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Supplemental Brief of the State of Washington Department of Ecology

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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

SUPPLEMENTAL BRIEF OF THE STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

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I. INTRODUCTION

The purpose of this brief is to respond and clarify matters raised in the reply briefs filed by the United States and the Spokane Tribe. By the filing of this supplemental brief we do not intend to raise new matters to which another set of briefs will be necessary.[1/] Nor do we mean to repeat a discussion of all the issues raised in the opening briefs of the parties. Accordingly, in this brief the Department of Ecology will focus primarily on two issues on which new cases have been decided since our opening brief and on which the plaintiffs have raised arguments in their reply briefs which are inaccurate statements of the law. Except for the matters which will be dealt with briefly immediately following, the remainder of the brief will be limited to discussions of (1) the scope of the Winters Doctrine as applied to the Spokane Reservation and (2) the question of the applicability of state water rights laws to waters on non-Indian lands within the original boundaries of the Spokane Reservation.

A. This Case is a "General Adjudication" of Water Rights.

It is important to keep in mind what this case is all about.

At the beginning of its reply brief the Tribe states (1) "there is but one issue" in this case,

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1/ By letter to the Court of July 21, 1977, counsel for the Spokane Tribe implied that another brief would be necessary to respond to new matters raised in the supplemental briefs of the Departments of Ecology and Natural Resources and that the Tribe is prepared to furnish the court new evidentiary matter being compiled by their consultant. There are procedures for reopening a case for new evidence. If the Tribe wishes to invoke these, we will respond appropriately. However, we strenuously object to the offering of additional evidentiary material without the opportunity to cross-examine the person compiling the evidence and the opportunity to make objections.

"whether the Tribe and the United States have reserved rights to the natural summertime flow of the Chamokane that are prior and superior to the permits to the same which have been issued or which might be issued by the State."

and (2) that this is not a "general adjudication." Spokane Reply Brief at 1-2.

The Tribe is wrong on both statements.

This is a general adjudication as that term is commonly understood in western water law. See 6 E. Clark, Water Rights and Water Law §§ 531-31 (1972); Dugan v. Rank, 372 U.S. 609 (1963), aff'g in part, reversing in part, 293 F.2d 340 (9th Cir. 1961). This is a case in which all claimants to water rights to a stream system are joined in one proceeding, each claimant is offered the opportunity to both prove his claim and contest the claims of all other claimants, and ultimately the court enters a decree setting forth a schedule of rights correlated one as against the other. The ultimate objective of the decree is, of course, to determine who is entitled to make use of waters of a stream during times when there are not enough waters available to satisfy all rights confirmed by the court.

It is clear that a general adjudication is the type of case the United States intended to and did initiate in this proceeding.[2/]

2/ The court should be aware of the following background. At the time the United States served the Department of Ecology in this cause, the State of Washington was in the final stages of preparation of pleadings leading to filing of a "general adjudication" of the Chamokane Creek stream system in state court. The State had intended to join the United States, pursuant to 43 U.S.C. § 666, so that all federal water rights, reserved as well as state based including those of Indians, could be adjudicated in state court in the same manner as it has in approximately a dozen adjudications over the past decade. See, e.g., the Superior Court decree reviewed by the State Supreme Court in In re Chiliwist Creek, 77 Wn.2d 658, 466 P.2d 513 (1970). When the United States served the State of Washington in this proceeding the Department's attorney, Mr. Roe, immediately inquired of the Department of Justice attorney, Mr. Donald Redd, as to whether the United States was initiating a general adjudication of the Chamokane. The response of the lead attorney of the Justice Department was in the affirmative. Thereafter the State decided not to pursue further the initiation of the state court proceeding and, after

The amended complaint of the United States is clear on this point. See pages 10-11 of the Amended Complaint of the United States. Further, the Court, at all times, conducted the trial as though it was a general adjudication. Each party who participated in the trial had filed a claim and submitted proof in support thereof. And each party was provided the opportunity to test and contest the evidence in support of the claims of others.

This is not a case of the United States, on behalf of the Tribe, against all others as a class as contended by the Tribe. Spokane Reply Brief at 1. The issue, as described by Tribe, is far too restrictive. The case takes into account all parties' claims not just the Tribe's claims and whether they are paramount. As another example, the Tribe limits the case to "summertime" flows, obviously a far too limited description of the issues. Further, the suggestion by the Tribe that its claims of rights deal with superiority over water right permits issued by the state is, on its face, faulty.

We emphasize the nature of the case because of the nature of water law as applied to a general adjudication decree. The Tribe, especially, seems to say that we have paramount rights; therefore, all the waters in the stream are "ours"; therefore no one else has any rights. But that is not the way the system works. Assume, arguendo, that this Court confirms to the United States for the benefit of

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2/ (continued)
wiping out its spirit of disappointment at the United States Department of Justice unannounced "race to the court house," provided that Department, without charge, an exhaustive title report listing all potential claimants to Chamokane waters. This report, which was developed by the state earlier in the year at the cost of several thousand dollars, set out the parties required to be joined as necessary parties in a general adjudication. The United States thereafter amended its complaint by joining these claimants.

If the decision of Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976) had been announced a few years earlier the state would have likely pursued its original intention to file a state court proceeding, rather than defer to the United States actions in bringing this case. As this Court is aware, State courts, through general adjudication proceedings, are better equipped, by both procedural devices and expertise, to handle this type of lengthy, technical, tedious type of litigation.

the Tribe, a large reserved agricultural irrigation right from the Chamokane amounting to a right to dry up the stream. That does not mean the United States or the Tribe owns or has sole control over the stream. It only means if the Tribe exercises its right it may dry up the stream. But if the Tribe does not exercise its rights the water in the stream is available for use by holders of junior rights. These lesser priority rights are still valid and may be exercised at those times when the paramount rights lie dormant.

The same analysis is equally applicable even if the court were to grant the large quantities claimed as instream rights for fishery and recreational purposes. In other words, the rights confirmed in this proceeding are not rights to the stream itself, but the rights to have certain portions, or the "corpus," of the stream diverted out of or remain in the stream for various beneficial uses. See Wiel, Running Water 22 Harv L. Rev. 109 (1909). These rights are to be protected when exercised, but when they are not, the junior rights, in times of shortage, may be exercised as though the senior rights did not exist.

The mistaken approach taken by the Tribe is that if their claims are confirmed, they own the stream itself. They do not; their ownership is limited to a usufruct. Likewise, the Tribe's rights are not based directly upon concepts of sovereignty,[3/] but rather are based on their real property interests established pursuant to the exercise of sovereign federal powers, blended with the Tribe's powers of self government. If the Court itself, keeps these distinctions in mind, the Court will go far towards developing a properly developed final decree.

3/ The crucial distinction between a tribe's powers of "self government," i.e., the power to regulate themselves and their real property interest, and general government powers of "sovereignty," which only the United States and the States have in our federal system, must be kept in mind. A mixing of the two will only create chaos in legal analysis. See the excellent discussion of this distinction by Congressman Lloyd Meeds in his dissent to the Report of the American Indian Policy Review Commission, copies of which have been filed with the Court.

B. The Rights of the United States (Held for the Spokane Tribe) to the Control and Use of the Chamokane Creek Are Based on Concepts of Real Property Interests and Not Sovereignty.

Closely associated with the preceeding discussion is the confusion which has developed in this case over the United States' and the Tribe's interest and power over the water as it flows through lands within the original boundaries of the reservation.

As just noted, the water rights of the Tribe are based on concepts of real property. That is, when the executive order establishing the Spokane reservation was executed, the United States, exercising constitutional powers, reserved (in this case by implication in an executive order) certain real property rights, i.e., rights to the use of the waters of Chamokane Creek.

We urge the Court to take into account the difference between Indian real property water right interests and general governmental powers. Stated as simply as we can state it: the creation of the reserved Indian water right property interest, absent federal authorization, removed the regulation and control of that interest from sovereign control by the state. That is because, generally, the State has no power, without federal approval, to regulate federally reserved Indian real property interests. However, the creation of that real property interest did not remove the state totally from regulation of waters flowing in Chamokane Creek within the original boundaries of the reservation. This is because the scope of the Indians' interest, which operates to preempt general state authority, (1) goes only to usufructory real property rights, not the stream itself, and (2) even if a usufructory right appears to authorize the use of the entire corpus of the stream, either by diversionary or instream uses, that right has preemptive effect upon state law only during those time periods when the usufructs are exercised so fully and completely as to eliminate, as a matter of

law, all waters from the stream so far as the exercise of any confirmed rights of a non-reserved nature are concerned. This is part of the larger constitutional picture which we set forth in our opening brief involving the allocation of powers over waters between the federal and state governments in our federal system.

In a nutshell the state's governmental powers are limited as to waters of Chamokane Creek within the reservation in that they cannot apply, absent express federal authorization or consent, to the administration of Indian reserved property rights. Likewise, the State's power is limited in that it laws cannot be applied so as to the interfere with any tribal powers of self government applicable to reserved real property interest, such as water rights. But, except for these two limitations, the state's powers extend to all waters of the Chamokane Creek to the same extent as they apply to lands outside the reservation within the State of Washington.

C. The Department of Ecology Does Not Contend that the United States Reserved No Rights by Implication for Benefit of the Spokane Tribe

The straw man approach to advocacy has been used by the plaintiffs on a number of occasions in their reply briefs. The most disconcerting aspect of plaintiffs use thereof is that they misconstrue the Department of Ecology positions and then whale away at them to their utmost advantage.

A prime example is how the plaintiffs have twisted the State's position with regard to the reserved right claims for the benefit of the Tribe. The plaintiffs claim grandiose rights for the late summer months (1) to irrigate and (2) for fisheries and recreation. During that period there is not enough water in the stream under normal conditions to satisfy both claimed rights. We argued in our opening brief that the claims for the Tribe for both (1) instream uses (requiring, it is claimed, all of the summer flow) and (2) agricultural irrigation rights (also requiring the whole stream) were

"mutually exclusive." From this, plaintiffs said we contend the Tribe gets nothing. See U.S. Reply Brief at 5.

Plaintiffs misstate the Department of Ecology's position.[4] The Department has consistently taken the position that along with the reservation of land by the presidential executive order of 1881 there was impliedly reserved rights to the use of water for agricultural irrigation uses. As we noted in our Brief, the right may be for substantial amounts, or it may be approaching zero. The evidence before the Court is not clear enough to precisely quantify. See Brief of the Department of Ecology at 27-31. The point we made in our opening brief, which the plaintiffs miss, is that it is difficult, from any of the description of the actions surrounding the execution of the presidential executive order, to support a finding of the establishment of two implied water rights: one authorizing the removal of of the stream for irrigation and the other authorizing the retention of all of the same waters for fisheries purposes. They are mutually exclusive. It could be one but not both. And, as the Court knows from the analysis of our opening brief, the Department suggested the confirmation of a reserved right for agricultural purposes was warranted. See Department of Ecology Brief at 29-30.

In any event, the Department of Ecology has never contended that the Tribe was not entitled to a right to make use of water from the Chamokane for both instream and agricultural uses.[5]

4/ The Department of Ecology is very sensitive on this score. Such approaches unfairly paint a picture of party setting forth an appearance of one who blatantly disregards well established law when, in good faith, they are attempting to follow the precedents to the best of their ability.

5/ Note is made that the Department of Ecology has already recommended that a minimal flow be set on the stream that flow should be set based not upon any impliedly reserved federal right but upon Washington state law. See Brief of Department of Ecology at 59. If the Court is reluctant to enter such an order, based upon concepts of primary jurisdiction or otherwise, the Court may wish to consider the entry of an order referring the matter of level setting pursuant to Chapter 90.22 RCW to the Department of Ecology.

D. The Plaintiffs' Arguments on "Checkerboarding" Are Without Merit

This fourth general observation is most critical to the outcome of this case. It is triggered by the contention that the position of the Department of Ecology promotes a "checkerboard" situation within the Indian reservation which is contrary to sound policy both from a water management and the protection of Indian interests basis. This contention reaches a sensitive nerve of the Department of Ecology because it is so flagrantly without merit.

Let us consider the following:

1. Waters of stream systems generally, and the Chamokane Creek drainages in particular, are transitory in nature following Newton's law not the vagaries of the location of governmental boundaries.

2. In the Chamokane drainage the majority of the stream's basin, from its beginnings until it discharges into the Spokane River, is outside the boundaries of the Spokane Reservation. And even when the stream flows within the original boundaries of the reservation reaches of the stream touch non-Indian lands.

3. Federal congressional policy has, for more than a century, pointed to and encouraged states to establish water rights laws applicable to the vast majority of federal lands as well as all non-federal lands. See, e.g., Acts of 1866, 1870, and 1877, 43 U.S.C. §§ 321, 661. Further federal policy has, on numerous occasions, directed federal agencies, activities, and licenses to comply with state water rights laws. See, e.g., Reclamation Act of 1902, 43 U.S.C. §§ 383, and Federal Power Act of 1920, 16 U.S.C. § 802.

4. As a matter of historical development, consistent with the aforementioned federal policy, the only governmental

unit equipped presently to operate a water rights allocation and regulation system applicable to the entire watershed, such as the Chamokane, is state government.

5. The federal government, while it has the constitutional power to develop such a comprehensive system, has not and, to the writers' knowledge, harbors no intentions to develop such systems. See statement of Secretary of the Interior Cecil Andrus, a copy of which is attached as Attachment A.

6. Further, the Department of the Interior has powers of a limited nature to allocate waters within the Spokane Reservation. Pursuant to the General Allotment Act of 1887, the powers would be limited to that portion of the Chamokane within the reservation, to allocation for only one use: agriculture, and to Indians only. See Section 7, General Allotment Act of 1887, 25 U.S.C. § 381. In addition, very belatedly, the Department of the Interior proposed regulations implementing the 1887 statute last year, it does not appear that these regulations will be adopted by the Department in the near future. Of note, any regulation adopted by the Department of the Interior would apply solely to one right of the Tribe: the impliedly reserved right of the Executive Order.

7. Further, "water codes" adopted very recently by various tribes such as the Yakima Tribe have very severe limitations affecting their effectiveness to function as a comprehensive regulatory tool even within the reservation.

   a. They may be invalid on the basis (1) a tribe has no power to adopt the code, or (2) a code may not be approved, through a delegation of statutory power concept, by the Department of the Interior. And,

further, it may be that the Secretary of the Department has no power to delegate the authority of the Department to administer a code to a tribe where the authority to adopt and administer codes is vested expressly in the Secretary.

b. Further, if valid, a tribal code's applicability would be limited in application to but one right: The Tribe's reserved right.

c. And, finally, a code would lack a comprehensive application; it may not reach all waters and water rights of a given drainage (such as the Chamokane) or even, as noted supra, all the waters or rights within the original boundaries of the tribal reserve.

8. Because the Spokane Reservation is no longer a place reserved for residency by Indians, as originally conceived, there are strong interests arising from a significant non-Indian residency that Washington's water rights regulation programs be applied within the reservation.

9. Finally it is almost beyond dispute that, as a matter of sound national water management policy, a unitary water rights adjudications and regulation policy be administered by a single governmental unit. This policy has been enunciated as national policy with the passage of the "McCarren Amendment" of 1952. 43 U.S.C. § 666.

All of these factors point in one direction: that as a practical matter the only governmental unit now equipped to regulate the waters of the Chamokane on a comprehensive non-piecemeal basis is the state acting through its Department of Ecology. There is no indication whatsoever that federal government, the only other governmental unit with the power to comprehensively administer a water regulation program, has any plans to embark into this area so long occupied by the state governments.

Thus, if "piecemealing" is a relevant policy consideration in deciding this case, as contended by the plaintiffs, the Court should construe the applicable law in a fashion which emphasizes the importance of the application of state water rights adjudications and regulation law to Chamokane as it flows both within and without the reservation's original boundaries. Every road sign leading to the avoidance of piecemealing we know of points to the increasing importance of the state's role and the state's water laws, not their diminution.6/

6/ The only roadsign pointing to a contrary result concerns the often repeated allegation that Indian interests cannot be treated fairly by the state's administrative and judicial branches. The contrary of this roadsign message is demonstrated by two important recent developments: a statement of the United States Supreme Court and the recent "non-actions" of the Department of Justice involving recent general adjudication conducted in state court pertaining to decisions on claims for reserved rights, including Indian rights.

(1) In Colorado River Water Conservation District v. United States, 424 U.S. 800, 812 (1976) the following discussion relating to the ability of state courts to be fair in water rights adjudications involving reserved Indian claims is set forth:

> [T]he Government's argument rests on the incorrect assumption that consent to state jurisdiction for the purpose of determining water rights imperils those rights or in some way breaches the special obligation of the Federal Government to protect Indians. Mere subjection of Indian rights to legal challenge in state court, however, would no more imperil those rights than would a suit brought by the Government in district court for their declaration, a suit which, absent the consent of the Amendment, would eventually be necesstated to resolve conflicting claims to a scarce resource. The Government has not abdicated any responsibility fully to defend Indian rights in state court, and Indian interests may be satisfactorily protected under regimes of state law.

(2) The United States, as a party defendant in Washington State court general adjudications, has set forth reserved rights claims in approximately twelve cases during the last twelve years. Of the cases so far decided the United States has never appealed the reserved water right confirmed by a state superior court. In In re Chiliwist Creek, 77 Wn.2d 658, 466 P.2d 513 (1970), the claim reserved Indian rights submitted by the United States was awarded the first (highest) priority on the stream. In In re Bonaparte Creek, Okanogan County No. 17787, a final decree has not yet been entered; however, in July, 1977, the United States, being apparently satisfied with the report of the referee, took no exception to the reserved Indian right proposed for confirmation by the Court by the referee appointed by the Court. (Exceptions were taken to the

In concluding this important issue, let us be precise. State courts now have authority to adjudicate and administer "reserved" Indian rights. 43 U.S.C. § 666. In other words, as to adjudication and regulation thereof, states have jurisdiction over all waters within its boundaries. Thus, the State of Washington has the comprehensive ability to determine who is entitled to make use of what waters of a stream, and to protect those rights one against another. These include the rights adjudicated to the Indians. (The power to adjudicate and protect, as we emphasized in our opening brief, does not include the general power to determine as between the Indians the individual apportionment to individual Indians of the "in gross" reserved Indian right. That is an issue of allocation vested in the United States (and perhaps shared with the Indians) which need not be decided in this case.)

Our approach has similarities to the state water rights authority regulation authority so commonly applied to other quasi-governmental units such as irrigation districts. A district establishes a water right. That right has many beneficiaries, i.e., the water users entitled to water delivered from the district's facilities. The State has authority, in its unitary command position, to insure the district gets its "in gross share," through general adjudication and other powers, and to protect others against the district taking too much. Subject to the state's general overview, the district itself controls the allocations among those entitled to portions of "in gross" amount adjudicated to the district. Analogyzing to the Indian reserved water rights situation, for those looking to entitlements from the federally reserved right the unit in charge of determining those entitlements is the United States or possibly the Tribe.

6/ (continued)
referee's proposal by other defendants, including a party to this proceeding, the Department of Natural Resources, and the matter of the reserved right was remanded to the referee for the taking of further evidence.)

For everyone else claiming rights not within the "gross" amount whether Indian or non-Indian and whether inside or outside boundaries of a reservation, the state is the jurisdiction in charge.

Taken in a comprehensive sense, as applied to the Chamokane drainage, the position of the state minimizes checkerboarding.

II. SCOPE OF THE WINTERS DOCTRINE

Earlier, the Department of Ecology took the position that, based on rules of interpretation announced in the Winters Doctrine and the evidence before the court, it would be supportable to confirm an impliedly reserved right to the United States for the benefit of the Indians, on a broad base, consisting of five uses: (1) irrigation, (2) stockwater, (3) domestic, (4) firefighting applicable to timber lands, and (5) road building and related construction activities incident to the production of timber. See Brief of Department of Ecology at 58. These uses, constituting a substantial gross amount of water are required to accomplish those purposes for which the Spokane Reservation was created - making a home and making a living thereon by developing the agriculture and timber resources of the reservation. This we believe is the result of the proper application of the Winter doctrine formula to the pertinent Presidential executive order and the background surrounding its execution.

Both plaintiffs contend in their briefs that the Winters Doctrine is even broader in scope than the Department of Ecology and seek support in Winters v. United States, 207 U.S. 564 (1908), Arizona v. California, 373 U.S. 546 (1963), and various recent cases to support their contention. They contend that reserved rights for the Spokane Tribe extend the right not only for irrigation and domestic uses, but to instream flow for protection of fish as a source of food and for recreational development as well, and for virtually any other purpose which might be considered a "beneficial use" under any contemporary standard or latter day revelation which may develop

during any period of time in the future.[7/]

Taken in sum, the plaintiffs appear to be contending that any activity on the reservation which with the addition of water will make the activity profitable for the Indians, constitutes a purpose for which the reservation was created and therefore a water right was reserved.

These cases do not support the position of the plaintiffs. Rather, when examined, they support the position of the Department of Ecology that the Winters Doctrine, as broad as it is, does have limits, the definition of which are of central importance in this case.

A. The Basis of the Winters Doctrine: Implied Intent to Reserve Water for the Purposes of the Reservation

The position of the Department of Ecology is that when the United States created an Indian Reservation, there was indeed reserved for the use of the tribe water in sufficient quantities to fulfill the purposes for which the reservation was created. This reservation of water need not be express, though it may be. Rather, it is implied from the purposes for which the reservation was created. Therefore, as in Winters, when the United States created an Indian Reservation, such as the Fort Belknap Reservation, for the purpose of placing Indians on farms, there was impliedly reserved water for agricultural purposes. Likewise, when the United States created a national monument one of the purposes of which is to preserve a unique species of pupfish, there is impliedly reserved water adequate to preserve that species. Cappaert v. United States, 426 U.S. 128 (1976).

Where the plaintiffs differ with the Department of Ecology is that they argue that an implied reservation of water may be made for

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7/ As stated by the Tribe, the Tribe's right to water encompasses "[e]verything that could be included . . . in their making a living. Spokane Reply Brief at 45.

a purpose which was not contemplated at the time the reservation was created. The Department of Ecology on the other hand, takes the position that the purposes of the reservation at the time of the creation of the reservation, i.e., primarily farming, control the scope of the Winters water right attaching to the reservation.8/ As we will show below, this interpretation not only is the correct one pursuant to the United States Supreme Court, but is the only reasonable and just basis on which the Winters Doctrine can be integrated into western water law with a minimum of conflict among jurisdictions and sectors of our society and a minimum of waste of a scarce resource.

1. Winters -- One More Close Examination.

The plaintiff Tribe constantly has led the Court back to the necessity of examining the entire sequence of Winters cases to fully understand its meaning. We concur with that approach.

In the first Ninth Circuit Winters opinion, the Court used some revealing language that explains the foundation of the Winters doctrine.

> We are of opinion that, when all the facts, circumstances, conditions, and surroundings of the Indians at the time the treaty was entered into are considered, it cannot judicially be said that no portion of the waters of Milk river was reserved by the terms of the treaty for the use and benefit of the Indians residing upon the reservation. Such a construction would be in violation of the true intent and meaning of the terms of the treaty. We must presume that the government and the Indians, in agreeing to the terms of the treaty, acted in the utmost good faith toward each other; that they

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8/ As will be explained fully later, any limitation on "Winters" rights are not limitations on the ability of the United States or a tribe to acquire "water" rights. Creation of a federally reserved right is just one way for the federal government to create a water right. The federal government or an Indian Tribe also may secure a right pursuant to state law. (Indeed, many federal agencies such as the Bureau of Reclamation are required to obtain the water rights through state laws.) Further, at least the United States could acquire additional water rights, as the purposes for which water is needed on reservations change from the original purposes, through its powers of eminent domain.

> both understood its meaning, purpose, and object; that they knew that "the soil could not be cultivated" without the use of water to "irrigate the same."

143 Fed. at 745 (emphasis added).

> If they [the Indians] were to graze cattle and cultivate the soil, they knew it could not be done successfully without the use of water. The absence of the words "to irrigate their lands" did not abrogate and destroy their rights as guaranteed by the terms of the treaty. We are of opinion that it was the intention of the treaty to reserve sufficient waters of Milk River, as was said by the court below, "to insure to the Indians the means wherewith to irrigate their farms," and that it was so understood by the respective parties to the treaty at the time it was signed.

Id. at 746 (emphasis added). In other words, even without expressly stating, both parties to the treaty were presumed to know that water was to be reserved to fulfill the express purpose of the reservation: agriculture.

This view was upheld by the United States Supreme Court. The Winters Court held that where there are two conflicting implications, one of which would defeat the purpose of the agreement (treaty) and one which would defeat it, the Court should choose that approach which would support and uphold the agreement and make it meaningful. 207 U.S. at 576. The purpose of the reservation was agriculture. There was an ambiguity in the treaty as to whether water was reserved. To construe the treaty to not include reserved water would defeat the purpose of the reservation; to construe the treaty to include water would support it.

This is the foundation of the Winters doctrine.

2. Arizona v. California

Arizona v. California supports this view. Though cited by the plaintiffs for establishing the "practicably irrigable acreage" standard, it can only be understood in the context in which the case developed.

This was an action for a sort of stream adjudication, different in scope and forum, but similar in kind to the instant case. The

purpose was to quantify rights to the use of water in the Colorado River. Among the competing users were Indian tribes and various other federal claimants. The Court spoke only briefly on the subject of reserved rights, adopting the analysis of Special Master.[9/]

One of the main issues was the quantity of water reserved and whether that quantity should be fixed or flexible, varying with future needs. The Master and subsequently the Court adopted a fixed quantity. The Master explored other options, including an open-ended decree, but concluded that

> such a limitless claim would place all junior water rights in jeopardy of the uncertain and the unknowable. Financing of irrigation projects would be severely hampered if investors were faced with the possibility that expanding needs on an Indian Reservation might result in a reduction of the project's water supply. Moreover, it would not give the United States any certainty as to the extent of its reserved rights, which would undoubtedly hamper the United States in developing them. Since, under the Arizona theory, United States water rights vary with changes in Indian population, the planning of works to serve future needs would be difficult because the United States could never know whether sufficient water to operate the works economically would be legally available.
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> . . . .
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> Therefore, the most feasible decree that could be adopted in this case, even accepting Arizona's contention, would be to establish a water right for each of the five Reservations in the amount of water necessary to irrigate all of the practicably irrigable acreage on the Reservation and to satisfy related stock and domestic uses. This will preserve the full extent of the water rights created by the United States and will establish water rights of fixed magnitude and priority so as to provide certainty for both the United States and non-Indian users.

Master's Report at 264-65.

After determining that the amount reserved should be fixed, the

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9/ We concur with the United States that the analysis of Special Master Simon Rifkind was "superb." United States Reply Brief at 30.

Master continued to define the quantity.

> 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 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.

Id. at 265 (emphasis added.)

Special Master Rifkind and subsequently the Supreme Court spoke clearly: the quantity of the reserved right should be fixed and limited to the purposes for which the reservation was created, i.e., agriculture. There was no reservation, and could not be, for purposes not contemplated, i.e., industry. There is no "continually expanding purposes doctrine" as urged by the plaintiffs in this case.

3. Cappaert v. United States

This view was confirmed most recently by the Supreme Court in Cappaert v. United States, 426 U.S. 128 (1976), discussed in detail in our opening brief.[10/] Department of Ecology Brief at 15-16. The Court stated:

10/ The United States contends that Cappaert holds that reserved rights may apply to ground waters. We agree. See United States Reply Brief at 4. However, Cappaert does not hold that the reserved rights doctrine applies to all ground waters. Rather, it holds that a court may enjoin the pumping of ground water which is in hydrologic continuity with surface waters to which federal reserved rights attach, an entirely different proposition. The Court held that the pool which contained the pupfish was surface water. 426 U.S. at 142.

> The implied reservation of water doctrine, however, reserves only that amount of water necessary to fulfill the purpose of the reservation, no more.

426 U.S. at 141 (emphasis added).

The Court examined the history of the creation of the federal reservation and based its decision on the original purpose, i.e., the purposes announced by President Truman by executive order in 1952.

4. Mimbres Valley Irrigation Co. v. Salopek

This rejection of "continually expanding purposes doctrine" was most recently articulated in Mimbres Valley Irrigation Co. v. Salopek, ___ N.M. ___, 564 P.2d 615 (1977), in which the United States claimed reserved water rights for instream flows and for recreational purposes in the Gila National Forest. The Court found that the original purposes of the reservation were "to insure favorable conditions of water flow and to furnish a continuous supply of timber. Recreational purposes and minimum instream flows were not contemplated." 564 P.2d at 618. However, Congress in subsequent legislation did recognize such other new and expanded purposes for our national forests in the Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. § 528, which states in part:

> It is the policy of the Congress that national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes.

The issue was whether at the time of creation of the reservation there was reserved water adequate to fulfill only the original contemplated purposes of the reservation (timber) or whether there was reserved water adequate to fulfill the expanded purposes of the reservation as expressed in the Multiple-Use Sustained-Yield Act (fish and aesthetics). The Court, after reviewing the landmark cases we have already discussed, concluded that "[t]he Cappaert decision restricts the application of the reservation doctrine to the limited purpose for which the reservation was created." 564 P.2d at 616.

5. United States v. Finch

The United States in its reply brief places great weight on the recent case of United States v. Finch, 548 F.2d 822 (9th Cir. 1976) United States Reply Brief at 7-9. However, in late June the Supreme Court granted certiorari and dismissed the appeal for want of jurisdiction in the Court of Appeals. 97 S.Ct. 1828 (1977). The case and argument by the United States, therefore, is of no import.

But even if Finch were "good law," it would not be the landmark case as advocated by the United States. It is not even relevant to this case.

Finch is cited by the United States as construing broadly the purposes for which a reservation is created. From those broad purposes, the United States argues, a broad, virtually unlimited federal reserved Winters right is created. However, decisively for application here, the discussion in Finch is not in the context of the Winters doctrine; it is a criminal case in which the boundaries of the reservation are at issue.

The question was whether the bed of the Big Horn River was within the reservation for the purposes of criminal jurisdiction. The Court of Appeals felt that for criminal jurisdiction the boundaries of the reservation encompassed the bed of the River. To reach that conclusion, the Court embarked on the appropriate analysis: analyzing the language of the treaty which granted the lands to the Crow Tribe.[11/] The court found that this treaty was particularly restrictive, noting that

> [t]he national government explicitly agreed that such lands would be "set apart for the absolute and undisturbed use and occupation of the Indians . . . ." [Citation omitted.] The treaty continues: "[t]he United States now solemnly agrees that no person, except those herein designated and authorized so to do, and except such officers, agents, and

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11/ The court used the term "grant" to describe this treaty. 548 F.2d at 831.

> employees of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians . . . ."

548 F.2d at 831.

In the words of the court, "the Government recognized that all the lands within the metes and bounds of the reservation were to be theirs [the Indians]." Id. Based on this strong language, the court found that the River bed was granted to the Tribe and was not retained by the federal government.

The court went on, in dicta, to dispell the argument raised that a lack of a fishing purpose indicates that the bed of the River was not conveyed. Rejecting this argument, the court resorted to history of the circumstances surrounding the creation of the reservation and concluded that although the express purpose[12/] of the reservation was to orient the Tribe toward agriculture, there was no intent to deprive the Indians of any source of food. In other words, the proposition for which Finch may be cited is that the limited express purpose of the reservation, i.e., agriculture, is not a limiting factor in construing the language of the treaty granting the Tribe criminal jurisdiction over their territory, which included the bed of the Big Horn River.

Contrast this with the instant case in which the Winters Doctrine (as opposed to criminal jurisdiction) is based on implication from the express purposes of the reservation. There is no intent to deny the Tribe of any source of food; that is not the question. The question is whether a Winters right attaches to purposes which are not express. Therefore, Finch is doubtful validity for use in this case. In sum,

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12/ The court referred to reorienting the Tribe toward agriculture as the "aim" of the United States. 548 F.2d at 832.

Winters holds that the scope of federal reserved rights is limited to the express purposes of the reservation. Finch (to the extent it may be good law) holds that the scope of criminal jurisdiction is not limited by the express purposes of a reservation.

6. Conclusion: There is No "Continually Expanding Purposes Doctrine" as Advocated by Plaintiffs

Both the Tribe and the United States have advocated that this court adopt a "continually expanding purposes doctrine" which would necessitate an open ended decree to allow for new purposes and therefore new needs of the Tribe as they develop time to time in the decades to come. As outlined above, this is not within the scope of the Winters Doctrine as expressed in the Winters, Arizona v. California, and Cappaert cases. Those cases show clearly that the scope of the right reserved to the Tribe is determined from the express purpose of the reservation at the time of creation of the reservation.[13/]

As stated by the Special Master:

> 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.

Masters Report at 266 (emphasis added). Just as western state water law cannot tolerate the uncertainty of open-ended decrees for non-Indians, federal water law cannot allow "limitless claim[s]" by the United States on behalf of Indian Tribes. See id. at 264.

13/ This of course does not mean that the purpose must be spelled out in so many words in the treaty or executive order creating the reservation. The purpose may be expressed in the proceedings leading up to the treaty or executive order, such as agreements or correspondence leading to the agreements. That would be the case with the Spokane Tribe. The purposes of the Spokane Reservation were described fully in our opening brief and will not be repeated here. Department of Ecology Brief at 18-24.

B. "Practicably Irrigable Acreage" and other "Rules"

Both the United States and the Tribe criticize the Department of Ecology for trying to obfuscate the issues and to confuse the "rules laid down in prior cases.[14/] But water law whether it be based on state or federal law is complex and not susceptible to short form rules or easy solutions.

A prime example of this is the so called "practicably irrigable acreage" standard articulated by the Supreme Court in Arizona v. California. The United States in its brief states it as a hard and fast rule, one which applies, apparently, regardless of intent of the parties. See United States Reply Brief at 28. However, again referring to the "superb analysis" of Special Master Rifkind, the basis of the irrigable acreage rule is apparent. It is a rule of construction designed to implement the implied intent of the parties in reserving water for the express purpose of agriculture. Obviously, if there is reserved land for the purpose of agriculture, there was reserved water adequate to irrigate that land. However, the land must be for the purpose of agriculture. As the Master stated:

> [W]herever I have found an intent to reserve water, I have inferred, absent evidence to the contrary, that the reservation was not limited to the needs of the population then resident upon the land, nor to the acreage being irrigated when the Reservation was created. I have concluded that enough water was reserved to satisfy the future expanding agricultural and related water needs of each Indian Reservation.

Master's Report at 260 (emphasis added).

> This conclusion is also supported by the fact that the irrigable land originally withdrawn for each of the five Indian Reservations was considerably more extensive than was necessary to support the Indians who inhabited the Reservation immediately after their establishment. The only explanation for this withdrawal of excess irrigable acreage is that the United States intended it to be utilized in the future.

14/ See, e.g., United States Reply Brief at 5, 13, 16, 37; Spokane Reply Brief at 2, 4.

Id. at 262 (emphasis added).

The highlighted language, "absent evidence to the contrary" and "only explanation," shows that the so-called irrigable acreage standard is not meant to apply in every case, regardless of factual circumstances. Where the only explanation for the reservation of irrigable lands is that they should be used for agriculture, then the standard obviously would apply. But as pointed out in our opening brief, such is not necessarily the case with the Spokane Reservation. Much of the land was timbered and that land, as timber land, was valuable to the Indians. Department of Ecology Brief at 19-20. Can it be said then that, at the time of the creation of the reservation, there was an intent to farm that land with crops other than trees? If it cannot, then there is no Winters right to irrigate attaching to that land, though there would be a Winters right attaching to that land in quantities adequate to fulfill the purposes of the reservation; i.e., water adequate to protect and grow the timber.15/

We would like there to be simplicity in the administration of federal reserved rights. That would make the job of the states in adjudicating and administering such rights under the McCarran Amendment, 43 U.S.C. § 666, much easier. Unfortunately, simplicity is not the law. Rather the quantity and type of Winters right reserved varies from reservation to reservation depending on the intent of the parties creating the reservation. The only way in which we can proceed is to analyze that intent as best we can and quantify the rights accordingly.

15/ The United States would lead this Court to believe that the Department of Ecology attaches some special significance to the Act of May 29, 1908. We do not and did not in our opening brief. That Act is relevant for the purpose of demonstrating that substantial quantities of timber land did exist near the turn of the century. Though it does not purport to describe the extent of timbered lands at the time of the creation of the reservation, it certainly described the minimum amount of acreage which was timbered just two decades earlier. Accordingly, documents supporting that Act may be the best evidence available to this Court in determining which lands which were not intended to be irrigated by reserved Winters rights.

C. The Exterior Boundaries of the Reservation Do Not Connote a Fisheries Purpose

As in the case of the practicably irrigable acreage "rule," the plaintiffs attempt in the case of reservation boundaries to find simplicity where none exists. The U.S. declares that the reason for President Hayes extending the boundaries to the outside borders of Chamokane Creek is "self-evident." Chamokane Creek was important. United States Reply Brief at 19.16/

There is no doubt that the Creek was important; so were the Spokane and Columbia Rivers. But the fact that their entire widths were within the boundaries of the reservation does not mean that all the resources passing through those river beds were controlled by the Tribe, with no regulation by the state. Rather, it indicates that the beds of the rivers were within the boundaries of the reservation. This may give rise to some regulatory power over the river which the Tribe otherwise would not have had, but it does not mean that there was any explicit purpose to the river. Cf. United States v. Finch, 548 F.2d 822 (9th Cir. 1976), rev'd, 97 S.Ct. 1828 (1977). It may connote the importance of water to the reservation, but that importance may take the form of importance to irrigation and to salmon fishing, not to trout fishing. Just as the inclusion of a river within the Crow Reservation did not connote a fisheries purpose in Finch, it does not do so here.17/ At the very least, the meaning of

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16/ The United States asks the Court to take judicial notice of the "fact" that the usual practice if to set boundaries of reservations at the middle of the watercourse. United States Reply Brief at 19. We have no certain knowledge of what the usual practice was, but we do know that there are other cases in which reservation boundaries extend to the outside of rivers, such as the Colorado Indian Reservation which extends to include the Colorado River. See Master's Report at 271.

17/ Fishing was not an important source of food for the Crow Tribe. 548 F.2d at 832, n. 17.

the boundary change is not "self-evident."

III. JURISDICTION OF STATE WITHIN BOUNDARIES OF THE SPOKANE RESERVATION

A. Framework for Discussion

The purpose of this section is not to repeat the exhaustive exhange which has taken place in the opening briefs of plaintiffs and the Department of Ecology. However, some response is necessary to clarify the varying approaches by the parties.

Plaintiffs base their approach on the premise that all jurisdiction both civil and criminal is retained by an Indian Tribe unless ceded away. United States Reply Brief at 38. They cite as general authority Worchester v. Georgia, 31 U.S. 515 (1832) and the recent case of Oliphant v. Schlie, 544 F.2d 1007 (9th Cir. 1976), cert. granted sub nom., Oliphant v. Suquamish Tribe, 97 S.Ct. 2919 (1977). They explain away contrary cases as being in specialized areas of taxation and criminal activity among non-Indians. United States Reply Brief at 40.

The Department of Ecology, on the other hand, approaches the matter in a more contemporary manner, acknowledging that there are many matters in which tribal self-government may be exercised to the exclusion of the state, but there exist numerous instances in which the state has jurisdiction over non-Indians within the reservation, areas within the reach of the state without an express cession of jurisdiction by the Tribe and without any direct grant of jurisdiction by Congress. We contend that in addition to certain specialized areas such as taxation and criminal activity among non-Indians, non-Indian water rights is one of these areas.

The plaintiffs admit that in all cases, as a matter of law, Indian Tribes do not have jurisdiction in all cases over non-Indians within the boundaries of the reservation. The tax cases are one

example. (In our opening brief, at page 36, we provided a string citation of cases supporting the validity of state law application within reservation boundaries.) The test is not whether or not the activity is a tax or not, but whether or not the activity is one in which the tribal rights to self-government are impaired. See Organized Village of Kake v. Egan, 369 U.S. 60 (1962); Williams v. Lee, 588 U.S. 217 (1959). In this case, there is no infringement upon the tribe's rights to self-government. As emphasized in our opening brief, we assert no jurisdiction over Indian rights to make use of water; we only assert jurisdiction over non-Indian water, i.e. "excess" waters.[18/] The question then becomes a narrow one: whether jurisdiction over non-Indians exercising non-Indian rights obtained under state law is left to the Tribe or the State. The plaintiffs assert that it is within the Tribe's sovereign power to exercise such jurisdiction. We assert that the resting of jurisdiction with the state does not infringe upon the Indians rights to self-government and therefore the state has jurisdiction.[19/]

However, even assuming that the approach of the plaintiffs is correct, using the analysis set forth in the Oliphant case, the result is the same: the state has jurisdiction over non-Indians on non-Indians lands of the Spokane Reservation using non-Indian water, i.e., waters in excess of the requirements of Indians to satisfy their reserved rights.

18/ The sole exception is the authority provided by 43 U.S.C. § 666 or where directed by a federal court to take such jurisdiction under the policy of that federal statute.

19/ The Supreme Court has recognized that it is permissible for the state to impose on a tribe a burden of collecting a tax levied by the state on non-Indians within the reservation. The Court found "nothing in this burden which frustrates tribal self-government . . . ." Moe v. Confederated Salish and Kootnai Tribes, 425 U.S. 463, 483 (1976). In contrast to Moe, where the exercise of state jurisdiction imposed a burden on the tribe, in the instant water rights case, no burden of any kind would be imposed.

B. Assuming the Plaintiffs' Approach is Correct, the State Nevertheless has Jurisdiction Within the Boundaries of the Spokane Reservation

1. The Oliphant Test

Though a criminal case, the Ninth Circuit (by a 2-1 majority) in Oliphant articulated a framework for analysis for criminal cases which has been picked up by the plaintiffs in this case of civil jurisdiction. The relevant passage of the case indicating the approach urged there is as follows:

> The proper approach to the question of tribal criminal jurisdiction is to ask "first, what the sovereign powers of the tribes were, and, then, how far and in what respects these powers have been limited." [Citations omitted.]
>
> "It must always be remembered that the various Indian tribes were once independent and sovereign nations . . ." [citation omitted] who, though conquered and dependent, retain those powers of autonomous states that are neither inconsistent with their status nor expressly terminated by Congress.

544 F.2d at 1009.

The Court then follows a two step analysis to determine whether the exercise of criminal jurisdiction by the Tribe over a non-Indian was proper. First, it must be determined whether the exercise of that jurisdiction was one of the "attributes of sovereignty" and if so whether that attribute of sovereignty was ceded to or taken away by the federal government. 544 F.2d at 1009.[20/]

2. State Exercise of Jurisdiction Over Non-Indians Within the Spokane Reservation Exercising Non-Indian Water Rights Does Not Infringe Upon Tribal Sovereignty

Though "sovereignty" really is a misnomer, and "self-government"

20/ Given this part of the Oliphant test, there may be little difference in the approaches offered by the various parties here. Though the United States cites Oliphant for the proposition that the tribe retains jurisdiction except where ceded (United States Reply Brief at 38), it clearly does not stand for that broad proposition.

is a more proper term,[21/] it is clear that, whatever that is, the state is not infringing upon it by its jurisdiction over water rights on the reservation. In Oliphant the court stated that "the power to preserve order on the reservation, when necessary by punishing those who violate tribal law, is a sine qua non of the sovereignty the Suquamish originally possessed." 544 F.2d at 1009.

Besides criminal jurisdiction within the boundaries, the courts have stated that where a civil transaction between an Indian and a non-Indian is involved, the tribal courts may have jurisdiction. Williams v. Lee 358 U.S. 217 (1959). The Williams Court, 358 U.S. at 254, stated the relevant test:

> Essentially, . . . the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.

Where the transaction involves an Indian, the courts generally have found tribal jurisdiction to the exclusion of the state. However, where the transaction is entirely among non-Indians and involves no Indian rights, then the state may exercise jurisdiction, as there is no infringement upon tribal self-government.

3. Even If Such Jurisdiction Would Infringe Upon the Rights of the Tribe to Self-Government, Such Jurisdiction Has Been Ceded by the Tribe and Granted by Congress.

The second part of the Oliphant test is whether there are any limitations on the right of the tribe to engage in self-government to the exclusion of state jurisdiction. This necessitates an examination of the treaty or agreement or other document creating the reservation to see if there exists any limitation of power and a search of various federal laws which may open up the reservation to state

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21/ See, e.g., Moe v. Confederated Salish and Kootnai Tribes, 425 U.S. 463 (1976); Organized Village of Kake v. Egan, 369 U.S. 60 (1962); Williams v. Lee, 358 U.S. 217 (1959); see generally the strong dissent of Congressman Lloyd Meeds in the Report of the American Indian Policy Review Commission (1977), copies of which have been filed with the Court.

jurisdiction. In the case of the Spokane Tribe, not only do we have an express agreement subjecting the Tribe to the laws of the state, but there is a series of statutes authorizing the state to apply its laws to non-Indians within the boundaries of the reservation and even to Indians within the boundaries of the reservation in certain instances.

a. The Agreement of 1877

The Agreement of 1877 is the most revealing and lays the basis for the subsequent Executive Order. After describing the lands of the reservation and agreeing to go upon those lands "with the view of establishing our permanent homes . . . and engaging in agricultural pursuits," the agreement continued:

> We hereby renew our friendly relations with the whites, and promise to remain at peace with the government and abide by all laws of the same, and obey the orders of the Indian Bureau and the officers acting thereunder.

This shows clearly that the Indians agreed to take the reservation subject to the law of "the whites." Although it could be argued that the laws of "the whites" referred only to the powers of the federal government, a better reading is that it referred to the sovereign powers of the white man's government, the bulk of which rested in the State of Washington in 1889. This is supported by the handwritten record of the proceedings leading up to the Agreement (P.E. 57) in which Colonel Watkins in discussing the application of criminal laws stated: "When a white man kills an Indian he shall be tried and hung. That's the white man's law." Clearly, he contemplated the application of some "white man's law" within the boundaries of the reservation. Further, it is supported by the jurisdictional history of the reservation.[22/] The parlay leading

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22/ The Supreme Court has recognized the relevance of jurisdictional history in interpreting Indian treaties and agreements. See Rosebud Sioux Tribe v. Kneip, 97 S.Ct. 1361, 1371 (1977).

to the Agreement of 1887 included several references to "white man's laws" and the desire of the Spokane's to live under them. See Spokane Brief, Appendix II at 4 ("I want the white man's laws, I want to take all of his laws."), 10 (". . . if you leave me in my country [the present Spokane Reservation] we will have the same laws as the white people."). This clearly shows both the intent of the government in creating the reservation and the contemporaneous understanding of the Tribe.

b. The General Allotment Act of 1877

Section 7 of the General Allotment Act of 1877 has been discussed adequately in earlier briefs. However, section 6 of that Act has not. That section, 25 U.S.C. § 349, states:

> That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property. [Emphasis added.]

In other words, this section stated that when the allotment process was complete for a given Indian, he is subject to all the laws of the state and territory in which he resides. Accordingly, when an Indian allottee conveyed his allotment to a non-Indian, that non-Indian likewise would be subject to the laws of the state or territory, water laws included.

We recognize that this section has been held not to allow "checkerboard" jurisdiction over Indians within the boundaries of a reservation for the purposes of taxation. Moe v. Confederated Salish and Kootnai Tribes, 425 U.S. 463 (1976). However, Moe is based on the policy as expressed in more contemporary statutes which establish a federal policy against treating various members of the Tribe differently in the basis of type of land title. Id. at 478-79; see also Yakima Indian Nation v. Washington, 522 F.2d 1332, (9th Cir. 1977). However, Moe did not state that Section 6 has been impliedly repealed. To the contrary, where application of that section does not lead to the type of checkerboard jurisdiction described in Moe, it retains vitality.

A recent Ninth Circuit case applying section 6 is Dillon v. Antler Land Company, 507 F.2d 940 (9th Cir. 1974) cert. denied, 421 U.S. 993 (1975). The question was whether, after the plaintiff obtained a fee patent for an allotment on the Crow Reservation, the Montana Statute of Limitations applied to bar her claim that a subsequent sale by her was void. The court in an opinion written by Judge McGovern sitting by designation stated that "25 U.S.C. § 349 . . . [§6 of the Allotment Act] could scarcely be more explicit . . ." and held Montana law to apply.

> Standing against the contentions of Appellant on this issue is the logic and the weight of authority in support of the proposition adopted by the trial court, namely, that issuance of the fee patent freed the United States from its duties and obligations to the Indians with respect to the lands it theretofore held in trust and defined the new status of those Indians in their relation to the State.

507 F.2d at 944. See also Dickson v. Luck Land Co., 212 U.S. 371 (1917); but cf. 61 Interior Dec. 298 (1954).

Applying section 6 to the present case would not result in the type of checkerboarding rejected in Moe. The problem there was one of treating, for purposes of taxation, various Indians differently

on the basis of land title. Such a distinction would have been an intolerable administrative burden. See 425 U.S. at 478. However, here the DOE claims no jurisdiction over Indians which would result in that type of checkerboarding. Nor do we assert any jurisdiction over any portion of those Indian water rights reserved pursuant to Winters and retained by the Indians. Rather, we seek only to regulate rights obtained through state law and federal rights not subject to any trust status or federal ownership. In effect, we seek to prevent the establishment of checkerboard jurisdiction in the administration of state-based water rights.

c. Homestead and Related Laws

In its opening brief, the United States argues that the Acts of 1866, 1870, and 1877 on their face do not grant jurisdiction to the state to exercise jurisdiction within the boundaries of the Spokane Reservation. In our opening brief, we countered, taking our approach that such analysis of those Acts is irrelevant because the state has jurisdiction over non-Indians within the reservation without the need for such a grant by the federal government. In this section of our reply brief, however, we assume, arguendo, the need for such a grant of jurisdiction. And in the homestead laws, including the above cited Acts, in conjunction with the order opening up the Spokane Reservation to homesteading, we find the requisite "grant."

In 1909, President Taft opened up the Spokane Reservation to homesteading, stating (PE-43):

> I, William H. Taft, . . . do hereby prescribe, proclaim, and make known that . . . all the non-mineral unreserved lands classified as agricultural lands within the Spokane Reservation in the State of Washington under the Act of Congress approved May 29, 1908 (35 Stat., 458) . . . shall be disposed of under the provisions of the homestead laws of the United States and said Acts of Congress . . . .

3 Kappler, Indian Laws and Treaties 655 (1913) (emphasis added). The cited 1908 Act authorized the President to open up the Spokane

Reservation "to settlement and entry under the provisions of the homestead laws."

We need only to look to the plain language of the 1908 Act and the proclamation to determine the meaning of the phrase "under the provisions of the homestead laws." It means those laws under which the early pioneers were allowed to settle on western lands. They included a multitude of statutes, including those of 1866, 1870, and 1877, which by themselves may not grant jurisdiction to the states but when coupled with the Act of 1908 and its implementing proclamation they do. For the effect of the aforementioned statutes setting forth direct applicability of state law to lands patented under the homestead laws, see California-Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935).

C. Tulalip Tribe v. Walker

The United States attempts to discredit the impact of the decision of Judge Charles R. Denny in Tulalip Tribe v. Walker Snohomish County No. 71421 (1963), as to the Court's holding that there is no "wall" around the reservation through which state water rights law cannot pierce, on the grounds the issue was only "peripheral" to the outcome of the case.

The United States' contention is wrong. The problem of the "wall" was the central issue of the case. The pre-trial order signed by Judge Denny is precise in this point. The following are all the issues of law listed in the pre-trial order (at 12):

> RESPONDENT'S CONTENTIONS OF LAW
>
> 1. That the Supervisor of Water Resources has jurisdiction over all waters flowing in Tulalip Creek on lands owned by Union Oil Company of California which are surplus to those waters reserved by the United States for the benefit of the Indians by the Treaty of 1855.
>
> 2. That the appellants are without standing to initiate this appeal, and this court is therefore without jurisdiction to consider this matter.

APPELLANT'S CONTENTIONS OF LAW

1. The Supervisor of Water Resources is without jurisdiction to enter the Order as shown by Exhibit 17.

2. That if the State of Washington has jurisdiction to make the aforesaid order, such jurisdiction applies only to that quantum of water vested in the original allottees or their successors in interest.

All of the subject lands owned by Union Oil Company fell within the boundaries of the Tulalip Indian Reservation, a reservation created by Treaty of 1855.

The Conclusions of law entered by the Court answered that issue:

IV

The reserved rights of the Indians to utilize the waters of the Tulalip Creek are paramount to any rights granted by the Supervisor of Water Resources, here in question.

V.

The Supervisor of Water Resources has jurisdiction over all waters flowing in Tulalip Creek across the lands of Union Oil Company which are surplus to amounts necessary to satisfy the needs of the tribe as reserved by the Treaty of Point Elliott.

VI

The order of the Supervisor of Water Resources relates solely to said surplus waters and is made subject to existing rights, which include the reserved rights of the Indian tribe to the beneficial use of the water in Tulalip Creek, both present and future.

. . . .

VIII

The Supervisor of Water Resources was acting within his jurisdiction in issuing the order authorizing Union Oil Company of California to withdraw waters from Tulalip Creek.

Judge Denny's "Memorandum Decision" also makes it clear that demolition of the "wall" was central to his decision when he wrote:

The conclusion expressed at the close of the trial that the State does not have jurisdiction to grant the permit in question as to surplus water

> over and above the needs of the tribe, is erroneous. The mistake which I made at the close of the trial was my failure to appreciate that the exclusive jurisdiction of the United States is confined to Indians.
>
> I can find no case which denies to a state the power to assert its legitimate interest in the water of a non-navigable stream flowing across lands owned in fee by non-Indians where only the right to the use to such water by non-Indians is involved and the right to use by Indians is not affected thereby. Several of the cases suggest that the state does have jurisdiction under these circumstances.
>
> . . . .
>
> The Montana cases which have been cited to me by appellants do not hold that the state has no right to adjudicate the use of water by non-Indians adjacent to or on a reservation. Those cases do hold that the rights to use of water for irrigation by Indians on a reservation were necessarily involved and, therefore, the United States is a necessary party to make such an adjudication; and the United States having refused to become a party, the state court of necessity cannot adjudicate the rights of white persons to water flowing adjacent to or on the reservation. Such is not the case here. The order under review does not seek to adjudicate the rights to Indians, nor is the right of any Indian affected by the order. It is limited to surplus water over and above the needs of the Indians.

Memorandum Decision at 1-2 (emphasis added).

We again commend Judge Denny's decision to the Court as one directly in point on the issue of the power of the state to establish water rights for non-Indians on non-Indian lands within the original boundaries of a reservation.

D. The 1905 Act: Assumption of Partial Jurisdiction by the United States

Plaintiffs contend that the Act of March 3, 1905, P.L. 58-173, was a grant of power to the state to exercise jurisdiction over water rights within the boundaries of the Spokane Reservation. The passage of the Act, they argue, demonstrates that without such legislation

there would be no state jurisdiction. See Spokane Reply Brief at 13-14; United States Reply Brief at 46.

Plaintiffs misconstrue the purpose and effect of the 1905 Act. It was an act passed before the Reservation was open to homesteading in 1908. Accordingly, there would have been little non-Indian settlement within the Reservation. It was an act passed for the purpose of facilitating industrial development within the Reservation and for the purpose of developing water power facilities on the Spokane River. By Act of February 15, 1901, Congress already had granted rights of way on the Reservation for power purposes. However, as the legislative history of the 1905 Act points out, this was not enough incentive for the private sector to develop the water power resource for industrial purposes. Accordingly, Congress passed the 1905 Act, one of the purposes of which was to allow the acquirement of lands on the Reservation for power purposes. See S. Rep. No. 4378, 58th Cong., 3d Sess. 1 (1905). This Act, when coupled with the rights obtainable under the 1901 Act, would enable persons to obtain rights in land adequate to facilitate the acquisition the necessary capital for development of power projects. Id. at 3.

The 1905 had another purpose: to clarify and facilitate the obtaining of water rights for proposed power projects. As the legislative history points out, there was confusion under Washington state law as to the interaction of the doctrines of riparian rights and prior appropriation. See id.; 39 Cong. Rec. 2413 (1905) (Remarks of Rep. Jones). The Washington Supreme Court at that time, contrary to the law in several western states, recognized the vitality of the riparian doctrine, even in the arid areas of the state, a doctrine which allowed a riparian owner "to be protected against subsequent appropriation of the water naturally flowing over the land." Benton v. Johncox, 17 Wash. 277, 288, 49 P. 499 (1897).

Like the uncertainty of title to land within the Reservation, the 1905 Act sought to end uncertainty as to the water rights which could be acquired in this state which recognized both riparian and prior appropriation doctrines. Accordingly, the Congress authorized the Secretary of the Interior to approve those appropriative rights acquired under state law. The purpose was to clarify the permanence and validity of those appropriative rights.

Looking at this true purpose of the 1905 Act, it is clear that it is not a grant of power to the state, but in fact a restriction of power already vested in the state over excess water through the preemptive power of Congress over waters in the Spokane River. See United States v. Big Bend Transit Co., 42 F. Supp. 459, 466-67 (E.D. Wash. 1941) (construing the 1905 Act).23/ If, as plaintiffs contend, Congress understood that the Tribe or the United States had exclusive jurisdiction over the waters in the Spokane River, then why was Congress concerned with the confusing state law? If state law did not apply to the Spokane River, but only federal or tribal law, then there would have been no concern expressed and no need to so clarify the situation by legislation. But Congress understood state law to apply to the Spokane River and was concerned that the application of that law could put a cloud on the water rights necessary to industrial development. Accordingly, it placed certain limits on some of the state's authority over the waters of the Spokane and enacted Public Law 58-173.

So, we can ask the same question concerning the 1905 Act as was asked by the Tribe: "Where is there legislative authority of a similar import covering the waters of Chamokane Creek?" Spokane

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23/ In Big Bend Transit, the Court stated:

> The purpose of the 1905 Act was plain and apparent upon its face . . . . It gave to the Secretary of the Interior the right to grant the use of water of the Spokane River for the purpose of developing hydroelectric power.

42 F. Supp. at 466-67.

Reply Brief at 14. There is none; Congress has exercised no preemptive power over the exercise of state jurisdiction over Chamokane Creek as it has with the Spokane River, even for those limited purposes spelled out in the 1905 Act.

E. State or Tribal Management of Water Rights: Which Creates a "Checkerboard"?

We have earlier refuted the checkerboard argument in terms of general policy consideration. In this section we speak to jurisdiction.

Plaintiffs fall back on the argument that to allow state jurisdiction within the boundaries of the Spokane Reservation would allow "checkerboard" jurisdiction leading to "an intolerable and chaotic system of water management . . . ." United States Reply Brief at 43. The argument against checkerboard jurisdiction has been used successfully before in relation to title to land. See Moe v. Confederated Salish and Kootnai Tribes, 425 U.S. 463 (1976). However, to extend that concept to regulation of water rights would be foolish. Consider the following assertion by the United States:

> We cannot over emphasize that a finding by this court that the United States and the Spokane Tribe have exclusive jurisdiction over the use of water within the exterior boundaries of the Spokane Reservation does not mean that non-Indian landowners the reservation have no right to water whatsoever. It only means that the permits and certificates that they now hold are invalid. If there is indeed water above and beyond that required for the federal reserved rights then those landowners should be able to appropriate a share of that water. United States Reply Brief of 44-45.

The U.S. is stating one of two things: (1) that in addition to administering federally reserved rights within the boundaries of the reservation the Tribe or the Department of the Interior would within the boundaries of the reservation administer "excess waters" for the benefit of both Indians and non-Indians living on the reservation based on state law (for the federal reserved waters law only apply to the non-excess waters -- the Winters rights), or (2) in addition to administering federally reserved rights, the Tribe

or the Department would administer rights to excess waters based on a tribal water code. Let us examine each of these.

Assuming the U.S. is advocating Tribal administration of state law, they are advocating the same abhorrent checkerboard jurisdiction they say they are seeking to avoid. Jurisdiction over water is not like jurisdiction over land (e.g. for taxing purposes). Water is a transitory resource; it does not recognize geographical boundaries. An on-reservation withdrawal may diminish the supply of water downstream off-reservation or in the ground water supply off-reservation just as an off-reservation withdrawal can impair rights on the reservation. The United States seems to be saying that in a year of shortage, after federal rights are satisfied, the Tribe is the only entity that can resolve disputes to which on-reservation residents are parties, even though those disputes may be with off-reservation residents seeking the same water under the same state laws. In what forum would the off-reservation appropriator seek redress? The on-reservation appropriator? The complex nature of this resource does not lend itself to simple geographical division of jurisdiction. Rather, there should be a division of jurisdiction on the basis of the source of the rights. For federally reserved rights, the Tribe or the United States would have jurisdiction. For rights based on state law (for the most part, "first in time, first in right" concept of the prior appropriation doctrine) the state would have jurisdiction, regardless of the residence of the appropriator. Any other division of jurisdiction would lead to needless conflict and confusion in an area of law already very difficult to administer.

On the other hand, the U.S. may be advocating Tribal administration of a tribal law for non-Indians living on the reservation, divorced from state law. Presumably, they argue that the Tribe or the Department could appropriate all water passing through the

reservation for the beneficial use (any beneficial use) of members of the Tribe and for persons residing on the reservation without regard to state law. Could they, in a year of shortage and after taking care of federal reserved rights, proceed to dry up the stream and rivers for the benefit of newcomers to the reservation to the detriment of off-reservation farmers who have been there for decades? Could they appropriate water and sell it off-reservation to the highest bidder? Could they sell it on reservation to the highest bidder? Could it be used to operate an oil shale or coal mining operation (transporting it perhaps by coal slurry pipeline from the reservation to California) to the detriment of off-reservation agricultural and domestic users?

The answer to all these questions should be and clearly is "no" for as we pointed out often in this and our opening brief, the extent of the Indian's interest and allocation authority is controlled by the federal reserved right. Under the assumed facts above the Tribe has jurisdiction to the "excess" waters.

It is this sort of question and problem which the Court and the Special Master in Arizona v. California sought to avoid in quantifying the scope of federal rights. The Court and the Master recognized the need for certainty in western water law. The only way to obtain this certainty is to define as precisely as possible both the scope of federal reserved right and the jurisdiction to allocate waters in "surplus" of that quantity.

IV. THE "LITTLE WINTERS RIGHTS" CLAIMED BY THE DEPARTMENT OF NATURAL RESOURCES -- COMMENTS BY THE DEPARTMENT OF ECOLOGY

If the Chamokane Creek were adjudicated in state court, the Department of Ecology's role would be, as the state's water rights law administrator, to provide its views to that court as to the validity of all claims, including those of the Department of Natural Resources. Applying that principle we submit views on the claim

of the Department of Natural Resources that it holds certain federal reserved rights acquired when the several "trust" lands of the Chamokane under the management jurisdiction of the Department of Natural Resources were transferred from the federal government to the State, normally at the time of entry of Washington into the Federal Union. See Brief of Department of Natural Resources at 39.

This is the second time the Department of Ecology, or a predecessor agency, has faced this contention of the Department of Natural Resources.[24/] We are not persuaded. Our analysis, in abbreviated form, follows.

The lands transferred by the federal government to the state, either at the time of statehood or at a later date through "lieu land" selections,[25/] were part of the general public domain -- not lands reserved for a special purpose. To be subject to such a transfer, these lands could not be held for a special federal reserved purpose. In California-Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935), the high court held that when parcels of general public domain lands, not held for a special purpose, were transferred from federal to non-federal ownerships only land was transferred. No water rights were involved. This was based on the determination that, through the Desert Land Act of 1877, if not before, waters on the public domain were severed from the land and that water rights relating to such lands, if any, were to be established pursuant to state law.

24/ This first time was in In re Stranger Creek 77 Wn.2d 649, 466 P.2d 508 (1970). The State Supreme Court did not discuss or rule upon the claim of the Department of Natural Resources.

25/ When the State of Washington entered the Union the United States granted the State trust land ownerships to all sections 16 and 36 except where such sections had been previously reserved for a special purpose or transferred to non-federal ownership. "Lieu lands" are those public lands made available by the United States and selected by the states in lieu of the sections 16 and 36 which were given by the United States at time of statehood.

Assuming the applicability of the teachings of the California-Oregon Power Co. case to the transfer of these "trust lands" from federal to state ownership, there were no federal water rights such as federal "reserved" rights, transferred.

On this basis, assuming the correctness of our interpretation of the very sketchy statement of analysis provided in the Brief Department of Natural Resources in support of its claim, the claim of a "little" Winters right should be denied.

V. CONCLUSION

A. The Federal View of the Department of Ecology's Reputation: The Department's Opening Brief is a "Discredit"

The United States states that the state does itself a "discredit by resorting to arguments which mirror the State's reluctance to recognize Indian Sovereignty or Indian property rights." United States Reply Brief at 60. The United States may characterize as it may the state's analysis and positions even when it is inaccurate. However, such characterizations amounting to shrill rhetoric and do little but add tension to federal-state relations on Indian matters which are already strained too far.

Slightly more than a decade ago the regional office of the solicitor of the Department of the Interior advised the Tulalip Tribal Attorney that there was no impermeable "wall," as a matter of law, around an Indian reservation through which state law cannot pierce.[26/] To the contrary, that office opined that state law could apply within the original boundaries of a treaty-established reservation. Now the attorney for the United States contends Washington State discredits itself for asserting the same position as taken by the Solicitor for the Department of Interior's Northwest Regional Office, and, more importantly, accepted by one of the most

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26/ See Memorandum from the Office of the Regional Solicitor to the Bureau of Indian Affairs, Realty Branch, dated June 15, 1960, attached hereto as Attachment B.

respected Washington state superior court judges and justices pro tem of the Washington State Supreme Court, Charles R. Denny. See Tulalip Tribes v. Walker, supra.

Further, we submit the position by the Department of Ecology is not only the legally sound approach, but a practical, common sense effort to resolve a complex controversy. If that is discrediting to the state, then so be it.

The state recognizes the Winters doctrine property rights held by the United States for Indians. The co-writer of this brief, Mr. Roe, has represented the state in all water rights litigation to which federally reserved rights have been involved where the state has been a party for the past seventeen years. Never, in court or out, has he, representing the Department of Ecology or its predecessor agencies, contended otherwise. The state does recognize Winters property rights. What the state does not recognize is the contention that the Winters doctrine is so broad in scope as to include any use which can be made of water on a reservation that promotes the economic interests or satisfies the desires of the Indians not only as they appear today but as they develop in the future. This is the position contended for by the plaintiff and intervenor-plaintiff. It is untenable. We strongly hold to the position that they have allowed the imagination to break away from common sense and the law; their positions are legally unsound and wrong.

Likewise, to suggest the State refuses to accept the Indians' "sovereignty" needs clarification. The Department of Ecology recognizes the limited tribal powers of self-government, i.e. the power to govern themselves and their resources. The Department of Ecology claims no power to interfere, except where expressly sanctioned by the Congress of the United States, to adjudicate or regulate Winters rights held by the United States for the benefits of Indians. However, the state strongly contends the tribe has no direct interest

over those rights not reserved for "sovereign" control under Winters. Put bluntly, the state accepts the concept of tribal self-government as a concept with a legal foundation. Broader attributes of "sovereignty" contended for by the Indians and the United States over all waters within the original boundaries of a reservation is no more than legal advocacy with no precedential foundation provided by the United States Supreme Court, certainly not by Winters.

B. An Alternate Proposal for Consideration by the Court

The complexity of this case is attributable in part to (1) the unfortunate circumstances causing the delay between the evidence receiving phase and final argument and (2) the blurriness of the record on certain factual matters which would be necessary to decide all the issues in the case. We suggest, as an alternative course, that the Court render its opinion on the critical points of law and thereupon refer the matter to the parties for the purpose of developing precise parameters pertinent to resolution of various claimed rights. If, following this course, the parties could not agree on the application of the rules to the specific facts within a reasonable time, the Court could take such further action, actions which it need not yet determine precisely.

DATED: September 7, 1977.

Respectfully submitted,

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CERTIFICATE OF MAILING

I certify that I mailed a copy of the foregoing document to all the parties on the following list on September 7, 1977, with postage prepaid:

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DEPARTMENT of the INTERIOR

OFFICE OF THE SECRETARY

news release

For Release August 4, 1977

ANDRUS EXTENDS WATER POLICY REVIEW TIME FOR 90 DAYS

Secretary of the Interior Cecil D. Andrus today extended for 90 days the completion of a national water policy review now underway. The action came in response to Congressional and gubernatorial requests to the President.

"Our initial hearings are already indicating there may well be additional need for more public hearings, as well as our normal consultation with members of Congress," the Secretary said.

Hearings on water policy were held in eight cities between July 28 and August 2. During that time, fears were expressed by some that a move was afoot to establish Federal water rights.

"As I have said before, we do not advocate and never have advocated Federal water rights that would preempt or even infringe upon State water rights and private water rights," Andrus declared. "Neither do I believe there should be transfers of water from one region to another. As a former Governor, and now as Interior Secretary, I've always opposed inter-basin transfer of water," he said.

"Somehow confusion and misconceptions have arisen on these points as a result of the hearings. I hope we can allay these deliberate distortions by reiterating the facts and purposes of the hearings," Andrus added.

"We recognize we are dealing with the Nation's most important resource and are aware of its value. The Carter Administration is seeking to establish the best uses of water and will work to establish criteria to identify those uses. Water is not only a tremendous energy issue now and in the future, but it touches on how the West will continue to grow.

"As Chairman of the Water Resources Council, I directed our people to go into the hearings with no preconceived ideas. We want the broadest possible views from the public about water. One thing the public is already telling us is that they want more time to comment on the issues and options presented. Because the President recognizes the importance of this issue, he gave us a 6-month deadline, to enable his Administration to come to grips with this problem at the earliest possible date," Andrus pointed out.

"We want open, honest consideration with the public, the States, and the Congress. When that objective is achieved, we will have the best water policy for everyone."

(more)

ATTACHMENT 'A'

The Secretary emphasized that publication July 15 in the Federal Register of those issues and options was intended in no way to restrict discussions of the national water policy he will recommend to the President. "Consequently, many views which this Administration does not necessarily endorse were voiced," Andrus said.

"We want comments to cover the full range of interests and available options," he added. "Public comment is solicited both to improve the discussion of alternatives and to establish positions of various interest on the alternatives.

"Both Congress and Governors must be fully informed about our policies. Once the President has made decisions on the elements of a new policy, we expect major legislative changes will be required. Congress will consider our proposals in the appropriate manner, as will Western Governors, with whom I'll be discussing this issue in Anchorage at the end of this month," he concluded.

x x x

UNITED STATES GOVERNMENT

MEMORANDUM

TO Bureau of Indian Affairs, Realty Branch

Date June 15, 1960

FROM Office of the Regional Solicitor

cc: BIA files

SUBJECT Diversion of Creek and Spring Waters, Tulalip Reservation

Your memorandum of April 25 asks our opinion relative to the right of Union Oil Company to file for appropriation with the State of Washington water rights within the Tulalip Indian Reservation. We regret the delay in the issuance of this opinion.

The Tulalip Indian Reservation was established pursuant to the provisions of Article III of the treaty concluded at Point Elliott, Washington Territory, January 2, 1855, ratified by the Senate on March 8, 1859, and proclaimed April 11, 1859 (12 Stat. 927). No tribe or band named Tulalip was a party thereot, and no such tribe or band ever existed. The name Tulalip is that of a place where one of the five reservations was established pursuant to treaty. The preamble of the treaty enumerates 22 bands or tribes, while 23 bands or tribes signed. The preamble stated that the convention was made with the tribes and bands named "and other allied and subordinate tribes and bands of Indians occupying certain lands situated in said Territory of Washington."

By Article I of the treaty, the Indians ceded to the United States all of their right, title and interest in and to a large area of land claimed by them, in consideration of the establishment of reservations as prescribed in Article III of the treaty. By Executive Order dated December 23, 1873, the President did, as he was bound to do by the treaty, establish the boundaries of the Article III reservation known as the "Tulalip Reservation". This was in consideration, among other things, of the extinguishment of the Indian title to a much larger area of land. The lands comprising the Indian reservation so established became firmly impressed with compensable Indian title. The United States held the legal title, and the power to control and manage the affairs of the Indians, but the Indians who settled on the reservation held the right of occupancy which our courts have uniformly and consistently held as sacred as the fee, together with all of its beneficial interests. See United States v. Shoshone Tribe, 299 U.S. 476, 81 L. Ed. 360; and 304 U.S. 111, 82 L. Ed. 1213; United States v. Santa Fee Pacific R. Co., 314 U.S. 339, 86 L. Ed. 260.

ATTACHMENT B

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The title to the waters within an Indian reservation, established pursuant to a treaty with the Indians whereby the Indians ceded to the Government large areas of land in consideration for a reservation are in the United States in trust for the Indians of the reservation. The treaty does not grant the water rights, but even though not mentioned in the treaty, the water rights are reserved to the Indians. (United States v. Winans, 198 U.S. 371, 49 L.Ed. 1089; Winters v. United States, 207 U.S. 564, 52 L. Ed. 340, cited with approval in United States v. Ahtanum Irrigation District, 236 Fed. 2d 321, Cert. denied 1 L. Ed. 2d 367; Conrad Investment Co. v. United States, 161 Fed. 829 (1908), and aff'g 156 Fed. 123. All waters within and appurtenant to the Tulalip Reservation, whether used for irrigation or stock or domestic purposes, impliedly were reserved by the United States for the Indians of that reservation, and the waters so reserved were subject to the disposal by the United States to the Indians for their benefit. The waters so reserved are such as may be necessary to make the lands productive or suitable to agricultural, stock raising, and domestice purposes. (Conrad Investment Co. v. United States, supra.)

The amount reserved is not merely that needed for present use of the Indians but also for future use. It is not limited to the use of the Indians at any particular date, but the Indians' rights extend to the ultimate needs of the Indians as those needs and requirements should grow to keep pace with the development of Indian agriculture, stock-raising and domestic purposes upon the reservation. (United States v. Ahtanum Irrigation District, supra.) In the present case the waters involved arise outside the reservation. As pointed out in United States v. Ahtanum Irrigation District, supra, this fact is immaterial in so far as the reservation of waters for the use of the Indians is concerned. Therefore, the Indian did not surrender their right to the water of Tulalip Creek regardless of the point of origin.

However, such waters as are surplus for present and future needs of the Indians are necessarily under State control in the present instance and a water right can be granted by the State, which, however, would be subject to the prior right of the Indians. Under the doctrine of United States v. Powers, 16 Fed. Supp. 155, modified C.C.A. 5, 94 Fed.2d 786 aff'd 305 U.S. 527, 83 L. Ed. 330 and also United States ex rel. Ray v. Hibner, 27 Fed. 2d 909, it has been held that the non-Indian grantee of an Indian owner succeeds to the rights of the prior Indian owner to the waters for irrigation, domestic, and stock-raising purposes held by his Indian predecessor in title.

Therefore, In our opinion the State would have absolute control only of water that would at all times be surplus of Indian needs, present and future, which, of course, is incapable of present determination and to that indefinable extent could regulate the priority of use between appropriators. However, the tribe could, with the approval of the Secretary, consent to the appropriation to the extent that it might interfere with Indian future needs of the water.

Copy of letter from Lewis A. Bell and clipping of legal notice attached to your memo of April 25 are returned to you herewith.

For the Regional Solicitor

Johnston Wilson
Attorney

Attachments