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Brief of the United States in Support of Its Claims

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FILED IN THE
U. S. DISTRICT COURT
Eastern District of Washington
DEC 30 1976
J. R. FALLQUIST, Clerk
DF Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,
Plaintiff,

v.

BARBARA J. & JAMES ANDERSON,
et al.,
Defendants.

CIVIL NO. 3643

BRIEF OF THE UNITED STATES IN
SUPPORT OF ITS CLAIMS

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I
STATEMENT OF THE CASE

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

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

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

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

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

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II

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

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

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

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

1 (1971); Arizona v. California, 373 U.S. 546, 601 (1963); F.P.C. v.
2 Oregon, 349 U.S. 435, 443-444 (1955); Winters v. United States, 207
3 U.S. 564, 577 (1908). As the Supreme Court has noted, in arid
4 areas, the reservation of land will often be of little use without
5 the water rights appurtenant to the land. Arizona v. California,
6 supra, 373 U.S. 599-601; Winters v. United States, supra, 207 U.S.
7 576.

8 Because the federal reserved right is a right derived
9 from the federal reservation of the land, it is not dependent upon
10 state law. Therefore, the test to be applied to determine the
11 existence of such a federal reserved water right is not compliance
12 with state law but whether the government intended to reserve
13 unappropriated and thus available water. Intent is inferred if
14 the previously unappropriated waters are necessary to accomplish
15 the purposes for which the reservation was created. Cappaert v.
16 United States, supra, 48 L. Ed. 2d at 534, 538; Arizona v. Cali-
17 fornia, supra, 373 U.S. at 599-601; Winters v. United States, supra,
18 207 U.S. at 576.

19 Since the doctrine is based on the need for the otherwise
20 unappropriated water to make the reservation of public land
21 useful and since the waters reserved are those appurtenant to the
22 land reserved, the reservation is not dependent upon the navigabil-
23 ity of the water. In Winters v. United States, supra, 207 U.S.
24 at 566, 577, the source of the waters reserved was a non-navigable
25 stream. Moreover, the reserved right includes future water needs
26 to fulfill the purpose of the reservation.*/
27

28
29 */ While the right reserves use of up to a certain amount of water,
30 if that amount is not actually used and is replenishable,
31 others are free to use it, but on the condition that they will
32 curtail their use if the water is needed for the reservation. See
Morreale, Federal-State Rights and Relations, in 2 Clark, Waters
and Water Rights 80-82 (1967); see also Conrad Inv. Co. v. United
States, 161 Fed. 829, 835 (C.A. 9, 1908); Tweedy v. Texas Co., 286
F.Supp. 383, 386 (D. Mont.).

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

3 It is clear from our cases that the United
4 States often has reserved water rights based
5 on withdrawals from the public domain. As we
6 said in Arizona v. California, 373 U.S. 546,
7 the Federal Government had the authority both
8 before and after a State is admitted into the
9 Union "to reserve waters for the use and bene-
10 fit of federally reserved lands." Id., at 597.
11 The federally reserved lands include any federal
12 enclave. In Arizona v. California we were pri-
13 marily concerned with Indian reservations. Id.,
14 at 598-601. The reservation of waters may be
15 only implied and the amount will reflect the
16 nature of the federal enclave. Id. at 600-601.

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

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

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

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

4 The United States then filed suit in the district court
5 seeking to limit the Cappaert's pumping of their wells. The
6 district court permanently enjoined pumping that would lower the
7 water below a certain level necessary to preserve the fish, holding
8 that in establishing Devil's Hole as a national monument, the
9 United States reserved appurtenant, unappropriated waters necessary
10 to the purpose of the reservation including the preservation of
11 the pool and its fish. The district court further held that the
12 federal water rights antedated those of the Cappaerts. 375 F.Supp.
13 456 (U.S.D.C., Nevada, 1974). The Ninth Circuit Court of Appeals
14 affirmed. 508 F.2d 313 (1974). The United States Supreme Court,
15 in a unanimous decision, affirmed, holding "that as of 1952 when
16 the United States reserved Devil's Hole, it acquired by reservation
17 water rights in unappropriated appurtenant water sufficient to
18 maintain the level of the pool to preserve its scientific value
19 and thereby implement Proclamation No. 2961." 48 L. Ed. 2d at 539.

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

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

1 the water level in Devil's Hole to drop
2 by their heavy pumping. See Corker, supra;
3 see also Water Policies for the Future -
4 Final Report to the President and to the
5 Congress of the United States by the
6 National Water Commission 233 (1973). It
7 appears that Nevada itself may recognize
8 the potential interrelationship between
9 surface and groundwater since Nevada applies
10 the law of prior appropriation to both.
11 Nev. Rev. Stat. §§533.010 et seq.; 534.020;
12 534.080, 534.090. See generally Trelease,
13 Water Law - Resource Use and Environmental
14 Protection 457-552 (2d ed. 1974); Meyers &
15 Tarlock; Water Resource Management 553-634
16 (1971).

17 Thus, since the implied reservation of water
18 doctrine is based on the necessity of water
19 for the purpose of the federal reservation,
20 we hold that the United States can protect
21 its water from subsequent diversion, whether
22 the diversion is of surface or groundwater.
23 [Footnote omitted] 48 L. Ed. 2d at 536.

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

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

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

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

15 Groundwater and surface water are physically
16 interrelated as integral parts of the hydrologic
17 cycle. Groundwater basins feed and are feed
18 by surface streams. Surface water and ground-
19 water are interchangeable for most purposes.
20 Wells deplete surface streams. Depletion of
21 surface streams depletes water supply to wells.
22 Optimum utilization of ground and surface
23 water usually involves conjunctive operation
24 by which stored ground water supplements and
25 firms up the supply of intermittently available
26 stream water. Different rules of law dependent
27 on the surface or underground point of diversion
28 promote and perpetuate missallocation of the
29 resource. [Emphasis added]

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

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

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

1 Recommendation No. 7-1: State laws should
2 recognize and take account of the substantial
3 interrelation of surface water and ground
4 water. Rights in both sources of supply
5 should be integrated, and uses should be admin-
6 istered and managed conjunctively. There should
7 not be separate codifications of surface water
8 law and ground water law; the law of waters
9 should be a single, integrated body of juris-
10 prudence.

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

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

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

1 B. The Agreement of August 18, 1877, validity established
2 the Spokane Indian Reservation and thereby reserved the unappro-
3 priated waters necessary to fulfill the purposes for which the
4 reservation was created.

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

8 The Spokane Indian Reservation is located approximately
9 30 miles northwest of the City of Spokane, Washington in the
10 eastern portion of that state. The Spokane Tribe of Indians is the
11 present day tribal entity which, with respect to the matters that
12 are the subject of this litigation, is the political successor in
13 interest to the tribe which was a party to the Agreement of August
14 18, 1877. It is recognized by the United States as a currently
15 functioning Indian tribe maintaining a tribal government. Its
16 membership is determined in accordance with its Constitution and
17 Bylaws as approved by the Secretary of the Interior. There are
18 currently approximately 1,700 enrolled members of the Spokane
19 Tribe, 600 to 700 of whom reside on the reservation. (Tr. 704-705,
20 720; PE-1)

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

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

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

5 The major food sources of the Spokane Indians were the
6 wild fish, animal and vegetative resources of the area. While
7 the tribal members attempted to vary their diet by gathering such
8 diverse food as deer, buffalo, camas roots and bitterroots, fish
9 remained their main item of subsistence. The various waterways
10 which flowed through the area occupied by the tribe, including the
11 Columbia, Spokane and Little Spokane Rivers and Chamokane Creek
12 provided an abundant supply of several varieties of fish. Among the
13 types of fish found in the area were chinook salmon and steelhead
14 trout (which migrated from the Pacific Ocean, up the Columbia River
15 to the upper reaches of the Columbia's tributaries to spawn) and
16 native fresh water fish including trout. The areas chosen by the
17 bands as their more or less permanent sites of residence were
18 chosen primarily because of their proximity to excellent fishing
19 spots. The Upper Spokanes lived near Spokane Falls because of the
20 fact that the salmon and steelhead couldn't ascend the falls and
21 were forced to congregate in pools below the falls making this
22 area a prime one for fishing. The Middle Spokanes chose the con-
23 fluence of the Spokane and Little Spokane Rivers because that too
24 was a major fishing spot. The Lower Spokanes lived at the conflu-
25 ence of the Columbia and Spokane River for the same reason. There
26 was generally good fishing all along the Spokane River from its
27 mouth upstream. (Tr. 465, 661-662, 665, 667, 674-675, 685, 695,
28 809; PE-84, p. 8-9)

29 By the Act of August 14, 1848, 9 Stat. 323, the United
30 States established the Oregon Territory and provided that nothing
31 contained in said Act "shall be construed to impair the rights of
32

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

22 In 1855, Governor Stevens journeyed to what is now
23 Montana to treat with the Blackfeet. It was his stated intention
24 to meet with the Colvilles, Spokanes and Coeur d'Alenes on his
25 return trip. Having completed negotiating a treaty with the Black-
26 feet, however, Stevens received word that a major Indian war had
27 begun in the western portion of the Oregon and Washington terri-
28 tories and he deemed it advisable to return to the Puget Sound area
29 immediately. As a result, the Spokanes did not receive the oppor-
30 tunity to negotiate for a "Stevens treaty" with its specific
31 guarantees of Indian rights which included the fishing right.

32 (PE-50)

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

30 In 1880, the concern of the Federal Government was focused
31 on getting formal approval for the then existing Spokane Indian
32

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

21 Commencing at a point where Chemakane (sic)
22 Creek crosses the forty-eighth parallel of
23 latitude; thence down the east bank of said
24 creek to where it enters the Spokane River;
25 thence across said Spokane River westwardly
26 along the southern bank thereof to a point
27 where it enters the Columbia River; thence
28 across the Columbia River, northwardly along
29 its western bank to a point where said river
30 crosses the said forty-eighth parallel of
31 latitude; thence east along said parallel to
32 the place of beginning.

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

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

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

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

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

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

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

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

12 2. The Agreement of August 18, 1877, reser-
13 ving the Spokane Indian Reservation
14 reserved the water rights necessary to
15 preserve the recreation and esthetic
16 value of Chamokane Creek and the fish
17 which live in it.

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

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

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

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

17 During the negotiations leading up to the Agreement of
18 August 18, 1877, the Indians evidenced as their primary concern,
19 their being allowed to remain in the area which is now the reser-
20 vation. On the opening day of the Council at Spokane Falls, August
21 16, 1877, the Chief of the Lower Spokanes stated that he "[didn't]
22 want to be moved from [his] Country". (PE-57)

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

1 onward and to make the reservation their "permanent homes", then
2 they must have intended that the Indians would rely on their ancient
3 food gathering practices including fishing while they attempted to
4 become farmers. This logically follows because the agreement was
5 signed in late summer of 1877. At that time, there was virtually
6 no land under cultivation on the reservation, hence, in the coming
7 winter the Indians would have to rely on one of two sources of food;
8 either handouts by the government or on their ancient food sources.
9 One does not have to be an expert in the history of Indian/non-Indian
10 relations to know that in 1877, the United States was not particu-
11 larly interested in feeding Indians when it didn't have to. The
12 only logical conclusion, therefore, is that the government intended
13 for the Indians to maintain their old food gathering ways as much
14 as possible while learning to farm. It is evident from the records
15 which were kept of the council proceedings, from the correspondence
16 concerning the negotiations and from what is generally known of the
17 history of that era, that during the treaty negotiations, a primary
18 concern of the Indians whose way of life was so heavily dependent
19 upon the harvesting of fish, was that they be allowed to remain near
20 their usual and accustomed fishing places. It was the intention of
21 the United States Government, in negotiating the Agreement of August
22 18, 1877, to make the Spokane Indians agriculturalists, although
23 not to restrict them to that, to diversify Indian economy, to teach
24 western skills and trades to the Indians and to accomplish a transi-
25 tion of the Indians into western culture.^{*/} There was no intent,
26 however, to prevent the Indians from continuing to gather fish as
27 their main food item. In fact, the Indians were encouraged to
28 continue their fishing so that the United States would not have to
29
30

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

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

8 This conclusion is buttressed by certain events following
9 the creation of the reservation. On September 3, 1880, Brigadier
10 General Howard issued an order directing that the Spokane Reserva-
11 tion be protected against settlement until surveyed or until he
12 received instructions to the contrary. General Howard's actions
13 were discussed in a letter dated November 3, 1880, from William J.
14 Pollack, Indian Inspector, to the Secretary of the Interior.

15 (PE-54) In the course of that letter, Pollack recommended that the
16 Spokane Reservation be enlarged so that the other bands of the
17 tribe could join the lower band in living there. His reasoning for
18 the enlargement was that:

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

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

1 Commencing at a point where Chemakane (sic)
2 Creek crosses the forty-eighth parallel of
3 latitude; thence down the east bank of said
4 creek to where it enters the Spokane River;
5 thence across said Spokane River westwardly
6 along the southern bank thereof to a point
7 where it enters the Columbia River; thence
8 across the Columbia River, northwardly along
9 its western bank to a point where said river
10 crosses the said forty-eighth parallel of
11 latitude; thence east along said parallel
12 to the place of beginning. [Emphasis added]
13 (PE-52)

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

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

33 */ That Congress continues to recognize and protect the right of
34 the Spokane Indians to fish is evidenced by 16 U.S.C. Sec.
35 835d. By that law, the Secretary of the Interior is authorized to
36 set aside up to one quarter of the reservoir created by the
37 Columbia Basin Project "for the paramount use of the Indians of the
38 Spokane and Colville Reservations for hunting, fishing and boating
39 purposes."

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

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

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

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

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

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

23 In spite of the foregoing, the defendants would argue that
24 the only purpose of the creation of the Spokane Reservation was to
25 provide the Indians with land upon which to become agriculturalists.
26 See, Memorandum of Authorities of defendant Boise Cascade Corpora-
27 tion, page 1 and 2. They cite Northern Pac. Railway Co. v. Wismer,
28 246 U.S. 283 (1918), as controlling on the question of the purposes
29 for which the reservation was created. Wismer, however, did not
30 address the question since it wasn't an issue in the case. The
31 issue in Wismer was the ownership of certain land on the Spokane
32 Reservation. The railroad claimed the land under a plat filed in

1 1880. The defendant claimed the land as a successor in interest to
2 a homesteader. The Supreme Court held for the defendant on the
3 basis that since the Spokane Reservation was created in 1877, the
4 1880 plat was void as far as reservation land was concerned. The
5 Agreement of August 18, 1877, and the facts surrounding it were
6 discussed only in order to establish the effective date of the
7 reservation. There was no issue of the purpose of the reservation
8 raised hence the Court didn't address itself to that. The refer-
9 ences to agriculture found in the opinion were merely references to
10 the language of the agreement, which has been discussed above.

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

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

19 It is axiomatic that the test to be applied in determining
20 the existence, nature and the extent of a federal reserved water
21 right is whether the reservation of the water was necessary to
22 accomplish the purposes for which the reservation was created.
23 Cappaert, supra, 48 L. Ed. 2d at 534; Arizona v. California, supra,
24 373 U.S. at 599-601; Winters, supra, 207 U.S. at 576. This is the
25 language that the courts have consistently used.

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

1 Western Water Law, 1975 Utah Law. Rev. 871 (1975); Note - Minimum
2 Stream Flows - Federal Power to Secure, 15 Nat. Res. Journal 799
3 (1975); Comment, Application of the Winters Doctrine: Quantifica-
4 tion of the Madison Formation, 21 S. Dakota L. Rev. 144 (1976).

5 Even those courts finding a federal reserved right for
6 irrigation on an Indian Reservation do so only after a careful re-
7 view of the creation of the reservation and the reasons for the
8 selection of that particular site.

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

26 The ninth circuit opinion in the Winters case is even more
27 revealing. It should be noted that Winters was before the ninth
28 circuit twice, once because of the issuance of a preliminary
29 injunction, 143 Fed. 740 (C.A. 9, 1906), and again after the final
30 decree was entered, 148 Fed. 684 (1906). In the opinion dealing
31 with the appeal of the issuance of the preliminary injunction, the
32

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

7 Why was the northern boundary of the res-
8 ervation located 'in the middle of Milk
9 River' unless it was for the purpose of
10 reserving the right to the Indians to the
11 use of said water for irrigation, as well
12 as for other purposes? 143 Fed. at 745.

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

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

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

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

1 The law of that case (Winters) is appli-
2 cable to the present case, and determines
3 the paramount right of the Indians of the
4 Blackfeet Indian reservation to the use
5 of the waters of Birch Creek to the extent
6 reasonably necessary for the purposes of
7 irrigation and stock raising, and domestic
8 and other useful purposes. 161 Fed. at
9 831. [Emphasis added]

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

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

13 The United States relies on the recently decided case of
14 Cappaert v. United States, supra, for the proposition that a federal
15 reserved right may extend to water for fishery, recreational and
16 esthetic purposes. As noted above, in Cappaert, the Supreme Court
17 found that the reservation of Devil's Hole as a national monument
18 included sufficient water to maintain the level of its pool and
19 thereby preserve the pupfish living in that pool. It is difficult
20 to understand how the United States could validly reserve enough
21 water to maintain a minimum level in a pool located within a nation-
22 al monument but could not validly reserve enough water to maintain
23 a minimum flow in a stream located on an Indian reservation. In
24 Arizona v. California, supra, 373 U.S. at 546, the Supreme Court
25 held that the principle underlying the reservation of water rights
26 for Indian reservations was equally applicable to other federal
27 reservations. Obviously, then, the converse is true and if a
28

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

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

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

12 (1) The protection of watersheds and the
13 maintenance of natural flow in streams
14 below the sheds; (2) production of tim-
15 ber; (3) production of forage for domestic
16 animals; (4) protection and propagation
17 of wildlife; and (5) recreation for the
18 general public. Water is used for recre-
19 ation, domestic purposes, irrigation and
20 stock watering. Masters Report, page 96.

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

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

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

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

3 The United States created more than 13 Indian reservations
4 in western Washington to be the homes of the western Washington
5 tribes. These tribes were historically a fishing people and both
6 the treaties entered into and the reservation sites plainly reveal
7 an intention by the United States that the Indians retain their
8 aboriginal fishing ways. See United States v. State of Washington,
9 384 F.Supp. 312 (USDC, WD Wash., 1974), affm'd 520 F.2d 676 (C.A.
10 9, 1975), cert. den. 423 U.S. 1086 (1976).

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

19 The president has set apart the reserva-
20 tion for the use of the Pah Utes and
21 other Indians residing thereon. He has
22 done this by authority of law. We know
23 that the lake was included in the res-
24 ervation, that it might be a fishing
25 ground for the Indians. 27 Fed. Cas. 1357.

26 See also, United States v. Walker River Irr. Dist., et al., 104 F.2d
27 334, 338 (C.A. 9, 1939).^{**/}

28 ^{*/} The treaties between the United States and the various Indian
29 tribes have always focused on the needs and unique character-
30 istics of each tribe. See Treaty with the Wyandot, January 21,
31 1785 (7 Stat. 16) and Treaty with the Cherokee, November 28,
32 1785 (7 Stat. 18) (reservations set aside for the Indians "to live
and hunt upon."); Treaty with the Cherokee, October 25, 1805 (7
Stat. 93) (Cherokees to accept "useful articles of, and machines for
agriculture and manufactures"); Treaty with the Utah, December 30,
1849 (9 Stat. 984) (Indians to "pursue such other industrial pursuits
as will best promote their happiness and prosperity").

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

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

5 Alaska Pacific Fisheries v. United States, 248 U.S. 78
6 (1918), is a case directly on point. This was a suit by the United
7 States to enjoin the Alaska Pacific Fisheries from maintaining an
8 extensive fish trap just off of the Annette Islands in Alaska. The
9 United States argued, inter alia, that the waters in which the
10 trap was located were part of the Indian reservation, thus, that
11 the defendants had no right to place the trap there. The Annette
12 Islands had been set aside as a reservation for the Metlakahtla
13 Islands by the Act of March 3, 1891 (26 Stat. 1101). The reserva-
14 tion was to consist of "the body of lands known as Annette Islands".
15 The question thus presented to the Court was whether the reservation
16 embraced only the upland of the islands or also included the
17 adjacent waters and submerged land.

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

21 . . . it is important, in approaching a
22 solution of the question stated, to have
23 in mind the circumstances in which the
24 reservation was created -- the power of
25 Congress in the premises, the location
26 and character of the islands, the situa-
27 tion and needs of the Indians and the
28 object to be attained. 248 U.S. at 87.

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

31 con't

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

1 It held that Congress did indeed have the power to make the reser-
2 vation inclusive of the adjacent waters and submerged lands.

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

10 [T]o establish an Indian colony which would
11 be self-sustaining and reasonably free
12 from the obstacles which attend the advance-
13 ment of a primitive people. They are
14 largely fishermen and hunters, accustomed
15 to live from the returns of those voca-
16 tions, and looked upon the islands as a
17 suitable location for their colony, be-
18 cause the fishery adjacent to the shore
19 would afford a primary means of subsistence
20 and a promising opportunity for industrial
21 and commercial development. 248 U.S. at 88

22 Thus the Court found:

23 The purpose of creating the reservation
24 was to encourage, assist and protect the
25 Indians in their effort to train them-
26 selves to habits of industry, become
27 self-sustaining and advance to the ways
28 of civilized life . . . The Indians could
29 not sustain themselves from the use of
30 the upland alone. The use of the adja-
31 cent fishing grounds was equally essential.
32 248 U.S. at 89.

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

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

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

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

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

20 As a basic proposition it is clear that
21 Indians traditionally enjoyed the exclusive
22 right to hunt and fish on lands reserved to
23 them, unless such rights were clearly
24 relinquished by treaty. Menominee Tribe
25 v. United States, 391 U.S. 404 (1968);
26 Alaska Pacific Fisheries v. United States,
27 248 U.S. 78 (1918); Kimball v. Callahan,
28 493 F.2d 564 (9th Cir., 1974) cert. denied,
29 419 U.S. 1019 (1975); United States v.
30 State of Washington, 384 F.Supp. 312 (W.D.
31 Wash. 1974) aff'd. ___ F.2d ___ (9th Cir.,
32 June 4, 1975). This right is implied where
not explicitly mentioned in the agreement
establishing a reservation, for such agree-
ments are not grants of rights to the Indians,
but rather a reservation of rights already
possessed by them and not granted away.
United States v. Winans, 198 U.S. 371 (1905)
. . . . Further, this right is extant whether
the reservation is created by executive order
or established by treaty. United States v.
Walker River Irrigation District, 104 F.2d
334 (9th Cir., 1939) (citations omitted).
Slip Opinion p. 5.

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

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

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

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

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

24 It is indeed strange for the State of Washington and its
25 citizens to argue that the United States cannot reserve water for
26 fishery, recreational and esthetic purposes. The state itself
27 recognizes these uses as beneficial and worthy of protection.*/
28

29 The Water Resources Act of 1971, RCW 90.54.020 sets forth legislative
30 guidelines and provides that the:

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

1 Utilization and management of the waters
2 of the State shall be guided by the fol-
3 lowing general declaration of fundamentals:

4 (1) Uses of water for domestic,
5 stock watering, industrial, commercial,
6 agricultural, irrigation, hydroelectric
7 power production, mining, fish and
8 wildlife maintenance and enhancement,
9 recreational, and thermal power produc-
10 tion purposes, and preservation of envi-
11 ronmental and aesthetic values, and all
12 other uses compatible with the enjoyment
13 of the public waters of the State, are
14 declared to be beneficial.

15 * * *

16 (3) The quality of the natural envi-
17 ronment shall be protected and, where pos-
18 sible, enhanced as follows:

19 (a) Perennial rivers and streams
20 of the State shall be retained with base
21 flows necessary to provide for preserva-
22 tion of wildlife, fish, scenic, aesthetic
23 and other environmental values, and navi-
24 gational values. Lakes and ponds shall
25 be retained substantially in their natural
26 condition. Withdrawals of water which
27 would conflict therewith shall be author-
28 ized only in those situations where it is
29 clear that overriding consideration of
30 the public interest will be served.
31 [Emphasis added]*/

32 * * *

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

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

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

1 (5) Multiple-purpose impoundment
2 structures are to be preferred over single-
3 purpose structures. Due regard shall be
4 given to means and methods for protection
5 of fishery resources in the planning for
6 and construction of water impoundment
7 structures and other artificial obstruc-
8 tions.

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

8 * * *

9 (2) In order to carry out the policy
10 set forth in this chapter, it is the con-
11 tinuing responsibility of the State of
12 Washington and all agencies of the State
13 to use all practicable means, consistent
14 with other essential considerations of
15 State policy, to improve and coordinate
16 plans, functions, programs, and resources
17 to the end that the State and its citizens
18 may:

15 * * *

16 (b) Assure for all people of
17 Washington safe, healthful, productive,
18 and esthetically and culturally pleasing
19 surroundings;

18 * * *

19 (d) Preserve important historic,
20 cultural, and natural aspects of our
21 national heritage;

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

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

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

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

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

20 Certainly, agricultural needs have figured predominantly
21 in the application of federal reserved rights to Indian reserva-
22 tions. It must be remembered, however, that the test is whether a
23 reservation of water would be required to fulfill the purposes for
24 which the reservation was created. Since the Spokane Reservation
25 was created to provide a "permanent home" for the tribe, there must
26 have been an intent to reserve enough water to develop the reserva-
27 tion as a home which would include the irrigation of land, develop-
28 ment of minerals, preservation of the environment for game and fish
29 and preservation of the environment for recreational and esthetic
30 purposes.

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

1 still smoke and dry fish and use them as their staple food item.
2 Virtually every male member of the Spokane Tribe has fished or
3 will fish on the reservation sometime during his lifetime. (Tr. 763,
4 809, 828)

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

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

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

24 Historically, Chamokane Creek was the spawning grounds of
25 salmon and steelhead trout as well as the permanent home for several
26 species of native trout and other fish. Presently, the creek is
27 inhabited by German brown trout, rainbow trout and eastern brook
28 trout, as well as several varieties of suckers and sculpins. (Tr.
29 463-465, 675, 695; PE-64, p. 20-22)

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

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

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

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

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

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

4 In order to maintain a water temperature lower than
5 68° F. in lower Chamokane Creek, an average daily minimum flow of
6 30 cfs will be required. A minimum flow of 30 cfs would also insure
7 the protection of the entire creek in terms of food production
8 areas and would provide the living space necessary for an optimum
9 trout fishery. (Tr. 453-454, 505, 519, 532, 537)

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

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

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

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

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

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

25 A 30 cfs minimum stream flow in lower Chamokane Creek is
26 certainly necessary as testified to by Mr. Navarre and Mr. Woodward.
27 Without this flow, the fishery cannot be maintained and the recrea-
28 tional and esthetic values of the area will be endangered. The
29 United States Supreme Court has held that the implied reservation
30 of water doctrine reserves only that amount of water necessary to
31 fulfill the purpose of the reservation and no more. Cappaert, supra,
32

1 48 L. Ed. 2d at 535. The preponderance of the evidence presented
2 at the trial of this case supports the contention that a minimum
3 flow of 30 cfs is necessary for one of the primary purposes for
4 which the Spokane Indian Reservation was created.

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

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

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

28
29 ^{*/} See generally, Ranquist, The Winters Doctrine and How it Grew:
30 Federal Reservation of Rights to the use of water, 1975
31 Brigham Young University L. Rev. 639, 662 (1975).

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

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

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

20 The fact that it was intended the tribal members would
21 gradually shift some of their efforts toward agriculture is evident
22 from the language of the Agreement of August 18, 1877. By the
23 terms of that agreement, the government agreed to the creation of
24 the Spokane Reservation and the tribe agreed "to go upon the same
25 by the first of November next, with the view of establishing our
26 permanent homes thereon and engaging in agricultural pursuits."

27 (PE-63) A clearer statement of at least one of the purposes for
28 the creation of this reservation cannot be imagined.

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

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

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

7 As the defendants have correctly noted^{*/} the reservation
8 of water rights under the Federal Reserved Rights Doctrine for
9 the irrigation of land within an Indian reservation has long been
10 recognized by the federal courts. The test of the existence of the
11 right has been consistently held to be whether at least one of the
12 purposes for the creation of the reservation was to provide land
13 which the Indians could farm. If it were intended that the land
14 should be farmed and if the land was in fact arid, then the courts
15 have held that there was an implied intention to reserve sufficient
16 water to irrigate that land. Winters v. United States, 207 U.S. 564,
17 576-577 (1908); Conrad Inv. Co. v. United States, 161 Fed. 829,
18 831-832 (C.A. 9, 1908); Skeem v. United States, 273 Fed. 93, 95
19 (C.A. 9, 1921); United States v. Parkins, 18 F.2d 642, 643 (USDC,
20 Wyo., 1926); United States v. Hibner, 27 F.2d 909, 911 (USDC, Idaho,
21 1928).

22 The controlling authority is Arizona v. California, 373
23 U.S. 546 (1963). That case began before the United States Supreme
24 Court as an original action by the State of Arizona against the
25 State of California over how much water each state had a right to
26 use out of the Colorado River and its tributaries. The United
27 States, as well as the States of Nevada, New Mexico, and Utah, later
28 intervened. A special master was appointed who conducted a trial
29 and filed a report of his findings. The United States claimed
30

31 _____
32 ^{*/} Memorandum of Authorities of Defendant Boise Cascade Corp.,
p. 1-4.

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

9 I have concluded that enough water was
10 reserved to satisfy the future expanding
11 agricultural and related water needs of
12 each Indian Reservation. Invariably the
13 United States intended that the Indian Tribes
14 settled on a Reservation would remain there
15 for generations, and the possibility that
16 other Indians would be settled on the
17 Reservation could not be excluded. Certainly
18 the possibility of expanding populations,
19 expanding agricultural development, and
20 hence expanding water needs must have been
21 apparent at the time each Reservation was
22 created.

23 * * *

24 This brings us to the question of quantity.
25 This is sharply debated, and many conflict-
26 ing views have been advanced. I have
27 concluded that the United States effectuated
28 the intention to provide for the future needs
29 of the Indians by reserving sufficient water
30 to irrigate all of the practicably irriga-
31 ble lands in a Reservation and to supply
32 related stock and domestic uses. The
33 magnitude of the water rights created by the
34 United States is measured by the amount of
35 irrigable land set aside within a Reservation,
36 not by the number of Indians inhabiting it.
37 (Master's Report, pp. 260, 262)

38 The Supreme Court agreed:

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

47
48
49
50
51
52 */ Arizona v. California, Master's Report, p. 257.

1 did the Master, that the only feasible and
2 fair way by which reserved water for the reser-
3 vations can be measured is irrigable acreage.
4 Arizona v. California, 373 U.S. 600-601

5 Thus, the quantification of a federal reserved right for
6 irrigation purposes takes place by determining: (1) the amount of
7 acreage on the reservation which is "practicably irrigable" and (2)
8 the number of acre-feet of water per acre it will take to grow
9 crops on that acreage. The term "practicably irrigable" has not
10 been specifically defined by either the Supreme Court or any other
11 court but it is suggested that the meaning of the term is evident
12 from Arizona v. California, itself. In his findings of fact regard-
13 ing the rights of the Indian reservations, the Special Master fixed
14 the quantum of each right as a stated maximum annual diversion
15 requirement in acre-feet for the irrigation of a stated number of
16 acres of "irrigable Reservation land". The evidence which the
17 Master cites^{*/} to support his number of irrigable acres and the
18 resultant diversion requirement largely consists of tables which
19 show how the diversion requirements are computed (U.S. Exhibits 570,
20 1009, 1121 and 1210). These tables show the water source, the net
21 area on which consumptive use is computed (or the net area of
22 irrigable land as determined by the soil classification surveys),
23 the consumptive use, and the amount of water to be diverted to
24 achieve the consumptive use requirement. Arizona v. California,
25 transcript pp. 14,468-14,474. Further, in making its presentation
26 as to the irrigable acreage on each of the reservations, the United
27 States relied chiefly on two types of exhibits. One was a map
28 showing the results of the soil classification survey (soil classes
29 I-IV) and the other was a map showing irrigated and irrigable land
30 or the potential reservation irrigation project. In each case
31 involving these reservations, the area of the irrigable acreage was
32 found to coincide exactly with the class I, II, III and IV land.

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

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

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

8 1. The right is based on irrigable
9 acreage and not on the extent of actual
10 irrigation at any given point in time,
11 the Tribes plans to irrigate (or lack
12 thereof) or any other factor. Arizona v.
13 California, 373 U.S. at 600

14 2. To establish the irrigable acreage, it
15 need only be shown that the land is arable
16 soil to which water is delivered or can be
17 delivered and which is or can be made capable
18 of producing crops by the construction of
19 those facilities necessary for sustained
20 irrigation.

21 (c) The United States has a right to 25,380
22 acre-feet of water per year for the
23 irrigation of 8,460 acres.

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

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

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

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

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

11 (Tr. 113)

12 Based upon a maximum requirement of three acre-feet per
13 acre, the irrigable land on the reservation above elevation 2,100
14 feet will require a maximum of 19,740 acre-feet and the land below
15 elevation 2,100 feet a maximum of 5,640 acre-feet. This makes a
16 total irrigation requirement of 25,380 acre-feet or approximately
17 34.7 cfs. (Tr. 114)

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

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

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

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

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

23 Before dealing with these contentions, it may be useful
24 to review the history of the land status of the Spokane Indian
25 Reservation.
26
27
28

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

1 The Spokane Indian Reservation, as set aside on August 18,
2 1877, contained approximately 154,898 acres. This land was held in
3 trust by the United States for the use and benefit of the Spokane
4 Tribe under 25 U.S.C. 177. By the beginning of the Twentieth
5 Century, however, the government had begun to make inroads on the
6 property rights as reserved for the Indians. By the Act of May 27,
7 1902 (32 Stat. 266), the mineral lands on the Spokane Reservation
8 were opened to entry by non-Indians. Lands allotted to Indians,
9 used by the government or used for school purposes were excluded.
10 This act was amended by the Act of June 19, 1902 (32 Stat. 744),
11 which directed the Secretary of the Interior to make allotments on
12 the Spokane Reservation and to open the remainder of the reservation
13 to purchase under the mining laws. There is no evidence that allot-
14 ments actually took place under this act. (PE-46; PE-47; DE-28,
15 p. 987)

16 On May 29, 1908, Congress passed Public Law 157 which was
17 entitled "An Act to authorize the Secretary of the Interior to sell
18 and dispose of the surplus, unallotted agricultural lands of the
19 Spokane Indian Reservation, Washington, and for other purposes."
20 (35 Stat. 458). Under the provisions of that act, the Secretary of
21 the Interior was authorized and directed to cause allotments of
22 land to be made on the Spokane Reservation. After the completion
23 of the allotment process, the Secretary was to see that the surplus
24 land was classified as either agricultural or timber. The land
25 classified as agricultural was then to be opened to non-Indian
26 settlement under the provisions of the homestead laws under condi-
27 tions as prescribed by the President. The land classified as timber
28 land was to remain in trust for the benefit of the tribe. The
29 act closed with the provision that "nothing in this Act shall be
30 construed to deprive said Indians of the Spokane Indian Reservation,
31 in the State of Washington, of any benefits to which they are
32 entitled under existing treaties or agreements not inconsistent

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

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

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

19 Subsequent to the allotment of land to individual Indians,
20 a limited amount of this land was sold to non-Indians. Beginning
21 in the 1930s, the Spokane Tribe undertook a program of purchasing
22 allotments which belonged to individual Indians and had remained in
23 trust status, allotments which had passed to non-Indian ownership
24 and also purchasing land which had been homesteaded. By the Act of
25 June 10, 1968 (82 Stat. 174), as amended by the Act of May 21, 1974
26 (88 Stat. 142 [25 U.S.C. 487]), the Secretary of the Interior was
27 authorized to purchase for the tribe, lands within the Spokane
28 Reservation. The purchased land is returned to trust status where
29 necessary. Under this act, approximately 2,523.44 acres have been
30 returned to the tribe and trust status and of this amount, 1,798.11
31 acres are within the Chamokane Creek basin. Once returned to trust
32

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

3 As of June 1, 1974, the land status of the Spokane Reser-
4 vation was as follows:

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

10 (Tr. 1343; PE-100)

11 Thus, it is evident from the foregoing that the issue of
12 the priority date for irrigable land concerns chiefly three cate-
13 gories of land: (1) land which became part of the reservation in
14 1877 and which has remained in that status to the present; (2) land
15 which was opened to to homestead under the Act of May 29, 1908, was
16 not claimed and was "restored" to tribal ownership by the Act of
17 May 19, 1958; (3) land which was either sold to a non-Indian by an
18 Indian allottee or homesteaded and later repurchased by the tribe
19 and returned to trust status under 25 U.S.C. 487. Each of these
20 categories will be dealt with individually.

21 (1) The vast majority of the acres
22 claimed as irrigable have remained
23 in trust status since the reserva-
tion was created in 1877.

24 The Spokane Indian Reservation, as originally created, was
25 entirely held in trust by the United States for the benefit of the
26 Spokane Indians. 25 U.S.C. 177. The extinguishment of Indian
27 property rights can only be done pursuant to an act of Congress.
28 Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 667-670
29 (1974); United States v. Santa Fe Pacific Railroad Co., 314 U.S. 339,
30 347 (1941); Federal Power Commission v. Tuscarora Indian Nation, 362
31 U.S. 99, 119 (1960); United States v. Ahtanum Irrigation District,
32 236 F.2d 321, 334 (C.A. 9, 1956), cert. den. 352 U.S. 988. Even

1 when Congress acts, extinguishments of Indian rights must be express,
2 they will never be implied. DeCoteau v. District County Court, 420
3 U.S. 425, 444-445 (1975); Mattz v. Arnett, 412 U.S. 481, 504-505
4 (1973); Menominee Tribe v. United States, 391 U.S. 404, 413 (1968).

5 The evidence in this case clearly establishes that most
6 of the acreage claimed as irrigable became part of the reservation
7 in 1877 and has continued in that status until this day. Plaintiffs
8 exhibits 63 (Agreement of August 18, 1877) and 52 (Executive Order
9 of January 18, 1881) establish the original boundaries of the
10 Spokane Reservation. Plaintiff's exhibit 34 shows that the land
11 claimed as irrigable is within the boundaries of the reservation.
12 Plaintiff's exhibits 99 and 100 show that most of the land claimed
13 as irrigable is land which is presently held in trust by the United
14 States and was neither formerly opened to homestead nor formerly
15 non-Indian owned. Thus, except as to that land which has been
16 identified as formerly opened to homestead or formerly non-Indian
17 owned, there is no evidence in the record that the acreage claimed
18 as irrigable has been in anything but trust status since 1877.

19 Once title to or ownership of property is shown to have existed in
20 a particular person at a particular time, the title or ownership is
21 presumed to continue to exist until such time as it appears from
22 the evidence that such person was divested of it by his own act or
23 by operation of law. Old Salem Chautaugua Asso. v. Illinois Dist.
24 Council of Assembly of God, 16 Ill. 2d 470, 158 NE 2d 38, 41 (Ill.,
25 1959), cert. den. 361 U.S. 864. See also Bean v. Morris, 221 U.S.
26 485 (1911). Therefore, until a given parcel of land is shown to
27 have suffered a break in the chain of title from 1877 to the
28 present, the land must be considered to have a water right priority
29 date of August 18, 1877. That date will attach to the bulk of
30 the 8,460 acres claimed as irrigable.
31
32

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

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

7 There are only 77 acres of land within the Chamokane Creek
8 basin portion of the Spokane Reservation which were opened to home-
9 steading under the Act of May 29, 1908, (35 Stat. 548), were never
10 claimed and were restored to tribal ownership under the Act of
11 May 19, 1958 (72 Stat. 121). (PE-98, PE-99) Of these 77 acres, only
12 28.7 acres are claimed as irrigable.^{*/} (PE-34, PE-98, PE-99) It
13 would produce an undue administrative burden to single 28.7 acres
14 out of 8,460 acres for special treatment. On this basis alone, this
15 court should include the 28.7 acres among the land with an August
16 18, 1877 priority date.

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

26
27
28

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

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

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

31 The 48.3 acre parcel is not irrigable. See, PE-98, PE-34.
32

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

6 That nothing in this act contained shall
7 in any manner bind the United States to
8 purchase any portion of the land herein
9 described, except sections sixteen and
10 thirty-six of the agricultural lands or
11 the equivalent in each township, or to
12 dispose of said land except as provided
13 herein, or to guarantee to find purchasers
14 for said lands or any portion thereof, it
15 being the intention of this act that the
16 United States shall act as trustee for said
17 Indians to dispose of the said lands and to
18 expend and pay over the proceeds received
19 from the sale thereof only as received as
20 herein provided: Provided, That nothing
21 in this act shall be construed to deprive
22 said Indians of the Spokane Indian Reservation,
23 in the State of Washington, of any benefits
24 to which they are entitled under existing
25 treaties or agreements not inconsistent
26 with the provisions of this act.

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

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

1 In 1913, the Ash Sheep Company sought to graze sheep on
2 the unallotted lands opened for settlement without compliance with
3 Interior Department regulations, claiming that the Act of 1904 had
4 diminished the reservation and converted the land affected into
5 "public land". The Supreme Court disagreed, stating (252 U.S.
6 165-166):

7 It is obvious that the relation thus
8 established by the act between the Govern-
9 ment and the tribe of Indians was essentially
10 that of trustee and beneficiary and that
11 the agreement contained many features
12 appropriate to a trust agreement to sell
13 lands and devote the proceeds to the
14 interests of the cestui que trust.
15 Minnesota v. Hitchcock, 185 U.S. 373,
16 394, 398.

17 * * *

18 Taking all of the provisions of the
19 agreement together we cannot doubt that
20 while the Indians by the agreement released
21 their possessory right to the Government,
22 the owner of the fee, so that, as their
23 trustee, it could make perfect title to
24 purchasers, nevertheless, until sales
25 should be made any benefits which might
26 be derived from the use of the lands would
27 belong to the beneficiaries and not to the
28 trustee, and that they did not become
29 'Public lands' in the sense of being subject
30 to sale, or other disposition, under the
31 general land laws. [Emphasis added]

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

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

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

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

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

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

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

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

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

18 Thus, it is evident from the foregoing that it has been
19 the policy of the United States that Indian tribes should receive
20 the benefits from their reservation lands in one form or another.
21 Even when the land is opened for non-Indian settlement, the Indians
22 were to receive the proceeds from the sales. Unless and until the
23 land was actually exchanged for money, the land remained in trust
24 and was administered for the benefit of the Indians. Along this
25 line, is a series of cases holding that the mere opening of a reser-
26 vation to non-Indian settlers does not mean that the reservation is
27 discontinued or the boundaries altered. DeCoteau v. District County
28 Court, 420 U.S. 425, 444 (1975); Mattz v. Arnett, 412 U.S. 481 (1973);
29 Seymour v. Superintendent, 368 U.S. 351 (1962); The City of New Town,
30 North Dakota v. United States, 454 F.2d 121 (C.A. 8, 1972); United
31 States v. Erickson, 478 F.2d 684 (C.A. 8, 1973).
32

1 The so-called "Land Restoration Act" by which the unhome-
2 steaded land was "restored" to tribal ownership is the Act of May 19,
3 1958 (72 Stat. 121). See 25 U.S.C. 463, Historical Note. It is
4 evident from the legislative history of that act that the intent of
5 Congress was merely to remove any remaining cloud from the title to
6 this land so that the tribe and the United States could engage in
7 long range plans for improvement and development. The Congressional
8 reports on the law are found in S. Rept. 1508, 85th Cong., 2d sess.
9 (1958) and H. Rept. 1336, 85th Cong., 2d sess. (1958).*/ The
10 Senate Report's explanation of the Bill states in part:

11 The purpose of H.R. 8544, is to provide
12 for equality of treatment in the restora-
13 tion to tribal ownership of . . . surplus
14 lands on the . . . Spokane, Wash.
15 reservation[s].

16 This legislation, if enacted, will restore
17 the lands to tribal ownership, thus termina-
18 ting the right of the Federal Government to
19 dispose of them under the cession statutes,
20 and will assure the Indians the continued
21 use rights.

22 In a series of Cases (United States v.
23 Brindle, 110 U.S. 688, 690, 693; Minnesota
24 v. Hitchcock, 185 U.S. 373, 394-395; United
25 States v. Mille Lac Chippewas, 229 U.S. 498,
26 509; Ash Sheep Co. v. United States, 252 U.S.
27 159, 164-166) the Supreme Court of the
28 United States has held that this land con-
29 tinued in the beneficial ownership of the
30 Indians even though they had ceded 'all their
31 right, title, and interest'. So the net
32 affect of H.R. 8544 is to clarify the Indian
title to these lands in order that they may
be managed and administered by the tribes.
[Emphasis added]

33 Thus, it is clear from the legislative history of this act that
34 Congress merely intended to clarify the title to the land in question
35 and to forever stop the operation of the 1908 Act. It is submitted
36 that nothing in the language of the statute itself conflicts with
37 this interpretation. Even if the statute were somewhat ambiguous,
38

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

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

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

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

15 As has been explained above, the Act of May 29, 1908,
16 authorized both the allotment to individual Indians of reservation
17 land and the opening of certain land to homesteading. As a result,
18 small tracts of land of both types eventually ended up in non-Indian
19 ownership. Beginning in the 1930s, the Spokane Tribe began
20 reacquiring some of these former reservation lands which had passed
21 to non-Indian ownership. By the Act of June 10, 1968 (82 Stat. 174),
22 as amended by the Act of May 21, 1974 (88 Stat. 142)^{*/} the Secretary
23 of the Interior was authorized to return such reacquired land to
24 trust status. To date, approximately 1,798.11 acres of this type
25 of land have been returned to trust status within the Chamokane
26 Creek basin. (PE-97; PE-99) Only a portion, however, of these
27 1,798.11 acres are claimed as irrigable. Plaintiff's exhibit 97
28 identifies the land which was formerly non-Indian owned and which
29 has been returned to trust status.^{**/} By comparing that listing to

30 ^{*/} 25 U.S.C. 487.

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

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

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

24 con't

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

1 con't

2	Section	Description, Tract No.	Acreage claimed
3	<u>Twsp. & Range</u>	<u>& Date of Acq. of</u> <u>irrigable land</u>	<u>as irrigable</u>
4	Sec. 2, T27N, R39E	Lots 6 & 9, NE1/4NW1/4, S1/2NW1/4, NW1/4SW1/4, T1001-2/2/42	48.00
5			
6	Sec. 11, T27N. R39E	N/A	None
7		TOTAL	<u>562.00</u>

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

15 The language of the Acts of June 10, 1968 and May 21, 1974
16 (25 U.S.C. 487) is not particularly helpful in determining whether
17 Congress intended for this land to revert to the same status as all
18 other trust land when it reacquired trust status.

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

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

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

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

1 in fee to non-Indians. In order to consoli-
2 date the landholdings into larger blocks,
3 broader acquisition, and disposal authority
4 is needed. In order to develop the land on
5 advantageous terms, longer term lease authority
6 is needed.

7 The tribe has developed a land purchase and
8 consolidation program, but the plan cannot
9 be carried out without this enabling
10 legislation.

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

16 The tribal land is checkerboarded with
17 allotted and fee land. In many instances
18 the tribe owns a tract of land surrounded
19 by fee land. It has little value to the
20 tribe and yet would most likely be of
21 considerable value to the adjoining owner.
22 Both Indians and non-Indians also own
23 isolated tracts surrounded by tribal
24 lands. This legislation would permit the
25 tribe to dispose of its isolated tracts
26 and replace them with tracts contiguous
27 to other tribal land.

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

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

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

12 The priority date, therefore, for this 562.0 acres is
13 August 18, 1877. The unique factual situation involved here concern-
14 ing the changes of title to this land, the legislative history of
15 the 1968 act and the de minimus nature of the acreage involved all
16 merge to justify this "relation-back" of the priority date to the
17 creation of the reservation.^{*/} Should this court find that the
18 priority date of this land does not relate back to the creation of
19 the reservation, then the priority date of each parcel would, of
20 course, be the date that the land was reacquired by the tribe.^{**/}
21 This result follows from the fact that 25 U.S.C. 487 merely "gave
22 formal sanction to an accomplished fact". United States v. Walker
23 River Irr. Dist., 104 F.2d 334, 338 (C.A. 9, 1939). Once the
24 formerly reservation land was reacquired by the tribe, it was treated
25 by both the tribe and the Department of the Interior as any reserva-
26

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

30 ^{**/} The dates are set forth on PE-97.

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

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

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

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

20 Although this case is a stream adjudication which will
21 result in a "final" decree, in at least one sense, it can never
22 really be final. In this respect, the courts have consistently
23 held that since Indian reservations are created to be the home of
24 their respective tribes in perpetuity water rights which are implied-
25 ly reserved at the creation of the reservation are reserved in order
26 to achieve this purpose. Therefore, the quantity of water needed
27 to sustain the reservation should not be limited to presently foresee-
28 able uses but rather should provide for future uses which are also
29 in fulfillment of the purposes for which the reservation was
30 created.

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

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

10 In order to determine whether or not the defendant was
11 interfering with the Indians' water rights, the district court had
12 to determine what the Indian right was. The court found that
13 approximately 10,000 acres of reservation land were susceptible to
14 irrigation from Birch Creek (although only a fraction of this land
15 was then actually under cultivation) and that irrigation of this
16 land would require 1,666 2/3 inches or roughly 33 1/2 cfs. 156 F.
17 123, 130 (USDC, Montana, 1907). Having found that the United States
18 was entitled to the 33 1/2 cfs with a priority date of 1888 which
19 was senior to that of the defendants, the court enjoined the defend-
20 ants from infringing on the government's right. The decree also
21 provided that:

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

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

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

1 rights as adjudged by the decree. Having
2 determined that the Indians on the reserva-
3 tion have a paramount right to the waters
4 of Birch Creek, it follows that the
5 permission given to the defendant to have
6 the excess over the amount of water
7 specified in the decree should be subject
8 to modification, should the conditions
9 on the reservation at any time require
10 such modification. 161 F. at 835

11 To justify this approach, the court had reasoned that:

12 What amount of water will be required for
13 these purposes may not be determined with
14 absolute accuracy at this time; but the
15 policy of the government to reserve what-
16 ever water of Birch Creek may be reasonably
17 necessary, not only for present uses, but
18 for future requirements, is clearly within
19 the terms of the treaties as construed by
20 the Supreme Court in Winters case. 161 F.
21 at 832.

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

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

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

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

1 We also agree with the Master's conclu-
2 sion as to the quantity of water intended
3 to be reserved. He found that the water
4 was intended to satisfy the future as
5 well as the present needs of the Indian
6 Reservations */

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

14 The Indians had command of the lands
15 and the waters - command of their
16 beneficial use, whether kept for hunting
17 and grazing roving herds of stock, or
18 turned to agriculture and the arts of
19 civilization. 207 U.S. at 576 [Emphasis
20 added]

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

24 Under the existing laws of the various western states,
25 including Washington, a water right owner may change the point of
26 diversion or the place and nature of use, as long as the rights of
27 others will not be materially injured.^{**/} The courts have generally
28 held that the right to change the point of diversion or the place
29

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

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

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

4 There is no valid reason that this concept should not be
5 applicable to this case, even though federal reserved rights are
6 present. The Special Master in Arizona v. California, 373 U.S. 546
7 (1963) concluded that:

8 The amount of water reserved for the five
9 Reservations, and the water rights created
10 thereby, are measured by the water needed
11 for agricultural, stock and related domestic
12 purposes. The reservations of water were
13 made for the purpose of enabling the
14 Indians to develop a viable agricultural
15 economy; other uses, such as those for
16 industry, which might consume substantially
17 more water than agricultural uses, were
18 not contemplated at the time as the Reser-
19 vations were created. Indeed, the United
20 States asks only for enough water to
21 satisfy future agricultural and related
22 uses. This does not necessarily mean,
23 however, that water reserved for Indian
24 Reservations may not be used for purposes
25 other than agricultural and related uses.
26 The question of change in the character of
27 use is not before me. I hold only that the
28 amount of water reserved, and hence the
29 magnitude of the water rights created, is
30 determined by agricultural and related
31 requirements, since when the water was reser-
32 ved that was the purpose of the reservation.

The water rights established for the benefit
of the five Indian Reservations and enforced
in the recommended decree are similar in
many respects to the ordinary water right
recognized under the law of many western
states: They are of fixed magnitude and priority
and are appurtenant to defined lands. They
may be utilized regardless of the character of
the particular user. Thus Congress has provided
for the leasing of certain Reservation lands
to non-Indians, and these lessees may exercise
the water rights appurtenant to the leased
lands. Skeem v. United States, 273 Fed. 93, 96
(9th Cir. 1921). The measurement used in
defining the magnitude of the water rights is
the amount of water necessary for agricultural
and related purposes because this was the initial
purpose of the reservations, but the decree
establishes a property right which the United
States may utilize or dispose of for the benefit
of the Indians as the relevant law may allow.

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

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

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

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

1. Injunctive relief is the proper relief.

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

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

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

1 375 F.Supp. 456, 458-460. The Court also found that the reserved
2 right of the United States was senior to the rights of the
3 defendants. Having found the existence of the right in the
4 United States and the interference with that right by the defend-
5 ants, the Court entered a permanent injunction. The injunction
6 limited "the pumping from underground waters . . . to the
7 extent required to achieve and to maintain . . . a daily mean
8 water level" 375 F.Supp. 461-462. This use of the
9 injunction was affirmed by the Ninth Circuit, 508 F.2d 313, 322
10 (C.A. 9, 1974) and by a unanimous Supreme Court, Cappaert v. United
11 States, supra.

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

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

20 Much of the testimony and many of the exhibits presented
21 to the court during the trial of this case related to the hydraulic
22 connection between the flow of Lower Chamokane Creek and the
23 surface and ground water withdrawals of the defendants. The evi-
24 dence establishes the following:

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

1 to mountains in the north central area. High areas and meadow
2 valleys are predominant in the western part and in some of the
3 south slope areas. Relatively narrow benches skirt the Spokane
4 and Columbia arms of F.D.R. Lake with basaltic bluffs or steep
5 sand slopes forming the rim. The reservation varies in elevation
6 from 1,300 feet to over 4,000 feet. The northern portion of the
7 reservation is timberland, the southern part or southwest slopes
8 are open benches. (Tr. 31, 748, 859; PE-1; PE-3; PE-82; PE-3-6-74-
9 29, p. 6)

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

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

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

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

21 The Chamokane Creek basin was formed through prehistoric
22 glacial action. While the area was affected by two glacial periods,
23 it is the later period which more directly resulted in the basin's
24 current geological features. The second period occurred approxi-
25 mately 30,000 to 40,000 years ago and it was during that period
26 that the erosional trough which generally forms the basin, was
27 gouged out. It was also at this time that the glacier deposited
28 the rock it was carrying into the trough filling it with what is now
29 the basin's overburden. (Tr. 44, 47, 52, 258-259; PE-4; PE-4a;
30 PE-5)
31
32

1 The geological make up of the Chamokane Creek basin
2 clearly reflects its glacial history. As the later glacier moved
3 southward carving out the trough, it was stopped on the west by
4 basalt and on the east by granite, which today are the respective
5 basin boundary walls. The glacier was stopped in its southward
6 movement by a granite dike which is located approximately one and
7 one-half miles north of the mouth of Chamokane Creek. This granite
8 dike forms the southern boundary wall of the basin. These three
9 physical barriers more or less act to close the basin and keep
10 ground water from flowing out the sides. The entire basin is
11 underlain with granite bedrock. As the glacier retreated, it
12 left a lateral moraine to a depth of 150 feet which blocks off
13 Camas Valley thereby precluding any appreciable ground water flow
14 into the Chamokane Creek basin from that area. (Tr. 55, 185-186,
15 260; PE-5; PE-6; PE-7; PE-27-1-7; PE-3-6-74-29, p. 10)

16 As the later glacier retreated, it dropped the material
17 it had picked up as it moved south thereby filling the basin with
18 its present overburden. The glacial recession tended to rinse out
19 the upper layers of the overburden resulting in tighter lower
20 layers and looser upper layers. The looser upper layer of over-
21 burden is non-uniform, varies from 20 feet to 50 feet thick and is
22 made up of porous gravel and sand. The lower, tighter layer is
23 more uniform, varies from 50 feet to 100 feet thick and is made
24 up of sand with some gravel and clay. Ground water is found with-
25 in both layers. While the lower layer has more water in it, it
26 does not yield it readily. The upper layer, in contrast, does
27 yield its water readily. The lower layer will yield about 3 to
28 5 gpm and is generally used for domestic purposes, the upper
29 layer will yield around 1,000 to 1,500 gpm and is used for irriga-
30 tion. (Tr. 47, 52, 55, 71-72, 199-201, 407-408, 1044; PE-8;
31 PE-9; PE-3-6-74-29, pp. 13-19; United States Reconstruction of
32 Record, p.5)

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

6 The ground water flow in the Chamokane Creek basin from
7 the north line of the reservation to the Massive Springs area is
8 in a generally southwesterly direction. (Tr. 64, 187, 322, 902,
9 1309; United States Reconstruction of Record, pp. 4-5)

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

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

24 All of the water entering the Chamokane Creek basin does
25 so in the form of precipitation, either rain or snow. This pre-
26 cipitation either sinks into the ground, runs off or is burned
27 up through evaporation or evapotranspiration. All of the
28 precipitation that enters the drainage basin is eventually
29 measured below the falls minus any manmade depletions, evaporation
30 or evapotranspiration. That portion of the precipitation which
31 sinks into the ground and joins the ground water system eventually
32

1 exits through Massive Springs. (Tr. 67; United States Reconstruc-
2 tion of Record, pp. 5-6)

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

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

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

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

22 Since the USGS gaging station located below Chamokane
23 Creek falls was not established until February 1971, there are
24 no actual records for the total flow of lower Chamokane Creek
25 until that time. Records from that station indicate the
26 following were the flows of Lower Chamokane Creek for the period
27 since 1971:
28
29
30
31
32

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

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

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

1931-1970	average of 33 cfs
1961-1970	average of 30 cfs

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

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

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

1 permits for another 5.95 cfs. This is a total of 25.98 cfs. The
2 total effective reduction in Chamokane Creek from these uses
3 is 6.62 cfs. In addition, there are applications pending for
4 31.74 cfs which would effectively reduce Chamokane Creek by 9.33
5 cfs. Thus, if all existing certificates, permits and applica-
6 tions were utilized to their maximum, Chaomkane Creek would be
7 effectively reduced by a total of 15.96 cfs. (Tr. 77, 88-89,
8 124-125; PE-14; PE-32; PE-33)

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

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

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

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

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

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

26 Defendant Dawn Mining Company owns land on the Spokane
27 Indian Reservation adjacent to and west of Chamokane Creek.
28 Dawn Mining Company has a surface diversion of approximately 1 cfs
29 from the creek which has the immediate and direct effect of
30 reducing the flow in lower Chamokane Creek by 1 cfs. (Tr. 100,
31 840)
32

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

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

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

1 870; PE-3-6-74-29, p. 11; PE-18, 18A; PE-19, 19A; PE-24, 24A; PE-25,
2 25A; PE-26; PE-3-6-74-29, pp. 76-88; Affidavit of Walter L. Woodward,
3 p. 4)

4 It is clear from the evidence in this case that the surface
5 diversions and ground water withdrawals of the defendants are hydrau-
6 lically connected with the flow of the Massive Springs and thus the flow
7 in lower Chamokane Creek. Therefore, the United States and the
8 Spokane Tribe are entitled to permanent injunctive relief against
9 the defendants forbidding them to use any water such as will inter-
10 fere with the plaintiff's reserved rights.

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

15 1. The State of Washington has no authority
16 to issue permits for the appropriation
17 of water, to manage or to in any way con-
18 trol the right to use water within the
exterior boundaries of the Spokane Indian
Reservation.

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

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

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

5 For the following reasons the above set forth six certifi-
6 cates, permits and applications are void and the state should be
7 enjoined from issuing similar ones for water within the exterior
8 boundaries of the reservation.

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

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

20 When the territory now comprising the State of Washington
21 came into the ownership of the United States through cession from
22 foreign sovereigns, the United States became the owner of the land
23 and all rights pertaining thereto, except for those interests in
24 lands and appurtenant rights established under the previous sover-
25 eigns. Borax Consolidated, Ltd. v. Los Angeles, 296 U.S. 161, 183-
26 184 (1891). The right to the use of the appurtenant waters on
27 these lands was a part of the bundle of rights acquired by the United
28 States in the acquiring ^{title} to these lands. See 2 Clark, Waters and
29 Water Rights, pp. 81-82 (1967). By its very acquiescence, the
30 United States, during the initial stages of the settlement of the

31 ^{*/} The Schaffner property was homesteaded by Emil Schaffner in
32 1910. (Tr. 1248; PE-67; PE-71)

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

17 That whenever, by priority of possession,
18 rights to the use of water for mining,
19 agricultural, manufacturing, or other
20 purposes, have vested and accrued, and
21 the same are recognized and acknowledged
22 by the local customs, laws, and the
23 decisions of courts, the possessors and
24 owners of such vested rights shall be
25 maintained and protected in the same;
26 and the right of way for the construction
27 of ditches and canals for the purposes
28 aforesaid is hereby acknowledged and
29 confirmed:

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

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

1 By virtue of the passage of these two acts and finally the
2 Desert Lands Act in 1877, 19 Stat. 377, 43 U.S.C. §321, the Congress
3 of the United States fully recognized and confirmed the policy of
4 the appropriation of waters for a beneficial use, as recognized by
5 local rules and customs, as the test and measure of private water
6 rights in and to the non-navigable waters on the public domain.

7 Cappaert v. United States, ____ U.S. ____, 48 L.Ed.2d 523 (1976);
8 FPC v. Oregon, 349 U.S. 435, 448 (1955); California & Oregon Power
9 Co. v. Beaver Portland Cement Co., 295 U.S. 142, 158, 163-164 (1935).

10 In this regard, the pertinent section of the Desert Lands Act pro-
11 vides in part as follows:

12 . . . all surplus waters over and above
13 such actual appropriation and use, to-
14 gether with the water of all lakes,
15 rivers and other sources of water supply
16 upon the public lands and not navigable,
17 shall remain and be held free for the
18 appropriation and use of the public for
19 irrigation, mining and manufacturing
20 purposes subject to existing rights.
21 19 Stat. 377. [Emphasis added.]

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

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

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

1 itself to what extent the rule of appro-
2 priation or the common law rule in respect
3 of riparian rights should obtain.
4 [Emphasis added.]

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

28 (b) Congress has not authorized the
29 State of Washington to assume
30 jurisdiction over the waters of
31 Chamokane Creek for use on for-
32 merly allotted or homestead land.

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

1 this fact, however, such lands do not become public lands nor do
2 they become a part of the public domain in the sense that they are
3 subject to sale or other disposition under the general land laws of
4 the United States and, therefore, subject to state jurisdiction
5 under the Desert Lands Act of 1877. Tweedy v. Texas, 286 F.Supp.
6 383, 385 (D. Mont. 1968); United States v. McIntire, 101 F.2d 650
7 (C.A. 9, 1939). See also Union Pacific RR Co. v. Harris, 215 U.S.
8 386 (1909); Ash Sheep Co. v. United States, 252 U.S. 159 (1920);
9 Seymour v. Superintendent, 306 U.S. 351 (1961); Mattz v. Arnett,
10 412 U.S. 481 (1973).

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

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

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

1 That statute [referring to the Act of
2 July 26, 1866, 43 U.S.C.A. §661, a pred-
3 ecessor to the Desert Lands Act] applies
4 only to public lands. [Citations
5 omitted.] Lands which are reserved are
6 severed from the public domain. [Cita-
7 tions omitted.] The statute mentioned,
8 therefore, does not, we think, apply
9 here. Likewise the Montana statutes re-
10 garding water rights are not applicable,
11 because Congress at no time has made
12 such statutes controlling on the reser-
13 vation. In fact, the Montana enabling
14 act specifically provided that Indian
15 lands, within the limits of the State,
16 'shall remain under the absolute juris-
17 diction and control of the Congress of
18 the United States'. 25 Stat. 676, §4.

11 It is perhaps appropriate at this juncture to bring to the
12 Court's attention the fact that section 4 of the Enabling Act of the
13 State of Washington, as well as Article 26, §2 of the Constitution
14 of the State of Washington, ^{*/} are substantially similar to the
15

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

18 The following ordinance shall be
19 irrevocable without the consent of the
20 United States and the people of this
21 state:-----

21 * * *

22 Second. That the people inhabiting
23 this state do agree and declare that they
24 forever disclaim all right and title to
25 the unappropriated public lands lying
26 within the boundaries of this state, and
27 to all lands lying within said limits
28 owned or held by any Indian or Indian
29 tribes; and that until the title thereto
30 shall have been extinguished by the
31 United States, the same shall be and re-
32 main subject to the disposition of the
United States, and said Indian lands
shall remain under the absolute jurisdic-
tion and control of the congress of the
United States

1 Enabling Act provisions and provisions of the Constitution of the
2 State of Montana mentioned above in the McIntire case. In this
3 regard, the United States contends that the State of Washington, in
4 the absence of specific congressional authority and in the absence
5 of the consent of the people of the State of Washington, as re-
6 quired by the Enabling Act and Constitution of the State of Washing-
7 ton, is precluded from exercising jurisdiction over the waters
8 within the exterior boundaries of the Spokane Indian Reservation.
9 In this same regard, it should be noted that by passage of Section
10 7 of the General Allotment Act of 1887, 25 U.S.C. §381, Congress
11 has specifically preempted the exercise of state jurisdiction over
12 waters on an Indian reservation by placing such authority within
13 the power of the Secretary of the Interior. Section 7 provides:

14 In cases where the use of water for irri-
15 gation is necessary to render the lands
16 within any Indian reservation available
17 for agricultural purposes, the Secretary
18 of the Interior is authorized to pre-
19 scribe rules and regulations as he may
20 deem necessary to secure a just and
21 equitable distribution thereof among
Indians residing upon any such reserva-
tions; and no other appropriation or
grant of water by any riparian proprie-
tor shall be authorized or permitted to
the damage of any other riparian propri-
etor.

22 As further evidence of Congress' intent to preclude the
23 states from exercising jurisdiction over waters affecting Indian
24 lands, Congress, in allowing the states to exercise limited jurisdic-
25 tion over Indian lands pursuant to Public Law 280, expressly pro-
26 hibited states from assuming jurisdiction over water rights belonging
27 to any Indian or Indian tribe. 28 U.S.C. §1360(b) and 25 U.S.C.
28 §1322(b). More particularly, 28 U.S.C. 1360(b)^{*/} provides:

30 ^{*/} See Snohomish County v. Seattle Disposal Company, 70 Wn.2d 688,
31 425 P.2d 22 (1967).

1 (b) Nothing in this section shall author-
2 rize the alienation, encumbrance, or taxa-
3 tion of any real or personal property,
4 including water rights, belonging to any
5 Indian tribe, band, or community that is
6 held in trust by the United States or is
7 subject to a restriction against aliena-
8 tion imposed by the United States; or
9 shall authorize regulation of the use of
10 such property in a manner inconsistent
11 with any Federal treaty, agreement, or
12 statute or with any regulation made pur-
13 suant thereto; or shall confer jurisdic-
14 tion upon the State to adjudicate, in
15 probate proceedings or otherwise, the
16 ownership or right to possession of such
17 property or any interest therein.
18 [Emphasis added.]

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

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

20 [N]othing in this act shall be construed
21 to deprive said Indians of the Spokane
22 Indian Reservation, in the State of Wash-
23 ington, of any benefits to which they are
24 entitled under existing treaties or
25 agreements not inconsistent with the pro-
26 visions of this act. (Section 7)

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

1 homestead but not claimed, it remained the property of the United
2 States held in trust for the tribe. Ash Sheep Co. v. United States,
3 252 U.S. 159 (1920). While the land retained its reservation
4 status, it did not become part of the public domain and therefore
5 was not subject to the public land laws or state jurisdiction.
6 FPC v. Oregon, supra, at 443-444. United States v. McIntire, 101
7 F.2d 650 (C.A. 9, 1939). Once title passed from the United States
8 (as trustee) to the individual landowner, it became that individual's
9 property. Thus, this land never became part of the public domain
10 and therefore never became subject to state jurisdiction over its
11 waters as that jurisdiction is conferred by the Desert Lands Act.
12 See Union Pacific RR Co. v. Harris, 215 U.S. 386, 388 (1909);
13 Mattz v. Arnett, 412 U.S. 481, 497 (1973).

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

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

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

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

4 The most outstanding thing about this legislation is that it pro-
5 vides for the consent of the Secretary of the Interior to any
6 appropriation of water from this section of the Spokane River. This
7 is a retention of authority and indicates that without an express
8 delegation to the state, the state would have no authority whatso-
9 ever to grant rights to this water. Since there is no similar
10 legislation concerning Chamokane Creek, that jurisdiction has not
11 passed to the state.

12 Second, "as a matter of both logic and sound practical
13 administration, jurisdiction must depend on the location of the
14 property, not on the owner's race or the title status of his prop-
15 erty." Pelcyger, Indian Water Rights: Some Emerging Frontiers,
16 21 Rocky Mountain Mineral Law Institute 743, 770 (1976). The
17 Supreme Court has consistently resisted state jurisdictional argu-
18 ments, the upholding of which would have resulted in "impractical
19 patterns of checkerboard jurisdiction". Seymour v. Superintendent,
20 368 U.S. 351, 358 (1962); Moe v. Salish and Kootenai Tribes,
21 U.S. _____, 48 L.Ed.2d 96, 109 (1976). The evidence indicates that
22 on the Spokane Reservation as a whole, only 21,683 acres out of
23 over 154,000 acres are in fee ownership. (PE-100) Obviously,
24 state jurisdiction over only some of these 21,683 acres would
25 create precisely the type of "checkerboard jurisdiction" that the
26 Supreme Court has sought to avoid.

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

1 2. The State of Washington should be
2 enjoined from the further issuance
3 of permits for the appropriation
4 of the waters of Chamokane Creek
5 outside the boundaries of the res-
6 ervation until otherwise ordered
7 by this Court.

8 Dr. George E. Maddox, a witness called by the State of
9 Washington, testified on cross examination that historically the
10 Department of Ecology has granted more water rights on streams than
11 there is water flowing in those streams. (Tr. 1062) That is
12 certainly true in this case since there currently exists certifi-
13 cates, permits and applications for water rights to Chamokane Creek
14 in the amount of 57.72 cfs which would effectively reduce Chamokane
15 Creek 15.96 cfs. (Tr. 124-125; PE-32; PE-33) In addition to that,
16 the United States and the tribe claim rights to another 64.7 cfs
17 (30 cfs for the preservation of the stream and 34.7 cfs for irriga-
18 tion), disregarding for a moment the 10 cfs for the fish hatchery
19 which is non-consumptive in nature. This makes a total of 122.42
20 cfs of water which has been claimed to date. This is for a stream
21 which averaged 33 cfs in the period 1931-1970. (Tr. 85)

22 Until such time as this court is satisfied that the rights
23 decreed in this case are being satisfied and that there exists
24 unappropriated water which can be used by others, the state should
25 issue no further water rights. To allow the state to continue as
26 it has in the past will merely complicate the administration of the
27 waters of Chamokane Creek and needlessly induce people to rely on
28 water rights which they will in fact never be able to exercise.
29
30
31
32

1 IV. Conclusion

2 It has been said that although water rights are considered
3 real property, the adjudication of those rights generally presents
4 more complicated problems than the adjudication of rights to land.
5 6 Clark, Waters and Water Rights 504 (1972). This case is no
6 exception, as the 1,381 pages of testimony and over 175 exhibits
7 evidence. In this brief, the United States has limited its
8 presentation to its own claims and the injunctive relief which is
9 being sought. In its reply brief, the Government will address the
10 validity of the various claims made by the defendants. Several
11 questions, such as the appointment of a water master, will only
12 become ripe for discussion once the Court determines the validity
13 and relative priority of each of the claims. For that reason,
14 those questions are not addressed here.

15 Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

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

CERTIFICATE OF SERVICE

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

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