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MAC ASBILL
OF COUNSEL

June 18, 1971

AIR MAIL

Mr. Robert E. Carson
Secretary and Commissioner
Flathead Irrigation District
Finley Point Road
Polson, Montana 59860

Re: Confederated Salish and Kootenai Tribes of the Flathead Reservation v. United States, Court of Claims, Docket No. 50223 (Para. 13)

Dear Mr. Carson:

Enclosed is a draft of the proposed findings of fact and brief which we hope the Government will adopt as its own in the Court of Claims case. This is still in rough form and should be regarded as a first draft. There are several findings, for example, on which considerable additional work must be done. The Tribes filed equally voluminous findings and brief in January, totaling approximately 250 pages.

Under the Commissioner's order permitting us to participate as Amici Curiae, we are entitled to submit proposed findings of fact in our own name only if the Government is unwilling to include material we desire in its proposed findings. We hope that the Government will adopt our version of the proposed findings as its own so that we can get before the Court all of our arguments supporting the right of the Districts to enjoy the benefit of the special electric power rates.

Although we do have a right to file a comprehensive brief in our own name, it seems preferable to us from the tactical point of view to have the Government's brief include pretty much all of the arguments we desire

to advance. We shall then file a very short brief simply adopting the Government's arguments as our own. This will take some burden off the Commissioner, who will then not be forced to consider two, rather than one, comprehensive briefs. In any event, the Commissioner's basic order outlining the scope of our participation cautioned that we should avoid duplicating in our brief materials advanced by the Government.

We are this day sending the enclosed draft to R. W. Beck and Associates, the rate consultants retained by the Government. As you know, we, as well as the Government, have been benefiting from Beck's help and assistance (although the Government is paying all of Beck's fees and expenses).

We and the Government have filed for an extension of time to file to and including June 26, 1971. A copy of our motion is enclosed. Since this is probably the last extension we can obtain, we would appreciate receiving your comments and those of Messrs. Moon, Wolf and Jensen as soon as possible.

Kind personal regards.

Sincerely,

Edward J. Grenier, Jr.

Enclosure
EJG:Jr./tlh
cc: Mr. George L. Moon (w/encl.)
Mr. Paul G. Wolf (w/encl.)
Mr. W. Ray Jensen (w/encl.)

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In the

UNITED STATES COURT OF CLAIMS

Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana Plaintiff v. United States of America Defendant	)	Docket No. 50233 Paragraph 13- Alleged Taking of Power Values of Tribal Dam Site

DEFENDANT'S BRIEF
ON THE LAW

Statement of Procedural Background

This claim (paragraph 13 of the Petition, as amended) is one of several before the court pursuant to the Act of July 30, 1946, 60 Stat. 715, conferring jurisdiction on the Court "to hear, examine, adjudicate, and render judgment in any and all legal and equitable claims of whatsoever nature which the Confederated Salish and Kootenai Tribes of Indians of the Flathead Reservation of Montana, or any Tribe or band thereof, may have against the United States."

The claim in paragraph 13 is, in substance, that Federal Power Commission License No. 5 issued on May 23, 1930, to the Rocky Mountain Power Company for improvement of navagation and water power development by use of the Tribes' dam site at tribal site No. 1 (known as the Kerr Dam site) necessarily deprived the Tribes of the full power value of their dam site because it made provisions for certain blocks of electrical power at certain fixed rates to be made available to the United States for the benefit of the irrigation project on the reservation. Paragraph 13 of the petition is set out as Appendix A to Volume II of Plaintiff's Proposed Findings filed January 25, 1971.

Defendant United States, by its answer, stated inter alia that the amounts charged for the horse power furnished to the United States for the benefit of the irrigation project were not less than the fair and reasonable market value of such power and that the Plaintiffs had not asserted grounds for a compensable claim. Defendant's answer is set out as Appendix B to Volume II of Plaintiff's Proposed Findings.

On July 29, 1966 Defendant United States filed a Motion for Summary Judgment alleging (1) that the Tribes possessed no compensable right to the power value of the Kerr Dam site utilized for the licensed power facility, (2) prior settlement of the claim

in paragraph 13 by the Act of May 25, 1948, ch. 340, 62 Stat. 269, 272, and finally (3) that the Tribes did not in any case suffer a loss because of the requirement that the licensee make power available to the United States on behalf of the irrigation project.

On December 15, 1967, the court denied defendant's Motion for Summary Judgment. The Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana v. United States, 181 Ct. Cl. 739 (1967). In its opinion the court recognized that under the principle of many cases the Tribes had no Constitutional right to be paid just compensation for values of their land attributable to its location on a navigable stream. United States v. Rands, 389 U.S. 121 (1967); United States v. Twin City Power Company, 350 U.S. 222 (1956); United States va. Appalachian Electric Power Company, 311 U.S. 377 (1940). See, The Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana v. United States, 189 Ct. Cl. 320, 323, n. 3 (1969). Nevertheless, the court held that Congress, by the Act of March 7, 1928, ch. 137, 45 Stat. 200, 212-13 "recognized and confirmed the Tribes' right to the power value of the Kerr Dam site and desired them (regardless of Constitutional mandates) to be paid for power value." The court also held that the

Plaintiffs' claim in paragraph 13 had not been resolved by the Act of May 25, 1948.*/ Finally, the court held that the question whether any loss resulted to the Tribes because of the furnishing of power to the United States for the benefit of the irrigation project was "a matter for the proof," and the case was remanded to the Commissioner for trial and proof of loss, if any, suffered by the Tribes.

The first trial of this matter was held before Commissioner Arens. At that trial, the Tribes made no effort to establish the economic cost, if any, caused to the licensee by the furnishing of the power for the irrigation project. Likewise the Tribes made no effort to establish a casual relation, if any, between the furnishing of the irrigation power and the amount of the Indian rentals. Instead, the Tribes offered proof relating to the value of power produced by the Kerr project, claiming without supporting factual analysis or

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*/ In connection with this second ground for summary judgment asserted by defendant, the court had occassion to state that the irrigation project "has, and had had no interest at all in the Kerr Dam site." This statement by the court cannot be taken, as the Tribes apparently would like it to be, as holding that no one, other than the Tribes, had any interest in the land or water resources contributed to the hydroelectric development licensed by the Federal Power Commission in License No. 5.

legal authority, that the Tribes had been wrongfully deprived of the commercial value of 15,000 horsepower, which is the maximum amount of power which the United States could demand under certain circumstances for use by the irrigation project, less the amounts paid for such power by the United States.

Commissioner Arens, in his report to the court, filed December 3, 1968, concluded that the Tribes had established no basis for recovery. Commissioner Arens stated at page 3 of his report:

> "Although this court in its opinion repeatedly alluded to the entitlement of plaintiffs to the power value of the Tribes' land used by the licensee, plaintiffs' proof at the trial was directed solely to the value of the power which was made available to the Federal Government under the license. Plaintiffs claim entitlement to the difference between the amounts chargeable to the Government under the license and the value of an alternate source of power, equivalent to that made available to the Government for the 50-year license period, plus interest. It is clear, however, that the power value of the Tribes' land and the value of the power made available to the Government are not the same. Plaintiffs did not own the power, but only the land which was used as a power site. There was, moreover, other land and water, in addition to the Tribal land and water, involved in the production of the power and there were other factors in addition to land which contributed to such production, i.e., construction of the dam and other items associated with an electric power utility. Plaintiffs have failed to relate the value of the power made available to the Government to the power value of the Tribes' land."

Commissioner Arens expressly found that the Federal Power

Commission allocated only 42.13 percent of the land and water resources contributing to the commercial value of the Kerr power development to the Tribes. (Finding 6(h), pp. 14-15 of Slip Opinion.)

The Tribes took exceptions to the Commissioner's findings and Report. The court in its opinion agreed with the Commissioner that the Tribes had failed to establish any relationship between the furnishing of power to the irrigation project and the Indian rentals. The Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana v. United States, 189 Ct. Cl. 320 (November 14, 1969). The court stated at 189 Ct. Cl. 322-324:

> "One solution would be to say that the plaintiffs have had their chance, as the claimants, to prove their loss, and having failed to do so under the proper standard they should now be dismissed, without being accorded another opportunity. This is the stand the trial commissioner may have taken. We do not, however, follow that course for several reasons. The first is that the present record, defective though it is, does indicate that the power company probably incurred an annual loss in supplying the 15,000 horsepower to the Federal Government. 1/ From

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1/ At the hearings before the Federal Power Commission, prior to the award of the license, a representative of the company testified that the annual out-of-pocket loss would be $62,500. Assistant Commissioner of Indian Affairs Scattergood calculated that the loss would be $25,336. The present record does not contain enough information to resolve this conflict.

that significant fact it would appear, at least prima facie, that the licensee would probably have been willing to raise the payments to the Indians, to some extent, if that loss were removed. The serious problem posed by this fact of a substantial annual loss for the licensee on the required sale calls for further exploration to see whether, in fact, the loss on the sale of this block of 15,000 horsepower would have any effect on the rentals payable to the Tribes. 2/

Second, our prior opinion was not explicit on the proper measure of plaintiffs' loss and, consequently, may not have warned palintiffs against the course they followed at the trial. Since the parties put no emphasis, at that point in the case, on the measure of the loss, and we were remanding for trial on that issue, we did not treat expressly with the standard. Though we see nothing incorrect or misleading in our opinion, the incidental references to "power value"--which were pertinent to the then issue of whether Congress had agreed to pay for the power value incident to the Tribes' land 3/ may have been taken by the plaintiffs as sanctioning the incorrect measure they proposed at trial, i.e. the market value of the power to be sold by the power company to the Federal Government.

2/ The present record contains opposing contemporary conclusions on this point--Assistant Commissioner Scattergood thought that the Indians' return was not affected, while others thought it was and would have to be--but there is very little analysis of the problem, and none in any depth.

3/ At that juncture, the main question was whether Congress, although not compelled by the Constitution to compensate the Indians for the water power value of their lands taken for the power project, did undertake to do so in various pieces of legislation, particularly the Act of March 7, 1928, ch. 137, 45 Stat. 200, 212-213. The court held that Congress did so intend.

Third, we are not certain that the trial commissioner adopted the correct standard for the loss to the Indians from the compulsory sale to the United States. Much of his short memorandum opinion reads as if he probably did apply the proper measure, but he does not spell out his reasoning in enough detail for us to be sure. For instance, he does not refer to, or deal with, the significant fact that the company probably suffered a substantial loss on the lower-price sales for the benefit of the irrigation project. 4/

Finally, we cannot forget that this is a litigation brought by Indian Tribes to redress an alleged wrong by the Government which has long supervised their affairs. Though we do not lean over backwards in such a case, we are somewhat more lenient in procedural matters than we might be in other classes of cases in which the relationships of the parties are not so special.

For these reasons, we do not hold the plaintiffs strictly to their failure, up to now, to prove the existence and the amount of any loss they may have incurred. Instead, we remand the case to a trial commissioner for a new trial, vacating the prior commissioner's opinion and findings so that the parties can start afresh and direct their presentation to the correct measure of damages. 5/

4/ It may also be that the commissioner believed that the United States gave more of a quid pro quo for these sales than it actually gave. Plaintiffs insist that he made factual errors in this connection.

5/ The court has denied, as untimely, a post-argument motion by the Flathead, Mission and Jocko Valley Irrigation Districts to file a post-argument brief amici curiae in support of the defendant. However, these parties are hereby granted leave to participate as amici curiae in the further proceedings before the commissioner, if they wish to do so.

> So that there will be no mistake, we stress that we are in no way holding that plaintiffs have yet proved [that they suffered] any loss, let alone the amount of such a loss. The issue of the existence of a loss, as well as of the amount, remains to be tried again. To recover, plaintiffs must prove that a supposititious willing buyer desiring to develop the site for power purposes, and able to obtain the necessary license, would have paid, and a willing owner would have accepted, a higher rental than the amount actually paid, if the former had not been burdened with the necessity to sell at the prescribed rate the block of 15,000 horsepower to the Federal Government, and then the plaintiffs must show the probable amount of that excess.
>
> The commissioner's memorandum opinion and findings, filed December 3, 1968, are vacated and the case is returned to a trial commissioner for further proceedings in conformity with this opinion." (Emphasis and words in brackets added) 189 Ct. Cl. at 322-324.

Judge Skelton dissented from the holding of the court. In view of the court's first opinion (181 Ct. Cl. 739 (1967)) and the"literally dozens of pre-trial conferences held by the trial commissioner as to the issue and burden of proof" (189 Ct.Cl. at 325), Judge Skelton believed that the Tribes should not be given a second chance to prove the power value of the dam site. To do so, he said, would be like "allowing a condemnee in an eminent domain case to prove he was not paid the full value of his land in the condemnation proceedings by showing, after the condemnation is completed, the profit made by the condemnor in selling gravel from the land after it got title." 181 Ct. Cl. at 326. Judge Skelton

was also troubled by the statement of the issue as including a requirement that the plaintiffs "prove that a supposititious willing buyer...would have paid a higher rental than the amount actually paid, if the former had not been burdened with the necessity to sell at the prescribed rate the block of 15,000 horsepower to the Federal Government, and then plaintiffs must show the probable amount of that excess." 181 Ct. Cl. at 324. Judge Skelton saw that this formulation in isolation can be read to leave out an important element of the proof of power value, anmely, the necessary allocation of some portion of the commercial value of the total hydroelectric development to contributions of land and water rights by the Federal Government to the project, as found by the trial commissioner. Slip Opinion, p. 7. Judge Skelton thought that the courts formulation of the issue made it appear, contrary to facts found by the Commissioner that everything connected with the project, and not just the dam site, was contributed by and owned by the Tribes, and hence that all consideration paid by the licensee should go to the Tribes.

FORMULATION OF ISSUES PRESENTED

The defendant believes that Judge Skelton's fear that the court's opinion might be read to state the issue in such manner as not to take into consideration contributions

by the Government to the hydroelectric development of the Kerr site and to require that the Tribes be awarded a windfall if a loss to the licensee in furnishing the 15,000 horsepower to the United States can be established, is un-warrented when the court's opinion (pertinent parts of which are set out above) is considered as a whole. In discussing the problems that would be posed if a substantial annual loss to the licensee could be established because of the power furnished to the United States, the court said that "[t]he serious problem posed by this fact...calls for further exploration to see whether, in fact, that loss on the sale of this block of this 15,000 horsepower would have any effect on the rentals payable to the Tribes." 181 Ct. Cl at 322. In a footnote (footnote 2) appended to this language from the text, the court said "[t]he present record contains opposing contemporary conclusions on this point--Assistant Commissioner Scattergood thought that the Indians' return was not affected, while others thought that it was and would have to be--but there is very little analysis of the problem, and none in any depth." 181 Ct. Cl. at 322, n. 2.

The above quoted excerpts from the court's opinion remanding the case show that the court focused clearly on the "serious problem" (181 Ct. Cl. at 322) whether any loss to the licensee which the Tribes might be able to establish would have anything to do with the Tribes' rental. In so doing, the court

clearly invited, if it did not require, in-depth analysis of the contemporary views of Assistant Commissioner Scattergood and others. As is more thoroughly set out in Defendant's Requested Finding No. 22, Assistant Commissioner Scattergood's views were tied inextricably to the proposition that approximately 50% of valuable land and water resources contributing to the commercial value of the development at the Kerr site would come from sources other than the Tribes. It is, therefore, perfectly clear that the court intended that this proposition, and its revelance to the "serious problem" of relating any loss to the licensee to the amount of the Indian rentals, be thoroughly explored on remand. Defendant's Requested Finding No. 19 shows that Assistant Commissioner Scattergood's view that approximately 50% of the land and water resources of the development were contributed by sources other than the Tribes is consistent with contemporary and modern views, and with the views urged in other proceedings relating to License No. 5 by all who have taken part therein including the Tribes. Defendant also shows that because of this, the Tribes claim to entitlement to all the consideration paid by the licensee for the privilege of developing power at the Kerr Dam cannot be sustained without divesting rightful claims of others for the purpose of giving the Tribes a windfall. The Tribes' only asserted basis for recovery is that they are entitled to all consideration because only they contributed resources to the project. Since this is not the case, and since no proof

was offered to establish that the rentals received were less than the fair market value of their contribution, their cliam under paragraph 13 must fail.

The Tribes in their statement of questions presented in their Brief in Support of Requested Findings of Fact (hereinafter referred to as "Plaintiffs' Brief"), have isolated the very language which concerned Judge Skelton because it can be read as entitling the Tribes to a windfall. Plaintiffs' Brief, p. 1. As stated above, such reading of the court's language in isolation from other parts of the opinion has the effect of nullifying or rendering nonsensical all of the court's discussion and amplification of the issue which went before. Defendant believes that the issues on this remand must be framed in such way as to give due respect to the entire opinion of the court, and that the issues may be stated as follows:

QUESTIONS PRESENTED

> The ultimate question, as stated by the court, is "[w]hat, if anything, the Tribes lost from the requirement that the licensee sell the 15,000 horsepower to the Federal Government at the lesser rate specified in the license [?]" 189 Ct. Cl. at 321. Subsidiary questions in logical order are the following:
>
> A. Taking into consideration the actual circumstances at the time, what loss, if any, would a qualified hypothetical licensee actually and reasonably anticipate as a result of furnishing the 15,000 horsepower to the Federal Government in accordance with the terms and conditions, including the stipulated rates, of License No. 5? If the answer to the foregoing is that no loss, or no substantial loss, would have been anticipated by such a qualified hypothetical licensee, the case should be decided against the Tribes without further inquiry.

B. Assuming that the Tribes carry their burden of proof and establish a substantial anticipated loss, what effect, if any, would such anticipated loss have had on the amount of Indian rental which a qualified hypothetical licensee would have been willing to pay? This question, as to which the court called for in-depth analysis, also has subparts:

(1) Was the United States the owner or proprietor of certain valuable "water rights reserved or appropriated for the irrigation projects"*/ which were necessarily involved in the hydroelectric development at the Kerr site and for the use of which it could demand reasonable compensation after assuring that such compensation would not affect Indian rentals or unduly raise electric rates for consumers? If so, the case must be decided against the Tribes since their claim depends upon the proposition that only they were entitled to compensation from the licensee.

(2) Were the Indian and non-Indian landowners on the irrigation project owners or proprietors of Winters doctrine water rights, as successors in interest to individual Indian allottees and the Tribes, which were necessarily involved in the hydroelectric development at the Kerr site, and for the use of which they, or the United States on their behalf, could reasonably demand compensation, after assuring that such compensation would not affect Indian rentals or unduly raise electric rates to consumers? If so, the case must be decided against the Tribe for the reasons stated above in (1).

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*/ Act of March 7, 1928, ch. 137, 45 Stat. 400, 212-213.

(3) Would the effect of public utility regulation, and the mechanism for assuring the effectiveness of such regulation contemplated at the time and ultimately incorporated in License No. 5, have given assurance to a qualified hypothetical licensee that its anticipated cost in furnishing the 15,000 horsepower block of power could be lawfully passed on imperceptably to the members of the consuming public through its rate structure, with the result that the impact of such loss on the amount such licensee would pay in Indian rentals would be nonexistent or negligible?

SUMMARY OF THE FACTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ARGUMENT

I

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ARGUMENT

II

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

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

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

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

squarely within the doctrine enunciated in Winters.

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

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

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

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

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

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

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

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

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

as a trustee for the Indians and held the proceeds of such disposition in trust for the benefit of the Tribes. Compare United States v. Powers, supra.

This application of the Winters doctrine plainly accords with common sense. If land held in trust for Indians were deemed to lose its appurtenant water rights upon allotment to an individual Indian or conveyance to an Indian or non-Indian, then (1) the individual Indian allottee might be deprived of his means of livelihood on the land and (2) in the case of conveyance, the Tribes would be deprived of the full value of their land since land without water rights would sell for less and indeed might be worthless. */

2. Water Rights Secured by Governmental Reservation or Appropriation.

It is clear that landowners served by the Flathead Irrigation Project, as successors in title of reserved lands

*/ The Tribes are not in a position to attempt to answer this point on the ground that, historically, they did not receive the full value of their land sold upon the opening of the Reservation for settlement pursuant to the 1904 Act. Under paragraph 10 of their petition in this litigation, the Tribes claimed and have recently been awarded a substantial judgment based upon the market value of these lands as of January 12, 1912. It is clear from the evidence in the paragraph 10 proceeding that this award included substantial value attributed to the promise of the United States to supply irrigation water through the Flathead Irrigation Project including facilities of the proposed power development.

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

Since without water for irrigation the lands within the Reservation are practically valueless for agricultural purposes, the 1904 Act, authorizing the allotment of lands to the Indians and the opening of unallotted lands for settlement and cultivation udner the homestead laws, necessarily precipitated plans for a vast irrigation project which was actually begun and publicized by the United States prior to and during the making of allotments and the offering of the lands for homestead settlement. Because a substantial portion of the irrigable land on the Reservation could be irrigated only by pumping water from the Flathead River, original plans necessarily included the development of a hydroelectric power.facility to supply power for pumping. See Defendant's Requested Finding, Nos. 4 and 5.

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

Through a series of enactments, including provisions in Irrigation Project appropriation measures, Congress made clear its intent to benefit the Irrigation Project by providing needed power for pumping. See Defendant's Requested Findings, Nos.,6, 7, and 8.

Thus by the Act of May 29, 1908, ch. 216, §15, 35 Stat. 448-450, Congress amended the 1904 Act to provide for the manner in which the planned irrigation project would be paid for. Then by the Act of March 3, 1909, ch. 263, 35 Stat. 781, 796, Congress again amended the 1904 Act by adding a new section authorizing the Secretary of the Interior to set aside land chiefly valuable for power and reservoir sites. Almost immediately thereafter the Secretary reserved Tribal Site No. 1 and other power and reservoir sites for use by the Irrigation Project for the development of power and for the storage of irrigation water. The effect of this reservation was twofold: first it withdrew the power sites in question from allotment entry or other disposition to private interests under the 1904 Act; second, it operated for the benefit of the irrigation project the unreserved and unappropriated water power rights necessary for full development of hydroelectric power. Federal Power Commission v. Oregon, 349 U.S. 435 (1955) (Pelton Dam Case). See Defendat's Requested Finding No. 6.

Thereafter, in December of 1909, the Secretary of the Interior began the construction of the Newell Tunnel at Site No. 1, as the first step in building the needed power facility, and the work continued for two years. The over $100,000 expended on the Newell Tunnel was taken by the Secretary from monies appropriated by Congress in 1910 and 1911,

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

Beginning in 1909 or earlier, the Reclamation Service made water filings on all Reservation streams pursuant to Montana Statutes authorizing the United States to make such filings. The first filing at Tribal Site No. 1 was made on January 28, 1910; it and subsequent timely filings through 1927 served notice on all concerned of the Government's continuing intention to appropriate and make use of the waters of the river for the development of power

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

for the irrigation project. These filings were made pursuant to a special act of the Montana legislature authorizing the federal government thus to give notice of exercise of its power of appropriation or reservation. See Defendant's Requested Finding No. 7. The provision in question now appears as Section 89-808 of the Revised Code of Montana of 1947. The filings operated to clarify the government's prior reservation of water power rights and, to the extent deemed necessary or desirable to establish a priority for the irrigation and power use of the river waters under Montana's prior appropriation law. See Bailey v. Tintinger, 45 Mont. 154, 177; 122 P. 575 (1912); Mettler v. Ames Realty Co., 61 Mont. 152, 168, 201 P. 702 (1921). It cannot be doubted that Congress, pursuant to the Commerce and Property clauses of the United States Constitution, had full authority to appropriate and dispose of the unreserved and unappropriated navigable waters of the Flathead River and Lake. Arizona v. California, 373 U.S. 546, 597-8 599 (1963); United States v. Grand River Dam Authority, 363 U.S. 229, 233 (1960).*/ Thus all of the water power rights over and above those reserved to the Reservation Lands by the 1855 Treaty pursuant to the Winters doctrine (i.e. water power necessary and sufficient to irrigate the irrigable Reservation lands), were available in 1909-1910 for appropriation and disposition by Congress for any public purpose.

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

Arizona v. California, supra, at 599. Such appropriation and disposition in favor of the government's irrigation project was accomplished by Congress by the 1909 withdrawal of the dam site. Federal Power Commission v. Oregon, supra, or by the filing of notices of appropriation for the benefit of the irrigation project in conformity with state notice statues in 1910 and following. Cf. Winters v. United States, supra; Arizona v. California, supra. See Defendant's Requested Findings, Nos. 6 and 7.

Thus Congress and the Executive Branch took the necessary actions to appropriate or reserve water rights for the development of power for the benefit of the Flathead Irrigation Project. Even if their actions had not been so definitive, the facts that the Congress authorized the Flathead Irrigation Project and that the Executive Branch commenced its construction were sufficient to invoke the general principle that Congress and the Government in general cannot be considered to have done a useless and indeed misleading act by holding out land as suitable for agricultural use without providing the wherewithal for such use. See Arizona v. California, supra; Winters v. United States, supra. See Defendant's Requested Findings, Nos. 3 through 9.

B. By the Act of March 7, 1928, ch. 137, 45 Stat. 200, 212-213, Congress authorized the licensing of the water rights

reserved or appropriated for the irrigation projects to a private developer in exchange for power at special rates.

1. The Act Itself

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

> "[T]he Federal Power Commission is authorized in accordance with the Federal Water Power Act and upon terms satisfactory to the Secretary of the Interior, to issue a permit or permits, or a license or licenses for the use, for the development of power, (1) of power sites on the Flathead Reservation and (2) of water rights reserved or appropriated for the irrigation projects; Provided further, that rentals from such licenses for the use of Indian lands shall be paid to the Indians of said reservation as a tribe, which money shall be deposited in the Treasury of the United States to the credit of said Indians, and shall draw interest at the rate of 4 per centum....." (Numbers and emphasis supplied.)

The 1928 Act thus expressly recognized and confirmed the reserved or appropriated water rights of the landowners served by the Irrigation Project. In addition it expressly authorized the licensing of the same to a private developer "upon terms satisfactory to the Secretary of the Interior." See Defendant's Requested Finding, No. 18.

2. The Legislative History of the Act.

The bill which became the Act of March 7, 1928, was reported by the House Appropriations Subcommittee, which was chaired by Mr. Louis C. Crampton of Michigan. Mr. Crampton testified that the measure was intended to authorize the

licensing of the irrigation project water rights in exchange for power on a special basis to be approved by the Secretary of the Interior. This was generally understood by members of Congress and others as the Committee reports and debates reveal. The only opposition which the bill encountered was on the sole basis that the bill was intended to authorize power at special rates for the irrigation project. The debates however fully developed the fact that the special rates for this irrigation project were in return for water power rights previously reserved or appropriated for the irrigation project. Probably because of this the opposition was highly vocal but totally unsuccessful. In any event the bill reported by Mr. Crampton's committee became law.

In a curious but apparent attempt to ignore this result, the tribes restrict their analysis of the legislative history to arguments made by those who attempted to defeat the Act of March 7, 1928. The arguments cited merely confirm the general understanding of proponents and opponents alike that the bill was intended to authorize the special power rate for the irrigation project subsequently incorporated into License No. 5. The tribes admit that a measure with substantially similar wording in all pertinent respects, which was reported by Congressman Crampton's committee in 1927 but defeated in the Senate Committee, was intended to authorize the special rates for the irrigation project, and urge that

the opponents at the 1928 Act thought that it would authorize such special rates, but nonetheless conclude that the 1928 Act, when it became law, actually forbade such special rates for the irrigation project. See Defendant's Requested Findings, Nos. 14, 15, 16 and 18.

C. The Tribes subsequently consented to the terms of License No. 5 including the provision therein for power for the irrigation project at special rates.

Subsequent to their organization as a tribe pursuant to the Wheeler-Howard Act of 1934, the tribes consented to an amendment to License No. 5 by which they gave approval to the terms thereof including the power to be furnished at special rates to the irrigation project. See Defendant's Requested Finding, No. 24.

D. By their attorney the tribes expressly urged passage of the Act of May 25, 1948, ch. 340, 62 Stat. 267, by which Congress again recognized the water power rights of the irrigation project, and that the same were granted to the licensee of License No. 5 in exchange for power at special rates.

Section 2(g) of the Act of May 25, 1948, ch. 340, 62 Stat. 267 which readjusted the accrued and future costs of the irrigation and power systems of the Flathead Irrigation Project, provided as follows:

> Electric energy available for sale through the power system shall be sold at the lowest rates which, in the judgement of the Secretary of the Interior,

> will produce net revenues sufficient to liquidate the annual installments of the power system construction costs established pursuant to subsection (f) of this section, and (for the purpose of reducing the irrigation system construction costs chargeable against the lands embraced within the project and of insuring the carrying out of the intent and purpose of legislation and repayment contracts applicable to the project) to yield a reasonable return on the unliquidated portion of the power system construction costs, and (for the same purpose) to yield such additional sums as will cover the amount by which the wholesale value of the electric energy sold exceeds the cost thereof where such excess is the result of the electric energy having been obtained on a special basis in return for water rights or other grants." (Emphasis added)

By this provision, Congress expressly recognized the existence of the irrigation project's water rights and also recognized and ratified the fact that these rights were granted to the licensee in exchange for power at special rates.

The 1948 Act was drafted jointly by representatives of the Tribes, the Department of Interior and the irrigation districts on the irrigation project. Moreover, by letter dated March 1, 1948, addressed to the chairman of the House committee from John W. Cragun, attorney for the Tribes, the Tribes recorded their express consent to and support of the jointly drafted legislation. See Defendant's Requested Finding, No. 25.

E. The Federal Power Commission has recently concluded based on expert testimony offered by the Tribes, that the Tribes contributed 42.13% of the land and water rights involved in the development of Site No. 1.

In Opinion No. 529, dated October 4, 1967, 38 F.P.C. 766 (1967) involving readjustment of the Tribes rental for the licensee's use of Tribal Site No. 1, the Federal Power Commission, after full study of the project, concluded on the basis of expert testimony offered by the Tribes, that the Tribes contributed only 42.13% of the valuable land and water resources involved in the Flathead hydroelectric development. The Power Commission had no occasion to determine the source of other contributions and noted only that the balance of the resources belonged to the power company pursuant to the license. See Defendant's Requested Finding, No. 26.

The Tribes have premised their right of recovery herein on the simple proposition that only the Tribes contributed valuable land and water to the development and that in consequence they are entitled to all the proceeds thereof. Since the grant of power at special rates is a part of the proceeds, they claim that they are entitled to compensation therefor. Since they are in error on this point, it is not necessary for Defendant to show that it, or anyone else in particular, contributed a portion of that balance in the form of water rights reserved or appropriated for the irrigation project. The Tribes' right to recover falls upon proof that others did

contribute. The Tribes do not claim and certainly are not entitled to claim something which by rights should go to someone else. If it is to be assumed that the Tribes and the Government, through its irrigation project, are the only contributors, the Tribes can not prove any right of recovery since they have made no effort to assign relative values to their contributions as opposed to the Government's.

ARGUMENT

III

ASSUMING THAT A HYPOTHETICAL LICENSEE COULD HAVE ANTICIPATED AN OUT-OF-POCKET LOSS AS A RESULT OF FURNISHING THE IRRIGATION PROJECT POWER, AND ASSUMING THAT VALUABLE WATER RIGHTS OF THE IRRIGATION PROJECT WERE NOT INVOLVED, THE EVIDENCE ESTABLISHES THAT ANY LOSS WHICH COULD HAVE BEEN ANTICIPATED WOULD NOT HAVE FALLEN ON THE LICENSEE AND HENCE COULD NOT HAVE REDUCED THE AMOUNT HE WOULD HAVE BEEN WILLING TO PAY AS INDIAN RENTAL.

Any hypothetical licensee would have been either a public utility, which is expressly allowed by public regulation to recover its costs of service through its rates, or a non-public utility producer in competition with area public utilities. Such a non-public utility producer could theoretically set his rates at least as high as the public utility and remain competitive. Costs for all hypothetical licensees must be assumed equal unless resort to particular possible licen-

sees and their peculiar advantages or disadvantages is to be made, or unless it is to be assumed, as is likely, that non-public utilities would always have lower costs because they can serve their customers without building a distribution system to serve a whole community. In any case a non-public utility would certainly be in as good a position as a regulated company to recover its costs through rates. The propostion is so obviously true that it need hardly be stated.

Contemporary evidence in the Scattergood Report shows conclusively that the above was clearly recognized in 1929-30. Further, specific attention was directed to facilitating identification of a specific amount, conservatively determined in order to satisfy the power company applicant, so that the latter could more easily recover this amount through very slight increases in its rates.

The expert witnesses at the July 1970 hearing in this case, including the expert witness for the Tribes, seemed to recognize that a public utility is authorized to recover and does recover its cost of service through rates, and that any cost associated with the power to be furnished to the irrigation project at special rates would clearly qualify as cost of service. Furthermore, Mr. Van Scoyoc testified that the process for recovery of any cost proposed by Mr. Scattergood would "make Montana Power whole." Tr. p. 346, Mr Van Scoyoc

also testified that an additional cost of service of as much as $62,500 (the largest loss figure actually contemplated by the parties in 1929-30) "when spread among the customers of the company, would have been a very small fraction of a percent, so far as their individual cost of power. I certainly would agree with that." Tr., p. 398. Thus from Mr. Van Scoyoc's testimony alone it is apparent that a hypothetical licensee would not have been affected in the least by an additional cost of service of a magnitude on the order of $62,500. This being the case, it is clear that any loss considered or advocated by the parties to be associated with supplying the irrigation project power could not possibly have had an adverse effect on a hypothetical licensee's willingness or ability to pay a given Indian rental. See Defendant's Requested Finding, No. 29.

CONCLUSION

The Tribes have not carried their burden of proof and are not entitled to recover.

Finding No. 1

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

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

Footnotes to Finding No. 1

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

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

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

Awards to be paid in specie.

claimants; the said contracting parties obliging themselves to satisfy the said awards in specie, without deduction, at the times and places pointed out, and under the conditions which may be expressed by the Board of Commissioners.

Rights founded on claims originating from excesses of foreign cruisers, reserved by each party.

6. It not having been possible for the said Plenipotentiaries to agree upon a mode by which the above mentioned Board of Commissioners should arbitrate the claims originating from the excesses of foreign cruizers, agents, consuls, or tribunals, in their respective territories, which might be imputable to their two governments, they have expressly agreed that each government shall reserve (as it does by this Convention) to itself, its subjects or citizens, respectively, all the rights which they now have, and under which they may hereafter bring forward their claims, at such times as may be most convenient to them.

Convention effective on exchange of ratifications.

7. The present Convention shall have no force or effect until it be ratified by the contracting parties, and the ratification shall be exchanged as soon as possible.

In faith whereof, we, the underwritten Plenipotentiaries, have signed this Convention, and have affixed thereto our respective seals.

Done at Madrid, this 11th day of August, 1802.

PEDRO CEVALLOS. (L. S.)
CHARLES PINCKNEY. (L. S.)

TREATY

Between the United States of America and the French Republic. (a)

April 30, 1803.

Desire of the parties to remove all sources of misunderstanding relative to the construction of the treaty of Madrid, &c. &c.

THE President of the United States of America, and the First Consul of the French Republic, in the name of the French people, desiring to remove all source of misunderstanding relative to objects of discussion mentioned in the second and fifth articles of the convention of the 8th Vendémiaire, an. 9 (30th September, 1800) relative to the rights claimed by the United States, in virtue of the treaty concluded at Madrid, the 27th of October, 1795, between his Catholic Majesty and the said United States, and willing to strengthen the union and friendship which at the time of the said convention was happily re-established between the two nations, have respectively named their plenipotentiaries, to wit: the President of the United States [of America,] by and with the advice and consent of the Senate of the said states, Robert R. Livingston, minister plenipotentiary of the United States, and James Monroe, minister plenipotentiary and envoy extraordinary of the said states, near the government of the French Republic; and the First Consul, in the name of the French people, citizen Francis Barbé Marbois, minister of the public treasury, who, after having respectively exchanged their full powers, have agreed to the following articles.

ARTICLE I. Whereas, by the article the third of the treaty concluded at St. Ildefonso, the 9th Vendémiaire, an. 9 (1st October, 1800) be-

(a) For notes of the Treaties and Conventions between the United States and France, see page 6.

Retrocession from Spain to France stated.

tween the First Consul of the French Republic and his Catholic Ma jesty, it was agreed as follows: "His Catholic Majesty promises an engages on his part, to cede to the French Republic, six months afte the full and entire execution of the conditions and stipulations herei relative to his royal highness the duke of Parma, the colony or province of Louisiana, with the same extent that it now has in the hands of Spain, and that it had when France possessed it; and such as it should be after the treaties subsequently entered into between Spain and othe states." *And whereas*, in pursuance of the treaty, and particularly o the third article, the French Republic has an incontestible title to the domain and to the possession of the said territory: The First Consu of the French Republic desiring to give to the United States a stron proof of his friendship, doth hereby cede to the said United States, i the name of the French Republic, forever and in full sovereignty, th said territory with all its rights and appurtenances, as fully and in th same manner as they have been acquired by the French Republic, i virtue of the above-mentioned treaty, concluded with his Catholic Ma jesty.

Islands, &c. included in the cession by the preceding articles.

ART. II. In the cession made by the preceding article are include the adjacent islands belonging to Louisiana, all public lots and square vacant lands, and all public buildings, fortifications, barracks, and othe edifices which are not private property.—The archives, papers, an documents, relative to the domain and sovereignty of Louisiana, and i dependences, will be left in the possession of the commissaries of th United States, and copies will be afterwards given in due form to th magistrates and municipal officers, of such of the said papers and doc ments as may be necessary to them.

Inhabitants of the ceded territory incorporated in the Union upon certain principles.

ART. III. The inhabitants of the ceded territory shall be incorp rated in the Union of the United States, and admitted as soon as poss ble, according to the principles of the Federal constitution, to the e joyment of all the rights, advantages and immunities of citizens of th United States; and in the mean time they shall be maintained and pr tected in the free enjoyment of their liberty, property, and the religio which they profess.

A commissary to be sent from France to receive the province of Louisiana, and to pass it over to the U. S.

ART. IV. There shall be sent by the government of France a com missary to Louisiana, to the end that he do every act necessary, as we to receive from the officers of his Catholic Majesty the said country an its dependences, in the name of the French Republic, if it has n been already done, as to transmit it in the name of the French Repu lic to the commissary or agent of the United States.

When the commissaries of the U. S. shall have possession.

ART. V. Immediately after the ratification of the present treaty b the President of the United States, and in case that of the First Cons shall have been previously obtained, the commissary of the French R public shall remit all the military posts of New Orleans, and other par of the ceded territory, to the commissary or commissaries named b the President to take possession; the troops, whether of France Spain, who may be there, shall cease to occupy any military post fro the time of taking possession, and shall be embarked as soon as poss ble, in the course of three months after the ratification of this treaty.

U. S. to execute certain Indian treaties.

ART. VI. The United States promise to execute such treaties an articles as may have been agreed between Spain and the tribes and n tions of Indians, until, by mutual consent of the United States and th said tribes or nations, other suitable articles shall have been agree upon.

Vessels of France and Spain laden with the productions of their respective countries entitled to same privileges as vessels of U. S. &c.

ART. VII. As it is reciprocally advantageous to the commerce of France and the United States to encourage the communication of both nations for a limited time in the country ceded by the present treaty, until general arrangements relative to the commerce of both nations may be agreed on; it has been agreed between the contracting parties, that the French ships coming directly from France or any of her colonies, loaded only with the produce and manufactures of France or her said colonies; and the ships of Spain coming directly from Spain or any of her colonies, loaded only with the produce or manufactures of Spain or her colonies, shall be admitted during the space of twelve years in the ports of New Orleans, and in all other legal ports of entry within the ceded territory, in the same manner as the ships of the United States coming directly from France or Spain, or any of their colonies, without being subject to any other or greater duty on merchandize, or other or greater tonnage than that paid by the citizens of the United States.

No other vessels entitled to same privilege during said period.

During the space of time above mentioned, no other nation shall have a right to the same privileges in the ports of the ceded territory: the twelve years shall commence three months after the exchange of ratifications, if it shall take place in France, or three months after it shall have been notified at Paris to the French government, if it shall take place in the United States; it is however well understood that the object of the above article is to favor the manufactures, commerce, freight and navigation of France and of Spain, so far as relates to the importations that the French and Spanish shall make into the said ports of the United States, without in any sort affecting the regulations that the United States may make concerning the exportation of the produce and merchandize of the United States, or any right they may have to make such regulations.

Vessels of France to be upon the footing of those of the most favoured nations.

ART. VIII. In future and forever after the expiration of the twelve years, the ships of France shall be treated upon the footing of the most favored nations in the ports above mentioned.

Convention providing for the payment of debts to citizens of U. S. to be ratified when this is.

ART. IX. The particular convention signed this day by the respective ministers, having for its object to provide for the payment of debts due to the citizens of the United States by the French Republic, prior to the 30th of September, 1800, (8th Vendemiaire, an. 9,) is approved, and to have its execution in the same manner as if it had been inserted in this present treaty; and it shall be ratified in the same form and in the same time, so that the one shall not be ratified distinct from the other.

Another convention to be ratified at the same time.

Another particular convention signed at the same date as the present treaty relative to a definitive rule between the contracting parties is in the like manner approved, and will be ratified in the same form, and in the same time, and jointly.

In what time the ratifications must be exchanged.

ART. X. The present treaty shall be ratified in good and due form, and the ratifications shall be exchanged in the space of six months after the date of the signature by the ministers plenipotentiary, or sooner, if possible.

IN FAITH WHEREOF, the respective plenipotentiaries have signed these articles in the French and English languages; declaring nevertheless that the present treaty was originally agreed to in the French language; and have thereunto affixed their seals.

Done at Paris, the tenth day of Floreal, in the eleventh year of the French Republic, and the 30th of April, 1803.

(Signed) ROBERT R. LIVINGSTON, (L. S.)
JAMES MONROE, (L. S.)
F. BARBÉ MARBOIS, (L. S.)

CONVENTION

Between the United States of America and the French Republic.

April 30, 1803.

THE President of the United States of America and the First Consul of the French Republic, in the name of the French people, in consequence of the treaty of cession of Louisiana, which has been signed this day, wishing to regulate definitively every thing which has relation to the said cession, have authorized to this effect the plenipotentiaries, that is to say: the President of the United States has, by and with the advice and consent of the Senate of the said States, nominated for their plenipotentiaries, Robert R. Livingston, minister plenipotentiary of the United States, and James Monroe, minister plenipotentiary and envoy extraordinary of the said United States, near the government of the French Republic; and the First Consul of the French Republic, in the name of the French people, has named as plenipotentiary of the said Republic, the citizen Francis Barbé Marbois; who, in virtue of their full powers, which have been exchanged this day, have agreed to the following articles:

U. S. engage to pay 60,000,000 francs to France, &c.

ART. I. The government of the United States engages to pay to the French government, in the manner specified in the following article, the sum of sixty millions of francs, independent of the sum which shall be fixed by another convention for the payment of the debts due by France to citizens of the United States.

A stock to be created equal to the 60,000,000 of francs, &c.

ART. II. For the payment of the sum of sixty millions of francs, mentioned in the preceding article, the United States shall create a stock of eleven millions two hundred and fifty thousand dollars, bearing an interest of six per cent. per annum, payable half yearly in London, Amsterdam or Paris, amounting by the half year, to three hundred and thirty-seven thousand five hundred dollars, according to the proportions which shall be determined by the French government to be paid at either place: the principal of the said stock to be reimbursed at the Treasury of the United States, in annual payments of not less than three millions of dollars each; of which the first payment shall commence fifteen years after the date of the exchange of ratifications: this stock shall be transferred to the government of France, or to such person or persons as shall be authorized to receive it, in three months at most after the exchange of the ratifications of this treaty, and after Louisiana shall be taken possession of in the name of the government of the United States.

When the first payment shall be made.

French government selling stock in Europe,

It is further agreed, that if the French government should be desirous of disposing of the said stock to receive the capital in Europe, at shorter terms, that its measures for that purpose shall be taken so as to favor,

to do it upon the best terms for U. S.

in the greatest degree possible, the credit of the United States, and to raise to the highest price the said stock.

Value of the dollar of U. S. referred to, fixed.

ART. III. It is agreed that the dollar of the United States, specified in the present convention, shall be fixed at five francs $\frac{33}{100}$ or five livres, eight sous tournois.

When convention must be ratified and exchanged.

The present convention shall be ratified in good and due form, and the ratifications shall be exchanged in the space of six months to date from this day, or sooner if possible.

IN FAITH OF WHICH, The respective plenipotentiaries have signed the above articles, both in the French and English languages, declaring, nevertheless, that the present treaty has been originally agreed on and written in the French language; to which they have hereunto affixed their seals.

Done at Paris, the tenth of Floreal, eleventh year of the French Republic, (30th April, 1803.)

ROBERT R. LIVINGSTON, (L. S.)
JAMES MONROE, (L. S.)
BARBÉ MARBOIS. (L. S.)

CONVENTION

Between the United States of America and the French Republic.

April 30, 1803.

THE President of the United States of America and the First Consul of the French Republic, in the name of the French people, having by a treaty of this date terminated all difficulties relative to Louisiana, and established on a solid foundation the friendship which unites the two nations, and being desirous, in compliance with the second and fifth articles of the convention of the eighth Vendemiaire, ninth year of the French Republic (30th September, 1800,) to secure the payment of the sums due by France to the citizens of the United States, have respectively nominated as plenipotentiaries, that is to say: the President of the United States of America, by and with the advice and consent of their Senate, Robert R. Livingston, minister plenipotentiary, and James Monroe, minister plenipotentiary and envoy extraordinary of the said states, near the government of the French Republic; and the First Consul, in the name of the French people, the citizen Francis Barbé Marbois, minister of the public treasury: who after having exchanged their full powers, have agreed to the following articles:

Debts due from France to citizens of U. S. to be paid according to fixed regulations.

ART. I. The debts due by France to citizens of the United States, contracted before the 8th of Vendemiaire, ninth year of the French Republic (30th September, 1800) shall be paid according to the following regulations, with interest at six per cent. to commence from the periods when the accounts and vouchers were presented to the French government.

ART. II. The debts provided for by the preceding article are those

Debts provided for by the preceding article.

whose result is comprised in the conjectural note (a) annexed to the present convention, and which, with the interest, cannot exceed the sum of twenty millions of francs. The claims comprised in the said note which fall within the exceptions of the following articles, shall not be admitted to the benefit of this provision.

How the said debts are to be paid.

ART. III. The principal and interests of the said debts shall be discharged by the United States, by orders drawn by their minister plenipotentiary on their treasury; these orders shall be payable sixty days after the exchange of ratifications of the treaty and the conventions signed this day, and after possession shall be given of Louisiana by the commissaries of France to those of the United States.

What debts are comprehended by the preceding articles.

ART. IV. It is expressly agreed, that the preceding articles shall comprehend no debts but such as are due to citizens of the United States, who have been and are yet creditors of France, for supplies, for embargoes, and prizes made at sea, in which the appeal has been properly lodged within the time mentioned in the said convention, 8th Vendemiaire, ninth year, (30th September, 1800.)

To what cases they are particularly to apply.

ART. V. The preceding articles shall apply only, 1st, to captures of which the council of prizes shall have ordered restitution, it being well understood that the claimant cannot have recourse to the United States, otherwise than he might have had to the government of the French Republic, and only in case of insufficiency of the captors; 2d, the debts mentioned in the said fifth article of the convention contracted before the 8th Vendemiaire, an. 9 (30th September, 1800,) the payment of which has been heretofore claimed of the actual government of France, and for which the creditors have a right to the protection of the United States; the said fifth article does not comprehend prizes whose condemnation has been or shall be confirmed: it is the express intention of the contracting parties not to extend the benefit of the present convention to reclamations of American citizens, who shall have established houses of commerce in France, England, or other countries than the United States, in partnership with foreigners, and who by that reason and the nature of their commerce, ought to be regarded as domiciliated in the places where such houses exist. All agreements and bargains concerning merchandize, which shall not be the property of American citizens, are equally excepted from the benefit of the said convention, saving, however, to such persons their claims in like manner as if this treaty had not been made.

Ministers plenipotentiary of U. S. to appoint commissioners to act provisionally.

ART. VI. And that the different questions which may arise under the preceding article may be fairly investigated, the ministers plenipotentiary of the United States shall name three persons, who shall act from the present and provisionally, and who shall have full power to examine, without removing the documents, all the accounts of the different claims already liquidated by the bureaus established for this purpose by the French Republic, and to ascertain whether they belong to the classes designated by the present convention and the principles established in it; or if they are not in one of its exceptions and on their certificate, declaring that the debt is due to an American citizen or his representative, and that it existed before the 8th Vendemiaire, 9th year (30th September, 1800) the debtor shall be entitled to an order on the Treasury of the United States, in the manner prescribed by the third article.

ART. VII. The same agents shall likewise have power, without re-

(a) This "conjectural note" was not deposited in the Department of State until May 17, 1832, and is therefore omitted here.

To examine the claims, &c. and to certify those which ought to be admitted.

moving the documents, to examine the claims which are prepared for verification, and to certify those which ought to be admitted by uniting the necessary qualifications, and not being comprised in the exceptions contained in the present convention.

To examine those not prepared for liquidation, &c.

ART. VIII. The same agents shall likewise examine the claims which are not prepared for liquidation, and certify in writing those which in their judgment ought to be admitted to liquidation.

Debts discharged at the treasury of U.S. with interest.

ART. IX. In proportion as the debts mentioned in these articles shall be admitted, they shall be discharged with interest, at six per cent. by the Treasury of the United States.

Commercial agent of U. S. at Paris to assist in the examination of claims, &c.

ART. X. And that no debt which shall not have the qualifications above mentioned, and that no unjust or exorbitant demand may be admitted, the commercial agent of the United States at Paris, or such other agent as the minister plenipotentiary of the United States shall think proper to nominate, shall assist at the operations of the bureaus, and co-operate in the examination of the claims; and if this agent shall be of opinion that any debt is not completely proved, or if he shall judge that it is not comprised in the principles of the fifth article above mentioned, and if notwithstanding his opinion, the bureaus established by the French government should think that it ought to be liquidated, he shall transmit his observations to the board established by the United States, who, without removing documents, shall make a complete examination of the debt and vouchers which support it, and report the result to the minister of the United States. The minister of the United States shall transmit his observations, in all such cases, to the minister of the treasury of the French Republic, on whose report the French government shall decide definitively in every case.

Rejection of a claim to exempt U. S. from paying it.

The rejection of any claim shall have no other effect than to exempt the United States from the payment of it, the French government reserving to itself the right to decide definitively on such claim so far as it concerns itself.

Decisions to be made, &c.

ART. XI. Every necessary decision shall be made in the course of a year, to commence from the exchange of ratifications, and no reclamation shall be admitted afterwards.

Claims since 30th Sep. 1800, may be pursued, and payment demanded.

ART. XII. In case of claims for debts contracted by the government of France with citizens of the United States since the 8th Vendemiaire, ninth year, (30th September, 1800) not being comprised in this convention, may be pursued, and the payment demanded in the same manner as if it had not been made.

When this convention must be ratified, &c.

ART. XIII. The present convention shall be ratified in good and due form, and the ratifications shall be exchanged in six months from the date of the signature of the ministers plenipotentiary, or sooner, if possible.

IN FAITH OF WHICH, the respective Ministers plenipotentiary have signed the above articles both in the French and English languages, declaring, nevertheless, that the present treaty has been originally agreed on and written in the French language; to which they have hereunto affixed their seals.

Done at Paris, the tenth of Floreal, eleventh year of the French Republic, 30th April, 1803.

(Signed) ROBERT R. LIVINGSTON, (L. S.)
JAMES MONROE, (L. S.)
BARBÉ MARBOIS. (L. S.)

TREATY WITH GREAT BRITAIN,

IN REGARD TO LIMITS WESTWARD OF THE ROCKY MOUNTAINS.

June 15, 1846.

Ratifications exchanged at London, July 17, 1846.

Proclamation, Aug. 5, 1846.

Preamble.

Negotiators.

THE United States of America and her Majesty the Queen of the United Kingdom of Great Britain and Ireland, deeming it to be desirable for the future welfare of both countries that the state of doubt and uncertainty which has hitherto prevailed respecting the sovereignty and government of the territory on the northwest coast of America, lying westward of the Rocky or Stony Mountains, should be finally terminated by an amicable compromise of the rights mutually asserted by the two parties over the said territory, have respectively named plenipotentiaries to treat and agree concerning the terms of such settlement — that is to say: the President of the United States of America has, on his part, furnished with full powers James Buchanan, Secretary of State of the United States, and her Majesty the Queen of the United Kingdom of Great Britain and Ireland has, on her part, appointed the Right Honorable Richard Pakenham, a member of her Majesty's Most Honorable Privy Council, and her Majesty's Envoy Extraordinary and Minister Plenipotentiary to the United States; who, after having communicated to each other their respective full powers, found in good and due form, have agreed upon and concluded the following articles: —

ARTICLE I.

Boundary line between the U. S. and British possessions west of Rocky Mountains.

From the point on the forty-ninth parallel of north latitude, where the boundary laid down in existing treaties and conventions between the United States and Great Britain terminates, the line of boundary between the territories of the United States and those of her Britannic Majesty shall be continued westward along the said forty-ninth parallel of north latitude to the middle of the channel which separates the continent from Vancouver's Island, and thence southerly through the middle of the said channel, and of Fuca's Straits, to the Pacific Ocean: *Provided, however*, That the navigation of the whole of the said channel and straits, south of the forty-ninth parallel of north latitude, remain free and open to both parties.

Navigation of the channel between Vancouver's Island and the continent, and of Fuca's Straits, to be free and open to both parties.

ARTICLE II.

Navigation of part of Columbia River to be free and open to Hudson's Bay Co. and British subjects trading with them, &c.

From the point at which the forty-ninth parallel of north latitude shall be found to intersect the great northern branch of the Columbia River, the navigation of the said branch shall be free and open to the Hudson's Bay Company, and to all British subjects trading with the same, to the point where the said branch meets the main stream of the Columbia, and thence down the said main stream to the ocean, with free access into and through the said river or rivers, it being understood that all the usual portages along the line thus described shall, in like manner, be free and open. In navigating the said river or rivers, British subjects, with their goods and produce, shall be treated on the same footing as citizens of the United States; it being, however, always understood that nothing in this article shall be construed as preventing, or intended to prevent, the government of the United States from making any regulations respecting the navigation of the said river or rivers not inconsistent with the present treaty.

Not to be construed to prevent the U. S. from making regulations for navigation of said river.

ARTICLE III.

Possessory rights of the Hudson's Bay Company and all British subjects to be respected.

In the future appropriation of the territory south of the forty-ninth parallel of north latitude, as provided in the first article of this treaty, the possessory rights of the Hudson's Bay Company, and of all British subjects who may be already in the occupation of land or other property lawfully acquired within the said territory, shall be respected.

ARTICLE IV.

Farms, &c., belonging to Puget's Sound Agricultural Co. to be confirmed to them; but, under certain circumstances, may be transferred to the U. S. at a proper valuation.

The farms, lands, and other property of every description, belonging to the Puget's Sound Agricultural Company, on the north side of the Columbia River, shall be confirmed to the said company. In case, however, the situation of those farms and lands should be considered by the United States to be of public and political importance, and the United States government should signify a desire to obtain possession of the whole, or of any part thereof, the property so required shall be transferred to the said government, at a proper valuation, to be agreed upon between the parties.

ARTICLE V.

Treaty to be ratified, and ratifications exchanged, within six months from date.

The present treaty shall be ratified by the President of the United States, by and with the advice and consent of the Senate thereof, and by her Britannic Majesty; and the ratifications shall be exchanged at London, at the expiration of six months from the date hereof, or sooner, if possible.

In witness whereof, the respective Plenipotentiaries have signed the same, and have affixed thereto the seals of their arms.

Done at Washington, the fifteenth day of June, in the year of our Lord one thousand eight hundred and forty-six.

JAMES BUCHANAN. [L. S.]
RICHARD PAKENHAM. [L. S.]

Finding No. 2

Creation of Plaintiffs' Reservation Out of Lands Ceded to the United States

By the Treaty of Hell Gate, 12 Stat. 975 (1855) Defendant acquired from the Plaintiffs all of their right, title and interest in all of the lands formerly occupied and claimed by the Plaintiffs in what are now the states of Montana and Idaho, and, in exchange therefor, and for other consideration, reserved from the lands in question a large tract "for the exclusive use and benefit" of the Plaintiffs.[1/] Since pursuant to the Commerce and Property Clauses of its Federal Constitution Defendant had the power to dispose of all the water flowing on the lands, and since the intent of the Treaty of Hell Gate creating the Reservation was to provide the Plaintiffs with productive land for cultivation, the express reservation of the lands worked an implied reservation in favor of those lands of sufficient water and water power rights in the streams and lakes on or bordering on the Reservation to irrigate all of the irrigable lands on the Reservaiton.[2/] Water and water power rights in excess of the paramount rights so reserved for the benefit of irrigable Reservation lands were unencumbered by such reservation[3/] and, to the extent not reserved to or appropriated by others under applicable State or other laws, remained subject to the Defendant's plenary powers of appropriation and disposition.[4/] These excess waters

and water power rights included a substantial portion of the navigable waters of the Flathead (or Pend d'Oreille) River and of Flathead Lake.

Footnotes to Finding No. 2

1/ Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana v. United States, Commissioner's Report to the Court re paragraph 10 of the Petition (Opening of the Reservation) dated May 28, 1970, pp. 20-22 (hereinafter referred to as "Commissioner's Paragraph 10 Report"). The Commissioner's Paragraph 10 Report accurately summarizes pertinent facts.

2/ Winters v. United States, 207 U.S. 564 (1908); Arizona v. California, 373 U.S. 546 (1963); United States v. McIntyre, 101 F. 2d 650 (9th Cir. 1939).

3/ United States v. Ahtanum Irrigation District, 236 F. 2d 321, 327 (9th Cir., 1956); Conrad Investment Co. v. United States, 161 F. 829 (9th Cir., 1908).

4/ Arizona v. California, 373 U.S. 546, 599 (1963); United States v. Grand River Dam Authority, 363 U.S. 229, 233 (1960).

Finding No. 3

Acts of April 23, 1904, 33 Stat. 302

By the Act of April 23, 1904, 33 Stat. 302,[1] Congress directed a survey of Reservation lands and allotment of the same to all persons having tribal relations with Plaintiffs, in accordance with the allotment laws of the United States. These allotment laws provided for allotment of reservation lands in severalty to individual Indians, and, after a trust period (usually 25 years), the patenting of the allotted land to the individual free of all tribal or other claim or encumbrance. 25 U.S.C.A. 348, Act of February 8, 1887, 24 Stat. 388, §5. Subsequent to such allotments the unallotted or other lands were to be classified and appraised and thereafter, with certain exceptions, disposed of under the general provision of the homestead, mineral and town-site laws of the United States. Agricultural and grazing lands were to be opened to entry and settlement under the homestead laws by Presidential proclamation. The homestead laws imposed a duty of cultivation on the homesteader.[2] The appraised price of homestead lands was to be paid one-third in cash at entry, and the balance in five annual installments beginning one year after entry, with right of commutation. After five years unentered lands were to be sold to the highest bidder for cash, at not less than the appraised price. One-half of the net proceeds of the lands disposed of were to be expended for irrigation ditches on the Reservation, and for assistance to the Indians in farming and stock raising and for their education and civilization. The remaining one-half was to be paid to the Indians or expended for their account as they might direct.[3]

Footnotes to Finding No. 3

1/ Pertinent provisions of the Act of April 23, 1904 are accurately summarized in the Commissioner's Paragraph 10 Report, pp. 22-25.

2/ Department of Interior Notice dated April 10, 1910, Plaintiffs' Exhibit 18, p. 1.

3/ Plaintiffs state in their footnote 1 to proposed Finding No. 2 that the amendment to the 1904 Act enacted as the Act of June 21, 1906, 34 Stat. 325, and quoted in part in Plaintiffs' Requested Finding No. 3, is pertinent to issues presented. The quoted amendment added Section 19 to the 1904 Act as follows:

> "Section 19. That nothing in this Act shall be construed to deprive any of said Indians, or said persons or corporations to whom the use of the land is granted by this Act, of the use of water appropriated and used by them for the necessary irrigation of their lands or for domestic use or any ditches, dams, flumes, reservoirs constructed and used by them in the appropriation and use of said water."

In United States v. McIntyre, 101 F. 2d 650 (9th Cir. 1939) it was expressly held that this 1906 provision was a savings clause enacted to secure irrigation water rights to Indian and non-Indian owners of Reservation land under principles of appropriation and use, just in case what are now called Winters doctrine water rights for all irrigable lands on the Reservation were rejected by the Supreme Court. Since the Supreme Court upheld Winters doctrine rights (which do not depend on appropriation and use) in the 1908 Winters decision, the savings clause was rendered entirely without effort. 101 F. 2d at 652.

Defendant therefore contends that the 1906 amendment is not pertinent to issues presented herein, except, perhaps, to show that Congress considered Winters doctrine rights to be appurtenant to all irrigable Reservation lands, regardless of whether or how Indian title was extenguished. See Defendant's Requested Finding No. .

Finding No. 4

Investigation of Development of Water Power for Public Use

While survey, allotment and appraisal under the 1904 Act proceeded, the Reclamation Service, at the request of the Office of Indian Affairs, investigated the feasibility of irrigation the Reservation lands. An elaborate study (Report of Robert S. Stockton, dated November 12, 1907; Plaintiffs' Exhibit 16), including detailed investigation of the water power of the Flathead River, was made, and it was concluded that development of 21,000 horsepower of electric power for irrigation pumping would be necessary to irrigate a substantial portion of the irrigable lands. This 1907 report included the following statement:

> "The power at the falls of the Pend d'Oreille has already been reserved by the Government in pursuance of the wise policy of public use of this great power in ways that are already sufficiently determined to more than justify the policy." Stockton Report, p. 45; Plaintiff's Exhibit 16 (Emphasis added).

Finding No. 5

Flathead Irrigation Project

The Stockton Report prompted Congress to appropriate $50,000.00, reimbursable out of proceeds from Tribal land sales, for preliminary surveys, plans and estimates for an irrigation system for the irrigable allotted and unallotted Reservation lands. Act of April 30, 1908, 35 Stat. 70, 82.[1/] Congress also amended the 1904 Act to incorporate therein the developing scheme for an irrigation project on the Reservation, and to allocate water rights to each parcel of the irrigable land in an amount required to irrigate such lands. Act of May 29, 1908, 35 Stat. 444, 448-450.[2/] Allotted lands were to receive irrigation water from project ditches free of construction charges until such time as the allotted land was sold by the allottee, but the right to receive water from project ditches was not to attach permanently to homestead lands or purchased allotments served by the project until payment by the homesteader or purchaser of apportioned construction costs accruing since entry, in the case of the homesteader, or since the expiration after trust period or the date of purchase, whichever was later, in the case of purchasers, in fifteen annual installments.[3/] All lands including Indian allotments were to bear their proportionate share of operating and maintenance charges. Upon payment of construction costs allocated to a major portion of homestead lands, the irrigation project would become the property of the landowners it served.

The Act of May 29, 1908 also authorized the Secretary of the Interior to use proceeds from the disposition of Reservation lands to finance project construction costs pending reimbursement of the Tribal funds by settlers in the fifteen annual installments mentioned above.

This temporary use of Tribal funds was thought to be amply compensated by the waiver of construction costs for Indian allottees. Subsequently Congress recognized that while the furnishing of irrigation water free of construction charges would benefit members of the Tribes as allottees, it would not benefit the Tribes as such; hence, by the Act of May 18, 1916, 39 Stat. 123, 140-141, it was provided that Tribal funds used for construction costs for the irrigation project should be returned to the Tribes and a method for assessing proportionate construction costs against allotted lands was established.

Footnotes to Finding No. 5

1/ The pertinent provisions of the Act of April 30, 1908, are set out in footnote 2 to Plaintiff's Finding No. 4, Plaintiffs' Proposed Findings of Fact of Rehearing, Vol. 1, p. 24.

2/ Pertinent provisions of the Act of May 29, 1908, are set out in paragraph C. of Plaintiffs' Proposed Finding No. 4, Plaintiffs' Proposed Findings of Fact on Rehearing, Vol. 1, pp. 19-23.

4/ ~~3/~~ The language of the Act of May 29, 1908, giving water rights to the lands allotted to Indians was as follows:

> "The land irrigable under the systems herein provided, which has been allocated to Indians in severalty, shall be deemed to have a right to so much water as may be required to irrigate such lands without cost to the Indians for construction of such irrigation systems. The purchase of any Indian allotment, purchased prior to the expiration of the trust period thereon, shall be exempt from any and all charges for construction of the irrigation system incurred up to the time of purchase. All lands allotted to the Indians shall bear them pro rata shares of the cost of the operation and maintenance of the system under which they lie."

It has been held that the above provision conferred rights to so much water as may be required "for irrigation on all irrigable land whether allotted or unallotted". United States v. McIntyre, 101, F. 2d 650 (9th Cir. 1939); but see United States v. Alexander, 131, F. 2d 359 (9th Cir. 1942), which may be read as leaving open the question of relative priorities of water rights of allotted and unallotted lands. In any event, in times of scarcity, water may be apportioned by the Secretary of the Interior among all lands, including both allotted and unallotted lands, whether owned by Indians or non-Indians, under the "just and equal distribution" provisions of 23 U.S.C.A. §381. United States v. McIntyre, 101, F. 2d 650 (9th Cir. 1939); United States v. Alexander, 131, F. 2d 359 (9th Cir., 1942). Recent case authority upholds the Secretary's broad authority to supply water to Reservation land acquired by a non-Indian from an allottee or from the Government before supplying water to all Reservation land in Indian ownership. Scholder v. United States, 298 F. Supp., 1282 (S.D. Cal. 1969).

3/ The Act of May 29, 1908 provided in pertinent part as follows:

> "'A failure to make any two payments when due shall render the entry and water-right application subject to cancellation, with the forfeiture of all rights under this Act, as well as of any moneys paid thereon. The funds arising hereunder shall be paid into the Treasury of the United States and be added to the proceeds derived from the sale of the lands. No right to the use of water for lands in private ownership shall be sold to any landowner unless he be an actual bona fide resident on such land or occupant thereof residing in the neighborhood of such land, and no such right shall permanently attach until all payments thereafter are made.
>
> "'All applicants for water rights under the systems constructed in pursuance of this Act shall be required to pay such annual charges for operation and maintenance as shall be fixed by the Secretary of the Interior, and the failure to pay such charges when due shall render the water-right application and the entry subject to cancellation, with the forfeiture of all rights under this Act as well as of any moneys already paid thereon.

A similar security interest in water rights, securing repayment of construction costs and payment of operation and maintenance charges, was retained by the United States pursuant to the General Reclamation Act of June 17, 1902, 32 Stat. 388. In Ickes v. Fox, 300 U.S. 82 (1937) the Supreme Court held that the landowners on a reclamation project who had paid all such charges which were due were the owners of the water apportioned and supplied to them through the Government's irrigation works. Thus, in a suit by such landowners to enforce prior regulations of the Secretary of Interior regarding charges, the United States was not a necessary party defendant.

Thus the Winters doctrine water rights, or the water rights otherwise reserved or appropriated for the irrigation project actually belonged to the landowners on the project. It was recognized in Sheer v. Moody, 148 F. 2d 327, 331-332 (D. Mont. 1931) that the enjoyment of Winters doctrine rights may be conditioned by Congress upon a requirement for payment of

construction, operation and maintenance charges associated with project works supplied and owned by the United States.

Finding No. 6

Congressional Reservation of Tribal Power Site for Benefit of Irrigation Project

By the Act of March 3, 1909, 35 Stat. 781, Congress Appropriated $250,000.00 for construction and for surveys, plans and estimates relating to the irrigation system,[1] and also authorized and directed the Secretary of the Interior to reserve from sale or disposition under the homestead and other laws, valuable reservoir and power sites on the Reservation and to report said site reservations to Congress.[2] Pursuant thereto the Secretary promptly reserved numerous reservoir sites to be used for water storage in connection with the irrigation system, and five power sites along the Flathead River, including (as Site No. 1) what is now known as the Kerr Dam site.[3] The fact that the authorization to reserve the five power sites, including Site No. 1, was a part of legislation authorizing funds for the irrigation project, and reservation of reservoirs to store irrigation water, together with the then prevailing legislation pattern of reserving power sites to develop power to benefit nearby irrigation projects,[4] and the express language of subsequent legislation,[5] indicate beyond any doubt that the reservation of the power site was intended by Congress to benefit the irrigation project. The reservation of the sites not only withheld the land from entry and disposition but also reserved or appropriated to the United States for the benefit of the irrigation project the water rights necessary to develop the hydroelectric project later erected there.[6]

Footnotes to Finding No. 6

1/ The purpose of the appropriation of $250,000.00 was stated as follows:

> "For construction of irrigation systems to irrigate the allotted lands of the Flathead Reservation of Montana and the unallotted lands to be disposed of under [the Act of April 23, 1904], including necessary surveys, plans and estimates...", Act of March 3, 1909, 35 Stat. 781.

2/ Section 22 of the Act of March 3, 1909, 35 Stat. 781, provided:

> "That the Secretary of the Interior be, and is hereby, authorized, in his discretion, to reserve from location, entry, sale, or other appropriation all lands within said Flathead Indian Reservation chiefly valuable for power sites or reservoir sites, and he shall report to Congress such reservations."

3/ The Secretary's withdrawals pursuant to Section 22 of the Act of March 3, 1909, 35 Stat. 781, were reported to the Senate on April 23, 1909, 44 Cong. Rec. 1488 (1909), reprinted in Sen. Doc. No. 19, 61st Cong., 1st Sess., and to the House on April 26, 1909, 44 Cong. Rec. 1944. See Plaintiffs' Exhibit 1 giving legal descriptions of the lands withdrawn. Plaintiffs' Exhibit 58 gives the general location of the five power sites withdrawn.

Congress later provided for alternate or "lieu" allotments for individual allottees where allotments lay within withdrawn reservoir on power sites. Act of April 12, 1910, 35 Stat. 296, 297.

The numerous reservoir sites withdrawnby this Act of March 3, 1909, 35 Stat. 781, 796, for use in connection with this irrigation system were and are now used by the irrigation project. The Tribes were fully compensated for the use of their reservoir sites by the Act of May 25, 1948, ch. 340, 62 Stat. 269, 272. See Confederated Salish and Kootenai Tribes v. United States, 181 Ct. Cl. 739, 749-752. Section 2(g) of the Act of May 25, 1948, recognizes, however, the "water rights and other grants" of the irrigation project to the licensee of Site No. 1. See Finding No. , infra.

4/ Soon after enacting the special withdrawal and "lieu" allotment provisions for the Flathead Reservation, Congress enacted general legislation employing the same procedure for ~~individuals~~ of power sites. These provisions indicate expressly that the withdrawals were intended to benefit irrigation projects. The provisions, as amended, are now codified as 43 U.S.C.A. 150 and 25 U.S.C.A. 352. The general withdrawal Act is as follows:

reservation

> "The Secretary of the Interior is authorized, in his discretion, to reserve from location, entry, sale, allotment, or other appropriation any lands within any Indian reservation valuable for power or reservoir sites, or which may be necessary for use in connection with any irrigation project authorized by Congress: Provided, That if no irrigation project shall be authorized prior to the opening of any Indian reservation containing such power or reservoir sites the Secretary of the Interior may, in his discretion, reserve such sites pending future legislation by Congress for their disposition." Act of June 25, 1910, c. 431, §13,36 Stat. 858; as amended by the Act of June 29, 1960, Pub.L. 86-533, §1(13), 74 Stat. 248.

The 1960 amendment to the Act of June 25, 1910, Pub.L. 86-533 simply eliminated a provision which required the Secretary to report to Congress all reservations made.

The "lieu" allotment provision is as follows:

> "The Secretary of the Interior, after notice and hearing, is authorized to cancel trust patents issued to Indian allottees for allotments within any power or reservoir site and for allotments or such portions of allotments as are located upon or include lands set aside, reserved, or required within any Indian reservation for irrigation purposes under authority of Congress: Provided, That any Indian allottee whose allotment shall be so canceled shall be reimbursed for all improvements on his canceled allotment, out of any moneys available for the construction of the irrigation project for which the said power or reservoir site may be set aside: Provided further, That any Indian allottee whose allotment, or part thereof, is so canceled shall be allotted land of equal value within the area subject to irrigation by any such project. Act of June 25, 1910, c. 431, §14,36 Stat. 859.

Exhibit 11 to the Federal Power Commission Hearing held in 1929 on the licensing of Site No. 1, was a letter from the Secretary of the Interior transmitting a draft of what became the Act of June 25, 1910 (authorizing withdrawal of power sites on Indian reservations for the benefit of irrigation projects). Excerpts from the letter, included in Defendants' Exhibit 13 B-2, p. 25, are as follows:

> "Department of the Interior,
> Washington, February 23, 1910.
>
> SIR: By direction of the President, I have the honor to transmit a rough draft of a bill authorizing the Secretary of the Interior to set aside and reserve lands within Indian reservations chiefly valuable as power and reservoir sites, before the surplus lands are opened to settlement and entry; to authorize the cancellation of patents issued for allotments within such power and reservoir sites and reimburse the Indian allotees for improvements on such canceled allotments; and to reallot such Indian allottees on other lands within the irrigable areas of such Indian reservations.
>
> "It is found that on many of the Indian reservations there

are valuable power sites and reservoir sites which this department should have authority to set aside and reserve for use in connection with irrigating projects now being constructed by the Government or which may be hereafter authorized by the Congress.

* * *

"It is believed that where the irrigation of a large area of land depends on the use of a power or reservoir site within which are patented Indian allotments the department should be authorized to cancel such allotments, giving the allottee lands within the irrigable area in lieu of his canceled allotment and pay him for any improvements thereon.

* * *

"By the act of March 3, 1909 (35Stat. L., 781), authority was conferred on the department to set aside and reserve power and reservoir sites on the Flathead Reservation in Montana for use in connection with irrigation projects under construction there, but no authority exists to cancel the trust patents issued for allotments within these sites, except on the voluntary relinquishments of the allottees. The department has been unable to procure relinquishments from all of these allottees, and as the reservation is to be opened to entry on April 1, 1910, the necessity for the authority asked for is apparent and this department would be glad to see legislation similar to that contained in the inclosed draft enacted into law.

Very respectfully,
R. A. BALLINGER, Secretary.

The Speaker of the House of Representatives."

(Here follows draft of proposed bill which was enacted into law June 25, 1910, 36 Stat. 858, U. S. Code, Title 43, Sec. 148, Title 25, Sec. 3521.)

5/ Both the Act of March 7, 1928, 45 Stat. 200, 212, and the Act of May 25, 1948, ch. 340, 62 Stat. 269, expressly recognized Congressional reservation or appropriation of water rights for the benefit of the irrigation project. See Findings No. 14 and 25, infra.

6/ There can be no doubt as to the power of Congress to reserve navigable waters for the intended purpose. Arizona v. California, 373 U.S. 546, 599 (1963); United States v. Grand River Dam Authority, 363 U.S. 229, 233 (1960). Similarly, it is established that a power site reservation constitutes a reservation of water rights needed for power development Federal Power Commission v. Oregon, 349 U.S. 435 (1955) (Pelton Dam case).

Finding No. 7

Water Rights Filings by United States Pursuant to Montana Statute Authorizing Same as Notice of Intent to Appropriate Water Rights Claimed by the United States for the Benefit of the Irrigation Project

Beginning at least as early as January 1910 (and probably as early as 1907; See Stockton Report, p. 45, quoted supra) and continuing through at least December, 1927, the United States Reclamation Service made water right filings on the Flathead River at Site No. 1 appropriating water for power and other purposes under a special statute enacted by the Montana legislature to permit the United States to give legal notice of its claim of legal right to the use, possession and control of waters in Montana.[1/] A typical filing was that of March 29, 1910, the first four paragraphs of which were as follows:

"NOTICE OF APPROPRIATION"

THE UNITED STATES OF AMERICA,)
STATE OF MONTANA) ss.
County of Missoula)

TO ALL WHOM THESE PRESENTS MAY CONCERN:

BE IT KNOWN, That the United States of America, under and by virtue of an act of the Legislative Assembly of the State of Montana, entitled "An Act authorizing the Government of the United States to appropriate the water of the Streams in the State of Montana, subject to certain restrictions," approved February 27, 1905, and acting by and through H. N. Savage, Supervising Engineer, thereunto duly authorized by the Secretary of the Interior of the said United States in that behalf, does hereby publish and declare as a legal notice to all the world, as follows, to wit:

I. That the said United States has a legal right to the use, possession and control of and claims 100,000 cubic feed per second of the waters of the Flathead River in said County and State for irrigating and other purposes.

II. That the purpose for which said water is claimed and the place of intended use is for the purpose of irrigating 50,000 acres of land on the Flathead Indian Reservation for domestic uses, and for developing power for pumping and other purposes.

III. That the means of diversion, with the size of flume, ditch, pipe or acqueduct, by which it is intended to divert the said waters is as follows: A dam across the river near this notice and canals and tunnels leading therefrom to a power house below dam, said conduits to have a capacity of ten thousand second feet, also suitable hydraulic and electric machinery to develop power and pump water at this point and by electric transmission lines at other points, together with pumps, pipes, flumes, reservoirs and canals to raise, convey and distribute water, over the lands described; also suitable works as above described at otherpoints on this stream within the Flathead Indian Reservation for the purposes of irrigation and development of power for other purposes. The lands to be irrigated lie in tps. 17 and 19 N., Rs. 19 to 24 W., M.P.M., the development of power is contemplated by turbines placed as above described and at other suitable points within the reservation.

IV. That the said United States of America is the appropriator of said water, and said appropriation was made on the 29th day of March, A.D., 1910, and said appropriation and the diversion of said waters is to be effected and consumated by means of said dams, canals, tunnels, pumps, pipes, flumes, reservoirs, and other hydraulic and electric machiners." Defendant's Exhibit 13-B-2, p. 22-23" (Emphasis added).

Footnotes to Finding No. 7

1/ Defendants' Exhibit 13-B-3, pp. 21-25 (Extracts of evidence presented at the 1929 hearings before the Federal Power Commission, included in the brief of the [illegible] Flathead Irrigation District). See pp. _____, Defendants' Exhibit 13-D-3.

While there may have been doubt about the matter in the period of these filings, it is now quite clear that the Act of Congress of March 3, 1909, 35 Stat. 781, was sufficient to accomplish the intended reservation without the necessity of complying with state appropriation statutes. Federal Power Commission v. Oregon, 349 U.S. 435 (1955); United States v. Grand River Dam Authority, 363 U.S. 229 (1960); Arizona v. California, 373 U. S. 546 (1963).

Finding No. 8

Actual Work Toward Development of Power for the Irrigation Project, Including Construction of the Newell Tunnel

Subsequent to the Stockton Report and the appropriation of March 3, 1909, the Secretary of the Interior carried forward surveys and plans necessary to the power development. He recommended that power and reservoir sites be reserved, resulting in enactment of the Act of March 3, 1909 authorizing the same (See Finding No. 6), and located Indian allotments within the reserved areas and arranged for approval of improvements thereon. Excavations were made to test pump site foundations and pumping sites were located.[1/] Also beginning in 1909 the so-called Newell Tunnel was driven some 1700 feet through the solid rock on the inside of the bend in the river at Site No. 1. This tunnel was to be used to divert the river so that a power dam could be constructed at the bend.[2/] Prior to 1914, the Newell tunnel was completed except for a break through into the river at upstream end.[3/]

All funds expended in the above endeavors were from amounts appropriated for the irrigation project, which were to be reimbursed from proceeds of the sale of Reservation lands.[4/] The progress of the work on the power development for the irrigation project was regularly reported to Congress each year during this period, and the expenditure of irrigation project funds for the purpose was thus tacitly approved.[5/]

Footnotes to Finding No. 8

1/ Defendants' Exhibit 13-B-2, pp. 16-20 (Extracts from the evidence at the F.P.C. hearing in 1929 contained in the Flathead Irrigation District's Brief as Intervenor).

2/ Id., p. 20; 69 Cong. Rec. 2482-2484 (1928) (Memorandum of Walter L. Pope, incorporated into record by Senator Walsh of Montana.)

3/ Defendant's Exhibit 13-B-2, pp. 29-30 (Extracts from the evidence at the 1929 F.P.C. hearing contained in the brief of the Flathead Irrigation District,

4/ The appropriation acts during the period were the Act of March 3, 1909, 35 Stat. 781 (quoted in note 3 to Finding No. 6, supra) and similarly worded provisions in the Act of April 4, 1910, 36 Stat. 267, 269; Act of March 3, 1911, 36 Stat. 1058, 1066; Act of March 3, 1911, 36 Stat. 1058, 1066; Act of August 24, 1912, 37 Stat. 518, 526; Act of June 30, 1913, 38 Stat. 77, 90; Act of August 1, 1914, 38 Stat. 589, 593; Act of May 18, 1916, 39 Stat. 123, 139.

5/ Defendants' Exhibit 13-B-2, pp. 26-28 (Extracts from the evidence at the F.P.C. hearing in 1929 contained in the Flathead Irrigation District's Brief as Intervenor).

Finding No. 9

Opening of Reservation under Promise to Irrigate All Agricultural Land "As Far As Possible"

On May 22, 1909, the President proclaimed the opening of the Reservation to homestead entry.[1] The Schedule of Lands published by the Department of Interior on April 10, 1910 in advance of the actual opening of the Reservation to entry on May 2, 1910, informed prospective homestead entrymen that the United States would "as far as possible" provide irrigation water for all of the agricultural (irrigable) lands, but that irrigation of all such lands, or the time when irrigation would be available, was not guaranteed.[2] In consequence of the Government's activities and publicity connected with the irrigation project and related power development, the homesteaders who settled on the Reservation understood that water would eventually be delivered to ~~his~~ their land.[3]

Entry which actually began on May 2, 1910, continued through 1935.[4]

The compensation awarded the Plaintiffs for homesteaded land pursuant to paragraph 10 of the Petition (Opening of the Reservation)[5] includes value attributed to the promise of the United States to provide irrigation water as far as

possible, since the stipulated valuation date for purposes of paragraph 10 was January 1, 1912, and Plaintiffs' expert testified (in the Paragraph 10 proceedings) that market values for reservation land fell off sharply in 1913 and 1914 when it became known that there would be more delay than previously anticipated in providing irrigation water.[6/]

Footnotes to Finding No. 9

1/ Proclamation of May 22, 1909, 36 Stat. 2494.

2/ Department of Interior Notice dated April 10, 1910, Plaintiffs' Exhibit 18, p. 1.

3/ See, e.g., the testimony at the 1929 hearings of Congressman Louis C. Crampton Chairman of the House Appropriation Subcommittee that originated the bill which became the Act of March 7, 1928. Defendants' Exhibit 13-B-J, pp. 4298 et seq. Mr. Crampton said that the Act of March 7, 1928, was intended to assure protection of the Irrigation Project's water rights, as well as to protect the Indian's interest in their dam site. He then noted that recognition of the water power rights of the irrigation project landowners was long overdue.

See also H. Doc. 1215, 63d Cong., 3d Sess. 36; a 1914 Report of a Commission to the Secretary of the Interior on water rights on the Reservation.

> "One thing that impressed me when I was there in 1925 was the splendid spirit of those settlers who had been hanging on there like grim death, with disappointment after disappointment, failure to give them what had been promised them in the way of water supply; and they had good spirit left. They still did not stick around kicking about the government. They simply said, "If you will go ahead, we will make good on this project." Defendant's Exhibit 13-B-3, p. 4303.

4/ Commissioner's Report re Paragraph 10, p. 18 and note 40.

5/ Slip Opinion of the Court of Claims re Paragraph 10, January 22, 1971.

6/ Transcript of Paragraph 10 hearing, pp. 216-217.

Finding No. 10

Pursuant to the doctrine of Winters v. United States, 207 U.S. 564 (1908) and the express provisions of the 1908 and other amendments to the Act of April 23, 1904, Indian Allottees and homestead entrymen who settled on the Reservation between 1910 and 1935 and successors in interest of such allottees or settlers, acquired, in addition to their lands, water rights sufficient to irrigate their lands. These rights inhered in and became appurtenant to the lands. They included the right to use the water of the Flathead River for development of electric power to the extent necessary to achieve irrigation of the lands to which they were appurtenant. 1/

Footnote to Finding No. 10

1/ The Department of Interior has ruled as follows:

> "The waters of the Flathead Indian Reservation are . . . therefore inseparably appurtenant to the allotted and unallotted lands of the Reservation, and were, in substance, appropriated to these lands when the Reservation was established, and its control must rest in the United States Government." Quoted at p. 18 of a Department of Interior Memorandum dated April 28, 1967, by William H. Veeder, Water Conservation and Utilization Specialist. The quotation is apparently taken from various orders of the Department issued in 1921, including a letter dated May 24, 1921 [40 I.D. 57?].

Finding No. 11

Act of May 18, 1916, 39 Stat. 123, 141-142, Appropriating Additional Funds for the Irrigation Project and Charging all Accrued and Future Costs of Construction of the Irrigation Project, including the Costs Incurred in Connection with Construction of the Newell Tunnel and the Power Project, to the Indian and Non-Indian Landowners on the Irrigation Project

In the appropriation Act of August 1, 1914, 38 Stat. 589, 593, Congress provided that a report showing the status of water rights on the Reservation should be submitted in December, 1914. The report (H. Doc. 1215, 63d Cong., 3d Sess.) referred to the fact that the irrigation project contemplated and required the development of power, and called attention to the fact that funds of the Tribes, the proceeds of the sale of Reservation lands, had been set aside and used for partial payment of the costs of the irrigation project. The report recommended that costs of the irrigation project should instead be charged to and made a lien against the lands irrigated by the project.[1/]

Congress also provided in the Act of August 1, 1914, that no further Tribal funds should be used to reimburse costs of the irrigation project, and that amounts previously covered into the Treasury for partial reimbursement of accrued construction costs of the irrigation project should be restored to the

Tribes. In consequence of this, the Tribes were in fact repaid $440,217.78 in 1916, and a balance of $64,570.56 found to be still due on an accounting pursuant to the Act of May 25, 1948, 62 Stat. 269, 72.[2/]

By the Act of May 18, 1916, 39 Stat. 123, 141-142,[3/] Congress appropriated an additional $750,000.00 for construction of the irrigation project, and provided that this amount and all other amounts theretofore or thereafter expended for the irrigation project should be charged against all the lands irrigated by the project and made reimbursable by the owners, including Indian allottees,[4/] of the irrigated lands on a pro rata basis in not more than fifteen annual installments. The amounts thus made reimbursable by the project landowners included, of course, all amounts expended for construction of the Newell Tunnel, as well as other funds spent in connection with the contemplated development of hydroelectric power for use by the irrigation project.[5/]

Footnotes to Finding No. 11

1/ Defendant's Exhibit 13-B-13, pp. 8-9; H. Doc. 1215, 63d Cong., 3d Sess.

2/ See Plaintiffs' Proposed Findings of Fact on Rehearing, p. 40 (Note 5 to Proposed Finding No. 9); Commissioner's Report Re Paragraph 10, p. 26 (Finding 12(e)).

The Act of August 1, 1914 also contained a provision prescribing that Winters doctrine rights appurtenant to land still in Indian Title (allotted and other lands not disposed of pursuant ot the 1904 Act as amended) would remain in the United States for the benefit of such lands until Indian title was extinguished.

3/ The pertinent provisions of the Act of May 18, 1916, 39 Stat. 123, 141-142, are set out in footnote 1 to the Tribes Proposed Finding No. 9, Plaintiffs' Proposed Findings of Fact on Rehearing, Vol. I, pp. 37-39.

4/ It was held in Sheer v. Moody, 48 F. 2d 327, 331-332 (D. Mont. 1931) that the 1916 Act was ineffective to the extent that it purported to revoke the waiver of construction charges for Indian allottees during the trust period, and for purchasers from allottees during the trust period up to time of purchase.

5/ See e.g. Plaintiffs' Exhibit 25, p. 22.

Finding No. 12

Federal Water Power Act of June 10, 1920, 41 Stat. 1063: Annual Charges for Use of Tribal and/or Government Property, and Other Provisions

By enactment of the Federal Water Power Act, Act of June 10, 1920, 41 Stat. 1063, Congress provided that licenses issued under the act would be conditioned on payment of certain charges, and that the charges would be distributed in a certain manner. The charges to be collected were provided for in paragraphs (e) and (f) of section 10 of the act in the following terms:

> (e) That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the commission for the purpose of reimbursing the United States for the costs of the administration of this Act; for recompensing it for the use, occupancy, and enjoyment of its lands or other property; and for the expropriation to the Government of excessive profits until the respective States shall make provision for preventing excessive profits or for the expropriation thereof to themselves, or until the period of amortization as herein provided is reached, and in fixing such charges the commission shall seek to avoid increasing the price to the consumers of power by such charges; and the charges for the expropriation of excessive profits may be adjusted from time to time by the commission as conditions may require: Provided, That when licenses are issued involving the use of Government dams or other structures owned by the United States or tribal lands embraced within Indian Reservations the commission shall fix a reasonable annual charge for the use thereof, and such charges may be readjusted at the end of twenty years after the beginning of operations and at periods of not less than ten years thereafter in a manner to be described in each license: * * *.
>
> (f) That whenever any licensee hereunder is directly benefited by the construction work of another licensee, a permittee, or of the United States of a storage reservoir or other headwater improvement, the commission shall require as a condition of the license that the licensee so benefited shall reimburse the owner of such reservoir or other improvements for such part of the annual charges for interest, maintenance, and depreciation thereon as the commission may deem equitable. The proportion of such charges to

be paid by any licensee shall be determined by the commission.

Whenever such reservoir or other improvement is constructed by the United States the commission shall assess similar charges against any licensee directly benefited thereby, and any amount so assessed shall be paid into the Treasury of the United States, to be reserved and appropriated as a part of the special fund for headwater improvements as provided in section 17 hereof." The provisions of the act concerning distribution of charges thus collected were set forth in section 17 which read:

"That all proceeds from any Indian reservation shall be placed to the credit of the Indians of such reservation. All other charges arising from licenses hereunder shall be paid into the Treasure of the United States, subject to the following distribution: Twelve and one-half per centum thereof is hereby appropriated to be paid into the Treasury of the United States and credited to "Miscellaneous receipts"; 50 per centum of the charges arising from licenses hereunder for the occupancy and use of public lands, national monuments, national forests, and national parks shall be paid into, reserved, and appropriated as a part of the reclamation fund created by the act of Congress known as the reclamation act, approved June 17, 1902; and 37 1/2 per centum of the charges arising from licenses hereunder for the occupancy and use of national forests, national parks, public lands, and national monuments, from development within the boundaries of any State shall be paid by the Secretary of the Treasury to such State; and 50 per centum of the charges arising from all other licenses hereunder is hereby reserved and appropriated as a special fund in the Treasure to be expended under the direction of the Secretary of War in the maintenance and operation of dams and other navigation structures owned by the United States or in the construction, maintenance, or operation of headwater or other improvements of navigable waters of the United States.[1]

The act also provided that licenses issued should not conflict with any Government reservation. Section 4 provided:

"That licenses shall be issued within any reservation only after a finding by the Commission that the licenses will not interfere or be inconsistent with the purpose for which such reservation was created or acquired."

The word "reservation" as used in the Federal Water Power Act was defined by the Act as follows in Section 1 :

"Reservation means national monuments, national parks, national forests, tribal lands embraced within Indian Reservations, military reservations and other lands and interests in lands owned by the United States and withdrawn, reserved or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purpose."

Footnote to Finding No. 12

1/ The Bureau of the Budget, in response to a request by the Federal Power commission dated February 27, 1928, ruled on March 7, 1928, as follows:

> "The provision in [section 17] that all proceeds from any Indian reservation should be placed to the credit of the Indians must be construed and understood as reserving to the Indians all charges derived from the occupancy and use of tribal lands, or other tribal property, under licenses issued by your commission. Where the license, however, involves also, in addition to such tribal lands, other public property, the charges for the occupancy and use of such public property are not "proceeds from any Indian reservation" within the meaning of the law requiring that such proceeds be placed to the credit of the Indians." Plaintiffs' Exhibit 24c, p. 149 (Emphasis added).

Finding No. 13

Application of the Rocky Mountain Power Company for Preliminary Permits to Develop the Five Tribal Sites

On January 6, 1921 the Rocky Mountain Power Company, a subsidiary of the Montana Power Company, filed an application with the Federal Power Commission for a preliminary permit to construct power projects using the five reserved sites. The Commission suspended action on the application on March 2, 1923, pending a Department of Interior study of the Columbia River water shed then in progress.[1/]

Footnote to Finding No. 13

1/ Plaintiffs' Exhibit 24A, p. 177, First Annual Report of the Federal Power Commission, Fiscal Year ended June 30, 1921.

The Commission gave preliminary consideration to the position of the Flathead Project Water Users' Association that the irrigation project was entitled to recognition of their interests in the Newell Tunnel (the cost of which had been added to the reimbursible costs of the irrigation project). The Commission took no action on the claim and for reasons not explained took the view that the claimed interests in the Newell Tunnel were "doubtful". The Commission apparently did not consider the "water rights reserved or appropriated for the irrigation projects" which were expressly confirmed by Congress in the Act of March 7, 1928, authorizing the licensing of the five Tribal sites.

The Commission also was of the view that the power project had been abandoned by the Government. This simply was not the case, since it was always known that pumping of irrigation water would be absolutely necessary for the success of the irrigation project. Defendants' Exhibit 13-D-3, p. _____ (T. 1788); Defendants' Exhibit 13-B-2, pp. 8, 33. The conclusion that the power development had been abandoned was based on statements by the Reclamation Service and the Department of the Interior that a power block from private developer would be accepted in lieu of a Government development. Plaintiffs' Proposed Findings of Fact on Rehearing, Vol. I, p. 45 (Finding No. 11, paragraph d); Plaintiffs' Exhibit 25. These statements quite obviously show that far from having abandoned the power project, the Department was anxious to find ways and means of procuring its development as soon as possible and in the most advantageous way possible. Moreover, the Congressional decision in 1925-1926 to "continue" construction of the power project (Act of May 10, 1926, 44 Stat. 453, 464. See Finding No. 14, infra) shows conclusively that the power development plans were never abandoned.

Finding No. 14

Congressional Decision to Complete Government Development of Power for Benefit of Irrigation Project

In 1925 a committee of Congress headed by Congressman Louis Crampton of Michigan, Chairman of the House Appropriations Subcommittee, visited the Reservation for the purpose, among others, of determining whether the project should be completed or abandoned, and how to proceed if the decision was to complete the project. Congressman Crampton reported to Congress that the power project was needed to supplement water supply, which was found to be inadequate even on acreage nominally under completed works, and to provide revenues to help repay the United States the money spent for irrigation project construction. Construction costs owed to the United States were so high that some landowners could not otherwise be expected to repay the United States.[1/] In consequence, by the Act of May 10, 1926, 44 Stat. 453, 464, Congress appropriated funds for "continuing construction" of the power project to be operated by the Government and for continued expansion and operation of the irrigation system as well.[2/] However, no funds for the power project or irrigation system were to be available until water users on the project (exclusive of trust patent Indian landowners) organized irrigation districts under Montana law to execute repayment contracts in favor of the United States providing for repayment of all accrued and future construction costs incurred in construction

of both the power project and the irrigation system. These repayment contracts were to contain provisions acknowledging that accrued and future construction costs for the irrigation and power project were made a first lien on project lands. Net revenues from sale of the excess power to be sold to farms and towns on the Reservation were to be used first to reimburse the United States for the construction of the power plant; second, to liquidate payment of deferred excessive costs of the irrigation of the Camas division of the project; third, to liquidate construction costs on an equal per acre basis on the entire project, and fourth, to pay operation and maintenance costs on the entire project. Additional appropriations, also contingent upon execution of repayment contracts, were included in the Act of January 12, 1927, 44 Stat. 945.[3/]

The Flathead, Jocko Valley and Mission Irrigation Districts were promptly organized pursuant to Montana law and, in an effort to assure completion of the needed power project and ultimate completion of the irrigation system, the districts in turn executed repayment contracts acknowledging the first lien on their lands for past and future power and irrigation construction costs and obligating the landowners to repay the same over a period of years, and authorizing the Secretary of the Interior to license "the reserved or appropriated water rights of the irrigation projects to a private developer, in such manner as to assist in meeting the construction costs."[4/]

A form of repayment contract containing the above authority to lease the irrigation project's water power rights was approved by the Interior Department on December 16, 1927, before enactment of the Act of March 7, 1928 actually authorizing the alternative of private development. Pleaintiffs' Exhibit 38.

Footnotes to Finding No. 14

1/ 67 Cong. Rec. 7864-65, April 20, 1926. The statement of Congressman Crampton is set out in note 1 to Plaintiffs' Proposed Finding No. 12. The Committee's finding as to water supply was as follows:

> "That inspection impressed us with the great natural advantages of the project, the unsatisfactory conditions as to water supply now existing on the project, and the courageous attitude, the uprightness, and the capacity of the settlers now on the project.
>
> While water was said by the reports to be available for 112,000 acres under constructed works, we found that only a small proportion of that acreage had a dependably sufficient supply and nearly everywhere development and settlement was seriously handicapped by lack of water through the season."

2/ It was contemplated that a rental would be paid to the Tribes for the proposed use of one of their dam sites. Congressman Louis C. Crampton, Chairman of the House Appropriations Subcommittee who sponsored the 1926 legislation testified as follows concerning the point at the 1929 hearings before the Federal Power Commission:

> "So far as the Indian aspect was concerned at that time, we were told by Commissioner Burke that the Indians would have certain rights in connection with the lease of lands, and it was the understanding that the customary fee would be paid them the same as to any other landowners, although the power development would not be large; and it was not expected to amount to more than a few thousand dollars a year because of that."

Congressman Crampton's testimony, including the above, is more fully set out in note 3 to Defendant's Requested Finding No. 21.

3/ Pertinent provisions of the Act of January 12, 1927 are set out in Plaintiffs' Proposed Finding No. 14.

4/ The three irrigation districts were formed on August 26, 1926, by order of the Fourth Judicial District Court of the State of Montana. All irrigable land on the project was included. Plaintiffs' Exhibit 31.

Repayment contracts acknowledging the first lien of the United States on members' farms were executed by the Flathead, Jocko Valley and Mission Irrigation Districts on January 14, 1928, April 21, 1931, and November 13, 1934 respectively. Paragraph 9 of the original contract (Plaintiffs' Exhibit 37) executed by the Flathead Irrigation District on January 14, 1928, provided as follows:

> "The Secretary of the Interior is hereby authorized and empowered, insofar as the Districts executing this contract may authorize the same, to construct, operate, maintain, improve and extend the power plant authorized by the Act of May 10, 1926, aforesaid, together with such accessory works, including a proper transmission line and pumping plants, as he shall deem proper and concerning which he may be authorized by law to act; or to consent to the licensing by the Federal Power Commission of a corporation or corporations to build, operate and maintain said plant, transmission line or other works or any part thereof, instead of or in connection with his building the same or any part thereof himself; and, in connection with the licensing aforesaid, to permit the use of water and other rights and privileges appropriated or reserved for said project (for power purposes), all upon such terms, designed to secure ample and cheap electrical power for pumping water for irrigation and other project purposes, and for sale, and to aid in paying project construction and other charges as contemplated by said quoted statutes, as the said Secretary may deem proper." Plaintiffs' Exhibit 37.

Finding No. 15

Government Investigation of a Large Scale Private Development Instead of the Proposed Government Development

On May 5, 1926, Mr. F. W. Kerr, President of the Rocky Mountain Power Company, applicant for preliminary permits on Tribal Sites 1 through 5 since January 26, 1921, wrote to the Federal Power Commission concerning the applications. He noted that the Department of the Interior study of the Columbia River basin had been concluded and that use of Flathead Lake storage for use of development of the sites was now cleared. He also stated that a market of 40,000 kilowatts of power now existed, such power to be sold principally to the Anaconda Cooper Mining Company for electolytic reduction of zinc. Hence, Mr. Kerr argued, the reasons for suspending action of the power company's applications no longer existed. Finally, in regard to the continued construction of the small government project at Site 1, Mr. Kerr stated that if granted a license to develop the site, the Rocky Mountain Power Company would supply the Government with an amount of power equal to that which such a small installation would produce at a price materially less than the cost of the small project to the Government.[1/]
On May 6, 1926, and again on July 8, 1926, Mr. Kerr wrote to the Commissioner of Indian Affairs repeating and clarifying

the basic proposition included in the letter to the Federal Power Commission. Certain figures designed to provide the Government with power at cost were proposed, and a willingness to negotiate was indicated. Mr. Kerr also stated in his letter of May 6, 1926 that the company wanted to begin construction as soon as possible and would proceed with preliminary borings and surveys. Assurances were sought that the power company's proposition in some form might be acceptable. There is no indication that any such assurances were given, and the letter of July 8, 1926, would indicate that no such assurances were given.[2/]

As a result of this preliminary proposition of the Rocky Mountain Power Company, the Government officials charged with responsibility sought to determine the feasability and desirability of the development of the power on a larger scale, either by the power company or by the Government itself, in lieu of the small project proposed to be built by the Government. In consequence a study dated February 2, 1927 was prepared by Mr. Edwin L. Rose of the United States Indian Irrigation Service.[3/] Mr. Rose concluded that no matter who developed the power, and no matter how much power was developed, the rights of the Flathead Tribes would have to be recognized and compensated.[4/] He recommended that a full development of the power

be made in lieu of the Government's small installation, and thought it preferable to license the project to a private developer such as the Montana Power Company. Mr. Rose recognized the Government's considerable ownership interests in the power development and the decision of the Government to devote some of the corresponding benefit to the irrigation project after satisfying the just claim of the Tribes for the use of their Reservation lands. Mr. Rose also recognized that the State of Montana (i.e. the consumers of Montana) had an interest "if Flathead Lake is classed as navigable".[5/] In this connection Mr. Rose stated as follows under the heading "Ownership of the Flathead River power resource":

> Besides the rights of the Montana Power Company in the site at Thompson Falls and water appropriated in connection therewith, and possibly certain state rights if Flathead Lake is classed as navigable, the rights in this whole resource are in the United States, subject, however, to such legal, equitable or moral rights as may be determined to exist, or to be recognized by the Government as existing, in the Flathead Indians as a Tribe, on account of their ownership of their reservation [,] and in the Flathead irrigation project. A number of applications of private persons as well as corporations, for permits to develop these resources have been made, but none of these have been approved. These applications have been refused because the Government early determined to utilize this resource itself for its Flathead Irrigation Project, and the Federal Power Commission has so far recognized this determination." Plaintiffs' Exhibit 32, p. 8.

Mr. Rose concluded that the best procedure would be to permit a private company to develop the power, making use of Flathead Lake storage, upon condition that the licensee pay rentals to the Tribes equal to the then current schedule for private development of hydroelectric projects on National Forest lands. This would have amounted to $1.00 per horsepower after ten years. Mr. Rose thought this charge had "the advantage of being established on precedent." Then, in exchange for its interest, Mr. Rose thought that the Government should obtain power for pumping and for resale at a price approximating the licensee's development cost. Mr. Rose thought that this price approximating development costs could be paid to the licensee either in the form of a rate for energy used, or as a lump sum advance.[6/]

Shortly after submission of the Rose Report a conference was held in Washington at which power company and irrigation district representatives, as well as Interior Department officials were present. All matters discussed during the several days of the conference were set down in a memorandum draft proposal submitted by the power company to the Commissioner of Indian Affairs under date of February 17, 1927.[7/] This proposal included a provision for power for the irrigation project (as had been suggested by Mr. Rose as com-

pensation for the reserved or appropriated rights of the project) and, in addition, a provision for a division of the $1.00 per horsepower rental for Tribal lands between the Tribes and the irrigation project.[8/] The latter proposition was undoubtedly based on the argument, then being made on behalf of the irrigation districts,[9/] that the project has some interest in the power site itself apart from its interests in (1) the Newell Tunnel which had been paid for with funds reimburseable by landowners on the irrigation project,[10/] and (2) "water rights reserved or appropriated for the irrigation projects."[11/]

Footnotes to Finding No. 15

1/ Defendant's Exhibit 13-B-1, Exhibit F; Plaintiffs' Exhibit 27.

2/ Defendant's Exhibit 13-B-1, Exhibit F1; Plaintiffs' Exhibit 28.

3/ Plaintiffs' Exhibit 32.

4/ Plaintiffs' Exhibit 32, p. 27.

5/ Lands underlying navigable waters within state boundaries belong to the state. This was a commonly accepted principle until the decision of the Supreme Court in United States v. California, 332 U.S. 19 (1947), which created some doubt on the point. Congress subsequently confirmed the ownership which the states had always claimed by the Act of May 22, 1953, c. 65, Title II, 67 Stat. 29. See House Report No. 695, 82d Congress, 1st Session, 1953 U.S. Code Cong. and Adm. News, p. 1395, 1399.

6/ Plaintiffs' Exhibit 32, p. .

7/ Plaintiffs' Exhibit 33.

8/ The memorandum proposal was as follows:

> "Consideration of the factors in this matter, many of which have been discussed with subordinates of your office during the past week, leas me to make on behalf of the Montana Power Co. the following suggestions as a basis for an agreement, if the proper permits can be obtained and necessary conditions fulfilled, under which the Montana Power Co. or its subsidiary company, the Rocky Mountain Power Co., would undertake the development of the Flathead River power sites on the Indian reservation.
>
> "A. The Power Co. would agree to deliver at the plant to be erected at the Newell site electrical energy to be used by the irrigation project exclusively for pumping water for irrigation all power required by the Government for that purpose up to 10,000 horsepower at the price of 1 mill per kilowatt-hour.

"B. The Power Co. will deliver, either at the Newell plant or at some place more convenient to the project to be agreed upon, such power as may be demanded by the United States for all project and farm uses and for sale up to 5,000 horsepower at a price of 2 1/2 mills per kilowatt-hour delivered.

"C. The Power Co. will pay to the United States each year during the life of its permits from the United States $1 per annual average horsepower generated at its proposed Newell plant and all other plants on the Flathead River on said reservation erected below Flathead Lake, the idea being that the United States may devote the sum so paid as it shall see fit, and that said payments are expected to cover all charges made on account of or through the Federal Power Commission, and that the remainder will probably be divided between the Flathead Indians as a tribe and the United States on account of the irrigation project in the proportion of one-third to the tribe and two-thirds to the irrigation project.

"D. The Power Co. as soon as it starts construction on the Newell plant or any other plant will reimburse the United States for the cost, without interest, of the Newell tunnel, which sum is about $101,000, and does not exceed and shall not for this purpose be taken as exceeding $102,000.

"E. The Power Co. will agree to press its applications already made and make other applications, if necessary, to the Federal Power Commission for permits to utilize the said power sites on the Flathead River, and will accept permits from said commission containing the usual provision of documents of that character and embodying the agreement to be made in accordance with this memorandum.

"F. The Power Co. will agree to acquire the necessary rights to use Flathead Lake as a reservoir and make the necessary dam therefor, said dam shall be capable of raising the water level in said lake to elevation 2,893 feet above sea level; datum and rights to maintain the lake level to that extent shall be acquired.

"G. The Power Co. will agree to start the necessary preliminaries to construction of the aforesaid dam and proceed diligently with the actual construction thereof and of the power plant at the Newell site as soon as proper borings of the site have been made for determination of foundation conditions, and will start those borings within six months from the date hereof.

"H. The company will agree to equip the plant at said Newell site so as to produce 50,000 kilowatts at the beginning and thereafter to develop the said site to full capacity within a reasonable time, to be agreed upon in the above-mentioned contract and to be fixed in said permits.

"I. It is contemplated that the above-mentioned contract shall contain such proper limitations and requirements as may be agreed upon looking to the development of the other power sites as the demand for power shall warrant and with the idea that the company shall either develop those sites promptly when the demand for power does warrant or permit of their being developed by other licensees of the United States.

"J. The company will also be expected to make appropriate agreements looking to the regulation of the Flathead Lake reservoir so as to insure the best use of the water stored there for power purposes, not only at the Newell power site but at all other sites on the river, whether or not the lower sites shall be developed by the Power Co. or by others and also so that navigation on Flathead Lake shall not be interfered with.

"K. The company furthermore agrees to make all proper appropriations of water for the development of these power sites or to acquire other appropriations or filings already made as may be useful or necessary for that purpose. The company will also agree that the United States for the irrigation project shall have the privilege of pumping water from Flathead Lake or the Flathead River for all purposes of irrigation on the Flathead irrigation project or the Flathead reservation lands whether included in said project or not.

"L. The Power Co. realizes that after it has begun construction or the making of preparations therefor, it will have power from some of its existing plants on the reservation before power will be produced from any of these sites. A part of such power would be useful for farm and project purposes, and therefore the company will agree to deliver power for such purposes at a point on its line to any transmission line constructed by the Government in quantities required by the United States up to 500 horsepower at 2 1/2 mills per kilowatt-hour.

"M. The company realizes that it may be impossible to have final permits issued from the power commission before it starts making preparations and doing other acts that practically commit it to this development. The company desires to undertake this development at once if agreements contemplated by this memorandum can be reached. If they can not be reached, the company desires to go elsewhere for the power that it wishes to develop at this time. The company finds it is in a position where it must make further developments for its customers, and therefore desires to reserve the right to make other arrangements if on July 1, 1927, it is unable to make this contract.

"N. The power company desires to aid in the development of the irrigation project and development of the rest of the land on the reservation and is willing to have the proposed contract contain appropriate provision securing to the Government, the project or the irrigation districts, the exclusive right to sell power within the Flathead Reservation.

"The foregoing, of course, does not cover all the items that should be taken care of in the contract, but it is hoped that it sufficiently shows the lines upon which such a contract could be consummated. This memorandum is submitted so as these things can be concluded if this meets with your approval."

Plaintiff's Pet. Ex. 33. See also 69 Cong. Rec. at 2480 (Def Ex 13-B-11, p. 2480) and Def Ex 13-D-3, p. 3949.

Finding No. 16

Effort to Implement the Proposal of February 17, 1927 by Enabling Legislation

The proposal of the power company dated February 17, 1927, indicated that action confirming authority to proceed was needed quickly, or the power company would be forced to turn to other power developments. In an effort to obtain enabling legislation to permit large scale development of the project by the Rocky Mountain Power Company (then the only applicant), it was decided that an interim measure should be sought in the Deficiency Appropriation Bill for Fiscal 1927 (H.R. 17291). The proposed bill read in pertinent part as follows:

> "'The unexpended balance of the $395,000 appropriated for the Flathead irrigation project for the fiscal year 1927, and reappropriated for the fiscal year 1928 for continuation of construction of a power plant, may be used either for that purpose or for the construction and operation of a power-distributing system, including the necessary substations, and for purchase of power, but shall be available only when an appropriate repayment contract in form approved by the Secretary of the Interior and which, except as hereinafter provided, contains the provisions set forth for such a contract in the appropriation for this project for the fiscal years 1927 and 1928, shall have been executed by a district or districts under State law embracing not less than 70,000 acres of irrigable land under the project: Provided further, That any contract provided for in this paragraph

shall require that the net revenues derived from operation of the power plant or the distributing system and from sale of power, together with that part of any rentals which may become available to the irrigation project through any permit or license as hereinafter provided, shall be used to reimburse the United States in the following order: First, to liquidate the cost of the power plant or distributing system; second, to liquidate payment of the deferred obligation on the Camas division; third, to liquidate construction costs on an equal per acre basis on each acre of irrigable land within the district or districts contracting; and fourth, to liquidate operation and maintenance costs within such district or districts: Provided further, That the Federal Power Commission is authorized, in accordance with the Federal water power act and upon terms satisfactory to the Secretary of the Interior, to issue a permit or permits, or a license or licenses, for the use [1] of power sites on the Flathead Reservation and [2] water rights reserved or appropriated for the irrigation project for the development of power: Provided further, That the rentals from such permits or licenses, with the exception of fees for administration under the Federal water power act and charges for use of public lands not within the reservation, shall be divided between the Indians of said reservation as a tribe and the irrigation project, or otherwise as may be determined hereafter by appropriate legislation: And provided further, That the public notice provided for in the appropriation for the project for the fiscal year 1927 shall be issued by the Secretary of the Interior upon the 1st day of November 1929.'" Hearings before Subcommittee of the Senate Committee on Appropriations, Interior Department Appropriations Bill, Fiscal 1929, 70th Cong., 1st Sess., p. 72 (Emphasis and numbers in brackets added).

As the Tribes state in their Requested Finding No. 19,[1/] the interim measure sought to be included in H.R. 17291 was intended to implement the proposal of February 17, 1927;

this would of course include the provisions therein for a block of power at cost for the irrigation project. The interim measure, like the later bill which became the Act of March 7, 1928,[2/] contained authority to license, for the development of power, both the Tribes dam sites and "water rights reserved or appropriated for the irrigation projects." It also provided, as did the later bill which became law, that funds previously appropriated for the Government development, if not needed for that purpose, could be used instead to build a power distribution system. This provision was obviously meant to be used only if a license to a private developer was in fact issued with a provision for power at cost for the irrigation project. The project otherwise would have no power for its distribution system, or would be unable to resell power at a profit. The proposal also provided for the disposition of the net profits which would be derived from resale of the low cost power by the irrigation project.

The proposed interim measure sought to be included in H.R. 17291 died in the Senate Subcommittee because the division of rental for the Tribal sites was questioned;[3/] no objection was made to the proposed furnishing of power to the irrigation project at low cost, or to the building

of a distribution system for the purpose of permitting resale of such part of the low cost power as was not needed for irrigation purposes at a net profit to be used in the manner specified in the bill.

The fact that the interim measure anticipated that there would be "net revenues" from resale of power authorized to be purchased and distributed by the project shows that the drafters intended that the project would be furnished power by a private developer at a cost approximating what the project would otherwise spend on the proposed Government development. In other words, the drafters clearly had in mind the proposal of the Rocky Mountain Power Company dated February 17, 1927, relating to compensation in the form of power at relatively low cost to the irrigation project for the use of the "water rights reserved or appropriated for the irrigation project." 4/

Footnotes to Finding No. 16

1/ Plaintiffs' Proposed Findings of Fact on Rehearing, Finding No. 19, Vol. I, p. 80. The Plaintiffs' Proposed Finding reads:

> "After reaching the testative agreement of February 17, 1927, members of the Indian Bureau drafted legislation to effect that agreement and on February 26, 1927, Congressman Crampton introduced a proposed Deficiency Appropriation Bill for 1927 (H.R. 17291, 69th Cong., 2d Sess.) . . .." (Footnotes omitted).

2/ See Defendant's Requested Finding No. 18.

3/ 68th Cong. Rec. 4930, 69th Cong., 2d Sess. (1927).

4/ Congressman Louis C. Crampton, Chairman of the House Appropriations Subcommittee which originally reported the Deficiency Appropriation Bill for Fiscal 1927 (H.R. 17291), and the bill which, without change, became the Act of March 7, 1928 (discussed in Defendant's Requested Finding No. 18, infra) was quite explicit in his testimony before the Federal Power Commission as to the intent of both measures to authorize the Secretary of the Interior to assure that the irrigation project would receive power at special rates as compensation for use of their water power rights. Mr. Crampton's testimony in this regard is set out at length in note 3 to Finding 18, infra.

Finding No. 17

Application of Walter H. Wheeler for Preliminary Permits to Develop Tribal Sites

On January 11, 1928, Walter H. Wheeler, an engineer in Minneapolis, Minnesota, filed an application with the Federal Power Commission for a preliminary permit for a proposed power development of the five Tribal sites on the Flathead River.[1/] Mr. Wheeler's proposed installation was practically identical to that of the Rocky Mountain Power Company and may have been copied therefrom.[2/] By selling power at low rates he hoped to attract a market to be made up of electrochemical fertilizer and electrometallurgical industries which he expected to become technically feasible.[3/] Mr. Wheeler's application was accompanied by an agreement signed by Plaintiffs' Tribal council whereby Plaintiffs' council agreed to accept $1.12 1/2 per developed horsepower for the use of Tribal lands.[4/]

Footnotes to Finding No. 17

1/ Defendant's Exhibit 13-D-3, p. 3652.

2/

3/ Plaintiffs' Exhibit 58, p. 3 (Scattergood Report);

4/ Plaintiffs' Exhibit 58, p. 16 (Scattergood Report).

Finding No. 18

The Act of March 7, 1928, by Which Congress Recognized "the Water Rights Reserved or Appropriated for the Irrigation Projects" and Authorized the Leasing Thereof, Together With the Tribes' Dam Site, to a Private Developer.

By the Act of March 7, 1928, ch. 137, 45 Stat. 200, 212-213, Congress authorized the Federal Power Commission to issue a license for private development of the Tribal sites and of the "water rights reserved or appropriated for the irrigation projects" pursuant to the Federal Power Act, and upon terms satisfactory to the Secretary of Interior.

The Act of March 7, 1928 provided in part as follows:

> "The unexpended balance of the appropriation for continuing construction of the irrigation systems on the Flathead Indian Reservation, Montana, contained in the Act of May 10, 1926 (Forty-fourth Statutes at Large, pages 464-466), as continued available in the Act of January 12, 1927 (Forty-fourth Statutes at Large page 945), shall remain available for the fiscal year 1929, subject to the conditions and provisions of said Acts: Provided, That the unexpended balance of the $395,000 available for continuation of construction of a power plant may be used, in the discretion of the Secretary of the Interior, for the construction and operation of a power distributing system and for purchase of power for said project but shall be available for that purpose only upon execution of an appropriate repayment contract as provided for in said Acts: Provided further, that the net revenues derived from the operation of such distributing system shall be used to reimburse the United States in

> the order provided for in said Acts: Provided further, that the Federal Power Commission is authorized in accordance with the Federal Water Power Act and upon terms satisfactory to the Secretary of the Interior, to issue a permit or permits or a license or licenses for the use, for the development of power, [1] of power sites on the Flathead Reservation and [2] of water rights reserved or appropriated for the irrigation projects: Provided further: That rentals from such licenses for use of Indian lands shall be paid the Indians of said reservation as a Tribe, which money shall be deposited in the Treasury of the United States to the credit of said Indians, and shall draw interest at the rate of 4 per centum: . . ." (45 Stat. 25 212-213).

Except for the elimination of the provision for a division of the rental to be paid for use of the Tribal dam sites,[1/] and certain more specific language as to the manner of payment and a provision for interest on that rental,[2/] the provisions of the Act of March 7, 1928, including its explicit reference to "water rights reserved or appropriated for the irrigation projects," are substantially identical to the unsuccessful interim measure included in H.R. 17291. It is clear, therefore, from the origin as well as from the language of the Act of March 7, 1928, that it too was intended to authorize the furnishing of a block of power by the licensee at cost as compensation to the landowners of the irrigation project for the use by the licensee of their reserved or appropriated water rights.[3/] This fact was fully appreciated by the Tribes at the time and was the sole basis for their opposition to the act.[4/]

The legislative history of the Act of March 7, 1928, shows continuing concern by members of Congress that the Tribes should receive all of the proceeds from the leasing of their dam sites, and that such proceeds should not be divided between the Tribes and the irrigation project as had been proposed by the power company proposal of February 17, 1927, and by the interim measure sought to be included in H.R. 17291. The Department representatives who testified at the Congressional hearings went out of their way to state that the rentals for the Tribes' dam sites should not be so divided.[5/] On the other hand members of Congress,[6/] Department of Interior representatives,[7/] and spokesmen for the Tribes[8/] all recognized that the proposed bill contemplated, if it did not compel, that a block of power be furnished at cost to the irrigation project in part for use by the project and in part for resale at a profit. Indeed, it was this universally acknowledged fact alone which inspired the unsuccessful opposition of the Tribes and of some members of the Senate to enactment of what became the Act of March 7, 1928.[9/] The legislative history of the Act of March 7, 1928, therefore confirms that the Act was intended by Congress to authorize, but not to compel, a provision for power at cost for the irrigation project in any license to be issued thereunder.

Those members of Congress who inquired adequately into the matter understood that the power thus authorized to be furnished to the irrigation project at cost was not to be given in exchange for any claimed interest in the irrigation project in the proceeds of the leasing of the Tribes' dam sites, but was instead to be given in compensation for use of reserved or appropriated water rights of the irrigation projects which would necessarily be involved in the development of power, and as to which the Tribes neither had nor could assert any legitimate right whatsoever. The following excerpts from the Senate debate just prior to approval of the conference report recommending enactment of the Act of March 7, 1928, conclusively demonstrates the foregoing:

> "Mr. KING. The statement is accurate, is it not, that the Indians are only distributees of their pro rate share of the profits derived from the sale of the power.
>
> "Mr. WHEELER. That is correct.
>
> * * *
>
> "Mr. KING. Mr. President, will the Senator permit an inquiry?
>
> "The PRESIDING OFFICER. Does the Senator from Montana yield to the Senator from Utah?
>
> "Mr. WHEELER. Yes.

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

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

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

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

"Mr. WHEELER. I do.

"Mr. WALSH of Montana. The Reclamation Service, pursuant to a statute of the State of Montana, made appropriations of water for all irrigation projects in the State of Montana, as I understand has been done in the case of every irrigation project. Pursuant to the statute authorizing the United States

to make the appropriation, the United States as the representative of the settlers on the project, made the appropriation of this water. The appropriation by the United States is in trust for the settlers on the project, and for the district when it shall be organized.

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

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

"Mr. KING. As riparian proprietors?

"Mr. WALSH of Montana. As riparian proprietors; and I fully agree with that."10/

Footnotes to Finding No. 18

1/ The division of the dam site rentals was first proposed by the Rocky Mountain Power Company in its memorandum of February 17, 1927. (See Defendant's Requested Finding No. 15, supra.) It was included in, and was the cause of the ultimate failure of, a provision in H.R. 17291, which was intended to effectuate the power company's February 17, 1927 proposal. Defendant's Requested Finding No. 16, supra; Plaintiff's Proposed Finding No. 19.

2/ The Act of March 7, 1928, contains the following proviso:

> "Provided further, that rentals from such licenses for the use of Indian lands [1] shall be paid to the Indians of said reservation as a Tribe, which money [2] shall be deposited in the Treasury of the United States to the credit of said Indians, and [3] shall draw interest at the rate of 4 per centum...." (Emphasis and numbers in brackets supplied.)

The House Committee substituted the above language for the following language in the bill as originally introduced:

> "Provided further, that rentals from such permits or licenses shall be distributed as provided for in the said Federal Water Power Act...."

The original language requiring distribution of rentals in compliance with the Federal Water Power Act was redundant since the enabling portion of the act (quoted in full in the text of Finding 18) explicitly required that any licenses issued be "in accordance with the Federal water power act," which clearly required that the Tribes receive a reasonable annual rental for the use of their land. However, Section 17 of the Federal Water Power Act provided simply that "proceeds from any Indian reservation shall be placed to the credit of

such Indians of such reservation." The Federal Water Power Act thus did not stipulate the place of the required deposit or whether the deposit would bear interest. Moreover, it seemed to require that the funds be credited to the Indians of the reservation as individuals, and not as a tribe. Thus, the amendment made by the House Committee was necessary to specify that the Tribes' rental for the use of their dam site (1) should be deposited in the United States Treasury, (2) should bear interest at the stipulated rate, and (3) would belong to the Indians "as a tribe" and not as individuals.

The committee amendment clearly was not intended and cannot possibly be construed as authorizing rentals to the Tribes for the use of their land to the exclusion of all other charges normally made, in addition to the rental for use of tribal lands, pursuant to explicit requirements of the Federal Water Power Act. In the first place, the provision refers only to "rentals ... for the use of Indian lands," and makes no mention of other charges required to be made by Section 10(e) of the Federal Water Power Act. Secondly, Congress expressly waived imposition of the normal Federal Power Commission charge for administrative costs, authorized by Section 10(e) of the Act of March 4, 1929, ch. 707, 45 Stat. 1623, 1639. It is quite clear that this would have been unnecessary if the 1928 act itself prohibited payment of any charges by the licensee other than a charge or rental for the use of tribal lands. See Defendant's Requested Finding No. 27 infra.

3/ The Chairman of the House Appropriations Subcommittee whose committee reported both the unsuccessful H.R. 17921 (see Defendant's Requested Finding No. 16) and the bill which became, without a single change in language, the Act of March 7, 1928, testified at the 1929 hearings before the Federal Power Commission that both measures were intended by Congress to authorize the furnishing of power at special rates to the irrigation project in exchange for the irrigation project's reserved or appropriated rights to the flow of the Flathead River for the development of power. He states that the details of the manner of carrying out this authority were left to the discretion of the authorities authorized to issue the license so that the bill would not be overburdened with detail, and so that maximum flexibility of action could be preserved.

Mr. Crampton's testimony was in pertinent part as follows:

We learned that the project needed power, that the villages there needed electricity for various purposes, and so we proposed that to complete that power project, using the stream flow of the Flathead River, at a cost that was estimated then and later at somewhere around $800,000; that the profits from the sale of that power should be used, first, to repay the Government for the cost of constructing this power plant; and secondly, to retire this suspended account from the Camas division due the Government; and after that to take care of the construction cost of the project generally.

We were not sure how that would appeal to other sections of the project than the Camas. But on our last day, in conference with representatives of the various water users' associations, we put the proposition up to them and found that it met entirely with their approval. There was involved in the proposition this also: That the Government would not go ahead with this expenditure of $305,000 for the power plant until the project entered into a new contract for payment of its obligation to the Government. The contract was to put our relations with them on a much better business condition. It is not necessary for your purpose, probably, to go into those details.

That understanding was carried into the appropriation act for the fiscal year 1927, approved May 10, 1926. I think it is not necessary to take your time to read any portion of that provision. If you desire, it could be inserted here. But it carried into effect the program that I have outlined.

Later I was told by the Indian Office after that provision became law that a certain power company in Montana was desirous of a permit to develop power using Flathead Lake as a reservoir.

Mr. DIXON. Right there, Mr. Cramton: You also discovered that this irrigation project was for the benefit of the Indian lands as well as for the white settlers, did you not?

Mr. CRAMTON. Oh, yes. The Indian lands were given a greater consideration in this enactment than the white lands. As I recall, about one-fifth of the land was still in Indian ownership; but all the lands were originally in Indian ownership and were sold by the Indians, giving the Indians the same obligation as any owners of land would have, selling them, not to stand in the way of their proper development, the only kind of development that would ever make those lands valuable.

So far as the Indian aspect was concerned at that time, we were told by Commissioner Burke that the Indians would have certain rights in connection with the lease of lands, and it was the understanding that the customary fee would be paid them the same as to any other landowners, although the power development would not be large; and it was not expected to amount to more than a few thousand dollars a year because of that.

Later, when it was suggested that power interests desired to develop a big power project at Flathead Lake, they suggested to the Indian Office that if—and as you understand, this being termed an Indian irrigation project, it was under the Indian Office and not the Bureau of Reclamation—suggested to the Indian Office that if we would forego the building of our power plant, they would furnish the needed power to the project at a price lower than we could manufacture it. That, of course, seemed reasonable to me—that they could do that very nicely on a big power development; and I said to the bureau that so far as I was concerned, if they really did make a proposition and really did sell to the project on more favorable terms than we could make it, then there was no reason for us to get in the way of a big development.

After some negotiations the proposition made by that power concern became definite enough to justify our belief that power could be bought better than to make it, as far as the project was concerned. Therefore later legislation was adopted that gave the Indian Bureau alternative authority. I think that was in the appropriation act for the fiscal year 1928, which was approved January 12, 1927.

The change at that time in the legislation, so far as you are interested in it, was to permit the appropriation that had been made—we had appropriated enough for half the cost of the power plant on a 2-year program—we then made in the 1928 act that appropriation available to the disbursing department, either for the building of the power plant or for the construction of a distributing system in case they bought power; and, further, that in the event that that policy was followed, that the profits that would result from the sale, the resale of that power, should be distributed as we had already provided that the profits from manufactured power should be distributed. That left it with the department, and negotiations continued between the department and the power people as to the nature of the contract, and so forth.

There were, of course, various controversies arising from time to time that had delayed this. The project found it difficult to agree on the new contract that

was required, and great efforts were necessary, and certain portions of the project have not as yet entered into the contract; and in one of the appropriation acts we changed it so that it did not require the entire acreage to agree, but a certain part of it could enter into a contract, and then that part of it would have the benefits of the legislation.

Later, in the 1929 act, which was approved March 7, 1928, a further attempt was made to work out this problem, and that carried this provision: It is possible that the authority for the use of the distributing system first appears in the 1928 act. I won't take your time to read it. The 1928 act certainly did provide for the distribution of the profits, and I think that first appeared in that act—that is, the profits from the operation of the distributing system. That act further has this:

"*Provided further*, That the Federal Power Commission is authorized in accordance with the Federal water power act, and upon terms satisfactory to the Secretary of the Interior, to issue a permit or permits or a license or licenses for the use for the development of power or power sites on the Flathead Reservation and of water rights reserved or appropriated for the irrigation projects.

"*Provided further*, That the rentals from such licenses for the use of Indian lands shall be paid to the Indians of said reservation as a tribe, which money shall be deposited in the Treasury of the United States to the credit of said Indians, and to draw interest at the rate of 4 per cent," and so forth.

That is the authority on which or the legislation under which this proceeding is going on, as I understand it.

I am not speaking authoritatively at all on the water-power legislation. My contact with the work of the Federal Power Commission and of the laws governing the power permits issued by them has been very limited.

In my effort that I have made in this matter—and I think I am justified in saying, in the effort that the Committee on Appropriations in the House has made which has resulted in this legislation—it has not been the desire or attempt of Congress to usurp the authority delegated to the Federal Power Commission heretofore by Congress with reference to water-power permits generally. It has been our thought that in passing on this proposition at Flathead Lake the Power Commission would use the same judgment and follow the same course and be guided by the same principles that it would on any other power application, except for two material facts.

The first of those facts is this: In a later act, which I have not here—if I recall, it was in the deficiency act—in consultation with Assistant Indian Commissioner Meritt and Secretary West last December, I think, it was suggested that the Flathead Indians should not be subjected to the charge for administration of the water power act against their lease rentals that would be made as against lands in other ownership. I don't recall, but it was Mr. Meritt's estimates and the information that I had, that on the proposed large development that charge might run to fifteen or twenty or twenty-five thousand dollars a year. I don't just recall which.

As a result of that conference I asked Mr. Meritt to draft proper language; and having received it from him, I took it to Senator Wheeler, of Montana. The bill in question had left the House. It was too late to do anything in the House. I took it to Senator Wheeler and explained the situation to him. It met with his approval, and he secured its inclusion in the bill, which I think was the deficiency bill that passed last winter.

That did make an exception from the general act that governs the commission—and that is the first exception made—for the benefit of those Indians, that the charge of $15,000 to $25,000 a year should not be made against them, but would be borne instead by the Treasury of the United States.

In the handling of matters affecting Indians I have been governed by this doctrine, which I think is sound: That when it comes to action by Congress on a matter that affects Indians on one side and other American citizens on the other side, Congress has no moral right to take something that belongs to white men and give it to the Indians. The Indians—all they have the right to expect is an equality before the law and to be treated justly; and that does not involve taking something away from white citizens and giving it to them. But when it comes to the Treasury of the United States, we have certain obligations to the Indians, certain desires with reference to their development; and if the country sees fit to devote some money out of the Treasury to the development of the Indians, that is quite right; and in this case we felt justified. And so there is that first restriction on the power of this commission through this legislation as to that expense.

The second one was in this language: "The Federal Power Commission is authorized in accordance with the Federal water power act, upon terms satisfactory to the Secretary of the Interior, to issue a permit," and so forth. The Secretary of the Interior is a member of the Federal Power Commission; and it is not a matter of the general law that the action of the commission be subject to the approval of the Secretary of the Interior, except as he acts as a member of the commission. But this language was put in for this reason: In order that that project that is so much mixed up with this proposition might be properly protected also in its rights.

It had been gone into with care by the representatives of the executive and legislative branches of the Government; and we were prepared to go ahead, and the money was available for the construction of that power plant for the project. The tunnel had been constructed 15 years before, or 20 years before, at the expense of the project. We had authorized the construction of the power plant that was necessary to the proper development of that project. That power plant would have been completed and in operation to-day if there had not come this application from the power interests for the development of a big proposition at Flathead Lake.

That had developed, and we only suspended the idea of building a project upon the definite and responsible assurance that power could be bought more cheaply than we could make it, if we would get out of the way. And so the matter was suspended.

Now, our committee did not desire to take a chance that the rights of that project should be overlooked; but, having authorized the building of the power plant and then having stood aside so that the big development could be effected, we did not want the project left without any proper source of power. It was suggested by Mr. Pope, representing the project, that certain terms be put here in the legislation that the Power Commission would have to require of the permittee. I did not desire to encumber legislation with a mass of details of permits, and, furthermore, to give them entirely that flexibility that legislation produces.

Instead, our committee discussed the matter with the Indian Office. We had the assurance, definitely and positively, of the Indian Office and of the Interior Department that the project would be given an opportunity to buy power if the program of building a plant was foregone. Hence, the matter being one that the Secretary of the Interior had handled entirely, and his office being thoroughly advised as to all of these complications that had extended over several years, we accepted that assurance and left it simply that it must be on terms satisfactory to the Secretary of the Interior and that, so far as the committee was concerned, had to do with the assurance of proper treatment for the Indians that were his wards and proper treatment of this irrigation project.

The appropriation has gone on from year to year, has been continued available. Some portions of it have been used to carry on construction works since the new contracts were executed by a part of that project. The money is now in the Treasury so that the Interior Department have it in their discretion to begin to-morrow either the construction of that power plant that was authorized by Congress, that would take some of the stream flow of the Flathead River, or in the construction of a distributing plant that would distribute power from a private producer.

Now, I desire to make it very clear to the commission that the attitude of our committee, and I think I can fairly say the attitude of Congress, as represented by the legislation that is on the statute books, is that we have not sought to dictate what permittee should have the permit to develop Flathead Lake. We have not sought to hamper or limit the power of the Federal Water Power Commission in determining that. We have sought to make sure that the Indians were relieved from certain charges that we thought were more onerous than we thought they ought to be in this case, and to make sure that the project through this development was assured of a power supply as cheaply as they could make it themselves if they went ahead with the project, the power project, that was commenced 20 years ago, the Newell Tunnel.

Defendants Exhibit 15-15-S, pp. 4299-4302 (Emphasis added).

Congressman Crampton's summation of the intent of Congress by the Act of March 7, 1928, was noted by counsel for the Flathead Irrigation District in the brief filed by him before the Federal Power Commission in 1929. Defendant's Exhibit 13-B-2, p. 53.

4/ Mr. Collier, Secretary of the American Indian Defense Association, took the position that all the language of the bill dealing with the building of a power distribution system for the irrigation project and the licensing of power projects to private developers should be eliminated, since it was clear that this power commission and the Secretary of the Interior would be free to license a project to a private developer who would make power available at cost to the irrigation project for distribution at a profit. Mr. Collier mistakenly believed that this would diminish the Indian rental because he failed to take into consideration the quid pro quo given by the irrigation project, namely their renewal of appropriated water rights. It is quite clear, however, that Mr. Collier believed the power block at cost would be authorized by the bill which he opposed:

> "... The lesee who obtains this power site, whoever he be, can be in effect required and will be required to agree, as a condition precedent to obtaining the lease, to deliver this big block of power at cost. Of course it will be taken into consideration in determining how much rent he shall pay. It is one part of the consideration that he pays for the possession of the power site over a 50-year period. It will be deducted inevitably and properly from the Indian rental."
>
> "It is said that the language of the bill does not require anything of the kind. No; it does not. The language of the bill necessitates a power-distributing system at the cost of $285,000. It is in the power of the Secretary of the Interior and of the

Federal Power Commission to establish a condition precedent of this kind. The clamor that will go up from that region of Montana for delivering this lease to the lessee who thus agrees to furnish 15,000 horsepower at cost will be overwhelming and will prevail." Defendant's Exhibit 13-B-10, p. 500.

Similarly, Mr. Grorud, an attorney who spoke for the Tribes, proposed elimination of this same language for the same reasons. Mr. Grorud, who likewise failed to take into account the water rights of the irrigation project, was equally positive as to the intent of the bill to permit the furnishing of a power block to the irrigation project:

> "This agreement [i.e., the proposal of the power company dated February 17, 1927] carries forward the bureau's favorite idea of going into the power business. It prescribes that 15,000 horsepower shall be delivered to the Government at 1 1/2 mills per kilowatt-hour, of which a part shall be available for resale by the Government. This idea of getting part of the payment for the power site in the shape of power at cost and of reselling it at a large profit and applying the profit to liquidating the debt of the irrigation district, appears in the hearings of each year and climaxes in this agreement, and is now carried over into the objectionable subject matter of the present bill.
>
> "The urgent deficiency amendment, based on the agreement of February 17 appears in the Congressional Record at page 4927....
>
> "This amendment was shot through the House in three minutes, without explanation or debate. It was eliminated by your committee in the Senate, and it was characterized by Senator Walsh on August 3, 1927, as 'an indefensible piece of legislation.'

"The promoters of this discredited legislation know that they could not hope to pass it through Congress in the present session, but they acted in accordance with that agreement of February 17, which is the controlling element in the present situation, and they drafted the present language of the appropriation bill, designed to accomplish the same result in a more disbuised form.

"That result, in its bearing on the rights of the Flathead Tribe, is to split the proceeds of the power site into two parts. One part is to be delivered in the shpae of power at cost, to be distributed through the distribution system to be built by the Indian bureau at a cost of about $285,000, the beginning cost, not the ending cost. Said power will be resold at such profit as the Indian Bureau can get, and the proceeds of the sale will be disposed of as prescribed in the bill now before you, for the benefit of the irrigation district.

"Then a rental will be fixed, very low, because this payment in the shape of power at cost will be taken into consideration, and this reduced rental the Indians are to be allowed to get.

"Any lessee who is to be allowed the right to develop the Flathead power sites will be required to submit to these conditions. It is evident that one of the competing bidders has already submitted to them, because the tentative agreement signed by the Montana Power Co. already agrees to them. Any bidder willing to join in robbing the Indians in this fashion can have the site, if he has the good will of the Federal Power Commission. No bidder not willing to accede to this plan of robbing the Indians can have a look in.

"It will be evident to you that the present scheme is designed to throw this water-power site into the possession of just one bidder, the competitor who has already proposed to meet the terms implied in the present language of the bill.

The Indian Bureau will get what it wants. It will be enabled to go into the power business, into the business of distributing electric power in the local market. The Flathead Tribe is not concerned with the Government ownership question, but if the United States if going into the power-distributing business, can it not find some agent more honest and less inefficient than the Indian Bureau to do the work for it? Hasn't the Indian Bureau got enough jobs already, and is it not failing on enough jobs already?

We insist that if there is an honest intention in the Interior Department to allow the leasing of these power sites, they have nothing to do but to join the Flathead Tribe in asking that this whole objectionable subject matter be cut out of the bill. When it is cut out of the bill, the Federal power act applies. That act applies already but the Federal Power Commission has chosen to construe that it does not apply, in view of the existing authorizations. Wipe out the authorizations and obviously and indisputably it applies. Then the power site can be leased tomorrow. The getting of an adequate rental will be an issue between the Flathead Tribe and the Federal Power Commission and need not enter into the considerations of this Appropriations Committee at this time." (Emphasis added.)

5/ Mr. Meritt, Assistant Commissioner of Indian Affairs, testified before the House and Senate Subcommittees to the effect that all proceeds from the leasing of the Tribal dam sites, after deduction of an amount charged by the Power Commission for administering the Federal Water Power Act, should go to the Tribes, in accordance with the requirements of the Federal Water Power Act. House Subcommittee Hearings, Interior Department Appropriations Bill, 1929, 70th Cong., 1st Sess., pp. 341-42 (quoted in part in Plaintiff's Requested Finding of Facts on Rehearing, pp. 91-92; Senate Subcommittee Hearings, 70th Cong., 1st Sess. (Defendant's Exhibit 13-B-10). Thus, referring to the February 17, 1927, memorandum proposal of the Rocky Mountain Power Company, where it was proposed that a proposed $1.00 per horsepower rental be divided 30% to the Tribes and 70% to the irrigation project, Dr. Meritt stated that the entire $1.00 per horsepower rental therein proposed to be paid for use of the dam site, less the administration charge made by the power commission, should go to the Tribes.

> "Mr. MERITT....As I understand the proposition, this power site is capable of developing about 20,000 horsepower, and by using Flathead Lake for storage purposes it could develop approximately 120,000 horsepower. There has been submitted a tentative proposition of $1.00 per horsepower per year.
>
> "Mr. TAYLOR. By whom was that offer made?
>
> "Mr. MERITT. By the Montana Power Company. This power site can be developed to maximum capacity within a period of three years. Therefore, under these figures the Flathead Indians would receive from the maximum development more than $100,000 per year." House Subcommittee Hearings, Interior Department Appropriation Bill, 1929, 70th Cong., 1st Sess., pp. 341-342 (quoted in Plaintiff's Proposed Findings of Facts on Rehearing, Vol. I, pp. 91-92.)

The February 17, 1928 proposal of the power company also provided for the power for the irrigation project at cost in exchange for their water rights, in addition to the $1.00 per horsepower rental.

During the hearings before the Senate subcommittee Senator Smoot summarized Mr. Meritt's testimony as follows:

> "... Doctor Merit has already told the committee twice now that the department has no intention whatever of agreeing to the proposition here of 30 and 70...." Defendant's Exhibit 13-B-10, p. 101.

6/ See the explanation of the intent of the Act of March 7, 1928, given by Mr. Crampton, Chairman of the House Committee in which the bill originated, supra, note 3. The point was summarized as follows by members of the Senate subcommittee during the Senate committee hearings.

> "Senator PHIPPS. It is proposed to go into the business of distributing power which [the irrigation project] would receive at cost from the company that will deve' 'p the entire scheme as a much bigger project than originally contemplated. That is the picture, is it not?
>
> "Senator WHEELER. That is exactly the picture." (Emphasis added.)

Senators who wished to prevent the furnishing of power at cost, as well as those Senators who wished to have the matter further considered, advocated eliminating all provisions relating to private development of the power from the bill. ~~See Note 6, infra.~~ The Senate Subcommittee followed this course and the Senate immediately went along. 69th Cong. Rec. 2477-2478, 2491 (1928) by the House. However, the House refused to recede in conference and the bill became law upon Senate approval of the bill with the provisions authorizing the furnishing of power at cost still in it. Id. at 3329-3340.

7/ Mr. Reed, the Chief Engineer of the Department of Interior, was called upon to explain and did explain that the proposed use of the distribution system provided for in the bill was for resale at a profit of the power to be furnished at cost to the irrigation project.

"Senator WHEELER. I would like to know, and I have not been able to get it yet from Mr. Reed, as to the proposal. I would like to have him explain to the committee what they intend to do with this distributing plant. Candidly I would like to see this $395,000 left in there, but I would like to have him explain to the committee what it is going to be used for, and how it is going to be used, and how they intend to benefit the white settlers by it, what his opinion is if it is put in there as to how it will benefit them.

"Mr. REED. If there were permission given to some company to develop the power and make it available and it could be purchased at cost so that a profit could be made, it would be distributed through the valley to the towns, and for such manufacturing purposes as they needed, or for elevators and things of that kind. Now, this was not the original idea of theIndian Service. It was the whites who wanted this for the purpose of reducing the cost of the project and, if possible, making some profit.

"Senator WHEELER. And they seem to be of the opinion that they are going to make big profits out of it. I would like to get your idea as to whether you think they can get any profit.

"Mr. REED. Buying the current at the price that was set in the tentative proposal, there would be a profit, but not much to start with, because there is not much use right now.

"Senator WHEELER. Not much of a market for it?

"Mr. REED. Not much of a market, but I think that would develop. If not, the project would be a failure. If the market were developed, there would be more or less profit made from it, not millions that have been mentioned by some overoptimistic people, but there would be a profit if it could be purchased at 2 1/2 mills." Defendant's Exhibit 13-B-10, p. 101.

The Department of Interior approved, on December 16, 1927, a form of repayment contract containing the -uthority of the irrigation project landowners to lease their water power rights to a private developer in exchange for power at special rates. Plaintiffs' Exhibit 38. It is clear, therefore, beyond any doubt that the Department was of the view that the then proposed Act of March 7, 1928, authorized the licensing of these water rights to a private developer in exchange for power at special rates.

8/ See note 4, supra, setting forth the basis for the opposition of the American Indian Defense Association and of theTribes.

9/ It was acknowledged by all that the bill which became the Act of March 7, 1928, left the matter of the furnishing of power at cost to the irrigation project to the discretion of the Power Commission and the Secretary of the Interior. The Act did not by any means require the insertion of such a provision as a condition precedent to any license issued (see exchange between Senators King and Walsh during the Senate floor debates quoted in note 9 of the Tribes Requested Finding No. 22; Defense Exhibit 13-B-12, p. 3333); on the other hand, it clearly did permit the insertion of such condition if deemed appropriate. See the interpretation put upon the bill by Mr. Collier of the American Indian Defense Association during the Senate Subcommittee hearings, supra note 6.

10/ Defendant's Exhibit 13-B-11, 2479, 2487.

Finding No. 19

Rocky Mountain Power Company
Application for License for
Construction of Project at Tribal Site No. 1

On March 27, 1928, the Rocky Mountain Power Company, which had previously applied for preliminary permits on all five Flathead sites, applied for a license authorizing immediate development of Tribal Site No. 1 using ten feet of regulated storage of Flathead Lake, and a power house with installed capacity of 150,000 horsepower. It was proposed to sell the power for public use, for electromentallurgical purposes, and to the Flathead irrigation project. Construction was to begin within one year and was to be completed within three years after the license was granted. Tenth Annual Report of the Federal Power Commission, Fiscal Year Ending June 30, 1930, Defendant's Exhibit 13-D-5, p. 113.

Finding No. 20

Recommendations of the Chief of Engineers of the War Department to Grant the Applications of the Rocky Mountain Power Company

In April of 1928 the Chief of Engineers of the War Department reported that the Rocky Mountain Power Company's application for preliminary permits (filed January 26, 1921) should be granted, and that the application of Walter H. Wheeler for such permits (filed January 11, 1928) should be denied.[1/] On July 16, 1929, the Chief of Engineers of the War Department recommended that the application for license for immediate construction filed by Rocky Mountain Power Company on March 27, 1928, should be granted, with appropriate safeguards to navigation and irrigation.[2/]

Footnotes to Finding No. 20

1/ Tenth Annual Report of the Federal Power Commission, Fiscal year ended June 30, 1930. Defendant's Exhibit No. 13-B-5, p. 113.

2/ Id.

Finding No. 21

Acts of March 4, 1929, chs. 705 and 707, 45 Stat. 1623, 1640 and 1562, 1574, Including Waiver of Normal FPC Charges for Administering Federal Water Power Act.

The Act of March 4, 1929, ch. 705, 45 Stat. 1563, 1574 and the Act of March 4, 1929, ch. 707, 45 Stat. 1623, 1939, continued the appropriation made for construction of the power plant, or for construction of a power distribution system and for the purchase of power, with additional provisions allowing diversion of small amounts thereof for certain specified irrigation project needs. The Act of March 4, 1929, ch. 707, 45 Stat. 1623, 1639, made amounts of the prior appropriation not diverted to specific irrigation needs available immediately for construction of power distribution lines and for the purchase of power "if and when a license for the development of power on the Flathead River shall have been issued by the Federal Power Commission as provided in the Act of March 7, 1928," and

> "Provided further that the Federal Power Commission in issuing any permits or licenses for the development of power or power sites in the State of Montana, as authorized by the Act of March 7, 1928 (45 Stat. pp. 212, 213), is hereby authorized and directed to waive payment of the usual administrative fees or commissions charged under regulations of said Federal Power Commission in the issuance of any such permits or licenses."

The express waiver by Congress of one of the usual charges made by the Federal Power Commission under Section 10(e) of the Federal Water Power Act, set out in Finding No. 11 supra, clearly shows that this and other charges authorized by Section 10(e), including the charge for use of Government land or other property, were not waived by the Act of March 7, 1928.

Finding No. 22

Hearings Before the Federal Power Commission Resulting in Award of License to Rocky Mountain Power Company Provided Suitable Agreement Could be Reached as to Amount of Indian Rental.

On August 22, 1929, applicant Walter H. Wheeler was notified by the Secretary of the Federal Power Commission that subject to his right to file exceptions or to request a hearing on the matter, the application of the Rocky Mountain Power Company for preliminary permits would be recommended for approval subject to appropriate conditions, and his (Mr. Wheeler's) application for preliminary permit would be recommended for rejection.[1/] Mr. Wheeler objected to any such actions without a hearing and in consequence a hearing was granted.[2/] The hearing was held before the members of the Federal Power Commission from October 28, to November 9, 1929. Participants in the hearing included the two applicants, Mr. J. Henry Scattergood, Assistant Commissioner of Indian Affairs, who appeared on behalf of the Secretary of Interior, and Mr. Walter L. Pope who appeared on behalf of the Flathead Irrigation District.[3/]

At the hearing before the Federal Power Commission, the Rocky Mountain Power Company made a satisfactory showing

that if granted the license sought for Site No. 1 it would begin construction within one year and would begin operations within three years. The company also made a satisfactory showing as to its market for the power which would be produced, and as to its ability to finance construction.[4/] Mr. Wheeler, on the other hand, who sought only a preliminary permit for the five sites, showed only that he was prepared to investigate the possibility of developing a market for power, and to prepare designs for a power development. Mr. Wheeler made no conclusive showing that he could successfully market the power if authorization for the development were granted to him.[5/]

As a result of the showings made by the applicants, at the hearing, Federal Power Commission staff reports relating to the feasability of the competing applications, an Indian Bureau Report supported by the Secretary of the Interior regarding Indian rentals, the Federal Power Commission recommended award of a license to develop Site No. 1 to the Rocky Mountain Power Company (the only applicant for an immediate license) in accordance with the company's proposal including irrigation project power, provided that the company agreed to pay a higher Indian rental satisfactory to the Secretary of Interior. The Commission rejected Mr. Wheeler's application for a preliminary permit for Site No. 1,

and, in addition, rejected the applications of both applicants for preliminary permits for Sites 2 through 4.[6/]

The making of the recommended grant conditional upon agreement by the power company to pay a higher Indian rental agreeable to the Secretary of the Interior was almost entirely due to the efforts of Mr. J. Henry Scattergood, Assistant Commissioner of Indian Affairs, who participated as counsel for the Secretary of the Interior and who prepared the above mentioned report approved by the Secretary of the Interior. Much time at the hearing was devoted to the matter of the Indian rentals to be paid for the use of the tribal site or sites. Through Mr. Scattergood's efforts it was demonstrated that the rental of $1.00 per actually produced horsepower, modeled on the National Forest Service charge for use of sites in National Forests, was totally inadequate as compensation for the commercial value of the Tribes' dam site, and that the $1.00 per horsepower rate was in effect a nominal charge set with a view to passing substantially all of the value of publicly owned dam sites out through the rate structure of the licenses to the public who are the beneficial owner of the sites as well as the other water and land resources contributing to the hydroelectric developments.[7/]

In his carefully prepared memorandum filed subse-

quent to the hearing but before the above mentioned action was taken by the Power Commission, Mr. Scattergood demonstrated that the commercial value of the Tribes contribution of the dam site to the proposed development of Site No. 1 was $2.21 per developed horsepower, more than twice the nominal $1.00 per developed horsepower proposed by the power company, and almost twice the $1.12 1/2 per developed horsepower rental proposed by the applicant Wheeler and agreed to by the Tribes.

Mr. Scattergood first determined that the annual per developed horsepower commercial value of the entire commercial development would be the difference between the annual cost of development including 8% return for the developer (but excluding Indian rentals) and the market value of, or price which would be obtained for the developed power at the dam site.[8/]

The key to Mr. Wheeler's hope to attract new industry was his proposed low price of $15.00 per horsepower year. Mr. Wheeler's annual costs including 8% return were shown to be $14.00 per horsepower per year. This gave a margin of only $1.00 per developed horsepower per year, as the commercial value of Mr. Wheeler's proposal.[9/] Since Wheeler proposed an optimistic efficiency factor of 87-1/2%, instead of the 70% factor used by the Federal Power Commis-

sion, his proposal was for 95,000 prime horsepower, or 14,500 horsepower more than the 80,500 prime horsepower which was produced by the Standard Federal Power Commission formula for prime power.[10/] Even so, it is easy to calculate that the maximum annual commercial value of the Wheeler proposal at maximum development would be only $95,000.

The Rocky Mountain Power Company, on the other hand, proposed a wholesale price to the Montana Power Company of $18.00 per horsepower per year. In addition to the fact that this proposed price was considerably higher than that offered by the only other actual applicant, the relative fairness and adequacy of this price was verified by the fact that it was slightly above the Montana Power Company's system wide generating costs, including 8% return, of $17.72. The Montana Power Company's estimated costs, as adjusted by Mr. Scattergood, were $13.39 per horsepower per year. By using a mean figure between the proposed $18.00 intercompany price and the $17.72 figure representing Montana Power Company's overall generating costs including 8% return as the market value of the power to be produced by the power company proposal, Scattergood obtained an annual commercial value of $4.42 per horsepower per year for the Rocky Mountain Power Company proposal. Since according to the conservative

Federal Power Commission formula for prime power, and according to Mr. Scattergood's adjustment of the RMPC's figures, the Rocky Mountain Power Company proposed prime power of 80,500 horsepower,[12/] the maximum annual commercial value of the power company's proposal at maximum development would be $355,810 (80,500 X $4.42), vastly in excess of the commercial value of Mr. Wheeler's Proposal.

Mr. Scattergood quite naturally concluded that the greater per horsepower or overall commercial values resulting from the Rocky Mountain Power Company proposal constituted the fair commercial value of the site which should be used for purposes of calculating the Indian rental. He attributed one-half of this commercial value, or $2.21 per developed horsepower (instead of the $1.00 per developed horsepower proposed by the power company or the $1.12 1/2 per developed horsepower proposed by applicant Wheeler), to the Tribes on account of the use of (1) their dam site, (2) other tribal land (which would be flooded by the proposed storage or which underlay the river and the southern one-half of Flathead Lake), and (3) the portion of the water rights involved which belonged to the Tribes under the Winters Doctrine. The balance of the land and water rights involved in the development were, according to Mr. Scattergood, subject to disposition pursuant to the laws

of the State of Montana, and the one-half of the commercial value of the project attributable thereto belonged to the people of Montana.[13/]

Mr. Scattergood's method for arriving at a pro forma rental for each developed horsepower took maximum power to be produced at the site into consideration and was not to be discounted in any way or otherwise affected by the actual price paid for that power by the irrigation project or by anyone else. In other words, the rental was arrived at on the assumption that every horsepower of power produced would have its full commercial value regardless of what price was actually paid for such horsepower. The matter of irrigation project power was not taken into account at all in determining the pro forma Indian rental.[14/]

The one-half of the commercial value viewed by Mr. Scattergood as belonging to the people of Montana was attributable in part to the "water rights reserved or appropriated for the irrigation projects"[15/] by the United States pursuant to the laws of Montana. It was appropriate, therefore, for the United States, in issuing the license pursuant to the Act of March 7, 1928, to provide for compensation by the licensee for the use of these water rights reserved or appropriated for the irrigation projects by diverting a small portion of the general public's one-half

of the total commercial value of the development to the owners or beneficiaries of those reserved or appropriated water rights as special members of the public. This was to be accomplished by requiring the licensee of the hydroelectric project to do what the RMPC had already agreed to do, i.e. to make up to 15,000 horsepower of power available to the irrigation project for certain uses at rates approximating cost of development. The balance of the public's share of the commercial value of the site, which would, of course, be the greater part thereof, would remain with the licensee available for reduction of rates pursuant to public utility regulation by the State of Montana. Whether the benefit would actually be passed on to the public or absorbed by the licensee would be left to state regulatory functions unless, of course, such regulation was not exercised by the State and abuse warranted exappropriation of excess licensee profits by the United States pursuant to Section 10(e) of the Federal Water Power Act, quoted supra p. [16/].

In order to assure the RMPC that, if it became the licensee, it would be insulated against any possible adverse economic impact flowing from the power to be furnished at cost to the irrigation project, Mr. Scattergood computed what he concluded was the maximum possible cost

which could theoretically be imputed to the company furnishing the irrigation power, and suggested that this amount be added to the inter-company price to be paid by the Montana Power Company to the Rocky Mountain Power Company. By thus isolating and identifying the cost, if any, such cost would clearly be recoverable through the rate structures of the Montana Power Company with no perceptible affect whatever on power rates.[17/] Of course, such isolation of the cost could have been accomplished by the power company without necessity of Mr. Scattergood's suggestion, and undoubtedly this would have been done by the Company in order to assure recovery of its cost of service. Mr. Scattergood's efforts in this regard probably served only the function of keeping the Power Company's estimate of the cost lower than it would otherwise have been.

It was established at the hearing that the Montana Power Company's actual rate of return had been 13.84% in recent years, or 5.84% in excess of the reasonable return of 8% to which it was entitled under Montana public utilities regulatory practice.[18/] The company's entitlement to this excess 5.84% would in any case be doubtful, and any reduction thereof could hardly be called a cost. Nevertheless, at the hearing before the Federal Power Commission, the Rocky Mountain Power Company took the position that furnishing the

power to the irrigation district under the terms and conditions specified in the company's own proposal would cost the power company $62,500 annually.[19] This figure was produced, using the Company's excessively low figure for plant capacity based on the 59-1/2% factor for efficiency and utilization, by allocating costs (including the company's 8% return) between maximum demand and average energy factors of the power to be furnished to the irrigation project (despite the fact that the company's proposed rates for the irrigation project power had been based on a straight energy approach) and by subtracting from the costs so determined the agreed estimate of revenues expected from the irrigation project power of $60,500.[20] Mr. Scattergood, on the other hand, felt that the power company's costs should be computed on a straight energy approach which the power company itself had determined to be appropriate when, by its proposal of February 17, 1927, it established the rates which it proposed to charge to the irrigation project.[21] Using this straight energy method, Mr. Scattergood concluded, after making certain adjustments to the figures provided by the power company, and by indulging certain assumptions contrary to known facts "for the sake of conservatism," that the company's costs, or more properly, the theoretical reduction of its already excessive return, could not possibly exceed $25,336.00.[22]

Neither of these so-called cost figures represented actual costs, but merely represented theoretical reductions of the company's already excessive rate of return. Moreover, these figures both assumed that the company would not or could not recover whatever amount was involved by infinitesmal increases in its customer rates. This assumption was unrealistic under the circumstances.

In his memorandum referred to above, Mr. Scattergood reported the above analysis of the evidence taken at the hearing to the Secretary of the Interior and to the Federal Power Commission, and recommended that the Secretary of the Interior and the Federal Power Commission (1) insist upon a higher Indian rental in the neighborhood of the pro forma $2.21 per developed horsepower year which he had, (2) grant a license to develop Site No. 1 to the only applicant for such license, the Rocky Mountain Power Company, since having the site developed as quickly as possible would be to the financial advantage of the Indians; and (3) require the licensee to provide power, in accordance with an agreement entered into by it, to the irrigation project. Finally, Mr. Scattergood recommended (4) that a preliminary permit for one of the other valuable tribal sites be issued to Mr. Wheeler to give him the opportunity he had requested to attract new industries to the Flathead vicinity. Mr. Scatter-

good believed that acceptance of his recommendations would assure an early income by the Indians from Site No. 1, and at the same time fully exploit the possibilities of development of the other sites for industrial purposes, in accordance with the general plan offered by Mr. Wheeler in support of his application for preliminary permits.[23/]

Footnotes to Finding No. 22

1/ Plaintiffs' Exhibit No. 42.

2/ Mr. Wheeler did not at first address his requests for a hearing to the Federal Power Commission, but instead telegrammed Senators Frazier and Norris, complaining of the action. Plaintiffs' Exhibits 43 and 46. These political appeals resulted in direct political intervention, including intervention by Senator B.K. Wheeler of Montana, who felt that a hearing should be granted to safeguard the rights of the Indians. Plaintiffs' Exhibits 45 and 46. In his letter to the Secretary of the Power Commission, Senator Wheeler set forth the statements of Senator Walsh of Montana to the effect that the granting of the license to the Rocky Mountain Power Company, or to another licensee which would make power available to the irrigation project, was not compelled by the Act of March 7, 1928; Senator Wheeler thought that a grant of the Rocky Mountain Power Company's application without a hearing gave the impression that Mr. Wheeler and the Indians were not being given a full opportunity to present their side of the issues to the Commission. Plaintiffs' Exhibit 46.

3/ Plaintiffs' Exhibit 36A; Defendant's Exhibit 13-B-3, p. 3653.

4/ Defendant's Exhibit 13-B-5, p. 114.

5/ Id.

6/ Tenth Annual Report of the Federal Power Commission, Fiscal Year Ending June 30, 1930, Defendant;s Exhibit 13-B-4, pp. 114-119.

7/ Scattergood Report, Plaintiffs' Exhibit 58, pp. 36-37; 1929 Hearing Transcript, Defendant's Exhibit 13-D-3, p. _____.

8/ Id., p. 33

9/ Id., p. 32, 50. Mr. Wheeler originally proposed to develop 105,000 prime horsepower based on an assumed flow of 6,000 cubic feet per second 90% of the time, and a low efficiency factor of 87.5%. (Mr. Wheeler applied no

utilization factor, claiming he would use all prime power produced). This would have produced an annual per horsepower cost of $12.50. However, Federal Power Commission studies showed that estimated storage permitted guaranteed flows of only 5,440 cubic feet per second 90% of the time. This resulted in only 95,000 prime horsepower for Wheeler's proposal (still 14,500 horsepower in excess of the prime horsepower produced by the Standard Federal Power Commission formula then in use: see note 10, infra.) with a resultant per horsepower cost of $14.00. Id., p. 11.

10/ The Standard Federal Power Commission formula for continuous or prime capacity employed an efficiency factor of 70% which included allowance for less than full utilization. Scattergood Report; Plaintiffs' Exhibit 58, p.10, footnote 1; Defendant's Exhibit 13-B-3, p. 3652. The Federal Power Commission in fact computed the prime capacity of the proposed Flathead development to be 80,500 horsepower. Defendant's Exhibit 13-B-3, p. 3652.

11/ Scattergood Report, Plaintiffs' Exhibit 58, p. 32.

12/ The RMPC originally proposed 80,000 continuous or prime horsepower. Defendant's Exhibit 13-B-3, p. 4058, 4083. This 80,000 horsepower figure had built into it a 70% efficiency factor such as was used by the Federal Power Commission in computing prime or continuous power. Defendant's Exhibit 13-B-3, p. 4059. It was 500 horsepower less than the Federal Power Commission figure because it used 5,400 cubic feet per second for available flow 90% of the time, whereas the Federal Power Commission figure was based on a study which unlike the Power Company figure included storage in the river above the lake and showed available 90% flow of 5,440 cubic feet per second. Defendant Exhibit 13-B-3, p. 3652. In addition, the RMPC applied to the 80,000 figure a utilization factor of 85%, representing the amount of prime power which it believed it could sell. Id., p. 4058. This proposal of the RMPC ignored the fact that the 70% factor used by the Federal Power Commission included a utilization factor already. Defendant's Exhibit, 13-B-3, p. 3652. The combined efficiency and utilization factors thus attempted to be applied by the RMPC was 59-1/2%. Scattergood Report, Plaintiff's Exhibit 58, p. 12. Mr. Scattergood noted that the power company admitted that the Federal Power Commission used only a 70% combined efficiency and utilization factor and that this was itself conservative. Id.

He also pointed out a current authority which suggested an efficiency factor of 77% for plants like the proposed development, and that the Montana Power Company system's actual average utilization factor for the five most recent years was 91%. As a result, Mr. Scattergood, in order to be conservative, applied an efficiency factor of 77% and a utilization factor of 91%, for a combined factor of 70,07%. He pointed out that the validity of this was borne out by the Power Commission's recommended combined factor of 70%. Id., pp. 12-4.

In consequence of the above adjustments to the efficiency and utilization factors used by the company Mr. Scattergood derived a figure of 80,500 prime horsepower for the power company proposal. This figure was exactly the same as that derived by application of the Standard Federal Power Commission formula.

13/ Scattergood Report, Plaintiffs' Exhibit 58, pp. 33-34. Scattergood's words were as follows:

> "As already pointed out, the difference between the intercompany wholesale price and the annual average generating cost represents the economic rental value of the site and this should be divided between the Indians as a tribe and the general public interests (of which of course the Indians as individuals also form a part) in fair proportion. In other words, the Indians have the ownership of the five sites and of that portion of the Flathead Lake that lies within the reservation, while the State of Montana owns the remainder of Flathead Lake and the right to control the use of the waters in the lake and river over and above the prior rights of the Indians. Thus both the Indians and the general public have rightful interests in the Flathead power development. Hence it would seem fair that whatever economic rental value this site has should be divided either approximately half to the Indians as a tribe and half to the public, or if it is really possible to determine their respective interests more exactly, that this rental value should be apportioned pro rata between them. In this connection it may be said that there are now being made in the Federal Power Commission and in the General Land Office studies

of the Indian tribal lands and of Indian allotment lands, and that these seem to indicate that the Indian interests in the power development are 46.5% and the non-Indian interests 53.5%. However, as these studies appear to be somewhat tentative and perhaps open to certain legal uncertainties relating to the easements upon lands bordering on the lake, it seems best for the purposes of this memorandum to assume 50% of the economic rental value of the site as belonging to the Flathead Indians as a tribe, and the other 50% as belonging to the general public of the State of Montana. It is perhaps superfluous to add that the Indian rental will be paid to the Federal Government in trust for the Indians, and the public's interest will be under the care and protection of the Montana Public Service Commission in its regulation of the Rocky Mountain Power Company and the Montana Power Company."

14/ Id., p. 43

15/ The quoted words are, of course, the words of the Act of March 7, 1928, which authorized the licensing of the power project to a private developer. It is significant, as Mr. Scattergood pointed out by including pertinent language from a report by the general counsel of the Department of Interior, that Congress expressly authorized the licensing of both the Indian's dam sites and the water rights of the irrigation project. The language of the general counsel quoted by Mr. Scattergood was as follows:

"Actual development of power by the Government at site No. 1, or elsewhere within the Flathead Reservation, has not yet been had, although considerable sums have been expended and much preliminary work done with that end in view. Subsequent to the passage of the Federal Water Power Act of June 10, 1920 (41 Stats. L. 1063), it was suggested that the power possibilities at Flathead be developed by outside interests rather than by the Government. Accordingly, an item in the Act of March 7, 1928 (45 Stats. L. 212-213) authorized

> the Federal Power Commission upon terms satisfactory to the Secretary of the Interior to issue licenses "for the use, for the development of power sites on the Flathead Reservation and of water rights reserved or appropriated for the irrigation projects."

It was also provided that the rentals from such licenses for the use of Indian lands should be deposited in the Treasury of the United States to the credit of these Indians as a tribe. It will be observed, however, that this statute contemplates the use of both the power sites on the reservation and of the water rights reserved or appropriated for this irrigation project.

Manifestly under this situation two interests are primarily involved, (a) that of the Indians and (b) of the irrigation project, meaning, of course, the landowners under that project. More accurately speaking, the interests of the Indians are twofold, first as a tribe in the revenue to be derived from these power resources developed from their tribal lands, and, secondly, as individual allottees owning lands under an irrigation project to be supplied in part with water by pumping, power at a cheap rate being essentially for the latter purpose. Approximately 20 per cent of the irrigable lands within the Flathead irrigation project are still owned by individual members of the tribe. Necessarily the Federal Government is concerned in seeing that the Indians receive adequate compensation for the use of their lands for power site purposes and also that its obligation to the landowners under this project is fulfilled by supplying an adequate quantity of water for irrigation at a minimum cost, it being here borne in mind that the landowners under this system, both Indian and white, are obligated to repay to the United States the cost of irrigation, on a per acre basis." Scattergood Report, Plaintiffs' Exhibit 58, p. 41.

16/ Id., pp. 33-34.

17/ Id., pp. 40-46.

18/ Scattergood Report, Plaintiffs' Exhibit 58, p. 24 et seq.

19/ Id., p. 44.

20/ Id.

21/ Id.

22/ Id., p. 45. The methods used by the parties to produce the two so-called loss figures are thoroughly set forth in Defendant's Requested Finding, No. 23.

23/ Scattergood Report, Plaintiffs' Exhibit 58, pp. 46-47.

Finding No. 23

A Hypothetical Licensee would not have Anticipated any Out-of-Pocket Loss in Furnishing the Irrigation Project Power

Analysis of figures and information actually used or available in 1929-30[1] establishes that neither the Rocky Mountain Power Company nor any hypothetical licensee of the Flathead Hydroelectric Development would have anticipated an out-of-pocket loss as a result of furnishing the irrigation project power in accordance with the provisions therefor incorporated into License No. 5. On the contrary, the Rocky Mountain Power Company, and any other hypothetical licensee would have anticipated a profit on the power to be sold to the irrigation project.[2]

It was generally agreed by all actual parties in 1929-30 that the cost of the Flathead development should be allocated entirely to continuous or prime plant capacity[3] which at the time was power, not in excess of the hydraulic capacity of installed generating equipment, available 90% of the time, taking into account the most adverse water conditions contemplated.[4] There was therefore complete agreement that no costs should be allocated to secondary power, or power in excess of prime available only during time of excess water.[5]

It was fully recognized that a substantial portion of the irrigation project load would be supplied from secondary energy. The Rocky Mountain Power Company in fact conceded that 1,500, or one-half of the irrigation pumping load estimated at 30% of the 10,000 horsepower in the first two blocks of power, would be furnished from secondary power because 110 days of the irrigation pumping season coincided with 51% of the 92 days of excess water.[6/] The company did not take into account that a portion of the 5,000 horsepower block to be used year 'round for non-pumping uses at an estimated load factor of 50% could also be furnished from the secondary power available during the 92 days (approximately 25% of the year) when secondary energy would be abundant even in critical years. Thus a hypothetical licensee would have anticipated that an additional 625 horsepower (.25 X 5,000 X .50) of the anticipated irrigation project load of 5,500 horsepower, or a total of 2,125 of the 5,500 horsepower average load of the irrigation project would be supplied from secondary power.

There was likewise substantial agreement as to the correct figure for prime or continuous plant capacity. The Rocky Mountain Power Company using the standard Federal Power Commission formula, the static head produced by the Federal Power Commission formula of 185 feet, and K factor of .08, and a flowage figure of 5,400 cubic feet per second, obtained a figure of 80,000 horsepower as the prime or continuous

capacity of the proposed plant.[7] The Federal Power Commission itself, using the same formula and figures except for an increased flowage figure of 5,440 cubic feet per second (based on an increase of the Rocky Mountain Power Company's storage figure of 1,160,000 acre feet to 1,205,000 acre feet by taking river channel storage above the lake into account), obtained the slightly larger figure of 80,500 horsepower.[8]

The Rocky Mountain Power Company attempted to reduce its prime power figure further before allocating costs by introducing into the standard formula a larger than normal utilization factor based on the particular experience of the Montana Power Company system over a period of years.[9] In other words, the Rocky Mountain Power Company sought to reduce the capacity over which costs would be allocated by taking account of the fact that the Rocky Mountain Power Company did not expect to make as full use of the development as was expected of licensees of the power commission in general. It undoubtedly did not surprise the Rocky Mountain Power Company when this factor, peculiar to its own record, was in effect disregarded by Mr. Scattergood. Mr. Scattergood in fact demonstrated that the current utilization factor for the Montana Power Company system was 91%, and that he expected efficiency of a new plant would be 77%, or a combined factor of 70.07%, only slightly more than the combined factor of 70% for utilization and efficiency used by the Commission.[10] In any case,

the Rocky Mountain Power Company was in effect held to the normal formula in general use, and it is certain that other hypothetical licensees would likewise have been held to the utilization factor built into that formula. Applicant Wheeler proposed a higher than normal efficiency factor of 87 1/2% and no separate utilization factor (and an effective head of 175 feet) with a resulting prime or continuous capacity of 95,000 horsepower.[11/] This would result, he claimed, from his rather unusual and optimistic plan to use all prime power all the time to serve an exclusively industrial load. As stated above, the hypothetical licensee would undoubtedly have been held to a combined 70% factor; by the same token, he probably would not have been pressed to propose any higher factor. If he had, however, the effect would have been to lower the unit cost of power.

There was also substantial agreement between the Rocky Mountain Power Company and Mr. Scattergood as to the total annual cost of the project, excluding the Indian rental. The difference between the Rocky Mountain Power Company's figures of $1,079,680, and Mr. Scattergood's slight adjustment to $1,077,804 was less than 0.2% and clearly negligible.[12/]

There was, of course, a difference of opinion among the actual parties in 1929-30 as to the proper amount of the Indian rental. The Rocky Mountain Power Company had made a nominal offer of $1.00 per produced horsepower, and Wheeler

had offered slightly more--$1.12 1/2 per produced horsepower.[13] Mr. Scattergood had proposed a significantly higher rental based on the commercial value of the development attributable to Tribal property, namely $2.21 per developed horsepower.[14] All of these proposed Indian rentals had in common the fact that the actual amount of the total annual rental would depend on actual development of power at Flathead. The highest proposal, that of Mr. Scattergood, was keyed to the average annual 15-minute peak output of the development. Mr. Scattergood recognized that such a formula might induce the Rocky Mountain Power Company, if it became the licensee, to use the development for peaking purposes only (i.e. keep the Flathead development idle most of the year and use it only when needed to meet system peak demand.) He therefore proposed a schedule of minimum rental payments keyed to peak output of Flathead and based on stated annual load factors (calculated the same as the overall Montana Power System load factor).[15] Thus during the first year of the project's operation (but not including the three year period contemplated as required for construction), the Indian rental would be fixed at not less than 60% annual load factor "based on the actual peak for 15 minutes." During the second year, the load factor would be increased to 67.5%; and during the third year to 70%. For the fourth year of operation and thereafter, the actual overall Montana Power System load factor would be used.[16]

The Montana Power System load factor, of course, varied but, at the time of Mr. Scattergood's proposal, was 83%.[17/] On the basis of the 83% load factor, Mr. Scattergood calculated average annual 15 minute peak for the Flathead development at 97,000 horsepower (using the accepted 80,500 horsepower figure for continuous plant capacity (.83 -- 80,500 = 97,000)). The resulting maximum annual Indian rental that could be reached after construction and start-up time and assuming continued growth of area load sufficient to absorb the new capacity at Flathead, the load factor of 83% and a 15 minute Flathead peak of 97,000 horsepower, would be $177,905.[18/] But the Rocky Mountain Power Company predicted an average annual peak 15-minute for Flathead of only 82,000 horsepower (instead of the 97,000 horsepower derived by Scattergood).[19/] This figure was derived by dividing .83 (representing the Montana Power Company system load factor) into 68,000 horsepower, the Rocky Mountain Power Company's predicted average load for the Flathead development based on the Montana Power Company's system wide utilization factor. Thus the Rocky Mountain Power Company's estimate of the maximum annual Indian rental that would be reached after construction and start-up time was not more than $150,200, assuming continued economic and business growth sufficient to absorb the Flathead development without deterioration of the utiliza-

tion factor of the Montana Power System. (68,000 X $2.21 = $150,280). These theoretical maximums could not be reached for a number of years, of course, and were dependent on continued growth of area load.

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An apparently more significant difference of opinion regarding the costing of power which arose between the Rocky Mountain Power Company and Mr. Scattergood at the hearing in 1929 concerned the method by which annual costs were to be allocated to prime or continuous plant capacity.[20/] This difference of approach was in fact less significant than it might seem, since when the factors referred to above are taken into consideration, as they would have been by a hypothetical licensee in 1929-30, it makes little difference whether the so-called straight-energy approach used by Mr. Scattergood, or the so-called demand-energy appraoch used by the Rocky Mountain Power Company is used.[21/] The result in both cases demonstrates that a hypothetical licensee would not have anticipated a loss on the sale of the irrigation project power.

Straight-energy Approach

The Rocky Mountain Power Company had itself used the so-called straight-energy approach to pricing power in its proposal for irrigation project power of February 27, 1927,[22/] and it continued this approach in the revision of that proposal dated December 20, 1928.[23/] That is, the company proposed to charge only for energy actually used, and no charge was proposed for the mere right to demand given amounts of power

at specified times (as is characteristic of the demand-energy method of allocating costs). Mr. Scattergood quite naturally concluded from this fact that the straight-energy approach to calculating the cost of the power involved was a satisfactory one.[24/] Under this approach the cost of each unit of prime energy is determined by dividing annual cost by the total number of units of prime energy to be generated.[25/] In fact the straight-energy method was an appropriate method, and in view of the fact that it was the only method considered when the terms respecting the furnishing of irrigation project power were drawn up, it was the best method available in 1929-30 for computing the cost of furnishing the irrigation project power.[26/]

In applying the straight-energy approach, a hypothetical licensee in 1929-30 would have taken into account the facts substantially agreed to by the actual parties, namely, (1) the annual costs, and (2) the proposition that such costs should all be allocated to prime energy, and that no cost should be allocated to secondary energy which would supply at least 2,125 of the irrigation project load. Furthermore, such hypothetical licensee would have taken into account the figure for prime or continuous plant capacity produced by the standard Federal Power Commission formula then in use. Finally, such hypothetical licensee would have taken into account that all proposals for the Indian rental depended on actual power

production which in any event would not reach a maximum of available load for several years (because of construction and operational start-up time) and the ultimate amount of which would depend entirely on prevailing economic conditions. At the time of the issuance of License No. 5, the system load of the Montana Power System instead of continuing to grow, as had been anticipated, had dropped off sharply (approximately 15% from 1929 levels).[27] The hypothetical licensee would therefore have discounted the estimated cost of the proposed rentals for both construction and start-up time and he would also have adjusted his estimates downward in order to take into account the already evident serious decline in the area demand for power. The resulting estimate of annual rental on a levelized annual basis would not therefore have exceeded the levelized annual cost of the actual fixed rental subsequently incorporated in License No. 5, or $136,418.[28]

As a result, the hypothetical licensee would have concluded, using the straight-energy method of computing costs, that furnishing the irrigation project power would net a profit of approximately $9,500.00.[29]

Demand-Energy Approach

At the Federal Power Commission hearing in 1929 the Rocky Mountain Power Company for the first time contend ' that costs should be allocated between demand, or the right a particular customer to use a given amount of power at ven time, and energy, or the amount of prime energy in fact to be

used. It thus proposed a separate demand and energy change for each unit of demand, and each unit of energy consumed, respectively. For purposes of arriving at the demand-energy charge, the Rocky Mountain Power Company proposed assigning 40% of costs to the demand capacity of the project it proposed to construct (i.e., to plant factors actually producing peak output potential, such as generating equipment, etc.), and 60% to energy capacity (i.e., to plant and operational factors contributing to average kilowatt hours of electricity produced, such as dam and reservoir, salaries, etc.).[30/]

In deriving the unit cost of energy under this approach, however, the Rocky Mountain Power Company devided the 60% of annual costs allocated to energy by 68,000 horsepower, the figure it derived by applying its proposed excessive 85% utilization factor to continuous capacity.[31/] A hypothetical licensee would have used the standard formula of the Federal Power Commission with the much smaller built-in utilization factor and would have used the resulting 80,500 horsepower as the prime or continuous capacity of the proposed plant, with the result that the cost allocated to each unit of power would have been appreciably smaller.

In deriving the unit cost of increments of demand applicable to the irrigation project load, the Rocky Mountain Power Company (1) used as the demand capacity of the proposed plant an average annual peak load figure produced by applying

the Montana Power Company system load factor of 83% to the assumed prime or continuous capacity of 68,000 horsepower,[32] and (2) it used 15,000 horsepower as the applicable annual maximum demand of the irrigation project load.[33]

The hypothetical licensee would not have used an average figure at all for plant demand capacity, and hence would not have derived demand capacity from the 68,000 horsepower "prime" figure produced by applying the Montana Power Company's peculiar system utilization factor to the prime power figure produced by the standard Federal Power Commission formula. the hypothetical licensee proposing installed capacity of 150,000 horsepower (the installed capacity in fact proposed by actual applicants) would instead have used 150,000 horsepower as the demand capacity of the plant, since known water conditions were such that the plant could in fact be operated at 150,000 horsepower of output more than 60% of the year.[34]

Finally, the hypothetical licensee would not have used 15,000 horsepower for the applicable demand of the irrigation project. It was agreed by the actual parties that the irrigation project would use 10,000 of the 15,000 irrigation project horsepower only for irrigation pumping and only for irrigation pumping and only during the irrigation season, i.e. for approximately 110 out of the 365 days of the year. Furthermore, it was known that the non-pumping or year 'round irrigation project needs for power would not equal, much less exceed,

the remaining 5,000 horsepower of the irrigation project power. The hypothetical licensee, therefore, would not have attributed 15,000 year 'round demand to the irrigation project, and would not have computed demand unit cost on any such basis. Instead it would have charged for 5,000 horsepower of demand for the whole year, and an additional 10,000 horsepower of demand during the 110 days out of the 365. The annualized maximum demand of the irrigation project would thus have been 8,014 horsepower ($\frac{110}{365}$ X 10,000 + 5,000 = 8,014), instead of the 15,000 horsepower annual demand used by the Rocky Mountain Power Company.[35/]

As a result, the hypothetical licensee would have concluded using the demand-energy approach for computing costs, that furnishing the irrigation project power would net a profit of approximately $3,700.[36/]

Footnotes to Finding No. 23

1/ Mr. Spencer, Tr. pp. 90, 92-94.

2/ Id.

3/ Mr. Spencer, Tr. pp. 98-99, 103; See Exhibit 12 of the RMPC at the 1929 hearings where no cost was assigned to secondary energy, Plaintiffs' Exhibit 59.

4/ Mr. Spencer, Tr. p. 87; Scattergood Report, Plaintiffs' Exhibit 58, p. 10

5/ See reference at Note 3, supra.

6/ Defendant;s Exhibit 13-D-3, p. 4087; quoted by Mr. Spencer, Tr. pp. 89-90; See Mr. Van Scoyoc, Tr. pp. 51-52.

7/ Defendant's Exhibit 13-B-3, pp. 3652, 4058, 4083.

8/ Defendant's Exhibit 13-B-3, p. 3652.

9/ Defendant's Exhibit 13-B-3, p. 4058.

10/ Scattergood Report, Plaintiffs' Exhibit 58, pp. 12-14.

11/ Id.

12/ Id., fold out sheet between pp. 46 and 47.

13/ Id., pp. 49-50.

14/ Id., pp. 34, 50.

15/ Id., p. 38.

16/ Id.

17/ Id.

18/ Id., pp. 34, 50.

19/ Id., fold out sheet between pp. 46 and 47.

20/ Id., p. 44.

21/ Spencer, Tr. p. _____; Gallups, Tr. p. 271, et seq.

22/ See Finding 15, supra.

23/ See Finding 24, note 13, supra.

24/ Scattergood Report, Plaintiffs' Exhibit 58, p. 44.

25/ Mr. Spencer, Tr. p. 95.

26/ Mr. Gallups, Tr., p. 271 et seq.

27/ Defendant's Exhibit 13-B-1, Appendix C.

28/ Beck Report, p. 25 and Appendix C, Defendant's Exhibit 13-B-1. Whole thing about 13-B-9 and its relation to conclusion.

29/ The studies made by Beck Associates and presented at the hearing in July 1970 included a calculation of the profit which would have been anticipated by a hypothetical licensee taking account of all the factors mentioned in Finding No. 22, including the use of a substantial amount of secondary power to serve the irrigation project load. Column 5A of Defendant's Exhibit 13-B-9 shows that a profit of $783 would have been anticipated by the hypothetical licensee taking into account that 1,500 horsepower of the annual load of 3,000 horsepower for irrigation pumping would be furnished from secondary power. The larger profit figure stated in the text is the result of also taking into account the obvious fact that 25% of the anticipated ~~5,000~~ 2,500 horsepower non-pumping load (an additional 625 horsepower) could also be served with secondary power. The higher profit figure is derived simply by using figures developed from the evidence by Beck Associates in the Beck Report, Appendix H (Defendant's Exhibit 13-B-1) and in Exhibit 13-B-9, and taking account of the additional amount of 625 horsepower of the irrigation load that would be served with secondary power. The calculation is as follows:

1. Average Irrigation Project Load	5,500 hp.
Amount Served with Secondary Power (1,500 + 625)	2,125 hp.
Amount Served with Primary Power	3,375 hp.

2. 3,375 hp X .746 = 2,518 kilowatts

3. Cost per kilowatt hour 2.30 mills (Defendant's Exhibit 13-B-1 Appendix H, Column 5)

4. 2518 kilowatts X 8760 (hours in year) X 2.30 mills = $50,732.27.

5.

Revenue	$60,500
Less Cost	50,732
	$ 9,732 profit

[Add to this note additional beneficial effect of Thompson Falls]

30/ Mr. Van Scoyoc, Tr. pp. _____.

31/ RMPC Exhibit 12 at 1929 hearings, Plaintiffs' Exhibit 59.

32/ Scattergood Report, fold-out sheet between pp. 46 and 47, Plaintiffs' Exhibit 58.

33/ RMPC Exhibit 12 at 1929 hearings, Plaintiffs' Exhibit 59.

34/ Gallup, Tr. p. _____.

35/ Gallup, Tr. p. _____; Defendant's Exhibit 13-B-4.

36/ The Beck studies, as indicated above, in note 29, took into account that 1500 horsepower of the irrigation project pumping load would be served from secondary power. They did not, however, take into account that an additional 625 horsepower of the 2,500 horsepower non-pumping load would also be served with secondary power. The 3375 prime horsepower needed to supply the irrigation project load (see note 29 supra), multiplied times the unit energy cost of 8.43 per horsepower in Defendant's Exhibit 13-B-7, column 5A, the total cost allocable to energy in the demand-energy calculation is $28,451.25, instead of $33,720 shown in Defendant's Exhibit 13-B-7, column 5A. The difference between this figure for cost of energy is $5,269. By subtracting the small loss of $1,472 shown in column 5A, the result is a profit on sale of the irrigation project power of $3,797.
[Add effect of Thompson Falls]

Finding No. 24

Agreement with Regard to Indian Rental Reported to the Secretary of the Interior and to the Federal Power Commission (Supplemental Scattergood Memorandum dated May 14, 1930)

After the close of the hearing on November 9, 1929, and the filing of Mr. Scattergood's initial report and recommendations in December, the Federal Power Commission recommended that the application of the Rocky Mountain Power Company for Site No. 1 be granted, provided a higher Indian rental ~~than that proposed~~ satisfactory to the Secretary of the Interior could be agreed upon.[1/] Negotiations between the company and representatives of the Secretary of Interior continued for several months thereafter.[2/]

Mr. Scattergood reported the results of these negotiations to the Secretary of Interior in a supplemental memorandum dated May 14, 1930 (Supplemental Scattergood Report, Plaintiffs' Exhibit 58, pp. 49 et seq.) Mr. Scattergood reviewed studies by the Federal Power Commission, and the Army engineers (the latter having been requested by the Secretary of the Interior in order to obtain a fresh and independent study) and reported that all studies confirmed the inadequacy of the offers for Indian rentals made by both of

applicants.[3]

The various studies suggested three methods for determining the proper amount of Indian rental. Mr. Scattergood, in his earlier report, had suggested a spot rate of $2.21 per horsepower produced. The Federal Power Commission and the Army engineers, as well as the Indian Bureau, had prepared studies based on a combination of a fixed rental plus an energy charge. In effect, this approach adopted a minimum fixed rental charge up to a given horsepower of development, and added an energy charge for development above that point at a rate designed to divide revenues in excess of the company's 8% return between the Indians and the public through the company under regulation. This plan resulted in a constantly deminishing cost per kilowatt hour to the company and in a steadily rising rate of rental per horsepower to the Indians. It had the advantage of relatively high Indian income at high rates of power production, but relatively low Indian income in the lower brackets of power output actually advocated as minimum expected development to the RMPC at the 1929 hearings.[4] It was in effect a profit sharing arrangement which did not avoid but rather increased the possibility that the licensee might use the Flathead plant for peaking purposes only, or to furnish a

lower than pro rata portion of the Montana Power Company's system load. Because of these difficulties, months of negotiations failed to produce an agreement and the profit sharing was finally abandoned for a third approach.[5/]

The third approach which was finally agreed upon was the flat rental approach. This approach isolating the Indians' from all business risks (a significant advantage indeed in context of the great Depression which had begun with the market crash in October 1929)[6/] since it provided an assured, definite and uniform rental "regardless of the amount of use of the plant by the bureau", i.e. regardless of the general business climate or the success or failure of the Flathead development. It also avoided the difficulties of assuring to the Flathead development its fair portion of Montana Power Company system load, and any inducement for use of the Flathead development for peaking purposes, as well as any inducement for "starving" the Flathead development during high water periods when other plants in the Montana Power Company system could carry an increased share of the load. In short, the agreed solution avoided all problems which would otherwise have arisen from a partnership or profit sharing arrangement between the Indians and the licensee and eliminated all risk to the Indians because

of economic conditions.

The agreement reached took the form of a license provision and was as follows:

> "Article 30: (a) The licensee shall pay into the United States Treasury as compensation for the use, in connection with this license, of the Flathead Indian tribal lands annual charges computed as follows:
>
> (1) A charge at the rate of $1,000 per calendar month, beginning with the month in which the license is issued and extending to and including the month in which the project is placed in commercial operation. For the purpose of the payments under this article, the beginning of commercial operation shall be considered as the time when one of the licensee's generating units shall have been installed, tested, and demonstrated to be in suitable condition to produce electric energy for commercial purposes with a reasonable degree of reliability.
>
> (2) A charge at the rate of $5,000 per month, beginning with the calendar month next succeeding the date on which the project is placed in commercial operation and extending to the end of the calendar year in which such commercial operation shall commence.
>
> (3) For each full calendar year from and after the 1st of January next following the date on which the first unit is placed in commercial operation, annual charges will be as follows:

	Per year
For the first two years	$ 60,000
For the third year	75,000
For the fourth year	100,000
For the fifth year	125,000
For the next five years	150,000

	Per year
For the next five years	$160,000
For the next five years and/or until readjustment of the annual charges payable hereunder shall have been effected pursuant to the provisions of par.(D) of this article 30	175,000

(B) Payments shall be made for each calendar year within 30 days after the close thereof on bills rendered by the Commission.

(C) Pursuant to the provisions of the act of March 4, 1929 (45 Stat. 1640), all charges for reimbursing the United States for the cost of administration of the Federal water power act have been and are hereby expressly waived.

(D) The annual charges payable under this license may be readjusted at the end of 20 years after the beginning of operation under this license and a periods of not less than 10 years thereafter by mutual agreement between the commission and the licensee, with the approval of the Secretary of the Interior. In case the licensee, the commission, and the Secretary of the Interior cannot agree upon the readjustment of such charges, it is hereby agreed that the fixing of readjusted charges shall be submitted to arbitration in the manner provided for in the United States arbitration act (U.S.C., title 9), such readjusted annual charges to be reasonable charges fixed upon the basis provided in section 5 of regulation 14 of the commission, to wit, upon the commercial value of the tribal lands involved, for the most profitable purpose for which suitable, including power development."8/

The full rental of $175,000 per year, reached after the start-up period, would appear to be based upon the figure

of $177,905 produced by multiplying Mr. Scattergood's recommended $2.21 rental per horsepower time 83% of Mr. Scattergood's optimistic prediction of 15-minute peak system load, of 80,500 horsepower.[9/] The small reduction in ultimate rental was an appropriate quid pro quo to be given in exchange for a guaranteed flat rental of the full amount without regard to economic conditions or actual company operations. Moreover, one of the negotiated terms incorporated into the final agreement was that the Montana Power Company, the parent company of the licensee, would enter into a contract with its subsidiary, Rocky Mountain Power Company for the 50-year period of the license to take all of its production of electric energy except for such current as was taken by the United States for the benefit of the irrigation district. The Montana Power Company agreed to pay for the power taken on the basis of actual cost, including Indian rental plus 8% return upon the net investment cost. This gave assurance of a market for the entire period of the license, and, in effect, acted as a guarantee that the Rocky Mountain Power Company would be able to carry out its obligations including payment of the Indian rental. Undoubtedly these guarantees were considered to be especially valuable in the dark days of the great economic depression, the advent of

which was then beginning to be appreciated.

The wisdom of Scattergood's decision to recommend uniform rentals (levelized at $136,000-plus over the 50-year license) may be illustrated by looking at the Montana Power Company System demand for the year 1932. Based on Appendix C to the Beck Report, such demand appears to lie in the neighborhood of 100,000 kw - a sharp drop from the 1926-1927 level of approximately 190,000 kw.[10/] Based on Scattergood's concept of equal treatment for Flathead, the annual 15-minute peak for Flathead during 1932 (assuming it were in operation) would not be 97,000 horsepower, but rather would be approximately 51,053 (computed pursuant to the equation 190,000:100,000 equals 97,000:X). Using the Montana Power Company system load factor of 83%, the Indian rental under such circumstances would be $93,646.54[11/] - more than $80,000 below Scattergood's optimistic projection of $177,905.

After the results of the negotiations with respect to Indian rentals had been reported to the Federal Power Commission, the proposed rentals were studied carefully by the Commission's executive secretary and engineering staff. The Commission staff was of the opinion that the Indian rentals agreed to for use of the Indian lands was reasonable

and adequate based upon the commercial value thereof for the most profitable purpose for which suitable, including power and development.[12/] The Commission subsequently issued License No. 5 to the Rocky Mountain Power Company on May 23, 1930. The license as issued contained the provisions for Indian rentals and for parent company guarantees which had been worked out with the Rocky Mountain Power Company and Montana Power Company and reported by Mr. Scattergood in his memorandum of May 14, 1930. The license also contained a provision for power for the irrigation project in accordance with the proposition previously agreed to by the Rocky Mountain Power Company.[13/]

In its Tenth Annual Report for the fiscal year ending June 30, 1930, the Federal Power Commission reported issuance of License No. 5. On page 222 of the report, the newly licensed project was described in the following words:

> "Description of Project: The project involved the occupation and use of certain public lands of the United States, certain lands of the Flathead Indian Reservation, and of the Flathead National Forest, together with all riparian rights appurtenant thereto which are necessary or useful for the purposes of the project [,] and water power rights for power purposes reserved or appropriated for Indian irrigation projects."[13/]

Footnotes for Finding No. 23

1/ Scattergood's Supplemental Report, Plaintiffs' Exhibit No. 58, p. 49.

2/ Id., p. 51 .

3/ Id., p. 49.

4/ See the strenuous objections to the profit sharing approach raised by the American Indian Defence Association in Def. Ex. 12-B-3, pp. 3489, 3494, 3540, 3565, 3567, 3571.

5/ Id., p. 51

6/ It has been established that, contrary to popular belief for many years, the stock market crash beginning in October of 1929 was, in part at least, the cause of the Depression, and not the other way around. John Kenneth Galbraith, in his book The Great Crash 1929, published by Houghton Mifflin Company, Boston, in 1954, is credited with having established this point. The accurateness of Galbraith's conclusion has been widely conceded, according to the editors of Time in their introduction to the 1962 paperback edition of The Great Crash 1929 .

7/ Scattergood's Supplemental Report, Plaintiffs' Exhibit 58, pp. 51-52.

8/ Id., p. 52.

9/ Id., p. 50.

10/ The figures developed for 1926 and 1927 from pp. 21-22 of the Scattergood Report do correspond with the graph in Appendix C to the Beck Report, Def. Ex. 13-B-1.

11/ 51,053 X .83 X $2.21 = 93,646.54.

12/ Scattergood Report, Plaintiffs' Exhibit 58, p. 37 et seq; Defendant's Exhibit 13-D-5, p. 114.

13/ The original proposition of the Rocky Mountain Power Company set forth in the memorandum of February 17, 1927 was revised effective December 20, 1928. The revised agreement made the second 5,000 horsepower block of the total of 15,000 horsepower irrigation project demand available for "farm and for sale," instead of only for irrigation pumping. Plaintiffs' Exhibit 41.

The provisions of License No. 5 relating to the irrigation project were as follows:

> "Article 24. In consideration of the use to be made of the partially completed Newell tunnel, the Licensee shall pay into the treasury of the United States the sum of one hundred and one thousand six hundred and eighty-five dollars and eleven cents ($101,685.11), such payment to be made within nine (9) months from and after the date of this license and to be a part of and included in the Licensee's net investment in the project.
>
> * * *
>
> "Article 26. On June 1, 1939, or on such earlier date as the project works may be placed in commercial operation, and thereafter throughout the remainder of the term of the license, Licensee shall make available, at the project boundary at or near the Licensee's generating station, and the United States, for and on behalf of the Flathead irrigation project or the Flathead irrigation district, may take and, having taken, shall pay for, at the price of one mill per kilowatt hour: (1) electrical energy in an amount not exceeding 5,000 horsepower of demand to be used exclusively for pumping water for irrigation; and (2) electrical energy in an amount not exceeding 5,000 horsepower of demand for all project and farm uses and for resale. Such deliveries shall be made

at such standard voltage as may be selected by the Commission. The Licensee shall also make available, at the voltage of the line from which service is taken, either at the project boundary at or near the Licensee's generating station or at some more convenient place on the project to be agreed upon, and the United States, for and on behalf of the Flathead irrigation project or the Flathead irrigation district, may take and, having taken, shall pay for, at the price of two and one-half mills per kilowatt hour, additional electrical energy in an amount not exceeding 5,000 horsepower of demand for all project and farm uses and for resale:

"During the period starting June 1, 1934, and ending June 1, 1939, the licensee shall make available to the United States at the project boundary near Licensee's generating station 5,000 horsepower for the use of the Flathead irrigation project or the Flathead irrigation district, at a price of 1 mill per kilowatt hour, and the licensee shall allow credit to the United States for and on behalf of the Flathead irrigation project for all sums paid in excess of this rate for energy used by the said project from and after June 1, 1934, provided nothing herein shall prevent The Montana Power Company from asserting any valid offsetting claim or claims for amounts due or hereafter to become due from the United States or the Flathead irrigation project by reason of services rendered or facilities afforded in connection with the power referred to.

"The Licensee shall install, as a part of the initial development, two three-phase transformers, each with a capacity of at least 3,750 kilovolt-amperes, for the delivery of electrical energy in accordance with the provisions hereof, and shall install a third transformer at such time as the Commission may direct.

* * *

"Article 28. The United States reserves to itself or to the Flathead irrigation project management the exclusive right to sell power within the boundaries of the Flathead Indian Reservation, to the extent of 10,000 horsepower to be delivered for use and/or sale as provided in Article 26 hereof.5/

* * *

"Article 29. The Licensee shall pay to the United States reasonable annual charges for recompensing it for the use, occupancy and enjoyment of public and reserved lands (not including Indian tribal lands) or other property hereinbefore described. The payment by the Licensee of such annual charges for any calendar year shall be made to the United States at the end of the year, or within thirty days thereafter, upon bills rendered or approved by the Commission. Such charges shall be determined in accordance with the provisions of Regulation 14 of said rules and regualtions of the Commission, and for the purposes of such determination the prime power capacity of the project shall be taken as 80,000 horsepower."

The last quotes provision of Article 29 regarding payment for use of public land and specifically described other Government property (of which there was none) is further conclusive evidence that the proviso regarding payment of rentals for use of Indian lands contained in The Act of March 7, 1928, did not limit payment of consideration by the licensee to payments to be made to the Tribes. The Tribes considered a partial record of payments made by the licensee pursuant to Article 29 and included it as a part of footnote 6 to Plaintiffs' Proposed Finding on Rehearing, p. 168.

13/ Defendant's Exhibit 13-B-5, p. 222.

Finding No. 24

Tribes Subsequent Consent to
Rental and Irrigation Project Power

Because of the adverse economic conditions caused by the great Depression and an almost immediate and dramatic consequent decrease in the Montana Power Company system's load, the licensee was unable to complete construction as contemplated by License No. 5 and a subsequent amendment thereto.[1/] The licensee applied to the Federal Power Commission for a further extension of time in May of 1935, but the Secretary of Interior declined to approve such extension until the Tribes, which had assumed powers of self-determination under the Wheeler-Howard Act, or Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984; 25 U.S.C. §§461-474, had first given their consent. Thereupon the Rocky Mountain Power Company conferred with the Tribes and obtained their consent after agreeing, among other things, to pay liquidated damages and a higher annual rental. Subsequently, an amendment incorporating the agreement obtained by the Tribes was approved by the Tribes, the Secretary of the Interior and the Federal Power Commission on July 17, 1936.[2/] This amendment, Amendment No. 2, recites the Tribes' express consent and agreement to the annual rental which they were to receive.[3/] The

license, as amended, incorporated the provision for a block of power for the irrigation project. Thus, the Tribes consented to the rentals they now claim to be inadequate because of the power block furnished to irrigation project.

Footnotes to Finding No. 24

1/ Defendant's Exhibit 13-B-1, p. 11; Tr. p. 86.

2/ Montana Power Company v. Federal Power Commission, ____ U.S. App. D.C. ____, ____ F. 2d ____ (1969).

3/ The Amendment to Article 30, increasing the annual Indian rental, was as follows:

[get this from Plaintiffs' Exhibit No. 13-F-2A (certified copy of License No. 5 and all amendments, on file with Ct. Cl.)]

Finding No. 25

With the Express Approval of, and at the Recommendation of the Tribes, Congress Again Expressly Recognized the Water Rights Reserved or Appropriated for the Irrigation Project and, in Addition, Explicitly Acknowledged and Sanctioned Power Furnished to the Irrigation Project Pursuant to License No. 5 in Compensation for Grant of Such Water Rights to the Power Company Licensee as Contemplated by the Act 8 March 7, 1928.

By the Act of May 25, 1948, ch. 340, 62 Stat. 267, Congress expressly provided for the manner in which accrued and future construction costs for the irrigation project's irrigation and power systems would be determined, allocated and repaid, and also prescribed the manner in which accumulated and future net revenues of the irrigation project's power system would be applied to defray costs of the power and irrigation systems. The costs of the irrigation project's power system not defrayed by application of accumulated net revenues were made reimbursible only out of future net revenues of the irrigation project power system. Section 2(g) of the Act provided as follows:

> Electric energy available for sale through the power system shall be sold at the lowest rates which, in the judgement of the Secretary of the Interior, will produce net revenues sufficient to liquidate the annual installments of the power system construction costs estab-

> lished pursuant to subsection (f) of this section, and (for the purpose of reducing the irrigation system construction costs chargeable against the lands embraced within the project and of insuring the carrying out of the intent and purpose of legislation and repayment contracts applicable to the project) to yield a reasonable return on the unliquidated portion of the power system construction costs, and (for the same purpose) to yield such additional sums as will cover the amount by which the wholesale value of the electric energy sold exceeds the cost thereof where such excess is the result of the electric energy having been obtained on a special basis in return for water rights or other grants." (Emphasis added) 1/

The quoted provision was obviously for the purpose of assuring that the power system would yield (1) amounts sufficient to reimburse the United States for sums advanced to the irrigation project to build the system, (2) a reasonable return on the outstanding balance of such advances, and (3) the additional amount of any savings realized pursuant to power purchased by the irrigation project at or near cost pursuant to License No. 5. The quoted language of the Act expressly states that items (2) and (3), referred to in the preceeding sentence, were intended by applicable legislation and repayment contracts (an obvious reference to the Act of March 7, 1928, and earlier legislation relating to repayment contracts as well as to the repayment of reimburseable costs of the irrigation system, and not to accrue to the benefit of power users on the project by

way of reduced electric power rates.

Section 2(g) of the Act of May 25, 1948, was, in any case, an express recognition by Congress that the irrigation project (1) had water rights which it (2) granted to the power company licensee of License No. 5 in exchange for power at special rates, and (3) that such exchange was pursuant to the purpose and intent of the Act of March 7, 1928, and other pertinent legislation.

The Act of May 25, 1948 was actually drafted by representatives of the Tribes, the Bureau of Indian Affairs, and the irrigation districts who met together for the purpose of submitting a mutually satisfactory proposal. Moreover the legislation including the above quoted provision was enacted on the specific recommendation of the attorney for the Tribes who wrote a letter to the chairman of the House committee for the express purpose of recording the Tribes' consent and support to the draft of the bill which became law. 2/

1/ The full text of the Act of May 25, 1948, ch. 340, 62 Stat. 269, is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the repayment to the United States of all reimbursable costs heretofore or hereafter incurred for the construction of the irrigation and power systems of the Flathead Indian irrigation project in Montana (hereinafter called the project), including such operation and maintenance costs as have been covered into construction costs under the Act of March 7, 1928 (45 Stat. 200, 212–213), and supplemental Acts, and including the unpaid operation and maintenance costs for the irrigation seasons of 1926 and 1927 which are hereby covered into construction costs, shall be accomplished as prescribed by this Act, notwithstanding any provision of law to the contrary.

SEC. 2. (a) All costs heretofore or hereafter incurred for the construction of the irrigation system shall be allocated to the Mission Valley, Camas, and Jocko divisions of the project in proportion to the amount of such costs incurred for the respective benefit of each of these divisions.

(b) The net revenues heretofore and hereafter accumulated from the power system shall be determined by deducting from the gross revenues the expenses of operating and maintaining the power system, and the funds necessary to provide for the creation and maintenance of appropriate reserves in accordance with section 3 of the Act of August 7, 1946 (60 Stat. 895; 31 U. S. C., sec. 725s–3).

(c) The deferred obligation established by the Act of May 10, 1926 (44 Stat. 453, 464–466), for repayment of the per acre costs of the Camas division in excess of the per acre costs of the Mission Valley division shall be determined on the basis of the costs heretofore incurred for the construction of those divisions, and shall be liquidated

from the net revenues heretofore accumulated from the power system.

(d) The remainder of the net revenues heretofore accumulated from the power system shall be applied to reduce the reimbursable costs heretofore incurred for the construction of the power system, and the reimbursable costs heretofore incurred for the construction of the irrigation system (exclusive of the deferred obligation for the excess costs of the Camas division) as allocated among the several divisions pursuant to subsection (a) of this section, in proportion to the respective amounts of each of the foregoing categories of costs.

(e) The reimbursable costs heretofore incurred for the construction of the irrigation system of each division of the project and not repaid through the credits provided for in subsections (c) and (d) of this subsection shall be scheduled for repayment in annual installments of approximately equal amount, in a manner which will provide for liquidation of such costs over a period of fifty years from January 1, 1950. The reimbursable costs hereafter incurred for the construction of the irrigation system shall be added to the schedule of repayments established pursuant to this subsection by increasing the amount or the number, or both, of the annual installments maturing after the incurrence of such costs, in a manner which will provide for their liquidation within a period not exceeding the useful life of the works involved, or not exceeding fifty years from the time when the additional costs are incurred, whichever period is the lesser. Each annual installment shall be distributed over all irrigable lands within the division on an equal per acre basis, and the costs so charged against any parcel of lands within the division shall constitute a first lien thereon under the Act of May 10, 1926 (44 Stat. 453, 464–466). Upon the maturity or prepayment of any annual installment, the amount of the installment shall be reduced by deducting any sums included therein which are chargeable to lands on which the collection of construction costs is then deferred under the Act of July 1, 1932 (47 Stat. 564; 25 U. S. C., sec. 386a), or which are chargeable to other lands and have been already repaid to the United States.

(f) The reimbursable costs heretofore incurred for the construction of the power system and not repaid through the credits provided for in subsections (c) and (d) of this subsection, or through other credits from the revenues of the power system, shall be scheduled for repayment in annual installments of approximately equal amount, in a manner which will provide for liquidation of such costs over a period not exceeding the remaining useful life of the power system as a whole, or not exceeding fifty years from January 1, 1950, whichever period is the lesser. The reimbursable costs hereafter incurred for the construction of the power system shall be added to the schedule of repayments established pursuant to this subsection by increasing the amount or the number, or both, of the annual installments maturing after the incurrence of such costs, in a manner which will provide for their liquidation within a period not exceeding the useful life of the works involved, or not exceeding fifty years from the time when the additional costs are incurred, whichever period is the lesser. Each annual installment shall be repaid to the United States solely out of the revenues from the power system.

(g) Electric energy available for sale through the power system shall be sold at the lowest rates which, in the judgment of the Secretary of the Interior, will produce net revenues sufficient to liquidate the annual installments of the power system construction costs established pursuant to subsection (f) of this section, and (for the purpose of reducing the irrigation system construction costs chargeable against the lands embraced within the project and of insuring the carrying out of the intent and purpose of legislation and repayment contracts

applicable to the project) to yield a reasonable return on the unliquidated portion of the power system construction costs, and (for the same purpose) to yield such additional sums as will cover the amount by which the wholesale value of the electric energy sold exceeds the cost thereof where such excess is the result of the electric energy having been obtained on a special basis in return for water rights or other grants.

(h) All net revenues hereafter accumulated from the power system shall be applied annually to the following purposes, in the following order of priority:

(1) To liquidate all matured installments of the schedule of repayments for construction costs of the power system;

(2) To liquidate all matured installments of the schedule of repayments for construction costs of the irrigation system of each division, on an equal per acre basis for all irrigable lands within the division;

(3) To liquidate unmatured installments of the schedule of repayments for construction costs of the power system which will mature at a date not later than the maturity of any unliquidated installment of irrigation system construction costs;

(4) To liquidate unmatured installments of the schedule of repayments for construction costs of the irrigation system of each division which will mature at a date prior to the maturity of any unliquidated installment of power system construction costs, on an equal per acre basis for all irrigable lands within the division;

(5) To liquidate construction costs chargeable against Indian-owned lands the collection of which is deferred under the Act of July 1, 1932 (47 Stat. 564; 25 U. S. C., sec. 386a); and

(6) To liquidate the annual operation and maintenance costs of the irrigation system.

(i) In applying net revenues from the power system to the annual installments of irrigation system construction costs for any division of the project under the preceding subsection, allowance shall be made for any construction costs deferred under the Act of July 1, 1932 (47 Stat. 564; 25 U. S. C., sec. 386a), or already repaid to the United States which have been deducted from such installments under subsection (e) of this section, by distributing the net revenues available for such application over all irrigable lands within the division on an equal per acre basis, and by applying the net revenues distributed to the lands chargeable with the construction costs that have been so deferred or repaid, in amounts proportionate to the deductions made on account of such costs, to any then unpaid or subsequently assessed costs of operating and maintaining the irrigation system which are chargeable against the same lands.

(j) Any matured installment of irrigation system construction costs, or portion thereof, which is not liquidated at or before its maturity through the application thereto of net revenues from the power system under subsection (h) of this section shall be repaid to the United States by an assessment against the lands chargeable with the construction costs included in the installment. Such repayment shall be deferred for any period of time that may be requisite to provide for the assessment and collection of such costs in conformity with the laws of the State of Montana, but shall be completed within two years after the maturity of the installment concerned.

SEC. 3. The repayment adjustments provided for in sections 1 and 2 of this Act shall not become effective unless, within two years after the approval of this Act, the irrigation districts embracing lands within the project not covered by trust or restricted patents have entered into contracts satisfactory to the Secretary of the Interior, whereby such districts (1) obligate themselves for the repayment of

the construction costs chargeable against all irrigable lands embraced within the districts contracting (exclusive of Indian-owned lands on which the collection of construction costs is deferred) to the extent and in the manner prescribed by sections 1 and 2 of this Act; (2) consent to such revisions in the limits of cost for the project, or any division thereof, as the Secretary and the districts contracting may mutually agree upon in order to facilitate the making of needed improvements and extensions to the irrigation and power systems; (3) provide for redetermination by the Secretary of the irrigable area of the project, or any division thereof, and for the exclusion of lands from the project, with the consent of the holder of any water rights that would be canceled by such exclusion; and (4) make such other changes in the existing repayment contracts as the Secretary and the districts contracting may mutually agree upon for accomplishment of the purposes of this Act. In order to facilitate the commencement of repayment at the earliest practicable time, such contracts may provide for adjusting the maturity dates or amounts of the annual installments in a manner which will ultimately place the repayment schedules on substantially the same basis as though such contracts had been entered into prior to their actual execution, but not earlier than January 1, 1949.

SEC. 4. Unpaid charges for operation and maintenance of the irrigation system which were assessed prior to May 10, 1926, against any lands within the project, amounting to a sum not exceeding $40,549.89, and unpaid charges due from consumers for electric energy sold through the power system between July 1, 1931, and June 30, 1942, amounting to a sum not exceeding $2,195.16, are hereby canceled. The cancellation of the operation and maintenance charges shall be reported in the reimbursable accounts rendered to the Comptroller General of the United States, pursuant to the Act of April 14, 1910 (36 Stat. 269, 270; 25 U. S. C., sec. 145), as deductions from the total indebtedness of the project without regard to the fiscal years in which, or the appropriations from which, the expenditures were made.

SEC. 5. There is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, the following sums, for the following purposes, to be reimbursed to the United States as hereinafter provided:

(a) The sum of $64,161.18, with interest thereon at the rate of 4 per centum per annum from May 18, 1916, and the sum of $409.38, with interest thereon at the same rate from December 1, 1925, to be used to repay the Confederated Salish and Kootenai Tribes of the Flathead Reservation in Montana the balance remaining due them under the Act of May 18, 1916 (39 Stat. 123, 141). The aggregate principal amount of $64,570.56 so repaid shall be added to the construction costs of the project and shall be reimbursable.

(b) The sum of $400,000 to be deposited in the United States Treasury to the credit of the Confederated Salish and Kootenai Tribes of the Flathead Reservation in Montana; of which sum one-half shall be in full settlement of all claims of said tribes on account of the past use of tribal lands for the physical works and facilities of the irrigation and power systems of the project, or for wildlife refuges; and the other one-half shall be in full payment to said tribes for a permanent easement to the United States, its grantees and assigns, for the continuation of any and all of the foregoing uses, whether heretofore or hereafter initiated, upon the tribal lands now used or reserved for the foregoing purposes. The said tribes shall have the right to use such tribal lands, and to grant leases or concessions thereon, for any and all purposes not inconsistent with such permanent easement. The amount deposited in the Treasury pursuant to this subsection shall be added to the construction costs of the project and shall be reimbursable.

(c) The sum of $1,000,000 to continue the construction of the irrigation and power systems of the project. Amounts expended pursuant to this subsection shall be added to the construction costs of the project and shall be reimbursable.

(d) No expenditure shall be made from any appropriation granted under the authorizations contained in this section until the repayment of all reimbursable construction costs incurred through such expenditure has been secured by contracts conforming to the requirements of section 3 of this Act.

SEC. 6. In each fiscal year commencing after the approval of this Act for which an appropriation of the power revenues from the project is made in an indefinite amount pursuant to section 3 of the Act of August 7, 1946 (60 Stat. 895; 31 U. S. C., sec. 725s-3), the power revenues so appropriated shall be available, to the extent of not to exceed $75,000, for the purpose, in addition to those other purposes now required or permitted by law, of making such improvements and extensions to the power system as the Secretary of the Interior may deem requisite for the provision of electric service to persons whose applications for such service could not otherwise be complied with in due course of business. Amounts so expended shall be added to the unmatured portion of the reimbursable construction costs of the power system in accordance with subsection 2 (f) of this Act, so as not to reduce the net power revenues available for application under subsection 2 (h) of this Act.

SEC. 7. Consistent with the terms of the repayment contracts heretofore or hereafter executed, the Secretary of the Interior is hereby authorized to issue such public notices fixing construction costs and apportioning construction charges, to enter into such contracts, to make such determinations to effect such adjustments in project accounts, to prescribe such regulations, and to do such other acts and things as may be necessary or appropriate to accomplish the purposes of this Act.

SEC. 8. All Acts or parts thereof inconsistent with the provisions of this Act are hereby repealed.

2/ Senate Report No. 1234, Defendant's Exhibit B-B-14. This exhibit shows that the attorney for the Tribes, urging passage of the bill and recording the Tribes' consent and support, was set out in full in both the Senate and the House Committee reports accompanying the bill.

Finding No. 26

The Tribes Have Recently Advocated and the Federal Power Commission has Recently Held that the Tribes are Entitled to Only 42.13% of the Commercial Value of the Kerr Development at Tribal Site No. 1.

The Tribes, having been organized on October 28, 1935 as the Confederated Salish and Kootnai Tribes of the Flathead Reservation, pursuant to the Indian Reorganization Act of June 18, 1934, filed a petition in 1959 for readjustment of the Indian rental for Site No. 1 pursuant to Section 10(e) of the Federal Power Act. The Tribes claimed that the Federal Power Act superceded the provision for readjustment of rentals by agreement or, if necessary, arbitration, incorporated in Article 30(d) of original License No. 5. Action on the petition of the Tribes was deferred by the Commission pending a decision in the Third Unit case.[1/] After the final determination of the Third Unit case by the Court of Appeals for the District of Columbia on January 25, 1962, efforts to negotiate a readjustment of the annual charges resumed but again failed. Therefore, on March 29, 1965 the Federal Power Commission ordered a hearing on the readjustment.[2/] On October 4, 1967 the Federal Power Commission

issued an opinion and order readjusting annual charges.[3] Although the Commission adopted a somewhat different method for arriving at the commercial value of the development at the Kerr site (adopting the "profitability method"[4] in lieu of the "division of the net benefits method" used by the Commission in the Third Unit case) the Commission adhered to the view that the Tribes contributed only a portion of the resources involved in the development and hence were entitled to a rental reflecting that portion of the benefits. Actually in this latest decision in point, the Federal Power Commission attributed only 42.13% of the resources contributing to the development to the Tribes.

The figure 42.13% was arrived at by the Commission in the following manner: the land underlying the dam and power plant structures (i.e., the dam site), and the water flowing by that site unrelated to Flathead storage (i.e., natural stream flow at the site plus releases from the upstream Government development at Hungry Horse), were assigned a value of 68.5% of the total. This was on the theory that a run-of-the-river installation at the dam site using only natural stream flow plus regulated releases from Hungry Horse would produce 68.5% of the power which could be produced at Kerr. Since the Tribes owned the land at

the dam site, but did not own the water,[5] and since value was divided 50-50 between the land and water, the Tribes were credited by the Commission with 34.25% of the value of the development on account of their ownership of the dam site. Since storage in Flathead Lake would account for the remaining 31.5% of the value of the development attributable to natural resources, and since the Tribes were credited with owning the land underlying one-half of the lake but none of the water in the lake, the Tribes were credited with 1/4 of this 31.5%, which was rounded up to 8%. The figure 42.13% is the sume of 34.23% attributable to the dam site and 8% attributable to the Tribes' interest in Flathead Lake.

The above theory of allocating a portion of the value of the development to the Tribes was based primarily upon the expert testimony of Mr. Sporseen, an expert witness whose testimony was offered by the Tribes.[6]

Footnotes to Finding No. 26

1/ Under the terms of the amendment of July 17, 1936 which were agreed to by the Tribes, the licensee was to install two units totaling over 150,000 horsepower, instead of the original three units totalling 150,000 horsepower which had been proposed originally. The first of these units was installed and placed in operation in May of 1939; the second was placed in operation in May of 1949. Montana Power Co. v. F.P.C., 112 U.S. App. D.C. 7, 8, 298 F. 2d 335, 336 (1962).

On December 3, 1951, application was made by the licensee for an amendment to License No. 5 which would authorize the construction of a third generating unit at the Kerr Site. Id. The Tribes objected to the issuance of a license for the third unit unless provision was made in License No. 5 for payment by the licensee of reasonable additional compensation to the Tribes for the additional uses proposed. Negotiations failed to produce agreement and the licensee, by letter dated December 1, 1954, requested a hearing on the matters as promptly as possible. Additional efforts to negotiate a settlement failed and the Commission, by order dated April 17, 1958, ordered a hearing on the issues involved, including a determination of additional amount of annual charges, if any, for the use of the Indian Tribal land, as proposed in the application for a third unit. 22 F.P.C. 502, 505 (1959). The hearing was held June 24-30, July 9, and September 22-23, 1958. Montana Power Co. v. F.P.C., supra, 298 F. 2d at 336-337. After considering various theories, some of which recognized that the Tribes contributed only approximately 50% of the resources of the development, the hearing examiner in his initial decision awarded the Tribes an additional $50,000 annually. 22 F.P.C. 504 (1959). The initial decision of the examiner was adopted by the Commission on September 18, 1959 (22 F.P.C. 502) and sent, by letter dated September 28, 1959, to the Secretary of the Interior for his approval pursuant to the Act of March 7, 1928. On January 15, 1960 the Assistant Secretary for Public Land Management recommended to the Secretary of the Interior, and on January 22, 1960, the Secretary of the Interior approved, appointment of a committee from the Department of Interior to study the decision of the Federal Power Commission. This committee reported its

findings to the Secretary on February 18, 1960, Plaintiffs' Exhibit 54. The committee recommended a somewhat higher additional rental than that approved by the Federal Power Commission, using an approach which included as one of its key factors the proposition that the Tribes owned about 50% of the land and water resources contributing to the development. Id. The committee's exact words were the following:

> "The committee is convinced the Indians own approximately 50% of the overall power site which includes the power house site, the revier to Flathead Lake and the south half of Flathead Lake, although documentation of this latter is lacking." Plaintiffs' Exhibit 54, p. 6.

The Tribes' ownership of the southeast one-half of the land underlying Flathead Lake was documented in United States v. 5,677.94 Acres of Land, 162 F. Supp. 108 (D. Mont. 1958).

The committee concluded that another 50-50 division of the value of the third unit was required because one-half of the value of the third unit was attributable to the existing two units in conjunction with which it would be operated. Hence, the Tribes were credited with 25% of the value added by addition of the third unit. Plaintiffs' Exhibit 54, pp. 6-7.

On March 9, 1960 the Acting Secretary of the Interior wrote a letter to the Federal Power Commission adopting the committee's report. On May 19, 1960 the Federal Power Commission ordered a reopening of the hearing before the examiner so that the views of the Department of Interior could be taken into consideration. The hearings were reopened and were concluded on July 11, 1960. The examiner reaffirmed his initial opinion by opinion dated November 3, 1960. Thereafter, the Commission adopted the approach of the Committee of the Department of the Interior in a final decision dated January 30, 1961. The Commission's actions were affirmed by the United States Court of Appeals for the District of Columbia on January 25, 1962.

2/ ____ F.P.C. 647 (1965).

3/ ____ F.P.C. 766 (1967); Defendant's Exhibits 13-D-8.

4/ While the validity of the method used in 1930 for determining the commercial value for the Tribes' Site is not involved in this litigation, since the Tribes have made no effort either to allege or prove that they received less than their share of the commercial value other than as a result of the furnishing of power to the irrigation project, it is nevertheless worthy of note that the "profitability method" credited the Tribes only with profits retained by the license. The method adopted in 1930 by the Federal Power Commission and the Secretary of Interior for arriving at total commercial value included not only amounts retained by the company but also benefits passed out to the public through rates. Thus, the theory used by Mr. Scattergood for determining the commercial value of the Flathead project was more favorable to the Tribes than that adopted by the Federal Power Commission in its most recent decision in point. Likewise, Mr. Scattergood credited the Tribes with 50% of the total value thus derived, whereas the Commission credited the Tribes with only 42.13%.

5/ It is to be noted that the Federal Power Commission in this most recent decision relating to the Flathead development did not credit the Tribes with any interest in the water of Flathead Lake and Flathead River. Mr. Scattergood and others at the time of the issuance of License No. 5 credited the Tribes with their Winters Doctrine water rights consisting of some portion, considerably less than all, of the water power rights in the waters of the Flathead River and Flathead Lake: namely, water power sufficient to supply pumping of irrigation water. See Scattergood Report, Plaintiffs' Exhibit 58, p. 33. Failure by the Federal Power Commission to attribute any of the water power to the Tribes as distinguished from land value attributable to the presence of water power, may account for the fact the Federal Power Commission only attributed 42.13% of natural resources to the Tribes, whereas Mr. Scattergood credited the Tribes with 50% of the natural resources involved in the development.

Mr. Van Scoyoc also testified for the Tribes at the hearing on the Readjustment of Rentals. It will be noted that his attribution of ownership of the land and natural water power at the dam site to the Tribes was specifically rejected by the Commission in favor of Sporseen's view that the Tribes owned only the land at the dam site. Sporseen and the Commission weighted the value of the land at the dam site heavily because of its critical location with relation to water, but the Tribes were not credited with ownership of the water or water power itself.

6/ Id., p. 783. The following are excerpts from the opinion deal with the question of the allocation of a portion of the value of the development to the Tribes:

> This brings us to considering the appropriate percentage of the commercial value of the Kerr project which should be allocated to the Tribes by virtue of the ownership of related lands and (waters). Similar to the figures in the first step, there are widely varying recommendations ranging from 25 percent by Staff, Woy and Seymour to 57.53 percent by Van Scoyoc.
>
> Before describing the various methods, it is helpful to understand the three factors accounting for the value of the Kerr project. These three factors are the dam site (owned by the Tribes), Flathead Lake (the proprietary interest which is equally divided between the Tribes and Montana Power), releases from Hungry Horse, (respecting which neither Montana Power nor the Tribes have any proprietary interest). During critical water conditions, Kerr generation totals 1069 MW months: 161 MW months by Flathead Lake storage; and 657 MW months by Hungry Horse storage.
>
> The method used by Staff (which also forms a part of certain of the recommendations of other parties) is denominated as the sharing of net

benefits method. This method assigns 50 percent to the developer for taking the risks assocaited with developing the site. The dam site and Flathead Lake are considered as a unit. Since the Tribes own one-half of Flathead Lake, their portion is said to be one-half of one-half, or 25 percent of the net benefits. This was the method nominally followed by the Commission in the third unit case.

There are further objections. Staff's method assigns 50 percent of the net value to the developer. Since we are using Van Scoyoc's profitability method, Montana Power's risks, such as they are, are fully reflected in the rate of return element of project costs which were deducted from the project revenues in determining the project's net benefits. Additionally, this method lumps the values attributable to natural stream flow, Flathead Lake and Hungry Horse, and fails to weigh the interests of each party in these three principal contributors to the Kerr Project.

The Secretary has shown the strange and illogical results this method can produce by applying it to other situations. (1) If the Tribes own all of the land underlying the generating site and lake bed, they receive half of the net benefits, and the Company receives half; (2) if, as in this case, the Tribes own all of the generating site land and half of the lake bed, they receive 25 percent of the net benefits and the Company, 75 percent; (3) if the Tribes own all of the generating site lands but none of the lake bed, they receive one percent of the net benefits, while the Company receives 99 percent; (4) if the Tribes own none of the generating site lands but half of the lake bed, they receive 24 percent of the net benefits and the Company, 76 percent; and (5) if the Tribes own none of the land underlying the generating site but all of the lake bed, they receive about 49 percent of the net benefits and the Company 51 percent.

In none of the situations described above does the Company own any land within the project. Yet it may receive from 50 percent to 99 percent of the net benefits. In the first three situations the Tribes own all the land underlying the dam and powerhouse. Yet they may receive from one percent to 50 percent of the net benefits. But in the last two situations, even though they own none of the power site lands, the Tribes may receive from 24 percent to 49 percent of the net benefits. The unreasonableness, inconsistency, and inequity of these divers results are directly attributable to the failure in the method employed to properly distinguish between land underlying the dam and powerhouse and land underlying the lake bed.

With one exception, we believe Montana Power has expressed the most appropriate concept for making the allocation in its brief opposing exceptions. It there criticizes the allocations of Mohler as conceptually wrong because power value requires an inseparable combination of both land and water. The same criticism is also applicable to Van Scoyoc's method, at least insofar as it allocates the value of the dam site exclusively to the Tribes. Montana Power states: "If the combination of land water is to be used as a basis for sharing a net benefit, some grouping of land ownership and water associated with that land ownership must be made."

This is precisely what Sporseen has done, and we believe his method to be the most reasonable of those advanced in this proceeding. The only difference between what Sporseen did and what Montana Power argues relates to Hungry Horse. Sporseen included it. Montana Power would not on the basis that none of the land required to develop Hungry Horse storage is owned by the Indians and because headwater payments are made by the licensee. Regarding the latter, headwater payments were deducted in computing the benefits, so that point

is not meritorious. Regarding the former, we think Hungry Horse should be included because the value of a parcel of realty depends not only on its intrinsic worth, but also upon its location relative to other realty. Thus, land adjacent to the intersection of two interstate freeways is more valuable for commercial purposes than an identical parcel of property on a little used secondary road. And the property on which Kerr is located is similarly more valuable by reason of its location relative to Hungry Horse. To close our eyes to Hungry Horse would be to fail to recognize the value of Kerr.

Accordingly we adopt Sporseen's 42.13 percent allocation figure which, when applied to Van Scoyoc's computation of profitability of $2,254,286 produces annual charges of $949,731, which we will round off to $950,000.00.

Finding No. 28

The Expert Testimony Presented at the July 1970 Hearing by the Tribes was Restricted to Conclusions Based on Untested Underlying Assumptions, and was Therefore Largely Meaningless in Context of the Issues Presented in This Case.

At the hearing in this case held before the Commissioner on July 28-29, 1970, the expert witness presented by the Tribes, Mr. Melwood W. Van Scoyoc, testified on direct examination concerning the present values using alternative discount factors, of the two figures developed by the Rocky Mountain Power Company and Mr. Scattergood as the purported out-of-pocket loss to the power company in furnishing the irrigation project power.[1/] He then explained the mathematics of the development of these two supposed cost figures.[2/] Mr. Van Scoyoc did not evaluate the separate components of the two mathematical computations.[3/] For example, in his discussion of the Rocky Mountain Power Company's calculation of cost based on demand and energy factors, Mr. Scattergood did not even mention the 80,000 horsepower maximum demand figure by which costs allocated to demand capacity were divided.[4/] Similarly, Mr.

Van Scoyoc did not discuss the validity of using that figure instead of the actual proposed installed capacity of 150,000 horsepower.[5] It may be said that Mr. Van Scoyoc's testimony was based entirely on the figures actually used and the calculations made at that time, without any evaluation or analysis of the derivation or validity of the figures used.

Mr. Van Scoyoc was then asked whether he had an opinion as to which of the two methods of determining the cost was the more logical and realistic.[6] Mr. Van Scoyoc was never asked whether either method was an appropriate method, or even whether either method was accurately applied. He was never asked and never testified that either method as actually applied was in fact logical or realistic.

Mr. Van Scoyoc did testify that the method used by the company (producing the larger loss figure ($62,500)) was the more logical and realistic of the methods used in 1929-30.[7] He based this solely upon the fact that the company had allocated costs between a demand factor and an energy factor.[8] Mr. Van Scoyoc defended such a method of allocating costs as opposed to the straight energy basis employed prior to the hearing by the Rocky Mountain Power Company and by Mr. Scattergood, as a general proposition;[9] however, Mr. Van Scoyoc did not relate the validity of the method in general to the particular manner in which the demand energy method was in fact used by the power

company in 1929-30, or to the Flathead project specifically.

Mr. Van Scoyoc then undertook to establish the limits of the cost difference which could result from the demand energy load factor relationship.[10] For this purpose, it is of interest, that Mr. Van Scoyoc used 97,000 horsepower (72,750 kilowatts) as the demand capacity of the proposed facility.[11] Mr. Van Scoyoc offered no justification for this figure, and did not explain why he did not use the 80,000 horsepower figure used by the Rocky Mountain Power Company in 1929, or why he did not use the actually proposed plant capacity of 150,000 horsepower. In this connection, it should be noted that Mr. Scattergood's 97,000 horsepower figure, which Mr. Van Scoyoc described as "the peak or maximum output of the Kerr plant" as estimated by Mr. Scattergood, was in fact a figure purporting to represent the "Peak load of plant on basis of 83 per cent annual load factor."[12] In other words, it did not purport to be a peak output figure at all, or the amount of energy which the proposed plant was capable of producing. Instead it was an annual average figure stated by Mr. Scattergood on a table and neither used nor in any way related by him to computations of demand energy cost. Obviously, it is inappropriate to use an <u>average</u> annual figure for maximum demand for the facility in computing cost on a demand energy basis. This fact

was acknowledged by Mr. Van Scoyoc himself during cross-examination.[13/]

In any case, Mr. Van Scoyoc derived what he called the maximum cost that could be assignable to the irrigation project by obtaining the ratio of energy to be sold to the irrigation district (11,190 kilowatts) to this average annual load factor figure (72,750 kilowatts), or 15.38%. He then applied this percentage to the total annual cost of $1,262,246.00 (including an unlevelized Indian rental of $177,905, which is, of course, a grossly overstated figure in view of construction and start-up time, and the limitations on the maximum rental imposed by reason of the area system load factor of 83% of prime power)[14/] and obtained a maximum cost of $194,133.00.[15/] It should be noted that in addition to using an average annual load factor figure, instead of a plant capacity peak output figure, and a grossly overstated Indian rental, Mr. Van Scoyoc also assigned cost to secondary power, something which even the Rocky Mountain Power Company had not done.[16/] If the appropriate peak output figure of 150,000 horsepower (112,500 kilowatts) had been used, and if a levelized Indian rental had been used, and finally if the use of secondary energy had been taken into account and only prime power of 4,000 horsepower (3,000 kilowatts) had been used, then this so-called

maximum cost would have been only $126,224.00.[17]

Mr. Van Scoyoc then proceeded to compute what he called the minimum costs which could be assigned to the irrigation power if a straight energy approach was used.[18] In so doing, Mr. Van Scoyoc again grossly overstated the Indian rental costs to the secondary power.[19] As a result he produced a so-called minimum cost of $85,820.00. This figure was within a few dollars of the amount computed by Mr. Scattergood, since Mr. Scattergood also failed to levelize Indian rentals and "for the sake of conservatism" treated secondary as having a cost associated with it. If the proper figures are used to reflect levelization of Indian rentals and the use of secondary power at no cost, Mr. Van Scoyoc's computed minimum costs assignable to the irrigation project power would have been $63,112.00.[20]

Mr. Van Scoyoc then applied the company's demand-energy method, to Mr. Scattergood's figures, including, again without explanation, Mr. Scattergood's figure of 97,000 horsepower (72,750 kilowatts), for maximum demand, this time inaccurately calling it "peak demand for the Kerr plant".[21] In fact this figure, as is shown above, was average load figure. In this computation as well Mr. Van Scoyoc grossly overstated Indian rentals and did not take into account that a portion of the irrigation project power would be secondary and he obtained a figure of $129,136.00, which, he ways, is $6,136.00 in excess of the cost calculated by Mr. Cochrane in 1929.[22] Mr. Van Scoyoc did not mention that he, unlike Mr. Cochrane, failed to take into account secondary power with which no cost is associated and otherwise used figures quite different from Mr. Cochrane's.[23] Hence Mr. Van Scoyoc's comparison of his figure with Mr. Cochrane's was somewhat misleading. If levelized Indian rentals and the use of secondary power had properly been taken into account, then the cost produced by use of Scattergood's figures and the company's method would be $_____, a figure some $_____below the cost calculated by Mr. Cochrane.[24]

In general, it may be said that all of Mr. Van Scoyoc's computations, by which he either parrotted or supposedly "tested" the computations made in 1929, are based upon unexamined and untested erroneous assumptions embodied in the figures used. For this reason Mr. Van Scoyoc's figures are essentially meaningless in the context of the issues presented.

Since Mr. Van Scoyoc had not testified, and had not been asked to testify, concerning any relationship which might exist between the cost figures developed by the RMPC and Mr. Scattergood in 1929, and the amount of Indian rentals, the Commissioner asked appropriate questions beginning at page 73 of the transcript. Mr. Van Scoyoc testified that in his opinion any cost established would reduce the Indian rental.[25] When the Commissioner asked him by how much, Mr. Van Scoyoc responded that it would depend in some way on the amount of the cost to the company.[26] The Commissioner then asked whether Mr. Van Scoyoc's testimony in Mr. Van Scoyoc's opinion indicated the amount of that cost. Mr. Van Scoyoc's answer was "My testimony indicates that the amount that Mr. Cochrane computed is a better measure of that loss than the amount that Mr. Scattergood computed, for the reasons that I explained in my testimony."[27]

It is obvious that Mr. Van Scoyoc did not wayt to assume responsibility for the figures produced by either calculation as to which he had testified, but wished to restrict his testimony to a theoretical preference for a demand-energy approach, as opposed to a straight energy approach. A clear indication of his reason for wishing thus to restrict his testimony is the larger figure which this testimony supports indirectly, which was, according to Mr. Van Scoyoc's own testimony, based upon an invalid application of the demand energy method.[2/]

Footnotes to Finding 28

1/ Tr., pp. 46-51

2/ Tr. pp. 51-56

3/ Contract the careful and detailed analysis and evaluation of these components performed by R. W. Beck and Associates, expert witness for the Defendant. Defendant's Finding No. 27, supra.

4/ Tr., pp. 51-52.

5/ Mr. Van Scoyoc does testify, however, that the possible actual output of the development would substantially prime power "if all available water were utilized throughout the year up to the plant's hydraulic capacity . . ." Tr. p. 59.

6/ Tr., p. 56

7/ Id.

8/ Tr., pp. 57-58.

9/ Id.

10/ Tr. p. 60 et seq.

11/ Tr. pp. 58, 60

12/ Scattergood Report, Plaintiffs' Exhibit 58, fold out page.

13/ Tr. pp. 68-69, Mr. Van Scoyoc testified as follows:

Q. I meant to ask why on your testimony you gave a clear analysis, we understand there from that, of the split between demand costs and energy costs. How do you translate those into unit costs?

A. You are referring to the demand unit costs, so many dollars per kilowatt of demand?

Q. Yes.

A. Well, you would divide the demand -- the cost that you have assigned to demand by the number of demand units, the number of kilowatts, of whatever you want to use: the kilowatts of output, potential output of the plant, the prime power output, the average output. You could get a different cost, depending on which one you use.

Q. What is the most commonly used principle?

A. Well, if we were determining the demand cost -- or if you were determining the unit demand cost for a hydroelectric plant, you could -- I find it a little hard to say "commonly used," because they both are used -- you would take the cost that you have assigned to capacity or demand, and divide it. You would divide it by the peak output of the plant. You would divide it, and that would give you a unit demand cost, so many dollars per kilowatt.

You could also divide it by the average output of the plant, and you would get a so-called demand cost. I don't think it would be the true demand cost for a hydroelectric plant, but it could be done that way.

MR. SULLIVAN: I believe that will be all the cross-examination.

14/ Scattergood Report, Plaintiffs' Exhibit 58, p. 38.

15/ Tr. p. 60.

16/ Tr. p. 60. Mr. Van Scoyoc in fact ignores the fact that secondary energy is involved by using, without analysis, the figures used by Mr. Scattergood. Mr. Scattergood intentionally assumed that secondary was involved despite his knowledge to the contrary "for the sake of conservatism." Mr. Scattergood, of course, stated his assumption. Scattergood Report, Plaintiffs' Exhibit 58, p. 44.

17/ To Mr. Van Scoyoc, the portion of total annual costs applicable to the irrigation project would be the ratio of 11,190 kilowatts to 112,500 kilowatts,

9.9%. Application of this percentage to the total annual cost of $1,262,246 produces a cost of $126,224 . . . . This is the maximum cost attributable to the irrigation project power [Note: the above does not make allowance for levelized Indian rental; this will further reduce this maximum.]

18/ Tr. p. 60.

19/ He did so simply by using unexamined figures lifted from the 1929-30 record.

20/ Again paraphrasing Mr. Van Scoyoc, if it is assumed that all Kerr plant annual costs are energy-related, then the portion applicable to the irrigation project would be the ratio of 3,000 kilowatts to 60,375 kilowatts, or 5%. Application of this percentage to the total annual costs of $1,262,246 would produce a cost of $63,112.

21/ Tr. p. 61

22/ Id.

23/ Id.

24/

Finding No. 29

Assuming There Would or Might be Some Loss in Furnishing Power to the Irrigation Project, and Assuming that Valuable Water Rights of the Irrigation Project were not Involved, the Evidence Establishes that any Such Loss Could have been Easily Recouped by the Hypothetical licensee Through its Rate Structure so that the Anticipation of the Loss Would have had no Practical Impact on the Amount of Indian Rentals Such Licensee Would have been Willing or Able to Pay.

The evidence establishes that any loss or cost of the magnitude which conceivably could have been anticipated by a hypothetical licensee in 1929-30 could quite easily have been passed on to rate payers as a cost of service.[1/] The amount of any individual customer's rate attributable to such cost would be so small as to be clearly negligible as far as the customer would be concerned.[2/] It is clear that the actual parties in 1929-30 had this fact well in mind.[3/] Thus there is no practical possibility whatever that the cost or loss, if any, that might have been anticipated by a hypothetical licensee could have had any impact on the amount of Indian rental such hypothetical licensee would have been able or willing to pay.

Footnotes to Finding No. 29

1/ Mr. Spencer testified as follows concerning this fact:

Q. Even if a hypothetical licensee were to conclude that he would suffer an annual loss on account of furnishing the 15,000 horsepower to the Flathead Irrigation Project, what effect, if any, would such conclusion have upon the amount of rentals such licensee would have been willing to pay to the Tribes?

A. In my opinion, there would be no effect.

Q. Please explain.

A. Any hypothetical licensee of the Kerr Project would have been subject to regulation as a public utility. Under public utility regulatory concepts then -- and indeed now -- considered applicable, the licensee would have been entitled to earn its full return (then at 8 percent in Montana) on the Kerr Project and to include in its cost of service for the project all reasonable and prudent expenditures made in connection with the project. Since the licensee was required in the license to furnish the 15,000 horsepower of demand to the United States for the Irrigation Project, there can be no doubt that the full cost of furnishing such power would be included in the licensee's cost of service. Furthermore, the revenues which the Rocky Mountain Power Company would be permitted to receive would likewise include the revenues from the Flathead Irrigation Project. The balance of costs would have to be made up from revenues received from the Montana Power Company. If the sale of energy to the Flathead Irrigation Project had not covered the share of costs associated with supply of power to the project, the rates to the Montana Power Company would be slightly higher than they would otherwise have been.

Q. Is there any evidence contemporaneous with the consideration and issuance of the license for the Kerr Project to support your opinion that the full loss would (or at least could) have been passed on to the licensee's ratepayers and thus not have had any impact upon the licensee?

A. Yes. In the case of Rocky Mountain Power Company itself, Mr. Scattergood, on page 45 of his report, addressed himself to this problem. After determining --erroneously, as we have shown -- that the Rocky Mountain Power Company would suffer a loss of approximately $25,000 per annum on account of furnishing the power blocks to the Flathead Irrigation Project at the specified rates, he recommended that the intercompany price to be paid by Montana Power Company to Rocky Mountain Power Company be raised so as to relieve Rocky Mountain Power Company completely from the impact of any loss.

Q. Please explain exactly how Mr. Scattergood's procedure was intended to work.

A. The Rocky Mountain Power Company was a wholly-owned subsidiary of the Montana Power Company. Under its application and the license as ultimately granted, Rocky Mountain Power Company was to be obligated by contract to deliver the entire output at Kerr, except for the power delivered to the Flathead Irrigation Project, to Montana Power Company. Mr. Scattergood had determined that Rocky Mountain would be assured of recovering its full cost of service at Kerr, including a return at 8 percent, if the intercompany price (the price to be paid by Montana Power to Rocky Mountain) were fixed at 2.387 mills per kilowatt-hour, or $15.60 per horsepower for prime power. That was the price determined without taking into account the loss allegedly to be incurred on account of the furnishing of the power blocks to the irrigation project. Implicit in his computations is the delivery of secondary energy to the Montana Power Company at no charge. Mr. Scattergood recommended that the alleged loss be passed in toto by Rocky Mountain to Montana Power and thence to Montana Power's ratepayers throughout its system through the simple device of raising the intercompany price to 2.439 mills per kilowatt-hour for prime energy, or $15.94 per horsepower. As Mr. Scattergood stated, by such raising of the intercompany price,

". . . the 15,000 horsepower for the irrigation project can be sold at the prices quoted and the Rocky Mountain Power Company will still have its full average revenue of 2.387 mills; i.e., $15.60, which will enable it to pay the undiminished Indian rental of $2.21 and preserve its own 8 per cent return."

Q. Despite this analysis, however, if Rocky Mountain Power Company or any other prospective licensee of the Kerr Project had not been faced with the alleged prospect of a loss on account of furnishing the power blocks to the irrigation project (which, as you have shown in your report, was not in fact a realistic expectation), would not it have been willing to pay higher rentals to the tribes for use of their lands?

A. No. As I have explained, a regulated public utility is entitled to include in its cost of service -- and thus pass on to its customers -- only such expenditures as are reasonable and prudent. Consequently, neither Rocky Mountain nor any other prospective licensee of the Kerr Project would have been entitled to pay as Indian rentals any sum beyond the fair value of the use of their lands for power development, that is, the fair power value of their lands. Therefore, if the Indian rentals were fixed in a manner designed to compensate the tribes fully for the use of their lands for power development, the existence or non-existence of a loss on account of the furnishing of power to the Irrigation Project would be totally irrelevant. Mr. Scattergood recognized this principle, since he fixed the Indian rentals <u>without</u> <u>regard</u> to the furnishing of the power blocks to the irrigation project and then, as I have pointed out, suggested that any loss occasioned thereby be compensated for by adjusting the intercompany price to account for the furnishing of the power blocks to the irrigaiton project. Actually, even assuming the hypothetical loss presented by Mr. Scattergood, he developed the fact that such loss would only increase the intercompany price from 2.387 mills per kilowatt-hour to 2.439 mills per kilowatt-hour, an increase of only about 2 percent."

Mr. Spencer's assumption that any licensee would be a public utility is, as a practical matter, probably correct in view of the Federal Power Commission's duty to serve the public rather than special interests in awarded licenses for valuable power developments. Nevertheless, any non-public utility would be even freer to its costs through rates than a publicly regulated company which would at least have to prove its costs. Such a non-public utility would also have generally lower costs since it could build distribution facilities directly to its industrial customers' plants and dispense with a distribution system to serve the public at large. Thus it could easily recover its actual out-of-pocket costs and still under sell a public utility competitor.

2/ Mr. Van Scoyoc testified as follows on cross examination:

Q. Now I'd like to call your attention to page 45 of the Scattergood report and ask you: Isn't it a fact that Mr. Scattergood -- contrary to what I believe you have stated in your testimony -- that Mr. Scattergood, himself, concluded that even if there were a loss incurred by a licensee in furnishing power to the irrigation project, there would be no effect on the rentals -- the amount of the rentals -- because the simple way to handle this would be to adjust the intercompany price upward by a small amount, namely, to 2.439 mills?

A. That is right. Mr. Scattergood indicated that -- well, they can -- the Montana -- or as far as Rocky Mountain Power Company is concerned, why, they can collect this from the parent Montana Power Company, and presumably Montana Power Company would in turn collect it from the rate-payers. But while this would make Montana Power whole, it would certainly deprive the Indians of something.

Q. Well, on what basis do you say it would deprive the Indians of something?

A. Because I think the Indians, as I had previously testified, would have been able to secure a higher rental had this cost of the furnishing power to the irrigation project not been made a burden.

Q. Well, isn't it a fact --

A. On the licensee.

Q. Pardon me.

Isn't it a fact that the slight increase in the intercompany price would have had a very negligible effect on the rate-payers of the Montana Power Company?

COMMISSIONER WOOD: Mr. Grenier, your question assumes that we are dealing only with the Montana Power Company and Rocky Mountain Power Company. I am not inclined to permit this line of inquiry to go any further unless you can show me that it has some relevance to what's before me.

MR. GRENIER: Well, Mr. Commissioner, if we can get an answer to this particular question, depending on what the answer is, then I would ask about any hypothetical licensee, and then I'll be finished.

COMMISSIONER WOOD: All right. I will permit it, giving it such weight as it deserves.

THE WITNESS: Well, so far as the rate-payers of Montana Power Company, a figure of -- even in those days a figure of 60,000 or 62,500 additional revenue, when spread among all the customers of the company, would have been, of course, a very small fraction of a percent, so far as their individual cost of power. I certainly would agree with that.

BY MR. GRENIER:

Q. And would this not be true of any hypothetical licensee who would be subject to regulation by some public body?

A. Yes, if the output was to be sold to the public, the same situation would prevail.

3/ Mr. Scattergood focused directly on this point in his report. See e.g., Scattergood Report, Plaintiffs' Exhibit 58, pp. 45, 50.

Finding No. 30

Assuming Some Impact on Idian Rentals Resulting from an Anticipated Loss, the Impact was Entirely Justified by the Valuable Rights Received in Exchange for Such Loss, and the Tribes Clearly are not Entitled to Recover such Loss, or any Amount in any way Related Thereto.

The Tribes, as they have framed their complaint, have the burden of proving that every consideration paid by the licensee of License No. 5 by right belongs to the Tribes. This has been the Tribes' contention throughout this litigation. Since the evidence establishes that the irrigation project contributed valuable water power rights for which it is entitled to be compensated by the licensee, the Tribes must lose. Since the evidence establishes that the irrigation project was entitled to some compensation, and the Tribes by framing the complaint precluded themselves from showing, and have made no effort to show that the compensation in fact received by the irrigation project was excessive, the Tribes have entirely failed to establish a right of recovery.