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Cover Photograph: President Dwight Eisenhower and Secretary of the Interior Douglas McKay supported private over public development of western water resources, the subject of Karl Brooks' article in this issue. (Courtesy of Dwight D. Eisenhower Library)

CLIFTON MATHEWS: A REMEMBRANCE

JOHN J. MATHEWS

Editor's note: Clifton Mathews was appointed to the Ninth Circuit bench from Arizona in 1935, took senior status in 1955, and continued to hear cases until his death in 1963. John J. Mathews, his youngest son, retired from the trucking and warehousing industries in 1989, and since then has written extensively for newspapers and magazines. The following memoir of his father is excerpted from John Mathews' forthcoming book It Gets Late Really Early.

WE ARE WHAT WE MAKE OURSELVES

The black-robed Louisiana Supreme Court justices, arrayed behind the high bench in the cavernous old Cabildo in New Orleans, knew that the slim young applicant before them had seen little formal education, most of that in one-room schoolhouses away in a hill parish against the Arkansas border, not a day of it in law school. Yet they couldn't help being impressed with his responding to the Civil Code questions in better French than they usually heard around the bayous. They had no way of knowing that, by firelight and in the shade of southern pine, he had also taught himself Latin and classical Greek, and that he could record testimony in Pitman shorthand at the pace of normal speech. When, at length, the oral examination was finished, the

John J. Mathews began his career as a journalist and then entered the trucking and warehousing business. He is now retired.

judges excused him and signaled for the next candidate to be sent in.

Waiting in an outer room of this building from which Spain had once ruled this part of the New World, the applicant from Union Parish had time to reflect on what this next hour would mean: Grant of his petition would launch him into the world of wits and intellect for which he was so gifted; denial would send down a blank curtain. All he could know for certain was that he would never return to the rural isolation and struggle that had claimed his father's life, had left one of his brothers dead before his teens, and had left one of his sisters deaf from a high fever before school age.

One by one, the other petitioners filed back into the waiting room, made small talk, and lapsed into silence. The air had grown warm by the time the court's clerk entered, looked around, and called out his name. The young man from Union Parish rose, studying the white-haired clerk's face. The manila envelope sparked his hopes, but before he could form the question, he heard the answer. The words would remain with



Clifton Mathews was admitted to practice after examination by Louisiana's Supreme Court in New Orleans' historic Cabildo. (Courtesy of Louisiana State Museum)

him for almost sixty years: "Congratulations, Clifton!" My father had passed the Louisiana bar.

On the northbound train, the jubilant farmboy-scholar-lawyer, just turned twenty-four, could hardly wait to reach Farmerville, the seat of Union Parish, where he had read law. The town, boasting fewer than a thousand souls, was nonetheless the biggest community in which he had ever lived. The familiar fields of corn and cotton now slipping past the train window were about to become no more than a backdrop.

In Clifton's hands, the *Picayune* reported the Democrats' search for a candidate who might turn the Rough Rider out of the White House. In his borrowed briefcase, the ink was hardly dry on his license to practice. In his bloodstream, unsuspected, lurked a third item acquired in New Orleans: the parasite *Plasmodium vivax*.

Among friends and family in Farmerville, Clifton shared a small celebration and was invited to join the private practice of Frederick Fauntleroy Preaus, the parish's best-known lawyer, who also served part time as the district attorney. It was a moment of high promise. The newly licensed advocate was courting attorney Preaus' daughter Virginia—beautiful, spirited, and nineteen. Secretly, they whispered of marriage.

Only days after Clifton's triumphant return home, however, the *vivax* parasite announced itself, and he found himself locked in the first battle of what would prove to be decades of recurring warfare with malaria. That first engagement threatened to be the last—raging fevers and chills, pounding headache and vomiting. His doctor, one of two in the area, warned friends and family against optimism. The patient sensed the grim tidings being spread, and whispered, "Not yet. Virginia and I have other plans."

As it turned out, malaria was not to be the only obstacle to his marriage. His intended's mother, a strong-willed woman whose energy and personality would later lead her grandchildren to call her "Mr. Muzz," objected when she sniffed out the marriage plans. "Too young!" she growled. But her daughter, herself amply endowed with self-assurance, reminded her that, by the time of the wedding, she would be twenty years old; that the objecting mother had, at the time of her own wedding, been only sixteen; and that the mother's mother had entered matrimony at fifteen.

Almost a year after the first malaria attack, the proud young lawyer was able to flash his radiant smile as he escorted his bride up the aisle to the swelling sounds of the Baptist church brass choir. Within months, the first addition to the family was on the way—Halcyon days for the young couple. Then, in a hot autumn, the malaria struck again, this time with even

greater vehemence. Once more, as the symptoms worsened, Dr. Taylor cautioned the mother-to-be to prepare for the worst.

Clifton suspected what was being said in the next room. When Virginia came to his bedside, he reassured her, "Don't believe them. I'm going to hold our baby in my arms." And he did—that baby and, in time, others.

Clifton's legal experience kept pace with his family's growth. By 1912, after eight years of law practice and seven years of marriage, he and Virginia had two daughters, Isabel and Olive, and a son, Fred, and his father-in-law was ready to step down as district attorney. The young lawyer, already working long hours, prepared to throw his hat into the ring. Even the modest salary of the district attorney would be an improvement in helping to sustain his growing family at a time and place where legal fees were often paid in meat, milk, eggs, produce, or labor.

But his election was not to be. While Theodore Roosevelt and William Howard Taft and Woodrow Wilson were waging their three-way struggle for the White House, the farm-town lawyer began coughing up white phlegm specked with blood. The family doctor soon confirmed that he had contracted tuberculosis and told him that not only was his run for office ended, so were his days in humid Farmerville. Bed rest and dry climate were the only treatments known.

New Mexico, newly admitted to statehood, boasted the Christianson Brothers Sanitarium, one of the nation's finest for treating tuberculosis. "I'll be back," Clifton told the family as he prepared to leave for the high, arid hillside in Silver City. Of course, not many at home believed the brave words. "When TB lays hold of a fella who's been run down by malaria, there's not much chance," it was said. In church and among the little frame houses around town, a long succession of prayers began.

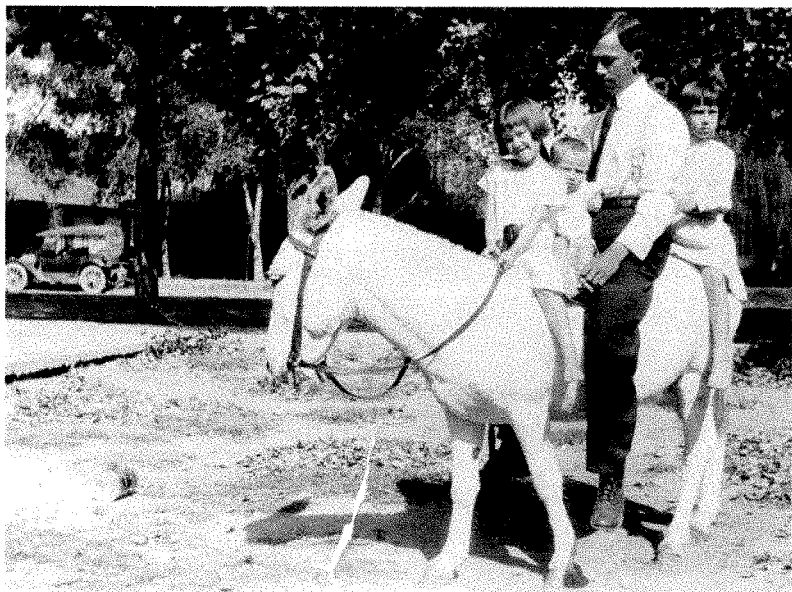
On the three-day train ride west, Clifton occupied his mind with other thoughts. Would his meager savings sustain his family until he was well? How long would that be? When he was discharged, could he hope to find clients in a place where he was a total stranger? Could any lawyer whose study and practice had been exclusively in the nation's only Code Civil state possibly prevail in court over other attorneys whose careers had been entirely in the common law? He never asked himself, "Will I get well?"

While undergoing "total bed rest" in New Mexico, and incidentally committing to memory vast passages from Homer, Virgil, Shakespeare, and other classics, Clifton began to evaluate possible homesites in the region. Mining, cattle-ranching, and timber were all active local industries, but he had only a passing acquaintance with the last and none with

the others. As his condition improved, he was allowed to refresh his typing skills on one of the sanatorium's two high-framed Royals.

One afternoon, only seven months after the family had waved its tearful good-byes, a deeply tanned stranger approached the cottage on Academy Street in Farmerville. "It can't be him," murmured one of the girls. "He's wearing a blue shirt." A telegram had told them to expect their father—the Christianson brothers had pronounced his case "arrested"—but, since he had first hung out his shingle, no one had ever seen him in other than white broadcloth shirts. Yet the dark-skinned stranger called out their names: "Isabel! Olive!" And he bent down and scooped them up and hurried them, wriggling and gasping and laughing, into the house. Virginia hardly recognized her once-wan husband.

The next day, Clifton gathered them all around a map of New Mexico and pointed out a dot in the southeast quadrant. "Roswell," he told them, "is a prosperous farming and livestock center, beautiful country. High and dry. As soon as we can get our things together, that's where we're going—to live." He didn't tell them that this little speech had exhausted much of his knowledge of their world-to-be.



Olive, Fred, and Isabel Mathews with their father astride a burro in Roswell, New Mexico, 1913. (Courtesy of the author)

MARCHING TO THE PROMISED LAND

Roswell was a new world indeed. Almost ten times the size of Farmerville, it boasted a daily newspaper and a few paved streets. Another first was that the family's house was served by electricity. Downtown, the newcomer hung out his first shingle as a sole practitioner: "Clifton Mathews, Lawyer."

With Clifton's tuberculosis arrested and the malaria attacks subsiding, the Mathews family was finally beginning to feel settled. On their ninth wedding anniversary, March 22, 1914, less than two years after arriving in Roswell, Virginia presented Clifton with a second son, George. The family appeared complete.

Then, in faraway Sarajevo, Archduke Ferdinand was assassinated. The world exploded into war. The shockwaves affected many industries, including copper mining, and the mines in neighboring Arizona boomed. Before long the senior partner of Arizona's leading law firm visited Roswell to recruit Clifton Mathews for his practice, headquartered in Bisbee, a mine-scarred copper center in the southeast corner of the state. For some months Clifton resisted the flattering invitations; there had been enough turns in his life already. But the blandishments continued, and as he approached his thirty-third birthday, he assented.

From this day forward, his difficulties would no longer be small-town isolation or the specter of failing health. The new challenge would be to succeed in the world of huge corporations, powerful politicians, and phalanxes of opposing attorneys trained at the country's leading law schools.

The first of these tests was not long in coming. The United States had barely joined the other great powers in the World War when the International Workers of the World struck the Bisbee mine and smelter, shutting off the flow of copper. The town fathers, including the mine owners and management, reacted in a frenzy of patriotism and self-interest. Deputizing all able-bodied, reliable people, they rounded up the Wobblies and their sympathizers and shipped them by cattle car to an army camp across the New Mexico line. This was more than even the federal government, desperately trying to mobilize its war effort, could abide. In short order, the Justice Department tried the perpetrators of the roundup on civil rights charges. Among the defendants facing fines and imprisonment were the mine owners and managers, the largest clients of my father's law firm.

The case did not go well. The federal district court found for the prosecution. At lunch one day, my father overheard his

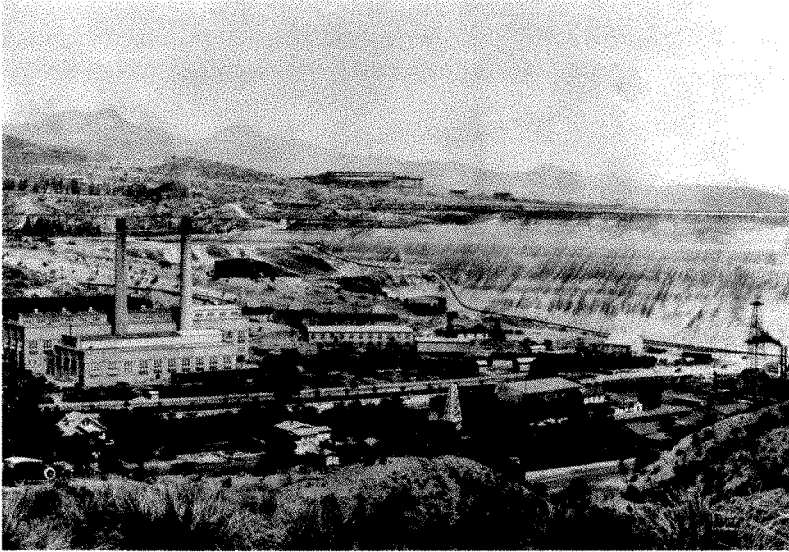
defeated colleagues discussing their strategy for an appeal, and he offered the opinion that both prosecution and defense theories about the case had been wrong from the outset. Before sundown, Ralph Ellinwood, the firm's senior partner, demanded to hear Clifton's ideas. Then he promptly handed the responsibility for the appeal to the embarrassed kibitzer.

Clifton's embarrassment was short lived. He prepared the appeal and demolished the government's case before a three-judge appellate panel sitting in Tombstone. The convictions were overturned. The stakes were raised, however, when the U.S. attorney general persuaded the Supreme Court to hear the case. Working with co-counsel Charles Evans Hughes, who was between his term as an associate justice and his later term as chief justice of the United States, my father prevailed. No longer was Clifton Mathews considered a small-town lawyer.

The success presented the Ellinwood & Ross firm with a problem, however. To bring in my father as a principal would be an affront to all the other able associates who had served the firm longer, so they helped him form a new partnership with a highly regarded attorney in the Globe-Miami mining district about two hundred miles north of Bisbee. There, in 1921, at Globe's Gila County Hospital, a short distance from the Old Dominion smelter, I was born, Virginia and Clifton's fifth child. My father regarded me as a replacement for their first son Fred, who had succumbed to scarlet fever at the age of four.

The plunge back into a two-man practice in another new community was risky, but Clifton was soon named general counsel for the Inspiration Consolidated Copper Company, with vast operations in neighboring Miami. On the company's behalf, Clifton began thirteen years of battling an array of adversaries: government agencies, suppliers such as DuPont, and behemoth competitors like Anaconda.

Another challenge arose. As the 1920s proceeded, Arizona became locked in a fateful struggle with California, which had negotiated treaties with other states to give it the lion's share of water from the Colorado River. When Arizona began to fear that its key water supply would be snatched away, the state named Clifton as special assistant attorney general to litigate the dispute up through the U.S. Supreme Court. Arrayed against him were the money and legal talent of much of the Southwest. Even his own client, in the person of the Arizona governor, told him just to do his best, warning, "The deck is stacked." But the Supreme Court rejected the stacked deck and handed down a decision that not only set regional water policy for decades to come, but thrust Clifton further into the spotlight.



Clifton Mathews became general counsel for the Inspiration Consolidated Copper Company in Miami, Arizona. (Courtesy of Arizona Collection, Arizona State University Libraries)

The victory was gratifying. Still, the mines' prosperity rested on a fragile base. Foreign copper was undercutting domestic prices to the point where the Old Dominion operation in Globe was forced to cut back. It was becoming clear that the Inspiration complex in neighboring Miami would soon follow. Then came the 1929 stock market crash. The Old Dominion closed altogether, and my father's client, Inspiration, could not be expected to hang on much longer. When Clifton and his partner, Edward Rice, surveyed their alternatives, it appeared that their practice would soon shrink below a level that would sustain the two of them.

Then, in spring 1933, newly elected president Franklin D. Roosevelt named my father U.S. attorney for Arizona. The appointment meant a pay cut of almost 80 percent and thrust him into the midst of the corrupt and powerful Phoenix establishment. Still, it was a chance to showcase his abilities in a larger community, and he rather relished the prospect of the David-and-Goliath situation.

Clifton immediately launched a typically high-profile, Depression-era prosecution of racketeers who could buy local immunity, but who had neglected to file income tax returns. In little more than a year, the Phoenix mayor and his colleagues who had been prospering from contract kickbacks

were cooling their heels in the federal penitentiary at McNeil Island. It was the closest I ever came to seeing my father gloat.

Only two years after he became U.S. attorney, a letter arrived on his desk typed on blue, gold, and white U.S. Senate Judiciary Committee stationery:

Dear Clifton:

Yesterday, the Attorney General, Mr. Homer Stillé Cummings, asked me to come down to his office. There he asked me whom, if I were the President, would I name to fill the vacancy on the Ninth Circuit Court of Appeals bench in San Francisco.

"General," I said, "if I were the President of the United States, I would name Clifton Mathews of Arizona."

I thought you might be interested in this conversation. Best regards to Virginia,

Henry Ashurst, Chairman
U.S. Senate Judiciary Committee

As today's readers know, confirmation hearings can be excruciating, reducing even highly capable nominees to political "roadkill," but in 1935 Senator Ashurst, who had been a U.S. senator since Arizona's admission to the Union, ruled the Judiciary Committee as something close to a private fiefdom. His brethren in the Senate at large gave the nomination their unanimous blessing.

Thus the self-taught country lawyer found himself in the rarified atmosphere of the nation's second-highest bench. The chief judge was a magna cum laude graduate of Annapolis and a former secretary of the navy, and the attorneys who came to plead before the court included alumni of the country's most distinguished law schools, often representing vast corporate interests. All soon learned that they were in the presence of an awesome legal mind.

Clifton Mathews' written opinions have, from the outset, been characterized by leading figures of the bar as models of clarity and unassailable reasoning. He treasured scholarship, but scorned fancy writing. Brevity was one of his beacons.

Despite widening recognition, however, he, like many of his most highly regarded fellow jurists, voiced his contempt for Roosevelt's court-packing scheme, thus destroying his chances of ever being elevated to the U.S. Supreme Court. Other battles remained to fight. Almost single-handedly, he per-

suaded Congress to reverse a severe impairment of the retirement program for the federal judiciary.¹

Clifton also received numerous awards, including an Honorary Doctor of Laws degree from the University of Arizona, the only college degree he ever received. At my parents' fiftieth wedding anniversary, twenty years after my father mounted the bench, Chief Judge Curtis D. Wilbur offered a toast to my mother and to "the finest legal scholar of our time."

In the fall of 1962, after eighty-two years of working to overcome the handicap of birth in rural isolation, the near-absence of formal education,² and the deadly assaults of malaria and tuberculosis, Clifton came to his final rest. The U.S. Court of Appeals for the Ninth Circuit honored him with a special memorial service, in which lawyers and judges from throughout the circuit came to offer their tributes to a man Chief Judge Richard Chambers called one of the great judges in the history of the court.³

1. During the 1937 effort by the Roosevelt administration to enlarge the Supreme Court's membership in order to obtain a more favorable judicial environment for New Deal legislative innovations, the news media attacked the plan as a "court-packing" scheme. It occurred to Clifton that perhaps the administration would welcome an unpacking strategy. He suggested to the Arizona senators, both of whom occupied strategic committee positions in the Senate and both of whom were stalwart Democrats, that a lot of Harding and Coolidge appointees might take senior status if a simple statutory amendment would assure them that senior judges would receive any salary increases enacted by Congress for itself and for the judiciary. The existing statute provided that a judge taking senior status would continue to receive the salary at the rate last paid during active status. Fear of missing out on future salary increases if the Depression ever ended and salaries went up motivated a number of older judges in the circuit and district courts to continue on active service. The amendment that would guarantee them future increases sailed through both houses and was signed by the president. Almost immediately, a number of aging Republican judges stood down and were replaced with judges likely to be more kindly disposed toward the New Deal. Clifton Mathews has been revered by generations of senior judges of both parties who did not learn the identity of their benefactor until later.

2. Clifton's only recorded formal education was a few years' attendance at Peabody College in Nashville, Tennessee, which produced no degree but apparently enabled him to begin reading law with a local practitioner.

3. The official record of these proceedings is reported at 312 F 2d 5 (1962).

THE DAWES ACT AND THE PERMANENCY OF EXECUTIVE ORDER RESERVATIONS¹

E. RICHARD HART

INTRODUCTION

The history of executive orders that established or enlarged Indian reservations naturally falls into several periods. During the period between 1776 and 1854, executive authority over Indian affairs was established, but no executive orders were issued reserving land for Indian purposes. The next period includes the years between 1855 and 1871, during which a number of orders were issued, individually authorized by Congress. This period closed with an important policy shift, as treaty-making ended and Congress determined that reservations normally should be established by executive order. During the period between 1871 and 1887, the executive

E. Richard Hart, who provides historical, ethnohistorical, and environmental historical services and expert testimony, is the author or editor of seven books, the most recent of which is the award-winning *Zuni and the Courts: A Struggle for Sovereign Land Rights*.

¹The material in this paper is drawn from the following, larger report that I produced for the U.S. Department of Justice: E. Richard Hart, "The Efficacy of the 1873 Coeur D'Alene Executive Order" (Hart West & Assoc., July 19, 1997), prepared for the U.S. Department of Justice, as expert testimony in *United States v. Idaho*, Civil #92-35703, 2 vols. An earlier version of this paper was presented at The Native American Studies Conference at Boise State University on February 27, 1998.

A number of people assisted the author in research relating to the case, including Dr. Marilyn Watkins of Hart West & Associates, and Dr. Floyd A. O'Neil and Dr. Gregory E. Smoak of the American West Center.

exercised a broadly established authority in setting aside millions of acres of land for Indian use and occupancy. During that period, the orders were considered to be of a temporary nature, until such time as Congress might act and make them permanent.

The record clearly shows that with passage of the 1887 General Allotment Act (commonly known as the Dawes Act), Congress intended to ratify all executive order reservations (make them "permanent") and thus establish parallel title for executive order, statute, and treaty reservations.

With the General Allotment Act of 1887, policy in regard to executive orders changed, as Congress recognized an Indian interest in executive order reservations and moved to restore reservation lands to the public domain. Under this policy, during the years 1887 to 1919, special authorization of each order issued was expected by Congress (although continuing authority existed in many cases). In 1919, Congress acted again to change the policy in regard to executive orders, making it illegal for the executive to set aside reservation lands without the express direction of Congress. Thus, between 1919 and the present, all executive orders have needed express congressional authorization. Since 1931 the orders themselves have contained a reference to such authority. The inevitable conclusion is that executive orders establishing or enlarging Indian reservations, throughout their history, have been issued under clear authority from Congress, either individually authorized or generally authorized, depending on the period.

THE ESTABLISHMENT OF EXECUTIVE POWERS OVER INDIAN AFFAIRS, 1776-1854

Under Article I, Section 8 of the Constitution, Congress was given the power to regulate commerce with the Indian tribes. Congressional power over Indian affairs emanated from this constitutional source. Congress also had authority over the public lands.

The principal purpose of the executive branch of the government, as its name suggests, was to execute or carry out actions necessary to the government. Since the executive was the branch of government that was conceived of and designed to be action oriented, it follows, for instance, that under Article II, Section II of the Constitution, the president, as head of the executive branch of the government, is made com-

mander-in-chief of the military forces of the United States. With its constitutional sources of power, the legislative branch of government, the Congress, established laws and policies to deal with Indians, and provided authorization to the executive branch to carry out the actions necessary to implement those laws and policies. Between 1789 and 1855, extensive authority was granted to the executive to implement law and to carry out the desired (shifting and changing) policies of the Congress.

During the country's earliest years, Congress made it very clear that Indian rights should be protected and that the president, as head of the executive branch of government and commander-in-chief of the military, would be responsible for regulating the nation's relations with Indians.² The Trade and Intercourse Acts provided the foundation of Indian policy and gave authority to the executive to carry out mandated provisions.³ Between 1800 and 1829, a number of important acts established executive authority to regulate Indian affairs and to set aside public lands for various purposes.⁴ In 1830, with

²*Statutes at Large of the United States of America*, vol. 1, pp. 51–53. "Northwest Ordinance," July 13, 1787; Francis Paul Prucha, *Documents of United States Indian Policy* (Lincoln, Neb., 1975), pp. 3 and 8–10, provides the text of the Northwest Ordinance, as taken from *Journals of the Continental Congress*, 32:340–41; Wilcomb E. Washburn, *The American Indian and the United States*, vol. 3 (Westport, Conn., 1973), pp. 2144–50, also provides the full text of the Northwest Ordinance.

Thomas Donaldson, *The Public Domain: Its History, With Statistics* (New York and London, 1970 [originally published Washington, D.C., 1884, by the Public Land Commission]), pp. 199 and 240, reviews the 1790 plan of Alexander Hamilton for dealing with Indian lands, and Article XI of the Articles of Confederation also dealing with Indian lands.

Cyrus Thomas, "Introduction," to Charles C. Royce, "Indian Land Cessions in the United States," in *Eighteenth Annual Report of the Bureau of American Ethnology to the Secretary of the Smithsonian Institution*, 1896–97, ed. J.W. Powell, part 2, pp. 533 and 639–40, also reviews early congressional actions relating to Indian policy.

³Prucha, *Documents of United States Indian Policy*, pp. 14–21, reprinting the following acts: *U.S. Statutes at Large*, 1:49–50; *U.S. Statutes at Large*, 1:137–38; *U.S. Statutes at Large*, 2:139–46. Acts were passed in 1790, 1793, 1796, 1799, and 1802.

⁴Cyrus Thomas, "Introduction," to Royce, "Indian Land Cessions," part 2, p. 534, providing the text of the 1803 act relating to Indian lands in former French territory; Prucha, *Documents of United States Indian Policy*, pp. 23–24, 30–31, 33–34, and 37–38, reprinting the following statutes: *U.S. Statutes at Large*, 2:402–404; *U.S. Statutes at Large*, 3:428; *U.S. Statutes at Large*, 3:516–517; *U.S. Statutes at Large*, 3:682–83; and *U.S. Statutes at Large*, 4:35–36; Benjamin Harris Brewster to secretary of the interior, January 17, 1882, "Indian Reservations," Attorney General Opinion (17 U.S. Op. Atty. Gen. 258), who also cited *Grisar v. McDowell*, 6 Wall., 363 (see p. 381); Charles J. Kappler, *Indian Affairs: Laws and Treaties*, vol. 3 (Laws), compiled to

passage of the Indian Removal Act, Congress authorized the president to negotiate treaties and to set aside lands for tribes.⁵

The Indian Removal Act led to establishment of the Indian Territory, a precursor to reservations. A number of additional acts that were passed between 1830 and 1855 have been cited as providing evidence that Congress provided the president with broad authority to establish Indian reservations by executive order.⁶ Some of the most important of these were

December 1, 1913 [Washington, D.C., 1913], pp. 692–95, listing the following eight acts that authorized the president to set aside public lands: April 12, 1792 (1 Stat. 252), military garrison; March 26, 1804 (2 Stat. 280), salt springs; April 21, 1806 (2 Stat. 394), school lands and salt springs; March 31, 1807 (2 Stat. 449), lead mines; February 10, 1811 (2 Stat., 621) and March 3, 1811 (2 Stat. 665), school lands, salt springs, and lead mines in Louisiana Territory; March 3, 1815 (3 Stat. 229), school lands; March 5, 1816 (3 Stat. 256), salt springs and lead mines; and April 24, 1820 (3 Stat. 567), authorizing the president to offer public lands for sale.

⁵Prucha, *American Indian Treaties: The History of a Political Anomaly* (Berkeley, Calif., 1994), pp. 164–65, provides an overview of the history behind passage of the Indian Removal Act. He also furnishes a list of 367 ratified treaties with statute sources, and an in-depth analysis of treaty-making with tribes in the United States.

Cyrus Thomas, "Treaties," in *Handbook of American Indians North of Mexico*, ed. Frederick Webb Hodge (Washington, D.C., 1907–1910), vol. 2, pp. 803–14, provides an overview of treaty-making with tribes and the constitutional authority empowering treaties, and a list of all treaties made with tribes, together with a notation of the volume and page where they may be found in the *Statutes at Large*.

Mary E. Young, "Indian Removal and Land Allotment: The Civilized Tribes and Jacksonian Justice," in *The Rape of Indian Lands*, ed. Paul W. Gates (New York, 1979), pp. 31 and 37; Prucha, *Documents of United States Indian Policy*, p. 52–53, reprinting: *U.S. Statutes at Large*, 4:411–12; G.E.E. Lindquist, "Indian Treaty Making," *Chronicles of Oklahoma* 26:4 (Winter 1948–49), pp. 416–48, analyzes treaty-making with tribes by the United States and groups treaties by type and purpose.

⁶"An Act to grant pre-emption rights to settlers on the public lands," 21st Cong., 1st sess., May 29, 1830 (4 Stat. 420–21); Benjamin Harris Brewster to secretary of the interior, January 17, 1882, "Indian Reservations," Attorney General Opinion (17 U.S. Op. Atty. Gen. 258), cited the 1830 Pre-emption Act; Kappler, *Indian Affairs: Laws and Treaties*, compiled to December 1, 1913, pp. 692–95, also cites the act of June 28, 1832 (4 Stat. 550), allowing the executive to reserve Florida lands for public purposes, and the act of June 26, 1834 (4 Stat. 687), allowing the executive to set aside school and military lands; Prucha, *Documents of United States Indian Policy*, pp. 62–69, reprinting the following statutes: *U.S. Statutes at Large*, 4:564; *U.S. Statutes at Large*, 4:729–35; and *U.S. Statutes at Large*, 4:735–38.

"An Act to appropriate the proceeds of the sales of the public lands, and to grant pre-emption rights," 27th Cong., 1st sess., September 4, 1841 (5 Stat. 453–58).

the 1834 act that organized the Department of Indian Affairs,⁷ the act establishing the Department of the Interior and placing the Indian Office and commissioner of Indian affairs under the Interior Department, and the 1851 act that gave the president further authority to negotiate treaties with tribes.⁸

In the early 1850s, Congress granted the executive special authority to deal with public lands, giving the president broad powers to negotiate treaties with the tribes of Oregon, to remove Indians west of the Cascades Mountains to lands east of the Cascades, and to set aside lands for various purposes, including for forts.⁹ In 1853 and 1855, Congress passed acts authorizing the president to establish seven "military reservations" for the Indians of California.¹⁰ Kappler cited two additional acts passed in 1855 as evidence that the executive's power to protect and administer the public lands extended to Indian lands.¹¹

⁷"An Act to provide for the organization of the department of Indian affairs," 23d Cong., 1st sess., June 30, 1834 [*U.S. Statutes at Large*, 4:735-38].

⁸Prucha, *Documents of United States Indian Policy*, pp. 80-81, 83-84, and 89-92, reprinting the following statutes and report: *U.S. Statutes at Large*, 9:395; *U.S. Statutes at Large*, 9:437; *U.S. Statutes at Large* 9:586-87; *Annual Report of the Commissioner of Indian Affairs*, November 22, 1856, Senate Executive document No. 5, 34th Cong., 3d sess., Serial Set 875, pp. 571-75.

⁹*Statutes at Large and Treaties of the United States of America. From December 1, 1845, to March 3, 1851*, vol. 9, ed. George Minot (Boston, 1854), p. 437 [9 Stat. 437].

"An Act to create the Office of Surveyor-General of the Public Lands in Oregon, and to provide for the Survey, and to make Donations to Settlers of the said Public Lands," 31st Cong., 1st sess., September 27, 1850 [9 Stat. 496-500].

"An Act to amend an act entitled 'An Act to create the Office of Surveyor-General of the Public Lands in Oregon, and to provide for the Survey, and to make Donations to the Settlers of the said Public Lands,'" 32d Cong., 2d sess., February 14, 1853, in which Section 14 of the 1850 act was amended to limit the presidential reservations to not exceed 20 acres, except for forts, which could be up to 640 acres [10 Stat. 158-60].

"An Act to amend the Act approved September twenty-seven, eighteen hundred and fifty, to create the office of Surveyor-General of the Public Lands in Oregon, etc., and also the Act amendatory thereof, approved February nineteen [fourteenth] eighteen hundred and fifty-three," 33d Cong., 1st sess., July 17, 1854, in which the 1841 preemption act was made to apply to Washington and Oregon territories, including that act's reservations and disclaimers, and time limits on the previous acts were extended [10 Stat. 305-306].

¹⁰*Statutes at Large and Treaties of the United States of America. From December 1, 1851, to March 3, 1855*, vol. 10, ed. George Minot (Boston, 1855), p. 238. [10 Stat. 238]; *ibid.*, p. 699 [10 Stat. 699].

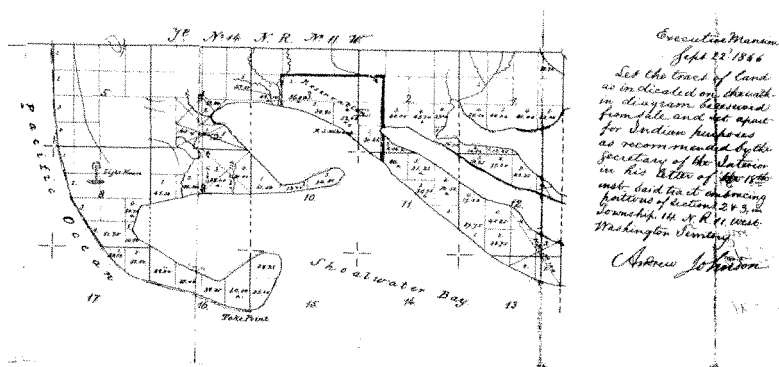
¹¹Kappler, *Indian Affairs: Laws and Treaties*, vol. 3 (*Laws*), compiled to December 1, 1913, pp. 692-95, cites the following statutes: an act of March 3, 1853 [10 Stat. 246], making California lands subject to preemption unless reserved; and an act of March 3, 1853 [10 Stat. 258], making mineral and reserved lands exempt from disposal.

THE END OF TREATY-MAKING WITH TRIBES, 1855-71

In 1855, for the first time, the president exercised executive powers to set aside reservations for the use and occupancy of Indian tribes. During that year, President Pierce signed five orders. Between 1855 and the end of treaty-making with tribes on March 3, 1871, five different presidents signed twenty-nine executive orders affecting Indian reservations. Twenty-six of those established or enlarged Indian reservations. Of the twenty-three executive order reservations that were established during this period and that continue to exist today, direct individual congressional authorization was provided for twenty-two. During the same period, ninety-three treaties with Indian tribes were ratified by Congress. This number constituted nearly one-quarter of the total of all ratified treaties between 1778 and 1871, and was a little more than three times the number of executive orders affecting Indian reservations. With two or three anomalous exceptions, all of the executive orders affecting Indian reservations during the period were authorized either by ratified treaty or statute. In addition to the early California orders, several of the orders, including the order setting aside the Bosque Redondo Reservation, were also associated with the executive's powers as commander-in-chief of the nation's military forces.

In the late 1860s, the fresh memory of the bitter suffering of the Civil War left Congress and the public with no taste for further Indian hostilities. Between 1867 and 1871, Congress wrestled with federal Indian policy and devised a new policy and system for dealing with Indian lands. By the mid-1860s, Congress had concluded that Indians would either become Christians and learn to farm, or would not survive. The establishment of reservations was seen as a necessary step in the perceived evolution from "savagery" to "civilization." Reservations could be authorized either by statute or by Senate-ratified treaty. They could be set aside by a statute or treaty, or, as was becoming more common, by an executive order authorized by treaty or statute. At the same time as this new Indian policy developed in the 1860s, Congress also provided authority to the executive to reserve portions of the public lands for several purposes, including for Indian reservations.¹²

¹²*Ibid.*, pp. 692-95 cites the following additional acts in reaching his conclusion that Congress had authorized the executive to set aside Indian reservations by executive order: an act of March 3, 1863 (12 Stat. 754), to establish town lots; and an act of March 3, 1863 (12 Stat. 819), allowing for setting aside reservations for Indians; an act of April 8, 1864 (13 Stat. 39), to set aside Indian reservations in California; and an act of October 21, 1869 (18 Stat. 689), authorizing the executive to establish military posts and permanent reservations.



President Andrew Johnson wrote his 1866 Shoalwater order on a map of the new reservation. (Courtesy of the National Archives, RG 75, entry 107, box 1, Shoalwater)

By 1865 Congress was dissatisfied with the overall system of dealing with tribes. The Indian bureau was perceived to be riddled with corruption, and Indian wars were frequent, bloody, and costly. On March 3, 1865, Congress created a Joint Special Committee to investigate and report on the condition of the tribes. Chaired by James R. Doolittle, it became known as the Doolittle Committee. Its report, issued on January 26, 1867, initiated events in Congress that would eventually lead to the end of treaty-making with tribes. In fact, in 1867, Congress briefly suspended treaty-making. Shocked by recent hostilities involving the Sioux and Cheyenne,¹³ and frustrated with the knowledge of the Doolittle Report,¹⁴ which blamed many hostilities on unfair treatment

¹³Robert M. Utley, *The Indian Frontier of the American West, 1846-1890* (Albuquerque, N.Mex., 1984), pp. 106-109.

¹⁴Prucha, *The Great Father: The United States Government and the American Indians*, two vols. in one (Lincoln, Neb., and London, 1995), pp. 485-88; Donald Chaput, "Generals, Indian Agents, Politicians: The Doolittle Survey of 1865," *The Western Historical Quarterly* 3:3 (July 1972): pp. 272-73; Prucha, *American Indian Policy in Crisis: Christian Reformers and the Indian, 1865-1900* (Norman, Okla., 1976), pp. 14-19; U.S. Senate, "Condition of the Indian Tribes. Report of the Joint Special Committee . . .," 39th Cong., 2d sess., Senate Report No. 156 (Washington, D.C., 1867); Prucha, *Documents of United States Indian Policy*, pp. 103-107; Prucha, *American Indian Treaties*, pp. 279-80.

of Indians by government officials, on March 29, 1867 Congress added a section to an obscure appropriations act repealing all laws allowing the president, secretary of the interior, or commissioner of Indian affairs to make treaties with tribes. Section 6 of the act included the following provision:

And all laws allowing the President, the Secretary of the Interior, or the commissioner of Indian affairs to enter into treaties with any Indian tribes are hereby repealed, and no expense shall hereafter be incurred in negotiating a treaty with any Indian tribe until an appropriation authorizing such expense.¹⁵

In examining the shift of policy between 1867 and 1871, it is extremely important to note the language in this provision, which indicates that neither the president nor the secretary of the interior could negotiate treaties with any Indian tribe, "until [Congress passed] an appropriation authorizing such expense." During the debate that ensued in Congress about ending treaty-making, congressmen emphasized over and over again the fact that when Congress appropriated money to the executive to deal with Indians, it also was providing the executive with authority to carry out its policy of placing Indians on reservations.¹⁶ After establishing the "Peace Commission" later in 1867, Congress repealed the provision

¹⁵"An Act making Appropriations to supply Deficiencies in the Appropriations for contingent Expenses of the Senate of the United States for the fiscal Year ending June thirtieth, eighteen hundred and sixty-seven, and for other purposes," 40th Cong., 1st sess., ch. 13, March 29, 1867, *Statutes at Large*, December 1867–March 1869, pp. 7–9.

¹⁶"An Act making Appropriations for the Expenses of Commissioner sent by the President to the Indian Country," 40th Cong., 1st sess., ch. 2, March 14, 1867, *Statutes at Large*, December 1867–March 1869, p. 1, for instance, provided \$20,000 to the president to support commissioners sent by the president to Indian country; U.S. Congress, Appropriation Act, *Statutes at Large*, vol. 14, 39th Cong., 2d sess., 1867, p. 512. The Appropriation Act for 1867, for example, contained language authorizing the executive to provide funds to support the Indian service in Idaho. Among the uses of funds authorized was to "assist them to locate in permanent abodes and sustain themselves by the pursuits of civilized life. . . ."

John R. Wunder, "No More Treaties: The Resolution of 1871 and the Alteration of Indian Rights to Their Homelands," in *Working the Range: Essays on the History of Western Land Management and the Environment*, ed. John R. Wunder (Westport, Conn., 1985), p. 43. Wunder, in this excellent review, was apparently the first to describe this provision in print.

ending treaty-making, allowing the executive to resume negotiating treaties for the time-being.¹⁷

But the debate on treaties and Indian policy continued on the floor of Congress. Treaties were ratified by the Senate alone, in closed session. Many members of the House objected to passing appropriations that were mandated by treaties on which they could not vote, and to which many members objected. It was argued that some treaties were merely vehicles designed to take Indian land and give it to the railroads. Members also objected to the elevated status a tribe received when it was party to a treaty with the United States. But as debate continued through 1869, the main objection of the House seemed to be that treaties dealt with public lands and title to the public lands, and that these treaties were confirmed without the House's consent.¹⁸

The House had now begun to question the treaties negotiated by the Peace Commission, which had been established two years earlier, and concluded that it must either acquiesce to the Senate's action on the treaties made by the peace commissioners, or establish a new policy, either temporary or permanent. A new commission was recommended, one that would contain members of both the Senate and the House, to deal with the tribes. But Congress concluded that while details of the new policy were being worked out, the executive branch of government would have to handle Indian affairs. Congressman Dawes proposed appropriating \$2 million to enable the president to take whatever actions were necessary to maintain the peace, including establishing tribes on reservations. Specifically, he suggested that

¹⁷"An Act to establish Peace with certain Hostile Indian Tribes," 40th Cong., 1st sess., ch. 32, July 20, 1867, *Statutes at Large*, December 1867–March 1869, pp. 17–18.

"An Act making Appropriations for the current and contingent Expenses of the Indian Department, and for fulfilling Treaty Stipulations with various Indian Tribes for the Year ending June thirty, eighteen hundred and sixty-eight," 39th Cong., 2d sess., ch. 173, March 2, 1867, p. 515. This act included a provision that no money or annuity could be paid to an Indian tribe engaged in hostilities.

"An Act amendatory of 'An Act making Appropriations to supply Deficiencies in the Appropriations for contingent Expenses of the Senate of the United States for the fiscal Year ending June thirty, eighteen hundred and sixty-seven, and for other purposes,'" 40th Cong., 1st sess., ch. 34, July 20, 1867, *Statutes at Large*, December 1867–March 1869, p. 18.

¹⁸*Congressional Globe*, 40th Cong., 3d sess., part 3, February 27, 1869, pp. 1698–1708. *Ibid.*, March 3, 1869, pp. 1813–14; *ibid.*, 41st Cong., 1st sess., March 19–April 6, 1869, pp. 164–66, 167–70, 413–14, and 421–22.

there be appropriated the further sum of \$2,000,000, or so much thereof as may be necessary, to enable the President to maintain peace among and with the Indian tribes, bands, and parties of Indians not otherwise provided for in this act and to promote civilization among said Indians, bring them when practicable upon reservations, relieve their necessities, and encourage their efforts at self-support: a report of all expenditures under this appropriation to be made in detail to Congress in December next. . . .

It puts the responsibility where it belongs, with the Executive. He is at liberty under this provision to appoint such of these benevolent gentlemen as he may have confidence in or to omit to appoint them. He may bring these Indians upon reservations if he sees fit. He can do everything, so long as the \$2,000,000 last, that the treaties if ratified would require at our hands. And when we come together in December we shall have the benefit of his experience in whatever line of policy he may adopt, either for our instruction or for our avoidance. We shall have peace preserved. . . . [The Indian Committee] dislike as much as anybody can to put appropriations at the disposal of an Executive without laws prescribing exactly how they are to be expended. But it is not unusual. In exigencies, in emergencies, it is often done. . . . It is impossible for us to prescribe beforehand in an enactment just what is to be done, for the expenditure of the money depends upon sudden emergencies and exigencies and upon different conditions of things impossible to be foreseen in an enactment.

During debate on the appropriation, when one congressman questioned giving the president so much authority and power over Indians and the establishment of reservations, Congressman Dawes replied,

I have no doubt, Mr. Chairman, that if we adopt this amendment we put it within the power of the President to expend this money just as he pleases, subject to the limitations specified. We do trust him. There is, it seems to me, no alternative in the present stage of the case but to repose this confidence in somebody. I do not want to repose it in anybody but the head. Let the President employ such agents as he pleases and report the results to Congress. Let him alone be responsible to Congress for the manner in which this undertaking is carried out.

Finally, the appropriation was passed on April 6, 1869, after the House added a provision asserting that the act could not be construed to ratify any treaty passed since July 20, 1867, the date the original 1867 end of treaty-making provision had been repealed.¹⁹

With this legislation Congress embarked on an experiment. It had determined to appropriate funds for the executive branch, attaching full authority to the president to exercise policy among the tribes as he saw fit. The executive could negotiate with tribes to extinguish aboriginal title, and he could set aside reservations by executive order. The executive branch would report to the Congress the following year on what had transpired. If Congress did not like a reservation established by the president, it could abolish it. The matter of the Senate's power over treaty-making remained unresolved, but Congress had already moved to change the primary manner in which reservations were set aside. During the remainder of 1869 and early 1870, the president exercised that authority five times, establishing or enlarging several reservations, although in almost every case the reservations were authorized by previous treaties as well as by the 1869 appropriation act.

Early in 1870 the president reported on expenditures of nearly all of the \$2 million that had been appropriated. The House was satisfied with the president's handling of Indian affairs, but debate continued over treaty-making, and members continued to question the treaties negotiated by the Peace Commission. The president's authority was extended with the Indian Appropriation Act of 1870.²⁰

In 1871, when the Indian Appropriations Bill was brought to the floor, Congress again debated treaty-making with Indians. Now both House and Senate members were expressing opposition to treaties with tribes.²¹ Eventually, the House and the Senate reached an agreement in conference and a provision was added to the 1871 Indian Appropriation Act

[t]hat hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or

¹⁹*Ibid.*, pp. 558–70, in which 16 Stat., 40 is debated and passed. Prucha, *The Great Father*, vol. 1, p. 531; Wunder, "No More Treaties," p. 48.

²⁰U.S. Congress, *Congressional Globe*, 41st Cong., 2d sess., part 6, June 29, 1870–July 14, 1870, pp. 4971–73 and 5606–10.

²¹*Ibid.*, 3d sess., part 2, February 10–23, 1871, pp. 1112–15, 1480–97, 1499–1508, and 1562–89; *ibid.*, part 3, March 1, 1871, p. 1810.

recognized as an independent nation, tribe, or power with whom the United States may contract by treaty: *Provided, further*, that nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe.²²

It was a compromise agreement between the House and the Senate. The House achieved an end to treaty-making and firmly established that both houses needed to ratify agreements with tribes, while the Senate secured House recognition of past treaties. It was a compromise that worked for both houses of Congress. While Congress set out a general policy, the executive now would execute that policy. Congressman Lawrence, expounding on Grant's successes with his new peace policy, said "[A] new era has dawned."²³ It should be noted that although treaties ended in 1873, many agreements continued to be made. Vine Deloria, Jr. has identified some eighty-six agreements with tribes that were ratified by Congress between 1873 and 1954.²⁴

With the end to treaty-making, Congress had instilled new and broad authority in the executive to deal with Indian tribes. Congress tested the mechanism in 1869, providing authority and funding to the president to establish reservations and to move tribes onto those lands, thus exercising his executive authority over both Indians and the military. Insofar as these executive order reservations could be revoked either by Congress or by another executive order from the president, they

²²Prucha, ed., *Documents of United States Indian Policy*, pp. 136-37, reprinting 16 Stat., 566.

The recent Supreme Court decision on the "Cherokee Tobacco Case" provided support to those who opposed treaty-making. See Prucha, *Documents of United States Indian Policy*, pp. 136, reprinting a section from 11 Wallace, 616, 620-21; Arrell Morgan Gibson, *The American Indian: Prehistory to the Present* (Lexington, Ky., 1980), pp. 396-97; Washburn, *The Indian in America* (New York, 1975), pp. 97-98, summarized the debate in Congress and the issues that led to the end of treaty-making; Prucha, *The Great Father*, vol. 1, pp. 529-33, also summarizes the debate over the end of treaty-making.

²³*Congressional Globe*, 41st Cong., 3d sess., part 3, March 1, 1871, pp. 1810-12 and 1821-25, in which 16 Stat., 566 is debated and enacted. Wunder, "No More Treaties," pp. 49-50, provides details of the conference committee's make-up and deliberations.

See also Paul Wallace Gates, *Fifty Million Acres* (New York, 1979), p. 210; Prucha, *The Great Father*, pp. 527-33; Prucha, *Documents of United States Indian Policy*, p. 136; Prucha, *American Indian Policy in Crisis*, pp. 295-98, 301-305, and 308.

²⁴Personal communication, Vine Deloria, Jr. to Hart, March 17, 1998.

were considered to be of a temporary nature, until such time as an agreement with the tribe could be consummated by both houses of Congress. Congress also continued to recognize that Indian title to lands had to be extinguished by either conquest or negotiation. The Peace Policy called for peaceful negotiations by the executive branch with tribes, followed by an agreement that was ratified by Congress. To Congress' communal mind, policy had been made at once both more consistent and more effective.

THE EXECUTIVE ORDER PERIOD, 1871-87

After the end of treaty-making in 1871, as Prucha has pointed out, "the use of executive orders to establish and modify Indian reservations increased tremendously; an order was the chief vehicle for the purpose, although agreements ratified by Congress and other acts of Congress continued to play a part."²⁵ In the period from 1871 to 1887 more than 150 executive orders affecting Indian reservations were signed by the president. Of these, seventy-seven established or enlarged reservations. Prior to 1871, executive orders establishing or enlarging reservations had specific congressional authority.²⁶ However, between 1871 and the passage of the General Allotment Act in 1887, nineteen executive orders signed by the president had no apparent individual congressional authorization. These orders were issued under the general congressional authority provided with the 1871 end of treaty-making. Although debate on the floor of Congress demonstrates that Congress expected appropriations dealing with Indian tribes to carry with them the authority for the president to establish reservations by order, there was no explicit statutory language granting that general authority. Until ratified by a congressional act, these reservations were considered temporary and subject to abolishment by either the executive or Congress. The "temporary" nature of these orders contributed to the change in federal Indian policy during the next sixteen years.

Especially during the years from 1855 to 1873, executive orders frequently contained little, and sometimes none, of the operative language necessary to set aside lands as re-

²⁵Prucha, *American Indian Treaties*, p. 331.

²⁶Conversely, prior to 1871, any executive order establishing or enlarging reservations that did not have specific congressional authority would have to be considered anomalous.

serves.²⁷ Some orders consisted entirely of statements like, "Let it be done." Descriptions of the land to be set aside and reasons for the order were often found in letters and documents drafted by government officials to whom authority over the matter had been delegated by the president. However, by 1873, President Grant had established a basic form for the orders which at least included metes and bounds of the land to be set aside, but other documents continued to provide necessary background relating to objectives and reasons for the orders.²⁸

During the 1870s Congress increasingly questioned the Peace Policy and began to promote a policy of Indians taking lands in severalty. Since the very beginning of the country, some policy-makers had argued that an important step in encouraging Indian tribes to live like the dominant white society was to have individual Indians take lands in severalty. The idea was that if Indians received personal allotments of land on their reservations, they would begin to understand personal property, give up communal tribal life, dress like Europeans, and become farmers and Christians. Taking lands in severalty did not necessarily mean opening the reservations to non-Indians.²⁹ A number of the plans that were suggested, and sometimes tried, called for Indians to take lands in severalty on the reservations, with surplus lands remaining in trust for the tribe as a whole. By the mid-1870s, discussion of allotment as a general national policy began to get more attention.

As the emphasis increased on a general policy of allotment in severalty, for various reasons—some supportive and some counter to Indian desires—government officials began to call for uniform and permanent title to reservations. In 1878,

²⁷For example, see the 1867 order setting apart both the 1867 Coeur D'Alene Reservation and the Fort Hall Reservation; the order consisted of the following statement: "Let the lands be set apart as reservations for the Indians within named, as recommended by the Acting Secretary of the Interior." Charles Joseph Kappler, *Indian Affairs, Laws and Treaties*, vol. 1 (Washington, D.C., 1904), p. 835.

²⁸W.P.A. Historical Records Survey, *Presidential Executive Orders*, vol. 1: List (New York, 1944), pp. v–xi.

²⁹For example, see "An Act to protect the Property of Indians who had adopted the Habits of civilized Life," 37th Cong., 2d sess., 1862, *Statutes at Large*, vol. 12, 1862, pp. 427–28, which allowed individual Indians to take lands in severalty from a reservation. It left the remainder of the reservation in trust, and provided penalties for trespass on the Indians' allotments, whether by non-Indians or Indians.

1872
Executive Mansion
Washington April 9th 1872
Order
revoked by Order
of July 25, 1872

It is hereby ordered that the
Tract of country referred to in the
within letter of the Acting Secretary
of the Interior, and designated
upon the accompanying map
be set apart for the bands of
Indians in Washington Territory
named in the communication
of the Commissioner of Indian Af-
fairs dated the 8th instant, and for
such other Indians as the Depart-
ment of the Interior may see fit to locate
thereon.

M. Grant

The 1872 executive order establishing the Colville Reservation is typical of orders that confirmed recommendations submitted by the secretary of the interior or the commissioner of Indian affairs. (Courtesy of the National Archives, RG 75, entry 107, box 2, Colville)

Commissioner Ezra A. Hayt noted that Indians distrusted the United States and had come to believe that their lands were not permanent. He suggested that allotment in severalty would solve the problem, with issuance of patents so that Indians could hold land with the same certainty as whites.³⁰

An 1879 report from a joint committee of Congress noted that 143 reservations had been variously set aside by treaties, acts of Congress, executive orders, or order of the secretary of the interior. The committee emphasized establishing permanent title to all types of reservations:

The Indian should have his land allotted, and the permanent title thereto given, with the precaution provided that he is not despoiled of his rights. . . .³¹

During the same year, as debate over the proposed allotment policy continued, another congressional report also highlighted the necessity of uniform title to reservations. The commissioner of Indian affairs said,

In the last annual report of this office a brief reference was made to the importance of giving to the various Indian tribes of the United States *several, uniform, perfect, and indefeasible title to the lands occupied by them*.

He also proposed allotment as a solution, saying "all questions connected with the subject of Indian reservations and Indian titles can, within a brief period, be finally settled."³²

In 1879, the publication of the highly influential *Report on the Lands of the Arid Region of the United States* by John Wesley Powell helped prompt Congress to establish the Public Lands Commission.³³ Thomas Donaldson wrote the fifth

³⁰U.S. Commissioner of Indian Affairs, *Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior for the Year 1878* (Washington, D.C., 1878), pp. iv–xi.

³¹U.S. House, "Transfer of the Indian Bureau to the War Department," 45th Cong., 3d sess., House Report No. 93, January 31, 1879.

³²U.S. House, "Lands to Indians in Severalty," 45th Cong., 3d sess., House Report No. 165, March 3, 1879 [Serial 1866]. Emphasis added. U.S. Senate, *Congressional Record*, vol. 9, part 1, March 24, 1879, pp. 44–45 and 615, also includes brief mention of allotment and Indian title to lands occupied.

³³J.W. Powell, *Report on the Lands of the Arid Region of the United States* (Washington, D.C., 1879), pp. ii–xi, 1–4, 6, 10–12, 19–24, and 27–43; Wallace Stegner, *Beyond the Hundredth Meridian* (Boston, 1954), p. 242.

volume of the commission's 1880 report, *The Public Domain*. This was the first official government report on the public lands, and remains important today to any study of public lands and public land policy.³⁴ Donaldson addressed the method of establishing Indian reservations, as well as the question of permanency of title. Since the end of treaty-making in 1871, the procedure for using executive orders to set aside Indian reservations had been well established. The "Procedure in Making an Indian Reservation," as described by Donaldson, was only through executive order.

The method of making an Indian reservation is by an Executive order withdrawing certain lands from sale or entry and setting them apart for the use and occupancy of the Indians, such reservation previously having been selected by officers acting under the direction of the Commissioner of Indian Affairs or that of the Secretary of the Interior, and recommended by the Secretary of the Interior to the President.

The Executive order is sent to the Office of Indian Affairs, and copy thereof is furnished by that office to the General Land Office, upon receipt of which the reservation is noted upon the land office records and local land officers are furnished with copy of the order and are directed to protect the reservation from interference; after this the Indians are gathered up and placed upon the reservation.

The method for abolishing a reservation, according to Donaldson, depended on how it had been established. An executive order reservation could be abolished by executive action alone, but reservations established by statute or treaty required congressional action. Donaldson joined other government officials in recommending that a uniform and permanent title be established, saying,

The tenure by which most of the Indian tribes hold their land is very unsatisfactory. . . .

To the end that the Indians may be secure in their titles and have the assurance that they will not be removed, except by their free consent, I recommend the passage of a law to give each tribe a patent for the land

³⁴Donaldson, *The Public Domain*, pp. v and viii–ix; Gates, *History of Public Land Law Development*, p. v.

the Government has guaranteed to it, leaving the Indians to determine the question of allotment for themselves. This system has given entire satisfaction of the civilized Indians of the Indian Territory, and is consonant with Indian law and religion.³⁵

By 1880, reformists were convinced that the Peace Policy was failing and that a new policy had to be implemented to deal with Indians. Religious appointments had ceased by 1882, and two themes—making Indian reservation titles permanent, and establishing a general allotment policy—dominated the debate about Indian policy in the 1880s. The stage was set for the great debate over allotment, which would dominate discussion of Indian affairs throughout the 1880s.

In the 1880 annual report, the new commissioner of Indian affairs again emphasized the need for tribes to obtain a uniform and permanent title to their lands:

In former annual reports of this office attention was drawn to the importance of securing to the Indians a uniform and perfect title to their lands, as a measure conducive in the highest degree to their present and future welfare.³⁶

In the early 1880s, debate on the proposed allotment policy first focused on a Ute bill and then on a general allotment bill that was introduced by Senator Coke in May 1880, and became known as the Coke Bill.³⁷ During debate Senator Coke noted,

The act of 1871 simply denationalized the Indian tribes as sovereign treaty-making powers, but left them, as the practice of the Executive Department, as the practice of the Indian Department show, and as the positive legislation of Congress shows, in possession of those attributes which enable them to contract as tribes.³⁸

³⁵Donaldson, *The Public Domain*, pp. 243, 727, 730, and 1252–54.

³⁶U.S. Commissioner of Indian Affairs, *Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior for the Year 1880* (Washington, D.C., 1880), pp. xvi–xviii.

³⁷*Congressional Record*, vol. 10, part 4, May 19, 1880, p. 3507.

³⁸*Ibid.*, part 3, April 1–12, 1880, pp. 2146, 2152–64, 2189–2202, 2221–28.

In 1881, commissioner of Indian affairs Roland E. Trowbridge provided a history of proposed legislation on severalty and said he supported such a piece of legislation. He noted that there was a wide range of types of titles to Indian land, and he concluded that Indians wanted land allotted to them, but "want[ed] a perfect and secure title that [would] protect [them] against the rapacity of the white man." The commissioner supported severalty, but with protection of the patent:

No question which enters into the present and future welfare and permanent advancement of the Indians is of so much importance as the question of allotment to them of lands in severalty, with a perfect and permanent title.³⁹

In 1881, throughout the debate on allotment, the issue of permanent title to tribal land continued to be central to the discussion in Congress.⁴⁰ It was becoming clear to Congress that severalty, as envisioned, could not take place unless tribes had permanent title. Senators and congressmen began to discuss the possibility of making title to executive order reservations parallel with that of statute and treaty reservations.⁴¹

The following year the commissioner of Indian affairs again noted the lack of permanency of executive order reservations, and suggested that lack of permanent title made allotment impossible:

A great many tribes occupy reservations created by the President. There is no authority of law for the allotment of the lands within this class of reservations.

Again he supported allotment legislation as a method of remedying the problem.⁴²

³⁹U.S. Commissioner of Indian Affairs, *Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior for the Year 1881* (Washington, D.C., 1881), pp. iii–v and xxii–xxix.

⁴⁰*Congressional Record*, vol. 11, part 1, January 20–25, 1881, pp. 873–82 and 904–913, quoted at 911; *ibid.*, part 2, January 25, February 5, 1881, pp. 913, 933–43, 994–1003, and 1028–36.

⁴¹*Ibid.*, part 2, January 25, February 5, 1881, pp. 1060–70, 1096, 1211, and 1253.

⁴²U.S. Commissioner of Indian Affairs, *Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior for the Year 1882* (Washington, D.C., 1882), pp. xlii–xlv.

In 1882 Congress gave authority to the president, subject to tribal approval, to consolidate tribes on executive order reservations and to abolish agencies.⁴³ During the same year the question of the efficacy of executive order reservations reached the attorney general of the United States. The attorney general had been asked if the president had the proper authority to set aside Indian reservations by executive order. In his "Opinion," the attorney general replied that although the Constitution did not give the president that authority, Congress had bestowed it.

From an early period, however, it has been the practice of the President to order from time to time, as the exigencies of the public service required, parcels of land belonging to the United States to be reserved from sale and set apart for public uses.

This practice doubtless has sprung from the authority given by Congress to the President early in the history of this Government to appropriate lands for purposes more or less general.

Acts of 1798, 1806, and 1819, said the attorney general, gave the president authority to set aside lands for fortifications necessary to public safety, trading houses needed to trade with the Indians "on either or both sides of the Mississippi River," and fortifications necessary for protection on the frontier. Congress recognized the president's authority in the Preemption Act of 1830 and an act of 1841, which disallowed entries into reservations set aside by executive order.

By the acts of July 9, 1832 (4 Stat., 564), and 30th of June, 1834 (4 Stat., 738), a bureau of Indian affairs was established, and extensive powers were given to the President in the control and management of the Indians. . . .

A reservation from the public lands therefore for Indian occupation may well be regarded as a measure in the public interest and as for a public use. Congress has in numerous acts of legislation recognized it as such.⁴⁴

⁴³*Statutes at Large*, 47th Cong., 1st sess., ch. 169, sec. 6, 1882, p. 88.

⁴⁴Benjamin Harris Brewster to secretary of the interior, January 17, 1882, "Indian Reservations," Attorney General Opinion [17 U.S. Op. Atty. Gen. 258]. The attorney general also concluded that the president had authority to set aside reservations within state boundaries, mostly by acquiescence of the states, and said there seemed to be no case law to prevent such a reservation.

There was a lull in the debate on allotment during the next two years, although bills dealing with the allotment of individual tribes were brought to the floor.⁴⁵ In 1883 the commissioner again endorsed allotment as a general policy, and new allotment bills were introduced in both houses of Congress, but there was little debate on the subject.⁴⁶

In 1884 debate on the revived Coke Bill heated up. The commissioner again endorsed passage of a general allotment act, and the influential Lake Mohonk Conference, made up of leaders of most of the Indian reform organizations, also endorsed allotment for those Indians who desired it.⁴⁷ At the same time that the Coke Bill was being debated, individual tribal allotment bills also reached the floor, including one to allot the Umatilla Reservation that did not include a provision to open the remaining lands to non-Indian settlement.⁴⁸

The issue of tribal title to reservation lands continued to be a central issue in the debate. Senator Henry L. Dawes gained passage of an amendment to the Coke Bill that would have given tribes a patent to reservations created by statute or treaty.⁴⁹ Under this failed proposal, executive order reservations would not be treated in a parallel manner with statute and treaty reservations.

In 1885 the Lake Mohonk Conference and the commissioner of Indian affairs were joined by the president in encouraging Congress to pass a general allotment act. For the first time, both the president and the commissioner spoke of opening the reservations following allotment. In his First Annual Message

⁴⁵*Congressional Record*, vol. 13, part 1, December 5, 1881–January 18, 1882, pp. 3, 77, 101–102, and 484; *ibid.*, part 2, February 21–March 13, 1882, pp. 1326–30, 1524, 1697, and 1824; *ibid.*, part 3, July 28, 1882, p. 2141; *ibid.*, part 7, July 28, 1882, p. 6625.

⁴⁶U.S. Commissioner of Indian Affairs, *Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior for the Year 1883* (Washington, D.C., 1883), pp. xi–xvii. *Congressional Record*, vol. 15, part 1, December 4, 1883–January 7, 1884, pp. 13, 117, and 249.

⁴⁷U.S. Commissioner of Indian Affairs, *Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior for the Year 1884* (Washington, D.C., 1884), pp. xiii–xv, and xlviii–li. Prucha, *Documents of United States Indian Policy*, pp. 163–66.

⁴⁸*Congressional Record*, vol. 15, part 2, February 27, 1884, p. 1414. U.S. Senate, "In the Senate of the United States," 48th Cong., 1st sess., Senate Report No. 234, February 27, 1884 (Serial #2174).

⁴⁹*Congressional Record*, vol. 15, part 3, March 25–26, 1884, pp. 2240–42 and 2277–80; *ibid.*, part 4, April 29, 1884, pp. 3520–22. In April there was further debate on the bill to allot the Umatilla Reservation.

to Congress in 1885, President Cleveland emphasized that Indians were wards of a government whose ultimate goal was to civilize them until they could achieve citizenship. He proposed a commission that would evaluate tribes' reservations and determine if portions of the reservations should be purchased from them, "for their benefit; . . . what, if any, Indians may, with their consent, be removed to other reservations . . ."; and "what Indian lands now held in common should be allotted in severalty. . . ." ⁵⁰ In his annual report for 1885, the commissioner of Indian affairs echoed the president's message.⁵¹

At their October 1885 gathering, the reformers at the Lake Mohonk Conference supported executive authority over Indians, and also spoke about the need for a general allotment act. Dr. James E. Rhoads stated that the executive branch's authority over Indians should be strengthened even further:

[I]t is of serious moment that this Conference, as representing the friends of the Indian, shall do all in its power to strengthen the hands of the President, the Secretary of the Interior, the Commissioner of Indian Affairs, and others engaged in Indian management.

During discussion of citizenship, Mohonk Conference member General Samuel C. Armstrong expressed support for the new Dawes Bill and the Coke Bill, and suggested that Indian consent should not be necessary to allotment. The president should have the authority to force allotment (he was not referring to opening the remainder of the lands to non-Indian settlement). During the conference, Senator Dawes addressed the group, emphasizing the need for Indians to take lands in severalty. In discussing the Coke Bill, he said,

The purpose of the bill is to clothe the Secretary of the Interior with all the power he needs to do everything in respect to the Indian that every one of you said to-day he wanted to have done. . . .

Again, under this bill, it must be the Indian's choice. . . .⁵²

⁵⁰George F. Parker, *The Writings and Speeches of Grover Cleveland* (New York, 1970), pp. 408-415 and 419-23.

⁵¹U.S. Commissioner of Indian Affairs, *Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior for the Year 1885* (Washington, D.C., 1885), pp. iii-vii.

⁵²Lake Mohonk Conference, *Proceedings of the Third Annual Meeting of the Lake Mohonk Conference of the Friends of the Indian*, October 7-9, 1885 (Philadelphia, Pa., 1886), pp. 6-7, 27-39.

Then, for the first time, the subject of executive order reservations came up during the debate and discussion. Dawes did not want executive order reservations to be regarded as equal to statute or treaty reserves, a position he would maintain until the House/Senate conference finally overcame his objections two years later. Dawes (and the Coke Bill) also called for giving reservation patents to statute and treaty tribes, but not to executive order reserves. Speaking of the language in the Coke Bill, which would not be passed, he said,

Now, I want to show you a feature of the bill which has struck some with alarm. There are three kinds of titles: First, A treaty title; Second, A statute title; and Third, a reservation under an executive title. A statute title is one created by statute since we passed a law that there should be no more treaties made. It is another name for the treaty title. This bill provides that, in all cases, bands and tribes, either by virtue of treaty stipulations, or by act of Congress, shall have this patent. It is confined to these two. The title by executive order, is not included here, because the title by executive order is created by the President's will, and can be modified to-morrow, or extinguished altogether. Therefore, the Indians have no interest in it, but the title by treaty and statute is a title by purchase.

Dawes' reasoning and motive are easily explained. The attorney general had just rendered an opinion indicating that a treaty reservation (and by obvious extension a statute reservation) could not be abolished by executive order.⁵³ Since one of Dawes' ultimate (though for the most part ulterior) objectives was to see the opening of reservations to non-Indian settlement, a method had to be designed so that the reservations could be purchased directly from the Indians, with less executive interference. Since he believed that executive order reservations could be abolished without payment of any kind to the pertinent tribes, it would be counter-productive to encourage the resident Indians to take an interest in the title to executive order reservations. In this regard, Dawes would ultimately be defeated. Patents to statute and treaty reservations would not be provided to tribes, and executive order reservations would be raised to an equal level in the final

⁵³A.H. Garland to the secretary of the interior, March 29, 1885, "Old Winnebago and Crow Creek Reservation," Opinion of the Attorney General (18 U.S. Op. Atty. Gen. 141).

legislation. Much of the ensuing congressional debate would focus on this issue, and the bill would contain the results of the final compromise. For the moment, however, the Lake Mohonk Conference did not choose sides on the issue, although it did send a strong message that the executive authority should be enhanced, and that reservations should be broken up and the lands allotted.⁵⁴

In the House, the report on the Coke Bill from the Committee on Indian Affairs again focused on the issue of permanency. To members of Congress, "permanent" meant not that land would always be Indian land, but that Congress affirmed the reservation and that the tribe had an interest in the title and, thus, an interest in whether they allotted and/or sold and opened the "surplus" or remainder of the reservation. To Congress, the ultimate goal was, of course, to see the Indian become "civilized," which to a majority of congressmen meant that tribal members must accept allotment and then have their reservation opened. Thus Congress came to believe that tribes had to have permanent and uniform title to their reservations in order that those reservations could be allotted and opened. At the moment, however, in 1885, such allotment and opening would be subject to tribal consent. The report from the Committee on Indian Affairs to accompany the Coke Bill pointed out that the bill called for providing tribes with patents to the lands within their reservation, "thus giving them assurance of permanency in their occupancy." The bill also provided the president with the authority to allot the land, with two-thirds consent from the tribe. Patents to individual allotments would be held in trust for twenty-five years. Then the remaining surplus and "permanent" lands could be purchased by the United States.

The bill contains other provisions by which the United States may, with consent of Congress, acquire title to all lands not thus allotted in severalty.

The committee recommended passage.⁵⁵ Through the remainder of 1885, most congressional activity related to passage of the Umatilla allotment bill.⁵⁶

⁵⁴Lake Mohonk Conference, *Proceedings of the Third Annual Meeting*, pp. 38–45 and 48–50.

⁵⁵U.S. House, "Allowance of Lands in Severalty to Indians," 48th Cong., 2d sess., House Report No. 2247, January 9, 1885 (Serial #2328).

⁵⁶*Congressional Record*, vol. 16, part 3, February 23–March 3, 1885, pp. 2030–31, 2086–87, 2116, 2127, 2205, 2236, 2257, 2290, 2306, and 2503.

Debate on the proposed general policy of allotment shifted during 1886 to the Dawes Act, and eventually led to its passage. Early in 1886, President Cleveland, in his Second Annual Message, reiterated his support for a general allotment act.⁵⁷ Proponents of the Dawes Act, like Carl Schurz, claimed it would at least save a portion of Indian lands for the Indians, while opponents of the bill, including Senator Henry M. Teller, believed that the bill would result in the loss of Indian lands and that severalty was doomed to failure. The Indian Rights Association seemed to side more with proponents, and many other organizations and prominent individuals clearly favored passage, including the Board of Indian Commissioners, the Women's National Indian Association, the Indian Rights Association, the Lake Mohonk Conference (Dawes said his bill should have been called the Mohonk Bill), ethnologist Alice C. Fletcher, and John Wesley Powell. Indian opposition to the bill was ignored by Congress.⁵⁸

The Coke Bill had failed to pass, but the previous December Dawes had introduced S. 54, the bill that would become the basis for the final General Allotment Act.⁵⁹ With continuing support from the Lake Mohonk Conference,⁶⁰ in January 1886 Dawes' bill was reported out of committee without amendment, and in February debate on it began. The numerous bills that were before Congress, designed to allot various individual tribes, gave emphasis to the growing swell of opinion inside and outside of Congress that the authority to allot tribes should be with the president, in general allotment

⁵⁷Parker, *The Writings and Speeches of Grover Cleveland*, pp. 408–415 and 419–23.

⁵⁸D.S. Otis, *The Dawes Act and the Allotment of Indian Lands* (with an introduction by Francis Paul Prucha) (1934; Norman, Okla., 1973), pp. 12–15, 30, 33–39, 40–56, and 93–94. Schurz indicated that an aspect of his support was related to Indians obtaining recognized title to at least some of their lands.

⁵⁹*Congressional Record*, vol. 17, part 1, December 8, 1885–February 19, 1886, p. 123. Wunder, "Retained by the People": *A History of American Indians and the Bill of Rights* (New York, 1994), pp. 29–32, traces Dawes' change in attitude from 1871, when he was in the House, through 1887, when the General Allotment Act was passed, and summarizes some of the issues prompting the end of treaty-making.

⁶⁰Lake Mohonk Conference, *Proceedings of the Fourth Annual Meeting of the Lake Mohonk Conference of the Friends of the Indian*, October 12–14, 1886 (Washington, D.C., 1887), pp. 11–12 and 30–35. Dawes again emphasized the authority the bill would instill in the executive branch.

legislation, so that the president could execute the policy of Congress uniformly among the tribes.⁶¹

In Dawes' original version of the bill, executive order reservations were not treated equally with statute or treaty reservations. On February 19, 1886, as debate on the Dawes Bill continued, Senator Plumb of Kansas raised the question of executive order reservations. Section 1 of the original bill did not include executive order reservations, but section 2 did. Plumb asked for an explanation. Dawes responded,

Section 1 provides for the issuing of a tribal patent in cases where the Indians hold their title by treaty or statute title. It was not supposed by the committee possible or wise to include in that provision reservations made by executive order. Reservations by executive order are in the nature of things temporary, and they include sometimes vast tracts of lands which there is no propriety in giving a tribe any tribal patent for. But when you come to the second section, it proposes to authorize the Secretary of the Interior to take individual Indians as well [as] those upon the treaty and statute reservations . . . [and] those upon reservations established by executive order, and set them out upon land in severalty just as fast in his opinion as these individual Indians are competent and desire to take this land and support themselves.

An executive-order reservation is public land set apart temporarily for an Indian reservation; and, if upon such a reservation there are Indians so far advanced in civilization as in the opinion of the Secretary of the Interior to be able to support themselves upon land in severalty, he is authorized by the second section to take them upon this public land and give them their 160 acres in severalty. That is why the authority in the second section is broader than that in the first section.

Senator Plumb, however, did not agree:

It seems to me that the statement of the case made by the Senator from Massachusetts indicates clearly that

⁶¹*Congressional Record*, vol. 17, part 1, December 8, 1885–February 19, 1886, pp. 389, 412, 486, 699, 941, also dealing with bills for the Peorias, the Miamis, and the Round Valley Reservation; U.S. House, "Allotment of Lands to United Peorias and Miamis of Indian Territory, Etc.," 49th Cong., 1st sess., House Report No. 1682, April 20, 1886 (Serial 2440); *Congressional Record*, vol. 17, part 4, April 27–28, 1886, pp. 3864 and 3929, dealt with Round Valley.

this distinction should not exist. If there is any purpose in connection with the awarding of land in severalty it is to enable and in fact to require the Indian to make a living upon that land and to make his home there. Now, to put him upon land which has been set apart by executive order, and which the Senator from Massachusetts says furnishes only a temporary provision, to induce him to go on that land to make a home, build a house, plow the land, cultivate it, and yet provide no means of giving him title, is to put him in the way of not only a very great disappointment but of a very great injustice.

In other words, Senator Plumb believed that the potential permanence or impermanence of the allotment would stem from the original title by which the reservation as a whole was held. In the end, both houses would agree with Senator Plumb and make all reservations equal under the law and permanent.⁶²

Dawes defended his point of view and tried to explain his tiered approach to reservations, but Plumb argued that Dawes was incorrect in his interpretation, and that the second section alone would mean a ratification of all executive order reservations:

[I]t is a ratification now, by act of Congress, of all the acts of the Executive in setting aside by order the bounds of Indian reservations.

Plumb said this should not be done without "the utmost consideration," and claimed that some reservations did not have enough arable land to allot 160 acres to each Indian, meaning that the Indians would be left with insufficient lands.⁶³

Dawes again tried to defend his bill, but Plumb proposed an amendment deleting executive order reservations from the bill altogether. Dawes responded with an argument that would prevail, that Congress must pass a bill to deal with all reservations under one policy.

If the language is stricken out, then we shall have one process of dealing with the Indians upon treaty and

⁶²*Congressional Record*, vol. 17, part 1, December 8, 1885–February 19, 1886, pp. 1558–59 and 1630–35.

⁶³*Congressional Record*, vol. 17, part 1, December 8, 1885–February 19, 1886, pp. 1558–59 and 1630–35.

statute reservations, and another process of dealing with those upon executive-order reservations. . . . that vast number of Indians, three-fourths of them all, or half of them at least who are now upon executive order reservations will be without benefits of this statute.

Senator Teller then asked Dawes what effect the second section of the bill would have, "whether it is to give the Indian tribe the title to the whole executive order reservation they occupy?" Dawes explained that his reason for having two different sections, one dealing with statute and treaty reservations, and the other dealing with executive order reservations, was to exclude that possibility:

The change of phraseology between the first and second sections was for the very purpose of excluding the conclusion suggested by the Senator. If the present language of the bill is maintained, the tribal title will apply only to treaty and statute reservations and will not extend to any executive-order reservation.

Conversely, it should be noted that the legislation as actually passed did leave Indians on all reservations with equal and permanent title. Plumb's amendment to exclude executive order reservations from the bill was defeated.⁶⁴

In the Senate version of the bill, Section 5 required tribal "consent" in order for the president to open the remainder of the reservation for sale to non-Indians after allotment. With that word, "consent," tribes on executive order reservations were given exactly the same status as treaty and statute reservation tribes, and were vested with a material interest in the title to their reservation. Under this policy, all Indian lands were now to be allotted, there being no difference in reservations (with the exception of the Utes). Moreover, under this act, executive order reservations could not be opened for sale without tribal consent. Officials for more than a decade had complained that progress toward civilization, which would be best approached through allotment in severalty, could not be made until tribal title to lands was made uniform and permanent. With passage of this legislation, the next step would be taken.

As debate continued on the bill in February, Senator Teller emphasized his desire to see a policy that was not tiered and

⁶⁴Ibid.

under which executive order reservations were treated the same as statute and treaty reservations. He underscored his hope for a single policy that the executive could apply uniformly for all reservations. But the Senate did not agree with Teller, and the bill was passed in Dawes' form and sent on to the House.⁶⁵

In the House a few days later, the bill was reported from the Committee on Indian Affairs, with a report. The main purpose of the report was to suggest an amendment including language making executive order reservations subject to the act, and equal to statute and treaty reservations. The amendment provided

[t]hat in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use, the Secretary of the Interior [language later amended to read "President of the United States"] be, and he hereby is, authorized, whenever in his opinion any reservation of [amended in conference to "or any part thereof of"] such Indians is advantageous for agricultural and grazing purposes, to cause said reservation [later amended to include "or any part thereof"] to be surveyed, or resurveyed if necessary, and to allot the lands in said reservation in severalty to the Indians located thereon [later amended to "any Indian located thereon"], in quantities as specified in the treaty with said tribes or bands if said reservation was created by treaty in quantities as follows [later amended to "in quantities"].⁶⁶

So the lines were now drawn. The House wanted all reservations to be made permanent and to be treated equally. The Senate wanted a tiered approach, with unequal status for executive order reservations. Both houses agreed that tribal consent would be necessary before opening surplus lands to non-Indian settlement.

When Commissioner of Indian Affairs John D.C. Atkins made his annual report later that year, he recommended that

⁶⁵*Congressional Record*, vol. 17, part 2, February 23–March 2, 1886, pp. 1688, 1719–20, 1762–64, and 1959.

⁶⁶U.S. House, "Allotment of Lands in Severalty to Indians," 49th Cong., 1st sess., House Report No. 1835, April 20, 1886 [Serial 2440].

the House pass the Dawes Bill, saying there seemed "to be no substantial opposition to this bill."⁶⁷

On December 15, 1886, the House began debate on the Dawes Bill (S. 54), "to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes." The entire text of the Senate version was read into the record, as well as the House report, described above, and which included the amendments proposed by the House Committee on Indian Affairs.

The most important amendment was the first, which struck out the first two sections of the Senate bill that provided for treating statute and treaty reservations differently from executive order reservations. In the House amendment, a single section would replace the two, treating treaty, statute, and executive order reservations equally. The bill was passed with the amendment making executive order reservations parallel with statute and treaty reserves. On December 17, 1886, the House returned S. 54 to the Senate, printed with the House amendment inserted. It was promptly sent back to the Senate Committee on Indian Affairs.⁶⁸

On January 10, 1887, the Senate Indian Affairs Committee announced that it would not concur with the House amendments, so Senator Dawes requested a conference committee. Senators Dawes, Jones, and Bowen were appointed. The next day, the House also agreed to a conference committee, appointing representatives Skinner, Peel, and Perkins. According to Representative Skinner's report of the results on January 18, the House committee had agreed to the House version of section one, treating all reservations equally, but had changed the wording to give final authority to the president instead of the secretary of the interior, as it was in the original Senate version. On January 21, the House voted to accept the conference committee's report on the General Allotment Bill.⁶⁹

A few days later, Senator Dawes reported the results of his conference committee to the Senate.⁷⁰ The General Allotment Act was signed in both the Senate and the House on January 26,

⁶⁷U.S. Commissioner of Indian Affairs, *Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior for the Year 1886* (Washington, D.C., 1886), pp. xix-xx.

⁶⁸*Congressional Record*, vol. 18, part 1, December 15, 1886-January 25, 1887, pp. 189-92, 224-26.

⁶⁹*Ibid.*, pp. 772-73.

⁷⁰*Ibid.*, pp. 882 and 972-74.

1887.⁷¹ Less than three weeks after the signing, in an "Opinion" delivered to the secretary of the interior, attorney A.H. Garland referred to the president's "power to declare *permanent* reservation for Indians to the exclusion of others on the public domain."⁷²

A major piece of legislation affecting federal Indian policy and affairs had been passed, and there was considerable reaction to it. At the Lake Mohonk Conference in 1887, Dr. Lyman Abbott declared, "The Indian is no longer to be cared for by the executive department of the government; he is coming under the general protection under which we all live, namely the protection of the courts." As D.S. Otis explained in his study of the allotment act, "[T]he Indian (it was hoped) would not be cared for by the executive branch of the Government: like everyone else he was to come under the protection of the courts."⁷³

But the meaning and effect of the Dawes Act, as the General Allotment Act came to be known, was probably best summarized by Thomas Jefferson Morgan, commissioner of Indian affairs from 1889 to 1893. Morgan placed great emphasis on education and worked with the Lake Mohonk Conference in developing policy for Indians. His annual reports were particularly analytical and scholarly.⁷⁴ On September 5, 1890, Commissioner Morgan submitted his annual report to the secretary of

⁷¹Ibid., part 2, December 15, 1886–January 25, 1887, pp. 189–92, 224–26, 247, 273, 285, 313–15, 478, 511, 534, 580, 772–73, 882, and 972–74.

⁷²A.H. Garland to secretary of the interior, "Opinion," February 28, 1877 [sic, 1887] (18 U.S. Op. Atty. Gen. 557). Emphasis added. See also Prucha, *Documents of United States Indian Policy*, pp. 171–74, for text of the act; and Prucha, *American Indian Policy in Crisis*, pp. 252 and 255. Michael R. McLaughlin, "The Dawes Act, or Indian General Allotment Act of 1887: The Continuing Burden of Allotment. A Selective Annotated Bibliography," *American Indian Culture and Research Journal* 20:2 (1996): 59–105, provides an overview of publications dealing with the General Allotment Act.

Frederick E. Hoxie, "The End of the Savage: Indian Policy in the United States Senate, 1880–1900," *The Chronicles of Oklahoma* 55:2 (Summer 1977): 157–79, describes the political climate at the time of the Dawes Act, focusing on "exceptionalists," politicians who believed Indians deserved exceptional treatment, and "anti-exceptionalists," who were against such treatment; Burton M. Smith, "The Politics of Allotment: The Flathead Indian Reservation as a Test Case," *Pacific Northwest Quarterly* 70:3 (July 1979): 131–40, focuses on implementation of the act with the allotment of the Flatheads in the early twentieth century; D.S. Otis, *The Dawes Act and the Allotment of Indian Lands*, provides an excellent overview of the act.

⁷³Ibid., p. 154.

⁷⁴Prucha, "Thomas Jefferson Morgan, 1889–1893," in *The Commissioners of Indian Affairs, 1824–1977*, ed. Robert M. Kvasnicka and Herman J. Viola (Lincoln, Neb., 1979), pp. 193–203.

the interior in the accustomed form, opening his report by reviewing the duties of the commissioner, including responsibility for ascertaining matters of law relating to Indian land and title. He reviewed the history of Indian lands from before the revolution, and recounted the importance of the passage of the Dawes General Allotment Act of 1887 to executive order reservations:

Reservations by Executive Order—Of the fifty-six established by executive order, the title has not been held to be permanent, but the land has been subject to restoration to the public domain at the pleasure of the President. Under the general allotment act, however, of 1887 (24 Stats., p. 388), the tenure has been materially changed and all reservations, whether established by Executive order, act of Congress, or treaty, are held to be permanent.

The permanency of this tenure is further shown by the act of Congress authorizing and directing the Secretary of the Interior to negotiate with the Coeur d'Alene tribe of Indians in Idaho for the purchase and release of a portion of their reservation, which was established by executive order. . . .⁷⁵

On July 28, 1998, Judge Edward J. Lodge issued his "Decision and Order," in *United States v. State of Idaho*,⁷⁶ ruling that the Coeur d'Alene tribe held title to certain Lake Coeur

⁷⁵U.S. Commissioner of Indian Affairs, *Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior for the Year 1890* (Washington, D.C., 1890), pp. iii–vi and xxii–xxxi.

In its ruling on *Sioux Tribe of Indians v. United States*, 316 U. S. 317 (1942), the Supreme Court quoted from an 1892 congressional report on a bill to abolish a portion of the Colville Reservation. In this report the Senate Committee on Indian Affairs strongly states that the Dawes Act did not give the Colville Indians title to their executive order reservation. That is quite true. The title to executive order reservations remained in trust with the United States after the Dawes Act. Congress could abolish a reservation at will, however it had been established. What the act did do was make it impossible for the executive to unilaterally abolish an executive order reservation. *The State of Idaho, in United States v. State of Idaho* (CIV 94-0328-N-EJL) has cited the *Sioux* decision and the congressional report as evidence that the Dawes Act did not give permanency to executive order reservations. The state's position is incorrect. The Dawes Act did not provide tribes title to executive order reservations, but it did provide congressional ratification to those reserves and made them "permanent."

⁷⁶Judge Edward J. Lodge, "Memorandum Decision and Order," July 28, 1998, *United States v. State of Idaho*, Civ. No. 94-328-N-EJL. Idaho appealed the decision, and in December 1999, oral arguments on the case were held before the Ninth Circuit Court of Appeals. On May 2, 2000, the Ninth Circuit affirmed Judge Lodge's decision.

d'Alene submerged lands. Responding to a claim by the state of Idaho that the Supreme Court ruling in *Sioux Tribe of Indians v. United States*⁷⁷ amounted to a precedent determining that the Dawes Act did not give permanency to executive order reservations, Judge Lodge made a dictum reference to *Sioux*, citing the Supreme Court's ruling that the Dawes Act "did not amount to recognition of tribal ownership." Analysis here shows that with passage of the Dawes Act, Congress intended to make executive order reservations permanent (i.e., to ratify them). While this does not amount to a recognition of tribal ownership of executive order reserves, the facts presented here could be read to be in conflict with that ruling.

In its ruling on *Sioux*, the Supreme Court quoted from an 1892 congressional report on a bill to abolish a portion of the Colville Reservation. In this report the Senate Committee on Indian Affairs strongly stated that the Dawes Act did not give the Colville Indians title to their executive order reservation. That is quite true. The title to executive order reservations remained in trust with the United States after the Dawes Act. Congress could abolish a reservation at will, however it had been established. What the act did was make it impossible for the executive to abolish an executive order reservation unilaterally.

Even so, language in the *Sioux* ruling suggests that the Court did not have a full measure of the facts before it when it considered this case. For example, the Court refers to Congress' "long continued acquiescence in the executive practice" of establishing reservations by executive order. The present study has shown that no such "long period of acquiescence" ever existed, and that Congress clearly instilled the executive with the necessary authority. While it was not within the scope of this work to examine what evidence was placed before the Court during its deliberation of *Sioux*, the language of the Court's ruling and the evidence presented here suggest that such an examination should be made and perhaps the case should be revisited.

The record clearly shows that with passage of the 1887 General Allotment Act (commonly known as the Dawes Act), Congress intended to ratify all executive order reservations (make them "permanent") and thus establish parallel title for executive order, statute, and treaty reservations.

⁷⁷*Sioux Tribe of Indians v. United States*, 316 U.S. at 317 [1942].

POSTSCRIPT

With the passage of the Dawes Act, the number of executive orders affecting Indian reservations greatly decreased. Between February 1887 and the end of 1899, only eight orders were signed establishing and enlarging reservations that still exist today. Although Congress had invested authority with the executive to set aside permanent reservations by executive order, nearly all of these orders also had individual statute or treaty authorizations for their existence. The Dawes Act also affected executive authority to abolish or diminish reservations, since Indians now had a material interest in the title to their reservations. It is no surprise, then, that in the period following the passage of the Dawes Act until 1902, only two executive orders were issued that diminished executive order reservations.

It was the tribes' material interest in their reservations, resulting from the Dawes Act, that prompted the commissioner of Indian affairs' comment in 1891:

They should be protected in the permanent possession of all this land necessary for their own support, and whatever is taken from them should be paid for at its full market value.⁷⁸

In 1902 the Bureau of American Ethnology published Charles C. Royce's *Indian Land Cessions in the United States*. This important work provided the government view of official tribal cessions throughout the life of the nation. In the introduction, Cyrus Thomas explained title to executive order reservations. He noted that prior to 1887 the method of establishing reservations had "not been uniform, some being by treaty, some by Executive order, and others by act of Congress." Those established by executive order, independent of an act of Congress, were not held to be permanent before the "general allotment act" of 1887, under which, Thomas concluded, quoting

⁷⁸D.S. Otis, *The Dawes Act and the Allotment of Indian Lands* (with an introduction by Francis Paul Prucha) (1934; Norman, Okla., 1973), p. 84. U.S. Commissioner of Indian Affairs, *Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior for the Year 1891* (Washington, D.C., 1891), pp. 9-43, also discussed the end of treaty-making, which he said "was not regarded as depriving the several tribes or nations of their condition as alien dependent powers, but simply as restricting to simple agreements such diplomatic negotiations between them and the United States as the changing conditions might render expedient or necessary."

former commissioner T. J. Morgan, "the tenure has been materially changed and all reservations, whether by Executive order, act of Congress, or treaty, are held permanent."⁷⁹

During the same year, the Senate authorized the compilation of treaties, laws, and executive orders then in force relating to Indians. Charles J. Kappler, clerk to the Senate Committee on Indian Affairs, made the compilation, with the assistance of several Washington, D.C., attorneys. The work was intended as a reference tool for members of Congress and officials of the Interior Department, to make the texts of important documents readily available. It was issued in two volumes, the first, dated February 1, 1903, containing laws and executive orders. In this volume Kappler compiled executive orders affecting Indian reservations from 1855 to 1902. Four additional volumes were published between 1913 and 1938, updating the executive order compilation. In the first update of 1913, Kappler published a memorandum in which he explained how he believed Congress had authorized the orders. In the fourth volume he added opinions of the attorney general and solicitor from the 1920s relating to authority. Because he thought it plainly evident that Congress had authorized all executive orders, he saw no need to provide individual authority for orders in the post-1902 period, although such authority was often easily available.⁸⁰

By 1911, the congressional ratification of executive orders with the Dawes Act had been tested in court a number of times. In *Ex. parte Wilson*, the Supreme Court ruled that any doubts about the validity of executive order reservations prior to 1887 had been laid to rest by the General Allotment Act:

Whatever doubts there might have been, if any, as to the validity of such executive order, are put at rest by the act of congress of February 8, 1887 (24 St. 388,). . . . The necessary effect of this legislative recognition was to

⁷⁹Cyrus Thomas, "Introduction" to Charles C. Royce, comp., "Indian Land Cessions in the United States," in *Eighteenth Annual Report of the Bureau of American Ethnology, 1896-'97*, part 2 (Washington, D.C., 1902), pp. 641-43.

⁸⁰Charles J. Kappler, comp. and ed., *Indian Affairs: Laws and Treaties*, vol. 4 [Laws compiled to March 4, 1927] (Washington, D.C., 1929), pp. 1001-53; *ibid.*, vol. 3 [Laws compiled to December 1, 1913] (Washington, D.C., 1913), pp. 667-95; *ibid.*, vol. 1 [Laws compiled to December 1, 1902] (Washington, D.C., 1904), pp. 801-936.

confirm the executive order, and establish beyond challenge the Indian title to this reservation.⁸¹

Other decisions of the courts between 1890 and 1910, including *Gibson v. Anderson* in 1904, had also ruled that executive order reservations were efficacious in every way.⁸² It was certainly no surprise, then, that in a 1911 "Opinion" provided to the secretary of agriculture, the attorney general again cited the Dawes Act as having ratified and made permanent executive orders. The attorney general had been queried by the secretary of agriculture regarding sales of timber from unallotted lands on an executive order Indian reservation. The opinion concluded that the General Allotment Act of 1887 was an action by Congress that validated executive order reservations. Attorney General Knaebel quoted from the Supreme Court decision in *Wilson*, saying,

The necessary effect of this legislative recognition was to confirm the Executive order, and establish beyond challenge the Indian title to this reservation.⁸³

Other decisions of the Court between 1912 and 1919 also enforced the efficacy of title to lands, including submerged lands, set aside by executive order.⁸⁴

⁸¹Ex. parte *Wilson* (140 US 575, 11 S Ct. 870, May 25, 1891), pp. 576-77.

⁸²*Gibson v. Anderson* (131 Fed., 39, Ninth Circuit Court of Appeals, May 3, 1904). *McFadden v. Mountain View Min. & Mill. Co.* (97 Fed 670, September 11, 1899, Ninth Circuit Court of Appeals, No. 482), in which the Court appears to have recognized the legality of an executive order conveying submerged lands. *Jones v. Callvert et al., State Land Commissioners* (32 Wash 610, 73 P 701, September 8, 1903), in which Washington State court ruled that bed-lands could be conveyed to an Indian tribe, prior to statehood, by executive order. *Spalding v. Chandler* No. 86 (160 US 394, 16 S Ct. 360, January 6, 1896), in which the Court noted, however, that a treaty right could not be defeated by an executive order alone.

⁸³Ernest Knaebel, acting attorney general, to the secretary of agriculture, September 5, 1911 (29 U.S. Op. Atty. Gen 239).

⁸⁴*Donnelly v. US* (228 US 243, 1913), in which the Court ruled that executive order reservation lands were "Indian country" for the purpose of criminal prosecutions, and that the Congress has given the president broad powers to set aside Indian reservations by executive order. In *United States v. Midwest Oil Company et al.* (236 U.S. 459, 35 S.Ct. 309, February 23, 1915), the Court ruled that when President Taft withdrew lands from the public domain, Congress had implied acquiescence to the reservation, though declining to find an "inherent executive constitutional right." *United States v. Romaine* (255 F 253, 9th Cir, 1919), in which the Ninth Circuit ruled that an executive order reservation set aside by Grant could include tidelands.

Although the efficacy of executive order reservations was by then firmly established, by the second decade of the twentieth century non-Indian settlement of the public domain was taking place in every corner of the West, and virtually all tribes had been located on established reservations. The intention of Congress continued to focus mainly on allotting tribal lands and then opening reservations, so Congress moved, in 1919, to end the executive's authority to establish reservations except at the wish of Congress. The 1919 act of Congress, which prohibited future executive orders establishing reservations except when explicitly authorized by a new act of Congress, stated,

[t]hat hereafter no public lands of the United States shall be withdrawn by Executive Order, proclamation, or otherwise, for or as an Indian reservation except by act of Congress.⁸⁵

CONCLUSION

After briefly ending treaty-making with tribes in 1867, Congress wrestled with federal Indian policy until 1871, when treaty-making was ended and a new system for dealing with tribes was established. Between 1871 and 1887, Congress provided the president with general authority to establish Indian reservations by executive order. When Congress passed the General Allotment Act in 1887, it intended to ratify all executive order reservations and thus establish parallel title for executive order, statute, and treaty reservations. Title to all reservations was held by the United States in trust for the Indians. Through the provision of the act that required tribal consent for sale of unallotted lands, Congress also recognized a tribal interest in the title to Indian reservations.

⁸⁵*Statutes at Large*, 66th Cong., 1st sess., ch. 4, sec. 27, 1919 (vol. XLI, p. 34) 41 Stat., 34.

40 Stat., 570, an act of the previous year, had restricted the president from establishing further executive order reservations in Arizona and New Mexico.

ILLUMINATING THE POSTWAR NORTHWEST: PRIVATE POWER AND PUBLIC LAW IN HELLS CANYON, 1950–57

KARL BROOKS

In the years after World War II, fierce debates about hydroelectrifying Hells Canyon, the basalt chasm demarcating 120 miles of the Idaho-Oregon border, enlivened Northwestern public life.¹ Ultimately, a local investor-owned utility, Idaho Power Company, would transform the Snake River in Hells Canyon into a corporate asset during the 1950s. The Federal Power Commission (FPC), charged by the Federal Power Act with licensing nonfederal dams on interstate rivers, first had to decide whether Idaho Power's plans best served the public interest in hydroelectricity, navigation, flood control, and fishing.² For seven years the FPC, the federal courts, and Congress struggled to mesh Idaho Power's private ambitions with the Federal Power Act's public purposes.³ Appellate

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¹The U.S. Board of Geographical Names decreed in June 1957 that the proper designation was "Hells Canyon." *New York Times*, June 13, 1957 (hereafter NYT). An enterprising reporter from Portland, Oregon, Richard Neuberger, coined the colorful place name in the early 1950s as part of a campaign to earn national tourist attention for the remote river reach. Until then, maps simply showed that portion of the boundary as "Box Canyon" or "Snake River Canyon." Tim Palmer, *The Snake River: Window to the West* (Washington, D.C., 1991), 202. Neuberger won election as a Democrat to the United States Senate from Oregon in 1954. He died in 1960 before completing his first term. *Biographical Directory of the American Congress: 1776–1971* (Washington, D.C., 1971), 1466.

²Act of 26 August 1935, ch. 687, 49 Stat. 863, codified at 16 U.S.C.S. §§ 791a–825l (1997).

³*Idaho Power Co.*, 14 F.P.C. 55 (1955), *aff'd sub nom.*, *National Hells Canyon Ass'n v. Federal Power Comm'n*, 237 F.2d 777 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 924 (1957).

approval of the commission's license realized a goal sought by Northwesterners of all political persuasions: rapid transformation of the Snake River's current into hydroelectricity.⁴ Corporate enterprise had earned vast new powers during the almost continuous national security crisis that built a political economy geared for total war after Pearl Harbor. Idaho Power mobilized those political and social forces to reshape public law in Hells Canyon.⁵

Champions of public-power agencies, such as the Army Corps of Engineers and the Bureau of Reclamation, contested Idaho Power's Hells Canyon project from the time it was announced in December 1950.⁶ War in Korea doomed the Truman administration's scheme for incorporating a federal Hells Canyon dam into an ambitious Columbia Valley Administration (CVA), modeled on the New Deal's Tennessee Valley Authority.⁷ Public-power advocates, led by Senators Warren Magnuson (D-Wash.) and Wayne Morse (D-Ore.), pressed competing public dam plans even after the U.S. Supreme Court declined to review Idaho Power's 1955 FPC license.⁸ The Senate authorized a federal high dam in late June 1957,

⁴Indian tribes claiming treaty rights to Snake Basin anadromous fish protested dams in Hells Canyon and elsewhere on river reaches within aboriginal lands in Washington, Oregon, and Idaho. *Nez Perce Tribe v. Idaho Power Co.*, 847 F. Supp. 791 (D. Idaho 1994) recounts one tribe's unsuccessful effort to block both public and private Hells Canyon dams. A relative handful of Indians, whose treaty rights would ultimately reshape the Snake Basin's political ecology, weighed little in the region's postwar political-legal calculus. Keith C. Petersen, *River of Life/Channel of Death* (Lewiston, Idaho, 1995), ch. 10, traces the partial fulfillment of treaty fishing rights in the 1970s and 1980s.

⁵Gerald D. Nash, *The American West Transformed: The Impact of the Second World War* (Bloomington, Ind., 1985); Richard White, "It's Your Misfortune and None of My Own": A New History of the American West (Norman, Okla., 1991), chs. 18 and 19; and Sidney Lens, *Permanent War: The Militarization of America* (New York, 1987), offer increasingly critical interpretations of national security's effects on postwar America.

⁶Susan M. Stacy, *Legacy of Light: A History of Idaho Power Company* (Boise, Idaho, 1991), chs. 14–15.

⁷Elmo Richardson, *Dams, Parks & Politics: Resource Development and Preservation in the Truman-Eisenhower Era* (Lexington, Ky., 1973), offers a useful sketch of CVA in chapter 1. Truman's "non-political tour" of the Northwest in summer 1948 previewed both his "whistlestop campaign" attacks on corporate utilities and his special 1949 CVA message to Congress. *Public Papers of the Presidents of the United States: Harry S. Truman, 1948* (Washington, D.C., 1964), 300–301 (Pocatello, 7 June), 308–309 (Spokane, 9 June), 315–16 (Tacoma, 10 June); David McCullough, *Truman* (New York, 1992), ch. 14; *Public Papers: Truman, 1949* (Washington, D.C., 1964), 208–13.

⁸*National Hells Canyon Ass'n v. FPC*, 353 U.S. 924 (1957). Justice William O. Douglas dissented from the denial of certiorari.

but vigorous lobbying by President Eisenhower and the utility industry blocked the bill in the House of Representatives.⁹ Even "Hell's Belle," Idaho's Democratic congresswoman Gracie Pfost, finally admitted that corporate power's alliance with the executive branch had prevailed.¹⁰ Deep in the canyon, Idaho Power's contractors had been blasting and grading for nearly two years, despite public-power forces' appeal of its FPC license.¹¹ With mountains topping eight thousand feet on both sides of the canyon, making heavy truck travel infeasible between November and June, Idaho Power did not want to lose a construction season while judges decided whether its dams were "in the public interest."¹²

This study maps private power's capacity to shape postwar public law while determining, for a time, a river's course. Hells Canyon's hydroelectric history will help test which of three competing interpretations of Western political and economic history best explains the society and polity that emerged in the post-war American West: Gerald D. Nash's consensual, democratic account in *World War II and the West: Reshaping the Economy*; Donald Worster's oligarchic, technocratic view of water management in *Rivers of Empire: Water, Aridity, and the Growth of the American West*; or William G. Robbins' domestic Marxist model, set out in *Colony and Empire: The Capitalist Transformation of the American West*.¹³ A true environmental history of Hells Canyon law

⁹NYT, June 22, 1957. LeRoy Ashby and Rod Gramer, *Fighting the Odds: The Life of Senator Frank Church* (Pullman, Wash., 1994), ch. 4, depicts Northwestern Democrats battling the Eisenhower administration over Hells Canyon.

¹⁰NYT, July 25, 1957; NYT, July 27, 1957. Pfost, Idaho's first woman elected to federal office, had represented Idaho's First District, which bordered Hells Canyon, since ousting a one-term Republican sympathetic to Idaho Power's case against federal dam building. *Biographical Directory of the American Congress*, 1537; *Idaho Blue Book: 1995-1996* (Boise, Idaho, 1996), 38-40; Ashby and Gramer, *Frank Church*, 162.

¹¹Idaho Power's robust exploitation of the FPC's decision can be tracked in NYT, August 6, 1955; NYT, November 5, 1955; NYT, June 6, 1956; NYT, July 11, 1956.

¹²Stacy, *Legacy of Light*, 138-39. Idaho Power hired M-K to build its Hells Canyon project four months before the FPC formally licensed construction, and two years before the Supreme Court's denial of certiorari finally validated the Federal Power Act license. FPC hearing examiner William Costello's recommendation that the commission license Idaho Power in April 1955 probably triggered the Idaho Power/M-K contract. NYT, April 9, 1955; NYT, April 10, 1955.

¹³Nash, *World War II and the West* (Lincoln, Neb., 1990); Donald Worster, *Rivers of Empire* (New York, 1985); William G. Robbins, *Colony and Empire* (Lawrence, Kan., 1994).

would explain the ways in which human energy, unleashed in the law, encountered the river's current, and how each responded to the other's force. For although the Federal Power Commission and the District of Columbia Circuit Court of Appeals dictated one course the river would take, the Snake's own imperatives—its physics, the pulse of its anadromous and other fisheries, its aboriginal meaning—kept (and still keep) eroding the law's footings in the river. Although Idaho Power's Brownlee, Oxbow, and Hells Canyon Dams now delay the Snake from mixing its waters with the Columbia's at Wallula, Washington, the river's energy and life continue transforming the legal and political substructure that undergirds the dams.¹⁴

Part I sets appellate review of Idaho Power's FPC license in its juridical context, demonstrating the firm hold Justice Felix Frankfurter's New Deal administrative-law jurisprudence still exerted in 1957. Although the Supreme Court's personnel had changed markedly since their 1953 clash over the FPC's private-power preferences, Frankfurter's deference to agency expertise still trumped Justice William O. Douglas' suspicion of agency capture by corporate power. Part II shows how new president Dwight Eisenhower's aggressive remodeling of the Federal Power Commission, coupled with his appointment strategy to the District of Columbia Circuit Court of Appeals, facilitated approval of Idaho Power's license application. Eisenhower's quick exploitation of the appointing power redeemed private-power promises he had made to the Northwestern and national corporate community in the 1952 presidential campaign. Part III depicts how the legacy of McCarthyism still tainted Congress' considerations of natural-resources policy in the Hells Canyon debate. The private-power "Cadillac," as Oregon Senator Wayne Morse scornfully dubbed Idaho Power's dams, easily outpaced the "creeping socialism" that many Northwesterners equated with a federal dam in Hells Canyon. Idaho Power and the utility industry skillfully mobilized corporate enterprise's new postwar power, securing control of Hells Canyon in 1957 by deploying ideological symbols forged during a decade of anxious debates about foreign communism and domestic subversion.

¹⁴Arthur F. McEvoy, *The Fisherman's Problem: Ecology and Law in the California Fisheries, 1850-1980* (New York, 1986), advances a model of historical interpretation using law, ecology, and history to explain a complex natural-resources problem.

I. FRANKFURTER'S NEW DEAL IN THE EISENHOWER ERA

A. Administrative Power and Judicial Deference

Felix Frankfurter and William O. Douglas joined the U.S. Supreme Court three months apart in 1939.¹⁵ Both had quick minds, were loyal to the New Deal, and were personal friends of the president, and both claimed, disingenuously, that their appointments had come unsought and unexpectedly.¹⁶ Franklin Roosevelt appointed Douglas to the Court directly from the helm of one of the nation's preeminent administrative agencies, the Securities and Exchange Commission. Douglas had replaced the SEC's first chairman, Joseph P. Kennedy, in 1934, and had directed the agency's administrative-law strategy, selecting and training staff counsel and managing its enforcement actions in federal courts.¹⁷ He also had taught administrative law at Yale and Columbia for nearly a decade.

Douglas ridiculed Frankfurter, who had been a law teacher for more than twenty years, as a "brilliant traditionalist."¹⁸ While on the Harvard Law faculty, Frankfurter had written extensively about judicial review of administrative agency work. A pioneer in regulatory theory, Frankfurter nevertheless adhered to a strict separation of administrative and judicial functions. Two years before joining the Supreme Court, he differentiated the judicial function cleanly from that discharged by elected officeholders: Judges were not elected, and only elected legislators and executives could legitimately make political decisions. Judges who intruded into the policy-making sphere reserved by constitutions for elected officials and by statutes for their administrative appointees threatened to upset governmental stability and to undermine judicial legitimacy.

[O]ne of the greatest duties of a judge [is] the duty not to enlarge his authority. That the Court is not the maker of

¹⁵William E. Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* (New York, 1995), considers the circumstances of both appointments.

¹⁶Melvin I. Urofsky, ed., *The Douglas Letters: Selections from the Private Papers of William O. Douglas* (Bethesda, Md., 1987), xvi-xvii.

¹⁷William O. Douglas, *Go East, Young Man: The Early Years* (New York, 1974), chs. 11, 18, 19.

¹⁸*Ibid.*, 164.

policy but is concerned solely with questions of ultimate power, is a tenet to which all justices have subscribed.¹⁹

Despite Douglas' extensive practical experience in administering the New Deal state, Frankfurter's opinions decisively shaped the Supreme Court's administrative-law jurisprudence during the 1940s and 1950s. By the time an appeal of the FPC's 1955 license to Idaho Power was pending before the District of Columbia Circuit Court of Appeals, Frankfurter's opinions had largely foreclosed reviewing courts from challenging the commission's key procedural or substantive decisions. The D.C. Circuit was especially unlikely to flout the Supreme Court's clear preference for administrative competence. The circuit court's judges, who considered the vast majority of judicial actions arising out of federal agency actions, worked just down Capitol Hill from the nation's highest court.²⁰ Their law clerks were typically midway in the phase of their bright careers that would carry them from elite eastern law schools to Supreme Court clerkships; they were speeding along the kinds of hiring networks that Frankfurter himself had overseen from Harvard Law School.²¹

In 1957, when the Supreme Court declined to review the D.C. Circuit's decision upholding the Federal Power Commission's licensure of Idaho Power's Hells Canyon dams, Frankfurter's jurisprudence of administrative law received a careful, skeptical appreciation in the *Yale Law Journal*. Nathaniel L. Nathanson's article reviewed eighteen years of Frankfurter's opinions, finding that he had articulated and enforced standards of judicial deference that enabled the New Deal agencies to work out interpretations of congressional authority largely unencumbered by judicial second-guessing.²² "Consistent with his concern for the inherent limits of judi-

¹⁹Felix Frankfurter, *The Commerce Clause under Marshall, Taney and Waite* (Chapel Hill, N.C., 1937), 80–81.

²⁰See Richard B. Stewart, "The Reformation of American Administrative Law," *Harvard Law Review* 88 (June 1975): 1669–1813, on the preeminence of the D.C. Circuit in reviewing challenged federal agency actions. Robert Glicksman and C.H. Schroeder, "EPA and the Courts: Twenty Years of Law and Politics," *Law and Contemporary Problems* 54 (Autumn 1991): 249–309, seconds Stewart's observations about the D.C. Circuit's centrality in appellate review of agency action.

²¹Bob Woodward and Scott Armstrong, *The Brethren: Inside the Supreme Court* (New York, 1979), offers useful accounts of Supreme Court law clerks' career trajectories in the 1960s and 1970s. Little suggests that these trajectories differed much from those two decades earlier.

²²Nathaniel L. Nathanson, "Mr. Justice Frankfurter and Administrative Law," *Yale Law Journal* 60 (December 1957): 240–65.

cial power," Frankfurter time and again persuaded his colleagues to respect agencies' broad discretion to effect congressional policy choices.²³ His opinions refused to allow judicial notions of standing to sue, due process, and evidentiary weight to be imported into administrative processes established under quite different legal regimes. Agencies worked to achieve purposes ill suited to the judicial function, he argued. Congress, for example, had plainly decided to preclude certain litigants from challenging agency actions in court, to afford parties to administrative proceedings less than what a judge might consider "due process," and to leave interpretation of the underlying statute to the agency charged with its administration.²⁴ Frankfurter's guiding principle had not wavered since he extolled judicial self-restraint in *The Commerce Clause* twenty years before, Nathanson thought. Throughout his opinions, "he stresses that courts should respect the integrity of the administrative process." Unlike several of his brethren, "he has been more ready . . . to accept the dangers of administrative finality simply because Congress has chosen to accept them." In a modern administrative state, Frankfurter's jurisprudence of deference struck Nathanson as more concerned with reason than justice: "[T]he most that he has asked of any agency has been a rational explanation of its choice among competing policies authorized by statute."²⁵

B. Roanoke Rapids and Hells Canyon: Private Power over Public Rights

National Hells Canyon Association v. Federal Power Commission, the District of Columbia Circuit Court of Appeals' affirmation of private over public power in Hells Canyon,²⁶ cited only one precedent, *Chapman v. Federal Power Commission*, written in 1953 by Justice Frankfurter over a bitter dissent by Justice Douglas.²⁷ At issue in *Chapman* were competing public and private hydroelectric dam projects on the Roanoke River in North Carolina.

²³*Ibid.*, 240.

²⁴*Ibid.*, 242 (standing), 251–53 (Frankfurter's "hands-off" policy in reviewing due process claims in administrative procedures), 262–63 ("the administrative agency may, within limits, have discretionary authority to determine the exact content of the general [statutory] language").

²⁵*Ibid.*, 264 (integrity), 265 (finality, discretion).

²⁶*National Hells Canyon Ass'n v. FPC*, 237 F.2d 777 (D.C. Cir. 1956).

²⁷*United States ex rel. Chapman v. FPC*, 345 U.S. 153 (1953).

Frankfurter's deferential administrative-law jurisprudence collided there with Douglas' willingness to test agency action against public-interest standards. In 1953, Frankfurter chose private power and deference to administrative discretion at Roanoke Rapids. Four of his brethren followed his lead.²⁸ Four years later, although three of his four *Chapman* allies were gone, Frankfurter's authority in administrative law still enabled him to isolate Douglas in the vote to deny certiorari in *National Hells Canyon*. On Roanoke Rapids and in Hells Canyon, Frankfurter's jurisprudence equated the public interest in directing hydropower development and natural-resource exploitation with judicial deferral to agency competence.

Chapman's facts anticipated those that would soon emerge in Hells Canyon. Three private utilities proposed to build a dam at Roanoke Rapids, where public-power advocates wanted a federal project.²⁹ The Federal Power Commission found that Congress had not withdrawn the site for public development under Section 7(b) of the Federal Power Act and, exercising its power under Section 4(e) of the act, licensed the private-power dam in 1950. The Fourth Circuit Court of Appeals affirmed the license,³⁰ and Truman's Department of Interior joined several Virginia rural electric associations (REAs) in seeking Supreme Court review.³¹

To Justice Frankfurter, the battle at Roanoke Rapids between corporate power and public agencies did not require the Supreme Court "to intimate a preference between private or public construction at this site." Instead, *Chapman* only required the Court to determine whether Congress had somehow reversed itself by "withdraw[ing] the power to decide this question from the Commission" and "contract[ing] . . . the broad standing powers of the Commission."³² Frankfurter thus

²⁸Frankfurter's five-justice majority included Stanley Reed, Robert H. Jackson, Harold H. Burton, and Sherman Minton. Tom C. Clark concurred, but wrote separately.

²⁹Facts about the competing dam projects are at 345 U.S. 156–66.

³⁰191 F.2d 796 (4th Cir. 1951).

³¹A commentator quickly noted how the Fourth Circuit's celebration of administrative discretion betrayed naivete about the utilities' dam-building plans. Roanoke Rapids derived much of its hydroelectric value from extensive publicly funded river works upstream. Truman's 1950 Water Resources Policy Commission had warned that corporate utilities would "cherry-pick" attractive hydropower sites within river basins, thus "free-loading" on public subsidies. The Harvard Law School commentator also discerned a widening split between the Department of Interior's public-power preference and the FPC's sympathy for the utility industry. "Note, *U.S. ex rel. Chapman v. FPC*," *Harvard Law Review* 52 (March 1952): 894.

³²345 U.S. at 169.

decided the case by reviewing the legislative history of flood-control and power-production projects slated for the Roanoke River. Though extensive and apparently indicative of a continuing congressional interest in public power, they disclosed no intent to "take over the entire river basin for public development with such definiteness and finality so as to warrant us in holding that Congress has withdrawn as to this whole river basin its general grant of continuing authority to the Federal Power Commission to act as the responsible agent in exercising the licensing power of Congress."³³ The Interior Department and local REAs, thought Frankfurter, were simply inviting the federal courts to interfere with policy-making decisions about navigable waters, which the Constitution confined to Congress, and which Congress had delegated by the Federal Power Act to the commission.³⁴ Any doubts about the constitutional propriety of Congress' delegation of dam-building decisions to the FPC had, for Frankfurter, been answered seven years earlier in *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*.³⁵

Justice Douglas thought Frankfurter deferred too easily to agency discretion. His reliance on congressional delegation, charged Douglas' vigorous dissent, missed both the constitutional and practical significance of the Roanoke Rapids controversy. Rather than beginning with the assumption that the FPC enjoyed broad powers delegated by Congress under the Federal Power Act, the *Chapman* Court should have recalled the basic constitutional principle that "Roanoke Rapids is a part of the *public domain*."³⁶ For Douglas, the question was not whether Congress had somehow narrowed the FPC's discretion to choose between private and public exploitation of navigable rivers' hydropower potential, but whether the Court was ignoring Congress' clear legislative preference for "*public* projects whose authorization was in no way dependent on commission action."³⁷ Once Douglas' dissent restated

³³Ibid. at 167.

³⁴Frankfurter's *Chapman* opinion restated the "breadth of authority granted to the Commission by Congress . . . in hydroelectric power development." Crucial to his conclusion that this was a case for administrative competence and judicial deference was Congress' decision in 1930 to amend the Federal Power Act, which "reorganized [the FPC] as an expert body of five full-time commissioners . . . granted broad administrative and investigative power, making the Commission the permanent disinterested expert agency of Congress to carry out these policies." 345 U.S. at 167-68.

³⁵328 U.S. 152 (1946).

³⁶345 U.S. at 175 (Douglas, J., diss.) (emphasis in original).

³⁷345 U.S. at 181 (emphasis in original).

the obvious—that the Roanoke River was a navigable stream whose hydroelectric potential belonged to the public and whose dam sites were public property—then his conclusion was inevitable: the Court could not simply defer to agency discretion without “infer[ring] that Congress . . . was utterly reckless with the *public domain*.”³⁸ Frankfurter’s reliance on judicial deference to administrative expertise further galled Douglas. The utilities’ proposal, it seemed plain to him, leveraged public investment upstream to boost downstream private-power generation:

The true character of this raid on the *public domain* is seen when Roanoke Rapids is viewed in relation to the other projects in the comprehensive plan. . . . The master plan now becomes clear: the Federal Government will put up the auxiliary units—the unprofitable ones; and the private power interests will take the plums—the choice ones. There is not a word in the [Federal Power] Act which allows such an unconscionable appropriation of the *public domain* by private interests.³⁹

Chapman set the jurisprudential boundaries for the court of appeals when public-power advocates appealed FPC licensure of Idaho Power’s Hells Canyon project in late 1955. Frankfurter’s legacy of judicial caution and agency discretion precluded any real likelihood that the three judges who decided *National Hells Canyon* would engage in the searching inquiry into constitutional and economic issues demanded by Douglas’ *Chapman* dissent. From the outset, when court of appeals Judge Wilbur K. Miller stated the issue on appeal as one of agency “judgment,” the Frankfurter impress was clear:

Our review of the Commission’s orders in these cases is quite limited in scope. When we have determined whether the agency violated constitutional or statutory provisions, and whether its decision had a substantial basis in the evidence considered in its entirety, we are done.⁴⁰

Miller found that *Chapman* controlled their decision because the court was only reviewing “the broad discretion as to these

³⁸345 U.S. at 182 (emphasis in original).

³⁹345 U.S. at 181–82 (emphasis in original).

⁴⁰*National Hells Canyon*, 237 F.2d at 780.

technical matters which Congress has committed to the Commission. 'Judgment upon these conflicting engineering and economic issues is precisely that which the Commission exists to determine,' said the Supreme Court in the Roanoke Rapids case, 'so long as it cannot be said . . . that the judgment which it exercised had no basis in evidence and so was devoid of reason.'"⁴¹ *National Hells Canyon* briefly surveyed the arguments for and against private exploitation of Hells Canyon. Yet this effort was more obligatory than judgmental, given Congress' delegation of decision-making to the FPC and *Chapman's* admonition against judicial second-guessing:

[I]t may be the Commission could properly have concluded that the high dam project was appropriate for federal development. But the decision was for the Commission, not for us.⁴²

Commentary on *National Hells Canyon* conceded that *Chapman* left appellate courts little to do when reviewing FPC decisions. William Barnds agreed that, as soon as the D.C. Circuit characterized the case as one "emphasizing the broad discretion allowed the FPC in factual determinations by the [Federal Power] Act," its reviewing job was at an end.⁴³ Congress had not yet expressed any clear preference for building public hydropower dams on the Snake River. Thus, unlike in the Roanoke Basin, there was not even the hint of public-power preference at stake in *National Hells Canyon*. Since the Federal Power Act, according to Frankfurter's interpretation, expressed neither any presumption in favor of public power nor any definitive standards to guide the FPC's choice between private and public projects, judicial intrusion into the agency's work would be impermissible second-guessing.⁴⁴ On one point, though, Barnds found Justice Frankfurter, private utilities, and public-power advocates in agreement: The Federal Power Act "was designed to encourage development of our water resources."⁴⁵ Idaho Power was in position to act. It had already secured private financing and hired a general contractor. Federal courts had no duty to ask

⁴¹237 F.2d at 779-80 (quoting *Chapman*) (ellipsis in original).

⁴²237 F.2d at 784.

⁴³William Barnds, "Decisions—*National Hells Canyon Ass'n v. FPC*," *Georgetown Law Journal* 45 (Summer 1957): 688-91, at 689.

⁴⁴*Ibid.*, at 691.

⁴⁵*Ibid.*, at 690.

whether constructing *any* dam in Hells Canyon served the public interest better.

Death and the Eisenhower administration quickly remade the Supreme Court between 1953 and 1957. The justices who decided *Chapman* were not the same as those who would have to weigh the court of appeals' approval of Idaho Power's license after public-power advocates sought a writ of certiorari.⁴⁶ Gone were Chief Justice Fred Vinson and Associate Justices Stanley Reed, Robert Jackson, and Sherman Minton. In the Roanoke Rapids case, Reed, Jackson, and Minton had joined Frankfurter; Vinson had dissented with Douglas. Yet so powerful was Frankfurter's authority over the Court's administrative-law caseload that he persuaded all of his former allies' successors—John Marshall Harlan, William J. Brennan, Jr., and Charles E. Whittaker—as well as the new chief justice, Earl Warren, to vote against Douglas when *National Hells Canyon* came before the Court in the 1956 term. Even Hugo Black deserted his Roanoke Rapids dissent. Douglas alone thought Hells Canyon a good place to refight the Roanoke Rapids battle and perhaps to question the assumption that *any* dam served the Northwest's public interest.⁴⁷

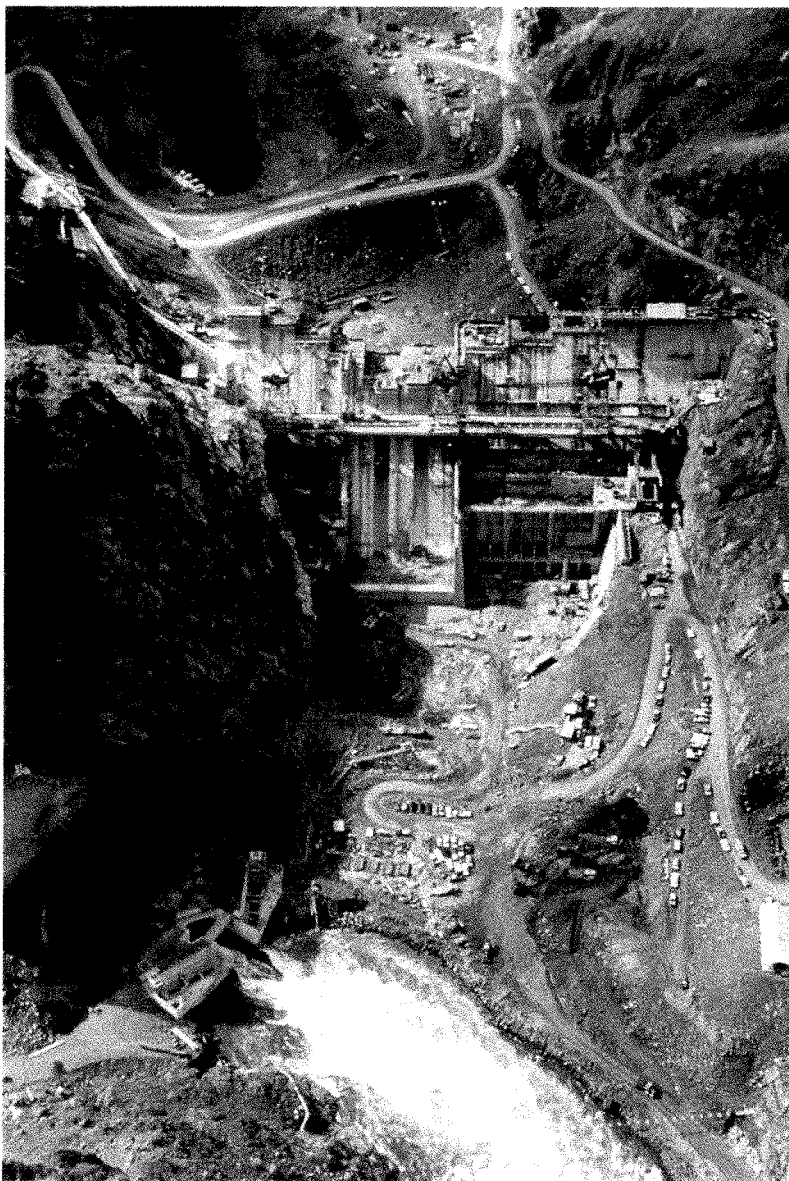
II. A "NEW LOOK" AT FPC AND THE D.C. CIRCUIT

A. Eisenhower Remakes the FPC: "Partnership" and Partisanship

The Federal Power Act directed the Federal Power Commission to decide whether private enterprise or public agencies, such as the Army Corps of Engineers and the Interior Department's Bureau of Reclamation, should dam

⁴⁶NYT, November 18, 1956.

⁴⁷353 U.S. 924 (1957). Volume 353 of the United States Reports, iii, lists the Supreme Court's 1956–57 members. Volume 345, iii, lists the Supreme Court's 1952–53 members. Four justices must vote in favor of reviewing a lower federal court decision to grant certiorari. *Maryland v. Baltimore Radio Show*, 338 U.S. 912 (1950) (Frankfurter, J.). Melvin I. Urofsky, *Division and Discord: The Supreme Court under Stone and Vinson, 1941–1953* (Columbia, S.C., 1997), and Mary Frances Berry, *Stability, Security, and Continuity: Mr. Justice Burton and Decision-Making in the Supreme Court, 1945–1958* (Westport, Conn., 1978), offer useful, but quite different, interpretations of personnel changes in the Court during the fifties.



Idaho Power Company's "low" Hells Canyon Dam under construction in the early 1960s. (Courtesy of Idaho Power Co.)

interstate waters to generate electricity.⁴⁸ Given the commission's statutory discretion and the agencies' statutory powers over hydroelectricity, presidential appointments after Republicans won control of the White House in 1952 offered corporations favoring private power new opportunities to reverse decisions made during the previous twenty years.

Under Franklin Roosevelt, the Interior Department, which oversaw substantial hydroelectric projects through its Bureau of Reclamation, was directed by a single leader: Harold Ickes, the longest-serving interior secretary in history.⁴⁹ To historian Elmo Richardson, "[t]he New Deal's legacy in the area of natural resource policy was, to a great extent, the record of the old warhorse, Harold Ickes. No other official could match his mastery of the problems that faced the government or the means that might be used in postwar programs."⁵⁰ After Truman succeeded to office in April 1945, federal water policy lost much of its Rooseveltian unity. Truman quickly indicated his desire for Ickes' rapid departure, and Ickes promptly reciprocated, showing equal and more public disdain for his White House adversary.⁵¹ Two secretaries thereafter directed Harry Truman's Interior Department: Julius "Cap" Krug between 1945 and 1949, and Oscar Chapman through the end of the Truman administration.

Eisenhower also failed to match Roosevelt's legacy of administrative continuity at Interior. His first interior secretary, Oregon governor Douglas McKay, left office in 1956. Fred Seaton, a former U.S. senator from Nebraska, took over through the end of the Eisenhower administration in 1961. As Truman's special Water Resources Policy Commission foresaw in its 1950 report, divided and unsteady federal responsibility for natural resources policy-making encouraged proponents of particular policies and projects to capture control of specific

⁴⁸*National Hells Canyon Ass'n v. FPC*, 237 F.2d 777 (D.C. Cir. 1956), supplies a basic explanation of the statutory framework under sections 4, 7, and 10 of the FPA, codified at 16 U.S.C. §§ 797, 800, and 803. Two contemporaneous law review articles discussed the Federal Power Act's complex statutory history: "Note, Public or Private Power—Responsibilities of the FPC," *Indiana Law Journal* 29 (Summer 1954): 560–77, text at notes 2–5; Charles P. Schwartz, Jr., "Niagara Mohawk v. FPC: Have Private Water Rights Been Destroyed by the Federal Power Act?" *University of Pennsylvania Law Review* 102 (November 1953): 31–79, at 31–37.

⁴⁹Richardson, *Dams, Parks & Politics*, Prologue.

⁵⁰*Ibid.*, 18.

⁵¹*Ibid.*, 19–22.

federal posts and agencies, using these redoubts to force decisions that served their needs.⁵²

When Idaho Power applied in 1950 for a license to build a single dam in Hells Canyon, the FPC's commissioners and their senior legal staff were all either Roosevelt or Truman appointees. For more than two years, the commission took no substantive action on Idaho Power's first license bid. By the time the company filed its second round of license applications in spring 1953, expanding its proposal to three dams, partisan politics had dramatically changed the commission's complexion. Less than six months after Eisenhower's 1952 defeat of Adlai Stevenson, a new FPC began to appear, one far more hospitable to private power on the Snake. Consequently, the commission ordered its new general counsel to commence full-scale hearings in summer 1953. By spring 1955, when an agency hearing examiner recommended approving Idaho Power's license application, the commission had become an Eisenhower/private power stronghold.

Eisenhower and Truman considered the Pacific Northwest—broadly defined to include Montana, Utah, Idaho, Oregon, and Washington—a key 1952 battleground. While the GOP controlled most of the region's governorships, Democrats continued to enjoy congressional dominance attributable to their New Deal legacy.⁵³ At a Boise, Idaho, campaign rally in August 1952, Eisenhower pledged to reverse decisively the course of federal natural-resources policy in the Northwest. He charged that Democrats, dedicated to a "philosophy of the left," had tried to reduce the West to a "province of Government by absentee landlords." Sarcastic and caustic by turns, the general blasted New Deal public-power projects, leaving few listeners uncertain about his administration's course if Hells Canyon became his responsibility:

The Government will build power dams, the Government will tell you how to distribute your power. . . . The

⁵²Lengthy articles collected in complete issues dedicated to "River Basin Development," *Law and Contemporary Problems* 22 (Spring 1957), and "Water Resources," *ibid.* (Summer 1957), consider the law, politics, economics, and administration of national and state water policies. Few of the authors deemed river ecology a factor worth discussing. These were, after all, serious participants in the nation's postwar drive to exploit nature. As Richardson noted, federal water policy in the fifties mixed "economic materialism, bureaucratic inertia, and political gamesmanship." *Dams, Parks & Politics*, 201.

⁵³White, *A New History of the American West*, chs. 17 and 18, discusses the West's enthusiastic embrace of the New Deal from 1932 to 1936, and the concrete benefits its residents reaped from their identification with FDR and his successor.

Government does everything but come in and wash the dishes for the housewife.⁵⁴

Eisenhower hammered at the public-versus-private power issue each time he swung through the Northwest. One month before Election Day, he told a shivering audience at the Seattle Civic Ice Rink that Democrats had packed the Federal Power Commission to force "whole-hog Federal Government" on the West. Terming this a "different kind of corruption . . . that goes to the roots of our American system," he charged the FPC with being "far more interested in empire-building" than in "a real working partnership." Eisenhower, testing a rhetorical label for the choices that would reveal his administration's philosophy toward Hells Canyon after 1952, pledged the West would "have all the power it requires for efficient use of its vast resources" through "full use of private resources plus a local-state-federal partnership." He had no quarrel with Democrats and public-power advocates on the underlying question of ends: "We need river basin development to the highest degree." But he signaled his clear intent to select new means.⁵⁵

To the victor in 1952 would go the right to fill key posts on the Federal Power Commission, which would decide whether Idaho Power or the United States, acting through the Bureau of Reclamation or the Army Corps of Engineers, would dam Hells Canyon. Truman had tried to ensure his legacy of public power, nominating Washington governor Monrad Wallgren, a friend from their Senate days, to a five-year term as the commission's chairman in 1950.⁵⁶ Led by Wallgren's bitter home-state Republican adversary, Senator Harry Cain, the Republican Senate refused Truman's appointment.⁵⁷

Cain won his reward. Eisenhower seized the opportunity given him in the 1952 Republican landslide by nominating Jerome K. Kuykendall to chair the FPC in April 1953. Kuykendall, a Tacoma, Washington, attorney, was a Cain

⁵⁴August 20, 1952, speech in Boise, Idaho, *NYT*, August 22, 1952. Truman, infuriated by criticisms of public services delivered by "a man who has spent much of his adult life in the service of that same government," lashed back in October. "[P]ublic power in this country is just as much a part of the American system as public schools or municipal waterworks." *NYT*, October 2, 1952 [Hungry Horse Dam dedication, Kalispell, Montana].

⁵⁵*NYT*, October 7, 1952.

⁵⁶*Facts on File: 1949*, pp. 340, 397; *Facts on File: 1950*, p. 164.

⁵⁷Richardson, *Dams, Parks & Politics*, 35.

protégé who chaired the state's Public Services Commission.⁵⁸ Kuykendall, in turn, remade the commission's senior legal staff, promoting Willard W. Gatchell to general counsel and reaching deep into the commission's staff to elevate John C. Mason to become Gatchell's assistant.⁵⁹ Shortly after his Senate confirmation, Kuykendall persuaded his fellow commissioners to begin hearings on Idaho Power's license application. Idaho Power, correctly perceiving the message sent by Eisenhower's choice of Kuykendall and the latter's promotion of Gatchell and especially Mason, filed new applications for its three-dam complex with the FPC on 15 May 1953.⁶⁰

Private-power advocates nationwide cheered Eisenhower's determined remodeling of the FPC. Idaho Power had particular reason to celebrate. As each Democratic commissioner's five-year term expired, Eisenhower named a private-power advocate to succeed him. By the time the full commission had to decide whether to issue Idaho Power's license, the five-member commission had an Eisenhower majority. Frederick Stueck, a St. Louis attorney who had aided the Republican campaign in 1952, replaced D.E. Doty in June 1954.⁶¹ Eisenhower finished transforming the agency into a private-power bastion in the nick of time for Idaho Power. When FPC examiner William Costello filed his record of decision, recommending Idaho Power's licensure in early April 1955, the five-member commission still had a Truman majority: vice chairman Nelson Lee Smith and commissioners Seaborn L. Digby and Claude L. Draper. But in February, Eisenhower had named Connecticut Public Utility Commission general counsel William R. Connoles to succeed Smith as vice chairman.⁶² Smith's term

⁵⁸For Kuykendall's background and nomination, *Facts on File: 1953*, p. 124; NYT, April 23, 1953. Cain, a Tacoma banker, had been that city's mayor from 1940 to 1946 before he was elected to the Senate in 1946. *Biographical Directory of Congress*, 689.

⁵⁹Gatchell's and Mason's careers epitomize their serviceability to Eisenhower and Kuykendall. Gatchell had been an FPC staff counsel for twenty-two years before his promotion to general counsel. He retired in 1960, to be succeeded by Mason. As soon as John Kennedy took office in 1961, Mason was relegated two levels down, becoming one of the commission's deputy general counsels. He left government service in 1967, aged fifty-five, to join a Philadelphia law firm's Washington, D.C., office. The firm represented some of the nation's largest utilities. *Who's Who in America: 1956-57*, p. 937 (Gatchell); *Who's Who in America: 1972-73*, vol. 2, p. 2045 (Mason).

⁶⁰*Idaho Power*, 14 F.P.C. at 57.

⁶¹*Facts on File: 1954*, p. 372.

⁶²*Facts on File: 1955*, pp. 67, 124.

expired on June 22, and Connole was sworn in the next day.⁶³ The full commission heard oral arguments on the Idaho Power case on July 6. One month later, the full commission sustained Costello's hearing decision and awarded Idaho Power a fifty-year license to build all three of its proposed dams in Hells Canyon.⁶⁴ Eisenhower acted again in 1956 to ensure that the FPC would remain sympathetic to his vision of "partnership" in Hells Canyon. While the Idaho Power license decision was pending before the court of appeals in summer 1956, the president named Wyoming Republican state judge Arthur Kline to replace Draper, whose term expired in June.⁶⁵

B. Judicial Appointments: Eisenhower, Danaher, and the District of Columbia Circuit

On the Snake River in Hells Canyon, the outline of new forces making federal water policy in the 1950s emerged.

⁶³Volume 14 of the FPC's published decisions obscures the impact of Eisenhower's private-power appointment strategy on the commission's Hells Canyon decision. The volume's list of the 1955–56 commissioners is footnoted: "The Commissioners in 1955 were Jerome K. Kuykendall, Claude L. Draper, Seaborn L. Digby, Frederick Stueck, and Nelson Lee Smith. Mr. Smith's appointment expired on June 22, 1955, and William R. Connole was appointed on June 23, 1955." 14 F.P.C. [unpaginated]. In fact, Eisenhower appointed Connole in February, Connole immediately took his seat when Smith's term expired, and the decision-making commissioners on Idaho Power's case in 1955 never included Smith, who participated in neither July's oral argument nor issuance of the FPC's license decision in August. Thus, in the only two times the full five-member commission considered the merits of Idaho Power's Hells Canyon bid, Eisenhower's private-power majority had taken office.

⁶⁴*Idaho Power*, 14 F.P.C. at 72 (oral argument), 79 (50-year license).

⁶⁵*NYT*, March 10, 1956; June 6, 1956. All later FPC decisions on Hells Canyon—such as denial of public-power advocates' plea to halt dam construction during their appeal of the license—were the products of a commission solidly controlled by Eisenhower appointees. As later became evident, M-K's construction of the three dams exacted a high toll on anadromous fish runs in the Middle Snake. The FPC largely dismissed pleas for assistance in requiring Idaho Power and its contractor to take license-based steps to better safeguard the river's fishery in the later 1950s. During the 1953–54 administrative hearing, evidence that Idaho Power's operations elsewhere on the Snake River had severely damaged fisheries had to be introduced by the intervenors, rather than by Mason, the FPC's own trial counsel. The company dismissed Boise angler Clayton Davidson's passionate testimony about fish kills as "grossly exaggerated." *NYT*, October 16, 1953. Court files in *Nez Perce Tribe v. Idaho Power Co.*, CV91-0517 (U.S. District Court for the District of Idaho), document the dams' gathering pressure on salmon and steelhead that spawned in and migrated up and down the Snake.

When public-power advocates appealed the FPC's 1955 licensure, the federal appellate panel responsible for reviewing the agency's compliance with the Federal Power Act included a recent appointee with distinct reasons for appreciating Eisenhower's mandate. The federal courts were integral to federal decision-making about natural resources exploitation. In the case of hydroelectricity, dams on interstate or navigable rivers (the Snake was both) implicated national policies requiring at least statutory interpretations by the federal judiciary.⁶⁶ And the courts could potentially assess the constitutional implications of private power dams. As Douglas' dissent noted about the private dams on North Carolina's Roanoke River authorized in *Chapman v. Federal Power Commission*, "The dam sites on this navigable stream are public property. . . . This project is as much in the public domain as any of our national forests or national parks. It deals with assets belonging to all the people."⁶⁷

Given the prevailing Frankfurter paradigm on administrative discretion and judicial diffidence, the federal bureaucracy's most influential appellate court—the District of Columbia Circuit Court of Appeals—could be expected to approach cautiously the FPC's grant of a license to Idaho Power.⁶⁸ Eisenhower's first appointment to that court further strengthened the commission's position on appeal. John A. Danaher's presence on the court of appeals panel considering *National Hells Canyon* ensured a respectful hearing for corporate-power advocates striving to defend Idaho Power's 1955 license.

The National Hells Canyon Association appealed the FPC's *Idaho Power* ruling in October 1955.⁶⁹ The Federal Power Act

⁶⁶Charles P. Schwartz, Jr., "Federalism and Anadromous Fish: *FPC v. Oregon*," *George Washington Law Review* 23 (April 1955): 535–47, discusses the interplay between federal executive agencies and the federal courts.

⁶⁷345 U.S. at 176.

⁶⁸See text *supra* at notes 15–47.

⁶⁹*NYT*, October 29, 1955. Public power advocates had organized the association as it became clear that Eisenhower's new interior secretary Douglas McKay intended to withdraw his department's formal opposition to Idaho Power's private dam bid. "Hells Canyon Dam Stirs Bitter Fight," *NYT*, July 6, 1953 (McKay "leaving the matter to the FPC"). Spearheaded by Idaho's new congresswoman Pfof and eastern Oregon's future congressman Al Ullman (he would be elected in 1956, defeating a private power supporter), the association was, according to the D.C. Circuit's opinion, "organized in 1953 by certain farm and labor organizations, public power associations and Rural Electric Associations for the purpose of opposing Idaho Power's application and advocating federal development instead." 237 F.2d at 778 n. 2. William Ashworth, *Hells Canyon: The Deepest Gorge on Earth* (New York, 1977), chs. 5–7, discusses regional political alignments and the association's birth.

permitted appellants to file in either the D.C. Circuit or the Ninth Circuit, which included both Idaho and Oregon.⁷⁰ In retrospect, Evelyn Cooper and Lucien Hilmer, lead counsel for the association, may have erred in lodging their appeal in the D.C. Circuit. Its fealty to New Deal administrative-deference jurisprudence of the Frankfurter variety made it unusually sympathetic to federal regulatory agencies' claims for discretion and interpretive authority. By contrast, the Ninth Circuit may have offered a marginally less hostile forum to challenges of agency action.⁷¹

The three-judge panel of D.C. Circuit judges assigned to decide whether the FPC had interpreted the Federal Power Act properly in licensing Idaho Power included Eisenhower's first appointment to that bench, John A. Danaher, in November 1953.⁷² Judge Danaher's extensive political background enabled him to appreciate acutely the partisan nature of decisions about Hells Canyon being made simultaneously in Congress, the executive agencies, and the courts.⁷³ In addition, the president's considerable personal influence in making him a federal judge must have given Danaher a particular insight into the case's high stakes for redeeming Eisenhower's campaign promise of "partnership."

⁷⁰16 U.S.C. § 825l.

⁷¹The Ninth Circuit had twice recently struggled with the implications of FPC discretion for Northwestern fisheries and governance. In 1953, the court had reluctantly affirmed a dam license on Washington's Cowlitz River, in *State of Washington Dep't of Game v. FPC*, 207 F.2d 391 (9th Cir. 1953), cert. denied, 347 U.S. 936 (1954); and in 1954 had rejected the FPC's licensure of a private dam on Oregon's Deschutes River, *State of Oregon v. FPC*, 211 F.2d 347 (9th Cir. 1954), only to see the U.S. Supreme Court, in *FPC v. Oregon*, 349 U.S. 435 (1955), sustain the commission's vast powers under the Federal Power Act. For the reasons behind the Ninth Circuit's hesitant embrace of Frankfurter's New Deal jurisprudence of administrative discretion and judicial diffidence, David C. Frederick, *Rugged Justice: The Ninth Circuit Court of Appeals and the American West, 1891-1941* (Berkeley, Calif., 1994), suggests lines of historical inquiry.

⁷²The two other panelists also boded ill for the association's attack on administrative discretion. Wilbur K. Miller, a 1945 Truman appointee, was a Kentucky crony of that state's then-Democratic senator and later Truman vice president, Alben Barkley. George Thomas Washington, a 1949 Truman appointee, was a Yale-educated Rhodes scholar who had taught corporate law at Cornell before rapidly rising through the wartime military's legal ranks. Washington represented the federal government's interests so impressively that Attorney General Tom Clark and Truman elevated him to acting solicitor general in 1946. He joined the D.C. Circuit Court in 1949 directly from his permanent appointment as assistant solicitor general. Truman named his patron, Clark, to the Supreme Court that same year. "Wilbur K. Miller" and "George Thomas Washington," *Directory of American Judges: 1955* (Chicago, 1955).

⁷³Eisenhower named Danaher in a recess appointment in September 1953; the Senate did not formally confirm his nomination to the court of appeals until March 1954. *NYT*, September 30, 1953; March 30, 1954.

Before joining the appellate bench, Danaher had had extensive experience with all three federal branches, as well as with the peculiarly ferocious battles spawned at the state level by partisan struggles for influence. He had ascended quickly through the ranks of Connecticut Republican politics in the 1920s and 1930s, serving as an assistant U.S. attorney in the Coolidge and Hoover administrations before winning election as state treasurer in 1934. Danaher's ethnic pedigree and academic qualifications (he was an Irish Catholic and a Yale College and Law School graduate) enabled the GOP's Yankees to attract urban Catholic votes. Defeating an Irish Catholic Democrat in 1938, Danaher entered the U.S. Senate at age thirty-nine. In 1944, however, in his first bid for reelection, he was beaten by a Catholic Democrat.⁷⁴ Danaher, by then privately practicing law in Hartford and Washington, started the 1952 Republican presidential race as a Taft backer. His desertion helped him steer the Nutmeg State's convention delegation toward Eisenhower. He continued to deploy his considerable political and legal skills on the general's behalf during the fall campaign, managing the Republican National Committee's research division.⁷⁵

Danaher reaped his reward for advancing Eisenhower's cause against Taft and Stevenson: His name quickly surfaced in summer 1953 as a likely appointee to one of two vacancies on the Second Circuit Court of Appeals. But a combination of intra-party enmity, spawned by his switch from Taft, and professional disdain, centered in the Second Circuit's august bench, quickly put Danaher on the defensive. As summer ended, his likely nomination to the Second Circuit faded; a powerful coalition of judges and attorneys in New York and Connecticut had publicly formed to block his appointment.⁷⁶ President Eisenhower rescued Danaher from the fate of a long life practicing law in Hartford, though, by nominating him on September 29 to a vacancy on the D.C. Circuit opened by a death less than two weeks earlier.⁷⁷ Eisenhower stuck by Danaher during one more critical skirmish, his Senate confirmation. The Senate Judiciary Committee, determined to win patronage battles in the Midwest, seemed willing to sacrifice

⁷⁴*Biographical Directory of Congress*, 75th and 76th Congresses, 822 [Danaher biography].

⁷⁵This portrait of an active Republican former officeholder comes from *NYT*, July 7, 1953; August 21, 1953; September 17, 1953.

⁷⁶This account of necessarily backdoor maneuverings is drawn from *NYT*, July 25, 1953; July 28, 1953; August 6, 1953; August 21, 1953; September 30, 1953.

⁷⁷*NYT*, September 30, 1953 ["surprising many," the *Times* observed of Eisenhower's abrupt change of course].

Danaher in March 1954. Finally, administration pressure broke the logjam, Senator William Langer (R-N. Dak.) adjusted his differences with the White House, and Danaher officially joined the court where he had been serving since November 1953.⁷⁸

III. Red-Baiting on Wall Street: Private Power's Triumph in Congress

National debate about the best means of electrifying Hells Canyon juggled symbols packed with political dynamite. The Hells Canyon struggle between 1950 and 1957 took place in an atmosphere supercharged by fantastic claims about communist subversion in government and Soviet dominance abroad. In and out of government, McCarthyite images of "creeping socialism" and "union dictatorship" stigmatized public-power advocates.⁷⁹

Congress' disdain for Truman's Columbia Valley Administration probably owed more to Korea's explosion than to domestic fears of collectivism.⁸⁰ By 1952, though, the utility industry had learned to exploit McCarthyite fears. Industry leaders and sympathetic politicians were able to assemble formidable national and regional coalitions by branding Idaho Power's opponents as dangerously collectivist.⁸¹

⁷⁸This account of Danaher's Senate ordeal is drawn from NYT, March 13, 1954; March 30, 1954.

⁷⁹Senator Joseph McCarthy's spectacular career as the nation's leading anti-communist rabble-rouser covered the first half of the Hells Canyon controversy, between his "Wheeling speech" of February 1950 and his censure by the U.S. Senate in December 1954. He died in May 1957, one month after the Supreme Court refused to set aside the FPC license to Idaho Power. Robert Griffith, *The Politics of Fear: Joseph R. McCarthy and the Senate* (New York, 1970). Stephen Whitfield, *The Culture of the Cold War*, 2d ed. (Baltimore, 1996), analyzes the ways in which fear of communism distorted an array of domestic debates. Elizabeth A. Fones-Wolf, *Selling Free Enterprise: The Business Assault on Labor and Liberalism, 1945-1960* (Urbana, Ill., 1994), explores a specific phase of the anticommunist offensive with obvious implications for Hells Canyon.

⁸⁰See text *supra* at notes 6-10.

⁸¹We know too little about why the public-private power debate became so ferocious in the fifties. Richardson, *Dams, Parks, and Politics* (1973), wrote well before environmental and political-cultural historiography of the postwar period began to flower in the mid-1980s. Samuel P. Hays, *Beauty, Health, and Permanence: Environmental Politics in the United States, 1955-1985* (New York, 1987), and Robert Griffith's two studies, "Dwight D. Eisenhower and the Corporate Commonwealth," *American Historical Review* 87 (February 1982): 87-122, and "Forging America's Postwar Order: Domestic Politics and Political Economy in the Age of Truman," in Michael J. Lacey, ed., *The Truman Presidency* (Cambridge, England, 1989), 57-88, offer suggestive hints. Any fuller interpretation of Hells Canyon must make use of the utility industry's own account of its goals, found in volumes 39 to 60 (1947-57) of *Public Utilities Fortnightly*.

Eisenhower's election stimulated new efforts on Wall Street, on Capitol Hill, and in the Northwest to mobilize opinion along lines selected by private power. *Turn on the Light*, a pamphlet published in December 1952 by the utility industry's public-relations lobby, warned Americans about "the growing Federal power empire." The pamphlet was sent free of charge nationwide to utility shareholders and employees, educators, and public officeholders.⁸² At the Investment Bankers Association's year-end meeting in New York, its Public Services Securities Committee called a press conference to brand public power "a national threat."⁸³ Elected officials, conditioned by a decade of national-security crisis to delegate vast powers to corporate business, characterized Idaho Power's Hells Canyon project as "put[ting] power development in its proper sphere as an economic rather than a political fact."⁸⁴ Private dams, argued Idaho's Republican governor Len B. Jordan, "will return their investment and pay dividends."⁸⁵ The *New York Times* reported in October 1951 that Idaho's "leading citizens and private business enterprises see no reason why government funds should be used to produce the same electric generating capacity when private capital is willing and able to do the job."⁸⁶ From Wall Street, the National Association of Electric Companies distributed studies purporting to show that its members had "more than met our responsibility to furnish power where and as needed" since the end of World War II. "Those who advocate greater spending of taxpayers' dollars for government power production," the NAEC warned, "often do so without regard to our nation's actual power needs or to the facts about the expanding plans of the electric companies."⁸⁷ One month before being named Eisenhower's new secretary of defense, former General Electric chief executive Charles E. Wilson described the Hells Canyon choice as one between a "powerful dictatorship of union executives" who would lead the Northwest "down the road to Socialism" and free enterprise's respect for local control and market discipline.⁸⁸ His audience, the Bond

⁸² *NYT*, December 3, 1952 (National Association of Electric Companies).

⁸³ *Ibid.* Eisenhower's new secretary of state, John Foster Dulles, had long represented both major utilities and their underwriters in his Wall Street law practice. Douglas, *Go East*, ch. 18.

⁸⁴ Senator Guy Cordon (R-Ore.), *NYT*, December 24, 1952.

⁸⁵ *NYT*, December 31, 1952.

⁸⁶ *NYT*, October 21, 1951.

⁸⁷ *NYT*, August 11, 1952.

⁸⁸ *NYT*, October 17, 1952.

Club of Wall Street, applauded: They would soon be responsible for selling and buying the \$175 million in bonds that Idaho Power needed to pay for its three-dam complex.⁸⁹

Eisenhower's choice of Douglas McKay as his new secretary of interior in late November 1952 signaled that the emotional slogans of the fall campaign had accurately summarized his intent to get "whole-hog Government" out of the Northwest's river basins.⁹⁰ McKay, Oregon's Republican governor and the grandson of Scots immigrants, was a wealthy car dealer from Salem. He had vigorously fought Truman's CVA in 1949–51. Although the secretary-designate "described natural-resources development as a hobby of many years," the *New York Times* characterized him as an "arch foe of the river valley development favored by the Truman Administration."⁹¹ Barely three months after taking office in January 1953, McKay ordered the Interior Department's Bureau of Reclamation to withdraw its formal opposition to Idaho Power in the FPC's proceeding. Congressional advocates of federal dam-building in Hells Canyon correctly predicted that this reversal of the department's long-standing position, coming one month after Eisenhower had named public-dam opponent Jerome Kuykendall to chair the FPC, would mean resumed hearings on Idaho Power's application and an eventual choice of private over public power.⁹²

McKay defended his decision as frugal and rational, dedicated more to budget-balancing than ideology: "Public power is here and it's going to stay."⁹³ But at his press conference that same day, the president recalled the issue at stake in Hells Canyon: It was "local control," symbolized by Idaho Power, versus "exclusive [federal] jurisdiction." By giving Republicans landslide majorities in 1952, Eisenhower told his questioners, Idahoans and Oregonians "insisted that they did not believe in this big hydropower scheme."⁹⁴ A month later, the president more fully explained why his "partnership" preferred corporate power instead of public management of the hydroelectric transformation of the West's rivers. At the dedication of Garrison Dam on the Missouri River in North Dakota, Eisenhower assured his listeners that huge federally

⁸⁹*National Hells Canyon*, 237 F.2d 780.

⁹⁰See text *supra* at notes 53–55.

⁹¹*NYT*, November 21, 1952.

⁹²*NYT*, May 7, 1953.

⁹³*NYT*, May 15, 1953.

⁹⁴*Ibid.*

funded public works would continue to transform the West's nature into commodities. But appropriations must not carry the taint of dictatorship: "[T]here is always a place in our country for private enterprise. Indeed, when that function disappears then we will be under some alien form of government."⁹⁵

Oregon's Democratic senator, Wayne Morse, reacted furiously to the administration's preference for corporate power in Hells Canyon. Long a backer of federal projects to exploit the West's natural wealth, Morse sounded the themes in 1953 that structured congressional debates about Hells Canyon for the next four years. He told a Democratic Party gathering in Portland in June that McKay's "surrender" to Idaho Power typified a "cold-blooded pattern of subservience to private utility monopoly." "I shall fight," Morse promised, "to protect the people of Oregon from having to pay tribute in the form of high power rates to a private utility out to monopolize the Snake River."⁹⁶ Back in Washington, D.C., in July to press his and Senator Warren Magnuson's bill to authorize a federal high dam in Hells Canyon, Morse renewed his attack on McKay and on Kuykendall's FPC, which had just announced its decision to begin hearings on Idaho Power's new three-dam license proposal. "Why is the FPC in a mad rush to decide the Hells Canyon case?" Morse asked the Senate. Idaho Power's "hit-and-run Cadillac crusade" threatened the national interest. He claimed McKay, the "Cadillac's driver," had publicly praised Idaho Power's project.⁹⁷ McKay's protest that he had never expressed any preference for Idaho Power's Hells Canyon project did little to reassure Morse and the friends of public power in Congress.⁹⁸

IV. CONCLUSION

Only seven years elapsed between Truman's public-power idea—the Columbia Valley Administration—and the private-power reality of Idaho Power's Hells Canyon complex. Between 1950 and 1957, corporate power shaped both the law and the politics of Hells Canyon's hydroelectric future. Many

⁹⁵*NYT*, June 12, 1953.

⁹⁶*NYT*, June 13, 1953.

⁹⁷*NYT*, July 12, 1953.

⁹⁸*NYT*, July 15, 1953.



Oregon senator Wayne Morse was an outspoken proponent of the federal government's public power system in the Pacific Northwest. (Courtesy of Dwight D. Eisenhower Library)

Northwesterners passionately opposed Idaho Power. Wayne Morse and Gracie Pfost spoke for them. Just as many, and probably more, welcomed private enterprise's gaining a concrete foothold in the canyon. Douglas McKay made sure the Interior Department's policies reflected their preferences. Each camp claimed its dam project was "in the public interest,"

while its rival's project would waste natural resources and oppress the Northwest's human residents. Yet the tempest spawned by the Hells Canyon controversy, which rivaled in fury the river's own headlong dash down the black rock walls, concealed two fundamental truths now visible a half-century later. First, both federal largesse and corporate capital were busily remaking the Snake Basin in the interests of production and consumption.⁹⁹ And where that project required a legal choice between federal and private leadership, none of the combatants thought the law should do anything other than referee the political debate and order the victor's exploitation of triumph.

Governing law, expressed in the Federal Power Act and other federal statutes, commanded the Federal Power Commission to assess all relevant factors before awarding Hells Canyon's electric potential to either the utility industry or the federal dam-building agencies.¹⁰⁰ Yet the law's actual application reflected its interpreters' contemporary assumptions. Hydroelectricity was deemed the Snake River's highest productive use. To other values, whether embraced by Nez Perce tribal anglers or Boise sportsmen, the law gave no hearing. Testimony about Idaho Power's destruction of fisheries at its other Snake River dams came into the FPC's license hearing only over the agency's objection. Not a word of the appellate decision validating the commission's license to Idaho Power mentioned fish, recreation, the river's biological health, or the canyon's scenic and cultural significance to both Indians and whites.

Much changed in politics and law between CVA and *National Hells Canyon*. Yet before Idaho Power completed its three-dam complex in the mid-1960s, the law's continuous dialogue with the Snake in Hells Canyon would yield different appreciations of the river's values and corporate power's consequences. Under pressure due to ecology and social change, Northwesterners and the nation at large would enter a new phase of legal transformation deep in the black rock canyon.

⁹⁹Thomas Harvey, "The Changing Face of the Pacific Northwest," *Journal of the West* 37 (July 1998): 22-32, finds that both the state and business urbanized the region's landscape.

¹⁰⁰Three different postwar statutes directed the FPC to consider biology and recreation in its licensing decisions under the Federal Power Act: the 1946 Fish and Wildlife Coordination Act Amendments, ch. 965, 60 Stat. 1089, codified at 16 U.S.C.S. §§ 661-66 (1997); the Fish and Wildlife Act of 1956, ch. 1036, 70 Stat. 1120, codified at 16 U.S.C.S. §§ 742a-742j (1997); and the Fish and Wildlife Coordination Act of 1958, P.L. 85-624, 72 Stat. 563, codified at 16 U.S.C.S. §§ 661-66 (1997). The 1946 Administrative Procedure Act, ch. 324, 60 Stat. 327, codified at 5 U.S.C.S. §§ 551-59, 701-706 (1997), exerted its own long-term influence on the FPC's administration of the FPA.

CONGRESSMAN JOHN J. RHODES AND REPRESENTATION: THE CASE OF NATIVE AMERICAN WATER RIGHTS

MARK A. WEITZ

One of the ironies of democracy lies in the inherent contradiction between the underlying theory that the people should govern themselves and the reality that a government representing millions of people cannot hope to function if each member of society must pass upon each and every action and law. Therefore, the people in a democracy delegate their authority to a smaller, more efficient body of elected officials. Herein lies the problem: To what degree are the elected officials in a democracy responsible to the voters who placed them in office, and from whom, as a collective body, do they derive their power to act? What should a representative do on behalf of his constituents? To what extent is he obligated to follow the direct wishes of those who elected him, and when, if at all, can he exercise his own judgment for what he perceives to be the good of the nation? How does a representative in a federal system of government resolve conflicting interests between those in his district and those who have no place to look for assistance other than his good offices? All of these questions go to the heart of political representation. The career of John Rhodes, Republican U.S. representative from the First District of Arizona, offers a fascinating opportunity to examine notions of representation in the twentieth century, on the part of both an elected official and his constituents.

In the twentieth century, political representation became increasingly important as America expanded to its westernmost boundaries. The physical environment in the West and the expanding role of the federal government in local and state

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affairs placed growing importance on the functions of state and federal representatives. The first fifteen years of John Rhodes' career and the explosive issue of water allocation in Arizona provide a vivid example of the dilemmas faced by elected officials in the twentieth-century West and the realities of a political system that responded to the needs of many but left some feeling cheated.

The 1950s and 1960s in America presented a plethora of political issues for examination. Basking in the glory of victory in World War II and simultaneously settling down to life in the shadow of the rapidly escalating Cold War, Americans debated questions of military spending, nuclear weapons, social security, labor relations, communism, and education. However, the most effective way to examine the peculiarities of representation and political action is to find an issue that affected the people of one state in a concrete and personal way, created at least two clearly competing sides, and, if possible, possessed that element of all good classical Greek tragedies, the inability of mortal humans to resolve the conundrum. In Arizona, water presented such an issue, and John Rhodes found himself at the center of the controversy.

Conflicts surrounding notions of representation occupied a prominent place in American political history even before the American Revolution. Although subtle nuances existed, two clear theories emerged early in America's history. One concept held that a representative acted as an agent or trustee of the people as a whole, legislating for the good of the general population and not for any one part of the nation. The contrary theory of representation followed the much stricter notion of "actual" representation that bound the representative to follow the specific instructions of his constituents. A trustee going beyond the wishes of those creating the trust or a creation becoming greater than the creators constituted an unacceptable state of affairs for actual representationists. These notions of representation remained important issues throughout the nineteenth and into the twentieth century.¹

¹For good coverage of representation from the Stamp Act through the Civil War, see James Otis, "Considerations on Behalf of a Colonist in a Letter to a Noble Lord," in James R. Ferguson "Reason in Madness: The Political Thought of James Otis," *William & Mary Quarterly* 36 (1979): 194-214; Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (New York and London, 1969), 27; Robert A. Gross, *The Minutemen and Their World* (New York, 1976), 162; Robert W. Tucker and David C. Henderson, *Empire of Liberty: The Statecraft of Thomas Jefferson* (New York and Oxford, 1990); Harry Watson, *Liberty and Power: The Politics of Jacksonian America* (New York, 1990); Michael Holt, *Political Crisis of the 1850s* (New York, 1978).

On April 17, 1964, Senator William F. Bennett of Utah addressed the Senate: "Mr. President: Utah is a state where a drop of water is almost as valuable as a nugget of gold. Water in an arid land such as ours is the very life-blood of the economy and the future. Without water there is no future for Utah. Without water there is no future for the West."²

Bennett's opening remarks prefaced a long and involved discussion of the dispute over the release of water from Glen Canyon Dam on April 14, 1964, but his analysis of water and its link to the West crystallized the importance of water for America's western states. The issue is much more complex than a mere insufficiency of supply for a homogeneous population. Despite water's apparently well-established physical qualities, western water assumed unique propensities that, given the competing interests in the West, defined the importance of the resource and the nature of the struggle over its allocation.

In describing his tribe's attempts to secure its water rights, Navajo tribal chairman Peterson Zah reflected on his childhood conceptions versus adult realities: "When I was a kid in geography, I was taught that water always flows downhill. What I have learned since is that water flows to money and power, wherever they may be."³ Zah's belief summed up the water struggle in the West, where scarcity generated a struggle drawn along racial, economic, and territorial lines. At the heart of this struggle rested two diametrically opposed interests: one represented by Native Americans living on government-established and protected Indian reservations who possessed little political power; the other the non-Indian population of Arizona, which, despite an inferior legal right to dominate scarce water resources, possessed tremendous political power. It is in this context that John Rhodes' notions of representation and his obligations as a "representative of the people" can best be analyzed.

To understand the nature of the struggle, one must be aware of the source of water allocation in the West and the identity of the competing interests. In the American West, water rights are governed by the doctrine of prior appropriation, which means, literally "first come, first served." Whoever gets to the water first, regardless of whether he is the "riparian owner"—

²*Congressional Record*, April 17, 1964.

³Floyd Burton, *American Indian Water Rights and the Limits of the Law* (Lawrence, Kans., 1991), x.

the actual owner of the land through which the water runs—has priority before all others who come after, to appropriate the amount of water he first uses. In times of a shortage, later appropriators are required to relinquish their water to the person holding the prior appropriation right. This doctrine was a necessary legal innovation by western states that altered the old common law rule giving the owner of the land through which the water ran complete ownership of it. Under English common law, the upstream owner cannot block the flow of water, but he has the right to unlimited use, beneficial or otherwise, of the water. Furthermore, his ownership of the land precludes non-owners from reaching the water across his land. English common law has never operated in Arizona.

Prior appropriation also rejected the Spanish water law doctrine that prevailed in Arizona before it became a U.S. territory; Spanish law stressed communal ownership of water rights for agriculture and irrigation purposes.

Appropriated water rights developed in response to the geography and climate of the West, where water was not only a valuable resource, but existed in insufficient quantities to satisfy everyone's needs. The doctrine discouraged waste and stressed the importance of beneficial use, but in the process evoked an entrepreneurial scramble for water that quickly made appropriated water rights a valuable form of property that could be bought and sold.⁴

Conversely, Indian water rights are a creature of the federal government, more specifically the U.S. Supreme Court. In 1908 the court decided the case of *Winters vs. United States*,⁵ and held that despite the absence of an expressed grant of water rights to Indian reservations, when the United States entered into treaties with the Indian nations, the respective grants of reservation lands carried with them an implied grant of the water rights for streams and rivers running through the reservations. From its inception, the *Winters* decision created a legal right to an undefined amount of water for Native Americans on Indian reservations.⁶ In 1963, the Supreme

⁴Kermit L. Hall, *The Magic Mirror* (New York and Oxford, 1989), 115–17; Dean E. Mann, *The Politics of Water in Arizona* (Tucson, Ariz., 1963), 30–31. For a complete discussion of the evolution of prior appropriation, see *ibid.*, pp. 29–31.

⁵*Winters vs. the United States*, 207 U.S. 564 (1908).

⁶Norris Hundley, "Water and the West in Historical Imagination," *Western History Quarterly* 27:1 (Spring 1996): 27–28. Hundley cites both Lloyd Burton and Daniel McCool for the proposition that Indian water rights under *Winters* represented a superior claim but did not really constitute an "open-ended grant" of water.

Court in *Arizona vs. California* resolved almost sixty years of ambiguity by stating that, at least for the Colorado River Indians, "future Indian water needs" meant the amount of water necessary to irrigate all of the "practicable irrigable acres" on the five reservations, or about one million acre-feet of water per year. For many non-Indian interests this decision signaled that Indians had first call on virtually all water in the West.⁷

The potential for water controversy in Arizona lay dormant for decades. From 1880 to the 1920s, the primary goal of water planning focused on providing sufficient water for agricultural purposes. In the years following statehood, Arizona's water projects continued to concentrate on facilitating agricultural growth and development. At this time the state's population was both small and stable; during the 1930s, its population increased by only a modest 14.6 percent. However, in the postwar era Arizona experienced tremendous population growth. By 1950 it had 750,000 residents, and its ten-year growth rate of 50.1 percent led the nation. Arizona's population reached 1,302,000 in 1960, an increase of 73 percent from its 1950 figure. Estimates in 1960 called for continued growth, with even the most conservative figures predicting an increase of 39 percent between 1960 and 1970. Arizona's population not only grew faster than that of any other state, but the nature of its population shifted dramatically. A state previously dominated by a small, agricultural population became a showcase for western urbanization. Prior to 1940, only 35 percent of Arizona residents lived in urban areas; by 1960 that figure had reached 71 percent in Tucson and Phoenix alone, with projections of continued growth in both places.⁸

Population growth had an immediate effect on Arizona's water consumption. By 1950, groundwater pumpage had more than doubled from 2.5 million acre-feet per year to 4.7 million acre-feet per year. The depletion of the water table made groundwater extraction increasingly costly—so costly that in some areas land fell out of production. As Arizona searched for new alternatives for future water development, all eyes turned to the Colorado River, which quickly became the center of competing interests.

⁷*Arizona vs. California*, 373 U.S. 546 (1963); Michael C. Nelson, *The Winters Doctrine: Seventy years of Application of "Reserved" Water Rights to Indian Reservations* (Tucson, Ariz., 1977), 3.

⁸Paul Bracker, *Arizona Tomorrow: A Precursor of Post Industrial America: A Study by the Hudson Institute* (Corton-On-Hudson, N.Y., 1975), 83; Mann, *Politics of Water*, 10; Lawrence Clark Powell, *Arizona, A Bicentennial History* (New York, 1976), 92.

In addition to simply increasing water use, the growing urban population altered the state's water demands from agriculture to municipal and recreation. Once the leading figures in Arizona water management had been farmers. In the late 1950s and 1960s, a new, nonagricultural elite emerged, one whose primary objective was the growth of urban communities. This elite, with its modern priorities, altered the pattern of water use not only away from agriculture but away from any other use or group that might interfere with its vision.⁹

Other people had their own vision that required water. In the 1960s, just as Arizona's growth and urbanization shifted into high gear, the state's Native Americans, the largest Indian population in America, set out to develop and improve their way of life. Officials of the Bureau of Indian Affairs (B.I.A.), armed with the *Winters* decision and the belief that the federal Indian reservation grants conveyed both land and water, openly expressed the opinion that they did not have to abide by state water laws. An Arizona water study done in 1963 indicated that by the early 1960s, the Indian reservations had begun to act on the beliefs expressed by the B.I.A. The study described a projected twenty-year water conservation and development program with estimated expenditures of more than \$107 million involving the Papago, Pima, San Carlos Apache, Navajo, and Hopi reservations. In addition to conservation and management, the Indians stepped up efforts to develop water recreation areas designed to improve the income potential of their lands. For example, the Fort Apache Indians began efforts to impound water for a 4,500-acre-foot lake on the reservation. The potentially adverse effect that increased Indian water development would have on non-Indian water use caused one attorney of the Salt River Water Users Association to remark, "It might be well that Arizona and California will be required, to some extent, to forget their differences in order to jointly defend against Indian claims."¹⁰ The success of both Indian and non-Indian visions, in a land of limited water, depended on who got first call.

In areas of abundance, first call merely designates a pecking order; in water-hungry Arizona, many interpreted first call to mean "only call." In a letter to Congressman Rhodes in late 1963, attorney Grieg Scott stated, "Business interests and others here in the valley are beginning to become alarmed." Scott and others in Phoenix believed that Indian water rights could conceivably take all of Arizona's Colorado River allot-

⁹Bracker, *Arizona Tomorrow*, 81-82; Mann, *Politics of Water*, 6, 9-10.

¹⁰Mann, *Politics of Water*, 14-15, 170-78, 197.



The rapid growth of Phoenix in the 1950s fueled the conflict over Arizona's limited water supply. (Courtesy of Arizona Collection, Arizona State University Libraries)

ment.¹¹ While Indians claimed water rights under *Winters*, non-Indians, relying on state water laws, realized that there was an insufficient supply and set out to preserve their vision of Arizona, which was impossible without adequate water. Between the two competing interests stood the various state and federal representatives of Arizona—and prominent among them was John Rhodes.

There are two ways to identify a representative's notions of representation: his words and his actions. Both reveal aspects of his ideas of representative government, both in general and in regard to a particular element of the electorate. Several

¹¹"Grieg Scott to John J. Rhodes, 10/24/63," *John J. Rhodes Papers*, 1953–1983, 88th Cong., box 35, folder 4., Arizona Collection, Hayden Library, Tempe, Arizona. The citation by Congress number, box, and folder corresponds directly to the manner in which these documents are kept and indexed. These documents are referred to as *Rhodes Papers* throughout the article.

sources can help provide an understanding of how Congressman Rhodes' personal opinions related to this issue. He wrote or cowrote two books, one in 1976 and the other in 1995. In addition, his theories and opinions come through in his letters and in his general publications to his constituents.

In his first book, Congressman Rhodes condemned the federal system as one in which "the majority of congressional actions are not at producing results for the American people, but at perpetuating the longevity and comfort of those who run congress. It is a ripoff of the American taxpayer, injurious to the national interest and an insult to the dignity of the legislative branch envisioned by the founding fathers."¹² Rhodes believed in a system that responded to the electorate, but it is unclear from anything in this earlier work what the nature of that responsiveness was supposed to be or who the "people" were. However, in 1995 he wrote his autobiography, and in this later work he expresses his views more clearly about the representative's role. Rhodes recognized that one of the problems he and other congressmen faced was the need to give adequate representation to their constituents. Reflecting on his years in the House, he stated, "In most cases I was able to vote as the majority of my constituents expected me to vote. But there were times when I had to choose between the expressed will of some of my district's voters and what I believed to be the way I should vote."¹³ Clearly, based on this analysis of his own conduct, Rhodes envisioned himself as a "trustee" of the public will. He felt bound by his voters' wishes, but only to the extent that those wishes did not conflict with his own ideas. Statements he made about representation during the years he served support his retrospective analysis in 1995.

Shortly after taking office in 1953 Rhodes initiated a bimonthly newsletter called *John J. Rhodes Reports*. This publication, which rarely exceeded four pages, met the expressed goal of keeping his voters up-to-date on the main issues and the various bills before the house, including legislation he sponsored. Every two years, when Rhodes faced reelection, the final installment of the newsletter for that year carried a front page call for his constituents' support. In one of his earlier requests for votes, Rhodes stated the substance of his beliefs: "I have attempted in every way to represent this

¹²John J. Rhodes, *The Futile System: How to Unchain Congress and Make the System Work Again* (McLean, Va., 1976), 15.

¹³Rhodes, with Dean Smith, *I Was There* (Salt Lake City, Utah, 1995), 124.

county in a manner that would reflect the views of the great majority of its citizens, regardless of their party affiliation."¹⁴ These various statements from his books, papers, and newsletters combine to establish Rhodes' view that his obligation as a U.S. congressman was to the voters of his district, in this case the First Congressional District of Maricopa County. His votes in Congress generally followed the views of the majority of those voters; only in instances where his better judgment led him to disagree did he vote contrary to their expressed wishes. Armed with this broad notion of representation, Rhodes applied his beliefs to the difficult issues inherent in water politics.

If any question existed as to where Rhodes' constituents stood on the issue of water and who his constituents really were, his correspondence in 1957 removes all doubt. In January 1957, R.J. McMullen, general manager for the Salt River Project (SRP), sent Rhodes a copy of a brief written by J.A. Riggins, attorney for the SRP, entitled, "The Indian Threat to Our Water Rights." The brief is only twenty-four pages long, but it sets out in a coherent and persuasive fashion the genesis of Indian water rights and the non-Indian analysis of Indian water law followed to its natural conclusion. Riggins did not view Indians as victims or unempowered citizens, but stated, "We are dealing with an integrated leadership which has no hesitancy whatsoever in depriving our existing non-Indian areas of the water upon which the civilization and economy of the West has been based."¹⁵ The message was clear: We, your non-Indian constituents, are engaged in a life-or-death struggle with the reservation Indians, and the survival of Arizona's non-Indian civilization and economy is at stake. Rhodes responded to McMullen on January 31, 1957, thanking him for the brief and stating, "The implications surrounding the possibility of extending the Winters Case are appalling. This is just one of the many reasons why it appears to be almost impossible to come up with a national water policy." "Appalling" could be considered rather strong language when used to describe a federally protected right that applied to some of his own constituents . . . or did it?¹⁶

The same day that Rhodes wrote McMullen, he also responded to an inquiry dated January 11, 1957, from Helen L.

¹⁴Rhodes, *John J. Rhodes Reports*, November 1, 1958.

¹⁵Rhodes, *Rhodes Papers*, 85th Cong., box 14, file 5, "Indians."

¹⁶"John J. Rhodes to R.J. McMullen, January 31, 1957," *Rhodes Papers*, 85th Cong., box 14, file 5, "Indians."

Peterson, executive director of the National Congress of American Indians, regarding Indians and their access to the political system. She asked Rhodes to identify the size of his Indian constituency, their level of political activity, their political party preference, the numbers of Indian candidates for office, the nature of their political power, and any obstacles or handicaps to their political involvement. Rhodes responded that he had only three hundred Indian constituents on reservations, but that there were large numbers of non-reservation Indians. Indians did not actively participate in politics and showed no party preference that he could identify, except that he felt they generally supported his positions. Although Rhodes knew of no Indian political candidates, he stated that they possessed an effective political voice in matters that concerned them. Finally, Rhodes believed that there "were no obstacles or handicaps to hinder Indians taking part in government as citizens."¹⁷ "Citizen" is an important term, because it had a distinct meaning for Rhodes in relation to Native Americans.

Rhodes did not view Indians on reservations outside of his district to be his constituents. Although he had an estimated three hundred Indians on reservations within the First District, under his theory of "majority rules," three hundred voices easily became drowned out in the deafening clamor of the non-Indian majority. This kind of logic, however, does not work in regards to Indian water rights, which are federally created and protected; only the federal government occupies a position to protect those rights. The state water law clearly contradicted the federally established *Winters* law. Furthermore, the efforts of state lawmakers in Arizona showed a clear intent to obstruct and circumvent *Winters*. In January 1960, a resolution entitled "House Joint Memorial 2" came before the Arizona legislature allowing the state to control waters generated from within its geographical area.¹⁸ Arizona demonstrated its concern with protecting state water law; its non-Indian residents understood that although the federal government had control over vital watershed areas within Arizona, state water laws had to be affirmed and protected.¹⁹

¹⁷"Helen L. Peterson to John J. Rhodes, January 11, 1957," *Rhodes Papers*, 85th Cong., box 13, file 1, "Indians"; "John J. Rhodes to Mrs. Helen L. Peterson, January 31, 1957," *Rhodes Papers*, 85th Cong., box 13, file 1, "Indians."

¹⁸"House Joint Resolution 2, Introduced Jan. 13, 1960," *Rhodes Papers*, 85th Cong., box 14, file 5, "Indians."

¹⁹"Rich Johnson, Central Arizona Project Assn., to John J. Rhodes, September 12, 1958," *Rhodes Papers*, 85th Cong., box 14, file 13, "Indians."

Congressman Rhodes' notion of representation included only his constituents, particularly if a nonconstituent interest ran contrary to that of a constituent. In May 1964, the SRP began draining large amounts of water from Roosevelt Lake. The Miami town clerk, J.B. Gutierrez, wrote Rhodes, asking him to do something about the situation, which could create severe shortages before the summer was over. Rhodes responded within two weeks, telling Gutierrez that Miami was out of his district, that Roosevelt Lake was completely within the control of the Salt River Water Users Association, and that the federal government had no jurisdiction. He added, "I hope it will not be necessary for the lake to be depleted. . . . As many Arizona Natives have often said, 'It will rain—it always does.'" Gutierrez did not care whose jurisdiction it was, nor that Miami was not in the First Congressional District. He merely wanted Rhodes to use his influence, whether with the state, the federal government, or the SRP, to bring some relief. Rhodes was not inclined to do so.²⁰

In March 1966, Frank Moore, a Douglas, Arizona, resident concerned with surface water waste, wrote to Congressman Rhodes asking for suggestions. Rhodes responded that he "only wished there was something of a concrete nature I could do about it." In May, Moore wrote to Rhodes again, suggesting that the situation required a state law against uncontrolled drilling. Finally, in June, Moore bluntly asked Rhodes to use "his good influence with people and organizations in Maricopa County." Two weeks later, Rhodes responded almost as bluntly, saying, "[Y]ou have completely overestimated my power with the Arizona Legislature." Rhodes added that his efforts several years before to influence state legislation had brought criticism from those who viewed his efforts as "attempts on my part to make political capital and it took three years to get the bill passed."²¹

Rhodes perceived both the Miami and Douglas problems, like the Native American situation, as outside his district and beyond his jurisdiction as a federal representative. However, the key distinction between the Indians and the Miami and Douglas people is not that one cause was any more or less

²⁰"J.B. Gutierrez to John Rhodes, May 22, 1964," and "John Rhodes to J.B. Gutierrez, June 2, 1964," *Rhodes Papers*, 88th Cong., box 35, file 1, "Water."

²¹"Frank E. Moore to John J. Rhodes, March 25, 1966," "John J. Rhodes to Frank E. Moore, April 25, 1966," "Frank E. Moore to John J. Rhodes, May 6, 1966 and June 8, 1966," and "John J. Rhodes to Frank E. Moore, June 23, 1966," *Rhodes Papers*, 89th Cong., box 41, file 4, "Water."

meritorious than the other, but that the Miami and Douglas people had clear avenues of relief within the state system. The rights they were trying to assert were not uniquely created and protected by federal law. Reservation Indians, on the other hand, had no place to look but to Congress. Unfortunately, whereas federal courts treated Indians as nations and treaties as agreements between coequals, Congress saw the Indians as just one more ethnic minority.²² John Rhodes shared this view.

The May 1954 issue of *John J. Rhodes Reports* contains an article entitled "Indian Education," which includes a short statement defining Rhodes' beliefs about Indians in American society and helps explain his actions in the coming years. Rhodes' views clearly related directly to his concept of American citizenship and the status of the Indians in America. He began by explaining that the federal government experimented with many methods for finding a satisfactory solution to our "Indian problem." Rhodes declared that the problem "as briefly as I can state it is to integrate every Indian into full citizenship on an equal footing with every other American citizen."²³

"Citizen" is the key word in Rhodes' views of Native Americans. In his response to Helen Peterson in 1957, Rhodes said he saw no obstacles to Indians' full participation in government as "citizens." He advocated full assimilation of Indians into American society. The problem with such an approach is twofold: (1) American Indians legally exist as citizens of their tribes, with clearly defined national reservation boundaries; and (2) As far as water rights are concerned, Indians do not have to be American citizens to realize the full benefit of their federally mandated right. So, regardless of whether Indians were American citizens, the government that Rhodes represented had guaranteed Indians certain rights that Rhodes arguably had an obligation to uphold. Unfortunately, he belonged to a larger body, the U.S. Congress, that from 1862 had consistently deferred to state water rights laws. In arid states such as Arizona, these laws followed the doctrine of prior appropriation, which ran contrary to the federally protected rights established in *Winters*.²⁴ Because Rhodes' beliefs compelled him to vote and act in accordance with his conscience, his views regarding represen-

²²Burton, *American Indian Water Rights*, 2, 7.

²³Rhodes, *John J. Rhodes Reports*, May 30, 1954.

²⁴Daniel McCool, *Command of the Waters: Iron Triangles, Federal Water Development, and Indian Water* (Berkeley, Los Angeles, and London, 1987), 50-51.

tation led him to subordinate Indian water rights as a federal responsibility to non-Indian water rights as a constituent obligation.

Rhodes' refusal to advocate the enforcement of Indian water rights stemmed from his belief that Indians should be assimilated into white society—a process that required them to relinquish their independent status. One manifestation of that status was their right to build a life on the reservation where they not only owned land but shared bonds of kinship and community. Rhodes believed that the reservation acted as an impediment to Indian assimilation, and he said so in 1956. In a February installment of *John J. Rhodes Reports*, the congressman stated, "American Indians set an all time record this past year in accepting job opportunities off the reservation." He added that thirty-five hundred Indians left the reservation for greater economic opportunity and employment advantages, and that reports showed that fewer than thirteen out of one hundred "give up and go back."²⁵ Rhodes viewed returning to the reservation as failure.

In most matters, Rhodes voted as he believed his constituents wanted him to, but he admitted that, in some cases, he voted his conscience. His own beliefs told him that Indians should assimilate. The protection of Indian water rights perpetuated the reservation's existence and fostered its economic and agricultural growth. More importantly for John Rhodes, protecting Indian water rights meant sacrificing non-Indian water rights, and non-Indians dominated his constituency. The questions now are, What did Rhodes do when confronted with this issue, and how did he do it? The answers to both questions reveal something of Rhodes' notions of representation.

The actions Rhodes took had as their primary goal the development and preservation of non-Indian water rights. His constituency in Arizona—Phoenix and urban Maricopa County—consisted mainly of non-Indians and non-reservation Indians. The Salt River Project, representing the water interests of Phoenix, maintained capable and prominent lawyers. The people who operated the SRP counted heavily among Rhodes' voters, and many of its managers enjoyed a close relationship with the congressman. On the other hand, although Rhodes' relations with Indian nations and their representatives were consistently cordial, rarely if ever in the

²⁵Rhodes, *John J. Rhodes Reports*, February 15, 1956.

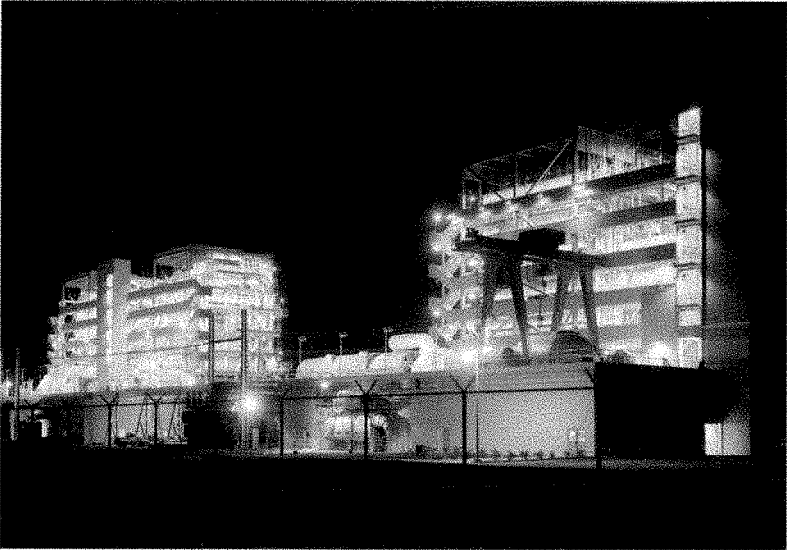
years between 1956 and 1967 did he appear to regard the Indians as peers.²⁶

The tone of the correspondence between the SRP and Rhodes demonstrates a mutual respect, tempered by an expectation or presumption that Rhodes would support the project. The events that unfolded in the 1960s gave every indication that the SRP did not misplace its faith.

The differences between the relationships Rhodes maintained with the SRP and with the reservation Indians became important in the 1960s. As water politics developed in Arizona, the SRP and the Indian reservations each sought to control and use the same water resources. The SRP represented the needs of Phoenix and Maricopa County, a community of diverse economic and agricultural interests that continued to grow in physical size and population. Indian reservations, whether in Maricopa County or in other parts of Arizona, looked to the same water resources for agricultural and economic development. Water use by one group necessarily diminished water use by the other. An Indian reservation reservoir upstream from Phoenix diverted water that the city badly needed, while shortages of water for irrigation or recreational facilities retarded the reservation's development. More importantly, advocacy of one interest effectively diminished the other, because there was not enough water to allow both sides to tap the available supply to its full potential.²⁷

²⁶My research into Congressman Rhodes' correspondence took me from the 85th Congress through the 89th Congress and covered a period of ten years. His bimonthly newsletters begin in 1953 and are complete through 1966. After a time I noticed that Mr. Riggins was "Ted" and Mr. McMullin was "R.J." Although letters to Filmore Carlos often began "Dear Filmore," the nature of the relationship, as it unfolds in the correspondence, was not close. Rhodes always responded promptly to inquiries, most of the time personally, but his closer personal relationships are evident from not only the casualness of his letters, but the frankness of his opinions.

²⁷Burton, *American Indian Water Rights*, 5. Burton refers to water law as a double-edged sword. Despite the strong pull of the majority non-Indian water advocates, Indian water rights were "fully allocated resources." To compromise this allocation in favor of the SRP or any other non-Indian interests diminished the Indian interest. The pace of Phoenix's growth during this period almost needs no documentation, and the pleas of his constituents to protect Maricopa County's water that are set out in this article bear witness to the citizens' perceptions of the water needed to fuel this growth. A 1965 proposal for developing South Phoenix prepared by West M.R. & Company—Consumer Research provides data about Phoenix's growth since 1955 and the projected growth into the seventies. The data in the proposal depict the growth of Phoenix and the surrounding suburbs as "not only considerable, but relatively steady . . . less liable to cyclical variation." See West M.R. & Company—Consumer Research, *South Phoenix—Potential for Industry* (Phoenix, 1965), 1.



Plants like the Salt River Project's Agua Fria facility produced hydroelectric power needed to fuel Phoenix's growth. (Courtesy of Arizona Collection, Arizona State University Libraries)

In this environment of conflicting interests, Rhodes' statements provide a sound foundation for determining his notions of representation. Did his actions confirm his statements or run contrary to them? Indian reactions to Rhodes' efforts in the first five years of his congressional career are difficult to find in his correspondence. There is a complete absence of constituent criticism on the issue of water; Rhodes' "Reports" demonstrate only his conscientious efforts on behalf of his local constituents. In March 1954, he introduced legislation providing for a \$32 million federal loan, interest free, payable in forty years, to line the existing Salt River Valley Users Association water canals and ditches and to construct underground conduits. Rhodes estimated the savings of water at approximately 200,000 acre-feet per year. In April 1954, he introduced H.R. 3598 to consolidate the Parker and Davis Dams under one administrator. That same month he introduced H.R. 4293, authorizing the secretary of agriculture to sell certain improvements on national forests to the Salt River Valley Users Association. In 1955, Rhodes succeeded in getting H.R. 1602 passed, authorizing the transfer of twenty-

nine acres from the city of Tempe to the Salt River Valley Water Users Association for construction of a headquarters building.²⁸ Not only does this legislation appear beneficial to Rhodes' district, based on its content and on Rhodes' inclusion of it in his newsletter, but on its face it appears harmless to Indian water rights.

Nothing in his correspondence or in the bills Rhodes authored indicates that his activity in the 1950s conflicted with reservation water rights or harmed the reservation in any way. However, something transpired during this period that upset one Native American to such a degree that he authored the most searing criticism of Rhodes found in any correspondence on Indians or water up to 1967. In a letter dated September 24, 1958, this nonconstituent Native American, identified only as "Craig," representing the "League of North American Indian Wemitaikwichen Keewayhenus," accused John Rhodes of complicity in "Hopi Genocide." Craig claimed that Rhodes "played ball" with Congressman Morris Udall and Senator Barry Goldwater in the passage of Public Law 85-547. This act grew out of S. 692 and H.R. 3789 and purported to settle the boundary dispute between the Hopi and the Navajo nations. Craig contended that no boundary dispute existed, that the real purpose of the settlement involved divesting the Hopis of their water rights. Quoting from an article by Felix Cohen in the *Yale Law Journal*, Craig concluded his letter, "Like the miner's canary, the Indian marks the shift from fresh air to poison gas in our political atmosphere, and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall of our democratic faith."²⁹ A review of secondary literature fails to substantiate Rhodes' complicity in this conspiracy. However, this omission from history is not surprising in view of Rhodes' presence in the general literature on Western water, both Indian and non-Indian. Rhodes is conspicuous by the lack of direct references to him or his role in Western water. His absence from the story is the result of a conscious effort and not an accident or omission of history.³⁰

²⁸Rhodes, *Rhodes Reports*, March 5, 1954, April 2, 1954, and May 16, 1955.

²⁹"Craig to John J. Rhodes," September 24, 1958, *Rhodes Papers*, 85th Cong., box 13, file 1, "Indians."

³⁰The sources on water and Indian water listed within these notes represented my efforts to understand the water controversy. During this process I checked each work for specific references to Rhodes. In most cases there was no mention of him at all. In the rare instances where he appeared, the reference never attacked Rhodes regardless of the ethnic background of the author. In most cases Rhodes made a general statement like, "Water is a problem."

During the early part of his career, Rhodes took an active role in the interstate water controversy. In his first reference to the Central Arizona Project (CAP) in 1956, he acknowledges that "[t]he entire delegation of Arizona worked very hard for this bill." By 1959, Rhodes appeared confident of starting the Central Arizona Project. He suggested the development and creation of a state agency to serve as a contracting agent with the federal government on dam projects. Exactly who would benefit remained somewhat obscure at this stage of the project, but reservation Indians would not be among the principal beneficiaries. The only major dam bill involving Rhodes' district during the early years of his tenure came in 1958. The U.S. Army Corps of Engineers recommended flood control dams on the Gila and Salt Rivers, and allocated \$3.3 million for that purpose. Rhodes indicated that the project would go before Congress in early 1959 for approval, and believed it was significant enough to mention that "none (of the contemplated space needed for the dams) appears to be on Indian reservation land."³¹ During the decade of the 1960s, which loomed on the horizon, water politics heated up, and demands increased from Arizona citizens.

Water management in Arizona during the 1960s presented challenges for both Indians and non-Indians, but the challenges were different for each group. Non-Indians working to overcome the uncertainties of Western living needed sufficient water to sustain growth. Not only did they have to manage existing water resources; they had to find additional supplies. The Native American population already possessed sufficient water resources, but they needed to turn their legal right into actual water, or turn "paper water into wet water."³² Congressman Rhodes was caught between two factions that believed they had a moral and legal right to receive his assistance.

Rhodes' correspondence from 1960 to 1967 reveals a distinct pattern in his management of water problems and the requests from Indian and non-Indian groups. What he did reflected what he believed, which meant that non-Indian interests consistently prevailed over Indian interests, even in

³¹Rhodes, *Rhodes Reports*, March 15, 1956, July 1, 1959, July 7, 1959, and August 1, 1958.

³²"Victor I. Corbell to Governor Paul J. Fannin, February 26, 1963," *Rhodes Papers*, 88th Cong., box 35, file 1, "Water"; Daniel McCool, "Negotiating Water Settlements: Ten Common Themes," in *Indian Water in the New West*, ed. Thomas C. McGuire, William B. Word and Mary C. Wallace (Tucson, Ariz., 1993), 95. At the time he wrote the governor, Victor Corbell was president of the Salt River Project.

situations where there was no apparent conflict. However, the real story lies in how Rhodes managed to subordinate Indian to non-Indian interests and yet not appear to have abandoned his responsibility to help reservation Indians protect and develop their water rights.

The first observable pattern appears in the nature of Rhodes' application of his congressional power. In a letter to Easley S. Reed, county director for the Friends of Arizona Indians, Rhodes indicated he was "pleased to render any service I can to our Indian citizenry." In certain matters this pledge rings true. For example, *John J. Rhodes Reports* contains numerous references to "Indian education" on the reservation and to Rhodes' support for those endeavors. In addition, he made efforts to help provide infrastructure, such as power plants, for the reservations.³³ But in Indian water matters, Rhodes acted as a conduit of information, rather than an Indian advocate, between the reservation authorities and the congressional committees or federal agencies from which the Indians sought support. He did serve as a representative, but only in a passive sense.

In February 1966, the Salt River Pima Maricopa Indian (SRPM) Reservation applied for a technical assistance grant from the Economic Development Administration (EDA). By August, there was still no response. Filmore Carlos, president of the SRPM Reservation, wrote and telegraphed Rhodes for assistance. Rhodes contacted Thomas Harvey of the EDA to inquire about the status of the grant, but did not advocate or insist that the grant be made. When the EDA denied the grant on August 8, Carlos telegraphed Rhodes immediately to ask for assistance. He explained that the Bureau of Indian Affairs had approved the grant and that it was very important to the welfare of the tribe. Rhodes wrote Harvey on August 8, 1966 asking for an explanation of why the grant had been rejected, so "I may appropriately respond to Mr. Carlos." Harvey replied that the grant held little value to anyone, that the EDA was contemplating a 701 grant in the near future for both Indian and non-Indian water uses on the Salt River, and that if a need were shown for a specific technical assistance study for the Salt River Pimas, the EDA might reconsider. Rhodes then

³³"John J. Rhodes to Easley I. Reed, August 31, 1964," *Rhodes Papers*, 89th Cong., box 40, file 1, "Indians." Rhodes' efforts to secure the Dickson Electric Plant for the Salt River Pima Maricopa Indian Reservation appear in a press release dated June 4, 1964, and the failure to secure the plant is explained in an April 20, 1965, letter from Filmore Carlos to Rhodes; see *Rhodes Papers*, 88th Cong., box 32, file 6, "Indians."

wrote Carlos, repeating what Harvey had told him.³⁴ Clearly the congressman had not opposed the grant, but he had not actively advocated for it. No study designed to turn paper water into wet water materialized. Whether intentionally or unintentionally, Rhodes' notions of representation and the "Indian problem" dictated his action . . . or inaction.

The engineering grant was only one of several instances of unsuccessful Indian entreaties to Rhodes about projects or matters that uniquely benefited them. In 1965, Filmore Carlos asked Rhodes to push for an amendment to the 1956 Small Dam Reclamation Act allowing Indian reservations to acquire funds to build dams. Rhodes asked Wayne Aspinall to see that the tribe's request be given "careful consideration" in the hearings on the amendment, and he forwarded a copy of this letter to Carlos, but there is no indication that Rhodes made any follow-up attempts. Samuel Goddard, governor of Arizona, made a much stronger plea on behalf of the Indians. He wrote Aspinall explaining that federally funded reclamation projects were critical to the efforts of Arizona's seventeen tribes to convert land to agriculture. Goddard specifically asked that the SRPM Reservation be included.³⁵

The same scenario played out in 1964 when the Papago Indians attempted to secure approval for a dam on reservation land. In August, the Army Corps of Engineers generated a proposal for the multipurpose Santa Rosa Dam to be built on the Papago Indian Reservation. Five months earlier, the corps had issued a report approving the project and outlining the primary benefit to the reservation. Unfortunately, two months before that report, Rhodes had already begun to receive letters from non-Indian water interests, particularly Buckeye Irrigation Company officials and lawyers, warning of injury to downstream water rights if a multipurpose dam became a reality. Although a dam for flood control apparently met with everyone's approval, the multipurpose or recreational aspect

³⁴The technical assistance grant application filed February 10, 1966, sought \$92,500 for an engineering study to help the Pima Indians develop their water rights along the Salt River. "John J. Rhodes to Filmore Carlos, February 25, 1966," "Filmore Carlos to John J. Rhodes, March 3, 1966," "August 8, 1966 Telegram, Filmore Carlos to John J. Rhodes," John J. Rhodes to Thomas Harvey, August 8, 1966," "Thomas Harvey to John J. Rhodes, August 22, 1966," and "John J. Rhodes to Filmore Carlos, August 25, 1966," *Rhodes Papers*, 89th Cong., box 40, file 6, "Indians."

³⁵"Filmore Carlos to John J. Rhodes, June 22, 1965," "John J. Rhodes to William Aspinall, June 24, 1965," and "Samuel P. Goddard to Wayne Aspinall, July 1, 1965," *Rhodes Papers*, *ibid.*

did not pass muster with the non-Indians. Among the reasons offered by Buckeye's lawyers were the alleged nomadic tendencies of the Papagos, their inability to manage the facility, and the tremendous cost.

Other than the various letters and reports that passed through Rhodes' office from other parties, the congressman himself is conspicuously absent from the correspondence exchanges about the Santa Rosa Dam. On a letter he received from the Army Corps of Engineers in November 1963, he wrote one handwritten note to an aide, indicating that he wanted to be briefed about the Santa Rosa Project when it was convenient for him and the Corps of Engineers. On page 30 of Senate Bill 2300, dated July 28, 1965, the Santa Rosa Project appears as a flood control project only.³⁶ There is no indication that Rhodes opposed the project or in any way advocated for non-Indian interests. However, there is nothing to indicate he made any effort to push the Santa Rosa Dam as a multipurpose project designed to bring economic gain to the reservation.

This passive representation may appear relatively harmless, but it demonstrates a clear pattern of "lying low" when Indian water issues arose, a pattern manifested by Rhodes' practice of passing on information without expressing an opinion. Another good example of this pattern exists in the annual request by the Arizona Commission of Indian Affairs for federally generated data on the amount of money spent by the Bureau of Indian Affairs on Arizona Indians each year. The 1965 letter from the commission to Rhodes begins, "It's that time of year again." The correspondence files indicate that Rhodes provided these data every year between 1960 and 1965.³⁷

This pattern of neglect of Indian issues stands in stark contrast to Rhodes' actions in relation to non-Indian constituent interests. In 1964, H.R. 9032 came before the U.S. House

³⁶"Army Corps of Engineers Memo to the Chief Engineer, Dept. of the Army, August 1, 1963," "Army Corps of Engineers to John Rhodes, November 13, 1963," "John S. Schaper to Army Corps of Engineers, January 6, 7, 1964 [Rhodes copied]," "Leonard C. Halpenny, Water Development Corp to Army Corps of Engineers, January 6, 1964 [Rhodes copied]," *Rhodes Papers*, 88th Cong., box 32, file 7, "Indians"; "S. 2300, July 28, 1965," *ibid.*, file 8, "Indians."

³⁷"Charles F. Gritzner to John J. Rhodes, August 12, 1965," *Rhodes Papers*, 89th Cong., box 41, file 1, "Water"; *Rhodes Papers*, 85th Cong., box 13, files 1-10, 12-13, box 14, files 5 and 13; 88th Cong., box 32, file 2, box 33, files 1-6, box 34, files 1-6, box 35, files 4 and 5; 89th Cong., box 40, files 1, 6, and 7, box 41, files 1-7, box 42, files -15 *passim*. The letters were often only two sentences, but the pattern of representation through information transfer appears throughout the period covered by these correspondence files.

of Representatives with a provision placing recreational development of water resources under the control of the secretary of the interior. On March 3, 1964, R.J. McMullin wrote to Rhodes, not only strongly advocating against the bill but asking for his help in preventing the legislation from adversely affecting the SRP. McMullin had a very clear idea of what needed to be done and included in his letter specific language to be inserted into section 2 of H.R. 9032: "The Provisions of this section shall not apply to any existing reclamation project which has heretofore been turned over to a local water users association or agency for operation and maintenance by such local entity." This language specifically covered the SRP and the Roosevelt Dam.³⁸

Rhodes wasted little time. A handwritten note on a pad embossed "From the Desk of John Rhodes," dated March 9, 1964, says, "checked with McFarland, . . . re 2nd and 3rd paragraphs of McMullin's letter, . . . McFarland said, ". . . he has nothing to worry about." On March 13, Rhodes replied to McMullin, "Dear Rod," and explained that he, Rhodes, would track the bill and push the requested amendment. That same day, Rhodes wrote Wayne Aspinall, the chair of the Committee on Interior and Insular Affairs, where the bill had begun, "Since certain provisions of the bill have become a matter of concern to the S.R.P., it would be appreciated if the committee would offer an amendment when it comes to the floor which would include language similar to that offered by Mr. McMullin."³⁹ This is representation in its most direct form, very different from a vague request for "careful consideration."

John Rhodes had power, and he understood how and when to use it. In 1963, when the Apache Junction-Gilbert Watershed Project came before the House, he prepared and submitted a two-page written statement not only outlining the benefits of the project, but specifically requesting its passage.⁴⁰ Where and when Rhodes exercised power related directly to his notions of representation, which dictated that he follow his constituents' wishes when they did not conflict with his own. If conflict arose between his conscience and his voters,

³⁸"R.J. McMullin to John J. Rhodes, March 6, 1964," *Rhodes Papers*, 88th Cong., box 35, file 1, "Water."

³⁹"Note dated March 9, 1964 from the Desk of John Rhodes," "John J. Rhodes to R.J. McMullin, March 13, 1964," and "John J. Rhodes to Wayne Aspinall, March 13, 1964," *ibid.*

⁴⁰"Written Statement by John J. Rhodes, October 2, 1963," *ibid.*, box 35, file 2, "Water."

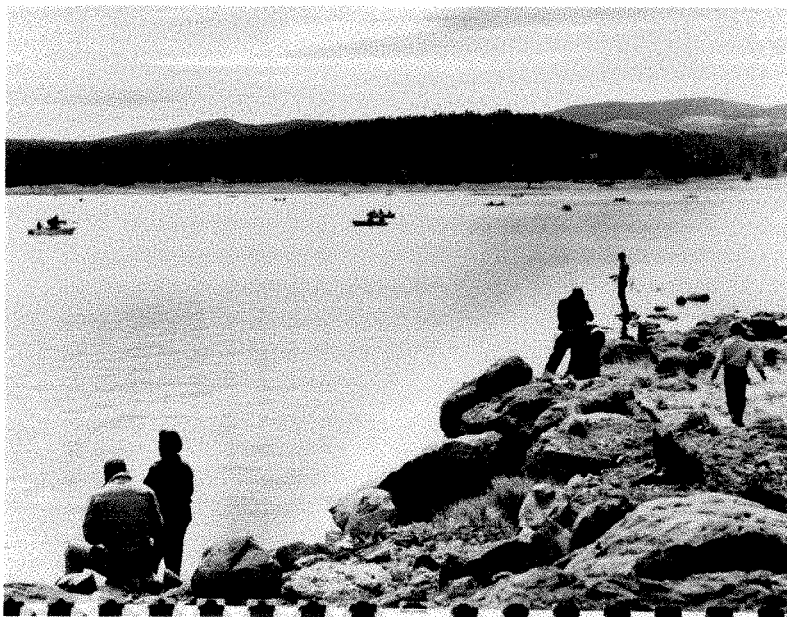
he obeyed his conscience. Native Americans had no real place in this concept of representation. Within Rhodes' district they did not fall within the "majority" of his voters. Nonreservation Indians who resided outside his district did not fall among his constituents. Despite the federal nature of Native American water rights grants, which technically made all Arizona Native Americans his constituents, the wishes of these voters ran contrary to his own views of America as a homogeneous nation and of the reservation as an impediment to that view.

The notion that Indians existed outside his political reality is apparent in Rhodes' excitement over the Central Arizona Project. In January 1962, Rhodes told his district, "At long last, a dependable water supply for our growing cities and our fertile agricultural areas." The definition of "our" came clear one year later when he explained to his voters, "The Supreme Court has given Indian lands in the lower basin of the Colorado a vested right to as much water as can be used. The question of the magnitude of the water available for Indian lands appears to be a little obscure . . . but the mainstream depletion will not be of a magnitude to endanger the feasibility of 'our' water diversion project."⁴¹ Native Americans were consistently absent from Rhodes' politics through the first fifteen years of his career. His two books contain virtually no reference to Native Americans, their water rights, or his position in relation to the federal obligation to enforce and protect them.

Regardless of whether one agrees or disagrees with Rhodes' concept of representation, no one can question the sincerity of his convictions. He stated them clearly and publicly at the outset of his career and followed them throughout. Noted columnist George Will said of Rhodes, "One glance tells you God had a congressman in mind when he made John Rhodes. And he is just what the founding fathers had in mind when they designed the House of Representatives, the body intended to be closest to the common man."⁴² Many Arizonans would agree with Will completely, while some would not be sure how to respond. Therein lies the genius of Rhodes' representation in relation to water rights. As Peterson Zah said, water runs to money and power. Rhodes allowed it to run where political gravity took it. He merely needed to know when to act and when to do nothing while appearing to act.

⁴¹Rhodes, *Rhodes Reports*, January 15, 1962 and June 15, 1963.

⁴²Rhodes, *I Was There*, 123.



Hawley Lake on the Fort Apache Reservation is the kind of recreation facility that could have been developed on other Indian lands had Congressman Rhodes been more supportive. (Courtesy of Arizona Collection, Arizona State University Libraries)

In 1964, a Phoenix attorney begged Rhodes to sponsor a bill specifically limiting Indian water rights to pure domestic uses unless otherwise approved by Congress. Rhodes knew when he could not win, and his response clearly demonstrates his political skills. Comparing the water issue to a powder keg, Rhodes replied, "I am not sure it gets any worse as time goes on, provided the fuse remains unlit. . . . I don't ordinarily like to ignore a problem and play like it is not there, unless to attempt a solution might be to cause the problem to become an immediate danger instead of a contingent danger." Rhodes never opposed the Indian water position; he simply facilitated the natural flow of the water to money and power. His political prowess enabled him to represent zealously those to whom he believed he was obligated, while managing not to alienate the Native Americans of Arizona. Although the various Indian reservations realized little gain when they actively sought his assistance, they never expressed any real animosity. Rhodes succeeded in representing his district without compromising

his own integrity or incurring the wrath of a small, but significant segment of the population that clearly did not benefit from his term in the House.⁴³

⁴³Hundley, "Water and the West," 28. Indians realized little from anyone's efforts in water politics. Writing in 1996, Norris Hundley acknowledged that court law never became congressional law, and not a single Indian water project ever reached completion.

BOOK REVIEWS

Warren G. Magnuson and the Shaping of Twentieth-Century America, by Shelby Scates. Seattle: University of Washington Press, 1997; 392 pp., illustrations, notes, index; \$27.50, cloth.

In this biography of former United States Senator Warren "Maggie" Magnuson, Shelby Scates, a former reporter and columnist for the *Seattle Post-Intelligencer*, tackles a subject well known to him. Magnuson's legislative career, which included six terms in the Senate, spanned nearly five decades, and Scates covers the latter half of that career. Unfortunately, perhaps because of his familiarity with his subject, Scates' book is more hagiography than biography.

On the positive side, because Maggie's arc in public life intersected with those of so many others, *Magnuson* is a primer of Washington state politics from the New Deal to the present: Scates explores in detail the friendship and political partnership between Maggie and fellow senator Henry "Scoop" Jackson. Former speaker of the House of Representatives Tom Foley makes an appearance as a Jackson staffer. Norm Dicks, currently a member of the House, shows up as another of Maggie's staffers. A number of Washington governors, including Albert Rosselini, Dan Evans, and Dixie Lee Ray, make appearances as well.

Scates both scores points and misses opportunities when he addresses the relationship between Maggie and his staffers, whom Maggie affectionately dubbed the "Bumblebees." Without openly arguing for the proposition, Scates makes a forceful case for the importance of able staffers in shaping Maggie's views on public policy and his career and reputation as a legislator. These accounts include a good retelling of the efforts of Maggie and his staffers to secure passage of Title II of the Civil Rights Act of 1964, which prohibited restaurants, accommodations, and other facilities open to the public from discriminating on the basis of color. Scates also recounts how staffers Jerry Grinstein and Mike Pertschuk—a Bumblebee whose later efforts to regulate the tobacco industry are chronicled in Richard Kluger's history of the cigarette *Ashes to Ashes*—led Maggie to champion the cause of consumer protection legislation in the 1960s and 1970s.

From the details and accounts provided, many of Maggie's former staffers have maintained their admiration and affection for the man they served so ably. Thus, every few pages, a Bumblebee can be found opining favorably about Maggie's compassion, political acumen, or stand on particular issues. Maggie appears to have benefitted personally from deals that today would be lambasted as conflict-of-interest or insider transactions, including holding stock in Northwest Airlines and a Seattle radio station while pushing their interests as a legislator. When Scates addresses such concerns, however, he tends to fall back on staffers or friends who provide exculpatory commentary lauding Maggie's interest in the public good. In addition, Scates relies on similar anecdotal evidence to dismiss concerns that Maggie's fondness for strong drink hampered his effectiveness as a legislator.

Although it isn't an easy task, Scates does his best to touch all the bases in assessing Magnuson's career as a legislator. The breadth of his career is simply astounding: state legislation regarding unemployment relief during the Great Depression, legislation providing for publicly financed construction of hydroelectric dams, groundbreaking environmental legislation protecting Puget Sound and its marine life, and legislation addressing medical research and civil rights, as well as old-fashioned porkbarrel projects. Many of Maggie's legislative endeavors could serve as the basis of a fine book in their own right, and indeed Bumblebee Eric Redman provided one such book, entitled *The Dance of Legislation*, containing his account of the legislative maneuvering and horsetrading involved in passing the National Health Services Act. Although by no means supplying definitive accounts of the passage of this bill or that, Scates nevertheless manages to provide adequate coverage of Maggie's major legislative triumphs.

Readers of this book will likely gain a new understanding of Washington State politics, but I doubt that many will feel that they altogether understand Magnuson. Scates, the former reporter, seems unwilling to ask tough questions about a man he admires. He chronicles Maggie's philandering and drinking but provides his subject with absolution at every turn. Although Maggie rose from humble beginnings in turn-of-the-century North Dakota to amass a personal fortune of more than two million dollars by his death in 1989, Scates repeatedly claims that opportunity for personal gain did not motivate Magnuson while in office. Magnuson was a complex man, with his share of contradictions: a shy public figure, but the consummate dealmaker in the cloakroom; a champion of liberal causes and consumer protection who carried the water when necessary for the Washington business establishment.

Scates avoids addressing Maggie's inconsistencies and contradictions, and the resulting biography is more elegy than analysis.

Steven Davis
Seattle, Washington

The Privilege Against Self-Incrimination: Its Origins and Development, by R.H. Helmholz, John H. Langhein, Charles M. Gray, Eben Moglen, Henry E. Smith, and Albert W. Alschuler. Chicago: University of Chicago Press, 1997; 301 pp., tables of statutes, index; \$29.95, cloth.

The privilege against self-incrimination is one of the most celebrated of the provisions of the Bill of Rights. As the authors of this fascinating volume demonstrate, however, the parameters of this privilege have long been misunderstood. *The Privilege Against Self-Incrimination* offers a reinterpretation of the historical record. The six authors argue that the privilege today is a far cry from the privilege developed at early common law, or even at the time of the ratification of the Constitution. This is a revisionist view, contrary to the interpretation presented by Leonard Levy in the Pulitzer Prize-winning *Origins of the Fifth Amendment* (1968). The newer view appears the more accurate, based as it is on a close examination of almost one thousand years of historical documents. A copious amount of research went into this book, as evidenced by the inclusion of ninety pages of notes to accompany approximately two hundred pages of text.

The common view is that the privilege assumed its modern form sometime in the mid-seventeenth century, in response to the abuses of the Star Chamber and the treason trial of John Lilburne. The authors demonstrate convincingly that this interpretation of the historical record is inaccurate, placing, as it does, too much reliance on the mention of the privilege in court records when in practice the privilege was very limited.

The authors here reveal that the criminal trial was designed virtually to force defendants to speak: They had no right to counsel in felony cases until 1806, there was no right to subpoena witnesses, parties in interest were barred from testifying, the reasonable doubt standard was not firmly established until the nineteenth century, and, perhaps most importantly, the defendant was expected to answer questions put to him by a magistrate prior to trial. It was not until the criminal trial was transformed during the nineteenth century

from what Langbein calls an "accused speaks" model to a "testing the prosecution" model and procedural safeguards were in place that the maxim took on a practical meaning. Helmholz's chapter focuses on the role of the privilege in ecclesiastical and Roman law to the seventeenth century. He discusses the *ius commune* and the importance placed on oath taking. Gray's chapter examines the role of the privilege in the conflict between the common law courts and the ecclesiastical courts. Ecclesiastical courts did not allow the use of the *ex officio* oath to compel testimony, and common law courts were occasionally asked to issue writs of prohibition to prevent this practice. The oath required defendants to swear before God that they would testify before being asked any questions—at the time the oath meant something, and thus was treated as a form of compulsion.

Langbein's chapter traces the development of early modern common law criminal procedure. He argues convincingly that no meaningful privilege existed prior to the mid-nineteenth century. Although an oft-repeated maxim declared that no man should be compelled to be a witness against himself, the reality of criminal procedure prevented the assertion of the right.

Smith's chapter traces the development of the modern privilege and takes up Langbein's argument. He asserts that the privilege took on new meaning with the "lawyerization" of criminal procedure and the adoption of rules increasing the role of counsel. As defendants gained the right to have counsel speak for them, and magistrates were required to inform suspects of the right to remain silent, the privilege against self-incrimination began to grow teeth.

Moglen's chapter examines the privilege in colonial and post-Revolutionary America. Prior to the Revolution, the privilege was limited, as in England. How then is the broad language of the Fifth Amendment to be explained? Moglen's answer to this lies in two factors: (1) the founding fathers' use of "constitutional polemic," or extravagant rhetoric; and (2) the importance in their eyes of the jury trial as a check on the power of government, a response to British activities before the Revolution. The Fifth Amendment was a "legal ancillary" necessary to give meaning to the jury trial—after all, if a defendant is forced to confess, there is little left for the jury to do!

Finally, Alschuler's chapter examines the privilege as it exists today. Building on the previous chapters, he argues that the privilege has taken on a much broader meaning than the founding fathers intended, and suggests a return to a more limited privilege, where magistrates could require defendants to answer incriminating questions. This astounding sugges-

tion has profound implications for the administration of criminal justice.

The Privilege Against Self-Incrimination is essential reading for criminal procedure scholars. Although it is written in an academic style, it is excellent reading for the layperson interested in obtaining a better understanding of the development of the law. In this era of Supreme Court decisions emphasizing the truth-finding function at the expense of the protection of defendants' rights (*Ohio v. Robinette*, 1996; *Wyoming v. Houghton*, 1999), and an increased reliance on original intent as an interpretive tool (*Wilson v. Arkansas*, 1995), it is imperative that citizens have a full and accurate understanding of their rights. The authors of this book have taken a major step toward clarifying and correcting our understanding of perhaps the most important criminal trial right possessed by a defendant.

Craig Hemmens
Boise State University

Dividing New Mexico's Waters, 1700–1912, by John O. Baxter. Albuquerque: University of New Mexico Press, 1997; 144 pp., illustrations, notes, bibliography, index; \$24.95, paper.

Historian John O. Baxter has taken on the complex task of sorting out the patterns of water development in New Mexico. The appointment of a territorial water engineer in 1907 and the achievement of statehood in 1912 mark a departure from the earlier eras of Spanish colonial, Mexican, and American water control. Navigating through a mass of primary accounts culled from a wide array of archival sources, Baxter serves as our guide to a time period when legal decisions regarding water use and allocation were local issues. This sentimental journal to a traditional era stands in marked contrast to the twentieth-century West, which has been characterized by a strong federal role in water development.

Baxter bring a methodical approach to his subject, dividing the history of water use in New Mexico into four eras: Spanish colonial, Mexican, early territorial (prior to the arrival of the railroad in 1878), and late territorial. A skilled researcher who has completed several studies of water use for the New Mexico State Engineer's Office, Baxter based his book on extensive use of original documents. The result is a concise and brisk account of the challenges faced by succeeding generations of water administrators. Baxter argues that the successful resolution of conflict during this period is traced to

community-based decision-making, which facilitated compromise among those competing for an increasingly scarce resource.

New Mexico's Spanish colonial governors represented the authority of the king of Spain, yet decisions regarding water allocation disputes were most often investigated and decided at the level of the *alcaldes mayores* appointed by the governor. These local officials served as court of first resort for petitioners, although litigants could opt to bypass the alcade and appeal directly to the governor. The preference for settling disputes close to the location of the litigants set the pattern for two centuries of administrative policy.

During the early years of the Mexican era, local control over water resources increased through the operation of municipal councils known as *ayuntamientos*. After conservatives seized power in Mexico in 1836, the role of the *ayuntamientos* was replaced with *juezes de paz* (justices of the peace). These local officials continued the policy of adjusting grievances by traditional customs.

Following the conquest of New Mexico by the United States in 1846, Hispano residents struggled to adapt to a new form of government. Drafters of New Mexico's new code of laws looked to Hispanic traditions in the realm of water use. Combined with a strong measure of control over the territorial legislature and courts originating from greater numbers of Hispano residents, New Mexicans managed to continue local control during the early territorial years. The arrival of the railroad in 1878, bringing with it an end to the isolation of the territory, ushered in an era of land speculation. Investors planned and executed a large number of privately funded irrigation projects that strained traditional water relationships. The culmination of the shift in power came in 1907 with the adoption of a new water code and the creation of the office of territorial engineer.

Baxter builds a strong case for the importance of local control with regard to water allocation and use. Today, during an era of increasing federal involvement in Western water issues, the idea that local water users should control their own destiny holds considerable value for many. At the same time, problems faced by Western water users are increasingly complex. Issues such as adjudicating Native American claims, fulfilling interstate and international compacts, and safeguarding the environment require a regional approach.

Dividing New Mexico's Waters could have had a stronger policy impact if Baxter had linked his findings with contemporary issues. Even without this addition, the work stands as an excellent summary of the early period of water administrations in New Mexico. Readers in the legal community will

find Baxter's book an admirable example of the value that historical research has in the area of water rights litigation, as demonstrated by his mastery of the archival record. General readers of Western history will find the many stories of early water disputes fascinating. *Dividing New Mexico's Waters* is a welcome addition to the bookshelf of anyone interested in Western water issues.

Douglas E. Kupel
Phoenix, Arizona

Jurismania: The Madness of American Law, by Paul F. Campos. New York: Oxford University Press, 1998; 209 pp., index; \$23.00, cloth.

Paul Campos believes that the American legal system is suffering from a severe mental illness, which he calls "jurismania." Campos, a professor of law at the University of Colorado and director of the Byron R. White Center for American Constitutional Study, says that this illness is a manifestation of a larger disorder: an over-reliance on rationality, on producing reasons for every action.

Anyone who has not been comatose nor has not been denied access to television or newspapers during the past few years would have a hard time arguing with Campos' thesis that the American legal system has become bloated. We have witnessed long, expensive trials; publicity-seeking defendants, plaintiffs, lawyers, judges, and jurors; and the penchant to turn every social affront into a legal issue. Campos points to the most obvious example, the O.J. Simpson trial, where "we saw in the most extreme form various characteristic features of the American legal system . . . the worship of procedure; the attempt to rationalize every aspect of the decision-making process; the distrust of spontaneous action; the demand for something approaching perfection in the handling of relevant legal materials; the urge to maintain a continuous and pervasive managerial control over every participant; and, above all, the daunting complexity of the rules that such a system requires" (p. 22).

In this context, Campos also discusses several older cases in which settling a dispute became increasingly complicated. For example, in Hawaii in the late 1960s, a couple's attempt to collect court-awarded monetary damages for injuries incurred in an automobile accident became involved with a complicated provision of property law when the defendant transferred ownership of his home—and then died—in order to avoid

paying the judgment. And the state supreme court justices only added to the confusion in their attempt "to navigate [the] conceptual muddle through the straightforward use of circular reasoning" (p. 110).

Campos blames American law schools for the sickness of the legal system, especially their endeavor to find a rationale for every action, plus the reliance on appellate court opinions, despite the fact that the cases affecting most ordinary citizens are dispensed with in lower courts. His prescription to cure legal madness is for lawyers and lay persons to realize that some, if not most, issues can and should be settled in a simpler, "arational" manner because an overdose of reason confuses the real issue and prevents true justice.

Campos' message is accurate and timely. Too often issues of justice for the victim and punishment for the offender are obscured by entanglements in legal minutia; too often the wait for justice to be done is too long and too expensive. Unfortunately, Campos' argument is obscured by his frequent tangential discussions (akin to what he accuses lawyers of doing). For example, in one chapter he discusses college football betting for several pages before he makes the point that the American public has fooled itself into believing that lawyers have all the answers. Another problem with the book is that, although Campos says he is writing for the general reader, his tone and vocabulary say otherwise. The book could also use some historical perspective: When did the system become ill? Lastly, the lack of notes and citations, other than a few comments at the bottom of a page, is frustrating.

Isabel Levinson
Minneapolis, Minnesota

The Chief Justiceship of John Marshall, 1801-1835, by Herbert A. Johnson. Columbia: University of South Carolina Press, 1997; 336 pp., illustrations, appendices, bibliography, index; \$39.95, cloth.

No individual has exerted greater influence on the United States Supreme Court and the U.S. Constitution than John Marshall. Few individuals have exerted greater influence on the course of the early American republic. Hence John Marshall is widely studied and written about, and a reader might wonder about the point of reading (let alone writing) another book on the topic. Herbert A. Johnson's book should put any such concern to rest.

This book is a wide-ranging study of John Marshall's chief justiceship. Rather than following a chronological format, the book is broken into chapters such as "The Chief Justice and His Associates" (chapter I), "Politics and Constitution in the Marshall Era" (chapter II), and "The American Common Market and Property Rights" (chapter IV).

The aim of the book is to inform the reader about the chief justice and his colleagues and to explain how "together they shaped constitutional, international, and private law" (preface, p. ix). This aim is admirably fulfilled.

Johnson provides excellent context and background, both historical and jurisprudential, throughout the book. The story is always told in a political, historical, and often (in the case of admiralty law) diplomatic context. The practical workings of the court receive particular attention. The result is a fine book, which is primarily a historical exposition rather than a jurisprudential study.

The strength of this volume is twofold. First, biographical information about Marshall and his colleagues and use of Marshall's papers allow Johnson to give us a unique insight into the inner workings of the court. Second, the breadth of Johnson's study exposes the reader to topics not usually associated with John Marshall.

Understandably, a large part of this work focuses on two topics: the leadership of John Marshall, and federal supremacy and judicial power. I found the chapters entitled "The American Common Market and Property Rights" (VI), "Fine Tuning the Federal Common Market: Private Law in the Supreme Court" (VII), and "The United States in The Family of Nations" (VIII) most interesting, in large part because they discuss topics that are less often associated with John Marshall and the Supreme Court during his chief justiceship. For example, Johnson tells us in chapter VII that "thirty-two percent of the cases heard by the Marshall Court from 1801 to 1815 dealt with illegal trade or prize cases" (p 191). In a subchapter on illegal trade, Johnson discusses how the Supreme Court dealt with illegal commerce and "stood ready to employ federal judicial power for its suppression" (p 197). For the average reader, this discussion of admiralty cases opens up a whole new world of commerce, history, jurisprudence, and federal judicial power that is largely lost to us today. It is fascinating to read about maritime liens, salvage cases, and marine insurance, and how, given the importance of the shipping industry at the time, the Supreme Court adjudicated these issues.

Other examples of topics not readily associated with John Marshall's Court are slavery and the slave trade, prize cases,

and the acquisition of the Louisiana Territory, all of which are discussed in chapter VIII, "The United States in the Family of Nations." The Supreme Court functioned as the principal court of international law in the federal republic. This fact is usually remembered in the context of the Cherokee cases, so Johnson's expanded discussion on this topic is welcome. All in all this is a fine book. It is well written and easily accessible. Johnson's use of biographical information about John Marshall and his colleagues gives us a valuable insight into how Marshall managed the court and molded it into the institution we know today. Johnson reminds us that these internal factors, along with political and socioeconomic factors, played a greater role in shaping the Court and the advancement of federal power than did pure jurisprudential concerns.

Judge Karsten Rasmussen
Eugene, Oregon

A Courtroom of Her Own: The Life and Work of Judge Mary Anne Richey, by Barbara Ann Atwood. Durham, N.C.: Carolina Academic Press, 1998; 376 pp., illustrations, index; \$40.00, cloth.

This book examines Judge Mary Anne Richey's personal and professional growth as well as the changes in the role of women in the judicial system. Atwood begins with a thorough overview of academic theories concerning the contrasts between male and female stereotypical viewpoints, outlooks, and problem-solving in the judicial setting. She takes issue with one theorist who posits Justice Sandra Day O'Connor as a model of the uniquely feminine jurist, although later in the biography she comments on the professional similarities between Justice O'Connor and Judge Richey.

The academic nature of the introduction contrasts sharply with the human character of the biography itself. Additionally, the focus shifts from feminism to the personal and professional growth of the well-respected jurist without regard to her gender.

The author, a professor of law at the University of Arizona, was Judge Richey's first federal law clerk. Clearly, Atwood's personal connection to her subject gives this work an especially insightful perspective. To her credit, Atwood did not rely solely on her own relationship with Judge Richey. She spent countless hours interviewing friends, family, and colleagues, as well as poring over court records to reconstruct accurately "the life and work of Mary Anne Richey." The

reminiscences of Richey's family and colleagues bring a multidimensional quality to this work.

What makes this biography so compelling is that it is a true story of the realization of the "American dream." From humble beginnings in a small midwestern town, Mary Anne Richey became a federal judge at a time when women were truly pioneers in the legal, or just about any, profession. The chronology of Richey's atypical path to the judiciary is nothing short of inspiring, regardless of gender.

Contrary to what one would expect, Richey was not a straight "A" student who went immediately from high school to college to law school. Rather, she possessed an insatiable desire to explore and trailblaze instead of following the ordinary path. After her high school graduation, she chose to travel to India for a year rather than marry her high school sweetheart. As a young adult, she continued to defy tradition. During her short-lived first marriage, she became a pilot, joined the WASPs during World War II, and took a military assignment in Tucson. After the war she remained in the West, where she managed a ranch. Then, in her thirties, she applied to law school. Thereafter, she faced the dilemma of juggling family and career to achieve a balanced, albeit unconventional, life. One thing is certain: Mary Anne Richey's strong character is what fueled her professional development and earned her the respect of her peers.

Atwood examines the tumultuous social and political history of Judge Richey's times by spotlighting some of her more interesting cases, candidly setting forth the conflicting issues and the results of her opinions. The insight into the reasoning of an experienced and respected judge is fascinating and thought provoking.

This work is more than a biography; it is a thoughtful and multidimensional review of the changes in twentieth-century political and social history, as reflected in the life of Mary Anne Richey.

Deborah Weiss
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ARTICLES OF RELATED INTEREST

Below we list articles recently published in journals of history, law, political science, and other fields that we believe may be of interest to readers. Although comprehensive, the list is not definitive, and the editor would appreciate being informed of articles not included here.

Alexander, Thomas G. "Utah's Constitution: A Reflection of the Territorial Experience," *Utah Historical Quarterly* 64 (Summer 1996).

Bak, Thomas. "Pretrial Detention in the Ninth Circuit," *San Diego Law Review* 35:4 (November-December 1998).

Bakken, Gordon Morris. "The Limits of Patriarchy: Women's Rights and 'Unwritten Law' in the West," *Historian* 60 (Summer 1998).

Belknap, Michal R. "The Warren Court and the Vietnam War: The Limits of Legal Liberalism," *Georgia Law Review* 33 (Fall 1998).

Boston College Law Review and *Boston College Third World Law Journal* 40:1 (1998). "Symposium: The Long Shadow of Korematsu."

Carle, Susan D. "Lawyers' Duty to Do Justice: A New Look at the History of the 1908 Canons," *Law & Social Inquiry* 24:1 (Winter 1999).

Clow, Richmond L. "Justice in Transition: The Murder Trial of Straight Head and Scares the Hawk," *South Dakota History* 27 (Fall 1997).

Colten, Craig E. "Groundwater and the Law: Records v. Recollections," *Public Historian* 20 (Spring 1998).

Cross, Raymond. "Sovereign Bargains, Indian Takings, and the Preservation of Indian Country in the Twenty-First Century," *Arizona Law Review* 40:2 (1998).

Delgado, Richard, and Jean Stefancic. "Home-Grown Racism: Colorado's Historic Embrace and Denial of Equal Opportunity in Higher Education," *University of Colorado Law Review* 70:1 (1999).

Dolan, Coby C. "The National Grasslands and Disappearing Biodiversity: Can the Prairie Dog Save Us from an Ecological Desert," *Environmental Law* 20:1 (Spring 1999).

Drizin, Steven A. "The Juvenile Court at 100," *Judicature* 83:1 (July–August 1999).

Elliott, Michael A. "Telling the Difference: Nineteenth-Century Legal Narratives of Racial Taxonomy," *Law & Social Inquiry* 24:3 (Summer 1999).

Ellis, Mark R. "Reservation *Akicita*s: The Pine Ridge Indian Police, 1879–1885," *South Dakota History* 29:3 (Fall 1999).

Ford, Richard T. "Law's Territory: A History of Jurisdiction," *Michigan Law Review* 97:4 (February 1999).

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George Washington Law Review 67:3 (March 1999). "Background and History of Impeachment."

Hansen, Mark. "The Federal Judiciary: Mid-Atlantic Drift," *ABA Journal* 85 (August 1999).

Henderson, Thelton E. "Black Law Students Annual Black History Month Celebration," *McGeorge Law Review* 30:3 (1999).

Herald, Marybeth. "Reversed, Vacated, and Split: The Supreme Court, the Ninth Circuit, and the Congress," *Oregon Law Review* 77:2 (Summer 1998).

Hoffert, Sylvia D. "Gender and Vigilantism on the Minnesota Frontier: Jane Grey Swisshelm and the Dakota War of 1862," *Western Historical Quarterly* 29 (Autumn 1998).

Hug, Procter J. "The Commission on Structural Alternatives for the Federal Court of Appeals' Final Report: An Analysis of the Commission's Recommendations for the Ninth Circuit," *University of California at Davis Law Review* 32:4 (Summer 1999).

Jones, Sondra. "The Trial of Don Pedro Leon: Politics, Prejudice, and Pragmatism," *Utah Historical Quarterly* 65 (Spring 1997).

Kelsh, John P. "The Opinion Delivery Practices of the United States Supreme Court, 1790-1945," *Washington University Law Quarterly* 77:1 (Spring 1999).

King, Jennifer. "The State of Wyoming's Participation in the Colorado River Compact," *Annals of Wyoming* 69 (Spring 1997).

Kozinski, Alex. "Conduct Unbecoming," *Yale Law Journal* 108:4 (January 1999).

Kutulas, Judy. "In Quest of Autonomy: The Northern California Affiliate of the American Civil Liberties Union and World War II," *Pacific Historical Review* 67 (May 1998).

Lee, Nella. "Impossible Mission: A History of the Legal Control of Native Drinking in Alaska," *Wicazo Sa Review* 12 (Fall 1997).

Lee, Thomas R. "Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court," *Vanderbilt Law Review* 52:3 (April 1999).

Martin, Kallen M. "The Beginning of Respect: The U.S. Repatriation Law," *Native Americans* 14 (Fall 1997).

McLaughlin, Robert H. "The American Archaeological Record: Authority to Dig, Power to Interpret," *International Journal of Cultural Property* 7 (1998).

———. "The Antiquities Act of 1906: Politics and the Framing of an American Anthropology and Archaeology," *Oklahoma City University Law Review* 61 (1998).

Minnesota Law Review 83:5 (May 1999). "Symposium: *United States v. Nixon*: Presidential Power and Executive Privilege Twenty-Five Years Later."

Monhollon, Rusty L. "Taking the Plunge: Race, Rights, and the Politics of Desegregation in Lawrence, Kansas, 1960," *Kansas History* 20 (Autumn 1997).

Moss, David A., and Gibbs A. Johnson. "The Rise of Consumer Bankruptcy: Evolution, Revolution, or Both?" *American Bankruptcy Law Journal* 73:2 (Spring 1999).

Naske, Claus-M. "The United States Commissioners in Alaska," *Pacific Northwest Quarterly* 89 (Summer 1998).

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Palmquist, Robert F. "Mining, Keno, and the Law: The Tombstone Careers of Bob Winders, Charley Smith, and Fred Dodge, 1879–1888," *Journal of Arizona History* 38 (Summer 1997).

Ragsdale, John W., Jr. "Anasazi Jurisprudence," *American Indian Law Review* 22:2 (1998).

Reinhardt, Stephen. "The Anatomy of an Execution: Fairness vs. 'Process'," *New York University Law Review* 74:2 (May 1999).

Ridge, Martin. "Disorder, Crime, and Punishment in the California Gold Rush," *Montana* 49:3 (Autumn 1999).

Scherer, Mark R. "Imperfect Victory: The Legal Struggle for Blackbird Bend, 1966–1995," *Annals of Iowa* 57 (Winter 1998).

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