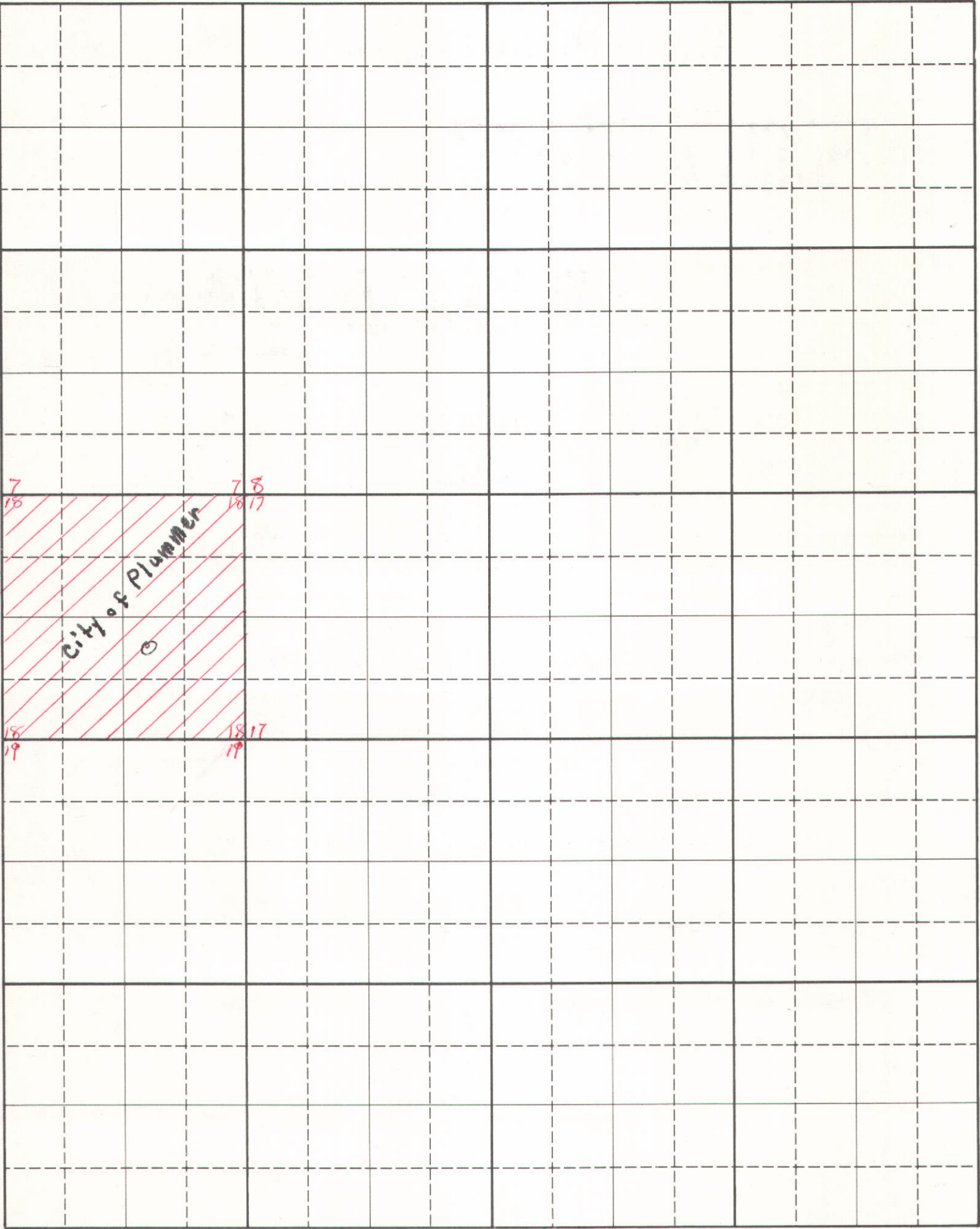


11. Map of proposed project: show clearly the proposed point of diversion, place of use, section number, township and range number.



Scale: 2 inches equal 1 mile

BE IT KNOWN that the undersigned hereby makes application for permit to appropriate the public waters of the State of Idaho as herein set forth.

City of Plummer
(Applicant)
Donald W Evans - Mayor
95 7188

RECEIVED

Affidavit of Publication

STATE OF IDAHO
County of Benewah, ss.

JoJane Hammes, being first duly sworn on oath, deposes and says that she is co-publisher and business manager of the St. Maries Gazette Record, a weekly newspaper printed and published at St. Maries, Benewah County, State of Idaho; the St. Maries Gazette Record is a newspaper having general circulation in Benewah county, State of Idaho, and has been continuously and uninterruptedly published in Benewah County, State of Idaho, during a period of more than seventy-eight consecutive weeks prior to the first publication of the notice of advertisement hereon.

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That said newspaper was regularly distributed to its subscribers during the time of the same period; that said notice was published in the regular and entire issue of said paper.

Subscribed and sworn to before me this 7th day of July, 1972

Ora Lyon
Notary Public in and for Benewah County, Idaho
Residing at St. Maries, Idaho

NOTICE OF APPLICATION
FOR WATER PERMIT

Notice is hereby given that City of Plummer, Box B, Plummer, Idaho has on May 23, 1972 submitted Application No. 95-7188 for a permit to appropriate 1.0 cubic feet per second of water from a ground water source by means of well and pump within the NW $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 18, T. 46N, R. 4W, B.M. (Block 3 of Public Reserve in Block 138), Benewah County to be used from Jan. 1 to Dec. 31 for municipal purposes for 200 families within the Sec. 18, T 46N N., R. 4 W.B.M.

If issued, this permit will be subject to all prior water rights. Protests against the granting of the permit must be filed with the Idaho Department of Water Administration, Statehouse, Boise, Idaho, 83707, on or before July 8, 1972.

R. KEITH HIGGINSON
Director

Published in the St. Maries Gazette Record, St. Maries, Idaho on June 22 and June 29, 1972.

No. 2383 - June 29 - July 6

95 7188

Affidavit of Publication

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Subscribed and sworn to before me this 7th day of July, 1972

Ora Lyon
Notary Public in and for Benewah County, Idaho
Residing at St. Maries, Idaho

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R. KEITH HIGGINSON
Director

Published in the St. Maries Gazette Record, St. Maries, Idaho on June 22 and June 29, 1972.

No. 2383 - June 29 - July 6

State of Idaho
Department of Water Administration
WATER RIGHT LICENSE

License of Water Right No. 95-7188 Priority May 23, 1972 Amount 0.13 cfs

THIS IS TO CERTIFY, that the CITY OF PLUMMER
of Plummer, Idaho, has complied with the terms and conditions of Permit
No. 95-7188 issued pursuant to Application for Permit dated May 23, 1972,
and has submitted proof to the Department of Water Administration on December 31, 1973,
that he has applied water to a beneficial use; an examination by the Department indicates that the works have a
capacity for the diversion of 0.13 cfs of water from a ground water source,
tributary to _____, and that the permit holder has applied to a beneficial use &
established a right to use water as follows:

Beneficial Use	Period of Use	Rate of Diversion	Annual Volume
<u>Municipal</u>	from <u>Jan. 1</u> to <u>Dec. 31</u>	at <u>0.13</u> cfs and <u>n/a</u>	
	from _____ to _____	at _____ cfs and _____	
	from _____ to _____	at _____ cfs and _____	

(both dates inclusive)

Subject, however, to the condition that no more than 0.13 cfs of water be diverted at any one time, and
that the amount of water so diverted and to which such right is entitled and confirmed is for the purpose
aforementioned and is limited to the amount which can actually be beneficially used and shall not exceed
n/a acre feet per year, said waters to be diverted within the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Sec. 18,
Twp. 46 N, Rge. 4 W, B.M. in the County of Benewah

Description and location of place of use: City of Plummer, Idaho

Twp.	Range	Sec.	NE $\frac{1}{4}$				NW $\frac{1}{4}$				SW $\frac{1}{4}$				SE $\frac{1}{4}$				Totals
			NE $\frac{1}{4}$	NW $\frac{1}{4}$	SW $\frac{1}{4}$	SE $\frac{1}{4}$	NE $\frac{1}{4}$	NW $\frac{1}{4}$	SW $\frac{1}{4}$	SE $\frac{1}{4}$	NE $\frac{1}{4}$	NW $\frac{1}{4}$	SW $\frac{1}{4}$	SE $\frac{1}{4}$	NE $\frac{1}{4}$	NW $\frac{1}{4}$	SW $\frac{1}{4}$	SE $\frac{1}{4}$	
46 N	4 W	18	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	

Total number of acres irrigated _____

A measuring device of a type approved by this Department shall be permanently
maintained as part of the diverting works.

NOTE: Modifications to or variance from this license must be made within the limits of Section 42-222, Idaho
Code, or the applicable Idaho Law. This right may be forfeited by five years of non-use.

The right to the use of the water hereby confirmed is restricted and appurtenant to the lands or place of use
herein described, as provided by the laws of Idaho.

Witness the seal and signature of the Director, affixed at Boise, Idaho, this 24 day of
September, 19 74.

Director

BEFORE THE DEPARTMENT OF WATER ADMINISTRATION
OF THE
STATE OF IDAHO

In the Matter of Application for Permit No.)
95-7188, CITY OF PLUMMER)
_____)

MEMORANDUM DECISION

On May 23, 1972, the City of Plummer filed Application for Permit No. 95-7188 to appropriate 1.0 second foot of ground water from a well to be drilled in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Sec. 18, Twp. 46 N, Rge. 4 W, B.M., Benewah County, to be used for the municipal purposes of the City. Notice of this proposed appropriation was published in the St. Maries Gazette Record, St. Maries, Idaho, on June 29 and July 6, 1972.

On July 21, 1972, the Department received a letter from Mr. Robert D. Dellwo, Attorney for the Coeur d'Alene Tribe of Indians, protesting the granting of the permit. A hearing concerning this matter was held at Coeur d'Alene, Idaho, on October 6, 1972. The protestants were represented by Mr. Dellwo and the applicant by its attorney, Richard McFadden of St. Maries, Idaho.

Following the hearing, Mr. Dellwo submitted a memorandum on behalf of the protesting Coeur d'Alene Tribe.

Based upon the information in the file, the statements made at the hearing, the memorandum of the protestants, and the Department's understanding of the law, the Director makes the following Findings of Fact, Conclusions of Law and Order:

Findings of Fact

(1) The City of Plummer is a municipal corporation of the State of Idaho with a population of 430 persons. The proposed well would be drilled on property which the city obtained by patent on October 8, 1921. It is admitted that the City needs the one second foot of water for its municipal water system.

(2) The water available in the source is sufficient for the purposes for which it is sought to be appropriated.

(3) The City of Plummer has the financial resources with which to complete the proposed project.

(4) The application for permit was filed in good faith and not for delay or speculation purposes.

95 7188

(5) Diversion of water as proposed would not reduce the quantity of water available to nor interfere with existing water rights.

(6) The waters which are the subject of this application are public waters of the State of Idaho which may be appropriated under provisions of State law.

Conclusions of Law

(1) The Idaho Department of Water Administration has jurisdiction over the waters in question. This is challenged by the Indians on the basis of a claim to a superior right which was created when the lands were reserved for them in 1873. They claim that this "reservation", or Winters Doctrine, right includes ". . . all the waters of the reservation, including ground waters necessary to fulfill their beneficial needs . . ." We do not disagree with that statement, but we emphatically deny that the Indians may claim or that they or the Secretary of the Interior or any other entity except the State of Idaho has jurisdiction of the appropriation and use of the water which is the subject of this application. At best, the Indians have a claim to sufficient use of the water resources within the reservation to serve the needs of those lands remaining in Indian ownership, in individual allotments or tribal trust status. Such claim of a right is also limited to the purpose for which the lands were originally reserved.

The Coeur d'Alene Tribe has failed to show that the particular 1.0 second foot of water for which the City of Plummer is making application is needed by them or that its use by the City would interfere with a claimed Indian use. The reservation, at one time, covered some 350,000 acres, but tribal or individual Indian ownership has now been reduced to about 65,000 acres. Even if the Tribe still controlled the entire 350,000 acres, they would have no right to all of the water within the reservation boundary but only to all of the water necessary to fulfill their needs. This could amount to only a fraction of the water resource which is available. Since the Tribe has alienated 4/5 of the original land area, their claim to water has been reduced to the currently held lands. We find that the conveyance of Indian land to other ownership carries with it whatever rights the Indians held, including reservation water rights, but that such conveyed lands become subject to state and local laws. This includes state water laws. The Tribe retains no right to water to serve the lands which have been conveyed, including the land on which the well is to be drilled and the entire City of Plummer.

(2) The City of Plummer is entitled to a permit from the State of Idaho for the

appropriation of 1.0 second foot of water from a well for its municipal water supply purposes.

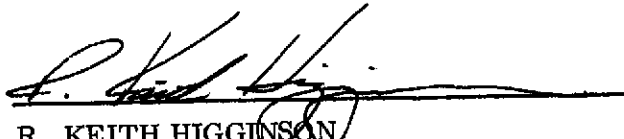
(3) The protest of the Coeur d'Alene Tribe of Indians is unfounded and must be rejected.

Order

It is, therefore, Ordered and Application for Permit No. 95-7188 is hereby APPROVED subject to the following conditions:

- (1) That the permit be and is subject to all prior existing water rights.
- (2) That proof of construction of works and application of water to beneficial use shall be submitted to the Department on or before January 1, 1974.
- (3) That a measuring device of a type approved by the Department shall be permanently installed and maintained as part of the diverting works.

Dated this 5 day of January, 1973.


R. KEITH HIGGINSON
Director

APPROVED

Identification No. _____

Application No. 95 7188

STATE OF IDAHO
DEPARTMENT OF WATER ADMINISTRATION
APPLICATION FOR PERMIT

To Appropriate the Public Waters of the State of Idaho
(TYPE OR PRINT IN INK)

PERMIT ISSUED FOR 13 SEC. FE.
PERMIT PAGE NO. _____

1. Name of applicant CITY OF PLUMMER
post office address Box B PLUMMER, IDAHO 83851
2. Source of water supply groundwater CB which is a tributary of _____
3. a. Location of point of diversion is ~~NE~~ NW $\frac{1}{4}$ of SE $\frac{1}{4}$ of Section 18 Township 46 N
Range 4 W B.M. Bannock County; additional points of diversion if any: Block 3 of Public Reserve 110 Block 138
- b. If water is not consumed, it will be discharged into NA at a point in _____ $\frac{1}{4}$
of _____ $\frac{1}{4}$ of Section _____ Township _____ Range _____ B.M. _____
4. Water will be used for the following purposes:
Amount 1 CFS for Municipal purpose from JAN 1st to DEC 31st (both dates inclusive)
(cfs or acre-feet per annum)
Amount _____ for _____ purpose from _____ to _____ (both dates inclusive)
(cfs or acre-feet per annum)
Amount _____ for _____ purpose from _____ to _____ (both dates inclusive)
(cfs or acre-feet per annum)
5. Total quantity to be appropriated:
a. 1 CFS cubic feet per second and/or
b. _____ acre feet per annum.
6. Proposed diverting works:
a. Description of ditches, flumes, pumps, headgates, etc. NA

b. Height of storage dam NA feet, active reservoir capacity NA acre feet; total reservoir capacity NA acre feet, materials used in storage dam: _____
Period of year during which storage will occur _____ to _____ inclusive.
(Mo. Day) (Mo. Day)
c. Proposed well diameter is 6 inches; proposed depth of well is 400 feet.
7. a. Time required for the completion of the works and application of the water to the proposed beneficial use is ~~3 years~~ 1 year
b. Estimated construction cost is \$?
8. Description of proposed uses:
a. If water is **not** for irrigation:
(1) Give the place of use of water: all of sec 18 HG 10 4 W CB
NA $\frac{1}{4}$ of SE $\frac{1}{4}$ of Section 18 Township 46 N
Range 4 W B.M. _____
(2) Amount of power to be generated: ? hp under ? feet of head.
(3) List number of each kind of livestock to be watered NA

(4) Name of municipality to be served PLUMMER IDAHO, or number of families to be supplied with domestic water 220.
(5) If water is to be used for other purposes describe: NA - City water

95 7188

NE1%	NW1%	SW1%	SE1%	NE1%	NW1%	SW1%	SE1%	NE1%	NW1%	SW1%	SE1%	NE1%	NW1%	SW1%	SE1%
NE1%				NW1%				SW1%				SE1%			

NA Total number of acres to be irrigated

9. a. Who owns the property at the point of diversion City of Phoenix

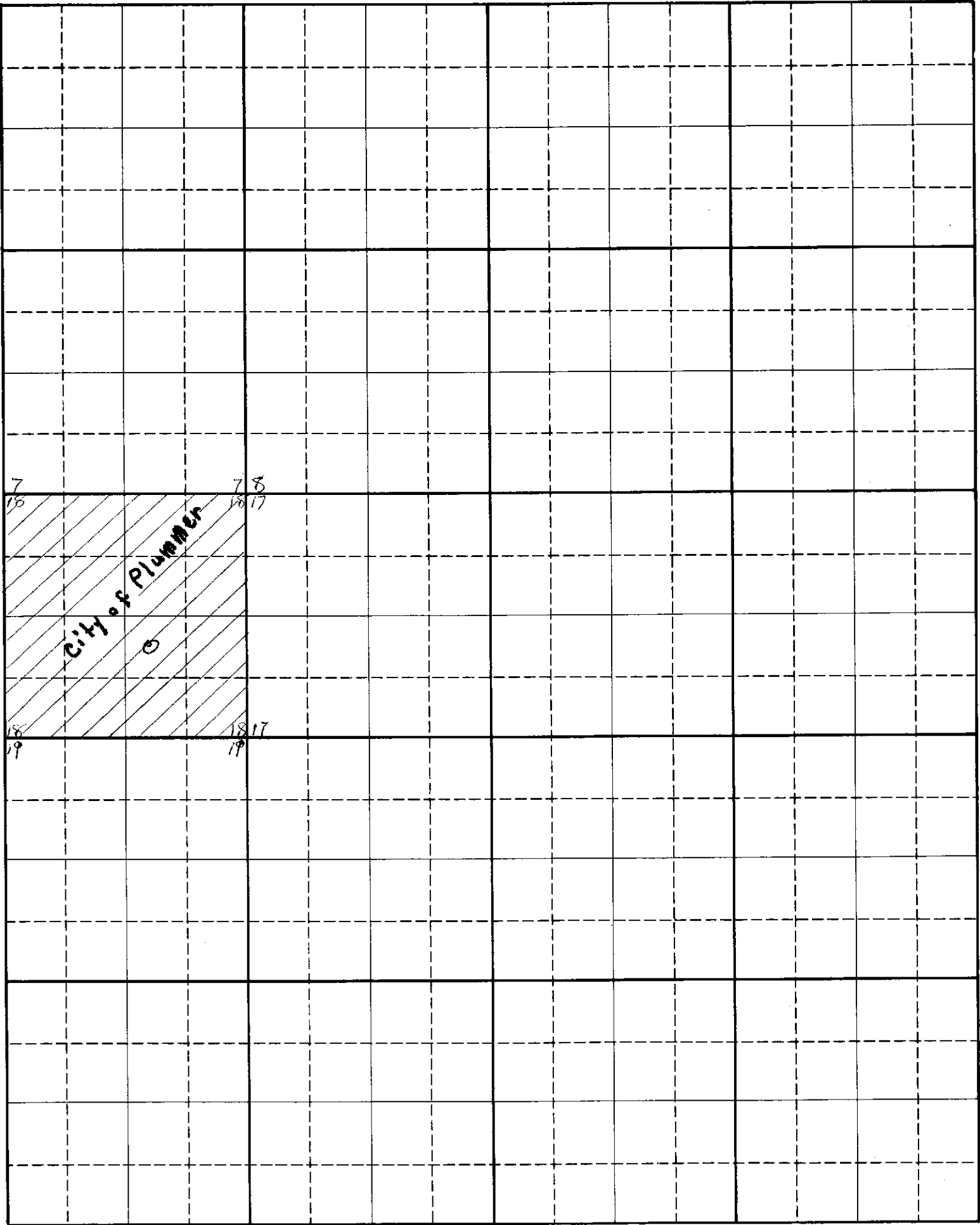
c. If the property is owned by a person other than the applicant, describe the arrangement enabling the

applicant to make this filing-

10. Remarks Well to supply water for the city of Blomman

~~City Councilman's Sec. 18 46 N HW (all) BB~~

11. Map of proposed project: show clearly the proposed point of diversion, place of use, section number, township and range number.



Scale: 2 inches equal 1 mile

BE IT KNOWN that the undersigned hereby makes application for permit to appropriate the public waters of the State of Idaho as herein set forth.

R. B. Plummer
(Applicant)
Ronald W. Evans - Mayor
95 7188

04 5-31-72

Rec'd # 92710

Received by Date 5-22-72 Time 8:00

Preliminary check by Fee \$ 25.00 (35 check fac.)

Received by Date 5-26-72

Publication prepared by CR Date 6-9-72

Published in St. Maries Gazette Record

Publication dates 6-21 & 6-28-72

Publication approved Date 7-12-72

Priority reduced to 5/23/72 Reason

Protests filed by:

Copies of protests forwarded by

Hearing held by Date

Recommended for approval denial by

ACTION OF THE DIRECTOR, DEPARTMENT OF WATER ADMINISTRATION

This is to certify that I have examined Application for Permit to appropriate the public waters of the State of Idaho No. 95-7188, and said application is hereby APPROVED.

1. Approval of said application is subject to the following limitations and conditions:

a. SUBJECT TO ALL PRIOR WATER RIGHTS.

b. Proof of construction of works and application of water to beneficial use shall be submitted on or before January 1, 19 74.

c. Other: Pursuant to Memorandum Decision of this date.

2. Denial of said application is for the following reasons:

Witness my hand this 5 day of January, 19 73.

Director

Affidavit of Publication

STATE OF IDAHO

County of Benewah, ss.

JoJane Hammes, being first duly sworn on oath, deposes and says that she is co-publisher and business manager of the St. Maries Gazette Record, a weekly newspaper printed and published at St. Maries, Benewah County, State of Idaho; the St. Maries Gazette Record is a newspaper having general circulation in Benewah county, State of Idaho, and has been continuously and uninterruptedly published in Benewah County, State of Idaho, during a period of more than seventy-eight consecutive weeks prior to the first publication of the notice of advertisement hereon.

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That said newspaper was regularly distributed to its subscribers during the time of the same period; that said notice was published in the regular and entire issue of said paper.

Subscribed and sworn to before me this 7th day of July, 1972

Notary Public in and for Benewah County, Idaho
Residing at St. Maries, Idaho

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R. KEITH HIGGINSON
Director

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No. 2383 - June 29 - July 6

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One Regan
Notary Public in and for Benewah County, Idaho
Residing at St. Maries, Idaho

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R. KEITH HIGGINSON
Director

Published in the St. Maries Gazette Record, St. Maries, Idaho on June 22 and June 29, 1972.

No. 2383 - June 29 - July 6

DEPARTMENT OF WATER ADMINISTRATION

STAFF ANALYSIS
NORTHERN DISTRICT

Application No. 95-7188 Name City of Plummer

Source Ground water

Point of Diversion NW $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 18, T. 46N, R. 4W, B.M. (Block 3 of Public Reserve in Block 138), Benewah County

Quantity 1.0 cfs Use Municipal Period Jan. 1 to Dec.31

Quantity Use Period

Quantity Use Period

Well Size Diameter 6 inches Proposed Depth 400 Feet

Use Municipal purposes for the City of Plummer

Date Forwarded 6-16-72 Date Returned Received by

COMMENTS: Static w/c varies from 60 to 125 feet, depending upon location. Primary aquifer is sandstone & broken shale. Yields are generally low. No data available on w/c fluctuations. No problems anticipated with possible interference or declining water levels.

RECOMMENDED:

Applied: Qty. <u> </u>	Use <u> </u>	Period <u> </u>	AF/A <u> </u>	AF <u> </u>
Qty. <u> </u>	Use <u> </u>	Period <u> </u>	AF/A <u> </u>	AF <u> </u>
Qty. <u> </u>	Use <u> </u>	Period <u> </u>	AF/A <u> </u>	AF <u> </u>
Maximum: Qty. <u> </u>	Use <u> </u>	Period <u> </u>	AF/A <u> </u>	AF <u> </u>
Qty. <u> </u>	Use <u> </u>	Period <u> </u>	AF/A <u> </u>	AF <u> </u>
Qty. <u> </u>	Use <u> </u>	Period <u> </u>	AF/A <u> </u>	AF <u> </u>

ACTION: Approved ☒ Denied

Conditions of approval or reason for denial:

INVESTIGATION By Paul M. Casteln Title W.R.I. - I

Date July 7, 1972

6 adj.

City of Plummer

P.O. BOX B
PLUMMER, ID 83851
PH. 208-686-1641

RECEIVED

JUN 21 1993

Department of Water Resources

95-7188 ✓
7611
8582

To whom it may concern,

Please correct your mailing list to show our correct address:

City of Plummer
P.O. Box B
Plummer, Idaho 83851

Thank you.

Donna Spier

Donna Spier
City Clerk

DEPARTMENT OF WATER RESOURCES
STATEHOUSE
BOISE, IDAHO 83720



CITY OF PLUMMER
CITY HALL
PLUMMER, ID 83851

City of Plummer

P.O. BOX B / PLUMMER, ID 83851

44501 TR2



Department of Water Resources
Statehouse
Boise, ID 83720

LAW OFFICES
DELLWO, RUDOLF & GRANT

ROBERT D. DELLWO
KERMIT M. RUDOLF
WILLIAM J. GRANT
RICHARD J. SCHROEDER
JOSEPH A. ESPOSITO

1016 OLD NATIONAL BANK BUILDING
SPOKANE, WASHINGTON 99201
(509) 624-4291

November 2, 1972

RECEIVED

NOV 3 1972

Department of Water Administration

R. Keith Higginson
Director
Department of Water Administration
State of Idaho
Statehouse Annex 2
Boise, Idaho 83707

Dear Mr. Higginson:

Re: City of Plummer Ground Water
Application No. 95-7188

Enclosed for filing is Memorandum of Coeur d'Alene Tribe of Idaho in protest against approval of the Application for Permit No. 95-7188 by the City of Plummer.

I will leave it to you to furnish a copy of the enclosed memorandum to the Attorney General's Office if you wish.

Together with copy of this letter I am mailing copy of the memorandum to counsel for the City of Plummer this date.

Yours respectfully,

DELLWO, RUDOLF & GRANT

Robert D. Dellwo

By: Robert D. Dellwo

Attorneys for Coeur d'Alene Tribe

RDD:fb

cc: Richard L. McFadden, St. Maries, Idaho

95 7188

RECEIVED
JUN 10 1952
Department of Water Administration

BEFORE THE DEPARTMENT OF WATER ADMINISTRATION
OF THE
STATE OF IDAHO

In the Matter of Protest Against }
Approval of Application for }
Permit No. 95-7188 in the name of }
the CITY OF PLUMMER }

MEMORANDUM OF THE
COEUR D'ALENE TRIBE OF IDAHO

Captioned case constitutes a classic circumstance of an attempt of a non-Indian, non-tribal municipal community within an Indian reservation to acquire a water right through state law. It is the contention of the Coeur d'Alene Indian Tribe that all the waters on the Coeur d'Alene Reservation are subject to the "Winters Doctrine Rights of the Tribe" and that their allocation and use by Indians and non-Indians are within the exclusive jurisdiction of the Secretary of the Interior.

It is apparently the legal position of the State of Idaho, Department of Water Administration, that the waters involved constitute unappropriated water of the State of Idaho, surplus to the needs of the Indians and their tribe, and hence subject to appropriation under the applicable Idaho statutes.

It is the Tribe's position, even assuming that the involved waters are surplus to tribal and Indian needs, that it is within the exclusive jurisdiction of the Secretary of the Interior to administer them, in cooperation with the Tribe. No water right issued by the State of Idaho can have any legal effect as to such waters. At the very least if as an ultimate principle the State of Idaho would have jurisdiction to administer such surplus water, the fact of their surplusage would have to be established by the Secretary of the Interior. The State of Idaho can not just move onto an Indian reservation and assume such surplusage and proceed with issuing water licenses and permits on the waters involved.

THE WINTERS DOCTRINE OF INDIAN WATER RIGHTS

The Indian Tribe and Indians on the reservation have the indisputable Winters Doctrine Water Rights to which all the waters within, under or bounding the reservation are subject. It is not the intent of the writer, attorney for the Tribe, to set out a detailed brief of these rights. He assumes that the recipients of this memorandum are acquainted with the Winters Doctrine and the family of cases which affirm them. The writer has already circulated his law review article entitled "Indian Water Rights--the Winters Doctrine Updated." In the interest of brevity he suggests that that article be considered a part of this memorandum in so far as it defines the Winters Doctrine and cites and discusses the landmark cases interpreting it.

BACKGROUND AND HISTORY

The Coeur d'Alene Indian Tribe aboriginally occupied approximately 5,000,000 acres of land for centuries and from time immemorial. This aboriginal title and use was recognized in its Claims Case against the

95-7188

United States Government which was settled in 1958 and in which the United States agreed that the Tribe had held aboriginal title to about 3,500,000 acres of land extending roughly from about the center of the present Spokane Valley, east to the present state line of Montana, circling to the south, returning in about the Moscow-Pullman area and north to the point of beginning. This aboriginal homeland enclosed most of the watershed of the various streams, rivers and ground water course which are situated on the present reservation or which flow into Coeur d'Alene Lake.

The Coeur d'Alene Reservation was initially proclaimed by Executive Order dated November 8, 1873. A copy of that order is attached. A study of this proclamation will reveal that the boundaries of the then-proclaimed reservation were the same as they now are except for the later cession of 100,000 acres from the north end.

The lands involved were a part of the aboriginal holdings of the Tribe and were in fact their principal areas of residence--in effect their primary homeland. This fact is important in evaluating their water rights because it is rights to water and land held by them immemorially, the title to which was never extinguished.

Governor Stevens came and went in the 1850's and the Indians of this area waited for a long time for a presidential delegation to come again and parley or negotiate the terms for an eventual treaty. In the meantime white encroachers and settlers were proliferating through the entire aboriginal area and the Indians felt they were being pressed into their eventual reservations but without protection even there. The above cited Executive Order did little to slow down this process of encroachment.

Finally, Jared Wright and company came to the Coeur d'Alene Indian Mission at DeSmet in 1886 and there was negotiated the Articles of Agreement of 1887 a copy of which is attached. In it the Tribe, for a stated small consideration, ceded all its holdings outside the reservation in return for the commitment of the United States that the lands of the reservation "shall be held forever as Indian land and as homes for the Coeur d'Alene Indians . . ."

The Articles of Agreement were not immediately approved by Congress but, as was the case with other treaties and agreements with other tribes, the U. S. Commission was back two years later telling the Coeur d'Alene Indians that they could get their reservation if they would cede another 100,000 acres at the north end. This was done in the supplemental agreement of 1889. The outer boundaries of the reservation have remained the same to the present time.

WINTERS DOCTRINE RIGHTS OF THE COEUR D'ALENE TRIBE

Any casual perusal of the Winters Doctrine cases (Winters v. U. S. 207 U.S. 564; Conrad Investment Co. v. U.S., 161 F. 829 (1908), U. S. v. Walker River Irrigation District, 104 F.2d 334 (1939), U.S. v. Ahtanum Irrigation District, 236 F.2d 321 (9th Cir. 1964); 338 F.2d 307 (9th Cir. 1965); Cert. denied 831 U.S. 924 (1965); State of Arizona

v. State of California, 373 U.S. 546 (1963); U. S. v. Powers, 305 U.S. 527 (1939), and many other lesser cases, will convince any lawyer or administrator versed in water law that the United States and the Coeur d'Alene Indian Tribe (in the sequence above) reserved for the Coeur d'Alene Indians paramount and superior water rights to all the waters of the reservation, including ground waters, necessary to fulfill their beneficial needs not only for their present uses (and needs), as set out in the Conrad case cited above, but for future requirements.

That the foregoing is true is too obvious for cavil. I am sure the Winters Rights of the Tribe will be freely acknowledged by the State of Idaho and the City of Plummer.

JURISDICTION OF TRIBE AND SECRETARY OF THE INTERIOR

Aboriginally and when the reservation was first formed, the Indian members of the Tribe lived communally sharing whatever tribal assets there were. Among these were their land and water rights. With the General Allotment Act of 1887 (25 USCA 331 et seq.) a portion of the reservation was broken up into Indian allotments of 160 acres each. Later the reservation was opened for homestead. Through the process of homesteads and the alienation of Indian allotments, the land base of the Tribe dropped from the initial 350,000 acres in 1889 to its present base of about 65,000 acres of inherited Indian allotments and 14,000 acres of tribal land. The boundaries of the reservation, enclosing as they did 350,000 acres, remain the same.

With the allotment of tribal lands, there was an individualization not only of a tract of land but of a pro rata "Winters Doctrine" water right for the beneficial use of water on that land. "Individualization" is an appropriate word because the legal title to these property rights was and still is held in trust for the individual Indians and the Tribe by the United States of America.

Just as the Allotment Act provided for the allotment of specific lands to individual Indians, it also provided for the fair and equitable allocation of the tribal water rights among the allottees. 25 USCA 381 provides:

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

Thus, the Secretary of the Interior was given the jurisdiction and the responsibility of apportioning the water upon the reservation. In exercising this authority as he has done in many cases, he allocates the water to Indian and non-Indian alike. There is attached a xerox copy of 25 USCA 381, together with annotations, some of which the writer has bracketed as being most relevant to instant case.

Attention is directed to the cited case of Anderson v. Speak-Morgan Livestock Co. under the heading "4. Allottees rights before allotments." Because the Secretary has not made any allocation of waters or prescribed any rules on the Coeur d'Alene Reservation this case would be applicable. The right to the use of the water by the Tribe or its members remains inchoate, undefined as to precise amount until the Secretary acts.

A review of the cited cases verifies that successors in title of formerly allotted lands do derive a water right from their original Indian grantor. The administration and allocation of the resulting combination of Indian and successor non-Indian water rights is the exclusive responsibility of the United States Government. As a matter of fact it would appear that most of the lands served by the various Indian irrigation districts such as the Flathead Indian Irrigation District now belong to non-Indians. ?

JURISDICTION OF SECRETARY IS EXCLUSIVE

The material included under this heading is an edited draft of a memorandum prepared on the same subject by the Regional Solicitor's office at Portland, Oregon. The purpose of the memorandum was to establish that a water right issued by the State of Washington to a non-Indian on the Lummi Reservation was of no legal effect and that the only one who could issue a water right would be the Secretary performing his responsibilities under 25 USCA 381. The writer has adapted the Regional Solicitor's memorandum to delete or change references from the State of Washington and the Lummi Reservation to the State of Idaho and the Coeur d'Alene Reservation. The law would be identical in both cases. The writer has bracketed that portion of the memorandum.

[There is ample authority for the Secretary of the Interior to assume exclusive jurisdiction over all waters within an Indian reservation and administer the use thereof. Under the doctrine as set forth in Winters v. United States, 207 U. S. 564, 52 L.Ed. 340, (1907), the Indians on the reservation are entitled to a prior right to all water flowing through or adjacent to the reservation. This doctrine has been extended to groundwater as well as surface water. Solicitor's Opinion, September 10, 1953, 61 I.D. 209, and Tweedy v. Texas Co., 286 F.Supp. (D. Mont. 1968). Such waters being reserved, the rights thereto can be obtained only in the manner specified by Congress; United States v. McIntire, 101 F. 2d 650, 653 (9th Cir. 1939); United States v. Alexander, 131 F. 2d 359, 360 (9th Cir. 1942); Merrill v. Bishop, 74 Wyo. 298, 287 P.2d 620, 625 (1955). Prior to the Allotment Act of February 8, 1887, 24 Stat. 390, all lands within an Indian reservation were communally owned with Indians residing thereon equally sharing the benefits. NOT 7 1/2

[The allotment act which provided the authority for subdividing the reservation also authorized the Secretary of the Interior by section 7 of the act to proscribe such rules and regulations as he may deem necessary to secure a just and equal distribution of water among the Indians residing upon any such reservation. 25 USC, sec. 381. Therefore, the jurisdiction to regulate the use of reserved waters of a reservation was vested by Congress in the

Secretary. United States v. Powers, 305 U.S. 527, 83 L.Ed. 330 (1939).

[To permit the state to unilaterally determine the needs of the Indians and create rights in others by the issuance of permits for what it determines to be surplus to these needs is an infringement upon this authority. In the case of Segundo v. United States, 123 F.Supp. 554, 558 (S.D. Cal. 1954), appeal dismissed, 221 F.2d 296, the court held that it was the administrative duty of the Secretary of the Interior to determine the distribution of water on a reservation, but if the Secretary has failed or refused to perform this duty the federal district courts had jurisdiction to adjudicate the controversies. See also the case of United States v. Pierce, 235 F. 2d 885, 892 (9th Cir. 1956), where the court decided that the facts of that particular case did not justify the federal courts interfering with the Secretary's duty to administer these waters.

[The state will certainly raise the question as to the authority of the Secretary to regulate the use of waters on land which has passed out of trust. In the case of United States v. Hibner, 27 F. 2d 909 (D. Idaho 1928), the court held that the non-Indian purchaser was entitled to the same character of water right as that of the Indian seller (as to priority) but only as to the water being used as of the date of the sale. The determination of the extent of this reserved right which passes to a non-Indian is a federal question and not within the province of the administrative agencies of a state to decide by applying the state's particular administrative rules and procedures. The right that passes at the time of sale to a non-Indian is the only water right that is appurtenant to such nontrust land; and being a right which sprang from the Indians' reserved right it is subject to continued administration by the Secretary under 25 USC, section 381, the same as it was prior to the sale to the non-Indian.]

[The "surplus water" doctrine is unsound and misleading as a legal principle, since such waters, if they do exist, could be used only at the sufferance of those holding the existing rights. For the state to give such usage the dignity of a permit creates a fictitious right misleading subsequent owners which could result in violation of Idaho statute that makes it a misdemeanor for a landowner to make an unauthorized use of groundwater. Idaho Code 42-237g. It can create hardship and controversy if the permit becomes the basis of major capital improvements such as may occur in Plummer. In other words, the rights as defined in Winters v. United States, supra, United States v. Hibner, supra, and other cases related thereto, are the only water rights recognized on an Indian reservation, leaving nothing for the state to administer. Also as a practical matter, a chaotic condition is created where the United States and the state compete in the administration of a water source as used on the checkerboard ownership of trust and nontrust lands within a reservation. The Plummer community is a vivid example of where the United States through the Indian Health

Service and the Bureau of Indian Affairs is competing for water for federally sponsored Indian communities with a federally unregulated non-Indian community which seeks a color of right through a state-issued permit.

[The State of Idaho looks to language such as that contained in United States v. Ahtanum Irrig. Dist., 236 F. 2d 321, 335 (9th Cir. 1956), cert. denied, 352 U.S. 938, 1 L.Ed. 2d 367, where the court stated that although the rights of the white settlers were subordinate to the rights of the Indians "they were not non-existent," and that there was no legal obstacle to the use of these waters by the white settlers until the Indians could make use thereof. However, this was a case between off-reservation owners and on-reservation Indians and not a case involving the administration of the checkerboard trust and nontrust ownerships of a reservation. The court in Tweedy v. Texas Co., supra, adopted this language in holding that "need and use" by an Indian was a requisite to the reserved water right. However, neither case held that use of the water on nontrust land prior to its need on trust land was subject to the exclusive administration of a state under state law. In fact the Tweedy case appears to hold quite the opposite.

[We therefore are of the opinion that since all waters of an Indian reservation are reserved they are subject to the exclusive jurisdiction of the United States to administer whether used on trust or nontrust land, and that the Secretary of the Interior has been authorized by Congress to promulgate rules and regulations to administer all reservation waters.]

The waters involved in instant case are ground waters, declared to be "Public Waters" by Idaho Code 42-226. That statute states among other things that "All ground waters in this state are declared to be the property of the state, whose duty it shall be to supervise their appropriation and allotment to those diverting the same for beneficial use . . ."

Such a statutory declaration could not possibly have any effect on Indian reservations where admittedly the tribes have superior and paramount Winters Rights to the ground waters. These waters cannot be regulated and administered both by the State and the Secretary of the Interior. Because the tribal rights are paramount, prior and superior, the State could not conceivably force the Secretary and the Tribe out of the administrative picture. The State cannot regulate the tribal rights but the Secretary can regulate and control both the tribal and nontribal rights. Hence it is the Secretary, not the State, that must administer the ground waters within the reservation.

WATER INVENTORY OF COEUR D'ALENE TRIBE

One might ask what the Secretary is doing about the administration of water rights on the Coeur d'Alene Reservation. At the present time through contract with the Tribe a water inventory is being conducted, beginning with the Hangman drainage area, which ultimately will inventory all the surface and ground waters of the reservation and the tribal need therefor. This inventory will include the waters in question. It is hoped the inventory will ascertain the amount of water available and the tribal needs and uses relative thereto. Until this inventory

is completed there will be no credible and reliable information from which any equitable departmental allocation or apportionment of the ground waters can be logically made.

CONCLUSION

The State of Idaho has no jurisdiction whatever to issue water permits on the Coeur d'Alene Reservation. Such jurisdiction is by statute in the Secretary of the Interior and aboriginally and residually in the Coeur d'Alene Indian Tribe. Any license or permit that the State might issue the City of Plummer would be nugatory and of no legal effect except perhaps to allocate the priority of "non rights" among non-Indians. Certainly such a permit will not grant to the City any right to the ground water that would not be junior and subordinate to tribal rights to the same water. The permit therefore should not be issued and the City should instead apply to the Secretary of the Interior and the Coeur d'Alene Indian Tribe if it wishes to pursue its application.

Respectfully submitted

DELLWO, RUDOLF & GRANT

Robert D. Dellwo

By: Robert D. Dellwo

Attorneys for the Coeur d'Alene Tribe

cc: Mailed to:

Richard L. McFadden
Attorney for City of Plummer
St. Maries, Idaho 83861

95 7188

October 11, 1972

Mr. Richard L. McFadden, Attorney
720 College
St. Maries, Idaho 83861

Re: City of Plummer Ground Water Application No. 95-7188

Dear Mr. McFadden:

This letter is to confirm my understanding of the agreement reached at the hearing held in Coeur d'Alene, Idaho on October 6, 1972, concerning the application of the City of Plummer for a water permit. Mr. Dellwo requested 30 days to prepare and submit a memorandum concerning the claimed Indian water right which will be submitted by November 6. You requested 10 days thereafter to determine whether you wished to file an answer thereto. Following receipt of the memorandum and any answer, we will issue a decision concerning this matter.

Very truly yours,

R. KEITH HIGGINSON
Director

RKH:mjl

October 11, 1972

Mr. Robert D. Dellwo
Law Offices
Dellwo, Rudolf & Grant
1016 Old National Bank Building
Spokane, Washington 99201

Re: City of Plummer Ground Water Application No. 95-7188

Dear Mr. Dellwo:

This letter is to confirm my understanding of the agreement reached at the hearing held in Coeur d'Alene, Idaho on October 6, 1972, concerning the application of the City of Plummer for a water permit. You requested 30 days to prepare and submit a memorandum concerning the claimed Indian water right which will be submitted by November 6. Mr. McFadden requested 10 days thereafter to determine whether he wished to file an answer thereto. Following receipt of the memorandum and any answer, we will issue a decision concerning this matter.

Very truly yours,

R. KEITH HIGGINSON
Director

RKH:mjl

December 4, 1973

Mr. Robert D. Dellwo
DELLWO, RUDOLF & SCHROEDER
Attorneys for the Coeur d'Alene Tribe
1016 Old National Bank Bldg.
Spokane, Washington 99201

Re: Application for Permit Nos. 95-7396, 91-7010 and 92-7015

Dear Mr. Dellwo:

This is to acknowledge receipt of your recent letter with which you forwarded protests against the granting of Application for Permit Nos. 95-7396, 91-7010 and 92-7015.

We have previously discussed on several occasions, the position of the State of Idaho with regard to the rights of the Coeur d'Alene Indian tribe. I therefore do not feel that it is necessary for me to repeat our position concerning this matter. Since you have filed a protest, you are entitled to have the matter heard before a permit is issued. However, in the case of Application for Permit Nos. 91-7010 and 92-7015, the permits were issued on October 23 and October 29, 1973 respectively. It is therefore not possible at this time to rescind that approval and give you the opportunity for a hearing. You could, however, file a petition for a review of the decision in the appropriate District Court under the provisions of Chapter 2, Title 42, Idaho Code. With regard to Application for Permit No. 95-7396, it will be held in abeyance until you have been given an opportunity for a hearing concerning it.

Very truly yours,

R. KEITH HIGGINSON
Director

RKH:mjr

cc: Idaho Department of Water Administration
Northern District Office

IDENT. NO. 95-7188

I D A H O D E P A R T M E N T O F W A T E R R E S O U R C E S

WATER RIGHT
DATA ENTRY LOG

[illegible]

September 24, 1974

Re: Permit No. 95-7188

City of Plummer
Box B
Plummer, Idaho 83851

Gentlemen:

Enclosed is a copy of the water license issued on the above referenced permit.

Sincerely,

BOBBY D. FLEENOR
Chief, Water Rights

BDF:jfr

Enclosure

RECORDED

September 6, 1974

City of Plummer
Box "E"
Plummer, Idaho 83851

Gentlemen:

A representative of this Department has made an examination of the works covered by your Permit No. 95-1188 and has found the following:

Quantity of water diverted: 0.13 cfs

Amount of water that can be recognized as beneficially used under Idaho law: 0.13 cfs

The maximum quantity diverted shall not exceed n/a acre feet per year.

Beneficial use: For municipal uses within the City of Plummer, Idaho, Sec. 18, Twp. 46N, Rge. 4W

Point of diversion: NW¹/4 Sec. 18, Twp. 46N, Rge. 4W, B.M.

Priority date established: May 23, 1972

If you do not concur with these findings, please advise us within 10 days; otherwise a license will be issued as set forth in this letter.

Sincerely,

BOBBY D. FLEENOR
Chief, Water Rights

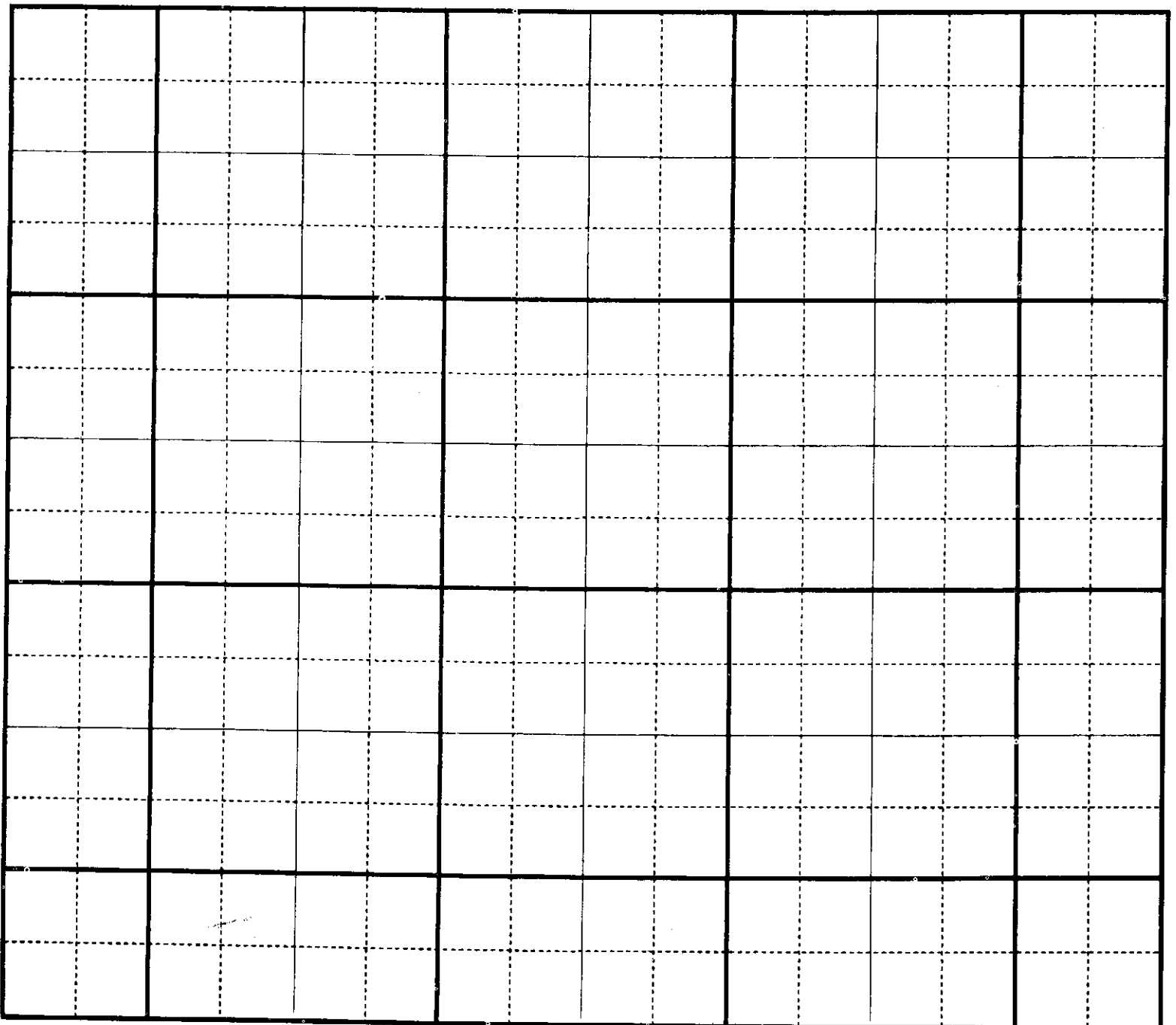
BDF:jr

RECEIVED

FIELD REPORT

TOTAL ACREAGE

Diagram of System



DATE OF EXAM 7/18/74

ACREAGE

Found _____
Recommended _____

Irrigation Requirement _____ Ac Ft/Ac

USE

Irrigation Q= _____ c.f.s. V= _____ AF/Ann. from _____ to _____
Domestic Q= _____ c.f.s. V= _____ AF/Ann. from _____ to _____
Livestock Q= _____ c.f.s. V= _____ AF/Ann. from _____ to _____

MUNICIPAL Q= 0.13 cfs.

JAN 1

DEC 31

Is water co-mingled? yes _____ no X

Name source: _____

twp. _____ N/S, Rge _____ E/W, B.M., Sec. _____, Sub. _____ 1/4 _____ 1/4 _____ County _____

Exchange? yes _____ no X

Name source exchanged with: _____

twp. _____ N/S, Rge _____ E/W, B.M., Sec. _____, Sub. _____ 1/4 _____ 1/4 _____ County _____

Point of injection:

twp. _____ N/S, Rge _____ E/W, B.M., Sec. _____, Sub. _____ 1/4 _____ 1/4 _____ County _____

Point of exchange:

twp. _____ N/S, Rge _____ E/W, B.M., Sec. _____, Sub. _____ 1/4 _____ 1/4 _____ County _____

Total Q measured 0.13 Method of measurement METER

Total Q recommended 0.13 Meter No. 22200009 Type 1 1/2" ROCKWELL Condition GOOD

Total V recommended →

Recommended Amendments:

P.D. _____
Place of Use _____
Other _____
None X

MEASUREMENT CALCULATION:

59 GPM. OFF OF METER $\frac{59}{442.8} = 0.13 \text{ cfs}$

SYSTEM DESCRIPTION:

SUBMERSIBLE PUMP WITH SHP. U.S. ELECTRICAL MOTORS
BOOSTER PUMP (MODEL F-F149-00-171. ONE OF
FOUR PUMPS THAT PUMP INTO STORAGE TANK
METER

REMARKS:

Examiner's Signature [Signature] Date 7/19/74

Checked by [Signature] Date 7/26/74

Approved by _____ Date _____

January 22, 1974

Re: Permit No. 95-7188

City of Plummer
Box "B"
Plummer, Idaho 83851

Gentlemen:

We acknowledge receipt of the affidavit submitted as proof of beneficial use for the above referenced permit.

Before a license can be issued, a field examination must be made by a representative of this Department. We cannot tell just when this examination will be made, but our examiner will try to contact you at the time he makes the examination so that you may show him the system.

If you have any questions concerning the field exam, please contact our Northern District Office at 401 Front Ave., Room 209, Coeur d'Alene, Idaho.

Sincerely,

D. Darlene Reich
Water Rights Supervisor

DDR:JC

95-7188

STATE OF IDAHO

DEPARTMENT OF WATER ADMINISTRATION



Cecil D. Andrus
Governor

R. Keith Higginson
Director

614 State Street
Statehouse - Annex 2
Boise, Idaho 83720
(208) 384-2190

Water Rights Administration
Water Resource Investigations
Dam and Reservoir Safety
Water Well Drilling
Waste Disposal Wells
Stream Channel Protection

January 9, 1974

City of Plummer
Box "B"
Plummer, Idaho 83851

Re: Permit No. 95-7188

Gentlemen:

We have recently received your affidavit of Proof of Application of Water to Beneficial Use under your Permit No. 95-7188.

You will recall that one of the conditions of approval was that a measuring device of a type approved by the department had to be installed as part of the diverting works. The purpose of that was to provide a means whereby this department, as well as the city, could determine the amount of water being applied to beneficial use and could have some means of determining whether future appropriations by others are causing interference with your well. In your affidavit, you do not indicate that a measuring device has been installed. However, you have given us information concerning the production of the well (60 gallons per minute) and the total withdrawal of 11,888,800 acre-feet since the well was dug. If that information was obtained from a measuring device or meter, please advise as to the type and its location. If not, and the well only produces 60 gallons per minute, you may request that the requirement for a measuring device be removed from the permit, since the requirement was based upon your original proposal to divert 450 gallons per minute.

Please let us hear from you within 10 days concerning this matter.

Very truly yours,


R. KEITH HIGGINSON
Director

RKH:mjr

*Rockwell meter
meter - U. S. Gallons measurement.
meter - In pump house beyond booster pump.
French meter.*

RECEIVED
JAN 21 1974

Department of Water Administration

95-7188

Identification No. _____
Permit No. 95-7188

STATE OF IDAHO
DEPARTMENT OF WATER ADMINISTRATION
PROOF OF APPLICATION OF WATER TO BENEFICIAL USE

RECEIVED

DEC 31 1973

1. a) Name of Permit Holder City of Plummer Department of Water Administration
b) Post Office Address Plummer Idaho
2. Permit Number 95-7188
3. Date of Priority that you are prepared to establish 5/23/72
4. a) Source from which water was appropriated _____
b) Location of the point of diversion: Lots 3+4 1/4 Block 139 1/4, Section 18
Township 46 N, Range 4 W ~~6 W~~ Boise Meridian, Other points of diversion: _____
5. a) The amount of water and use to which the water has been applied: well 60 gal per minute
amount 11,888,800 since well was dug. purposes from 11/13/73 to 12/6/73 incl.
(cfs and/or acre feet per annum) (Month-Day) (Month-Day)
amount 522700 gal for Household & Business. purposes from _____ to _____ incl.
(cfs and/or acre feet per annum) (Month-Day) (Month-Day)
amount _____ for _____ purposes from _____ to _____ incl.
(cfs and/or acre feet per annum) (Month-Day) (Month-Day)
b) Total amount appropriated _____ cfs and/or acre feet per annum
c) Describe how and by whom measurement of rate of flow or amount of storage was made and the qualifications of the person making the measurement: Agua well drilling Co. & Bernard
Quinn water superintendent - Plummer - Idaho.
6. If the means of diversion and conveyance are owned by someone other than the Permit Holder:
a) Give the name or description of the canal, ditch or other works by which the water is conducted to the place of use: no
b) Describe the agreement or understanding by which you take water from the works: _____
7. a) Briefly describe the works for diverting and conveying the water to the place of use, (If from a subterranean source, give the pump size, motor size, size of well casing, depth of well; if from surface water, give brief description of diversion structure and/or canal or ditch) _____
b) Describe the type and size of measuring device which you have installed at your point of diversion: _____
c) Give well drillers name and address and date the well was completed _____

Exam typed 1/22/74 by JSC

95-7188

~~Notary Public residing at - Plummer, Idaho~~

State of Idaho)
County of Benewah) ss.

12/27/73

(Signature)

The above information is a true statement of the extent to which the above numbered permit has been developed.

10. Remarks:

Total number of acres irrigated

[illegible]

Sion:

9. Irrigation uses: Describe the lands irrigated by giving the acreages irrigated within each 40 acre subdivi-

050 10

8. If for other than irrigation, describe the beneficial use to which you have applied the water and the place

8812-510

January 9, 1974

City of Plummer
Box "B"
Plummer, Idaho 83851

Re: Permit No. 95-7188

Gentlemen:

We have recently received your affidavit of Proof of Application of Water to Beneficial Use under your Permit No. 95-7188.

You will recall that one of the conditions of approval was that a measuring device of a type approved by the department had to be installed as part of the diverting works. The purpose of that was to provide a means whereby this department, as well as the city, could determine the amount of water being applied to beneficial use and could have some means of determining whether future appropriations by others are causing interference with your well. In your affidavit, you do not indicate that a measuring device has been installed. However, you have given us information concerning the production of the well (60 gallons per minute) and the total withdrawal of 11,888,800 acre-feet since the well was dug. If that information was obtained from a measuring device or meter, please advise as to the type and its location. If not, and the well only produces 60 gallons per minute, you may request that the requirement for a measuring device be removed from the permit, since the requirement was based upon your original proposal to divert 450 gallons per minute.

Please let us hear from you within 10 days concerning this matter.

Very truly yours,

R. KEITH HIGGINSON
Director

RKH:mjr

95-7188

SENDER: Be sure to follow instructions on other side

PLEASE FURNISH SERVICE(S) INDICATED BY CHECKED BLOCK(S)

(Additional charges required for these services)

☐

Show address
where delivered

☐

Deliver ONLY
to addressee

RECEIPT

Received the numbered article described below

REGISTERED NO.

SIGNATURE OR NAME OF ADDRESSEE (Must always be filled in)

CERTIFIED NO.

1

City of Plummer

INSURED NO.

2

SIGNATURE OF ADDRESSEE'S AGENT, IF ANY,

By Florence Yarbrough

DATE DELIVERED

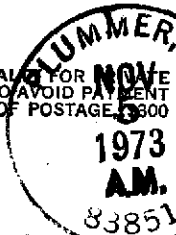
3

SHOW WHERE DELIVERED (Only if requested, and include ZIP Code)

95-7188

U.S. POSTAL SERVICE
OFFICIAL BUSINESS

PENALTY FOR
USE TO AVOID PAYMENT
OF POSTAGE \$300



Postmark of Delivering Office

SENDER INSTRUCTIONS

Print in the space below your name, address, including ZIP Code.



- If special services are desired, check block(s) on other side.
- Moisten gummed ends and attach to back of article.

**RETURN
TO**



DEPARTMENT OF WATER ADMINISTRATION
STATE HOUSE - FANNIN AVE
BOISE, IDAHO 83707

95-7188

November 1, 1973

CERTIFIED MAIL

#24968

Re: Permit No. 95-7188

City of Plummer
Box "B"
Plummer, Idaho 83851

Gentlemen:

One of the conditions of approval of your water Permit No. 95-7188 (see last page of your approved permit) was that evidence of the extent of development be submitted as proof of application of water to beneficial use to this office on or before January 1, 1974. Enclosed is an affidavit form which must be used to submit the required proof of beneficial use.

If you have not fully completed your project, and you have not previously received an extension of time, you may request an extension of time provided the delay is for reasonable cause as indicated in Section 42-204, Idaho Code, amended. If you have been prevented from proceeding by a governmental agency or by litigation, more than one extension of time can be granted.

Either the beneficial use affidavit or a request for an extension of time must be received by this Department on or before the above mentioned date, otherwise the permit will lapse and be of no further force or effect.



R. KEITH HIGGINSON
Director

Enc: Proof affidavit

cc: Richard L. McFadden
720 College Avenue
St. Maries, Idaho 83861

95 7188

State of Idaho
Department of Water Administration

State law requires that this report be filed with the Director, Department of Water Administration within 30 days after the completion or abandonment of the well.

[illegible]

January 8, 1973

Re: Permit No. 95-7188

City of Plummer
Box "B"
Plummer, Idaho 83851

Gentlemen:

Enclosed is a copy of your approved Application for Permit No. 95-7188 along with a copy of the Memorandum Decision. We direct your attention to the conditions of approval.

Be sure to note that a special condition requiring you to install and maintain a measuring device at your point of diversion has been placed upon the permit. We are enclosing a letter describing different types of measuring devices accepted by this Department.

Sincerely,

BOBBY D. FLEENOR
Assistant Director

BDF:DR

Enc: Copy of permit w/copy of
Memorandum Decision

cc: Robert D. Dellwo
Richard L. McFadden
Coeur d'Alene Tribe
Enc: Copy of Memorandum Decision

bc: Northern District Office

95 7188

LAW OFFICES OF
MCFADDEN & PARK
720 COLLEGE AVENUE
ST. MARIES, IDAHO
83881

RECEIVED

1972
Department of Water Administration

November 18, 1972

Mr. R. Keith Higginson, Director
Department of Water Administration
Statehouse - Annex 2
Boise, Idaho 83707

Re: Application for permit No. 95-7188

Dear Sir:

At the conference held on the matter of the protest against approval of application for permit no. 95-7188 in the name of the City of Plummer, and at the conclusion thereof, the attorney for the Coeur d'Alene Indian Tribe was requested to file a memorandum setting forth the position of the Tribe with respect to such protest. We are in receipt of a copy of the memorandum filed pursuant to this understanding. The City of Plummer was then permitted to file a responsive memorandum thereto. Rather than to attempt to prepare a formal brief or memorandum responding specifically to the position taken by the Coeur d'Alene Tribe, I would like by this letter to explain and clarify the position of the City in this matter.

First of all, it should be understood that the City of Plummer, which is a small municipal corporation of a population of about 430 persons, operates, as is true of most small municipalities, on rather a tight financial budget. The Mayor and City Council, operating within these budgetary limitations, does the best job possible in managing the City and seeing to its municipal requirements. The City, as such, is not in any position at this time to engage in a protracted argument or litigation over the matter of its pending water right application. However, as pointed out by Mr. Dellwo at the time of the conference, it is our understanding that litigation is contemplated in the future wherein a court determination will be made which will clarify the status of the water rights within the Coeur d'Alene Indian Reservation. We are hoping that the City of Plummer will not be a party to such litigation and will not be required

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to incur the expense and cope with the problems which would necessarily be involved therein. We do appreciate that a definitive answer to the questions raised in this matter, particularly jurisdictional in character, would be very desirable. The City is willing to defer to the decision of the Department of Water Administration to be made in this matter, or to any court of competent jurisdiction to which the issue might ultimately be submitted. We decline at this time to engage in a controversy with the Coeur d'Alene Tribe over the confusing and complex jurisdictional question that has been raised by the Tribe. We are frankly not in a financial position to do so, nor do we feel that we have interests which are adverse to the Coeur d'Alene Tribe, the State of Idaho, or to any other person or entity. We are simply trying to operate our little city as efficiently and economically as possible and we do know that the water source which our application refers to is necessary for the citizens and residents of the City of Plummer and the Plummer area, some of whom happen to be Coeur d'Alene Indians.

Further, I would like to make the following observations as concerns the application for permit which was filed in this instance: we attended the hearing prepared to some degree to meet the requirements suggested in our letter from the Department of Water Administration dated August 8, 1972. These concerned the proposed use of the water, its sufficiency, the good faith of the applicant, and financial resources of the applicant. I believe that no issues were raised at this conference or at any time relative to these matters. The location of the well was on City property duly patented unto the Village of Plummer and held as city property from October 8, 1921 to the present time. We believe that our permit was in substantially proper form, and that presumptively, at least, the State of Idaho, acting through its Department of Water Administration, is the proper authority to grant the permit requested.

In other words, we think our application was in order and that the necessity exists in this municipality for this water source, and there appears to be no controversy with respect to these things. We do appreciate the position of the Tribe in contesting the jurisdiction of the State to grant this permit, but we as the City, do not feel that we should be required to meet and to contest the position of the Tribe herein, but that the State of Idaho should properly argue this aspect of the matter out with the

Mr. R. Keith Higginson
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Coeur d'Alene Tribe. If it is ultimately determined that the State of Idaho does not have jurisdiction to grant the permit, I assume the City would back off and makes it application to the Secretary of Interior or to the Tribe or to whatever entity would determine to have jurisdiction.

Until this matter is adjudicated by a court of competent jurisdiction and that decision becomes final, we do respectfully request that favorable action be taken on our application for permit by the State of Idaho. It seems to us that this would clear the air and lay a proper predicate for a court action by or on behalf of the Tribe if it (the Tribe) desires to pursue this particular matter to this extent.

We certainly appreciate the courteous and cooperative manner in which this matter has thus far been handled. We hope that the Director will understand our position in not being inclined at this time, for the reasons mentioned above, to actively dispute with the Coeur d'Alene Tribe the jurisdictional issues which it raises.

Respectfully,

McFADDEN & PARK

By Richard L. McFadden
Richard L. McFadden, City
Attorney of the City of Plummer,
Idaho

RLM:lb

cc: Mr. Robert D. Dellwo
Dellwo, Rudolf & Grant
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November 2, 1972

RECEIVED

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Department of Water Administration

R. Keith Higginson
Director
Department of Water Administration
State of Idaho
Statehouse Annex 2
Boise, Idaho 83707

Dear Mr. Higginson:

Re: City of Plummer Ground Water
Application No. 95-7188

Enclosed for filing is Memorandum of Coeur d'Alene Tribe of Idaho in protest against approval of the Application for Permit No. 95-7188 by the City of Plummer.

I will leave it to you to furnish a copy of the enclosed memorandum to the Attorney General's Office if you wish.

Together with copy of this letter I am mailing copy of the memorandum to counsel for the City of Plummer this date.

Yours respectfully,

DELLWO, RUDOLF & GRANT

Robert D. Dellwo

By: Robert D. Dellwo

Attorneys for Coeur d'Alene Tribe

RDD:fb

cc: Richard L. McFadden, St. Maries, Idaho

95 7188

BEFORE THE DEPARTMENT OF WATER ADMINISTRATION
OF THE
STATE OF IDAHO

In the Matter of Protest Against }
Approval of Application for }
Permit No. 95-7188 in the name of }
the CITY OF PLUMMER }

MEMORANDUM OF THE
COEUR D'ALENE TRIBE OF IDAHO

Captioned case constitutes a classic circumstance of an attempt of a non-Indian, non-tribal municipal community within an Indian reservation to acquire a water right through state law. It is the contention of the Coeur d'Alene Indian Tribe that all the waters on the Coeur d'Alene Reservation are subject to the "Winters Doctrine Rights of the Tribe" and that their allocation and use by Indians and non-Indians are within the exclusive jurisdiction of the Secretary of the Interior.

It is apparently the legal position of the State of Idaho, Department of Water Administration, that the waters involved constitute unappropriated water of the State of Idaho, surplus to the needs of the Indians and their tribe, and hence subject to appropriation under the applicable Idaho statutes.

It is the Tribe's position, even assuming that the involved waters are surplus to tribal and Indian needs, that it is within the exclusive jurisdiction of the Secretary of the Interior to administer them, in cooperation with the Tribe. No water right issued by the State of Idaho can have any legal effect as to such waters. At the very least if as an ultimate principle the State of Idaho would have jurisdiction to administer such surplus water, the fact of their surplusage would have to be established by the Secretary of the Interior. The State of Idaho can not just move onto an Indian reservation and assume such surplusage and proceed with issuing water licenses and permits on the waters involved.

THE WINTERS DOCTRINE OF INDIAN WATER RIGHTS

The Indian Tribe and Indians on the reservation have the indisputable Winters Doctrine Water Rights to which all the waters within, under or bounding the reservation are subject. It is not the intent of the writer, attorney for the Tribe, to set out a detailed brief of these rights. He assumes that the recipients of this memorandum are acquainted with the Winters Doctrine and the family of cases which affirm them. The writer has already circulated his law review article entitled "Indian Water Rights--the Winters Doctrine Updated." In the interest of brevity he suggests that that article be considered a part of this memorandum in so far as it defines the Winters Doctrine and cites and discusses the landmark cases interpreting it.

BACKGROUND AND HISTORY

The Coeur d'Alene Indian Tribe aboriginally occupied approximately 5,000,000 acres of land for centuries and from time immemorial. This aboriginal title and use was recognized in its Claims Case against the

United States Government which was settled in 1958 and in which the United States agreed that the Tribe had held aboriginal title to about 3,500,000 acres of land extending roughly from about the center of the present Spokane Valley, east to the present state line of Montana, circling to the south, returning in about the Moscow-Pullman area and north to the point of beginning. This aboriginal homeland enclosed most of the watershed of the various streams, rivers and ground water course which are situated on the present reservation or which flow into Coeur d'Alene Lake.

The Coeur d'Alene Reservation was initially proclaimed by Executive Order dated November 8, 1873. A copy of that order is attached. A study of this proclamation will reveal that the boundaries of the then-proclaimed reservation were the same as they now are except for the later cession of 100,000 acres from the north end.

The lands involved were a part of the aboriginal holdings of the Tribe and were in fact their principal areas of residence--in effect their primary homeland. This fact is important in evaluating their water rights because it is rights to water and land held by them immemorially, the title to which was never extinguished.

Governor Stevens came and went in the 1850's and the Indians of this area waited for a long time for a presidential delegation to come again and parley or negotiate the terms for an eventual treaty. In the meantime white encroachers and settlers were proliferating through the entire aboriginal area and the Indians felt they were being pressed into their eventual reservations but without protection even there. The above cited Executive Order did little to slow down this process of encroachment.

Finally, Jared Wright and company came to the Coeur d'Alene Indian Mission at DeSmet in 1886 and there was negotiated the Articles of Agreement of 1887 a copy of which is attached. In it the Tribe, for a stated small consideration, ceded all its holdings outside the reservation in return for the commitment of the United States that the lands of the reservation "shall be held forever as Indian land and as homes for the Coeur d'Alene Indians . . ."

The Articles of Agreement were not immediately approved by Congress but, as was the case with other treaties and agreements with other tribes, the U. S. Commission was back two years later telling the Coeur d'Alene Indians that they could get their reservation if they would cede another 100,000 acres at the north end. This was done in the supplemental agreement of 1889. The outer boundaries of the reservation have remained the same to the present time.

WINTERS DOCTRINE RIGHTS OF THE COEUR D'ALENE TRIBE

Any casual perusal of the Winters Doctrine cases (Winters v. U. S. 207 U.S. 564; Conrad Investment Co. v. U.S., 161 F. 829 (1908), U. S. v. Walker River Irrigation District, 104 F.2d 334 (1939), U.S. v. Ahtanum Irrigation District, 236 F.2d 321 (9th Cir. 1964); 338 F.2d 307 (9th Cir. 1965); Cert. denied 831 U.S. 924 (1965); State of Arizona

v. State of California, 373 U.S. 546 (1963); U. S. v. Powers, 305 U.S. 527 (1939), and many other lesser cases, will convince any lawyer or administrator versed in water law that the United States and the Coeur d'Alene Indian Tribe (in the sequence above) reserved for the Coeur d'Alene Indians paramount and superior water rights to all the waters of the reservation, including ground waters, necessary to fulfill their beneficial needs not only for their present uses (and needs), as set out in the Conrad case cited above, but for future requirements.

That the foregoing is true is too obvious for cavil. I am sure the Winters Rights of the Tribe will be freely acknowledged by the State of Idaho and the City of Plummer.

JURISDICTION OF TRIBE AND SECRETARY OF THE INTERIOR

Aboriginally and when the reservation was first formed, the Indian members of the Tribe lived communally sharing whatever tribal assets there were. Among these were their land and water rights. With the General Allotment Act of 1887 (25 USCA 331 et seq.) a portion of the reservation was broken up into Indian allotments of 160 acres each. Later the reservation was opened for homestead. Through the process of homesteads and the alienation of Indian allotments, the land base of the Tribe dropped from the initial 350,000 acres in 1889 to its present base of about 65,000 acres of inherited Indian allotments and 14,000 acres of tribal land. The boundaries of the reservation, enclosing as they did 350,000 acres, remain the same.

With the allotment of tribal lands, there was an individualization not only of a tract of land but of a pro rata "Winters Doctrine" water right for the beneficial use of water on that land. "Individualization" is an appropriate word because the legal title to these property rights was and still is held in trust for the individual Indians and the Tribe by the United States of America.

Just as the Allotment Act provided for the allotment of specific lands to individual Indians, it also provided for the fair and equitable allocation of the tribal water rights among the allottees. 25 USCA 381 provides:

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

Thus, the Secretary of the Interior was given the jurisdiction and the responsibility of apportioning the water upon the reservation. In exercising this authority as he has done in many cases, he allocates the water to Indian and non-Indian alike. There is attached a xerox copy of 25 USCA 381, together with annotations, some of which the writer has bracketed as being most relevant to instant case.

Attention is directed to the cited case of Anderson v. Speak-Morgan Livestock Co. under the heading "4. Allottees rights before allotments." Because the Secretary has not made any allocation of waters or prescribed any rules on the Coeur d'Alene Reservation this case would be applicable. The right to the use of the water by the Tribe or its members remains inchoate, undefined as to precise amount until the Secretary acts.

A review of the cited cases verifies that successors in title of formerly allotted lands do derive a water right from their original Indian grantor. The administration and allocation of the resulting combination of Indian and successor non-Indian water rights is the exclusive responsibility of the United States Government. As a matter of fact it would appear that most of the lands served by the various Indian irrigation districts such as the Flathead Indian Irrigation District now belong to non-Indians.

JURISDICTION OF SECRETARY IS EXCLUSIVE

The material included under this heading is an edited draft of a memorandum prepared on the same subject by the Regional Solicitor's office at Portland, Oregon. The purpose of the memorandum was to establish that a water right issued by the State of Washington to a non-Indian on the Lummi Reservation was of no legal effect and that the only one who could issue a water right would be the Secretary performing his responsibilities under 25 USCA 381. The writer has adapted the Regional Solicitor's memorandum to delete or change references from the State of Washington and the Lummi Reservation to the State of Idaho and the Coeur d'Alene Reservation. The law would be identical in both cases. The writer has bracketed that portion of the memorandum.

[There is ample authority for the Secretary of the Interior to assume exclusive jurisdiction over all waters within an Indian reservation and administer the use thereof. Under the doctrine as set forth in Winters v. United States, 207 U. S. 564, 52 L.Ed. 340, (1907), the Indians on the reservation are entitled to a prior right to all water flowing through or adjacent to the reservation. This doctrine has been extended to groundwater as well as surface water. Solicitor's Opinion, September 10, 1953, 61 I.D. 209, and Tweedy v. Texas Co., 286 F.Supp. (D. Mont. 1968). Such waters being reserved, the rights thereto can be obtained only in the manner specified by Congress; United States v. McIntire, 101 F. 2d 650, 653 (9th Cir. 1939); United States v. Alexander, 131 F. 2d 359, 360 (9th Cir. 1942); Merrill v. Bishop, 74 Wyo. 298, 287 P.2d 620, 625 (1955). Prior to the Allotment Act of February 8, 1887, 24 Stat. 390, all lands within an Indian reservation were communally owned with Indians residing thereon equally sharing the benefits.

[The allotment act which provided the authority for subdividing the reservation also authorized the Secretary of the Interior by section 7 of the act to proscribe such rules and regulations as he may deem necessary to secure a just and equal distribution of water among the Indians residing upon any such reservation. 25 USC, sec. 381. Therefore, the jurisdiction to regulate the use of reserved waters of a reservation was vested by Congress in the

Secretary. United States v. Powers, 305 U.S. 527, 83 L.Ed. 330 (1939).

[To permit the state to unilaterally determine the needs of the Indians and create rights in others by the issuance of permits for what it determines to be surplus to these needs is an infringement upon this authority. In the case of Segundo v. United States, 123 F.Supp. 554, 558 (S.D. Cal. 1954), appeal dismissed, 221 F.2d 296, the court held that it was the administrative duty of the Secretary of the Interior to determine the distribution of water on a reservation, but if the Secretary has failed or refused to perform this duty the federal district courts had jurisdiction to adjudicate the controversies. See also the case of United States v. Pierce, 235 F. 2d 885, 892 (9th Cir. 1956), where the court decided that the facts of that particular case did not justify the federal courts interfering with the Secretary's duty to administer these waters.

[The state will certainly raise the question as to the authority of the Secretary to regulate the use of waters on land which has passed out of trust. In the case of United States v. Hibner, 27 F. 2d 909 (D. Idaho 1928), the court held that the non-Indian purchaser was entitled to the same character of water right as that of the Indian seller (as to priority) but only as to the water being used as of the date of the sale. The determination of the extent of this reserved right which passes to a non-Indian is a federal question and not within the province of the administrative agencies of a state to decide by applying the state's particular administrative rules and procedures. The right that passes at the time of sale to a non-Indian is the only water right that is appurtenant to such nontrust land; and being a right which sprang from the Indians' reserved right it is subject to continued administration by the Secretary under 25 USC, section 381, the same as it was prior to the sale to the non-Indian.

[The "surplus water" doctrine is unsound and misleading as a legal principle, since such waters, if they do exist, could be used only at the sufferance of those holding the existing rights. For the state to give such usage the dignity of a permit creates a fictitious right misleading subsequent owners which could result in violation of Idaho statute that makes it a misdemeanor for a landowner to make an unauthorized use of groundwater. Idaho Code 42-237g. It can create hardship and controversy if the permit becomes the basis of major capital improvements such as may occur in Plummer. In other words, the rights as defined in Winters v. United States, supra, United States v. Hibner, supra, and other cases related thereto, are the only water rights recognized on an Indian reservation, leaving nothing for the state to administer. Also as a practical matter, a chaotic condition is created where the United States and the state compete in the administration of a water source as used on the checkerboard ownership of trust and nontrust lands within a reservation. The Plummer community is a vivid example of where the United States through the Indian Health

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Best of
Both
Systems
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PLS
US
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of
Interior

Service and the Bureau of Indian Affairs is competing for water for federally sponsored Indian communities with a federally unregulated non-Indian community which seeks a color of right through a state-issued permit. what competition?

[The State of Idaho looks to language such as that contained in United States v. Ahtanum Irrig. Dist., 236 F. 2d 321, 335 (9th Cir. 1956), cert. denied, 352 U.S. 988, 1 L.Ed. 2d 367, where the court stated that although the rights of the white settlers were subordinate to the rights of the Indians "they were not non-existent," and that there was no legal obstacle to the use of these waters by the white settlers until the Indians could make use thereof. However, this was a case between off-reservation owners and on-reservation Indians and not a case involving the administration of the checkerboard trust and nontrust ownerships of a reservation. The court in Tweedy v. Texas Co., supra, adopted this language in holding that "need and use" by an Indian was a requisite to the reserved water right. However, neither case held that use of the water on nontrust land prior to its need on trust land was subject to the exclusive administration of a state under state law. In fact the Tweedy case appears to hold quite the opposite. No case cited

[We therefore are of the opinion that since all waters of an Indian reservation are reserved they are subject to the exclusive jurisdiction of the United States to administer whether used on trust or nontrust land, and that the Secretary of the Interior has been authorized by Congress to promulgate rules and regulations to administer all reservation waters.]

The waters involved in instant case are ground waters, declared to be "Public Waters" by Idaho Code 42-226. That statute states among other things that "All ground waters in this state are declared to be the property of the state, whose duty it shall be to supervise their appropriation and allotment to those diverting the same for beneficial use . . ."

Such a statutory declaration could not possibly have any effect on Indian reservations where admittedly the tribes have superior and paramount Winters Rights to the ground waters. These waters cannot be regulated and administered both by the State and the Secretary of the Interior. Because the tribal rights are paramount, prior and superior, the State could not conceivably force the Secretary and the Tribe out of the administrative picture. The State cannot regulate the tribal rights but the Secretary can regulate and control both the tribal and nontribal rights. Hence it is the Secretary, not the State, that must administer the ground waters within the reservation.

WATER INVENTORY OF COEUR D'ALENE TRIBE

One might ask what the Secretary is doing about the administration of water rights on the Coeur d'Alene Reservation. At the present time through contract with the Tribe a water inventory is being conducted, beginning with the Hangman drainage area, which ultimately will inventory all the surface and ground waters of the reservation and the tribal need therefor. This inventory will include the waters in question. It is hoped the inventory will ascertain the amount of water available and the tribal needs and uses relative thereto. Until this inventory

is completed there will be no credible and reliable information from which any equitable departmental allocation or apportionment of the ground waters can be logically made.

CONCLUSION

The State of Idaho has no jurisdiction whatever to issue water permits on the Coeur d'Alene Reservation. Such jurisdiction is by statute in the Secretary of the Interior and aboriginally and residually in the Coeur d'Alene Indian Tribe. Any license or permit that the State might issue the City of Plummer would be nugatory and of no legal effect except perhaps to allocate the priority of "non rights" among non-Indians. Certainly such a permit will not grant to the City any right to the ground water that would not be junior and subordinate to tribal rights to the same water. The permit therefore should not be issued and the City should instead apply to the Secretary of the Interior and the Coeur d'Alene Indian Tribe if it wishes to pursue its application.

Respectfully submitted

DELLWO, RUDOLF & GRANT

Robert D. Dellwo

By: Robert D. Dellwo

Attorneys for the Coeur d'Alene Tribe

cc: Mailed to:

Richard L. McFadden
Attorney for City of Plummer
St. Maries, Idaho 83861

95 7188

same to the Department, together with the papers accompanying the same.

I have the honor to be, very respectfully, your obedient servant,
 JOS. S. WILSON, *Commissioner.*

Hon. W. T. OTTO,
Acting Secretary of the Interior.

DEPARTMENT OF THE INTERIOR,
 Washington, D. C., June 13, 1867.

SIR: I submit herewith the papers that accompanied the inclosed report of the Commissioner of Indian Affairs of the 23d ultimo. in relation to the propriety of selecting reservations in Idaho Territory upon which to locate the Cœur d'Alènes and other Indians in the northern part of Idaho, and the Boisé and Bruneau bands of Shoshones in the southern part of that Territory.

This Department concurs in the recommendation of the Commissioner of Indian Affairs that the lands indicated upon the annexed diagram, and defined in the accompanying report of the Commissioner of the General Land Office of the 6th instant, be set apart as reservations for the Indians referred to, and I have the honor to request, if it meet your approval, that you make the requisite order in the premises.

With great respect, your obedient servant,

W. T. OTTO, *Acting Secretary.*

The PRESIDENT.

WASHINGTON, D. C., June 14, 1867.

Let the lands be set apart as reservations for the Indians within named, as recommended by the Acting Secretary of the Interior.

ANDREW JOHNSON.

EXECUTIVE MANSION, November 8, 1873.

It is hereby ordered that the following tract of country in the Territory of Idaho be, and the same is hereby, withdrawn from sale and set apart as a reservation for the Cœur d'Alène Indians, in said Territory, viz:

"Beginning at a point on the top of the dividing ridge between Pine and Latah (or Hangman's) Creeks, directly south of a point on said last-named creek, 6 miles above the point where the trail from Lewiston to Spokane Bridge crosses said creek; thence in a north-easterly direction in a direct line to the Cœur d'Alène Mission, on the Cœur d'Alène River (but not to include the lands of said mission); thence in a westerly direction, in a direct line, to the point where the Spokane River heads in, or leaves the Cœur d'Alène Lakes; thence down along the center of the channel of said Spokane River to the dividing line between the Territories of Idaho and Washington, as established by the act of Congress organizing a Territorial government for the Territory of Idaho; thence south along said dividing line, to the top of the dividing ridge between Pine and Latah (or Hangman's) Creek; thence along the top of the said ridge to the place of beginning."

U. S. GRANT.

Duck Valley Reserve.

(See Nevada, post, page 866.)

SEC. 16. That whenever any of the lands acquired by either of the three foregoing agreements respecting lands in the Indian or Oklahoma Territory shall by operation of law or proclamation of the President of the United States be open to settlement they shall be disposed of to actual settlers only, under the provisions of the homestead and town site laws (except section twenty-three hundred and one of the Revised Statutes of the United States which shall not apply): *Provided, however,* That each settler, on said lands shall before making a final proof and receiving a certificate of entry, pay to the United States for the land so taken by him, in addition to the fees provided by law, and within five years from the date of the first original entry, the sum of one dollar and fifty cents per acre, one-half of which shall be paid within two years: But the rights of honorably discharged Union soldiers and sailors as defined and described in Sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes of the United States shall not be abridged except as to the sum to be paid as aforesaid, and all the lands in Oklahoma are hereby declared to be agricultural lands, and proof of their non-mineral character shall not be required as a condition precedent to final entry.

SEC. 17. That before any lands in Oklahoma are open to settlement it shall be the duty of the Secretary of the Interior to divide the same into counties which shall contain as near as possible not less than nine hundred square miles in each county. In establishing said county line the Secretary is hereby authorized to extend the lines of the counties already located so as to make the area of said counties equal, as near as may be, to the area of the counties provided for in this act. At the first election for county officers the people of each county may vote for a name for each county, and the name which receives the greatest number of votes shall be the name of such county: *Provided, further,* That as soon as the county lines are designated by the Secretary, he shall reserve not to exceed one-half section of land in each county to be located near the center of said county, for county seat purposes to be entered under sections twenty-three hundred and eighty-seven and twenty-three and eighty-eight of the Revised Statutes: *Provided,* That in addition to the jurisdiction granted to the probate courts and the judges thereof in Oklahoma Territory by Legislative enactments which enactments are hereby ratified, the Probate Judges of said Territory are hereby granted such jurisdiction in town site matters and under such regulations as are provided by the laws of the State of Kansas.

SEC. 18. That the school lands reserved in the Territory of Oklahoma by this and former acts of Congress may be leased for a period not exceeding three years for the benefit of the school fund of said Territory by the Governor thereof, under regulations to be prescribed by the Secretary of the Interior.

SEC. 19. The following agreement entered into on the part of the United States by John V. Wright, Jared W. Daniels and Henry W. Andrews, Commissioners with the Cœur d'Alene Indians in Idaho Territory signed on the part of said Indians by Chief Andrew Seltice, and others which bears date March twenty-sixth, eighteen hundred and eighty-seven, and now on file in the Interior Department, is hereby accepted, ratified, and confirmed and is in the following words, to-wit:

AGREEMENT WITH CŒUR D'ALENE.

This agreement made pursuant to an item in the act of Congress entitled "An act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the year ending June thirtieth,

Lands opened to homestead settlement only.

R. S., sec. 2301.

Proviso.

Additional payment.

Soldiers and sailors.
R. S., sec. 2304-2305, p. 422.

Division into counties.
Oklahoma lands.

Election.

County seats.
Provisos.

R. S., secs. 2287, 2338.

Lease of school lands.

Agreement with Cœur d'Alene Indians ratified.

Agreement.

Post, p. 446.

eighteen hundred and eighty-seven, and for other purposes," approved May fifteenth, eighteen hundred and eighty-six, by John V. Wright, Jared W. Daniels, and Henry W. Andrews, duly appointed commissioners on the part of the United States and the Cœur d'Alene tribe of Indians now residing on the Cœur d'Alene Reservation, in the Territory of Idaho, by their chiefs, headmen, and other male adults, whose names are hereunto subscribed, they being duly authorized to act in the premises, witnesseth:

ARTICLE 1.

ARTICLE 1.

Preamble.

Whereas said Cœur d'Alene Indians were formerly possessed of a large and valuable tract of land lying in the Territories of Washington, Idaho, and Montana, and whereas said Indians have never ceded the same to the United States, but the same, with the exception of the present Cœur d'Alene Reservation, is held by the United States and settlers and owners deriving title from the United States, and whereas said Indians have received no compensation for said land from the United States: Therefore,

ARTICLE 2.

ARTICLE 2.

Lands ceded.

For the consideration hereinafter stated the said Cœur d'Alene Indians hereby cede, grant, relinquish, and quitclaim to the United States all right, title, and claim which they now have, or ever had, to all lands in said Territories and elsewhere, except the portion of land within the boundaries of their present reservation in the Territory of Idaho, known as the Cœur d'Alene Reservation.

ARTICLE 3.

ARTICLE 3.

Consent to settlement of Spokane.

The said Cœur d'Alene Indians agree and consent that the Upper and Middle bands of Spokane Indians residing in and around Spokane Falls in the Territory of Washington, may be removed to the Cœur d'Alene Reservation and settled thereon in permanent homes on the terms and conditions contained in an agreement made and entered into by and between John V. Wright, Jared W. Daniels, and Henry W. Andrews, commissioners on the part of the United States and said Spokane Indians, concluded on the fifteenth day of March, eighteen hundred and eighty-seven, at Spokane Falls, in the Territory of Washington.

ARTICLE 4.

ARTICLE 4.

Consent to settlement of Calespel and other Indians.

And it is further agreed that the tribe or band of Indians known as Calespels, now residing in the Calespel Valley, Washington Territory, and any other bands of non-reservation Indians now belonging to the Colville Indian Agency, may be removed to the Cœur d'Alene Reservation by the United States, on such terms as may be mutually agreed on by the United States and any such tribes or bands.

ARTICLE 5.

ARTICLE 5.

Cœur d'Alene Reservation to remain Indian land.

In consideration of the foregoing cession and agreements, it is agreed that the Cœur d'Alene Reservation shall be held forever as Indian land and as homes for the Cœur d'Alene Indians, now residing on said reservation, and the Spokane or other Indians who may be removed to said reservation under this agreement, and their posterity; and no part of said reservation shall ever be sold, occupied, open to white settlement, or otherwise disposed of without the consent of the Indians residing on said reservation.

ARTICLE 6.

And it is further agreed that the United States will expend for the benefit of said Cœur d'Alene Indians the sum of one hundred and fifty thousand dollars, to be expended under the direction of the Secretary of the Interior, as follows: For the first year, thirty thousand dollars, and for each succeeding year for fifteen years, eight thousand dollars. As soon as possible after the ratification of this agreement by Congress, there shall be erected on said reservation a saw and grist mill, to be operated by steam, and an engineer and miller employed, the expenses of building said mill and paying the engineer and miller to be paid out of the funds herein provided. The remaining portion of said thirty thousand dollars, if any, and the other annual payments shall be expended in the purchase of such useful and necessary articles as shall best promote the progress, comfort, improvement, education, and civilization of said Cœur d'Alene Indians, parties hereto.

Payment to Cœur d'Alene.

Distribution.

Mill.

Articles.

ARTICLE 7.

It is further agreed that if it shall appear to the satisfaction of the Secretary of the Interior that in any year in which payments are to be made as herein provided said Cœur d'Alene Indians are supplied with such useful and necessary articles and do not need the same, and that they will judiciously use the money, then said payment shall be made to them in cash.

Cash payments instead of articles.

ARTICLE 8.

It is further agreed that any money which shall not be used in the purchase of such necessary articles or paid over, as provided in article seven, shall be placed in the Treasury of the United States to the credit of the said Cœur d'Alene Indians, parties hereto, and expended for their benefit, or paid over to them, as provided in the foregoing articles.

ARTICLE 8.

Balances.

ARTICLE 9.

It is further agreed that in the purchase for distribution of said articles for the benefit of said Indians the wishes of said Indians shall be consulted as to what useful articles they may need, or whether they need any at all, and their wishes shall govern as far as it is just and proper.

ARTICLE 9.

Selection of articles.

ARTICLE 10.

It is further agreed that in the employment of engineers, millers, mechanics, and laborers of every kind, preference shall be given in all cases to Indians, parties hereto, qualified to perform the work and labor, and it shall be the duty of all millers, engineers, and mechanics to teach all Indians placed under their charge their trades and vocations.

Employment of Indians.

ARTICLE 11.

It is further agreed that in addition to the amount heretofore provided for the benefit of said Cœur d'Alene Indians the United States, at its own expense, will furnish and employ for the benefit of said Indians on said reservation a competent physician, medicines, a blacksmith, and carpenter.

Physician, blacksmith, and carpenter.

ARTICLE 12.

In order to protect the morals and property of the Indians, parties hereto, no female of the Cœur d'Alene tribe shall be allowed to marry any white man unless, before said marriage is solemnized, said white

Marriages with white men.

man shall give such evidence of his character for morality and industry as shall satisfy the agent in charge, the minister in charge, and the chief of the tribe that he is a fit person to reside among the Indians; and it is further agreed that Stephen E. Liberty, Joseph Peavy, Patrick Nixon, and Julien Boutelier, white men who have married Indian women and with their families reside on the Cœur d'Alene Reservation, are permitted to remain thereon, they being subject, however, to all laws, rules, and regulations of the Commissioner of Indian Affairs applicable to Indian reservations.

ARTICLE 13.

Lands for De Smet Mission.

It is further agreed and understood that in consideration of the amount expended in buildings and other improvements on said Cœur d'Alene Reservation for religious and educational purposes by the De Smet Mission, and valuable services in the education and moral training of children on said reservation, and in consideration that the Indians, parties hereto, have donated for said purposes one section of land on which is situated the boys' school, one section on which is situated the girl's school, and one section of timbered land for use of the schools, that said De Smet Mission and its successors may continue to hold and use said three sections of land and the buildings and improvements thereon so long as the same shall be used by said De Smet Mission and its successors for religious and educational purposes.

ARTICLE 14.

Effect.

Signatures.

This agreement shall not be binding on either party until ratified by Congress.

In testimony whereof the said John V. Wright, Jared W. Daniels, and Henry W. Andrews, on the part of the United States, and the chiefs, headmen, and other adult Indians, on the part of the Indians, parties hereto, have hereunto set their hands and affixed their seals.

Done at De Smet Mission on the Cœur d'Alene Reservation, in the Territory of Idaho, on this the twenty-sixth day of March, in the year of our Lord one thousand eight hundred and eighty-nine.

Agreement with Cœur d'Alene ratified.

SEC. 20. That the following agreement entered into with the said Cœur d'Alene Indians by Benjamin Simpson, John H. Shupe, and Napoleon B. Humphrey, Commissioners on the part of the United States, signed by said Commissioners and by said Andrew Seltice, Chief, and others, on the part of said Indians, which agreement bears date September ninth, eighteen hundred and eighty-nine, and is now on file in the Interior Department, is hereby accepted, ratified, and confirmed, and is in the following words, to wit:

Agreement.

AGREEMENT.

25 Stat., p. 1002.

This agreement, made pursuant to an item of an Act of Congress, namely: Section 4 of the Indian appropriation act, approved March two, eighteen hundred and eighty-nine, (25 Stat., 1002), by Benjamin Simpson, John H. Shupe, and Napoleon B. Humphrey, duly appointed commissioners on the part of the United States, parties of the first part, and the Cœur d'Alene tribe of Indians, now residing on the Cœur d'Alene Reservation in the Territory of Idaho, by their chiefs, headmen, and other male adults whose names are hereunto subscribed, parties of the second part witnesseth:

ARTICLE 1.

Lands on reservation ceded.

For the consideration hereinafter named the said Cœur d'Alene Indians hereby cede, grant, relinquish, and quitclaim to the United States, all the right, title, and claim which they now have, or ever

had, to the following-described portion of their reservation, to wit: Description.
Beginning at the northeast corner of the said reservation, thence running along the north boundary line north sixty-seven degrees twenty-nine minutes west to the head of the Spokane River; thence down the Spokane River to the northwest boundary corner of the said reservation; thence south along the Washington Territory line twelve miles; thence due east to the west shore of the Cœur d'Alene Lake; thence southerly along the west shore of said lake to a point due west of the mouth of the Cœur d'Alene River where it empties into the said lake; thence in a due east line until it intersects with the eastern boundary line of the said reservation; thence northerly along the said east boundary line to the place of beginning.

ARTICLE 2.

And it is further agreed, in consideration of the above, that the United States will pay to the said Cœur d'Alene tribe of Indians the sum of five hundred thousand dollars, the same to be paid to the said Cœur d'Alene tribe of Indians upon the completion of all the provisions of this agreement. Money payment.

ARTICLE 3.

It is further agreed that the payment of money aforesaid shall be made to the said tribe of Indians pro rata or share and share alike for each and every member of the said tribe as recognized by said tribe now living on said reservation. To be paid pro rata.

ARTICLE 4.

It is further agreed and understood that this agreement shall not be binding on either party until the former agreement now existing between the United States by the duly-appointed commissioners and the said Cœur d'Alene tribe of Indians, bearing date March twenty-sixth, eighteen hundred and eighty-seven, shall be duly ratified by Congress; and in the event of the ratification of the aforesaid agreement of March twenty-sixth, eighteen hundred and eighty-seven, then this agreement to be and remain in full force and effect but not binding on either party until ratified by Congress. In witness whereof the said Benjamin Simpson, John H. Shupe, and Napoleon B. Humphrey, on the part of the United States, and the chiefs, headmen, and other adult male Indians, on the part of the Indians, parties hereto, have hereunto set their hands and affixed their seals. Dependent on ratification of former agreement.

Done at De Smet Mission, on the Cœur d'Alene Reservation, in the Territory of Idaho, this the 9th day of September, in the year of our Lord one thousand eight hundred and eighty-nine. Signatures.

Sec. 21. That for the purpose of carrying into effect the provisions of said two agreements with said Cœur d'Alene Indians there are hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, in the manner and for the purpose as herein-after specifically stated the following sums, to wit: For the first installment of one hundred and fifty thousand dollars, as provided for in article six of the first of said agreements, thirty thousand dollars, to be expended for the building and erection on said Cœur d'Alene Indian Reservation of a saw and grist mill, to be operated by steam, and for the payment of the wages of the engineer and miller to be employed in said mill, respectively, the remaining portion of said thirty thousand dollars, if any, to be expended in the purchase of such useful and necessary articles as shall best promote the progress, comfort, improvement, education, and civilization of said Cœur d'Alene Indians, all of said articles to be purchased, and said engineer and miller to be employed as near as may be in strict conformity with articles nine and ten of the first of said agreements. And for the Payment to Cœur d'Alene.
Division.
MILL.
Necessary articles.

Pro rata payment.

purpose of meeting the requirements of articles two and three of the second agreement aforesaid the sum of five hundred thousand dollars is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, to be paid by the United States to the said Cœur d'Alene tribe of Indians upon their compliance with all the provisions of the said second agreement hereinbefore recited, the same to be paid to the said tribe of Indians pro rata, or share and share alike, for each and every member of the said tribe as recognized by said tribe now living on said reservation.

Ceded lands open to homestead entry only.

SECTION 22. That all lands so sold and released to the United States, as recited or described in both of said agreements, and not heretofore granted or reserved from entry or location, shall, on the passage of this act, be restored to the public domain, and shall be disposed of by the United States to actual settlers only, under the provisions of the homestead law, except section twenty-three hundred and one of the Revised Statutes of the United States, which shall not apply, and under the law relative to town sites or to locators or purchasers under the mineral laws of the United States: *Provided*, That each settler or purchaser under and in accordance with the provisions of said homestead act, shall pay to the United States, for the land so taken by him, in addition to the fees provided by law, and within five years from the date of the first original entry, the sum of one dollar and fifty cents per acre, one-half of which shall be paid within two years; but the rights of honorably discharged Union soldiers and sailors, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes of the United States shall not be abridged, except as to the said sum to be paid as aforesaid: *Provided further*, That the Secretary of the Interior shall cause to be surveyed for and patented to Frederick Post, upon his making final proof of all thereof before the register and receiver of the proper United States land office, and to the satisfaction of the Commissioner of the General Land Office and Secretary of the Interior, and paying therefor two dollars and fifty cents per acre and the cost of making such survey of such portion of said reservation as is recited in the agreement in word and figures as follows, to wit:

R. S., sec. 2301

Proviso.
Additional payment.

Soldiers and sailors.

R. S., secs. 2304, 2305.

Patent to Frederick Post.

Payment.

Agreement.

Description.

Know all men by these presents that I, Andrew Seltice chief of the Cœur d'Alene Indians, did on the first day of June, A. D. eighteen hundred and seventy-one, with the consent of my people, when the country on both sides of the Spokane River belonged to me and my people, for a valuable consideration sell to Frederick Post the place now known as Post Falls, in Kootenai County, Idaho, to improve and use the same (water-power): said sale included all three of the river channels and islands, with enough land on the north and south shores for water-power and improvements; and have always protected the said Frederick Post, for eighteen years, in the rights there and then conveyed, and he has always done right with me and my people. We, the chiefs of the Cœur d'Alenes, have signed articles of agreement with the Government to sell the portion of the reservation joining Post Falls, in which we have excepted the above-prescribed rights, before conveyed to Frederick Post, and no Indian and no white man except Frederick Post have any rights on the above-described lands and river channels; the said Frederick Post has fulfilled all of his agreements with me and my people by improving the water-power and building mills at great expense, and I hereby authorize him to build a house and take full possession of the above-described lands on the reservation side, so that when the treaty is confirmed he may have full possession and protection of the Government in the same.

Given under my hand and seal this 16th day of Sept'r., A. D. 1889.

his
"ANDREW X SELTICE.
mark.

Note 51

ceased member of one of the Five Civilized Indian Tribes, under provisions of Congressional Act, will not be disturbed by Supreme Court unless against clear weight of evidence. In re Morrison's Estate, 1933, 74 P.2d 1161, 181 Okl. 380.

The action of a county court of Oklahoma in approving a conveyance of a full-blood Indian heir to lands inherited by such Indian from a member of the tribe, which conveyance was required by this

section to be approved by the county court, is not judicial in its nature, nor the exercise of any judicial function, and an appeal will not lie from an action of the county court in approving or disapproving a conveyance. Haddock v. Johnson, 1920, 194 P. 1077, 80 Okl. 230.

Certiorari will not lie to review the action of the county court in approving or disapproving a conveyance. In re Conchman's Estate, 1920, 187 P. 465, 77 Okl. 185.

§ 380. Lease of inherited allotments by superintendent

Restricted allotments of deceased Indians may be leased, except for oil and gas mining purposes, by the superintendents of the reservation within which the lands are located (1) when the heirs or devisees of such decedents have not been determined and (2) when the heirs or devisees of the decedents have been determined, and such lands are not in use by any of the heirs and the heirs have not been able during a three-months' period to agree upon a lease by reason of the number of the heirs, their absence from the reservation, or for other cause, under such rules and regulations as the Secretary of the Interior may prescribe. The proceeds derived from such leases shall be credited to the estates or other accounts of the individuals entitled thereto in accordance with their respective interests. July 8, 1940, c. 554, 54 Stat. 745.

Library references: Indians C-16(1); C.J.S. Indians § 30 et seq.

Historical Note

Transfer of Functions. All functions of all officers of the Department of the Interior and all functions of all agencies and employees of the Department were, with two exceptions, transferred to the Secretary of the Interior, with power vested in him to authorize their performance or the performance of any of his

functions by any of those officers, agencies, and employees, by 1950 Reorg. Plan No. 3, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3174, 64 Stat. 1262, set out in note under section 481 of Title 5, Executive Departments and Government Officers and Employees.

Cross References

Navajo and Hopi Indians, lease of restricted allotments of deceased Indians in connection with rehabilitation program, by persons prescribed in this section, see section 635 of this title.

CHAPTER 11.—IRRIGATION OF ALLOTTED LANDS

Sec.

- 381. Irrigation lands; regulation of use of water.
- 382. Irrigation projects under Reclamation Act.
- 383. Estimates of cost; limitations as to.
- 384. Employment of superintendents of irrigation.
- 385. Maintenance charges; reimbursement of construction costs; apportionment of cost.
- 386. Reimbursement of construction charges.

Sec.

- 386a. Adjustment of reimbursable debts; construction charges.
- 387. Basis of apportionment of costs of irrigation projects including maintenance; liens.
- 388. Claims for damages; settlement by agreement.
- 389. Investigation and adjustment of irrigation charges on lands within projects on Indian reservations.
- 389a. Same; declaring lands to be temporarily nonirrigable.
- 389b. Elimination to permanently nonirrigable lands.
- 389c. Same; cancellation of charges in absence of lien or contract for payment.
- 389d. Same; rules and regulations.
- 389e. Same; reports to Congress.
- 390. Concessions on reservoir sites and other lands in Indian irrigation projects; leases for agricultural, grazing, and other purposes.

§ 381. Irrigation lands; regulation of use of water

In cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior is authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations; and no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor. Feb. 8, 1887, c. 119, § 7, 24 Stat. 390.

Historical Note

Appropriations for Irrigation Works, etc.

1925—Mar. 3, 1925, c. 462, 43 Stat. 1150-1155.

1924—June 7, 1924, c. 238, § 1, 43 Stat. 475.

Act June 7, 1924 authorized the Secretary of the Interior through the Indian service, to construct a dam across the Canyon of the Gila River near San Carlos, Arizona, as a part of the San Carlos irrigation project at a limit of cost of \$5,500,000 for the purpose first of provid-

ing water for lands allotted to the Pima Indians and second for the irrigation of such other lands in public or private ownership as in the opinion of the Secretary could be served with water impounded by said dam without diminishing the supply necessary for said Indian lands. Such Act contained provisions relating to the method of defraying and reimbursing the United States and imposed certain conditions and limitations on the expenditure of funds for construction on account of privately owned lands.

Cross References

Cancellation of trust patents within power or reservoir sites, see section 352 of this title.

Reclamation Act irrigation projects to be carried on under such arrangements and agreements as Secretary of Interior deems for best interests of the Indians, see section 382 of this title.

Notes of Decisions

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Indians § 12.
 C.J.S. Indians § 29.

1. Purpose

This section indicates congressional recognition of equal rights among resident Indians as respects rights of holders of fee-simple titles to land in Crow Indian Reservation to use part of tribal waters essential for cultivation. *U. S. v. Powers*, Mont.1938, 59 S.Ct. 344, 305 U.S. 527, 83 L.Ed. 330.

Adoption by the Secretary of the Interior of plans for irrigation projects to serve certain lands in Crow Indian Reservation under authority of this section was insufficient to indicate a purpose to exclude all other land from participation in essential water and thereby destroy the equal interest guaranteed by the treaty between the Crow Indians and the United States. *Id.*

Where natural flow of water on Indian reservation was insufficient adequately to irrigate all land allotted in severalty, this section requiring just and equal distribution of water among the Indians residing upon a reservation where irrigation is necessary was applicable. *U. S. v. Alexander*, C.C.A.Mont.1912, 131 F.2d 350.

Purpose of this section, authorizing Secretary of Interior to prescribe rules to secure just distribution of waters among Indians residing upon any reservation where use of water for irrigation is necessary to render the lands available for agricultural purposes, is to secure distribution to individual Indians, and

duty devolves upon Secretary to provide rules for such just distribution. *U. S. v. Powers*, D.C.Mont.1936, 16 F.Supp. 155, modified on other grounds 94 F.2d 783, affirmed 59 S.Ct. 344, 305 U.S. 527, 83 L.Ed. 330.

The purpose of this section is to provide for distribution of rights to use such water among individual Indians. *Anderson v. Spear-Morgan Livestock Co.*, 1938, 79 F.2d 667, 107 Mont. 18.

2. Generally

The treaty between the Crow Indians and the United States creating the Crow Indian Reservation impliedly reserved water to Indians for irrigation purposes. *U. S. v. Powers*, C.C.A.Mont.1938, 94 F.2d 783, affirmed 59 S.Ct. 344, 305 U.S. 527, 83 L.Ed. 330.

3. Exclusive right of United States to use waters for benefit of Indians

Where waters of creek on Indian reservation were impliedly reserved to Indians by treaty, no title to waters could be acquired by any one except as specified by Congress. *U. S. v. McIntire*, C.C.A.Mont. 1939, 101 F.2d 650. See, also, *U. S. v. Alexander*, C.C.A.Mont.1942, 131 F.2d 350.

The Montana statutes regarding water rights were not applicable to asserted rights to water from creek on Flathead Indian Reservation, where Congress had not made such statutes controlling in the reservation. *U. S. v. McIntire*, C.C.A. Mont.1939, 101 F.2d 650.

The waters of creek on land reserved as a general Indian reservation by treaty with Indians ceding land to United States were impliedly reserved by treaty to Indians, and United States became a trustee holding legal title to land and waters for benefit of Indians. *Id.*

Where the United States has not specifically granted to a state any right in the waters of streams within an Indian reservation, created by treaty before the state was admitted, it has the exclusive right to use such waters for the benefit of the Indians of the reservation. *U. S. v. Parkins*, D.C.Wyo.1926, 13 F.2d 642.

By Treaty of May 7, 1868, 15 Stat. 649, creating Crow Indian Reservation, title to waters of reservation stream was vested in United States as trustee for Indians. *Lewis v. Hanson*, 1951, 227 P.2d 70, 124 Mont. 492.

4. Allottees' rights before allotments

The right to use water on Indian reservation for irrigation before distribution

thereof by Secretary of Interior among Indians residing thereon is inchoate in sense that precise amount or extent of right assigned to individual allottee is undetermined, but vested so far as existence of allottee's right to use water is concerned. *Anderson v. Spear-Morgan Livestock Co.*, 1938, 79 F.2d 667, 107 Mont. 18.

5. Distribution after allotments

An Indian in possession of land within Indian reservation who constructed ditch to carry water to his land, and who thereafter gave notice of appropriation of water, obtained no valid rights to water, which had been impliedly reserved by treaty reserving land as an Indian reservation. *U. S. v. McIntire*, C.C.A.Mont. 1939, 101 F.2d 650.

Where supply of water is insufficient to irrigate land reserved to Indians and thereafter allotted to Indians in severalty, provision of this section will be applicable. *Id.*

6. Liability to United States of land owners for irrigation charges

The acts of Congress authorizing irrigation projects on Indian reservations and granting power to the Interior Department to regulate the same and apportion the charges for operation and maintenance upon the lands irrigated creates a direct liability for such charges, which will sustain an action therefor by the United States and an owner of land in an Indian reservation and under a government irrigation project who received water therefrom for a number of years, when he refused to make further payments on back charges due for operation and maintenance, was liable for such charges for each year, though on his refusal the water was turned off from his land. *U. S. v. Parkins*, D.C.Wyo.1926, 13 F.2d 642.

7. Abandonment or forfeiture of water rights

Indians' reserved water rights were not abandoned or forfeited by failure to reside on land and use water. *U. S. ex rel. Ray v. Hibner*, D.C.Idaho, 1928, 27 F.2d 909.

8. Purchasers of Indian lands, water rights of

Under treaty between the Crow Indians and the United States creating Crow Indian Reservation, waters within reservation were reserved for equal benefit of tribal members even though treaty contained no definite provision concerning apportionment or use of waters, and, when allotments of land were duly made

for exclusive use and thereafter conveyed in fee, right to use some portion of tribal waters essential for cultivation passed to owners whose lands were selected for homes and individual farming and had no value for agriculture without water. *U. S. v. Powers*, Mont.1938, 59 S.Ct. 344, 305 U.S. 527, 83 L.Ed. 330.

This section did not authorize Secretary to deprive an allottee or patentee of lands in Crow Reservation, or the successor in title of any such allottee or patentee, of his just and equal right to the use of waters. *U. S. v. Powers*, C.C.A.Mont.1938, 94 F.2d 783, affirmed 59 S.Ct. 344, 305 U.S. 527, 83 L.Ed. 330.

Purchasers of Indians' lands acquire same water rights for acreage irrigated when title passed, and added with reasonable diligence thereafter, subject to general laws. *U. S. ex rel. Ray v. Hibner*, D.C.Idaho 1928, 27 F.2d 909.

An Indian allottee's right to use water on Indian reservation for irrigation is appurtenant to land on which used, but conveyance of such land by allottee acquiring fee-simple title after removal of restrictions of trust patent conveys right to use water as appurtenance, in absence of contrary intention. *Anderson v. Spear-Morgan Livestock Co.*, 1938, 79 F.2d 667, 107 Mont. 18.

9. Jurisdiction

A state court was without jurisdiction to adjudicate right to use water of stream on lands within Indian reservation, as United States could not be made party thereto for lack of jurisdiction. *Anderson v. Spear-Morgan Livestock Co.*, 1938, 79 F.2d 667, 107 Mont. 18.

10. Parties

Owners of unallotted lands were "indispensable parties" to suit to determine the priority of rights to water on Indian reservation as between allotted and unallotted lands. *U. S. v. Alexander*, C.C.A. Mont.1942, 131 F.2d 359.

The United States was not an "indispensable party" to suit to establish right to waters from Mud creek on Flathead Indian Reservation, where bill stated no cause of action. *U. S. v. McIntire*, C.C.A. Mont.1939, 101 F.2d 650.

The right, if any, of the United States and patentees, or successors in title of patentees, to whom the United States conveyed allotted lands in Crow Indian Reservation, or any of them, to divert or use waters of Lodge Grass creek, Little Big Horn river, and their tributaries, could not be determined in suit to which all owners of lands within the reservation were not parties, since all owners of

lands within reservation were "necessary parties." *U. S. v. Powers*, C.C.A.Mont. 1938, 91 F.2d 783, affirmed 59 S.Ct. 314, 305 U.S. 527, 83 L.Ed. 330.

Where by creation of Indian reservation, title to waters was vested in United States as trustee for Indians, and no allotment of waters of streams of reservation had been made to any reservation land, plaintiff, owner of reservation land, who sought to enjoin defendants, owners of land outside of reservation, from using water from reservation creek for irrigation, until sufficient water had been set aside for plaintiff, was required to submit proof of his right to use a specified quantity of water and as defendants contended that there was no right to use of any specified amount of water until necessities of every acre of Indian land had been determined, United States was a necessary party to maintenance of action. *Lewis v. Hanson*, 1931, 227 P.2d 70, 124 Mont. 492.

11. Pleadings

Where United States brought suit as trustee of Indians to quiet title to certain alleged water rights of Indians, court should have required all defendants to appear by answer and set forth their claims of right to use of waters. *U. S. v. Ahtanum Irr. Dist.*, C.A.Wash.1956, 236 F.2d 321, certiorari denied 77 S.Ct. 386, 352 U.S. 988, 1 L.Ed.2d 367.

12. Dismissal

Where United States brought suit as trustee of Indian tribe to quiet title in certain water rights, court committed error in dismissing suit after deciding that Indians had no water rights because of prior agreement by Secretary of Interior when claims and issues were presented that required determination and adjudication of the extent of the rights of the parties. *U. S. v. Ahtanum Irr. Dist.*, C.A.Wash.1956, 236 F.2d 321, certiorari denied 77 S.Ct. 386, 352 U.S. 988, 1 L.Ed.2d 367.

13. Evidence

In suit by United States as trustee for Indian tribe to quiet title to certain alleged water rights of tribe, where quantity of water required by Indian lands was both stipulated and proven no more was required, as the United States has the right to make distribution of its water under such rules as it may adopt, and it was not necessary to show what particular parcels or allotments were served by the Indian Service ditches, so long as adequate proof was made of their aggregate needs. *U. S. v. Ahtanum Irr. Dist.*, C.A.Wash.1956, 236 F.2d 321, certiorari denied 77 S.Ct. 386, 352 U.S. 988, 1 L.Ed.2d 367.

In suit by federal government to restrain white grantees of lands situated within Indian reservation from diverting waters of reservation, evidence established that one-half mile's inch of water per acre delivered upon land to be irrigated was sufficient for successful irrigation of crops. *U. S. v. Powers*, D.C.Mont.1936, 16 P.Supp. 155, modified on other grounds, 91 F.2d 783, affirmed 59 S.Ct. 314, 305 U.S. 527, 83 L.Ed. 330.

14. Defenses

The United States in bringing suit on behalf of Indian tribe to quiet title to Indians' alleged rights to water is not subject to the defenses of laches or estoppel. *U. S. v. Ahtanum Irr. Dist.*, C.A.Wash.1956, 236 F.2d 321, certiorari denied 77 S.Ct. 386, 352 U.S. 988, 1 L.Ed.2d 367.

Transferees of fee patented Indian allotments were not barred by statute of limitations or laches from claiming any participation in the benefit of government's irrigation system on Indian reservation, since any suit brought to establish rights would necessarily include United States as a necessary party, and since United States was not susceptible to suit, rights could not be said to be barred. *Id.*

15. Injunctions

In a case involving disputed rights of Indians and white settlers bordering on reservation as to their respective rights to water in stream forming boundary of reservation, wherein it was claimed that diversion by white settlers of water was wasteful, an injunction against such waste would be an appropriate part of the decree if the facts disclosed a need for it. *U. S. v. Ahtanum Irr. Dist.*, C.A.Wash. 1956, 236 F.2d 321, certiorari denied 77 S.Ct. 386, 352 U.S. 988, 1 L.Ed.2d 367.

The United States, in order to enjoin owners of allotted lands on Indian reservations from diverting through their privately constructed ditches water on the reservation impliedly reserved to Indians, must show that water was wrongfully diverted. *U. S. v. Alexander*, C.C.A.Mont.1942, 131 F.2d 359.

The diversion by owners of Indian allotments through their privately constructed ditches of water on Indian reservation impliedly reserved by treaty to Indians was not subject to injunction as "wrongful diversion" in the absence of showing that more than was required to irrigate the allotments was diverted or that diversion violated rules promulgated by Secretary of Interior under authority of this section to insure equal distribution of water. *Id.*

Secretarial decrees relating to private rights were not such rules as Secretary of Interior was authorized by this section to prescribe in order to secure the just and equal distribution of water among Indians residing upon a reservation, the violation of which rules might be made the basis for injunctive relief against diversion by owners of Indian allotments through their privately constructed ditches of water on the reservation. *Id.*

§ 382. Irrigation projects under Reclamation Act

In carrying out any irrigation project which may be undertaken under the provisions of the Reclamation Act, and which may make possible, and provide for in connection with the reclamation of other lands, the irrigation of all or any part of the irrigable lands heretofore included in allotments made to Indians under section 334 of this title, the Secretary of the Interior is authorized to make such arrangement and agreement in reference thereto as said Secretary deems for the best interest of the Indians: *Provided*, That no lien or charge for construction, operation, or maintenance shall thereby be created against any such lands. Mar. 3, 1909, c. 263, 35 Stat. 708.

Historical Note

References in Text. The Reclamation Act, referred to in the text, is classified to sections 372, 373, 381, 385, 391, 392, 411, 416, 419, 421, 431, 432, 434, 439, 461, 491, and 498 of Title 43, Public Lands.

Similar Provisions. Similar provisions were contained in Act Apr. 30, 1908, c. 153, 35 Stat. 85.

Drainage Assessments. Provisions for the payment of drainage assessments on allotted Indian lands in Oklahoma were made by Act July 19, 1912, c. 240, 37 Stat. 194, as amended by Act Aug. 31, 1916, c. 423, 39 Stat. 673.

Codification. A further proviso authorized the expenditure, to meet the cost of carrying out this section, of a limited amount from the appropriation in the act for irrigation and was omitted as temporary.

Notes of Decisions

Library references

Indians § 12.
C.J.S. Indians § 29.

1. Conditions precedent to construction of dam as part of irrigation project

Under Act June 7, 1924, c. 288, 43 Stat. 475, entitled "An Act For the continuance of construction work on the San Carlos Federal irrigation project in Arizona, and for other purposes" which provides by section 1 that the Secretary of the Interior through the Indian service may construct a dam across the Canyon of the Gila River near San Carlos, Arizona, as a part of the San Carlos irrigation project as contemplated in the report of the chief engineer of the Indian irrigation service for the purpose, first, of providing water for the irrigation of lands allotted to Pima Indians on the Gila River Reservation, Arizona, and second,

for the irrigation of such other lands as in the opinion of the said Secretary can be served with water impounded by said dam without diminishing the supply necessary for said Indian lands and which provides by section 4 that no part of the sum provided for by the Act shall be expended for construction on account of any lands in private ownership until an appropriate repayment contract in accordance with the terms of the Act and in form approved by the said Secretary shall have been properly executed, etc., the Secretary of the Interior may proceed with construction of the dam without awaiting fulfillment of requirements and conditions of section 4, the primary purpose of the Act being to provide water for the Indians on the Gila River Reservation which might be defeated if the commencement of construction must await the pleasure of private owners. 1929, 35 Op.Atty.Gen. 61.

vested in government official power to revoke or rewrite will which reflected national testamentary scheme simply be-

cause of subjective feeling of government official that the disposition of estate was not just and equitable. Id.

§ 375d. Disposition of estates of intestate members of Cherokee, Chickasaw, Choctaw, and Seminole Nations of Oklahoma dying without heirs

Upon the final determination of a court having jurisdiction or by decision of the Secretary of the Interior after a period of five years from the death of the decedent, it is determined that a member of the Cherokee, Chickasaw, Choctaw, or Seminole Nations or Tribes of Oklahoma or a person of the blood of said tribes has died intestate without heirs, owning trust or restricted Indian lands in Oklahoma or an interest therein or rents or profits therefrom, such lands, interests, or profits shall escheat to the Nation or tribe from which title to the trust or restricted Indian lands or interest therein was derived and shall be held thereafter in trust by the United States for said nation or tribe.

Pub.L. 91-240, May 7, 1970, 84 Stat. 203.

Legislative History. For legislative history and purpose of Pub.L. 91-240, see 2078.

§ 378. Partition of allotment among heirs; patents

Index to Notes

Parties 1

1. Parties

United States had interest in land allotted to deceased Indian, was an indispensable

party to action to partition allotment and had not consented to be sued so that dismissal of partition action was required. *Chemah v. Fodder*, D.C.Okla. 1966, 259 F.Supp. 910.

§ 380. Lease of inherited allotments by superintendent

Index to Notes

Injunctions 1

1. Injunctions

Action by minority number of owners of undivided heirship interest in original trust patent Indian allotted lands to permanently enjoin Indian agency superintendent from leasing or permitting certain lands in reservation until he complied with all statutes, rules and regulations and procured valid authority from all heirs or devisees would be dismissed as moot when act sought to be enjoined was

carried into effect by superintendent on or about time action was commenced or immediately following denial of motion for temporary injunction. *Holy Eagle v. Towle*, D.C.S.D.1963, 32 F.R.D. 591.

Action by minority number of owners of undivided heirship interest in original trust patent Indian allotted lands to permanently enjoin superintendent of Indian reservation from leasing or permitting certain land until he complied with certain conditions would be dismissed for failure to join as parties defendant persons to whom land was proposed to be leased and the other 111 owners of interest in land. Id.

CHAPTER 11.—IRRIGATION OF ALLOTTED LANDS

§ 381. Irrigation lands; regulation of use of water

2. Purchasers of Indian lands, water rights of

Secretary of Interior and Bureau of Indian Affairs have statutory authority to expend funds for benefit of lands located within Indian irrigation projects without regard to whether lands are owned by Indians or non-Indians. *Scholder v. U. S.*, D.C.Cal.1969, 298 F.Supp. 1282, affirmed in part, reversed in part on other grounds 428 F.2d 1123, certiorari denied 91 S.Ct. 240, 400 U.S. 942, 27 L.Ed.2d 246.

Proposed expenditure of Indian irrigation project funds for benefit of non-Indian owner of land situated within Indian irrigation system did not constitute an unconstitutional taking in violation of U.S.C.A.Const. Amend 5, a breach of fiduciary duty owed to Indians by government or an abuse of discretion, granted to Secretary of Interior and Bureau of Indian Affairs, regarding disbursement of moneys appropriated for Indian irrigation projects. Id.

§ 388a. Adjustment of reimbursable debts; construction charges

Supplementary Index to Notes

Administrative remedies, exhaustion 3

3. Administrative remedies, exhaustion Where judgment was awarded to Indian tribe for which Congress had previ-

ously authorized appropriations, United States' claim for recovery of reimbursable expenditures as debt owing to United States was matter which Congress had reserved at least initially for exclusive administrative determination and, in absence of such determination, court would not consider claim. *Navajo Tribe of Indians v. U. S.*, 1966, 368 F.2d 279, 177 Ct.Cl. 365.

§ 389. Investigation and adjustment of irrigation charges on lands within projects on Indian reservations

Fort Peck Indian Irrigation Project. Pub.L. 90-143, Nov. 16, 1967, 81 Stat. 463, provided:

"That, in accordance with provisions of the Act of June 22, 1936 (49 Stat. 1803; 25 U.S.C. 389-389c) [sections 389-389c of this title], the order of the Secretary of the Interior canceling delinquent irrigation operation and maintenance charges in the amount of \$461.40 and any accrued interest thereon for certain lands adjacent to but outside the boundary of the Fort Peck Indian Irrigation project, Montana, and reimbursable irrigation construction costs in the amount of \$206,190.21 against lands within the Fort Peck Indian Irrigation project, Montana, as listed and described in schedules referred to in such order, is hereby approved.

"Sec. 2. Unassessed construction costs of \$118,206.64 allocable against both the Indian- and non-Indian-owned lands in the Frazier-Wolf Point unit of the Fort Peck Indian Irrigation project, Montana, are hereby canceled."

Klamath Indian Irrigation Project. In accordance with sections 389-389c of this title, the order of the Secretary of Interior canceling \$401,440.55 of reimbursable irrigation costs and any accrued interest thereon chargeable to lands in the Klamath Indian Irrigation project, was approved by Pub.L. 88-456, Aug. 20, 1964, 78 Stat. 554.

Utah Indian Irrigation Project. Pub.L. 91-403, §§ 1-5, Sept. 18, 1970, 84 Stat. 843-844, authorized the Secretary of Interior to reimburse the Ute Tribe of the Utah and Ouray Reservation for tribal funds that were used to construct, operate, and maintain the Utah Indian irrigation project, Utah.

Wapato Indian Irrigation Project. In accordance with sections 389-389c of this title, order of Secretary of the Interior dated September 12, 1962, canceling \$4,494.53 of delinquent irrigation charges, providing for the deferred payment of \$10,356.03, and providing for the removal of 78.12 acres of assessable land from the Wapato Indian Irrigation project, was approved by Pub.L. 88-159, Oct. 28, 1963, 77 Stat. 278.

Wind River Indian Irrigation Project. Pub.L. 88-116, Sept. 6, 1963, 77 Stat. 151, provided: "That, in accordance with the provision of the Act of June 22, 1936 (49 Stat. 1803, 25 U.S.C. 389-389c) [sections 389-389c of this title], the order of the Secretary of the Interior canceling delinquent operation and maintenance irrigation charges in the amount of \$1,134.99, which includes both principal and accrued interest thereon, against lands on the Wind River Indian Irrigation project, Wyoming, described as the northwest quarter northwest quarter, southwest quarter northwest quarter of section 9, township 1 south, range 4 east, Wind River meridian, and a contract for the deferred payment of delinquent charges in the amount of \$2,331.59, are hereby approved."

Index to Notes

Generally 1/2
Power of Secretary 1

1/2. Generally

This section authorizing Secretary of Interior to investigate irrigation charges levied on owners of non-Indian lands under Indian irrigation projects and to recommend deferral of those charges in appropriate cases does not include only charges that arose when land which has been purchased by a non-Indian, was Indian-owned but includes charges arising subsequent to purchase. *Scholder v. U. S.*, C.A.Cal.1970, 428 F.2d 1123, certiorari denied 91 S.Ct. 240, 400 U.S. 942, 27 L.Ed.2d 246.

1. Power of Secretary

Secretary of Interior and Bureau of Indian Affairs have statutory authority to expend funds for benefit of lands located within Indian irrigation projects without regard to whether lands are owned by Indians or non-Indians. *Scholder v. U. S.*, D.C.Cal.1969, 298 F.Supp. 1282, affirmed in part, reversed in part on other grounds 428 F.2d 1123, certiorari denied 91 S.Ct. 240, 400 U.S. 942, 27 L.Ed.2d 246.

CHAPTER 12.—LEASE, SALE, OR SURRENDER OF ALLOTTED OR UNALLOTTED LANDS

Sec. 410.

Leases of trust or restricted lands on San Xavier and Salt River Pima-Maricopa Indian Reservations for public, religious, educational, recreational, residential, business, farming or grazing purposes [New].

410a. Same; covenant provision; Federal or State court jurisdiction of violations [New].

410b. Same; notification of lease provisions; outline of major provisions; consideration of comments; non-Indian lessees [New].

Sec. 410c.

Same; lease of lands of deceased Indians for benefit of heirs or devisees [New].

410d. Same; advance payment of rent or other consideration [New].

410e. Same; approval of leases [New].

410f. Same; dedication of land for public purposes [New].

410g. Same; contract for water, sewerage, law enforcement, or other public services [New].

410h. Same; zoning, building, and sanitary regulations [New].

410i. Same; restrictions [New].

410j. Same; Mission San Xavier del Bac [New].

§ 391. Continuance of restrictions on alienation in patent

3. Law governing

Leasing of restricted Indian lands and right to enter and remain thereon is matter regulated by federal law. *Bledsoe v. U. S.*, C.A.Okla.1965, 349 F.2d 605.

57 U.S.C.A.—4
1971 P.P.

October 11, 1972

Mr. Richard L. McFadden, Attorney
720 College
St. Maries, Idaho 83861

Re: City of Plummer Ground Water Application No. 95-7188

Dear Mr. McFadden:

This letter is to confirm my understanding of the agreement reached at the hearing held in Coeur d'Alene, Idaho on October 6, 1972, concerning the application of the City of Plummer for a water permit. Mr. Dellwo requested 30 days to prepare and submit a memorandum concerning the claimed Indian water right which will be submitted by November 6. You requested 10 days thereafter to determine whether you wished to file an answer thereto. Following receipt of the memorandum and any answer, we will issue a decision concerning this matter.

Very truly yours,

R. KEITH HIGGINSON
Director

RKH:mjl

95 7188

October 11, 1972

Mr. Robert D. Dellwo
Law Offices
Dellwo, Rudolf & Grant
1016 Old National Bank Building
Spokane, Washington 99201

Re: City of Plummer Ground Water Application No. 95-7188

Dear Mr. Dellwo:

This letter is to confirm my understanding of the agreement reached at the hearing held in Coeur d'Alene, Idaho on October 6, 1972, concerning the application of the City of Plummer for a water permit. You requested 30 days to prepare and submit a memorandum concerning the claimed Indian water right which will be submitted by November 6. Mr. McFadden requested 10 days thereafter to determine whether he wished to file an answer thereto. Following receipt of the memorandum and any answer, we will issue a decision concerning this matter.

Very truly yours,

R. KEITH HIGGINSON
Director

RKH:mjl

95 7188

95-7188 - City of Plummer

Office, Department of Water Administration,
Coeur d'Alene, Idaho

October 6, 1972 - 9:00 am

ROSTER OF ATTENDANCE

Name	Address	Representing
Bernard F. Sedwitz	Druid, Idaho	Coeur d'Alene Tribe
Richard M. Tisdell	St. Maries, Idaho	Plummer, Idaho
Donald W. Evans	Plummer	
Paul H. Helling	1016 ON 13 S, Plummer	CLA Tribe

95 7188

CITY OF PUMMUR - 95-7188

ROBERT DENNO)
BERNARD LOSATTE) COEUR D'ALENE INDIANS

Don McFarland)
BENAS) CITY OF PUMMUR

MCGONSON

HIGER

EISENBARTH

McFarland

WELL WITHIN CORPORATE LIMITS OF CITY
NEED FOR WATER IS STIPULATED TO
OWNERSHIP OF SURFACE NOT IN ISSUE

Denno

PRESERVATION ESTABLISHED BY ACTS OF
LEGISLATURE OF ~~1871~~ 1871.

ALL OF WATERS WERE "RESERVED" BY
TREATY.

T RIVER STILL HAS ALL OF WATER FOR
PRESENT AND FUTURE NEEDS.

ENGINEERING RESEARCH CENTER
WASHINGTON STATE UNIVERSITY

INDIANS HAVE "SUPERIOR" RIGHT TO WATER WHICH
CITY SEEMS TO APPROPRIATE.

JURISDICTION OF STATE

25 USC 381

CLAIM COA TRIBE OR SEC OF TART WOULD
HAVE AUTHORITY

95 7188

SENDER: Be sure to follow instructions on other side

PLEASE FURNISH SERVICE(S) INDICATED BY CHECKED BLOCK(S)
(Additional charges required for these services)

☐ Show to whom, date and address
where delivered

☐ Deliver **ONLY**
to addressee

RECEIPT

Received the numbered article described below

REGISTERED NO.

SIGNATURE OR NAME OF ADDRESSEE *(Must always be filled in)*

CERTIFIED NO.

23986

1

SIGNATURE OF ADDRESSEE'S AGENT, IF ANY

INSURED NO.

2

DATE DELIVERED

SEP 25 1972

3

SHOW WHERE DELIVERED *(Only if requested, and include ZIP Code)*

95-7182

**U.S. POSTAL SERVICE
OFFICIAL BUSINESS**

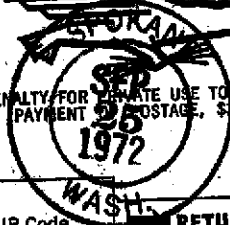
Postmark of Delivering Office

SENDER INSTRUCTIONS

Print in the space below your name, address, including ZIP Code.

- If special services are desired, check block(s) on other side.
- Moisten gummed ends and attach to back of article.

PENALTY FOR PRIVATE USE TO AVOID
PAYMENT POSTAGE, \$1.00



**RETURN
TO**

SENDER: Be sure to follow instructions on other side

PLEASE FURNISH SERVICE(S) INDICATED BY CHECKED BLOCK(S)
(Additional charges required for these services)

☐ Show to whom, date and address
where delivered

☐ Deliver ONLY
to addressee

RECEIPT

Received the numbered article described below

REGISTERED NO.

SIGNATURE OR NAME OF ADDRESSEE (Must always be filled in)

CERTIFIED NO.

23985

1

City of Plumber

SIGNATURE OF ADDRESSEE'S AGENT, IF ANY

INSURED NO.

2

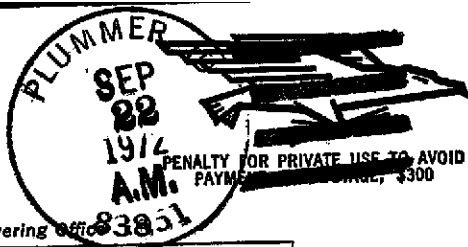
Don Evans

DATE DELIVERED

SHOW WHERE DELIVERED (Only if requested, and include ZIP Code)

3

U.S. POSTAL SERVICE
OFFICIAL BUSINESS



Postmark of Delivering Office 83851

SENDER INSTRUCTIONS

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- ↓
- If special services are desired, check block(s) on other side.
 - Moisten gummed ends and attach to back of article.



NAME AND
ADDRESS
OF SENDER

Dept of Water Admin

Indicate type of mail:

☐ REGISTERED ☐ REGISTERED
C.O.D.
☒ CERTIFIEDAffix stamp here if issued as certificate of mailing or for additional
copies of this bill.
POSTMARK AND DATE OF RECEIPT
HEARING

NUMBER OF ARTICLE	NAME OF ADDRESSEE, STREET, AND POST OFFICE ADDRESS	POSTAGE	FEE	R. R. FEE	REG. DEL. FEE	ACTUAL VALUE	SURCHARGE	REMARKS*
1 23985	City of Plummer, Attn: Gerald W.							95-7128
2	Spokane, Mayor, Box "B", Plummer							
3								
4 23986	Robert W. Nellums, Nellums, Rudolf, P.							
5	Spokane 1016 Old National Bank Bldg							
6	Spokane, Washington							
7								
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9								
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12								
13	Sent by:							
14	Darlene Reich 9-21-72							
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TOTAL NO. OF PIECES
LISTED BY SENDER

2

TOTAL NO. OF
PIECES REC'D AT P. O.

POSTMASTER, PER (Name of receiving employee)

*Show under "Remarks" class postage paid if other than first or
if international

BEFORE THE DEPARTMENT OF WATER ADMINISTRATION
OF THE
STATE OF IDAHO

In the Matter of Protest Against Approval of)
Application for Permit No. 95-7188 in the)
name of the CITY OF PLUMMER)
_____)

NOTICE OF CONFERENCE
AND/OR HEARING

On May 23, 1972, the City of Plummer, Idaho, filed with the Department of Water Administration an application to appropriate the public waters of the State of Idaho. On July 21, 1972, the Department received a protest against said application from Robert D. Dellwo, of the firm of Dellwo, Rudolf & Grant, representing the Coeur d'Alene Tribe.

The Department has set the matter of protest for conference and/or hearing for Friday, October 6, 1972, at 9:00 a.m., at the Northern District Office of the Department of Water Administration at 401 Front Avenue, Room 209, Coeur d'Alene, Idaho. Any hearing will be held in accordance with the Rules and Regulations of the Idaho Code and adopted Rules of Practice and Procedure of the Department of Water Administration. Opportunity shall be afforded all parties to respond and present evidence and argument on all issues involved.

Any party may request in writing five (5) days before any hearing that the oral proceedings thereof be taken in the form of stenographic notes. Any party may have such stenographic notes of the oral proceedings, or part thereof, transcribed at his own expense. A taped record of the proceedings will be maintained for the appeal period.

Failure to appear at the time and place set for hearing by the applicant or protestant may allow the Department without prejudice to dismiss the protest or the application. Any and all cost incurred by reason of such non-appearance may be assessed against such non-appearing parties.

Dated this 21st day of September, 1972.



BOBBY D. FLEENOR
Assistant Director

95 7188

August 8, 1972

Re: Application for Permit No. 95-7188

City of Plummer
Box B
Plummer, Idaho 83851

Gentlemen:

We have enclosed a copy of the protest filed against the issuance of a permit pursuant to your Application No. 95-7188. You should be aware that the following are the principle items we can consider at a conference and/or hearing in either approving or denying an application for permit (Section 42-203, Idaho Code):

1. Will the proposed use reduce the quantity of water under existing water rights?
2. Is the proposed water supply insufficient for the purposes intended?
3. Is the application made in good faith or for delay or speculative purposes?
4. Has the applicant sufficient financial resources with which to complete the project?

A permit issued by this office is subject to all prior water rights and does not in any way convey or establish a right-of-way over private or governmental lands. Any right-of-way or easement must be obtained by the applicant through action outside of the water right proceedings.

You will be notified at a later date as to the time and place set for a conference and/or hearing to discuss the matters of protest. Legal counsel is not mandatory at any proceeding before the Department, although you may desire to employ an attorney in your behalf.

If we may be of any assistance, please contact us.

Sincerely,

BOBBY D. FLEENOR
Assistant Director

BDF:DR
Enc: Copy of protest

95 7188

July 24, 1972

Mr. Robert D. Dellwo
Dellwo, Rudolf & Grant
Law Offices
1016 Old National Bank Building
Spokane, Washington 99201

Re: City of Plummer Groundwater Application

Dear Mr. Dellwo:

I appreciate receiving your recent letter indicating the Coeur d'Alene Tribe protests the granting of the permit to the City of Plummer. That protest will be made a part of the record and you will be advised of a future conference or hearing concerning this matter. I also appreciate receiving a copy of the permit used by the Spokane Indian Tribe. The Indians are certainly free to do whatever they wish concerning this matter; however, I feel that water is either unappropriated water of the State of Idaho or is outside of our jurisdiction. I am certain that we differ concerning interpretation of the prior decision of the court relative to the Indian water right. I certainly cannot agree that it is proper for the Indians to claim rights to water that have not previously been diverted and put to use on reservation lands. In other words, I feel that the Indian right is limited by the extent to which the Indians have divested themselves of lands for which they may, at one time, have been able to claim a water right.

Very truly yours,

R. KEITH HIGGINSON
Director

RKH:mjl

95 7188

LAW OFFICES
DELLWO, RUDOLF & GRANT

ROBERT D. DELLWO
KERMIT M. RUDOLF
WILLIAM J. GRANT
RICHARD J. SCHROEDER
JOSEPH A. ESPOSITO

RECEIVED
JUL 21 1972

Department of Water Administration

OLD NATIONAL BANK BUILDING
SPOKANE, WASHINGTON 99201
(509) 624-4291

July 20, 1972

R. Keith Higginson, Director
Idaho Department of Water Administration
Statehouse
Boise, Idaho 83707

Dear Mr. Higginson:

Re: City of Plummer Ground Water
Application

As tribal attorney for the Coeur d'Alene Tribe, I want to express its protest against the granting of a permit to the City of Plummer per notice published in the St. Maries Gazette Record on June 22 and June 29.

The protest of the tribe is for the same reasons as its previous protests in the Lawson and other cases. It is based on the Winters Doctrine rights of the tribe as outlined in the other matters. The tribe is moving ahead in its farm enterprise and its need to exercise its Winters Rights will steadily increase.

In similar situations on the Spokane Reservation we have followed a procedure of the non-Indian owner or interest applying to the tribe for a permit. A copy of the application form used by the Spokane Tribe is enclosed. It would seem to me that in this area of dual jurisdiction and, in fact, possible exclusive jurisdiction in the Department of the Interior, it would be well to set up a similar system on the Coeur d'Alene Reservation. As applied to the Plummer, Idaho matter, the City could apply to the tribe and seek a tribal permit as well as a state permit.

You might let me have your views about this approach.

Yours very truly,

DELLWO, RUDOLF & GRANT

Robb Dellwo

BY: Robert D. Dellwo

RDD:fb

Encl.

SPOKANE INDIAN TRIBE
APPLICATION AND PERMIT TO USE TRIBAL WATERS

Name _____

Address _____

Applies for a permit to use beneficially waters belonging to the Spokane Indian Tribe as follows:

Date of Permit _____

Source & Location of water to be used: _____

Description of land on which water will be used: _____

Quantity of water to be used shall not exceed _____ gallons per minute or _____ feet per second (strike one), or its equivalent, and _____ acre feet per year, or its equivalent.

USE OR USES TO WHICH WATER IS TO BE APPLIED: _____

Effective date of permit _____ Termination date _____

[NOTE: If no termination date is listed, it is with one year's notice by Tribal Council.]

TERMS, CONDITIONS AND RESTRICTIONS OF WATER USE: _____

[NOTE: Please use back or attach sheet if additional space is needed.]

Date _____

Signature of Applicant

SPOKANE TRIBAL RESOLUTION NO. _____

The application for the foregoing permit having been reviewed by the Spokane Tribal Business Council at its meeting held on _____, 19____, by a vote of _____ to _____, IT IS RESOLVED that the said permit is approved.

Chairman, Spokane Tribal Business Council

Accepted and agreed to:

Signature of Applicant

[Note: Need be signed here by applicant only if permit is at variance with application.]

95 7188

June 12, 1972

Re: Application for Permit No. 95-7188 - City of Plummer

Benewah County Office
Panhandle District Health Dept.
P.O. Box 108
Silverton, Idaho 83867

ATTN: H. Edwin Tulloch, Environmentalist

Gentlemen:

We are enclosing a copy of an application that may be of interest to your agency. Please review the application and if you have any comments, please submit them to our Department as soon as possible. We normally complete the processing of an application within a 6-week period and we are required to take final action shortly thereafter.

If we may be of further assistance, please contact us.

Very truly yours,

Bred Eisenbarth
Water Resource Examiner
Northern District

FE:CR

Enc: copy

95 7188

June 9, 1972

Re: Application No. 95-7188 - City of Plummer

St. Maries Gazette Record
P.O. Box 367
St. Maries, Idaho 83861

Gentlemen:

Enclosed you will find a legal notice which we wish to have published once a week for two consecutive weekly issues of your newspaper. We have inserted the publication dates allowing ample time for you to submit us a galley proof for review before publication.

After sending us a galley proof, proceed with the publication on the dates we have inserted, assuming the notice is correct. If we have any corrections, we will notify you before the first publication. If you cannot publish the notice on the proposed dates, please contact us immediately.

An affidavit of publication must be submitted to the Department along with the publication bill. In order to receive payment, the following certification must appear on the bill:

"I hereby certify that the foregoing account is just and correct, that the amount claimed is legally due, after allowing all just credits, and that no part of the same has been paid.

(signature of claimant)

Very truly yours,

Fred Eisenbarth
Water Resource Examiner
Northern District

FE:CR

Enc: Legal Notice

*Bill submitted
9-13-72
JH*

95 7188

NOTICE OF APPLICATION FOR WATER PERMIT

Notice is hereby given that City of Plummer, Box B,

Plummer, Idaho

has on May 23, 1972 submitted Application No. 95-7188

for a permit to appropriate 1.0 cubic feet per second ~~acre feet per annum~~

of water from a ground water source

by means of well and pump

within the NW¹SE⁴, Sec. 18, T. 46N, R. 4W, B.M. (Block 3 of Public Reserve in
Block 138), Benewah County

to be used from Jan. 1 to Dec. 31

for municipal purposes for 200 families

within the Sec. 18, T. ^{46 N}56N, R. 4W, B.M.

If issued, this permit will be subject to all prior water rights. Protests against the granting of the permit must be filed with the Idaho Department of Water Administration, Statehouse, Boise, Idaho, 83707, on or before July 8, 1972.

R. KEITH HIGGINSON

Director

Published in the St. Maries Gazette Record, St. Maries, Idaho

on June 21 and June 28, 1972

95 7188

**NOTICE OF APPLICATION
FOR WATER PERMIT**

Notice is hereby given that City of Plummer, Box B, Plummer, Idaho has on May 23, 1972 submitted Application No. 95-7188 for a permit to appropriate 1.0 cubic feet per second of water from a ground water source by means of well and pump within the NW $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 18, T. 46N, R. 4W, B.M. (Block 3 of Public Reserve in Block 138), Benewah County to be used from Jan. 1 to Dec. 31 for municipal purposes for 200 families within the Sec. 18, T. 56N, R. 4W, B.M.

If issued, this permit will be subject to all prior water rights. Protests against the granting of the permit must be filed with the Idaho Department of Water Administration, Statehouse, Boise, Idaho, 83707, on or before July 8, 1972.

R. KEITH HIGGINSON
Director

Published in the St. Maries
Gazette Record, St. Maries,
Idaho on June 22 and June 29,
1972.

No. 2383 1-245-3453

95 7188



R. Keith Higginson
Director

Water Rights Administration
Water Resource Investigations
Dam and Reservoir Safety
Water Well Drilling
Flood Plain Management
Irrigation and
Flood Control Districts

STATE OF IDAHO

DEPARTMENT OF WATER ADMINISTRATION

Statehouse - Annex 2
Boise, Idaho 83707
(208) 384-2215

May 26, 1972

City of Plummer
Box B
Plummer, Idaho 83851

Gentlemen:
Attached herewith is your receipt No. _____ in the amount of \$ _____
for _____

which was received in this office.

9270

25.00

Very truly yours, your application for permit

M. RUSSELL BOSCH
Administrative Assistant

MRB:ejw

Enclosure: Receipt

95 7188

May 24, ,972

C
City of Plummer
Box B
Plummer, Idaho 83851

O
Attn: Donald W. Evans, Mayor

Dear Mayor Evans:

P
Enclosed please find your check from the City of Plummer, number 92-170, in the amount of \$35.00.

The required fee for 1.0 c.f.s. is \$25.00. After talking with your City Clerk May 23, I found we cannot refund money from our Department. We will hold the application (#95-7188) until we receive the proper fees.

If you have any further questions please feel free to contact us.

Y
Very truly yours,

BRVIN E. BALLOU
Water Resource Examiner
Northern District

EEB:ejw

Enclosure

95 7188

FILE 95 7188NAME OF PARTY City Clerk City of PlummerEMPLOYEE Erwin E. Ballou

RE: I called city clerk's office May 23,
1972 spoke with the city clerk. He
informed me that the city boundaries
are the outer limits of Sec. 18, 46 N 4 W
that the place of use would not
change and use would be in municipal
water system within Sec. 18
that we would refund \$10
for only payment of \$11 on
application.

5-23-72 found couldn't refund
so mailed back check - see
letter same date

1 Paid for fees 10/18/72

EE

95 7188