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Brief of the United States in Support of Its Claims

Michael R. Thorp
Attorney, Department of Justice, Land and Natural Resources Division

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, Plaintiff, v. BARBARA J. & JAMES ANDERSON, et al., Defendants.	CIVIL NO. 3643

BRIEF OF THE UNITED STATES IN SUPPORT OF ITS CLAIMS

(134)

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I

STATEMENT OF THE CASE

This case is an action to adjudicate the rights in and to the waters of Chamokane Creek and its tributaries. The suit was filed on May 5, 1972, by the United States on its own behalf and as trustee for the Spokane Tribe of Indians. The Spokane Tribe itself was later allowed to intervene as a plaintiff. Defendants include the State of Washington in its governmental and proprietary capacities and all other persons and corporations who might have an interest in the waters of Chamokane Creek or its tributaries.

The United States makes essentially four claims. It claims, first of all, sufficient water to maintain Chamokane Creek as a fishery and as a free flowing recreational and esthetic stream. Secondly, it claims sufficient water to irrigate all of the irrigable acres of land within the Chamokane Creek basin portion of the Spokane Indian Reservation. Thirdly, it claims 10 cfs (nonconsumptive) for fish propagation purposes at a fish hatchery. Finally, it claims such water as may be needed in the future to fulfill the purposes for which the reservation was created.

The defendants make individual claims to water generally relying on water rights certificates, permits or applications issued by the state. The United States denies the validity of those certificates, permits or applications for uses within the exterior boundaries of the Spokane Indian Reservation and seeks to enjoin the state from the further issuance of such certificates, etc. In addition, the United States seeks to limit the exercise of any of the defendants' valid and existing water rights to that amount which will not interfere with the various rights of the United States. The United States asks the court to appoint a water master to enforce the final decree that is entered.

The defendants deny the existence of the rights as claimed by the United States and, additionally, have moved that the court dismiss this action for what they perceive as a failure of the government and the tribe to prove up priority dates for reservation land which has passed in and out of trust status.

In this brief, the United States will set forth and substantiate both legally and factually, its claims to the surface and ground waters of Chamokane Creek and its tributaries. The United States will respond to the claims of the defendants once their briefs are received.

II

RIGHTS OF THE UNITED STATES AND SPOKANE TRIBE OF INDIANS TO THE SURFACE AND GROUND WATERS OF CHAMOKANE CREEK AND ITS TRIBUTARIES.

A. The United States, by withdrawing the land of the Spokane Indian Reservation from the public domain and reserving it for the use and benefit of the Spokane Indians, reserved unappropriated waters appurtenant to the land to the extent necessary to fulfill the purpose of the reservation.

1. The federal reserved right and the principles supporting it are firmly established by decisions of the United States Supreme Court.

The area which now makes up the State of Washington and in which the Spokane Indian Reservation is located, became subject to the sovereignty of the United States by discovery and settlement and by the treaty extinguishment of the conflicting claims of Spain (Treaty of February 22, 1819, 8 Stat. 252), Russia (Convention of April 17, 1824, 8 Stat. 302) and Great Britain (Treaty of June 15, 1846, 9 Stat. 869). The decisions of the United States Supreme Court firmly establish that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the government, by implication, reserves the right to use water then unappropriated to the extent necessary to accomplish the purpose of the reservation. In so doing, the United States acquires a reserved right in unappropriated water which is superior to the rights of future appropiators. This power of the Federal Government to reserve water rights is found in the Commerce Clause, Article I §8 and the Property Clause, Article IV, §3. The doctrine applies to Indian reservations, as well as other federal enclaves. Cappaert v. United States, ____ U.S. ____, 48 L. Ed. 2d 523, 534, 96 S.Ct. ____ (1976); United States v. District Court for Eagle County, 401 U.S. 520, 522-523

(1971); Arizona v. California, 373 U.S. 546, 601 (1963); F.P.C. v. Oregon, 349 U.S. 435, 443-444 (1955); Winters v. United States, 207 U.S. 564, 577 (1908). As the Supreme Court has noted, in arid areas, the reservation of land will often be of little use without the water rights appurtenant to the land. Arizona v. California, supra, 373 U.S. 599-601; Winters v. United States, supra, 207 U.S. 576.

Because the federal reserved right is a right derived from the federal reservation of the land, it is not dependent upon state law. Therefore, the test to be applied to determine the existence of such a federal reserved water right is not compliance with state law but whether the government intended to reserve unappropriated and thus available water. Intent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created. Cappaert v. United States, supra, 48 L. Ed. 2d at 534, 538; Arizona v. California, supra, 373 U.S. at 599-601; Winters v. United States, supra, 207 U.S. at 576.

Since the doctrine is based on the need for the otherwise unappropriated water to make the reservation of public land useful and since the waters reserved are those appurtenant to the land reserved, the reservation is not dependent upon the navigability of the water. In Winters v. United States, supra, 207 U.S. at 566, 577, the source of the waters reserved was a non-navigable stream. Moreover, the reserved right includes future water needs to fulfill the purpose of the reservation.*/

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*/ While the right reserves use of up to a certain amount of water, if that amount is not actually used and is replenishable, others are free to use it, but on the condition that they will curtail their use if the water is needed for the reservation. See Morreale, Federal-State Rights and Relations, in 2 Clark, Waters and Water Rights 80-82 (1967); see also Conrad Inv. Co. v. United States, 161 Fed. 829, 835 (C.A. 9, 1908); Tweedy v. Texas Co., 286 F.Supp. 383, 386 (D. Mont.).

In sum, as the Supreme Court stated in United States v. District Court for Eagle County, 401 U.S. 520, 522-523:

> It is clear from our cases that the United States often has reserved water rights based on withdrawals from the public domain. As we said in Arizona v. California, 373 U.S. 546, the Federal Government had the authority both before and after a State is admitted into the Union "to reserve waters for the use and benefit of federally reserved lands." Id., at 597. The federally reserved lands include any federal enclave. In Arizona v. California we were primarily concerned with Indian reservations. Id., at 598-601. The reservation of waters may be only implied and the amount will reflect the nature of the federal enclave. Id. at 600-601.

2. The United States' and Spokane Tribes' reserved water rights are equally applicable to surface water and ground water.

The reason for the federal reserved right requires that it apply to underground, as well as surface waters. Moreover, the nature of underground water, its relationship to surface water and the laws affecting each, far from militating against such application, support treating the two sources alike. Recently, the United States Supreme Court had occasion to settle this question in Cappaert v. United States, ____ U.S. ____, 48 L. Ed. 2d 523, 96 S.Ct. ___ (1976).

The factual background in Cappaert was as follows. Devil's Hole, a deep cavern on federal land in Nevada containing an underground pool inhabited by a unique species of desert fish (cyprinodon diabolis or Devil's Hole pupfish), was reserved as a National Monument by a 1952 Presidential Proclamation. In 1968, the Cappaerts, who own a nearby ranch, began pumping ground water coming from the same source as the water in Devil's Hole, thereby reducing the water level in Devil's Hole and endangering its fish. Subsequently, the Cappaerts applied to the Nevada State Engineer for

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permits to change the use of water from several of their wells. The State Engineer granted the permits over the protest of the United States.

The United States then filed suit in the district court seeking to limit the Cappaert's pumping of their wells. The district court permanently enjoined pumping that would lower the water below a certain level necessary to preserve the fish, holding that in establishing Devil's Hole as a national monument, the United States reserved appurtenant, unappropriated waters necessary to the purpose of the reservation including the preservation of the pool and its fish. The district court further held that the federal water rights antedated those of the Cappaerts. 375 F.Supp. 456 (U.S.D.C., Nevada, 1974). The Ninth Circuit Court of Appeals affirmed. 508 F.2d 313 (1974). The United States Supreme Court, in a unanimous decision, affirmed, holding "that as of 1952 when the United States reserved Devil's Hole, it acquired by reservation water rights in unappropriated appurtenant water sufficient to maintain the level of the pool to preserve its scientific value and thereby implement Proclamation No. 2961." 48 L. Ed. 2d at 539.

One of the arguments advanced by the State of Nevada and the Cappaerts before the Supreme Court was that it was illogical to "extend" the reserved right doctrine to ground water. Section II of the Court's opinion disposed of that argument and because of that sections brevity, is here set forth in full.

> No cases of this Court have applied the doctrine of implied reservation of water rights to groundwater. Nevada argues that the implied reservation doctrine is limited to surface water. Here, however, the water in the pool is surface water. The federal water rights were being depleted because, as the evidence showed, the 'groundwater and surface water are physically interrelated as integral parts of the hydrologic cycle.' Corker, Groundwater Law, Management and Administration, National Water Commission Legal Study No. 6, p. xxiv (1971). Here the Cappaerts are causing

> the water level in Devil's Hole to drop by their heavy pumping. See Corker, supra; see also Water Policies for the Future - Final Report to the President and to the Congress of the United States by the National Water Commission 233 (1973). It appears that Nevada itself may recognize the potential interrelationship between surface and groundwater since Nevada applies the law of prior appropriation to both. Nev. Rev. Stat. §§533.010 et seq.; 534.020; 534.080, 534.090. See generally Trelease, Water Law - Resource Use and Environmental Protection 457-552 (2d ed. 1974); Meyers & Tarlock; Water Resource Management 553-634 (1971).
>
> Thus, since the implied reservation of water doctrine is based on the necessity of water for the purpose of the federal reservation, we hold that the United States can protect its water from subsequent diversion, whether the diversion is of surface or groundwater. [Footnote omitted] 48 L. Ed. 2d at 536.

The Supreme Court's holding that the federal reserved right doctrine encompasses ground water, as well as surface water, was only logical. The reserved right, as we have pointed out, is not based on navigability or some other characteristic of the water, but on the initial possession of the land in question by the United States or the tribe and its reservation for a purpose requiring the use of unappropriated waters. In reserving the land, it is assumed that the United States or the tribe intends to reserve the unappropriated water rights needed to fulfill the purpose of the reservation.

In Winters v. United States, supra, the Court recognized the tacit reservation of waters from a non-navigable stream and sustained an injunction barring diversions by upstream land owners. The Court said (207 U.S. at 576): "The lands were arid and, without irrigation, were practically valueless. And yet, it is contended, the means of irrigation were deliberately given up by the Indians . . ." - a contention the Court rejected. If, rather than depending on a non-navigable stream for irrigation, the Indians had depended on wells, as is often the situation in the State of Washington,

there would be no reason that their right to draw water from those wells should not be as fully protected as their right to draw water from a stream. The reservation would be equally as useless without the wells and the government's intent to reserve their use would be equally clear. Similarly, it should not matter whether the water reserved for a federal use is interfered with by a surface diversion or by a well. The affect on the reserved land (no water available for its use) and the diverter (obtaining the use of water previously spoken for) is the same.

Ground water and surface water are interlocking resources, part of the same hydrologic cycle, and should be treated similarly by the law. As a study for the National Water Commission states (Corker, Groundwater Law, Management and Administration, National Water Commission Legal Study No. 6, pp. xxiv-xxv (1971):

> Groundwater and surface water are physically interrelated as integral parts of the hydrologic cycle. Groundwater basins fed and are feed by surface streams. Surface water and groundwater are interchangeable for most purposes. Wells deplete surface streams. Depletion of surface streams depletes water supply to wells. Optimum utilization of ground and surface water usually involves conjunctive operation by which stored ground water supplements and firms up the supply of intermittently available stream water. Different rules of law dependent on the surface or underground point of diversion promote and perpetuate missallocation of the resource. [Emphasis added]

The present case illustrates the interrelationship between ground and surface water. See, Section III A below.

The interrelationship of surface and underground water is now increasingly recognized in the laws and decisions of western states. See Revised Code of Washington (RCW) 90.44.020 and 90.44.060. The National Commission has recommended (Final Report at 233):*/

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*/ Water Policies for the Future - Final Report to the President and to the Congress of the United States by the National Water Commission (1973).

> Recommendation No. 7-1: State laws should recognize and take account of the substantial interrelation of surface water and ground water. Rights in both sources of supply should be integrated, and uses should be administered and managed conjunctively. There should not be separate codifications of surface water law and ground water law; the law of waters should be a single, integrated body of jurisprudence.

The Supreme Court's decision in Cappaert is controlling on the issue of the applicability of a federal reserved right to ground water. It should be noted, however, that it is not the first decision to so hold. In 1968, for instance, in a suit in the Federal District Court for Montana by a surface lessee of land on the Blackfeet Indian Reservation, the lessee claimed that a mineral lessee infringed his water rights. The Court found that the establishment of the reservation reserved underground waters to the same extent, and with the same limitations, as surface waters. Tweedy v. Texas Co., 286 F.Supp. 383, 386. The court held (286 F.Supp. at 385):

> The Winters case dealt only with the surface water, but the same implications which led the Supreme Court to hold that surface waters had been reserved would apply to underground waters as well. The land was arid - water would make it more useful, and whether the waters were found on the surface of the land or under it should make no difference.

But the court found no actual infringement under the facts of the case, emphasizing that the reserved right, unless a permanent depletion of the water source is threatened, does not prohibit use by others of waters not actually being used for purposes of the reservation at the time. 286 F.Supp. at 386.

B. The Agreement of August 18, 1877, validity established the Spokane Indian Reservation and thereby reserved the unappropriated waters necessary to fulfill the purposes for which the reservation was created.

1. The Agreement of August 18, 1877, established the Spokane Indian Reservation as of that date.

The Spokane Indian Reservation is located approximately 30 miles northwest of the City of Spokane, Washington in the eastern portion of that state. The Spokane Tribe of Indians is the present day tribal entity which, with respect to the matters that are the subject of this litigation, is the political successor in interest to the tribe which was a party to the Agreement of August 18, 1877. It is recognized by the United States as a currently functioning Indian tribe maintaining a tribal government. Its membership is determined in accordance with its Constitution and Bylaws as approved by the Secretary of the Interior. There are currently approximately 1,700 enrolled members of the Spokane Tribe, 600 to 700 of whom reside on the reservation. (Tr. 704-705, 720; PE-1)

Since time immemorial, the Spokanes have used and occupied most of what is now Eastern Washington State. They are known to have fished as far north on the Columbia River as Kettle Falls and as far south as the Snake River. They seldom ventured west of the Columbia or east of the Spokane Falls (site of present day Spokane, Washington) although upon occasion, they moved east in search of buffalo. (Tr. 663, 667, 694, 702)

The Spokane Tribe was made up historically of three bands; the upper, middle and lower bands. Each of these bands tended to localize their activities in one certain area although they utilized the entire tribal area as necessary in their food gathering. The upper band lived near the present day site of Spokane, Washington.

The Middle Spokanes resided around the confluence of the Spokane and Little Spokane Rivers. The lower band lived near the confluence of the Columbia River and the Spokane River on land which is now the Spokane Indian Reservation. (Tr. 659-661, 665, 670)

The major food sources of the Spokane Indians were the wild fish, animal and vegetative resources of the area. While the tribal members attempted to vary their diet by gathering such diverse food as deer, buffalo, camas roots and bitterroots, fish remained their main item of subsistence. The various waterways which flowed through the area occupied by the tribe, including the Columbia, Spokane and Little Spokane Rivers and Chamokane Creek provided an abundant supply of several varieties of fish. Among the types of fish found in the area were chinook salmon and steelhead trout (which migrated from the Pacific Ocean, up the Columbia River to the upper reaches of the Columbia's tributaries to spawn) and native fresh water fish including trout. The areas chosen by the bands as their more or less permanent sites of residence were chosen primarily because of their proximity to excellent fishing spots. The Upper Spokanes lived near Spokane Falls because of the fact that the salmon and steelhead couldn't ascend the falls and were forced to congregate in pools below the falls making this area a prime one for fishing. The Middle Spokanes chose the confluence of the Spokane and Little Spokane Rivers because that too was a major fishing spot. The Lower Spokanes lived at the confluence of the Columbia and Spokane River for the same reason. There was generally good fishing all along the Spokane River from its mouth upstream. (Tr. 465, 661-662, 665, 667, 674-675, 685, 695, 809; PE-84, p. 8-9)

By the Act of August 14, 1848, 9 Stat. 323, the United States established the Oregon Territory and provided that nothing contained in said Act "shall be construed to impair the rights of

person or property now pertaining to the Indians in said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians . . . ." By the mid-1850s, the heavy influx of white settlers into what is now the State of Washington was causing the United States great concern over their safety. As a result, Isaac Stevens, the first Governor and Superintendent of Indian Affairs of the Washington Territory was directed to negotiate treaties with the various tribes under his jurisdiction with the purpose of extinguishing Indian claims to the land in Washington Territory, to establish reservations for the Indians and to provide for peaceful and compatible coexistence of Indians and non-Indians in the area. The United States was concerned with forestalling friction between Indians and settlers and between settlers and the government. Governor Stevens proceeded with his mission and between 1854 and 1856 negotiated treaties with many of the tribes in what is now Washington, Oregon, Idaho and Montana. Each of those treaties provided for the cession of land to the United States, a reservation of certain land for the Indians and a guarantee of certain rights, among them "[t]he right of taking fish, at all usual and accustomed grounds and stations . . . ." See, e.g. 10 Stat. 1132, 12 Stat. 927 etc.

In 1855, Governor Stevens journeyed to what is now Montana to treat with the Blackfeet. It was his stated intention to meet with the Colvilles, Spokanes and Coeur d'Alenes on his return trip. Having completed negotiating a treaty with the Blackfeet, however, Stevens received word that a major Indian war had begun in the western portion of the Oregon and Washington territories and he deemed it advisable to return to the Puget Sound area immediately. As a result, the Spokanes did not receive the opportunity to negotiate for a "Stevens treaty" with its specific guarantees of Indian rights which included the fishing right. (PE-50)

In 1877, certain Pacific Northwest Indian Tribes were again at war with the United States and wanted the bands of the Spokane Tribe to join them. In order to forestall such a move, the Commissioner of Indian Affairs directed Colonel E.C. Watkins, an Indian inspector in charge of all agencies in the Washington Territory, to give his attention to gathering the Indians upon permanent reservations. To this end, Watkins arranged to meet with some of the tribes at Spokane Falls in August, 1877. The council lasted from August 16 to August 18, 1877, and was attended by the Lower Spokanes, Chief Garry of the Upper Spokanes and representatives of several other tribes. The negotiations were cordial with the representatives of the United States stressing the need for peace and for the Indians to settle down on a reservation and the Indians emphasizing that they wanted to remain in their native areas where they would be able to continue to fish while they learned to farm. An agreement was entered into between the United States and the Lower Spokanes on August 18, 1877. Under the terms of that agreement, the Spokanes agreed to accept a reservation described as follows: "Beginning at the source of the Chamokan (sic) Creek in Washington Territory thence down said creek to the Spokane River, thence down said river to the Columbia River, thence up the Columbia River to the mouth of the Nimchin Creek, thence easterly to the place of beginning." The Indians further agreed "to go upon the same by the first of November next, with the view of establishing our permanent homes thereon and engaging in agricultural pursuits." On August 23, 1877, Watkins reported the agreement to the Commissioner of Indian Affairs and on November 26, 1877, he reported that he had been relocating the Indians on the reservation. (Tr. 669-670, 686; PE-57; PE-63)

In 1880, the concern of the Federal Government was focused on getting formal approval for the then existing Spokane Indian

Reservation and coming to some sort of an agreement with the Middle and Upper Spokanes concerning where they would be located. By an order dated September 3, 1880, Brigadier General Howard directed the Spokane Reservation be protected against settlement until surveyed or until he received instructions to the contrary. In his order, General Howard noted that Watkins had promised the Spokanes an exclusive reservation and that the Indians were distrubed by attempts of whites to move on to the reservation. General Howard's action was discussed in a letter dated November 3, 1880, from William J. Pollock, Indian Inspector, to the Secretary of the Interior. Pollock noted that dependence of the Spokanes generally on fishing, the proximity of the Spokane Reservation to the good fishing spots and recommended that the reservation be enlarged so that the rest of the Spokanes could live there also. During the next year, there were several exchanges of correspondence between government officials aimed at formalizing the establishment of the Spokane Reservation. These efforts were eventually successful and on January 18, 1881, President Rutherford B. Hayes signed an Executive order which set aside and reserved for the use of the Spokane Indians the following described area:

> Commencing at a point where Chemakane (sic) Creek crosses the forty-eighth parallel of latitude; thence down the east bank of said creek to where it enters the Spokane River; thence across said Spokane River westwardly along the southern bank thereof to a point where it enters the Columbia River; thence across the Columbia River, northwardly along its western bank to a point where said river crosses the said forty-eighth parallel of latitude; thence east along said parallel to the place of beginning.

(Tr. 27-28; PE-52; PE-53; PE-54; PE-56; PE-3-1-74-17)

By letter dated July 27, 1886, John V. Wright was instructed by the Commissioner of Indian Affairs to meet with the Upper and Middle Spokanes and to try to get them moved onto a reservation. An agreement was entered into on March 18, 1887, and by the terms

of that agreement, the upper and middle bands agreed to move to the Coeur d'Alene Reservation where they would be given allotments of land. This agreement was ratified by Congress on July 13, 1892. Actually, most of the Middle Band of Spokanes ended up on the Spokane Reservation. (Tr. 671; PE-48; PE-49; PE-51; PE-62)

To summarize, prior to 1877, the Spokane Tribe occupied the lands which now comprise Eastern Washington, including the area now known as the Spokane Indian Reservation. In order to minimize Indian-settler conflict, the United States entered into an agreement with the Spokanes on August 18, 1877, whereby the Indians gave up the right to the use and occupancy of their aboriginal land in return for the guaranteed, exclusive use of the Spokane Reservation. From the date of the agreement to the present, the Spokanes have resided on the reservation and the United States has recognized the reservation as such. The actions taken to establish the Spokane Indian Reservation were confirmed by President Hayes in an Executive Order dated January 18, 1881.

The effective date of the creation of the Spokane Reservation has been found by the United States Supreme Court to be the date of the Agreement of August 18, 1877. Northern Pac. Ry. Co. v. Wismer, 246 U.S. 283 (1918). In that case, the Court recalled the history of the creation of the reservation and then stated:

> That the reservation was in fact made and the lands exclusively devoted to the use of the Indians from the date of the agreement of August, 1877, is beyond controversy; that no objection was ever made by his superiors to the action taken by Colonel Watkins is equally clear, and to hold that, for want of a formal approval by the Secretary of the Interior, all of the conduct of the Government and the Indians in making and ratifying and in good faith carrying out the agreement between them, even to the extent of protecting the reservation by military forces from intrusion, is without effect, would be to subordinate the realities of the situation to mere form, for the delay in the issuing of the formal Executive Order of the President under the circumstances can be attributed only to the exigencies of the public business; - by his representative, the Secretary of the Interior, he had approved the setting apart of the lands to the use of the Indians almost three years before. 246 U.S. at 288-289

To the same effect is the case of Gibson v. Anderson, 131 Fed. 39 (C.A. 9, 1904).

These cases and the holding that the Spokane Indian Reservation was created as of August 18, 1877, are in accord with the case law of this circuit. See United States v. Walker River Irr. Dist., 104 F.2d 334, 338 (C.A. 9, 1939) (Date of Commissioner of Indian Affairs' request to General Land Office that reservation be set aside held to be date of creation of reservation even though the official Executive order was not issued for 15 years). See also F. Cohen, Handbook of Federal Indian Law 302 (Univ. of New Mex. Press ed., 1971).

2. The Agreement of August 18, 1877, reserving the Spokane Indian Reservation reserved the water rights necessary to preserve the recreation and esthetic value of Chamokane Creek and the fish which live in it.

   (a) The facts of the case establish that the United States and the Spokane Tribe intended to reserve sufficient water to preserve and protect Chamokane Creek and its fishery.

Much of the testimony and exhibits offered by the United States and the Spokane Tribe at the trial dealt with the importance of Chamokane Creek and its fishery to the Spokane Tribe and the impact that this recognized importance had on the selection of the site of the Spokane Reservation.

It is undisputed that the Spokane Tribe was historically and remains today, a fishing people. Fish were and are one of the major food sources of the members of the tribe. The area which is now the Spokane Reservation was the aboriginal home of the Lower Band of Spokane Indians (signatories to the Agreement of August 18, 1877) primarily because of the excellent fishing in the Columbia River, Spokane River and Chamokane Creek. That Chamokane Creek itself was especially important is reflected in the fact that the

eastern boundary of the Spokane Indian Reservation is the east bank of Chamokane Creek. The inclusion of the entire creek within the boundaries of the reservation was intentional and reflects the importance that creek had to the life of the Spokane Tribe. Historically, the Chamokane Creek area was used as the tribe's winter quarters. During the summer, the Indians would gather camas and bitterroots and dry salmon and store it near Chamokane Creek for winter use. In the fall, the tribe would move to the Chamokane Creek area where they could take advantage of its fresh, pure water which would not freeze during the winter and they would be able to fish for fresh trout. There were three different wintering sites on Chamokane Creek which were used. The first was located at the mouth of the creek. The second was near the present Boise Cascade veneer mill (and was known as SKOF - TA - WEH). The third site was a little above the Bridge at Ford, Washington (and was known as CHIMOCANE). (Tr. 665-666, 683)

During the negotiations leading up to the Agreement of August 18, 1877, the Indians evidenced as their primary concern, their being allowed to remain in the area which is now the reservation. On the opening day of the Council at Spokane Falls, August 16, 1877, the Chief of the Lower Spokanes stated that he "[didn't] want to be moved from [his] Country". (PE-57)

The resulting agreement reserved for the tribe the present Spokane Reservation. It is noteworthy in two respects. First, the description of the reservation which is contained in the agreement specifically refers to Chamokane Creek as the eastern boundary of the reserve. This specific reference indicates the recognized importance of the creek to the tribe. Secondly, in the agreement, the Spokanes agreed to go to the reservation "with the view of establishing our permanent homes thereon . . . ." (PE-63) If the United States Government and the Spokanes themselves intended for the tribe to live on the reservation from August 18, 1877,

onward and to make the reservation their "permanent homes", then they must have intended that the Indians would rely on their ancient food gathering practices including fishing while they attempted to become farmers. This logically follows because the agreement was signed in late summer of 1877. At that time, there was virtually no land under cultivation on the reservation, hence, in the coming winter the Indians would have to rely on one of two sources of food; either handouts by the government or on their ancient food sources. One does not have to be an expert in the history of Indian/non-Indian relations to know that in 1877, the United States was not particularly interested in feeding Indians when it didn't have to. The only logical conclusion, therefore, is that the government intended for the Indians to maintain their old food gathering ways as much as possible while learning to farm. It is evident from the records which were kept of the council proceedings, from the correspondence concerning the negotiations and from what is generally known of the history of that era, that during the treaty negotiations, a primary concern of the Indians whose way of life was so heavily dependent upon the harvesting of fish, was that they be allowed to remain near their usual and accustomed fishing places. It was the intention of the United States Government, in negotiating the Agreement of August 18, 1877, to make the Spokane Indians agriculturalists, although not to restrict them to that, to diversify Indian economy, to teach western skills and trades to the Indians and to accomplsih a transition of the Indians into western culture.*/ There was no intent, however, to prevent the Indians from continuing to gather fish as their main food item. In fact, the Indians were encouraged to continue their fishing so that the United States would not have to

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*/ See United States v. Washington, 384 F.Supp. 312, 355 (USDC, W.D. Wash., 1974) affm'd 520 F.2d 676 (C.A. 9, 1975) cert. den. 423 U.S. 1086.

assume the financial burden of feeding the Indians while they learned to be farmers. The site of the Spokane Indian Reservation was selected, therefore, as a permanent home for the Spokane Indians because it had been their home since time immemorial, it contained plentiful fisheries upon which the tribal members would be able to sustain themselves and had available sufficient land and water for irrigation so that the Indians might also become agriculturalists.

This conclusion is buttressed by certain events following the creation of the reservation. On September 3, 1880, Brigadier General Howard issued an order directing that the Spokane Reservation be protected against settlement until surveyed or until he received instructions to the contrary. General Howard's actions were discussed in a letter dated November 3, 1880, from William J. Pollack, Indian Inspector, to the Secretary of the Interior. (PE-54) In the course of that letter, Pollack recommended that the Spokane Reservation be enlarged so that the other bands of the tribe could join the lower band in living there. His reasoning for the enlargement was that:

> This would include and enlarge upon the reservation recently established by General Howard, would more nearly comport with the promise of Inspector Watkins and would be much more satisfactory to the Indians generally than General Howards, for the reason that it would include the Colvilles and their improvements and the Salmon fishery two miles below the mouth of Kettle river, as well as the two fisheries on the Spokane, upon which they depend largely for subsistence and from which they will never willingly be separated. (PE-54) [Emphasis added]

Pollack's letter and other exchanges of correspondence between government officials aimed at formalizing the establishment of the Spokane Reservation were successful in 1881. On January 18, 1881, President Hayes signed an Executive Order which set aside for the use of the Spokane Indians the present day reservation. The description of the reservation, as contained in the Executive order is as follows:

> Commencing at a point where Chemakane (sic) Creek crosses the forty-eighth parallel of latitude; thence down the east bank of said creek to where it enters the Spokane River; thence across said Spokane River westwardly along the southern bank thereof to a point where it enters the Columbia River; thence across the Columbia River, northwardly along its western bank to a point where said river crosses the said forty-eighth parallel of latitude; thence east along said parallel to the place of beginning. [Emphasis added] (PE-52)

It is manifestly clear from the foregoing that one of the purposes of the creation of the Spokane Indian Reservation was the provision of a permanent home for the Indians, which impliedly included the maintenance and preservation of the plentiful fisheries upon which the tribal members relied. This follows from the historical dependence of the Spokanes on fishing and on the Chamokane Creek fishery in particular, the desire of the United States and the tribe that the tribe continue to utilize their fishery resource while developing as farmers, the fact that this desire is reflected in both the Agreement of August 18, 1877, and the other correspondence surrounding the creation of the reservation and finally, the fact that in the formal Executive order, all of Chamokane Creek was included in the reservation, the boundary line running along the east side of the creek rather than down the middle of the stream as is usual.*/

Nor is this recognition by both the United States and the Spokane Tribe of the importance in reserving the tribe's historic fishery unique to this tribe and this reservation. Only 180 miles southwest of the Spokane Reservation is located the Yakima Indian Reservation. The Yakima Tribe, a tribe with an aboriginal lifestyle

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*/ That Congress continues to recognize and protect the right of the Spokane Indians to fish is evidenced by 16 U.S.C. Sec. 835d. By that law, the Secretary of the Interior is authorized to set aside up to one quarter of the reservoir created by the Columbia Basin Project "for the paramount use of the Indians of the Spokane and Colville Reservations for hunting, fishing and boating purposes."

quite similar to that of the Spokanes, has been repeatedly held by the United States Supreme Court to have had a special interest in the preservation of their historical fishing rights. In United States v. Winans, 198 U.S. 371, 381 (1905), for example, the Court noted that:

> The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians that the atmosphere they breathed.

Further, in Tulee v. Washington, 315 U.S. 681, 684 (1942) the Court stated that:

> From the report set out in the record before us, of the proceedings in the long council at which the treaty agreement was reached, we are impressed by the strong desire the Indians had to retain the right to hunt and fish in accordance with the immemorial customs of their tribes.

See also United States v. Washington, 384 F.Supp. 312 (USDC, WD Wash., 1974), affm'd 520 F.2d 676 (C.A. 9, 1975), cert. den. 423 U.S. 1086.

Just as the Yakimas and the other Pacific Northwest Tribes sought to preserve their ancient food gathering methods as much as possible, so the Spokanes also sought to preserve their fishery.

In spite of the foregoing, the defendants would argue that the only purpose of the creation of the Spokane Reservation was to provide the Indians with land upon which to become agriculturalists. See, Memorandum of Authorities of defendant Boise Cascade Corporation, page 1 and 2. They cite Northern Pac. Railway Co. v. Wismer, 246 U.S. 283 (1918), as controlling on the question of the purposes for which the reservation was created. Wismer, however, did not address the question since it wasn't an issue in the case. The issue in Wismer was the ownership of certain land on the Spokane Reservation. The railroad claimed the land under a plat filed in

1880. The defendant claimed the land as a successor in interest to a homesteader. The Supreme Court held for the defendant on the basis that since the Spokane Reservation was created in 1877, the 1880 plat was void as far as reservation land was concerned. The Agreement of August 18, 1877, and the facts surrounding it were discussed only in order to establish the effective date of the reservation. There was no issue of the purpose of the reservation raised hence the Court didn't address itself to that. The references to agriculture found in the opinion were merely references to the language of the agreement, which has been discussed above.

(b) The United States Supreme Court and other federal courts have recognized that federal reserved water rights are not limited to the right to use water for irrigation.

The defendants would have this Court believe that the federal reserved water right is limited to the right to use water for irrigation. That is manifestly not correct.

It is axiomatic that the test to be applied in determining the existence, nature and the extent of a federal reserved water right is whether the reservation of the water was necessary to accomplish the purposes for which the reservation was created. Cappaert, supra, 48 L. Ed. 2d at 534; Arizona v. California, supra, 373 U.S. at 599-601; Winters, supra, 207 U.S. at 576. This is the language that the courts have consistently used.

To be sure, most of the cases to date which deal with the reserved right to water on Indian reservations have concerned the right of water for irrigation. It has not been until recent years, however, that there has been growing concern over the preservation of water courses for fishing, recreation and esthetic purposes, as well as for domestic use, irrigation and power generation. See Sax, Water Law, Planning and Policy - Cases and Materials, 220-221 (1968); Tarlock, Recent Developments in the Recognition of Instream Uses in

Western Water Law, 1975 Utah Law. Rev. 871 (1975); Note - Minimum Stream Flows - Federal Power to Secure, 15 Nat. Res. Journal 799 (1975); Comment, Application of the Winters Doctrine: Quantification of the Madison Formation, 21 S. Dakota L. Rev. 144 (1976).

Even those courts finding a federal reserved right for irrigation on an Indian Reservation do so only after a careful review of the creation of the reservation and the reasons for the selection of that particular site.

Winters v. United States, supra, a case heavily relied upon by the defendants as supporting their view that the federal reserved right extends only to water for irrigation, does not support that contention. Winters was a suit brought by the United States to restrain certain individuals from constructing or maintaining dams on the Milk River in Montana or in any other manner interfering with the water right for irrigation held by the United States for the benefit of the Fort Belknap Indian Reservation. It was not a general stream adjudication, hence the United States was not required to put forth all of its claims to the Milk River. The statement of the case suggests that the government's proof was concerned solely with establishing the date of reservation, that a purpose of the reservation was farming and the grazing of animals, the amount of water necessary for these activities and that the defendants were interfering with that water. 207 U.S. at 565-567. The opinion of the Court (207 U.S. at 575-578) is also addressed solely to the irrigation issue.

The ninth circuit opinion in the Winters case is even more revealing. It should be noted that Winters was before the ninth circuit twice, once because of the issuance of a preliminary injunction, 143 Fed. 740 (C.A. 9, 1906), and again after the final decree was entered, 148 Fed. 684 (1906). In the opinion dealing with the appeal of the issuance of the preliminary injunction, the

Court extensively reviewed the facts which had been established concerning the establishment of the reservation. Great emphasis was laid on the fact that a good deal of irrigation was actually being done on the reservation by 1906. In discussing the intent of the government and the tribe to reserve water for irrigation as well as the land itself, the Court noted:

> Why was the northern boundary of the reservation located 'in the middle of Milk River' unless it was for the purpose of reserving the right to the Indians to the use of said water for irrigation, as well as for other purposes? 143 Fed. at 745.

From this statement, it must be concluded that the ninth circuit, even as early as 1906, realized that the Indians who were trying to make their homes on reservations could conceivably need water for things besides irrigation and that a federal reserved right for these other uses could exist. In the portion of the opinion setting forth the Court's holding, the Court stated:

> In conclusion, we are of the opinion that the court below did not err in holding that, 'when the Indians made the treaty granting rights to the United States, they reserved the right to use the waters of the Milk River, at least to an extent reasonably necessary to irrigate their lands.' 143 Fed. at 749 [Emphasis added]

Again, the phrase "at least to an extent reasonably necessary" definitely indicates that the Court was not foreclosing the United States and the tribe from claiming water from the Milk River for other purposes, should there ever be a general adjudication of the river or should anyone ever interfere with these other Indian uses.

To the same effect is Conrad Inv. Co. v. United States, 161 Fed. 829 (C.A. 9, 1908). That case was a suit by the United States to enjoin interference with the rights of the Blackfeet Indian Reservation. In holding for the United States, the ninth circuit noted:

> The law of that case (Winters) is applicable to the present case, and determines the paramount right of the Indians of the Blackfeet Indian reservation to the use of the waters of Birch Creek to the extent reasonably necessary for the purposes of irrigation and stock raising, and domestic and other useful purposes. 161 Fed. at 831. [Emphasis added]

Thus, in Conrad, the Court recognized at least four possible uses of water as part of the reserved right on an Indian reservation: irrigation, stock raising, domestic use and "other useful purposes".

Contrary to the arguments advanced by the defendants, neither Winters nor Conrad stand for the proposition that the only reserved water right possible on an Indian reservation is one for irrigation.*/

The United States relies on the recently decided case of Cappaert v. United States, supra, for the proposition that a federal reserved right may extend to water for fishery, recreational and esthetic purposes. As noted above, in Cappaert, the Supreme Court found that the reservation of Devil's Hole as a national monument included sufficient water to maintain the level of its pool and thereby preserve the pupfish living in that pool. It is difficult to understand how the United States could validly reserve enough water to maintain a minimum level in a pool located within a national monument but could not validly reserve enough water to maintain a minimum flow in a stream located on an Indian reservation. In Arizona v. California, supra, 373 U.S. at 546, the Supreme Court held that the principle underlying the reservation of water rights for Indian reservations was equally applicable to other federal reservations. Obviously, then, the converse is true and if a

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*/ In Burley v. United States, 179 Fed. 1, 12 (C.A. 9, 1910) the court further indicated that "the United States may, where the circumstances and conditions require it, reserve the waters of a river flowing through its public lands for a particular, beneficial purpose . . . ." [Emphasis added]

minimum level can be reserved on a national monument, a minimum flow may be reserved on an Indian reservation.

Arizona v. California, supra, itself, is also controlling on this point. The Supreme Court, in passing on the claims of the United States in that case, specifically held "We approve [the Special Master's] decision as to which claims required adjudication, and likewise we approve the decree he recommended for the government claims he did decide." 373 U.S. at 595. The Special Master, in discussing the government's claims to water for some eleven national forests involved in the case, held that they were established for the following purposes:

> (1) The protection of watersheds and the maintenance of natural flow in streams below the sheds; (2) production of timber; (3) production of forage for domestic animals; (4) protection and propagation of wildlife; and (5) recreation for the general public. Water is used for recreation, domestic purposes, irrigation and stock watering. Masters Report, page 96.

It seems only logical that if the Supreme Court has, by adopting the Special Master's findings, stated that these were purposes for which water rights could be reserved on national forest land and that the same principle applies to both Indian reservations and other federal lands, then it must follow that an Indian reservation could conceivably be created with some of these same purposes in mind.

As stated above, the test of the existence of a federal reserved right is the purpose for which the reservation was created. Implicit in the defendant's argument, then, is the assumption that all Indian reservations were created to turn the tribal members into farmers. A more unfounded assumption cannot be imagined.

There are many examples of reservations which were created for other than agricultural purposes.*/ The main reason for the choice of a given site was usually, of course, that the Indians had always lived there. Thus, there is usually a connection between

the historical life style of the tribe and the site chosen as its reservation. A few examples should suffice.

The United States created more than 13 Indian reservations in western Washington to be the homes of the western Washington tribes. These tribes were historically a fishing people and both the treaties entered into and the reservation sites plainly reveal an intention by the United States that the Indians retain their aboriginal fishing ways. See United States v. State of Washington, 384 F.Supp. 312 (USDC, WD Wash., 1974), affm'd 520 F.2d 676 (C.A. 9, 1975), cert. den. 423 U.S. 1086 (1976).

In 1859, the United States set aside for the use of certain Paiute Indians, the Pyramid Lake Indian Reservation in western Nevada. The reservation boundaries were drawn to narrowly include the lake and about 12 miles of the Truckee River. Several cases have held that the obvious purpose for the creation of the reservation was the fact that the Paiutes relied on the lake and river as a fishery. In United States v. Sturgeon, et al., 27 Fed. Cas. 1357 (USDC, Nevada, 1879), the Court stated:

> The president has set apart the reservation for the use of the Pah Utes and other Indians residing thereon. He has done this by authority of law. We know that the lake was included in the reservation, that it might be a fishing ground for the Indians. 27 Fed. Cas. 1357.

See also, United States v. Walker River Irr. Dist., et al., 104 F.2d 334, 338 (C.A. 9, 1939).**/

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*/ The treaties between the United States and the various Indian tribes have always focused on the needs and unique characteristics of each tribe. See Treaty with the Wyandot, January 21, 1785 (7 Stat. 16) and Treaty with the Cherokee, November 28, 1785 (7 Stat. 18) (reservations set aside for the Indians "to live and hunt upon."); Treaty with the Cherokee, October 25, 1805 (7 Stat. 93) (Cherokees to accept "useful articles of, and machines for agriculture and manufactures"); Treaty with the Utah, December 30, 1849 (9 Stat. 984)(Indians to "pursue such other industrial pursuits as will best promote their happiness and prosperity").

**/ The United States has filed a suit to establish a water right in the Truckee River for the maintenance and preservation of

That the United States Government has, in the past, validly reserved bodies of water for Indian fishing purposes has been declared by both the United States Supreme Court and the ninth circuit.

Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918), is a case directly on point. This was a suit by the United States to enjoin the Alaska Pacific Fisheries from maintaining an extensive fish trap just off of the Annette Islands in Alaska. The United States argued, inter alia, that the waters in which the trap was located were part of the Indian reservation, thus, that the defendants had no right to place the trap there. The Annette Islands had been set aside as a reservation for the Metlakahtla Islands by the Act of March 3, 1891 (26 Stat. 1101). The reservation was to consist of "the body of lands known as Annette Islands". The question thus presented to the Court was whether the reservation embraced only the upland of the islands or also included the adjacent waters and submerged land.

In answering this question, the Court first of all indicated the elements which should be considered in determining the nature and extent of any federal reservation of land.

> . . . it is important, in approaching a solution of the question stated, to have in mind the circumstances in which the reservation was created -- the power of Congress in the premises, the location and character of the islands, the situation and needs of the Indians and the object to be attained. 248 U.S. at 87.

Next, the Court addressed itself to whether Congress could make the type of reservation as advanced by the Government.

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**/ the Pyramid Lake fishery. For a history of the litigation to date, see United States v. Nevada, 412 U.S. 534 (1973); Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F.Supp. 252 (D.C. D.C., 1973); United States v. T.C.I.D., 71 F.R.D. 10 (USDC, Nevada, 1975).

It held that Congress did indeed have the power to make the reservation inclusive of the adjacent waters and submerged lands.

The question then became whether Congress had exercised this power. The Court held that it had. It noted that the Annette Islands, while bearing a fair supply of timber and a small portion of arable land, was mainly of value for settlement and inhabitance because of the salmon and other fish abundant in the adjacent waters. The Court found that the purpose for placing these Indians on this reservation was:

> [T]o establish an Indian colony which would be self-sustaining and reasonably free from the obstacles which attend the advancement of a primitive people. They are largely fishermen and hunters, accustomed to live from the returns of those vocations, and looked upon the islands as a suitable location for their colony, because the fishery adjacent to the shore would afford a primary means of subsistence and a promising opportunity for industrial and commercial development. 248 U.S. at 88

Thus the Court found:

> The purpose of creating the reservation was to encourage, assist and protect the Indians in their effort to train themselves to habits of industry, become self-sustaining and advance to the ways of civilized life . . . The Indians could not sustain themselves from the use of the upland alone. The use of the adjacent fishing grounds was equally essential. 248 U.S. at 89.

The Court held that since the adjacent fishing grounds were part of the reservation, the defendants' trap had to be removed.

To the same effect is Moore v. United States, 157 F.2d 760 (C.A. 9, 1946). In that case, the ninth circuit held that the Quillayute Reservation in the State of Washington included the bed and waters of the Quillayute River which were within the boundaries of the reservation and that thus the tribe had the exclusive right to fish in those waters. The Court, in the course of its opinion, reviewed the history of the creation of the reservation noting that the reservation "was not suited for agriculture, in which the Indians

had no experience". Further, it found that the Quillayute Tribe was highly developed industrially and commercially in fishing and whaling. 157 F.2d at 762. As a result, the court went on to hold that:

> President Cleveland, for the protection and expansion of their established industries, intended and did reserve to these Indians the sandspit, including its tribal lands, and the bed and waters of the Quillayute River, not only by the express reservation of its mouth, but also for the mile upwards from its mouth enclosed by the reservation lands . . . . 157 F.2d at 763

By the same token, the Agreement of August 18, 1877, reserved the exclusive right to hunt and fish within the exterior boundaries of their reservation to the Spokane Tribe. As this court recently held in Confederated Tribes of the Colville Indian Reservation v. State of Washington, No. C-75-146 (USDC, ED Wash., filed April 14, 1976):*/

> As a basic proposition it is clear that Indians traditionally enjoyed the exclusive right to hunt and fish on lands reserved to them, unless such rights were clearly relinquished by treaty. Menominee Tribe v. United States, 391 U.S. 404 (1968); Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918); Kimball v. Callahan, 493 F.2d 564 (9th Cir., 1974) cert. denied, 419 U.S. 1019 (1975); United States v. State of Washington, 384 F.Supp. 312 (W.D. Wash. 1974) aff'd. ___ F.2d ___ (9th Cir., June 4, 1975). This right is implied where not explicitly mentioned in the agreement establishing a reservation, for such agreements are not grants of rights to the Indians, but rather a reservation of rights already possessed by them and not granted away. United States v. Winans, 198 U.S. 371 (1905) . . . . Further, this right is extant whether the reservation is created by executive order or established by treaty. United States v. Walker River Irrigation District, 104 F.2d 334 (9th Cir., 1939) (citations omitted). Slip Opinion p. 5.

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*/ Cited with approval in Eastern Band of Cherokee Indians v. North Carolina Dept. of Natural and Economic Resources, Civ. No. BC-C-76-65 (USDC, WD, N.C., filed August 27, 1976) Slip Opinion p. 11.

From this, it must necessarily follow that the tribe would be guaranteed enough water (or minimum flow) in the water courses on the reservation, to keep the fisheries viable. An exclusive fishing right would be a hollow one if the fishery could be destroyed at the whim of an adjacent or upstream landowner who wanted to put the water to other uses.

It is equally clear that the interest of the United States in creating a permanent home for the Spokane Indians went beyond merely providing for the economic well being of the tribe (i.e. water for irrigation and to preserve the fishery). Implicit in the notion of a "home" is that it will be a pleasant place to live. The Supreme Court has repeatedly held that the zone of legitimate government interest may include:

> . . . values . . . (which) are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully patrolled. Berman v. Parker, 348 U.S. 26, 33 (1954). See also Construction Ind. Assn., Sonoma Co. v. City of Petaluma, 522 F.2d 897 (C.A. 9, 1975).

If government may show these concerns on behalf of non-Indian communities, it certainly can show the same concerns toward Indian communities.

It is indeed strange for the State of Washington and its citizens to argue that the United States cannot reserve water for fishery, recreational and esthetic purposes. The state itself recognizes these uses as beneficial and worthy of protection.*/ The Water Resources Act of 1971, RCW 90.54.020 sets forth legislative guidelines and provides that the:

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*/ Most of the western states now recognize these uses as beneficial. W. Hutchins, Selected Problems in the Law of Water Rights in the West 314 (1942).

Utilization and management of the waters of the State shall be guided by the following general declaration of fundamentals:

(1) Uses of water for domestic, stock watering, industrial, commercial, agricultural, irrigation, hydroelectric power production, mining, fish and wildlife maintenance and enhancement, recreational, and thermal power production purposes, and preservation of environmental and aesthetic values, and all other uses compatible with the enjoyment of the public waters of the State, are declared to be beneficial.

* * *

(3) The quality of the natural environment shall be protected and, where posible, enhanced as follows:

(a) Perennial rivers and streams of the State shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values. Lakes and ponds shall be retained substantially in their natural condition. Withdrawals of water which would conflict therewith shall be authorized only in those situations where it is clear that overriding consideration of the public interest will be served. [Emphasis added]*/

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*/ Wash. Rev. Code Sec. 90.22.010 which was enacted in 1969 stated that:

> The department of water resources may establish minimum water flows or levels for streams, lakes or other public water for the purposes of protecting fish, game, birds or other wildlife resources, or recreational or aesthetic values of said public waters whenever it appears to be in the public interest to establish the same. [Emphasis added]

The Water Resources Act replaced the permissive "may" with the admonition "shall". R.C.W. Sec. 90.54.020(3).

> (5) Multiple-purpose impoundment structures are to be preferred over single-purpose structures. Due regard shall be given to means and methods for protection of fishery resources in the planning for and construction of water impoundment structures and other artificial obstructions.

Another act of significance is the State Environmental Policy Act of 1971, RCW 43,21C.020, which declares, among other things:

* * *

> (2) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the State of Washington and all agencies of the State to use all practicable means, consistent with other essential considerations of State policy, to improve and coordinate plans, functions, programs, and resources to the end that the State and its citizens may:
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> * * *
>
> (b) Assure for all people of Washington safe, healthful, productive, and esthetically and culturally pleasing surroundings;
>
> * * *
>
> (d) Preserve important historic, cultural, and natural aspects of our national heritage;

Indeed, the state itself has recognized the need for a minimum flow in Lower Chamokane Creek. (PE-41; PE-41A; PE-87) While the United States and the tribe will show that the state's proposed 20 cfs minimum flow is arbitrary and unreasonably low, nonetheless, the state must be said to be in agreement with the basic premise of the plaintiffs - that Chamokane Creek must be preserved and protected.

Perhaps this would be an appropriate place to point out that the benefits which will result from the 30 cfs minimum flow are not restricted to preservation and maintenance of the fishery and recreational-esthetic purposes. The flow will also be beneficial in that it will provide water power for the generation of electricity at Little Falls Dam and other down stream sites. Water power

has been recognized as a resource title to which passes to the Indians along with the rest of the reservation. In United States v. Walker River Irr. Dist., 104 F.2d 334, 338 (C.A. 9, 1939), the Court noted:

> It was pointed out in the illuminating opinion of Attorney General (now Justice) Stone of May 12, 1924 (Opinions of Attorneys General, vol. 34, p. 171), that doubts whether the reservation of lands for the Indians included rights to hidden or latent resources, such as minerals, petroleum or water power, have, as a practical matter, uniformly been resolved in favor of the Indians. [Emphasis added]

See also, Treaty with the Ute, March 2, 1868 (15 Stat. 619) (United States agreed to provide reservation Indians with "a good water-power saw-mill"); 35 Stat. 796, 36 Stat. 455, 36 Stat. 855 (Secretary of the Interior authorized to withhold power sites on Indian reservations from allotment or other disposal); Act of December 16, 1926 (44 Stat. 922) which excluded "lands containing . . . bodies of water needed or used by the Indians for watering livestock, irrigation, or water-power purposes . . ." from entry under the mining laws.

Certainly, agricultural needs have figured predominantly in the application of federal reserved rights to Indian reservations. It must be remembered, however, that the test is whether a reservation of water would be required to fulfill the purposes for which the reservation was created. Since the Spokane Reservation was created to provide a "permanent home" for the tribe, there must have been an intent to reserve enough water to develop the reservation as a home which would include the irrigation of land, development of minerals, preservation of the environment for game and fish and preservation of the environment for recreational and esthetic purposes.

Finally, it should be noted that fish continue to be a large part of the diet of most Spokane Indians. Some tribal members

still smoke and dry fish and use them as their staple food item. Virtually every male member of the Spokane Tribe has fished or will fish on the reservation sometime during his lifetime. (Tr. 763, 809, 828)

Similarly, early efforts to turn the Indians' attention to farming were for the most part unsuccessful due to the problems involved with clearing the land and bringing in irrigation water. While individual Indians have, in some instances, managed to get small plots of ground under cultivation, it has not been until recently that large scale agricultural development has been financially possible. (Tr. 688, 696, 719)

(c) A minimum flow of 30 cfs in Lower Chamokane Creek is necessary to preserve and maintain the fishery and the creek's recreational and esthetic values.

Mr. Richard J. Navarre, Assistant Program Manager of the Northwest Fisheries Program, United States Fish and Wildlife Service, and the only witness to have actually studied the Chamokane Creek fishery, testified that in order to preserve and maintain the fishery in Lower Chamokane Creek, a minimum flow of 30 cfs would be required. (Tr. 453, L. 6 to L. 9; PE-64) In addition, Mr. Walt Woodward testified that a minimum flow of 30 cfs would be required for recreational and esthetic purposes. (Tr. 178, L. 24 to Tr. 179 L. 19).

Historically, Chamokane Creek was the spawning grounds of salmon and steelhead trout as well as the permanent home for several species of native trout and other fish. Presently, the creek is inhabited by German brown trout, rainbow trout and eastern brook trout, as well as several varities of suckers and sculpins. (Tr. 463-465, 675, 695; PE-64, p. 20-22)

The numbers and volume of organisms in Chamokane Creek which can be utilized by trout as food compare favorably with those found in other streams containing sizeable trout populations. Any

reduction in flow in the creek during the summer, however, will expose areas of the stream thus reducing the food production potential. (Tr. 426, 430, 450, 491; PE-64, p. 20)

The temperature of the water flowing in Chamokane Creek is inversely proportional to the volume, i.e. other factors remaining constant, more water means a lower temperature. The water temperature is normally a fairly constant 47° F. at the springs and begins to rise as the water moves downstream. During the period July 18, to August 1, 1973, the maximum water temperature in lower Chamokane Creek exceeded 68° F. on nine days. Of these nine days, seven had daily flow averages of 20 cfs or below and two had daily flow averages of 20 cfs or above. During this same period, the temperature of 60° F. was exceeded in lower Chamokane Creek every day. (Tr. 174, 451-452, 483, 772-773; PE-64, pp. 5-14, 18)

Trout of the species found in Chamokane Creek have an optimum temperature range of 50° F. to 60° F. Within this range, trout will grow and put on weight. The maximum water temperature for a successful trout habitat is 68° F. When water temperatures rise above 66° F., trout cease feeding. As the water temperature rises above 68° F., trout metabolism begins to increase and the fish begin to undergo physiological stress. As the stress increases, the trout are no longer able to maintain their position in the creek and are forced down stream, many of them eventually ending up in the Spokane River. Once in the Spokane River, most of the fish are unable to reenter Chamokane Creek and those which do are not able to once again get above the falls. The virulency of trout disease also increases above 60° F. (Tr. 440-446; PE-64, p. 13)

At present, higher than desirable water temperatures exist mainly in lower Chamokane Creek from the mouth of the stream to the falls. There is a noticeable lack of trout in that area of the creek as a result of the excessive water temperature in spite of the existence of pools and an abundant food supply. (Tr. 439, 502, 519)

Chamokane Creek contains high quality water more than adequate to support a trout fishery. (Tr. 134, 450, 491; PE-64, pp. 14, 19)

In order to maintain a water temperature lower than 68° F. in lower Chamokane Creek, an average daily minimum flow of 30 cfs will be required. A minimum flow of 30 cfs would also insure the protection of the entire creek in terms of food production areas and would provide the living space necessary for an optimum trout fishery. (Tr. 453-454, 505, 519, 532, 537)

Since 1970, the fishing in lower Chamokane Creek has deteriorated until, at present, the number of trout taken is about one-half of what it was in 1970. (Tr. 796)

Chamokane Creek remains today a scenic, rushing stream of pure water which plunges through a beautiful gorge over rapids and picturesque falls. In addition to its use as a fresh water fishing area, it is used for hunting, picnicing and other recreational purposes by both Indians and non-Indians. It has the potential for campground development. The Spokane Tribe recognizes that the Chamokane Creek area is the only undeveloped area of the reservation capable of long term recreational development and has acted through its tribal council to keep the area in its natural state as long as possible. (Tr. 115, 172, 677, 732, 780; Spokane Tribe's Reconstruction of Record, p. 5; PE-27; PE-37; PE-81)

The use of Chamokane Creek for recreational activities including fishing, hunting, picnicing, camping and other activities as well as maintenance of the creek for its esthetic value is the highest and best use that could be made of the creek. (Tr. 178)

An average daily minimum flow of 30 cfs is required to maintain lower Chamokane Creek for its recreational and esthetic purposes and uses. (Tr. 179)

There are no feasible alternatives to the establishment of a 30 cfs average daily minimum flow in lower Chamokane Creek. The planting of a legal sized trout is not acceptable over the long term because of the high costs involved, availability of fish and the fact that native trout are a better game fish. (Tr. 621, 646; PE-42)

Indeed, the State of Washington itself is on record as supporting the establishment of a minimum flow in lower Chamokane Creek for fishery, recreational and esthetic purposes. In a letter dated August 18, 1969, from Don Earnest, Regional Fisheries Biologist, Department of Game to John Ward, Game Biologist, Mr. Earnest stated that Chamokane Creek was one of the best, unspoiled trout streams in eastern Washington and that "the esthetic values as well as the fishery resource should be preserved." He also noted that the 20 cfs minimum flow proposed by the state was "of course, an arbitrary one". (DE-3) In a letter dated August 22, 1969, to Mr. Glen H. Fiedler, Division of Water Management from the Directors of the State Departments of Game and Fisheries, Chamokane Creek was again praised as "one of the best unspoiled trout streams in this portion of the state." A minimum flow was requested in order to perpetuate this "valuable fishery". The state has, in fact, begun implementation of the minimum flow concept in that the Smithpeter permit contains the provision that diversions will cease when the flow of lower Chamokane drops below 20 cfs. (PE-87; DE-2).

A 30 cfs minimum stream flow in lower Chamokane Creek is certainly necessary as testified to by Mr. Navarre and Mr. Woodward. Without this flow, the fishery cannot be maintained and the recreational and esthetic values of the area will be endangered. The United States Supreme Court has held that the implied reservation of water doctrine reserves only that amount of water necessary to fulfill the purpose of the reservation and no more. Cappaert, supra,

48 L. Ed. 2d at 535. The preponderance of the evidence presented at the trial of this case supports the contention that a minimum flow of 30 cfs is necessary for one of the primary purposes for which the Spokane Indian Reservation was created.

(d) The priority date for the 30 cfs minimum flow in lower Chamokane is time immemorial.

Normally, the priority date of a federal reserved right for an Indian Reservation is the date of the creation of that reservation. Arizona v. California, 373 U.S. at 600. It has been held, however, that in addition to the water reserved by the Federal Government upon creation of the Indian Reservation, some tribes may have established an aboriginal, or immemorial water right by use prior to the acquisition of sovereign authority by the United States. This aboriginal right is a right to continue using water as it was used by the Indians in their aboriginal state from time immemorial. Such a right has been found to exist by the United States District Court in United States v. Gila Valley Irr. Dist., et al., Globe Equity No. 59 (USDC, Arizona, June 29, 1935). In that case, the court decreed to the United States on behalf of the Pima-Maricopa Indian Tribe, a right to 210,000 acre-feet with a priority date of time immemorial. (Decree, pp. 14, 86)*/

In this case, the minimum flow for fishery, recreational and esthetic purposes is a use which antedates the creation of the Spokane Indian Reservation. The priority date, therefore, is time immemorial. Should this court find that the time immemorial priority date is not appropriate in this instance, then the date would be, of course, August 18, 1877.

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*/ See generally, Ranquist, The Winters Doctrine and How it Grew: Federal Reservation of Rights to the use of water, 1975 Brigham Young University L. Rev. 639, 662 (1975).

3. The Agreement of August 18, 1877, also reserved the water rights necessary to irrigate the irrigable acreage within the Chamokane Creek basin portion of the Spokane Reservation.

(a) The United States and the Spokane Tribe intended to reserve sufficient water to irrigate the irrigable acreage.

The testimony and the exhibits received into evidence in this case plainly establish that one of the purposes for the creation of the Spokane Reservation was to provide the Indians with land suitable for farming. The Spokane Indians did not engage in agricultural pursuits in aboriginal times. They were mainly a hunting, fishing and a gathering people. With the movement of non-Indians into the Spokane's traditional food gathering areas in the mid-1800s, both the tribe and the government came to realize that only through a combination of traditional food gathering practices and farming could the tribe hope to survive.

The fact that it was intended the tribal members would gradually shift some of their efforts toward agriculture is evident from the language of the Agreement of August 18, 1877. By the terms of that agreement, the government agreed to the creation of the Spokane Reservation and the tribe agreed "to go upon the same by the first of November next, with the view of establishing our permanent homes thereon and engaging in agricultural pursuits." (PE-63) A clearer statement of at least one of the purposes for the creation of this reservation cannot be imagined.

Furthermore, in accepting the limited area of the reservation, the tribe was giving up the use of its much larger aboriginal territory. That meant food sources previously utilized would no longer be available. In order to make up for this loss of food resources, both the government and the tribe knew that the Indians would have to eventually turn at least in part to agriculture. They also knew that the land of the Spokane Reservation was generally

arid and would require the application of irrigation water in order to become productive. Therefore, the government and the tribe must have intended to reserve sufficient water for that purpose. See, Winters v. United States, 207 U.S. at 576.

(b) A federal reserved right may extend to the irrigable acreage of an Indian Reservation.

As the defendants have correctly noted,*/ the reservation of water rights under the Federal Reserved Rights Doctrine for the irrigation of land within an Indian reservation has long been recognized by the federal courts. The test of the existence of the right has been consistently held to be whether at least one of the purposes for the creation of the reservation was to provide land which the Indians could farm. If it were intended that the land should be farmed and if the land was in fact arid, then the courts have held that there was an implied intention to reserve sufficient water to irrigate that land. Winters v. United States, 207 U.S. 564, 576-577 (1908); Conrad Inv. Co. v. United States, 161 Fed. 829, 831-832 (C.A. 9, 1908); Skeem v. United States, 273 Fed. 93, 95 (C.A. 9, 1921); United States v. Parkins, 18 F.2d 642, 643 (USDC, Wyo., 1926); United States v. Hibner, 27 F.2d 909, 911 (USDC, Idaho, 1928).

The controlling authority is Arizona v. California, 373 U.S. 546 (1963). That case began before the United States Supreme Court as an original action by the State of Arizona against the State of California over how much water each state had a right to use out of the Colorado River and its tributaries. The United States, as well as the States of Nevada, New Mexico, and Utah, later intervened. A special master was appointed who conducted a trial and filed a report of his findings. The United States claimed

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*/ Memorandum of Authorities of Defendant Boise Cascade Corp., p. 1-4.

water for both federally owned land and a number of Indian reservations although, as to the latter, only the rights of the Chemehuevi, Cocopah, Yuma, Colorado River and Fort Mojave Reservations were actually determined. The claim made on behalf of the Indian reservations was for sufficient water to irrigate the irrigable acreage on the reservations. In sustaining these claims,*/ the Special Master described the nature of the water right he was finding to exist to the benefit of the Indian reservations:

> I have concluded that enough water was reserved to satisfy the future expanding agricultural and related water needs of each Indian Reservation. Invariably the United States intended that the Indian Tribes settled on a Reservation would remain there for generations, and the possibility that other Indians would be settled on the Reservation could not be excluded. Certainly the possibility of expanding populations, expanding agricultural development, and hence expanding water needs must have been apparent at the time each Reservation was created.
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> * * *
>
> This brings us to the question of quantity. This is sharply debated, and many conflicting views have been advanced. I have concluded that the United States effectuated the intention to provide for the future needs of the Indians by reserving sufficient water to irrigate all of the practicably irrigable lands in a Reservation and to supply related stock and domestic uses. The magnitude of the water rights created by the United States is measured by the amount of irrigable land set aside within a Reservation, not by the number of Indians inhabiting it. (Master's Report, pp. 260, 262)

The Supreme Court agreed:

> We also agree with the Master's conclusion as to the quantity of water intended to be reserved. He found that the water was intended to satisfy the future as well as the present needs of the Indian Reservations and ruled that enough water was reserved to irrigate all the practicably irrigable acreage on the reservations . . . . We have concluded, as

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*/ Arizona v. California, Master's Report, p. 257.

> did the Master, that the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage. Arizona v. California, 373 U.S. 600-601

Thus, the quantification of a federal reserved right for irrigation purposes takes place by determining: (1) the amount of acreage on the reservation which is "practicably irrigable" and (2) the number of acre-feet of water per acre it will take to grow crops on that acreage. The term "practicably irrigable" has not been specifically defined by either the Supreme Court or any other court but it is suggested that the meaning of the term is evident from Arizona v. California, itself. In his findings of fact regarding the rights of the Indian reservations, the Special Master fixed the quantum of each right as a stated maximum annual diversion requirement in acre-feet for the irrigation of a stated number of acres of "irrigable Reservation land". The evidence which the Master cites*/ to support his number of irrigable acres and the resultant diversion requirement largely consists of tables which show how the diversion requirements are computed (U.S. Exhibits 570, 1009, 1121 and 1210). These tables show the water source, the net area on which consumptive use is computed (or the net area of irrigable land as determined by the soil classification surveys), the consumptive use, and the amount of water to be diverted to achieve the consumptive use requirement. Arizona v. California, transcript pp. 14,468-14,474. Further, in making its presentation as to the irrigable acreage on each of the reservations, the United States relied chiefly on two types of exhibits. One was a map showing the results of the soil classification survey (soil classes I-IV) and the other was a map showing irrigated and irrigable land or the potential reservation irrigation project. In each case involving these reservations, the area of the irrigable acreage was found to coincide exactly with the class I, II, III and IV land.

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*/ Master's Report, pp. 267-283.

See, U.S. Exhibits 1006, 1007, 560; 561; 1317; 1318; 1207, 1208.

Summarizing it is readily apparent from the Supreme Court's opinion in Arizona v. California, and from the Master's Report, both viewed in the context of the record in the case, that the following points are the law with regard to the quantum of a federal reserved right for irrigation purposes on an Indian reservation:

> 1. The right is based on irrigable acreage and not on the extent of actual irrigation at any given point in time, the Tribes plans to irrigate (or lack thereof) or any other factor. Arizona v. California, 373 U.S. at 600
>
> 2. To establish the irrigable acreage, it need only be shown that the land is arable soil to which water is delivered or can be delivered and which is or can be made capable of producing crops by the construction of those facilities necessary for sustained irrigation.
>
> (c) The United States has a right to 25,380 acre-feet of water per year for the irrigation of 8,460 acres.

The character and topography of the Chamokane Creek basin portion of the Spokane Indian Reservation are such that there are two tracts of irrigable land upon which water will be required: (1) a tract of 1,880 acres below elevation 2,100 feet (bottom land) and (2) a tract of about 6,580 acres above elevation 2,100 feet (bench land). (Tr. 108, 111-113, 224, 559, 562; PE-11; PE-12; PE-34)

With regard to the bottom land, the evidence introduced at the trial established that there are 1,880 acres lying below elevation 2,100 feet which are of soil class III and IV and therefore, are suitable for the growing of crops if irrigated. (PE-34)

The bench land consists of 6,580 acres which is mainly soil class II. (PE-34)

Crops suitable for growing on the irrigable land within the Chamokane Creek basin include small grains and hay above elevation 2,200 feet and hay and corn below elevation 2,200 feet. (Tr. 283, 570, 583)

The lands upon which the ground water of the Chamokane Creek basin and surface waters of the Chamokane Creek and its tributaries are to be used lie in an arid region of the United States. In order to make these lands productive, irrigation thereof is necessary. These lands vary somewhat in texture, terrain, crop use and other factors which affect the amount of water necessary to irrigate different portions of these lands. For proper irrigation and crop productivity during the irrigation season, varying quantities of water per acre should be applied to the land not to exceed three acre-feet per acre during the irrigation season. (Tr. 113)

Based upon a maximum requirement of three acre-feet per acre, the irrigable land on the reservation above elevation 2,100 feet will require a maximum of 19,740 acre-feet and the land below elevation 2,100 feet a maximum of 5,640 acre-feet. This makes a total irrigation requirement of 25,380 acre-feet or approximately 34.7 cfs. (Tr. 114)

The 1880 acres of bottom and 6,580 acres of bench land which are owned by the United States for the benefit of the Indians are similar to land now being successfully irrigated by defendants east of Chamokane Creek using either surface water from Chamokane Creek or ground water from the basin. The irrigation of these Indian lands using these same sources is as logical as any existing withdrawals or diversions. The Indian lands could be irrigated from either the Spokane River or from the surface and ground waters of the Chamokane Creek basin. Due to the distance involved in bringing water from the Spokane River and the relative proximity of the land to the surface waters and ground waters of the Chamokane Creek basin, it is more economically feasible to irrigate using the Chamokane Creek basin waters. It would be economically feasible to irrigate these Indian lands from the surface water and ground water of the Chamokane Creek basin. (Tr. 144, 178, 227, 284, 583, 852-855; PE- 3-6-74-29, pp. 4, 53)

Thus, the evidence establishes that the practicably irrigable acreage within the Chamokane Creek basin portion of the Spokane Reservation consists of a total of 8,460 acres with a total per year water requirement of 25,380 acre-feet.

(d) The priority date for the entire 8,460 acres is the date the Spokane Reservation was created, August 18, 1877.

The priority date for federal reserved water rights on Indian reservations (other than aboriginal uses) is the date of the creation of the reservation. Arizona v. California, 373 U.S. at 600. Since the Spokane Reservation was created on August 18, 1877, the priority date for its irrigation right is that date (see Section IIB1 above).

The defendants, however, have suggested that the United States has shown no right to water for irrigation since it has not established a "chain of title" for the federal ownership of the irrigable land from the date of the establishment of the reservation. They urge that several "changes in status" of reservation land has resulted in later priority dates for that land. They contend that unless the government can establish the priority date for each given parcel of land based upon its unique circumstances, the government should get no water right whatsoever.*/

Before dealing with these contentions, it may be useful to review the history of the land status of the Spokane Indian Reservation.

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*/ Memorandum of State of Washington, Department of Ecology, in support of motion to dismiss, dated May 30, 1974. Brief of defendant, State of Washington, Department of Natural Resources in support of motion to dismiss. Memorandum of defendant Boise Cascade in support of motion to dismiss.

The Spokane Indian Reservation, as set aside on August 18, 1877, contained approximately 154,898 acres. This land was held in trust by the United States for the use and benefit of the Spokane Tribe under 25 U.S.C. 177. By the beginning of the Twentieth Century, however, the government had begun to make inroads on the property rights as reserved for the Indians. By the Act of May 27, 1902 (32 Stat. 266), the mineral lands on the Spokane Reservation were opened to entry by non-Indians. Lands allotted to Indians, used by the government or used for school purposes were excluded. This act was amended by the Act of June 19, 1902 (32 Stat. 744), which directed the Secretary of the Interior to make allotments on the Spokane Reservation and to open the remainder of the reservation to purchase under the mining laws. There is no evidence that allotments actually took place under this act. (PE-46; PE-47; DE-28, p. 987)

On May 29, 1908, Congress passed Public Law 157 which was entitled "An Act to authorize the Secretary of the Interior to sell and dispose of the surplus, unallotted agricultural lands of the Spokane Indian Reservation, Washington, and for other purposes." (35 Stat. 458). Under the provisions of that act, the Secretary of the Interior was authorized and directed to cause allotments of land to be made on the Spokane Reservation. After the completion of the allotment process, the Secretary was to see that the surplus land was classified as either agricultural or timber. The land classified as agricultural was then to be opened to non-Indian settlement under the provisions of the homestead laws under conditions as prescribed by the President. The land classified as timber land was to remain in trust for the benefit of the tribe. The act closed with the provision that "nothing in this Act shall be construed to deprive said Indians of the Spokane Indian Reservation, in the State of Washington, of any benefits to which they are entitled under existing treaties or agreements not inconsistent

with the provisions of this Act." Pursuant to this act, allotments of land were made to individual Indians, the land to be held in trust by the United States for their benefit. Allotments were made to approximately 600 individuals, encompassing between 60,000 and 70,000 acres. The Commissioner of Indian Affairs, acting for the Secretary of the Interior then ordered that the remaining land be classified as either timber or agricultural. On June 15, 1909, Clair Hunt and M.F. Nourse, the classification commissioners, submitted their report to the Commissioner of Indian Affairs. In this report, they classified 82,647.5 acres as timberland and 5,781.22 acres as agricultural. Most of the agricultural land was located on the eastern portion of the reservation. In a letter dated June 15, 1909, which accompanied the surplus land classification schedule to the Commissioner of Indian Affairs, the Commissioners explained how they arrived at their final acreage figures. They stated that they had relied mainly on two sources of data, a soil survey and Forest Service input. The Forest Service's contribution was apparently limited to its opinion that the land eventually described as agricultural was not suitable for inclusion in a forest reserve. No detailed soil classification study as we know them today was attempted nor was any consideration given to the possibility of irrigating the land. (Tr. 812-813, 1346; PE-44; PE-101, PE-102)

On May 22, 1909, President Taft issued a proclamation (36 Stat., Part 2, 2494) in which the procedures were specified whereby the non-mineral, unallotted lands classified as agricultural within the Spokane Reservation were opened to homesteading. In the years that followed, several non-Indian families purchased tracts of this land receiving patents from the United States. Not all of the land eligible for homesteading, however, was claimed. (Tr. 1338; PE-43)

On September 19, 1934, Secretary of the Interior Harold L. Ickes approved a recommendation that the undisposed of land on the Spokane Reservation, among others, be temporarily withdrawn from disposal. This action was evidently taken so that the matter of the lands permanent restoration to tribal ownership could be given consideration with reference to the Indian Reorganization Act, Act of June 18, 1934 (43 Stat. 984). See 54 I.D. 559, 562-563.

By the Act of May 19, 1958, (72 Stat. 121), the land on the Spokane Reservation which had been eligible for homesteading but which had never been claimed was restored to tribal ownership. Under this act, 77 acres were restored to tribal ownership within the Chamokane Creek basin. (Tr. 813, 1338; PE-98; PE-99)

At no time during the period 1909 to 1958 was there any difference in the management, administration or crediting of revenues by the Bureau of Indian Affairs between the unhomesteaded land and general tribal land. Unhomesteaded land was treated the same as general tribal land. (Tr. 904; Response of the United States to Defendant's Reconstruction of the Record, p. 2)

Subsequent to the allotment of land to individual Indians, a limited amount of this land was sold to non-Indians. Beginning in the 1930s, the Spokane Tribe undertook a program of purchasing allotments which belonged to individual Indians and had remained in trust status, allotments which had passed to non-Indian ownership and also purchasing land which had been homesteaded. By the Act of June 10, 1968 (82 Stat. 174), as amended by the Act of May 21, 1974 (88 Stat. 142 [25 U.S.C. 487]), the Secretary of the Interior was authorized to purchase for the tribe, lands within the Spokane Reservation. The purchased land is returned to trust status where necessary. Under this act, approximately 2,523.44 acres have been returned to the tribe and trust status and of this amount, 1,798.11 acres are within the Chamokane Creek basin. Once returned to trust

status, this land is managed the same as any other tribally owned land. (Tr. 814, 1339-1341; PE-97; PE-99)

As of June 1, 1974, the land status of the Spokane Reservation was as follows:

Tribal Trust	100,221A
Individual Trust	29,640A
Fee Ownership	21,683A
Government under Administration by BIA for Tribe	3,085A

(Tr. 1343; PE-100)

Thus, it is evident from the foregoing that the issue of the priority date for irrigable land concerns chiefly three categories of land: (1) land which became part of the reservation in 1877 and which has remained in that status to the present; (2) land which was opened to to homestead under the Act of May 29, 1908, was not claimed and was "restored" to tribal ownership by the Act of May 19, 1958; (3) land which was either sold to a non-Indian by an Indian allottee or homesteaded and later repurchased by the tribe and returned to trust status under 25 U.S.C. 487. Each of these categories will be dealt with individually.

(1) The vast majority of the acres claimed as irrigable have remained in trust status since the reservation was created in 1877.

The Spokane Indian Reservation, as originally created, was entirely held in trust by the United States for the benefit of the Spokane Indians. 25 U.S.C. 177. The extinguishment of Indian property rights can only be done pursuant to an act of Congress. Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 667-670 (1974); United States v. Santa Fe Pacific Railroad Co., 314 U.S. 339, 347 (1941); Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99, 119 (1960); United States v. Ahtanum Irrigation District, 236 F.2d 321, 334 (C.A. 9, 1956), cert. den. 352 U.S. 988. Even

when Congress acts, extinguishments of Indian rights must be express, they will never be implied. DeCoteau v. District County Court, 420 U.S. 425, 444-445 (1975); Mattz v. Arnett, 412 U.S. 481, 504-505 (1973); Menominee Tribe v. United States, 391 U.S. 404, 413 (1968).

The evidence in this case clearly establishes that most of the acreage claimed as irrigable became part of the reservation in 1877 and has continued in that status until this day. Plaintiffs exhibits 63 (Agreement of August 18, 1877) and 52 (Executive Order of January 18, 1881) establish the original boundaries of the Spokane Reservation. Plaintiff's exhibit 34 shows that the land claimed as irrigable is within the boundaries of the reservation. Plaintiff's exhibits 99 and 100 show that most of the land claimed as irrigable is land which is presently held in trust by the United States and was neither formerly opened to homestead nor formerly non-Indian owned. Thus, except as to that land which has been identified as formerly opened to homestead or formerly non-Indian owned, there is no evidence in the record that the acreage claimed as irrigable has been in anything but trust status since 1877. Once title to or ownership of property is shown to have existed in a particular person at a particular time, the title or ownership is presumed to continue to exist until such time as it appears from the evidence that such person was divested of it by his own act or by operation of law. Old Salem Chautaugua Asso. v. Illinois Dist. Council of Assembly of God, 16 Ill. 2d 470, 158 NE 2d 38, 41 (Ill., 1959), cert. den. 361 U.S. 864. See also Bean v. Morris, 221 U.S. 485 (1911). Therefore, until a given parcel of land is shown to have suffered a break in the chain of title from 1877 to the present, the land must be considered to have a water right priority date of August 18, 1877. That date will attach to the bulk of the 8,460 acres claimed as irrigable.

The evidence does indicate that a small portion of the irrigable land may have been in other than trust status since 1877. These two possible changes in land status will be discussed in turn.

(2) The priority date for the reservation land which was opened for homesteading but never claimed is August 18, 1877.

There are only 77 acres of land within the Chamokane Creek basin portion of the Spokane Reservation which were opened to homesteading under the Act of May 29, 1908, (35 Stat. 548), were never claimed and were restored to tribal ownership under the Act of May 19, 1958 (72 Stat. 121). (PE-98, PE-99) Of these 77 acres, only 28.7 acres are claimed as irrigable.*/ (PE-34, PE-98, PE-99) It would produce an undue administrative burden to single 28.7 acres out of 8,460 acres for special treatment. On this basis alone, this court should include the 28.7 acres among the land with an August 18, 1877 priority date.

In any event, the August 18, 1877, priority date is the proper one. At the outset, it must be remembered that "when Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress." United States v. Celestine, 215 U.S. 278, 285 (1909). The question here is whether the Act of May 29, 1908 "separated" the land opened to homestead from the reservation or whether the "separation" only took place if and when a non-Indian settler received a patent for the land.

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*/ The two parcels claimed as irrigable are described as:

NW1/4NE1/4NE1/4 sec. 24, T. 28 N., R. 39 E. (10 acres)

Lot 5, sec. 23, T. 29 N., R. 40 E. (18.7 acres)

The 48.3 acre parcel is not irrigable. See, PE-98, PE-34.

Under the Act of May 29, 1908, the Secretary of the Interior was authorized to make allotments to the Spokane Indians and then to "classify the surplus lands as agricultural and timber lands, the agricultural lands to be opened to settlement and entry . . ." (Section 2). Section 7 of that act provides:

> That nothing in this act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six of the agricultural lands or the equivalent in each township, or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this act that the United States shall act as trustee for said Indians to dispose of the said lands and to expend and pay over the proceeds received from the sale thereof only as received as herein provided: Provided, That nothing in this act shall be construed to deprive said Indians of the Spokane Indian Reservation, in the State of Washington, of any benefits to which they are entitled under existing treaties or agreements not inconsistent with the provisions of this act.

The United States Supreme Court has consistently held that acts such as this one which merely "open" the reservations to settlement and entry do not affect the title or status of the land until actual settlement or entry is made. Three cases are particularly on point.

In Ash Sheep Co. v. United States, 252 U.S. 159 (1920), the factual situation was as follows. In 1899, the United States had negotiated an agreement with the Crow Tribe, by which the tribe agreed to "cede, grant and relinquish" to the United States, for a lump sum, a portion of its reservation in Montana, 33 Stat. 352-356. In 1904, however, Congress unilaterally "amended and modified" the unratified 1899 Agreement to include an uncertain-sum-in-trust provision, 33 Stat. 361 (Section 6), and a trusteeship provision, 33 Stat. 361 (Section 8), while retaining the "cede, grant and relinquish" language of the 1899 Agreement. The land was opened by Presidential Proclamation in 1906, 34 Stat. (Part III) 3200, and much of the land was disposed of.

In 1913, the Ash Sheep Company sought to graze sheep on the unallotted lands opened for settlement without compliance with Interior Department regulations, claiming that the Act of 1904 had diminished the reservation and converted the land affected into "public land". The Supreme Court disagreed, stating (252 U.S. 165-166):

> It is obvious that the relation thus established by the act between the Government and the tribe of Indians was essentially that of trustee and beneficiary and that the agreement contained many features appropriate to a trust agreement to sell lands and devote the proceeds to the interests of the cestui que trust. Minnesota v. Hitchcock, 185 U.S. 373, 394, 398.
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> * * *
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> Taking all of the provisions of the agreement together we cannot doubt that while the Indians by the agreement released their possessory right to the Government, the owner of the fee, so that, as their trustee, it could make perfect title to purchasers, nevertheless, until sales should be made any benefits which might be derived from the use of the lands would belong to the beneficiaries and not to the trustee, and that they did not become 'Public lands' in the sense of being subject to sale, or other disposition, under the general land laws. [Emphasis added]

Thus, the Presidential Proclamation of 1906 had not automatically removed the Indian lands from trust status.

To the same affect is Minnesota v. Hitchcock, 185 U.S. 373 (1902). Minnesota had sued to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from selling any sections 16 and 36 on the Red Lake Indian Reservation. The case turned on whether a cession-in-trust to the government by the Chippewa Indians of Indian land for resale gave Minnesota the right to sections 16 and 36. The Enabling Act admitting Minnesota to the Union, provided that the state was entitled to sections 16 and 36 from all "public lands" within the state for schools. The Supreme

Court concluded that the land in question had never been restored to the public domain because the cession was in trust and the proceeds from uncertain future sales were to be deposited in the treasury for the Indians' benefit. (185 U.S. at 395) Thus, Congress, if it wanted the state to receive sections 16 and 36 while they remained within the opened Indian reservation, had to include an express provision to that effect.

Finally, this conclusion is fortified by United States v. Brindle, 110 U.S. 688 (1884). In this case, the plaintiff had brought the action to recover commissions on the sales of certain Indian trust lands. He had been appointed the receiver of public moneys for the sale of certain public lands and later was also appointed to assist in the sale of certain Indian trust lands. He claimed that his right to receive commissions extended to the trust land also. The Indian land in question had been ceded to the United States by the Delaware Tribe in return for $10,000 and all of the money received from the land sale.

The Court held that the commission feature of plaintiff's appointment did not extend to the trust land.

> These Indian trust lands were never public lands of the United States, and were never subject to sale at the Lecompton land office. The cessions to the United States were in trust, to survey, manage and sell the lands and pay the net proceeds to or invest them for the Indians. There was never a time that the United States occupied any other position under the cessions than that of trustee, with the power to sell for the benefit of the Indians. In equity, under the operation of the treaties, the Indians continued, until sales were made, the beneficial owners of all their country ceded in trust. Of this we have no doubt. 110 U.S. 693 [Emphasis added]

It is clear that the land on the Spokane Reservation which was opened to homestead but never claimed has the same status as the land in issue in the three foregoing cases. In each of those cases, the United States had opened the reservations to non-Indian settle-

ment, had committed itself to holding the proceeds of the sales in trust for the Indians but had not committed itself to buying up all of the unpurchased land. The act opening up the Spokane Reservation is to the same effect. (35 Stat. 458, Section 7).

Furthermore, the fact that the Spokane Indians "continued, until sales were made, [to be] the beneficial owners of all of their country ceded in trust", Brindle, 110 U.S. 693, is evident from the record in this case. Both Mr. James H. Stevens, Superintendent of the Spokane Agency and Mr. Glenn F. Galbraith, Executive Director of the Spokane Tribe testified that the land opened to homestead but never claimed was administered and managed by the tribe and the Bureau of Indian Affairs in the same fashion as all of the trust lands. At all times since the land was opened to homestead in 1908, all of the revenues from these unclaimed lands went into the tribal account just as did moneys from any other tribal land. (Tr. 904-906; Response of Plaintiff United States to Defendants' Proposed Reconstruction of Record, p. 2)

Thus, it is evident from the foregoing that it has been the policy of the United States that Indian tribes should receive the benefits from their reservation lands in one form or another. Even when the land is opened for non-Indian settlement, the Indians were to receive the proceeds from the sales. Unless and until the land was actually exchanged for money, the land remained in trust and was administered for the benefit of the Indians. Along this line, is a series of cases holding that the mere opening of a reservation to non-Indian settlers does not mean that the reservation is discontinued or the boundaries altered. DeCoteau v. District County Court, 420 U.S. 425, 444 (1975); Mattz v. Arnett, 412 U.S. 481 (1973); Seymour v. Superintendent, 368 U.S. 351 (1962); The City of New Town, North Dakota v. United States, 454 F.2d 121 (C.A. 8, 1972); United States v. Erickson, 478 F.2d 684 (C.A. 8, 1973).

The so-called "Land Restoration Act" by which the unhomesteaded land was "restored" to tribal ownership is the Act of May 19, 1958 (72 Stat. 121). See 25 U.S.C. 463, Historical Note. It is evident from the legislative history of that act that the intent of Congress was merely to remove any remaining cloud from the title to this land so that the tribe and the United States could engage in long range plans for improvement and development. The Congressional reports on the law are found in S. Rept. 1508, 85th Cong., 2d sess. (1958) and H. Rept. 1336, 85th Cong., 2d sess. (1958).*/ The Senate Report's explanation of the Bill states in part:

> The purpose of H.R. 8544, is to provide for equality of treatment in the restoration to tribal ownership of . . . surplus lands on the . . . Spokane, Wash. reservation[s].
>
> This legislation, if enacted, will restore the lands to tribal ownership, thus terminating the right of the Federal Government to dispose of them under the cession statutes, and will assure the Indians the continued use rights.
>
> In a series of Cases (United States v. Brindle, 110 U.S. 688, 690, 693; Minnesota v. Hitchcock, 185 U.S. 373, 394-395; United States v. Mille Lac Chippewas, 229 U.S. 498, 509; Ash Sheep Co. v. United States, 252 U.S. 159, 164-166) the Supreme Court of the United States has held that this land continued in the beneficial ownership of the Indians even though they had ceded 'all their right, title, and interest'. So the net affect of H.R. 8544 is to clarify the Indian title to these lands in order that they may be managed and administered by the tribes. [Emphasis added]

Thus, it is clear from the legislative history of this act that Congress merely intended to clarify the title to the land in question and to forever stop the operation of the 1908 Act. It is submitted that nothing in the language of the statute itself conflicts with this interpretation. Even if the statute were somewhat ambiguous,

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*/ The Senate Report is reprinted in [1958] U.S. Code Cong. & Ad. News 2462.

which it is not, it would have to be interpreted in favor of the Indians. Squire v. Capoeman, 351 U.S. 1, 6 (1956); Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89 (1918); Carpenter v. Shaw, 280 U.S. 363, 367 (1930).

Therefore, since the 28.7 acres in question have never left trust status and have continued to be administered the same as other tribal land and since Congress has expressly stated that this land shall receive "equality of treatment" with other tribal land, this land has a priority date of August 18, 1877.

(3) The formerly non-Indian owned reservation land which has been returned to trust status likewise has an August 18, 1877, priority date.

As has been explained above, the Act of May 29, 1908, authorized both the allotment to individual Indians of reservation land and the opening of certain land to homesteading. As a result, small tracts of land of both types eventually ended up in non-Indian ownership. Beginning in the 1930s, the Spokane Tribe began reacquiring some of these former reservation lands which had passed to non-Indian ownership. By the Act of June 10, 1968 (82 Stat. 174), as amended by the Act of May 21, 1974 (88 Stat. 142)*/ the Secretary of the Interior was authorized to return such reacquired land to trust status. To date, approximately 1,798.11 acres of this type of land have been returned to trust status within the Chamokane Creek basin. (PE-97; PE-99) Only a portion, however, of these 1,798.11 acres are claimed as irrigable. Plaintiff's exhibit 97 identifies the land which was formerly non-Indian owned and which has been returned to trust status.**/ By comparing that listing to

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*/ 25 U.S.C. 487.

**/ Although PE-97 is entitled "Chamokane Creek - Trust Lands Acquired; Formerly Fee Simple," there is some question as to whether that listing does not inadvertently contain land which was purchased by the tribe from Indian allottees. Such land would never

plaintiff's exhibit 34, which shows the land claimed as irrigable, the following land may be identified as that land which was formerly non-Indian owned, is now in trust status and is claimed as irrigable by the United States and the tribe:

Section Twsp. & Range	Description, Tract No. & Date of Acq. of irrigable land	Acreage claimed as irrigable
Sec. 27, T29N, R39E	N/A	None
Sec. 34, T29N. R39E	N/A	None
Sec. 35, T29N. R39E	E1/2SE1/4, T1000-3/24/42	15.00
Sec. 36, T29N, R39E	SW1/4, T1000-3/24/42 T1001-2/2/42	130.00
Sec. 2, T28N, R39E	Lots 1 & 2, S1/2NE1/4, T1010-3/25/42	130.00
Sec. 23, T28N, R39E	Lot 2, S1/2SE1/2NE1/4, NE1/4, SE1/4, T1007-2/7/42	30.00
Sec. 24, T28N, R39E	Lots 7 & 8, T1006-2/7/42	49.00
Sec. 27, T28N, R39E	E1/2SE1/4, T1012-7/16/45	15.00
Sec. 34, T28N, R39E	NE1/4, E1/2SE1/4, T1012-7/16/45	15.00
Sec. 35, T28N, R39E	N/A	None
Sec. 19, T28N, R40E	N/A	None
Sec. 21, T29N. R40E	Lots 5 & 7, E1/2SW1/4, E1/2SE1/4, T1001-2/2/42	20.00
Sec. 22, T29N. R40E	N/A	None
Sec. 23, T29N. R40E	N/A	None
Sec. 28, T29N. R40E	N/A	None
Sec. 31, T29N. R40E	NW1/4, W1/2NE1/4, T1001-2/2/42	110.00
Sec. 25, T29N. R38E	N/A	None

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con't

**/ have left trust status hence would automatically receive an August 18, 1877, priority date. This possible error is currently being checked and should it prove to have occurred, the Court and the other parties will be so notified

con't

Section Twsp. & Range	Description, Tract No. & Date of Acq. of irrigable land	Acreage claimed as irrigable
Sec. 2, T27N, R39E	Lots 6 & 9, NE1/4NW1/4, S1/2NW1/4, NW1/4SW1/4, T1001-2/2/42	48.00
Sec. 11, T27N. R39E	N/A	None
	TOTAL	562.00

Thus, of the 8,460 acres claimed as irrigable, only 562 acres fit into this category. The fact that these lands are in many cases contingent to and intermixed with land carrying the August 18, 1877, priority date again makes it reasonable that these lands carry the same date. Otherwise, undue administrative expenditures will be required in order to administer these numerous small parcels separately.

The language of the Acts of June 10, 1968 and May 21, 1974 (25 U.S.C. 487) is not particularly helpful in determining whether Congress intended for this land to revert to the same status as all other trust land when it reacquired trust status.

The legislative history of the 1968 statute is more illuminating. The reports on the Act of June 10, 1968, are found in S. Rept. 1142, 90th Cong. 2d sess. (1968) and in H. Rept. 1287, 90th Cong. 2d sess. (1968). According to the Senate report, the purpose of the bill was to:

> . . . provide general authority to acquire and hold in trust for the Spokane Indian Tribe land within its reservation, to dispose of tribal land, and to enter into long-term leases of tribal or allotted land, all for the purpose of consolidating landownership patterns within the reservation and making the maximum utilization of the reservation land base.

The need for the bill, the report continues is because:

> [t]he landownership pattern in the reservation is checkerboarded, some lands being tribal, some being held in trust for individual Indians, and some being patented

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> in fee to non-Indians. In order to consolidate the landholdings into larger blocks, broader acquisition, and disposal authority is needed. In order to develop the land on advantageous terms, longer term lease authority is needed.
>
> The tribe has developed a land purchase and consolidation program, but the plan cannot be carried out without this enabling legislation.

The report of the Department of the Interior on the bill is found in a letter dated March 27, 1968, from Harry R. Anderson, Assistant Secretary of the Interior to Representative Wayne N. Aspinall. S. Rept. 1142, 90th Cong. 2d sess. 2 (1968). That report states in part as follows:

> The tribal land is checkerboarded with alloted and fee land. In many instances the tribe owns a tract of land surrounded by fee land. It has little value to the tribe and yet would most likely be of considerable value to the adjoining owner. Both Indians and non-Indians also own isolated tracts surrounded by tribal lands. This legislation would permit the tribe to dispose of its isolated tracts and replace them with tracts contiguous to other tribal land.

It is evident that Congress intended for the reacquired land to revert to trust status on an equal footing with the reservation land which had never left Indian ownership. As set forth above, the primary purpose of the act was to facilitate the consolidation of landownership patterns within the reservation and to provide for the maximum utilization of the reservation land base. The Department of the Interior, as well as Congress, was aware that consolidation could very well mean the exchanging of trust land for former trust land now in non-Indian ownership. Surely, Congress did not intend that the United States, as trustee, or the tribe would have to exchange land within an 1877 priority federal reserve water right for land with water rights dating from the 1940s. Furthermore, it would seem that the "maximum utilization of the reservation land base" would ipso facto require that Congress intended for the

reacquired land to reacquire its 1877 priority date. Otherwise, maximum utilization could scarcely be achieved since it is doubtful if land with the earlier priority date would be exchanged for land with a later date and if such an exchange did take place, the land couldn't be used whenever there was insufficient water to meet the needs of senior appropriators.

The Act of May 21, 1974, merely amended the original law to remove the restriction on the amount of reservation land which could be returned to trust status in any one given year. Neither it nor its legislative history is relevant to the issue being discussed here.

The priority date, therefore, for this 562.0 acres is August 18, 1877. The unique factual situation involved here concerning the changes of title to this land, the legislative history of the 1968 act and the de minimus nature of the acreage involved all merge to justify this "relation-back" of the priority date to the creation of the reservation.*/ Should this court find that the priority date of this land does not relate back to the creation of the reservation, then the priority date of each parcel would, of course, be the date that the land was reacquired by the tribe.**/ This result follows from the fact that 25 U.S.C. 487 merely "gave formal sanction to an accomplished fact". United States v. Walker River Irr. Dist., 104 F.2d 334, 338 (C.A. 9, 1939). Once the formerly reservation land was reacquired by the tribe, it was treated by both the tribe and the Department of the Interior as any reserva-

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*/ For an example of the use of the doctrine of relation with regard to the reserved water rights on an Indian reservation see United States v. Hibner, 27 F.2d 909, 912 (USDC, ED Idaho, 1928).

**/ The dates are set forth on PE-97.

tion land in trust status. (Tr. 1340) This de facto status as part of the reservation was merely confirmed by the 1968 act hence the latest possible priority dates are those in the 1940s.

4. The United States has the right to the use of 10 cfs (non-consumptive) for fish propagation purposes.

The United States, through its Bureau of Reclamation, Department of the Interior is the holder of Surface Water Certificate No. 2831 issued by the State of Washington. This certificate bears a priority date of October 21, 1942, and authorizes the use of 10 cfs of the flow of Spring Creek (a tributary of Chamokane Creek) for fish propagation purposes. The use is non-consumptive and is exercised by the State of Washington in the operation of a fish hatchery pursuant to agreement with the Secretary of the Interior. None of the parties to this action have challenged the validity of this water rights certificate.

5. The Agreement of August 18, 1877, reserved sufficient water to fulfill the future needs of the Indians on the Spokane Reservation.

Although this case is a stream adjudication which will result in a "final" decree, in at least one sense, it can never really be final. In this respect, the courts have consistently held that since Indian reservations are created to be the home of their respective tribes in perpetuity water rights which are impliedly reserved at the creation of the reservation are reserved in order to achieve this purpose. Therefore, the quantity of water needed to sustain the reservation should not be limited to presently forseeable uses but rather should provide for future uses which are also in fullfillment of the purposes for which the reservation was created.

This concept of a water decree which could be modified in the future for increased Indian usage was first suggested by the ninth circuit in Conrad Inv. Co. v. United States, 161 F. 829 (C.A. 9, 1908).

In Conrad, the United States brought suit in the District Court of Montana to enjoin the defendant from interfering with the rights of the Indians of the Blackfeet Indian Reservation to the waters of Birch Creek. Birch Creek is a non-navigable stream whose middle line forms the southern and southeastern boundaries of the Blackfeet Indian Reservation. The defendant had constructed a dam across the creek in order to divert water into an irrigation ditch. The effect of the dam was to cut off the flow of the creek to the reservation except in flood seasons.

In order to determine whether or not the defendant was interfering with the Indians' water rights, the district court had to determine what the Indian right was. The court found that approximately 10,000 acres of reservation land were susceptible to irrigation from Birch Creek (although only a fraction of this land was then actually under cultivation) and that irrigation of this land would require 1,666 2/3 inches or roughly 33 1/2 cfs. 156 F. 123, 130 (USDC, Montana, 1907). Having found that the United States was entitled to the 33 1/2 cfs with a priority date of 1888 which was senior to that of the defendants, the court enjoined the defendants from infringing on the government's right. The decree also provided that:

> [t]he government will have leave to apply for a modification of this decree at any time that it may determine that its needs will be in excess of the amount of water so designated. 156 F. 132

The ninth circuit affirmed. With regard to the future modification provision, the court stated that:

> It is further objected that the decree of the Circuit Court provides that, whenever the needs and requirements of the complainant for the use of the waters of Birch Creek for irrigating and other useful purposes upon the reservation exceed the amount of water reserved by the decree for that purpose, the complainant may apply to the court for a modification of the decree. This is entirely in accord with complainant's

> rights as adjudged by the decree. Having determined that the Indians on the reservation have a paramount right to the waters of Birch Creek, it follows that the permission given to the defendant to have the excess over the amount of water specified in the decree should be subject to modification, should the conditions on the reservation at any time require such modification. 161 F. at 835

To justify this approach, the court had reasoned that:

> What amount of water will be required for these purposes may not be determined with absolute accuracy at this time; but the policy of the government to reserve whatever water of Birch Creek may be reasonably necessary, not only for present uses, but for future requirements, is clearly within the terms of the treaties as construed by the Supreme Court in Winters case. 161 F. at 832.

Thus, the court in Conrad realized that it would not always be possible to accurately predict the amount of water which would be needed in the future to fulfill the purposes for which the reservation was created. The future modification provision was the device chosen whereby appropriators would be able to get an idea of how their rights compared to others (including the government) yet the Indians would not lose valuable rights simply because neither they nor the government had the technology to accurately predict future needs.

This position was reaffirmed by the ninth circuit in United States v. Ahtanum Irrigation District, 236 F.2d 321, 327 (C.A. 9, 1956), cert. den. 352 U.S. 988 where the court stated:

> It is plain from our decision in the Conrad Inv. Co. case, supra, that the paramount right of the Indians to the waters of Ahtanum Creek was not limited to the use of the Indians at any given date but this right extended to the ultimate needs of the Indians as those needs and requirements should grow to keep pace with the development of Indian agriculture upon the reservation.

Finally, in Arizona v. California, 373 U.S. 546, 600 (1963) the Supreme Court noted:

> We also agree with the Master's conclusion as to the quantity of water intended to be reserved. He found that the water was intended to satisfy the future as well as the present needs of the Indian Reservations . . . . */

In keeping with the much affirmed judicial declaration that the Indians have rights to water to meet their present and future needs, this court should provide for a decree which will be modifiable whenever there are increased demands for water on the reservation. This is the only practical method by which the Indian rights may be adequately protected, rights which were described in Winters as:

> The Indians had command of the lands and the waters - command of their beneficial use, whether kept for hunting and grazing roving heards of stock, or turned to agriculture and the arts of civilization. 207 U.S. at 576 [Emphasis added]

6. The Decree should contain a provision allowing changes in place and nature of use of the water rights adjudged therein.

Under the existing laws of the various western states, including Washington, a water right owner may change the point of diversion or the place and nature of use, as long as the rights of others will not be materially injured.**/ The courts have generally held that the right to change the point of diversion or the place

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*/ The Court went on to affirm the Special Master's conclusion that in this particular case, the only feasible way to measure the reserved water right and still include future uses was to measure the right by the irrigable acreage. The decision to compute a final quantity rather than leaving the decree open ended resulted from the fact that this case was original in the Supreme Court and was about to determine the rights to one of the major river systems in the United States. For this reason, the Court chose not to leave open a decree which apportioned roughly 7,500,000 A/F when the Indian rights were in the neighborhood of 900,000 A/F. Master's Report pp. 267-291. Final Decree, 376 U.S. 340, 344-345 (1964).

**/ Wash. Rev. Code Ann., Sec. 90.03.380, 90.03.390; 5 Clark, Waters and Water Rights 157 (1972); 1 Wiel, Water Rights in the Western States, Sec. 496, et seq. (3d Ed., 1911).

or purpose of use is inherent in the water right and that the right of change cannot be denied unless others will be injured. See, Sax, Water Law, Planning and Policy, p. 238 (1968).

There is no valid reason that this concept should not be applicable to this case, even though federal reserved rights are present. The Special Master in Arizona v. California, 373 U.S. 546 (1963) concluded that:

> The amount of water reserved for the five Reservations, and the water rights created thereby, are measured by the water needed for agricultural, stock and related domestic purposes. The reservations of water were made for the purpose of enabling the Indians to develop a viable agricultural economy; other uses, such as those for industry, which might consume substantially more water than agricultural uses, were not contemplated at the time as the Reservations were created. Indeed, the United States asks only for enough water to satisfy future agricultural and related uses. This does not necessarily mean, however, that water reserved for Indian Reservations may not be used for purposes other than agricultural and related uses. The question of change in the character of use is not before me. I hold only that the amount of water reserved, and hence the magnitude of the water rights created, is determined by agricultural and related requirements, since when the water was reserved that was the purpose of the reservation.
>
> The water rights established for the benefit of the five Indian Reservations and enforced in the recommended decree are similar in many respects to the ordinary water right recognized under the law of many western states: They are of fixed magnitude and priority and are appurtenant to defined lands. They may be utilized regardless of the character of the particular user. Thus Congress has provided for the leasing of certain Reservation lands to non-Indians, and these lessees may exercise the water rights appurtenant to the leased lands. Skeem v. United States, 273 Fed. 93, 96 (9th Cir. 1921). The measurement used in defining the magnitude of the water rights is the amount of water necessary for agricultural and related purposes because this was the initial purpose of the reservations, but the decree establishes a property right which the United States may utilize or dispose of for the benefit of the Indians as the relevant law may allow.

See United States v. Powers, 305 U.S. 527 (1939). Master's Report, p. 265-266 [Emphasis added] [footnote omitted]

Therefore, the United States respectfully requests that a provision of this nature be included in the decree.

III

RIGHT OF THE UNITED STATES AND SPOKANE TRIBE OF INDIANS TO INJUNCTIVE RELIEF AGAINST THE DEFENDANTS.

A. The United States has shown that it is entitled to injunctive relief whenever the surface diversions or ground water withdrawals by defendants threaten to infringe on the rights of the United States as established herein.

1. Injunctive relief is the proper relief.

It is axiomatic that one whose rights are invaded by the wrongful diversion of water is entitled to the preventive remedy of injunction. Atchison v. Peterson, 87 U.S. 507, 515 (1874); 6 Clark, Waters and Water Rights 347 (1972). It is also fundamental, however, that no one is entitled to an injunction unless he can show that he has a valid right which will be interfered with unless the injunction issues. Thus, an injunction may properly be granted where the plaintiff proves both (1) the existence of a right and (2) interference or the threat of interference of that right by the defendant.*/

The proper use of injunctive relief in a case like this was recently demonstrated in Cappaert v. United States, _____ U.S. _____, 48 L.Ed.2d 523 (1976). In that case, the district court found that there was a hydraulic connection between the pumping of certain wells operated by the defendants and the drop in the water level of the pool in Devil's Hole.

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*/ It is noteworthy that a majority of the early cases dealing with reserved water rights on Indian reservations resulted in the granting of injunctive relief in favor of the United States and against defendants who were interfering with those rights. See, e.g. Winters v. United States, 207 U.S. 564 (1908); Conrad Inv. Co. v. United States, 161 F. 829 (C.A. 9, 1908); United States v. Parkins, 18 F.2d 642 (USDC, Wyoming, 1926); United States v. Walker River Irr. Dist., 104 F.2d 334 (C.A. 9, 1939).

375 F.Supp. 456, 458-460. The Court also found that the reserved right of the United States was senior to the rights of the defendants. Having found the existence of the right in the United States and the interference with that right by the defendants, the Court entered a permanent injunction. The injunction limited "the pumping from underground waters . . . to the extent required to achieve and to maintain . . . a daily mean water level . . . ." 375 F.Supp. 461-462. This use of the injunction was affirmed by the Ninth Circuit, 508 F.2d 313, 322 (C.A. 9, 1974) and by a unanimous Supreme Court, Cappaert v. United States, supra.

The existence of the senior right of the United States to the surface and ground waters of Chamokane Creek is clear as discussed in Section II, above. That discussion will not be repeated here.

2. Certain of the surface water diversions and ground water withdrawals by defendants are interfering with the rights of the United States and Spokane Tribe.

Much of the testimony and many of the exhibits presented to the court during the trial of this case related to the hydraulic connection between the flow of Lower Chamokane Creek and the surface and ground water withdrawals of the defendants. The evidence establishes the following:

The Spokane Indian Reservation is located in northeastern Washington State at the confluence of the Columbia River and the Spokane River. As a result of Grand Coulee Dam, the Columbia River backs up along the western edge of the reservation to form the Columbia River arm of Franklin D. Roosevelt Lake. The dam also causes the Spokane River to back up as far as Little Falls, forming the Spokane arm of F.D.R. Lake. The reservation topography varies from broad valleys and high benches on the east

to mountains in the north central area. High areas and meadow valleys are predominant in the western part and in some of the south slope areas. Relatively narrow benches skirt the Spokane and Columbia arms of F.D.R. Lake with basaltic bluffs or steep sand slopes forming the rim. The reservation varies in elevation from 1,300 feet to over 4,000 feet. The northern portion of the reservation is timberland, the southern part or southwest slopes are open benches. (Tr. 31, 748, 859; PE-1; PE-3; PE-82; PE-3-6-74-29, p. 6)

The major sources of surface water for the Spokane Reservation are the Columbia and Spokane Rivers. In addition, there are nine drainage basins on the reservation. Excluding the two main rivers, Chamokane Creek and its drainage basin constitute approximately one half of the total on-reservation water resources. (Tr. 24-25; PE-2; PE-3-6-74-29, p. 4)

Chamokane Creek has a drainage area of 178 square miles with its headwaters in the Huckleberry Mountains north of the reservation. The creek flows eastward through the Camas Valley (Upper Chamokane area) north of and parallel to the north boundary of the reservation to a point near the town of Springdale, Washington, where it turns southeastward to the north line of the reservation. The creek then flows south and southwesterly through the mid-Chamokane or Walker's Prairie area to Chamokane Creek Falls, forming the east boundary of the reservation. From the falls, it flows south through the Lower Chamokane area to the Spokane River. The drainage basin generally parallels the creek and varies in width from about seven miles wide at the northwest end to about three miles wide just north of the mouth. (Tr. 33; PE-2; PE-10; PE-3-6-74-29, p. 9)

Chamokane Creek is unique in several respects. Although the flow of the creek is continuous at the north line of the reservation to a point about two miles south, beginning at this point and for the next five miles the stream is intermittent, being constantly dry during the summer months. Then, beginning just above Ford, Washington, and for the next three miles, massive springs have a regular flow throughout the year. These springs feed the creek which is again continuous to the Spokane River. This unique intermittent nature of the creek's flow was recognized by the Spokane Tribe who called the creek Tshiwesch or "big stream coming out of the ground." Likewise, the area just above Ford, Washington, was known as Chimocane meaning "over and under." (Tr. 26, 38, 306, 661-664; PE-3-6-74-29, p. 9)

The massive springs area is made of several large springs comprising what is known as the Hatchery Springs, a group of large springs comprising what are called Galbraith Springs and a number of minor springs. Once the water leaves these springs, it flows some three miles to the Chamokane Creek Falls. After the falls, the creek flows another mile and one half to the Spokane River. (Tr. 34)

The Chamokane Creek basin was formed through prehistoric glacial action. While the area was affected by two glacial periods, it is the later period which more directly resulted in the basin's current geological features. The second period occurred approximately 30,000 to 40,000 years ago and it was during that period that the erosional trough which generally forms the basin, was gouged out. It was also at this time that the glacier deposited the rock it was carrying into the trough filing it with what is now the basin's overburden. (Tr. 44, 47, 52, 258-259; PE-4; PE-4a; PE-5)

The geological make up of the Chamokane Creek basin clearly reflects its glacial history. As the later glacier moved southward carving out the trough, it was stopped on the west by basalt and on the east by granite, which today are the respective basin boundary walls. The glacier was stopped in its southward movement by a granite dike which is located approximately one and one-half miles north of the mouth of Chamokane Creek. This granite dike forms the southern boundary wall of the basin. These three physical barriers more or less act to close the basin and keep ground water from flowing out the sides. The entire basin is underlain with granite bedrock. As the glacier retreated, it left a lateral moraine to a depth of 150 feet which blocks off Camas Valley thereby precluding any appreciable ground water flow into the Chamokane Creek basin from that area. (Tr. 55, 185-186, 260; PE-5; PE-6; PE-7; PE-27-1-7; PE-3-6-74-29, p. 10)

As the later glacier retreated, it dropped the material it had picked up as it moved south thereby filling the basin with its present overburden. The glacial recession tended to rinse out the upper layers of the overburden resulting in tighter lower layers and looser upper layers. The looser upper layer of overburden is non-uniform, varies from 20 feet to 50 feet thick and is made up of porous gravel and sand. The lower, tighter layer is more uniform, varies from 50 feet to 100 feet thick and is made up of sand with some gravel and clay. Ground water is found within both layers. While the lower layer has more water in it, it does not yield it readily. The upper layer, in contrast, does yield its water readily. The lower layer will yield about 3 to 5 gpm and is generally used for domestic purposes, the upper layer will yield around 1,000 to 1,500 gpm and is used for irrigation. (Tr. 47, 52, 55, 71-72, 199-201, 407-408, 1044; PE-8; PE-9; PE-3-6-74-29, pp. 13-19; United States Reconstruction of Record, p.5)

Both the hydraulic gradient and the surface gradient in the Walker's Prairie area are approximately 15 feet to the mile. This drops off near Ford and from there to the falls averages about 36 feet to the mile. The general direction of the gradient is south and southwest. (Tr. 19, 48, 72)

The ground water flow in the Chamokane Creek basin from the north line of the reservation to the Massive Springs area is in a genrally southwesterly direction. (Tr. 64, 187, 322, 902, 1309; United States Reconstruction of Record, pp. 4-5)

As the ground water flows southwesterly through the Chamokane Creek basin, it surfaces either at Massive Springs or at the falls. The reason for the surfacing at Massive Springs is that at that point, the ground water surface intercepts the land surface forcing a ground water discharge. The discharge at the falls is caused by the southwesterly flowing water encountering the granite dike which forces the water up and over the dike as a falls. (Tr. 53-54, 1020; PE-9; United States Reconstruction of Record, p. 5)

There is no evidence of any appreciable faults either along the eastern or western basin boundaries or at the southern dike. As a result, the Chamokane Creek basin must be considered a closed basin whose total discharge of water can be measured immediately below the falls. (Tr. 193, 871, 899; PE-41)

All of the water entering the Chamokane Creek basin does so in the form of precipitation, either rain or snow. This precipitation either sinks into the ground, runs off or is burned up through evaporation or evapotranspiration. All of the precipitation that enters the drainage basin is eventually measured below the falls minus any manmade depletions, evaporation or evapotranspiration. That portion of the precipitation which sinks into the ground and joins the ground water system eventually

exits through Massive Springs. (Tr. 67; United States Reconstruction of Record, pp. 5-6)

In the Huckleberry Mountains north of the reservation, snow accumulates during the winter with some runoff occurring at that time but most coming in the srping. As the snow melts, numerous tributary streams bring the water down into Camas Valley where it joins precipitation that has fallen directly into the valley and either sinks into the ground or flows into Chamokane Creek. That portion of the water joining the Camas Valley underground reservoir remains in that area due to a lateral moraine separating Camas Valley from the rest of the Chamokane Creek basin. There is no significant groundwater contribution out of the Camas Valley underground system into the Walker's Prairie area. That portion of the runoff joining Chamokane Creek flows out of Camas Valley into Walker's Prairie. Of this amount, in a normal water year such as 1971-1972, approximately 8,000 acre-feet enters the Chamokane Creek ground water system as recharge during the winter and spring. An additional 700 acre-feet is summer recharge out of Camas Valley. The remainder of the runoff remains in the creek and flows out of the system usually in the form of spring floods. (Tr. 57, 60-69, 73, 864-865; PE-3; PE-10; United States Reconstruction of Record, pp. 5-6)

Precipitation also falls on Walker's Prairie and the hills surrounding the prairie. Approximately 8,000 acre-feet on the average is recharged into the ground water system from the precipitation falling on the hills. Another 2,000 acre-feet is recharged from precipitation falling on the prairie itself. The remainder of the precipitation is either lost through evaporation or evapotranspiration or flows out of the basin in the creek. (Tr. 59, 68-69)

Thus, in a normal water year, such as 1971-1972, precipitation in and around the basin contributes a recharge to the underground reservoir of approximately 18,700 acre-feet. This 18,700 acre-feet figure is also the approximate longterm average for the flow out of the Massive Springs. 18,700 acre-feet is approximately 25 cubic feet per second (cfs). This is the base flow of Lower Chamokane Creek. (Tr. 62, 70, 76, 206-208; PE-31)

The total output of the Chamokane Creek drainage system is measurable at the USGS gage below the falls and measurements taken there indicate an average flow of 34,000 to 35,000 acre-feet per year. The difference between the 35,000 acre-feet total discharge and the 18,700 acre-feet recharge-springs flow figure is 16,300 acre-feet which is that amount of water which escapes the system by flowing down Chamokane Creek, usually in spring floods. This 16,300 acre-feet remains surface flow at all times, never joining the ground water system. There is no significant augmentation of the stream flow below the falls because the runoff from the sides of the rather steep canyon contributes little water to the flow of the stream, especially in the summer. (Tr. 60-61, 67, 134, 206, 268, 851; PE-3; PE-31)

Since the USGS gaging station located below Chamokane Creek falls was not established until February 1971, there are no actual records for the total flow of lower Chamokane Creek until that time. Records from that station indicate the following were the flows of Lower Chamokane Creek for the period since 1971:

Year	Ave. stream flow low flow month	Maximum	Minimum
1971	29.3 cfs	1,320 cfs	21 cfs
1972	26.1 cfs	332 cfs	20 cfs
1973	19.7 cfs	269 cfs	17 cfs
1974	35.3 cfs	955 cfs	22 cfs
1975	39.1 cfs	1,430 cfs	34 cfs

(Tr. 20; PE-15, 15A; PE-16, 16A; PE-17A-53; Affidavit of Walter Woodward, p. 5)

Based primarily on the interpolation of the existing flow records of Fish Hatchery Springs, the following average base or daily mean flows for Lower Chamokane Creek can be calculated for the years prior to 1971:

1931-1970 average of 33 cfs

1961-1970 average of 30 cfs

(Tr. 85; PE--19, 19A; PE-36)

There is a direct relationship between the extent of precipitation and the amount of water in the underground reservoir and the base flow of Chamokane Creek. There has been a decline in the water surface elevations and the base flow of the creek in the years 1971 to 1974. There has also been a decline in the amount of precipitation during this period. This drop in precipitation, however, accounts for only part of the decline in water surface elevations and base flow. (Tr. 361-363; PE-24, 24A; PE-25, 25A)

There has been, in recent years, a steady increase in both surface and ground water withdrawals by non-Indians both on and adjacent to the Spokane Reservation. The State of Washington has issued certificates and permits for both surface and ground water withdrawals within the Chamokane Creek basin both on and off of the reservation. To date, the state has issued certificates authorizing a total withdrawal of 20.03 cfs, and

permits for another 5.95 cfs. This is a total of 25.98 cfs. The total effective reduction in Chamokane Creek from these uses is 6.62 cfs. In addition, there are applications pending for 31.74 cfs which would effectively reduce Chamokane Creek by 9.33 cfs. Thus, if all existing certificates, permits and applications were utilized to their maximum, Chaomkane Creek would be effectively reduced by a total of 15.96 cfs. (Tr. 77, 88-89, 124-125; PE-14; PE-32; PE-33)

If the withdrawals as authorized by the State of Washington had not taken place during the period 1971 to 1974, the base flow of Lower Chamokane Creek would have been an average for that period of 33 cfs. (Tr. 87; PE-18, 18A; PE-23A-C)

The closed nature of the basin and the fact that the ground water in the basin generally flows southwest to the springs and the falls means that any ground water withdrawals in the Walker's Prairie area or the diversions of water from any of the streams running into it, affects the flow of the springs and hence the flow of Chamokane Creek. (Tr. 77)

Defendant James R. Newhouse owns land directly to the east of Chamokane Creek approximately two miles northeast of the town of Ford, Washington. In 1969, Newhouse drilled a well and began withdrawing water from the ground water reservoir. In 1970, Newhouse's pumping began to be monitored by comparing his withdrawals with the drop in water surface elevation in the Hill well which was located a quarter mile to the west, on the west side of Chamokane Creek. It was discovered that during the summer when Newhouse was not pumping, the rate of decline in the Hill well was fifteen thousandths of a foot per day. Once Newhouse commenced pumping, the rate of decline in the Hill well accelerated to from 30 to 50 thousandths of a foot per day, or between two and three times the normal daily decrease. Once the Newhouse well ceased pumping, the Hill well resumed its

normal decline but did not return to previous water levels. Defendant Newhouse's pumping has drawn water from the underground sources which comprise the supply for the springs and lower Chamokane Creek. Because the Newhouse well and the springs are hydraulically connected, defendant Newhouse's pumping has caused the water level in lower Chamokane Creek to drop. (Tr. 93-96, 1360-1361; PE-18, 18A; PE-23A-C)

Defendants Robert J. and Dorothy Seagle own land on the east and southeast side of Chamokane Creek. Seagle had three wells drilled in 1951 and one in 1956 or 1957. The later well has never been used. The location of these wells adjacent to Chamokane Creek and within the Chaomkane Creek basin put them in the same hydraulic relationship with the springs and lower Chamokane Creek as the Newhouse well. Thus, because the Seagle wells are hydraulically connected to the springs and lower Chamokane Creek, the pumping of these wells has caused the water level in lower Chamokane Creek to drop. (Tr. 86, 1223-1227)

Defendants Smithpeter own land on the Spokane Indian Reservation to the west of and adjacent to Chamokane Creek approximately one mile north of the falls. The Smithpeter withdrawal is a surface diversion directly from Chamokane Creek. It has an immediate effect of withdrawing 2 1/2 cfs from the stream just one mile above the falls. This has the immediate and direct effect of decreasing the flow in lower Chamokane Creek by 2 1/2 cfs. (Tr. 34, 99, 845, 901; PE-96; DE-10)

Defendant Dawn Mining Company owns land on the Spokane Indian Reservation adjacent to and west of Chamokane Creek. Dawn Mining Company has a surface diversion of approximately 1 cfs from the creek which has the immediate and direct effect of reducing the flow in lower Chamokane Creek by 1 cfs. (Tr. 100, 840)

Any and all other defendants with ground water withdrawals within the Chamokane Creek basin below Camas Valley are hydraulically connected with the Massive Springs and lower Chamokane Creek. Any withdrawal through those wells has the direct effect of reducing the flow in lower Chamokane Creek. Any and all defendants making surface withdrawals from Chamokane Creek or any of its tributaries anywhere within the Chamokane Creek basin have the direct effect of reducing the flow in lower Chamokane Creek. (Tr. 77, 105-106, 122-123; PE-14; PE-32; PE-33; PE-3-6-74-29, pp. 4,10)

While the ground water within the Chamokane Creek basin percolates down gradient through the overburden from the upper basin to the springs and the falls, it does so slowly thereby creating a time lag in the effect a given withdrawal will have on the flow of the springs or lower Chamokane Creek. There is a delay of from nine months to one year in the effect on the springs of pumping in the Seagle-Newhouse area. The farther upstream the pumping takes place, the longer the time lag. At the north line of the reservation or above, the delay may be up to two years. Withdrawals near the springs have no delay in their effect. Therefore, the reduction of spring flow from ground water withdrawals at any given moment in time is a function of all withdrawals but figuring in the time lag of each withdrawal. (Tr. 98, 129, 212, 131, 133, 396, 875)

Thus, the evidence substantiates that there is a direct relationship between precipitation (as measured at both Wellpinit and the two snow measuring stations) and the water levels in the Walker's Prairie area monitoring wells. Further, there is a relationship between those water levels and the flow at Fish Hatchery Springs. Through the use of the precipitation records and the well level measurements, we are able to predict the base flow of lower Chamokane Creek. Based on this analysis, we are able to determine in advance what the flow of lower Chamokane Creek will be and from that, how much water each defendant will be able to pump. (Tr. 869-

870; PE-3-6-74-29, p. 11; PE-18, 18A; PE-19, 19A; PE-24, 24A; PE-25, 25A; PE-26; PE-3-6-74-29, pp. 76-88; Affidavit of Walter L. Woodward, p. 4)

It is clear from the evidence in this case that the surface diversions and ground water withdrawals of the defendants are hydraulically connected with the flow of the Massive Springs and thus the flow in lower Chamokane Creek. Therefore, the United States and the Spokane Tribe are entitled to permanent injunctive relief against the defendants forbidding them to use any water such as will interfere with the plaintiff's reserved rights.

B. The United States is entitled to injunctive relief against the State of Washington to stop the further approval or issuance of any permits or certificates or any other exercise of jurisdiction over the use of the waters of Chamokane Creek.

1. The State of Washington has no authority to issue permits for the appropriation of water, to manage or to in any way control the right to use water within the exterior boundaries of the Spokane Indian Reservation.

Prior to the initiation of this lawsuit, the State of Washington had issued or approved the following water rights certificates, permits and applications for non-Indian appropriation of water within the exterior boundaries of the Spokane Reservation:

Certificate No. 7142	Dawn Mining Co.	August 1, 1956 (DE-19, DE-71)
Certificate No. 8826	Urban S. Schaffner	March 20, 1958 (DE-61)
Permit No. 15894	A.L., F.L. Smithpeter	March 28, 1969 (PE-87, DE-2)
Application No. 11989	B. Dituri, et al.	June 23, 1971 (DE-37)
Application No. 320422	Urban Schaffner	July 3, 1972 (DE-70)
Application No. 320536	Paul Duddy	September 28, 1972 (DE-40)

Of these, the evidence indicates that Certificate No. 8826, and Application No. 320422 are each for uses of water on homestead land within the reservation.*/ The other uses are on lands as to which the source of title is unclear from the record.

For the following reasons the above set forth six certificates, permits and applications are void and the state should be enjoined from issuing similar ones for water within the exterior boundaries of the reservation.

The United States and the Spokane Tribe assert that they have exclusive jurisdiction within the exterior boundaries of the reservation to manage and control the federal reserved water rights appurtenant to the reservation. Further, Congress has never authorized the State of Washington to assume jurisdiction over the waters of Chamokane Creek for uses on formerly allotted or homestead land.

(a) The United States and the tribe have exclusive jurisdiction to manage and control federal reserved water rights.

When the territory now comprising the State of Washington came into the ownership of the United States through cession from foreign sovereigns, the United States became the owner of the land and all rights pertaining thereto, except for those interests in lands and appurtenant rights established under the previous sovereigns. Borax Consolidated, Ltd. v. Los Angeles, 296 U.S. 161, 183-184 (1891). The right to the use of the appurtentant waters on these lands was a part of the bundle of rights acquired by the United States in the acquiring title to these lands. See 2 Clark, Waters and Water Rights, pp. 81-82 (1967). By its very acquiescence, the United States, during the initial stages of the settlement of the

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*/ The Schaffner property was homesteaded by Emil Schaffner in 1910. (Tr. 1248; PE-67; PE-71)

western United States, permitted the use of these lands, and the appurtenant waters, by the pioneers and the numerous miners occupying this area. On reaching this arid region, however, the new inhabitants quickly discovered the insufficiency of available waters to meet the various needs of all concerned. In order to foster some degree of order as a result of the shortages of water, there developed among the pioneers and the miners certain local customs and rules which effectively regulated the right to the usages of water in this arid region of our country. Under these local rules and customs, it was generally understood that the first person to use water for mining, agricultural or any other beneficial use would be recognized as having the prior right to the extent that he used the water. This general rule regarding the appropriation of water in the west, now referred to as the "prior appropriation doctrine", was first fully recognized by Congress in its passage of the Act of July 26, 1866, 14 Stat. 251. Section 9 of that act provides:

> That whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed: . . . .

To ensure that all persons settling the lands of the United States under the general land laws of the United States were made aware of the recognition of the appropriation policy, the Congress of the United States passed the Act of July 9, 1870, 16 Stat. 217, amending the Act of 1866, to provide:

> . . . all patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the ninth section of the act of which this act is amendatory.

By virtue of the passage of these two acts and finally the Desert Lands Act in 1877, 19 Stat. 377, 43 U.S.C. §321, the Congress of the United States fully recognized and confirmed the policy of the appropriation of waters for a beneficial use, as recognized by local rules and customs, as the test and measure of private water rights in and to the non-navigable waters on the public domain. Cappaert v. United States, ____ U.S. ____, 48 L.Ed.2d 523 (1976); FPC v. Oregon, 349 U.S. 435, 448 (1955); California & Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 158, 163-164 (1935). In this regard, the pertinent section of the Desert Lands Act provides in part as follows:

> . . . all surplus waters over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights. 19 Stat. 377. [Emphasis added.]

Public lands, within the meaning of the Desert Lands Act, are those lands open to sale or other disposition under the general land laws. See Barker v. Harvey, 181 U.S. 481, 490 (1901); see also Northern Pacific RR Co. v. United States, 227 U.S. 355 (1913). Further, it should be noted that this act applied specifically to the State of Washington in addition to the States of Arizona, California, Idaho, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah and Wyoming.

In construing the effect and meaning of the Desert Lands Act, the Supreme Court of the United States, in California & Oregon Power Co. v. Beaver Portland Cement Co., supra, at 163-164, held:

> [As a result of the Act of 1877] . . . all non-navigable water then a part of the public domain became 'public juris', subject to the plenary control of the designated states, including those since created out of the territories named, with the right in each to determine for

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> itself to what extent the rule of appropriation or the common law rule in respect of riparian rights should obtain. [Emphasis added.]

Although the aforementioned acts of Congress grant the State of Washington the authority to exercise jurisdiction over the use of waters on "public lands" within that state, the lands in question here, i.e. the lands located within the exterior boundaries of the Spokane Indian Reservation, are not public lands and are, therefore, within the meaning of the Desert Lands Act, outside of the jurisdictional authority of the State of Washington in this regard. These lands were lands specifically reserved and withdrawn from the public domain by the United States in 1877 pursuant to the provisions of the Agreement of August 18, 1877. In the recently decided case of Cappaert v. United States, supra, at 537, the Supreme Court of the United States, in reaffirming its earlier holdings in FPC v. Oregon and California & Oregon Power Co. v. Beaver Portland Cement Co., supra, unequivocally stated that "the Desert Land Act does not apply to water rights of federal reserved land". It is clear from these holdings, therefore, that the State of Washington does not have jurisdictional authority over the waters located within the boundaries of the Spokane Indian Reservation and, further, that the determination of reserved water rights within such reservation is not governed by state law but rather is derived from the federal purpose for which the reservation was created. Winters v. United States, 207 U.S. 564 (1908); Arizona v. California, 373 U.S. 546, 601 (1963).

(b) Congress has not authorized the State of Washington to assume jurisdiction over the waters of Chamokane Creek for use on formerly allotted or homestead land.

In the present case, the lands of some of the defendants are lands which were at one time allotted land held in trust by the United States and was eventually sold to a non-Indian. Notwithstanding

this fact, however, such lands do not become public lands nor do they become a part of the public domain in the sense that they are subject to sale or other disposition under the general land laws of the United States and, therefore, subject to state jurisdiction under the Desert Lands Act of 1877. Tweedy v. Texas, 286 F.Supp. 383, 385 (D. Mont. 1968); United States v. McIntire, 101 F.2d 650 (C.A. 9, 1939). See also Union Pacific RR Co. v. Harris, 215 U.S. 386 (1909); Ash Sheep Co. v. United States, 252 U.S. 159 (1920); Seymour v. Superintendent, 306 U.S. 351 (1961); Mattz v. Arnett, 412 U.S. 481 (1973).

In Tweedy, supra, at 385, the non-Indian plaintiffs brought an action seeking to recover damages from the defendant non-Indian corporation claiming that the defendant had taken several hundred thousand barrels of underground water from the Blackfeet Indian Reservation in the State of Montana. The court, in denying plaintiff's claim for failure to show a need or a use for the water, stated:

> the waters being reserved [on the Blackfeet Indian Reservation] are governed by federal rather than state law. United States v. McIntire, 101 F.2d 650 (9th Cir., 1939). This is so even after the trust patents are issued and lands have passed out of Indian ownership. [Emphasis added.]

In United States v. McIntire, supra, Michel Pablo, an Indian residing within the boundaries of the Flathead Indian Reservation, also in the State of Montana, sought to appropriate waters pursuant to state law. The appellees in this case were the owners of land which had originally been owned by Pablo and, as successors in interest, were contending that Pablo had acquired a water right by prior appropriation and, as such, the water right should be governed by state law. The court, in denying relief, stated:

> That statute [referring to the Act of July 26, 1866, 43 U.S.C.A. §661, a predecessor to the Desert Lands Act] applies only to public lands. [Citations omitted.] Lands which are reserved are severed from the public domain. [Citations omitted.] The statute mentioned, therefore, does not, we think, apply here. Likewise the Montana statutes regarding water rights are not applicable, because Congress at no time has made such statutes controlling on the reservation. In fact, the Montana enabling act specifically provided that Indian lands, within the limits of the State, 'shall remain under the absolute jurisdiction and control of the Congress of the United States'. 25 Stat. 676, §4.

It is perhaps appropriate at this juncture to bring to the Court's attention the fact that section 4 of the Enabling Act of the State of Washington, as well as Article 26, §2 of the Constitution of the State of Washington,*/ are substantially similar to the

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*/ Article 26, §2 of the Constitution of the State of Washington is taken word for word from section 4 of the Enabling Act (25 Stat. 676), and provides in part:

> The following ordinance shall be irrevocable without the consent of the United States and the people of this state:-----
>
> * * *
>
> Second. That the people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries of this state, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States . . . .

Enabling Act provisions and provisions of the Constitution of the State of Montana mentioned above in the McIntire case. In this regard, the United States contends that the State of Washington, in the absence of specific congressional authority and in the absence of the consent of the people of the State of Washington, as required by the Enabling Act and Constitution of the State of Washington, is precluded from exercising jurisdiction over the waters within the exterior boundaries of the Spokane Indian Reservation. In this same regard, it should be noted that by passage of Section 7 of the General Allotment Act of 1887, 25 U.S.C. §381, Congress has specifically preempted the exercise of state jurisdiction over waters on an Indian reservation by placing such authority within the power of the Secretary of the Interior. Section 7 provides:

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

As further evidence of Congress' intent to preclude the states from exercising jurisdiction over waters affecting Indian lands, Congress, in allowing the states to exercise limited jurisdiction over Indian lands pursuant to Public Law 280, expressly prohibited states from assuming jurisdiction over water rights belonging to any Indian or Indian tribe. 28 U.S.C. §1360(b) and 25 U.S.C. §1322(b). More particularly, 28 U.S.C. 1360(b)*/ provides:

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*/ See Snohomish County v. Seattle Disposal Company, 70 Wn.2d 688, 425 P.2d 22 (1967).

> (b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein. [Emphasis added.]

The homestead land on the reservation which is in non-Indian ownership presents a slightly different question, i.e. did the Act of May 29, 1908 (PE-44) pass jurisdiction over water for the homestead land to the State of Washington? The answer is that it did not.

Under the Act of May 29, 1908, the so-called "agricultural lands" on the Spokane Reservation were to be "opened to settlement and entry under the provisions of the homestead laws by proclamation of the President . . . ." Section 2. The act also stated that:

> [N]othing in this act shall be construed to deprive said Indians of the Spokane Indian Reservation, in the State of Washington, of any benefits to which they are entitled under existing treaties or agreements not inconsistent with the provisions of this act. (Section 7)

The Presidential Proclamation actually opening the reservation to homesteading was issued on May 22, 1909, 36 Stat., Part 2, 2494 (PE-43). The proclamation provides in part that the "agricultural lands within the Spokane Indian Reservation . . . shall be disposed of under the provisions of the homestead laws of the United States and said Acts of Congress . . . ." In order for the state to have obtained jurisdiction over this land with regard to water rights, the land must have become part of the public domain at some point. It did not. While the land was open to

homestead but not claimed, it remained the property of the United States held in trust for the tribe. Ash Sheep Co. v. United States, 252 U.S. 159 (1920). While the land retained its reservation status, it did not become part of the public domain and therefore was not subject to the public land laws or state jurisdiction. FPC v. Oregon, supra, at 443-444. United States v. McIntire, 101 F.2d 650 (C.A. 9, 1939). Once title passed from the United States (as trustee) to the individual landowner, it became that individual's property. Thus, this land never became part of the public domain and therefore never became subject to state jurisdiction over its waters as that jurisdiction is conferred by the Desert Lands Act. See Union Pacific RR Co. v. Harris, 215 U.S. 386, 388 (1909); Mattz v. Arnett, 412 U.S. 481, 497 (1973).

Summarizing, there are several factors which lead to the inescapable conclusion that the State of Washington does not have jurisdiction over the use of water within the exterior boundaries of the Spokane Indian Reservation.

First of all, there is no act of Congress passing this jurisdiction to the state. It should be noted that the boundaries of the reservation were specifically drawn so as to include all of both Chamokane Creek and the Spokane River as they pass the reservation. (PE-52) Since these waters are entirely within and a part of the reservation, state jurisdiction does not extend to them. Moore v. United States, 157 F.2d 760, 764 (C.A. 9, 1946). As to the Spokane River portion of the reservation, Congress has found it necessary to provide specifically for the non-Indian appropriation of water. The Act of March 3, 1905 (33 Stat. 1006) (PE-45), provides in part as follows:

> That the right to the use of the waters of the Spokane River where the said river forms the southern boundary of the Spokane Indian Reservation may, with the consent of the Secretary of the Interior, be acquired by any citizen, association,

or corporation of the United States by appropriation under and pursuant to the laws of the State of Washington.

The most outstanding thing about this legislation is that it provides for the consent of the Secretary of the Interior to any appropriation of water from this section of the Spokane River. This is a retention of authority and indicates that without an express delegation to the state, the state would have no authority whatsoever to grant rights to this water. Since there is no similar legislation concerning Chamokane Creek, that jurisdiction has not passed to the state.

Second, "as a matter of both logic and sound practical administration, jurisdiction must depend on the location of the property, not on the owner's race or the title status of his property." Pelcyger, Indian Water Rights: Some Emerging Frontiers, 21 Rocky Mountain Mineral Law Institute 743, 770 (1976). The Supreme Court has consistently resisted state jurisdictional arguments, the upholding of which would have resulted in "impractical patterns of checkerboard jurisdiction". Seymour v. Superintendent, 368 U.S. 351, 358 (1962); Moe v. Salish and Kootenai Tribes, ____ U.S. ____, 48 L.Ed.2d 96, 109 (1976). The evidence indicates that on the Spokane Reservation as a whole, only 21,683 acres out of over 154,000 acres are in fee ownership. (PE-100) Obviously, state jurisdiction over only some of these 21,683 acres would create precisely the type of "checkerboard jurisdiction" that the Supreme Court has sought to avoid.

Thus, it is respectfully requested that this court declare that the State of Washington has no authority or jurisdiction over the waters within the Chamokane Creek basin portion of the Spokane Indian Reservation.

2. The State of Washington should be enjoined from the further issuance of permits for the appropriation of the waters of Chamokane Creek outside the boundaries of the reservation until otherwise ordered by this Court.

Dr. George E. Maddox, a witness called by the State of Washington, testified on cross examination that historically the Department of Ecology has granted more water rights on streams than there is water flowing in those streams. (Tr. 1062) That is certainly true in this case since there currently exists certificates, permits and applications for water rights to Chamokane Creek in the amount of 57.72 cfs which would effectively reduce Chamokane Creek 15.96 cfs. (Tr. 124-125; PE-32; PE-33) In addition to that, the United States and the tribe claim rights to another 64.7 cfs (30 cfs for the preservation of the stream and 34.7 cfs for irrigation), disregarding for a moment the 10 cfs for the fish hatchery which is non-consumptive in nature. This makes a total of 122.42 cfs of water which has been claimed to date. This is for a stream which averaged 33 cfs in the period 1931-1970. (Tr. 85)

Until such time as this court is satisfied that the rights decreed in this case are being satisfied and that there exists unappropriated water which can be used by others, the state should issue no further water rights. To allow the state to continue as it has in the past will merely complicate the administration of the waters of Chamokane Creek and needlessly induce people to rely on water rights which they will in fact never be able to exercise.

IV. Conclusion

It has been said that although water rights are considered real property, the adjudication of those rights generally presents more complicated problems than the adjudication of rights to land. 6 Clark, Waters and Water Rights 504 (1972). This case is no exception, as the 1,381 pages of testimony and over 175 exhibits evidence. In this brief, the United States has limited its presentation to its own claims and the injunctive relief which is being sought. In its reply brief, the Government will address the validity of the various claims made by the defendants. Several questions, such as the appointment of a water master, will only become ripe for discussion once the Court determines the validity and relative priority of each of the claims. For that reason, those questions are not addressed here.

Respectfully submitted,

DEAN C. SMITH
United States Attorney
Box 1494
Spokane, Washington 99210
Telephone: (509) 456-3811

JAMES B. CRUM
Assistant United States Attorney

Michael R Thorp

MICHAEL R. THORP
Attorney, U.S. Department of Justice
Land and Natural Resources Division
10th and Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Telephone: (202) 739-2653

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF WASHINGTON

THE UNITED STATES OF AMERICA, Plaintiff, v. BARBARA J. ANDERSON, et al., Defendants.	)	CIVIL NO. 3643

CERTIFICATE OF SERVICE

This is to certify that on the 28th day of December 1976 I mailed a copy of the "Brief of the United States in Support of Its Claims" to all the parties on the attached list.

Michael R Thorp mch

MICHAEL R. THORP
Attorney, U.S. Department of Justice
Land and Natural Resources Division
Washington, D.C. 20530

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DEAN C. SMITH
United States Attorney
JAMES B. CRUM
Assistant United States Attorney
851 United States Courthouse
Box 1494
Spokane, Washington 99210

ROBERT DELLWO
KERMIT RUDOLPH
Attorneys at Law
1016 Old National Bank Building
Spokane, Washington 99201

WILLARD ZELLMER
PATRICK CERUTTI
Attorneys at Law
555 Lincoln Building
Spokane, Washington 99201

WICK DUFFORD
Assistant Attorney General
CHARLES ROE
Assistant Attorney General
Department of Ecology
Olympia, Washington 98504

ROBERT McNICHOLS
Attorney at Law
Fifth Floor, Spokane & Eastern Building
Spokane, Washington 99201

JOHN McRAE
Attorney at Law
911 West Sprague Avenue
Spokane, Washington 99204

FRED N. and RUTH M. STAHL
202 Mt. View Drive
Pullman, Washington 99163

KENNETH and ELIZABETH SWIGER
P. O. Box 706
Ford, Washington 99013

LEONARD E. LYONS
P. O. Box 84
Springdale, Washington 99173

JOHN F. CAMPBELL
Attorney at Law
1306 Washington Mutual Bank Building
Spokane, Washington 99201

LAWRENCE L. TRACY
Attorney at Law
Ries & Kenison
P.O. Drawer 610
Moses Lake, Washington 98837

JOSEPH J. REKOFKE
Attorney at Law
Fifth Floor, Spokane & Eastern Building
Spokane, Washington 99201

THEODORE O. TORVE
Assistant Attorney General
Department of Natural Resources
Olympia, Washington 98504