Department of Interior and the Bureau of Indian Affairs, Report No. 80 June 15, 1949. See too: William M. Brooke, "Yellowtail Dam: A Study in Indian Land," Masters Thesis, Department of History, Carroll College, Helena, MT, 1981.

²¹ Opinion M-35093, March 28, 1948, Mastin G. White, Solicitor, Department of Interior.

²² Opinion M-36015. October 7, 1949, W.H. Flanery, Acting Solicitor, Department of Interior.

²³ Zimmerman to Secretary, Feb. 1949 in "Missouri River Basin Investigations: Yellowtail Dam and Reservoir, Montana," The Department of Interior and the Bureau of Indian Affairs, Report No. 80 June 15, 1949.

²⁴ The Reclamation Act, 32 STAT 389.

²⁵ Opinion M-36148, October 27, 1952 Mastin G. White, Solicitor, Department of Interior.

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- ²⁶ Opinion M-36148 (Supp.), February, 1954, Clarence A. Davis, Solicitor, Department of Interior.
- ²⁷ McCarran Amendment, 66 Stat.560.
- ²⁸ Lawson, *Dammed Indians*.
- ²⁹ Complaints about Yellowtail bookkeeping can be found in Ezzell to Seagle, April 20, 1946, Stigler Collection, Box 9, Folder 37, From the Collections of The Carl Albert Center Congressional Archives. See too generally letters in "Crow Accounts: 1940-55," Box 96, RG 75, The Bureau of Indian Affairs, National Archives and Records Administration Rocky Mountain Region (Denver)
- ³⁰ Folder Crow Accounts 1940-1950, Box 8, RG 75, Bureau of Indian Affairs-Crow, National Archives and Records Administration Rocky Mountain Region (Denver).
- ³¹ Brooke, "Yellowtail Dam."
- ³² Minutes of the Crow Tribal Council, January 11, 1956, Folder 780 "Land Acquisitions Yellowtail Dam and Reservoir," Box 88, RG 115 The Bureau of Reclamation, National Archives and Records Administration Rocky Mountain Region (Denver).
- ³³ Viscusi and Berkman, *Damming the West*, chapter 7. See also Otis Beasley, Administrative Assistant Secretary of the Interior to Senator James Murray, May 29, 1957, *Sale of Crow Lands* (Washington, 1958).
- ³⁴ *Ibid.*
- ³⁵ Chronology from *United States v. 5.677.94 acres of land, more or less of the Crow Reservation of Montana*. Civil No. 1825, United States District Court for the District of Montana.162 F. Supp. 108; May 15, 1956.
- ³⁶ *Ibid.*
- ³⁷ *Ibid.*, Opinion, Judge Charles Pray, Motion to Dismiss.
- ³⁸ *Ibid.*, Defendant's brief.
- ³⁹ The Crow Act of 1920, 41 Stat. 751, The Crow Amendment, 44 Stat. 658 Act on Crow Matters, 1946, 60 Stat 333.
- ⁴⁰ Act of December 22, 1944. 58 Stat. 887, quoted in Defendants Brief *United States v. 5.677.94 acres of land*.
- ⁴¹ *United States v. Kagama* (1886), 118 U.S. 375, 6 S.Ct. 1109.
- ⁴² Brief for Defendants, *United States v. 5.677.94 acres of land*.
- ⁴³ *Lane v. Santa Rosa Pueblo* (1919), 249 U.S. 110, as quoted in Brief for Defendants.
- ⁴⁴ Opinion, *United States v. 5.677.94 acres of land. Lone Wolf v. Hitchcock*, 187 U.S. 553, 23 S.Ct.216; *Henkel v. United States*, 237 U.S. 43, 35 S.Ct. 536; *Federal Power Commission v. Tuscarora Indian Nation* (1960), 362 U.S. 99.
- ⁴⁵ *United States v. Twin City Power*, 76 S.Ct, 259 as quoted in brief for plaintiff, *United States v. 5.677.94 acres of land*.
- ⁴⁶ *Ibid.*
- ⁴⁷ *The Daniel Ball*, 77 US 557 1871
- ⁴⁸ Brief for the defendants, *United States v. 5.677.94 acres of land*.
- ⁴⁹ *Winters v. United States*, 207 U.S 564 (1908) as quoted in Brief for the defendants, *United States v. 5.677.94 acres of land*.
- ⁵⁰ Opinion, *United States v. 5.677.94 acres of land*.
- ⁵¹ *The Crow Tribe of Indians of Montana v. The United States* (Civil no. 214 Mont District). The case and decision regrettably are unpublished. Also transcripts of testimony were destroyed by fire while "on loan to atty." Parts remain in Federal Record Center-Seattle. The case was crucial to Crow arguments later in *U.S. v Montana*(1981).
- ⁵² Allegation printed in *Big Horn County News*, July 17, 2000, "Crow Tribe doesn't need reminders from reporters" by Eloise Whitebear-Pease. Mrs. Whitebear-Pease attended the Council meeting in 1956 and currently serves in the Crow legislature.
- ⁵³ These takings documented in "Missouri River Basin Investigations: Yellowtail Dam and Reservoir, Montana," The Department of Interior and the Bureau of Indian Affairs, Report No. 80 June 15, 1949.
- ⁵⁴ "Annual Project History Yellowtail Unit Lower Bighorn Division, Missouri River Basin Project" Volumes I-6, United States Department of the Interior Bureau of Reclamation

Region 6, in Entry 10 Box 346. RG 115 The Bureau of Reclamation, National Archives and Records Administration Rocky Mountain Region (Denver);

⁵⁵ Folder 002 -“Celebration and Dedication, 1945-84,” Box 96, RG 115, The Bureau of Reclamation, National Archives and Records Administration Rocky Mountain Region (Denver);

⁵⁶ The Missouri Valley Project, River Basin Suveys, he Smithsonian Institution issued two reports: “Preliminary Appraisal of the Archeological and Paleontological Resources of Yellowtail Reservoir Montana and Wyoming-May 1947” and “Appraisal Supplement—October 1952.” There was wide acknowledgment in the scientific community that significant artifacts would be sacrificed in the Missouri Basin inundations.

⁵⁷ Quoted in *Crow Indian Tribe of Montana: Billings Area Office: Withdrawal Programming*, September 10, 1952. Folder: Misc. Correspondence 1953,” Box 194, RG 75 Bureau of Indian Affairs-Crow, National Archives and Records Administration Rocky Mountain Region (Denver).

Chapter Four
Interpreting “the arts of civilization” on the
Crow Reservation

“Behold! He drinketh up a river.”

-The Book of Job

The Bighorn River rises today in Wyoming’s Wind River Mountains, flows northward along the foothills in a broad basin, bounded on the west by the Absarokas. Joined by the waters of the Shoshone, the river meanders quietly north on its certain path to the Missouri. Though leisurely today, the waters were torrential during ice age thaws, and as they came up against mountains—now called the Bighorns, the water cut a canyon path through deposits left in earth’s time.

In its canyon cutting, the Bighorn River made quick work of recent quaternary remnants and paused only briefly to chew through the vertebrate secrets laid down in the layers of the Triassic Chugwater. The raging water then devoured the earlier Pennsylvanian Tensleep red sandstone before it reached limestone deposited over tens of millions of years of repeated inundation by a vast inland sea. First the river cut through the Amsden limestone with its paleontological memoirs written in fossilized algae, coral, and coiled cephalopods. Then the waters began an unrelenting assault on the hundreds of feet of Madison Formation limestone laid down in Mississippian time, rock that contained fossil gastropods. Between the Amsden and the Madison, the water, over time, carved remarkable caves into the seam. The river washed away more gastropods in the dolomite of the Ordovician’s Bighorn Formation, before finally finding its bed in the geologic basement, the Cambrian shale. The river’s work was dramatic and beautiful—the Bighorn

Canyon walls were 3000 feet high, and there, written in the multi-hued striations of stone was the geologic history of 490 million years.¹

At 3 p.m. on November 3, 1965, dam builders turned the diverted waters of the Bighorn River back into its old channel. The Yellowtail dam was complete. As the water now poured back into its original bed, it raged up against the dam, and began to fill the canyon. Over the next six days, the rising water retraced its geologic progress up the canyon walls: Cambrian, Ordovician, Mississippian. Engineers from the Bureau of Reclamation checked for leaks in the Yellowtail dam. There were none.²

Yellowtail Dam was multipurpose. Its primary purpose was to prevent flooding on the lower Missouri River, but its four turbines also produced 250,000 kilowatts of hydroelectricity. And, in line with the original mission of the Bureau of Reclamation, some of the 1,427,840 acre-feet of water trapped behind the 525 foot long, 22 foot thick concrete arch dam was intended to water the lands of the Crow Reservation. As Senator Burton Wheeler (D-Mont.) had testified in 1936, “We are constantly appropriating money to help these Indians become self-supporting. If this dam should be built, the whole Crow Reservation could be irrigated at practically no expense, and then those particular Indians would become self-supporting.” Congress’s intent was that Crow land would benefit from the eventual Yellowtail Reservoir.³

Lending authority to the Bureau of Reclamation in this mission to reclaim Indian lands in the west, the Supreme Court, in the 1963 decision *Arizona v. California*, had taken a significant step toward the quantification of the Indian reserved water right. In 1908, *US v Winters* had designated a reservation of water sufficient to turn a nomadic people to a settled existence. “The Indians had command of their lands and the waters—command of all their beneficial use, whether kept for hunting, ‘and grazing roving herds of stock,’ or turned to agriculture and the arts of civilization.”⁴ The date of appropriation was to be the

date of any Treaty reserving land, and, unlike water appropriated under state law, the Indian water right was not lost with lack of use: “The power of the government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be... That the government did reserve them we have decided, and for a use which would be necessarily continued through the years.”⁵ In the subsequent *US v. Thomas Powers* (1939), the high court again addressed the nature of the reserved water right. At the time of allotment, it decided a portion of the tribal water right had passed to individual Indian allottees. While lower court decisions had also shaped the nature of the reserved right, the Supreme Court had not.

In 1963, the high court, in *Arizona v. California*, again spoke to the nature of the Indian reserved right, this time as to its quantity. Using the language of the *Powers* decision, the water master determined that the Indian reserved water right should be sufficient to water all “practicable irrigable acres” of any given reservation. Decidedly generous to the Indians according to threatened non-Indian water users, “PIA” nevertheless became the law.⁶ The watermaster specifically rejected other calculations for quantification. Arizona had urged “reasonable foreseeable needs” as determinative. The watermaster rejected this, finding that sufficient water had been reserved to satisfy “future as well as present needs.” The watermaster also rejected the division of water based on “equitable apportionment,” a judicial doctrine by which water was divided between states. Equitable apportionment was based on present use. The court rejected equitable apportionment because it did not take into account future needs of the tribes. The only way to calculate future need was to calculate irrigable acres.

Yellowtail Dam was under construction as the Court handed down its decision, and Reclamation took into account *Arizona v. California* as it determined the water allocations from the new reservoir. Though constrained to abide by state water law by the 1950

Yellowstone Compact and its own 1902 legislative mandate, the Bureau nevertheless withheld a significant federal reserve *before* allocating according to the dictates of the Compact. This was a departure from previous practice. Interstate water compact allocation had traditionally subtracted the Indian reserve after state allocation; that is, the Indian reserve was subtracted from the state's share.

In fact, the Indian reserve was at the center of the *Arizona v. California* case. The Colorado River Compact subtracted what might become a considerable Indian reserve from the Arizona share. When Arizona objected, the court addressed the larger issue of the nature of the Indian reserve. Under compacting tradition, Indian water had become vulnerable to state water law in a way that defied the intent of the *Winters* decision. As a result of *Arizona v. California*, the intent of *Winters* was honored—at least for awhile. As the Bureau of Reclamation divided the waters of Yellowtail reservoir, in immediate post-*Arizona* decision making, the Indian reserve was subtracted *before* state allocation. Using the drawdown from tandem reservoirs, Yellowtail and Wyoming's Boysen, Reclamation designated a total 302,800 acre-feet annually reserved for Montana Indians, including the Crow, before any division designated by the Yellowstone Compact. Of that reservation, Reclamation reserved 71,000 acre feet for Wyoming Indians, 98,000 for Montana Indians. The figures were at decided variance with the percentages dictated by the Yellowstone Compact for the Bighorn Basin: 20% Montana-80% Wyoming.⁷

Reclamation also differentiated between Indian reserved water for agricultural use and that used potentially by Indians for municipal and industrial purposes. Practicable irrigable acres was inherently agricultural designation. As yet unsettled legally was whether or not Indian reserve water could serve alternative purposes, that is could agricultural water be used for industrial development, power generation, or slurry operations. What exactly were the *Winters*-defined "arts of civilization?"⁸ Though some tribes maintained a reserve right

for fishing, for the Crow and most other tribes in the west, PIA allocation intended agricultural use. Following closely the letter of the *Arizona* decision, Indian irrigation project water allocation—*Winters* water— was subtracted prior to state division, while Indian industrial water, potentially not part of any federal reserve right, 110,000 acre feet for Montana Indians, was subtracted after state division.⁹

The complicated Bighorn allocation left 697,000 acre feet in Yellowtail Reservoir available for sale after the subtracted federal and Indian reserve, with 80% going to Wyoming and 20% to be allocated in Montana. Using Bureau arithmetic, Montana received 263,000 acre feet from Yellowtail Reservoir for the allocation termed “municipal and industrial.” At the order of the Secretary of Interior, almost half, 110,000 acre feet, was reserved for Montana’s Indian “M&I.” specifically to develop coal reserves.¹⁰

As a result of the calculations for the reserved right, on the Crow reservation the Bureau of Reclamation might easily have supplied sufficient water to irrigate all irrigable land. The Yellowtail project included an afterbay dam below the high dam that provided water for the Bureau of Indian Affairs Irrigation Service’s Bighorn Canal. But in addition to the afterbay dam, the Bureau of Reclamation’s Yellowtail project intended for new construction to irrigate the bench land west of the canyon. The proposal, called the Hardin Project, was to supply water to 54,566 acres, half of which were owned by Crow Indians. Much of the Indian land was leased to non-Indian dry land wheat farmers—the majority to the Thomas Campbell Farms. Campbell controlled the leases on 15,903 acres. Built into the Yellowtail Dam at significant extra expense was a tunnel called “the Grapevine.” Designers and Congress projected that the Grapevine tunnel, named after its location close to Grapevine Creek, would carry water to the Hardin bench. In this way the dam would fulfill its multipurpose designation and justify the Bureau of Reclamation’s participation.¹¹

In 1947, long before the decision in *Arizona v. California*, the Bureau of Reclamation proudly claimed the benefits of the Hardin diversion for the Crow. The irrigated land, they speculated, would raise the per acre income from the \$1.57 most Crow received for the lease of the dry land bench to \$7.93. That was conservative, they insisted. The bench soil was friable and tillable as opposed to the gumbo along the old Indian Irrigation Project ditches. Crop diversification and stabilization would mean even higher income. Sugar beets, wheat, oats, barley, corn, and potatoes might well raise the lease income per acre to over \$30.¹²

The Bureau of Reclamation also claimed the long touted benefit of employment for the Crow. "There will be many opportunities for Indians to find employment in the construction of Yellowtail Dam and the Hardin Unit." Further, "Increased industrialization of the region and the expansion of business in the area due to increased production of agricultural commodities...will make more jobs for more people, some of whom should be Indians."¹³

To be fair, there were problems from the beginning according to the Bureau: "The problem of financing the construction of improvements on Indian lands in the Unit is one that will prove most difficult." In fact, the Bureau of Reclamation already anticipated the failure of the Indians to reimburse the project's construction costs along with the annual operation and maintenance. Long held antagonism between Reclamation and the Indian Service irrigation projects revealed itself even in these earliest plans for the Hardin Unit. "There is a very serious question whether this unit should be developed to make use of water as soon as it is available from Yellowtail Dam, or whether construction should be delayed. There are those who ask why a unit of this size should be developed until the existing Crow Irrigation Project has been rebuilt and is in full development and use. Others point to a number of smaller units which would be developed on the Crow Reservation,

and ask why the costs and benefits of constructing these units should not be considered before the Hardin Unit is built.” The Bureau had dipped freely into tribal funds for its own Huntley Project on the old Ceded Strip—a project that intended to benefit white settlers, but it sincerely understood it to be the Bureau of Indian Affairs fiscal responsibility to actually irrigate Indian lands.¹⁴

Despite the Reclamation Bureau’s misgivings about the Hardin project, it put its considerable engineering skills along with taxpayer money to use designing and building the Grapevine Tunnel. In order to supply water to the Hardin bench, a nine and a half-foot diameter steel-lined conduit, capable of carrying 900 cubic feet of water per second penetrated the left abutment of the dam and extended 105 feet. The Bureau allocated 34,800 acre feet of the water in Yellowtail Reservoir for Indian use on the Hardin Bench in an effort to supply water to its practicable irrigable acres. Though non-Indians owned roughly half the land, the Bureau allocated 22,300 acre feet for white agricultural use. The Indian reserve would supply white as well as Indian needs.¹⁵

The Grapevine tunnel waited for a funding recommendation from the Bureau. It never came. Before the concrete had dried on the Yellowtail Dam, the afterbay, and the Grapevine, the Bureau of Reclamation began selling the newly impounded water to a long list of demanding clients: Humble Oil, Gulf Mineral Resources, Reynolds Mining Company, Coal Conversion Corporation, Peabody Coal, Westmoreland Industries, Cardinal Petroleum Company, Panhandle Eastern Pipeline, Colorado Interstate Gas Company, Phillips Petroleum, Shell Oil, and Kerr-McGee Corporation. The extractive industries had long coveted two beds of lignite and subbituminous coal, the Rosebud-McKay and the Robinson. The coal deposit, “one of the world’s largest,” according to the Bureau of Reclamation, lay within the Tongue River member of the Tertiary age Ft. Union formation and might well supply thermal-electricity to the “load centers in the midwest and

power short NW.” The Rosebud-McKay, along with the Robinson, underbedded much of the eastern Montana and Wyoming range—and the land of the Crow Reservation. All the industrial giants needed to extract the coal, was to strip away the surface, the gamma, the bluestem, and the Crow reservation mustard yellow “greasy grass.” Crow reserved water rights now became irrevocably intertwined with Crow coal resources; now Crow strip mines became one of the “arts of civilization,” because the coal industry needed all the water newly impounded behind the Yellowtail Dam. ¹⁶

The industrial demands on the water of the Bighorn Reservoir rapidly rose to compete with the proposed agricultural use. Of the 697,000 a.f. allocated for municipal and industrial use, Reclamation almost immediately contracted with extractive industries for options on 593,000. The first contract was negotiated with Humble in 1966 and was to run for 50 years. Understanding the need for exploration, Billings regional Bureau director G.J. Cheney stipulated that the crucial first 10 years be interest free. For \$9 per acre foot, Humble contracted with the Bureau of Reclamation for 50,000 acre feet. Reclamation calculated the rate so that over the 50 years, fully leased, they could repay the total \$14,228,000 municipal and industrial obligation incurred to the taxpayer. ¹⁷

The mining and energy giants had their eyes on the Crow reservation, and the Bureau of Reclamation aided them by projecting its own compatible strategic plan for the area. In a 1970 report, the Bureau set its task: “It appears that the combined circumstances of rising needs for energy in the United States and growing demands on the nation’s petroleum production capacities leave little question that the coal resources of the upper Missouri Basin must be developed. The Bureau of Reclamation is moving forward with the objective of bringing water to these areas in an expert and economically feasible manner,” The Bureau had left behind its directive to water the arid west. Even hydroelectricity would

play only a minor role. With taxpayers subsidizing water use, the now economical coal-fired power generation would prove the more feasible alternative.

The Bureau adapted quickly to the dictates of the new economy. In the same report it promised to build “hundreds of miles of buried pipe to operate year around in cold climates, long tunnels, high head pumping plants, energy dissipaters, surge tanks, ... pondage along conduits, thermal storage, transmission lines, switchyards, and substations.” And they planned to begin on the Crow reservation. ¹⁸

As dictated by the Bureau of Reclamation, the Crow Tribe had until April 1, 1970 to use the 110,000 a.f. of industrial water. While the water had been allocated at the specific request of the Secretary of Interior to benefit all Montana Indians, Reclamation quickly moved to allocate it all on the Crow Reservation. To aid the tribe in its decision making, the Bureau of Indian Affairs advertised for bids on Crow coal, while Reclamation accepted bids on the water allocation. Bureaucratic coordination proved difficult. Bids came in immediately, and the B.I.A. accepted options from Peabody Coal, Gulf Mineral Resources, and Shell Oil. Altogether 200,000 acres of reservation land was optioned for coal development. After the B.I.A accepted bids, the corporations attempted to lease water from Reclamation. Peabody and Gulf leased options on 40,000 and 50,000 a.f. respectively, leaving Shell with too little water to execute the terms of its bid for the coal extraction.¹⁹

Compounding the problem was yet another B.I.A.-Crow agreement with Westmoreland Industries. Under the aegis of Rogers and Norsworthy, Billings, Montana speculators in mineral and water rights, Westmoreland leased options from the Crow on the coal rights to 30,876 acres, but unlike the other option holders, Westmoreland was ready to begin operations. The day after the Crow decision, the corporation signed contracts for the delivery of 77,000,000 tons to utility companies in Wisconsin, Illinois,

Minnesota, and Iowa. Westmoreland's strategic plan also included a gasification and/or a liquification plant; both required a large volume of water. The energy giant planned to begin strip mining by first excavating 770 acres. The location for the strip mine was the land known as the Ceded Strip.²⁰

By a complicated turn of events, the Crow retained the mineral rights to the land "ceded" to the federal government in 1898. The Ceded Strip was the 1 million acres of land first granted by agreement to the United States in 1898 for government compensation of \$1,500,000 to the tribe. The payment was never made. Six years after the cession, at the behest of Congress, the newly established Reclamation Service credited the amount to its revolving fund for use building the Huntley Project on the Strip. Both the Indian Service and Reclamation justified the taking by claiming the irrigated land would garner higher prices from white settlers, money that would then, theoretically, be credited to the Crow trust. In violation of the original agreement, the bureaucracies entered into a speculative land operation while the Crow assumed all the risk.²¹

Much of the land on the Ceded Strip was sold to white settlers while Reclamation spent the profit on further construction. Notoriously unable to complete their projections, Reclamation's irrigation ditches never included the entire area. There remained a number of vacant and unsold acres, many of which were leased to non-Indians for grazing. Lease income also found its way into the revolving fund though designated by the name "Suspense account." Over many years the Crow had demanded compensation from Reclamation both for the land and the lease income. In, 1958, in the spirit of compensation anticipating termination, Congress restored the unsold acreage of the Ceded Strip to trust status for the benefit of the Crow Tribe.²²

Tribal Chairman Edison Realbird demanded much more. Significantly and much to the surprise of the white farmers and ranchers who had settled on the Strip, the government

also restored to the tribe the mineral rights to the land underlying the entire million acres. Twelve years later, in 1970, as U.S. executive Indian policy turned from “termination” to “self-determination,” at no cost to their land base, the long determined Crow leased to Westmoreland Industries the right to extract coal from under the land of their non-Indian neighbors to the north.

The problem for both the Crow and Westmoreland lay in the lack of coordination between the bureaucracies. Reclamation had already leased the necessary water to Peabody and to Gulf, but Shell still demanded its share. With the April, 1970 deadline for the use of the Montana Indian M&I 110,000 a.f., the Crow complained bitterly that their agreement was being prejudiced by the foot dragging Reclamation. After lengthy legal correspondence with representatives from both corporations, Reclamation offered a solution. The tribe, they suggested, could transfer part of its agricultural water allocation, to municipal and industrial. What they never explained was that the agricultural use was considered part of the Indian reserved right subtracted prior to state allocation. The municipal and industrial came directly out of the state allocation—Montana’s Yellowstone Compact allocation of 20% of Bighorn water. Furthermore, the reserved water right of tribes had only been successfully asserted for agricultural need or for fishing—either might fulfill the need for which the reservation was originally intended. The question of the use to which reserved water could be put was not yet a settled one. The *Winters* decision stipulated a reservation of water for “agriculture and the arts of civilization.” *Arizona*, while establishing PIA, had specifically not precluded other use for the reserved water. The water master in the case refused to settle an issue beyond his immediate situation, “the question of change in the character of use is not before me.” But clearly, for the Crow changing the designation from agricultural to industrial risked losing the reserved right designation.²³

The Bureau of Reclamation explained its position: “We believe that a balanced development of Indian lands is essential. Water associated with agricultural, recreational, municipal and other multi-purpose functions should be kept in proper perspective.” The Crow Tribe officially concurred with the proposed change in the water allocation in its January 9, 1971 tribal council meeting. In a resolution of understanding between itself, the Bureau of Reclamation, and the Bureau of Indian Affairs, the tribe redesignated 30,000 a.f. from agricultural to industrial to be offered to Westmoreland. The Crow Tribe specified that the relinquishment of their reserved right would “in no way prejudice any present or future claims by or on behalf of the Crow Indian Tribe to water from any source or for any purpose.”²⁴

Legal objections to the transfer were swift and came first from within the tribe. Frederick Lefthand, a member of the Crow Executive Committee, challenged the validity of the tribal council’s decision to redesignate the Crow water right. Representing a tribal faction opposed to coal development, Lefthand appealed to the Montana District Court. He claimed that the tribe violated his rights according to the controversial 1968 Indian Civil Rights Act.²⁵

The Indian Civil Rights Act attempted to protect Indian citizens from abuses by their tribal governments. Among other things, it extended many protections of the Bill of Rights to Indian tribes. Highly controversial in Indian country, the act extended first amendment freedoms of speech, press, and the exercise of religion; protection from illegal search and seizure, protection against double jeopardy and self incrimination; compensation for taking private property for public use; the right of the accused to a speedy trial; protection from excessive bail; trial by jury in criminal cases; protection against *ex post facto*; and limited the ability of a tribal authority to deny “to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or

property without due process of law.” The act purposefully did not address the establishment of religion; a republican form of government or any right to vote; trial by jury in civil matters; and the right to free counsel. Viewed by many as an unnecessary violation of the sovereignty of Indian tribes, the bill nevertheless became law and, in 1971, Frederick Lefthand used the equal protection and due process clause in his legal argument in *Lefthand v. Crow Tribal Council*.

In District Court, Lefthand claimed several irregularities in the January, 1971 meeting of the Crow tribal council, irregularities that violated the Crow Constitution. But his main argument centered around the loss of his property rights. The tribe, he declared, deprived him of his property rights by changing the designation of the tribal water allocation from agricultural to industrial. The judge dismissed the case for lack of jurisdiction. His reasoning might well have reassured Indian country as to the reach of the United States into the internal affairs of the tribe, but failed to provide satisfaction for Lefthand. The judge found, “a lack of infringement of individual, constitutional rights, and because of the intratribal nature of the dispute, the action does not present a substantial Federal controversy.” Though precedents were few, the judge cited the opinion in *Pinnow v. Shoshone Tribal Council*: “Internal matters of tribal government are not within the bounds of federal jurisdiction unless jurisdiction is expressly conferred by Congressional enactment...”²⁶

The Court was more specific as to the nature of the property right. As an individual, the Court stipulated, Lefthand had no action as concerned the communally held property of the Crow Tribe. In a refinement if not a reversal of the opinions of the 1930s regarding tribal ownership of water rights, Judge Battin found no reason to extend the tribal Crow right to the individual, Lefthand. Lefthand’s loss had not deprived him of due process because the property was public in nature, owned by a “a political division or

entity.” “nor do inhabitants of a political division or entity have any vested property rights in the property of the division or entity which are entitled to the protection of the due process clause.” That faction within the Crow Tribe represented by Lefthand objected to the redesignation of Crow water from agricultural to industrial, and therefore from reserved water right to water right subject to the terms of the Yellowstone interstate compact. With the dismissal of *Lefthand v. Crow*, they had no further recourse.

The Department of Interior’s new water and coal development policies met serious objections from within the Crow Tribe. They also stirred serious controversy among those non-Indian ranchers on the Ceded Strip. These lands were originally homesteaded under the auspices of the Reclamation Act in the first decade of the century. By 1970, successors in interest owned and operated major ranching enterprises. The original homesteaders received land but not the mineral interest underlying it. Those were retained by the United States. The United States returned all mineral rights to the land on the Ceded Strip to the Crow Tribe in 1958 when they returned the unsold acres. The ranches, particularly those along Sarpy Creek belonging to Bruce and Dorothy Cady and J.T. Redding, lay in close proximity to proposed Westmoreland strip mining operations. In what proved to be an interesting and enduring alliance, these ranchers enlisted the help of the Friends of the Earth.²⁷

The court action *Cady, et. al v. Rogers C.B. Morton, Secretary of the Department of Interior, et. al.* was one of many cases originating in the early 1970s, in the wake of the National Environmental Policy Act (1969). The nascent and now empowered environmental movement took on the Department of Interior and the Bureau of Reclamation in an attempt to rein in an overmighty executive branch. Environmental protection organizations, Friends of the Earth, the Environmental Defense Fund, and the Sierra Club legally insisted that federal agencies themselves abide by and enforce the

mandates of National Environmental Policy Act. On behalf of the ranchers on the Ceded Strip, the Friends of the Earth filed the *Cady v. Morton* action against the Secretary of the Interior, the Crow Tribe, Westmoreland, the Commissioner of the BIA, the Superintendent of Crow Agency of the BIA, the Geological Survey, and the Area Mining Supervisor of the Conservation Division of the Geological Survey. Friends of the Earth's most potent weapon became the NEPA-required environmental impact statement.²⁸

The Crow Tribe was not unique in its new status as defendant. While reservations in the west encompassed 2% of the land, the tribes laid claim to 30% of the coal west of the Mississippi, 37% of the uranium and 3% of the oil and gas. The Crow coal deposits had the potential to make the tribe the ninth largest coal producing country in the world. Tribes had attained control over their own mineral leasing in 1938, but their ability to negotiate with extractive giants remained subject to their lack of expertise, their failure to share experience, and their inability to put into place any regulatory authority. Tribes remained dependent for expertise on their guardian, the United States.²⁹

The "domestic dependent" status had never served the tribes well. The Crow for example had accepted a contract with Westmoreland that paid 17.5 cents a ton for the coal. The standard flat royalty, rather than a percentage royalty, failed to protect them as energy prices escalated in the 1970s. With the formation of the Council of Energy Resource Tribes in 1970, organized with Oklahoma's Ladonna Harris as a driving force, tribes began to acquire the needed expertise to coordinate their approach to both Interior and industry. Eventually they would be accused of being a domestic OPEC. In the meantime, by following their guardian's advice tribes all over the west bore the significant financial burden of defending the Bureau of Reclamation's influence over their industrial leasing. Even as the environmental movement exploited the Indian image, portraying him as the ultimate environmentalist, even as Iron Eyes Cody, with a tear in his eye, stood

overlooking the polluted river for television viewers across the country, environmental lawyers were in court suing the tribes. The rights of nature and the rights of Indian tribes were at odds.³⁰

In the Friends of the Earth case *Cady v. Morton*, the plaintiffs made two threatening allegations. The first involved the ownership of mineral rights. Friends of the Earth argued on behalf of the ranchers that the Crow had no claim on the coal rights and therefore had no right to lease those rights to Westmoreland. Only the United States, they asserted, had authority. Both the District and the Appeal Court made quick work of the argument. The ranchers had no right to challenge Crow ownership of the mineral rights. Ownership rights could not be legally challenged by the third party ranchers: "It is hornbook law that in an action to quiet title, a plaintiff must succeed on the strength of his own title and not the weakness of his opponent's." The Crow successfully fought off what might have been a devastating challenge to their coal ownership.³¹

The main legal assault on the Secretary, the Crow Tribe, and the other federal entities involved the failure of Westmoreland to provide an adequate environmental impact statement for the 30,000 acres they intended to strip mine. While Westmoreland had supplied an EIS for the 770 acres on the Ceded Strip, the larger impact of the 30,000 acre development with the intended water-intensive gasification plant went unassessed.

The Bureau of Reclamation and Indian Affairs defended their failure to require the broader statement on several grounds, including the sovereignty of the Crow. Just as the Justice Department had cast aside the interest of the Crow in the 1930s *Powers* case in favor of the Department of Interior, so now the guardian defended itself. Lawyers for the government asserted that the Crow were entirely sovereign, therefore their lease with Westmoreland did not need to fall into compliance with NEPA. The Friends of the Earth, the government asserted, had no action for enforcement of a federal law on an Indian

reservation. The United States had acted only as a fiduciary and therefore was not responsible. To save Interior, Justice lawyers placed the Crow and all Indian tribes in jeopardy of becoming third world fiefdoms where the writ of NEPA would not run.

The Montana District Court rewarded the government contention. Not usually the defender of Indian sovereignty, the Montana District Court restricted the Friends and the ranchers from instituting an action against the Crow Tribe. Only on appeal did the Ninth Circuit Court clarify the lines of sovereignty. In overturning the District, Justice Sneed asserted that, "Appellants here allege injury to both environmental and economic interests which are within the "zone of interests" to be protected by NEPA...this conclusion is not altered either by the fact that Indians were parties to the leases being attacked or by the fact that the Secretary of the Interior acted in his capacity as a fiduciary for such Indians....NEPA's stated purpose is to "assure for *all Americans* safe, healthful, productive, and esthetically and culturally pleasing surroundings ...Judicial interpretations of NEPA, moreover, give no indication that major federal actions primarily pertaining to Indians were to be immune from environmental challenges by all but such Indians." The judge determined that environmental law was "not inherently flexible."³²

In *Cady v. Morton*, the court ruled that the 30,000 acre strip mine was a "major federal action," and as such the entire project required impact statements from each of the federal agencies involved as well as from Westmoreland.

The legal conclusions of the Ninth Circuit in *Cady v. Morton* did not settle the question of NEPA enforcement on Indian reservations. In their urgent quest to enforce the Act, forces in the environmental movement continued inadvertently to push Indian-US sovereign boundaries. The Environmental Protection Agency relied on state agencies for enforcement of all environmental quality standards. Therefore, states had the power to enforce the rules or withhold punishment from those responsible for environmental

degradation. Clearly state agencies had no enforcement authority over tribal lands. The limitations on a state's legal right to assert their rule of law in Indian country left a major loophole in NEPA. Congress stepped in and increasingly designated tribal authority over environmental enforcement in Indian country. Eventually this would be formalized into a special designation: Treatment As State or TAS. Though sovereignty issues made the designation highly controversial, the EPA supplied any requesting tribes with expertise and funds to develop their own regulatory agencies. Almost immediately, the Crow's neighbor to the east, the much smaller Northern Cheyenne reservation, used all the potential of the new status to limit Crow coal development.³³

The Northern Cheyenne requested and received from the Environmental Protection Agency a Class I air quality designation—a designation usually reserved for pristine wilderness areas or national parks. The designation, along with Westmoreland's court ordered acknowledgment of the detrimental impact on air quality, sealed the doom for future coal gasification and liquification. The Crow joined other plaintiff's in court action against the Northern Cheyenne, but in the landmark *Nance v. EPA* (1981), the Ninth Circuit upheld EPA's approval of the Northern Cheyenne's new stringent air quality standards.³⁴

Agitation from environmental organizations, energy producing tribes, and particularly the Northern Cheyenne resulted in even more remarkable responses. In 1973, Secretary of the Interior Rogers Morton ordered a moratorium on mineral leasing by the government until environmental impact statements could be prepared. Then, a year later, he supported the Northern Cheyenne in nullifying a federal lease arrangement on reservation coal, offering to pay for any necessary litigation. While the Northern Cheyenne found it unnecessary to go to court, the Crow moved legally, suing their guardian for lack

of fiduciary responsibility in their effort to renegotiate the terms of their contracts with Westmoreland, Peabody, and Shell.³⁵

The Crow won the right to renegotiate the lease options on 200,000 acres of their reservation land. They terminated option contracts with other corporations including Peabody, and they renegotiated a contract with Shell. Shell failed to pick up its option. Finally Westmoreland was the only corporation to mine Crow coal. They began operations in 1974 and in that year the Crow successfully brought the giant to the table to renegotiate their contract. While the old contract insured a 17.5% per ton flat rate royalty, the new rate took into account an almost 300% increase in the price of coal. Westmoreland paid the tribe a \$500,000 bonus and advance royalties of \$628,000. In the amended lease, the 1974-75 royalties were set at 25 cents per ton or 6% whichever was higher. The base price rose to 35 cents in 1977 and eventually to 40 cents or 8%. Westmoreland also guaranteed production levels for the term of the lease and they contractually agreed to reclaim the land after mining operations ended. At the time the Crow contract with Westmoreland had the best terms negotiated by any tribe in the west.³⁶

Westmoreland was already engaged in stripping 770 acres from the Ceded Strip. But because of delays forced by the protracted court case, the necessity of producing the impact statements, and the Northern Cheyenne Class I designation, Westmoreland's production costs rose significantly. The company abandoned its plans for highly controversial gasification and liquification plants. Either plant might well have put the Crow reserved water right in jeopardy. Extremely water intensive, the more extensive plans would, as Westmoreland admitted in its environmental impact statement, would be highly damaging to water resources: "All existing aquifers in the proposed mine above the base of the Robinson coal bed will be destroyed during mining and irretrievable lost." The newly answerable Westmoreland continued, "adjacent parts of these aquifers will be affected by

lowered water levels during the 20 year lease of the mine....Five existing wells and 10 springs will be destroyed by mining and as many as 20 wells and 11 springs could be affected by lowered water levels.” Though it is impossible to know, the smaller water projects might well have been those developed from Robert Yellowtail’s hard earned New Deal funds.³⁷

The lengthy legal fight and subsequent negotiations took a toll on the tribe. Internal divisions over coal development continued and were exacerbated by the Bureau of Indian Affairs. Tribal members perceived the Secretary of Interior’s moratorium and EPA requirements as beneficial, but the Bureau of Indian Affairs continued to exercise inappropriate authority. In December, 1977, Jiggs Yellowtail, Chairman of the Crow Coal Authority, complained to Congress. At the tribal council meeting in December 1976, disagreement over the direction of coal development had led to the impeachment of Chairman Pat Stands, and the election of a new chairman, the decidedly less cooperative Forest Horn. Horn appointed a new Coal Authority to continue negotiations. The new Authority included Yellowtail. Not wanting to work with the less cooperative administration, Bureau of Indian Affairs area director Canan never recognized the new chairman and continued to negotiate contracts through the impeached Coal Authority. When pressed at the contentious Council meeting in October, 1977, the Crow Agency Superintendent declared that the Bureau was, as required by the Crow constitution, neutral as to the political situation. But the Bureau’s neutrality took an odd and self-serving twist. It now recognized two Coal Authorities. As a result of the controversy, according to the Area Bureau, clearly no tribal Coal Authority could have the responsibility of negotiating the new contracts. The negotiating responsibility would necessarily fall to the BIA.³⁸

In his appeal, Yellowtail beseeched Congress, “We believe the origin of much of what is stated herein lies with the Billings Area Office of the Bureau of Indian Affairs and

the Area Director Canan....Mr. Canan has consistently come down with decisions and actions which are inconsistent with majority wishes of the tribe.... The tribe's normal appeals process to the Secretary, thus, appears to be blocked by the Superintendent, by the Area Director, and now the Assistant Secretary, which makes it extremely difficult to petition for a just review in light of the tremendous stakes at issue.”³⁹

With the lawsuit hanging over his head, the Assistant Secretary of Indian Affairs claimed that tribal factionalism was the culprit but acknowledged, “this Department is a defendant in a lawsuit by the Crow Tribe challenging the legality of leases and options to lease Crow coal. On the other hand, this Department as the principal agent of the trustee United States, is charged with the exacting fiduciary duty to assist the Crow Tribe in the development of these resources....” The Assistant Secretary accurately expressed the conflict of interest. The Bureau's ability to act as fiduciary was impeded by the legal action, charging them with lack of fiduciary duty. Had the BIA been less corporation-friendly in the Crow coal lease arrangements—indeed all tribal leasing-- the conflict would never have arisen. The controversy on the Crow reservation points to the continued intrusive management of the BIA even as, ironically, its stated policy was one of “self-determination.”⁴⁰

By 1974, the Bureau of Reclamation's stake in the water impounded behind Yellowtail Dam increased. The seeming capitulation of Interior to the Bureau of Indian Affairs over leasing and to environmental organizations was a direct assault on the Bureau's ability to do business with the corporate giants. At the same time the rise in Indian activism in the 1970s fostered a climate of renewed claims on the reserved water right. A new generation of tribal attorneys asserted parameters for the water right that struck terror into Reclamation and all non-Indian water users. The *Winters* doctrine, they claimed, extended not only to agricultural but to industrial and municipal, and to off-

reservation water sales. Moreover, the tribes now offered to sell “their” water to non-Indian successors in interest to original allottees, on-reservation farmers who had uniquely enjoyed all the privileges of *Winters* water by virtue of purchasing Indian land. Some activist attorneys asserted that the principle of implied reserved rights extended to all natural resources. The very principle of reserved rights became open-ended and unquantifiable and highly inflammatory to the Bureau of Reclamation as well as to its many customers.⁴¹

Clear title to the water, free of any Indian reserve rights, might well serve the interests of the Bureau of Reclamation and coal development. At the same time a rising energy market promised even higher returns on their investment should they acquire all water rights in the Bighorn. Tired of the trying negotiation process with the Crow tribe and the environmental demands of the Northern Cheyenne, the United States moved again to sacrifice its ward by claiming to itself the reserved right to the Bighorn River. Reclamation began an assault on the inchoate nature of the reserved rights of the Indian nations.

Reclamation had never been overly respectful of the Indian reserve right doctrine when it did not serve its interests. That was particularly true with the water in the Bighorn Basin. As early as 1968, the Shoshone tribe, upstream from Yellowtail, contacted Reclamation about the proposed water sales. The Shoshone made a claim on the water and its revenue. Claiming *Winters* rights, the Shoshone asserted that selling the water from Yellowtail and Boysen Reservoirs committed amounts that limited their own ability use the upstream water. Criticizing the Bureau’s roughshod approach to appropriating the Indian reserve, the attorneys noted, “The issue before the Field Solicitor concerned water rights. The Tribes and Bureau of Reclamation were the only possible claimants. In this conflict of interest situation within the Department, the Tribes were given no notice and were afforded no opportunity to be heard. The Field Solicitor reached his conclusion without the Tribes.

On the face such procedure is offensive...The Secretary of Interior has no authority to sell water which is the property of the tribe.”⁴²

The Interior field solicitor A.E. Bielefeld, a man who influenced administrative law from his Billings office for thirty years, virtually snorted at the attack. Referring to the Shoshone demands, he wrote Sun Oil, “Those theories should be interesting.” Indeed, he responded finally to his superiors dismissing completely the Shoshone argument. The Shoshone required water to develop their own mineral and timber interests, rights they had won in the Supreme Court in *U.S. v. Shoshone Tribe of Indians* (1938). The water, Bielefeld argued could not be reserved for that use. Only the original intention of the reservation, agriculture in the Shoshone case, could be considered in claiming a *Winters* right to water. Responding to the Shoshone complaint that they were not notified of the intended water sale, Bielefeld listed at sarcastic length the water users, both Indian and non-Indian downstream to the Shoshone: “If it were necessary to consult one water rights claimant as a preliminary to the Secretary’s impoundment and sale of unused waters in the Wind and Bighorn Rivers, it would be necessary to consult all of them, This would be a curious and unique condition to impose on the Secretary in his prosecution of the congressional directive to impound waters in the Boysen and Yellowtail reservoirs and to sell the impounded water for the purposes of paying the costs of the impoundment, Mr. Sonosky cannot be serious.”⁴³

It was in this same climate that the Crow defended their own reserved rights to Bighorn water. Having made what he thought was short work of the Shoshone reserved right claim, Beilefeld moved on to the Crow. In 1974 the Bureau of Reclamation asserted its own right to all the impounded water in the Bighorn Reservoir. Along with the 5,677.94 acres of land, the Bureau claimed that in the condemnation trials, the Crow had also relinquished any and all of their reserved water rights to the river. Not only had

Reclamation never constructed the Hardin irrigation project, now they would never be able to. The Crow, according to Reclamation, would no longer have the water to fulfill the agricultural need.⁴⁴

Reclamation argued that Judge Jameson in the district court decision *5677.94 acres* had extinguished the Indian water right—the *Winters* right to the Bighorn. Their argument was essentially similar to the argument the United States made in the original case. The Bighorn was an interstate navigable river and as such the United States had a “dominant servitude” over the water according to the Commerce Clause of the constitution. In the original condemnation case, Judge Jameson had not declared the Bighorn navigable but in the subsequent case assessing value, *Crow v. United States*, the unpublished opinion affirmed the river was indeed navigable. But did that finding change the Crow right? What followed was a remarkable legal argument between some of the most knowledgeable attorneys in the nation concerning the parameters of *Winters* rights.

Challenging Indian “hardheadedness,” Beilefeld asserted that quantification of all Indian rights was necessary to develop fully the potential of the Missouri Basin project. The Crow, he alleged, had adopted a “dog-in-the-manger” attitude toward developing their water rights, while Reclamation was assiduous in putting Yellowtail water to beneficial use, as designated in Montana state law. Though the Indian right had never been based on a present use standard, Beilefeld argued that this was the only sound basis for quantification. In fact Beilefeld argued for an even more exacting standard. Hoping to limit the water right further, he urged an exemption on any pump irrigation. To that end, he urged a modification of PIA that he called time-of-irrigability. TIA designated the Treaty date as the date for establishing how many acres were irrigable. For the Crow, with their extensive irrigation projects, TIA would be acres actually irrigated in 1868—none.⁴⁵

Barring his recommended quantification of the Indian reserve, Beilefeld argued for unrestricted secondary use. That is, should the Indian right not be utilized, non-Indian water users could assert a claim that was paramount to all other non-Indian claims. "In these circumstances, the right of the next superior appropriator, particularly if such appropriator were the United States proceeding under the Commerce clause, would seem to be unassailable."⁴⁶

Bureau of Indian Affairs solicitor, William H. Veeder parried the attack in a number of articles and in testimony before Congress. "in terms of the trust responsibility, a divided loyalty is created, and the Interior Department, rather than advocating for *Winters* doctrine rights in a manner consonant with the trust responsibility, frequently leads the attack on them by urging the most narrow construction possible of such rights, a position explicitly contrary to its trustee duties." Veeder continued, "There are no major streams—indeed there are few tributaries of major streams—where there are not agencies in the Interior Department competing with Indians for a supply of water which is inadequate to meet all present and future demands....Politically oriented and powerfully backed, the Bureau of Reclamation has taken and continues to take from American Indians rights to the use of water for the projects which it builds."⁴⁷

Veeder specifically addressed the rights of the Crow. Using *Winans* and *Powers*, Veeder asserted, "The Crows have owned aboriginal rights in the Bighorn River since time immemorial; they were not recipients of those rights from the national government. Explicit recognition of the reservation of these rights was contained in *United States v. Powers*, where the Supreme Court, relying on *Winters*, affirmed a circuit court opinion that "the implied reservation was to the Indians not to the United States."⁴⁸

Veeder further asserted that Judge Jameson decreed in 5677. 9 acres, that navigability did not in and of itself establish the "dominant servitude" that Beilefeld

claimed. As such the United States did not have paramount rights to the river according to the Commerce Clause. In a case involving an Indian nation, the treaty rights of the tribe prevailed. The “dominant servitude” remained with the Crow. The only rights held by the United States were those expressly relinquished by the Crow: the land and the power site. Urging a more responsible position for the Department of Interior, Veeder concluded by stating, “It is submitted that the United States has failed miserably in its attempt to protect Indian water rights in the Yellowstone Basin.”⁴⁹

Crow tribal attorneys added their brief: “No legal action—judicial, legislative, or executive—that has occurred since the making of those treaties has taken or diminished the water rights of the Tribe or justifies the United States’ action in diverting for its own benefit proceeds which rightfully belong to the Crow Tribe, its Indian ward.”⁵⁰

The United States Justice Department took its own approach. Rather than argue the case interdepartmentally or before Congressional committee, the United States took the issue to court. The Justice Department did not file in federal district court as they very well might have; rather the United States, ever averse to laying its sovereign interest before any state, filed in Montana state court for an adjudication of the Bighorn River. As with all tribes, the Crow tribe had long been recognized by federal courts as being at a disadvantage in state proceedings. In this particularly defiant step, the United States placed the reserved rights doctrine of the domestic dependent nation at the mercy of local interests in the state of Montana. Self determination contained significant vestigial remains of termination.⁵¹

United States v. Bighorn Low Line Canal placed the Indian reserved right of the Crow at the mercy of the state courts, subjecting the right to the state standard of beneficial use. Would the court take into account the Grapevine tunnel and the projected 50,000acre Reclamation project land as yet undeveloped? Would it consider the Ceded Strip water use on the Huntley project as Indian use? Was the state limited by agricultural use in

determining the Crow water right? Was use only determined by riparian interests or did the Northern Cheyenne, also dependent on the Bighorn, have water rights? And how would the state allocate Indian interests in light of the Yellowstone Compact, an instrument that had expressly excluded the Indian reserved right? Only one thing was certain, tribal attorneys would profit.

The case had a half-life equivalent to atomic radiation. A state court heard the case, then the Crow appealed to federal district and circuit courts. The Crow were remanded to state court while the Northern Cheyenne appealed to the Supreme Court. The State of Montana changed its constitution, incorporating a Water Court and establishing the Montana Reserved Water Rights Compact Commission. More appeals were filed. In short, the state never adjudicated Crow rights. Instead under the auspices of the Montana Reserved Water Rights Compact Commission, the state opted for voluntary negotiated compacts with sovereign tribes. With eight Indian reservations in Montana including the original litigant, the Gros Ventre and Assiniboine of the Ft. Belknap Reservation, all asserting a *Winters* claim, the state perceived it in its interest to negotiate settlements rather than litigate them. As with all compacts, the United States would be a party.⁵²

By the mid 1970s, many very determined tribes asserted their *Winters* rights beyond the scope of anything envisioned by early 20th century jurists. The Courts were filled with cases pushing the boundaries of tribal sovereignty. For Indians a number of unresolved issues were at stake: what water use constitutes a tribal reservation? Could water be sold outside the reservation? Could water be sold outside the Basin despite the restrictions of interstate compacts? What of the water rights of non-Indian inholders? Did the reservation of water extend to groundwater? Could states force tribes into state court in adjudications as they could with the federal government according to the McCarran Amendment? After a half-century of administrative oversight but little court resolution,

within the next decade, many long asked questions came before the courts. But for the Crow the next legal battle would once again be for the Bighorn. As the Supreme Court took a conservative turn, the Crow yet again fought for dominion over their the river.⁵³

In 1979, the Crow found 2000 dead fish washed up along the Bighorn below the Afterbay dam. The area had become a blue ribbon trout stream, internationally known. Anglers claimed that, “construction of the hydroelectric and irrigation dam changed the lower Bighorn and created a classic tailwater trout fishery....it may be the finest large trout river on our continent.” The dam apparently cooled the waters of the Bighorn to 60 degrees, sufficiently cool to create the ideal spawning ground for brown and rainbow trout. Temperatures were warmer in the winter so less ice formed and without the scouring of a spring runoff, weed growth along the banks of the Bighorn increased and insects became more abundant, with “dramatic” hatches of mayflies, caddisflies, and scuds so important to both trout growth and fly fishermen. The fish quickly matured to trophy size and just as quickly word spread through the usually tight-lipped community of fly fishermen. The large numbers of fishermen seemed incapable of denting the phenomenal trout population. In the twelve miles below the Afterbay dam Fish and Wildlife counts found 2,700 brown trout per mile. Of those, 700 per mile were over 15 inches and 35 trout per mile were over 22 inches.⁵⁴

Over the years a number of internecine controversies arose in Interior between Reclamation and Fish and Wildlife. Reclamation’s “drawdowns” often reduced the flow to one-quarter of its potential and caused significant fish death by trapping the spawning trout in backwater pools. Reclamation defended itself by claiming industrial water sales maintained a more constant level for the fish than irrigation would have. Organizations such as Trout, Unlimited, kept a close eye on the management of the water levels. The

dead fish first noticed by the Crow had enormous economic and environmental implications.⁵⁵

Scientists soon found that the dead fish all suffered from the once rare gas bubble disease, an affliction similar to the “bends” in people. First noticed in salmon under the dams along the Columbia, the disease was caused by gas supersaturation. Water pouring through spillways created high levels of oxygen and nitrogen in the waters below—levels high enough to cause disease. “Bubbles” or blisters on the skin between the fin rays were among the symptoms found on the trophy brown and rainbow trout. Severely diseased fish had the blisters over their entire bodies—their gill arches and their fins. The blisters formed inside the fish, in their hearts and stomachs, and blisters invaded the connective tissue in the eye orbits forcing the eyeballs from the sockets. By late summer as many as three-quarters of the entire fish population had the disease. In the most cruel of twists, the most severely afflicted trout were those over 2 pounds. The cause was universally acknowledged—the pounding water from the generators on Yellowtail Dam. Reclamation had given and Reclamation had taken away.⁵⁶

Under extreme pressure from the Crow tribe, the Bureau of Indian Affairs, Environmental Agencies, U. S. Fish and Wildlife Service, and the state of Montana, Reclamation scrambled to come up with a solution. They all agreed that the Crow trust would pay for a study and supply the manpower to test the river for nitrogen levels and fish disease rates. The fish continued to die. Reclamation installed a “flip lip” on the Afterbay Dam, a device that slowed the rate of water discharge, but boulders the “size of a man’s head” became lodged in the spillway and pounded against the concrete. The structural integrity of the small dam that supplied water for the old Bighorn Irrigation Canal worried engineers enough that they removed the flip lip. Claiming finally that the disease was not

really as bad as first thought, Reclamation turned the problem over to the other agencies. Finally responsible were the Crow.⁵⁷

In 1940, Reclamation and Indian Affairs district counsel Kenneth Simmons had urged superiors in Reclamation not to extend water use beyond the capacity of the environment to produce it. To do so, he feared, would force an adjudication of the water rights on the Crow reservation and jeopardize the principle of Indian reserved rights, “the principle established in the *Winter’s* case so valuable to this Service would be at stake....”⁵⁸

The legal doctrine embodied in the *Winters* decision lent power to Reclamation’s directive and as such was far more important than quantifying any Indian water right and certainly more important than providing water development on the Crow reservation. Simmons’ opinion rippled through Interior and as a result, in the critical period of termination, the Indian reserve right survived as an inchoate concept. Not until *Arizona v. California* in 1963 did the practical irrigable acres designation begin to quantify Indian rights. So generous was the watermaster’s directive that the quantified right threatened to interfere with the Secretarial “command of the waters.” It was no longer in the interest of federal water development to incorporate Indian water rights into the federal reserve.

By 1970, the policy of self-determination at last officially divided the federal reserve claimed by the Secretary of Interior. As tribes increasingly claimed their rights to the stored water provided by the Bureau of Reclamation, Interior became openly antagonistic. Now it acknowledged a separate Indian reserve, one that was at odds with newly profitable water sales to extractive industry. Now the guardian of the Indian trust placed the burden of protecting *Winters* rights on the tribes themselves. With often meager resources, individual tribes now bore the responsibility to hire attorneys and defend their

unquantified right from their guardian, the states, checkerboarded non-Indians, upstream and downstream non-Indian water users, extractive industries, and other tribes.

The Crow had enjoyed a privileged relationship in terms of water allocated from Yellowtail Reservoir, and they had been able to capitalize on their abundant coal reserves. But their successes only raised their profile as far as water use was concerned. Their separate interests, never well-represented, now were abandoned by Interior, and they became newly vulnerable to demands by Montana, the Shoshone, the Northern Cheyenne, Campbell Farms, Westmoreland, and the tandem team of environmentalists and sportsmen intent on rescuing the Bighorn River. Internally, the always contentious tribe became contemptuous of those within their own ranks who disagreed with development decisions. The intensely democratic tribal council form of government, rather than serving the interest of consensus building, now seemed anarchic. And as the decade of the 1970s came to a close, the tribe, tattered by self-determination, had before it the most significant legal fight of their lives—at stake, tribal dominion over the Bighorn River.

¹ “Appraisal of the Archeological and Paleontological Resources of the Yellowtail Reservoir Sit Montana and Wyoming—Supplement,” October 1952, Missouri Basin Project, Smithsonian Institution.

² *Annual Project History: Yellowtail Unit, Lower Bighorn Division Missouri River Basin Project*, Volumes 1-6. United States Department of the Interior Bureau of Reclamation, District 6, Box 346, Entry 10, RG 115, The Bureau of Reclamation, National Archives and Records Administration—Rocky Mountain Region (Denver).

³ *Congressional Record*, Senate, May 20, 1936, 7796-7805.

⁴ *Winters, v. United States*, 207 U.S.564 (1908).

⁵ *Ibid.*

⁶ *Arizona v. California*, 373 U.S 546 (1963); *Winters, v. United States*, 207 U.S.564 (1908); *United States. v. Powers*, 305 U.S. 527 (1939).

⁷ The figures for the Yellowtail allocation are in a sort of Bureau of Reclamation code. The calculations are based on a 31-month flow measuring period, allocations percentages then calculated, divided by 31, and multiplied by 12 to get an annual acre foot total. The pages in this file that involve allocation all have marginalia with these calculations figured over and over again: See *Bighorn River Water Allocations* Folder 062, Box 96, RG 115, The Bureau of Reclamation, National Archives and Records Administration—Rocky Mountain Region (Denver).

⁸ The issue would be clarified in 1976 in *Capeart v. U.S.* 426 U.S. 128 “only that amount of water necessary to fulfill the purposes of the reservation, no more.”

⁹ *Bighorn River Water Allocations* Folder 062, Box 96, RG 115, The Bureau of Reclamation, National Archives and Records Administration—Rocky Mountain Region (Denver).

¹⁰ *Ibid.* See memos in the same location concerning the 110,000 M&I for Montana Indians. Secretary of Interior Udall originally stipulated 250,000 a.f. for Montana Indians. The Bureau skillfully dodged that amount through interdepartmental memos and redesignated the lower amount. See especially Memo: May 3, 1966, To: Files, From Doyle; Memo: March 22 1968, To: Assistant Secretary From Acting Commissioner of Reclamation:

¹¹ Charles R. Peleter, *Preliminary Report on Crow Indian Participation in the Proposed Harden Irrigation Unit of the Bureau of Reclamation*, Department of the Interior, Bureau of Indian Affairs, Missouri River Basin Investigations, December 31, 1947.

¹² *Ibid.*, 15.

¹³ *Ibid.*, at 19.

¹⁴ *Ibid.*, 21-22.

¹⁵ Specification for Grapevine in *Yellowtail Dam and Powerplant: Technical Record of Design and Construction*, The Bureau of Reclamation, United States Department of the Interior, Missouri Basin Project, May 1975, Ch. 9. Allocations for Hardin in: *Bighorn River Water Allocations*, Folder 062, Box 96, RG 115, The Bureau of Reclamation, National Archives and Records Administration—Rocky Mountain Region (Denver).

¹⁶ Folder 062, Box 96, RG 115, The Bureau of Reclamation, National Archives and Records Administration—Rocky Mountain Region (Denver). Coal resource information from three environmental impact statements: *Proposed 20 year Plan of Mining and Reclamation, Westmoreland Resources Tract III, Crow Indian Ceded Area, Montana*, U.S. Department of the Interior-Geological Survey; *Environmental Statement*, U.S. Department of the Interior-Bureau of Reclamation; and, *Descriptive Guide to Coal Development on the Crow Reservation*, Department of the Interior-Bureau of Indian Affairs.

¹⁷ Cheney to commissioner, March 3, 1967, Folder- "Domestic and industrial water" 112607, 99-148, RG 115, The Bureau of Reclamation, National Archives and Records Administration—Rocky Mountain Region (Denver).

¹⁸ *Semiannual Report: Fiscal Year 1970*, Department of Interior, Bureau of Reclamation, Missouri Basin Field Committee, January 1970, Folders 69-71, Box 96-062, RG 115, The Bureau of Reclamation, National Archives and Records Administration—Rocky Mountain Region (Denver).

¹⁹ Folder "Yellowtail Contracts-1961-1981," The folder contains documents from the lengthy chronology of the controversy between Shell and Norsworthy. Box 96-089, RG 115, The Bureau of Reclamation, National Archives and Records Administration—Rocky Mountain Region (Denver).

²⁰ *Proposed 20 year Plan of Mining and Reclamation, Westmoreland Resources Tract III, Crow Indian Ceded Area, Montana*, U.S. Department of the Interior-Geological Survey.

²¹ Act of April 27, 1904, 33 Stat.352, and Folder 130, Box 466, Entry 3, RG 115, The Bureau of Reclamation, National Archives and Records Administration—Rocky Mountain Region (Denver).

²² For details see *Yellowtail Dam and Reservoir, Montana, Findings of fact as to description and ownership of tribal and allotted lands for damsite, reservoir, campsite, and recreational area set forth in two applications of the Bureau of Reclamation to the Secretary of Interior*, February 1949, Department of the Interior, Bureau of Indian Affairs, Missouri Basin Investigations, Report No. 80. Debate on compensation from *Hearings before the Subcommittee on Indian Affairs and the Committee on Interior and insular affairs, House of Representative, 85th Congress on H.R. 9617: a bill to provide compensation to the Crow tribe of Indians for certain ceded lands*. January 31, February 17, March 6, 7, 19, and 26, 1958, Serial No. 23.

²³ *Memorandum of Understanding Between Bureau of Indian Affairs, Bureau of Reclamation, and Crow Tribe of Indians for the Temporary Use of Agricultural Waters Stored within Yellowtail Dam and Reservoir, Montana*, Jan 29, 1971, Box 96-089, RG 115, The Bureau of Reclamation, National Archives and Records Administration—Rocky Mountain Region (Denver). *Arizona v. California*, 373 U.S 546 (1963);

²⁴ *To regional director from Commissioner Bureau of Reclamation*, Jan. 29, 1971, Box 96-089, RG 115, The Bureau of Reclamation, National Archives and Records Administration—Rocky Mountain Region (Denver).

²⁵ *Lefthand v. Crow Tribal Council* (1971), Civ. No. 927, 329 F. Supp. 728: 1971 U.S. Dist. Indian Civil Rights Act, 25 U.S.C. The Indian Civil Rights Act amended Public Law 280 the highly

unpopular legislation that allowed states to bring Indians into their criminal jurisdiction. Though it was a hard piece of legislation for proponents of sovereignty, the amendment to 280 made it just palatable enough.

²⁶ *Pinnow v. Shoshone Tribal Council in Lefthand v. Crow Tribal Council*.

²⁷ *Cady, et. al v. Rogers C.B. Morton, Secretary of the Department of Interior, et. al.* (1975) No. 74-1984, 527 Fd. 786; 1975 U.S. App.

²⁸ National Environmental Protection Act, 42 U.S.C. 4321.

²⁹ Mineral Leasing Act of 1938, 25 U.S.C.396; the information from the remarkable work of Marjane Ambler, *Breaking the Iron Bonds: Indian Control of Energy Development* (Lawrence, 1990).

³⁰ *Ibid.*

³¹ *Cady v. Morton* 527 F.2d 786.

³² *Calvert Cliffs' Coordinating Comm., Inc., v. Atomic Energy Commission*, 146 U.S. App. D.C. 33, 449 F.2d 1109, quoted in *Cady v. Morton* 1975 U.S. App.

³³ David H. Getches, Charles F. Wilkinson, Robert A. Williams, Jr., *Cases and Materials on Federal Indian Law* (St Paul, 1998), 633-35; Ambler, *Breaking the Iron Bonds*, 183-185.

³⁴ *Nance v. EPA* (1981),

³⁵ Ambler, *Breaking the Iron Bonds*.

³⁶ *Ibid.*

³⁷ *Proposed 20 year Plan of Mining and Reclamation, Westmoreland Resources Tract III Crow Indian Ceded Area, Montana* U.S. Department of the Interior-Geological Survey, 17, 379. See also *Environmental Statement*; U.S. Department of the Interior-Bureau of Reclamation: and, *Descriptive Guide to Coal Development on the Crow Reservation*, Department of the Interior-Bureau of Indian Affairs.

³⁸ Yellowtail to Abourezk, December 6, 1977; see other correspondence in the same location. Folder 4, Box 35, The Collection of the Hon. Dewey F. Bartlett, The Carl Albert Center Congressional Archives, The University of Oklahoma.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ The most prolific of the attorneys was Interior Solicitor William F. Veeder whose testimony before Congress and his many articles detailed the threat to Indian reserved water rights and specifically to the Crow. See particularly "Winters Doctrine Rights: Keystone of National Programs for Western Land and Water Conservation and Utilization," *Montana Law Review* 26: 149-172; "Indian Prior and Paramount Rights to the Use of Water," *Rocky Mountain Mineral Law Institute Journal* 16: 631-668; "Indian water rights in the Upper Missouri River Basin," *North Dakota Law Review* 48: 617-638; "Indian Water Rights and the National Water Commission." *Civil Rights Digest* 6(1): 28-33; "Indian Prior and Paramount Rights Versus State Rights," *North Dakota Law Review* 51: 107-136; "Confiscation of Indian Water Rights in the Upper Missouri River Basin," *South Dakota Law Review* 21: 282-309; "Water Rights in the Coal Fields of the Yellowstone River Basin," *Law and Contemporary Problems* 40: 77-96. Reid Peyton Chambers also weighed in with two seminal works on sovereignty issues "Regulating Sovereignty: Secretarial Discretion and the leasing of Indian Lands," *Stanford Law Review* 26:1061-1097; "Judicial Enforcement of the Federal Trust Responsibility to Indians," *Stanford Law Review* 27: 1213-1248: See also R. S. Pelcyger, "Indian Water Rights: Some Emerging Frontiers," *Rocky Mountain Mineral Law Institute Journal*, 21: 743-775; "The Winters Doctrine and the Greening of the Reservations," *Journal of Contemporary Law* 419-37: H.A. Ranquist, "The Effect of Changes and Nature of Use of Indian Rights to Water Reserved Under the Winters Doctrine," *Natural Resources Lawyer* 5:34-41.

⁴² "Sonoskey to Sun Oil.: April 10, 1968, Folder- "Yellowtail Contracts, 1961-1981," Box 089, 96, RG 115, The Bureau of Reclamation, National Archives and Records Administration—Rocky Mountain Region (Denver).

⁴³ Bielefeld to Hanson, Sun Oil, April 17, 1968, Folder-"Yellowtail Contracts, 1961-1981," Box 089, 96, RG 115, The Bureau of Reclamation, National Archives and Records Administration—Rocky Mountain Region (Denver); Bielefeld to Area Director, Indian Affairs, May 3, 1968 at the same location.

⁴⁴ *Memorandum to the Secretary of the Interior, Re: Rights of the Crow Tribe of Indians to the Waters of the Big Horn River and of Yellowtail Reservoir and Re: Crow Tribal Ownership of the Riverbed of the Big Horn River Beneath Yellowtail Dam and Running Downstream Beyond the Afterbay Dam*, Wilkinson, Cragun, and Barker, May 31, 1974.

⁴⁵ Alvin E. Bielefeld, "Navigability in the Missouri River Basin," *Land and Water Law Review* 4: 97-120.

⁴⁶ *Ibid.*

⁴⁷ Veeder, "Confiscation of Indian *Winters* Rights," 628.

⁴⁸ *Ibid.*, at 635.

⁴⁹ *Ibid.*

⁵⁰ Wilkinson, Cragun, "Memorandum."

⁵¹ *United States v. Bighorn Low Line Canal*, No. CV-75-34 (D. Mont., Filed 1975).

⁵² The Montana State Reserved Water Rights Compact Commission was created by the Montana Legislature in 1979. The nine member commission is charged with negotiating water compacts with the Indian tribes and other federal entities in Montana. See *Arizona et al. v. San Carlos Apache Tribe of Arizona*, et. al., 463 U.S. 545; 103 S.Ct. 3201; No. 81-2147, Decided July 1, 1983.

⁵³ *Montana v. U.S.* (1981), 450 U.S. 544, 101 S.Ct. 1245.

⁵⁴ George Anderson, "The Bighorn: Is It the Best?" *A Special Fly Fisherman Report*, Folder 055, Box 99, RG 115 The Bureau of Reclamation, National Archives and Records Administration—Rocky Mountain Region (Denver).

⁵⁵ Trout Unlimited to Marcotte, Regional Director, Bureau of Reclamation, July 22, 1983; Montana Department of Fish and Wildlife to Marcotte, Dec. 30, 1982. These are two among many in Folder "Cooperative Land Management," Box 055, Box 99, RG 115 The Bureau of Reclamation, National Archives and Records Administration—Rocky Mountain Region (Denver).

⁵⁶ *Study of Air Embolism*, Folder—"Cooperative Land Management," Box 055, Box 99, RG 115 The Bureau of Reclamation, National Archives and Records Administration—Rocky Mountain Region (Denver).

⁵⁷ Trout Unlimited to Marcotte, July 22, 1983, Folder—"Cooperative Land Management," Box 055, Box 99, RG 115 The Bureau of Reclamation, National Archives and Records Administration—Rocky Mountain Region (Denver).

⁵⁸ "Hanna and Simmons to Walten, Sept 13, 1940," Folder- "Storage reservoirs Willow Creek Dam, Box 249, RG75 Bureau of Indian Affairs, National Archives and Records Administration—Rocky Mountain Region (Denver).

Chapter Five

Losing the Bighorn:

Montana v. United States

“She’ll go on winning, just like the Combine, because she has all the power of the Combine behind her. She don’t lose on her losses, but she wins on ours. To beat her you don’t have to whip her two out of three or three out of five, but every time you meet. As soon as you let down your guard, as soon as you lose once, she’s won for good. And eventually we all got to lose.” --Chief referring to Nurse Rachett

One Flew Over the Cuckoo’s Nest by Ken Kesey

In 1974, James Junior Finch drove through Hardin, Montana, turned south onto state highway 313 and entered the Crow Reservation. Along with some 6800 fishermen who annually “passed over” the lands of the Crow Reservation, Finch sought the trophy trout in the blue ribbon stretch of the Bighorn River below Yellowtail Dam. The four giant turbines of the dam sucked water from the cool depths of the reservoir and for 50 miles downstream, the outflow provided ideal habitat for brown and rainbow trout. The river ran through the considerably diminished lands originally guaranteed to the Crow in the 1851 and 1868 Treaties of Fort Laramie. Finch chose a site that belonged to the state of Montana—the state had acquired the land from a Crow allottee, and it was well within the boundaries of the Reservation. The fisherman cast his line into the river and in that moment, when his lure hit the water, Finch committed trespass according to Resolution 74-05, passed October 13, 1973 by the Crow Tribe. This act, passed by the tribal council, restricted all fishing in the Bighorn River. Congress had also passed a law in 1964 that made it a federal crime to trespass on any Indian reservation with the intent of hunting or fishing. Federal authorities arrested him and the Justice Department began litigation that

would alter the balance of federal/state/tribal sovereignty. Finch's lure danced in the aboriginal and sovereign waters of the Crow. But the Bighorn River had been declared navigable in 1963; navigability gave control of the river, legally termed "dominant servitude," to the United States according to the Commerce Clause of the Constitution. The state of Montana claimed the riverbed under the equal footing doctrine. The tribal, state, and federal claims carried with them principles of law dating to the legal foundations of the country and into the recesses of English common law. With these ideological implications, in a case heard twice before the United States Supreme Court, *The State of Montana v. The United States* was a pivotal case involving Indian sovereignty and treaty interpretation. The decision began an assault on the foundation law of Indian reserved rights, law that dated to both the 1905 *Winans* and 1908 *Winters* decisions. The Rehnquist court's "new subjectivism," gained momentum on the Bighorn.¹

The three sovereign powers, federal, state and tribal all had urgent reasons for caring about the "ownership" of the Bighorn. Paramount for the Crow was the urgency with which they sought to protect the fish. When one Crow fisherman found 2000 dead fish washed up on the shores of the Bighorn River, the tribe responded to an ecological assault with an ordinance denying fishing rights to any non-Crow. Twice, in 1961 and 1963, the tribe had taken similar action but it had not restricted fishing since the dam had produced the generous trout habitat and the enormous demand on the blue ribbon trout stream."²

Economics also factored into the Crow restrictions. The tribe sought to license fishing and outfitters. With close to 7000 fishermen, almost all non-Indian, selling licenses provided a rich source of income for the tribe. The river also needed policing. The state offered little help because the stream was outside its jurisdiction. The Crow could not afford to hire additional law enforcement, and controlling fishing on the reservation

seemed a logical move. And, despite the popularity of the Bighorn River below the Yellowtail Dam, the tribe thought it well within their rights under federal law.³ Empowered by pan-Indian rights organizations like the American Indian Movement and by vociferous idealistic left-leaning lawyers touting Indian rights, at no time had the Crow felt more emboldened to assert their tribal sovereignty.

The tribal attorneys asserted every historic legal precedent to encourage the tribe to believe that they controlled the Bighorn. The Supreme Court, in *U.S.v. Winans* (1905), articulated that treaties should be construed as reservations made *by* the sovereign tribes that included all that was not expressly granted by the tribe to the United States. While the state of Montana would disagree, court rulings established that the United States did not reserve territory to or for the tribes. The reservation originated in the sovereignty of the tribe and was based on the theory of aboriginal ownership. The Crow were the aboriginal tribe for the land reservation in question; that is, they had long occupied the territory where their reservation had been created. They were not “removed” to the reservation. That designation enhanced any Crow claim.

The Court had always held and reiterated in many decisions that treaties must be construed in a way that the Indians themselves would have understood them when they signed them. On the face of it, no treaty would have reserved only land and not the rivers that flowed through the land. It was on this foundation, along with *Winans*, that the original 1908 *Winters* decision rested. In *Winters* the high court extended the legal theory of implied reservation to include the water necessary to turn a nomadic people to “agriculture and the arts of civilization.”⁴

The state of Montana had a great deal to gain by defending James Junior Finch’s fishing rights. Tourism evaporated with the Crow’s restriction, and the state had considerable investment in the management of the Bighorn fishery. They had stocked the

non-indigenous brown and rainbow trout beginning in the early days of the century and licensing fees on the Bighorn supported much of the efforts of the Department of Fish and Wildlife. But the state had a broader agenda. As a result of the 1952 McCarran Amendment, also known as the McCarran Water Rights Suit Act, western states generally felt emboldened to challenge and quantify federal water rights. McCarran provided that: “consent is hereby given to join the United States as a defendant in any suit for the adjudication of rights to the use of water of a river system.”⁵ The amendment allowed states to enjoin the United States in any basin or interstate water adjudication; that is, it forced the United States into state court to quantify their reserve rights. As one lawyer noted, “The states are attempting to take what they can while they can, and to ask questions later.” The state of Montana was bolder than most. The state included a number of federal reserves, but more significantly, Montana had every interest in challenging sovereignty boundaries of the eight Indian nations within its borders. The state coveted particularly the Indian reserve water right. Quantifying all federal rights would provide Montana with an advantageous position in relation to the states downstream on the Missouri—states which all claimed water rights to the Missouri River; needed water for transportation; and also vied for the waters impounded by the dams of the Missouri Basin Project.⁶

Montana had a legal basis for its claim to the Bighorn. Like most other states, in its enabling act, Montana was granted the ownership of the stream beds of any navigable river over which the United States held “navigation servitude.” Under the equal footing doctrine, all states admitted subsequent to the original thirteen colonies, came into the Union with all the rights of those first states. The original colonies, as they came together to form the Union, never relinquished dominion over rivers; rather they individually acquired England’s “Crown servitude.” The Commerce Clause of the Constitution and the subsequent Marshall court decision, *Gibbons v. Ogden*, encroached upon the power of the

state over the navigable rivers within their boundaries by claiming rights to federal preemption. However, the bed and banks, along with all minerals remained property of the state. Montana extended the theory and added to it in a very creative way, based on the decision of Judge Jameson in *Crow v. United States* (1963). That case determined that the United States controlled the Bighorn, and had always that right. *Crow v U.S.* was part of the Yellowtail Dam settlement; navigability was considered and decided ostensibly to determine value of the dam site and the Bighorn Canyon. The river had never been used for navigation. However, according to the equal footing doctrine as it had filtered through the Marshall Court, the bed and banks of the newly navigable Bighorn belonged to Montana under the equal footing doctrine.

The state further argued that the Crow had no aboriginal rights to the river by the Fort Laramie Treaty because the “discovering sovereign” had extinguished those rights at the time of discovery. Resurrecting Marshall’s decision in *Johnson v. M’Intosh* (1823), Montana claimed that the United States, inherited control of the Bighorn from the discoverer—the French, and that subsequently the United States never expressly granted any dominion to the Crow.⁷

The state of Montana’s challenge to Crow law highlighted a very lengthy and well-acknowledged tension between state sovereignty and tribal sovereignty. The United States also had uneasy relations with the states over interstate streams. Under both the Reclamation Act and the Flood Control Act of 1944, the United States was obliged to abide by state law on the water impounded by their projects. Therefore, the Yellowstone Compact, negotiated by Montana and Wyoming and passed by Congress, determined the allocation of the waters of the Bighorn. The United States maintained command of the quantity of the water stored behind Yellowtail Dam, but the ultimate division of that water was subject to the terms of the Compact.⁸

Largely as a result of expanded federal water development projects in the 1950s, relations between the states and the federal government became openly hostile. In 1953, Congress passed McCarran Amendment waiving the sovereign immunity of the United States. In 1955 the Supreme Court volleyed with the Pelton Dam decision. In that case, the high court determined that the Federal Power Commission had the right to dam the Deschutes River despite the state of Oregon's objection. Furthermore, the Court decreed, the federal government had never relinquished control over the water flowing through the public domain. States reacted through their representatives in Congress with over 50 bills limiting federal water rights. The federal government countered with a legal rampage declaring interstate rivers "navigable."⁹

The legal designation of "navigable" gave the United States paramount rights of navigation along with the right to regulate all "commerce" on a river. Like an overriding easement, "navigation servitude" also reduced the obligation to pay compensation to private interests for asserting eminent domain. The designation of "navigable" gave the United States enhanced powers and reduced the cost of its enormous water development programs. According to all sides, the concerted effort by the courts to designate streams as navigable reached ridiculous proportions. For example, Judge Jameson in the 1963 *Crow v. United States* declared the impenetrable Bighorn River navigable. In his decision, he wrote that actual navigability did not necessarily determine the designation of navigable: "The physical characteristics of the river do not prevent its classification as navigable." Rather the *ability* to make a river navigable was determinative. One member of the Crow tribe reflected on the era somewhat more succinctly: "If you pissed on the sidewalk and threw a match stick in it, they declared it navigable."¹⁰

Riding on the outcome of the federal/state argument over control of western water were the multi-million dollar water development projects that now dotted the west.

Depending on those projects were the fortunes of the extractive energy giants and the exponentially expanding power needs of post war America, particularly those of the west coast. When James Junior Finch's lure hit the surface of the water in 1974, federal authorities not only arrested him, they had lain in wait. The Department of Justice had its own very wide and long agenda for usurping Indian rights on the Bighorn.¹¹

As eager as the United States was to fend off Montana's assault on the federal presence, by the time of Finch's arrest, the relationship between the United States and its ward tribe was openly hostile. The Crow viewed the federal presence on their reservation as intrusive, and the tension had become the subject of litigation. Throughout the west the empowered sovereign Indian nations threatened United States water development policies with their reinvigorated *Winters* claims. All Bureau of Reclamation water sales contracts were in serious jeopardy due to continuing litigation over the non-compliance with the National Environmental Policy Act passed in 1969. The problem had taken a particular toll on the Missouri Basin Projects. In an obscure article published in 1969 the United States Department of the Interior Northwest Regional Solicitor in Billings, Alvin Bielefeld revealed, perhaps inadvertently, the intent of the federal government in its relationship to the tribes on the upper Missouri. Laying out the precise scenario that was to follow, Bielefeld challenged the 70-yr-old implied reservation doctrine. He challenged *Winters*.¹²

Bielefeld explained that the Act of June 12, 1960 had made it a federal offense to fish on the tribal land without the permission of the tribe. But, as he extrapolated, the statute was subject to qualification in navigable waters. Quoting from a Claims Commission case, Bielefeld explained what was to become a judicial gauntlet:

- 1) No citizen has any exclusive right to the fish in navigable waters and has no right to exclude any other citizen from an equal opportunity to exercise his right to the possession of such fish. 2) Indians did not possess exclusive aboriginal fishing rights in navigable waters. 3) A tribal right to exclude non-

Indians from fishing in navigable waters can only be exercised if the grant of the Indian reservation included as part of the grant, the right to fish in designated areas free from interference. It would appear that even where the tribe has been held to own the bed of the navigable waterway, a non-Indian might reasonably urge that he could not be obliged to secure a tribal permit to fish thereon unless the Congress had granted tribal members an exclusive right to fish thereon.¹³

Bielefeld and the Bureau of Reclamation had an agenda broader than fishing rights. Bielefeld was intent on limiting all Indian *Winters* claims on the waters of the upper Missouri. Finch's trout were just the opening wedge in a lengthy battle challenging Indian sovereignty. Bielefeld, who was also charged with trust responsibility for the tribes, carefully couched his implied threat: "Intransigence can halt a program no matter how desirable the program may be. If the [Indian] hardheadedness can be minimized, comprehensive water resource development can make the [Missouri] Basin a very pleasant and secure place in which to live." Leaving no doubt that he referred to Indian reserved rights. "With respect to Indian rights, these must be carefully guarded but they must be adequately defined and quantified so that investments in general resource development can safely proceed." The open-ended nature of the Indian *Winters* claim was not conformable with United States water development in the west.¹⁴

Bielefeld's position reflected the true policy agenda of President Nixon's self-determination era—create a healthy environment for water sales to extractive industries. Like Bielefeld, many U.S. regional solicitors, rather than guard the reserve rights doctrine and Indian sovereignty, instead undermined it with arguments supporting narrow treaty interpretation. As the 1970s proceeded, the first assault for this self-serving faction was on the implied reservation doctrine. The tribes would indeed need to be very self-determined.

The law of the river played with other old ideologies and factoring too, as Finch cast his line, were the fishermen. English "Crown servitude" had specifically included the

rights of the public to fish in Crown waters. Sharply sensitive to public versus private property, the fishermen knew that their tax dollars had stocked the river and that private interests, as they interpreted the Crow action, now sought to deprive them of a right dating to early English common law. The 20 inch trophy trout belonged to the public not to the Crow. The fish and wildlife forces lobbied with much of the same intensity that the gun lobby did, and with considerable overlap. Indeed, non-Indian fishermen on the Crow Reservation began to arm themselves as they insisted on their right to river access. Local officials feared bloodshed. Two federal entities, the National Park Service, the BIA, joined tribal enforcement authorities, escalating the tension among the inherently anti-government group. Remarkably with the rise of the environmental movement, what had traditionally been a conservative fish and wildlife lobby joined with the liberal guardians of air and water quality. On the Crow reservation, the environmentalists had already established their alliance with the ranchers in opposition to Crow tribal coal development interests. James Junior Finch's action inadvertently created a zero sum game. All of the parties, Crow, Montana, United States, and fisherman, had everything to lose and everything to gain.¹⁵

As background to the Finch action, the federal government had once before filed trespass action against fishermen. In a 1971 federal action filed against two fishermen, Larry Haug and Thomas Jack Mill, Federal District Judge James F. Battin firmly upheld the notion of ownership by the Crow based on aboriginal title. Though he eventually found the two not guilty of violating the federal law outlawing fishing on Indian reservations, in a pre-trial opinion in a motion to dismiss, Battin made short work of the fishermen's challenge. Haug and Mills' attorney, Charles Moses, along with the State of Montana Fish and Game Commissioner in *amicus curiae* brief, argued that aboriginal title was insufficient to set aside the dominant servitude of the United States, and thus the riverbed to the state of Montana. Further they argued that aboriginal ownership could only be

achieved through *express* provision in the treaty. Citing what was to become a familiar precedent, *Choctaw Nation of Indians v. United States* (1970), the fishermen's attorney attempted to extend the theory of *express* treaty interpretation. In the *Choctaw* case, the court had granted the riverbed of the navigable Arkansas River to the Choctaw, Chickasaw, and Cherokee based on the express provision in the Treaty of Dancing Rabbit Creek: "beginning on the Arkansas River...thence up the Arkansas...thence down the Arkansas..." and the phraseology, "no part of the land granted to them shall ever be embraced in any Territory or States."¹⁶

In this 1971 action, *U.S. v Haug and Mill*, attorneys for the fishermen sought to extend the express reservation doctrine stated in *Choctaw*. The fishermen's attorneys argued that if the United States had intended that the Crow retain the Bighorn River, that reservation would have been expressly stated in the 1968 Treaty of Fort Laramie just as the Arkansas had been expressly granted to the Choctaw. At that time Judge Battin would have none of it. "Since its formation, the Crow Reservation has encompassed the portion of the Big Horn River in question. It should be noted that the Reservation as it exists today belongs to the Crow Tribe by virtue of aboriginal title rather than by an express grant in a treaty. It should be noted that these treaties were made before Montana was admitted to the Union. This court has previously recognized that these treaties are ones confirming the aboriginal title of the Indians..." As to the *Choctaw* precedent, Battin wrote, "To attempt to distinguish Choctaw Nation on the ground that it involved fee simple title whereas the present case involves aboriginal title, is to argue a distinction without a difference....In both instances the [treaty] includes the absolute right of use over the area described....The conclusion is inescapable that the riverbed, the islands and the river banks of the portion of the Big Horn River in question belong to the Crow Tribe." In 1971, the judge did not equivocate in his support of the Crow argument.¹⁷

Judge Battin reiterated his opinion as to the Crow riverbed ownership in the September, 1974 pretrial motion to dismiss in the case of James Junior Finch. But in April of 1975, he reversed both his prior opinions, *U.S. v. Haug and Mills* and *U.S. v James Junior Finch*. The judge, in his legal 180 degree pivot, followed the legal line of *Choctaw* and the express doctrine of treaty interpretation. "I have previously held that the portion of the Big Horn River bed in question is held by the United States in trust for the Crow Tribe of Indians....after further review of the pertinent treaties and the nature of the Tribe's title, I have concluded otherwise...Neither the Treaty of Ft. Laramie of 1851 nor the Treaty with Crow Indians of 1868 made specific reference as to the title of the Big Horn River bed." ¹⁸

In his prior opinions, the judge had declared simply that the riverbed belonged to the Crow despite the lack of expressed treaty provisions. According to Battin in his 1971 and 1974 opinions, the treaty of Fort Laramie had reserved the riverbed by implication on the theory of Crow aboriginal ownership and by the long held presumption that treaties be interpreted as the Indians themselves would have understood them. His reversal in what should have been a minor trespass case signaled a major shift in federal treaty interpretation.

Significantly, attorneys for Finch and the *amicus* brief for the State of Montana used the argument of United States regional solicitor, Alvin Bielefeld. In his 1969 article threatening usurpation of Indian fishing rights, Bielefeld had argued forcefully that Indians did not possess exclusive aboriginal fishing rights in navigable waters. According to Bielefeld, a tribe could only exclude non-Indians from fishing in navigable waters if the treaty stated that exclusion specifically. That is, Beilefeld promoted the *express* rights theory in treaty interpretation. Battin, in his opinion reiterated the new federal approach and found that United States servitude over the navigable Bighorn superseded any implied right that devolved from Crow aboriginal ownership.

With the servitude resting in the United States rather than the Crow, the streambed and all land to the high water mark on the banks of the Bighorn became the property of the state of Montana at statehood. None of the fishermen were guilty of trespass on the Bighorn because the land was not owned by the Crow. Remarkably, it was not owned by the United States either. According to the equal footing doctrine, title of the bed and banks of navigable rivers passed to the state, in this case the state of Montana according to its enabling act. Neither Larry Haug, nor Mills, nor James Junior Finch were guilty of a federal crime of trespass. They fished on a river belonging the state of Montana.

Between September, 1974 and April, 1975, Judge Battin became convinced that the *Choctaw* case was indeed determinative. Despite the vast differences in circumstances between the Jackson administration's removal treaty of a southeastern tribe from the confines of an existing state in the 1830s and the Treaty of Fort Laramie creating a reservation for an aboriginal tribe on the upper Missouri, the language of Dancing Rabbit Creek now worked against the Crow. The Treaty of Dancing Rabbit Creek was the first removal treaty, fiercely contested in Congress, and in many ways conciliatory to the Choctaw Tribe. The treaty removed the Choctaw from the state of Mississippi where aggressive whites had already extended the laws of the state over the Choctaw nation. The treaty provided land west of the Mississippi River in "Indian Territory," in land that much later became the state of Oklahoma. Because of the circumstances of removal, land patents were issued in fee, in Mississippi, and then exchanged for patents in the new homeland. In exchange for the Choctaw agreement to remove, the Jackson Administration promised, "...no part of the land granted to them shall ever be embraced in any Territory of States." According to the legal reasoning at the end of 1974, this assurance would have been expressed in any treaty, had the United States intended to express it.¹⁹

For the Bighorn case, the countering precedent to *Choctaw* was the obscure 1926 case, *United States v. Holt State Bank* which determined the title to the bed of a dry lake bed in Minnesota within the exterior boundaries of Red Lake Indian Reservation. In that case the navigable lake bed was determined never to have been granted to the Indians:

The United States early adopted and constantly has adhered to the policy of regarding lands under navigable waters in acquired territory...held for the ultimate benefit of future States, and so has refrained from making any disposal thereof, save in exceptional instances when impelled to particular disposals by some international duty or public exigency. It follows from this that disposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain. There was no formal setting apart of what was not ceded, nor any affirmative declaration of the rights of the Indians therein.²⁰

The remarkable difference between the *Holt Bank* case and Crow was that the Red Lake Band of the Chippewa relinquished by act of Congress, not treaty, part of their aboriginal holdings including the contested Mud Lake. The United States eventually recognized the uncaded portion as a reservation. With no express reservation of the lake bed, the Chippewa were deemed to have relinquished it with the surrounding land. Despite the clear differences, Judge Battin determined in the James Junior Finch case, the *Holt Bank* case provided a closer approximation to the Bighorn case than did the *Choctaw*. The bed of the Bighorn River remained part of the United States after the treaties with the Crow. The Crow Tribal Ordinance was invalid. James Junior Finch was not guilty of trespass according to Crow Ordinance dated October 13, 1973.

For the reason that the bed of the Big Horn River is not held by the United States in trust for the Crow Tribe of Indians, and for the reason that even if said river bed were held in trust for the Crow Indians the defendant is not charged with going upon said bed, and for the reason that the Crow Indians lack sufficient sovereignty to prohibit fishing from non-Indian land located within the external boundaries of the

reservation, the Court concludes that the information on the file herein doesn't state an offense against the United States.²¹

Battin might well have stopped there, but he no doubt felt compelled to respond to what he thought was a tribal overreach by added the caveat of his predecessor Judge Smith in the Great Falls Division of the Montana District:

No doubt the Indian tribes were at one time sovereign and even now the tribes are sometimes described as being sovereign. The blunt fact, however, is that an Indian tribe is sovereign to the extent that the United States permits it to be sovereign---neither more or less.²²

That Battin responded to the Crow's emboldened 1970s political stance seems clear.

While Battin fell into line with expressed rather than implied treaty interpretation, the 9th Circuit was not yet ready to make that leap. In December 1976, Judge Anthony Kennedy wrote his opinion for the 9th Circuit reversing Battin. The reasoning behind the reversal upheld implied rights. Justice Kennedy conceded that, "...the treaties between the Crow and the United States fell far short of constituting an express grant of all lands, including the beds of navigable streams..." however, he took from the *Choctaw* precedent the directive to interpret Indian treaties "in light of its history and the negotiations preceding it and to construe doubtful language in favor of the Indians." With this directive, the Judge found that the Crow Treaty of 1868—the Fort Laramie Treaty—reserved exclusive rights to the reservation lands. This cession, moreover, included rights in the riverbed. Quoting from the relevant treaty, the Judge wrote: "We desire to set apart a tract of your country as a home for yourselves and children forever, upon which your Great Father will not permit the white man to trespass."²³

For Kennedy and the 9th Circuit, the language seemed clear and therefore, must have seemed so to the 1868 Crow:

...the explicit language of the 1868 treaty could have had no other meaning in the minds of the Indians than that the Government recognized that all the lands within the metes and bounds of the reservation were to be theirs. We thus conclude that the United States, by signing the treaty of 1868 with the Crows intended to grant them dominion and control over that portion of the bed of the Bighorn River situated within the reservation subject to the retained power of the United States to exercise its paramount right to control navigation on the river.²⁴

As to the absence of any express terms, the Justice was emphatic: “the absence of similar provisions in the treaty with the Crow is not determinative. It is quite clear in light of the foregoing that in establishing the Crow Reservation, the United States intended that all lands including the riverbed were to be for the exclusive use of the tribe.”

The *James Junior Finch* decision in the trespass case eventually was vacated by the Supreme Court on the grounds of double jeopardy, and the high court did not address the question of the validity of the trespass law. The 9th Circuit decision, one that determined the riverbed to be Crow, remained the law. The Department of the Interior, now under the determined guidance of a group of determined, idealistic lawyers decided to continue the battle, to push the boundaries of Indian sovereignty. Based on the 9th Circuit decision, the United States requested a summary judgment quieting title to the riverbed in the United States to be held in trust for the Crow Tribe. Along with the title followed legal jurisdiction. This time, the ownership of the river would have a final determination in the Supreme Court with no trespass charges to muddy imperial waters. The Supreme Court would weigh in on the issue of expressed as opposed to implied treaty rights and with it the very limits of the sovereignty of the Indian nations.

Even before the final disposition in the *Finch* case, the Department of Interior’s Solicitor’s Office began to focus with apprehension on the role played by the Department of the Interior’s Northwest Regional Solicitor in Billings, Alvin Bielefeld. As *Montana*

moved into the courts, Bielefeld again weighed in with a memorandum that was in clear conflict with the litigation planned by the Justice Department and with the stated policy of the Department of the Interior, both of whom officially supported the 1960 federal law restricting hunting and fishing on Indian reservations without tribal permission. Over his long tenure, Bielefeld revealed through his correspondence a cozy relationship with the extractive industries doing business with the Bureau of Reclamation. He also displayed a continuing contempt for *Winters* rights and for the attorneys who confronted him over tribal water claims.²⁵

In 1975, Interior Associate Solicitor for Indian Affairs, Reid Peyton Chambers, a legal champion of tribal rights, accused Bielefeld of undermining the position of the United States. As Chambers discovered, as early as 1962, Bielefeld had issued a memorandum under official United States letterhead in which he expressed to the Montana State Fish and Game Department his views on the federal statute allowing tribes to regulate fishing within reservation boundaries. In that memorandum, written just two years after Congress passed the law restricting hunting and fishing, Bielefeld encouraged state authorities to challenge what he then considered an unsettled question—whether state fish and game laws extended into Indian country. The next year, Bielefeld served as Northwest Regional Solicitor for the Department of the Interior, Billings, when Judge Jameson went out of his way to declare the Bighorn navigable. Immediately, if not prior to the decision, it was evident to Bielefeld what the ramifications were as to state jurisdiction over the bed and banks of the Bighorn. In 1969, using his official title, he went on record again, in his *Land and Water Review* article, laying out the case to be made for state jurisdiction. He was still employed by the United States as Regional Solicitor in Billings and as such, he had guardian responsibilities to the tribes.²⁶

In 1972 Bielefeld again asserted his views in a letter to state of Montana authorities encouraging his view that the state had jurisdiction over reservation fishing by non-Indians. From court documents, it is clear that Montana's question of "jurisdiction" had a great deal more to do with collecting license fees than regulating the actual taking of fish. The Crow complained often urging the state to police non-Indian fishing. Documents date to 1881 pleading for such regulatory authority. The state employed only one warden to monitor an area considerable bigger than the Crow reserve. The tribes several prior attempts to restrict non-Indian fishing reveal a strong history of dissatisfaction with a state that insisted on collecting license fees but offered no help in policing the thousands of non-Indians who "passed over" the Crow reservation.²⁷

Bielefeld again asserted his contrary opinions in 1975 in the case *Colville Confederated Tribes v. Washington*. The State of Washington entered the U.S. Attorney's opinion as evidence in a case that determined fishing rights of the Colville tribes, the wards of the United States. Bielefeld came to his opinion despite the clear will of Congress restricting fishing and hunting. Not only was Bielefeld at odds with Congress, he was in clear disagreement with the stated policy of the United States Department of the Interior, his employer. At Interior, an exasperated Reid Chambers, in the strongest terms, expressed his frustration to the Justice Department urging them to rein in Bielefeld.

We are advised by attorneys for the Colville Tribes that the State of Washington filed the attached memorandum by the Field Solicitor, Billings as an indication of 'Government confusion'....The memorandum is in clear conflict with the letter of the Deputy Solicitor to the Assistant Attorney General...which requested that the United States support the Tribes. As you know, this Department has also supported a position similar...in *United States v. Finch*...and in the pending case *United States v. Montana*....To remove any possible confusion as to our views, I strongly urge that you immediately file this opinion with the court to clarify any confusion created by the Field Solicitor's memorandum.²⁸

Despite the clearly compromised position, the Justice Department continued to pursue its summary judgment in *U.S. v. Montana*. The State of Montana entered as evidence the opinion of Alvin Bielefeld, the Department of the Interior Regional Solicitor.

Save James Junior Finch, the cast of characters as well as the arguments remained the same in *United States v. State of Montana*. The federal courts would decide several questions: did the United States convey to the Crow the Bighorn at the time they made the treaties of 1851 and 1868 or did the United States convey the bed and banks of the Bighorn to the state of Montana at the time of statehood? Did the Crow have exclusive right to regulate all hunting and fishing by members and non-members of the tribe? Was the right to hunt and fish a tribal right or had it been conveyed to individual Indians at allotment? Did the State of Montana as successor in interest to fee land have a riparian right to the bed and banks of the Bighorn? If so, did that convey a right to fish?

The United States entered its complaint in October 1975. In February 1976 the court granted permission that the State of Montana be joined by the Big Horn County Rod and Gun Club. After a series of motions and cross motions District Court Judge James F. Battin considered the United States' and the Crow Tribe's request for summary judgment and refused it, ordering the case to trial. The trial itself did not occur until the summer of 1978. In that spring the Supreme Court handed down two significant decisions that might well have entered into the U.S. decision to continue litigating the Crow case.²⁹

In his March 1978 opinion, then Justice William Rehnquist, in the case *Oliphant v. Suquamish Indian Tribe*, determined that tribes had no criminal jurisdiction over non-Indians in Indian country. The case was one of a number that the high court heard in the 1970s and 80s that reined in what seemed to be the expanding notions of Indian sovereignty. *Oliphant* went further. Indians, Rehnquist wrote, now submitted to the overriding sovereignty of the United States and as such had given up their inherent right to

enforce tribal criminal law against non-Indian citizens of the United States except in a manner acceptable to Congress.

As an example of what a “manner acceptable to Congress” might be, Rehnquist pointed to the Treaty of Dancing Rabbit Creek. In that treaty the Choctaw, “express a wish that Congress may grant to the Choctaws the right of punishing by their own laws any white man who shall come into their nation and infringe any of their national regulations.” The Choctaw had expressly requested jurisdiction. In their treaty, the Suquamish clearly also had that option and had not requested jurisdiction. The treaty did not bestow any implied right to civil or criminal jurisdiction. Rehnquist had begun the assault on the implied rights doctrine.³⁰

Tribal courts had no jurisdiction to try and punish non-Indians. While non-Indians had fallen under federal jurisdiction for all major crimes from the Major Crimes Act of 1885, the high court now restricted tribal jurisdiction on any crime committed in Indian country. The intent of the Rehnquist court to restrict tribal sovereignty seemed clear.

Two weeks after the *Oliphant* decision, the high court spoke again to the issue of tribal jurisdiction in *U.S. v. Wheeler*. In that case the court unanimously reversed the lower courts in their finding that a defendant had suffered double jeopardy by being tried in both tribal and federal court. The difference between the *Wheeler* and *Oliphant* was that in *Wheeler*, the defendant was Indian. The high court’s decision in *Wheeler* upheld tribal sovereignty over Indians. The two cases were clear indications of the direction of the court in cases involving Indian sovereignty—sovereignty would not extend to non-Indians. Nevertheless, in the eastern district of Montana, the United States continued to seek the undisputed title to the Bighorn and along with it the right to control the right to regulate non-Indian fishing. From the beginning the attorneys for the State of Montana—armed with the Regional Solicitor for the Department of the Interior legal arguments— took the

offensive. They argued forcefully for an interpretation consistent with express treaty interpretation.³¹

The State first approached the question of Crow regulatory authority. Montana asserted that the issue of tribal regulatory control over non-Indians had been resolved by the Supreme Court. Quoting from the *Oliphant* decision, the attorneys cited: "...the 'trend' is away from 'the idea of inherent Indian sovereignty' and 'toward reliance on federal preemption.'" They continued to argue that the statute declaring it illegal to fish on reservation land, USC 1165, applied only to lands belonging to the tribe, trust lands, or lands owned by the United States in trust for the Indians. The code did not apply to private land within the reservation, that is, non-Indian land along the river including state of Montana land. "...approval of the tribe's summary and arbitrary regulation of fee owner's hunting and fishing privilege shocks the conscience and violates the fifth amendment to the United States Constitution." The act of tribal usurpation of riparian fishing rights was an illegal taking according to the state and quoting from *Oliphant* and from *Settler v. Yakima Tribal Court* (1969), they asserted that Montana citizens—fishermen—had the right to be free from "unwarranted intrusions on their personal liberty." Property values could not be "emasculated by an accident of residence."³²

The state of Montana continued with arguments in the second question of the case, the ownership of the riverbed. As in *Finch*, the question turned on whether the United States granted the riverbed of the now navigable river to the Crow with the reservation or to the state at statehood. The state's main argument, as it had been in *Finch*, continued to be the equal footing doctrine, the idea that the state received at statehood, the bed of navigable rivers whose servitude remained subject to the United States. To that end, the state cited the two precedents, *Holt Bank* and *Choctaw*. They argued that had the United States intended to grant the Crow the riverbed, they would have done so expressly. Rights

to the riverbed might well be implied in the treaty had the Crow been a tribe predominantly dependent on fishing, but they had no fishing traditions. Under existing legal precedent, the Crow must have understood in the 1868 Treaty that they relinquished the river.³³

The United States and the Crow arguments involved a detailed look at treaty construction. The initial Treaty of 1851 granted specific title to land to the participating tribes. The treaty also stated that the tribes did not “surrender the Privilege of hunting, fishing, or passing over any of the tracts of country heretofore described.” According to the United States and the Crow, the wording established that the Crow had indeed been aware of fishing even though they had been, predominantly, a hunting culture.³⁴

The Fort Laramie Treaty of 1868 was far more specific, reserving to the Crow 8 million acres for their “undisturbed use and occupation.” The territory included land bounded on the north and west by the “mid-point of the Yellowstone River.” The eastern boundary was to be the 107th longitude where it crossed the boundary of Montana Territory extending northward to the Yellowstone. The Bighorn ran through the middle of Crow country. Did the treaty include the Bighorn River that bisected the reserve? Yes according to the United States. Not only did the reserve include the Bighorn, and all rights to hunt and fish therein, the Crow also retained the privilege to hunt on unoccupied lands of the United States. The Treaty also clearly expressed that all those who trespassed on the reservation were subject to the authority of the United States. The Treaty interpretation of the United States and the Crow was that this conveyed to the Crow all rights to the streambed of the Bighorn. Using the construction that treaties be interpreted as the participants themselves would have understood them, and that all disputes be resolved in favor of the Indians, the result seemed clear: the Bighorn River belonged to the Crow Tribe.³⁵

Not so said the State of Montana. The Treaty of 1868 was modified by both Montana's statehood and the various allotment acts. All legislative history exhibited the clear intent of the United States Congress to change the terms of the treaty. The state of Montana was organized into a territory on December 12, 1864. When the Treaty was signed in 1868, the reservation was in Big Horn, Gallatin, Meagher, and Musselshell territorial counties. The Crow Treaty did not expressly exclude the Crow reserve from the territory of Montana. Using the precedent of the Choctaw treaty of Dancing Rabbit Creek, the state argued that had the United States intended to exclude the Crow reservation from the future state of Montana, it would have done so, just as it had for Choctaw in the then non-existent Oklahoma.³⁶

Finally the state cited the Shively presumption taken from the 1894 case *Shively v. Bowlby*. The Shively presumption stated that absent the clearest expression of intent to the contrary, the United States did not intend to divest itself of the sovereign rights to navigable waters and in the soil underneath them. Three factors might be used to overcome the presumption, according to the Court. First, international obligations may necessitate grants of navigable waterways. Second, the federal government may grant waterways to promote commerce with foreign nations or among the states according to the commerce clause of the constitution. Third, the federal government could be interpreted to have withheld navigable waters for "other public purposes." All three, international obligations, promoting commerce, and "other public purposes," required clear evidence of congressional intent. The courts were reluctant to extend to the Indian nations any of the Shively criteria for exempting navigable waters from federal divestiture. In the *Holt State Bank* case against the Red Lake Band of Chippawas the court specifically exempted Indian treaties from Shively exceptions when the judge asserted, "disposals of the United States during the territorial period are not lightly to be inferred." The Shively presumption as

filtered through the Chippawa would factor heavily not only in the Bighorn case but in subsequent cases where the newly navigable waterways appeared to grant the states new interest in streambeds.³⁷

The Crow Tribe entered evidence from documentary accounts of the various treaty negotiations. These might well speak to the understanding of the Crow. Did the original negotiators understand the reservation as including the rivers that flowed through them? Crow chief Blackfoot had represented the Crow at the 1868 Fort Laramie Treaty discussions and was on record as having testified, “The Crows used to own all this Country including all the rivers of the West...” He also had said, “We are not very numerous but are very strong and powerful. There is plenty of buffalo, deer, elk, and antelope in my country. There is plenty of beaver in all the streams. There is plenty of fish too...”³⁸

Legislation diminishing the reservation also included language that seemed to indicate that all assumed a Crow interest in the Bighorn River. In the discussions surrounding the unratified negotiations in 1873 many communications from the federal authorities included language like, “and if there is upon said reservation a locality where fishing could be valuable to the Indians, to include the same if practicable.” The 1891 cession described, “thence in a due easterly course on a parallel of latitude to a point whence it intersects the mid-channel of the Big Horn River...”³⁹

The tribe cited the Indian disclaimer in the state’s 1864 Organic Act: “Provided further, That nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said territory so long as such rights shall remain unextinguished by treaty between the United States and such Indians.” Finally the tribe cited the 1920 Crow Act Section 10, the section of the final allotment act. Section 10 expressly retained water power in the Bighorn River. The flow of the stream had been

determined by Judge Jameson in the Billings Federal District Court to belong to the Crow Tribe and the compensation of \$2 million had rested on that determination.⁴⁰

The trial also included Crow testimony which attempted to establish the Crow as the aboriginal owners of the territory, and therefore inured with the implied rights of the original occupant. To that end two Crow tribal historians testified: Joe Medicine Crow and Henry Old Coyote. Medicine Crow, who held a Master's degree and had completed course work toward a Ph.D. from UCLA, was addressed throughout his testimony by both the United States attorney and the Montana attorney as "Joe." He testified as to the origins of the Crow and their migration to the present state of Montana approximately three centuries earlier. Old Coyote, "Henry" testified similarly to a history of 11 generations of occupation retelling the story of the Crow naming of the Bighorn River. Of course the testimony was uncorroborated by physical evidence, much of which remained under 500 feet of water at the bottom of what had been the Bighorn Canyon.⁴¹

To assert implied rights to the fishing ground, the tribe needed to establish a fishing heritage. Was the Crow a fishing culture? Was the right to fish implied by a long tradition of fishing? Medicine Crow said yes. The state attempted to undermine Medicine Crow's assertion and under an assaultive barrage questioning Crow fishing interest, Medicine Crow finally said simply, "...they [the Crow}] do it rather quietly and you don't see them." The testimony did not impress Judge Battin.⁴²

First the judge determined that the Crow had no aboriginal claim to the area; they were not indigenous but instead were a nomadic tribe that did not occupy its present home before the "dominant society was migrating from the old world to the new world." He continued, "The Crow occupancy of the land now constituting the Crow Indian Reservation is not based upon aboriginal title from time immemorial." ⁴³

He continued to interpret the historical evidence. The Crow he determined had a sophisticated language, one that differentiated hunting and fishing, elk and trout, and, significantly, they semantically differentiated rights from privileges. According to Judge Battin, at the time the Crow signed the 1868 treaty, Crow negotiators could differentiate between the *right* to fish, one they theoretically retained from their aboriginal occupation, from the language that was used in the Treaty—the “*privilege*” to fish. The latter, according to Battin, must have conveyed significant meaning to the 1868 tribal negotiators. Crow negotiators must surely have understood that the word, “privilege” meant that the tribe’s dominion over the river was actually an ongoing grant from the United States, one that would be terminated when Montana entered the Union. Certainly the Crow understood that the United States would then turn the river bed and fishing rights over to the state according to the equal footing doctrine and they, the Crow, would have no rights under the 1893 Shively presumption.⁴⁴

The language of the decision itself surely stretched modern credulity. That the Crow at the time of the 1868 Treaty signing understood the logic was ridiculous. Nevertheless, the judge continued: “Neither the Treaty of 1851 nor the Treaty of 1868 conferred upon the Tribe the right to exclude the Crow Reservation from the Montana Territory...neither of the treaties considered contains an express grant of all land including the beds of navigable streams contained within the territorial boundaries of the land in question.” He continued, “The retention by the tribes of the privilege of fishing does not carry with it as a matter of law, nor does it grant, the exclusive right to fish. Had the exclusive Right to fish been deemed salient to the Crow, and it was not, based upon the record which is before the Court, surely it would have been mentioned in the treaties. This is especially so when it is considered that the Absorka [sic] or Crow language distinguishes between privileges and rights.”⁴⁵

As to the right of the Crow Tribe to regulate hunting and fishing on their reservation as directed in the federal statute¹⁶⁵, Battin made quick work of the argument. Referring to *Oliphant*, he quoted, “Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress...” The power to regulate was determined to be “inconsistent with their status.” The United States and the Crow Tribe attempted to show a long history of regulatory action on the Bighorn, but the judge found that regulation had begun as a result of the Yellowtail Dam construction, while the state of Montana had stocked the river for most of the century. “The federal government exercised concurrent jurisdiction with the state over nonmember fishing and hunting activities within the reservation. The exception to the Tribe’s attempt to exercise jurisdiction over non-Indian hunting and fishing is revealed in Tribal Resolution No. 74-05....Subsequent case law teaches that this attempted exercise of jurisdiction over non-Indians was fatally doomed.”⁴⁶

The Judge ruled on five issues. He found that the State of Montana held title to the bed and banks of the Bighorn River; that the state had jurisdiction to regulate non-Indian hunting and fishing on the river and all fee land owned by non-Indians; the United States had concurrent jurisdiction on lands owned by Indians and on tribal lands; that Crow Indian exclusive rights of hunting and fishing within the reservation were limited to trust lands; that the Crow right to regulate hunting and fishing were similarly limited to trust lands. The decision came as no surprise in light of Battin’s opinion in *Finch*. The United States and the Crow appealed to the Ninth Circuit.⁴⁷

As with the *Finch* decision, the Ninth Circuit overturned the District Court. Judges Sneed and Anderson heard the case with David W. Williams from the Central District of California sitting by designation. They returned their decision on June 12, 1979. Despite

the intervening precedents, *Oliphant* and *Wheeler*, handed down in the waning days of the Burger court, the 9th upheld its precedents in implied treaty interpretation:

We must recognize that in this case, as in others in which we are required to fix the rights and powers of Indians in the latter part of the twentieth century in the light of treaties of an earlier century, our task is to keep faith with the Indian while effectively acknowledging that Indians and non Indians alike are members of one Nation. Both seek power and gain through identical processes, Viz. commerce, politics, and litigation. We must however, live together a process not enhanced by unbending insistence on supposed legal rights which if found to exist may well yield tainted gains helpful to neither Indians nor non-Indians.⁴⁸

The appeals court continued with a reversal of the riverbed decision:

“Notwithstanding these scant references to the Crow Tribe’s hunting and fishing rights, Article 2 of the Treaty of 1868 specifically describes the reservation as the place ‘set apart for the absolute and undisturbed use and occupation of the Indians.’” That was the only relevant line as far as the court was concerned. “...the title to the bed and banks of the Big Horn River to the ordinary high water mark situated within the exterior boundaries of the Crow Indian Reservation is held in trust by the United States for the use and benefit of the Crow Tribe of Indians.”⁴⁹

The 9th Circuit judges then entered the more timely debate, the extent of tribal jurisdiction to regulate hunting and fishing. In so doing, they failed to support adequately the reversal on the riverbed and with the riverbed the assault on implied treaty interpretation that both the District and Supreme Court clearly waged. As to the tribal jurisdiction the appeals court limited the *Oliphant* decision by declaring the Crow to have exercised legitimate sovereign powers in passing their resolution, but limited their authority over non-members who hunted or fish on their own fee land. In compliance with *Oliphant*, the court also directed that the tribe had no power to impose criminal sanctions. The court determined that the state of Montana had power to regulate hunting and fishing

within the boundaries of the Crow Reservation by non-members of the tribe. Limitations included the stipulation that they not regulate Crow members and that the purpose or the regulation must be the conservation and proper management of the game and fish and must not to impede regulation by the Crow.

The court's decision urged cooperative management and as such, the judges answered the anticipated criticism that the overly precise decision was legislative:

Our holdings reflect a degree of precision not always present in the sources on which we must rely. Our justification is that the problems this case presents are serious and require resolutions whose outlines are reasonably sharp and clear. While the judiciary is frequently not the institution of government best suited to frame such resolutions, ...it is perceived that legislative or executive solutions are unlikely to be offered within the reasonable foreseeable future. This is precisely the situation we believe we confront in this case as well as in many other cases involving those responsibilities and necessities which this Nation confronts in dealing with Indians.⁵⁰

Local newspapers reported the decision with some derision. In an article entitled, "Who Controls the River?" the Hardin Herald declared the decision a "nightmare for enforcement." But the editor urged cooperation: "It's rough water ahead, full of snags for both, if some cooperation isn't forthcoming." The paper held out little hope for a satisfactory resolution in the inevitable Supreme Court appeal. The high court had failed to address the issue of the steam bed in *Finch* and its interest in the matter now was deemed by the paper to be "unpredictable." The Hardin locals seemed unaware that the "trend" was away from "the idea of inherent Indian sovereignty."⁵¹

The high court surprised Hardin by agreeing to review the case, *Montana v. United States*, to be heard in the October 1979 term. The court granted the appeal on three grounds: the riverbed issue; fishing and hunting jurisdiction; and on the equal protection issue—the states argument for non-member hunting on non- Indian fee land. The

arguments, though more eloquently stated, remained the same. The Crow Tribe was joined in *amici curiae* by virtually every tribe in the west.

Just as he had in the *Choctaw* case, Justice Potter Stewart delivered the opinion of the court. As to the riverbed, Stewart wrote: “Whatever property rights the language of the 1868 treaty created, however, its language is not strong enough to overcome the presumption against the sovereign’s conveyance of the riverbed. The treaty in no way expressly referred to the riverbed nor was an intention to convey the riverbed expressed in ‘clear and special words.’ (*Martin v. Waddell* 41 US at 411) or ‘definitely declared or otherwise made plain,’” (*Holt Bank*). Again quoting from *Holt Bank*, “the effect of what was done was to reserve in a general way for the continued occupation of the Indians what remained of their aboriginal territory.” Stewart continue, “The mere fact that the bed of a navigable water lies within the boundaries described in the treaty does not make the riverbed part of the conveyed land, especially when there is no express reference to the riverbed that might overcome the presumption against conveyance.”⁵²

Stewart continued to interpret the Fort Laramie Treaty, presumably as the Crow would have interpreted it in 1868: “ ‘absolute and undisturbed use’ and ‘occupation’ and ‘no persons except those designated herein shall ever be permitted,’ whatever they seem to mean literally do not give the Indians the exclusive right to occupy all the territory within the described boundaries.”⁵³

The judge then referred to his decision in the *Choctaw* case where the conveyance of a riverbed, the Arkansas to the Choctaw, “was based on very peculiar circumstances not present in this case.” That decision, Stewart insisted relied on the expressed stipulation that the land be granted in fee simple and that “no Territory or government shall ever have a right to pass laws for the government of the Choctaw Nation....and that no part of the land granted to them shall ever be embraced in any Territory or State.” Relying on the discovery

doctrine, the judge differentiated the right of occupation from that of civil ownership and without hesitation abandoned the doctrine of implied reservation: “Neither the special historical origins of the Choctaw and Cherokee treaties nor the crucial provisions granting Indian lands in fee simple and promising freedom from state jurisdiction in those treaties have any counterparts in the terms and circumstances of the Crow Treaties of 1851 and 1868.”⁵⁴

With the groundwork laid, Stewart proceeded to address the argument that the United States reserved the river for the Crow rather than the state. The Crow and the United States attorneys had argued that under the auspices of “appropriate public purpose,” the Crow met one of the three criteria to dismiss the presumption of conveying the riverbed to the state:

Moreover, even though the establishment of an Indian tribe can be an “appropriate public purpose” within the meaning of *Shively v. Bowlby* justifying a congressional conveyance of a riverbed, the situation of the Crow Indians at the time of the treaties presented no “public exigency” which would have required Congress to depart from its policy of reserving ownership of beds under navigable waters for the future States...that title to the bed of the Big Horn River passed to the State of Montana upon its admission into the Union, and that the Court of Appeals was in error in determining otherwise.⁵⁵

The decision on the riverbed was essential to what the court deemed the more crucial issue, that of Indian civil jurisdiction over non-Indians. The Court of Appeals had found two sources for their decision allowing Crow jurisdiction: the Crow treaties augmented by the 1964 congressional restrictions and “inherent” Indian sovereignty. Stewart wrote: “We believe that neither source supports the court’s conclusions.” The treaties had been modified by the Allotment Act, while 1165 clearly referred only to trust lands and other lands of Indians. Clearly exempt from tribal jurisdiction, according to Stewart, were fee lands owned by non-Indians. “Quoting *Wheeler*, Stewart wrote, “that Indian tribes are ‘unique aggregations, possessing attributes of sovereignty over both their

members and their territory,'But the Court was careful to note that through their original incorporation into the United States....Indian tribes have lost many of the attributes of sovereignty.”⁵⁶

Stewart now remarkably resurrected the implied reservation doctrine. But rather than applying it to what the tribes reserved by implication, the doctrine recognized an “implicit divestiture.” “The Court distinguishes between those inherent powers retained by the tribes and those divested: ‘The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe.’”⁵⁷

Justice Stewart then defined the limits of tribal sovereignty in the modern era: “A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct is consensual or when conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” But then preempting the Crow claim, “No such circumstances...are involved in this case...nothing in this case suggests that such non-Indian hunting and fishing so threatens the Tribe’s political or economic security....”⁵⁸

The high court was divided. Justices Brennan, Blackmun, and Marshall all dissented from the majority’s 180 degree legal pivot. In his dissent, Justice Blackmun upheld his understanding of implied rights. He accused the majority of blinding themselves to the circumstances of the treaty negotiations:

Only two years ago this Court reaffirmed that the terms of a treaty between the United States and an Indian tribe must be construed ‘In the sense in which they would naturally be understood by the Indians.’ In holding today that the bed of the Big Horn River passed to the State of Montana upon its admission to the Union, the Court disregards this settled rule of statutory construction...I believe that the United States intended, and the Crow Nation understood that the bed of the Big Horn was to belong to the Crow Indians...⁵⁹

As a result of the decision, the Crow lost the bed and banks of the Bighorn River to the high water mark. It was a resounding defeat for all of Indian country, and the tribes joined the Crow and United States in a motion for rehearing. The motion failed. More significant than the loss of fishing privileges on the river that flowed through the middle of their reservation was the Court's intent to abandon implied rights doctrine. If the rights and privileges of the Indian nations had to be precisely expressed in treaty, the implications for all Indian water rights, rights derived from their implied reservation as stated in *Winters*, was in serious jeopardy.

Crow tribal members reacted immediately to the Supreme Court's decision. They took the battle to the highways and bridges that "passed over" the Crow reservation. The State of Montana announced the Bighorn River officially reopened to fishing on August 21, 1981. The night before, under cover of darkness, Crow activist Bob Kelly organized hundreds of tribal members. With tribal elders and children, the Crow parked cars and trucks, and began an occupation of the Two Leggins bridge. Spanning the Bighorn River on State Highway 313, the 600 foot bridge provided river access on the main route south of Hardin. At daybreak hundreds of cars carrying non-Indian fishermen arrived at the crossing only to read the impromptu sign that protesters had raised: "Crow Reservation Closed to Fishing Today Tomorrow and Forever."⁶⁰

Modeled after the occupation of Alcatraz and Wounded Knee, the action was not tribally sanctioned, but in support of the protesters, Chairman Donald Stewart ordered tribal police and game wardens to close all reservation access roads. He had unsuccessfully appealed to Montana governor, Ted Schwinden to delay the opening because of the threat of violence. The governor refused to concede. Frustrated Stewart refused to be responsible for the violent confrontation he felt surely would ensue. To the Governor, he wrote: "It will be entirely your responsibility and the consequences placed squarely on your shoulders."⁶¹

Protesters argued that the state might own the river, but they and the fishermen had no right of access. “We realize there is no way to keep fishermen off all 52 miles of river by what we’ve done, but at least we’re making it difficult for them and letting people know we won’t be pushed around,” protest leader Kelly told the reporters who quickly descending on what promised to be a major confrontation on mythic ground. The story rapidly gained national attention as the occupying force garnered the interest of all of Indian country along with the national press. Will Sampson, applauded for his characterization of Chief Broom in the academy award-winning adaptation of Ken Kesey’s *One Flew Over the Cuckoo’s Nest*, arrived to lend his name and very high profile.

Seven years had passed since the blue ribbon stream had welcomed a fisherman’s lure. Fishermen, replete with their ideological entitlement, arrived by the hundreds to fish for what they imagined to be, by now, enormous trout. Local fisherman Al Lambrecht noted for a *New York Times* reporter: “Every outfitter in the state is out here and I’ve seen people from as far away as Maine. This whole thing kind of makes you sick.” Others were more vociferous. A former state game warden, Al Bishop, raised the level of confrontation: “What we all ought to do is march down there and throw those clowns right in the river. Only problem is we’d be the ones who’d get arrested.”⁶²

The fishermen’s cars and trucks backed up to Hardin. In the jurisdictional nightmare, state law enforcement had no authority on the bridge. Federal marshals arrived to keep the scene from erupting into violence. Montana has a segment of its population that Indians call “Indian fighters.” One such man was the sheriff of Yellowstone County—not Bighorn County where the occupation took place. From whatever sense of entitlement he gleaned, he arrived with police dogs intent on clearing the bridge of the Crow, among them praying elders and children. A lone BIA policeman confronted the sheriff, and drew his weapon. He ordered the man and his dogs off the reservation, dictating that no dogs would

be turned loose on any Indian people. In the midst of this confrontation tribal elder, John Alden walked to the center of the bridge and, in Crow, prayed: "In this country there are laws which say you cannot take the property of other people. God intended this river for the Crow tribe and we intend to preserve it for future generations."⁶³

The standoff lasted only one day. Organizer Kelly grew increasingly unable to control the high emotions of the tribal members and, fearing violence, he called off the protest. The happy fishermen poured onto the reservation as the state of Montana took official possession of its river.

Clearly local non-Indian interests had converged with a newly conservative Supreme Court, one that had little appreciation for Indian foundation law. As one attorney attested: "They are just making it up." The supposedly conservative courts eschewed "judicial legislation," but both the federal district court and the Supreme Court rewrote Congress's clearly stated 1960 act restricting hunting and fishing on tribal land. With the helping hand of the guardian of the Crow trust, Alvin Bielefeld, this confluence of local interests and the "self determined" Supreme Court savaged Indian sovereignty on the Bighorn. The courts wrote the law and, in the mind's eye, the German shepherds of Yellowstone County enforced it.

By declaring dominant servitude and by imposing new more stringent requirements on Indian treaty interpretation, the federal government regained command of the waters. Command of the waters was literal. The Bureau of Reclamation had a new, more environmentally sensitive directive: "Managing Water in the West." To achieve command, the United States failed in its fundamental obligation to its ward tribe and in fact subverted it. From Judge Jameson's largely unnecessary 1963 decision in *Crow v United States*, one that declared the Bighorn navigable, to the 1981 *Montana* decision, the United States sacrificed its ward to the interests of local and federal policy directives. As David

Getches has written: "It (the Supreme Court) now gauges tribal sovereignty as a function of changing conditions—demographic, social, political, and economic—and the expectations they create in the minds of affected non-Indians. In the emerging jurisprudence of Indian law, the Court arrogates to itself the role of reviewing and weighing non-Indian interests and, ultimately, of redesigning the sovereignty of Indian tribes." No tribe is more certain of this truth than the Crow.

¹ Fort Laramie Treaty of 1851, 11 Stat. 749, 11 Kapp.594; Fort Laramie Treaty 1868, 15 Stat. 649; 18 U.S.C.A 1165, "Whoever, without lawful authority or permission, willfully and knowingly goes upon any land that belongs to any Indian or Indian tribe...for the purpose of hunting, trapping, or fishing thereon...shall be fined not more than \$200 or imprisoned not more than 90 days, or both..." Navigability was declared in 1963 in an unpublished opinion by Judge Jameson in *Crow Tribe of Indians of Montana v. U.S.*, Civil No. 214 (D. Mont. 1961) *United States of America v. James Junior Finch*, District Court for the District of Montana, Billings Division 395 F. Supp. 205; 1975 U.S. Dist.; *United States v James Junior Finch*, 548 F.2d 822 (1976), vacated per curium, 433 U.S. 676 (1977). *United States v. Montana*, 457. Supp. 599,607 (1978); *United States v. Montana*, 604 F. 2d 1162, 1165 (1979); *Montana v. U.S.* 450 U.S. 544 (1981). David H. Getches, "Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law," *California Law Review* 84 (1996), 1573. *Winters v U.S.* 207 U.S. 564 (1908); *United States v. Winans*, 198 U.S. 371(1905).

² See Folder 005, Box 99, RG 115 The Bureau of Reclamation, National Archives and Records Administration—Rocky Mountain Region (Denver). The folder contains many documents pertaining to the fish kill. Crow Tribal Resolution No. 62-02-A, Adopted 8/11/61; Resolution 64-20, Adopted 16/11/63, both restrict hunting and fishing on tribal land.

³ 15 Stat. 649; 18 U.S.C.A 1165: "Whoever, without lawful authority or permission willfully and knowingly goes upon any land that belongs to any Indian or Indian tribe...or upon any lands of the United States that are reserved for Indian use, for the purpose of hunting, trapping, or fishing thereon...shall be fined not more than \$200 or imprisoned not more than ninety days, or both...."

⁴ *Winters v United States.*; *United States v. Winans*.

⁵ The McCarran Amendment, 43 U.S.C 666 (1952).

⁶ *Ibid.* Robert S. Pelcyger, "Indian Water Rights: Some Emerging Frontiers," *Mineral Law Institute* (1976) 743-775.

⁷ Patti Goldman, "Riverbed Ownership Law Metamorphosed into a Determinant of Tribal Regulatory Authority." *Wis. L. Rev.* (1982), 264-310. Ms Goldman's treatment of the issues involved in *Montana* is by far the best. See too Charles Wilkinson, *American Indians Time and the Law*; David H. Getches, Charles F. Wilkinson, Robert A. Williams, *Federal Indian Law*, 4th Edition (St Paul, 1998).; and Linda Navarro, "Creeping Termination: *U.S. v. Montana*, 1980." (Seminar paper, University of Washington, 1980). Navarro's extremely cogent analysis was written prior to the Supreme Court review. *Johnson and Graham's Lessee v. M'Intosh*, 21 U.S (8 Wheat.) (1823).

For a discussion of the origins of riverbed ownership see Fraser, "Title to Soil Under Public Waters—A Question of Fact," *Minn L. Re* 2,313 (1918); Leighty, "The Source and cope of Public and Private Rights in Navigable Waters, 5 Land and Water L. Review 391-6 (1970). *Martin v. Wadell's Lessee*, 41 U.S. 345 (1842).

⁸ Missouri Basin Flood Control Act; Reclamation Act 1902; Yellowstone River Compact June 2, 1949 (Public Law 83, 81st congress, First Session)

⁹ *Federal Power Commission v. Oregon* (1955). Navigability was established in *United States v. Appalachian Elec. Power Co.* 311 U.S. 377, 421(1940) often referred to as the New River Case. Subsequent to the New River Case a number of rivers were deemed navigable using new determinants. Along with *Crow v. United States*, upper Missouri navigability was contested in *Montana Power Co. v. FPC* 185 F.2d 491, 493 (D.C. Cir. 1950) and despite a 30 ft. fall was deemed navigable. Also *Rutten v. State*, 93 N.W. 2d 796 (N.D. 1958) declared Devil's Lake in North Dakota navigable; *Coates v. United States*, 110 F. Supp. 471 472 (Ct. Cl. 1953). The federal courts were not entirely consistent in their pursuit of navigability. In *U.S. v Ross*, 74 F. Supp. 6, 7-8 (D. Mo 1947) a waterway consisting of a partially blocked borrow pit was deemed non-navigable.

¹⁰ *Ibid. Crow v. United States.*

¹¹ Marc Reisner, *Cadillac Desert: The American West and its Disappearing Water* (New York, 1986); McCool, *Command of the Waters: Iron Triangles, Federal Water Development, and Indian Water* (Berkeley, 1987).

¹² See correspondence in Folder 4, Box 35, Collection of the Hon. Dewey F. Bartlett, The Carl Albert Center Congressional Archives, The University of Oklahoma. See too: Bielefeld to Area Director, Indian Affairs, May 3, 1968, in Folder "Yellowtail Contracts, 1961-1981, Box 089, RG 115 The Bureau of Reclamation, National Archives and Records Administration—Rocky Mountain Region (Denver). Alvin E. Bielefeld, "Navigability in the Missouri River Basin," *Land and Water Law Review*, 4, 97-120.

¹³ *Ibid.*, 118-19.

¹⁴ *Ibid.*, 119.

¹⁵ Patti Goldman, "Riverbed Ownership," *Hardin Tribune*, May 3, 1975, "Trouble Brewing on the Bighorn."

¹⁶ *U.S. v. Haug and Mill*, D. Mont, Billings Division., Misc. Crim. No. 511 (June 9, 1971). *Choctaw v. Oklahoma*, 397 U.S. 620 (1970). Treaty of Dancing Rabbit Creek of September 27, 1830, 7 Stat 333, 11 Kapp.

¹⁷ *U.S. v Haug and Mill*. See too: Gibson, "Indian Claims in the Beds of Oklahoma Watercourses," *American Indian Law Review* 83 (1976).

¹⁸ *United States of America v. James Junior Finch*, 395 F. Supp. 205 (1975).

¹⁹ Treaty of Dancing Rabbit Creek of September 27, 1830 7 Stat 333, 2 Kapp.

²⁰ *United States v. Holt State Bank*, 294 F 161 (1923), 397 US 90 S.Ct)

²¹ *U.S. v Finch*, opinion.

²² *US v Blackfeet Indian Reservation*, Civil No. 3197 US District Court for District of Montana, Great Falls Division.

²³ *U.S. v James Junior Finch*, 548 F.2d 822(1976). Construing treaty language in favor of Indians dates to the M'Lean's concurrence in *Worcester v. Georgia*, 31 U.S. 214, 261 (1832) and has often been reiterated.

²⁴ *Ibid.*

²⁵ Bielefeld was Interior Solicitor in Billings for 30 years. Many examples of his dealings are on record but see particularly Folder "Yellowtail Contracts, 1961-1981," Box 089, RG 115 The Bureau of Reclamation, National Archives and Records Administration—Rocky Mountain Region (Denver).

²⁶ See Bielefeld to Area Director Indian Affairs, August 15, 1960 included in joint appendix in the writ of certiorari to the Supreme Court, Fish and Wildlife amicus brief exhibit, *Montana v. United States*. See too in the same location Bielefeld to Area Director February 16, 1966; Bielefeld to Director, September 18, 1972.

²⁷ Brief for the Crow Tribe, *Montana v. United States*.

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- ²⁸ Chambers to Flint and Chambers to Area Director in Joint Appendix Exhibits on writ of certiorari to the 9th Circuit, *U.S. v. Montana*.
- ²⁹ Motion for summary judgment, *U.S. v. Montana*.
- ³⁰ *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S.Ct. 1011, 55Ed.2d 209. Richard B. Collins, "Implied Limitations on the Jurisdiction of Indian Tribes," *Wash. L. Rev.* 54, (1979), 479; Russell Lawrence Barsh and James Youngblood Henderson, "The Betrayal: *Oliphant v. Suquamish Indian Tribe* and the Hunting of the Snark," *Minn L. Rev.* 63 (1979) 609; David H. Getches, Charles F. Wilkinson, Robert A. Williams, *Federal Indian Law*, 4th Edition (St Paul, 1998).
- ³¹ *United States v. Wheeler*, 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 303.
- ³² *Settler v. Yakima Tribal Court* 419 F.2d 486 (9th Cir 1969), *Oliphant* as quoted in *U.S. v. Montana*, brief for the State of Montana, *U.S. v. Montana*
- ³³ Brief for the State of Montana.
- ³⁴ *Ibid.*
- ³⁵ Appendix E, "Treaty with the Crow, 1868," *U.S. v. Montana*.
- ³⁶ Brief for Montana, *U.S. v. Montana*.
- ³⁷ *Shively v. Bowlby*, 152 U.S. (1894). Leighty, "The Source and Scope of Public and Private rights in Navigable Waters," *Land and Water L. Rev.* 5 (1970).
- ³⁸ Testimony of Blackfoot in Brief for the Crow Tribe, joint appendix , *U.S.v Montana*.
- ³⁹ Crow brief, *U.S.v Montana*.
- ⁴⁰ The Crow Act of 1920, Crow Brief, *U.S. v. Montana*; *Crow Tribe of Indians of Montana v. U.S.*, Civil No. 214 (D. Mont. 1961)
- ⁴¹ Testimony, *U.S. v Montana*. Archeologist were overburdened by the Missouri Basin project most of which flooded aboriginal land. Work in the Bighorn canyon was cursory. See chapter 3.
- ⁴² *Ibid.*
- ⁴³ Opinion, Judge Battin, 457 F. Supp. (D. Mont. 1978).
- ⁴⁴ *Ibid.*
- ⁴⁵ *Ibid.*
- ⁴⁶ *Ibid.*
- ⁴⁷ *Ibid.*
- ⁴⁸ Opinion, *U.S. v Montana*, 604 F 2d 1162: 1979 U.S. App. (1979).
- ⁴⁹ *Ibid.*
- ⁵⁰ *Ibid.*
- ⁵¹ *Hardin Herald*, June 28, 1979, Richard Bowler, "Who Controls the River"
- ⁵² Opinion, *Montana v. U.S.* 450 U.S. 544 101 S.Ct. 1245, 67 L.Ed.2d. 493.
- ⁵³ *Ibid.*
- ⁵⁴ *Ibid.*
- ⁵⁵ *Ibid.*
- ⁵⁶ *Ibid.*
- ⁵⁷ *Ibid.* "Implicit divestiture" was the rationale in both *Oliphant* and *Wheeler*, but in those cases the new doctrine was applied to criminal jurisdiction; *Montana* extended the theory to real property. Implicit divestiture states that tribes lost, by implication, all attributes of sovereignty that were inconsistent with dependency.
- ⁵⁸ *Ibid.*
- ⁵⁹ Dissent, *Montana v. U.S.*
- ⁶⁰ *The New York Times*, August 21, 1981, William Schmidt, "Crow Indians in Battle for the Bighorn."
- ⁶¹ *Ibid.*
- ⁶² *Ibid.*
- ⁶³ *Ibid.*

Chapter 6

Quantification on the Crow Reservation

“Time is itself a river in constant movement, and the hours flow by like water, wave on wave, pursued, pursuing, forever fugitive, forever new; that which has been, is not; that which was not begins to be...”-Ovid

Scholar David Getches refers to the Indian decisions of the Rehnquist court as a “New Subjectivism.” Certainly *Montana* is among the cases that provided precedent for the erosive impulse on Indian sovereignty exacted by the Supreme Court during the last two decades of the 20th century. In that time, the high court found on behalf of the Indian nations in only 20% of the cases it reviewed. As Getches noted, “If Indians go to court, they are going to lose.” Along with the nature of Indian sovereignty, the nature of *Winters* rights--Indian reserved water rights-- also came into the sights of the Court.¹

In 1983, in a decision that combined *State of Arizona v. San Carlos Apache Tribe*, and *State of Montana v. Northern Cheyenne Tribe*, the high court extended the McCarran Amendment to Indian tribes. The 1953 Amendment waived the sovereign immunity of the United States in any comprehensive state water rights adjudication--state courts were free to exercise jurisdiction over the federal reserve. The question of whether the waiver included Indian reserved rights was not addressed in the original legislation and was one that the Court did not hear until 1976 in *Colorado River Water Conservation District v. United States*. In that case the Court held that Indian tribes, as wards of the United States could also be enjoined. The uniquely held *Winters* rights and the tribes long-recognized disadvantage in state court proceedings did not influence the decision. The tribes, the court ruled, could be enjoined in state court adjudication and be forced to quantify their reserve right.²

Quantification would force the tribes to sacrifice one of the most valuable aspects of the *Winters* right. Unlike state water rights, tribal rights were not lost by non-use. By remaining inchoate, the Indian reserved right allowed for the growth of tribal need. The viability of the tribe, its ability to grow and thrive was inherent in the unquantified nature of the Indian reserve. Forced quantification in state court compromised the *Winters* Doctrine.

The precedent of the Colorado case however was itself compromised. The Colorado Enabling Act, the act that articulated the terms of its statehood, did not carry the so-called “Indian disclaimer.” The enabling acts of eleven western states included language like Dakota territory’s act, one that read: “...they (the states) forever disclaim all right and title to...all lands... owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States.” When the state of Montana proceeded to adjudicate the Tongue River, the Northern Cheyenne and, intervening, the Crow both pointed to the disclaimer in the Enabling Act of February 22, 1889 for North and South Dakota, Montana and Washington. The disclaimer, attorneys argued, prevented any application of the McCarran amendment in Montana. The Northern Cheyenne and Crow could not be forced to quantify their *Winters* rights.³

The disclaimer, the tribes argued, was rationale to prohibit the states from forcing quantification on the tribes in basin wide adjudication. In *State of Montana v. Northern Cheyenne Tribe*, Crow tribal attorney Robert Pelcyger appealed on behalf of the tribes quoting from *U.S v. Winans* (1905), the case that initially stated the reserved rights doctrine: “...a ruling that the disclaimers do not make any difference or that they were implicitly repealed by a law that does not mention Indians and which totally ignores the disclaimers would ‘certainly [be] an impotent outcome to negotiations and a convention which seemed

to promise more, and give the word of the nation for more.’ If the water rights held by the tribes in the disclaimer states are to be subjected to state court adjudication, it should be done clearly and explicitly by the Congress.” And adapting the Black dissent in *Tuscarora*, he added, “This Court should presume that great nations, like great men, have kept their word.”⁴

Despite the clear wording of the Dakota Enabling Act, the Court determined that Congressional language of the 1953 McCarran Amendment superseded all earlier legislation. It found the same was true in the Arizona disclaimer and thus for all other western states with enabling act disclaimer language. The court now deemed that Congress did not intend to exempt the Indian reserved water right from state adjudication. The removal of this protection in 1983 added to the court’s assault on the implied rights doctrine in the 1981 Montana decision, leaving the tribes with clear certainty as to the intent of the high court in any litigation concerning *Winters* rights.

Then, in 1989, the case *Wyoming v. United States* came before the high court. The case involved the state adjudication of the Big Horn River in Wyoming, and the controversy emerged over quantification of the Wind River Reservation water allocation. Justice Sandra Day O’Connor wrote the opinion of the 5-4 majority. In the opinion she extended the Rehnquist doctrine, the so-called “sensitivity doctrine,” to Indian reserved water rights. In so doing she hoped to narrow the doctrine of practicable irrigable acres, “PIA,” the generous quantification laid down in *Arizona v. California* (1963). The sensitivity doctrine narrowed the scope of the reserved water right by “balancing the equities”—that is, the court considered the beneficial use to which the water in question had already been put and balanced it against the Indian right. How much of the water reserved had the surrounding communities, businesses, farms, and industries already appropriated? The long-articulated feature of the federal and Indian reserve water right that separated it from state

appropriation law was its exemption from the rule of beneficial use. The reserved right was a forward-looking reservation that anticipated increased use over time. Indian reserve water rights were not lost due to lack of use. They were *reserved*. The reserved water right was intended to fulfill the purpose of the reservation. The sensitivity doctrine was shorthand for protecting the water rights of non-Indians from the open-ended nature of the Indian reserve or from excessive quantification.⁵

Justice Rehnquist first advanced the sensitivity doctrine in the quantification of federal reserved rights in *Cappeart v. United States* (1976) and in *United States v. New Mexico* (1978). In those cases the federal, not Indian, reserve was extended to include groundwater, but at the same time, the court ordered that sensitivity to current use be considered. Using language from the 1938 *Powers* case, in the Wyoming decision, O'Connor moved to include the sensitivity doctrine in the adjudication of Indian reserved rights. Calling it "equitable tailoring" and "pragmatism," her intent was clear to the Indian community: lack of any existing water development would limit the scope of water allocation. The tribes' water allocation could be legally reduced if the water in question had already been put to use by non-Indian neighbors. Her decision upheld the *Winters* principle but left little doubt that had the case come before the Rehnquist court there would have been an entirely different outcome.⁶

The decision also advanced qualifiers on the nature of practicable irrigable acres. For the first time, the court articulated a net cost / benefit ratio in order more accurately to define what was "practicable." In other words, the cost of building new irrigation projects would be weighed against the value of the potential crops produced. The Bureau of Reclamation had moved out of the construction business as had the BIA; building new projects would not include any government contribution. The ability of the tribes to build the projects themselves would be the key factor in determining the "practicability." The

tribes were to be punished in quantification because the government had developed white irrigation interests instead of Indian. With new irrigation projects almost certainly impracticable, the court, with generosity typical of the Rehnquist subjectivism, guaranteed what was hoped to be a new standard by which state courts could determine the Indian reserve right: Minimal need.⁷

After circulating the majority opinion, O'Connor discovered a conflict of interest with her family's ranching enterprise in Arizona: "My brother, who manages the ranch, telephoned me this week to let me know the corporation has been named in a river water suit brought by an Indian tribe affecting the Gila River...as of now I believe I must disqualify myself in this case." She recused herself, leaving a 4-4 split in the court. The lower court decision would stand, one that was not generous to the Shoshone and Arapahoe of the Wind River Reservation, but nevertheless did not legally impact other tribes. The opinion however was widely circulated after being discovered in the confidential papers of Justice Marshall after his death.⁸

Justice Brennan, the last of the great liberals and friend to Indian causes, had offered to "try my hand," at a dissent. "The Court might well have taken as its motto for this case the words of Matthew 25:29: 'but from him that has not shall be taken away even that which he has.'...The Court, rather than invoking 'sensitivity' to non-Indian water users in depriving the Tribes of rights they acquired upon the establishment of the reservation, might do well to ask itself: Who was there first?"...Quoting from *Arizona*, Brennan added, "The Court in *Winters* concluded that the Government, when it created the Indian Reservation, intended to deal fairly with the Indians by reserving for them the water without which their lands would have been useless.' Do we still believe it?" The Court clearly would have answered no, but with the recusal of O'Connor, Indian country gained some time. What

might well have been a death knell for Indian reserve water rights became instead a warning bell.⁹

Both decisions put the Crow reserved water right in question, and, so badly damaged in the *Montana* decision, the Crow Tribe made the determination to negotiate its reserved water right. In 1998, under the leadership of Chairman Clara Nomee, a tribal negotiating team along with tribal attorney, Robert Pelcyger, began the lengthy and arduous process of hammering out a compact with the Montana State Reserved Rights Compact Commission. In a decision controversial throughout Indian country, the tribe sought to quantify their inchoate *Winters* right.

The question of whether to quantify their reserve right—the *Winters* right—serves as the crucial question before many tribes in the west. There are urgent and valid arguments on both sides. Quantification through negotiation rather than litigation requires compacting with states and the constitutionally stipulated permission and acceptance of the United States Congress. Despite, and perhaps because of a history of compacting taxation issues, some tribes point to the compact as an encroachment on sovereignty. They point also to the history of distrust and deceit between the Indian nations and the other necessary compact participants—the states of course but also the legislative and executive branches of the federal government. Adjudication, with traditionally friendlier judicial branch, has understood the foundation law of sovereignty more consistently than the other two branches. Additionally tribes and scholars both point to the time when land was “quantified.” That is, they look to allotment in the 19th century as an example of the impact of turning their land into property. For the same reason they resist turning the rivers into calculations of the duty of water and allocating appropriate acre feet.¹⁰

The arguments against compacting also include the simple appeal that no one knows what the future needs of a tribe will be. No one can accurately calculate how much

water will be necessary to “fulfill the purpose of the reservation.” Tribal populations continue to expand in ways that no one who authored the allotment legislation could have predicted. As with the Crow, many tribes have embraced resource development with unanticipated sophistication. But even as he warned against quantification, William Veeder also warned that, “you are being planned out of existence.” By that the 1970s protector of the reserved right meant that basin wide planning consistently under allocated tribal shares—a *de facto* encroachment on the reserved rights. And with the “sensitivity doctrine,” “equitable apportionment,” and “minimal need,” being promoted by the Supreme Court, Veeder’s prediction certainly seemed valid.¹¹

For the Crow, several factors unique to their situation proved decisive. First, as it had always been, was the upstream pressure on the Bighorn basin by a powerful irrigation lobby from Wyoming. Wyoming by the terms of the Yellowstone Compact, had a Bighorn River allocation of 80%. The Little Bighorn had remained out of the Compact. By 1980, irrigation interests had begun to cast an interested eye on the short Wyoming stretch at the source of the Little Bighorn. In 1981 agricultural interests joined with extractive industry in an effort to dam the Little Bighorn. In what locals termed the “Second Battle of the Little Bighorn,” Wyoming planned to develop a reservoir project just south, upstream, from the Crow Reservation with water use allocated to coal slurry operations. The Crow, of course, had extensive irrigation interests along the Little Bighorn, water they needed to protect.¹²

Along with the ever-present encroachment of Wyoming, the Crow had other reasons to consider quantifying their reserved water right. The federal government had already compacted with Montana, quantifying their reserved right to the Little Bighorn Battlefield, a federal enclave in the Crow Reservation. Along with their irrigation interests, the Crow also had ongoing coal operations on the Ceded Strip. While the tribe owned the mineral interests, the land itself lay outside the boundaries of the reservation. The strip

mining operation needed a guaranteed quantity of water; its location made a reserved water right claim tenuous. Also, other possible extractive operations, most notably coal bed methane, would require extensive water use.

Perhaps the key factor in the decision however, was the willingness of the state of Montana to bargain with the Crow generously. Montana had a major stake in any Crow claim to water. Of course it needed to sustain the state's blue ribbon trout stream, the newly acquired Bighorn, and the tourist dollars it generated. To that end, the state wanted a guaranteed in-stream flow. Montana also had ongoing expensive litigation with the Crow over the coal severance tax. Negotiations on quantification could include a settlement on how much of a tax bite the state could extract from the coal operations. Settling the controversy over coal income and severance taxes would be in the financial interests of Montana. The state also had every interest in maintaining the water resource to facilitate continuing investment by extractive industry. Finally, the state was upstream on the Missouri River. As such it had a powerful interest in generously quantifying all their many federal and Indian reserved water rights. The most significant objection among the tribes to quantification, the long history of Indian disadvantage in state proceedings, was not a factor for the Crow with the state of Montana. As it turned out, the two became formidable allies.

The Montana legislature created the Montana Reserved Water Rights Compact Commission and a new Montana State Water Court in 1979 and with the same pen. The Compact Commission offered the Indian tribes and the federal government a method by which they could quantify their reserved rights while at the same time the negotiation process would suspend the parties from any comprehensive adjudication in Montana Water Court. Representing the State of Montana on the Commission are nine members who serve 4-year terms. The state's attorney general appoints one member, the governor appoints four; the speaker of the Montana's house has two appointees, while the president of the Senate

also has two. While several states have negotiated water compacts, the Montana State Reserved Compact Commission is unique among the states.¹³

The Montana Reserved Water Rights Compact Commission (RWRCC) responded to the overarching change in water policy during the late 1970s and 1980s. From the Jimmy Carter administration, presidents have consistently opposed the large budgetary drain of Bureau of Reclamation water development. Both encouraged comprehensive quantification of the federal and Indian reserve water right. Both hoped to avoid costly adjudication of the reserve that the McCarran Amendment's stipulation allowed. In Montana negotiations began with the National Park Service over the reserved water right in Yellowstone National Park, Glacier National Park, Bighorn National Battlefield, and Bighorn Canyon National Recreation Area. The U.S. Fish and Wildlife Service began negotiations over the reserved water right for National Wildlife Refuges at Benton Lake, Black Coulee, and Red Rock Lakes. The Bureau of Land Management began to negotiate in stream flows for the Wild and Scenic segment of the Missouri River and the Madison River in Bear Trap Canyon.¹⁴

Several of the tribes also entered the negotiation process. Among them were the Assiniboine and Sioux of the Ft. Peck Reservation, the Northern Cheyenne, the Chippewa Cree of the Rocky Boy's Reservation, and the Crow. The settlement process was unique to each tribe. The legal nature of the compact makes it akin to a treaty and in each case and for each tribe it is entirely original. The Ft. Peck Compact for example included a provision for water marketing, while the Northern Cheyenne, in exchange for their quantification, required that the United States and Montana provide funds to repair and enlarge the Tongue River Dam.¹⁵

The process of compacting by its nature includes the United States as fiduciary. Further, it requires congressional oversight due the historic, federal Nonintercourse Acts, 18th and early 19th century legislation restricting non-sanctioned trade with the Indian

nations. The Federal Power Act also requires federal oversight on reservations where water power is at issue. But the United States has also come to require the tribes to settle any cause for claims against their fiduciary for violation of trust responsibility. The compact process, according to the United States must settle any remaining disputes with the negotiating tribe. Therefore the compacting table may well include the United States as both fiduciary and antagonist. That proved to be the case with the Crow negotiations.

The Crow, the United States, and the state of Montana all had particularly broad agendas for the proposed compact. Beyond the quantification of the Bighorn River, bargaining issues included water stored behind Yellowtail, now Bighorn Dam and the hydroelectric power generated. On the table too was the dismissal of the coal severance tax litigation. The Reservation had many in fee owners, both Indian and non-Indian, whose water rights would be at issue. These so-called *Walton* rights or on Crow still *Powers* rights, were *Winters* rights if still Indian owned, but if they had passed to non-Indians they fell to state jurisdiction. They retained the *Winters* priority date—that is, the 1867 date of the Fort Laramie treaty. And finally, both the tribe and the United States wanted to settle the long contested violations to Section Two of the Crow Act of 1920. ¹⁶

Section Two of the Crow Act limited the amount of land that could be alienated to any one individual, corporation, or company to 640 acres of agricultural land or 1280 of grazing land. Broadly ignored from the time it became law, Section Two had intended to protect the reservation from large corporate farmers and ranchers like the large dryland outfit, Campbell Farms. The government had been among the worst violators with the so-called “dead Indian sales.” In a single auction the government, acting as fiduciary for the Indians, might sell to the highest bidder many thousands of acres of Indian allotments. One non-Indian might well purchase the entire offering. Those in violation of Section Two had individually amassed holdings of as much as 134,678 acres in the most egregious case, but

also holdings of 38,000 and 25,000 acres, though not typical were not unusual. No one recorded the total acreage held in violation of Section Two but many thought it to include 500,000 acres of reservation land.¹⁷

The United States, during the termination era in 1957 sought to address the issue of Section Two violations by simply repealing what they had never enforced. Tribal Chairman Edward Whiteman, after presenting a 35 foot petition to Congress appealed to them:

“gentlemen, I call your attention to the pressure that is being exerted by that handful of land barons who are attempting to induce you to repeal section 2....The fact that the law has not been enforced until recently offers no excuse for its repeal....To repeal or make ineffective the provisions of section 2 would be to enforce and induce the land baron to continue to grab all available lands at his own price and not on a competitive basis.” Whiteman concluded by imploring Congress with its own words: “statutes relating to restrictions on lands held by Indians must be construed to promote the welfare of the Indians, and if the construction is open to doubt, it should be resolved in favor of the Indians.”¹⁸

Robert Yellowtail had opposed Section Two limitations in 1920 and continued to oppose them in the 1957 hearings. He supported repeal. He derived his stand primarily from his strong alliance with non-Indian Republican ranchers. In 1920 , Senator John Walsh wrote the “protection” of Crow interests into the Crow Act in hopes of promoting smaller non-Indian holdings and thus increasing his Democratic constituency. Yellowtail, true to his Republican roots, opposed Section Two because it placed an undue restriction on Indian land and with his political leanings, he favored an Indian’s ability to alienate freely his property. During his testimony in 1957, he castigated the “Indian protection,” Senator Walsh, and he accused Congress of complicity in the Section Two violations. The sale of trust land had always required the many hundreds of private acts passed by Congress at the behest of Montana representatives. Those private acts removed trust restrictions from

hundreds of thousands of acres of Indian land with the certain knowledge that the land would be alienated to the giant corporations on the Reservation. No doubt Yellowtail knew whereof he spoke.¹⁹

The amendment to the Crow Act removing Section Two failed to pass in 1957. From that time, the Crow had demanded compensation. With the water compact, parties hoped to arrive at a reasonable and responsible settlement for the federal failure in fiduciary responsibility. The settlement would involve the repatriation of hundreds of thousands of acres to the Crow Reservation. Attorney Robert Pelcyger has spoken of the opportunity inherent in compact negotiations for settling unique problems. By the broad expanse of issues to be addressed in the Crow Compact, negotiations between the tribe, the state, and the federal government tested the reach of possibility.²⁰

Tribal attorney Pelcyger, in an address before the Western Water Policy Review Advisory Commission in October, 1997 pointed to the federal government--specifically the executive branch-- as the major stumbling block in the negotiation process. He pointed out how difficult for the federal government a compact is to manage. Due to its idiosyncratic nature, the compact does not lend itself to a bureaucratic process. The coordination inherent in a creative resolution is expensive and difficult to oversee. Also powerful interests within the executive, including the Bureau of Reclamation, stand to lose significant resources and revenue in the process. Despite an overarching policy that encourages quantification, the executive branch, according to Pelcyger, has at one time or another opposed all compacts.²¹

To address the federal reluctance, Pelcyger recommended creating a political climate around the negotiation: "most settlements have been driven not by the Administration, but by a congressional supporter. One of the most vital components of a successful settlement is a very high profile political champion." A highly charged political process might include all the weapons at its disposal: embarrassment, placing holds on

unrelated confirmations, trading votes, or adding the settlement to veto-proof legislation. As the Crow Compact moved into the negotiating phase, rather than look to its fiduciary, the tribe and its attorney, Robert Pelcyger, moved to create an alliance with their traditional adversary—the state of Montana. To champion the compact, they looked to the governor of Montana, Republican rising star, Marc Racicot.²²

Historically, compact negotiations involve three separate fronts. First, the tribe and the state reach agreement. The resulting compact is sent to the state legislature for acceptance. Then the tribe negotiates a separate agreement with the federal government and that agreement along with the compact goes before Congress. Finally the compact returns to the tribe for its acceptance. Time estimates for any Indian reserved rights compact are typically long—20 years is not unusual. In what Chairman Nomee termed “a miracle,” the Crow Compact with the state—the first stage— took eight months to hammer out. Beginning in October, 1998, tribal negotiators met with their state and federal counterparts. Representing the Crow were Nomee appointees Robert Kelly, Barney Cummins, Karen Fagg, Cedric Black Eagle, and David Turns Plenty. The team included opponents of Nomee, but all agreed to “join forces on these issues,” in order to “assure our children of availability of the necessary natural elements to maintain our Crow Indian cultural identity.”²³

The eventual terms were remarkably generous for the well-prepared Crow. The generosity from the state resulted from the tribe’s willingness to grandfather in all existing state allocation, Indian and non-Indian, on the reservation with a priority date predating the compact. With that point off the table, negotiations proceeded smoothly and quickly. The Crow quantified their water right at 500,000 acre feet per year from the flow of the Bighorn River for existing and future use and from Montana’s share of the storage behind Yellowtail Dam, the state agreed to allocate 300,000 acre feet or virtually all of its share. For the

Ceded Strip the tribe garnered 47,000 acre feet from any water source including the Yellowstone River. The Compact closed all the basins to future state water appropriation: the Bighorn Basin, Little Bighorn Basin, Pryor Creek, Rosebud Creek. The tribe had complete control over the basins including groundwater. The tribe agreed to drop the coal severance litigation while the state agreed to pay the tribe a \$15 million settlement. The state further agreed not to tax coal on the reservation. With that the commission concluded negotiations.²⁴

In June, Governor Racicot, not wanting to jeopardize the compact, called the state legislature into special session. The only amendment attached to the compact was one proposed by Democrat Hal Harper from Helena. He stipulated that within one year a water management plan be developed that would protect the trout fishery between the big dam and the Two Leggins access at the north end of the reservation. On June 16, 1999 the legislature passed the amended Compact. The House voted 81-17 in favor while the Senate voted 40-5. Representing future generations of the Crow Tribe, the six year old descendent of Plenty Coups, Bird in Hat, and Two Leggins, young Amos BirdHat passed the pipe signifying agreement to Racicot who, ever aware of the photo opportunity, signed the Compact into law.²⁵

As with all negotiations, not everyone left the table happy. On the reservation, tribal landowners, represented by Democratic state representative from Crow Agency, Bill Eggers, were sharply critical of the agreement. Eggers had fought the compact in the special session arguing that the water rights of Crow landowners were not protected as had been the non-Indian owners. Indian landowners, Eggers asserted, would be completely dependent on the tribe for allocation of the tribal reserve, making their water rights vulnerable to tribal politics. Eggers, who was Crow, owned 2,000 acres of the Reservation, land criss-crossed by the Little Bighorn. In opposition to the compact, Eggers complained, "I've been the lone

wolf, the voice in the dark...I feel like I'm standing on the tracks trying to stop the Burlington Northern with a pillow." Eggers and other land owners asked to be excluded from the compact. Though he voted in opposition to the bill, he did not move to amend it. Reiterating Eggers in House debate was Blackfeet State Representative Carol Juneau from Browning. Though she voted for the compact, she urged, "that the Bureau of Indian Affairs will be a strong advocate for the individual allottee as this compact continues at the federal level."²⁶

Countering Eggers in the Legislature was Republican representative from Billings, Crow member, Jay Stovall. Stovall supported the compact and claimed he represented the true will of the tribe. Stovall joined negotiator Robert Kelly who testified as to the protections afforded in the Compact. The compact, according to Kelly protected five groups on the reservation: the first group included 5000 members, approximately half of the tribe who did not own any property at all. These tribal members needed to share in the wealth of the water. Second, according to Kelly, negotiators intended compact language to protect owners like himself who held trust land, and third the fractional share owners—the heirs. The compact also protected those few original allottees still alive. Finally for Eggers' benefit, the intent of negotiators according to Kelly, was to protect those who held in fee title. These owners, according to Kelly, also maintained their water rights, "in accord with federal policy and again through interpretation of U.S. Supreme Court case law, particularly *U.S. v Powers*, 1939 arising from a dispute on our Crow Reservation..." All groups had an interest in Crow water allocation as negotiated by the compact committee. All, Kelly claimed, were protected.²⁷

Eggers was not reassured, and his fear was somewhat realistic. In fee owners were protected in their present use, but future growth would be determined by the tribe. Rumor had it that Eggers hoped to develop Little Bighorn water resources with the construction of

reservoir. Tribal landowners did have very clear legal recourse as stated in *U.S. v Powers*(1939) and in *Colville Confederated v. Walton* (1981) decisions guaranteeing that water rights were conveyed with land in the 1887 Allotment Act. But Eggers, whose ties to the tribe were quite loose, feared that perpetual litigation would be necessary to maintain his water allocation at its present level. He was joined by the vocal Crow critic, T.R. Glenn, who articulated to negotiators somewhat more succinctly: “You folks are all wasting your time.”²⁸

Indian land owners throughout Montana felt rising anxiety about their water rights. Their unique position had given them state tax exemptions and investment tax credits available to tribal members and to those invested in Indian Country. They shared in *Winters* Doctrine rights, what many consider to be the best water rights in the west. At the same time according to the Indian Agriculture Act (P.L. 103-177) the tribe had no jurisdiction over them. Many Indian landowners opposed quantification because it actually restricted their access to *Winters* rights, particularly the right to increase their allocation should their need expand. Quantification gave the tribe jurisdiction over *Winters* rights, potentially at the expense of its landowning members, and it subjected the landowners to internal tribal machinations and to the as yet unwritten Tribal Water Code.

In March, 2000, the Blackfeet Original Allotment Heirs Association expanded to incorporate under the name Montana Indian Land Owners Association. Recognizing that they had an interest separate from the majority of non-landowning tribal members, the group, under the leadership of Al Reeves, outlined the need for all Montana tribal landowners to unite and take on the functions of the federal trustee, particularly as regarded their water rights. Clearly opposed to any state encroachment on their sovereignty, the Crow Land Owners Association joined the Montana Land Owners providing support for those within the Crow tribe who opposed the state compact. The group also provided those

interested Crow with a legal memorandum detailing judicial precedent and legislative intent concerning allottee water rights. The brief read: "It is settled that Indian allottees have a right to use reserved water," and quoting from the increasingly important *U.S. v. Powers*: " 'When allotments were made for the exclusive use and thereafter conveyed in fee, the right to use some portion of tribal waters essential for cultivation passed to the owners.' " Quoting from *Walton II*, the brief continued, "Indian allottees have a right to the use of *Winters* Doctrine reserved water...the water right is based on the proportion of practicable irrigable acres...Congress intended that Indian allottees receive the full economic benefit to their allotments, which necessarily includes a transferable, appurtenant water right." ²⁹

The same memorandum however revealed a 1990 decision of the Court of Claims, *Grey v. United States* clearly struck fear into the hearts of the landowners. The memo quoted the Court: "*Winters* Doctrine water rights corresponding to allotted tribal lands are communal in nature, and title resides in the tribe, not in individual allottees.... "*Winters* rights can exist only in a coherent system if they are held by the government. Conveyance of a *Winters* right with its exemption from state water law doctrines would give individual allottees the power to demand water previously put to beneficial use by proper appropriators. The *Winters* right doctrine must, therefore, be held by the government with title residing in the tribes themselves." Crow landowners along with their Blackfeet neighbors felt enormous concern over the nature of their water right as the Crow Compact moved closer to becoming law.³⁰

Clearly, as the Compact moved from the Montana legislature to Congress, many hurdles remained. Those included the river management plan between the tribe and Montana, due by July 2000, and the settlement with the federal government for Section Two trust violations. Eggers had fired a warning round from the Indian property owners. As

negotiations resumed, environmentalists and non-Indian ranchers joined his army of opponents.

Environmentalists in opposition to the compact included Trout Unlimited. The group opposed the compact because, unlike other compacts already negotiated, it contained no allocation for in stream flow. As one newspaper quoted the group, "The river comes last." With one year to negotiate a river management agreement, the organization went into an intense public relations campaign to preserve the in stream flow at levels adequate to protect the fishery. Worried about the Bureau of Reclamation's stance in the federal negotiations, the group's leader, Bruce Farling said, "We are worried about the feds because the Bureau of Reclamation is in the consumptive water business, not the instream flow business...whenever the Bureau has a choice between fish and consumptive use, the fish lose." ³¹

Following Montana's adoption of the compact, the Bureau did go to work detailing for the tribe and the state the model for their own three pronged coordinated management plan for the Bighorn River reservoirs: the upstream Buffalo Bill and Boysen in Wyoming, and Yellowtail. Using the Bureau model, by November, Montana had its management plan in place and in January, the tribe presented theirs. All were in basic agreement with Trout Unlimited; the fishery must be protected. To that end both the state and the tribe agreed to the provision that 250,000 acre feet of the 500,000 Crow allocation would remain in the river between the dam and Two Leggins access. The Crow could then use 250,000 acre feet above the fishery while its remaining share, 250,000, could be diverted below the access. The amount of water still available upstream could easily provide for the long-planned irrigation works on the Hardin Bench. Coal interests were below the access and had the additional 47,000 acre feet allocated for the Ceded Strip from the Yellowstone River. The Crow could easily acquiesce on the value of the in stream flow for the fishery. They clearly

understood its value to their own economy. In fact the Crow put on the table three more provisions. They insisted that they share in the revenue from state fishing licenses; that the tribe license outfitters; and they requested that the state settle two court cases by allowing a 4% tax that the tribe assessed on non-Indian fishing resorts. While the state saw many problems, particularly with the 4% tax issue, it remained open minded and negotiations proceeded.³²

The federal negotiators articulated more serious concerns, fueling rumors within the tribe that the settlement was flawed. The federal negotiators acting both as guardian and as opponent underscored to the tribe how low the state's offer had been to settle the severance tax--\$15 million. The federal component also pointed to the failure to guarantee to the reservoir a minimum lake level. They felt concern about the use of Yellowstone River water on the Ceded Strip. Finally the federal government was determined to guarantee allottee water rights independent of tribally held *Winters* rights.³³

As negotiations proceeded, the tribe provided the federal team with new concerns. The tribe asserted its demands for the revenues from the hydroelectricity produced by the dam. Bill Benjamin, head of the federal negotiating team, reported that the government was willing to consider the transfer. The tribe had been offered the hydroelectricity when the dam was constructed but had opted for a per capita payment instead. Now they stood to regain all the power produced by the four turbines. The most difficult question to resolve was the incendiary Section Two violations.³⁴

Immediately two problems emerged in negotiating Section Two violations. First the sheer magnitude of the violations was impossible to calculate. Were there 400,000 acres involved or 600,000? How complicit was the federal government? Second, the white ranchers were not one organization. They had no way to negotiate as one entity and no ability to reach consensus. The "membership" of the violators included ranchers with

varying attitudes toward the tribe whose land was at stake. Despite the difficulty, some very creative solutions moved across the negotiating table.³⁵

At the heart of the Crow demand was the desire for the lost land base to be returned to the tribe. While tribal negotiators also sought financial compensation--per capita payments--they also wanted an equitable solution. They wanted the land. To that end, negotiators sought to have the federal government account for its complicity by funding a repurchase program. The government would buy out the individual violators and return the land to the tribe. Should the violator want to remain on the land, a long-term lease arrangement could be negotiated.³⁶

The federal negotiators denied their complicity even as tribal negotiators produced evidence from their most valuable informant, the National Archives. Contained among the many folders marked "Crow" were posters printed in the 1920s by the federal government. The printed proof of federal complicity was starkly revealed. On the posters, Section Two limitations were clearly printed, and therefore evidence of knowledgeable violation. Federal negotiators adjourned the proceedings for the day and returned the next with an offer--\$50 million as per capita payment with a well-funded trust fund to buy back the land from those who were in violation of Section Two.³⁷

Violators had many opinions. Some were ready immediately to sell out. Others reiterated a century-old Indian policy and simply inquired incredulously, "What do a bunch of Indians want with all this land?" Rumors abounded that term-limited Governor Racicot was on the phone, strong-arming the non-Indians into a settlement. In the end, no overt action by the violators caused negotiations to break down.³⁸

In May, 2000, the Crow tribe held tribal elections. Clara Nomee, a convicted felon, declined to run. Negotiators then opted to run a slate of candidates headed by Albert Gros Ventre and included Cedric Black Eagle, Bernard Cummins, and Louis Good Luck. Nomee

changed her mind, ran, and split the vote that supported the water settlement. The split elevated Clifford Birdinground, long-time BIA employee, to the office of tribal Chairman in a 2 to 1 majority. Along with Birdinground, Vincent Goes Ahead, Tilton Old Bull, and Larry Little Owl assumed office. Rumors ran rampant that Birdinground's campaign had been, at the least, encouraged by non-Indian and Indian land owning factions who opposed the water settlement. Certainly among his supporters was the vocal opponent T.R. Glenn.³⁹

In their opposition to the compact, opponents revealed one of the roadblocks to successful resolution. The complexity of water resolution is easily misrepresented and ongoing education is vital. Yet negotiations are inherently a process that, at times, profit from behind the scenes give and take. The Birdinground administration immediately revealed its poor understanding of the issues. Under spokesman Glenn, the administration alleged that the McCarran Amendment did not apply to *Winters* rights. They asserted that Nomee was part of a conspiracy, one that involved the dismissal of her felony charges in exchange for favorable terms to federal and state governments. The administration expressed outrage and blamed negotiators for the terms of 1950 Yellowstone Compact; that is, the state of Montana's share of the Bighorn was 20%. Critics used as evidence of the poor deal the Rocky Boy settlement of \$200 million one that involved a federal settlement. They pointed to Ft. Peck settlement of one million acre feet without understanding that the tribes involved were on the Missouri River and benefited from the enormous Ft. Peck Reservoir project. Critics complained that the coal severance tax settlement at \$15 million was too low and thought continued litigation would result in more money. But at the heart of the criticism were the two issues: first, the desire to separate the Section Two federal violations from the water compact, and second, the perceived vulnerability of the allottee water rights—fears fostered by the federal government.⁴⁰

Birdinground fired tribal attorney and negotiator Robert Pelcyger, claiming that, “They’ve been there ten years and never won a case.” The Chairman then repudiated the Crow water compact. Though denying that he was ending the negotiating process, the new chairman announced that he was looking at the compact, and it was among the issues he hoped to, “straighten out.”⁴¹

Other issues the Chairman “straightened out” were the 1948 Crow constitution. The Crow Constitution was enacted well after the Indian Reorganization Act encouraged the tribes to author documents modeled after those of their paternal guardian. The Crow had insisted on institutionalizing their own concept of a tribal council, one that was comprised of the entire tribe. With the intensely democratic government, the resulting instability had long proven difficult for any consistent relations with the United States government as well as for the many business interests that participated with the tribe.⁴²

In the 1980s Harvard University’s Malcolm Weimer Center for Social Policy of the John F. Kennedy School of Government inaugurated a series of studies of Indian tribal government and economic development. In 1988, as a part of that study, Andrew Purkey reported on the Crow government, making a number of recommendations. Citing the Crow tribes’ “great dependence...on the Bureau of Indian Affairs,” Purkey recommended that the constitution be changed to accommodate a more stable decision making process. To that end, he urged the adoption of a new constitution, one that ended the century-old tribal council, and replacing it with an Executive Committee that would be a step removed from the fluctuations of opinion on the reservation. He also recommended extending the term for the Chairman—4 years instead of 2. The longer term, Purkey hoped would allow more stability in articulating a clear tribal vision. He also recommended a separate collections officer and comptroller apart from the elected tribal treasurer. The financial officers would fall under the aegis of the Chairman, a sort of executive bureaucracy that would lend to the

stability of the process and provide distance from the anarchic impulse of the “Athenian” democracy.⁴³

After his election, Clifford Birdinground immediately set about to strengthen the chairman’s ability to articulate the tribal vision. His first move was to bar the press from attending Crow tribal council meetings and then fired 500 employees. In July, 2000, the administration moved to impeach the newly elected Crow treasurer, Tilton Old Bull, who had begun to allege improprieties in expenditures. The decision was then made to remove Janice Pease Pretty On Top as president of Little Bighorn Community College, allegedly to access the multimillion dollar building fund. In December, 2000, Birdinground called for a vote to amend the 1948 constitution. Citing a history of the Crow government as “very negative,” Birdinground elaborated on and urged the needed changes, “We have been oppressed by a corrupt dictatorship for over a hundred years, from autocratic federal Indian agents to succeeding unethical Crow politicians.” Amendments included a retroactive extended term for the chairman, a secret ballot, required a separation of powers in the Crow government, and eliminated required BIA approval on constitutional amendments, including the ones in question. In a result contested by both tribal members and the BIA, the amendments passed. Birdinground’s term was now 4 years. In a letter to the BIA, Birdinground later urged that the Bureau reject the secret ballot provision. The BIA countered by encouraging Birdinground not to take the 4 year term.⁴⁴

The empowered Chairman now urged a entirely new constitution. Without complying with the terms of the 1948 constitution and without the support of the Tribal Executive Committee who were “astounded by the sheer audacity of a leader playing with his nation’s sacred blueprint.” Birdinground called for a vote on his new tribal constitution. Without being put on the agenda, without Crow citizen input, without debate, without a required 2/3 majority, and without a secret ballot, the new constitution was approved July

14, 2001, by a vote of 670 to 449. Many tribal council voters thought the question was a vote on the method of voting, hand-raising, secret balloting, or voice vote. "I was amazed," said one Executive Council member, "the people didn't even know about the first constitution being voted on but now there is a whole new one they haven't seen either." Water negotiator Robert Kelly urged on the opposition, "If you can't follow the laws you have now, what good is a new law." Outraged, the opposition accused Birdinground of assuming "God-like powers," and appealed to the BIA. In an Interior Department legal opinion, the BIA refused to intercede on what soon came to be called the "Methane-Powered Constitution." As their rationale the agency declared that the Crow had not chosen to come under the 1934 Indian Reorganization Act, and therefore the Bureau had no authority over internal tribal concerns.⁴⁵

The new constitution fundamentally altered the way the Crow tribe ran its business and theoretically created a system of checks and balances. Rather than a tribal council consisting of the entire membership, tribal members would elect a legislature consisting of three representatives from the six districts of the reservation: Pryor, Big Horn, Black Lodge, Center Lodge, Valley of the Chiefs (Lodge Grass), and Wyola. Off-reservation Crow would have no representatives. The constitution also called for elective tribal court judges, though the judiciary had no ability to review the executive branch. The traditionally weak Crow tribe executive, always subject to the democratic impulse of the tribe, now had increased power. As has been noted, power corrupts.

By fall, 2001 the impeached Tilton Old Bull weighed in again about the "totally inoperative and chaotic" government. The Birdinground administration, he alleged had spent millions of dollars for nothing. Water negotiator Kelly urged federal mediation to keep the tribe running: "This is not a game we are playing, and we had better quit acting like it is. After each of these screw--ups, the folks at the bottom pay for the mistakes by

being the first ones laid off or furloughed. Why not fire the jerks at the top?" In October, 700 protesters met and held a rump tribal council meeting. They suspended Birdinground and organized an interim government until the 1948 constitutionally mandated election in May 2002. Birdinground responded to the rival government by announcing, "I am the supreme ruler of the Crows, you will never get by with this election. I am the one in power not you so accept it." ⁴⁶

In November, the new Birdinground legislature as mandated by the new constitution was inaugurated. During the ceremony, former state senator and regional administrator of the EPA, Bill Yellowtail, ceremoniously congratulated Birdinground for having the courage to "relinquish a great deal of power." Yellowtail had been under investigation for violations of illegal campaign contributions. At that moment, the opposition government took control of Crow Agency tribal headquarters. As police looked on 100 members led by Arlo Stray Calf-Dawes, Tilton Old Bull, Gerald Red Wolf, Jr., and Dexter Fallsdown occupied the building. The BIA responded with dozens of officers and eventually a special tactical unit from Albuquerque. In the tense standoff, negotiations began. Eventually, the BIA agreed to reconsider demands for a secret ballot election and to take another look at the constitution. The standoff ended. ⁴⁷

Birdinground expended his remaining power on two fronts. He began to negotiate coal bed methane development on the reservation, and he negotiated the purchase of \$850,000 worth of automobiles from Homestead Motors in Billings. The latter proved to be his undoing. ⁴⁸

Coal bed methane is a form of natural gas that is trapped underground in the spaces around coal seams. This extremely clean fuel can be extracted through drilling but requires depressurizing the surrounding aquifer by pumping water to the surface. With the water removed, the gas rises to the surface. Coal bed methane supplies 8% of the nation's natural

gas use and the coal beds in southern Montana contain an estimated 39 trillion cubic feet. Interest in coal bed methane rises with the price of natural gas. As interest in the energy source increases so too does concern for the water necessary to extract it. The water pumped to the surface in a methane operation is safe for human and animal consumption but in Montana, because of its high salinity, the water is lethal to crops and the soil. Discharging the byproduct into rivers is therefore problematic. As Amy Frykman of the Northern Plains Resource Council said, "To us, its totally irresponsible to both ruin the river and leave the aquifer dry."⁴⁹

In 2001 the new Bush administration's Bureau of Land Management awarded leases for 600,000 acres of mineral rights for coal bed methane, declining to require an environmental impact statement and therefore the opportunity for public comment. Exasperated county governments and environmental groups fired back with ordinances that prohibited all drilling. In this climate, the Birdinground administration sought only one bid for developing their reserves of coal bed methane.⁵⁰

In June, 2002, negotiators from Crow and the Denver-based Bill Barrett Corporation struck a deal. After selling his former corporation to Tulsa-based Williams Corporation for a reported \$2.8 billion, Bill Barrett had been lured out of retirement by the lucrative opportunity and a Clinton administration 35% tax credit incentive for investment in Indian country. The secret negotiations between the Crow and Barrett remained secret as the contract passed through the tribal legislature. After initially voting down the contract in open session, the legislature met behind closed doors and reversed their vote on the multimillion-dollar contract in a 12-6 vote. According to the contract, the terms would remain secret. Of course they did not.⁵¹

The secrecy surrounding the agreement fueled rumors and led to more accusations of corruption in the Birdinground administration. Were other firms notified and considered

for the drilling operation? Were kickbacks given to those within the tribe who had formerly been employed in the Barrett operation and had arranged the deal? The Council for Energy Resource Tribes pointed out that the 37-page contract did contain many questionable provisions. The first concerned the royalty payment. The standard royalty for tribes had long been 18.5% of gross production. The Crow were to see only 18.5% of net after an astounding array of corporate post-production expenses were deducted including but not limited to gathering, compressing, treating, processing, marketing, and transportation cost. The Barrett Corporation, on the other hand, was guaranteed 85.5% of gross. According to what now seemed to be standard procedure under the new United States administration, no environmental impact statement would be necessary, only an “environmental assessment.” Exploration on the first “option block” would begin immediately—the contract was back-dated to March 2002—and would proceed “regardless of whether the parties have obtained the Secretary’s approval of this agreement.” The corporation was to have unlimited access across tribal and private land, total estimates included 483,040 acres. Drilling would proceed in the Wolf Mountains in the southeastern corner of the reservation and proceed north through the Little Bighorn basin ending with the option block under R. 36E T 3 directly adjacent to the Little Bighorn Battlefield.⁵²

The tribe waived sovereign immunity, a waiver all businesses urge on tribes. The waiver allows businesses to seek remedy against a tribe in state courts. The contract agreed to pay an 8% severance tax to the tribe plus a gross proceeds and ad valorem tax. The tribe made no agreement restricting the state’s right to tax. The Corporation agreed to pay \$200 per well to a scholarship fund and promised to give preference to Crow workers. Barrett also agreed to a \$2.5 million signing bonus payable immediately. One tribal legislator, in the margins of his or her copy of the contract, noted, “Who gets (Bonus Payment),” and then, in the same hand wrote the names of a tribal attorney and her step brothers, one of

whom had been employed by Barrett and had allegedly arranged the deal: “Majel, Rusty, and Pat Stands (2 ½ mill).” It was unclear whether that was written from a factual statement or from a detractor’s speculation, but the charges of corruption began to be asserted in the area press.⁵³

To gather support for the contract, Barrett Corporation sent representative to the reservation to answer questions in a series of regional meetings. They attempted to influence the tribe by explaining what a bad reputation the tribe had among those extractive giants like Barrett. The Crow, Jim Felton, a landman for Barrett explained, had not had a new mineral contract in 30 years. If the tribe caused trouble, he threatened, it would be the death knell for tribal development. His corporation was so well-respected that other extractive giants would be forced to speculate that, “If Bill Barrett couldn’t get it done, maybe no man can.”⁵⁴

Even as the corporation attempted to gain tribal consensus, federal agents closed in on Clifford Birdinground. In May, 2002 authorities charged the chairman with six felony counts involving the misappropriation of tribal funds. He was accused of creating a revolving fund of his own with a local car dealership. Allegations including the creation of an account using the sale of tribal vehicles purchased under the Nomee administration. Tapping the account were those friends, supporters, and family of the chairman who needed a down payment for a new car. Over \$800,000 allegedly passed through the account. Eventually Birdinground pled guilty to one felony count. While conviction of a felony was never a cause for removal from office, in this instance, Birdinground understood the ramifications. In June, 2002, he resigned as tribal chairman. New tribal elections were ordered and despite a representative from the Birdinground administration in the field of candidates, Carl Venne won the election. In January 2003, despite the clear ill will of the

tribe, and the corrupt nature of its inception, the Bureau of Indian Affairs gave the stamp of approval to the Crow contract with the Barrett corporation. Venne protested the decision.⁵⁵

Birdinground had attempted to reopen negotiations on the water compact. The rationale seemed clear after the methane deal became public. But the Compact Commission had not been overly cooperative. Now negotiations resumed in earnest. The tribe however worked under disadvantages they had not experienced in 1999. No longer was the governor an up and coming presidential aspirant who was powerfully connected in Congress and willing to use his political capital to leverage the deal. Now energy speculators might well be willing to buy the Bureau of Reclamation water behind Yellowtail Dam. No longer was the new Republican executive branch eager to settle Section Two violations. Opponents had better warning and now were organized. And courts had decided against the tribe in litigation over the 4% Crow tax on fishing businesses. Had the original timing been only a narrow window of possibility? Almost certainly the Crow would have to settle for less should they continue with the compacting decision. Other pitfalls await as well. The Compact Commission acknowledged their own lack of expertise concerning the ramifications of coal bed methane on water rights. They are not alone. As extractive industry continues to mine the Crow reservation, no doubt the education process will accelerate.⁵⁶

Each tribe in the west wrestles with the decision whether or not to quantify their reserved water right, their *Winters* right. On the Missouri alone, each tribe works with a unique set of circumstances that determines its decision. What is good for the Crow is not necessarily good for their basin neighbor the Northern Cheyenne, while downstream, the Sioux reservations have very different interests in and conflicts over the waters of the mighty Missouri. The Salish and Kootenai entered compact negotiations with the constraint of non-Indian overuse on Flathead Lake. Their compact will be a far more problematic for

that reason. Though the Crow have had to make some extremely difficult decisions in the 20th century, the decision to quantify their water right is as far-reaching as any since allotment in 1920. How is this decision to be made?

Robert Pelcyger, Crow tribal attorney for the early negotiations, points to the ingredient most crucial to the success of the compacting process: a unified vision of the tribe. The tribe seems to remain deeply divided by the polemics of the Birdinground administration. However, Alastair Baker pointed the finger in another direction. In a July 12, 2001 *Bighorn News* editorial he accused the B.I.A. of complicity in the tribal disarray. It was the federal bureaucracy that orchestrated much of the constitutional controversy. "After-all," Baker wrote, "its chaos that keeps the B.I.A. around on the Crow Reservation, and provides a reason for their existence." The B.I.A., Baker alleged, generated much of the chaos, "so that the B.I.A. can go on living off the Crow Nation, while providing nothing in return... with diminished problems comes an independence from federal control and a diminished need to have the B.I.A as a crutch to prop up successive administrations."⁵⁷

A more precise tribal vision about water quantification might well come from examining those who oppose compacting. No doubt that is different for each reservation. Opponent forces on the Crow reservation included three groups. The first are some within the tribe who own fee status land. These tribal members own land within the confines of the reservation according to the dictates of the Allotment Act. Therefore, they have mixed sovereign relations. Their concerns center on the very nature of the *Winters* right. Land owner rights fall between state and tribal authority in a space created by the disparate policy directives of the federal government. Are Indian allottee rights individual under the General Allotment Act or are they communal under Collier's Indian Reorganization? Land owners are concerned that quantification compromise their *Winters* right, and they are organized in their opposition. Other opponents include those on reservation non-Indians whose violation

of Section Two of the Crow Act. Though not organized, they fear they will not be adequately compensated for land that was acquired originally illegally. The third group opposing quantification have been some of the tribal attorneys who stand to profit from the lengthy litigation necessary for a general stream adjudication. Like many tribes, the Crow tribe is a lucrative client. Continued assertions that the compact process violates tribal sovereignty frequently come from those within the legal profession whose constitutional understanding of the compact is limited by their own immediate interest.

Finally, as Robert Pelcyger pointed out, ironically quantification is opposed most often by the federal government itself. The extent to which those within the executive bureaucracy orchestrated the breakdown in Crow negotiations is a question that awaits future historians, but certainly the Bureau of Reclamation and the Bureau of Indian Affairs saw their interest on the Crow reservation challenged by the compact with the state of Montana. Both agencies have long survived in Crow country on revenues intended for and generated by the Crow. Crow water is a valuable component of that revenue. Quantification renders unto the tribe that which rightfully belongs to the tribe.⁵⁸

Pelcyger has called water “a magical substance.” The ability to use water in negotiations to gain much of what has been lost makes water “more magical than money.” At the same time, in the high Court, the *Winters* Doctrine, “hangs by a thread.” The decision to negotiate resulted and continues to result from the realities of the time. The breakdown only confirms the need. And the implications of these Crow decisions will ripple and roil not only in the basin of the Bighorn, but throughout Indian country and into the foundations of tribal sovereignty.⁵⁹

When Laroque came the canyon and the river already had the name: Bighorn. And when Lewis and Clark arrived and named other rivers and flowers and mountains after themselves, the canyon already had its name: Bighorn. When the dam created the lake and

the guardian called it Yellowtail, the tribe cried out in opposition. The Crow remembered that the bighorn sheep saved the young Crow boy from certain death in the canyon. The people swore always to call the place after the savior sheep: Bighorn. Eventually the government heard and heeded the cries and restored the name.

While the western world rang in a new millennium, on the Crow reservation, people noticed something troubling. The bighorn sheep had no new lambs. No small lamblings gamboled precariously after their mothers up and down the precipitous walls of the Bighorn Canyon. What was becoming of the sheep whose name the Crow had bestowed on the canyon, on the river? The Bighorn failed to reproduce.

Scientists came, observed, took samples of soil, water, juniper berries, samples of sheep carcasses. Other scientists reported that up the river as far as the Wind Rivers, the sheep were dying; babies that survived at all were so weak that they became easy prey for the predator mountain lion. From down river to the Missouri more reports came. Herds on the Bighorn River had not sustained themselves. Fully half the sheep were gone. Theories included a pneumonia-complex epidemic, but many scientists thought the pneumonia would only take this sort of toll had the sheep population been stressed to begin with. Other scientists pointed to the forage and the toll of acid rain. Environmentalists had long warned of the phenomenon that might result from pollution as far away as the coal mines on the Navaho Reservation and from air pollution in southern California. Certainly something was taking its toll on the herds. No easy answers came, and the Montana Department of Fish and Wildlife moved to restock the herds, something they calculated they could do annually if necessary to maintain the ecological balance in the canyon. The bighorn is not, after all, endangered.⁶⁰

Crow decisions have implications beyond the sovereignty of the tribe. Policies made by the B.I.A and Bureau of Reclamation have ramifications beyond their place and

time. Directives by courts influence more than immediate circumstances. Arguments over the fluid boundary between the federal and state governments are not esoteric text. The letters and the words of the decisions, the policies, the directives flow in the waters of the Bighorn and determine the viability of a people as they interact with the ancient and evolving environment on this earth.

¹ David H. Getches, "Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law," *California Law Review*, 84 (1996), 1573-1655.

² *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983); 103 S.Ct. 3201 and 81-2188, *Montana et al. v. Northern Cheyenne Tribe*. McCarran Amendment (43 USCS 666) *Colorado River Water Conservation District v. United States* 424 U.S. 800.

³ Enabling Act of February 22, 1889, 25 Stat. 677.

⁴ Brief for The Northern Cheyenne, *Montana et al. v. Northern Cheyenne Tribe* and quoting from *FPC v. Tuscarora Indian Nation* 362 U.S. 99, 142 (1962).

⁵ *Arizona v. California* 373 U.S. 546, 83 S.Ct. 1468, (1963). Getches, "Conquering the Cultural Frontier;" Andrew C. Mergen and Sylvia F. Liu, "A Misplaced Sensitivity: The Draft Opinions in *Wyoming v. United States*, Colo. L. Rev. 68 (1997), 683; *In re General Adjudication of all rights to use water in the Big Horn River System* 753 F. 2d 76; 492 U.S. 406, 109 S.Ct. 2994 (1989).

⁶ *Cappeart v. United States*, 426 U.S. 128 (1976); *United States v. New Mexico*, 438 U.S. 696 (1978).

⁷ Mergen and Liu, "A Misplaced Sensitivity."

⁸ Getches, "Conquering the Cultural Frontier."

⁹ From the material circulated from Justice Thurgood Marshall's papers in the Library of Congress. My own source is a Crow tribal member.

¹⁰ Lloyd Burton, Jr, *American Indian Water Rights in the Western States: Litigation, Negotiation, and the Regional Planning Process* (Berkeley, 1984). Burton argues against compacting comparing it to land allotment. Peter W. Sly, *Reserved Water Rights Settlement Manual* (Washington D.C., 1988). Sly was the director of the Conference of Western Attorneys General. Robert Pelcyger articulated the many pitfalls in of negotiations in his conference paper "A Practitioners Perspective: Indian Tribes and the Federal Water Settlement Process" Report to the Western Water Policy Review Advisory Commission, Oct, 1997, published by Todd Olinger, *Trends and Directions in Federal Water Policy: A Summary of the Conference Proceedings*. See also: *The Longs Peak Report: Reforming National Water Policy* and "America's Waters: A New Era of Sustainability," The Longs Peak Working Group on National Water Policy, *Environmental Law Review* 24, 125. Charles Wilkinson, *American Indians Time and the Law: Native Societies in a Modern Constitutional Democracy* (New Haven, 1987) and Wilkinson, *Crossing the next Meridian: Land, Water, and the Future of the West* (Washington, D.C. 2000).

¹¹ Many of these arguments were articulated in the 2002 1st Annual William H. Veeder Memorial Conference of Indian Water Rights, sponsored by the Ogalla Lakota Nation Department of Water Resources. Among the speakers was attorney Peter Capossela, "Indian Reserved Water Rights in the Missouri River Basin," *Great Plains Natural Resources Journal*, v.6/no.2 (2002) 132-161.

¹² *The Hardin Herald*, February 11, 1981, "Precious water spurs fight."

¹³ Montana State Reserved Compact Commission was authorized in 1979 by the Montana Legislature, 85-2-701, MCA.

¹⁴ Ft Peck—Assiniboine and Sioux May 1985 (85-20-201, MCA); Northern Cheyenne Tribe September 1992 (85-20-301, MCA); U.S. National Park Service January 1994, May 1995 (85-20-301, MCA); U.S. Bureau of Land Management September 1997 (85-20-501, MCA); Rocky Boy's

Reservation-Chippewa Cree April 1997 (85-20-601, MCA) and (November 1999 PL 106-163); U.S. Fish and Wildlife Service July 1997 (85-20-701, MCA) and (85-20-801, MCA); Crow Tribe July 1999 (85-901, MCA). All compacts are recorded in *Montana Water Compacts*, State of Montana Department of Natural Resources and Conservation, 1625 Eleventh Avenue, Helena, Montana 59620. For federal policy directives I rely on Daniel McCool, *Command of the Waters: Iron Triangles, Federal Water Development, and Indian Water* (Berkeley, 1987); McCool, *Native Waters: Contemporary Indian Water Settlements and the Second Treaty Era* (Tucson, 2002); Christopher L. Kenney, "The Legacy and the Promise of the Settlement of Indian Reserved Water Claims," *Water Resources*, 107, 21.

¹⁵ *Ibid.*

¹⁶ *Colville v Walton*, 647 F. 2d 42 (1981); *U.S. v Thomas Powers*, 305 U.S. 527 9(1939). The Crow Act of June 4, 1920, P.L.239.

¹⁷ Amending the Act of June 4, 1920, As Amended, Providing for Allotment of Lands of the Crow Tribe, in 84th Congress 2d Session, House of Representatives, Report No. 2801, July 19, 1956.

¹⁸ *Ibid.*, "Whiteman testimony."

¹⁹ *Ibid.*, "Yellowtail testimony."

²⁰ Pelcyger, "A Practitioner's Perspective."

²¹ *Ibid.*

²² *Ibid.*

²³ Sly, *Reserved Water Rights Settlement Manual; The Billings Gazette*, June 6, 1999, "Proposed Crow water Compact significant enough for special session." In support of HB2-SB1, testimony of Robert M. Kelly.

²⁴ Crow Compact July 1999, 85-901, MCA).

²⁵ *The Billings Gazette*, June 17, 1999, "Compact is water under the bridge."

²⁶ *Ibid.*

²⁷ Kelly, "Testimony."

²⁸ *The Billings Gazette*, February 18, 2000, "Crow Present water management plan."

²⁹ *Colville v Walton*, 647 F. 2d 42 (1981); *U.S. v Thomas Powers*, 305 U.S. 527 9(1939).

"Memorandum Re: Legislative Intent of Indian General Allotment Act of 1887 to Water Rights Appurtenant to Reservation Indian Allotments, Revised October 5, 1993." Circulated by the Montana Landowners Association at the 2002 1st Annual William H. Veeder Memorial Conference of Indian Water Rights, sponsored by the Ogalla Lakota Nation Department of Water Resources, Billings, Montana.

³⁰ *Grey v. United States*, 21 Cl. Ct. 285 (1990) aff'd without opin. 935 F.2d. 281 (Fed. Cir. 1991), cert. Denied 112 S. Ct 934 (1992).

³¹ *High Country News*. August 2, 1999, "The River Comes Last."

³² *The Billings Gazette*, Feb. 18, 2000, "Crow Present Bighorn River Management Plan."

³³ *Ibid.* Rich Aldrich, Solicitor, Pacific Northwest Region, Department of the Interior, Billings Office.

³⁴ Pelcyger, "A Practitioner's Perspective."

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ *The Billings Gazette*, May 13, 2000, "Crow Tribe Votes Today."

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⁴¹ *The Billings Gazette*, July 9, 2000, "New Crow Leadership voids pacts."

⁴² The Crow Constitution.

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- ⁴³ Purkey, Andrew, *The Crow Tribal Government and Economic Development: A Report to the Crow Tribe of Montana* (Malcolm Wiener Center for Social Policy, John F. Kennedy School of Government, Harvard University, May 1988).
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- ⁵⁷ *Big Horn County News*, June 12, 2001, Alastair Baker, "Strange Days Ahead,"
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Conclusion

Playfair's Law

Every river appears to consist of a main trunk, fed from a variety of branches, each running in a valley proportioned to its size, and all of them together forming a system of valleys, communicating with one another, and having such a nice adjustment of their declivities that none of them join the principal valley, either on too high or too low a level; a circumstance that would be indefinitely improbable if each of these valleys were not the work of the stream that flows in it.----John Playfair, 1802

In the century since its articulation, Indian reserved water rights--*Winters* rights have flowed in a sort of doctrinal river. Many tributaries have influenced *Winters* rights. Some still flow through the Crow reservation. The executive bureaucracy--the B.I.A., the Reclamation Bureau, the Environmental Protection Agency, Congress, the Supreme Court—all the branches of the federal government have influenced the doctrine of Indian reserved water rights, as has the state of Montana in its relationship to the federal government. Tributaries also include interest groups. Environmental groups have increased their demands on behalf of the rights of the Bighorn. And economic demands from insatiable capitalist forces, from extractive industry giants have poured miasmic particulate into the dominion of Indian reserved water rights. Finally the Crow themselves have, as a tribe and as its individual members, brought their considerable power to bear on *Winters*.

Three Supreme Court decisions have influenced the flow of *Winters* rights as they have crossed the Crow reservation. The first was *U.S. v. Thomas Powers* (1939).¹ In *Powers*, the high Court restated *Winters* for the first time since the 1908 decision, not an insignificant matter considering the legal alternatives available at the time. The

Court determined that Congress intended that the tribal reserve water right should pass to the individual allottees with the land in a “just and equal distribution.” The Court stopped there, declining for another 40 years to state expressly whether or not Indian allottees could convey their water right to white successors in interest. The case set a collision course between the policy of allotment with its goal of assimilation—that is, subsuming tribal rights under those of the state—and the policy of the Collier New Deal with its reverence for maintaining the tribe as sovereign with tribally held water rights. Friction between individual allottees and the tribe began in earnest, exacerbated by the failure to define *Winters* within the federal bureaucracy.

Two tandem cases constituted the second legal assault on the Crow reservation and its water rights, *U.S. v. 5,677.94 acres of land (1958)* and *Crow v. U.S. (1960)*.² In the first case, the district court determined that the United States had the authority to condemn treaty guaranteed land, but using the rationale from *Winters*, compensation must include an amount that included the “flow” of the stream. The rationale rendered unto the Crow the value of the power site soon to be constructed on the Bighorn. The tandem *Crow v. U.S.* established the damages to be paid to the tribe. In a case that literally “disappeared,” the same district court awarded the Crow 2 ½ million for the lost power site and the land. That decision, with a rationale of determining value, declared the river “navigable.” Despite Judge Jameson’s assurances, navigability was not significant to the value, but it was crucial to the U.S.-orchestrated claims made by the state of Montana.

The final decision critical to the legal line of *Winters* as interpreted by and for the Crow was *U.S. v Montana*.³ That case determined ownership of the bed and banks of the riverbed, and while it did not involve Indian water rights explicitly, the case undermined the implied reservation doctrine upon which *Winters* rests. The Court

pointed to the express reservation of all rivers as stated in the Choctaw Treaty of Dancing Rabbit Creek and found that had Congress intended to reserve the Bighorn to the Crow it would have done so expressly rather than by implication. The case also limited the scope of Indian sovereignty by determining that only in cases of consensual relations or in cases that threatened “political integrity, economic security, health and welfare,” would tribal jurisdiction over non-Indians be recognized. Exercising what David Getches has called new subjectivism, the Court determined that the river that flowed through the middle of the Crow reservation was not integral to this new trilogy. Determining the boundaries of political integrity, economic security, health and welfare would fall to the executive branch. The definition of sovereignty as well as the *Winters* doctrine as always, came under the aegis of the guardian, the B.I.A., its Interior neighbor, the Bureau of Reclamation, and eventually the Environmental Protection Agency.

Kermit Hall has asserted that in a pragmatic sense, the law has grown increasingly to be what the regulatory agencies of the executive branch say it is.⁴ His articulation highlights another influence that enters the doctrinal stream of Indian reserved water rights. Regardless of the actions of the courts, enforcement falls to the executive—the federal bureaucracy. Despite Hall’s relatively modern legal interpretation, the principle was first articulated by Andrew Jackson who, as he opposed Chief Justice John Marshall’s decision in *Worcester v. Georgia*, perhaps apocryphally, said: “John Marshall has made his decision; now let him enforce it.”⁵

Daniel McCool asserts rightly that triangulation between the executive bureaucracy, Congress, and powerful interest groups have diminished the ability of the Bureau of Indian Affairs to protect the Indian reserve water right. Indeed that is certain.⁶ But McCool diminishes what seems clear on the Crow reservation: between

the 1930s and the 1970s, the inchoate, that is unquantified Indian reserved water right was also in the interest and perceived at the time to be in the interest of Bureau of Reclamation. From its earliest days, the Reclamation Bureau used as a rationale, as McCool calls it, an “Indian blanket.” The blanket included the *Winters* doctrine and the unquantified right became more and more useful as the Bureau expanded its vision of 1930s public works.

The Missouri Basin Project took Indian reservation land in Montana, North and South Dakota, as Michael Lawson documents, but the project also used water that might well have served the tribal reserve.⁷ Multiple use provided water power and water for extractive industry and water for transportation—all to benefit non-Indian development at the expense of the tribes. Basin-wide planning then “planned the Indian out of existence.” Unquantified, the Indian water right formed part of the federal reserve—stored marketable water, that then could disappear into bureaucratic calculations, could flow into the revolving quantification and never flow back out. The trustee determined what was in the best interest of the ward. Too often what was in the best interest of the guardian was determined to be in the best interest of the ward/tribe.

The legislation creating the Bureau of Reclamation deferred to state water law. But it had several weapons in its arsenal that helped defeat the intent of the restrictions; one of those was the control it held over the inchoate federal reserve and the Indian reserve. But for Interior the usefulness of Indian reserved water rights lay in its incipient nature. The Interior Department freely conflated three forms of “secretarial waters,” water rights that fell under the purview of the Secretary of the Interior. The first was federal reserve water, water reserved for Interior’s federal enclaves like national parks. Second were Indian reserved rights, waters reserved by the tribes in treaties. These two designations were legally considered real property held in trust by

the Secretary. The final designation overseen by the Secretary was considered personal property of the United States, the water stored behind the dams of the Bureau of Reclamation. The federal guardian freely usurped the first two to the advantage of the last. Few noticed. Despite the assertions of John Shurts in his history of the *Winters* decision, the *Winters* doctrine had little impact until the combined force of demand and drought forced the issue. Not until the ecological imperative of the 1930s did concerns arise in any substantive way.⁸

In the 1930s, as a result of drought, Indian water rights came under assault from state appropriators. Kenneth Simmons, U.S. Attorney in Billings attempted to establish *Winters* rights on the Crow reservation in *U.S. v Powers*. The case forever compromised and confused the tribally held *Winters* right by extending it to individual Indian allottees. Reclamation along with the Indian Service narrowly escaped losing the inchoate right to individual quantification—allocation that would follow the lines of the land allotment on the reservation. Most would go to non-Indians and move under state appropriation law and thus diminishing water that would remain at the discretionary use of the guardian Interior. The case involved the Bighorn basin, but it was a threat repeated throughout the west. Neither Interior nor Justice would risk litigating the doctrine again. As Kenneth Simmons, U.S. Attorney in Billings wrote in 1939: “Should state adjudication be attempted....the principle established in the Winter’s case, so valuable to this Service would be at stake.”⁹ Unquantified, the Indian reserve served the purposes of development.

Indeed Reclamation continued to dam the west while using both the federal reserve and the Indian reserved right in its own quantification. The Bureau seemed to reiterate in a more sophisticated way the sentiments of the non-Indian Crow reservation rancher in the 1999 compact negotiations: what are a bunch of Indians going to do with

all that water anyway? During the 1960s, after damming the Bighorn River, Reclamation continued to use treaty-guaranteed Crow reservation natural resources to provide water power and storage for power generation, both through sales to private hydroelectric sources and to the extractive petrochemical and hydrocarbon industries. The quantification used to calculate water sales clearly included the Indian reserve as part of the stored water available for sale to the highest and sometimes to the not so highest bidder. The Indian reserve was subtracted and marketed prior to the division of water to the states of Montana and Wyoming in compliance with the Yellowstone Compact. Reclamation used the Indian reserve water right for its own profit.

On Crow, Reclamation had, from its inception, used tribal trust money. With an act of Congress, the funds intended to reimburse the Crow for ceded land became a mandatory contribution to Reclamation's revolving fund—funds that built projects to water non-Indian land. In the 1960s with the construction of Yellowtail dam, again the Crow involuntarily contributed land, water, and the power site to the interests of non-Indian development. Almost certainly, even the court settlement for the cession, the \$2 ½ million won in *Crow v. U.S.* also entered unknown federal coffers with a line item “repayment of debt.” But forces within the Department of the Interior provided what Donald Pisani has called institutional fragmentation. The Environmental Protection Agency ended Reclamation's reign.

Two movements converged in the late 1960s that contributed to the downfall of Reclamation as a force for water development, and both sources used different “rights talk.” The Native American movement and the environmental movement had enormous impact on the Indian reserve right doctrine. With the 1969 National Environmental Policy Act, environmental organizations and eventually the agency itself forced Reclamation to account for the environmental consequences of its water sales. What

precisely was the environmental impact of the dams; what impact did the new facilitated presence of extractive industry have on the ecosystems that surrounded them. The taxpayer had supported the construction of the dams; the Indians had unknowingly provided the land and water; the petrochemical industry reaped the profit. Through many lawsuits Reclamation came to be accountable for their disregard for ecosystems if not Indian nations. The big dam era was over.

The Environmental Protection Agency also promoted tribal sovereignty. The Nixon administration policy of “self-determination” frequently simply greased the skids for extractive industry to operate on tribally held sovereign lands—lands outside, as some were ready to argue, the purview of the state enforcement arm of environmental law. In a policy called Treatment as State or T.A.S., the Agency instituted a program that acknowledged tribal sovereignty while at the same time it insured enforcement of federal law. The E.P.A. has offered a number of tribes the ability to limit corporate exploitation of their natural resources, while the courts have proven themselves to be far more concerned about their ward the environment than they have for the ward tribes.

The Crow discovered T.A.S. in the 1970s when their neighbor to the east, the Northern Cheyenne successfully ended Westmoreland’s vision of coal gasification and liquification on the Crow reservation. With their adoption of A-1 air quality standards the Northern Cheyenne required a higher level of accountability than the coal giant could provide. T.A.S. represents a viable movement in Indian country, one that encourages a federal-tribal relationship that philosophically replicates the federal-state relationship—federalism.

. While the Justice Department supported Reclamation in the lengthy litigation over non-compliance with environmental laws, beginning in the 1970s the Department of the Interior employed a series of Indian rights advocates. These lawyers retrieved the

work of Felix Cohen and resurrected the *Winters* doctrine from the recesses of Reclamation. In the eyes of Interior, of the tribes, and throughout the west, *Winters* rights truly came to belong not to the Secretary, but to Indian nations. Some thought the time was ripe to extend the reserved rights doctrine to include all natural resources. But the idealism of the time ended swiftly. In an era of so-called self-determination, the inchoate water right was no longer useful to the trustee. The protective arm of Interior did not envelop tribal water rights with quite the vigilance it had when Reclamation ruled.

Beginning in the 1930s with the *Powers* decision, the high Court determined that *Winters* rights belonged to Interior only as it might divide the water right equally between Indian allottees. The case itself was quickly subsumed under the burgeoning power of Reclamation and the umbrella of the Missouri River Project, a project that “equally” distributed dams and flood waters of the Missouri River and its tributaries over the lands reserved by Sioux Indians. The Supreme Court had made its decision; the Bureau of Reclamation would enforce it.

Again in the tandem cases, *U.S. v. 5,677.94 acres of land* (1958) and *Crow v. US* , the trust guardian first determined that it might seize the land and the Bighorn River power site from the Crow, declare navigability in the Bighorn in order to minimize reimbursement, and pay the tribe only \$2 1/2 million. Due to a bureaucratic accounting entry, the monetary sum never reached the Crow. Navigation servitude extended again the reach of the Bureau of Reclamation into the purview of the state in a legal maneuver skillfully crafted by Regional Solicitor Alvin Bielefeld. The navigation servitude exerted federal control over the Bighorn but placed in jeopardy the bed and banks as it ran through the Crow reservation. In 1981, the Supreme Court determined that no

longer would it recognize the implied treaty rights doctrine, one that asserted tribal ownership of the river and was foundation law for *Winters* rights.

Robert Williams has written that Indian law teems with conquest discourse.

Applying the work of Foucault, Williams quotes:

Power is war continued by other means. If it is true that political power puts an end to war that it installs a reign of peace in civil society, this by no means implies that it suspends the effects of war or neutralizes the disequilibrium revealed in the final battle. The role of political power ... is perpetually to reinscribe this relation through a form of unspoken warfare; to reinscribe it in social institutions in economic inequalities, in language, in the bodies themselves of each and everyone of us.¹⁰

In the context in which Williams quotes Foucault, the philosopher reiterates Tocqueville who in 1835 noticed the remarkable way that United States used its legal institutions to assert its authority over the tribes in the southeast:

The Spaniards were unable to exterminate the Indian race by those unparalleled atrocities which brand them with indelible shame, nor did they succeed even in wholly depriving it of its rights; but the Americans of the United States have accomplished this twofold purpose with singular felicity, tranquilly, legally, philanthropically, without shedding blood, and without violating a single great principle of morality in the eyes of the world. It is impossible to destroy men with more respect for the laws of humanity.

Williams applies conquest themes to Indian legal history while Donald Worster applies the same interpretation to 20th century water policy. Worster believes that in all societies, irrigation has led to hierarchy. He asserts that in United States water development policies created a water elite, the formation of a hydraulic empire. Both Williams and Worster present a narrow interpretation. Conquest historiography generates an interpretation of water and law that, to use the words of Donald Pisani, becomes little more than a “morality play.” Conquest interpretation can itself be autocratic as it rewrites history and risks making the result seem like the sad but

inevitable result of forces beyond our control. Presentist guilt eradicates the Indian, makes him “dependent,” “disappears” him just as surely as James Fenimore Cooper did. Conquest historical interpretation, in the end, is itself complicit with the conqueror. It becomes part of the hegemonic vocabulary described by Antonio Gramsci.

Frederick Hoxie supports this interpretation as he notes that the Crow, in their nation building have shown persistence and innovation and have decidedly not disappeared. Indeed, the most significant tributary to the doctrinal river of Indian reserved water rights remains the Crow themselves. Beginning in the 1880s, the Crow agreed to the agricultural endeavors promoted by their guardian—ones that intensified water use through irrigation. By the 1910s the irrigated lands had moved into non-Indian ownership or were leased to non-Indians. Tribal leaders spoke out against any further expenditure. Their 1926 testimony became part of the Meriam and the Preston-Engle Reports that called Interior to account for the failure of the allotment policy. Robert Yellowtail demanded compensation for the loss of *Winters* rights—for the loss of the water to the Crow.

The Crow revealed their pragmatic side. Tribal members had never been particularly willing to trust the “implied rights” doctrine. As early as the Crow Act of 1920, Robert Yellowtail, a Republican and a proponent of state citizenship for Indians, claimed the power site in the Bighorn Canyon. Individual Indian landowners owners within the tribe also influenced the *Winters* doctrine by *not* using it. They filed for their water right under state law. They did not perceive themselves to be adequately protected by tribally garnered implied treaty water rights. The division between Indian allottees and the tribe began early and continues today. The result of mixing federal Indian policies—one championing individualism the other tribal autonomy—continues to undermine both *Winters* rights and federal accountability.

The long life and leadership of Robert Yellowtail provided a savvy institutional memory as well as a long tribal memory. Indeed Yellowtail embodied attributes of both individualism and communalism. The first Indian appointed Superintendent, in 1934, Yellowtail came quickly to understand how the bureaucracy jeopardized the Indian reserve. He began to speak out against development projects that usurped the water right of the tribe. To be sure, he had his own interest in development, and that was private not tribal development, nevertheless, if *Winters* rights were to be used, let them be used to benefit Indians. Other allottees also spoke out. Raymond Bear Don't Walk made a very public and most poignant appeal to the government to end efforts to dam the tributaries of the Little Horn. By the 1950s, in a policy era of termination, the Crow used the courts to stall the seizure of their land and power site. They lost the right to the site to the federal government who exercised eminent domain. But they established for all Indian country the right to the flow of the river—the power.

The Montana case threatened the implied rights doctrine that sustained *Winters* rights. Along with the loss of the riverbed to the state of Montana, the loss of the foundation law for the reserved rights doctrine was a turning point for the Crow. As state pressure mounted to quantify the reserved right, the tribe moved to ally themselves with their most bitter foe, the state. Donald Pisani has refuted centralization theory by pointing to the influence and power inherent in local and state governments in the federal system. The Crow are notoriously pragmatic warriors. Their alliance with the United States against their aggressive neighbor tribes has long caused consternation in those who prefer their image of the Indian to be valiant but “disappeared.” As the 20th century came to an end, the Crow shifted allies and along with the state of Montana crafted a compact that quantified their reserved water right.

The tribes have long been the contested ground between federal and state authority. From the time of the Proclamation Line of 1763, the conqueror has claimed sole power to negotiate with the tribes. It was protective, yes, but always, maintaining a sovereign relationship with the tribes served the interests of the crown and then the nation. The Crow story illustrates some of the reasons that the relationship worked for the United States. The United States used the inchoate water right for its development projects including the Missouri Basin Project. Today the Crow continue to find ways to define what their relationship with the United States is to be in the 21st century. Necessarily that definition will include a relationship with the state of Montana.

The Crow Compact rejects the benefits of the trust relationship and shuns the tribal guardian. Informally they have revoked the trust. The trust relationship emerged from English religious courts and became civil under the reign Henry VIII. The Chancery Court, also called equity court, mitigated rigid common law precedent with what was fair. Chancery courts were innovative. They provided remedy; created the injunction and discovery. Under the influence of Elizabeth I, the Chancery became the court of choice for those who had no legal identity at law: women, children, orphans, so-called imbeciles, all who were “poore and ignorant of the law.” The “trust” was a way to provide a legal identity for these disadvantaged non-citizens. The trust is “equity’s child.”

When Chief Justice John Marshall articulated the relationship of the Indian nations to the United States, he did so by using equity’s imagery—one that demanded the most serious responsibility—the guardian/ward relationship. Inherently however it is a relationship that depreciates and diminishes sovereignty. The roots of the trust are based on equity not equality. That is, the law must be fair, and “fair” is an arbitrary

imposition that connotes inequality. It remains an arbitrary exercise subject to vagaries in policy and ripe for exploitation of the dependent ward.

Elouise Cobell has called Interior to account for their management of tribal assets. It is a simple case, one that accuses Interior of dereliction of duties as trustee of the ward, but the ideology called upon is very old and powerful. The trust is a revocable document that carries with it all the language of compact government, republicanism, democracy. Despite the dependency inherent in the trust, it is not top down, but rather bottom up political philosophy. Just as a ward can hold a guardian accountable so too can tribes revoke the trust relationship—the equitable. But what is to replace the equitable trust relationship between guardian and ward?

The Environmental Protection Agency has inadvertently provided a path. Rather than relate to the sovereign nations as wards, the agency and the tribes have initiated Treatment as State extending to the tribes all the benefits that accrue to states and to sovereigns. Among the most important conceptually is equal footing. The compact too is a legal instrument that recognizes tribal sovereignty as both foreign and equivalent to a state in terms of the tribal relationship to the federal government. With the unique legal nature of tribal sovereignty, these are important ways to relate with both the state and the federal government.

The Crow have taken advantage of the political triangulation and have used it to their advantage. In a sense, McCool's "interest group" has been the state of Montana, allied with the Crow and Congress. The alliance has left the executive entity, Interior--B.I.A. and Reclamation both frustrated. Other tribes may take note of this skillful approach to water rights negotiation. The Crow were fierce warriors, and they have been fierce and pragmatic negotiators. The extent to which the policies of neo-termination will determine the future of this people and this land will equate with the

people's ability to continue to articulate pragmatically through the undulating boundaries of federalism.

Looking out on the Crow reservation today, there are still the old Indian Irrigation Service canals and ditches. The Bighorn Canal takes off from Yellowtail Dam's little brother, the After Bay Dam. Willow Creek Dam creates its reservoir on ground more akin to moonscape than Montana; grassy slopes belie its tenuous construction. The reservoir still supports the canals along the Little Horn: Lodge Grass, Agency, 40 mile, Reno. The Indian "trust fund" paid for these canals. Most often, non-Indians still profit from the proximity.

On the Crow reservation, up the river, U.S. Geological Survey scientists corral female bighorn sheep. The sheep will receive new collars that will transmit their location to the government teams, men and women intent on finding the cause of the namesake's sudden demise. They have stocked and restocked the sheep in the canyon from the time the sheep first disappeared in the late 1800s. It is possible that domestic sheep transmit disease to their wild cousins.¹¹

Montana's Fish and Wildlife teams wonder how to restock the Bighorn River. In the Wyoming state hatchery, whirling disease has infected the trout hatchlings. The disease, caused by a parasite, attacks the spine and cartilage of young fish, resulting in the odd swimming behavior. It is a chronic problem in the waters of the west particularly where the stocked non-natives interact with the wild fish. Wyoming Wildlife workers already killed 400,000 of the little trout.¹²

The Bureau of Reclamation just concluded a study of the numbers of fish entrained in the irrigation system on their Glendive project. The "appalling number," caused raised eyebrows: over 800,000 sucked to their death in one season.¹³

Down river just past Hardin, the Elk Valley Game Ranch received the news they had feared. The elk they had hoped to offer to hunters that season were infected with chronic wasting disease. The disease is of unknown origin but the infected elk lose weight and undergo behavioral changes. In captivity they die of pneumonia. At Elk Valley personnel from the Montana Department of Livestock killed all 29 adult elk and 2 calves.¹⁴

Meanwhile, the U.S. Department of Fish and Wildlife launched a study to discover why they were seeing an alarming increase in the number of deformed frogs. The North American Center for Amphibian Malformations, acting on a tip from a middle school field trip, alerted the federal government—even in the pristine waters of Montana as many as 18% of all frogs are now found to be deformed.¹⁵

It is June and at the Billings airport, Tony Austin has just arrived from British Columbia where he is a postal worker. He is a dead ringer for General George Armstrong Custer and will play the part in this year's reenactment of the Battle of the Little Bighorn. Along with his trusty real-life Crow Scout, Arlo Stray Calf Dawes, the General will make a last stand—again. Times have changed though. Today, survey teams section off “option blocks” to drill for the methane that underlies the battle site.¹⁶

Like the Indian Irrigation Project, the environment here has become one constructed to appear to be something it no longer is, a sort of mind's eye reenactment of what might have been. Here, even history is myth. Though historiography may construct and reconstruct interpretations, reenactments of what happened on this ever contested ground, it is wise even for historians to remember one thing: Coyote made this country, made Crow country. He created it on that one day when he was bored and was able to enlist the help of the deep diving ducks. In the midst of floodwaters, he fashioned the country and the people out of mud and roots. Unlike the engineers, the

scientists, the bureaucrats, the politicians, the historians, Indian country knows Coyote.

They know that where Coyote plays, nothing is as it appears to be.

¹ *The United States v. Thomas Powers*, 305 U.S. 527 (1939).

² *The United States v. 5,677.94 acres of land, more or less of the Crow Reservation of Montana*, 162 F. Supp.108; *The Crow Tribe of Indians v. United States*, Civil 214, Mont, District.

³ *Montana v. United States*, 450 U.S. 544 (1981).

⁴ Kermit L Hall, *The Magic Mirror: Law in American History* (Oxford, 1989).

⁵ *Worcester v. Georgia*, 31 U.S. 515.

⁶ Daniel McCool, *Command of the Waters: Iron Triangles, Federal Water Developmet, and Indian Water* (Berkley, 1987).

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⁸ John Lytle Shurts, *Indian Reserved Water Rights: The Winters Doctrine in its Social and Legal Context, 1880s-1930s* (Norman, 2000).

⁹ Hanna and Simmons to Walten, September 13, 1940, Folder "Storage Reservoirs", Box 249, RG 75, National Archive and Records Administration, Rocky Mountain Region (Denver).

¹⁰ Robert Williams, *The American Indian in Western Legal Thought* (Oxford, 1990). Alexis de Tocqueville, *Democracy in America*.

¹¹ *The Billings Gazette*, September 13, 2001, "Bighorn Lambs are Dying."

¹² *The Billings Gazette*, June 15, 2000, "Fish eggs export to be cut back."

¹³ *The Billings Gazette*, May 13, 2000, "BuRec finds an 'appalling number' of fish sucked into irrigation system."

¹⁴ *The Billings Gazette*, June 21, 2000, "Area game farm elk to be killed."

¹⁵ *The Billings Gazette*, July 10, 2000, "More and more deformed frogs found."

¹⁶ *The Billings Gazette*, June, 22, 2000, "Custer back in town for another battle."

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