BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

The PUBLIC COUNSEL Section of the Office of the Washington Attorney General Complainant, v. CASCADE NATURAL GAS CORPORATION; PacifiCorp dba PACIFIC POWER & LIGHT COMPANY Respondents.	Docket No. U-030744 **PACIFICORP'S OPPOSITION TO CITY OF TOPPENISH'S MOTION FOR SUMMARY DETERMINATION** September 29, 2003

I. INTRODUCTION

The City of Toppenish ("Toppenish") moves for summary determination on the grounds that the Washington Utilities and Transportation Commission ("Commission") incorrectly determined that the fee imposed under the Yakama Nation Franchise Ordinance (the "Yakama Nation charge") should be characterized as a tax and not a fee for ratemaking purposes. Remarkably, Toppenish's Motion fails to mention that the position it advances here has been *rejected* in a final decision by the Yakima County Superior Court, in a decision which is *binding upon Toppenish* under principles of collateral estoppel and res judicata. Toppenish's Motion does not even acknowledge that such a decision exists, and compounds that omission by failing to provide any legal argument whatsoever explaining how it continues, nonetheless, to advocate a *contrary* outcome to the Commission. The Motion should be rejected, consistent with the Commission's earlier ruling on this issue and the confirming decision from Yakima County Superior Court. The Motion should be rejected for the further reason that it improperly seeks to expand the scope of this proceeding to include an additional issue – whether Toppenish is within the Yakama Nation Reservation – that was not raised either in Public Counsel's Complaint or Toppenish's Petition to Intervene.

II. ARGUMENT

A. Toppenish's Arguments Are Barred by the Doctrine of Collateral Estoppel.

The Yakima County Superior Court's findings on the issues raised in Toppenish's Motion act conclusively as a bar to relitigating these issues under the doctrine of collateral estoppel. "The doctrine of collateral estoppel is well known to Washington law as a means of preventing the endless relitigation of issues already actually litigated by the parties and decided by a competent tribunal. Collateral estoppel promotes judicial economy and prevents inconvenience, and even harassment, of parties." *Hadley v. Maxwell*, 144 Wn.2d 306, 311, 27 P.3d 600 (2001) (*quoting Reninger v. Dep't of Corrections*, 134 Wn.2d 437, 449, 951 p.2d 782 (1998)). The Commission recognizes that collateral estoppel, also known as issue preclusion, bars reconsideration of an issue already decided by the Commission or "another tribunal of competent jurisdiction." *United & Informed Citizen Advocates Network, Docket No. UT-971515, Third Supplemental Order (Jan. 1998)* at note 4. Thus, the decision of the Yakima County Superior Court in the prior action bars subsequent proceedings before the Commission on identical issues.

Collateral estoppel should be invoked where (1) the issues in both cases are identical; (2) the first action resulted in a final judgment on the merits; (3) the party against whom the doctrine is invoked was a party to or in privity with a party to the first action; and (4) applying the doctrine would not work an injustice against the party to whom it is applied. *City of Des Moines v. $81,231*, 87 Wn. App. 689, 700, 943 P.2d 669 (1997). These factors are satisfied in this instance.

1. The Commission Characterized the Yakama Nation Charge as a Utility Tax Rather than a Franchise Fee, Which Was Affirmed on Judicial Review.

It is clear that the issues raised by Toppenish in this proceeding are identical to the issues already determined. Toppenish seeks to challenge and alter the Commission's prior actions that allowed the PacifiCorp tariff to take effect. The proper regulatory treatment of the tax (*i.e.*, tax vs. fee) was decided and upheld on appeal.

The Commission's characterization of the Yakama Nation charge was the precise matter at issue in the Yakima County Superior Court proceedings. In that case, Plaintiffs' Claim 2 sought to order the Commission to require PacifiCorp and Cascade to recover the Yakama Nation charge as a fee from all customers throughout the companies' service territories. In other words, Plaintiffs claimed that the Commission "mischaracterized" the charge as a utility tax rather than a franchise fee in allowing the PacifiCorp and Cascade tariffs to become effective as filed.

This issue was thoroughly briefed by all parties to the Yakima County Superior Court proceeding in connection with Plaintiff's Motion for Summary Judgment on Alternative Claim for Relief. After considering these arguments, the Court denied the motion and dismissed the claim. On judicial review, the Court's August 22 order upheld the Commission's earlier action:

> "[T]he Washington Utilities and Transportation Commission was not arbitrary or capricious when it determined that the 3% surcharge should be treated as a tax for ratemaking purposes. Thus, the Washington Utilities and Transportation Commission did not have a duty required by law to either reject or suspend and set for an adjudicative hearing, tariffs filed by PacifiCorp and Cascade Natural Gas Corporation that proposed to recover the 3% charge as a tax only from ratepayers located within the Yakama Nation Reservation."

August 22, 2003 Order, ¶5.

2. The Court Already Reached Final Judgment on the Same Issue Raised by Toppenish in this Proceeding.

The Yakima County Superior Court reached a final judgment on the tax vs. fee issue when it entered summary judgment against Plaintiffs. A grant of summary judgment constitutes a final judgment on the merits and has the same preclusive effect as a full trial on the issue. *Nat'l Union Fire Ins. Co. v. Northwest Youth Serv.*, 97 Wn. App. 226, 232-33, 983 P.2d 1144 (1999). This holds true regardless of whether an appeal is taken. For collateral estoppel purposes (as well as res judicata) "a judgment otherwise final remains so despite the taking of an appeal." *Restatement (Second) of Judgments* § 13 comment f. *See also City of Des Moines*, 87 Wn. App. at 702. Accordingly, the second factor supporting collateral estoppel is satisfied.

3. Toppenish Is Bound By the Prior Determination Because Toppenish Participated in the Proceedings and Sits in Privity with the Willman Plaintiffs.

Toppenish is bound by the Yakima County Superior Court's ruling because it participated in the Cascade tariff filing in Docket No. UG-021502, which was part of the subject of the Willman Plaintiffs' appeal. In that docket, Toppenish lodged its objection to the treatment of the Yakama Nation charge as a tax instead of a fee. Toppenish Councilmember Scott Staples filed written comments on this issue.[1]

Although Toppenish chose not to appeal, the doctrine continues to apply to Toppenish because (1) it participated at the Commission level, and (2) it sits in privity with Willman, *et al.* The City of Toppenish, located within the boundaries of the Yakama Reservation, claims to represent "the City and its residents," which also naturally places them in privity with Willman, *et al.* The Willman Plaintiffs claimed that they are not members of the Tribe and "reside on fee land owned by themselves or other persons who are not members of the Tribe." *Petition for Review* at p. 4. Toppenish states that it, too, represents the interests of nonmembers of the Tribe sitting outside the jurisdiction of the Yakama Nation. *City of Toppenish's Motion for Summary Determination ("Toppenish Motion")* at p. 17. Moreover, Toppenish City Councilmember William Rogers submitted an affidavit in support of Plaintiffs' motion for summary judgment.[2] Thus, the third factor for collateral estoppel is satisfied.

4. Toppenish Actively Participated in the Commission Proceedings and on Appeal.

Last, it is clear that an injustice will not be invoked against Toppenish because Toppenish had an ample opportunity to present its case in the prior proceeding. Toppenish participated both at the Commission level and on appeal. Toppenish filed comments in the Cascade filing recommending that the Commission "reject Cascade's proposed treatment of the franchise fee as a tax, and require Cascade to treat payment of the fee as a general operating expense recoverable statewide from ratepayers." *See Exhibit 1.* Toppenish also filed an affidavit on the Willman

---

[1] A copy of Councilmember Staples' comments are attached hereto at Exhibit 1.

[2] A copy of Councilmember Rogers' affidavit is attached hereto at Exhibit 2.

Plaintiffs' behalf before the Yakima County Superior Court. *See Exhibit 2.* That Toppenish chose not to participate further is of no import, except to the extent that it supports the contention that the Commission should discourage a sit-and-wait approach and avoid duplicative proceedings on identical issues. Rather, precluding the relitigation of these issues averts injustice. *Nat'l Union Fire Ins. Co.*, 97 Wn. App. at 233-34, 983 P.2d 1144 (1999).

B. Toppenish's Claims are Barred by Res Judicata.

The doctrine of res judicata precludes litigating claims or issues that were, or should have been, litigated in a former action. *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 763, 887 P.2d 898 (1995). The purpose of the doctrine is to "prevent relitigation of already determined causes and curtail multiplicity of actions and harassment in the courts," *Bordeaux v. Ingersoll Rand Co.*, 71 Wn.2d 392, 395, 429 P.2d 207 (1967). Res judicata acts as a bar where the former and current action share the following four factors in common: (1) subject-matter; (2) cause of action; (3) persons and parties; and (4) the quality of the persons for or against whom the claim is made. *Northern Pac. Ry. v. Snohomish County*, 1010 Wn. 686, 688, 172 P. 878 (1918); *see also Loveridge*, 125 Wn.2d at 763.

The four factors are satisfied here. As discussed above, the subject matter in the Yakima County Superior Court appeal was identical to the instant proceeding. The subject matter of the appeal was the Commission's determination to allow Cascade's tariff filing, Docket No. UE-021502, and PacifiCorp's tariff filing, Docket No. UE-021637, to treat the Yakama Nation charge as a tax, not a fee. The subject matter in both cases revolves around the same nucleus of operative facts: the effect of the Yakama Franchise Ordinance and the regulatory treatment of the charges imposed on utilities operating within the boundaries of the Reservation.

The cause of action in both cases also is identical. Here, Toppenish claims that the issue is whether utilities are "authorized by law to characterize charges for use or occupancy of tribal property as a tax, rather than a cost, for tariffs." *Toppenish Motion* at p. 7. This is merely another way of raising the same question presented to the Yakima County Superior Court:

> [I]f payment of the franchise fee demanded of defendant corporations is recoverable as an expense, it is a general operating expense which the WUTC is required to use to establish system-wide revenue need and not to pass through to customers within the Yakima [sic] Indian Reservation."

Petition for Review at p. 4.[3] Moreover, res judicata applies to what might or should have been litigated as well as to what actually was litigated. *Philip A. Trautman, Claim and Issue Preclusion in Civil Litigation in Washington,* 60 Wash. L. Rev. 805, 814 (1985). Indeed, it is a long standing principle of Washington law that res judicata applies "not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time." *Sayward v. Thayer*, 9 Wn. 22, 24, 36 P. 966 (1894). Thus, Toppenish's arguments regarding the treatment of the Yakama Nation charge as "rent" versus a tax versus a fee, although not explicitly raised on appeal should be barred here as well.

Third, as discussed above, Toppenish participated in the proceedings both at the Commission level and on appeal, and also sits in privity with the Willman Plaintiffs. "Identity of parties is not a mere matter of form, but of substance .... Parties nominally different may be, in legal effect, the same." *Rains v. State*, 100 Wn.2d 660, 664, 674 P.2d 165, 169 (1983) (internal quotations and citations omitted). Moreover, Toppenish's participation in the appeal as providing testimony should also bind Toppenish to the same extent as a named party. *Desimone v. Spence*, 51 Wn.2d 412, 415, n.3, 318 P.2d 959 (1957); *Fies v. Storey*, 37 Wn.2d 105, 112, 221 P.2d 1031 (1950) (a judgment rendered may be res judicata against a witness who testified in the action). Thus, Toppenish for this purpose should be bound by the Yakima County Superior Court's decision.

---

[3] A copy of the Petition for Review of Agency Action filed by Elaine Willman and the Citizens Standup! Committee is attached hereto at Exhibit 3.

C. Toppenish's Claims Should Be Rejected Because The Regulatory Treatment of the Yakima Franchise Ordinance as a Tax is Supported by the Facts and the Law.

Even if the Commission determines that Toppenish's claims may go forward in this action despite issue and claim preclusion, Toppenish's motion for summary determination should be denied. Toppenish's Motion reargues the tax vs. fee distinction. Washington Courts have previously considered the distinction between a tax and a fee. The cases consider the manner in which a charge is assessed and the purpose for which a charge is assessed. Here, both the manner in which the charge is assessed and the purpose for the charge demonstrate that the Yakama Franchise Ordinance was properly treated as a tax for ratemaking purposes.

1. *Pacific Telephone* Governs the Legal Standard to Determine the Tax Versus Fee Issue.

Pacific Tel. & Tel. Co. v. Dept of Public Serv., 19 Wn.2d 200, 273-83 (1943) ("*Pac. Tel.*") provides the basis for the analysis to distinguish between a tax and a fee for ratemaking purposes. The Commission has adopted the *Pac. Tel.* distinction between a tax and a fee for ratemaking purposes. *WUTC v. Pacific Power & Light Co. et al., Order Rejecting Tariff Revisions and Authorizing Refiling, Cause No. U-79-43 et al.,* at pp. 2-3. *Pac. Tel.* holds that a municipal tax may be recovered by utilities only from customers within the municipality, which a franchise fee may be recovered by the utility from its entire customer base. The rationale for this distinction remains valid. A tax should be passed on only to ratepayers within the boundaries of the taxing jurisdiction "to avoid unjust discrimination against ratepayers . . . in portions of the state where no such tax, or a lesser tax has been imposed." *Id.* at 273. PacifiCorp pays the Yakama Nation charge to provide service and to avoid potential interruption of service to its customers within the boundaries of the Yakama Reservation, including residents of Toppenish. There is no reason its ratepayers outside the reservation should subsidize Toppenish residents or within the boundaries of the Reservation.

A tax is primarily a revenue-raising mechanism. Where an exaction is compulsory rather than consensual, it is likely to be a tax: "There is no element of contract in connection with such a tax." *Id.* at 277.

A franchise fee, on the other hand, must bear a reasonable relationship either to the municipality's administrative costs or to the reasonable compensation for use of the municipal rights of way. *Id.* at 279. A franchise, unlike a tax, is consensual. "[A] franchise is offered upon certain conditions. This offer, the applicant may either accept or refuse." *Id.* at 278. A franchise, because the utility is receiving value in return, "enlarging its service and making the same generally more useful and convenient," is "properly classified as a general operating expense" and so may be recovered from ratepayers statewide. *Id.* at 279-80. Toppenish identified no compelling reason why this analytical structure should not also apply to a tribal exaction.

2. Regardless of Its Characterization in the Ordinance, for Ratemaking Purposes the Yakama Franchise Ordinance Imposes a Tax.

The Yakama Franchise Ordinance, while styled as imposing a franchise fee, actually imposes a tax for ratemaking purposes, and the Commission's actions characterizing the charge as a tax are supported by law. A tax imposes an obligation to pay a charge regardless of whether there is a contract, independent of cost. A tax is "[a]n enforced contribution of money, assessed or charged by authority of sovereign government for the benefit of the state or the legal taxing authorities. It is not a debt or contract in the ordinary sense, but it is an exaction in the strictest sense of the word." *State ex rel. Seattle v. Dep't of Public Works*, 33 Wn.2d 896, 902, 207 P.2d 712 (1949). Furthermore, the amount of activity conducted by a business usually determines the extent of the tax by the taxing authority. *See Black's Law Dictionary* 585 (7th Ed. 1999) (defining "tax" as a charge "imposed on the manufacture, sale or use of goods ... or on an occupation or activity ... .")

In contrast, a true franchise fee represents a voluntary agreement between a company or person and a governmental body:

> A franchise fee is a 'special privilege conferred by the government on an individual or individuals and which does not belong to the citizens of the country generally, of common right.' 37 C.J.S. 142. Such a franchise as those with which we are here concerned is a contract between a municipal

> corporation and a person who has applied for leave to engage in certain business operations of a public nature within the limits of the municipality. Franchises ... include the right to place poles, wires, and conduits within public streets. Any person desiring such a franchise must apply therefore to the municipal corporation. If his application be favorably considered, a franchise is offered upon certain conditions. This offer the applicant may accept or refuse. * * *
>
> Such payments differ basically from taxes paid pursuant to excise or similar taxes levied by a municipality. Payments made under franchises such as those here in question are based upon contracts which grant ... the right to install portions of its equipment in the public streets.

Pac. Tel. at 278, 281.

The Yakama Nation charge is not related to the cost of rights of way and it is imposed regardless of whether a utility executes a franchise agreement. There is nothing voluntary about the Yakama Nation charge. Utilities are constrained to pay the full amount of the charge (3%), which is not subject to negotiation or consent of the utility. The Yakama Nation charge is imposed unilaterally and is assessed against the gross revenues of the utilities' sales within the boundaries of the Yakama Reservation. *Yakama Franchise Ordinance* at ¶ 5.1. Failure to pay the charge subjects the utility to additional monetary penalties and the potential requirement to remove all facilities from tribal lands or forfeit the facilities to the Nation. *Yakama Franchise Ordinance* at ¶¶ 7.1-7.3.

The Yakama Nation charge also acts like a tax and not a fee or a "rent" because the charge is imposed on the utility even if the Nation does not grant the utility the right to use the tribal lands where facilities are located. *Yakama Franchise Ordinance* at ¶ 5.3. Rather, the charge is a percent of revenues and is unrelated to the costs of the rights of way. For example, PacifiCorp has been paying the charge even though it has not entered into a franchise agreement. PacifiCorp receives no benefit or privilege in exchange for paying the charge.

Even if PacifiCorp derived a benefit from the payment of the charge – which it does not – the Yakama Nation charge is still not a fee. RCW 82.04.220 provides additional guidance on this issue. RCW 82.04.220 levies a state business and occupation *tax* for the "act or privilege of

engaging in business activities." It also measures the tax based on the gross proceeds of the company. Under Toppenish's analysis, such a business and occupation tax under RCW 82.04.220 would be treated as a fee, not a tax. Yet such business and occupation taxes are properly treated by the Commission as taxes, recoverable from the customers within the boundaries of the taxing jurisdiction. The same conclusion must be reached as to the Yakama Nation charge. Thus, the Yakama Nation charge is a tax, not a fee.

3. Determination of the Tax Versus Fee Issue Does Not Hinge on Toppenish's Political Status With Respect to the Yakama Nation.

Toppenish also claims that the tax should not be passed through to its residents because it claims that the City of Toppenish is not subject to the jurisdiction of the Yakama Nation. *Toppenish Motion* at pp. 17-21. The cases cited by Toppenish do not support Toppenish's "taxation without representation" argument. First, Toppenish misapplies *Pac. Tel.* to this case. In *Pac. Tel.*, the Court prohibited a state-wide recovery of a municipal tax because there would be an element of unjust discrimination against ratepayers outside the city that imposed the tax on a utility engaged in business throughout the state. The basis for the Court's decision was not, however, that ratepayers outside the city did not receive benefits from the city government in which they were not represented. Rather, the Court determined that the tax was imposed for the privilege of the utility to use the city streets and, therefore, only ratepayers within the city would benefit from service the utilities could then provide. *Pac. Tel.*, 19 Wn.2d at 277, 281. Indeed, *Pac. Tel.* supports recovery of the Nation's charge from tribal members and non-tribal members alike since they all benefit equally from the provision of utility service within the boundaries of the Yakama Reservation.

Toppenish also misconstrues *King County Water District No. 75 v. City of Seattle*, 89 Wn.2d 890, 901, 577 P.2d 567 (1968). In that case, the Court held that a water district cannot recover a tax imposed by the City on the water district from residents outside the City of Seattle. Yet there is a fundamental distinction between the relationship of a city with residents located outside city boundaries and the relationship between an Indian tribe and residents located within

the boundaries of the tribe's reservation.

Importantly, the Court derived its rationale in *King County* from a decision from the Missouri commission, which recognized the distinction of as case such as the instant proceedings where residents outside the city receive a benefit:

> A license tax is assessed wholly as a revenue-producing measure for a particular city or town making the assessment and *the company's system-wide operations are not benefited by the payment of such a tax.* For that reason it should not be included as an operating expense to be borne by parties receiving no benefit from it ... The commission if of the opinion that it will avoid undue discrimination if only subscribers who reside in a city which levies a license tax are required to pay such a tax. (Emphasis added.)

King County, 89 Wn.2d at 902. Therefore, as the Court determined in *Pac. Tel.*, the Court focused upon the benefits that *all* and *only* those ratepayers residing within the taxing authority receive from the provision of utility service with that taxing authority. The Court did not focus on or even discuss the benefits of political representation by ratepayers in the taxing authority.[4]

Burba v. City of Vancouver, 113 Wn.2d 800, 783 P.2d 1056 (1989) also supports a finding that the Yakama Nation charge should be borne by all customers within the boundaries of the Reservation. There, the Court held that the tax of the neighboring city properly could be levied against nonresidents and was upheld as constitutional. "That proposition holds true even where a sales tax levied in a neighboring city imposes an indirect burden on nonresidents." Like here, in *Burba*:

> The utility tax at issue is similar to a business and occupation tax on the Utility's privilege of operating within the city. The indirect burden on nonresident consumers is analogous to a B & O tax levied on a retailer selling products or providing services to both resident and nonresident customers. Like Vancouver's utility tax, B & O taxes are assessed against

[4] The Missouri state supreme court upheld the Missouri commission's decision, stating that it was appropriate for the utility to "collect the money with which to pay the tax from the tax beneficiaries rather than from all subscribers." *Missouri ex rel. City of West Plains v. Missouri Pub. Serv. Comm'n*, 310 S.W.2d 925, 934 (1958). The Missouri commission's decision under review focused on the benefits to ratepayers of the utility service, not on the benefits from a political representation. Hence, the Missouri commission's decision must be read in this context.

> the gross receipts of a business, are paid into the taxing authority's general fund, and are factored into the retailer's pricing decision.

Burba, 113 Wn.2d at 807. Thus, although challenged as taxation without representation, and even though nonresidents did not have right to vote in city's municipal elections, and despite the finding that the tax imposed indirect burden on nonresidents, the tax was upheld as against the nonresidents.

The different political status of customers is not relevant to determine whether there is rate discrimination. Rather, the relevant inquiry is an analysis of the conditions of utility service and the cost to provide utility service. *Cole v. Washington Utilities & Transp. Comm'n*, 79 Wn.2d 302, 210-11, 485 P.2d 71 (1971). Thus, there is no rate discrimination where customers are charged the same rate for the same service, as is done under PacifiCorp's tariff. *Arco v. Utilities & Transp. Comm'n*, 125 Wn.2d 805, 816-17, 888 P.2d 728 (1995). Where non-members and tribal members receive the same utility service under identical terms and conditions, there can be no rate discrimination.

4. Utility Facilities on Tribal Land Benefit Toppenish Residents.

Toppenish claims that the Yakama Nation charge should not be passed on to Toppenish residents because the residents are "not beneficiaries of the Yakama Nation tax . . . ." *Toppenish Motion* at p. 18. However, notwithstanding that Toppenish residents may not be subject to the jurisdiction of the Yakama Nation, they nonetheless receive a benefit. Toppenish is located within the boundaries of the Reservation and utility services run through and around it. As noted by the Yakama Nation: "major high pressure gas lines [go] down both the eastside of Toppenish .... And down into Toppenish ..., from there it branches out." AR 69-70. A map of the Yakama Nation which was included in the record before the Commission during its review of the Cascade filing (AR 135) depicts the Yakama Reservation and shows a patchwork of fee land interspersed with tribal lands. Tribal lands are intertwined with fee land, including Toppenish. It also shows that utility distribution and transmission lines are fully integrated into the Yakama Reservation regardless of who owns the land. This integrated network allows utilities including

PacifiCorp to serve *all* customers in the area, not just tribal members residing within the boundaries of the Reservation.[5]

D. The Commission Should Reject Toppenish's Effort to Expand the Proceeding's Scope.

Sections 3.1.1 and 5.3.3 of Toppenish's Memorandum contend that the City of Toppenish is not within or part of the Yakama Indian Reservation. Whether Toppenish is not within or part of the Yakama Indian Reservation is not among the issues raised in Public Counsel's Complaint or Toppenish's Petition for Intervention.

The Commission's Prehearing Conference Order does not expand the scope of this proceeding to determine whether the City of Toppenish is not within or part of the Yakama Indian Reservation. Toppenish did not seek reconsideration of the Commission's Prehearing Conference Order. The Commission should summarily reject Toppenish's effort to expand the scope of this proceeding to determine whether Toppenish is not within or part of the Yakama Indian Reservation.

1. Issuance of Fee Patents Does Not Remove Land from an Indian Reservation.

Toppenish concedes that the land within its city limits were at least at one time within the exterior boundaries of the Yakama Indian Reservation and that all such land at one time were owned by the Yakama Nation. *Toppenish Motion* at p. 2. Some land within the Yakama Reservation was allotted to individual Indians pursuant to federal law. Other than the federal statutes granting or authorizing the Secretary of the Interior to grant certain named Indians fee simple patents to land allotted to them in trust by the United States under the General Allotment Act, §§ 331-358, Toppenish points to no federal law or federal court decision supporting its claim that the Yakama Reservation was disestablished or diminished within the exterior boundaries of Toppenish.

[5] The map of the Yakama Reservation was provided and discussed extensively and made part of the administrative record during the open meeting on November 27, 2002. AR 64-100. The Commission may incorporate the administrative record in that proceeding to the instant case pursuant to WAC 480-09-745(4).

The Supreme Court has held that "'when Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress.'" *Seymour v. Superintendent*, 368 U.S. 351, 359 (1962).[6] In *Seymour*, the Supreme Court considered a claim that land patented in fee and owned by non-Indians within the Colville Indian reservation "cannot be said to be reserved for Indians." *Id.* at 357. The Supreme Court rejected that argument. Toppenish's argument that land held in fee is not part of the Yakama Reservation is contrary to Supreme Court precedent and should be rejected.

2. Land Included Within a Town or City Is Not Removed from an Indian Reservation.

Seymour also considered an argument that the land "located within a town laid out by the Federal Government" no longer was within the Colville Reservation." 368 U.S. at 359. The Supreme Court replied that the same reasons sufficient for rejecting the argument that lands patented in fee no longer were part of the Colville Reservation were "entirely adequate to require the same answer to this contention." *Id.* Since the acts of Yakima County and private persons leading to incorporation of Toppenish as a Washington municipality were taken wholly under state law, so far as Toppenish's Memorandum suggests, those acts cannot unilaterally determine much less bind Congress as to the boundaries of the Yakama Reservation. Toppenish's argument that land located within municipal boundaries is not part of the Yakama Reservation is contrary to Supreme Court precedent and should be rejected.

3. Acts Granting Fee Patents Do Not Automatically Diminish or Disestablish Reservations.

Toppenish quotes from a portion of a 1905 statute granting Josephine Lille fee simple title "free and clear from any trust or reservation . . . with full power in her to sell and convey the same . . . without restriction" to land that previously held in trust for her by the United States under the General Allotment Act, 25 U.S.C. §§ 331-358. During the trust period established by

[6] *See also Solem v. Bartlett*, 465 U.S. 463, 470 (1984): "Once a block of land is set aside for an Indian reservation and no matter what happens to title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise."

the General Allotment Act, land subject to the trust could not be sold or encumbered and were non-taxable. Copies of the beginning section of the 1905 statute, which is a long and complex statute dealing with many different Indian matters, and of the section granting Ms. Lille a fee patent are attached to this memorandum as Exhibit 4. Toppenish claims that in 1906 Congress granted fee patents to several more holders of Yakama trust allotments. Actually, Congress authorized the Secretary of the Interior, in his discretion, to issue such patents. Copies of the beginning section of the 1906 statute, which also was a long and complex statute dealing with many Indian matters, and of the sections authorizing issuance of those fee patents are attached as Exhibit 5. Toppenish claims at page 2 of its Motion that the city "came into being as a result of several special acts of the United States Congress," suggesting that Congress enacted one or more laws authorizing or establishing Toppenish. That claim is not supported by citation to any federal law authorizing or establishing Toppenish.[7]

Toppenish makes much of the fact that the statute granting a fee patent to Ms. Lille states that the grant was free and clear of any "trusts or reservations" together with a power in her to sell and convey the same. Of course, the very essence of a fee patent is the power of the owner to sell the same free and clear of all trusts and restrictions, unless the granting instrument imposes a limitation on the grant. It is entirely unclear what exactly the statute containing this language meant, if anything, other than freeing that land and its owner from the trust, restrictions, and reservations imposed by the General Allotment Act and other applicable federal law. The term "reservations" apparently is seized upon by Toppenish to mean that Ms. Lille's land was removed from the Yakama Reservation, which would then be diminished or disestablished to that extent. But the word "reservations" could have other meanings as well, including merely restating that the land would be freely alienable. The rule that every word in a statute be given meaning is put to its limit in the one paragraph section of the 1905 act. Congress

[7] Even if Toppenish is correct, it is unclear as a factual matter whether the lands described in the several deeds referenced by Toppenish cover the entire geographic area of Toppenish or whether those lands are coextensive with the entire city.

thrice repeated, but not always in the exact same phraseology, that that land was granted to Ms. Lille free and clear from any trust or restriction with full power to dispose of the same without any restrictions. What Congress meant by these odd repetitions, if anything beyond granting Ms. Lille a fully alienable fee patent, is not disclosed by this section of statute or its surroundings. That the word "reservation" itself has ambiguity is evidenced by the law of federal reservations generally, which includes the Hanford Reservation in eastern Washington, military reservations, national forests, national parks, power sites and other federal reservations, and by the General Allotment Act specifically. In the General Allotment Act, 25 U.S.C. § 352, the Secretary of the Interior was granted authority to cancel certain trust patents previously issued to Indians located within any power or reservoir site, which are considered reservations, and for allotments "located upon or [which] include land set aside, ***reserved***, or required within any Indian reservation for irrigation purposes under the power of Congress." Since it is common knowledge that much land within the Yakama Reservation and much other land in eastern Washington is irrigable, one possible interpretation of the reference to "reservation" in the statute granting Ms. Lille a fee patent was that it freed her land from any reservation referred to in section 352. Whatever Congress meant in the statutory references to "reservation" and "reservations" in the statutory section granting Ms. Lille a fee patent is ambiguous.

The 1906 statute misleadingly characterized, but not quoted, by Toppenish authorized the Secretary of the Interior, in his discretion, to issue fee patents to several holders of Yakama Reservation trust allotments. The section of the statute referenced by Toppenish provided simply that "the issuance of said [fee] patents shall operate as the removal of all restrictions as to the sale, encumbrance, or taxation of the lands to be so patented."

According to the U.S. Supreme Court, "Our touchstone to determine whether a given statute diminished or retained reservation boundaries is congressional purpose. Congress possesses plenary power over Indian affairs, including the power to modify or eliminate tribal rights. Accordingly, only Congress can alter the terms of an Indian treaty by diminishing a reservation." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998) (internal citations

omitted). The most probative evidence of what Congress intended, the Court has held, is the statute itself, although the Court has also looked to the historical context surrounding passage of the act, and to a lesser extent the subsequent treatment afforded the area in question, and the pattern of settlement. *Id.* at 344. Throughout that inquiry, the Court has held, "we resolve any ambiguities in favor of the Indians, and we will not lightly find diminishment." *Id.*

Beyond the bare words of the statutory sections cited by Toppenish, which are ambiguous, Toppenish has provided no evidence of the legislative history of the 1905 and 1906 statutes supporting its diminishment claim. Toppenish has provided no evidence that courts or administrative agencies of competent jurisdiction have treated Toppenish as no longer within or part of the Yakama Reservation. All Toppenish has provided is its own gloss on the meaning of ambiguous statutes. The Supreme Court rulings that ambiguities in statutes are construed in favor of Indians and that diminishment of an Indian reservation should not be lightly found stand in stark contrast to Toppenish's argument.

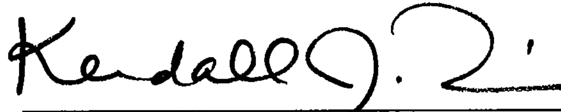
The Commission is not charged with determining whether Indian reservation boundaries have been diminished by Congress. There is no law or case clearly holding that the Yakama Reservation has been diminished or disestablished as suggested by Toppenish. The Commission should leave to other forums the difficult, time-consuming, and costly task of determining whether Congress has diminished or disestablished the Yakama Reservation in whole or in part. Accordingly, the Commission should reject Toppenish's invitation to expand this proceeding to determine as a matter of first impression whether congressional enactments granting or authorizing issuance of fee patents on the Yakama Reservation diminished or disestablished that Reservation in whole or in part.

III. CONCLUSION

For the reasons stated above and in PacifiCorp's September 15 Motion for Summary Determination, the City of Toppenish's Motion for Summary Determination should be denied.

DATED: September 29, 2003.

STOEL RIVES LLP



James M. Van Nostrand, WSBA No. 15897
Kendall J. Fisher, WSBA No. 28855
600 University Street, Suite 3600
Seattle, WA 98101-3197
Telephone: (206) 624-0900
Facsimile: (206) 386-7500
E-mail: jmvannostrand@stoel.com

Attorneys for Respondent PacifiCorp

Seattle-3197556.1 0058802-00096

EXHIBIT 1

CITY OF TOPPENISH
21 West First Avenue
Toppenish, WA 98948
"Where the West Still Lives"

RECEIVED
02 DEC -9 AM 8:50

December 5, 2002

Ms. Carole J. Washburn
Executive Secretary
Washington Utilities and Transportation Commission
1300 S. Evergreen Park Drive SW
Olympia, WA 98504-9022

Re: WUTC Docket No. UG-021502: Objection of the City of Toppenish

Dear Secretary Washburn:

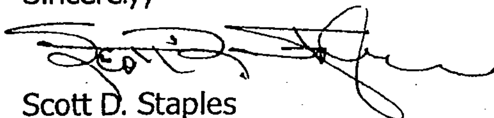
On behalf of the Toppenish City Council, I respectfully request that the Washington Utilities and Transportation Commission deny the request by Cascade Natural Gas Corporation (Cascade), as set forth in its revised tariff sheet (Thirty-Fifth Revision Sheet No. 500-A to its WN U-3 Tariff). The City Council opposes the efforts of Cascade Natural Gas to interpret the franchise fee as a utility tax to be paid solely by customers an the reservation.

However, if the Commission determines that a surcharge should be permitted, we respectfully request that the commission suspend Cascade's tariff amendment, reject Cascade's proposed treatment of the franchise fee as a tax, and require Cascade to treat payment of the fee as a general operating expense recoverable from statewide ratepayers. The surcharge, if imposed, should be spread among all utility customers, whether located on or off the reservation.

In expressing this preference, the City has no intent of relinquishing any objections it may have, factually or legally, to the validity of the Yakama Nation Franchise Ordinance, but believes that the commission is not the forum for a determination of the legality of the fee.

We thank you for your consideration of our position.

Sincerely,



Scott D. Staples
City Manager

C: City Council
City Attorney
County Commissioners

CITY COUNCIL • CITY MANAGER • CITY ATTORNEY
(509) 865-6319 FAX (509) 865-1950

EXHIBIT 2

Date: February 24, 2003

Re: Yakima County Superior Court
Case # 03-2-0086-7

AFFIDAVIT OF TOPPENISH CITY COUNCILMEMBER,
WILLIAM L. ROGERS

I am, William L. Rogers, a resident of the City of Toppenish, and provide the following statement to Yakima County Superior Court:

1. I have lived in the City of Toppenish for 51 years, having moved to this city in 1952.

2. I currently reside at 1007 Madison Avenue, located within the city boundaries of the City of Toppenish, and my telephone number is: (509) 865-2491;

3. I currently serve as a city council member for the City Council of the City of Toppenish, and have served as a city council member for twenty-one and one-half years;

4. Since 1970, I have been an appraiser and real estate broker, and maintained a business office at 10 South Alder Street, in the core downtown area, from 1970 through 2002;

5. I am very familiar with governmental services occurring within the City of Toppenish, as a resident, business person and long-time elected official.

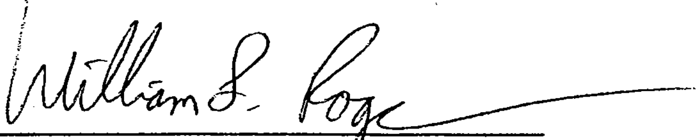
6. In my experience as a resident, business person, and elected official, it is my knowledge and experience that all government, public and social services available to Toppenish residents, and to myself in particular, derive only from municipal, county or state agencies.

7. I and other Toppenish citizens who are not enrolled tribal members, have never received services provided by the Confederated Bands and Tribes of the Yakama Nation.

8. Specifically, Yakama tribe provides no utility service to any citizens located within the municipal boundaries of the City of Toppenish.

9. The only recent contribution associated with Yakama Tribes is from proceeds derived from their Legends Casino, which contributed funding for a municipal fire truck, aforesaid funding being required of a state gaming compact, and received two or more years in arrears.

I swear under penalty of perjury in accordance with the laws of the State of Washington and of the United States, that the foregoing statements are true and correct to the best of my knowledge.



William L. Rogers, Council member
City of Toppenish

EXHIBIT 3

2003 JAN 10 PM 2:10
ATTORNEY GENERAL
OF WASHINGTON

1
2
3
4
5
6 SUPERIOR COURT OF WASHINGTON FOR YAKIMA COUNTY
7

Elaine Willman and the Citizens Standup! Committee, Plaintiffs, vs. Washington Utilities and Transportation Commission, Cascade Natural Gas Corporation and Pacificorp, d/b/a Pacific Power and Light Company, Defendants.	NO. Petition for Review of Agency Action

1. Petitioners:

   Elaine Willman
   P.O. Box 1280
   Toppenish WA 98948

   Citizens Standup! Committee
   P.O. Box 1280
   Toppenish WA 98948

2. Petitioners' counsel:
   Henke & Richter
   221 1st Ave. W. # 215
   Seattle WA 98119

3. Agency:
   Washington Utilities and Transportation Commission
   P.O. Box 47250
   Olympia WA 98504-7250

Henke & Richter
221 First Ave. W, Suite 215
Seattle, Washington 98119
(206) 282-2911

1 4. Agency action complained of:

2 a. Defendant Cascade is a natural gas utility subject
3 to the jurisdiction of the WUTC. Cascade filed a request with
4 the WUTC to amend its tariff schedule to establish a charge
5 for all customers living within the Yakima Indian Reservation
6 boundaries to recover a franchise fee in the amount of 3
7 percent of sales to all customers, in the manner of a
8 municipal tax, demanded of utilities doing business on the
9 Yakima Indian Reservation by the Yakama Nation, an Indian
10 tribe, pursuant to its Franchise Ordinance T-177-02, adopted
11 August 6, 2002. Over objection of the petitioners and the
12 Yakama Nation, the WUTC declined to reject the tariff
13 revision, and allowed it to go into effect without taking
14 action, at a hearing on its Docket UG-021502, December 11,
15 2002.

16 b. Defendant Pacificorp is an electric power utility
17 subject to the jurisdiction of the WUTC. Pacificorp filed a
18 request with the WUTC to amend its tariff schedule to
19 establish a charge for all customers living within the Yakima
20 Indian Reservation boundaries to recover a franchise fee in
21 the amount of 3 percent of sales to all customers, in the
22 manner of a municipal tax, demanded of utilities doing
23 business on the Yakima Indian Reservation by the Yakama
24 Nation, an Indian tribe, pursuant to its Franchise Ordinance
25 T-177-02, adopted August 6, 2002. Over objection of the
26 petitioners and the Yakama Nation, the WUTC declined to reject
27 the tariff revision, and allowed it to go into effect without
28

Henke & Richter
221 First Ave. W, Suite 215
Seattle, Washington 98119
(206) 282-2911

1 taking action, at a hearing on its Docket UE-021637, January
2 8, 2002.
3 5. Other parties:
4 Cascade Natural Gas Corporation is a Washington corporation
5 whose registered agent is

6 W. Brian Matsuyama
222 Fairview Ave. N
7 Seattle WA 98124

8 Pacificorp, d/b/a Pacific Power & Light Company, is an
9 Oregon Corporation whose registered agent is

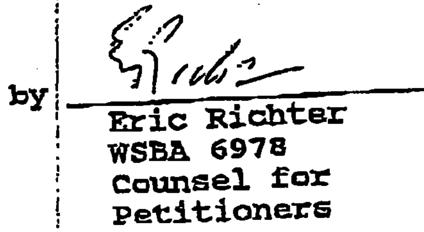
10 CT Corporation System
520 Pike St.
11 Seattle WA 98101

12 6. Facts:
13 a. The defendant corporations are not entities created
14 by the Yakama Nation (hereafter, the "Tribe"). Their service
15 of nonmember customers on the Yakima Indian Reservation does
16 not require consent of the Tribe. There is no evidence that
17 their facilities used to deliver service to Willman and
18 members of the Citizens Standup! Committee make use of
19 property subject to the control of the Tribe other than the
20 Tribe's mere assertion that the corporations' facilities may
21 trespass on some tribal property. Their supply of service to
22 nonmembers is not subject to the governmental authority of the
23 Tribe.
24 b. Petitioner Willman and the members of the Citizens
25 Standup! Committee, an association of citizens residing within
26 the Yakima Indian Reservation of which she is executive
27 director, are customers of the defendant corporations required
28

Henke & Richter
221 First Ave. W, Suite 215
Seattle, Washington 98119
(206) 282-2911

1 to pay for their utility service according to defendants'
2 tariff schedules. They are not members of the Tribe and
3 reside on and receive their utility service on fee land owned
4 by themselves or other persons who are not members of the
5 Tribe. The great majority of persons who reside on the Yakima
6 Indian Reservation and receive utility service there, like
7 petitioners, are not members of the Tribe and do not reside on
8 tribal property. These nonmembers' conduct upon non-Indian
9 fee land is not subject to the governmental authority of the
10 Tribe, they have no voice in tribal decision making, and they
11 receive no governmental services from the tribe.
12 7. Reasons why relief should be granted:
13 a. The Tribe has no authority, by reason of federal
14 law, to demand payment of a tax from defendant corporations
15 except upon sales to itself or its members.
16 b. The Tribe has no authority, by reason of federal
17 law, to demand payment of a fee from defendant corporations
18 for their provision of service to nonmembers except for the
19 reasonable value of tribal property owned by the Tribe or its
20 members, or services rendered by the Tribe, used or received
21 by defendants in the course of providing that service.
22 c. In the alternative, if payment of the franchise fee
23 demanded of defendant corporations is recoverable as an
24 expense, it is a general operating expense which the WUTC is
25 required to use to establish system-wide revenue need and not
26 to pass through to customers within the Yakima Indian
27 Reservation.
28

Henke & Richter
221 First Ave. W, Suite 215
Seattle, Washington 98119
(206) 282-2911

1 d. For the reasons stated above, it was unlawful or
2 arbitrary and capricious for the WUTC to allow defendant
3 corporations' tariff schedule revisions to go into effect.
4 8. Request for Relief:
5 Petitioners pray for judgment against the WUTC requiring
6 it to reject the tariff schedule revisions of defendant
7 corporations mentioned above, and
8 a. to require revision of the tariff schedules so as
9 either to exclude nonmembers of the tribe from recovery of the
10 3 percent of sales fee demanded by the Yakama Nation, or
11 b. in the alternative, if the above request (a.) be
12 denied, to treat the 3 percent of sales fee demanded by the
13 Yakama Nation as a general operating expense used to establish
14 system-wide revenue need, not to be passed through to
15 customers within the Yakima Indian Reservation,
16 c. and for petitioners' costs, reasonable attorneys'
17 fees and such other relief as may be just.
18 Respectfully submitted, January 9, 2003.
19
20 Henke & Richter
21
22 by 
Eric Richter
23 WSBA 6978
Counsel for
Petitioners
24
25
26
27
28

Henke & Richter
221 First Ave. W, Suite 215
Seattle, Washington 98119
(206) 282-2911

EXHIBIT 4

decided in favor of said company by the Supreme Court of the United States at the October term, nineteen hundred and three (volume one hundred and ninety-two, page three hundred and fifty-five, of the United States Reports), what part of said lands have been allotted to Indians and the value of the improvements thereon, and also for what price the said California and Oregon Land Company will convey the said lands to the United States, or on what terms the said company will exchange such lands for other lands, not allotted to Indians, within the original boundaries of said reservation. And it is hereby made the duty of the Secretary of the Interior to make a full and specific report to Congress, on or before the first day of the next session, in pursuance of the jurisdiction and duties imposed on him by this act.

Indian allotments.

Exchange of lands.

Report.

Approved, March 3, 1905.

Mar. 3, 1905.
[H. R. 17474.]

[Public, No. 212.]
33 Stat., 1048.

CHAP. 1479.—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 fiscal year ending June thirtieth, nineteen hundred and six, and for other purposes.

Indian Department appropriations.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums be, and they are hereby, appropriated, out of any money in the Treasury not otherwise appropriated, for the purpose of paying the current and contingent expenses of the Indian Department, and in full compensation for all officers the salaries for which are specially provided for herein, for the service of the fiscal year ending June thirtieth, nineteen hundred and six, and for fulfilling treaty stipulations with various Indian tribes, namely:

CURRENT AND CONTINGENT EXPENSES.

Pay of agents.

For pay of twenty-two agents of Indian affairs at the following-named agencies, at the rates respectively indicated, namely:

At the Blackfeet Agency, Montana, one thousand eight hundred dollars;

At the Cheyenne River Agency, South Dakota, one thousand eight hundred dollars;

At the Colville Agency, Washington, one thousand five hundred dollars;

At the Crow Creek Agency, South Dakota, one thousand six hundred dollars;

At the Crow Agency, Montana, one thousand eight hundred dollars;

At the Flathead Agency, Montana, one thousand five hundred dollars;

At the Kiowa Agency, Oklahoma Territory, one thousand eight hundred dollars;

At the La Pointe Agency, Wisconsin, one thousand eight hundred dollars;

At the Leech Lake Agency, Minnesota, one thousand eight hundred dollars;

At the Lower Brule Agency, South Dakota, one thousand four hundred dollars;

At the New York Agency, New York, one thousand dollars;

At the Osage Agency, Oklahoma Territory, one thousand eight hundred dollars;

At the Pine Ridge Agency, South Dakota, one thousand eight hundred dollars;

Josephine Lillie. Patent in fee to.

That Josephine Lillie is hereby given and granted the absolute, unqualified fee-simple title to the west half of the northwest quarter of section ten, in township ten north, range twenty east, of the Willamette meridian, in the Yakima Indian Reservation in the State of Washington, under patent heretofore issued to her by the United States of America, bearing date July tenth, eighteen hundred and ninety-seven, which patent is recorded in volume fifty-two, page two hundred and thirty-five, in the records of the General Land Office, free and clear from any trust or reservation, and with full power in her to sell and convey the same, free from any trust or reservation, and that a patent in due form of law shall be issued to her, her heirs and assigns, by the United States of America, giving, granting, and conveying to her the absolute fee-simple title thereto, free and clear from any trusts or reservations, and with full power in her to dispose of the same without restriction. And the provisions of the act of Congress approved February eighth, eighteen hundred and eighty-seven (Twenty-fourth Statutes, page three hundred and eighty-eight), as amended by the act of February twenty-eighth, eighteen hundred and ninety-one (Twenty-sixth Statutes, page seven hundred and ninety-four), shall not hereafter apply to or affect the said real property, and the patent hereto issued to her, bearing date July tenth, eighteen hundred and ninety-seven, and recorded in volume fifty-two, page two hundred and thirty-five, in the records of the General Land Office, be, and the same is hereby, canceled and held for naught.

1887, ch. 119, 24 Stat., p. 388, vol. 1, p. 33.
1891, ch. 383, 26 Stat., p. 794, vol. 1 p. 56.

Mrs. Kiva C. Lewis. Patent in fee to.

That the President be, and he is hereby, authorized, in his discretion, to issue a patent in fee to Mrs. Kiva C. Lewis, Rosebud allottee numbered thirty-nine hundred and eighty-six, for the lands heretofore allotted to her, and all restrictions as to sale, incumbrance, or taxation of said lands are hereby removed.

Jennie O. Morton, Fred. A. Kerr. Sale restrictions removed.

That all restrictions as to the sale, incumbrance, or taxation of the lands heretofore allotted or that may hereafter be allotted to Mrs. Jennie O. Morton, of Ramona, Indian Territory, or to Fred. A. Kerr, of Hereford, Indian Territory, both citizens of the Cherokee Nation, and duly enrolled as such, be, and the same hereby are, removed.

Henry A. Quinn. Patent in fee to.

That the Secretary of the Interior is hereby authorized and empowered to issue a patent to Henry A. Quinn for the east half of the northwest quarter, the northeast quarter of the southwest quarter, and the northwest quarter of the southeast quarter of section thirty-two, township one hundred and twenty-five north, range fifty west of the fifth principal meridian, South Dakota.[1]

33 Stat., 1068. Benjamin McBride. Patent in fee to.

That the Secretary of the Interior be, and he is hereby, authorized, in his discretion, to issue a patent in fee to Benjamin McBride, Yankton Sioux allottee, for the lands heretofore allotted him in South Dakota, and all restrictions as to the sale, incumbrance, or taxation of said lands are hereby removed.

Louisa Quinn Miller. Patent in fee to.

That the Secretary of the Interior be, and he is hereby, authorized and directed to issue a patent in fee to Louisa Quinn Miller, a member of the Sisseton and Wahpeton Band of Sioux Indians, for lands heretofore allotted to her in the State of South Dakota, and all restrictions as to sale, incumbrance, or taxation of said lands are hereby removed.

Yankton Indian Reservation. Land reserved for park, etc., purposes.

That the Secretary of the Interior be, and he is hereby, authorized and empowered to set apart a tract of land not exceeding twenty acres in extent on the land reserved for agency purposes on the Yankton Indian Reservation, in the State of South Dakota, for the perpetual use of the Yankton Tribe of Sioux Indians for a park and site for a monument or monuments to the memory of deceased Yankton Sioux chiefs and eminent members of their said tribe whose memory they may desire to perpetuate.

John F. Brown. Sale of lots to, confirmed.

That the resolutions of the Seminole council, passed and approved on April eighteenth, nineteen hundred, accepting and ratifying the

[1] Otto Monson v. S. J. Simonson, 231 U. S., 341.

EXHIBIT 5

June 21, 1906.
[H. R. 15331.]
[Public, No. 258.]
34 Stat., 325.

CHAP. 3504.—An act making appropriations for the current and contingent expenses of the Indian Department, for fulfilling treaty stipulations with various Indian tribes, and for other purposes, for the fiscal year ending June thirtieth, nineteen hundred and seven.

Indian Department appropriations.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums be, and they are hereby, appropriated, out of any money in the Treasury not otherwise appropriated, for the purpose of paying the current and contingent expenses of the Indian Department, for fulfilling treaty stipulations with various Indian tribes, and in full compensation for all offices the salaries for which are specially provided for herein for the service of the fiscal year ending June thirtieth, nineteen hundred and seven, namely:

I. GENERAL PROVISIONS.

General provisions.

PRESIDENT.

Under the President.

*   *   *   *   *   *   *

34 Stat., 326.
Rations to mission schools.

Mission schools on an Indian reservation may, under rules and regulations prescribed by the Commissioner of Indian Affairs, receive for such Indian children duly enrolled therein, the rations of food and clothing to which said children would be entitled under treaty stipulations if such children were living with their parents.

Continuing alienation restrictions.

That prior to the expiration of the trust period of any Indian allottee to whom a trust or other patent containing restrictions upon alienation has been or shall be issued under any law or treaty the President may in his discretion continue such restrictions on alienation for such period as he may deem best: *Provided, however,* That this shall not apply to lands in the Indian Territory.

Proviso.
Indian Territory excepted.

SECRETARY.

Under the Secretary.

Purchase of supplies to be advertised.

That no purchase of supplies for which appropriations are herein made, exceeding in the aggregate five hundred dollars in value at any one time, shall be made without first giving at least three weeks' public notice by advertisement, except in case of exigency, when, in the discretion of the Secretary of the Interior, who shall make official record of the facts constituting the exigency, and shall report the same to Congress at its next session, he may direct that purchases may be made in open market in amount not exceeding three thousand dollars at any one purchase: *Provided,* That supplies may be purchased, contracts let, and labor employed for the construction of artesian wells, ditches, and other works for irrigation, in the discretion of the Secretary of the Interior, without advertising as hereinbefore provided: *Provided further,* That as far as practicable Indian labor shall be employed and purchases in the open market made from Indians, under the direction of the Secretary of the Interior.

Exception.

Provisos.
Irrigation.

Open-market purchases, etc.

Use of surplus for subsistence deficiencies.

That the Secretary of the Interior, under the direction of the President, may use any surplus that may remain in any of the appropriations herein made for the purchase of subsistence for the several Indian tribes, to an amount not exceeding twenty-five thousand dollars in the aggregate, to supply any subsistence deficiency that may occur: *Provided,* That any diversions which shall be made under authority of this section shall be reported to Congress with the reason therefor in detail, at the session of Congress next succeeding such diversion: *Provided further,* That the Secretary of the Interior, under direction of the President, may use any sums appropriated in this act for subsistence, and not absolutely necessary for that purpose, for the

Provisos.
Report of diversions.

Stock cattle from subsistence funds.

the seventh article of the treaty of January twenty-second, eighteen hundred and fifty-five, with the Dwamish and other Indians (Twelfth Statutes, page nine hundred and twenty-seven), containing restrictions upon sale and alienation, may sell and convey the northwest quarter of the southwest quarter of section twenty-four, township thirty-four north, range two east, Willamette meridian, Washington, being forty acres of his allotment, but that such conveyance shall be under the supervision and subject to the approval of the Secretary of the Interior, and when so approved shall convey full title to the purchaser; also the south half of the north half of the southeast quarter of section twenty-three, township thirty-four north, range two east, Willamette meridian, or any part thereof, in the discretion of the Secretary of the Interior; and this conveyance, if any, shall be under the supervision and subject to the approval of the Secretary of the Interior, and when so approved shall convey full title to the purchaser.

Vol. 2, 669.
34 Stat., 379.

Lizzie Peone.
May sell part of allotment.

That Lizzie Peone, allottee numbered three hundred and thirty-one in what was formerly the north half of the Colville Indian Reservation, in the State of Washington, and to whom a trust patent has been issued containing restrictions upon alienation, may sell and convey any part of her allotment, but such conveyance shall be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe, and when so approved shall convey full title to the purchaser the same as if a final patent without restriction had been issued to the allottee.

Yakima allottees.
Fee-simple patents to certain.

That the Secretary of the Interior be, and he is hereby, authorized, in his discretion, to issue fee-simple patents to the following parties for the lands heretofore allotted them: L. F. Laqua, a Yakima Indian, to his allotment, numbered seven hundred and eighty; Susan Stone (Swasey), a Yakima Indian, to her allotment, numbered two hundred and eighty-six; Suis Sis Kin, or Loupe Loupe Charley, numbered four, Yakima, now Waterville, Washington; Charles Wannassy, Yakima allottee, numbered one thousand six hundred and eighteen; Margaret Sar Sarp Kin, numbered six, Washington; and the issuance of said patents shall operate as a removal of all restrictions as to the sale, incumbrance, or taxation of the lands so patented.

Franklin P. Olney.
Fee-simple patent to.

That the Secretary of the Interior be, and he is hereby, authorized, in his discretion, to issue a patent in fee simple to Franklin P. Olney, a Yakima Indian, for the land covered by his allotment numbered five hundred and eighty-three; and the issuance of said patent shall operate as the removal of all restrictions as to sale, incumbrance, or taxation of the land so patented.

WISCONSIN.

Wisconsin.

Agent, La Pointe Agency.

For pay of Indian agent at the La Pointe Agency, Wisconsin, one thousand eight hundred dollars.

HAYWARD SCHOOL.

Hayward school.

For the support and education of two hundred pupils at the Indian school at Hayward, Wisconsin, thirty-three thousand four hundred dollars;

Pay of superintendent, one thousand five hundred dollars;

General repairs and improvements, five thousand dollars;

Shop building, four thousand dollars;

In all, forty-three thousand nine hundred dollars.

TOMAH SCHOOL.

Tomah school.

For support and education of two hundred and fifty Indian pupils at the Indian school, Tomah, Wisconsin, forty-one thousand seven hundred and fifty dollars;

CERTIFICATE OF SERVICE

I hereby certify that I have this day, caused to be served, a copy of the foregoing document upon the parties of record in Docket No. U-030744, on the following individuals in the manner indicated below:

Simon ffitch
Public Counsel Section
Office of the Attorney General
900 Fourth Avenue, Suite 2000
Seattle, WA 98164
For Public Counsel

VIA HAND DELIVERY and ELECTRONIC MAIL

John L. West
Mary E. Crego
Hillis Clark Martin & Peterson, P.S.
500 Galland Building
1221 Second Avenue
Seattle, WA 98101-2925
For Cascade Natural Gas Corporation

VIA HAND DELIVERY and ELECTRONIC MAIL

P. Stephen DiJulio
Jeffery A. Richard
Foster Pepper & Shefelman PLLC
1111 Third Avenue, Suite 3400
Seattle, WA 98101
For the City of Toppenish

VIA HAND DELIVERY and ELECTRONIC MAIL

Eric Richter
Henke & Richter
221 1st Avenue W., Suite 215
Seattle, WA 98199
Elaine Willman, et al.

VIA HAND DELIVERY and ELECTRONIC MAIL

Judity A. Endejan
Graham & Dunn PC
Pier 70
2801 Alaskan Way, Suite 300
Seattle, WA 98121-1128
For Verizon

VIA HAND DELIVERY and ELECTRONIC MAIL

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101-3197
Telephone (206) 624-0900

Lynn Logen
Puget Sound Energy
P.O. Box 97034
Bellevue, WA 98009-9734
For Puget Sound Energy

VIA OVERNIGHT MAIL and ELECTRONIC MAIL

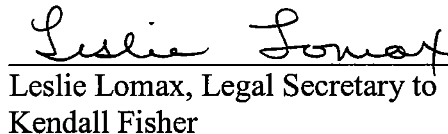
Mark P. Trinchero
Davis Wright Tremaine LLP
1300 SW 5th Avenue, Suite 2300
Portland, OR 97201
For Charter Communications

VIA OVERNIGHT MAIL and ELECTRONIC MAIL

William E. Hendricks III
Spring Corporation
902 Wasco Street
Hood River, OR 97031
For Sprint

VIA OVERNIGHT MAIL and ELECTRONIC MAIL

DATED September 29, 2003, at Seattle, Washington.



Leslie Lomax, Legal Secretary to
Kendall Fisher