(*c*) Congress should, by statute, recognize such appellate systems as court systems separate from State and Federal systems.

Three: Tribal court decisions should be entitled to "full faith and credit" by State and Federal courts.

Four: When tribal appellate systems—be they by individual tribes or multitribal—are firmly operative, the Federal court's role in review of their decisions should be limited exclusively to "writs of habeas corpus."

# VI. FINDINGS AND RECOMMENDATIONS

## A. General

### FINDINGS

One: There is throughout all levels of American society substantial ignorance and much misinformation concerning the legal-political status of Indian tribes and the history of the unique relationship between the United States and Indian tribes.

Two: This ignorance and misinformation, particularly when found among all levels of government—Federal, State and local—has significant negative impact on Indian tribes.

### RECOMMENDATIONS

One: Congress should require mandatory training concerning Indian history, legal status and cultures of all government employees administering any Federal program or State or local program funded in whole or in part by Federal funds.

Two: Congress should allocate sufficient resources so that a comprehensive program of Indian education for non-Indians can be conducted; such program should include:

(*a*) An evaluation of the history and civics curricula utilized by elementary, secondary, higher education institutions.

(*b*) The identification of gaps and inaccuracies in such curricula.

(*c*) The provision of model curricula which accurately reflects Indian history, tribal status and Indian culture.

# APPENDIX A

## Special Problem Areas: Indian Water Rights

### INTRODUCTION

This portion of the report will concentrate on the jurisdictional aspects of Indian water rights. Other Task Forces will discuss in greater detail the derivation of those rights, the application and administration thereof, and the role of the trustee United States in the protection, conservation, and utilization of those rights. The purpose here is to chronicle the importance of water to tribal existence; the conflicts that exist between the tribes and several states in which they are located; and finally, the federal-tribal conflicts over the performance of the federal government in administering the trust owing to the Indians under the Constitution regarding their most invaluable of all natural resources, their water rights.

Survival for the American Indian ultimately boils down to the relationship he bears to the lands to which he has been confined. White Americans have always moved to new locations once the resources were exhausted. Not so with the Indians—the maintenance of viable tribal structures and cultures is geared directly to the land base and the development and utilization of their resources contained therein.

This rapport between the Indians and their land is difficult to comprehend, much less describe. Failure to take cognizance of the Indians' concept of nature and their relationship with the land they and their ancestors occupied since time immemorial is to ignore a crucial concept of any development program and to impair potential economic reservation development, development which is inseparable from Indian rights to the use of water, which is their most invaluable possession. For, without water, reservation lands, or any other lands for that matter, are virtually without any economic value.

The demands of national energy and the scarcity of water supply are closing in on the American Indians at a rate which heightens the need for protective legislation that, as applied to Indians and their water rights, will sufficiently embrace Indian intangibles. To the fullest extent possible, development should recognize a role for the special identification Indians have with their land, water, and related natural resources.

### INDIAN DEVELOPMENT AND UTILIZATION OF WATER RESOURCES

History bears testimony to Indian use of water for sustenance as they shaped their lives to the demands of the varying environments. When an indigenous people called the Hohokams occupied lands in the Gila and Salt River Valleys over two thousand years ago, they diverted water by means of canals which even now are recognized as highly refined engineering accomplishments. They long ago demonstrated that water applied to the land was essential if communities were to be maintained and to have more than a rudimentary culture. They demonstrated the need for economic development which they undertook as a means of survival.[1]

Arizona's former Senator Hayden devoted much time to the history of the Pima and Maricopa Indians.[2] In great detail, he chronicles the use of the Gila River water by the Pimas and Maricopas. The first description of the Indian diversion and use of water in modern times, he reports, comes from Father Kino, a Jesuit Missionary who visited the Pimas in 1687. The missionary refers to the "very great aqueduct" constructed by the Indians to conduct Gila River water across great distances to irrigate large acreages of their river bottom lands.

[1] National Geographic Magazine, May 1967, Vol. 131, No. 5, pp. 670 et seq.
[2] A History of the Pima Indians and the San Carlos Irrigation Project, 89th Congress, 1st session; Document No. 11, first printed in 1924, reprinted in 1965.



77-467—76——11

The Pimas and Maricopas had flourishing communities of great magnitude in Arizona. The Spaniards described them as they existed near the end of the seventeenth century and marveled at the Indian economic development.

They observed the adjustments made by the Indians to a desert environment which, without water, produced a most meager subsistence. A half-century later, another Spanish Missionary was to report the Pima and Maricopa communities still undisturbed by non-Indian intrusion. He described the results of their use of the Gila River water:

"All these settlements on both banks of the river and on its islands have much green land. The Indians sow corn, beans, pumpkins, watermelons, cotton from which they make garments,* * *." [3]

According to the report, wheat was also grown. A hundred years later, the industrious Pimas and Maricopas continued to amaze soldiers, travelers, trappers, and explorers with their agricultural practices, their use of water, and the produce that supplied not only the Indians, but many others taking the southern route west. A short half-century was to elapse before the seizure of Indian lands was well underway, and, in another twenty-five years, the wanton divestiture of Indian land and water was far advanced.

Like the Arizona Indians, the Pueblos of the Rio Grande Valley adjusted to a desert environment by using water to promote agricultural development. Mohaves, Yumas, and Chemehuevis likewise adapted their lives to the surrounding desert by occupying lands on both sides of the Colorado River. In the "Great Colorado Valley," as early explorers referred to it, the soldiers and missionaries first encountered these Indians. Years later, Lieutenant Ives, in his 1858 explorations on the Colorado River, reports the Quechan Indians using water to raise their crops. Of the Mohaves, Ives said:

"It is somewhat remarkable that these Indians should thrive so well upon the diet to which they compelled to adhere. There is no game in the valley. The fish are scarce and of inferior quality. They subsist almost exclusively upon beans and corn, with occasional watermelons and pumpkins, and are as fine a race, physically, as there is in existence." [4]

Those Mohave crops were raised by the Indians who planted the lush river bottoms as soon as the perennial overflow had receded, thus using the natural irrigation furnished by the Colorado River. It goes without saying, that the importance of the rivers to the indigenous cultures throughout the western United States was not limited strictly to agricultural purposes. For example, the Northern Paiutes, in the vast desert areas of the present state of Nevada, depended upon fish taken from Pyramid Lake and the Truskee River as a source of sustenance. This was long before the so-called "discovery" of that lake by Fremont in 1844.[5]

Fisheries to the Indians of the Pacific Northwest, "were not much less necessary to the existence of the Indians than the atmosphere they breathed." [6] Salmon and other fish taken from the Columbia River were always an important item of trade among the Indians, as reported by Lewis and Clark.[7] And, of course, rivers were not only the source of sustenance for the American Indians, but they were also the arteries of crude commerce and travel. Quite significantly, when transition from their traditional way of life was forced upon the Western Indians, they relied upon their streams and rivers as a source of sustenance and the means to adopt the new ways of living. The Yakimas, in their transition from a nation given over largely to hunting and fishing, were the first in the state of Washington to undertake to irrigate their meager gardens. That change came about under the direction of missionaries who attempted to assist in the economic development of lands to which the Yakimas were restricted.[8]

Potential for economic development of the Indian reservations is inextricably related to the legal title to the right to divert and use water. Those reservations were established in perpetuity as a "home and abiding place" for the Indians. In the words of the Supreme Court: "It can be said without overstatement that when the Indians were put on these reservations, they were not considered to

[3] Ibid. A History of the Pima Indians * * *, p. 9.
[4] *Mohave Tribe of Indians* * * * v. *United States of America*, 7 Ind. Cl. Comm. 219, Finding 12(a), and sources relied upon.
[5] Popular Science Monthly, Vol. 58, 1900–1901, pp. 505–514.
[6] *United States* v. *Winans*, 198 U.S. 371, 381 (1904).
[7] Journals of Lewis and Clark, Bernard DeVoto, pp. 259 et seq.
[8] "* * * Ahtanum (Creek) was the cradle and proving ground of irrigation in the State of Washington * * *." —Pakima Valley Catholic Centennial, the Beginning of Irrigation in the State of Washington.



be located in the most desirable areas of the Nation." [9] Most of them were established during times when this Nation was experiencing great changes economically and socially. Changes were anticipated and changes came about, and the process of change continues. From a predominantly rural culture geared to the cultivation of the soil, this Nation has developed into an urban and industrial country. Changes likewise came about concerning the American Indians' occupation of reservations which were established by treaty and agreement between Indians and the National Government. Reservations were also established unilaterally by Congressional enactments and Executive Order. At the time of their establishment, those reservations were primarily suitable for farming and livestock raising. Coinciding with the shift in our national economy, the reservations have changed. Some, including the Pueblos of New Mexico and the Salt River Indian Reservation in Arizona, are close to and are rapidly becoming part of urban areas. This transformation required new thinking as to land uses which necessitates concomitant changes in water uses. Equally important is the fact that American Indian reservations are at the headwaters of, border upon, or are traversed by the major interstate stream systems of the West. For a variety of reasons, Indian water rights have remained unexercised to a very large extent. Sharp competition exists now—and will be accentuated with expanded economic development on the reservations—between the vested Indian water rights and those claimed by individuals or corporations, public or private, asserted under state law.

Title to water rights, although stemming from the Constitution itself, and fully recognized by the courts, does not in any sense guarantee to the American Indians that those rights cannot be taken from them. Far from humorous is the description that state permits to appropriate rights to the use of water are called "hunting licenses." For example, in California, a permit to appropriate water "* * * is * * * no assurance of water supply * * *." [10] However, "Surplus" waters in a stream frequently are diverted and used, and economies are built upon those waters quite aside from the fact that the "surplus" is actually water the rights to which reside in the Indians. Constitutional law, ethics, and a good conscience become mere technicalities to be avoided or ignored under the circumstances. To the holder of a permit from the state to appropriate water rights—although it is subject to vested rights—the existence of a surplus, although it may be momentary, allows him to expend money to develop its use with the hope that time will come to his aid as a barrier to the Indians' recovering the waters to which they are justly entitled. As a consequence of actual practice, as distinguished from legal niceties, the American Indians' rights to the use of water are rapidly being eroded away by those claiming under the guise of compliance with state law. They eloquently prove a truism about water in the West, however harsh and cynical it may be: "use it or lose it."

It is against that backdrop of history and law that the legal aspects of Indian water rights will be discussed, and recognition taken of the unique jurisdictional problems relating to the regulation and use of this most scarce commodity by the western states and the various Indian tribes.

## WINTERS DOCTRINE RIGHTS

Winters Doctrine Rights are unique in the field of Western Water Law. They differ drastically from, and by reason of their nature, are vastly superior to those water rights acquired privately through compliance with State law. American Indians probably did not pause much to give thought to the nature of a right to divert and use water or to maintain a fishery. The concept of title to land and the bundle of rights which constitute it was wholly foreign to them. In entering into treaties and agreements, or whatever means were used, they were totally unaware of the principles of conveyancing or of the formulation of written conventions, the terms of which, under the law, would be required to protect their vital interests, and thus, they did not and could not understand the legal implications flowing from those treaties and agreements. Most assuredly, these in no far stretch of the meaning of that term could be called equal, at-arms length transactions.

The Winters Doctrine, as enunciated by the courts, is based on law, equity, and history—the facts behind which are simple in the extreme: The Fort Belknap

[9] *Arizona* v. *California*, 373 U.S. 546, 598 (1962).
[10] California's "Rules and Regulations" governing appropriation of rights to the use of water.

Indian Reservation, in the state of Montana, is the residue of a once-vast area guaranteed to the Indians by the 1855 Treaty with the Blackfeet. (11 Stat. 657) In 1874, the original area established by the Treaty was sharply constricted. By an agreement in 1888, the Indians were limited to a small semi-arid acreage which could be made habitable only by means of irrigation. The north boundary of the reservation was the center of the Milk River, a tributary of the Missouri.[11]

In 1899, water was diverted from the Milk River to irrigate lands within the Fort Belknap Reservation. Upstream from the Indian diversion, Winters and other defendants, non-Indians, constructed dams, diversion works, and other structures which prevented the waters of the Milk River from flowing down to the Indian irrigation project. An action to restrain the Winters diversion was initiated in the federal district court, and an injunction ensued.

Winters appealed that injunction, and in sustaining the injunction, the Ninth Circuit Court of Appeals declared:

"In conclusion, we are of opinion that the court below did not err in holding that, 'when the Indians made the treaty granting rights to the United States, they reserved the right to use the waters of Milk River' at least to the extent reasonably necessary to irrigate their lands. The right so reserved continues to exist against the United States and its grantees, as well as against the state and its grantees." [12]

Thus, it was the Indians granting to the United States; it was the Indians reserving unto themselves that which was not granted—the rights to the use of the water of the Milk River to the extent required for their properties. That conclusion was reflective of the rationale in an earlier decision, the *Winans Decision*, rendered by the United States Supreme Court two years earlier which stated:

"* * * the treaty was not a grant of rights to the Indians, but a grant of rights from them [to the United States], a reservation of those not granted." [13]

That concept, that the Indians granted title to the United States, and not the converse, is important in regard to the nature of the title of the Indians. In *Winans*, the Court had before it the fishery provisions of the Treaty of June 9, 1855, between the United States and Confederated Tribes of Yakima Indians. By that document, the Indians retained the "exclusive right of taking fish in all the streams where running through or bordering" their reservation; also, "the right of taking fish at all usual and accustomed places" on and off the reservation. Patents were issued by the United States to lands along the Columbia River from which the Yakimas had traditionally fished. Those patents did not include any reference to the Indian treaty fishing rights, and the owners of the land denied that the lands thus patented were subject to Indian treaty fishery rights.

Moreover, the State of Washington had issued licenses to the landowners to operate fishing wheels which, it was asserted, "necessitates the exclusive possession of the space occupied by the wheels." [14] Rejecting the contentions of the landowners that the Yakima fishing rights in the Columbia River had been abrogated by the issuance of the patents, the Court declared:

"The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians * * * which were not much less necessary to the existence of the Indians than the atmosphere they breathed. Only a limitation of them, however, was necessary and intended, and not a taking away."

Having thus appraised the Yakima treaty, the Court then pronounced the crux of the decision:

"* * * the treaty was not a grant of rights to the Indians, but a grant of rights from them [to the United States], a reservation of those not granted." [15]

The Court further observed: "the right of [fishing] was intended to be continuing against the United States and its grantees as well as against the State and its grantees." [16] Thus, the nature of the title of the Indians under the treaties between them and the United States was cast in the correct light. Indian title does not stem from a conveyance to them, but rather, the title which resides in them to their lands, their rights to the use of water, their rights of fishery, their timber—all interests in real property and natural resources were

[11] For a full factual and procedural review, see *Winters* v. *United States*, 143 Fed. 740, 741 (CA9, 1906); *Winters* v. *United States*, 148 Fed. 684 (CA9, 1906).
[12] *Winters* v. *United States*, 143 Fed. 684 (CA9, 1906).
[13] *United States* v. *Winans*, 198 U.S. 371, 381 (1904).
[14] Id., at 380 (1904).
[15] Ibid., at 381 (1904).
[16] Ibid., at 381–382 (1904).



retained by them when they granted title to vast areas which had once been theirs.

Those pronouncements by the Supreme Court, declared in advance of the *Winters Decision*, are fundamental precepts of the law, recognizing that rights of fishery are interests in real property subject to protection under the Constitution.

On appeal, the Winters case presented two basic problems to the Supreme Court for resolution: (1). Were rights to the use of water in the Milk River reserved for the Fort Belknap Indian land, though no mention of those rights is contained in the treaty of October 17, 1855, the Act of 1874, or the Agreement of 1888; (2). assuming those rights were reserved for the Indian lands, was there a divestiture of them upon Montana's admission into the Union? [17]

In rendering its keystone opinion, the Court analyzed the unique relationship between the United States and the Indians, together with the objectives of the Agreement of 1888, in which the Indians ceded away a vast tract of land, retaining for themselves a mere vestige of that which they had formerly occupied. The Court then addressed itself to the non-Indian positions:

"The lands (retained by the Indians) were arid and, without irrigation, were practically valueless. And yet, it is contended, the means of irrigation were deliberately given up by the Indians and deliberately accepted by the Government. * * * The Indians had command of the lands and the waters—command of all their beneficial use, whether kept for hunting, "and grazing roving herds of stock," or turned to agriculture and the arts of civilization. Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate? * * * If it were possible to believe affirmative answers, we might also believe that the Indians were awed by the power of the Government or deceived by its negotiators. Neither view is possible.

"The Government is asserting the rights of the Indians." [18] Following the *Winans* concept of the Indians being the grantors, the Court further inquired: Did the Indians grant and the United States accept all the Indian rights to the use of water without which the lands were uninhabitable? It rejected that proposition out of hand as being without merit. Likewise significant prospectively was the Court's observation that, as the owners of the land and waters, the Indians could use them for hunting, grazing, or, in the Court's own words, for "agriculture and the arts of civilization." The Court could find no limitation here as to the application of the Indian water rights.

As to the part-legal, part-political question of Montana's jurisdiction over Indian water rights, the Supreme Court had this to say:

"The power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be. *The United States* v. *The Rio Grande Ditch & Irrigation Co.*, 174 U.S. 690 702(—); *United States* v. *Winans*, 198 U.S. 371(—). That the Government did reserve them we have decided, and for a use which would be necessarily continued through years. This was done May 1, 1888, and it would be extreme to believe that within a year, Congress destroyed the reservation and took from the Indians the consideration of their grant, leaving them a barren waste—took from them the means of continuing their old habits and yet did not leave them the power to change to new ones." [19]

The crucial aspect of the character of the Indian title is thus clear: (1). By the Agreement of 1888, the Indians reserved to themselves the rights to the use of water in the Milk River although that Agreement made no mention of rights of that nature; (2). The Indian rights thus reserved were not open to appropriation under the laws of the State of Montana upon its admission into the Union, but rather, were exempt from the operation of those laws.

That concept of a grant from the Indians to the National Government, and other decisions applied to the Indian title of rights to the use of water the principles governing interests in realty, viz: "This is a suit brought by the United States as trustee for the Yakima Tribe of Indians to establish and quiet title to the Indians' right to the use of waters of Ahtanum Creek in the State of Washington . . ." [20] With further reference to the nature of the rights and the action brought to have them determined, the Court states: "The suit (to protect

[17] *Winters* v. *United States*, 207 U.S. 564, 575 et seq. (1907).
[18] Ibid., 207 U.S. 564, 576 (1907).
[19] Ibid., 207 U.S. 564, 577 (1907).
[20] *United States* v. *Ahtanum Irrigation District*, 236 F. 2d 321, 323 (CA9, 1956).

the Yakima rights), like other proceedings designed to procure an adjudication of water rights, was, in its purpose and effect, one to quiet title to realty." [21]

As interests in real property, Winters Doctrine Rights are entitled to be protected, and the obligation to protect them against abridgement and loss is identical with the obligations respecting land itself. This concept goes far toward elimination of the confusion which has on occasion arisen respecting the course of conduct to pursue in protecting and exercising these rights.

Title to those rights are free of limitation on the purposes to which they could be applied. In *Conrad Investment Company*, 161 Fed. 829 (1908), the Court referred to the fact that there was vested in the Indians the rights to the use of the streams to meet future developments "for irrigation and other useful purposes"

It is pertinent at this phase of the consideration to turn to the state law governing water rights of private persons and briefly to discuss the exemption of Indian water rights from the operation of those laws. The location of Indian reservations and the competition to meet present and future water demands necessitates reference to the individual, corporation, municipal, and quasimunicipal rights acquired under the doctrine of prior appropriation. Western water law is generally the outgrowth of experience, not logic, and where logic purports to override experience, such as in California or Oregon and other Western states where there is some adherence to greatly modified principles of riparian rights, together with the doctrine of prior appropriation, confusion has ensued. Winters Doctrine Rights have been referred to as immemorial in character, prior and paramount, or in similar terms, according to the Indians' preferential status on streams. Indian rights, having been retained by the Indians or invested in them antecedent to settlement of the lands of the Western United States, demonstrate the coalescence of history and law. Those water rights were never opened by the Congress to private acquisition under state law.

Title to most of the Western United States—land, water, minerals, timber, and all natural resources—originally resided in the National Government. Thus, when miners came to the West exploring for precious minerals, water was the key. Without it, the minerals would remain in the ground. Consequently, water was diverted out of the streams to the mine locations, frequently over long distances and at a great cost in terms of personnel, time, and effort.

The mining and water diversions were accomplished with the knowledge and acquiescence of the United States Government. Violence was then very much a part of the history of water law in the West. But, as law and order came to the Old West, there grew up in the mining districts the precept that the "First in time" was "first in right" on the streams of the public domain, subsequently termed the appropriative rights doctrine. The doctrine of prior appropriation has been stated in these terms:

"... To appropriate water means to take and divert a specified quantity thereof and put it to beneficial use in accordance with the laws of the State where such water is found, and, by so doing, to acquire under such laws, a vested right to take and divert from the same source, and to use and consume the same quantity of water annually forever, subject only to the right of prior appropriations.... the perfected vested right to appropriate water flowing... cannot be acquired without the performance of physical acts through which the water is and will in fact be diverted to beneficial use." [22]

The date of investiture of title is the prime element in the value of any right to the use of water in the semiarid West, whether acquired by the sovereign pursuant to a treaty or by an individual pursuant to the local laws. *Nichols* v. *McIntosh*, 19 Colo., 22; 34 Pac. 278, (1893); see, also, *Whitmore* v. *Murray City*, 107 Utah 445; 154 P.2d 748, 751 (1944). For, where the demand so greatly exceeds the supply, the ownership or control of the legal right first to divert and use water, or to allow others to use it is of transcendent importance. It is likewise axiomatic, that he who controls the rights to the use of water also controls the utilization of the land. As a consequence, it is essential to consider the source of the title and the date of investiture of that title to "Winters Doctrine Rights."

Vast areas of lands were ceded by the Indian Tribes to the United States. Treaties with France, Great Britain, Spain, and Mexico were other sources of title to lands: with France in 1803, it was the land known as the Louisiana Purchase; in 1848, Mexico, by the Treaty of Guadalupe Hidalgo, conveyed to the United States that part of the country generally referred to as the Southwest; and Great Britain, in 1846, ceded to the National Government that area referred

[21] Ibid., 236 F. 2d 321, 339 (CA9, 1956).
[22] *Arizona* v. *California*, 283 U.S. 423 (1931).



to as the Pacific Northwest. Each of the cessions passed title, subject to then vested rights, to all of the lands and rights to the use of water which were part and parcel of them. By those cessions, not only the title, but complete jurisdiction in the fullest legal sense passed to the Central Government to "* * * all lands, lakes and rivers * * *." These means of acquiring title differ drastically from the requirements for obtaining title to appropriative rights; these rights were acquired by cession and not by appropriation. Other variances are made manifest when you consider that, unlike appropriative rights, Winters Doctrine Rights are reserved for uses "which would be necessarily continued through the years." [23] A "future use" as such, is entirely foreign to the doctrine of appropriative rights. As to that later right, the Supreme Court of Utah declared that "Beneficial use is the basis, the measure, and the limit of all rights to the use of water in this state." [24] That same court, in the same decision also stated: "No one can acquire the right to use more water than is necessary, with reasonable efficiency, to satisfy his beneficial requirements, * * *" and it must be used with due diligence. Indian rights are not thus limited, for, as the courts have stated:

"We deal here with the conduct of the Government as trustee for the Indians. It is not for us to say to the legislative branch of the Government... when those rights are to be exercised." [25]

Winters Doctrine Rights have a date of acquisition (by cession) and not a "priority date" as that term has been applied to the appropriative rights doctrine. That date, when the Winters Doctrine Rights were ceded to the United States is the date of acquisition of them. There is no basis in law for claiming a "priority date" for them as is asserted in connection with an appropriative right privately acquired pursuant to state law. Far from being an appropriator of rights to the use of water, the National Government is the source of title to those rights. Those Winters Doctrine Rights cannot be acquired by use nor lost by disuse, nor is any limitation applied to them as to when, where, and in what manner they should be exercised. Neither are the Winters Rights riparian in character. The doctrine of riparians rights to the use of water has been rejected in the states of Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming—essentially because it was unsuited to the arid and semiarid climates found in those states as opposed to the more humid climates back East where that doctrine is generally applied. Other states, in varying degrees, recognize the doctrine of riparian rights. California is the principal state in that regard. That state and other western states that take cognizance of riparian rights likewise recognize appropriative rights, with the result that they are referred to as hybrid states. Examination of the principal characteristics of the riparian doctrine is thus warranted.

Perhaps the prime factor in regard to those rights is that they are part and parcel of land and do not exist independent of it.[26] Moreover, a riparian right is held and exercised correlatively with all other riparian owners as a "tenancy in common and not a separate or severable estate." [27]

The concept of a "reserved right" in the National Government (both for itself and for the benefit of the Indians) is at variance with the limitations which are present in a tenancy in common. Further, "A riparian owner has not right to any mathematical or specific amount of the waters of a stream as against other like owners." [28] That aspect of riparian rights results from the fact that those rights are held correlatively with all other riparians. Consequently, the quantity of water riparian owners may use must be "reasonable" in light of the claims of all other riparians. "Reasonableness" is, of course, a variant depending upon the suppply of water, the demands of which vary from day to day, and upon a multitude of other factors.[29] Equally at odds with the Winters Doctrine Rights is this limitation upon the exercise of rights riparian in character: "The land, in order to be riparian, must be within the watershed of the stream." The rule as stated in another case is that:

"Land which is not within the watershed of the river is not riparian thereto, and is not entitled, as riparian land, to the use or benefit of the water from the river, although it may be part of an entire tract which does extend to the river * * *." [30]

[23] *Winters* v. *United States*, 207 U.S. 546, 577 (1908).
[24] *McNaughton* v. *Eaton*, 121 Utah 394; 242 P.2d 570, 573 (1953).
[25] *United States* v. *Ahtanum Irrigation District, et al*, 236 F.2d 321, 328 (CA9, 1956).
[26] The California Law of Water Rights, p. 187.
[27] *Seneca Consolidated Gold Mines Co.*, v. *Great Western Power Co.*, 209 Cal. 206; 287 Pac. 93, 98 (1930).
[28] *Prather* v. *Hoberg*, 24 Cal. 2d 549; 150 P. 2d 405, 410 (1944).
[29] The California Law of Water Rights, the Measure of Riparian Right, p. 218, et seq.
[30] *United States* v. *San Francisco*, 310 U.S. 16, (1939).

There is no reason to limit Indian Winters Doctrine Rights to streams arising upon their reservations. As was pointed out, those rights are against the stream system:

"The suggestion that much of the water of the Ahtanum Creek originates off the reservation is likewise of no significance. The same was true of the Milk River in Montana; and it would be a novel rule of water law to limit either the riparian proprietor or the appropriator to waters which originated upon his lands or within the area of appropriation. Most streams in this portion of the country originate in the mountains and far from the lands to which their waters ultimately become appurtenant." [31]

And the laws of the various states could not thus restrict the power of Congress over the properties of the Nation. Since neither the Congress nor the Indians have limited the uses for which the Winters Doctrine Rights may be exercised, there is no limit for possible uses to which they may be applied. These are some of the features of the Winters Doctrine Rights which should be contrasted to the appropriative rights or riparian rights which are acquired pursuant to state law. The source of titles to private appropriative rights is the National Government. Those private rights are acquired by compliance with and are subject to state law. Those rights may be used only at the places and for the purposes prescribed by state law. Immunity of Indian Winters Doctrine Rights from state interference or seizure has been guaranteed in a variety of ways. The State of Washington's Enabling Act and Constitution specifically provide that "Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States * * *." [32]

Concerning identical provisions in the Montana Enabling Act and Constitution, the Court of Appeals for the Ninth Circuit has unequivocally declared that the state laws respecting the appropriation of water rights have no application to the Flathead Indian Reservation.[33] That same court later declared:

"Rights reserved by treaties such as this are not subject to appropriation under state law, nor has the state power to dispose of them." [34]

These differences in characteristics as to the origin, nature, and extent of Winters Doctrine Rights and state appropriative and riparian rights have inevitably brought Indian and non-Indian claimants into conflict, as well as the Federal Government and the tribes, as the regulation and control of rights to the use of water.

TRIBAL—STATE CONFLICTS

The as-yet undeveloped Winters Doctrine Rights of the tribes are quite substantial in extent and in their potential adverse impact upon non-Indian economies built on water use permits issued pursuant to state law "subject to then existing rights." States purport to have the power to issue valid permits for the appropriation of water within the exterior boundaries of Indian reservations. See, for instance, *Colville Confederated Tribes* v. *Walton*, Civil No. 3421, 412 F. Supp 651 (Ed Wash, April 14, 1976) in the United States District Court for the Eastern District of Washington. There, the state has issued a permit to Walton, a non-Indian, who purchased former allotted lands and subsequently proceeded to develop his property to an extent which seriously impaired the development of tribal and allotted lands above and below his property, not to mention seriously damaging the water quality of Omak Lake which sustains a valuable Lahontan cutthroat game fishery belonging to the tribe. Essentially, the state seeks to regulate the stream for a non-Indian successor in interest to the original allottees—allegedly under the guise that the waters to No Name Creek are surplus to tribal needs. This assertion of jurisdiction encroaches not only upon the authority of the tribe, in its sovereign capacity over land and water within the exterior boundaries of the reservation, but also upon the authority of the Secretary of the Interior to allocate water rights among the Indians on the reservation. The following excerpts from Justice and Interior Department officials highlight the issues, and also point out the conflict existing between the Federal Government and the tribe as to ultimate authority over rights to govern the use of water, indeed, ultimate title to the rights to the use of water. The excerpts are self-explanatory when the conflict between the Colville Tribe and the Secretary of the Interior is understood, for the Secretary not only seeks to divest the tribe of its water rights but also seeks to usurp its power to administer those rights.

[31] *United States* v. *Ahtanum Irrigation District*, 236 F.2d 321, 325 (CA9, 1956).
[32] Enabling Act, Sec. 4, sec. subdivision; Constitution of the State of Washington, Article XXIV, second subdivision.
[33] *United States* v. *McIntire*, 101 F.2d 650 (CA9, 1939).
[34] *United States* v. *Ahanum Irrigation District*, 236 F.2d 321, 328 (CA9, 1956).



Nature of the tribal dilemma is outlined in the following letter prepared by the Department of Justice in response to a request by the Interior Department Solicitor on the Walton Case:

[*Air Mail*]

MARCH 6, 1973.

U.S. ATTORNEY,
*Spokane, Wash.*
(Attention of Robert Sweeney, Esq., Assistant U.S. Attorney).

DEAR SIR: There are enclosed an original and five (5) copies of a complaint which seeks to have enjoined the unauthorized diversion and use of water from an unnamed stream on formerly allotted lands within the exterior boundaries of the Colville Indian Reservation and to have a judicial determination of the validity of a permit issued by the State of Washington to non-Indians for the aforementioned use and diversion of water. It is the position of the United States that the Secretary of the Interior has the exclusive jurisdiction to control and administer the allocation of waters as tribal, allotted and formerly allotted lands of the Colville Reservation pursuant to the authority vested in the Secretary under 25 U.S.C. § 381. This allegation is the same as that made in the *United States* v. *Bel Bay Community* case. Civil No. 303–71–C2, United States District Court for the Western District of Washington.

As you are aware, now pending in the United States District Court for the Eastern District of Washington is the case entitled *Colville Confedcrated Tribe* v. *William Boyd Walton, et ux.*, Civil No. 3421, which addresses the same situation as the proposed suit. By letter dated February 2, 1973, the Department of the Interior requested that we intervene in the aforementioned suit and make the allegations which are now contained in the proposed action. A copy of that letter is enclosed. We have decided, however, not to intervene because the complaint filed on behalf of the tribe does not, in our opinion, raise the issue which must be addressed to obtain a judicial determination in this controversy, i.e., the authority of the Secretary of the Interior to determine the allocation of water on Indian lands.

We are not enclosing a copy of the litigation report provided this office, because the cover letter to that report indicates that you were provided with a copy of the report.

It would be appreciated if you would sign the aforementioned complaint, file it with the Court, and have service made upon the appropriate individuals. If you desire to make any changes in this complaint, to correct crimes or to comply with local court rules, please feel free to do so. It would be appreciated if you would send us a Xerox copy of the complaint as filed with the Court stamped showing the time of filing for our records.

Sincerely,

KENT FRIZZELL,
*Assistant Attorney General,*
*Land and Natural Reources Division.*
By FLOYD L. FRANCE,
*Chief, General Litigation Section.*

The allegation of power and authority to control water by the U.S. is a severe conflict of jurisdictional authority. The confusion over the ownership of the right to control the use of water is further demonstrated in the letter to that same Kent Frizzell, now Interior Department Solicitor, from Wallace Johnson, then Assistant Attorney General for the Lands and Natural Resources Division:

JULY 18, 1975.

KENT FRIZZELL, Esq.,
*Solicitor, Department of the Interior,*
*Washington. D.C.*

DEAR MR. FRIZZELL: We are writing with regard to *United States* v. *Walton*, et al., Civil No. 3831 in the United States District Court for the Eastern District of Washington.

You will recall that this action was initiated by this Department for the United States in its own right and on behalf of the Colville Confederated Tribes

at the request of the Department of the Interior on March 1973. The primary purposes of this adjudication were to enjoin the defendants Walton from diverting water from No Name Creek in an amount in excess of that authorized by the Secretary of the Interior, and to have the State of Washington, having no authority over the appropriation of waters within the external boundaries of the reservation, enjoined from issuing further permits for pumping or diversion therein. It is the position of the Government herein that consistent with *United States* v. *Powers*, 305 U.S. 527 (1939), Walton, as a successor in interest to an Indian allottee, has some right to water.

One of the theories on which this litigation has proceeded was that the diversion activities of the Waltons was in excess of their *appropriate share* and that their activities would cause irreparable harm to the Tribe because it has decreased the size of Omak Lake which lies downstream from the Walton allotments. In June of this year, it was determined by representatives of the Office of the Regional Solicitor in Portland, representatives of the Bureau of Indian Affairs, the Colville Tribe, and the Tribe's counsel, that additional hydrological testing was required in the area to establish the proof necessary to support the conclusions of the expert testimony to be presented at trial on October 14, 1975. This conclusion was reached after consultation with, and with the concurrence of the expert, Mr. Noble, and was concurred in by the United States Attorney handling the litigation.

We have now been advised that, as a result of the recommendations of an employee of the Bureau of Indian Affairs, which were contrary to the recommendations of all counsel for the Government and the Tribe, the expert and the United States Attorney, the Tribe has undertaken a well drilling program financed by the Bureau which precludes the possibility of the tests to be conducted. Further, we understand that the same employee of the Bureau recommended that the Tribe not permit the testing program previously agreed upon.

We, of course, cannot predict the ultimate effect of the lack of data on the outcome of this proceeding. However, we wish to express our disapproval of these actions which will result in either a change in a theory of the case to be presented or which will, in the view of the expert, render his testimony in support of that theory vulnerable to attack. Neither of these possible results is likely to improve our chances of success in this litigation and we believe that if a change of theory is necessary at this late time, it would undermine our efforts.

We have encountered another problem while ascertaining the facts of this controversy which is common to other litigation as well. The expert who is to provide the testimony supporting the Government's case here is a consultant employed by the Tribe with funds provided by the Bureau of Indian Affairs. There is no Government witness as such. We, and the United States Attorney, have had great difficulty locating the Tribe's expert and therefore have not always been able to ascertain his views. The ability of counsel to reach and work with experts is, as you know, of critical importance to pretrial preparation. The insulation of experts supporting the Government's case, as exists here, and the inability of counsel to assist in directing their pretrial preparation, prevents this office from effectively performing its mission.

Litigation is difficult under the best of circumstances. Without complete cooperation from the client agency it is much more difficult. Unless such cooperation is received, our efforts to vigorously act on behalf of Indians through the newly created Indian Resources Section will be frustrated. It is because of the severe consequences of less than complete cooperation that we are writing to express disapproval of the activities which prevented the tests deemed necessary by those in control of the litigation.

Sincerely,

WALLACE H. JOHNSON,
*Assistant Attorney General,*
*Land and Natural Resources Division.*

The assertion of U.S. right to regulation was further made apparent when several tribes attempted to adopt their water codes. Since the tribes owned the rights to the use of water, they assumed they had the right to regulate and control its uses to protect interests held for the benefit of their members. They were encouraged in their efforts at the outset by officials of the Interior Department that someone, in the final analysis, had the power to control rights to the use of water. Secretary Morton was terse in his instructions to prevent approval of



these tribal codes and the tribes were rebuffed at every turn in their quest for assistance and ultimate approval and sanction. The following is a series of memos and correspondence initiated early this year by a memo from Morris Thompson, Commissioner of Indian Affairs, to all Area Directors concerning the enactment of tribal water codes. The material is self-explanatory and is presented in its entirety.

JANUARY 20, 1975.

Memorandum.

To: (All Area Directors).
From: Commissioner of Indian Affairs.
Subject: Tribal Water Codes.

The attached directive from the Secretary of the Interior is transmitted to you for your information, guidance and action.

Please notify all Agency Superintendents of this directive immediately and instruct them to comply with the instructions contained in the memorandum.

MORRIS THOMPSON.

Attachment.

JANUARY 15, 1975.

Memorandum.

To: Commissioner of Indian Affairs.
From: Secretary of the Interior.
Subject: Tribal Water Codes.

As you know, the Department is currently considering regulations providing for the adoption of tribal codes to allocate the use of reserved waters on Indian reservations.

Our authority to regulate the use of water on Indian reservations is presently in litigation. I am informed, however, that some tribes may be considering the enactment of water use codes of their own. This could lead to confusion and a series of separate legal challenges which might lead to undesirable results. This may be avoided if our regulations could first be adopted.

I ask therefore that you instruct all agency superintendents and area directors to disapprove any tribal ordinance, resolution, code, or other enactment which purports to regulate the use of water on Indian reservations and which by the terms of the tribal governing document is subject to such approval or review in order to become or to remain effective, pending ultimate determination of this matter.

ROGERS C. B. MORTON.

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FEBRUARY 20, 1975.

Memorandum.

To: All Superintendents, Aberdeen Area.
From: Office of the Area Director.
Subject: Tribal Water Codes.

Enclosed is a copy of General Memorandum No. 75-17 dated February 14, 1975 from Wilkinson, Cragun & Barker, which they generously give us permission to send to the agencies in this area.

The memorandum disagrees with the Secretary of the Interior's position on tribal water codes as set forth in his memorandum of January 15, 1975 to the Commissioner of Indian Affairs, copy of which was furnished to you by our memorandum dated January 27, 1975.

Please make this information available to your Tribal Councils.

ACTING AREA DIRECTOR.

Enclosure.

FEBRUARY 14, 1975.

GENERAL MEMORANDUM NO. 75-17

In a memorandum dated January 15, 1975, the Secretary of the Interior directed the Commissioner of Indian Affairs to instruct all area directors and agency superintendents not to approve any tribal water codes purporting to regulate water use on Indian reservations.

The Secretary cited confusion that could result in promulgating such codes until his authority in the matter is settled by pending litigation.

As you will see from the attached response from us on your behalf, we strongly disagree with the position the Secretary has taken. We urge him to reconsider the matter and to issue, as soon as possible, regulatory guidelines for Indian tribes enacting their own water codes.

We shall keep you advised of further developments in this very important area.

Sincerely,

WILKINSON, CRAGUN & BARKER.

Attachment.

FEBRUARY 13, 1975.

Hon. ROGERS C. B. MORTON,
*Secretary of the Interior,*
*Washington, D.C.*

DEAR SECRETARY MORTON: We are general counsel for the Arapahoe Tribe of the Wind River Reservation, Wyoming, the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, the Quinault Tribe of the Quinault Reservation, Washington, and the Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota; special counsel for the Hoopa Valley Tribe of the Hoopa Valley Reservation, California, and the National Congress of American Indians, and water rights counsel for the Crow Tribe of the Crow Reservation, Montana.

We have received a copy of your memorandum dated January 15, 1975, to the Commissioner of Indian Affairs, directing him to instruct all BIA agency superintendents and area directors to disapprove any tribal ordinances and enactments purporting to regulate water use on Indian reservations, "pending ultimate determination of this matter."

Your concern about approving any such tribal water codes apparently stems from unresolved litigation dealing with your authority and that of the tribes to regulate use of water on Indian reservations. You are also concerned that confusion could result if tribal water codes are enacted before Departmental regulations can be adopted. Implicit in your letter is your position that the Department will not promulgate any regulations or proposed regulations concerning tribal water codes until the referenced litigation is decided.

Our tribal clients and we are deeply disturbed that you are in effect calling a halt to approval of tribal water codes for what could be at least two or three more years. We are informed that your Department was actively considering promulgation of a proposed rulemaking establishing guidelines for tribal governments in enacting their own codes.

We strongly urge that you reconsider your directive to the Commissioner and that your Department promulgate, as soon as possible, the proposed rulemaking. We ask this for three reasons.

First, with each day that passes, pressure from non-Indian water users to diminish or extinguish Indian water rights increases. Years more delay before Indians can obtain your approval to regulate their water rights will only serve to feed those pressures.

Second, issuance of the proposed, and subsequently final, Departmental guidelines for Indian water codes will immeasurably strengthen the position of the United States and the Indian tribes in litigation determining tribal authority to regulate reservation water use. Your active role in issuing guidelines could promote very favorable results in those very cases in which you now await final disposition.

Third, the need to delay is illusory. Cases on individual Indian reservations, even if they reach the United States Supreme Court, will not necessarily fully decide your authority and tribal authority in this important area. Other cases challenging that authority will undoubtedly arise elsewhere and continue for many years to come. Your enactment of guidelines and approval of tribal water codes crystallize the issues that will be involved in that litigation. Unless there is a general resolution of this whole regulatory question by the Supreme Court, Department of the Interior, and Indian tribal regulatory authority will always be open to question on many different Indian reservations where different treaties, statutes, and cases may foreshadow different legal results.

We know it is not your intention to prejudice Indian water rights. It is in the spirit of preserving and protecting those rights that we offer this constructive criticism on behalf of our tribal clients, in the hope you will recognize that reconsideration of your decision is essential.

Very sincerely,

WILKINSON, CRAGUN & BARKER,
By JERRY C. STRAUS.



The aforementioned authority of the Secretary over allocation of waters within a reservation is derived from Sec. 7 of the Dawes Act of 1887 (The General Allotment Act), 24 Stat. 388 which states as follows:

"That, 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 be, and he is hereby, authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such 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."

It is to be observed that the Secretary's authority is limited in application solely to Indians residing within a reservation, and it is interesting to note that that power of the Secretary has gone virtually unexercised since the passage of that act.

Pending in U.S. District Court for the Western District of Washington is a case attempting to resolve questions on state authority to issue permits to non-Indians who hold fee-simple title to former allotted lands within an Indian reservation (the Lummi Indian Reservation) to appropriate waters allegedly "surplus" to tribal needs. See *United States* v. *Bel Bay Community and Water Association*, File No. 303–71–C2.

The United States seeks to enjoin the pumping of ground water from a well on land within reservation boundaries by the Bel Bay Community and Water Association. The United States alleges that, pursuant to the Treaty of Point Elliot, dated January 22, 1855 (12 Stat. 927), all of the lands which now comprise the Lummi Indian Reservation were reserved by Executive Order of November 22, 1873, for the use and occupancy of the Lummi Tribe and which land was subsequently allotted to the individual tribal members pursuant to Article VII of the treaty. Upon removal of the restrictions against alienation, the land in question was sold to non-Indians and it was subsequently subdivided into 183 individual lots for homesites.

On August 19, 1969, defendant Bel Bay filed an application with the state for a permit to appropriate water in an amount of 50 gallons per minute from a well, for municipal and domestic purposes for an estimated 300 people. On December 17, 1970, the state granted a permit to use 30 gallons per minute. On July 29, 1970, Bel Bay filed another application for a permit to appropriate 50 gallons per minute from another well.

The Government contends that the waters within the reservation were reserved for the purposes of the reservation and that Washington State had no authority to grant permits to appropriate ground waters from within the exterior boundaries of the Lummi Reservation—alleging also that jurisdiction to regulate water use resided solely in the Lummi Tribe and the trustee United States.

The Government also contends that if water pumped from the first well is allowed at its present rate, salt water intrusions from Bellingham Bay will pollute and destroy ground water deposits which are the tribe's sole source of domestic water supply.

Washington alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations concerning the danger of salt water intrusions and of the allegations concerning source of supply of domestic water supply. It merely asserts its jurisdiction to issue permits for the appropriation of water surplus to Indian needs.[35]

### CONFUSION BETWEEN INDIAN RIGHTS AND FEDERAL RIGHTS

This portion of the consideration will focus on the conflicts stemming from the Indian rights and federal rights as to the differences in policy in the establishment of Indian reservations and the policy of encouraging settlement of public lands of the United States. Public lands, of course, are unqualifiedly open for sale and disposition. See, for instance, *Federal Power Commission* v. *State of Oregon*, 349 U.S. 435, 75 S. Ct. 832, 99 L.Ed 1215. (1955). It was the policy of the U.S. Government to encourage settlement of its lands and to create family-sized farms with little or no regard for Indian rights to the use of water, With

[35] The state of Washington has no legal basis for assessing or advancing the concept respecting its position other than an obscure opinion rendered by the Superior Court for Snohomish County, Washington State, on February 7, 1963, in *Tulalip Tribe* v. *Walker*. The decision merely states that the State had authority to administer water rights which were surplus to Indian needs since these waters were, in effect, public waters. The State made no attempt to find out the needs of the tribe when permits were issued to non-Indians, subject, of course, to then existing rights.

the encouragement, or at least, the cooperation of the Secretary of the Interior, the principal agent of the trustee United States charged with protecting Indian rights and natural resources, many large irrigation projects were constructed on streams that flowed through or bordered Indian reservations. With few exceptions, these projects were planned and built by the Federal Government without any attempt to define, let alone protect, the prior and paramount rights of the Indians, thereby creating the following dilemma: The future development of Indian water rights on streams fully appropriated would have a significant impact on uses initiated under state law and federal law—and the existence of these Indian rights on streams not yet fully appropriated would make determination of legally available supply difficult and thus prevent satisfactory future planning and development. To meet the need for certainty for effective planning and development was the purpose and intent of the McCarran Act. As to inventorying Indian rights, however, it is safe to assume that major disagreements will arise between the Indian and non-Indian claimants over priority dates, measure of need, and indeed, which forum to use to settle the actual and potential disputes. Prior to decision in *Colorado River Water Conservation District* v. *United States*, 96 S. Ct 1236 (March 24, 1976), and *Mary Akin* v. *United States*, 96 S. Ct 1236 (March 24, 1976), it wasn't clear whether Indian tribes should be sued in state courts for adjudication of their water rights.

The issue of jurisdiction turned upon interpretation of the McCarran Water Rights Suit Act of July 10, 1952, 62 Stat. 549, 43 U.S.C. 666, which gave consent to state jurisdiction concurrent with federal jurisdiction over controversies involving federal water rights—did this statute impliedly embrace Indian water rights? The only Supreme Court cases construing the McCarran Amendment were *United States* v. *District Court of Eagle County* (The Eagle River Case), 401 U.S. 501 (1971), and *United States* v. *Water Diversion No. 5*, 401 U.S. 527 (1971). The Indians, through their attorneys, experts, and national organizations, were quite vehement in expressing their fears to Justice and Interior Departments that these cases, if decided in favor of the state of Colorado, would subject tribes to suit in state courts without tribal consent and thus jeopardize their invaluable Winters Doctrine Rights. Nevertheless, Justice's brief to the Supreme Court said nothing about Indian water rights except by way of a footnote: "We are not aware of any Indian water rights directly involved in this litigation." The Eagle River cases were argued March 2, 1971, and decided March 24, 1971—an almost unheard of event unless a case had attracted national attention or unless things were pretty much well decided beforehand. In either case, the tribes had no opportunity to participate and to let their positions be known. And five years later, the Supreme Court held that the amendment includes consent to determine in state court reserved water rights held on behalf of Indians and that the exercise of state jurisdiction does not imperil those rights or breach the solemn obligation of the Government to protect the Indians' rights.

Mel Tonasket, President of the National Congress of the American Indians appeared before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary of the United States Senate, and his statements on the *Akin* Decision puts the history of that litigation in its proper perspective. For obvious reasons, his statement is included in its entirety as part of this report.

## Statement of Mel Tonasket, President of the National Congress of American Indians

### SUMMARY

The National Congress of American Indians petitions the Congress to amend the McCarran Act (43 U.S.C. 666) to restore to the American Indians their immunity from state jurisdiction, control, and administration of Indian *Winters Doctrine* rights to the use of water. By the March 24, 1976 opinion of the Supreme Court in the *Akin* case, the Western Indian Nations, Tribes, and people, their reservations and their survival are subject to the mercy of state jurisdiction, laws, and courts. Since the turn of the century, no greater catastrophe than the *Akin* decision has occurred to Indian people.

The results of that decision were foreseen five years ago when the *Eagle River* decision subjecting federal rights to state jurisdiction was rendered. Every effort was made by the National Congress of American Indians and the Indian communities in general to avoid the consequences of the *Eagle* decision which foreshadowed the *Akin* decision. However, the Department of Justice and the Department of the Interior, due to their inherent conflicts of interest, have refused to distinguish between the Indian *Waters* rights to the use of water and the federal rights for reclamation projects, national parks, and services. At the time of the *Eagle River* decision, the outcome was predictable. However, the Justice Department refused to change its position. Now the Justice Department, by its course of conduct, has again placed the Indians in a most precarious position.

Congress alone, by amending the McCarran Act, can exempt Indian Winters rights to the use of water from state jurisdiction. A different course will mark the end of the Indian reservations in Western United States.



I am Mel Tonasket and I am President of the National Congress of American Indians. I wish to thank this Committee for holding this very important hearing and for permitting me to appear before it.

Congress is being requested to preserve the American Indians of Western United States by amending the so-called McCarran Act and to restore to Indian Nations, Tribes, and people their immunity from proceedings in state courts to adjudicate their invaluable *Winters Doctrine* rights to the use of water.[1] Congress alone can preserve the Western Indians from the single greatest disaster they have experienced since before 1900.

I wish to make a part of this record a copy of my letter dated March 26, 1976, addressed to Senator Abourezk, a member of this Subcommittee and Chairman of the Senate Subcommittee on Indian Affairs. Attached to my letter to Senator Abourezk is a simple amendment to the McCarran Act (43 U.S.C. 666). I know of no legislation more vital to the American Indians. In Western United States, the immunity of Indian *Winters Doctrine* rights to the use of water from state law, state courts, state tribunals, state agencies, and state administrators and agents is a matter of survival—a matter of life or death for Western Reservations, particularly in the arid and semi-arid regions.

I do not purport to be able to understand what goes on in the minds of the bureaucracies in the Interior and Justice Department which control the lives and properties of Indian people. But I can tell you this: those bureaucracies knew or most assuredly should have known that the course of conduct they followed in the *Akin Cases* would result in subjugating the invaluable Indian *Winters Doctrine* rights to the use of water to state control, state seizure, and ultimately state destruction of Indian reservations in Western United States.

### *The* Akin *Decision,*[2] *a Product of Conflicts of Interest in the Justice and Interior Departments*

It is elemental that the Solicitor of the Department of the Interior is assigned by Congress to perform "The legal work for the Department of the Interior * * *" His primary task is to be the lawyer for the Secretary of the Interior. Equally clear is the fact that the Attorney General of the United States is the lawyer for the Secretary of the Interior before the Supreme Court and the lesser courts. As the lawyer for the Secretary of the Interior, both the Solicitor and the Attorney General have disparate and contradictory obligations and responsibilities between the non-Indian agencies of the Interior Department and the American Indian people who are subjected to the control of the Secretary of the Interior.

As previously stated, the Justice Department is primarily the lawyer for the Secretary of the Interior and the lawyer for the American Indians only as a subsidiary interest among the many interests of the Secretary. Thus, the "disparate and contradictory" obligations of the Secretary of the Interior with those of the Indians is frequently manifested. The conflicts between the Secretary and the Indians is all-pervasive in many areas. That conflict is manifested most often in regard to the Indians' *Winters* rights to the use of water and the claims of the Interior on behalf of the Bureau of Reclamation and other non-Indian agencies.

The conflicts between the Secretary of the Interior and the Indians over the use and control of the Indian *Winters* rights is not limited to conflicts among

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[1] The Indian Winters Doctrine rights to the use of water entitles the Indians to sufficient water from water resources on their reservations to meet their present and future water requirements. *Winters* v. *United States*, 207 U.S. 564 (1908).

[2] Decided by the Supreme Court of the United States March 24, 1976, *Colorado River Water Conservation District et al.* v. *United States; Mary Akin, et al.* v. *United States*, Nos. 74–940 and 74–949, October Term 1975.

Indians and non-Indian agencies within the Interior Department. Rather, it extends to the authority of the Indians to manage and to control their own rights to the use of water on their reservations. The attorneys for the Interior and Justice Departments are saying that Indian *Winters* rights to the use of water are identical with and cannot be separated from the federal rights to the use of water. Thus, in the *Eagle River* case, the *Akin* case, and now in the *Walton* case, on my own reservation, the Justice Department is refusing to distinguish between Indian rights held in trust for the Indians and non-federal rights administered for non-Indian purposes and projects.

The Colville Confederated Tribes declare in the *Walton* cases that their Indian *Winters* rights to the use of water are their own property rights. The Colvilles deny that the Secretary of the Interior has the power to seize their Indian Winters rights to the use of water, to control those rights, to administer those rights, or to allocate the waters to which the Colvilles are entitled to in the exercise of those rights. What is happening on the Colville Indian Reservation is happening throughout Indian country.

May I respectfully emphasize: severe losses are now and have been experienced due to the refusal of the Department of Justice and the Department of the Interior to distinguish administratively and before the courts the non-federal rights and the Indian *Winters* Doctrine rights to the use of water.

*The* Eagle River *Decision: "A Preface to Disaster for the American Indian People"* [3]

On March 24, 1971, five years to the day prior to the *Akin* decision, the Supreme Court rendered the *Eagle River* decision. What some call the infamous history of the *Eagle River* decision warrants comment. Briefly, here is what happened in that case. The United States owns the White River National Forest in the State of Colorado. A portion of that national forest is within the drainage system of the Eagle River, a tributary of the Colorado River. There was an on-going state water adjudication in Water District No. 37. Pursuant to the state law of Colorado, a "supplemental" water proceeding was being held in the District Court of Eagle County. As required by state law, service of notice of that supplemental state court proceeding was made upon the Justice Department in accordance with the McCarran Act.

I am advised—and in legal circles it is well known—that the laws and the decisions of the State of Colorado are strictly predicated upon state's rights—anti-federal and anti-Indian. From the moment the State of Colorado was admitted into the Union up to the present time, that State, under its Constitution, has asserted ownership of all the waters within is jurisdiction; has denied the federal claims. May I emphasize: In the court in which it was most likely to fail, the Justice Department asked to have the McCarran Act construed against the State. I do not know if a bureaucracy can have a death wish, but the Justice Department seems pointed in that direction, particularly when Indians are involved. It must be remembered that on repeated occasions the test of the application of the McCarran Act had been successfully avoided in both the Supreme Court and in the lower courts. It necessarily follows, therefore, when the Justice Department willingly invoked the jurisdiction of Colorado's Supreme Court to construe that act, the conduct of the Justice Department now and forever must be viewed with suspicion.

Having placed itself before the Supreme Court of Colorado, the Justice Department adopted the course of co-mingling, without differentiation, the Indian and non-Indian decisions. Justice pursued that dangerous course to support what it called "the reserved rights" of the United States. Indian rights, Justice insisted, are "federal rights." It is not surprising that the Colorado Court discussed the federal and Indian rights as identical in character.

Moreover, before the Supreme Court, the Justice Department relied heavily on the predominantly Indian decision of *Arizona* v. *California* to support the non-Indian federal claims for the Forest Service. It was not unreasonable, therefore, that the Supreme Court of the State of Colorado, in light of the presentation to it by the Justice Department, did not distinguish between Indian Winters rights to the use of water and federal non-Indian rights to the use of water.

Under the circumstances, the Supreme Court of Colorado did exactly what the Justice Department knew, or should have known, that it would do—it said the United States, by the McCarran Act, waived its immunity from suit in water

[3] "Conflicts of Interests in Proceedings Before the Supreme Court of the United States—A Preface to Disaster for the American Indian People," by William H. Veeder.



litigation, declaring: "We are holding here that whatever rights the United States has to water can be recognized and adjudicated by our district courts just as adequately as in any other forum—and perhaps more adequately." [4]

When the Indian community was informed of the *Eagle* decision and the assured impact it would have upon the Indian *Winters* rights, it began immediate action to force the Justice Department to refrain from mingling Indian Winters decisions with non-Indian decisions. The Fort Mojave Indian Tribe and the Agua Caliente Tribe, acting through their lawyer Raymond Simpson, wrote to the then Solicitor General. Mr. Simpson, in his letter dated November 20, 1970, detailed the threat of the Colorado decision to Indians in general and to the Fort Mojave Tribe in particular. Emphasis was placed upon the fact that the Fort Mojave Reservation is downstream from the Eagle River and claims rights in it.

The National Congress of American Indians, through Wilkinson, Cragun and Barker, by a letter dated December 22, 1970, joined Ray Simpson in emphasizing to the Justice Department the threat to the Western Indians by reason of the *Eagle River* decision. Louis A. Bruce, then Commissioner of the Bureau of Indian Affairs, and Leon F. Cook, then Acting Director, Economic Development of the Bureau of Indian Affairs and former president of the National Congress of American Indians, joined the Indian Tribes in advising the Department of Justice of the threat of the *Eagle River* decision. Pursuant to the direction of Commissioner Bruce and Leon Cook, there was prepared the above-mentioned analysis of the Colorado Court's *Eagle River* decision and the threat to the American Indians. That analysis is entitled: "Conflicts of Interest in Proceedings Before the Supreme Court—A Preface to Disaster for the American Indian People."

It is now history that the Justice Department filed briefs with the Supreme Court which repeated and emphasized the misconception of the Justice Department that Indian *Winters* rights are identical with federal reserved rights. That was in clear violation of promises made to the Tribes that "* * * the government intends to make the Supreme Court fully aware of its obligation as trustee of Indian rights in this matter, and of any bearing that the decision may have on those rights." [5]

In contrast to its commitments to distinguish the Indian *Winters* rights from the non-Indian federal rights; the Justice Department adhered to precisely the same approach to this Nation's Highest Court—it relied on Indian decisions to support what it referred to as the "reserved" rights of the United States: "Reserved rights have not been defined by this Court as the entitlement of the United States [not the Indians] to use as much water from sources on lands withdrawn from the public domain as is necessary to fulfill the purposes for which the lands were withdrawn * * * *Arizona* v. *California*." [6] In its summary of argument set forth in its brief to the Supreme Court in *Eagle River*, the Department of Justice said this: "That the United States had reserved water rights based on withdrawals from the public domain is well estabilshed. * * * *Arizona* v. *California*, 373 U.S. 546, *Winters* v. *United States* 207 U.S. 564." Those Indian cases were relied upon to support a claim for strictly federal Forest Service rights. Moreover, it was *not* the United States which reserved the rights in *Winters*—it was the Indians who, by their Treaty and Agreements, reserved the rights—not from the public domain but from their own aboriginal water sources.

Commitments made to the Indian people and violated are nothing new. Seldom, however, has such bad faith in the Justice Department respecting Indian people been more carefully documented and proved. The consequences of that bad faith by the Justice Department are clearly apparent in the words of the Supreme Court of the United States reflecting the failure of the Justice Department to separate the Indian and non-Indian rights in the *Eagle River* case: "It is clear from our cases that the United States often has reserved water rights based on withdrawals from the public domain. As we said in *Arizona* v. *California*, 373 U.S. 546, the Federal Government had the authority both before and after a state is admitted into the Union 'to reserve waters for the use and benefit of federally reserved lands.' Id., at 597. The federally reserved lands include any

[4] *United States of America, Petitioner* v. *The District Court in and for the County of Eagle*, 164 Colo. 555; 458 P2d, 760, 773 (1969).

[5] Letter dated November 6, 1970 to the Chairman of the Fort Mojave Tribe from the Solicitor General.

[6] Petition of the United States for a Writ of Certiorari to the Supreme Court of Colorado—*Eagle River Decision.*

federal enclave. In *Arizona* v. *California* we were primarily concerned with Indian reservations. Id., at 598–601." [7]

Immediately upon the release of the *Eagle River* decision, the Fort Mojave Tribe, in a final struggle to protect Indian people against the consequences of that decision, requested an opportunity to be heard. That petition was denied by the Supreme Court.[8]

Whether the Justice Department invited the catastrophe of *Eagle River* which foreshadowed *Akin*, does not matter. What does matter is that we are confronted with easily predictable consequences of the conduct of the Justice Department and the grave necessity for Congress to restore to the Indians their immunity from suit in water litigation.

*By Their Treaty of 1868, the Ute Indians Reserved Their* Winters *Rights to the Use of Water—They Are Not Federal Rights*

Of great importance is the fact that the Supreme Court and the Court of Appeals of the Ninth Circuit have held that: It is the Indians, having Treaties, who reserved to themselves their Indian *Winters* Doctrine rights to the use of water. Those Courts have declared that the Indian Treaties retained those rights for the Indians and that the rights were not derived from the Federal Government. Thus, it is that the Ute Indians, whose rights were involved in the *Akin* decision, retained for themselves those rights by the Treaty of March 2, 1868.[9]

Throughout the Akin brief, the Department of Justice failed to make that distinction. Rather than making that all-important differentiation, the Justice Department reiterated its errors in Eagle River and, on page 56 of the *Akin* brief, said this: "As recognized in *Arizona* v. *California* supra, 373 U.S. at 601, the principles of reserved rights doctrine are the same whether Indian or non-Indian federal claims are involved."

It was an imperative necessity for all Western Indians that the Justice Department specifically declare that the Indians, by their treaties, retained their water rights—that those rights were not granted by the United States to the Indians. Yet, as stated, the Justice Department co-mingled the Treaty rights of the Indians with the Forest Service rights and the consequences resulted in the *Akin* decision.

In these terms, the Supreme Court in the *Akin* case adopted the Justice Department rationale. Having referred to the *Eagle River* decision, the Court declared that the McCarran Act subjected "federal reserved rights" to state courts and added: "More specifically, the Court held that reserved rights were included in those rights where the United States was 'otherwise' the owner. *United States* v. *District Court for Eagle County, supra,* at 524. Though *Eagle County and Water Division No. 5* did not involve reserved rights on Indian reservations, viewing the Government's trusteeship of Indian rights as ownership, the logic of those cases clearly extends to such rights. Indeed, *Eagle County* spoke of non-Indian rights and Indian rights without any suggestion that there was a distinction between them for purposes of the amendment. Id., at 523." [10]

*As Construed in* Akin, *the McCarran Act Subjects Western Indian Reservations to State Control (It Must Be Amended)*

Congress is fully cognizant of the historic and presently on-going conflicts among the American Indians and the states. It is equally cognizant that to place the Indian *Winters* rights to the use of water under the control and the administration of state laws, jurisdiction, and administration is to place the Indian lives and property under state control. Yet, that is precisely the result of the *Akin* decision. It totally subjugates Indian rights to the use of water to the will of the state agencies. One of the strangest episodes ever seen in the law arises under the *Akin* decision. The states do not and cannot control Indian lands. Yet the *Akin* decision places under state control the Indian *Winters* rights without which the lands are, in the terms of the *Winters* and *Arizona* v. *California* decisions, without value; are uninhabitable. The states, by controlling Indian water, will control the Indian Reservations and the very lives of the Indians.

An analysis of the *Akin* decision and the brief of the Justice Department in

[7] *United States* v. *District Court for Eagle County*, 401 U.S. 520, 522, 523 (1971).
[8] *United States* v. *District Court for Eagle County* 402 U.S. 940, (1971).
[9] See *Winters* v. *United States*, 207 U.S. 564 (1908); *United States* v. *Ahtanum Irrigation District*, 236 F.2d 321, 326 (C.A. 9, 1956).
[10] *Colorado River Water Conservation District, et al* v. *United States* — U.S. —, 96 S. Ct., 1236 March 24, 1976) slip opinion pages 8 and 9, March 24, 1976.



that case, simply fail to recognize the power exercised by the state agencies which control the waters within their jurisdiction. Ignored completely is the fact that to administer the use of water on an Indian reservation entails an outright state invasion of every Indian reservation in western United States by state agencies which are now and have always been hostile to Indians and have sought to denegrate the Indian *Winters* rights.

Again, I must refer to the Department of Interior's conflicts of interest. Alliances have always existed between the Bureau of Reclamation and the states. Section 8 of the Reclamation Act provides, in effect, for close cooperation between the Bureau of Reclamation and the states. In the conflicts between the Indians in the San Juan River Basin, the Bureau of Reclamation is solidly aligned with the states against the San Juan River Indians.

On the Rio Grande, the Colorado, the Columbia, and the Missouri Rivers, the states and the Bureau of Reclamation work most closely. So, once again, there is repeated the conflict of interest which brought about the *Eagle* and *Akin* decisions.

*The McCarran Act as Construed in* Akin *Is Violative of This Nation's Trust Responsibility*

I am advised that the Congress cannot, under the Constitution, delegate its trust responsibility owing to the American Indians in regard to their *Winters* rights or otherwise. Yet, that is precisely how the Supreme Court has construed the *Akin* case.

If the *Akin* decision is permitted to stand, full power and control over the administration and distribution of the waters to which the Indians are legally entitled would be vested in the office of the state engineer. It would be that officer—not the federal officials—who will control the Indian water rights. Under those circumstances, it is respectfully submitted that Congress cannot fulfill its trust obligation. Only by amending the McCarran Act (as it is construed by the Supreme Court) can it protect the Indians' rights. Only by restoring to the Indians their immunity from state jurisdiction respecting their invaluable *Winters* rights to the use of water can true protection of the Indian Reservations be achieved.

On behalf of the National Congress of American Indians and all American Indians, I petition the Congress to act now before it is too late and to stop the threat of Indian destruction by the state invasion of our reservations. The simple amendment to the McCarran Act which is attached will, if it is enacted, preserve the Western Indian People from the threat of the *Akin* decision.

CONGRESS OF AMERICAN INDIANS,
*Washington, D.C., March 26, 1976.*

Senator JAMES ABOUREZK,
*Chairman, Senate Indian Affairs Subcommittee,*
*Washington, D.C.*

DEAR SENATOR ABOUREZK: On March 24, 1976, the Supreme Court rendered its opinion in the *Akin* case, which is entitled *Colorado River Water, Conservation District, et al.* v. *United States; Mary Akin, et al.* v. *United Stated*. A copy of that Opinion is attached.

Consequences of the *Akin* decision can be catastrophic to Indian nations, tribes and people. It construes the so-called McCarran Act (43 U.S.C. 666) as being applicable to Indian rights to the use of water and subjects those rights to state court jurisdiction for the adjudication of them. Tenuous nature of the decision and the extent to which the Court had to strain to arrive at its conclusion is attested to by sharp and cogent dissents of three Justices. Yet, the cruel fact remains, the Indians for the first time in history are confronted with losing their *Winters Doctrine* rights in state courts. Practical experience in those courts has repeatedly demonstrated that the Indians invariably lose in those courts.

Adding to the dilemma created by *Akin*, which the Indian people are facing, is the adamant refusal of the Justice Department to distinguish between Indian rights to the use of water and the rights for reclamation projects, national forests and similar non-Indian federal rights. That refusal by the Justice Department manifestly contributed to the *Akin* decision.

Another factor of great importance and equal seriousness to the Indian people is the ongoing internal struggle within the Department of the Interior between the Bureau of Reclamation and the Bureau of Indian Affairs over the method of determining water requirements for Indians, particularly in the Upper Basin of the Missouri River. Due to that internal and unresolved struggle, the Interior

Department and the Justice Department employees are not in a position to present effectively the Indian claims in a friendly tribunal, much less in hostile state courts.

Pending cases in the State of Montana involving the Crow Tribe and the Northern Cheyenne Tribe, *United States* v. *Big Horn Canal Company* and *United States* v. *Tongue River Water Users Association;* in the San Juan River Basin, *New Mexico* v. *United States;* in the Rio Grande, *United States* v. *Aamodt*, and other cases all point to irreparable and continuing damage for Indians throughout Western United States.

On that background, I cannot urge too strongly that you introduce an amendment to the McCarran Act exempting Indian rights from its application. A copy of suggested amendatory language is attached.

The National Congress of American Indians and all Indian nations, tribes and people will be forever grateful for your assistance in this matter.

Sincerely,

MEL TONASKET, *President.*

SUGGESTED AMENDATORY LANGUAGE,[1] M'CARRAN ACT (43 U.S.C. 666), ACT OF JULY 10, 1952, C. 651, TITLE II, SEC. 208 (A)–(C), 66 STAT. 560

> *Provided, however,* That this consent to the joinder of the United States as a defendant in suits or proceedings for the adjudication of rights to the use of water does not extend to or in any way include rights to or interest in the use of water of Indian nations, tribes or people, and those Indian rights to the use of water be and the same are specifically declared to be immune from state jurisdiction, control, administration or adjudication by states, state courts, state agencies, tribunals or administrative officers or state proceedings, any judicial decisions or opinions to the contrary notwithstanding.

Ample time for the tribes to express their fears to state administration of Indian water rights, subsequent to the Eagle River cases, came in 1973 through the National Water Commission hearings held throughout the country. The tribes opposed the Commission's suggestion that states could properly administer all federal water rights, including Indian water rights. At a 1973 hearing in Spokane, Washington, NCAI President Mel Tonasket commented to the Commission Chairman.

"Mr. Luce, as an attorney for the Umatilla Indians, you should know by now what all Indians know—that Indian tribes have never gotten anything but racist double-dealing from the states—(which do not) recognize tribes (as sovereigns), nor their (inherent) right to reservation self-government."

Philip Roy, a member of the Blackfeet tribe and also a tribal attorney, had this to say: "It is not because Indian people are separate itself. It is because they do not want to deteriorate the federal trust to the federal government." (It was that very same relationship which was being severed during the termination period, and one piece of terminationist legislation was P.L. 83–280 which conferred on certain named states authority to assume jurisdiction for civil and criminal matters on Indian reservations, but which also contained this provision: that nothing in this bill "shall confer jurisdiction upon the state to adjudicate in probate proceedings or otherwise, the ownership or right to possession of any real or personal property, including water rights, belonging to any Indian or Indian tribe . . . that is held in trust by the United States.")

Hilary Skannon, then chairman of the Coeur D'Alene tribe, stated that the Commission's draft recommendation "suggests solutions which are not acceptable to Indians. An example of one of these studies is the Interim State Water Plan for the State of Idaho. Mr. Keith Higginson is the director of the Department of Water for the State of Idaho. He is very knowledgeable about Indian water rights, but the report which was put out by his office, and which is 264 pages long, contains less than one page of its discussion on Indian water rights."

Dennis Karnoff, Warm Springs tribal attorney, had this to say as to some consequences of state court adjudication of tribal water rights:

"The Warm Springs tribe water rights arose from a treaty of negotiation, rather than a treaty of conquestion, between two sovereign nations, and we feel it is the solemn obligation of the United States to carry out and protect those rights. It is not a question of state procedural law. We don't think the Indian water rights would be afforded the proper priority and recognition under state law, and we also fear that they would in some ways be subject to state subsidy law.

"I notice that the report suggests that it is only procedural law and not substantive law, but in Oregon, as in most of the Western states I am aware of, we have a provision for cancellaion of a water permit for non-use for a period of five years.

"If an Indian water permit is filed having a priority dating back to 1855, and there would be a non-use, we believe the state would try to cancel that right pursuant to that. We are not sure, based on this proposal, whether that would be permissible by the state or not.

"We don't think it is permissible, and we don't think that the Indians' water rights should be subject to that type of thing.

"But, conceivably, these procedural rights affect the substance of the water right to a very great extent. Simply, we object to the extension of the state courts' jurisdiction over Indian water rights. We don't think the state courts have been the tribunals that have protected Indian rights . . . but the federal courts have done that."

The National Water Commission, after hearing testimony of the Indians and others as to the devastating impact of state administration and regulation of Indian water rights, concluded in its final report, Chapter 14, Recommendation No. 14–4:

"Jurisdiction of all actions affecting Indian water rights should be in the U.S. District Court for the district or districts in which lie the Indian reservations and the water body to be adjudicated. Indian tribes may initiate such actions and the United States and affected Indian tribes may be joined as parties in any such action. The jurisdiction of the Federal district court in such actions shall be exclusive, except where Article III of the Constitution grants jurisdiction to the U.S. Supreme Court. In such actions, the United States should represent the Indian tribes whose water rights are in issue, unless the tribe itself becomes a party to the action and requests permission to represent itself. Any state in which the reservation lies and any state having water users that might be affected in an Indian water rights adjudication may initiate an adjudication and may intervene in an adjudication commenced by others, including adjudications initiated by the United States, and by Indian tribes. Upon such appearance by the State, the State may move to represent its non-Indian water users *parens patrie*, and the motion should be granted except to non-Indian water users as to whom the state has a conflict of interest."

FEDERAL-TRIBAL CONFLICTS

Compounding state-tribal conflicts over water rights is the fact that there are virtually no major interstate stream systems, and few, if any, tributaries of main streams, where there are not any agencies of the Interior Department competing with the Indians for a supply of water inadequate to meet present and future demands.

Because of the magnitude of its projects, the Bureau of Reclamation is the chief competitor with the Indians for the scarce supply of water. Other Interior agencies such as Fish and Wild Life, Recreation, National Parks and Bureau of Land Management all participate in the development undertaken on stream systems by the Bureau of Reclamation. In their efforts to protect what remains of their heritage in the streams of the western states, tribes are confronted with a coalescence of forces far beyond the control of those who are charged with the legal responsibilities for protecting their interests—representatives from the Interior Solicitor's office find themselves becoming victims of a system ill-suited to protect, much less advocate the Indian interests. The confrontation of the agencies and tribes for water frequently gives rise to far-reaching and disastrous results to the Indians. Although charged with the obligation of prosecuting suits to protect and to have Indian rights declared, the Justice Department is confronted with conflicts just as severe if not more so than those faced by Interior. Justice is also charged with the obligation of representing the United States when Indians seek restitution for seizure of their rights by other agencies of the government. When Indian rights to the use of water are being adjudicated on streams upon which the Bureau of Reclamation is likewise asserting claims, Justice Department attorneys become engaged in preparing to defend against claims asserted by the Indians, while, at the same time, another group of attorneys in the same division is preparing to try suits to protect those same Indian

[1] Authorized, National Congress of American Indians Executive Committee Resolution, March 26, 1976.

rights. A good case in point was the struggle of the Yakima Tribe and the BIA to protect and preserve the rights of the Indians in Ahtanum Creek—which constituted the northern boundary of their reservation. The Indian and non-Indian lands on both sides of the stream were irrigated by it. Conflict developed between the two in the early 1900's. In 1906, the Bureau of Reclamation undertook the construction of the Yakima Reclamation Project. Ahtanum Creek is a tributary of the Yakima River from which the project was to receive its supply. The conflict between the Indians and the non-Indians concerned the Bureau that it might interfere with the project, chief among its concerns being which law was to apply to settle the dispute—Reclamation wanted to rely on the appropriative rights doctrine, while the Indian Service preferred the riparian rights—the *Winters* Doctrine as enunciated two years later, added to the difficulty—and under these pressures, the Secretary of the Interior entered into an agreement on May 8, 1908, which purportedly gave the non-Indians 75% of the waters of Ahtanum Creek and retained 25% for the Indians. Years passed before the Indians were informed of the agreement. Justice refused to act to recover the Yakimas' rights; and it resisted efforts to convince them to act and to protect the Indians for almost 60 years until the Yakimas were finally successful in getting the agreement overturned and were able to recover their rights.

A recent event which affects the New Mexico and Arizona tribes was the passage of the San Juan-Chama Reclamation Project, 76 Stat. 102, 43 U.S.C. 602a, said passage being the result of almost thirty years of planning and effort.

The first reclamation project in New Mexico, the Rio Grande Project, defined the basic conflict involved with every subsequent reclamation project—providing water for the incoming developers who anticipated the growth of the area through immigration, as opposed to protecting those prior and paramount rights which had been established before New Mexico was a part of the United States. Those prior and paramount rights which were unquestionably established prior to New Mexico's admission into the Union are those of the Indian tribes of the Southwest.

The San Juan-Chama project would enable New Mexico to use a major portion of the waters of the San Juan River in the Upper Colorado River Basin to which it was "entitled" under the earlier Colorado River and Upper Colorado River Basin Compacts—transporting water from the San Juan River across the Continental Divide to the Chama River on the Rio Grande Basin.

In a discussion of the need for this project, the Legislative History repeats the theme of earlier reports—a critical shortage of water: "The water needs of the Rio Grande Basin far exceed the amounts of water available, either in the basin or for the diversion from the San Juan Basin... The economic plight of the small communities in streams (including the Pueblo Indians) in the northern part of the Rio Grande Basin has long been recognized as a major problem of the State . . . Farther south, along the Rio Grande, the available water supply is over-committed and there is a critical need for supplemental water in order to stabilize the agricultural economy . . . The need for municipal and industrial water . . . is even more critical than the need for irrigation water. Albuquerque is one of the fastest growing cities in the United States . . . An assured water supply is essential . . . for the anticipated growth of Albuquerque."

A companion project, the Navajo Irrigation Project, anticipates a large diversion from the San Juan system to meet demands of the Four Corners area. While the primary purpose of the Navajo Project is irrigation, the "project is adapted to serve municipal and industrial water users as well as . . . irrigation. The officials of the State of New Mexico anticipated a relatively large municipal and industrial water demand will develop in the San Juan River Basin."

Water from the San Juan, necessary for the development of the Jicarilla Apache and Navajo tribal lands and economy, would thus be diverted to the Rio Grande Basin. The tribes on the lower Colorado River are also interested parties since the waters diverted from the San Juan would affect the downstream flow and threaten their supply.

In 1966, the State of New Mexico instituted one of five suits in the United States District Court of New Mexico, against the United States, four Pueblo tribes, and hundred more, for determination of the water rights of the defendants in the "Nambe-Pojoaque River System," a tributary of the Rio Grande. The purpose of the suit was to facilitate the administration of the San Juan-Chama reclamation project which was under construtcion.

The New Mexico complaint alleged that the users of the water in the "Nambe-Pojoaque River System," including the Pueblo tribes, used the water under New



Mexico appropriation law. The complaint asked that the court define and determine the water rights of each defendant.

The United States filed a motion to dismiss the action for lack of jurisdiction and then entered a motion to intervene in the suits.

In the motion to intervene, the United States claimed *Winters* Doctrine Rights to the use of water for the Pueblo Tribes to "satisfy the maximum needs and purposes of said Pueblos." But, in a Pre-Trial Memorandum, the United States claimed, as an alternative theory, rights for the Pueblo tribes based on appropriations and beneficial use. This theory would replace the Pueblo water rights and put them on the same basis as the rights of the non-Indian water users.

Several months later, two Pueblo tribes, downstream from the abovementioned tribes, filed a Petition to Intervene in the five suits instituted, on the grounds that their rights were not being protected by the United States in regard to the initial suits, since those suits affected waters from the upstream tributaries that fed the mainstream of the Rio Grande—it traverses the San Felipe and Santo Domingo Pueblos and the main stream and the ground waters thereof comprise the sole source of water to make the semiarid lands of the two Pueblos habitable. The Chama River in which both the San Felipe and Santo Domingo Pueblos own rights to the use of water, yields approximately one-third of the entire natural flow of the Rio Grande. Very substantial but unknown quantities of water, both surface and ground water, enter the Rio Grande from the Santa Cruz, Pojoaque Creek, Rio de Taos, and other streams involved in the multiple actions, and those waters are essential to the San Felipe and Santo Domingo Pueblos.

At a July 20, 1970 hearing on the multiple cases, the Justice Department filed a brief in opposition to the Petitions of the San Felipe and Santo Domingo Pueblos to intervene. In that brief are admissions that the stated objectives of the multiple actions on the Chama River and other tributaries is to have the waters of those tributaries "to which others may be entitled" including the Pueblos, adjudicated for use "within the tributary areas." The brief continues: "Storage facilities will be built (as part of the project) for the impounding and storage of local waters of the Nambe-Pojoaque, Santa Cruz, and Rio de Taos watersheds. This will make more water available during the irrigation season. The storage of water will also reduce the amount of water flowing from the tributaries into the Rio Grande."

Violation of the natural flow rights of the San Felipe and Santo Domingo Pueblos in the source of their water—the tributaries of the Rio Grande, is thus admitted. Violations of the trust responsibility of the United States owing to the Pueblos is thus indisputable.

By building the San Juan-Chama project, foreign water will be brought into the Rio Grande for non-Indian uses with the attendant conflicts inherent in a project of that nature. Further aiding and abetting that crisis is the trustee United States' failure to know or to have the means of knowing the nature, extent, and measure of the Pueblo Indian rights in the main stream of the Rio Grande.

Throughout this phase of the consideration, characteristic examples of the problem, which is widespread throughout the country, have been selected and reviewed to demonstrate the difficulties in protecting and preserving Indian *Winters* Doctrine Rights. The United States Government has made many statements about the protection of tribal land and water rights. Yet through the years, Indian tribes have witnessed a steady deterioration of their land and water resources, both in quality and quantity. They have seen the United States Government give its overt approval to assure the success of special interest groups which are taking away the very resources upon which tribal existence depends. In spite of numerous statements and admissions through the years to the effect that future growth could be accomplished only by bypassing the protection of Indian water rights, the United States has refrained from giving that protection.

Fundamentally, there is a formidable body of law quite favorable to the Indians, but the difficulties stem from the corruption of the federal agents of the United States in administering that law.

While recognizing that the Indians have a unique relationship with the Government and that their land and water rights were to be protected, the Government developed huge schemes to develop resources and use water for large non-Indian projects without first determining the origin, nature, and extent of the tribal land and water rights. Without water in the arid and semiarid regions, any program of development on Indian reservations must fail. It follows that if

Indian tribes are to survive and grow, the United States Government should exert its full effort to protect these tribal land and water rights. In light of the preceding review, there is a grave doubt as to whether the trust responsibility owing to the Indians in regard to development of their reservations can be fulfilled by the Nation under existing laws, policies, practices and procedures.

FINDINGS AND RECOMMENDATIONS

1. That the present method utilized by Congress in providing for irrigation development through the Bureau of Reclamation is destructive to Indian *Winters* Doctrine Rights and denigrates tribal sovereignty.

*Recommendation:* that Congress utilize existing funding approaches for Indian irrigation projects that would put the basic authority for administering these projects in tribal hands—Public Law 93–638 could be this mechanism since that Act provides a means for tribes to use the "Intergovernmental Personnel Act" to allow them to acquire from governmental agencies the technical expertise necessary to carry out these projects. This could provide the tribes with the engineering and capability of the Bureau of Reclamation without that agency's historical anti-Inidan bias.

2. That events leading to the Supreme Court's decision in the *Akin Case* caused the Court to misconstrue 43 U.S.C. 666 as embracing Indian water rights, whereas the legislative history of the Act indicates contrariwise or would not warrant such a conclusion.

If that decision is allowed to stand, Indians will be forced to litigate their water rights in hostile state tribunals—this may violate their sovereign immunity from suit. They will be forced to compete with the power and authority of state administrative systems that have consistently fought to gain control over Indian rights and would ultimately destroy the Winters Doctrine. Our hearings, together with other testimony presented before Congress and the National Water Commission amply illustrate the difficulties Indians would have receiving justice before state judicial bodies.

*Recommendation:* That Congress immediately amend 43 U.S.C. 666 to exclude any application of that law to Indians and their water rights.

3. That the corrupt administration and the conflicts of interest confronting the officials of the Justice and Interior Departments seriously impairs the effectiveness of the role of the United States as trustee for the Indians; that the confusion created by officials of the two departments between "ownership" and "trusteeship" of these rights will destroy the Indians' most valuable resource.

*Recommendation:* Responsibility for the protection of Indian water rights must be removed from the Department of the Interior and the Department of Justice and vested in a separate agency with full power to litigate or to take whatever other action necessary to effectuate the United States' responsibility as trustee over the Indian water rights.

# APPENDIX B

## INDIAN CHILD WELFARE STATISTICAL SURVEY, JULY 1976

### ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC.

The Association on American Indian Affairs (432 Park Avenue South, New York, New York 10016) is a private, non-profit, national citizens' organization supported by members and contributors. Founded in 1923, it assists American Indian and Alaska Native communities in their efforts to achieve full economic, social and civil equality, and to defend their rights. Policies and programs of the Association are formulated by a Board of Directors, the majority of whom are Indian and Alaska Native.

One of the special publications of the Association is "Indian Family Defense," a newsletter exclusively concerned with Indian child welfare issues.

## INTRODUCTION

This report presents the results of a nation-wide Indian child-welfare statistical survey done by the Association on American Indian Affairs (AAIA) at the request of the American Indian Policy Review Commission, an agency of the United States Congress, in July 1976.

The report indicates that Indian children are being removed from their families to be placed in adoptive care, foster care, special institutions, and federal boarding schools at rates far out of proportion to their percentage of the population.

The disparity in placement rates for Indian and non-Indian children is shocking and cries out for sweeping reform at all levels of government.

In Maine, Indian children are today placed in foster care at a per capita rate 19 times greater than that for non-Indian children. In Minnesota, an Indian child is 17 times more likely than a non-Indian child to be placed in foster care. In South Dakota per capita foster-care rate for Indians is 22 times the rate for non-Indians. The statistics from other states demonstrated that these rates are not uncommon elsewhere.

Most of the Indian children in foster care are placed with non-Indian families. In Maine, for example, 64 per cent of Indian foster children are living with non-Indian families. In New York approximately 97 per cent of Indian foster children are in non-Indian families, and in Utah 88 per cent of the Indian foster-care placements are with non-Indian families.

Indian children are also placed in adoptive homes at a rate far disproportionate to that for non-Indian children. In California, Indian children were adopted in 1975 at a per capita rate 8 times that for non-Indian children, and 93 per cent of such adoptions were made by non-Indian parents. In Montana, Indian children are adopted at a per capita rate almost 5 times that for non-Indian, and 87 per cent of such adoptions were made by non-Indians.

In states such as Alaska, Arizona, and New Mexico, which have large numbers of Indian children in boarding schools or boarding home programs, the rates at which Indian children are separated from their families indicate an even greater disproportion to the non-Indian rate. In New Mexico, when adoptive care, foster care, and federal boarding school placements are added together, Indian children are being separated from their families today at a per capita rate 74 times that for non-Indian children.

Nationwide, more than 29,000 Indian children (many as young as six years old) are placed in U.S. Bureau of Indian Affairs boarding schools. Enrollment in BIA boarding schools and dormitories is not based primarily on the educational needs of the children; it is chiefly a means of providing substitute care. The standards for taking children from their homes for boarding school placement are as vague and as arbitrary as are standards for Indian foster care placements.

The data base for the individual state reports consists of statistics supplied to the AAIA by responsible federal and state agencies. The statistics do not include many Indian children living outside their natural families for which there are no statistics, among them: (1) informal placements of Indian children that do not go through any legal process; (2) private boarding home programs which, in some western states, place thousands of Indian children away from their families for the entire school year; (3) Indian-to-Indian on-reservation placements which, while preferable to placements with non-Indian families off the reservation, are nevertheless an indication of family breakdown; and (4) Indian juveniles incarcerated in correctional institutions.

The state-wide figures presented here often mask important variations within a state. Those states for which the Association has been able to do county-by-county breakdowns of Indian foster care generally demonstrate a wide variation between communities. This indicates a need for greater precision in how child-welfare statistics are compiled and analyzed by the states and federal government.

The separation of Indian children from their families frequently occurs in situations where one or more of the following exist:

(1) the natural parent does not understand the nature of the documents or proceedings involved;

(2) neither the child nor the natural parents are represented by counsel or otherwise advised of their rights;

(3) the public officials involved are unfamiliar with, and often disdainful of, Indian culture and society;

(4) the conditions which led to the separation are not demonstrably harmful or are remediable or transitory in character; and

(5) responsible tribal authorities and Indian community agencies are not consulted about or even informed of the actions.

On August 27, 1976 Senator James Abourezk, Chairman of the U.S. Senate Subcommittee on Indian Affairs, introduced a bill drafted by the Association on American Indian Affairs and entitled the "Indian Child Welfare Act of 1976" (S. 3777). That bill, if enacted, would establish standards for the placement of Indian children in foster or adoptive homes, assure that Indian families will be accorded a full and fair hearing when child placement is at issue, establish a priority for Indian adoptive and foster families to care for Indian children, support Indian family development programs, and generally promote the stability and security of Indian family life.

INDIAN CHILDREN IN ADOPTIVE AND FOSTER CARE (SUMMARY)

| State | Indian and Alaska Native under 21 yr old | Adopted Indian children (estimate) | Per capita rate of Indians adopted non-Indians (percent) | Indian children in foster care | Per capita rate of Indians in foster care non-Indians (percent) | Indian children in adoptive and foster care combined (estimate) | Per capita rate of Indians in foster and adoptive care compared to non-Indians (percent) |
|---|---|---|---|---|---|---|---|
| Alaska | 28,334 | 957 | 460 | [1] 393 | [1] 300 | [1] [2] 3,777 | [1] [2] 1,110 |
| Arizona | 54,709 | 1,039 | 420 | [1] 558 | [1] 270 | [1] 1,597 | [1] 350 |
| California | 39,579 | 1,507 | 840 | 319 | 270 | 1,826 | 610 |
| Idaho | 3,808 | [3] | [4] 1,110 | 296 | 640 | [3] | [3] |
| Maine | 1,084 | [3] | [5] 100 | 82 | 1,910 | [3] | [3] |
| Michigan | 7,404 | 912 | 370 | 82 | 710 | 994 | 390 |
| Minnesota | 12,672 | 1,594 | 390 | 737 | 1,650 | 2,331 | 520 |
| Montana | 15,124 | 541 | 480 | 534 | 1,280 | 1,075 | 730 |
| Nevada | 3,739 | [3] | [5] 100 | 73 | 700 | [3] | [3] |
| New Mexico | 41,316 | [3] | [6] 150 | 287 | 240 | [3] | [3] |
| New York | 10,627 | [3] | [7] 330 | 142 | 300 | [3] | [3] |
| North Dakota | 8,186 | 269 | 280 | 296 | 2,010 | 565 | 520 |
| Oklahoma | 45,489 | 1,116 | 440 | 337 | 390 | 1,453 | 430 |
| Oregon | 6,839 | 402 | [1] 110 | 247 | 820 | 649 | [1] 170 |
| South Dakota | 18,322 | 1,019 | 160 | 832 | 2,240 | 1,851 | 270 |
| Utah | 6,690 | 328 | 340 | 249 | 1,500 | 577 | 500 |
| Washington | 15,980 | 740 | 1,880 | 558 | 960 | 1,298 | 1,330 |
| Wisconsin | 10,176 | 733 | 1,790 | 545 | 1,340 | 1,278 | 1,560 |
| Wyoming | 2,832 | [3] | [8] 400 | 98 | 1,040 | [3] | [3] |

[1] Minimum estimates, see State report.
[2] Includes Alaska Native children living away from home full time during the school year in the State's boarding home and boarding school program.
[3] Not available.
[4] Based only on the 3-yr period 1973–75.
[5] Based only on the 2-yr period 1974–75.
[6] Based only on fiscal year 1976 figures.
[7] Based only on 1976 figures.
[8] Based only on the 4-yr period 1972–75.

Note: For definitions and sources of data see individual State reports.



INDIAN FOSTER CARE (10 WORST STATES BY RATE OF INDIAN PLACEMENTS)

| State | Foster care placements per thousand | | Per capita rate of Indians in foster care compared to non-Indians (percent) |
|---|---|---|---|
| | Indian children | Non-Indian children | |
| Idaho | 77.5 | 12.1 | 640 |
| Maine | 75.8 | 4.0 | 1,910 |
| Minnesota | 58.1 | 3.5 | 1,650 |
| Wisconsin | 53.5 | 4.0 | 1,340 |
| South Dakota | 45.5 | 2.0 | 2,240 |
| Utah | 37.2 | 2.5 | 1,500 |
| North Dakota | 36.1 | 1.8 | 2,010 |
| Oregon | 36.1 | 4.4 | 820 |
| Montana | 35.3 | 2.8 | 1,280 |
| Washington | 35.0 | 3.6 | 960 |

Note: For definitions and sources of data see individual State reports.

## Alaska Native Adoption and Foster Care

### Basic Facts

1. There are 137,044 under twenty-one year olds in Alaska.[1]
2. There are 28,334 under twenty-one year old Alaska Natives (Indian, Eskimo, and Aleut) in Alaska.[2]
3. There are 108,710 non-Natives under twenty-one in Alaska.

### I. ADOPTION

In the State of Alaska, according to the Alaska Department of Health and Social Services Division of Family and Children Services, there is an average of 59 public agency adoptions per year of Alaska Native children.[3] Using federal age-at-adoption figures,[4] 83 percent (or 49) are under one year of age when placed. Another 13 percent (or eight) are one year to less than six years old when placed; and 4 percent (or two) are six years or older when placed. Using the formula, then: 49 Alaska Native children per year are placed in adoption for at least 17 years, eight Alaska Native children are placed in adoption for a minimum average of 14 years, and two Alaska Native children are placed in adoption for a minimum average of six years; there are 957 Alaska Natives under twenty-years old in adoption in Alaska. This represents one out of every 29.6 Alaska Native children in the State.

Using the same formula for non-Natives (there is an average public agency placement of non-Natives in adoptive homes in Alaska of 50 per year),[5] there are 807 under twenty-one year old non-Alaska Natives in adoption in Alaska. This represents one out of every 134.7 non-Alaska Native children in the State.

*Conclusion*

There are therefore by proportion 4.6 times (460 percent) as many Alaska Native children in adoptive homes as non-Alaska Natives; 93 percent of the adopted Native children are placed in non-Native adoptive homes.[6]

### II. FOSTER CARE

According to statistics from the U.S. Bureau of Indian Affairs, there were 263 Alaska Native children (under twenty-one years old) in BIA-administered foster care in 1972–73.[7] The Alaska Division of Family and Children Services does not have a racial breakdown of its foster care placements.[8] Assuming then that the Division of Family and Children Services places Alaska Natives in foster care in direct proportion to their percentage of the total population under twenty-one years old, there were 130 Alaska Native children in State-administered foster

[1] U.S. Bureau of the Census, 1970 Census of the Population, Vol. I: Characteristics of the Population, Part III: Alaska (Washington, D.C.: U.S. Government Printing Office: 1973), Table 19, pp. 3–34.

[2] Ibid., p. 3–34 (Table 19) pp. 3–205, 3–206 (Table 139). Alaska Natives (Indian, Eskimo and Aleut) comprise 81.2 percent of the total non-white population according to Table 139. According to Table 19 there are 34,894 non-whites under 21. 34,894 times 81.2 percent equals 28,334.

[3] Letter from Connie M. Hansen, ACSW, Foster Care and Child Protection Consultant, State of Alaska Department of Health and Social Services, Division of Family and Children Services, Sept. 11, 1973.

[4] National Center for Social Statistics, U.S. Department of Health, Education and Welfare, Adoptions in 1971. DHEW Publication No. (SRS) 73-03259, NCSS Report E-10 (1971), May 23, 1973. Table 6 "Children adopted by unrelated petitioners: Percentage distribution by age at time of placement, by type of placement, 1971."

[5] Letter from Connie M. Hansen, ACSW, *op. cit.*

[6] *Ibid.*

[7] U.S. Bureau of Indian Affairs, "Fiscal Year 1973—Child Welfare (Unduplicated Case count by States)."

[8] Letter from Connie M. Hansen, ACSW, *op. cit.*





care in 1973.[9] The combined figures (393 children) represent one out of every 72 Alaska Native children in the State.

By comparison (assuming the Division of Family and Children Services also places non-Natives in foster care in direct proportion to their percentage of the population), there were 496 non-Native children in foster care in 1973,[10] representing one out of every 219 non-Native children in the State.

*Conclusion*

By rate, therefore, Alaska Native children are placed in foster homes 3.0 times (300 percent) more often than non-Alaska Natives in Alaska. (Because the Division of Family and Children Services was unable to supply a racial breakdown for foster care, these figures are based on the conservative assumptions stated above. Were it to be assumed that Alaska Natives represent the same percentage of foster care placements as they do adoptive placements, the dispropotrion in foster care rates would more than double.)

### III. ADOPTIVE CARE, FOSTER CARE, AND BOARDING PROGRAMS

A large number of Native students live away from home full-time during the school year. In 1972–73, 2,427 (94%) of the 2,585 village Native students in public high schools were enrolled in a boarding home or boarding school program.[11] A more proper way of computing the number of Indian children who do not live in their natural homes in the State of Alaska is to include the boarding school figures. When this is done, the combined total of Native children in foster homes, adoptive homes and boarding programs is 3,777, representing one out of every 7.5 Alaska Native children in the State.

Since few, if any, non-Natives must enroll in boarding programs, the non-Native figure of 1,303 children in adoptive homes and foster homes remains the same, representing one in every 83.4 non-Natives.

*Conclusion*

Alaska Native children are out of their homes and in foster homes, adoptive homes, or in boarding programs at a rate 11.1 times (1,110 percent) greater than that for non-Natives in Alaska.

The Alaska statistics do not include placements made by private agencies, and therefore are minimum figures.

*Methodological note to the Alaska statistics.*—The Alaska State Division of Children Services probably removes very few Native children from their parents in the small rural villages. The population base for this report is all Natives, rural and urban; if the percentage of children outside their natural homes was based on only the urban Native population—likely the most revealing comparison—the percentage would of course be much higher. It is virtually certain, therefore, that these are absolutely minimum figures.

[9] National Center for Social Statistics, U.S. Department of Health, Education and Welfare, "Children Served by Public Welfare Agencies and Voluntary Child Welfare Agencies and Institutions March 1973." DHEW Publication No. (SRS) 76-03258, NCSS Report E-9 (3/73), November 1975. Table 1, "Children receiving social services from State and local public welfare agencies," p. 7. Indian people comprise 20.7 percent of the total under twenty-one year of population of Alaska. There were 626 children in foster family homes in 1973. 626 times 20.7 percent equals 130.

[10] *Ibid.* 626 times 79.3 percent equals 496.

[11] Judith Kleinfeld, "A Long Way From Home" (Fairbanks: Center for Northern Educational Research and Institute of Social, Economic and Government Research of the University of Alaska: 1973), p. 3.

## Arizona Adoption and Foster Care Statistics

### Basic Facts

1. There are 740,460 under twenty-one-year-olds in the State of Arizona.[1]
2. There are 54,709 under twenty-one-year-old American Indians in the State of Arizona.[2]
3. There are 685,751 non-Indians under twenty-one in the State of Arizona.

### I. ADOPTION

In the State of Arizona, according to the Arizona Department of Economic Security, there were an average of 65 public agency adoptions per year of American Indian children from 1969–1972.[3] Using federal age-at-adoption figures,[4] 83 percent (or 54) are under one year of age when placed. Another 13 percent (or eight) are one year to less than six years old when placed; and 4 percent (or three) are six years or older when placed. Using the formula, then, 54 Arizona Indian children per year are placed in adoption for at least 17 years, eight Arizona Indian children are placed in adoption for a minimum average of 14 years; and three are in adoption for a minimum average of three years; there are 1,039 Indians under twenty-one year olds in adoption in Arizona. This represents one out of every 52.7 Indian children in the state.

Using the same formula for non-Indians (there were an average public agency placement of non-Indians in adoptive homes in Arizona of 194 per year from 1969–1972),[5] there are 3,111 under twenty-one-year-old non-Indians in adoption in Arizona. This represents one out of every 220.4 non-Indian children in the State.

*Conclusion*

By rate, therefore, Indian children are placed in adoptive homes 4.2 times (420%) more often than non-Indian children in Arizona.

### II. FOSTER CARE

In the State of Arizona, according to statistics from the Arizona Department of Economic Security, there were 139 Indian children in foster care in April 1976 under a State contract with the U.S. Bureau of Indian Affairs.[6] There are no statistics giving a racial breakdown for the other State-administered foster care programs that include Indian children. However, making the most conservative assumption possible, that is, that the Arizona Social Services Bureau placed Indian children in foster care in direct proportion to their percentage of the population, there were an additional 208 Indian children in State-administered foster care.[7] (That this is indeed a most conservative assumption is demonstrated by the appendix to this report. The appendix, based on a random sample of children in State-administered foster care made by the Arizona Social Services Bureau in March 1974, demonstrates that Indian children are in fact placed in state-administered foster care at rates far disproportionate to their percentage of the population.) Thus, there was a combined total of 347 Indian children in State-administered foster care during April 1976. In addition, the Navajo and Phoenix area offices of the BIA report a combined total of 211 Indian children in foster care in Arizona during April 1976.[8] Combining the State and BIA figures, there were at least 558 Indian children in foster care in April 1976. This represents one out of every 98 Indian children in the State. By comparison, there were 2,601 non-Indian children in foster care in April 1976,[9] representing one out of every 263.6 non-Indian children.

*Conclusion*

By rate, therefore, Indian children are placed in foster care at least 2.7 times (2.0 percent) more often than non-Indians in Arizona.

See the county-by-county analysis in the appendix for projections of the actual rates at which Indian children are placed in state-administered foster care.

### III. COMBINED FOSTER CARE AND ADOPTIVE CARE

Using the above figures, a total of 1,597 under twenty-one year old Indian children are either in foster homes or adoptive homes in the state of Arizona. This represents one out of every 34.3 Indian children. Similarly, for non-Indians in the state, 5,712 under twenty-one year olds are either in foster care or adoptive care, representing one in every 120.1 non-Indian children.

*Conclusion*

By rate, therefore, Indian children are removed from their homes and placed in adoptive or foster care 3.5 times (350 percent) more often than non-Indian children in the State of Arizona.

### U.S. BUREAU OF INDIAN AFFAIRS BOARDING SCHOOLS

More than 10,000 Indian children in Arizona, in addition to those in foster care or adoptive care, are away from home and their families most of the year attending boarding schools operated by the U.S. Bureau of Indian Affairs. (See Note on boarding schools.) These children properly belong in any computation of children separated from their families. Adding the 10,977 Indian children in federal boarding schools in Arizona[10] to those in adoptive or foster care, there are a minimum of 12,574 Indian children separated from their families. This represents one in every 4.4 Indian children in Arizona.

*Conclusion*

By rate, therefore, Indian children are separated from their families to be placed in adoptive care, foster care, or federal boarding schools 27.3 times (2,730 percent) more often than non-Indian children in Arizona.

## Appendix to the Arizona Statistics

### I. YAVAPAI COUNTY

In Yavapai County in a random sample of the children in State-administered foster care made by the Arizona Social Services Bureau in March 1974, 35 percent of the children were known to be American Indian.[1] 42 percent of the

[1] U.S. Bureau of the Census, Census of Population: 1970, Volume I, Characteristics of the Population, Part 4, *Arizona* (U.S. Government Printing Office: Washington, D.C.: 1973), pp. 4–30.

[2] U.S. Bureau of the Census, Census of Population: 1970, Subject Reports, Final Report PC(2)-1F, "American Indians" (Washington, D.C.: U.S. Government Printing Office: 1973), Table 2, "Age of the Indian Population by Sex and Urban and Rural Residence: 1970," p. 6.

[3] Office of Research and Reports, Social Services Bureau, Arizona Department of Economic Security, "Children placed in adoption during 1969, 1970, 1971, and 1972," (Chart).

[4] National Center for Social Statistics, U.S. Department of Health, Education and Welfare, "Adoptions in 1971," DHEW Publication No. (SRS) 73–03259, NCSS Report E–10 (1971), May 23, 1973, Table 6, "Children adopted by unrelated petitioners: Percentage distribution by age at time of placement, by type of placement, 1971."

[5] "Children placed in adoption during 1969, 1970, 1971, and 1972," op. cit.

[6] Telephone interview with Mr. Wally Earl, Arizona Department of Economic Security, July 22, 1976.

[7] *Ibid.* Arizona reported 2,809 children in foster care in April 1976, excluding those on the BIA contract. Indian children comprise 7.4 percent of the under twenty-one year olds in Arizona. 2,809 times .074 equals 208.

[8] The BIA Phoenix Area Office reported 300 Indian children in foster care in Arizona in April 1976. (Telephone interview with Mr. Bert Grabes, Division of Social Services, Phoenix Area Office, July 23, 1976.) The BIA Navajo Area Office reported 50 Indian children in foster care in Arizona in April 1976. (Telephone interview with Mr. Steve Lacy, Child Welfare Specialist, Navajo Area Office, July 26, 1976.) Thus the BIA had a combined total of 350 Indian children in foster care in Arizona, from which those under the BIA foster care contract with the State should be subtracted: 350 minus 139 equals 211.

[9] Telephone interview with Mr. Walley Earl, op. cit. There were a total of 2,948 children in foster care in April 1976. We have estimated that 347 of these are Indian (see Report). 2,948 minus 347 equals 2,601.

[10] Office of Indian Education Programs, U.S. Bureau of Indian Affairs, "Fiscal Year 1974 Statistics concerning Indian Education" (Lawrence, Kans.: Haskell Indian Junior College: 1975). Table 4, "Boarding Schools Operated by the Bureau of Indian Affairs, Fiscal Year 1974," pp. 13–15.

[11] State of Arizona Social Services Bureau, Program Development and Evaluation, "Foster Care Evaluation Program (July 1974)," District III Foster Care Evaluation, Appendix I, Yavapai County: Evaluation of Foster Children Records, p. 13.

children in the random sample were known to be non-Indian.[2] Indian people comprise 1.9 percent of the population of Yavapai County.[3] Assuming then that the random sampling made by the Social Services Bureau is representative of the state-administered foster care population through Yavapai County, the following tentative conclusion can be drawn.

*Conclusion*

There are by proportion 18.4 times (1,840 percent) as many Indian children as non-Indian children in state-administered foster care in Yavapai County, Arizona.

II. NAVAJO COUNTY

In Navajo County, in a random sample of the children in state-administered foster care made by the Arizona Social Services Bureau in March 1974, 77 percent were known to be American Indian.[4] 19 percent of the children in the random sample were known to be non-Indian.[5] Indian people comprise 48.3 percent of the population of Navajo county.[6] Assuming then that the random sampling made by the Social Services Bureau is representative of the state-administered foster care population throughout Navajo County, the following tentative conclusion can be drawn.

*Conclusion*

There are by proportion 1.6 times (160 percent) as many Indian children as non-Indian children in state-administered foster care in Navajo County, Arizona.

III. COCONINO COUNTY

In Coconino County, in a random sample of the children in state-administered foster care made by the Arizona Social Services Bureau in March 1974, 58 percent of the children in the random sample were American Indian.[7] 42 percent of the children in the random sample were non-Indian.[8] Indian people comprise 24.8 percent of the population of Coconino County.[9] Assuming then that the random sampling made by the Social Services Bureau is representatives of the state-administered foster care population throughout Coconino County, the following tentative conclusion can be drawn.

*Conclusion*

There are therefore by proportion 2.3 times (230 percent) as many Indian children as non-Indian children in state-administered foster care in Coconino County, Arizona.

IV. YUMA COUNTY

In Yuma County, in a random sample of the children in state-administered foster care made by the Arizona Social Services Bureau in March 1974, 13 percent of the children were American Indian.[10] 87 percent of the children in the random sample were non-Indian.[11] Indian people comprise 3.7 percent of the population of Yuma County.[12] Assuming then that the random sampling made by the Social Services Bureau is representative of the state-administered foster care population throughout Yuma County, the following tentative conclusion can be drawn.

[2] Ibid. The race of 23 percent of the children was unknown. (Ibid.) If the figures used in this report were to be based only on the percentage of children for whom race is known, Indian children would comprise 45 percent of the foster care placements in the random sample—thus further increasing the disproportion between Indian and non-Indian placements.

[3] U.S. Bureau of the Census, Census of the Population: 1970 Supplementary Report PC (S1)–104, "Race of the Population by County: 1970" (U.S. Government Printing Office: Washington, D.C.: 1975), p. 5.

[4] State of Arizona Social Services Bureau, op. cit., District III Foster Care Evaluation, Appendix III, Navajo County: Evaluation of Foster Children Records, p. 19.

[5] *Ibid.* The race of 4 percent of the children was unknown. (Ibid.) If the figures used in this report were to be based only on the percentage of children for whom race is known, Indian children would comprise 80 percent of the foster care placements in the random sample—thus further increasing the disproportion between Indian and non-Indian placements.

[6] "Race of the Population by County: 1970," *op. cit.*, p. 5.

[7] State of Arizona Social Services Bureau, *op. cit.*, District III Foster Care Evaluation, Appendix V, Coconino County: Evaluation of Foster Children Records, p. 25.

[8] *Ibid.*

[9] "Race of the Population by County: 1970," *op cit.*, p. 5.

[10] State of Arizona Social Services Bureau, *op. cit.*, District IV Foster Care Evaluation, Appendix III, Yuma County: Evaluation of Foster Children Records, p. 16.

[11] *Ibid.*

[12] "Race of the Population by County: 1970," *op. cit.*, p. 5.



*Conclusion*

There are therefore by proportion 3.5 times (350 percent) as many Indian children as non-Indian children in state-administered foster care in Yuma County, Arizona.

V. GILA COUNTY

Gila County, in a random sample of the children in state-administered foster care made by the Arizona Social Services Bureau in March 1974, 17% of the children were known to be American Indian.[13] 79% of the children in the random sample were known to be non-Indian.[14] Indian people comprise 15.7% of the population of Gila County.[15] Assuming then that the random sampling made by the Social Services Bureau is representative of the state-administered foster care population throughout Gila County, the following tentative conclusion can be drawn.

*Conclusion*

There are by proportion 1.1 times (110 percent) as many Indian children as non-Indian children in state-administered foster care in Gila County, Arizona.

VI. GRAHAM COUNTY

In Graham County, in a random sample of the children in state-administered foster care made by the Arizona Social Services Bureau in March 1974, 18% of the children were American Indian.[16] 81% of the children in the sample were non-Indian.[17] Indian people comprise 10.1% of the population of Graham County.[18] Assuming then the random sampling made by the Social Services Bureau is representative of the state-administered foster care population throughout Gila County, the following tentative conclusion can be drawn.

*Conclusion*

There are by proportion 1.8 times (180 percent) as many Indian children as non-Indian children in state-administered foster care in Graham County, Arizona.

VII. COCHISE COUNTY

In Cochise County, in a random sample of the children in state-administered foster care made by the Arizona Social Services Bureau in March 1974, 9 percent of the children were American Indian.[19] 91 percent of the children in the random sample were non-Indian.[20] Indian people comprise 0.2 percent of the population of Cochise County.[21] Assuming then that the random sampling made by the Social Services Bureau is representative of the state-administered foster care population throughout Cochise County, the following tentative conclusion can be drawn.

*Conclusion*

There are by proportion 45 times (4500 percent) as many Indian children as non-Indian children in state-administered foster care in Cochise County, Arizona.

VIII. PINAL COUNTY

In Pinal County, in a random sample of the children in State-administered foster care made by the Arizona Social Services Bureau in March 1974, 20 percent of the children were known to be American Indians.[22] 74 percent of the children in the random sample were known to be non-Indian.[23] Indian people comprise 9.4

[13] State of Arizona Social Services Bureau, *op. cit.*, District V Foster Care Evaluation, Appendix III, Gila County: Evaluation of Foster Children Records, p. 16.

[14] *Ibid.* The race of 4 percent of the children was unknown. (Ibid.)

[15] "Race of the Population by County: 1970," op. cit., p. 5.

[16] State of Arizona Social Services Bureau, op. cit., District VI Foster Care Evaluation, Appendix III, Gila County: Evaluation of Foster Children Records, p. 16.

[17] *Ibid.* 1 percent of the children are unaccounted for by the Social Services Bureau. (Ibid.)

[18] "Race of the Population by County: 1970," op. cit., p. 5.

[19] State of Arizona Social Services Bureau, op. cit., District VI Foster Care Evaluation, Appendix V, Cochise County: Evaluation of Foster Care Children Records, p. 24.

[20] *Ibid.*

[21] "Race of the Population by County: 1970," op. cit., p. 5.

[22] State of Arizona Social Services Bureau, op. cit., District V Foster Care Evaluation, Appendix I, Pinal County: Evaluation of Foster Children Records, p. 10.

[23] *Ibid.* The race of 6 percent of the children was unknown. If the figures used in this report were to be based only on the percentage of children for whom race is known, Indian children would comprise 21 percent of the foster care placements in the random sample—thus further increasing the disproportion between Indian and non-Indian placements.

percent of the population of Pinal County.[24] Assuming then that the random sampling made by the Social Services Bureau is representative of the state-administered foster care population throughout Pinal County, the following tentative conclusion can be drawn.

*Conclusion*

There are by proportion 2.1 times (210 percent) as many Indian children as non-Indian children in state-administered foster care in Pinal County, Arizona.

### IX. MARICOPA COUNTY

In Maricopa County, in a random sample of the children in state-administered foster care made by the Arizona Social Services Bureau in March 1974, 7 percent of the children were known to be American Indian.[25] 86 percent of the children in the random sample were known to be non-Indian.[26] Indian people comprise 1.2 percent of the population of Maricopa County.[27] Assuming then that the random sampling made by the Social Services Bureau is representative of the state-administered foster care population throughout Maricopa County, the following tentative conclusion can be drawn.

*Conclusion*

There are by proportion 5.8 times (580 percent) as many Indian children as non-Indian children in state-administered foster care in Maricopa County, Arizona.

### X. PIMA COUNTY

In Pima County, in a ramdom sample of the children in state-administered foster care made by the Arizona Social Services Bureau in March 1974, 12% of the children were known to be American Indian.[28] 83 percent of the children in the random sample were known to be non-Indian.[29] Indian people comprise 2.5 percent of the population of Pima County.[30] Assuming then that the random sampling made by the Social Services Bureau is representative of the state-administered foster care population throughout Pima County, the following tentative conclusion can be drawn.

*Conclusion*

There are by proportion 4.8 times (480 percent) as many Indian children as non-Indian children in state-administered foster care in Pima County, Arizona.

*Methodological notes.*—(1) Since the data on which this appendix is based comes from a random sample (comprising 462 children out of a total of 1,808 children in state-administered faster care) [31] made by the Program Development and Evaluation Department of the Arizona Social Services Bureau, it is subject to the uncertainty of the random sample itself.

(2) It should be emphasized that these statistics include only state-administered placements; no BIA placements—which would undoubtedly be substantial in some counties—are included.

[24] "Race of the Population by County: 1970," op. cit., p. 5.
[25] State of Arizona Social Services Bureau, op. cit., District I Foster Care Evaluation, Appendix I: Evaluation of Foster Children Records, p. 12. Confirmed by telephone interview with Mr. Bob Hoogistraat, Program Development and Evaluation Department, July 12, 1976.
[26] *Ibid.*
[27] "Race of the Population by County: 1970," op. cit., p. 5.
[28] State of Arizona Social Services Bureau, op. cit., District II Foster Care Evaluation, Appendix I: Evaluation of Foster Children Records, p. 11. Confirmed by telephone interview with Mr. Bob Hoogistraat, Program Development and Evaluation Department, July 12, 1976.
[29] *Ibid.* The race of 4 percent of the children was unknown; and 1 percent of the children were unaccounted for by the Social Services Bureau. (Ibid.)
[30] "Race of the Population by County: 1970," op. cit., p. 5.
[31] State of Arizona Social Services Bureau, op. cit., p. 1.

## CALIFORNIA ADOPTION AND FOSTER CARE STATISTICS

### Basic Facts

1. There are 6,969,307 under twenty-one-year-olds in the state of California.[1]
2. There are 39,579 under twenty-one-year-old American Indians in the state of California.[2]
3. There are 6,929,728 non-Indians under twenty-one in the state of California.

### I. ADOPTION

In the state of California, according to the California Department of Health, there were 93 Indian children placed for adoption by public agencies in 1975.[3] Using federal age-at-adoption figures,[4] 83 percent (or 77) are under one year of age when placed. Another 13 percent (or 12) are one year to less than six years old when placed; 3 percent (or three) are six years, but less than twelve years old when placed; and 1 percent (or one) are twelve years of age and older. Using the formula then that: 77 Indian children per year are placed in adoption for at least 17 years, 12 Indian children are placed in adoption for a minimum average of 14 years, three Indian children are placed in adoption for an average of nine years, and one Indian child is placed for adoption for an average of three years; there are 1,507 Indian children under twenty-one years old in adoption at any one time in the State of California. This represents one in every 26.3 Indian children under the age of twenty-one in the State.

Using the same formula for non-Indians (there were 1,942 non-Indian children placed for adoption by public agencies in 1975)[5] there are 31,525 non-Indians under twenty-one years old in adoptive homes at any one time; representing one in every 219.8 non-Indian children.

*Conclusion*

There are therefore, by proportion, 8.4 times (840 percent) as many Indian children as non-Indian children in adoptive homes in California; 92.5 percent of the Indian children placed for adoption by public agencies in 1975 were placed in non-Indian homes.[6]

### II. FOSTER CARE

According to statistics from the State of California Department of Health there were 319 Indian children in foster family homes in 1974.[7] This represents one out of every 124 Indian children in the State. By comparison there were 20,590 non-Indian children in foster family homes in 1974,[8] representing one out of every 336.6 non-Indian children in the state.

*Conclusion*

There are therefore, by proportion, 2.7 times (270 percent) as many Indian children as non-Indian children in foster family homes in California.

[1] U.S. Bureau of the Census, Census of Population: 1970, Volume I, Characteristics of the Population, Part 6, Section 1, *California* (U.S. Government Printing Office: Washington, D.C.: 1973), p. 6–88.
[2] U.S. Bureau of the Census, Census of Population: 1970; Subject Reports, Final Report PC(2)–1F, "American Indians" (Washington, D.C.: U.S. Government Printing Office: 1973). Table 2, "Age of the Indian Population by Sex and Urban and Rural Residence: 1970," p. 6.
[3] AAIA child-welfare survey questionnaire completed by Mrs. T. Chu and Ms. Betsy Strong, Center for Health Statistics, California Department of Health, July 16, 1976.
[4] National Center for Social Statistics, U.S. Department of Health, Education, and Welfare, "Adoptions in 1971." DHEW Publication No. (SRS) 73–03259, NCSS Report E–10 (1971), May 23, 1973. Table 6, "Children adopted by unrelated petitioners: Percentage distribution by age at time of placement, by type of placement, 1971."
[5] AAIA child-welfare survey questionnaire, op. cit.
[6] *Ibid.*
[7] *Ibid.*
[8] *Ibid.*

### III. COMBINED FOSTER CARE AND ADOPTIVE CARE

Using the above figures, a total of 1,826 under-twenty-one Indian children are either in foster homes or adoptive homes in the state of California. This represents one in every 21.7 Indian children. Similarly for non-Indians in the state, 52,115 under-twenty-one-olds are either in foster homes or adoptive homes, representing one in every 133 non-Indian children.

*Conclusion*

By per capita rate, Indian children are removed from their homes and placed in adoptive homes and foster homes 6.1 times (610 percent) more often than non-Indian children in the state of California.

The above figures are based only on the statistics of the California Department of Health and do not include private agency placements. They are therefore minimum figures.

NOTE. In addition to the above figures, approximately 100 California Indian children between the ages of thirteen and eighteen attend a boarding school in California operated by the U.S. Bureau of Indian Affairs (Sherman Indian High School, Riverside, California).[9] An additional 175 California Indian children attend BIA boarding schools in Utah, Nevada, Arizona, and New Mexico.[10] Were these children to be added to the total above, Indian children would be away from their families at a per capita rate 7.1 times (710 percent) greater than that for non-Indians.

[9] *Ibid.*
[10] *Ibid.*

## CALIFORNIA: APPENDIX

### County-by-County Analysis of California Foster Care Statistics

#### ALAMEDA COUNTY

In Alameda County, according to statistics from the California Department of Health, there were 24 Indian children in state-administered foster family homes in 1974.[1] There are 2,548 Indian children under twenty-one years old in Alameda County.[2] Thus one out of every 106.2 Indian children is in a foster family home.

*Conclusion*

In Alameda County Indian children are in state-administered foster family homes at a per capita rate 3.2 times (320 percent) greater than the state-wide rate for non-Indians in California.

#### II. ALPINE COUNTY

In Alpine County, according to statistics from the California Department of Health, there was one Indian child in a state-administered foster family home in 1974.* There are 43 Indian children under twenty-one years old in Alpine County.† Thus one out of 43 Indian children is in a family foster home.

*Conclusion*

In Alpine County Indian children are in state-administered foster homes at a per capita rate 7.8 times (780 percent) greater than the state-wide rate for non-Indians in California.

#### III. AMADOR COUNTY

In Amador County, according to statistics from the California Department of Health, there were no Indian children in state-administered foster family homes in 1974.* There are 72 Indian children under twenty-one years old in Amador County.†

#### IV. BUTTE COUNTY

In Butte County, according to statistics from the California Department of Health, there were six Indian children in state-administered foster family homes in 1974.* There are 399 Indian children under twenty-one years old in Butte County.† Thus, one out of every 66.5 Indian children is in a foster family home.

*Conclusion*

In Butte County Indian children are in state-administered foster family homes at a per capita rate 5.1 times (510 percent) greater than the statewide rate for non-Indians in California.

#### V. CALAVERAS COUNTY

In Calaveras County, according to statistics from the California Department of Health, there were five Indian children in state-administered foster family

[1] AAIA child-welfare survey questionnaire completed by Ms. Tulane Chu, Public Health Statistician, Center for Health Statistics, California Department of Health, July 16, 1976.
[2] 44.8 percent of the California Indian population is under twenty-one years old. [U.S. Bureau of the Census, Census of Population: 1970; Subject Report PC(2)–1F, "American Indians" (Washington, D.C.: U.S. Government Printing Office: 1973). Table 2, "Age of the Indian Population by Sex and Urban and Rural Residence: 1970," pp. 6–7.] The total Indian population of Alameda County is 5,688. [U.S. Bureau of the Census, Census of Population: 1970 Supplementary Report PC(S1)–104, "Race of the Population by County": 1970 (Washington, D.C.: U.S. Government Printing Office: 1975), p. 6.] 5,688 times .448 equals 2,548. The same formula is used to determine the Indian under twenty-one year old population in the other California counties. Hereafter cited as "Race."
*AAIA Questionnaire, *op. cit.*
†Race of the Population by County: *op. cit.* 1970: 6, 7.

homes in 1974.* There are 77 Indian children under twenty-one years old in Calaveras County.† Thus, one out of every 15.4 Indian children is in a foster family home.

*Conclusion*

In Calaveras County Indian children are in state-administered foster family homes at a per capita rate 21.9 times (2,190 percent) greater than the state-wide rate for non-Indians in California.

VI. CONTRA COSTA COUNTY

In Contra Costa County, according to statistics from the California Department of Health, there were no Indian children in state-administered foster family homes in 1974.* There are 762 Indian children under twenty-one years old in Contra Costa County.†

VII. DEL NORTE COUNTY

In Del Norte County, according to statistics from the California Department of Health, there were 15 Indian children in state-administered foster family homes in 1974.* There are 326 Indian children under twenty-one years old in Del Norte County.† Thus, one out of every 21.7 Indian children is in a foster family home.

*Conclusion*

In Del Norte County Indian children are in foster family homes at a per capita rate 15.5 times (1,550 percent) greater than the state-wide rate for non-Indians in California.

VIII. EL DORADO COUNTY

In El Dorado County, according to statistics from the California Department of Health, there were no Indian children in state-administered foster family homes in 1974.* There are 103 Indian children under twenty-one years old in El Dorado County.†

IX. FRESNO COUNTY

In Fresno County, according to statistics from the California Department of Health, there were 22 Indian children in state-administered foster family homes in 1974.* There are 961 Indian children under twenty-one years old in Fresno County.† Thus, one out of every 43.7 Indian children is in a foster family home.

*Conclusion*

In Fresno County Indian children are in foster family homes at a per capita rate 7.7 times (770 percent) greater than the state-wide rate for non-Indians in California.

X. GLENN COUNTY

In Glenn County, according to statistics from the California Department of Health, there were five Indian children in state-administered foster family homes in 1974.* There are 84 Indian children under twenty-one years old in Glenn County.† Thus, one out of every 16.8 Indian children is in a foster family home.

*Conclusion*

In Glenn County Indian children are in foster family homes at a per capita rate 20 times (2,000 percent) greater than the state-wide rate for non-Indians in California.

XI. HUMBOLDT COUNTY

In Humboldt County, according to statistics from the California Department of Health, there were 18 Indian children in state-administered foster family homes in 1974.* There are 1,369 Indian children under twenty-one years old in Humboldt County.† Thus, one out of every 76.1 Indian children is in a foster family home.

*AAIA Questionnaire, *op. cit.*
†Race of the Population by County: *op. cit.* 1970; 6, 7.



*Conclusion*

In Humboldt County Indian children are in foster family homes at a per capita rate 4.4 times (440 percent) greater than the state-wide rate for non-Indians in California.

XII. IMPERIAL COUNTY

In Imperial County, according to statistics from the California Department of Health, there were seven Indian children in state-administered foster family homes in 1974.* There are 398 Indian children under twenty-one years old in Imperial County.† Thus, one out of every 56.9 Indian children is in a foster family home.

*Conclusion*

In Imperial County Indian children are in foster family homes at a per capita rate 5.9 times (590 percent) greater than the state-wide rate for non-Indians in California.

XIII. INYO COUNTY

In Inyo County, according to statistics from the California Department of Health, there were eight Indian children in state-administered foster family homes in 1974.* There are 524 Indian children under twent-one years old in Inyo County.† Thus, one out of every 65.5 Indian children is in a foster family home.

*Conclusion*

In Inyo County Indian children are in State-administered foster family homes at a per capita rate 5.1 times (510 percent) greater than the State-wide rate for non-Indians in California.

XIV. KERN COUNTY

In Kern County, according to statistics from the California Department of Health, there were three Indian children in State-administered foster family homes in 1974.* There are 913 Indian children under twenty-one years olds in Kings County.† Thus, one out of every 304 Indian children is in a foster family home.

*Conclusion*

In Kern County Indian children are in State-administered foster family homes at a per capita rate 10.5 times (1,050 percent) greater than the State-wide rate for non-Indians in California.

XV. KINGS COUNTY

In Kings County, according to statistics from the California Department of Health, there were five Indian children in state-administered foster family homes in 1974.* There are 160 Indian children under twenty-one years old in Kings County.† Thus, one out of every 32 Indian children is in a foster family home.

*Conclusion*

In Kings County Indian children are in State-administered foster family homes at a per capita rate 10.5 times (1,050 percent) greater than the state-wide rate for non-Indians in California.

XVI. LAKE COUNTY

In Lake County, according to statistics from the California Department of Health, there were two Indian children in state-administered foster family homes in 1974.* There are 145 Indian children under twenty-one years old in Lake County.† Thus, one out of every 72.5 Indian children is in a foster family home.

*AAIA Questionnaire, *op. cit.*
†Race of the Population by County: *op. cit.* 1970; 6, 7.

*Conclusion*

In Lake Couny Indian children are in state-administered foster family homes at a per capita rate 4.6 times (460 percent) greater than the State-wide rate for non-Indians in California.

XVII. LASSEN COUNTY

In Lassen County, according to statistics from the California Department of Health, there was one Indian child in a State-administered foster family home in 1974.* There are 156 Indian children under twenty-one years old in Lassen County.† Thus, one out of 156 Indian children is in a foster family home.

*Conclusion*

In Lassen County Indian children are in State-administered foster family homes at a per capita rate 2.2 times (220 percent) greater than the State-wide rate for non-Indians in California.

XVIII. LOS ANGELES COUNTY

In Los Angeles County, according to statistics from the California Department of Health, there were 45 Indian children in State-administered foster family homes in 1974.* There are 10,980 Indian children under twenty-one years old in Los Angeles County.† Thus, one out of every 244 Indian children is in a foster family home.

*Conclusion*

In Los Angeles County Indian children are in State-administered foster family homes at a per capita rate 1.4 times (140 percent) the State-wide rate for non-Indians in California.

XIX. MADERA COUNTY

In Madera County, according to statistics from the California Department of Health, there were two Indian children in State-administered foster family homes in 1974.* There are 335 Indian children under twenty-one years old in Madera County.† Thus, one out of every 168 Indian children is in a foster family home.

*Conclusion*

In Madera County Indian children are in State-administered foster family homes at a per capita rate 2.0 times (200 percent) greater than the State-wide rate for non-Indians in California.

XX. MARIN COUNTY

In Marin County, according to statistics from the California Department of Health, there were no Indian children in State-administered foster family homes in 1974.* There are 171 Indian children under twenty-one years old in Marin County.†

XXI. MENDOCINO COUNTY

In Mendocino County, according to statistics from the California Department of Health, there were eight Indian children in State-administered foster family homes in 1974.* There are 642 Indian children under twenty-one years old in Mendocino County.† Thus, one out of every 80.3 Indian children is in a foster family home.

*Conclusion*

In Mendocino County Indian children are in State-administered foster family homes at a per capita rate 4.2 times (420 percent) greater than the State-wide rate for non-Indians in California.

XXII. MERCED COUNTY

In Merced County, according to statistics from the California Department of Health, there was one Indian child in a State-administered foster family home in 1974.* There are 159 Indian children in Merced County.† Thus, one out of 159 Indian children is in a foster family home.

*AAIA Questionnaire, *op. cit.*
†Race of the Population by County: *op. cit.* 1970; 6, 7.



*Conclusion*

In Merced County Indian children are in State-administered foster family homes at a per capita rate 2.1 times (210 percent) greater than the State-wide rate for non-Indians in California.

XXIII. MODOC COUNTY

In Modoc County, according to statistics from the California Department of Health, there were seven Indian children in State-administered foster family homes in 1974.* There are 78 Indian children in Modoc County.† Thus, one out of every 11.1 Indian children is in a foster family home.

*Conclusion*

In Modoc County Indian children are in State-administered foster family homes at a per capita rate 30.3 times (3,030 percent) greater than the State-wide rate for non-Indians in California.

XXIV. MONO COUNTY

In Mono County, according to statistics from the California Department of Health, there was one Indian child in a State-administered foster family home in 1974.* There are 85 Indian children under twenty-one years old in Mono County.† Thus, one out of 85 Indian children is in a foster family home.

*Conclusion*

In Mono County Indian children are in State-administered foster family homes at a per capita rate 4.0 times (400 percent) greater than the State-wide rate for non-Indians in California.

XXV. MONTEREY COUNTY

In Monterey County, according to statistics from the California Department of Health, there were no Indian children in State-administered foster family homes in 1974.* There are 510 Indian children under twenty-one years old in Monterey County.†

XXVI. NAPA COUNTY

In Napa County, according to statistics from the California Department of Health, there was one Indian child in a State-administered foster family home in 1974.* There are 96 Indian children under twenty-one years old in Napa County.† Thus, one out of 96 Indian children is in a foster family home.

*Conclusion*

In Napa County Indian children are in State-administered foster family homes at a per capita rate 3.5 times (350 percent) greater than the State-wide rate for non-Indians in California.

XXVII. NEVADA COUNTY

In Nevada County, according to statistics from the California Department of Health, there were no Indian children in State-administered foster family homes in 1914.* There are 50 Indian children under twenty-one years old in Nevada County.†

XXVIII. ORANGE COUNTY

In Orange County, according to statistics from the California Department of Health, there were three Indian children in State-administered foster family homes in 1974.* There are 1,756 Indian children under twenty-one years old in Orange County.† Thus, one out of every 585 Indian children is in a foster family home.

*Conclusion*

In Orange County, Indian children are in State-administered foster family homes at a per capita rate 0.6 times (60 percent) the State-wide rate for non-Indians in California.

*AAIA Questionnaire, *op. cit.*
†Race of the Population by County: *op. cit.* 1970; 6, 7.

### XXIX. PLACER COUNTY

In Placer County, according to statistics from the California Department of Health, there was one Indian child in a State-administered foster family home in 1914.* There are 185 Indian children under twenty-one years old in Placer County.† Thus, one out of 185 Indian children is in a foster family home.

*Conclusion*

In Placer County Indian children are in State-administered foster family homes at a per capita rate 1.8 times (180 percent) the State-wide rate for non-Indians in California.

### XXX. PLUMAS COUNTY

In Plumas County, according to statistics from the California Department of Health, there were five Indian children in State-administered foster family homes in 1974.* There are 137 Indian children under twenty-one years old in Plumas County.† Thus, one out of every 27.4 Indian children is in a foster family home.

*Conclusion*

In Plumas County Indian children are in State-administered foster family homes at a per capita rate 12.3 times (1,230 percent) greater than the State-wide rate for non-Indians in California .

### XXXI. RIVERSIDE COUNTY

In Riverside County, according to statistics from the California Department of Health, there were six Indian children in State-administered foster family homes in 1974.* There are 1,309 Indian children under twenty-one years old in Riverside County.† Thus, one out of every 218 Indian children is in a foster family home.

*Conclusion*

In Riverside County Indian children are in State-administered foster family homes at a per capita rate 1.5 times (150 percent) the Statewide rate for non-Indians in California.

### XXXII. SACRAMENTO COUNTY

In Sacramento County, according to statistics from the California Department of Health, there were nine Indian children in State-administered foster family homes in 1974.* There are 1,196 Indian children under twenty-one years old in Sacramento County.† Thus, one out of every 132.9 Indian children is in a foster family home.

*Conclusion*

In Sacramento County Indian children are in State-administered foster family homes at a per capita rate 2.5 times (250 percent) greater than the State-wide rate for non-Indians in California.

### XXXIII. SAN BENIIO COUNTY

In San Benito County, according to statistics from the California Department of Health, there were no Indian children in State-administered foster family homes in 1974.* There are 24 Indian children under twenty-one years old in San Benito County.†

### XXXIV. SAN BERNARDINO COUNTY

In San Bernardino County, according to statistics from the California Department of Health, there were four Indian children in State-administered foster family homes in 1974.* There are 1,548 Indian children under twenty-one years old in San Bernardino County.† Thus, one out of every 387 Indian children is in a foster family home.

*Conclusion*

In San Bernardino County Indian children are in State-administered foster family homes at a per capita rate 0.9 times (90 percent) the State-wide rate for non-Indians in California.

*AAIA Questionnaire, *op. cit.*
†Race of the Population by County: *op. cit.* 1970; 6, 7.



### XXXV. SAN DIEGO COUNTY

In San Diego County, according to statistics from the California Department of Health, there were three Indian children in State-administered foster family homes in 1974.* There are 2,634 Indian children under twenty-one years old in San Diego County.† Thus, one out of every 878 Indian children are in foster family homes.

*Conclusion*

In San Diego County Indian children are in State-administered foster family homes at a per capita rate 0.4 times (40 percent) the State-wide rate for non-Indians in California.

### XXXVI. SAN FRANCISCO COUNTY

In San Francisco County, according to statistics from the California Department of Health, there were 11 Indian children in State-administered foster family homes in 1974.* There are 546 Indian children under twenty-one years old in San Francisco County.† Thus, one out of every 118.1 Indian children is in a foster family home.

*Conclusion*

In San Francisco County Indian children are in State-administered foster family homes at a per capita rate 2.9 times (290 percent) greater than the State-wide rate for non-Indians in California.

### XXXVII. SAN JOAQUIN COUNTY

In San Joaquin County, according to statistics from the California Department of Health, there were three Indian children in State-administered foster family homes in 1974.* There are 546 Indiaan children under twenty-one years old in San Joaquin County† Thus, one out of every 182 Indian children is in a foster family home.

*Conclusion*

In San Joaquin County Indian children are in State-administered foster family homes at a per capita rate 1.8 times (180 percent) the State-wide rate for non-Indians in California.

### XXXVIII. SAN LUIS OBISPO COUNTY

In San Luis Obispo County, according to statistics from the California Department of Health, there were no Indian children in State-administered foster family homes in 1974.* There are 232 Indian children under twenty-one years old in San Luis Obispo County.†

### XXXIX. SAN MATEO COUNTY

In San Mateo County, according to statistics from the California Department of Health, there were no Indian children in State-administered foster family homes in 1974.* There are 600 Indian children under twenty-one years old in San Mateo County.†

### XL. SANTA BARBARA COUNTY

In Santa Barbara County, according to statistics from the California Department of Health, there were no Indian children in State-administered foster family homes in 1974.* There are 452 Indian children under twenty-one years old in Santa Barbara County.†

### XLI. SANTA CLARA COUNTY

In Santa Clara County, according to statistics from the California Department of Health, there were 15 Indian children in State-administered foster family homes in 1974.* There are 1,814 Indian children under twenty-one years old in Santa Clara County.† Thus, one out of every 120.9 Indian children is in a foster family home.

*AAIA Questionnaire, *op. cit.*
†Race of the Population by County: *op. cit.* 1970; 6, 7.

*Conclusion*

In Santa Clara County Indian children are in State-administered foster family homes at a per capita rate 2.8 times (280 percent) greater than the State-wide rate for non-Indians in California.

XLII. SANTA CRUZ COUNTY

In Santa Cruz County, according to statistics from the California Department of Health, there was one Indian child in a State-administered foster family home in 1974.* There are 161 Indian children under twenty-one years old in Santa Cruz county.† Thus, one out of 161 Indian children is in a foster family home.

*Conclusion*

In Santa Cruz County Indian children are in State-administered foster family homes at a per capita rate 2.1 times (210 percent) greater than the State-wide rate for non-Indians in California.

XLIII. SHASTA COUNTY

In Shasta County, according to statistics from the California Department of Health, there were 13 Indian children in State-administered foster family homes in 1974* There are 592 Indian children under twenty-one year old in Shasta County.†. Thus, one out of every 45.4* Indian children is in a foster family home.

*Conclusion*

In Shasta County Indian children are in State-administered foster family homes at a per capita rate 7.4 times (740 percent) greater than the State-wide rate for non-Indians in California.

XLIV. SIERRA COUNTY

In Sierra County, according to statistics from the California Department of Health, there were no Indian children in State-administered foster family homes in 1974.* There are 17 Indian children under twenty-one years old in Sierra County.†

XLV. SISKIYOU COUNTY

In Siskiyou County, according to statistics from the California Department of Health there were 11 Indian children in State-administered foster family homes in 1974.* There are 434 Indian children under twenty-one years old in Siskiyou County.† Thus, one out of every 39.5 Indian children is in a foster family home

*Conclusion*

In Siskiyou County Indian children are in State-administered foster family homes at a per capita rate 8.5 times (850 percent) greater than the State-wide rate for non-Indians in California.

XLVI. SOLANO COUNTY

In Solano County, according to statistics from the California Department of Health, there was one Indian child in a State-administered foster family home in 1974.* There are 470 Indian children under twenty-one years old in Solano County.† Thus, one out of 470 Indian children is in a foster family home.

*Conclusion*

In Solano County Indian children are in State-administered foster family homes at a per capita rate 0.7 times (70 percent) the State-wide rate for non-Indians in California.

XLVII. SONOMA COUNTY

In Sonoma County, according to statistics from the California Department of Health, there were 18 Indian children in State-administered foster family homes in 1974.* There are 727 Indian children under twenty-one years old in Sonoma County.† Thus, one out of every 40.4 Indian children is in a foster family home.

*AAIA Questionnaire, *op. cit.*
†Race of the Population by County: *op. cit.* 1970; 6, 7.



*Conclusion*

In Sonoma County Indian children are in State-administered foster family homes at a per capita rate 8.3 times (830 percent) greater than the State-wide rate for non-Indians in California.

XLVIII. STANISLAUS COUNTY

In Stanislaus County, according to statistics from the California Department of Health, there were five Indian children in State-administered foster family homes in 1974.* There are 307 Indian children under twenty-one years old in Stanislaus County.† Thus, one out of every 61 Indian children is in a foster family home.

*Conclusion*

In Stanislaus County Indian children are in State-administered foster family homes at a per capita rate 5.5 times (550 percent) greater than the State-wide rate for non-Indians in California.

XLIX. SUTTER COUNTY

In Sutter County, according to statistics from the California Department of Health, there were three Indian children in State-administered foster family homes in 1974.* There are 94 Indian children under twenty-one years old in Sutter County.† Thus, one out of every 31.3 Indian children is in a foster family home.

*Conclusion*

In Sutter County Indian children are in State-administered foster family homes at a per capita rate 10.8 times (1,080 percent) greater than the State-wide rate for non-Indians in California.

L. TEHAMA COUNTY

In Tehama County, according to statistics from the California Department of Health, there was one Indian child in a State-administered foster family home in 1974.* There are 137 Indian children under twenty-one years old in Tehama County.† Thus, one out of 137 Indian children is in a foster family home.

*Conclusion*

In Tehama County Indian children are in State-administered foster family homes at a per capita rate 2.5 times (250 percent) greater than the State-wide rate for non-Indians in California.

LI. TULARE COUNTY

In Tulare County, according to statistics from the California Department of Health, there were 15 Indian children in State-administered foster family homes in 1974.* There are 613 Indian children under twenty-one years old in Tulare County.† Thus, one out of every 40.9 Indian children is in a foster family home.

*Conclusion*

In Tulare County Indian children are in State-administered foster family homes at a per capita rate 8.2 times (820 percent) greater than the State-wide rate for non-Indians in California.

LII. TUOLUMNE COUNTY

In Tuolumne County, according to statistics from the California Department of Health, there were two Indian children in State-administered foster family homes in 1974.* There are 246 Indian children under twenty-one years old in Tuolumne County.† Thus, one out of every 123 Indian children is in a foster family home.

*Conclusion*

In Tuolumne County Indian children are in State-administered foster family homes at a per capita rate 2.7 times (270 percent) greater than the State-wide rate for non-Indians in California.

*AAIA Questionnaire, *op. cit.*
†Race of the Population by County: *op. cit.* 1970; 6, 7.

LIII. VENTURA COUNTY

In Ventura County, according to statistics from the California Department of Health, there was one Indian child in a State-administered foster family home in 1974.* There are 515 Indian children under twenty-one years old in Ventura County.† Thus, one out of 515 Indian children is in a foster family home.

*Conclusion*

In Ventura County Indian children are in State-administered foster family homes at a per capita rate 0.7 times (70 percent) the State-wide rate for non-Indians in California.

LIV. YOLO COUNTY

In Yolo County, according to statistics from the California Department of Health, there was one Indian Child in a State-administered foster family home in 1974.* There are 213 Indian children under twenty-one years old in Yolo County.† Thus, one out of 213 Indian children is in a family foster home.

*Conclusion*

In Yolo County Indian children are in State-administered foster family homes at a per capita rate 1.6 times (160 percent) the State-wide rate for non-Indians in California.

LV. YUBA COUNTY

In Yuba County, according to statistics from the California Department of Health, there were no Indian children in State-administered foster family homes in 1974.* There are 94 Indian children under twenty-one years old in Yuba County.†

LVI–LVIII. COLUSA, MARIPOSA AND TRINITY COUNTIES

The California Department of Health was unable to supply any foster care data for Colusa, Mariposa and Trinity counties.* There are 278 Indian children under twenty-one years old in these three counties.*†

*AAIA Questionnaire, *op. cit.*
†Race of the Population by County: *op. cit.* 1970; 6, 7.

IDAHO INDIAN ADOPTION AND FOSTER CARE STATISTICS

Basic Facts

1. There are 302,170 under twenty-one year olds in the State of Idaho.[1]
2. There are 3,808 under twenty-one year old American Indians in the State of Idaho.[2]
3. There are 298,902 non-Indians under twenty-one years old in the State of Idaho.

I. ADOPTION

In the State of Idaho, according to the Idaho Department of Health and Welfare, there were an average of 14 public agency adoptions per year of American Indian children from 1973–1975.[3] This data base is too small to allow realistic projection of the total number of Indian children in adoptive care. We can say though that during 1973–1975 1.1 percent of Idaho Indian children were placed for adoption.

During 1973–1975, according to the Idaho Department of Health and Welfare, there were an average of 109 public agency adoptions per year of non-Indian children in Idaho.[4] Thus, during 1973–1975, 0.1 percent of Idaho non-Indian children were placed for adoption.

*Conclusion*

Based on the three-year period 1973–1975, and not including any private agency placements, Indian children were placed for adoption at a per capita rate 11 times (1,100 percent) greater than that for non-Indian children; 88 percent of the Indian children placed in adoption by public agencies in Idaho in 1975 were placed in non-Indian homes.[5]

II. FOSTER CARE

According to statistics from the Idaho Department of Health and Welfare, there were 296 Indian children in foster care in Fiscal Year 1976.[6] This represents one out of every 12.9 Indian children in the State. By comparison there were 3,615 non-Indian children in foster care during Fiscal Year 1976,[7] representing one out of every 82.7 non-Indian children in the State.

*Conclusion*

There are therefore, by proportion, 6.4 times (640 percent) as many Indian children as non-Indian children in foster care in Idaho.

III. COMBINED FOSTER CARE AND ADOPTIVE CARE

Since we are unable to estimate the total number of Indian children currently in adoptive care in Idaho, it is not possible either to estimate the total number of Indian children receiving adoptive and foster care. The foster care statistics alone, and the adoption data we do have, make it unmistakably clear

[1] U.S. Bureau of the Census, Census of Population: 1970, Volume I, Characteristics of the Population, Part 14, "Idaho" (U.S. Government Printing Office: Washington, D.C.: 1973), pp. 14–43.
[2] Ibid., pp. 14–43 (Table 19), pp. 14–265 (Table 139). Indian people comprise 54 percent of the total non-white population according to Table 139. According to Table 19 there are 7,051 non-whites under twenty-one. 7,051 times .54 equals 3,808.
[3] Telephone interview with Ms. Shirley Wheatley, Adoptions Coordinator, Idaho Department of Health and Welfare, July 23, 1976. A total of 41 Indian children were placed for adoption by the Idaho Departement of Health and Welfare during these three years.
[4] Ibid. A total of 328 non-Indian children were placed for adoption by the Idaho Department of Health and Welfare during these three years.
[5] Ibid.
[6] Telephone interview with Ms. Ruth Pefley, Bureau of Research and Statistics, Idaho Department of Health and Welfare, July 23, 1976.
[7] Ibid.



77-467—76——14