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## Reply Brief of the United States

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FILED IN THE  
U. S. DISTRICT COURT  
Eastern District of Washington

JUN 16 1977

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

J. R. FALLOQUIST, Clerk  
*RF*  
Deputy

UNITED STATES OF AMERICA, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
BARBARA J. & JAMES ANDERSON, )  
 )  
et al., )  
 )  
Defendants. )

CIVIL NO. 3643

REPLY BRIEF OF THE UNITED STATES

152

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1                                      REPLY BRIEF OF THE UNITED STATES

2                      In our opening brief, we contend that the United States  
3 owns the prior and paramount rights to the surface and ground waters  
4 of Chamokane Creek and its tributaries for the benefit of the  
5 Spokane Tribe of Indians. We set forth and substantiated four  
6 rights: sufficient water to maintain Chamokane Creek as a fishery  
7 and as a free flowing recreational and esthetic stream; sufficient  
8 water to irrigate all of the irrigable acres of land within the  
9 Chamokane Creek basin portion of the Spokane Indian Reservation;  
10 10 cfs (nonconsumptive) for fish propagation purposes at a fish  
11 hatchery; and such water as may be needed in the future to fulfill  
12 the purposes for which the Spokane Indian Reservation was created.  
13 The government also denied the validity of any water rights certifi-  
14 cates, permits or applications issued by the state for uses within  
15 the exterior boundaries of the Spokane Reservation, sought to  
16 enjoin the further issuance of such certificates, permits and appli-  
17 cations and sought to limit the exercise of the valid water rights  
18 of the defendants to that amount which will not interfere with the  
19 various rights of the United States.

20                      The principal attack on our position is made in the two  
21 briefs which have been filed by the State of Washington. Defendant  
22 Boise Cascade Corporation has also filed a brief in opposition to  
23 our claims. The defendants rely on essentially the same arguments  
24 which have been consistently rejected by the United States Supreme  
25 Court since that Court's decision in Winters v. United States, 207  
26 U.S. 564 (1908). They deny the existence of a reserved water right  
27 to maintain Chamokane Creek as a free flowing stream.<sup>\*/</sup> They deny  
28

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29  
30 <sup>\*/</sup> Department of Ecology (hereinafter, DOE) brief, pp. 20-25, 30  
31 and 59; Department of Natural Resources (hereinafter DNR) brief,  
pp. 15-21; Boise Cascade brief, pp. 14-15.

1 the existence of a reserved water right for irrigable land.<sup>\*/</sup> As  
2 to their own rights they assert the validity of all of the water  
3 rights certificates, permits and applications heretofore issued by  
4 the State of Washington for uses within the Chamokane Creek watershed  
5 and deny that any hydrologic connection has been established between  
6 those uses and the government's rights, if any. In short, the  
7 defendants here take the absolutely incredible position that the  
8 United States and the Spokane Tribe have no rights whatsoever to  
9 the surface or ground waters of Chamokane Creek and its tributaries  
10 and that all of the relief requested by the government and the  
11 tribe should be denied.

12 As will be shown below, counsel for the defendants are in  
13 error as to the effect of the decisions which they cite and the  
14 decisions generally of the United States Supreme Court concerning  
15 federal reserved water rights.

16 As will also be shown, counsel err in their contention  
17 that the Federal Government and the tribe have somehow failed to  
18 produce sufficient evidence to establish their water rights. Indeed,  
19 a comparison of the briefs of the plaintiffs and those of the  
20 defendants with regard to a discussion of the evidence and citations  
21 to the record leads one to the inescapable conclusion that the  
22 plaintiffs have proven their case by a clear preponderance of the  
23 evidence.

24 The United States, therefore, replies to the briefs of  
25 the defendants as follows.

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29 <sup>\*/</sup> DOE brief, p. 58; DNR brief, pp. 15, 32; Boise Cascade brief,  
30 p. 13.

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I

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

A. Decisions of the United States Supreme Court and  
Other Federal Courts Support the Plaintiffs' Positions in this Case.

1. Defendants concede the existence of federal reserved water rights and that the doctrine applies to ground water but misunderstand the nature and extent of the rights.

In each of their closing briefs, the defendants concede, as they must, that when the Federal Government withdraws land from the federal domain, it has the power to reserve the right to use water then unappropriated to the extent necessary to accomplish the purpose of the reservation. The Department of Ecology, for example, states that:

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". [Footnote omitted] This Court made doctrine, which will be discussed in detail, infra, is now well established and recognized in the law.\*/

Further, Ecology notes that:

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.\*\*/ [Footnote omitted]

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\*/ DOE brief, p. 10

\*\*/ DOE brief, p. 13; Similar statements are by the Department of Natural Resources (DNR brief, p. 16) and Boise Cascade (brief, p. 6).

1 Thus, the issue of whether or not the United States had the power  
2 to reserve the water rights claimed by the plaintiff and plaintiff-  
3 intervenor in this case is eliminated by this admission of the  
4 defendants as well as the case law on the subject. Cappaert v.  
5 United States, 426 U.S. 128, 138 (1976); United States v. District  
6 Court for Eagle County, 401 U.S. 520, 522-523 (1971); Arizona v.  
7 California, 373 U.S. 546, 601 (1963); F.P.C. v. Oregon, 349 U.S.  
8 435, 443-444 (1955); Winters v. United States, 207 U.S. 564, 577  
9 (1908).

10 Likewise, the defendants agree that the federal reserved  
11 rights doctrine may extend to the reservation of ground water. DOE  
12 brief, p. 25; <sup>\*/</sup> Boise Cascade brief, p. 3. Cappaert v. United  
13 States, supra, 426 U.S. at 142-143. Therefore, this issue is also  
14 eliminated from this case.

15 Apart from these concessions of the obvious, however, each  
16 of the defendants' closing briefs exhibits serious error in its  
17 interpretation of the nature and extent of federal reserved rights.  
18 The major misunderstandings may be summarized as follows:

19 BOISE CASCADE:

20 a. The federal reserved right doctrine is  
21 based upon the concept of necessity which  
22 requires the court to examine the competing  
interests. (Boise Cascade brief, p. 5)

23 b. A water right cannot be claimed for use  
24 on an Indian reservation if the tribe currently  
would prefer to make some other use of the  
water. (Boise Cascade brief, p. 13)

25 c. A federal reserved water right cannot be  
26 obtained for fishing, aesthetic or recreational  
27 purposes. (Boise Cascade brief, p. 14)

28 \*/ Having accurately stated the holding in Cappaert, however,  
29 Ecology immediately attempts to restrict the effect of that  
30 holding on this case by alleging that the hydrologic connection  
31 here is much more difficult to establish than it was in Cappaert.  
According to the evidence, quite the opposite is true.



1 DEPARTMENT OF NATURAL RESOURCES:

2 a. A federal reserved water right can only  
3 be held to exist if the absence of such a  
4 right would render the reservation land  
"valueless and uninhabitable." (DNR brief, p. 17)

5 b. A federal reserved water right for use  
6 on an Indian reservation is limited to agri-  
cultural purposes. (DNR brief, p. 17)

7 c. Even if a federal reserved water right  
8 could exist for the maintenance of a fishery,  
9 the existence of the right would depend on a  
showing of historical dependence on the  
fishery for subsistence. (DNR brief, p. 19)

10 DEPARTMENT OF ECOLOGY:

11 a. Federal reserved rights for instream  
12 flows are mutually incompatible with irrigation  
13 rights, therefore, the government and the  
tribe get neither. (DOE brief, pp. 2, 3, 29)

14 b. A water rights decree cannot be both  
15 based on irrigable acreage and left open subject  
to future modification. (DOE brief, p. 28)

16 Each of these arguments will be answered in turn.

17 2. The reserved right is based on the  
18 purpose of the reservation.

19 In our opening brief, we argued that the test to be  
20 applied in determining the existence, nature and the extent of a  
21 federal reserved water right is whether the reservation of the water  
22 was necessary to accomplish the purposes for which the reservation  
23 was created. We pointed out that the Supreme Court and other  
24 federal courts have recognized that federal reserved water rights  
25 are not limited to the right to use of water for irrigation.<sup>\*/</sup> The  
26 defendants generally disagree. First of all, Natural Resources  
27 and Boise Cascade would have this court believe that a federal  
28 reserved water right for an Indian reservation can only extend to  
29

30 <sup>\*/</sup> US brief, pp. 22-35  
31  
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1 the right to use water for irrigation.\* / They rely on the standard  
2 argument that it was the policy of the Federal Government in  
3 establishing Indian reservations to "integrate the various Indian  
4 tribes eventually into the agrarian level of our economy." They  
5 also argue that the line of federal reserved right cases since  
6 Winters v. United States, supra, which have dealt with Indian reser-  
7 vations have involved only the on-reservation consumptive use of  
8 water necessary for the agricultural development of reservation  
9 lands. These contentions are neither logical nor consistent with  
10 existing case law and are refuted in pages 16-35 of our opening  
11 brief. It is firmly established that Indian reservations were  
12 created with the idea that they would be "self-sustaining". Alaska  
13 Pacific Fisheries v. United States, 248 U.S. 78, 88 (1918). This  
14 has been held to mean that the Indians would be encouraged to main-  
15 tain traditional food gathering processes for subsistence and  
16 economic gain while learning new skills and trades which would be-  
17 come necessary for survival as aboriginal practices became restricted  
18 due to the encroachments of civilization. United States v. Wash-  
19 ington, 384 F.Supp. 312, 355 (USDC, WD Wash., 1974) affm'd 520 F.2d  
20 676 (C.A. 9, 1975) cert. den. 423 U.S. 1086.

21  
22  
23 \*/ DNR brief, p. 17; Boise Cascade brief, p. 14. Boise Cascade  
24 relies heavily on the case of Colorado River Water Conserva-  
25 tion District v. Rocky Mountain Power Co., 406 P.2d 798 (Colo. 1965)  
26 for the proposition that there can be no minimum flow right for  
27 fishery purposes. Boise Cascade brief, p. 14. But that case was  
28 a state court case between private parties and construed Colorado  
29 state law. 406 P.2d at 800. Obviously, Colorado law does not  
30 apply to the claims of the government in this case. As the United  
31 States Supreme Court said in United States v. District Court for  
32 Eagle County, 401 U.S. 520, 526 (1971), a case which arose out of  
the Colorado state courts:

All such questions, including the volume  
and scope of particular reserved rights,  
are federal questions which, if preserved,  
can be reviewed here . . . . [Emphasis  
added]

1           The court's attention is especially drawn to the recently  
2 decided case of United States v. Finch, 548 F.2d 822 (C.A. 9, 1976).  
3 This case was a criminal action in which James Junior Finch was  
4 charged with trespassing on Indian lands in violation of 18 U.S.C.  
5 1165. The defendant had been arrested while fishing from a bank  
6 of the Big Horn River. The bank and the bed of the river at the  
7 point where Finch stood were within the exterior boundaries of the  
8 Crow Indian Reservation. The State of Montana, however, owned the  
9 bank at the spot occupied by Finch, having acquired the property  
10 by purchase. Finch held a valid state fishing license but had  
11 received no permission to fish from either the Crow Tribe of the  
12 United States.

13           The district court held that no entry had been made on  
14 Indian land and dismissed the charges. The ninth circuit reversed.

15           The portion of the opinion which is relevant to this  
16 case begins on page 832. As part of their argument that Montana  
17 owned the bed of the river and not the United States as trustee  
18 for the Crow Tribe, counsel for Finch asserted that there was no  
19 evidence that the Crow Indians used the river as a source of food  
20 and that, therefore, the government could not have intended to  
21 reserve the river bed. The court answered the argument as follows:

22           Appellee misapprehends the purpose of  
23 Congress in creating the Crow Reservation.  
24 By establishing a reservation as a  
25 "permanent home" for the Crow Indians,  
26 see Treaty with the Crows of 1868, Art. 4,  
27 2 Kapp. 1008, 1009, the Government  
28 manifestly intended to set aside lands  
29 which would provide the tribe with the  
30 food and natural resources upon which  
31 their livelihood depended. It is true  
32 that the Crow Indians, in 1868, were  
predominantly hunters.<sup>17/</sup> The aim of the  
United States, however, was to fix the  
Crows in one location and to reorient their  
way of life toward "agricultural and other  
pursuits." We find it inconceivable that  
the United States intended to withhold from  
the Indians the right to sustain themselves

1 from any source of food which might be  
2 available on their reservation. It must  
3 have been no mystery to the Government that  
4 the Crow Tribe, whose nomadic ways they sought  
5 to change, might eventually be forced to derive  
6 their existence from a source other than  
7 big game, should the large herds of buffalo  
8 and elk roaming the plains become extinct by  
9 accident of nature or decimation by man.  
10 Cf. Menominee Tribe of Indians v. United  
11 States, 388 F.2d 998, 1002 (C.Cls., 1967)  
12 aff'd 391 U.S. 404 (1968). We therefore  
13 decline to adopt an interpretation which  
14 would mean that the Treaty of 1868 deprived  
15 the Crow Indians of potential control over  
16 a source of food on their reservation.  
17 [Footnote omitted] 548 F.2d at 832.

18 Footnote no. 17 to the above-quoted portion of the opinion reads  
19 as follows:

20 Published histories of the Crow Tribe indicate  
21 that the Crow Indians engaged principally in  
22 the hunting of large game such as elk and  
23 buffalo. Fishing was neither a primary nor  
24 an important source of food or industry. In  
25 his definitive study of the Crow Tribe,  
26 R. Lowie states:

27 A Crow was not happy without a  
28 diet of the flesh of ruminants.  
29 Boys went out shooting rabbits  
30 for fun, but that would be starva-  
31 tion fare for adults. I have  
32 never met a reference to eating  
of fish; berries, and roots dug  
up by the women formed a regular  
part of the ancient bill of fare  
but only as seasoning or dessert;  
and the corn traded in from the  
Hidatsa was eaten for the sake of  
variety rather than as a substitute  
for meat.

33 R. Lowie, The Crow Indians 72 (1938)

34 Thus, United States v. Finch underscores and emphasizes that the  
35 purpose for the creation of Indian reservations was to provide the  
36 Indians with a permanent home and that this means the government  
37 meant to reserve for the Indians the right to continue to sustain  
38 themselves from any source of food which might be available on  
39 their reservation. If this was the purpose of the reservation and  
40 if the government must be held to have impliedly reserved sufficient

1 water rights to fulfill the purpose of the reservation, then it  
2 surely must follow that water rights can be reserved for uses  
3 other than irrigation.

4 Interestingly, the Department of Ecology agrees that  
5 the courts have found other "purposes" to which federal reserved  
6 rights apply besides irrigation.<sup>\*/</sup> Ecology would recognize reserved  
7 water rights for the Spokane Tribe for domestic use, stockwatering,  
8 timber production and irrigation<sup>\*\*/</sup> and "acknowledges that fishing  
9 may have been a purpose of the reservation and water impliedly  
10 reserved for that purpose."<sup>\*\*\*</sup>/ However, Ecology would not recog-  
11 nize a water right for the preservation of the Chamokane Creek  
12 fishery because "[i]t is not a fishery on which the Spokanes depend  
13 for their livelihood."<sup>\*\*\*\*</sup>/ As noted above, however, Finch would  
14 protect all sources of food, not just major sources.

15 Next, the defendants argue that reserved rights for  
16 minimum stream flows and for irrigation are mutually inconsistent  
17 and that, therefore, the plaintiffs get neither! Ecology says  
18 that the government and the tribe are "making the mutually exclu-  
19 sive, incompatible contentions that the federally reserved rights  
20 in relation to the establishment of the Spokane Reservation,  
21 include both the right to dry up the stream during the summer  
22 months through diversions for agricultural irrigation and, for the  
23 very same period, the right to preserve the stream 'in its natural  
24 status and keep it a free-flowing stream."<sup>\*\*\*\*\*</sup>/ Counsel, however,  
25 misconstrue our efforts to set forth the government's rights.

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27 <sup>\*/</sup> DOE brief, p. 19  
28 <sup>\*\*/</sup> DOE brief, p. 58  
29 <sup>\*\*\*</sup>/ DOE brief, p. 20  
30 <sup>\*\*\*\*</sup>/ DOE brief, p. 23  
31 <sup>\*\*\*\*\*</sup>/ DOE brief, pp. 3, 16  
32

1 From the very outset of this litigation, the government and the  
2 tribe have made it absolutely clear that their major concern and  
3 objective is to preserve Chamokane Creek, (Amended Complaint, p. 4;  
4 Tr. 677, 700, 732, 781, 796; PE-37). The irrigation right was  
5 sought simultaneously for three reasons: (1) so that the tribe  
6 would be in a position to irrigate Chamokane Creek basin land  
7 with water in excess of that needed for minimum flow should the  
8 need arise; (2) so that the tribe would be able to irrigate all  
9 irrigable land in the basin if conditions should ever change so  
10 that a minimum flow was no longer possible or practical to maintain  
11 and (3) so that the tribe would be in a position to irrigate all  
12 irrigable land if this court or an appellate court should find  
13 that no right exists to maintain a minimum flow. It should be noted  
14 that the tribe has consistently taken the position that if it  
15 cannot maintain a minimum flow in Chamokane Creek, it will utilize  
16 the creek for agricultural development itself rather than let the  
17 defendants dry it up. (Tr. 835)

18 The defendants attempt to turn this most reasonable and  
19 beneficial approach against the plaintiffs. They argue that since  
20 the tribe wants to maintain the creek in its natural state and  
21 doesn't currently plan to use the water for irrigation, there can  
22 be no irrigation right. Further, since there can be no federal  
23 reserved right for minimum flow (or if there can, none was intended  
24 here) there is no minimum flow right either. Thus, the defendants  
25 would turn the tribe's plan for the use of Chamokane Creek which  
26 benefits everyone into a windfall for the defendants and the con-  
27 sequent destruction of one of eastern Washington's most beautiful  
28 streams.

29 A federal reserved water right for an Indian reservation  
30 does not in any way turn on the tribe's present plans for the  
31 reservation or lack thereof. Nor does it turn on whether or not  
32

1 the tribe really "wants" to utilize the water consumptively or the  
2 potential availability of another source. The existence of the  
3 right, its nature and its extent is solely determined by the amount  
4 of water needed to accomplish the purpose of the reservation.

5 Cappaert v. United States, supra, 426 U.S. at 138.

6 Natural Resources also argues that following Winters v.  
7 United States, supra, and Arizona v. California, supra, there must  
8 be some showing that "absence of water renders the Spokane reserva-  
9 tion lands 'valueless'" or "that water from the river would be  
10 essential to the life of the Indian people."<sup>\*</sup>/ Whether or not an  
11 absence of the water sought would render the reservation valueless  
12 and uninhabitable is not nor has it ever been the test of a  
13 reserved water right in any of the cases on the subject. The test  
14 is simply whether the reservation of water was needed to accomplish  
15 the purposes of the reservation. Cappaert v. United States, supra,  
16 426 U.S. at 138. Indeed, it would be ironic if the United States  
17 could only reserve water if its absence rendered the land "valueless  
18 and uninhabitable" while the defendants could appropriate as much  
19 water as they desire. Surely the Federal Government, in creating  
20 Indian reservations, did not intend to condemn its Indian people to  
21 the bare subsistence level that would result from such minimal  
22 water rights.

23 Natural Resources further asserts that plaintiffs get no  
24 water right to Chamokane Creek because "[t]here is no evidence of  
25 historical dependence on a fishery in Chamokane Creek for subsistence  
26 by Spokane Indians."<sup>\*\*</sup>/ Counsel is mistaken both as to the law and  
27 as to the facts. The test is not whether the fish found in Chamokane  
28 Creek either were or are "an indispensable or even important part  
29 of Spokane tribal subsistence." The test of the implied reservation is  
30

31 

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\*/ DNR brief, p. 17

32 \*\*/ DNR brief, p. 19

1 simply whether this was a "source of food which might be available  
2 on their reservation." United States v. Finch, supra, 548 F.2d at  
3 832. In any event, there is ample evidence in the record to the  
4 effect that Chamokane Creek has always been important to the  
5 Spokane Tribe as a source of food, as a place of recreation and  
6 for esthetic purposes.\*/

- 7 3. The quantification of known reserved  
8 water rights does not preclude provisions  
9 in the decree for future uses.

10 In this case, the United States and the Spokane Tribe  
11 have requested that the final decree contain a provision allowing  
12 modification to meet the future needs of the Indians.\*\*/ Ecology  
13 agrees that "[i]t is accepted law that reserved rights extend not  
14 just to meet existing needs of the tribe, but future needs as  
15 well."\*\*\*/ They also concede that a decree in a case like this  
16 can be left open for future modification. They argue, however, that  
17 the government and the tribe cannot have a decree based on both  
18 irrigable acreage and future needs. According to them, the irrigable  
19 acreage standard utilized by the Supreme Court in Arizona v.  
20 California was in lieu of the usual future modification provision.  
21 They reason that the unique circumstances of that case (i.e. a  
22 final adjudication of rights in the Colorado River Basin) mandated  
23 that some sort of outside limit be placed on Indian rights. If a  
24 decree is to contain a future modification provision, however, they  
25 feel that there is no reason to set any "outside limits." In other  
26 words, they would find the concepts of irrigable acreage and future  
27 modification to be mutually exclusive.

28  
29 \*/ US brief, pp. 16-39

30 \*\*/ US brief, pp. 63-66

31 \*\*\*/ DOE brief, p. 27



1           We disagree. It is true that in a sense, Arizona v.  
2 California was a unique case both because of the forum (it was an  
3 original action in the Supreme Court) and the scope of the action  
4 (allocation of the waters of the Colorado River).<sup>\*/</sup> Neither the  
5 uniqueness of the circumstances, however, nor the fact that the  
6 court wanted to "finalize" the case in any way qualify the fact  
7 that the Court held that where one of the purposes of a reservation  
8 was agricultural development, there was impliedly reserved sufficient  
9 water to irrigate all irrigable acreage. 373 U.S. 600-601

10           We feel that in water adjudications like the one before  
11 this court, it is incumbent on the United States and the tribe to  
12 make a good faith effort to quantify all of the reserved rights of  
13 which they have knowledge. This approach benefits the government  
14 because it creates certainty as to the general extent of the reserved  
15 rights and, therefore, promotes the efficient planning of develop-  
16 ment while at the same time it benefits the junior water users  
17 because they too know the general extent of the reserved right and  
18 can proceed with their own investment and development with a certain  
19 sense of security.

20           Accordingly, the United States and the tribe have set  
21 forth all of the claims to the waters of Chamokane Creek of which  
22 they are currently aware. We are not, however, able to foresee  
23 what the water needs of the Spokane Tribe will be 100 or 1,000  
24 years from now. Therefore, it remains absolutely essential that  
25 this court provide for a decree which will be modifiable whenever  
26 there are increased demands for water on the reservation.

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30  
31 <sup>\*/</sup> See our discussion of Arizona v. California, US brief,  
32 pp. 65-66.

1 4. The existence of federal reserved  
2 water rights does not depend on a  
3 "balancing of the equities."

4 In its brief, defendant Boise Cascade advances the argu-  
5 ment that "a thorough analysis of the facts in the cases invoking  
6 the implied reservation doctrine establishes that they are based  
7 upon the concept of necessity requiring an examination of the  
8 competing interests involved."<sup>\*/</sup> They then go on to argue that the  
9 "unique status of Boise Cascade in this case requires that the  
10 implied reservation doctrine give way to a more compelling private  
11 interest."<sup>\*\*/</sup>

12 This argument was recently rejected by the Supreme Court  
13 in the Cappaert case:

14 Nevada argues that the cases establish-  
15 ing the doctrine of federally reserved  
16 water rights articulate an equitable  
17 doctrine calling for a balancing of  
18 competing interests. However, an exam-  
19 ination of those cases shows they do not  
20 analyze the doctrine in terms of a  
21 balancing test. For example, in Winters  
22 v. United States, supra, the Court did  
23 mention the use made of the water by  
24 the upstream landowners in sustaining  
25 an injunction barring their diversions  
26 of the water. The "Statement of the  
27 Case" in Winters notes that the upstream  
28 users were homesteaders who had invested  
29 heavily in dams to divert the water to  
30 irrigate their land, not an unimportant  
31 interest. The Court held that when the  
32 Federal Government reserves land, by  
implication it reserves water rights  
sufficient to accomplish the purposes  
of the reservation.<sup>4/</sup> 426 U.S. at 138-139

Footnote 4 concluded that:

4/ Nevada is asking, in effect, that the  
Court overrule Arizona v. California, 373 U.S.  
546 (1963), and United States v. District  
Court for the County of Eagle, 401 U.S. 520  
(1971), to the extent that they hold that

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30 <sup>\*/</sup> Boise Cascade brief, p. 5-6

31 <sup>\*\*/</sup> Boise Cascade brief, p. 8

1 the implied reservation doctrine applies to  
2 all federal enclaves since in so holding  
3 those cases did not balance the "competing  
4 equities." Brief for Nevada, 15. However,  
5 since balancing the equities is not the test,  
6 those cases need not be disturbed. [Emphasis  
7 added]

8 Accordingly, the "balancing of the equities" argument must be  
9 rejected here.

10 It should be noted that Boise Cascade also states that  
11 "[t]he instant case presents a clear conflict between a federal  
12 and private right . . . ."<sup>\*/</sup> While this statement is perhaps of  
13 no great importance to the final outcome of this case, it emphasizes  
14 the general lack of understanding by counsel for the defendants  
15 and by the public in general of the nature of Indian property  
16 rights which are held in trust by the United States. Such rights  
17 are not "public" rights or "federal" rights in the same sense as  
18 rights which attach to national parks, national forests or public  
19 lands. They are and always have been private rights with the  
20 United States government holding title as trustee and the Indians  
21 holding the beneficial ownership. As private property rights, they  
22 deserve the same protection and respect that the defendants here  
23 want for their rights. The sooner the State of Washington and her  
24 citizens recognize this basic fact, the better for all concerned.

25 B. The Record in this Case Supports the Claims of the  
26 United States and the Spokane Tribe.

- 27 1. The defendants misunderstand the  
28 factual test of reserved water rights.

29 At the outset, Ecology correctly states that "the founda-  
30 tion of all reserved rights is intent, express or implied."<sup>\*\*/</sup>

31 <sup>\*/</sup> Boise Cascade brief, p. 6

32 <sup>\*\*/</sup> DOE brief, p. 25

1 They then, however, seem to suggest that implied intent does not  
2 satisfy the requirement at all but rather that the intent to  
3 reserve the water claimed must be shown to have been express. For  
4 example, with regard to the plaintiffs' claims to ground water,  
5 they say "[u]sing the standard set forth by the Ninth Circuit that  
6 the parties 'know' of the implied reservation, it is difficult to  
7 presume knowledge of hidden, underground waters."<sup>\*</sup>/ Ecology also  
8 states that "the record does not show clearly which sources of  
9 water the federal government intended to tap to fulfill the purposes  
10 of the reservation."<sup>\*\*</sup>/

11 No court has ever held that the test of a reserved right  
12 is actual or express intent to reserve. The case law is to the  
13 opposite effect. In Winters v. United States, 207 U.S. 564 (1908),  
14 the Court found that there was "a conflict of implications"<sup>\*\*\*</sup>/ and  
15 resolved that conflict in favor of a reserved water right for the  
16 Fort Belknap Reservation. There had been no express reservation  
17 of water.

18 Other cases have set forth explicitly the factors to be  
19 considered in determining the nature and extent of a reservation  
20 of federal rights. In Alaska Pacific Fisheries v. United States,  
21 248 U.S. 78, 87 (1918) the Court states:

22 [I]t is important, in approaching a  
23 solution of the question stated, to have  
24 in mind the circumstances in which the  
25 reservation was created - the power of  
26 Congress in the premises, the location  
27 and character of the islands, the situa-  
28 tion and needs of the Indians and the  
29 object to be attained.

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29 <sup>\*</sup>/ DOE brief, p. 26

30 <sup>\*\*</sup>/ Id.

31 <sup>\*\*\*</sup>/ 207 U.S. at 576

1 See also Moore v. United States, 157 F.2d 760, 762 (C.A. 9, 1946)  
2 cert. den. 330 U.S. 827.

3 United States v. Walker River Irr. Dist., 104 F.2d 334  
4 (C.A. 9, 1939) is directly on point. In that case, the court first  
5 noted that:

6 When the lands were set apart for Indian  
7 purposes there was no express reservation  
8 of the flow of the stream; but it is the  
9 position of the Government that there was  
an implied reservation of the water. 104  
F.2d at 335.

10 The court held that the "basic question for determination was one  
11 of intent - whether the waters of the stream were intended to be  
12 reserved for the use of the Indians, or whether the lands only were  
13 reserved." 104 F.2d at 336. The court found that the intent was  
14 to be arrived at "by taking account of the circumstances, the situa-  
15 tion and needs of the Indians and the purpose for which the lands  
16 had been reserved." Id.

17 The thrust of the above-cited cases, as well as the other  
18 cases in which courts have found federal reserved water rights to  
19 exist for the benefit of Indians, is that the test of a valid reser-  
20 vation of water rights is whether previously unappropriated waters  
21 appurtenant to the reservation were necessary to accomplish the  
22 purposes for which the reservation was created. No case can be  
23 found in which the existence of the right turned on an actual  
24 knowledge on the part of the United States as to the existence of  
25 the body of water in question. In Tweedy v. Texas Co., 286 F.Supp.  
26 383 (USDC, Montana, 1968) the court noted that:

27 The Winters case dealt only with the  
28 surface water, but the same implications  
29 which led the Supreme Court to hold that  
30 surface waters had been reserved would  
31 apply to underground waters as well. The  
32 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. 286  
F.Supp. at 385

1 Finally, no showing is required that the Federal Government intended  
2 to reserve water from one source instead of another. It is  
3 sufficient that the water claimed is located so as to be the most  
4 practical source for satisfaction of the Indians' requirements.

- 5  
6 2. The evidence clearly establishes an  
7 intent to reserve sufficient water  
8 to preserve and protect Chamokane Creek  
9 and its fishery.

10 In our opening brief, we discussed at length the evidence  
11 which supports our contention that the United States and the  
12 Spokane Tribe intended to reserve sufficient water to preserve  
13 and protect Chamokane Creek and its fishery. See US brief, pp. 10-  
14 11, 16-22. The defendants argue that there was no such intention.  
15 The Department of Ecology makes the more reasoned and reasonable  
16 argument though it is erroneous. Ecology "acknowledges that fishing  
17 may have been a purpose of the reservation and water impliedly  
18 reserved for that purpose. However, the record demonstrates that  
19 except for perhaps a de minimus amount, the Spokanes' fishery was  
20 not based on Chamokane Creek."<sup>\*</sup>/ They also argue that the fact  
21 that the eastern boundary of the reservation was drawn along the  
22 east bank of Chamokane Creek is not indicative of any intent to  
23 reserve the creek's water.

24 As we pointed out above, there is no requirement that  
25 the Chamokane Creek fishery must have been a large scale fishery  
26 or one upon which the Spokane Tribe depended for its livelihood.  
27 It is enough that it was a source of food available on the reser-  
28 vation. United States v. Finch, supra, 548 F.2d at 832. Further,  
29 the inclusion of the entire creek within the boundaries of the  
30 reservation was intentional and clearly reflects the recognized  
31 importance of the creek to the tribe. The fact that the Spokane

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32 <sup>\*</sup>/ DOE brief, p. 20

1 and Columbia Rivers were also included within the reservation only  
2 indicates that they too were recognized as important to the Indians.  
3 It is interesting that nowhere in their briefs do the defendants  
4 ever answer the question which arises once they argue that the  
5 placing of the boundary line is irrelevant to the purpose of the  
6 reservation: why did the Federal Government place the boundary line  
7 on the far side of Chamokane Creek rather than in the middle of  
8 the stream as it usually did? This court can take judicial notice  
9 of the fact that where rivers or streams were utilized by the  
10 government as boundaries of Indian reservations, the line was  
11 normally drawn in the center of the stream. See, for example,  
12 Winters v. United States, supra, 207 U.S. at 565 (boundary of Fort  
13 Belknap Reservation was middle of Milk River). If that is the  
14 case, then there must have been some reason that the normal procedure  
15 was not followed on the Spokane Reservation. That reason is  
16 self-evident. Chamokane Creek was of recognized importance to the  
17 tribe, hence, it was intended that the creek be included as part  
18 of the reservation. If it were intended that the creek be part of  
19 the reservation, then it must follow that there was an intent that  
20 the creek be preserved.

21           If the Department of Ecology's position is at least  
22 arguable (though incorrect), that of the Department of Natural  
23 Resources is absurd. For the most part, they rely on some sort  
24 of a collateral estoppel argument that the findings of fact in  
25 the Spokane Tribe's claims case now serve to estop the government  
26 and the tribe from claiming a reserved right in Chamokane Creek.  
27 Section I C, below, is devoted to a general discussion of the  
28 effect of the Claims Commission judgment on the case but some  
29 discussion is warranted here since it concerns the factual question  
30 of whether or not the government and the tribe intended to reserve  
31 Chamokane Creek as a fishery.  
32

1 First of all, Natural Resources quotes from page 16 of  
2 our opening brief<sup>\*/</sup> where we assert that the Spokane Tribe was and  
3 is a fishing people and that the site of the Spokane Reservation  
4 was selected because of the excellent fishing in the Columbia River,  
5 Spokane River and Chamokane Creek. DNR then says that "These  
6 statements are false"<sup>\*\*/</sup> and that findings of fact nos. 23 and 24  
7 from the Spokane Tribe's claims case "believe them". The findings  
8 are then quoted. A reading of these findings, however, reveals  
9 that they are consistent with and directly support the government's  
10 contentions. Finding No. 24, for example, contains the statement  
11 that "From June to October the Spokanes fished the Columbia and  
12 Spokane Rivers . . . ."<sup>\*\*\*/</sup> How can a tribe fish for five months  
13 of the year and not be considered a "fishing people"? DNR also  
14 argues that there is nothing in the Claims Commission findings of  
15 fact regarding fishing in Chamokane Creek, hence, such fishing  
16 must not have existed. The claims case, however, dealt with only  
17 aboriginal areas which had been ceded to the United States, not  
18 with areas retained by the tribe for its reservation. 163 C.Cls.  
19 at 61. Since the Chamokane Creek fishery is within the reservation,  
20 it follows that it was not relevant to the claims case.

21 In our brief, we also substantiated the need for a minimum  
22 flow of 30 cfs in Chamokane Creek in order to preserve and maintain  
23 the fishery and the creek's recreational and esthetic values. US  
24 brief, pp. 35-39. See also Spokane Tribe's brief, pp. 81-85. The  
25 Department of Ecology, however, "contends not only that the evidence  
26 does not show that a 30 cfs minimum flow is necessary but that a  
27 20 cfs flow fulfills the purpose of the reservation and more."<sup>\*\*\*\*/</sup>  
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30 <sup>\*/</sup> DNR brief, p. 18

31 <sup>\*\*/</sup> Id.

32 <sup>\*\*\*/</sup> Further, in The Spokane Tribe of Indians, et al. v. United States, 163 C.Cls. 58, 61 (1963), the court noted: "The Spokane Indians were a land-using and fishing group . . . ." [Emphasis added]

<sup>\*\*\*\*/</sup> DOE brief, p. 23



1 It is difficult to take the Department of Ecology seriously. As  
2 the court will recall, two witnesses testified with regard to the  
3 biological aspects and needs of the Chamokane Creek fishery. Mr.  
4 Richard J. Navarre, Assistant Program Manager of the Northwest  
5 Fisheries Program, United States Fish and Wildlife Service testified  
6 for the United States and the Spokane Tribe. Mr. Richard R. Simon,  
7 Regional Fisheries Biologist for the Washington State Department  
8 of Game testified for the defendants. The difference between the  
9 testimony of these two men in terms of actual knowledge of the  
10 Chamokane Creek fishery is striking.

11 Mr. Navarre conducted a serious, scientific study of the  
12 stream and its fishery. He first obtained all of the background  
13 information he could find on Chamokane Creek. (Tr. 424) He  
14 actually visited the study area a total of nine separate times.  
15 (Tr. 484) He walked the stream (Tr. 428, 433) and made numerous  
16 measurements of temperature, chemistry, food availability and fish  
17 content (Tr. 430-450). He produced a written report of his findings.  
18 (PE-64).

19 Mr. Simon, on the other hand, did not actually examine  
20 Chamokane Creek (Tr. 618). His "expertise" was limited to reviewing  
21 Mr. Navarre's study, listening to Mr. Navarre's testimony and giving  
22 both his critique. (Tr. 592)

23 In terms of substance, we believe that the best review  
24 of the evidence regarding the Chamokane Creek fishery is found in  
25 pages 35-39 of our opening brief and pages 81-85 of the tribe's  
26 brief. Ecology presents a short "review" of the evidence on  
27 pages 24-25 of their brief. Their chief arguments against a 30 cfs  
28 minimum flow might be summarized and answered as follows.

29 First, Ecology seems to argue that the water temperature  
30 problem only occurs below the falls and that since the area below  
31 the falls is only "one-sixth" of the fishery, the overall adverse  
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1 effect is minor and thus the 30 cfs is not justifiable. Ecology  
2 misunderstands the evidence. The area of the fishery below the  
3 falls is closer to two miles in length than the one mile suggested  
4 by defendants (Tr. 533). This is nearly one-third of the total  
5 fishery and is potentially the main fishing area due to the propen-  
6 sity of the trout to end up in that section of the stream. That  
7 area of the stream also has more potential for recreation develop-  
8 ment than the terrain above the falls. Further, the 30 cfs require-  
9 ment is not tied solely to temperature requirements. This minimum  
10 flow is also required to protect the food production areas in the  
11 entire creek and because more water means more fish production capac-  
12 ity in terms of fish per acre-foot (Tr. 519).

13 Ecology also argues that while there may be certain "minor"  
14 adverse effects in fish when exposed to prolonged temperatures in  
15 excess of 68°, they doubt if the effect is serious enough to mandate  
16 a minimum flow requirement.\*/ The evidence, however, indicates  
17 that the higher than desirable water temperatures which presently  
18 exist in lower Chamokane Creek, have already had a major adverse  
19 impact on the quality and quantity of the fishery. There is, for  
20 example, a noticeable lack of trout in that area of the creek as  
21 a result of the excessive water temperature in spite of the existence  
22 of pools and an abundant food supply. (Tr. 439, 502, 519)

23 Finally, Ecology argues that a minimum flow of 20 cfs is  
24 adequate to protect the fishery and states that they "would have  
25 no objection to the entry of a minimum flow for such uses based  
26 upon State law."<sup>\*\*/</sup> There is, however, absolutely nothing in the  
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28 \*/ In fact, they seem to indicate that temperature ranges above  
29 68° are "characteristic of all fisheries." No citation to  
30 the record is offered in support of this statement.

31 \*\*/ DOE brief, p. 59

1 record to support the 20 cfs flow figure. In fact, as we pointed  
2 out in our opening brief, Mr. Don Earnest, Regional Fisheries Biolo-  
3 gist for the Washington State Department of Game stated in a letter  
4 dated August 18, 1969, that the 20 cfs minimum flow proposed by the  
5 state was "of course, an arbitrary one." (DE-3) In sharp contrast,  
6 the record is replete with evidence sustaining the 30 cfs figure  
7 proposed by the government and the tribe. See US brief, pp. 35-39

8           The priority date for the 30 cfs minimum flow in lower  
9 Chamokane Creek is time immemorial or August 18, 1877, at the  
10 latest.<sup>\*/</sup> Department of Natural Resources argues that a time  
11 immemorial priority date is impossible because "original Indian  
12 title to lands over which the Upper, Middle and Lower bands of  
13 Spokanes formerly roamed was extinguished by the Government on  
14 July 13, 1892."<sup>\*\*/</sup> As we pointed out above, the cession of land  
15 by the Indians to the United States did not include the land within  
16 the exterior boundaries of the Spokane Reservation. The Spokane  
17 Tribe of Indians, et al. v. United States, 163 C.Cls. 58, 61 (1963).  
18 Therefore, the Claims Commission judgment has nothing to do with  
19 the extent to which aboriginal rights continue to exist on the  
20 reservation. DNR also argues that the date of creation of the  
21 Spokane Reservation fixes the priority date for any Winters right.<sup>\*\*\*/</sup>  
22 They perceive the date of creation to be 1881, the date of the  
23 issuance of the Executive order. The evidence in the case proves  
24 that the Spokane Reservation was created on August 18, 1877. Brief  
25 of United States, pp. 10-16. DNR argues that our reliance on  
26 Northern Pac. Ry. Co. v. Wismer, 246 U.S. 283 (1918) is misplaced.  
27 They seem to think that Wismer is unreliable "because it was decided  
28 on stipulated and incomplete facts."<sup>\*\*\*\*/</sup> The fact of the matter  
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30 \*/ US brief, p. 39

31 \*\*/ DNR brief, pp. 21-22

32 \*\*\*/ Id., p. 22

\*\*\*\*/ DNR brief, p. 24

1 is that Wisner, like any other lawsuit which is tried in a federal  
2 district court, heard by the court of appeals and finally reviewed  
3 by the United States Supreme Court, was handled by competent counsel  
4 who were engaged in meaningful adversary proceedings. It is true  
5 that the case was decided on stipulated facts. DNR seems to think  
6 that such a stipulation somehow taints the judgment and opinion of  
7 the court. The truth is that the district court also had before  
8 it extensive documentary evidence concerning the creation of the  
9 reservation. The transcript of the record in the case<sup>\*/</sup> as filed  
10 with the United States Supreme Court (Case No. 969, Oct. Term, 1915)  
11 lists the following documentary evidence:

12 Plaintiff's Exhibits

13 Exhibit 1: Affidavit of Publication  
14 dated September 7, 1910.

15 Defendants' Exhibits

16 Exhibit A: Indian Agreement in Council  
17 dated August 18, 1877.

18 Exhibit B: Order Directing Protection of  
19 Certain Territory against  
Settlement by others than  
Indians dated September 3, 1880.

20 Exhibit C: Executive Order of January 18,  
21 1881.

22 Exhibit D: Decision of Secretary of the  
Interior dated March 7, 1910.

23 Exhibit E: Map

24 Exhibit F: Excerpt from Report of Commis-  
25 sioner of Indian Affairs.

26 Exhibit G: Letter dated May 7, 1877, from  
27 Indian Commissioner to Indian  
Inspector.

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29 <sup>\*/</sup> A copy of the transcript of the record, as well as the briefs  
30 of counsel before the Supreme Court, is in the possession  
31 of the attorneys for the United States and copies will be made  
32 available to opposing counsel or the court upon request.

1 Defendants' Exhibits con't

- 2 Exhibit H: Excerpts from Record of Council  
3 held with Indians on August 16,  
4 through 18, 1877.  
5  
6 Excerpts from Report of Col.  
7 Watkins, dated Lewiston, Idaho,  
8 August 23, 1877.  
9  
10 Exhibit I: Excerpt from letter, dated  
11 August 18, 1877, from Inspector  
12 Watkins to General Howard.  
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14 Exhibit J: Excerpts from letter dated  
15 August 18, 1877, from Col.  
16 Wheaton to General Horace.  
17  
18 Exhibit K: Telegram dated August 23, 1877,  
19 from Wilkinson to Captain Sladen.  
20  
21 Exhibit L: Letter dated, December 29, 1877,  
22 from Commissioner to Secretary  
23 of the Interior.  
24  
25 Exhibit M: Letter, dated September 1, 1880,  
26 from War Department to Secretary  
27 of the Interior, etc.  
28  
29 Exhibit N: Senate Record.  
30  
31 Exhibit O: Order directing protection of  
32 certain territory against settle-  
ment by other than Indians etc.,  
dated September 3, 1880.  
33  
34 Exhibit P: Allotment of Isabel Moses.  
35  
36 Exhibit Q: Excerpt from Report of Commis-  
37 sioner of Indian Affairs for 1879.  
38  
39 Excerpt from Reports of Indian  
40 Commissioner for 1880 and 1881.

41 We also invite the court's attention to the ninth circuit's opinion  
42 in Wismer which is found at 230 Fed. 591 (C.A. 9, 1916). We have  
43 recited the above only to put to rest DNR's absurd contention that  
44 somehow Wismer is not good authority. That case turned on the  
45 date of the creation of the Spokane Reservation. It is difficult  
46 to believe that counsel for the parties to that case did not put  
47 forth their best efforts to win the case for their respective  
48 clients.\*/ On the other hand, DNR relies on the Claims Commission

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\*/ It should be noted that while DNR seems to criticize the efforts  
of counsel in Wismer, they presented very little in the way of  
historical evidence in this case. See DE-28 to DE-30.

1 findings to support the 1881 date. The actual date of the creation  
2 of the reservation was not, however, an issue before the Claims  
3 Commission and nothing in the findings of fact mitigates against  
4 the 1877 date. In fact, the findings support the August 18, 1877  
5 date. According to the findings of the Claims Commission, on  
6 August 18, 1877, the chiefs and headmen of the Spokane Tribe signed  
7 an instrument "agreeing on behalf of their people to accept and by  
8 November 1, 1877, go upon a tract of land north of Spokane River"  
9 9 Ind. Cl. Comm. at 240. Of extreme importance is finding no. 11  
10 (9 Ind. Cl. Comm. at 242) which states:

11 Minutes of the 1877 council, the treaty  
12 of August 18, 1877, and the report of  
13 Inspector E.C. Watkins disclose that the  
14 treaty of August 18, 1877, was intended  
15 to bind the Spokane Tribe. These instru-  
16 ments and the Executive Order of January 18,  
17 1881, disclose that the reservation established  
by that Order was for the use and occupancy  
of the Spokane Tribe. Throughout the 1877  
council the Spokane Tribe was represented  
by its head or principal chief, Garry, and  
by lesser chiefs.

18 In short, the evidence in this case, as well as the Supreme Court's  
19 decision in Wismer, are conclusive on the issue of the date the  
20 Spokane Reservation was created. It was August 18, 1877.

21 3. The United States and the Spokane  
22 Tribe reserved sufficient water to  
irrigate the irrigable acreage.

23 We contend that the government and the tribe are entitled  
24 to a maximum of 25,380 acre-feet of water per year to irrigate  
25 8,460 acres of land with a priority date of August 18, 1877. See  
26 US brief, pp. 40-63. The defendants agree that agricultural  
27 development was one of the purposes of the reservation.\*/  
28 Through a series of jurisprudential gymnastics, cleverly disguised as  
29 legal arguments, however, they deny that water was reserved from  
30 Chamokane Creek for that purpose. While we feel that our opening  
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32 \*/ DOE brief, p. 18; DNR brief, p. 15

1 brief, as well as that of the tribe, adequately deals with these  
2 arguments, we will address each of them briefly.

3 Defendants' main argument appears to be that any land  
4 classified as "timberland" under the Act of May 29, 1908, cannot  
5 now be considered as irrigable acreage for water right purposes.\*/  
6 A complete discussion of that act and its effect on the Spokane  
7 Reservation appears at pages 47 to 50 of our opening brief. It  
8 is quite clear from that discussion that the 1908 legislation has  
9 absolutely nothing whatsoever to do with the existence of reserved  
10 water rights for the land in question. The 1908 Act had a very  
11 narrow objective: to provide a mechanism whereby a limited amount  
12 of land on the Spokane Reservation would be made available to non-  
13 Indians for settlement. The method chosen for selecting the land  
14 to be opened was a simple one. A specially appointed commission  
15 surveyed the area, determined which land had timber suitable for  
16 a timber reserve and determined which of the remainder was then  
17 suitable for agricultural development. The land declared suitable  
18 for agricultural development was then opened for homesteading.  
19 The point is that the entire procedure was created for a specific,  
20 limited purpose and was based entirely on the condition of the land  
21 in 1908. Nothing in the act suggests that Congress intended to  
22 terminate reserved water rights with the 1908 Act.\*\*/ The language  
23 of the act suggests just the contrary: "nothing in this Act shall  
24 be construed to deprive said Indians of the Spokane Indian Reser-  
25 vation, in the State of Washington, of any benefits to which they  
26 are entitled under existing treaties or agreements not inconsistent  
27

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28 \*/ DOE brief, p. 29; DNR brief, p. 29

29 \*\*/ The reserved water rights sought here came into existence with  
30 the creation of the reservation in 1877 (or time immemorial),  
31 this suit merely asks judicial recognition of the rights.

1 with the provisions of this Act." [Emphasis added]. The fact that  
2 the land in question was covered by timber in 1908 (or today) has  
3 nothing to do with whether or not a water right exists to irrigate  
4 it. The purpose of the reservation is determined as of its date  
5 of creation. One of the purposes of this reservation was agricul-  
6 tural development. (PE-63). Where a purpose of a reservation was  
7 for agricultural development, there is an implied intent to also  
8 reserve sufficient water to irrigate all irrigable acreage.

9 Arizona v. California, 373 U.S. 546 (1963). To establish the  
10 irrigable acreage, it need only be shown that the land is arable  
11 soil to which water is delivered or can be delivered and which is  
12 or can be made capable of producing crops by the construction of  
13 those facilities necessary for sustained irrigation. Such proof  
14 is in the record. The presence of trees on the land is meaningless  
15 in terms of the reserved water right.

16 Secondly, the defendants argue that there is no showing  
17 that the government intended to irrigate from Chamokane Creek as  
18 opposed to the Spokane or Columbia Rivers.<sup>\*/</sup> No such showing of  
19 "actual intent" is required. The record evidences that the land  
20 in question is irrigable. The federal reserve right doctrine  
21 implies an intent to reserve the water necessary for this irriga-  
22 tion. An essential component of this implied reservation is that  
23 it extends to the most practical and economical source of unappro-  
24 priated water. The record in this case substantiates that Chamokane  
25 Creek is the most economical and logical source of water for irriga-  
26 tion of these lands.<sup>\*\*/</sup> As we stated earlier, it is true that the  
27 government and the tribe would rather preserve Chamokane Creek  
28 and irrigate from the Spokane River. This fact has nothing, however,  
29

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30 <sup>\*/</sup> DOE brief, p. 58

31 <sup>\*\*/</sup> See US brief, p. 45



1 to do with the implied reservation of Chamokane Creek water. We  
2 respectfully suggest that if anyone should be looking to the  
3 Spokane River for irrigation water, it is the junior users on the  
4 Chamokane Creek - the defendants here!

5 The Department of Natural Resources also argues that the  
6 government has failed to establish a reserved right for irrigable  
7 acreage because the record does not contain evidence of "a need  
8 or use for a water right on lands within the Chamokane Basin."<sup>\*/</sup>  
9 They seem to think that the United States has the burden here of  
10 showing present need and present use in order to establish a  
11 reserved water right. For this proposition, they cite Tweedy v.  
12 Texas Co., 286 F.Supp. 383 (D. Mont., 1968) and United States v.  
13 Ahtanum Irrigation District, 236 F.2d 321 (C.A. 9, 1956) cert. den.  
14 352 U.S. 988. They argue that the government had the duty to show:

15 (a) the location, point of diversion or  
16 capacity of any existing or planned with-  
17 drawal from Chamokane Creek;

18 (b) a description, irrigable area and  
19 location of reservation lands served or  
20 to be served;

21 (c) just which lands are owned by  
22 Indians under trust or fee patent;

23 (d) just which lands are owned by successors  
24 of Indian allottees;

25 (e) the quantities of water required by  
26 these lands (the duty of water for each  
27 tract.)<sup>\*\*/</sup>

28 It is probably safe to say that prior to Arizona v.  
29 California, supra, the case law was somewhat confusing as to the  
30 exact showing necessary to establish a reserved water right for  
31 agricultural purposes on an Indian reservation. The Supreme Court,  
32

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30 <sup>\*/</sup> DNR brief, p. 33

31 <sup>\*\*/</sup> DNR brief, p. 34

1 however, aided by the superb research and analysis of Special Master  
2 Rifkind, has now settled the question. The standard is irrigable  
3 acreage. Arizona v. California, supra, 373 U.S. at 600-601. Since  
4 the standard is intended to satisfy future as well as present  
5 needs, there is no requirement of present or projected use. Neither  
6 Tweedy nor Ahtanum are to the contrary and even if they were, the  
7 Supreme Court's decision would, of course, control. Tweedy was an  
8 action for damages, not a water rights adjudication. 286 F.Supp.  
9 at 383. Since the plaintiffs could not show a present use which  
10 had been interfered with by the defendants, they could prove no  
11 damages. Here we have not alleged that the defendants have inter-  
12 ferred with an irrigation use, we simply seek to establish the  
13 right.

14 United States v. Ahtanum Irrigation District, supra, was  
15 a water rights adjudication. In that case, however, the Yakima  
16 Nation had been fortunate in that the Bureau of Indian Affairs had  
17 built the Ahtanum Indian Irrigation Project many years before the  
18 suit was initiated. 236 F.2d at 327. Since the land for which  
19 the water rights were being sought was, therefore, already under  
20 irrigation the government was in a position to present evidence of  
21 actual use. The ninth circuit reviewed the government's proof and  
22 held that "[n]o more was required . . . ." 236 F.2d at 340. The  
23 court did not say that the government's proof in Ahtanum was the  
24 only method of quantifying a reserved water right.

25 In Arizona v. California, supra, the Supreme Court was  
26 confronted with a factual situation much more like the one before  
27 this Court: not all of the land for which water rights were claimed  
28 was actually under irrigation. Recognizing, however, that the  
29 right is for future use, as well as present, the Special Master  
30 and the Court found the rights to exist. An example of the findings  
31 of fact entered by the Special Master and approved by the Court for  
32 such land is that concerning the Chemehuevi Indian Reservation:

1 Findings of Fact

2 1. The Chemehuevi Indian Reservation was  
3 established by an order of withdrawal from  
4 entry made by the Secretary of the Interior  
5 dated February 2, 1907. [Footnote citing  
6 U.S. Ex. 1201]

7 2. In withdrawing lands for the Chemehuevi  
8 Indian Reservation the United States intended  
9 to reserve rights to the use of so much  
10 water from the Colorado River as would be  
11 necessary to irrigate all of the practically  
12 irrigable acreage therein and to satisfy  
13 related uses. [Footnote citing U.S. Exs.  
14 1201, 1204, 1205, 1207]

15 3. There are 1,900 acres of irrigable  
16 Reservation land all located within the  
17 State of California which, together with  
18 related uses, have a maximum annual diver-  
19 sion requirement of 11,340 acre-feet.  
20 [Footnote citing U.S. Ex. 1210] Special  
21 Master's Report, p. 267

22 There is nothing in the Special Master's report or the Supreme  
23 Court's opinion to indicate a requirement that the government show  
24 location of actual or planned point of diversion or actual usage.

25 Even assuming, for a moment, however, that Natural Resources  
26 is correct in their argument that certain evidence is required (DNR  
27 brief, p. 34), it is interesting to note that the government and  
28 the tribe have met all of the relevant evidenciary requirements:

29 <u>DNR - Suggested Requirement</u>	30 <u>U.S. and Tribe Evidence</u>
31 (a) the location, point of diversion or capacity of any existing or planned withdrawal from Chamokane Creek.	32 not relevant (see above) but in any event the withdrawal for irrigation would be by wells located on the land to be served. (Tr. 285; PE 3-6-74-29, p. 4)
33 (b) a description, irrigable area and location of reservation lands served or to be served.	34 PE-34. See US brief, p. 44.
35 (c) just which lands are owned by Indians under trust or fee patent.	36 all acreage claimed as irrigable is trust land. PE-34
37 (d) just which lands are owned by successors of Indian allottees.	38 none of the acreage claimed as irrigable is owned by a non-Indian successor to an allottee. PE-99, PE-100, PE-34.
39 (e) the quantities of water required by these lands (the duty of water for each tract).	40 3 acre-feet applied to the land during the irrigation season. Tr. 113.*

41 \*/ Ecology accepts this figure. DOE brief, p. 59

1 It is obvious from the above that DNR still believes that evidenci-  
2 ary requirements pertaining to rights acquired under state law are  
3 applicable to the establishment of federal reserved rights. That  
4 is simply not the case. Cappaert v. United States, supra, 426 U.S.  
5 at 143-146.

6 Finally, both Ecology and Natural Resources argue with  
7 our contention that the priority date for the irrigable acreage is  
8 August 18, 1877.<sup>\*/</sup> Since we have treated this question extensively  
9 in our opening brief at pages 46-63 and to some extent in this reply  
10 brief, we will not repeat our arguments here.

11  
12 C. The Department of Natural Resources Affirmative  
13 Defenses of Res Judicata, Collateral Estoppel and Payment Do Not  
14 Bar the Claims of the United States.

15 In their final brief, counsel for the Department of Natural  
16 Resources have come up with a series of most bizarre arguments  
17 concerning the Spokane Tribe's claims case: Spokane Tribe of Indians  
18 v. United States, 9 Ind. Cl. Comm. 236 (1961), affirmed in part,  
19 reversed in part 163 C.Cls. 58 (1963).<sup>\*\*/</sup> First, they argue that  
20 since the United States has extinguished the Spokane's aboriginal  
21 title to lands outside of their reservation and has compensated  
22 the tribe therefore and further since Chamokane Creek "arises" on  
23 those formerly aboriginal lands before flowing onto the reservation,  
24 that all of the tribe's rights to the water of the Creek were like-  
25 wise extinguished - even rights appurtenant to reservation land.  
26 Second, they argue that if the Spokane Tribe has any claim left  
27 to Chamokane Creek, they should take it to the Indian Claims Commis-  
28 sion. Finally, they contend that the findings of fact in the claims  
29 case have res judicata and/or collateral estoppel effect on the  
30 government's arguments here thus barring our claims.

31  
32 \*/ DOE brief, p. 59; DNR brief, p. 22

\*\*/ DNR brief, pp. 3-15

1 1. Department of Natural Resources has  
2 not properly raised these affirma-  
3 tive defenses.

4 This suit was filed on May 5, 1972. The Department of  
5 Natural Resources filed its answer to the complaint on May 4, 1973.  
6 Now, four years later, Natural Resources suddenly appears before  
7 this court urging res judicata, collateral estoppel and a payment  
8 theory. It is fundamental that the defendants here had a duty to  
9 set forth in their answers all of their affirmative defenses. Rule  
10 8(c) F.R.Civ.P. A failure to plead an affirmative defense results  
11 in the waiver of that defense and its exclusion from the case.  
12 Trio Process Corp. v. L. Goldstein's Sons, Inc., 461 F.2d 66, 74  
13 (C.A. 3, 1972) cert. den. 409 U.S. 997. Res judicata, collateral  
14 estoppel and payment are all affirmative defenses, being listed  
15 in Rule 8(c). They were not pled in DNR's answer nor the answer  
16 of any other of the defendants. They have thus been waived.

17 2. The extinguishment of aboriginal title  
18 has nothing to do with the existence  
19 of on-reservation reserved water rights.

20 Counsel for the Department of Natural Resources say that:  
21 "The nature of 'title' which the Indians possessed to the lands,  
22 waters and resources of what is now the State of Washington prior  
23 to the coming of the white man is the predicate to this case,"<sup>\*/</sup>  
24 and "[t]he question to be resolved, within the context of this  
25 suit, is whether the Spokane Tribe's aboriginal title to the lands  
26 over which they wandered has been extinguished by the United States."<sup>\*\*/</sup>  
27 Their basic argument as pointed out above, is that the Spokane's  
28 aboriginal title has been extinguished; that the Indians have been  
29 compensated; that the compensation included the loss of water rights;  
30 that Chamokane Creek arises on the aboriginal land; that, therefore,

31 <sup>\*/</sup> DNR brief, p. 3

32 <sup>\*\*/</sup> DNR brief, p. 6

1 the rights to the use of Chamokane Creek were included in the  
2 bundle of rights extinguished by the United States. This non  
3 sequitur reveals a fundamental misunderstanding of the law of water  
4 rights. Ownership of a source of a stream or river has nothing to  
5 do with the existence of downstream water rights. As the ninth  
6 circuit has said:

7           The suggestion that much of the water of  
8           the Ahtanum Creek originates off the  
9           reservation is likewise of no significance.  
10          The same thing was true of the Milk River in  
11          Montana; and it would be a novel rule of  
12          water law to limit either the riparian  
13          proprietor or the appropriator to waters which  
14          originated upon his lands or within the area  
15          of appropriation. Most streams in this portion  
16          of the country originate in the mountains and  
17          far from the lands to which their waters  
18          ultimately become appurtenant. United States  
19          v. Ahtanum Irr. Dist., 236 F.2d 321, 325  
20          (C.A. 9, 1956).

21 Indeed, if Natural Resources were correct, virtually none of the  
22 Indian reservations in the west would be entitled to water rights  
23 since the streams appurtenant thereto "arise" on formerly aboriginal  
24 land.\*/

25           It should also be pointed out that the claims case referred  
26 to above expressly dealt only with ceded aboriginal land, not with  
27 the land retained as the Spokane Reservation. 9 Ind. Cl. Comm. at  
28 236; 163 C.Cls. at 61.

29           3.    The Indian Claims Commission is not  
30           the proper forum for an assertion of  
31           a claim for water rights.

32           The Department of Natural Resources itself admits that  
33 "[b]y creation of the Indian Claims Commission in 1946, Congress  
34 established a forum to hear and determine all matters of a legal or  
35 equitable nature concerning Indian Tribal claims of loss, impairment

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36 \*/    It would seem that the Winters doctrine of reserved water  
37       rights assumes a ceding of aboriginal land, since it is a  
38       reservation doctrine.

1 or diminishment of rights to lands and resources . . . . .<sup>\*/</sup> [Empha-  
2 sis added] Neither the government nor the tribe allege any loss,  
3 impairment or diminishment of rights in this case. To the contrary,  
4 we are before this court to gain judicial recognition of the exist-  
5 ence of our rights so that they will be protected. We are certainly  
6 before the proper court. The existence of the Claims Commission is  
7 irrelevant.

8 4. The doctrines of res judicata and  
9 collateral estoppel do not bar the  
relief sought here.

10 Throughout its brief, Natural Resources urges the res  
11 judicata and collateral estoppel effect of the findings of fact  
12 entered in the Claims Commission case. See, e.g. DNR brief, pp. 11,  
13 18 and 19. As we have shown in some of the preceding portions of  
14 this brief, those findings actually support our view of the evidence  
15 in this case. That is not to be taken, however, as an admission  
16 by the government of the relevance of those findings to the litiga-  
17 tion. We doubt very much whether findings of fact entered in an  
18 Indian Claims Commission case can be used by a non-party to bind  
19 either the government or the tribe. In any event, those findings  
20 cannot be afforded res judicata or collateral estoppel effect in  
21 this proceeding.

22 Professor Moore has both defined and differentiated the  
23 doctrines of res judicata and collateral estoppel:

24 The term res judicata is often used to  
25 denote two things in respect to the  
26 effect of a valid, final judgment: (1)  
27 that such a judgment, when rendered on  
28 the merits, is an absolute bar to a  
29 subsequent action, between the same  
parties or those in privity with them,  
upon the same claim or demand; and (2)  
that such a judgment constitutes an  
estoppel, between the same parties or

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30 <sup>\*/</sup> DNR brief, p. 13  
31

1 those in privity with them, as to  
2 matters that were necessarily litigated  
3 and determined although the claims or  
4 demand in the subsequent action is  
5 different. 1B Moore's Federal Practice  
6 para. 0.405[1] (2d Ed., 1965)

7 Thus, res judicata, (1) above, has become a doctrine of "claim  
8 preclusion" while collateral estoppel, (2) above, refers to "issue  
9 preclusion." These definitions and the distinction between the  
10 doctrines reflect the approach that the Supreme Court has taken in  
11 this area. Lawlor v. National Screen Service, 349 U.S. 322, 326  
12 (1955); Cromwell v. County of Sac, 94 U.S. 351, 352 (1876).

13 It is obvious that the claim before this court (i.e. for  
14 reserved water rights appurtenant to the existing Spokane Reser-  
15 vation) is not the same claim as that before the Claims Commission  
16 (i.e. for loss of aboriginal land). Likewise, nothing in the claims  
17 case even remotely suggests that the issue of a right to the  
18 waters of Chamokane Creek was actually litigated. Thus, neither  
19 res judicata nor collateral estoppel have anything to do with the  
20 claims being asserted here.

## 21 II

22 THE STATE OF WASHINGTON HAS DEMON-  
23 STRATED NO AUTHORITY TO ISSUE PERMITS  
24 FOR THE APPROPRIATION OF WATER, TO  
25 MANAGE OR TO IN ANY WAY CONTROL THE  
26 RIGHT TO USE WATER WITHIN THE EXTERIOR  
27 BOUNDARIES OF THE SPOKANE INDIAN  
28 RESERVATION.

29 In our opening brief, we contended that the State of  
30 Washington does not have jurisdiction to manage or any way control  
31 the right to use water within the exterior boundaries of the  
32 Spokane Indian Reservation. The state disagrees. Through its  
Department of Ecology, it argues that:

- 33 1. The state recognizes the existence of  
34 federally reserved rights on the Spokane  
35 Reservation of some limited nature and  
36 that these rights, absent federal consent,  
37 are beyond the state's general govern-  
38 mental authority to regulate.



- 1           2.    The state has jurisdiction over all waters  
2           above the amount necessary to satisfy the  
3           federal reserved rights and the state has  
4           jurisdiction, at the least, over these  
5           waters located on or under non-Indian  
6           lands, whether former "allotments" or  
7           "homestead lands," within the original  
8           boundaries of the reservation.
- 9           3.    Further, state laws are applicable to  
10           reserved rights held by a non-Indian as  
11           the result of acquisition through purchase  
12           of an Indian "allotment" which has been  
13           severed from its special federal trust  
14           title status.\*/  
15

16 Ecology is correct insofar as it concedes that the state has no  
17 jurisdiction over federal reserved water rights. See, US brief,  
18 pp. 82-85. It errs, however, in its assertion of jurisdiction over  
19 any other water found on the reservation.

20           Before addressing Ecology's specific arguments, several  
21 points should be made. Throughout their brief, counsel for DOE  
22 insist on confusing the concepts of ownership of water rights and  
23 jurisdiction to control the use of water in a given area. For  
24 example, on page 14 of their brief, they make the statement:

25           the establishment of an Indian reserved  
26 right does not necessarily establish a right  
27 to use or jurisdiction over all waters flow-  
28 ing through or located within the exterior  
29 boundaries of an Indian reservation.

30 There is no doubt but that ownership of water and jurisdiction are  
31 intertwined concepts. This is especially true where, as here, one  
32 entity owns the rights to the vast majority of all of the water  
in the area. In such a situation, it is only practical that the  
water right owning governmental entity have jurisdiction or control  
over all of the water. To allow some other government to control  
a small portion can produce nothing but confusion. In a larger  
sense, however, jurisdiction is an attribute of sovereignty and  
governmental inherent power. It is in this area that the state

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\*/    DOE brief, p. 16

1 attempts to confuse the issue by trying to equate the extent of  
2 ownership with the extent of jurisdiction.\*/  
3

4 We should also point out that the very fact the State of  
5 Washington is represented by two sets of legal counsel (Ecology  
6 representing the state's governmental or "jurisdictional" interest  
7 and Natural Resources representing its proprietary or "ownership"  
8 interest) in this case refutes Ecology's attempts to equate owner-  
9 ship with jurisdiction.

10 A. The State has Shown no Congressional Authorization  
11 Allowing an Assumption of Jurisdiction Over the Waters of Chamokane  
12 Creek.

13 The United States, as trustee, and the Spokane Tribe  
14 "are not only landowning entities with extraordinarily valuable  
15 water rights, they are also sovereigns with wide-ranging governmental  
16 powers . . . within the boundaries of [the reservation]."\*\*/  
17 United States v. Mazurie, 419 U.S. 544 (1975); United States v.  
18 Kagama, 118 U.S. 375 (1886); Worcester v. Georgia, 31 U.S. 515  
19 (1832). In this connection, the courts have consistently held that  
20 the sovereignty of the United States and of the tribes will be  
21 upheld except where it has been specifically limited by Congress.  
22 McClanahan v. Arizona Tax Comm., 411 U.S. 164, 173 (1973); Oliphant  
23 v. Schlie, 544 F.2d 1007 (C.A. 9, 1976). Considerations of state  
24 versus federal/tribal jurisdiction on an Indian reservation call  
25 for a twofold analysis: "first, what the original sovereign powers  
26 of the tribes [and the United States] were, and, then, how far and  
27 in what respects these powers have been limited." Oliphant v.  
28 Schlie, supra, 544 F.2d at 1009.

29  
30 \*/ See, e.g. Ecology's "1000 acre reservation" example, DOE brief,  
31 p. 14.

32 \*\*/ Pelcyger, Indian Water Rights: Some Emerging Frontiers. 21  
Rocky Mountain Mineral Law Institute 743, 764 (1976).

1           There can be little doubt that the tribe's original  
2 sovereign powers and later those of both the tribe and the United  
3 States extended to jurisdiction over the use of water within their  
4 respective territories. Of the tribe, the Supreme Court has noted  
5 that "[t]he Indians had command of the lands and the waters -  
6 command of all their beneficial use . . . ." Winters v. United  
7 States, supra at 576, [Emphasis added]. The power of the United  
8 States was confirmed in California Oregon Power Co. v. Beaver Port-  
9 land Cement Co., 295 U.S. 142, 162 (1935) and F.P.C. v. Oregon, 349  
10 U.S. 435, 442 (1955).

11           In a bootstrapping manner, the State of Washington is  
12 contending that, in the absence of the United States citing statu-  
13 tory or decisional law specifically holding that the state does not  
14 have jurisdictional authority over waters within the boundaries of  
15 the Spokane Indian Reservation, the state is somehow automatically  
16 vested with such authority. As pointed out very clearly above, the  
17 question is not one of whether the state has been specifically  
18 precluded from exercising jurisdiction over waters within the  
19 Spokane Indian Reservation,<sup>\*/</sup> but rather one of whether the Congress  
20 of the United States has granted such jurisdiction over waters to  
21 the State of Washington. In addition to Congress' assent to  
22 state jurisdiction over waters on the reservation, we must also  
23 determine whether such jurisdiction would infringe upon the right  
24 of the Spokane Indian Tribe to regulate waters within its boundaries  
25 (see Oliphant v. Schlie, supra; Williams v. Lee, 358 U.S. 217 (1958);  
26 Bryan v. Itasca County, 426 U.S. 373 (1976) or whether such juris-  
27 diction would interfere with or impair a right granted or reserved  
28

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29           <sup>\*/</sup> The United States does contend, however, that the Secretary  
30 of the Interior's authority under 25 U.S.C. 381, under the  
31 doctrine of preemption, does preclude the state from exercising  
32 jurisdiction over waters within the Spokane Indian Reservation.

1 by federal law. See United States v. Finch, 548 F.2d 822 (C.A. 9,  
2 1976).\*/

3 The state, in support of its jurisdictional argument,  
4 also cites the case of Organized Village of Kake v. Egan, 369 U.S.  
5 69 (1964), presumably to imply that Indian tribes have lost their  
6 independent sovereignty long recognized since the Supreme Court's  
7 decision in the landmark case of Worcester v. Georgia, 31 U.S. 515  
8 (1832). A review of recent Supreme Court and other federal court  
9 decisions would clearly demonstrate otherwise. See e.g., Oliphant  
10 v. Schlie, supra; Bryan v. Itasca County, supra; United States v.  
11 Finch, supra; Williams v. Lee, supra; Moe v. Confederated Salish and  
12 Kootenai Tribes, 425 U.S. 463 (1976). Notwithstanding the holdings  
13 in these recent decisions regarding jurisdiction, however, it should  
14 be noted that the Supreme Court in McClanahan v. Arizona State Tax  
15 Commission, 411 U.S. 164 (1973) places the holding of Kake v. Egan  
16 in its proper perspective by stating:

17 In Egan, we held that "'absolute' federal  
18 jurisdiction is not invariably exclusive  
19 jurisdiction," and that this language in  
20 federal legislation did not preclude the  
21 exercise of residual state authority.  
22 But that holding came in the context of  
23 a decision concerning the fishing rights  
24 of non-reservation Indians. It did not  
25 purport to provide guidelines for the  
26 exercise of state authority in areas set  
27 aside by treaty for the exclusive use and  
28 control of Indians. [Citations omitted]  
29 [Emphasis added]

30 \*/ In this regard, the United States recognizes the existence of  
31 cases and instances in which state laws have been deemed to be  
32 applicable to non-Indians on an Indian reservation. These cases  
33 have been cited by the defendant State of Washington at page 37 of  
34 Ecology's brief. It should be strongly emphasized, however, that  
35 these cases relate primarily to the specialized area of taxation  
36 and to those instances of criminal activity in which one non-Indian  
37 is charged with an offense against another non-Indian while on the  
38 reservation. See, however, Oliphant v. Schlie, 544 F.2d 1007  
39 (C.A. 9, 1976). The United States, therefore, is of the opinion  
40 that a thorough reading of the cases cited by the defendant State  
41 of Washington will clearly demonstrate that they are inapposite to  
42 the present case and to the issue to be decided here.

1 The plain implication of this language is that "in areas set aside  
2 for the exclusive use and control of Indians" --- such as the  
3 Spokane Indian Reservation --- the State of Washington is without  
4 residual jurisdiction.

5           The State of Washington considers the case of Tulalip  
6 Tribes v. Walker dispositive of the question of the state's juris-  
7 diction over waters within the Spokane Indian Reservation.\*/ With  
8 respect to this case, it should be noted first of all that the United  
9 States was not a party to this lawsuit. Secondly, it should be  
10 noted that the primary purpose for the filing of this action was  
11 to ensure that the appropriation of waters by the Union Oil Company  
12 of California, for use in the development of an oil refinery on the  
13 Tulalip Reservation, was subject to the paramount reserved rights  
14 of the Tulalip Tribes. This concern was clearly vindicated by the  
15 tribe. Thirdly, it should be noted that the Union Oil Company of  
16 California and the Tulalip Tribes of Washington both joined as  
17 plaintiffs against the State of Washington in ensuring the desired  
18 outcome of this case. Most importantly, it must be emphasized that  
19 the "Memorandum Decision" rendered by the Honorable Judge Denney in  
20 this case does not cite or mention by reference any of the cases  
21 and statutory provisions which have been relied upon by the United  
22 States in the instant case for the proposition that the State of  
23 Washington is without jurisdictional authority over waters on the  
24 Spokane Indian Reservation. In view of the peripheral question of  
25 the state's jurisdiction in the Walker case, and in view of the  
26 court's failure to discuss its legal reasoning for its decision on  
27 such an important and complex issue, the United States contends  
28 that the Walker case is not controlling.  
29  
30  
31

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32 \*/ DOE brief, p. 46

1           In addressing the arguments made by the United States,  
2 the defendant State of Washington begins by stating that the Acts  
3 of 1866, 1870 and 1877, in addition to the case law interpreting  
4 these acts, relied upon by the United States in support of this  
5 Motion, are inapplicable to the present case.<sup>\*/</sup> The state bases  
6 this contention on the fact that these provisions relate only to  
7 the regulation of waters on "public lands" whereas the lands in  
8 question here are not "public lands". As previously mentioned, the  
9 United States agrees with the state to the extent that the lands  
10 owned by the defendants in this cause are not "public lands" within  
11 the meaning of the above-mentioned acts. As we pointed out in our  
12 brief, however, the applicability of this statutory and decisional  
13 authority to the present case lies in the fact that it is only  
14 over waters on "public lands" which the state has jurisdictional  
15 authority. Some of the lands owned by the defendants in this case  
16 are lands which were previously owned by Indians and held in trust  
17 by the United States for the benefit of such Indians. Although at  
18 the present time these lands are not Indian owned or held in trust  
19 by the United States, they are lands which remain within the exter-  
20 rior boundaries of the Spokane Indian Reservation. Additionally,  
21 it should be pointed out that these lands, as a result of their  
22 presence within the exterior boundaries of the Spokane Indian  
23 Reservation, remain susceptible to being repurchased by the Spokane  
24 Indian Tribe or its members and thereby returned to trust status.

25  
26           With respect to the plaintiff's contention that Section 4  
27 of the State Enabling Act and Article 26, Section 2 of the Washing-  
28 ton State Constitution preclude the state from exercising juris-  
29 diction over waters within the exterior boundaries of the Spokane

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30  
31 <sup>\*/</sup> DOE brief, p. 37

1 Indian Reservation, the state contends that although the "provisions  
2 of the Enabling Act and Washington Constitution bar this State  
3 from exercising authority to establish rights in real property  
4 interests, including reserved water rights . . ." (DOE brief, p. 44)  
5 the state's jurisdictional position is not in conflict with these  
6 provisions because the state asserts jurisdiction only over "surplus  
7 waters" on the reservation. Are these statements not patently  
8 contradictory? How could the State of Washington agree on the one  
9 hand that it has no authority to establish rights in real property  
10 interests, including reserved water rights<sup>\*/</sup> on the reservation and  
11 then claim jurisdiction over those waters they claim to be surplus  
12 to the needs of the Indians? By determining and regulating the  
13 "surplus waters", whatever they might be, the state is affecting  
14 the property interests of the tribe and its members on the reserva-  
15 tion. Such an ambiguous, ever-changing, and checkerboard type of  
16 jurisdictional scheme put forth by the state would create an  
17 intolerable and chaotic system of water management in the face of  
18 the Spokane Tribe's and the Secretary of the Interior's responsi-  
19 bility to ensure the equitable apportionment of waters on the  
20 reservation. The needs of the Indians and the availability of  
21 waters on the reservation change daily, thus creating the distinct  
22 possibility that jurisdictional authority predicated on "surplus  
23 waters" would be changing on a daily basis as well. Such a method  
24 of determining jurisdiction over waters on the reservation is not  
25 sound as a legal or as a practical matter.

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28 <sup>\*/</sup> It should be noted that the term "land", in a statute of  
29 general nature such as the State Enabling Act, is deemed to  
30 also include waters or waters upon the land. Holmes v. United  
31 States, 53 F.2d 960 (C.A. 10, 1931); Northside Canal Co. v. Twin-  
32 falls Canal Co., 12 F.2d 311 (D. Ida., 1926); and Anderson v.  
Spear-Morgan Livestock Company, 79 P.2d 667 (1930).

1           The State of Washington, in addressing the plaintiff's  
2 contention that Section 7 of the General Allotment Act of 1887,  
3 25 U.S.C. 381, preempts the state from exercising jurisdiction  
4 over waters on the Spokane Indian Reservation, asserts that this  
5 section of the act only applies to the distribution of waters  
6 "among individual Indians" and only for "agricultural" purposes,  
7 which the state concedes it does not have jurisdiction to regulate.  
8 It is inconceivable that the Congress of the United States intended  
9 that the secretary's authority to regulate the equitable distribu-  
10 tion of waters on a reservation would exclude the regulation of  
11 those waters used for domestic purposes, especially where such  
12 waters were necessary to sustain the lives and the livelihood of  
13 those Indians residing on their own reservation. See United States  
14 v. Finch, supra. In this same regard, it is also inconceivable that  
15 Congress, in specifically authorizing the Secretary of the Interior  
16 to regulate equitable distribution of waters on the reservation,  
17 would have intended that the Secretary would not have the authority  
18 to manage waters utilized by non-Indians on the same reservation.  
19 As a practical matter, how can the Secretary of the Interior regu-  
20 late waters equitably among the Indians on the reservation if he  
21 does not know who, where and how much water is being utilized by  
22 non-Indians on the reservation?  
23

24           B. Management and Control of the Use of Water within  
25 the Exterior Boundaries of the Spokane Indian Reservation must be  
26 within the Exclusive Jurisdiction of the United States and the  
27 Spokane Tribe.

28           We cannot over emphasize that a finding by this court  
29 that the United States and the Spokane Tribe have exclusive juris-  
30 diction over the use of water within the exterior boundaries of  
31 the Spokane Reservation does not mean that non-Indian landowners on  
32 the reservation have no right to water whatsoever. It only means



1 that the permits and certificates that they now hold are invalid.  
2 If there is indeed water above and beyond that required for the  
3 federal reserved rights then those landowners should be able to  
4 appropriate a share of that water. In California Oregon Power Co.  
5 v. Beaver Portland Cement Co., 295 U.S. 142, 155 (1935) the Supreme  
6 Court held that:

7       The effect of these acts [Homestead Act of  
8       July 26, 1866 as amended by the Act of  
9       July 9, 1970] is not limited to rights  
10       acquired before 1866. They reach into the  
11       future as well, and approve and confirm the  
12       policy of appropriation for a beneficial  
13       use, as recognized by local rules and  
14       customs, and the legislation and judicial  
15       decisions of the arid-land states as the  
16       test and measure of private rights in and  
17       to the non-navigable waters on the public  
18       domain.

19       Thus, the question presented here is not whether state  
20       substantive law governs the appropriation of water on non-Indian  
21       owned land on the reservation, but rather is one of sovereignty -  
22       which governmental entity will administer that law? The United  
23       States and the Spokane Tribe can just as well administer and regu-  
24       late non-Indians' water uses (even though some of those substantive  
25       rights may be governed by state law) as can the state itself. Since  
26       there is nothing to indicate that Congress has ever intended for  
27       the state to replace federal/tribal jurisdiction over this land,  
28       that jurisdiction must be said to remain in the United States and  
29       the tribe. McClanahan v. Arizona State Tax Commission, 411 U.S. 164,  
30       170-171 (1973).

31       Thus, there are several factors which lead to the inescap-  
32       able conclusion that the United States and the tribe have retained  
33       exclusive jurisdiction over the right to the use of the water within  
34       the exterior boundaries of the Spokane Reservation. First, state  
35       jurisdiction has been preempted by federal/tribal jurisdiction.  
36       Both the United States and the tribe originally held exclusive juris-  
37       diction on the reservation and, at least as to water rights in the

1 Chamokane Creek basin, this jurisdiction has never been taken away  
2 by Congress. In addition, it should be noted that the boundaries  
3 of the reservation were specifically drawn so as to include all of  
4 both Chamokane Creek and the Spokane River as they pass the reser-  
5 vation (PE-52). Since these waters are entirely within and a part  
6 of the reservation, state jurisdiction does not extend to them.

7 Moore v. United States, 157 F.2d 760, 764 (C.A. 9, 1946). As to  
8 the Spokane River portion of the Reservation, Congress has found  
9 it necessary to provide specifically for the non-Indian appropria-  
10 tion of water. The Act of March 3, 1905 (33 Stat. 1006) (PE-45).

11 Second, "as a matter of both logic and sound practical  
12 administration, jurisdiction must depend on the location of the  
13 property, not on the owner's race or the title status of his  
14 property." Pelcyger, Indian Water Rights: Some Emerging Frontiers,  
15 21 Rocky Mountain Mineral Law Institute, 743, 770 (1976). The  
16 Supreme Court has consistently resisted state jurisdictional argu-  
17 ments the upholding of which would have resulted in "impractical  
18 patterns of checkerboard jurisdiction". Seymour v. Superintendent,  
19 368 U.S. 351, 358 (1962); Moe v. Salish and Kootenai Tribes, 425  
20 U.S. 463, 479 (1976). The evidence indicates that on the Spokane  
21 Reservation as a whole, only 21,683 acres out of over 154,000 acres  
22 are in fee ownership (PE-100). Obviously, state jurisdiction over  
23 only some of these 21,683 acres would create precisely the type  
24 of "checkerboard jurisdiction" that the Supreme Court has sought  
25 to avoid.

26 Third, state law cannot apply to non-Indians within the  
27 reservation when it would "infringe on the right of reservation  
28 Indians to make their own laws and be ruled by them". Williams v.  
29 Lee, 358 U.S. 217, 220 (1959); Fisher v. District Court, 424 U.S.  
30 382, 386 (1976). There is hardly anything more important to a  
31 state in the arid west than its water resources. Wyoming v. Colo-  
32 rado, 259 U.S. 419, 467-468 (1922). The same is true of an Indian

1 reservation located in such a state. Winters v. United States, 208  
2 U.S. at 576. "Thus, the regulation and control of the water re-  
3 sources within the reservation would be a matter at the very core  
4 of tribal sovereignty and state impairment or infringement of those  
5 crucial sovereign rights would be difficult, if not impossible, to  
6 justify." Pelcyger, Indian Water Rights: Some Emerging Frontiers,  
7 supra at 771. The proper utilization of the water resources within  
8 the Chamokane Creek basin portion of the Spokane Reservation will  
9 undoubtedly require future administration of those resources. Sub-  
10 jecting the same water to administration by both the state and the  
11 tribe or United States, will both create confusion and inconsistency  
12 and will undermine the present federal policy of strengthening  
13 tribal self-government. Bryan v. Itasca County, 426 U.S. 373, 388  
14 (fn. 14) (1976).

15 Finally, any decision with reference to on-reservation  
16 state versus federal/tribal jurisdiction must be made against the  
17 backdrop of a continuing pattern of state disregard for Indian  
18 rights. As the Supreme Court stated in United States v. Kagama,  
19 118 U.S. 375, 383-384 (1886):

20 These Indian tribes are the wards of the  
21 nation. They are communities dependant  
22 on the United States. . . . They owe no  
23 allegiance to the States, and receive  
24 from them no protection. Because of the  
local ill feeling, the people of the  
States where they are found are often  
their deadliest enemies.

25 Unfortunately, the Supreme Court's statement, made in 1886, remains  
26 true today. The Court recently had occasion to remark that "[t]here  
27 has been recurring tension between federal and state law; state  
28 authorities have not easily accepted the notion that federal law  
29 and federal courts must be deemed the controlling considera-  
30 tions in dealing with the Indians." Oneida Indian Nation v. County  
31 of Oneida, 414 U.S. 661, 678 (1974). Of the State of Washington in  
32 particular, the Ninth Circuit, (per Burns, J. concurring) has said:

1 The record in this case, and the history  
2 set forth in the Puyallup and Antoine cases,  
3 among others, make it crystal clear that it  
4 has been recalcitrance of Washington State  
5 officials (and their vocal non-Indian com-  
6 mercial and sports fishing allies) which  
7 produced the denial of Indian rights requir-  
8 ing intervention by district court. This  
9 responsibility should neither escape notice  
10 nor be forgotten. United States v. State of  
11 Washington, 520 F.2d 676, 693 (C.A. 9, 1975)  
12 cert. den. 423 U.S. 1086.

13 The state and the other defendants no doubt feel that if  
14 it is true that Indians can expect to be unfairly treated by the  
15 state, then the converse must be true and non-Indians can expect  
16 to be unfairly treated by the tribe. But this argument has been  
17 answered in Williams v. Lee, 358 U.S. 217, 223 (1959):

18 It is immaterial that respondent is not an  
19 Indian. He was on the Reservation and the  
20 transaction with an Indian took place there.  
21 The cases in this Court have consistently  
22 guarded the authority of Indian governments  
23 over their reservations . . . . If this  
24 power is to be taken away from them, it is  
25 for Congress to do so.

26 This language was recently cited with approval in United States v.  
27 Mazurie, 419 U.S. 544, 558 (1975). The Court went on to note that,  
28 while not deciding the issue, there are potential sources of  
29 protection against arbitrary tribal action through both the courts  
30 (see 25 U.S.C. Section 1302) and the Interior Department's admin-  
31 istrative procedures. Mazurie, supra at 558 (fn. 12).

### III

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

##### A. Injunctive Relief Against the State of Washington.

32 The United States has asked this court to enjoin the  
State of Washington from issuing any more water rights certificates  
and permits within the Chamokane Creek watershed. One basis for the  
request is that the state has already allowed a vast over-appropriation  
of existing water supplies. US brief, p. 92. The other reason

1 is, as discussed above, that the state has no jurisdiction over the  
2 use of water on the Spokane Indian Reservation.

3 The Department of Ecology argues that injunctive relief  
4 should be denied because (1) it is premature; (2) the state has  
5 agreed that it will not interfere with reserved rights; and (3)  
6 there are surplus waters available.\*/

7 Counsel are mistaken as to all three points. First, the  
8 relief sought is not premature. The record in the case substanti-  
9 ates our contention that the current exercise of state-issued  
10 certificates and permits are interfering with federal reserved  
11 rights. See, US brief, pp. 77-81. At a minimum, we are entitled  
12 to injunctive relief against the state so that no further inter-  
13 ference takes place. Second, although we appreciate the state's  
14 pledge that it will never interfere with the government's reserved  
15 rights, the record, as we stated above, shows otherwise. Finally,  
16 the record is quite clear that there is no "surplus" water left to  
17 be appropriated within the Chamokane Creek watershed. Counsel for  
18 the Spokane Tribe intend to address this contention at length in  
19 their reply brief so we are content to incorporate and rely on their  
20 argument.

21  
22 B. Injunctive Relief Against the Individual Defendants.

23 In our opening brief, we discussed at length the record  
24 of this case as it pertains to the Chamokane Creek hydrology and  
25 the effect that the use of water by the defendants has on the rights  
26 of the United States and the Spokane Tribe. See US brief, pp. 70-81  
27 The Spokane Tribe did the same. See Spokane Tribe brief, pp. 65-80  
28 The defendants have virtually refused to address themselves to the  
29 evidence. The Department of Ecology's discussion of the hydrological  
30

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31 \*/ DOE brief, pp. 56-57  
32

1 facts make up less than one page of their 63 page brief.<sup>\*/</sup> They  
2 say that there is "conflicting evidence on the relationship of  
3 ground water and surface water" and that Mr. Woodward and Dr. Maddox  
4 Disagreed on the nature of that relationship. They admit that "[a]  
5 fair reading of the evidence would be that a good deal of the ground  
6 water is interlocked with the surface water on the Chamokane" but  
7 say that:

8           However, there is evidence that at least  
9           some appropriations of ground water in the  
10           Chamokane Basin have no effect on the flow  
11           of the Chamokane. (Tr. 967) Appropriations  
12           of these ground waters flowing to the east  
13           and out of the drainage could not have been  
14           reserved by the federal government. [Foot-  
15           note omitted] <sup>\*\*/</sup>

16 We agree that ground water withdrawals in the Camas Valley have no  
17 affect on our reserved water rights. All other surface and ground  
18 water withdrawals do, however, affect our rights. See US brief, pp.  
19 77-81. Further, a preponderance of the evidence demonstrates that  
20 there is no movement of ground water to the east and out of the  
21 basin. US brief, p. 74<sup>\*\*\*/</sup>

22           The only other defendant to address itself to the Chamokane  
23 Creek hydrology was Boise Cascade. See, Boise Cascade brief, pp.  
24 2-5. Boise Cascade's chief argument seems to be that since we admit  
25 that ground water withdrawals in Camas Valley have no affect on our  
26 rights, we can get no relief against this defendant. In the first

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27 <sup>\*/</sup>     DOE brief, p. 26

28 <sup>\*\*/</sup>     Id.

29 <sup>\*\*\*/</sup>    It is true that Dr. Maddox testified to "some" easterly move-  
30           ment of ground water. Perhaps the court will recall, however,  
31           that it was established upon cross-examination that Dr. Maddox  
32           had inadvertently made incorrect assumptions regarding the surface  
33           water elevations of the Hill and Newhouse wells, thus rendering his  
34           flow net incorrect and his opinions on flow direction erroneous.  
35           See generally, Tr. 925-927, 1018-1019, 1073-1074, 1194-1195, 1300-  
36           1306, 1320.

1 place, however, not all of Boise Cascade's diversion points are in  
2 Camas Valley. PE-10 shows the division line between Camas Valley  
3 and the rest of the Chamokane Creek basin (see also Tr. 37). PE-14  
4 shows the location of Boise Cascade's diversion points. The follow-  
5 ing points are not in Camas Valley hence have some affect on plain-  
6 tiff's rights: points 2, 10, 11, 12 and 13. Of the remainder, the  
7 following, although in Camas Valley, are surface diversions hence  
8 also affect our rights: points 1, 3, 4, 5, 6, 7, 8 and 14. Only  
9 point 9 is a well hence immune from injunctive relief (tr. 1268-  
10 1270).

#### 11 IV

#### 12 WATER RIGHTS OF THE DEFENDANTS

13 The Department of Natural Resources and Boise Cascade have  
14 each filed briefs in support of their claims. The other defendants  
15 have chosen not to do so, evidently relying on their state issued  
16 certificates and permits. We have reviewed the evidence in this  
17 case and believe that the following is a fair statement of the  
18 defendants' rights:

19 A. Washington State Surface Water Certificate No. 294  
20 is issued in the name of Anna E. Cartier Van Dissel for use on land  
21 north of the Spokane Indian Reservation. It has a priority date of  
22 December 4, 1925, and a maximum use of 4.0 cfs. The effective  
23 reduction in Chamokane Creek from this maximum use is 1.08 cfs.  
24 (PE-32; PE-14; DE-57)

25 B. Washington State Surface Water Certificate No. 1675  
26 is issued in the name of George Russell for use on land north of  
27 the Spokane Indian Reservation. It has a priority date of May 13,  
28 1940, and a maximum use of .01 cfs. The effective reduction in  
29 Chamokane Creek from this maximum use is .01 cfs. (PE-14; PE-32;  
30 DE-52)

1           C.    Washington State Surface Water Certificate No. 1725  
 2 is issued in the name of Chris Mickelson for use on land north of  
 3 the Spokane Indian Reservation. It has a priority date of May 15,  
 4 1940, and a maximum use of .01 cfs. The effective reduction in  
 5 Chamokane Creek from this maximum use is .01 cfs. (PE-14; PE-32;  
 6 DE-48)

7           D.    Washington State Surface Water Certificate No. 2258  
 8 is issued in the name of Fred J. Werth for use on land north of the  
 9 Spokane Indian Reservation. It has a priority date of February 12,  
 10 1945, and a maximum use of .01 cfs. The effective reduction in  
 11 Chamokane Creek from this maximum use if .01 cfs. (PE-14; PE-32;  
 12 DE-59)

13           E.    Washington State Surface Water Certificate No. 3386  
 14 is issued in the name of John A Smith for use on land east of the  
 15 Spokane Indian Reservation. It has a priority date of July 8, 1946,  
 16 and a maximum use of .02 cfs. The effective reduction in Chamokane  
 17 Creek for this maximum use is .02 cfs. (PE-14; PE-32; DE-53)

18           F.    Washington State Surface Water Certificate No. 8600  
 19 is issued in the name of M.B. Echelbarger for use on land northeast  
 20 of the Spokane Indian Reservation. It has a priority date of  
 21 October 21, 1946, and a maximum use of 1.0 cfs. The effective  
 22 reduction in Chamokane Creek from this maximum use is .27 cfs. This  
 23 surface water diversion may not be exercised when Swamp Creek recedes  
 24 to 2.0 cfs. (PE-14; PE-32; DE-41)

25           G.    Washington State Surface Water Certificate No. 4872  
 26 is issued in the name of Edward A. Franks for use on land north of  
 27 the Spokane Indian Reservation. It has a priority date of March 17,  
 28 1950, and a maximum use of .20 cfs. The effective reduction in  
 29 Chamokane Creek from this maximum use is .08 cfs. (PE-14; PE-32;  
 30 DE-43)



1           H.    Washington State Surface Water Certificate No. 6394  
2 is issued in the name of C.W. Noack for use on land north of the  
3 Spokane Indian Reservation. It has a priority date of July 21,  
4 1950, and a maximum use of .80 cfs. The effective reduction in  
5 Chamokane Creek from this maximum use is .01 cfs. (PE-14; PE-32;  
6 DE-50)

7           I.    Washington State Ground Water Certificate No. 4891A  
8 is issued in the name of Robert J. Seagle for use on land east of  
9 the Spokane Indian Reservation. It has a priority date of February  
10 1, 1951, and a stated minimum use of 1150 gallons per minute up to  
11 1400 acre-feet per year. This use has never, however, exceeded  
12 528 gallons per minute. The effective reduction in Chamokane Creek  
13 from this use is .35 cfs. (Tr. 1228; PE-14; PE-32; DE-64A; Interroga-  
14 tories answered by Seagle, Nos. 10, 11 and 12, dated July 11, 1973.)

15           J.    Washington State Ground Water Certificate No. 2768  
16 is issued in the name of Ford Development Company for use on land  
17 east of the Spokane Indian Reservation. It has a priority date of  
18 September 6, 1956, and a maximum use of 100 gallons per minute up  
19 to 160 acre-feet per year. The effective reduction in Chamokane  
20 Creek from this maximum use is .07 cfs. (PE-14; PE-32; DE-42)

21           K.    Washington State Surface Water Application No. 20248  
22 is issued in the name of Kenneth Swiger for use on land east of the  
23 Spokane Indian Reservation. It has a priority date of May 19,  
24 1967, and a maximum use of .20 cfs. The effective reduction in  
25 Chamokane Creek from this maximum use is .06 cfs. (PE-14; PE-33;  
26 DE-56)

27           L.    Washington State Ground Water Permit No. 9361 is  
28 issued in the name of James R. Newhouse for use on land east of the  
29 Spokane Indian Reservation. It has a priority date of September 17,  
30 1968, and a maximum use of 1,500 gallons per minute up to 648 acre-  
31 feet per year. The effective reduction in Chamokane Creek from  
32 this maximum use is .90 cfs. (PE-14; PE-32; PE-86)

1           M. Washington State Ground Water Permit No. 9563 is  
2 issued in the name of Peter M. Welk for use on land east of the  
3 Spokane Indian Reservation. It has a priority date of January 30,  
4 1969, and a maximum use of 50 gallons per minute up to 20 acre-feet  
5 per year. The effective reduction in Chamokane Creek from this  
6 maximum use is .04 cfs. (PE-14; PE-32; DE-58)

7           N. Washington State Ground Water Application No. 10344  
8 is issued in the name of Leonard E. Lyons for use on land east of  
9 the Spokane Indian Reservation. It has a priority date of August 6,  
10 1969, and a maximum use of 1,000 gallons per minute. The effective  
11 reduction in Chamokane Creek is .60 cfs. (PE-14; PE-33; DE-47)

12           O. Washington State Surface Water Application No. 21786  
13 is issued in the name of Robert J. Seagle for use on land east of  
14 the Spokane Indian Reservation. It has a priority date of August 25,  
15 1969, and a maximum use of .33 cfs. The effective reduction in  
16 Chamokane Creek from this maximum use is .10 cfs. (PE-14; PE-33;  
17 DE-64B)

18           P. Washington State Ground Water Application No. 10386  
19 is issued in the name of James K. Swiger for use on land east of  
20 the Spokane Indian Reservation. It has a priority date of September  
21 3, 1969, and a maximum use of 1,000 gallons per minute. The effec-  
22 tive reduction in Chamokane Creek from this maximum use is .60 cfs.  
23 (PE-14; PE-33; DE-55)

24           Q. Washington State Ground Water Application No. 10506  
25 is issued in the name of Jess Sulgrove, Jr. for use on land east of  
26 the Spokane Indian Reservation. It has a priority date of November  
27 18, 1969, and a maximum use of 2,500 gallons per minute up to 7  
28 acre-feet per year. The effective reduction in Chamokane Creek from  
29 this maximum use is 1.50 cfs. (PE-14; PE-33; DE-54)

1           R.   Washington State Ground Water Application No. 11227  
2 is issued in the names of Gust and Clara Willging for use on land  
3 east of the Spokane Indian Reservation. It has a priority date of  
4 September 11, 1970, and a maximum use of 2,000 gallons per minute  
5 up to 10 acre-feet per year. The effective reduction in Chamokane  
6 Creek from this maximum use is 1.20 cfs. (PE-14; PE-33; DE-60)

7           S.   Washington State Surface Water Application No. 22922  
8 is issued in the names of Alice M. Liepold and Frances J. Lindberg  
9 for use on land east of the Spokane Indian Reservation. It has a  
10 priority date of March 9, 1971, and a maximum use of .01 cfs. The  
11 effective reduction in Chamokane Creek from this maximum use is .01  
12 cfs. (PE-14; PE-33; DE-45)

13           T.   Washington State Ground Water Application No. 11753  
14 is issued in the names of Howard W. and Harold A. Dixon for use on  
15 land north of the Spokane Indian Reservation. It has a priority  
16 date of April 2, 1971, and a maximum use of 100 gallons per minute.  
17 It does not affect the flow in Chamokane Creek. (PE-14; PE-33;  
18 DE-39)

19           U.   Washington State Ground Water Application No. 11905  
20 is issued in the name of Floyd Norris for use on land northeast of  
21 the Spokane Indian Reservation. It has a priority date of May 20,  
22 1971, and a maximum use of 2,000 gallons per minute. The effective  
23 reduction in Chamokane Creek from this maximum use is 1.20 cfs.  
24 (PE-14; PE-33; DE-51)

25           V.   Washington State Surface Water Application No. 23509  
26 is issued in the name of Henry L. Brown for use on land north of  
27 the Spokane Indian Reservation. It has a stated priority date of  
28 November 10, 1971, and a maximum use of .12 cfs. The effective  
29 reduction in Chamokane Creek from this maximum use is .04 cfs. (PE-  
30 14; PE-33; DE-38)

1           W.    Washington State Surface Water Application No. 23551  
2 is issued in the name of John Luper for use on land northeast of  
3 the Spokane Indian Reservation. It has a stated priority date of  
4 December 3, 1971, and a maximum use of 2.0 cfs not to exceed 250  
5 acre-feet per year. The effective reduction in Chamokane Creek  
6 from this maximum use is .54 cfs. (PE-14; PE-33; DE-46)

7           X.    Washington State Ground Water Application No. 321939  
8 is issued in the names of Richard S. and Patricia M. Krieger for use  
9 on land north of the Spokane Indian Reservation. It has a stated  
10 priority date of October 15, 1973, and a maximum use of 1.0 cfs.  
11 This use is nonconsumptive. (PE-14; PE-33; DE-44)

12           Y.    Washington State Surface Water Certificate No. 9100  
13 is issued in the name of Arthur A. Miller for use on land north of  
14 the Spokane Indian Reservation. Its stated priority date is  
15 missing from our records. Its maximum use is .7 cfs not to exceed  
16 105 acre-feet per year. The effective reduction in Chamokane Creek  
17 is .20 cfs. (PE-14; PE-32; DE-49)

18           Z.    Defendant Boise Cascade Corporation owns approximately  
19 18,000 acres within the Chamokane Creek basin. Some of the land is  
20 adjacent to Chamokane Creek, approximately 120 acres lie within the  
21 exterior boundaries of the Spokane Indian Reservation. The land is  
22 used chiefly for timber production, secondarily for grazing. None  
23 of the lands are irrigated. Water is required by the company in  
24 connection with its logging activities and for the stock which  
25 grazes its land. The following diversion points and their respective  
26 quantities are claimed:

<u>Point No.</u>	<u>Location</u>	<u>Quantity Claimed</u>
1	T. 29 N., R. 40 E.	30 a/f
2	T. 29 N., R. 40 E.	30 a/f
3	T. 30 N., R. 38 E.	30 a/f
4	T. 30 N., R. 38 E.	30 a/f

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2	<u>Point No.</u>	<u>Location</u>	<u>Quantity Claimed</u>
3	5	T. 30 N., R. 38 E.	60 a/f
4	6	T. 30 N., R. 38 E.	30 a/f
5	7	T. 30 N., R. 39 E.	30 a/f
6	8	T. 30 N., R. 39 E.	30 a/f
7	9	T. 30 N., R. 39 E.	30 a/f
8	10	T. 29 N., R. 41 E.	30 a/f
9	11	T. 29 N., R. 41 E.	40 a/f
10	12	T. 29 N., R. 41 E.	40 a/f
11	13	T. 29 N., R. 41 E.	40 a/f
12	14		SWC 2258 - .01 cfs

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Testimony presented by Boise Cascade indicated that the maximum use in any one year would be approximately 100 acre-feet. The only claim of Boise Cascade which holds a water rights certificate from the State of Washington is point no. 14. As to the remainder of these claims, there is nothing in the record to indicate the basis upon which a water right is claimed. The quantity of 100 acre-feet is excessive for stock watering, dust abatement and fire protection activities of the type carried on by Boise Cascade. (Tr. 1260, 1262-1263, 1266, 1268-1271, 1281-1282; DE-62; DE-72) The United States, however, has no objection to the court authorizing Boise Cascade to utilize water in reasonable amounts for these purposes.

AA. The State of Washington owns 15,851.19 acres of land within the Chamokane Creek basin. These lands are generally being used for timber production, grazing of livestock and recreational purposes. There is no irrigation on any of these lands. The Department of Natural Resources claims 1,845, 586 gallons per year for use on lands within the watershed and 59,432.4 gallons per year for use on lands outside the Chamokane Creek basin for a total of

1 1,905,018.4 gallons per year. No state water rights certificate  
2 has ever been issued for any of these claims. (Tr. 1204, 1205, 1206,  
3 1218; DE-23; DE-24; DE-31 through DE-36; DE-67; DE-68)

4 The Department of Natural Resources, however, attempts to  
5 base its claims upon a truly ingenuous "state reserved rights" argu-  
6 ment. Their argument might be summarized as follows. Upon the  
7 admission of the State of Washington to the Union in 1889, sections  
8 16 and 36 were granted by the Federal Government to the state for  
9 the support of public education and certain public institutions.  
10 DNR then states that "Natural Resources submits that its water  
11 rights for all the granted trust lands in question have a priority  
12 date of November 11, 1889. United States v. Wyoming, 331 U.S. 440  
13 (1947)<sup>\*/</sup> We are unaware of any decision of any court which has so  
14 held. Nothing in United States v. Wyoming, supra, indicates the  
15 existence of "state reserved rights" in connection with school lands.  
16 That case was a suit by the United States against Wyoming and the  
17 Ohio Oil Company to establish the Federal Government's title to  
18 certain land claimed by the state and to recover for oil which the  
19 oil company had extracted from the lands under the lease from the  
20 state. The land in question was claimed by the state as school  
21 land. The Supreme Court held that the lands in question did not  
22 belong to Wyoming having been placed in a petroleum reserve by the  
23 United States after statehood but before the official survey had  
24 taken place. 331 U.S. at 454. If it stands for anything, this case  
25 stands for the proposition that neither the enactment of a state's  
26 enabling act nor statehood itself vest any sort of "absolute" rights  
27 in the state to school lands. The case certainly does not support  
28 a "state reserved rights" theory.  
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31 <sup>\*/</sup> DNR brief, p. 39

1 To the contrary, the law is well settled that the state  
2 itself must acquire substantive water rights either pursuant to  
3 state law or through its power of eminent domain. See, e.g. In re  
4 Stranger Creek, 77 Wn.2d 649, 657, 466 P.2d 508 (1970).

5 Natural Resources also claims that its rights are based  
6 on riparian usage. We have no doubt but that the state may  
7 establish riparian water rights in its trust lands, to the same  
8 extent that such rights could be established by a private owner.  
9 In re Stranger Creek, supra. Here, however, the state has not done  
10 so. The existence and continuation of riparian rights under the law  
11 of the State of Washington are dependent upon beneficial use.  
12 United States v. Ahtanum Irr. Dist., 330 F.2d 897, 904 (C.A. 9, 1964).  
13 The state has failed to demonstrate that the water claimed in now  
14 being beneficially used. There was general testimony that state  
15 lands were being used for timber production, livestock and recrea-  
16 tional purposes. (Tr. 1205). But the state's witness, Mr. Isaacson  
17 admitted that no land was being irrigated. (Tr. 1206). Having  
18 failed to delineate which of their claimed water uses are now being  
19 beneficially used, Natural Resources' claims must be denied  
20 inclusion in this decree.

21 The above completes our listing of the rights of the  
22 defendants according to the record in this case. Two water rights  
23 certificates, one permit and three applications were not listed  
24 because they are void as a matter of law, having been issued by  
25 the state for use on the Spokane Reservation. See, US brief, p. 81.  
26

27 We have also declined to discuss the issue of whether or  
28 not non-Indian successors to allottees get any share of an Indian  
29 allottee's reserved water right. Ecology would like to make this  
30 an issue in the case.<sup>\*/</sup> There is, however, absolutely no evidence

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31 <sup>\*/</sup> DOE brief, pp. 53-54  
32

1 in the record which would indicate that any of the defendants are  
2 in fact successors in interest to Indian allottees. Nor have any  
3 of the defendants' based their claims on such a theory, having  
4 chosen instead to rely on their state authorized water rights  
5 certificates and permits. We believe that this case is complex  
6 enough without the inclusion of issues which are not necessary to  
7 a decision. We urge the court to disregard Ecology's argument  
8 regarding this issue. Should the court invite the government's  
9 views on the question then we would, of course, be happy to respond.

11 V

12 CONCLUSION

13 In the "conclusion" sections of their respective briefs,<sup>\*/</sup>  
14 counsel for the State of Washington do themselves discredit by  
15 resorting to arguments which mirror the state's continuing reluctance  
16 to recognize either Indian sovereignty or Indian property rights.  
17 Ecology, for example, argues that the reason the Federal Government  
18 is before this court presenting these claims on behalf of the  
19 Spokane Tribe is to make "up for misdeeds and sins of the past."  
20 They quote Dean Trelease as having written that "[j]ustice to Indians  
21 may not mean giving them everything they ask."<sup>\*\*/</sup> They contend that  
22 a decision favorable to the United States and the tribe will have  
23 an "extremely high potential for the agony of displacement" of  
24 non-Indian interests.

25 Natural Resources implies that we are attempting to arouse  
26 the sympathy of the court and urges the court to "apply sound legal  
27 concepts and precedent to the resolution of the question presented  
28 herein."

29 \_\_\_\_\_  
30 <sup>\*/</sup> DOE brief, pp. 61-63; DNR brief, pp. 39-40

31 <sup>\*\*/</sup> Counsel for the Department of Ecology quote and cite  
32 Mr. Trelease's works liberally throughout their brief. See,  
e.g. DOE brief, pp. 7, 8, 49, 61, 63. Mr. Trelease is a respected



1 We do not base our claims on past injustices done to the  
2 Indians. We believe them to be firmly grounded in the law and the  
3 record of this case. It is true that to some extent, a decision  
4 favorable to the government and the tribe will adversely affect  
5 some defendants. But in a sense, this is simply another "confron-  
6 tation between the 'manifest destiny' of the westward movement of  
7 American civilization and the rights of the native American Indians  
8 to their lands." United States v. Southern Pac. Transp. Co., 543  
9 F.2d 676, 680 (C.A. 9, 1976). We believe that the court must  
10 confirm our rights to the surface and ground waters of Chamokane  
11 Creek and that "[a]lthough it may appear harsh [to subordinate the  
12 rights of the defendants to the rights of the Federal Government  
13 and the tribe, the court must] conclude that an even older policy  
14 of Indian law compels this result." United States v. Southern Pac.  
15 Transp. Co., supra, 543 F.2d at 699.

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26 authority in the field of water law. His writings should be read,  
27 however, against the backdrop of the fact that he is perhaps the  
28 spokesman for the state point of view. Mr. Trelease is currently  
29 a Special Assistant Attorney General for the State of Wyoming in  
30 the Big Horn River adjudication. In re the General Adjudication  
31 of All Rights to Use Water in the Big Horn River System and All  
32 Other Sources, No. 4993, in the District Court for the Fifth  
Judicial District, Wyoming in which case the United States is a  
defendant.

1 Respectfully submitted,

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

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

CERTIFICATE OF SERVICE

This is to certify that on the 14<sup>th</sup> day of June, 1977,  
I mailed a copy of the Reply Brief of the United States to all  
parties on the attached list.

  
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