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Brief of the State of Washington, Department of Ecology

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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF WASHINGTON

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

BRIEF OF THE STATE OF WASHINGTON,

DEPARTMENT OF ECOLOGY

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I. INTRODUCTION

This brief is written in response to the filings entitled "Brief of the United States in Support of its Claims" and "Brief of Spokane Indian Tribe."

A. Statement of the Proceedings.

This suit was initiated by the United States of America, on May 5, 1972, for the purpose of obtaining a decree of this Court setting forth the rights of various claimants in and to the use of the waters of Chamokane Creek and its tributaries located in Stevens County, Washington. The State of Washington was joined as a defendant along with a large number of private parties.

This case constitutes a federal court variation of the special form of quiet title action commonly referred to in the water rights law of the western states as a "general adjudication" or "general determination" of water rights.[1/] In this case all persons and entities claiming water rights in Chamokane Creek and its tributaries have been joined together for the purpose of proving their individual claims and contesting the claims of others.

During a two-week period during the Summer of 1974, this Court conducted a trial at which it received evidence with regard to the several claims presented by the parties. The Court has now reached the final stage of the proceeding with the presentation of final written arguments by the parties regarding the validity of the various claims to water rights. The Court will shortly be in a position to enter a decree correlating the rights recognized by the Court, one as against another, among the various claimants. As with most general adjudication decrees, the Court may well be entering a document which

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1/ For a discussion of the three major variations of state procedures - the Colorado, Wyoming, and Oregon "systems" - see Hutchins, General Types of Procedures in the Western States, 1956 University of Texas Proceedings on Water Law 56 (1956). For general discussions of general adjudication procedures see 3 Kinney, Irrigation and Water Rights, chapters 79 and 80 (2d ed. 1912); and 2 Wiel, Water Rights in Western United States, chapter 51 (3rd ed. 1911). Washington's general adjudication procedures are found in RCW 90.03.110 - RCW 90.03.240. See also RCW 90.44.220.

will determine who, during periods of water shortage, is entitled to withdraw waters of Chamokane Creek and its tributaries:

(1) in what amounts,

(2) for what beneficial uses,

(3) at what points of diversion,

(4) for uses at what places, and

(5) for what periods of time.

The Court is also asked by the United States (as well as the Spokane Indian Tribe) to confirm claimed rights of the United States relating to instream flows in Chamokane Creek during the late summer months.

This case deals with one of the most complex of all areas of law - the law of water rights. The case is made even more complicated not only because it is concerned with often debated issues involving fundamentals of our federal system - federal and state governmental authority over allocation of rights to use waters located within a state, but because it deals with newly conceived and very expansive water rights claims of the United States Department of Justice made, in this case, on behalf of the Spokane Indian Tribe.[2/]

This litigation also involves areas of the law which have been seldom, if ever, opined upon by the courts, federal or state. For example, the Court is asked to announce a rule of law, never before announced by any court, which would place a wall on the original boundaries of an Indian reservation through which state water right laws could not pierce even to the extent of applying to non-Indians on lands owned by non-Indians within the boundaries. (U.S. Brief, p. 81.) Another example is the request of the United States to expand the federal Indian "reserved rights" doctrine far beyond the long recognized scope of that doctrine by making the mutually exclusive,

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2/ A leading authority in the field has suggested that ". . . the outcome of Indian water rights litigation in the courts is almost as conjectural as trial by combat." Corker, Water Rights and Federalism, 45 Col. L. Rev. 604, 627 (1956).

incompatible contentions that the federally reserved rights in relation to the establishment of the Spokane Reservation, include both the right to dry up the stream during the summer months through diversions for agricultural irrigation and, for the very same period, the right to preserve the stream "in its natural status and keep it a free flowing stream." (Spokane Brief, p. 61.) A third example is the request of the Tribe to this Court to hold that non-Indian purchasers of allotments located within the original boundaries, contrary to holdings of the United States Supreme Court and a sister district court within the Ninth Circuit, obtain no "reserved" water rights as successors to an Indian allottee. (Spokane Brief, p. 117.) See United States v. Powers, 305 U.S. 527 (1939), and United States v. Hibner, 27 F.2d 909 (D. Idaho 1928).

In other words, this Court is asked to plow new ground in a number of areas of great importance not only to Indians but to the various western states and their citizenry. In so requesting the Court, the United States is proposing an announcement of law which has the potential, if applied throughout the rest of Washington State as well as the western United States, for severe detrimental impacts through displacement of major cultural and economic communities. Many of these communities, we should add, were developed as the result of long established federally inspired land settlement policies which encouraged the successful pioneering efforts so familiar to all who live in the arid west. In sum, the conclusions reached by the Court in this case, together with the analysis used to reach the same, will have great implications reaching far beyond the relatively small amounts of water in controversy in this case.

B. The Chamokane Creek Drainage.

Chamokane Creek has its headwaters in the Huckleberry Mountains of southern Stevens County in Washington State. From its place of origin the creek flows in a generally southeastern direction over

private and state owned lands until it reaches the eastern border of the Spokane Indian Reservation. Thereafter the creek changes its direction of flow to the south for a reach of approximately sixteen miles whereupon it empties into the Spokane River at a point approximately 1.4 miles below Long Lake. Some of the controversy of this case revolves around the fact the sixteen mile southerly flow reach of Chamokane Creek constitutes the easterly boundary of the Spokane Indian Reservation. (U.S. Brief, p. 17.)[3/]

The Chamokane Creek drainage is a semi-arid area. Winters in the area often reach low temperatures, while summer temperatures are often high. The drainage is generally covered by none-too-dense pine forests with some areas thereof in irrigated farm lands or in sagebrush cover. (P.E. 12, 13, 83.)

Chamokane Creek's flows vary greatly depending upon the season of the year. High flows, of up to 1430 cfs, have been reached as have flows below 30 cfs during some dry months. (P.E. 15, 17A-D.)

The Chamokane drainage is sparsely settled. Uses of the waters of the Chamokane drainage basin vary. In the upper areas of the basin, north of the Spokane Reservation, waters are used primarily for stockwatering. As the stream turns southward, waters of the Chamokane are used for agricultural irrigation on small acreages lying east of the creek outside the reservation. West of the creek (within the original boundaries of the Spokane Indian Reservation) there is minimal irrigation with most of the lands "under water" owned by non-Indians. The Spokane Tribe has no present plans to irrigate new lands in the Chamokane drainage portion of the original boundaries of the Spokane Reservation. (Tr. 731)

3/ The Spokane Indian Reservation, established by executive order of President Hayes in 1881, contained approximately 155,000 acres. (P.E. 28). There are 178 square miles in the Chamokane Creek drainage (U.S. Brief, p. 71), only a portion of which makes up the eastern part of the reservation adjacent to and in Chamokane Creek. (P.E. 2)

Waters flowing in the Chamokane Creek are derived (1) from precipitation falling on lands of the Chamokane drainage and entering the stream as direct surface runoff, and (2) from precipitation on drainage lands which percolate downward to a water bearing zone after which it migrates laterally until it breaks out into Chamokane Creek. (Tr. 928-60.) Whether all of this groundwater enters the creek or whether a portion thereof moves to the east out of Chamokane surface drainage is in question due to the differences in conclusion of the experts who testified on the subject. (See the differing views of Mr. Woodward, Tr. 67, and Dr. Maddox, Tr. 731.) As a general statement, it can be said that a significant part of the precipitation falling on the surface area of the Chamokane drainage ultimately enters Chamokane Creek and, except where removed by acts of man or nature, ultimately discharges from the creek into the Spokane River.

C. The Interests and Position(s) of the State of Washington.

Throughout this proceeding, beginning with the submission of answers and continuing through the evidence presenting phase, the State has participated through two of its executive branch arms. This division has been accepted by the Court because of the differing natures of the state government's interests involved and the two state agencies separately responsible, under state organizational structures, for protecting those interests.

The Department of Natural Resources of the State of Washington is represented because, as administrator of state owned lands within the Chamokane drainage, it (like other property owners similarly situated) claims real property (water right) interests in Chamokane Creek. The Department of Ecology of the State of Washington is also represented, not because it claims specific property rights to make use of the waters of Chamokane Creek, but because the State's governmental powers of managing and regulating the waters of the State, established in our federal system, are vested in the Department for implementation. See

generally Title 90 RCW and more specifically chapters 90.03 and 90.44 RCW. Further, the Department is mandated by state statutes to protect the interests of the State in relation to various governmental decisions pertaining to the State's waters. RCW 43.27A.090; RCW 90.54.080. In this case, the State's responsibilities include support of the validity of water right permits issued to non-Indians residing both within and without the Spokane Reservation.

This brief represents the position of the State of Washington, Department of Ecology. Wherever possible, we have coordinated our efforts with the writers of the brief of the Department of Natural Resources to avoid overlap and repetition of argument to the maximum extent practicable.

II. FEDERAL-STATE RELATIONSHIPS IN THE REGULATION AND CONTROL OF WATERS WITHIN THE BOUNDARIES OF THE STATE OF WASHINGTON.

In order to develop a proper perspective for addressing the issues raised in this case certain bases of federal-state relations must be set forth.

Waters within a state's boundaries are, in our federal system, subject to the jurisdictional authority of both federal and state government. The authority of the federal government is derived from a number of express grants of power contained in the United States Constitution including powers involving, among others, commerce (U.S. Const., Art. VI, cl. 2), war (U.S. Const., art. I, §8, cl. 11, 12, 13, and 14), treaty making (U.S. Const. art. II §2, cl. 2), property (U.S. Const., art. IV, §3), and taxation for the public welfare (U.S. Const. art. I, §8, cl 3). Trelease, Federal-State Relations in Water Law, National Water Commission Legal Study No. 5, chapter III (1971).[4/] A state's plenary power, typically embodied in the words "police powers," is recognized by the Tenth Amendment to the United States Constitution. These federal and state powers over water within a state's boundaries have been exercised, for the most part, concurrently throughout our nation's history. Trelease, supra, chapter IV. Indeed federal congressional policy, with very minor exceptions, has long favored the use of state water right laws for the allocation of water rights in the nation's waters.

It is a fundamental base of the State of Washington that its powers over waters within its boundaries, for purposes of establishing "water rights," extend to all except those which have been provided a preemptive "reserved status" by action of the federal government through the exercise of one or more of its constitutional powers. The exception embodies the proposition that where a conflict develops

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4/ This superb work, prepared by Dean Trelease as a study for the National Water Commission, is a federal government document.

in the implementation of federal and state laws, the mandate of the Supremacy Clause is "controlling" and federal law prevails. U.S. Const., Art. 6, cl. 2.

A. Western Water Rights Laws

The history of the development of rights to use of waters in the western United States is also essential to an understanding of this case.

From the earliest day of the exploration and settling of the western United States, federal congressional policy has been to emphasize the dominancy of state law in determining water rights allocation policy and water rights administration and regulation. See Act of 1866 and Act of 1870, 43 U.S.C. § 661; Desert Land Act of 1877, 43 U.S.C. § 321; National Forest Act of 1897, 16 U.S.C. § 481; Reclamation Act of 1902, 43 U.S.C. §383; Federal Power Act of 1920, 16 U.S.C. §802; Water Conservation Act of 1939, 16 U.S.C. 5902-1(b)(2); and the Reclamation Project Act, 43 U.S.C. § 485h-4. For general discussion, see Note, Federal-State Conflicts over Western Waters, 60 Colum. L. Rev. 967 (1960); Trelease, Federal-State Relations in Water Law, Ch. IV (1971). Through a combination of common law and state legislative enactments, a highly sophisticated system of procedures and standards for establishing "water rights," together with a comprehensive mechanism for determining and regulating these rights, have been developed. These systems are usually found in state "water codes."

B. Basis for Establishing Water Rights under Washington State Law

In terms of this "general adjudication," the relevant state laws, common and statutory, which a claimant may rely upon to establish rights in Chamokane Creek are embodied in two water rights doctrines in effect in Washington State: the riparian and the prior appropriation. Benton v. Johncock, 17 Wash. 277 (1897); see generally 1 Clark, Water and Water Rights, ch. 2 (1967).

The riparian doctrine, which was imported to Washington State as common law from England,[5] is based on the concept that a person owning lands, through which a stream flows, has rights to the use of the stream as an incident of his land ownership. Alexander v. Muenscher 7 Wn.2d 557 (1941).[6] Priority of a right established under this doctrine is the date the first step is taken by a person to remove federal lands to a non-federal ownership status. In re Alpowa Creek, 129 Wash. 9, 13 (1924). This Washington State water law doctrine can, of course, be relied upon by any person-Indian or non-Indian.

The second, and undoubtedly more prominent, doctrine for establishing water rights is the "prior appropriation" or "appropriation" doctrine of "first in time, first in right." Hunter Land Co. v. Laugenour, 140 Wash. 558 (1926); and RCW 90.03.010. A number of variations of this doctrine have been in effect in the State over the years. Ellis v. Pomeroy Improvement Co., 1 Wash. 572 (1889). See, e.g., the variation of "custom," Isaac v. Barber, 10 Wash. 124 (1894), and of "notice". Wash. Sess. Laws, 1891, ch. 21. The variation now in effect is the permit system which was brought into state statutory law by the "surface" water code of 1917. See chapter 90.03 RCW, especially RCW 90.03.250-.340. The foundation of this doctrine is that a person may establish a water right by showing an intention to divert water from a water body for a "beneficial use" and thereafter exercise "due diligence" in carrying out that intention. Grant Realty Co. v. Yearsley and Ryrie, 96 Wash. 616, 623 (1917). If the foregoing is accomplished, the priority of the right "relates back" to the date of initial intention to divert. Pleasant Valley Irrigation and Power

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5/ RCW 4.04.010. Geddis v. Parrish, 1 Wash. 587 (1884); Crook v. Hewitt, 4 Wash. 749 (1892).

6/ For a good discussion of the riparian doctrine see Long, A Treatise on the Law of Irrigation (2nd Ed. 1916). See also Hutchins, Selected Problems of the Law of Water Rights in the West, 38 (1943); 1 Wiel, Water Rights in the Western United States, chapter 28 et seq. (2d ed. 1912); II Farnham, Water and Water Rights, §41 et seq. (1904); and I Kinney, Irrigation and Water Rights, chapters 21-28 (2nd ed. 1912).

Co. v. Okanogan Power and Irrigation Co., 98 Wash. 401, 409 (1917). Like the riparian doctrine, the prior appropriation doctrine provides a basis for both Indian and non-Indians to establish water rights to Chamokane Creek. Indeed the federal government has, over the years, established many water rights under state law relying, for the most part, upon a state prior appropriation statute specially designed for the United States.[7] See chapter 90.40 RCW. The United States is claiming water rights relying in part on state law in this Chamokane proceeding. (U.S. Brief pp.31-33.)

C. Federal Water Rights Law - the "Reservation" Doctrine

Beginning with Winters v. United States, 207 U.S. 564 (1908), and continuing through a series of cases, the last being Cappaert v. United States, 426 U.S. 128 (1976), the United States Supreme Court has announced, developed, and amplified upon a federal water right doctrine known as the "reservation doctrine."[8] This Court made doctrine, which will be discussed in detail, infra, is now well established and recognized in the law. It is this doctrine which the Court is asked to rely upon to support the very, very substantial claim of the United States for the benefit of the Spokane Indian Tribe.

D. The Challenge of this General Adjudication

Few areas of the law are more complex and to a considerable extent, even at this late date, not fully developed. This is especially so in the area of federal-state relationships as they relate to federal reserved rights including reserved Indian rights. It is essential to be well grounded in the basic concepts of Washington State's water laws, especially the prior appropriation doctrine,

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7/ For treatise discussions of the prior appropriation doctrine see generally Hutchins, supra, 64; 1 Wiel, supra, chapters 5-17; III Farnham, supra, sess. 649 et seq.; and 2 Kinney, supra, chapters 31-58.

8/ The other major "reserved rights" case is Arizona v. California, 373 U.S. 546 (1963).

for this case relates to the difficult task of fitting special and unique forms of federal reserved Indian water rights, into the federally encouraged and sanctioned comprehensive water use allocation programs embodied in state water rights law as established in Washington State as well as in the other ten western states.

III. CLAIM OF THE UNITED STATES, FOR THE BENEFIT OF THE SPOKANE INDIAN TRIBE

A. Reserved Rights of the United States.

The foundation of the federal reserved right is, as previously noted, found in Winters v. United States, supra. That case involved the Fort Belknap Indian Reservation and a stream forming a boundary of the reservation, the Milk River. A federal treaty established the reservation in 1888. That treaty made no mention of water rights.

After the reservation's creation, non-Indians began to divert waters from the river upstream from the stream's entry into the reservation. These diversions were made based upon the prior appropriation laws of the State of Montana. The upstream diversions of the non-Indians caused a dewatering of the stream leaving the reach of the stream bordering the Indian Reservation dry. With this background, the United States requested the Federal Courts to enjoin the upstream non-Indian diversions to the extent necessary to protect rights of the Indians.

The ruling of the Supreme Court was based upon a conclusion that, although the treaty establishing the Fort Belknap Reservation was silent with regard to water rights, the treaty impliedly reserved the right of the Indians to make use of the waters of Milk River. Of importance to this case, the Winters case provides the following teachings:

> 1. When a reservation is established pursuant to a treaty and no mention is made of water rights, rights are implicitly reserved to use waters in amounts necessary, not only for the present but for the reasonable foreseeable future, to carry out the purposes for which the reservation is created.
>
> 2. The priority date of such "reserved" rights is the effective date of the treaty.

Because the non-Indians upstream diversion rights, established under Montana law, had priority dates later than the 1888 priority

date of the reserved rights of the Indians, a decree was entered requiring 5,000 cubic feet per second of Milk River waters to be passed on to the Belknap Reservation for use on the reservation to satisfy the Indians rights.

The Winters case has been the cornerstone of the development of the federal reserved water rights doctrine which, over the years, the Department of Justice has persuaded the Federal Courts to apply not only to Indian reserved lands but other federal "reserved" lands e.g., national forests, national monuments and wildlife refuges. Arizona v. California, 373 U.S. 546, 595 (1963); Cappaert v. United States, 426 U.S. 128 (1976). See also the Indian reserved rights cases of Conrad Investment Co. v. United States, 161 Fed. 829 (1908), and United States v. Walker River Irrigation District, 104 F. 2d 334 (9th Cir. 1908). Despite substantial difficulties by many western states in accepting the Winters "doctrine," the State of Washington has long recognized it as a viable base for establishing rights to appropriate waters within the State's boundaries.9/

One of the difficulties, assuming an impliedly reserved right is found under a specific treaty, is the scope (in terms of both uses and specific quantifications) of the reserved right. What amounts are the Indians entitled to divert from a stream and for what uses? The Winters formula does not lead directly to a specific amount authorized for diversion as is the case with the prior appropriation doctrine. Because almost all of the treaties and executive orders involved in reported reserved Indian water rights litigation have related to arid areas where viable agricultural economies are contemplated for establishment by the Indians, the specific measurement in cubic feet per second or some other precise parameter of the right has been expanded upon by the Courts only

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9/ As an example, federal reserved rights were recognized in the Washington State superior court general adjudication decree (which was appealed in relation to other matters) in Walker v. Biles-Coleman Lumber Company, 77 Wn.2d 658 (1970).

where the beneficial use involved has been for agricultural irrigation. Arizona v. California, supra, and United States v. Walker River Irrigation District, supra. In this regard, the Arizona case announced a formula for determining the outside limits of an Indian reserved right to irrigation to be that amount necessary to irrigate Indian lands which constitute "practicably irrigable acreage." 373 U.S. at 600.

There are three points to be made about the federal Indian reserved rights doctrine.

First, a court (including, we add, a state court) is an appropriate place to quantify a reserved right. See Colorado River Conservation District v. United States, 424 U.S. 800 (1976).

Second, the establishment of an Indian reserved right does not necessarily establish a right to use or jurisdiction over all waters flowing through or located within the exterior boundaries of an Indian reservation. The implied rights established by treaties or executive orders only reserve rights to divert water as are necessary to carry out the purposes of the reservation and no more. A simple fact pattern illustrates the point. Assume for example, a thousand-acre Indian reservation with a water right impliedly reserved by treaty to irrigate all practicably irrigable acres on the reservation. Assume further that every acre of the reservation is practicably irrigable. Assume also that within the reservation is a waterbody, like the mighty Columbia River, with water sufficient to irrigate a thousand-acre tract a thousand times over and more. Are all waters within the reservation reserved to the Indians? Obviously they are not. The reserved right of the Indians does not relate to diversion rights to or control over all of the waters of the water body. It is limited to the right to divert an amount necessary to take care of a thousand acres at the very most. That is the upper limit of the Indian reserve. That is the extent of Indian interest.

This aspect of the reserved rights doctrine was most clearly described in Cappaert v. United States, supra. Chief Justice Burger, writing for a unanimous Court emphasized the limited nature of a reserved water right. In discussing the scope of the reserved water right of the United States in the "pupfish" case, he used these words at page 138:

> This Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. (Emphasis added.)

He also noted, at page 136, that the

> ... doctrine applies to Indian reservations and other federal enclaves, encompassing water rights in navigable and non-navigable streams. (Emphasis added.)

The unanimous opinion of the Court followed, at page 141, with this especially telling description of the scope of impliedly reserved rights and their limited nature.

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

In other words, the establishment of a federal reservation, including an Indian reservation, does not necessarily reserve all the waters of the reservation to the United States' dominion and control. It is limited to "no more" than necessary to carry out the purposes of the reservation - a factual determination which is different for every reservation.

Third, and most important, the scope of the reserved right depends on the intent of the government in creating the reservation. Winters v. United States, supra at 575-76; United States v. Walker River Irrigation District, supra at 336.

Chief Justice Burger, writing in Cappaert, supra, at 139, discussed the potential for existence of a reserved water right with

these words:

> In determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether the Government intended to reserve unappropriated and thus available water. (Emphasis added.)

In sum, the Department of Ecology's position is as follows:

1. The State recognizes the existence of federally reserved rights on the Spokane Reservation of some limited nature and that these rights, absent federal consent, are beyond the State's general governmental authority to regulate.

2. The State has jurisdiction over all waters above the amount necessary to satisfy the federal reserved rights and that the State has jurisdiction, at the least, over these waters located on or under non-Indian lands, whether former "allotments" or "homestead lands," within the original boundaries of the reservation.

3. Further, state laws are applicable to reserved rights held by a non-Indian as the result of acquisition through purchase of an Indian "allotment" which has been severed from its special federal trust title status.

B. The Scope of Reserved Rights on the Spokane Reservation - The Search for Federal Intent.

A most difficult assignment of this case arises from the nature of the claims of the United States and the Spokane Indians. They have taken the "have their cake and eat it too" approach. (Spokane Brief, p. 63.) Not only is it contended that the federal government impliedly reserved the right on behalf of the Spokane Indians to dry up the stream during the summer months in order to irrigate Indian lands, but, for the first time in any reserved rights case we are aware of, they contend the same implied reserve of water rights embodies the "instream use" right, in effect, of having the stream flow "as it was wont to do in nature" along the lines of the "natural flow" variation of the common law riparian rights doctrine. A doctrine which is no more if, indeed, it ever was.

1. Relevant Sources of Intent

Before we can begin our search for the intent of the federal government to reserve rights to the Tribe, we must know what sources of intent are relevant to our inquiry. The best source, of course, would be a treaty. But in the absence of a treaty, an executive order may be indicative of intent. As stated in United States v. Walker River Irrigation District, 104 F.2d 334, 336 (9th Cir. 1939):

> "In the Winters case, as in this, the basic question for determination was one of intent - whether the waters of the stream were intended to be reserved for the use of the Indians, or whether the lands only were reserved. We see no reason to believe that the intention to reserve need be evidenced by treaty or agreement. A statute or an executive order setting apart the reservation may be equally indicative of the intent. While in the Winters case the court emphasized the treaty, there was in fact no express reservation of water to be found in that document. The intention had to be arrived at by taking account of the circumstances, the situation and needs of the Indians and the purpose for which the lands had been reserved." (Emphasis added; footnote omitted.)

The plaintiffs have cited numerous historical documents of the period surrounding the creation of the reservation. To the extent these speak to the intent of the parties, they are relevant to our inquiry.10/

What is not relevant are contemporary state laws11/ and new

10/ One of the sources cited extensively by the Tribe is transcribed minutes of proceedings leading up to the 1887 Agreement (hereinafter cited as "Minutes"), filed with their Brief as appendix ii. These minutes, so far as we are aware, were never admitted into evidence at the trial; indeed they were not even proposed for admission.

11/ Both the United States and Spokane briefs quote at length from Washington State law which recognizes minimum stream flows for the protection of fisheries and esthetics. Cited are portions of RCW 90.22.010 and RCW 90.54.020. (U.S. Brief pp. 31-33; Spokane Brief, pp. 86-91.) If these statutes are cited for the purpose of proving that fisheries and esthetics are "purposes" of the Spokane Indian Reservation, they of course are not supportive of that point. If, however, they are cited for the proposition that a governmental body has the power to protect a stream for the purpose of fisheries or esthetics, then such extensive quotation may have some relevance. However, by the plaintiffs own admission, the relevant inquiry is not whether the federal government may exercise its power to reserve waters for a given purpose, but whether the power was exercised in this case.

industries or "purposes" into which Indian tribes may venture.[12/]

Because there was no explicit reservation of water for the Spokane Indians in either the agreement of 1877 or the Executive Order creating the reservation,[13/] we therefore must turn to the history surrounding the creation of the reservation to ascertain: (1) the purposes for which the reservation was created and (2) the waters the parties intended to tap to meet those purposes. From these we can ascertain the quantity of water the parties intended to reserve to meet present and future needs of the Indians on the Spokane Reservation.

2. The "Purposes" of the Spokane Indian Reservation.

a. Agriculture

As is the case with the creation of most Indian reservations in the arid west, whether by treaty or executive order, the "intent is given to reduce the Indians to more compact reservations and orient them in the direction of agriculture." (Spokane Brief, p. 28.) The Department of Ecology has no quarrel with this purpose of the reservation. There is ample evidence in the record showing that

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12/ The question of the degree to which an Indian tribe may transfer water reserved for one purpose, such as agriculture, to another purpose, such as industry, is not before the Court. However, as admitted in the plaintiff's briefs, the quantity of the right reserved depends on the purposes for which the reservation was created, not on purposes conceived by future generations of Indians.

13/ The plaintiffs spend a great deal of time arguing that the priority date for the Winters right is the date of the agreement and not the date of the Executive Order. The Department of Ecology takes the position the date of the Presidential Executive Order of 1881 is the date of any claimed reserved rights. However, if we assume that the plaintiffs are correct in that the reserved right attached at the date of the agreement, then the intent of the parties must be ascertained at that point, looking to that agreement and the surrounding needs of all circumstances of the Indians. See, U.S. v. Walker River Irr. Dist. 104 F.2d at 336. To the extent the Executive Order manifests new intent not existing in the agreement, thereby creating different or modified purposes for the reservation, the date of attachment of the reserved right should be the date of the order. Because plantiffs place a great deal of weight on the change in reservation boundaries in the Executive Order as indicative of intent regarding a fisheries purpose, it would be logical to assume that, if that is indicative of a new or revised intent, the priority date would be the date of the Executive Order. For a lengthier discussion of the priority date of any existing rights, see the Brief of the Department of Natural Resources.

there was an intent to locate the Indians on land and to teach them the methods of agriculture. (P.E. 62) In the Agreement of 1877, the Indians agreed "to go upon the [reservation] . . . with the view of . . . engaging in agricultural pursuits." (P.E. 63). The government even intended to provide the Indians with the implements of agriculture. (P.E. 57.)

Indeed, as we previously noted, most so-called "Winters rights" reservations have been for agriculture. Implicit in the federal policy of placing Indians on western reservations was the policy of converting them from a nomadic people, engaged in hunting, fishing, and a variety of other activities, to a "civilized" people with agriculture as an economic base. As stated in Winters:

> "It was the policy of the government, it was the desire of the Indians, to change those [nomadic] habits and to become a pastoral and civilized people. If they should become such, the original tract would be inadequate without changed conditions." 207 U.S. at 576.

The Winters court concluded that "without irrigation, [these lands] were practically valueless." Id. The right to waters for irrigation, therefore, was implicit in the creation of the reservation. Such an implied right to waters for purposes of irrigation was found in similar cases dealing with Indian tribes on arid western lands.

b. Timber Production

The courts have found other "purposes" to which federal reserved rights apply. These purposes have either been stated expressly, Cappaert v. United States, supra (preserving unique species of fish), or follow so logically from the creation of the reservation, as in the case of agriculture that the parties "knew" of the reservation of waters, Winters v. United States, 143 Fed. 740, 745, (9th Cir. 1906), aff'd, 207 U.S. 564 (1908).

In addition to agriculture, another intended purpose of the Spokane Reservation clearly within the intent of both the federal

government and Tribe was timber production. The Minutes of the proceedings leading up to the 1887 agreement are clear on this. At one point, Enoch stated:

> "I know the land I want is not good. It is nothing but rock. It is nothing but timber. If you give me the land if it is only timber land, it is just the same as if you gave me a crop . . ." Minutes at 33.

A large portion of the Spokane Indian Reservation is timberland (Tr. 225) and timber has played an important part in the economy of the Spokane Tribe. Although there has been substantial logging in certain areas during this century which has depleted certain timber stands (Tr. 781, 818), the value of the timber resource certainly was within the knowledge of the Indians and the federal government at the time of the creation of the reservation, and according to the above quote, reserving timberland for the use by the tribe is as valuable as reserving land for other crops.

c. Fishing

Beyond agriculture and timber, other purposes of the Spokane Reservation are not clear.14/

The plaintiffs assert however, that in addition to agriculture and timber, the reservation was created for the purpose of fishing. The Department of Ecology acknowledges that fishing may have been a purpose of the reservation and water impliedly reserved for that purpose. However, the record demonstrates that, except for perhaps a de minimus amount, the Spokanes' fishery was not based on Chamokane Creek. Rather, it was a salmon fishery based on the Columbia River

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14/ The State agrees the implied reserved rights of the Indians include domestic and stockwatering uses normally associated with farming activities. The domestic use should be based on .01 cfs for family. The stockwatering uses should be the amount necessary to water stock when grazing under natural conditions of the land. In other words, the reserved right for stockwatering does not include water sufficient to satisfy an intensive use of lands for stock activities such as in the operation of a feed lot. Normally stockwatering should be measured as an instream value; i.e., in terms of flow. Note, however, there is evidence in the record that use of water for stockwatering will not affect the flow in Chamokane Creek. (Tr. 936)

and on the Spokane River (P.E. 55, 62; Tr. 674.) The Spokane Brief at 51 contains a good description of the fishery at the times of the Executive Order.

> The fishery at that time included a marvelous river system extending from above Kettle Falls on the Columbia to Spokane Falls on the Spokane. Included was Kettle Falls, Little Falls, the falls at what is now Long Lake Dam, the Little Spokane River and several other prime sites.

There was even a proposal to extend the reservation up the Columbia River to include the fishery at Kettle Falls. (P.E. 55.)

There was a salmon run on Chamokane Creek, but that was limited to the one mile stretch below the falls. (Tr. 675, 694-95.) This was a miniscule portion of the entire salmon fishery available to the Spokanes. Indeed, expressions of intent in the record as to the fishery purpose of the reservation do not mention the Chamokane Creek as a site for the salmon fishery.15/

The United States, in its brief, gives great weight to the fact that the Executive Order by President Hayes creating the reservation included the east bank of the Chamokane Creek. This fact, they assert, indicates that there is some special significance to that creek, implying its value as a fish resource. (U.S. Brief, p. 20.) Of course, the boundaries in the Executive Order also extend to the west bank of the Columbia and to the south bank of the Spokane. Chamokane Creek is not treated specially at all; it is treated as any other boundary of this reservation, and no conclusions as to fish can be deduced from those boundaries. We concur that the drawing of the boundaries to specifically include the entirety of these waters may indicate that water is important to the tribe, but it does not indicate for what purposes this water is to be used, nor

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15/ The Department of Natural Resources in its Brief supports this position by quoting extensively from the decision of the Indian Claims Commission in Spokane Tribe v. United States, 9 Ind. Cl. Comm. 236 (1961). We incorporate that argument by reference.

in what quantities. Certainly, drawing the boundary at the south bank of the Spokane and the west bank of the Columbia does not mean that the entire flows of those rivers are reserved for the Spokanes, for fisheries, or for any other purpose. Likewise, placing the boundary at the east bank of the Chamokane Creek does not automatically reserve the entire flow of that creek or any part thereof. See Cappaert v. United States, supra. Rather, the placement of the boundaries by the Executive Order can be construed as nothing but an attempt to define the area of the reservation. To learn the purposes of the reservation we must look elsewhere.

Even assuming a salmon fishery on the Chamokane was one of the purposes of the reservation, that salmon fishery is no more. After construction of the Grand Coulee Dam by the United States the salmon runs ceased. (Tr. 675.) Any needs for waters to satisfy such alleged reserved purposes being eliminated, it follows the water rights to such purposes also terminate. Further, even assuming no termination of water rights for protection of salmon fisheries by the Grand Coulee blockage, there was compensation made to the Spokane tribe for the loss of fish runs by providing them exclusive fishing zones in Franklin D. Roosevelt Lake as well as other compensation. 16 U.S.C. §§ 835 d-e. Clearly at this point, if not earlier, any reserved water rights for salmon fisheries were relinquished.16/

Plaintiffs also assert that there is a trout fishery on the Chamokane upstream from the falls and waters are impliedly reserved for the maintenance of that fishery. There is very little evidence of historical use of the trout fishery during "executive order" times. It is limited to some testimony on wintering sites on the Chamokane Creek where members of the Tribe stored their food, such as camas and bitterroots and "enough" dried salmon. (Tr. 665.) The water is

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16/ To the extent this compensation is inadequate, that is a matter between the Spokane tribe and the United States government.

fresh and pure (Tr. 666) and "they can also fish . . . for fresh fish." (Tr. 666.) This is the extent of the evidence on which plaintiffs contend there is intent to reserve water adequate for preservation of the trout fishery on Chamokane Creek. Even if this were enough evidence to deduce a purpose for which waters are reserved, note the limited extent of this purpose. It is not a large scale fishery. It is not a fishery on which the Spokanes depend for their livelihood. At most, it is a fishery to supplement an already abundantly available food supply during the winter months.

The plaintiffs contend that a minimum flow of 30 cfs is necessary to preserve this limited trout fishing on Chamokane Creek. The 20 cfs minimum flow, they contend, does not protect the fishery.17/

The issue is whether the 20 cfs flow is adequate to fulfill the purpose of the reservation; i.e., the trout fishery intended to be protected by the federal government at the time of creation of the reservation. Recall that this was a limited fishery, not one on which the livelihood of the tribe depended. There were "enough" salmon to meet the food requirements of the Tribe. (Tr. 665.) The Chamokane, however, was the site of three wintering camps for the Tribe, two above the falls, one below. (Tr. 665-66.) The Indians could obtain pure water from the springs and could also fish for trout. At most, the Tribe has a right to water to fulfill this purpose. If the 20 cfs minimum flow protects this limited fishery on the creek as a whole, then the inquiry is over. The Department of Ecology contends not only that the evidence does not show that a 30 cfs minimum flow is necessary but that a 20 cfs flow fulfills the purpose of the reservation and more.

17/ The 20 cfs minimum flow in Chamokane is based upon the implementation of State laws, designed to protect fisheries values, through the embodiment of a water right permit issued to defendant Smithpeter in 1969. See defendants' exhibit 2. The pertinent state laws are the permit system of the state water code, RCW 90.03.250 et seq. and the various policies found in the State statutes which require the protection of minimum flows. RCW 90.54.020(2); Chapters 90.22 RCW and RCW 75.20.050.

There are two parts to the trout fishery on the Chamokane. One is above the falls, the approximately five miles of the stream between the falls and the springs; the other is the one mile stretch below the falls to the mouth. (P.E. 64.) The plaintiff's own witness, Mr. Navarre, sampled water quality and water temperature at two stations, one above the falls and one below. There was no evidence of any potential water pollution problem anywhere in the stream. (Tr. 451; P.E. 64, p. 22.) The evidence also shows that there is no potential water temperature problem in the five-sixths of the fishery above the falls. (Tr. 474-75.) The only potential problem is below the falls where, Mr. Navarre testified, on several days in the summer, the "maximum" temperature during the day exceeded 68°F. (Tr. 474.) There is evidence that above 68°, fish will not feed and some will experience some stress (Tr. 440, 471, 631.) which could result in drifting downstream, possibly to the Spokane River where predators presumably are waiting. (Tr. 443.)

The Department of Ecology does not question whether there are certain minor adverse effects in fish when exposed to prolonged temperatures in excess of 68°, but the Department does question whether these effects in this small part of the fishery are so adverse as to violate the reserved rights of the Tribe in this limited trout fishery.

There is no evidence of dead fish (Tr. 498), and the temperature below the falls, even in the hottest days, did not approach 77°, the temperature at which fish may die. In fact, except for the very first instant the thermometer was placed in the stream, the highest temperature recorded was 70°. (P.E. 64, pp. 9-10.)[18/]

During the hot summer months of 1973, there were nine days on which the maximum temperature exceeded 68° (P.E. 64, p. 9), but as the

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18/ On July 17, the recorded temperature was 73°. (P.E. 64, p. 14.) On subsequent days when air temperature was higher, the temperature of the water did not approach this mark.

graphs of Mr. Navarre show, those temperature were reached for only an hour or two on each of those days. (P.E. 64, p. 7-8.) These are not the prolonged periods of high temperature that will force all fish downstream and stop all fish from feeding causing them to die. (Tr. 510, 519.) It does mean that fishing is not as good in mid-afternoon as in early morning or evening, but that is a characteristic of all fisheries, a fact so well known that judicial notice may be taken of it.

The fishery protected by the 20 cfs minimum flow may not be as good below the falls as above, but the fishery above the falls is thriving in excess of what was "reserved" at time of creation of the reservation. The Department asserts that the fishery below the falls is adequate to fulfill purpose it was intended to serve. And even if it does not, the fishery on the entire stretch of the Creek is more than adequate, and the 20 cfs minimum flow protects this fishery.

3. The federal intent to reserve water -- sources.

The United States in its brief states that "The Supreme Court's decision in Cappaert is controlling on the issue of the applicability of a federal reserved right to ground water." (U.S. Brief at 9.) The Department of Ecology agrees with this statement to the extent it means that the federal government may reserve ground waters for a specific purpose, but we disagree strongly if it means that the federal government always reserves ground water whenever it creates a reservation for a purpose for which water is required. We reemphasize that the foundation of all reserved rights is intent, express or implied. If the parties intend to reserve ground water, it is so reserved; if the parties intend to reserve only surface water, then ground waters are not reserved. Of course, this intent may be implied as well as express.

The leading case, Cappaert v. United States, is illustrative. There, the Supreme Court found that surface water in the underground pool in which the pupfish lived was so interconnected with the ground water pumped by the defendant ranchers that there the expressly reserved surface rights were protected against the ranchers who were relying on junior groundwater rights to pump the groundwaters tributary to the surface water pool. Cappaert, supra at 143.

Where there is a less direct relationship between the ground waters to the surface, as is the case with Chamokane Creek, an intent to reserve ground water is very difficult to imply. Using the standard set forth by the Ninth Circuit that the parties "know" of the implied reservation, it is difficult to presume knowledge of hidden, underground waters.

There is conflicting evidence on the relationship of ground water and surface water in the Chamokane Basin. The plaintiff's witness, Mr. Woodward, testified that the surface and ground water in the basin are a single system; appropriation from one depletes the other. The State's witness, Dr. Maddox, refutes this. (Tr. 937.) A fair reading of the evidence would be that a good deal of the ground water is interlocked with the surface water on the Chamokane. However, there is evidence that at least some appropriations of ground water in the Chamokane Basin have no effect on the flow of the Chamokane. (Tr. 967). Appropriations of these ground waters flowing to the east and out of the drainage could not have been reserved by the federal government.19/

Likewise, the record does not show clearly which sources of water the federal government intended to tap to fulfill the purposes of the reservation. There is, however, substantial evidence that it was

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19/ Although this is an adjudication case concerning the waters of Chamokane Creek, it is relevant to note that other sources of water for the reservation, the Spokane and Columbia rivers, may provide water to fulfill the purposes of the reservation, even within the Chamokane Basin. The Tribe noted that there are plans to irrigate lands within the Chamokane basin using waters from the Spokane and Columbia. (Spokane Brief, p. 63.) While the Chamokane basin comprises approximately one-sixth of the land area of the reservation, Chamokane Creek provides only a miniscule portion of all the water. (Tr. 183.)

not the Chamokane. The Spokane's never intended to use Chamokane Creek for irrigation. (Tr. 730, 781.) According to the testimony of Mr. McCoy:

> ". . . the Tribe never did plan on using Chamokane Creek for irrigation. We always did plan to use the fertilized Spokane River for irrigation."

This historical view has been endorsed by a more recent Tribal Council resolution declaring the Chamokane as not available for irrigation. (Tr. 731.)

4. The federal intent to reserve waters -- quantities

It is accepted law that reserved rights extend not just to meet existing needs of the Tribe, but future needs as well. This does not mean the federal government writes a blank check to Indian tribes when reservations are created. There are limits on the quantity of water reserved, limits inherent in the capabilities of the reservation, limits created by the doctrine that in the water-short west there will not be any waste of water, United States v. Walker River Irrigation District, supra, at 340 and most important, limits set by the intent of the parties.

If a reservation is created for the purposes of irrigation, the quantity of water reserved can be no more than that amount which can be put to use productively. The Supreme Court in Arizona v. California, 373 U.S. 546, 600-01 (1963), set the outside limit for this quantity as the "irrigable acreage" of the reservation. The Court rejected the present needs test for quantities of water and any test which was based on the number of Indians which may live on the reservation at some time in the forseeable future. "Irrigable acreage," the Court found, was the only "feasible and fair way" to determine the future needs of the Indians. Id. at 601.

Arizona v. California was a final adjudication of rights in the Colorado River Basin. The decree was not left open for modification as future needs of the Indians became apparent. If it had not been

a final adjudication, then perhaps the Court would have looked at "existing needs" or reasonably forseeable needs as the test for quantity of waters reserved. But the finality of that adjudication would have made this "unfair."

This view, that "irrigable acreage" is not necessarily the test in cases in which the decree is left open for future modification, is consistent with the law in the Ninth Circuit. In United States v. Walker River Irrigation District, supra, at 340, the Court stated:

> "There remains for decision the question as to the quantity to which the United States is entitled. The problem is one of great practical importance, and a priori theories ought not to stand in the way of a practical solution of it. The area of irrigable land included in the reservation is not necessarily the criterion for measuring the amount of water reserved, whether the standard be applied as of 1859 or as of the present. The extent to which the use of the stream might be necessary could only be demonstrated by experience."

We quote the above not for the purpose of asking this Court to reverse the "irrigable acreage" standard set in Arizona v. California. Rather, we quote it for the purpose of pointing out a distinction between those cases in which final decrees are issued and those in which the decree is left open subject to modification upon a showing by the Indians of changed needs. In this case, this is another example of the Tribe wanting to have their cake and eat it too. They want a decree based on irrigable acreage, but want it left open as well.

Natural limits on the quantity reserved, such as the irrigable acreage limit, are, of course, subject to the intent of the parties. Although a reservation created for the purpose of irrigation may have 10,000 acres considered irrigable, it does not follow that the parties intended all that land be irrigated. If use of water sufficient to irrigate all that land would deplete the stream flow so that other purposes of the reservation would not be served, then an intent to irrigate all irrigable lands could not be implied. Likewise, if some of the irrigable lands are intended to be used for

some other functions, then there could be no intended reservation of waters to irrigate those lands.

This is the case in the Spokane Reservation. The Tribe requests waters to irrigate all irrigable lands and urges the Court to include as irrigable lands a substantial number of acres of timberlands.[20/] The record clearly shows that maintenance of the timber stands and timber harvesting were among the original purposes of the reservation. (Minutes, p. 31.) To include these timber lands in "irrigable acreage" for purposes of quantifying reserved rights would be counter to one of the purposes of the reservation.[21/]

Furthermore, the Tribe cannot, consistent with the intent of the federal government in creating the reservation, have water adequate for all alleged irrigable acreage plans and also retain 30 cfs to maintain the stream for fish and aesthetics.

5. Conclusion -- the Federal Reserved Right

The quantity of water reserved to fulfill the purposes of a federal reservation is not determined by simple and broad general rules, such the "irrigable acreage" rule. The only applicable general rule is that the quantity is based on intent. Cappaert, supra at 139. The intent depends on the facts of each case.

At least the following factual determinations must be made before existing reserved rights to waters in Chamokane Creek may be quantified:

20/ The United States claims that 6,580 acres of the 8,460 claimed as irrigable lie in the area known as the Chamokane Bench. (U.S. Brief, p. 44.) However, the plaintiffs' own witness, Mr. Woodward, testified that a "major block" of these lands are timbered. (Tr. 225; P.E. 3-6-74-29.) The plaintiffs have not produced evidence showing which of their claimed irrigable lands are not timbered, nor which are "intended" to be irrigated from a source other than Chamokane Creek. Indeed, there is evidence that the Tribe never intended to irrigate lands on the Chamokane Bench. (Tr. 734.) The Brief of Department of Natural Resources expands on this further, an argument we incorporate by reference.

21/ The fact that some timber stands have been depleted (Tr. 781, 818) is irrelevant, just as it would be irrelevant if lands once irrigable and potentially productive no longer are so. The reserved right attaches at the date of the creation of the reservation.

1. Was preservation of a trout fishery on Chamokane Creek a "purpose" of the reservation?

2. If so, was the scope of that fishery such that it is preserved by the 20 cfs minimum flow?

3. Was agriculture a "purpose" of the reservation?

4. Was timber production a "purpose" of the reservation?

5. Was there an intent that water be reserved for irrigation of lands which at the time of creation of the reservation were producing timber?

6. Was there an intent that all water reserved for use within the Chamokane Basin be obtained solely from Chamokane Creek?

The Department of Ecology asserts that the purposes of the reservation were limited to agriculture and timber. To the extent there is a purpose of a trout fishery, it is a limited one well-protected by the 20 cfs minimum flow provision of state law. Finally, there was no intent to irrigate "irrigable lands" covered by timber, and there was an intent to irrigate some of the non-timbered irrigable lands from waters other than Chamokane Creek.

If the Court adopts this position, or one substantially similar, it must determine from the record or from additional evidence the number of acres of non-timbered "irrigable" lands within the Chamokane basin which were not intended to be irrigated from sources other than Chamokane Creek.

However, if the Court finds that the 20 cfs minimum flow does not adequately protect the limited trout fishery, then it should implement, not a higher minimum flow, but a regulatory program which is designed to retain the waters of the Chamokane Creek at temperatures below 68° Farenheit. This program, the Department of Ecology contends, could be worked out by various experts of the United States and State of Washington, through the evaluations and calculations, of the various diversion rights confirmed by this Court. The studies would

develop cause-effect relationships of various of the confirmed rights on the flows in certain amounts, and especially, during what periods of time. This approach would not require the Court to set a specific and arbitrary minimum flow, but rather provides for a flow which will serve the purposes of the reservation.

In the alternative, if the Court deems this approach inappropriate, the Department of Ecology urges a minimum flow of 20 cubic feet per second.

In either case, the minimum flow setting can be supported by fundamentals of state law as well as by specific implementation of state prior appropriation law to Chamokane Creek as set forth in the aforementioned condition of the Smithpeter permit.

IV. THE APPLICABILITY OF STATE WATER RIGHTS LAWS TO NON-INDIAN LANDS WITHIN THE ORIGINAL BOUNDARIES OF THE SPOKANE INDIAN RESERVATION.

As previously noted there are non-Indians owning lands within the original boundaries of the Spokane Reservation. Some of these landowners, either as owners of "homestead" or "allotted" lands, claim water rights established pursuant to laws of Washington State.

A major concern of the State of Washington is the position taken by the United States in its Brief, at page 82, that the United States (and the Spokane Tribe) assert that they have exclusive jurisdiction within the exterior boundaries of the reservation to manage and control the federal reserved water rights appurtenant to the reservation. Further, the United States asserts Congress has never authorized the State of Washington to assume jurisdiction over the waters of Chamokane Creek for uses on formerly allotted or homestead land. (U.S. Brief pp. 81-92.) This is a latter-day revelation by the United States of the law on the subject. The State of Washington has, over the years, issued numerous permits to withdraw waters on or underlying non-Indian lands within the original boundaries of the various reservations in Washington.[22/] Only recently, and certainly not before the decade of the 1970's, has the United States objected or otherwise suggested the State was misconstruing the reach of its water laws by extending permit issuance activities to water on or within non-Indian lands within the original boundaries of a reservation.

The position of the United States is further described on page 82 of its Brief as follows:

> "When the territory now comprising the State of Washington came into the ownership of the United States through cession from foreign sovereigns, the United

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22/ As examples, the Court can take judicial notice that the State of Washington has, over the years, been issuing permits to withdraw waters located on non-Indian owned land within the original boundaries of the Colville and Lummi reservations. Two of these permits are the subject of litigation now pending in this court, United States v. Walton, No. 3421, and in the Western District of Washington, United States v. Bel Bay Water Users Association, Civil No. 303-71C2.

> States became the owner of the land and all rights pertaining thereto, except for those interests in lands and appurtenant rights established under the previous sovereigns. Borax Consolidated, Ltd. v. Los Angeles, 296 U.S. 161, 183-184 (1891). The right to the use of the appurtenant waters on these lands was a part of the bundle of rights acquired by the United States in the acquiring title to those lands."

On page 85, the United States, citing three United States Supreme Court cases,[23/] elaborates on this quotation with the following legal conclusion:

> ". . . the State of Washington does not have jurisdictional authority over the waters located within the boundaries of the Spokane Indian reservation . . . ."

The United States brief then states on the same page:

> ". . . the determination of reserved water rights within such reservation is not governed by state law but rather is derived from the federal purpose for which the reservation was created."

In other words the United States takes the position there is, as a matter of law, a wall located on the original boundaries of the Spokane Reservation through which state water rights laws cannot pierce. Stated otherwise, regardless of the facts involved state water rights law cannot penetrate that wall and have applicability to non-Indians and to waters located on or under non-Indian lands. The only exception to that rule according to the United States, is that the Congress could, by express authorization, allow the State of Washington to assume jurisdiction over the waters "on formerly allotted or homestead land." (Brief of U.S., p. 85.) However, the United States continues, that express authorization has not been given to the State of Washington.

Let us examine these two theories: (1) the wall, and (2) the dependency of state power on a Congressional grant of authority to a state to regulate and manage waters.

23/ The United States cites Cappaert v. United States, supra; Federal Power Commission v. Oregon, 349 U.S. 435 (1955), and California and Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935).

A. There is a State Law Barring-Wall on the original boundaries of the Spokane Reservation - General Background.

The United States contends that state laws have no applicability, regardless of the factual circumstances, to non-Indians and to non-Indian owned lands within the original boundaries of a reservation. The United States cites no cases and we have found none.

Discussions of the general area often begin with the famous words of Chief Justice Marshall written almost 150 years ago in Worcester v. Georgia, 31 U.S. 515, 559-561 (1832) as follows:

> "The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil from time immemorial . . . The very term "nation," so generally applied to them, means "a people distinct from others." The constitution, by declaring treaties, already made, as well as those to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties . . .
>
> "The Cherokee Nation, then, is a distinct community, occupying its own territory, within boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter but with the assent of the Cherokees themselves or in conformity with treaties and with the acts of Congress. The whole intercourse between the United States and this nation is, by our constitution and laws, vested in the government of the United States. . . ."

These words, it must remembered, were written early in our country's history before the establishment of national policies which have resulted, over the years, in the reduction in the size of the areas of Indian lands within original reservation boundaries by allowing the removal of lands from a reserved Indian trust status to ownership by non-Indians. Today, unlike 150 years ago, vast areas within Washington State, originally held in trust for the benefit of Indians, are owned by non-Indians, citizens who (unlike their Indian citizen neighbors) are required to comply with state laws,

such as the taxation statutes, in the same manner owners of land which were never a part of a reservation.

Justice Frankfurter discussed the changes in the past century and one-half in Organized Village of Kake v. Egan, 369 U.S. 60 (1964), with these words at pages 71-72:

> "The relation between the Indians and the states has by no means remained constant since the days of John Marshall. In the early years, as the white man pressed against Indians in the eastern part of the continent, it was the policy of the United States to isolate the tribes on territories of their own beyond the Mississippi, where they were quite free to govern themselves . . . ."
>
> "As the United States spread westward, it became evident that there was no place where the Indians could be forever isolated. In recognition of this fact the United States began to consider the Indians less as foreign nations and more as a part of our country . . . ."

On page 72 Justice Frankfurter continued that:

> "The general notion drawn from Chief Justice Marshall's opinion in Worcester v. Georgia (US) 6 Pet 515, 561, 8 L ed 483, 501; Kansas Indians (Blue Jacket v Johnson County) (US) 5 Wall 737, 755-757, 18 L ed 667, 672, 673; and New York Indians (Fellows v Denniston) (US) 5 Wall 761, 18 L ed 708, that an Indian reservation is a distinct nation within whose boundaries state law cannot penetrate, has yielded to closer analysis when confronted, in the course of subsequent developments, with diverse concrete situations. By 1880 the Court no longer viewed reservations as distinct nations. On the contrary, it was said that a reservation was in many cases a part of the surrounding State or Territory, and subject to its jurisdiction except as forbidden by federal law, ..."

And recently Justice White, echoing the statements of Justice Frankfurter, discussed the vitality of Worcester v. Georgia, supra, in Mescalero Apache Tribe v. Jones, 411 U.S. 145, 149 (1973), by stating there have been "repeated statements" of the Court:

> "... to the effect that even on reservations state laws may be applied unless such application would interfere with reservation self government or would impair a right granted or reserved by federal laws."

These words were written in relation to the applicability of state law to Indians and Indian interests. Certainly if this is the case with Indians and Indian interests, there can be no impermeable wall around a reservation which prevents the applicability of state law, in every factual situation, to non-Indians and waters on non-Indian lands. As noted in Surplus Trading Company v. Cook, 281 U.S. 647 (1930) a reservation is:

> "... part of a state ... and her laws, civil and criminal, have the same force therein as elsewhere within her limits, save that they have only restricted application to Indian wards . . . ."

For an example of cases dealing generally with the upholding of the applicability of state laws to non-Indians within the original boundaries see Langford v. Monteith, 102 U.S. 145 (1880); Utah and Northern Railway v. Fisher, 116 U.S. 28 (1885); Thomas v. Gay, 169 U.S. 264 (1898); Draper v. United States, 164 U.S. 240 (1896); New York v. Martin, 326 U.S. 496 (1946); and United States v. Bratney, 104 U.S. 621 (1881). See also Norvell v. Sangres de Cristo Development Company, Inc., 372 F. Supp. 348, 353 (D. New Mexico, 1974), reversed on grounds not relevant to this case in 519 F. 2d 370 (10th Cir. 1975); McClanahan v. Arizona Tax Commission, 411 U.S. 164 (1973); and Williams v. Lee, 358 U.S. 217 (1959).

We finally note the two major treatises of Indian Law on the subject. In United States Department of the Interior, Federal Indian Law (1958), at page 513, this comprehensive study of Indian law states the "general rule" that:

> ". . . the Indian country within a state is not regarded as an area of exclusive Federal jurisdiction but is politically and governmentally a part of the State in which State laws apply to the extent that they do not conflict with Federal Indian law."

In support of this general rule on the scope of state jurisdiction that treatise cites the following quotation from United States v. McGowan, 302 U.S. 535, 539 (1983):

> "Enactments of the Federal Government passed to protect and guard the Indian wards affect the operation, within the colony [or reservation] of such state laws as conflict with the federal enactments.

This view comports with the seminal treatise on Indian Law, Cohen, Handbook of Federal Indian Law 121 (1940).

B. The "Wall" Theory and its Piercing by State Water Rights Laws.

With this background, we turn to the specific arguments of the United States in support of the contention that there is a wall around an Indian reservation through which state water right laws cannot pierce. As it shall be seen, the contentions provide no basis to support its position but rather amounts only to a series of irrelevancies.

The United States, on pages 82 through 91 of its Brief, sets forth a well-written statement of federal-state relationships dealing with the general subject of establishing water rights applicable to waters located on lands owned by the federal government. The United States provides a fair description of the statutes and cases cited. However, the entire presentation of the United States is irrelevant to the issue to be answered here. To avoid confusion, the issue is:

> Does the State of Washington have authority to issue water rights authorizing withdrawal and use of waters located on non-Indian lands within the original boundaries of an Indian reservation?

1. The Acts of 1866, 1870 and 1877. The United States first cites three statutes of the mid-1800's - Acts of 1866, 1870, and 1877 - in combination with California-Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935), Federal Power Commission v. Oregon, 349 U.S. 435 (1955), and Cappaert v. United States, supra, (1976) for the conclusion, as stated on page 85 of its brief, that ". . . the State of Washington does not have jurisdictional authority over the waters located within the boundaries of the Spokane Indian Reservation . . . ."

An examination of the individual components of the combination of statues and cases warrants no such conclusion.

Section 9 of the Act of July 26, 1866, 14 Stat. 251, the first statute cited by the United States, provides:

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

The United States correctly describes the historic background of this statute. It fails, however, to point out and emphasize that the statute constitutes a recognition in federal law that acts of withdrawal of waters on federal lands for various uses by persons based upon the customs and laws in local areas, which would otherwise constitute trespass, were recognized by the United States as valid water rights. The point to emphasize here is, of course, that the statute dealt with establishing rights to waters located on public lands. The lands in this case to which the State asserts its water rights laws have application are privately owned land severed from special federal trust ownership relationships on behalf of Indians.

The Act of July 9, 1870, 16 Stat. 217, amending the Act of 1866, relied upon by the United States is equally irrelevant. That statute provides in part:

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

Congressional intent in passing this statute is clear. Lands acquired from the federal government are subject to any water rights established prior to the transfer of the lands, by the federal government,

to a non-Federal ownership status. Again this is a public lands statute.

The Desert Lands Act of 1877, 19 Stat. 377, 43 U.S.C. § 321, is irrelevant for the same reason. Waters on public lands, the statute provides, shall be subject to appropriation under local customs (laws) of the west. This is the fair reading of the pertinent portion of the Desert Land Act which provides:

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

The thrust of these three statutes is that the pioneers of the arid western United States could enter lands owned by the federal government and establish rights to withdraw waters on federal lands. These statutes not only eliminated problems of trespass on public lands but broadened the opportunities to establish water rights in the arid western United States. In addition they established the primacy of state water laws in the western states.

The United States seeks help from the California-Oregon Power Co. case, supra. But it is misplaced. The relevant holding of that case is found in the following paragraph at page 163:

> "Nothing we have said is meant to suggest that the Act [the Desert Land Act of 1877], as we construe it, has the effect of curtailing the power of the states affected to legislate in respect of waters and water rights as they deem wise in the public interest. What we hold is that following the Act of 1877, if not before, all non-navigable waters then a part of the public domain became publici 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 itself to what extent the rule of appropriation or the common law rule in respect of riparian rights should obtain . . . ."

The Court, as the United States correctly notes, states that the state water laws are utilized to establish water rights on waters

located on federally owned "public lands."

The United States then continues, relying upon Federal Power Commission v. Oregon, supra, that the aforementioned Acts had no applicability to federal "reserved" lands but only federal "public" lands. Even if this contention is correct we still inquire - "So what?" We are not dealing in this case with the issue of relying upon state law to establish water rights on federally owned lands regardless of their characterization. Instead, we are dealing with the ability of a non-Indian to establish rights to use waters, located on his non-Indian lands within the State of Washington, based on state law.

In sum, the combination of mentioned mid-1800's federal statutes and the Beaver Portland Cement and Pelton Dam cases relied upon by the United States are not pertinent to any decision by this Court as to the ability of a non-Indian to establish a water right on non-Indian land within a reservation based upon state law.

2. Winters v. United States. The same is true of the United States' reliance on the landmark Indian water rights cases of Winters, supra, and Arizona v. California, supra. These cases are cited by the United States for two propositions: (1) ". . . the State of Washington does not have jurisdictional authority over the water located within the boundaries of the Spokane Indian Reservation," and (2) ". . . the determination of reserved water rights within such reservation is not governed by state law but rather is derived from the federal purpose for which the reservation is created." (U.S. Brief at 85.)

As to the first contention we have already discussed the import of the teachings of the Winters case. That case does not deal, in any manner, with the reach of state laws inside the boundaries of a reservation. Winters deals only with the nature and scope of Indian reserved rights. The same is true of Arizona v. California, supra.

So far as the second contention, i.e. a reserved right ". . . is not governed by state law . . .," we have no quarrel.[24/]

3. Tweedy v. Texas Company and United States v. McIntire. The United States, on pages 86 and 87 of its Brief, continues its irrelevant contentions by relying upon Tweedy v. Texas Company, 286 F. Supp. 383, 385 (D. Mont. 1968), and United States v. McIntire, 101 F.2d 650 (9th Cir. 1939).

In Tweedy, the non-Indian owners of surface rights to certain non-Indian lands within the Blackfeet Reservation sought damages from the defendant, Texas Company, on the basis the Company had withdrawn ground waters within said lands thereby interfering with the rights of the plaintiff in the ground waters. The precise holding of the case was that plaintiff was denied a claim for money damages on the basis that the plaintiffs could not establish "any title in the waters as such, and there is no evidence and no claim that defendant interfered with plaintiff's right to use water in satisfaction of any need for it." Tweedy, supra at 385.

While the analysis of the case supporting its holding is blurry, it appears to be based on two standard propositions of western water law. First, a water right is a right to withdraw and use waters of a waterbody and not a right to the corpus (or specific portions) of the waters of the ground-water body. Second, a water right holder cannot claim damages for an injury when another diverts water from a water body unless the diversion impairs the claimant's ability to satisfy his own rights. Both of these principles of water usage are sound in policy as well as in law. No one can complain of injury unless he is actually injured.

The United States cites portions of the following discussion of the Court in Tweedy, at 385:

24/ Our views on the Winters "reserved rights" doctrine were stated earlier herein. See Section II.C.

> "When the Blackfeet Indian Reservation was created, the waters of the reservation were reserved for the benefit of the reservation lands. Winters v. United States, 207 U.S. 564, 28 S. Ct. 207, 52 L.Ed. 340 (1908). The Winters case dealt only with the surface water, but the same implications which led the Supreme Court to hold that surface waters had been reserved would apply to underground waters as well. The land was arid - water would make it more useful and whether the waters were found on the surface of the land or under it should make no difference.
>
> "The waters being reserved are governed by federal rather than state law. United States v. McIntire, 101 F.2d 650 (9 Cir. 1939). This is so even after the trust patents are issued and lands have passed out of Indian ownership. . . ."

We have no disagreement with the statements of the Tweedy court assuming the Court determined, citing Winters, as a matter of fact that all waters within the original boundaries of the reservation were reserved. The Court's opinion is not clear on that point.

The State of Washington has stated many times herein, as the Court did in Tweedy, that federal reserved rights are governed by federal law, not state law. And of course we would not have any quarrel with the contention that such reserved water rights would apply to all waters within a specific water body whether located under trust severed non-Indian or Indian lands, or for that matter, located in part under non-Indian lands outside of the original boundaries of a reservation.[25/]

The United States also relies on the McIntire case for two propositions. It contends first that Montana's Enabling Act, with its "absolute jurisdiction and control language," precludes the applicability of state laws to non-Indian lands within the boundaries of a reservation. The non-barring effect of the wording is discussed

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25/ The State of Washington would of course disagree with the Tweedy Court if the Court, in the first sentence of the quoted language of its opinion, cites Winters for the proposition that, as a matter of law, all waters within a reservation are automatically reserved regardless of the needs to satisfy the purpose for which the reservation was created. Cappaert, supra, makes it clear that is not the law announced in Winters.

in subsection 4 infra. See Organized Village of Kake v. Egan, supra 369 U.S. 60 (1964).

Second the United States relies on the language of McIntire, supra at 101, which provides:

> ". . . appellees seem to contend that Michael Pablo acquired by prior appropriation the rights in question by local statute or custom, and that the Act of July 26, 1866, 43 U.S.C.A. § 661, requires recognition of those rights. That statute, however, applies only to "public" lands. Winters v. United States, 9 Cir., 143 F. 740, 747, affirmed 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340. Lands which are reserved are severed from the public domain. Leavenworth, etc., R. R. Co. v. United States, 92 U.S. 733, 745, 23 L.Ed. 634; United States v. Minnesota, 270 U.S. 181, 206, 46 S.Ct. 293, 70 L.Ed. 539. The statute mentioned, therefore, does not, we think, apply here."

We agree the Act of 1866 has been held to not constitute a basis for establishing a state law based water right on federal reserved lands. However, we are, in this case, dealing in this case with lands no longer in the federal reserve. We are dealing only with non-reserved lands within the original boundaries. The Act of 1866, on its face, applies only to publicly owned land situations.

4. The Enabling Act and the Washington State Constitution.

The United States next suggests, at pages 87 and 88, that the federal Enabling Act authorizing entry of the State of Washington, 25 Stat. 676, specifically bars non-Indians from establishing water rights applicable to waters on non-Indian lands based on state laws. Section 4 thereof provides in part:

> "That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States." (Emphasis supplied).

The United States contention is that Article 26, section 2, of the Washington State Constitution has the same barring effect. Section 2 contains the same wording as just quoted from the Enabling Act.

The failure of this contention is obvious. The quoted provisions of the Enabling Act and the Washington Constitution bar this State from exercising authority to establish rights in real property interests, including reserved water rights of the Indians as established by treaty. The State's position is not in conflict with these provisions. To the contrary, the state expressly asserts no authority over the rights of the Indians, absent federal consent. The State asserts jurisdiction only over "excess waters," i.e., waters of a water body on non-Indian lands not necessary to satisfy rights of tribes as reserved by treaty. Further, water rights issued by the State, applicable to water on non-Indian lands within a reservation, are clearly subject to all prior (senior) reserved Indian rights. The State's position is not only consistent with the letter but the spirit of these two foundation documents providing for our State's entry into the federal union.

We further note that the same words - ". . . under the absolute jurisdiction and control of the United States. . . ." - as contained in the Constitution of the State of Alaska, were construed by the United States Supreme Court in Organized Village of Kake v. Egan, supra. The teaching of the case, at 64-71, is that "absolute" jurisdiction is not the equivalent of "exclusive" jurisdiction. Note also a similar view expressed in Norvell v. Sangre de Cristo Development Corp., supra.

5. Section 7 of the General Allotment Act. The United States then suggests (at page 97 of its Brief) that section 7 of the General Allotment Act of 1887, 25 U.S.C. § 381, bars state authority. Section 7 provides:

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

A careful examination of its wording provides no such support. The section provides no sweeping preemptive water allocation policies as contended for by the United States. This section simply grants to the Secretary of the Interior the power to provide, among individual Indians, "just and equitable" distribution of the "in gross" waters of a water body reserved by treaty or executive order for the benefit of the Indians. Moreover the grant of power to the Secretary pertains only to "agricultural purposes." As stated at the outset hereof, the State does not claim the authority to allocate or administer reserved Indian water rights among Indians generally.26/

6. Public Law 83-280. Public Law 83-280 is relied upon by the United States in support of its bar theory. (U.S. Brief, p. 88.) This federal statute provides enumerated states with jurisdiction over Indians and Indians rights under certain circumstances. Washington State is one of the enumerated states. A portion thereof, 28 U.S.C. § 1360(b), contains this exclusionary language:

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

26/ A major exception is the authority provided to state courts in 43 U.S.C. § 666.

The State of Washington's companion statute containing similar language is RCW 37.12.050.

This contention also fails for the reason so often repeated herein, supra. The State of Washington does not contend for any power, through P.L. 83-280, to alienate, encumber, or tax water rights belonging to the Indians. For the range of views of what constitutes an ". . . alienation, encumbrances . . . belonging to an Indian tribe . . . .," see Snohomish County v. Seattle Disposal Co. 70 Wn.2d 668, 425 P.2d 22 (1967), and Rincon Band of Mission Indians v. County of San Diego, 324 F. Supp. 371, 373 (S.D.Cal, 1971); rev'd on other grounds, 495 F.2d 1 (9th Cir. 1974), cert. denied, 419 U.S. 1008 (1974).

Regardless of the view taken of the meaning of these words, the State's assertion of authority in this case extends only to: (1) non-Indians, (2) non-Indians lands, and (3) waters beyond the amount required to satisfy Indian reserved rights. In addition, all permits issued by the State are issued subject to prior Indian rights. Thus exercise of State authority does not and cannot conflict with the provisions of 28 U.S.C. § 1360(b).

In sum, whether the contentions of the United States are examined separately or in combination, the answer is the same. Nothing in any of the statutes, constitutional provisions, or cases cited comes close to suggesting that there is an unpenetrable wall located on the original boundaries of an Indian reservation through which the State of Washington's water laws cannot pierce and have application to waters, on non-Indian lands therein, which are not required to satisfy Indian reserved water rights.

7. Tulalip Tribe v. Walker - a case directly on point. The only case dealing with the validity of the "wall" theory, as it relates to water rights, is the case of Tulalip Indian Tribe v. Walker, Snohomish County No. 71421 (1963); copies of the court's memorandum and final judgment are attached as Appendix A. In this

case, Judge Charles R. Denny, (later a Washington State Supreme Court Justice pro tem), held that the state had authority to grant a water right permit authorizing diversion of "surplus" waters from a stream flowing across non-Indian lands located within the original boundaries of the Tulalip Indian Reservation.

The facts involved in the Tulalip case are generally as follows. The Tulalip Indian Reservation was authorized by a federal treaty executed in 1855. Tulalip Creek, the water body involved, originates north of the northern boundary of the reservation. The stream enters the reservation at a point on the northern boundary after which it flows in a southerly direction across the reservation until it discharges into the Puget Sound on the southern boundary of the reservation. During the course of its travels on the reservation, the creek crosses lands, owned by a non-Indian entity, free of any federal trust obligations.

In 1961 the owner of these non-Indian lands applied to the State of Washington, pursuant to the state's "water code," RCW 90.03.250 et seq., for a permit to withdraw waters of Tulalip Creek for industrial use. The point of diversion and place of use of the waters proposed for withdrawal were, at all times, within the lands of the non-Indian landowner. The State of Washington's Department of Water Resources, after a full investigation including the evaluation of the potential for interfering with Indian reserved rights, approved the application and issued a permit.

On appeal by the Tribe to the Superior Court, the Tribe contended, in effect, that there was a wall around the reservation which, as a matter of law, precluded the state from granting the permit. The state contended to the contrary. The Court ruled there was no wall and that the state could validly issue water rights applicable to "surplus" waters of Tulalip Creek. (The record before the Court as contained in the Pretrial Order entered by the Court in the case clearly showed there were waters in Tulalip Creek in excess of the

needs of the Indians both for the present and the reasonably foreseeable future). The Court in a memorandum opinion wrote on this point at page 1 thereof.

> "The conclusion expressed at the close of trial that the State does not have jurisdiction to grant the permit in question as to surplus water over and above the needs of the tribe, is erroneous . . . the mistake I made at the close of the trial was my failure to appreciate that the exclusive jurisdiction of the United States is confined to Indians.
>
> "I can find no case which denies to a state the power to assert its legitimate interest in the waters of a non-navigable stream flowing across lands owned in fee by non-Indians where only the right to the use of such waters by non-Indians is involved and the right to use by Indians is not affected thereby. Several of the cases suggest that the State does have jurisdiction under these circumstances."

This decision is recognized to be one of a state trial court. Yet like any other decision of a one-judge court of general jurisdiction, whether its validity stands the test of time depends on the persuasiveness of the Court's analysis in reaching its decision. Judge Denny's opinion and decision are solidly founded and, on that basis, we commend them to this Court for serious consideration in ruling contrary to the position taken by the United States.

In sum, based on the foregoing, we submit there is no basis to support the wall theory developed so recently by the fertile, imaginative minds of the salesman-lawyers of the Department of Justice.

C. Refocusing on Federal-State Relationships - The United States Misconceives the Basic Theories.

At page 90 of its brief the United States gives the primary "factor," in support of the "inescapable conclusion" that the ". . . State of Washington does not have jurisdiction over the use of waters within the exterior boundaries of the Spokane Indian Reservation." That first factor is ". . . there is no act of Congress passing this jurisdiction to the state." But does that sentence raise the appropriate inquiry? It does not.

As we stressed at the beginning of this brief, both the United States and the states have vast powers over waters within the boundaries of a state. And absent federal preemption, this concept of governmental concurrency of power remains valid as to all waters within a state.27/

Further the Court should be careful not to allow the issue to become one of who "owns" the aforementioned waters. On page 116 of its brief the Tribe suggests that federal ownership of the waters of Chamokane Creek by the federaly government is somehow relevant. We ask the Court steer clear of this concept for it will not be productive in resolving the controversies of the case.

The use by governmental units of the word "ownership" of waters in various water bodies has created considerable confusion. All western states, either in their constitutions or statutes, have claimed ownership of the waters within their boundaries. See, e.g., Colorado Constitution, article XVI, §5, and Wyoming Constitution, article VIII, §1. Washington State's "water code" declares in RCW 90.03.010 that "subject to existing rights all waters within the state belong to the public . . . ." To the contrary, the United States has claimed ownership of waters in at least one case which reached the United States Supreme Court, Nebraska v. Wyoming, 325 U.S. 589 (1945).

The use of the word "ownership" in these terms is misleading and deceptive.28/ For discussions see Trelease, supra at 147, and Meyers, Functional Analysis of Appropriation Law 23 (1971). The term, we contend should not be understood to mean "own" as used in

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27/ For an excellent discussion of federalism and water, see Wheatley and Corker, Study of the Development, Management and Use of Water Resources on Public Lands 7 (1969).

28/ In an extremely informative article, Trelease, Government Ownership and Trusteeship of Water, 45 Colum. L. Rev. 638 (1957), Dean Trelease makes the point that "ownership" is not a useful concept.

the context of ownership of one's house or farm, or even of waters when in a bottle. Rather, the term should be viewed in terms of governmental power over a transitory natural resource. The power we refer to is the power of a state and the United States to determine who, when, where, and for what purposes water may be removed from a lake, stream, or other water body within a state's boundaries.[29/] In the exercise of these powers, the State concedes the possibility that the federal government's powers could be exercised in such a fashion as to preclude most, if not all, state power over the subject area. This has never been done and, at least in recent years, we have heard of no suggestions that federal powers should be so exercised.[30/]

Recognizing that governmental power, not ownership, is the controlling concept in this case, the issue revolves around the search for the effect of the federal government's exercise of governmental power over waters on a state's power to regulate and control the same subject matter. In this regard the cases of Winters v. United States, supra, and Cappaert v. United States, supra, take us a long way towards resolution of the law applicable to this case. Those cases stand for the following:

a. The federal government may establish water rights through the setting aside or reserving of public lands for special purposes, and in so doing, reserve water rights, either expressly or impliedly,

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29/ In this regard a careful reading of the memorandum of the United States will show that the federal government makes no claim of "ownership" of waters. It claims ownership over lands within a state and a usufruct (of a "riparian rights" nature?) in the waters adjacent to the lands it owns but not in the waters themselves. United States Memorandum, page 11. In support thereof it cites Borax Consolidated, Inc. v. Los Angeles, 296 U.S. 161 (1891); and Clark, Water and Water Rights, 81-82 (1967). It cites no cases claiming ownership in all waters within a state.

30/ The position taken by the State is, we believe, based upon a well-founded analysis. The State recognizes this sovereignty-ownership issue has never been expressly settled by the United States Supreme Court and therefore remains open for further development by the courts in this complex area of our federal system. 2 Clark, Water and Water Rights, at 58 (1967).

in amounts necessary to carry out the purposes for which the reserved lands were created.

b. These exercises of federal power may relate to the establishment of Indian reservations.

c. The amount of water, when impliedly reserved, is limited to the amount necessary to fulfill the purposes of the reservation and "no more."

d. These reserved rights are not subject to state water law when held by the United States, i.e. State law has been preempted as to applicability to these rights. But see 43 U.S.C. §666.

In light of the above the question revolves around whether the federal government has exercised any of its many powers of control over waters within the State of Washington so as to set aside the applicability of state laws to waters not required to satisfy federal reserved rights located on or under non-Indian lands.

We are not aware of any such preemptive federal action.

In sum, the United State's contention on page 90 states the wrong inquiry. The issue is not whether the federal government has granted or "passed" jurisdiction to the State. The issue is whether powers recognized by the United States Constitution for implementation by the State over waters have been superseded by federal action.

Whether preemption of state water law from applicability to unreserved waters located on or under non-Indian lands within the original reservation boundaries has occurred is a matter of intent of Congress. The Supreme Court has set forth extremely stringent tests on this point. The intention of Congress to exclude states from exercising their sovereign police powers must be clearly manifested. Reid v. Colorado, 187 U.S. 137, 148 (1902); Napier v. Atlantic Coast Line, 272 U.S. 605, 611. That is, a court should not conclude that Congress legislated an ouster of state authority ". . . in the absence of an unambiguous congressional mandate to that effect." Florida Lime and Avocado Growers v. Paul, 373 U.S. 132 (1963). As stated in

Schwartz v. Texas, 344 U.S. 199 (1952), in relation to the super-session of state powers, "(t)he exercise of federal supremacy is not to be lightly presumed."

This brief contains discussion, in another context, which deals with the alleged preemptive effects of certain federal (and state) actions. See Section IV.B. Briefly we repeat that discussion. As to the exercise of federal power embodied in the Winters doctrine, such exercise has preemptive potential but in this case it is crystal clear that, at the least during certain periods of the year, there are waters in the Chamokane drainage in excess of the amounts necessary to satisfy federally reserved rights. Therefore, there is no preemptive wall barring all applicability of state law within the Chamokane drainage of the Spokane Reservation.

Likewise the three federal acts of 1866, 1870, and 1877 deal only with the applicability of state water rights laws to federally owned lands in a non-reserved status. Further, the disclaimer of state jurisdiction contained in Washington's Constitution, as well as in its related federal "Enabling Act", deal only with lands owned or held in trust for Indians not with non-Indian lands within the original boundaries of a reservation. Section 7 of the general allotment act is, on its face, non-preemptive in comprehensive sense. And Public Law 83-280 deals only with state regulation of Indian interests not non-Indian interests.

In sum, we are aware of no preemptive action of federal government which removes the applicability of state water laws to waters, on non-Indian lands within the original boundaries of a reservation, which are not required to satisfy any prior reserved rights of Indians. There is no state water rights law barring wall on the reservation boundary. The United States has not preempted such state laws from applying to such excess waters of the reservation are valid.

V. WATER RIGHTS ATTACHED TO LAND TRANSFERRED TO NON-INDIANS

A. A purchaser of an Indian allotment located within an Indian reservation acquires the reserved rights of its predecessor Indian owner.

On pages 103 and 104 of its brief the Tribe raises the issue as to whether a non-Indian purchaser of Indian allotment located within the original boundary of the Spokane Reservation suceed to the reserved right interest of the allottee. Because there are non-Indian owners of allottments, severed from the federal trust status, claiming such rights in this proceeding and because the State believes such a claimant has a reserved water right, and further because the state believes state water law comes into play once a non-Indian acquires such reserves rights, the following brief discussion of the States position is set forth.

In United States v. Powers, 305 U.S. 527 (1939), the United States Supreme Court held that, pursuant to section 7 of the General Allotment Act of 1887, 25 U.S.C. 381, each Indian allottee was entitled to an equitable share of reserved rights to use of waters of the reservation. The Court there also concluded that a non-Indian purchaser of an allotment was entitled to that pro-rata share. (The Supreme Court did not, however, expand on that general conclusion by amplifying on the exact extent or quantification of the purchaser's right; the reason being that the case was not in a proper posture for the Court to rule on those issues.) See also Skeem v. United States, 273 Fed. 93 (1921), and United States v. Ahtanum Irrigation District 236 F.2d 321, 326 (9th cir. 1956).

In Anderson v. Spear-Morgan Livestock Co. 79 P.2d 667 (1938) the Import of the Powers case is described as follows:

> "The purpose of this statute is to provide for the distribution of the right to use the water to individual Indians. United States v. Powers, . . . The right to use the water prior to a distribution of it by the Secretary of the Interior may be said to be inchoate in the sense that the precise amount or extent of the right assigned to an

> individual allottee would be undeteremined, but the right is vested in so far as the existence of the right to use the water in the allottee is concerned. This right is appurtenant to the land upon which it is to be used by the allottee. When the allottee became seized of fee simple title, after the removal of the restrictions of the trust patent, then a conveyance of the land, in the absence of a contrary intention, would operate to convey the right to use the water as an appurtenance. United States v. Powers, supra."

B. Upon Transfer of Reserved Water Rights to non-Indian Ownership for use on non-Indians lands, state water laws attach.

The only case dealing directly with water rights acquired by non-Indians as purchaser of a non-Indian allotment is United States v. Hibner, 27 F.2d 909 (D. Idaho 1928). The Court, at page 912, recited the rule which we believe is meritorious. A purchaser of an allotment acquired a water right

> ". . . for the actual acreage that was under irrigation at the time title passed from the Indians, and such acreage as he might from reasonable deligence place under irrigation . . ."

with a priority date from the creation of the reservation. The Court continued, relying on state law, that the purchaser could not await an "indefinite period" before putting the water to beneficial use.

The State of Washington's position closely parallels the Court's position in Hibner. Purchasers of Indian allotments, in effect, stand in the shoes of the Indians. A purchaser obtains a reserved water right. However, once the federal trust relationship to the allotment is severed, the rights of the new non-Indian become subject to state water laws. As an example of the effect of the application of state law, the reserved right transferred to a non-Indian area subjected for the first time to the possibilities for partial or

complete loss based upon the laws of Washington State dealing with abandonment or forfeiture. See RCW 90.14.130 et seq.[31/]

31/ With regard to lands of the Spokane Reservation open to settlement pursuant to the Act of 1908, 35 Stat. 458, and were thereafter "homesteaded," the State takes the position that the homesteaders obtained no reserved rights. This on the basis that the "opening" of such lands terminated any further reserved rights. Whatever rights, if any, a homesteader obtained are based upon state law. See California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935).

VI. THE REQUESTS OF THE UNITED STATES FOR INJUNCTIVE RELIEF.

A. Injunctive Relief is Premature

The United States contends that the court should enter a judgment enjoining the defendants from interfering with the water rights of the United States. The request is not well taken. This is a general adjudication. The decree contemplated for entry in such a proceeding would contain a schedule of correlative rights which sets forth who is entitled to remove water during various periods of times and water availability conditions. This decree should also provide for various regulatory mechanisms to insure that junior right holders do not infringe upon the rights of those holding senior priorities. In the context of this case, where the various claimed rights have not yet been "adjudicated," injunctive relief is not timely. It must be presumed that parties to a judgment will comply with its provisions absent a strong showing to the contrary. If after the adjudication is complete, and thereafter a party to the decree infringes, or threatens to infringe, upon the rights of parties to the proceeding injunctive relief may well be appropriate. There is no evidence in the record to support such a finding at this time. The granting of such an order at this point is clearly premature.

B. The State has not and will not interfere with Reserved Water Rights.

The United States also asks the Court to enjoin the issuance of permits to persons owning lands <u>within</u> the original boundaries of the Spokane Reservation. We already argued strenuously against the "wall" theory espoused by the government. There is no wall. The only limitation upon the state in the issuance of water rights permits is that no withdrawals may be authorized which will interfere with senior rights, including any of the same held by the United States. The State of Washington contends there is no evidence supporting the proposition that the State has, in the past, issued any permits which would authorize interference with the federal rights.

Further there is no evidence whatsoever that once this litigation is completed the State will not comply with the mandate of the court. The state has never contended it has power over any reserved water rights of the United States absent federal statutory consent to extend its power into the areas otherwise soley Federal domain. See 43 U.S.C. § 666. It does not do so here. The State's powers within the regional boundaries of the Spokane Reservation are limited to the non-reserved waters of the Chamokane and non-Indian lands pertaining thereto. There is no basis for any injunction against the State when it expressly disclaims any power over or intentions to interfere with reserved water rights of the United States.

C. There are "Surplus Waters" Available.

The United States asks the Court to enjoin to the State from issuing water right permits applicable to the Chamokane, even when the waters of that stream are outside the original boundaries of the Spokane Reservation. There is no basis for entry of such an order. In addition to the reasons noted in Section VI.B., immediately proceeding, there is no showing that there are no waters available for appropriation during all seasons of the year. Absent that condition an injunction is clearly not appropriate.

D. The Use of a Water Master

The use of a water master - a stream patrolmen - is the approach often taken to insure that general adjudication decrees are complied with. This standard feature of western water law lessens the need for courts to utilize their extraordinary powers of injunction. Whether a water master is needed in the Chamokane Creek is not yet ripe for decision by the Court. That decision, we submit will depend largely upon the Courts evaluation of the complexity of the final decree, the difficulty of its enforcement, the attitudes of the parties and other factors which are not before the Court.

VII. RECAPITULATION OF THE POSITION OF THE DEPARTMENT OF ECOLOGY.

A. Federal Reserved Rights

The following is a recapitulation of the reserved surface water rights to the Chamokane Creek held by the United States for the benefit of the Indians as perceived by the Department of Ecology.

1. Domestic rights. The United States is entitled to divert waters of the Chamokane for family home, lawn and small garden purposes. This amount would be de minimus.

2. Stockwatering. The United States is entitled to minimum flows of the Chamokane so as to provide water rights adequate to satisfy requirements for stock on riparian grazing lands which drink directly from the stream. The amounts hereof shall only relate to normal stock grazing uses of the land and shall not relate to intensive stock uses such as feed lots. The amount too would be de minimus.

3. Timber. The United States is entitled to withdraw waters of the Chamokane for purposes of firefighting and road and related construction incident to the production of timber. The right attaches to the timberlands portion of the Chamokane Basin. The extent of these lands is not formally in the Record, though the Department of Natural Resources in their Brief calculates on the basis of P.E. 101 that there are 10,164 such acres, so classified by the Act of 1908, 35 Stat. 458.

4. Irrigation. The United States is entitled to an irrigation right for the agricultural lands of the Chamokane drainage which are (1) irrigable, (2) not counted as timbered lands, and (3) not "intended" to be irrigated out of the Spokane or Columbia rivers. There is not adequate evidence in the Record to identify this amount, but given the extent of timberland (particularly on the Chamokane Bench, which contains most of the claimed irrigable lands) and the statements of plaintiff's own witnesses as to the intentions of the Tribe to irrigate only from the Spokane and Columbia rivers, this figure approaches zero. To the extent there is a right, there would

be a duty of three acre-feet per acre. The irrigation season is from April 1 to October 1.

5. Fisheries, Ceremonial, and Recreational. This is the claim which creates the greatest difficulty. Based on the evidence presented in this case we do not believe the United States intended, when it created the Spokane Reservation, to preserve the Chamokane Creek "as it was wont to do in nature" during the summer months. At the most, it appears a much lesser base flow may have been contemplated for recreation and fishery uses. In any event based on policies of state law, the State of Washington has concluded that 20 cubic feet per second satisfies the fisheries, recreational and other beneficial use requirements for the stream. Therefore, the State would have no objection to the entry of a minimum flow for such uses based upon State law.

B. Priority Dates.

In relation to the foregoing, we believe the priority dates should be as follows:

1. 1881 is the priority date for all rights pertaining to all lands within the original boundaries of the reservation which have been, at all times subsequent to 1881, held in a special trust status by the United States for the benefit of the Indians.

2. 1958 is the priority date for all rights pertaining to all lands which were reinstated to the reservation pursuant by the Act May 19, 1958 (72 Stat. 121).

3. Lands reacquired by the United States or by the Spokane Tribe should have the following priority dates:

a. Reacquired allotted lands - 1881.

b. Reacquired homestead lands - the date of reacquisition.

4. As to non-Indian holders of allotments of land within the original boundaries of the Spokane Indian Reservation they are entitled to 1881 priority date for the rights held as successors to an allottee.

5. As to non-Indian holders of lands within the original boundaries of a reservation acquired under the "homestead" law of 1905, they acquire no reserved rights. All rights of such landowners may be claimed only upon the basis of state law.

VIII. CONCLUSION

The conclusions reached by the Court in this case have extremely serious implications for all of the western United States. The United States and the Tribe, through latter day revelation of the law, make very expansive claims on behalf of itself and the Tribe, both in terms of water quantities and governmental powers. The policies supporting these claims - making up for the misdeeds and sins of the past - are very attractive to anyone who examines the history of the western United States.

Yet there are countervailing policies which must not be lost from view. Most of the development of the west is based on well recognized federal and state water allocation policy of longstanding. Displacement of these developments because of the loss of water rights would play havoc with our entire economic structure not to mention the potentials for social disruption. Dean Trelease, in his National Water Commission treatise, reached this conclusion on the issue of Indian reserved rights:

> "Justice to Indians may not mean giving them everything they ask. Justice to Indians cannot be injustice to non-Indians; there must be justice to both or the word is inapplicable." Trelease, Federal-State Relations in Water Law 174 (1971).

The Chamokane Creek is a small creek flowing through a sparsely settled land. The granting of the claims made by the United States, in this case, would displace only a relatively few. (Yet as to those few with long-standing water rights, who have justifiably relied upon state laws and the lack of any grand assertions of expansive claims of water for Indians for a century, the effect is personal and very substantial.) The broader concern is the precedential value of the policies announced by this court. The coattail effect of this case on decisions for other streams, with larger volumes and more valuable non-Indian interests involved, has extremely high potential for the agony of displacement previously noted.

When the teachings of Winters, Arizona v. California and Cappaert are applied to the facts of this case, we urge the scheme for quantification of reserved rights contained in our "recapitulation" be accepted by the court. By following this course we believe the Court will reach a reasonable interpretation of the federal intent as to impliedly reserving water rights for lands within the Spokane Reservation.

As to the application of state water laws to waters on non-Indian lands within the original boundaries of the reservation, we urge the Court to reject any suggestion there is an impermeable wall on the boundaries. The state has many legitimate interests within the reservation relating to the non-Indians and their property on the reservation. So long as the laws of the state relating to there interests do not interfere either with the Tribe's ability to govern and protect its own property interests or with federal statutes, the state laws should remain valid. In this case, the state asserts its law apply only to non-Indians, to non-Indian lands, and to waters in excess of those necessary to satisfy federal reserved rights. The state labors no desire, overtly, covertly, or otherwise, to allocate, regulate, or manage the federally reserved Indian rights of the Spokane Reservation. The State, in this case, only asserts its legitimate constitutional powers to regulate all waters within the state's boundaries except those placed in a reserved category through one the several powers vested in the federal government by the United States Constitution.

In recent years the concept of "cooperative federalism" has grown dramatically. This policy trend is not only embodied in many, many recent enactments of Congress,[32/] but more importantly by the United States Supreme Court. Note, The Preemption Doctrine Shifting

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32/ Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. 1251; Coastal Zone Management Act of 1972, 16 U.S.C. §1451 and 1452; and Deep Water Ports Act of 1974, 33 U.S.C. 150(a).

Perspectives on Federalism and the Burger Court, 75 Colum. L. Rev. 623 (1975).

We urge the Court to base its deliberations, leading to the development of a decree, on this new and promising spurt of cooperation among governments in our federal system. If the Court is so guided, legitimate interests of both federal and state governments will be better served and no government will preempt from its proper role. Likewise, the judge faced with the unhappy task of resolving water right disputes of will have achieved the "smallest injustice possible."33/

DATED: March 28, 1977.

Respectfully submitted,

SLADE GORTON
Attorney General

CHARLES B. ROE, JR.
Senior Assistant Attorney General

JEFFREY D. GOLTZ
Assistant Attorney General

Attorneys for State of
Washington, Department
of Ecology

33/ Trelease, Federal-State Relations in Water Law 174 (1971).

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SNOHOMISH

In the Matter of the Requests of UNION OIL COMPANY OF CALIFORNIA for Appropriation Permits under Applications No. 15989 and 15990; THE TULALIP TRIBES OF WASHINGTON and THE TULALIP TRIBES, Appellants, -vs- MURRAY G. WALKER as Supervisor of the Division of Water Resources, Department of Conservation, Respondent.	No. 71421 MEMORANDUM DECISION

Further consideration of the above named case convinces me:

(1) That the lands reserved by treaty for the use and occupancy of the Indians carries with it all water rights appurtenant to said lands; and if said lands are reserved to the Tribe such water right is held as a tribal right.

(2) That such water rights cover both present and future needs.

(3) That the order of the Supervisor of the Division of Water Resources is made subject to existing rights which includes the right of the Indian tribe to the beneficial use of water in the stream, both present and future.

(4) The conclusion expressed at the close of the trial that the State does not have jurisdiction to grant the permit in question as to surplus water over and above the needs of the tribe, is erroneous. The Union Oil Company holds title in fee and enjoys the same right to water as that of the Indian allottees who originally held title. The mistake which I made at the close of the trial was

my failure to appreciate that the exclusive jurisdiction of the United States is confined to Indians.

I can find no case which denies to a state the power to assert its legitimate interest in the water of a non-navigable stream flowing across lands owned in fee by non-Indians where only the right to the use to such water by non-Indians is involved and the right to use by Indians is not affected thereby. Several of the cases suggest that the state does have jurisdiction under these circumstances.

The Federal statute which provides that the Secretary of the Interior shall make a just and equitable division of water among Indians on a reservation is limited to water necessary and used for irrigation. The water here in question is not, has not, and there is no reason to believe will be used for irrigation.

The Montana cases which have been cited to me by appellants do not hold that the state has no right to adjudicate the use of water by non-Indians adjacent to or on a reservation. Those cases do hold that the rights to use of water for irrigation by Indians on a reservation were necessarily involved and, therefore, the United States is a necessary party to make such an adjudication; and the United States having refused to become a party, the state court of necessity cannot adjudicate the rights of white persons to water flowing adjacent to or on the reservation. Such is not the case here. The order under review does not seek to adjudicate the rights of Indians, nor is the right of any Indian affected by the order. It is limited to surplus water over and above the needs of the Indians.

The fact that Public Law 280 excludes any adjudication of water rights does not control this case. The state is not attempting to regulate or adjudicate the water rights of the Tribe.

I have read all of the cited cases. The press of work does

not permit me to take the time to discuss them; indeed, counsel have demonstrated in the preparation of their excellent briefs that they are fully competent to do so.

Findings and decree will enter affirming the action of the Supervisor, with the modification that such order does not adjudicate nor affect the rights of the Tribe in the water of the stream, both present and future.

DATED this 9th day of January 1963.

Charles H. Carney

J U D G E.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR SNOHOMISH COUNTY

In the Matter of the Requests of UNION OIL COMPANY OF CALIFORNIA for Appropriation Permits under Applications Nos. 15989 and 15990;	)	
THE TULALIP TRIBES OF WASHINGTON and THE TULALIP TRIBES,	)	No. 71421
Appellants,	)	FINDINGS OF FACT AND
vs.	)	CONCLUSIONS OF LAW
MURRAY G. WALKER as Supervisor of the Division of Water Resources, Department of Conservation, State of Washington,	)	
Respondent.	)	

The above entitled proceeding came before the above-entitled court, the Honorable Charles R. Denney presiding, on the 4th day of December, 1962.

The appellants The Tulalip Tribes of Washington, and The Tulalip Tribes appeared by their counsel, Bell, Ingram and Smith of Everett, Washington, Lewis A. Bell of counsel. The respondent Murray G. Walker as Supervisor of Water Resources, Department of Conservation, State of Washington, was represented by the Attorney General of the State of Washington, Charles B. Roe, Jr., Assistant Attorney General.

This matter comes to the court on appeal, pursuant to RCW 90.03.080, by the Tulalip Tribes of Washington, and The Tulalip Tribes, both corporations.

The appellants have challenged the jurisdiction of the Supervisor of Water Resources to issue the order, dated April 23,

1961, which authorized Union Oil Company of California to divert up to eight second feet of water from the west fork of Tulalip Creek at a point located on lands owned by the Union Oil Company of California within the boundaries of the Tulalip Indian Reservation, Snohomish County, Washington, and to utilize said waters for a consumptive use for the purpose of oil refinery operations on the aforesaid lands owned by Union Oil Company of California.

On the basis of the record, having carefully considered the return of the Supervisor of Water Resources, the pre-trial order, the evidence admitted at time of trial, and the written memorandums and oral argument of counsel the court makes the following:

FINDINGS OF FACT

I

The "Admitted Facts' set forth in paragraphs 1 through 18 of Section II of the Pre-Trial Order, dated November 30, 1962, as agreed to by the parties and entered in this proceeding, are accepted by this court as the findings of fact, and adopts the same by this reference as though set forth in full.

From the foregoing Findings of Fact, the Court makes the following

CONCLUSIONS OF LAW

I

This court has jurisdiction of the parties and subject matter involved in this proceeding.

II

The Treaty of Point Elliott, through which lands were reserved for the use and benefit of the Indians, impliedly reserved for the benefit of the Indians the right to withdraw and utilize waters in amounts reasonably necessary to carry out the purposes for which the reservation was created; and if said lands are reserved to the appellants, such water right is held as a tribal right.

III

The reserved rights to utilize the waters of Tulalip Creek include amounts reasonably necessary to satisfy not only the present needs but the future needs of the Indians, should the requirements of the Indians to carry out the purposes for which the reservation was created, expand.

IV

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

V

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

VI

The order of the Supervisor of Water Resources relates solely to said surplus waters and is made subject to existing rights,

which include the reserved rights of the Indian tribe to the beneficial use of the water in Tulalip Creek, both present and future.

VII

The order of the Supervisor of Water Resources does not attempt to adjudicate the rights of any claimant, including the appellants, to the use of the waters of Tulalip Creek, nor is the right of any Indian affected by the order.

VIII

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

IX

Respondent supervisor is entitled to a judgment affirming the order appealed from with the modification that said order state it does not adjudicate nor affect the rights of the tribe in the waters of the stream, both present and future, and is entitled to recover from appellants' his costs herein.

DONE IN OPEN COURT this 14 day of Feb, 1963.

/s/ Charles R Denney
JUDGE

Presented by

CHARLES B. ROE, JR.
Assistant Attorney General

Presentment waived this ___ day of _____, 1963.

/s/ Lewis A. Bell

IN THE SUPERIOR COUR' OF THE STATE OF WASHINGTON

FOR SN OHOMISH COUNTY

In the Matter of the Requests of UNION OIL COMPANY OF CALIFORI IA for Appropriation Permits under Applications Nos. 15989 and 15990;	
THE TULALIP TRIBES OF WASHIN TON and THE TULALIP TRIBES,	No. 71421
Appellants,	JUDGMENT
vs.	
MURRAY G. WALKER as Supervisor of the Division of Water Resources, Department of Conservation, State of Washington,	
Respondent.	

On the basis of the Findings of Fact and Conclusions of Law entered herein this day

IT IS HEREBY ORDERED, ADJUDG ED AND DECREED:

1. That that certain order of the respondent Supervisor of Water Resources, dated May 23, 1961, authorizing Union Oil Company of California to withdraw waters from Tulalip Creek, appealed from herein, be affirmed with the modification that such order does not adjudicate nor affect the rights of the appellants in the water of the stream, both present and in the future.

2. That the respondent Supervisor recover from appellants his costs and disbursements herein to be taxed.

DONE IN OPEN COURT this 7th day of February, 1963.

/s/ Charles R. Denney

JUDGE

Presented by:

CHARLES D. ROE, JR.
Assistant Attorney General

Presentment Waived this _____ day

of _____, 1963.

LEWIS A. BELL

CERTIFICATE OF SERVICE

I certify that I mailed a copy of the foregoing document to all parties on the following list on March 28, 1977, with postage prepaid:

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CERTIFICATE OF SERVICE -2-